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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

MIKELL R. SCARBOROUGH, Master in Equity

Appellate Case No. 2019-001289

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 Junevicus; 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.

FINAL REPLY BRIEF OF APPELLANT/RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

TREATISES

SUMMARY OF ARGUMENT

In its opening brief ("Raven's Run Br."), Appellant-Respondent Raven's Run Homeowners Association, Inc. ("Raven's Run") explained why the master in equity erred in holding that Raven's Run does not own the disputed property, a 10- to 12-foot-wide buffer strip of dry land lying between the rear lot lines of Lots 37E through 66E of Crown Pointe Subdivision and the waterline of a lake owned by Raven's Run.[1] (Raven's Run Br. at 17-26.) There are three Respondents to this appeal: James and Melissa Kubu ("the Kubus"), Leila Johnson, and Katherine Kinlaw.[2] However, only Kinlaw filed a brief in response to the opening brief filed by Raven's Run. In light of the failure of the Kubus and Johnson to file briefs, this Court should exercise its discretion under Rule 208(a)(4), SCACR, and summarily reverse as to them.

Although Kinlaw did file her respondent's brief, the Court should also reverse as to her. Kinlaw does not attempt to respond to the merits of Raven's Run's arguments but rather reiterates the arguments and errors made by the master. Like the master's orders on summary judgment and on reconsideration, Kinlaw's arguments cannot withstand scrutiny.

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[1] Contrary to Kinlaw's contention, the buffer strip is ***not*** "immediately adjacent to Kinlaw's house." (Resp. Br. at 10.) The buffer strip lies beyond the rear lot line of Lot 45E.

[2] Kinlaw cross-appealed the master's finding on reconsideration that the lake is owned by Raven's Run. Thus, the Kubus and Johnson are Respondents and Kinlaw is the Respondent/Appellant.

When the undisputed facts are considered in light of the applicable law, it is clear that the master's orders should be reversed. The matter should be remanded for entry of a declaratory judgment that Raven's Run owns the buffer strip and for further proceedings on the claims for trespass and nuisance. In 1985, and again in 1987, RAC Enterprises executed and recorded deeds (the "1985 Deed" and the "1987 Deed") conveying substantial swaths of property, including the buffer strip and the lake, to Raven's Run. Because these deeds are unambiguous, the Court need not consider any extrinsic evidence. To the extent there may be any doubt regarding the grantor's intent, the surrounding circumstances overwhelmingly confirm what is stated in the 1985 and 1987 Deeds, namely, that Raven's Run owns the buffer strip.

ARGUMENT

I. THE COURT SHOULD SUMMARILY REVERSE AS TO THE KUBUS AND JOHNSON

Raven's Run filed its complaint on January 31, 2017, naming Crown Pointe and the owners of Lots 37E through 66E as defendants. By the time of the summary judgment hearing in August 2018, Crown Pointe and all property owners except the Kubus, Johnson, and Kinlaw had settled with Raven's Run. After the master in equity granted summary judgment to these three remaining parties and denied Raven's Run's motion for reconsideration, Raven's Run appealed.

Raven's Run filed its initial opening brief and designation of matter on January 21, 2020. All Respondents were timely served through their counsel of record.[3] Kinlaw timely filed her respondent's brief and designation of matter on May 7, 2020, but nothing was filed by the Kubus or Johnson. A letter from the Clerk of Court dated June 1, 2020, reminded counsel for the Kubus and Johnson of the default and warned that they must file their respondents' briefs and designations of matter, together with motions for leave to file out of time, within the next 10 days.[4] As of the date of this filing, however, neither

[3] As shown in the Certificate of Service, the opening brief was served on all Respondents via U.S. Mail and email, addressed to the mailing and email addresses listed in the AIS system. To the best of counsel's knowledge, no document—whether sent in hard copy or by email—was returned as undeliverable.

[4] The Clerk's letter was also addressed to counsel for Crown Pointe. However, Crown Pointe and Raven's Run entered into a settlement prior to the summary judgment

the Kubus nor Johnson has filed a respondent's brief.

