THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Nov 25 2020
SC 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 TO BRIEF OF RESPONDENTS JAMES B. AND MELISSA F. KUBU

Counsel listed inside front cover

William W. Wilkins (S.C. Bar No. 6112)
Kirsten E. Small (S.C. Bar No. 75681)
Nexsen Pruet, LLC
55 E. Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603
Telephone: (864) 370-2211
Facsimile: (864) 282-1177
Bwilkins@nexsenpruet.com
Ksmall@nexsenpruet.com

G. Hamlin O'Kelley, III (S.C. Bar No. 15491)
Buist, Byars & Taylor, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
Telephone: (843) 856-4488
Hamlin.Okelley@buistbyars.com

Maria Kiehling Brees

Justin M. McGee

Attorneys for Appellant/Respondent
Raven's Run Homeowners Association, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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. (Raven's Run Br. at 17-26.) There are three Respondents to this appeal: Leila Johnson, Katherine Kinlaw, and James and Melissa Kubu ("the Kubus").[1] Johnson has not filed a brief or given any other indication that she intends to participate in this appeal. Kinlaw filed a brief in response to the opening brief filed by Raven's Run, and Raven's Run filed its reply to Kinlaw's brief.[2] Thereafter, the Kubus retained new counsel and obtained this Court's permission to file their response brief out of time. Raven's Run now files this reply to the Kubus' response brief.

The Kubus' brief is permeated with the same fundamental misunderstanding as the master-in-equity's erroneous rulings. Throughout their brief, the Kubus refer to the 60-foot drainage easement as though it is the property in dispute. That is incorrect. The

[1] 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.

[2] Kinlaw also filed an opening brief for her cross-appeal. Raven's Run filed its brief in response, and Kinlaw filed her reply. Thus, Kinlaw's cross-appeal is fully briefed.

only property that has ever been in dispute in this matter is the 10- to 12-foot buffer strip between the rear lot lines of Lots 37E through 66E of Crown Pointe Subdivision and the waterline of the Raven's Run lake.

When the undisputed facts are considered in light of the applicable law, it is clear that the master's orders should be reversed. 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.

Accordingly, the Court should reverse and remand 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.

ARGUMENT

I. THE COURT SHOULD SUMMARILY REVERSE AS TO 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] This letter prompted the Kubus to retain new

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

counsel, who obtained leave of the Court to file a late brief. As of the date of this filing, however, Johnson has not filed a respondent's brief or given any other indication she intends to participate in the appeal.

"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 Johnson has chosen not to participate in this appeal, this Court should summarily reverse as to her on the grounds presented in Raven's Run's opening brief, its reply to Kinlaw's response brief, and in this reply brief. Reversal as to Johnson is warranted regardless of how the Court rules as to Kinlaw and the Kubus because the arguments in the briefs filed by Kinlaw and the Kubus are specific to their respective properties. The Court should not assume that their arguments can be extrapolated to apply to Johnson. In any event, for the reasons explained in Part II, *infra*, and in the reply to Kinlaw's brief, these arguments are meritless.

II. THE KUBUS LACK CANNOT MAKE ARGUMENTS ON BEHALF OF JOHNSON AND CROWN POINTE

The heading for Part II of the Kubus' brief asserts that "the master's orders in concluding the Kubu[s], Kinlaw and Johnson own the disputed property are supported by undisputed facts and operation of law." (Kubu Br. at 9.) Similarly, statements in the Kubus' brief suggest that they are disputing the master's determination that Raven's Run owns the lake. (Kubu Br. at 3, 16.) The Court should reject these arguments because the Kubus cannot assert the interests of Johnson or Crown Pointe on appeal.[5]

The question of the Kubus' authority to make argument on behalf of Johnson and Crown Pointe is one of standing. "Only a party aggrieved by an order, judgment, sentence or decision may appeal." Rule 201(b), SCACR. "A party is aggrieved by a judgment or decree when it operates on ***his or her*** rights of property or bears ***directly*** on his or her interest." *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (emphasis added). "The word 'aggrieved' refers to a substantial grievance, ***a denial of some personal or property right***, or the imposition on a party of a burden or obligation." *Id.* (emphasis added). "A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests." *Id.* at 301, 551 S.E.2d at 589-90.