"Upon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper." Rule 208(a)(4), SCACR. "Such action may include reversal." *Robinson v. Hassiotis*, 364 S.C. 92, 93 n.2, 610 S.E.2d 858, 859 n.2 (Ct. App. 2005) (citing *Turner v. Santee Cement Carriers, Inc.*, 277 S.C. 91, 282 S.E.2d 858 (1981)). Under Rule 208(a)(4), this Court has discretion to "reverse on the points presented rather than … search the record for reasons to affirm." *Wierszewski v. Tokarick*, 308 S.C. 441, 444 n.2, 418 S.E.2d 557, 559 n.2 (Ct. App. 1992).

Because the Kubus and Johnson have chosen not to file their initial respondents' briefs and designations of matter, this Court should reverse on the grounds presented in Raven's Run's opening brief and in this reply brief. Reversal as to the Kubus and Johnson is warranted regardless of how the Court rules as to Kinlaw because the arguments in Kinlaw's brief are specific to her property. (For the reasons explained in Part II, *infra*, these arguments are meritless.) The Court should not assume that Kinlaw's arguments can be extrapolated to apply to the Kubus and Johnson. Accordingly, the Court should reverse as to the Kubus and Johnson, and should for entry of a declaratory judgment that Raven's Run owns the buffer strip and further proceedings on the trespass and nuisance claims.

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hearing. (Appellant's Br. at 9; R. pp. 354-356 (settlement agreement).) Accordingly, Crown Pointe is not a party to the appeal.

II. THE MASTER-IN-EQUITY ERRED IN GRANTING SUMMARY JUDGMENT TO KINLAW

Kinlaw's arguments in support of affirmance are unpersuasive and should be rejected by this Court.

A. Kinlaw Misstates the Standard of Review

Kinlaw contends that to avoid summary judgment, Raven's Run "had to prove that they own the [buffer strip]." (Resp. Br. at 10.) Kinlaw is wrong—this is the standard Raven's Run must meet to *prevail* in its declaratory judgment action.[5] The showing necessary to demonstrate that the master should not have granted summary judgment to Kinlaw—and, thus, that this Court should reverse and remand for trial—is far more lenient.

In cases involving construction of a deed, summary judgment is proper only if the deed is unambiguous, such that "the intention of the parties as to the legal effect of the [deed] may be gathered from the four corners of the instrument itself. " *Edgewater on Broad Creek Owners Ass'n, Inc. v. Ephesian Ventures, LLC*, ___ S.C. ___, ___ S.E.2d ___, 2020 WL 2182252, at *3 (Ct. App. May 6, 2020). "When the deed language contains ambiguities that require extrinsic evidence to determine the intentions of the parties, the inquiry becomes a question of fact." *Id.*; *see Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 464, 839 S.E.2d 879, 882 (2020) (holding summary judgment improper where the deed was ambiguous

[5] For the reasons explained *infra* and in its opening brief, Raven's Run has made this showing and is entitled to remand for entry of judgment in its favor.

with respect to the scope of one party's obligations).

B. In Relying on Plat BK-2 and the Drainage Easement, the Master and Kinlaw are Wrong on the Facts and the Law

The master granted summary judgment based on Plat BK-2, which was recorded in 1986 and which shows the property conveyed in the 2001 Quitclaim Deeds. (R. p. 345 (Plat BK-2).) The master found that the dedication of "the lakes and green areas 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 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)).)

On appeal, Kinlaw relies on the same flawed reasoning, contending that when Plat BK-2 was recorded on August 21, 1986, its dedication of the drainage easement "effectively remove[d] the possibility that Raven's Run has the right to control the portion of Plat BK-2 that shows the 60 foot drainage easement." (Resp. Br. at 11; *see* Resp. Br. at 12 (claiming that the 2001 Quitclaim Deeds show "the intent of RAC [Enterprises] to convey everything on the plat pages of BK-2 to Crown Pointe").) As a result, according

to Kinlaw, she has "sufficient ownership interests in the [buffer strip] such that Raven's Run has no right to bar [her] from use and maintenance" of it. (Resp. Br. at 14.)

The master's reasoning on summary judgment and Kinlaw's argument on appeal are wrong on the facts and the law. They are wrong on the facts because the property at issue is the buffer strip, not the drainage easement. They are wrong on the law because dedication of an easement does not convey title.

1. The Master and Kinlaw Are Wrong on the Facts: the Property at Issue Is the Buffer Strip, Not the Drainage Easement

Throughout the proceedings in the lower court and on appeal, there has been no question that the property in dispute is the buffer strip, *i.e.*, the 10- to 12-foot-wide strip of dry land lying between the rear lot lines of Lots 37E through 66E of the Crown Pointe subdivision (including Lot 45E, owned by Kinlaw) and the lake owned by Raven's Run.[6] This is clear from Raven's Run's complaint and amended complaint, both of which allege that Raven's Run owns the buffer strip. (R. pp. 32-33 (Compl. ¶¶ 42, 44); R. p. 98 (Am. Compl. ¶¶ 42, 44); *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

[6] In his order on reconsideration, the master determined that Raven's Run owns the lake. (R. p. 22 (Recons. Order, at 4).) On cross-appeal, Kinlaw argues that the lake is owned by Crown Pointe. As fully explained in Raven's Run's Respondent's Brief of Appellant/Respondent, Kinlaw's cross-appeal fails because (1) Kinlaw lacks standing to assert a claim on behalf of Crown Pointe; (2) the argument was not preserved for appeal; and (3) the relevant deeds unambiguously establish the intent of the grantor, RAC Enterprises, to convey ownership of the buffer strip and lake to Raven's Run.

have "trespass[ed]" on "and have damaged the property ***which they do not own***" (emphasis added)).) The master recognized this in his summary judgment order, which stated 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. 2 (MSJ Order, at 2 (emphasis added)).)[7]

Likewise, Kinlaw has admitted numerous times that the property at issue in this case is the buffer strip. Kinlaw specifically recognized this during the summary judgment hearing: "[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 (emphasis added)); *see* R. p. 156 (MSJ Tr. at 28 ("It's our contention that Raven's Run does not own ***that strip of land***." (emphasis added)).) Her respondent's brief reiterates this concession, identifying the "[c]entral … dispute" between the parties as "Raven's Run's right to restrict [Kinlaw] from maintaining and cutting on the strip of land between [her] lot property line and the body of water," *i.e.*, the buffer strip. (Resp. Br. at 2.) Elsewhere, Kinlaw admits that Raven's Run claims ownership of a "strip of land … between the Crown Pointe individual lot owners' lots and the body of water"—in other words, the

[7] In his order on reconsideration, the master incorrectly wrote that the parties' dispute concerned "ownership of certain real property ***on*** … individual lots in Crown Pointe subdivision." (R. p. 20 (Recons. Order, at 2 (emphasis added)).) To be clear, no part of the buffer strip lies ***on*** any part of any lot in the Crown Pointe subdivision. The buffer strip lies ***between*** the rear lot lines of Lots 37E through 66E and the waterline of the lake.

buffer strip. (Resp. Br. at 3.)

Although it is clear that the property at issue is the buffer strip, the master's summary judgment analysis erroneously conflates the buffer strip with the 60-foot drainage easement that lies "20 feet within" each platted lot and "40 feet towards the lakes" owned by Raven's Run. (R. p. 345 (Plat BK-2).) As described in Plat BK-2, the drainage easement covers the back 20 feet of Kinlaw's property (to the rear lot line) and then extends an additional 40 feet (across the buffer strip and into the lake). The buffer strip, in contrast, begins at Kinlaw's rear lot line and extends 10-12 feet to the waterline of the lake. Thus, the buffer strip and the easement are ***not*** the same thing. Only the buffer strip is at issue.

2. The Master and Kinlaw Are Wrong on the Law: Dedication of an Easement Does Not Convey Title

In addition to the factual error of focusing on the drainage easement instead of the buffer strip, the master erred on the law in ruling that dedication of the drainage easement on Plat BK-2 "effectively convey[ed]" title in the easement to Crown Pointe. (R. p. 16 (MSJ Order, at 8).) Kinlaw makes the same error in her appellate brief, contending that dedication of the drainage easement in Plat BK-2 means that Raven's Run does not own the buffer strip. (Resp. Br. at 12-13.) Both the master and Kinlaw are wrong as a matter of law, however, because dedication of an easement ***does not*** convey title.