[5] It is equally obvious that the Kubus cannot assert any arguments on behalf of Kinlaw, who has already filed her Respondent's Brief.

The Kubus have no interest in either Johnson's property or in the lake. Consequently, they cannot be aggrieved by any decision that affecting those properties. Their lack of standing precludes the from making any argument on behalf of either Johnson or Crown Pointe.

III. THE MASTER IN EQUITY ERRED IN GRANTING SUMMARY JUDGMENT TO THE KUBUS

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

A. The Kubus Misstate the Standard of Review

The Kubus contend that summary judgment should be affirmed because "Raven's Run did not prove the disputed property was a part of its chain of title as required in S.C. Code Ann. § 27-23-50." (Kubu Br. at 12.) This is a misstatement of the standard for summary judgment.

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*, 430 S.C. 400, 407, 845 S.E.2d 211, 214 (Ct. App. 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 with

respect to the scope of one party's obligations). Additionally, the Court must view any disputed facts in the light most favorable to Raven's Run, the non-movant on Respondents' cross-motion for summary judgment. *See Bluestein*, 429 S.C. at 462, 839 S.E.2d at 881.

B. The Kubus Cannot Seek Affirmance on Grounds Never Presented Below

The Kubus contend that "Raven's Run did not prove the [buffer strip] was part of its chain of title as required in S.C. Code Ann. § 27-23-50." (Kubu Br. at 12). As an initial matter, the Kubus are wrong: Raven's Run did prove ownership of the buffer strip, and the master erred in finding otherwise. *See infra* Part IV. Aside from this, the Kubus' argument that § 27-23-50 "mandates [that] any conveyance or granting of interest [in land] must be deeded in writing and signed by the grantor" (Kubu Br. at 12) was never presented to the master. Therefore, it cannot serve as an additional sustaining ground for affirmance. *See Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015); *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 206, 743 S.E.2d 850, 854 (Ct. App. 2013) (refusing to affirm on additional sustaining ground because the respondent "did not raise it in its summary judgment motion").

In addition to not having been raised below, § 27-23-50 is irrelevant. Section 27-23-50 "prohibits oral assignments of leases, or any estates or interests, in land." 5 S.C. Jur. *Assignments* § 4. No party in this matter has ever claimed that ownership of the buffer strip is based on an oral assignment. To the contrary, it has been undisputed throughout

this matter that ownership of the buffer strip depends on the construction of the various deeds and plats the parties presented to the master.

C. The Kubus Misstate the Record

The South Carolina Appellate Court Rules require that factual allegations in a brief "shall" be supported by "references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal." Rule 208(b)(4), SCACR; *see State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("[A] brief must reference the Record on Appeal to support the facts alleged."). The Kubus' brief fails to meet this basic standard.

First, the Kubus' brief contains factual statements that are ***not*** supported by any evidence in the record. Most significantly, the Kubus allege that they "have continually maintained the disputed property without protest, objection or interference from Raven's Run for years." (Kubu Br. at 1; *see id.* at 12.) This surprising claim is ***not*** supported by a citation to the Record on Appeal.[6] To the contrary, the record evidence demonstrates that Raven's Run has continually protested the Kubus' trespass on the buffer strip, which is owned by Raven's Run. (R. pp. 52-54 (Affidavit of Jonathan Guerra); R. pp. 55-57

[6] The same claim appears on page 12 of the Kubus brief, followed by a citation to page 3 of the Kubus' Answer to the Amended Complaint. (R. p. 110.) There is no statement on this page, or anywhere else in the Kubus' Answer, that even remotely supports the assertion in their brief.

(Affidavit of Joseph R. Pettit, Jr.); R. pp. 59-61 (Police Report); R. 98-99 (Amended Compl. ¶ 47).)

The Kubus also assert, again without citation to the Record on Appeal, that "[t]hey have relied on the plats that are within their chain of title in asserting ownership in the [buffer strip]."[7] (Kubu Br. at 1.) However, the Kubus ***never*** asserted any such reliance in their Answer to the Complaint or their Answer to the Amended Complaint. (R. pp. 62-64, 108-110.) Nor did they (or any other party) make any argument regarding reliance during either of the two hearings conducted by the master.