"An easement is a right to use the land ***of another*** for a specific purpose." *Town of Kingstree v. Chapman*, 405 S.C. 282, 299, 747 S.E.2d 494, 502-03 (Ct. App. 2003) (emphasis

added). The long-settled law of this state is that dedication of an easement "***gives no title*** to the land on which the servitude is imposed." *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) (internal quotation marks omitted; emphasis added); *see Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970) (holding that an easement "gives no title to the land on which the servitude is imposed"). The rule is no different when it comes to drainage easements. *See, e.g.*, 28 C.J.S. Drains § 104 ("A drainage easement ***does not convey title to property***, but only a nonpossessory interest in another's property[.]" (emphasis added)).

Attempting to prop up the master's flawed analysis, Kinlaw cites *Outlaw v. Moise*, 222 S.C. 24, 71 S.E.2d 509 (1952), for the proposition that "dedication [of an easement] conveys title." (Resp. Br. at 14.) But that is not what *Outlaw* holds. *Outlaw* is an adverse-possession case, in which the Supreme Court held that adverse possession cannot be used to acquire title to property that has been "dedicated to and used by the public for streets and highways." *Outlaw*, 222 S.C. at 28, 71 S.E.2d at 511; *see Davis v. Monteith*, 289 S.C. 176, 181, 345 S.E.2d 724, 727 (1986) ("In *Outlaw*, this Court held the mere possession of a public street or alley cannot confer title[.]"). Because this case involves neither adverse possession nor title to property dedicated to public use for a street or highway, *Outlaw* is inapposite.

C. Raven's Run Owns the Buffer Strip

The intent of the grantor, RAC Enterprises, controls the question of ownership of the buffer strip. *See Wayburn v. Smith*, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977) (holding that in construing a deed, "the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy"). 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).

1. *The 1985 and 1987 Deeds Clearly Show RAC Enterprises' Intent to Convey the Buffer Strip to Raven's Run*

The 1985 Deed plainly demonstrates the intent of RAC Enterprises to convey the buffer strip to Raven's Run.[8] The first two descriptive paragraphs of the 1985 Deed broadly convey:

> 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[.]

[8] Kinlaw incorrectly contends that the 1985 Deed was raised for the first time on reconsideration. (Resp. Br. at 13.) In fact, the 1985 Deed was submitted as Exhibit F in support of Raven's Run's summary judgment motion. (R. p. 268 (MSJ Ex. 1(F)).) Additionally, the 1985 Deed was discussed by the master and the parties during the summary judgment hearing. (R. pp. 145, 168-169, 173-174 (MSJ Tr. at 17, 40-41, 45-46).)

(R. p. 268 (1985 Deed. at 1).) Attempting to limit its scope, Kinlaw contends that the conveyance in the 1985 Deed is controlled and limited by what is shown on Plats BG-52, BG-53, and BG-54. (Resp. Br. at 13-14.) However, these Plats are only mentioned in the first descriptive paragraph.[9] All subsequent descriptive paragraphs in the 1985 Deed identify the property conveyed without reference to any plat, including the second paragraph's broad conveyance of "ALL lakes, fingers, coves, and other bodies of water" to Raven's Run. (*Id.*)

Kinlaw also tries to limit the scope of the 1985 Deed by pointing to text conveying "two irregular strips of land" lying "along the southern right-of-way of Rifle Range Road." (Resp. Br. at 13 (citing R. p. 268 (1985 Deed, at 1)).) According to Kinlaw, this language refers only to relatively short segments of land in the immediate vicinity of the intersection between Omni Boulevard and Rifle Range Road. (Resp. Br. at 14.) However, the language in the 1985 Deed imposes no such limitation. Moreover, Kinlaw's argument ignores the fact that the strip of land to the East of Omni Boulevard abuts the lake, which is a single, continuous body of water. Thus, as Raven's Run argued at the hearing on its motion for reconsideration, "that irregular strip … begins at [Lot] 66E up at Rifle Range

[9] In any event, one of the referenced plats supports a finding that the 1985 Deed conveys the buffer strip and the lake to Raven's Run. Plat BG-52 shows the lake and an outline of the land on the far side of the lake—the future location of Crown Pointe Subdivision—indicating that the conveyance in the 1985 Deed reached all the way across the lake to the buffer strip on the far side. (R. p. 342 (Plat BG-52).)

Road and [goes] all the way down to [Lot] 37E," which are all of the lots in question. (R. p. 209 (Recons. Tr. at 11).)

Augmenting the descriptive text, the 1985 Deed further identifies the property conveyed by reference to tax map number 561-01-00-093. (R. p. 268 (1985 Deed, at 1).) 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)).) A close-up view of the map clearly shows the presence of the buffer strip between Kinlaw's rear lot line (in red) and the waterline of the lake (represented by a dashed blue line). (R. p. 290 (MSJ Ex. 4(A)).)[10] Charleston County's tax records for this parcel list the 1985 Deed (as well as the 1987 Deed, discussed *infra*) as the conveyances establishing Raven's Run's ownership of the property. Moreover, there is no dispute that Raven's Run has paid the taxes on parcel 561-01-00-093 since 1985. (R. p. 351 (Recons. Ex. 7).)

Kinlaw unpersuasively attempts to brush off the reference to tax map number 561-01-00-093 as a mere "passing reference" of no import. (Resp. Br. at 12.) This position is unsupportable. The tax map number is handwritten on the 1985 Deed, which supports inference that the reference to parcel number 561-01-00-093 was a deliberate addition that is probative of the grantor's intent. *See Millvale Plantation v. Carrison Family Ltd. P'ship*, 401

[10] The buffer strip is equally clear on the close-up map showing the lots owned by the Kubus and Johnson. (R. p. 250 (MSJ Ex. 2(A)).) On the map, the Kubus' property (tax map #561-05-00-104) is outlined in red; Johnson's property (tax map #561-05-00-103) is next to the Kubus' property.

S.C. 166, 175, 736 S.E.2d 286, 290 (Ct. App. 2012) ("[T]he parties' decision to include tax map references in their deeds is significant and ***reflects their intent*** to convey the specific acreages described therein." (emphasis added)); *cf. Marichris, LLC v. Derrick*, 384 S.C. 345, 353-54, 682 S.E.2d 301, 305-06 (Ct. App. 2009) (allocating ownership interests in property based on, *inter alia*, a handwritten notation on the deed).[11]

The 1987 Deed, just as clearly, shows that RAC Enterprises intended 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 [sic], 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 (1987 Deed at 1 (emphasis added)).) Plat BL-57 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 (MSJ Ex. 1(E)).) Like the 1985 Deed, the 1987 Deed specifically references tax map number 561-01-00-093. (*Id.*)

[11] Kinlaw notes that Charleston County does not warrant or guaranty information on the GIS system. (Resp. Br. at 8.) This disclaimer of liability does not conflict with—and certainly cannot override—this Court's holdings in *Millvale Plantation* and *Marichris* that reference to a tax map number is probative evidence of the grantor's intent.

2. The 2001 Quitclaim Deeds, Referencing Plats BK-2 and BK-3, Convey Lakes and Green Areas Within the East Crossing and Crown Pointe Subdivisions—Not the Buffer Strip

As explained in Part II(B)(2), *supra*, the reliance of the master and Kinlaw on Plat BK-2 is misplaced because the property at issue is the buffer strip, not the easement, and because dedication of an easement does not convey title. The master in his summary judgment order, and Kinlaw on appeal, also rely on the 2001 Quitclaim Deeds, which reference Plats BK-2 and BK-3. (R. pp. 84, 332 (2001 Quitclaim Deeds).) The master found that the 2001 Quitclaim Deeds "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).) Kinlaw echoes this argument in her appellate brief and points to an abstractor's note stating, "It is the intention of this deed to convey al property set forth on the aforementioned plat, saving and excepting all platted lots and public rights of way depicted thereon." (Resp. Br. at 6; R. p. 332 (Deed H394/181).)