The Kubus also make assertions that are followed by references to the Record on Appeal, but the Record does ***not*** support the statement. Most egregiously, the Kubus claim that they "requested in their Answer [to the Amended Complaint] that property rights in the [buffer strip] be considered a part of their existing boundary line," citing to page 110 of the Record on Appeal. (Kubu Br. at 8.) ***No*** such request appears on Record page 110, or in any other filing by the Kubus.

In fact, the Kubus have ***never*** claimed ownership of the buffer strip. To the contrary, the Kubus, Kinlaw, and Johnson denied that Raven's Run owns the buffer strip without claiming ownership of the buffer strip for themselves. (R. pp. 108-110 (Kubu Answer to Am. Compl.); R. pp. 104-107 (Kinlaw Answer to Am. Compl.); R. pp. 65-67

[7] As discussed *infra*, the Kubus have never asserted ownership in the buffer strip.

(Johnson Answer to Compl.)[8].) During the summary judgment hearing, counsel for each Respondent made abundantly clear that they ***do not*** claim ownership of the buffer strip:

- 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) (emphasis added).)
- 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) (emphasis added).)
- 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) (emphasis added).)

Having denied any claim to ownership of the buffer strip throughout the proceedings below, the Kubus cannot now reverse course.

D. The Disputed Property Is the Buffer Strip, Not the Drainage Easement

The Kubus' arguments for affirmance rely heavily on Plat BK-2, which they cite no fewer than 13 times in their 17-page brief. The Kubus contend that Plat BK-2 "establishes a 60 foot dedicated easement which includes a 40 foot easement to the body of water and [a] 20 foot easement towards the rear [lot lines] of the owners of Crown Pointe." (Kubu Br. at 10.) The Kubus contend that dedication of the drainage easement resolves the question of who owns the buffer strip. This argument rests on the same fundamental

[8] It does not appear that Johnson ever answered the Amended Complaint.

error as the master's summary judgment order: it erroneously conflates the drainage easement with the buffer strip. However, they are not the same.

The property at issue is the buffer strip, the 10- to 12-foot wide strip of land that lies between the Kubus' rear lot line and the waterline of the lake.[9] 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)).)

The arguments of the Kubus' attorney, Mr. Pritchard, during the summary judgment hearing confirm that the property at issue is the buffer strip, not the drainage easement. Mr. Pritchard explained to the master that "[t]he trouble is here, the strip ***between my clients' rear lot line and the body of water***"—in other words, the buffer strip. (R. p. 176 (MSJ Tr. at 48 (emphasis added)); *see also* R. p. 192 (MSJ Tr. at 64) ("It goes kind of like that, Judge, and literally ***between the rear lot line to the lake***, Your Honor."

[9] 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.

(emphasis added)); R. p. 236 (Recons. Tr. at 38) ("From the rear lot lines of Crown Pointe to the lake is literally about 10 or 12 feet.").) Counsel for Kinlaw and Johnson also argued that the property at issue is the buffer strip, without contradiction from Mr. Pritchard. (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, 180 (MSJ Tr. at 10, 28, 36, 52).)

IV. RAVEN'S RUN OWNS THE BUFFER STRIP

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). As Raven's Run explained in its opening brief, RAC Enterprises is the common grantor, so its intent controls the question of ownership of the buffer strip. (Raven's Run Br. at 24-25.)

A. 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. 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[.]

(R. p. 268 (1985 Deed. at 1).)[10] The Kubus attempt to limit the scope of the 1985 Deed by noting that Plat BG-52 to -54 shows only "two irregular strips of land [that] did not abut or include Crown Pointe Subdivision." (Kubu Br. at 13.) However, these Plats are only mentioned in the first descriptive paragraph of the 1985 Deed. 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. (R. p. 268 (1985 Deed at 1).)

The Kubus' argument also 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 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).)

---

[10] The 1985 Deed references Plat BG-52, which 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).)

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 the Kubus' s rear lot line (in red) and the waterline of the lake (represented by a dashed blue line). (R. p. 250 (MSJ Ex. 2(A)).) 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).)

The Kubus' attempts to downplay the importance of the tax map are not persuasive. 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 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).