The 2001 Quitclaim Deeds do not defeat Raven's Run's claim to ownership of the buffer strip. First, the 2001 Quitclaim Deeds clearly convey ***different*** property than what was conveyed by the 1985 and 1987 Deeds (*i.e.*, the buffer strip and the lake). The 2001 Quitclaim Deeds 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 land and water 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 land or water abutting any lots on the ***eastern*** side of the Crown Pointe Subdivision, including Lots 37E through 66E, the rear lot lines of which abut the buffer strip and the lake.

Second, it is axiomatic that "[n]o deed can convey an interest which the grantor does not have in the land described in the deed, ***even though by its terms the deed may purport to do so***." *Cummings v. Varn*, 307 S.C. 37, 42, 413 S.E.2d 829, 832 (1992) (emphasis added); *see Griggs v. Griggs*, 199 S.C. 295, 19 S.E.2d 477, 479 (1942) (same). RAC Enterprises conveyed the buffer strip, along with the lake, to Raven's Run in the 1985 and 1987 Deeds. This being so, RAC Enterprises no longer owned the buffer strip in 2001 and could not have conveyed it in the 2001 Quitclaim Deeds.

3. The Crown Pointe Restrictive Covenants Are in Kinlaw's Chain of Title and Confirm that Raven's Run Owns the Buffer Strip

The restrictive covenants for the Crown Pointe Subdivision are dated August 29, 1986, and were recorded on October 17, 1986. (R. pp. 38-47 (MSJ Ex. 5).) Kinlaw does not dispute that the covenants are in her chain of title. As a matter of law, therefore, she had constructive notice of the covenants when she purchased her property and is now bound by them. *See Harbison Cmty. Ass'n, Inc. v. Mueller*, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995) ("A homeowner is charged with constructive notice of any restriction

properly recorded within the chain of title." (citing *Carolina Land Co. v. Bland,* 265 S.C. 98, 217 S.E.2d 16 (1975)).

The restrictive covenants set forth Crown Pointe owners' rights with respect to the "lakes and bodies of water" within the Crown Pointe Subdivision and the "lake systems of Raven's Run Subdivision which abut Lots 37E through 66E of Crown Pointe." (R. pp. 43-44 (MSJ Ex. 5).) The covenants provide that Crown Pointe owners are entitled to "use" the lakes and bodies of water within Crown Pointe Subdivision "for view" but that they have ***no rights whatsoever*** in the Raven's Run lake:

> 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.

(R. pp. 43-44 (Deed O158/414, at 6-7) (emphasis added).) Furthermore, the covenants unambiguously state that Raven's Run is the sole owner of the buffer strip:

> The portion of land between the rear lot lines of such lots [*i.e.*, Lots 37E through 66E of Crown Pointe] and the water line of the Raven's Run lakes ***is owned by the Raven's Run Homeowners Association, Inc.***

(R. p. 44 (Deed O158/414, at 7) (emphasis added).)

Kinlaw attempts to discount the probative weight of the covenants by noting that

they "can only be enforced by the developer or lot owners of Crown Pointe" and that they "may be freely amended by the owners of the lots of Crown Pointe" subdivision. (Resp. Br. at 7.) Both of these points are irrelevant because Raven's Run has never maintained that the covenants convey title to the buffer strip. Title to the buffer strip was conveyed by the 1985 and 1987 Deeds. The covenants are relevant because they provide further confirmation of RAC Enterprises' intent, as expressed in the 1985 and 1987 Deeds, to convey the buffer strip to Raven's Run. Additionally, the covenants put Kinlaw on notice that she has no ownership interest in the buffer strip.