The 1987 Deed also 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, which includes the buffer strip. (*Id.*)

B. 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

The master in his summary judgment order, and the Kubus 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).) The Kubus echo this argument in their brief, pointing 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." (Kubu Br. at 14; 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,"[11] 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.

[11] As explained in Raven's Run's Opening Brief, East Crossing is another subdivision developed on the 117 acres conveyed by Yaupon Plantation Investors to RAC Enterprises in 1983. (Raven's Run Br. at 3; R. p. 72.) It is not involved in this litigation.

This being so, RAC Enterprises no longer owned the buffer strip in 2001 and could not have conveyed it in the 2001 Quitclaim Deeds.

Third, 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)).

C. The Crown Pointe Restrictive Covenants Are in the Kubus' 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).) The Kubus do not dispute that the covenants are in their chain of title. As a matter of law, therefore, they had constructive notice of the covenants when they purchased their property and are 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).)

The Kubus attempt to discount the probative weight of the covenants by noting that Raven's Run cannot enforce covenants for the Crown Pointe Subdivision. (Kubu Br.

at 14.) This is irrelevant, because Raven's Run has never maintained that the covenants convey title to the buffer strip, nor has it sought to directly enforce them. (R. p. 101 (Amend. Compl. ¶ 64) (seeking "an Order of this Court requiring the Defendant Crown Pointe [to] enforce the Crown Pointe [restrictive covenants]").) 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 the Kubus on notice that they have no ownership interest in the buffer strip.

D. Plat BN-177, Referenced in the Deed to the Kubus, Shows that Raven's Run Owns the Buffer Strip

The Kubus purchased Lot 39E in December 2012, taking title under a deed referencing Plat BN-176 to -177 (R. pp. 282-284 (MSJ Ex. 2(C)).) Lot 39E appears on plat BN-177, which shows the metes and bounds description of Lot 39E, including the rear lot line. (R. p. 281.) The area beyond the Kubus' rear lot line—*i.e.*, the buffer strip and the lake—is plainly marked "RAVEN'S RUN HOMEOWNERS ASSOCIATION." (*Id.*) The Kubus' deed references Tax Map No. 561-05-00-104, an image of which is also in the record. (R. pp. 283 (reference to Tax Map), 280 (map image).) The tax map image plainly shows the buffer strip between the Kubus' rear lot line and the dashed line representing the waterline of the lake. (R. p. 280.)

As the Kubus recognize in their brief, "'[w]here a deed describes land as it is shown on a certain plat, such plat becomes part of the deed for the purpose of showing

the boundaries, metes, courses and distances of the property conveyed.'" (Kubu Br. at 9 (quoting *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979)).) Plat BN-177, like the plats referenced in the deeds to Kinlaw and Johnson, define the lots by metes and bounds, ***not*** by terms like "to the waterline." Such a description does not convey littoral rights. *Cf. Turner Subdivision Prop. Owners Ass'n v. Schneider*, 144 N.W.2d 848, 850 (Mich. Ct. App. 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."[12] (R. pp. 79, 281 (emphasis added).) This language confirms that the Kubus' 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.

E. The Cases Cited by the Kubus Are Inapposite

In contending that the master should be affirmed, the Kubus cite several cases that are inapposite. (Kubu Br. at 9-10). First, the Kubus cite *State ex rel. McLeod v. Sloan Construction Co.*, 284 S.C. 491, 499, 328 S.E.2d 84, 89 (Ct. App. 1985), for the proposition that "where one enters land under a claim of title, possession of any part within the boundaries set out in the title [is] possession of the whole tract covered by the title."

[12] 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).)

(Kubu Br. at 10.) This proposition does not help the Kubus, however, because there is no dispute that the "whole tract" conveyed in the deed to the Kubus does not include the buffer strip. Indeed, the Kubus' counsel expressly noted during the summary judgment hearing that the buffer strip is ***not*** within the boundaries of the tract conveyed to the Kubus. (R. p. 176 (MSJ Tr. at 48) ("The trouble is here, the strip ***between my client's rear lot line and the body of water*** – it's about 12 feet." (emphasis added)).)

Next, the Kubus next cite *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 233, 662 S.E.2d 452, 456 (Ct. App. 2008) ("*MIC*"), as holding that an "easement referenced in the plat is dedicated to the use of the owners of the lots, their successors in title, and to the public in general." (Kubu Br. at 10.) The Kubus' reliance on *MIC* is misplaced because this case concerns title to the buffer strip, not the drainage easement. Additionally, *MIC* involved a private easement for use of all streets shown on a plat, not a drainage easement.

Last, the Kubus cite *Ward v. Woodward*, 287 S.C. 343, 345, 338 S.E.2d 347, 348 (Ct. App. 1985), as establishing a rebuttable presumption "that a party granting land does not intend to retain a narrow strip between the land sold and his property line." (Kubu Br. at 10.) Despite the quoted reference to "a narrow strip" of land, *Ward* is nothing like this case. *Ward* involved a grant of 6.7 acres "lying on [the] west side of Jackson-John Dodd Road." *Id.* (internal quotation marks omitted). Ward, the grantor, later maintained that "he retained a sliver of land between the tract" conveyed to Woodward and the road and sought an injunction and damages for trespass. The circuit court concluded the deed was

ambiguous and construed it in favor of Woodward, the grantee. *See id.* This Court affirmed, explaining that there is a rebuttable presumption that a grantor "does not intend to retain a narrow strip between the land sold and his property line, especially where it would ***cut the grantee off from valuable privileges*** and where the strip is so narrow as to be of ***no practical use to the grantor***." *Id.* (emphasis added).

Ward is inapposite. First, this case does not involve an ambiguous conveyance.[13] As noted *supra*, the deed to the Kubus references and incorporates a plat that describes the tract conveyed by metes and bounds. It has been undisputed throughout the litigation that the buffer strip lies beyond the Kubus' rear lot line as defined by Plat BN-177. Second, the buffer strip does not "cut [the Kubus] off from valuable privileges." The Restrictive Covenants for Crown Pointe Subdivision, which are in the Kubus' chain of title, make clear that the owners of Lots 37E through 66E (including the Kubus, who own Lot 39E) have no rights or privileges whatsoever in the Raven's Run lake:

> ***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).) Third, the buffer strip is highly significant to Raven's Run, as it provides a screen of trees and greenery that enhances the

[13] Additionally, *Ward* was a dispute between the grantor (Ward) and the grantee (Woodward). Here, in contrast, Raven's Run and the Kubus are not grantor/grantee.

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).)

V. 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.) Pointing to the master's surprising and inexplicable conclusion, on reconsideration, that they (along with Kinlaw and Johnson) "have fee simple title … up to the waterline of the lake" (R. p. 23 (Recons. Order, at 5)), the Kubus contend because ownership of the buffer strip is disputed, they could not have intentionally trespassed when they entered the buffer strip and cut down the trees and greenery. (Kubu Br. at 16.) This argument ignores that the Kubus maintained throughout the proceedings below that they ***do not*** own the buffer strip that lies between their rear lot line and the lake. Moreover, the Kubus cannot claim to have acted innocently when the Crown Pointe restrictive covenants plainly state that the buffer strip is owned by Raven's Run. (R. p. 44.) 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 summary judgment order 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,

s/ *William W. Wilkins*

William W. Wilkins (S.C. Bar No. 6112)
Kirsten E. Small (S.C. Bar No. 75681)
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, SC 29603-0648
Telephone: 864.370.2211
Facsimile: 864.282.1177
BWilkins@nexsenpruet.com
KSmall@nexsenpruet.com

G. Hamlin O'Kelley, III (S.C. Bar No. 15491)
BUIST, BYARS & TAYLOR, LLC
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
Telephone: (843) 856-4488
Hamlin.Okelley@buistbyars.com

Attorneys for Appellant/Respondent
Raven's Run Homeowners Association, Inc.

November 25, 2020
Greenville, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this **Final Reply Brief of Appellant/Respondent to Brief of Respondents James B. and Melissa F. Kubu** complies with Rule 211(b), SCACR.

November 25, 2020

s/*Kirsten E. Small*

Kirsten E. Small (SC Bar No. 75681)
Nexsen Pruet, LLC
Post Office Drawer 10648
Greenville, SC 29603
(864) 370-2211