Kinlaw also recites the general rule that restrictive covenants are to be strictly construed in favor of the free use of property. (Resp. Br. at 12 (citing *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006)).) However, the rule of strict construction applies only when a restrictive covenant "is equally capable of two or more constructions." *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 SE2d 378, 381 (1980); *see Hardy*, 369 S.C. at 165-66, 631 S.E.2d at 541-42 (same). It "is not applicable so as to defeat the plain and obvious purpose of the instrument." *Hamilton*, 274 S.C. at 158, 263 S.E.2d at 381. The Crown Pointe covenants clearly and unambiguously inform the owners of Lots 37E through 66E, including Kinlaw, that "[t]he portion of land between the rear lot lines of such lots and the water line of the Raven's Run lakes," *i.e.*, the buffer strip, "***is owned by the Raven's Run Homeowners Association, Inc.***" (R. p. 44 (emphasis added).) Accordingly, the rule of strict construction does not apply.

4. Plat BP-161, Referenced in the Deed to Kinlaw, Shows that Raven's Run Owns the Buffer Strip

Kinlaw purchased Lot 45E in 2015, taking title under a deed referencing Plat BP-161. (R. pp. 291 (MSJ Ex. 4(C)).) On Plat BP-161, the rear lot line of Lot 45E is shown as a thick line. (R. p. 340 (MSJ Ex. 4(B)).) The area beyond Kinlaw's rear lot line—*i.e.*, the buffer strip and the lake—are plainly marked "RAVEN'S RUN HOMEOWNERS ASSOC." (*Id.*) Plat BP-161 also shows that the back 20 feet of Lot 45E, to the rear lot line, are burdened by the drainage easement, which extends another 40 feet beyond the rear lot line. Counsel for one of the individual lot owners admitted during the summary judgment hearing that "the 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***." (R. pp. 158-159 (MSJ Tr. at 30-31 (emphasis added)); *see also* R. pp. 138, 156, 164, 176, 180 (MSJ Tr. at 10, 28, 36, 48, 52).) Plat BP-161 shows that the "somebody else" is Raven's Run. No other name appears in the area beyond the rear lot line of Lot 45E.[12]

[12] Plat BP-161 also undermines the master's finding that the "green areas and lakes" dedicated on Plat BK-2 included the buffer strip and the lake owned by Raven's Run. Plat BP-161 is based in part on Plat BK-2 (R. p. 340 (MSJ Ex. 4(B) (referencing Plats BK-1 through BK-4)).) Plat BP-161 shows two "green areas": one bounded by Lots 68E through 77E, and another on the northwest side of Crown Pointe subdivision. (*Id.*) Plat BP-161 also shows a "lake" abutting Lots 32E through 36E. (*Id.*) This is not the Raven's Run lake, which abuts Lots 37E through 66E.

5. Raven's Run Is Entitled to a Declaratory Judgment that It Owns the Buffer Strip

RAC Enterprises is the common grantor for ***all*** of the foregoing conveyances—the 1985 Deed, the 1987 Deed, and the 2001 Quitclaim Deeds. RAC Enterprises also recorded the Crown Pointe restrictive covenants. Whether considered singly or together, these all point to the same conclusion: that Raven's Run owns the buffer strip. *Cf. Kinard v. Richardson*, 407 S.C. 247, 260. 754 S.E.2d 888, 895 (Ct. App. 2014) (determining developer's "unambiguous" intent based on "the Restrictive Covenants, deeds, and plats" by common grantor). In view of the overwhelming evidence of RAC Enterprises' intent to convey the buffer strip, along with the lake, to Raven's Run, the master's orders on summary judgment and reconsideration should be reversed. Since no reasonable jury could fail to find that Raven's Run owns the buffer strip, the Court should remand for entry of a declaratory judgment in its favor.

III. THE COURT SHOULD REMAND FOR FURTHER PROCEEDINGS ON THE TRESPASS AND NUISANCE CLAIMS

In its opening brief, Raven's Run demonstrated that if the Court reverses the master's summary judgment order, it should also remand for further proceedings on Raven's Run's claims for trespass and nuisance. (Raven's Run Br. at 26-27.) Kinlaw does not respond to this argument, and thereby has conceded it. Therefore, in addition to reversing and remanding with instructions to enter a declaratory judgment that Raven's Run owns the buffer strip, the Court should also remand these claims for further

proceedings, including a jury trial for the recovery of actual and punitive damages.

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.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF SERVICE

I certify that the foregoing **Final Reply 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.[13] 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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[13] 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.