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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Op. No. 5588 (S.C. Ct. App. refiled February 27, 2019)

Case No. 2010-CP-10-10490
Appellate Case No. 2019-000968

Brad J. Walbeck and Lea Ann Adkins, Both Individually and Derivatively on Behalf of The I'On Assembly, Inc.; and I'On Assembly, Inc.,

Petitioners-Respondents,

v.

The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC, and I'On Realty, LLC,

Respondents-Petitioners.

Final Brief of Respondents-Petitioners

Brian C. Duffy (SC Bar #16247)
Julie L. Moore (SC Bar # 78677)
Patrick C. Wooten (SC Bar # 77985)
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044

Attorneys for Respondents-Petitioners

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STATEMENT OF ISSUES ON APPEAL

I. Did the Court of Appeals err in stating that a developer's theoretical control of a homeowners association gives rise to an all-encompassing fiduciary duty pursuant to *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987)?

II. Did the Court of Appeals err in applying the two-issue rule to the trial court's rulings as to the validity of the 2000 Recreational Easement?

INTRODUCTION

Pursuant to South Carolina Appellate Court Rule 242(i) and this Court's Order granting the parties' respective Petitions for Writ of Certiorari, Respondents-Petitioners The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC, and I'On Realty, LLC (collectively, the "I'On Defendants") submit this Initial Brief.

The opinion issued by the Court of Appeals that is now under review by this Court is an opinion that, for the most part, correctly decided the issues in this case. *See Walbeck v. I'On Co., LLC*, 426 S.C. 494, 526, 827 S.E.2d 348, 364 (Ct. App. 2019). (App. pp. 1-28.) Nevertheless, the I'On Defendants seek this Court's review of two errors in the Court of Appeals' opinion: 1) the Court of Appeals included in its opinion an extraneous discussion that potentially expands the scope of the fiduciary duty owed by a developer to a homeowners association; and 2) the Court of Appeals misapplied the two-issue rule and, as a result, incorrectly affirmed the trial court's holding that a recreational easement created in 2000 (the "2000 Recreational Easement") was invalid and void *ab initio*.

This Court granted the Petition for Writ of Certiorari filed by the I'On Defendants, and this Court also granted the separate Petition for Writ of Certiorari filed by the plaintiffs at trial, Brad J. Walbeck and Lea Ann Adkins, both individually and derivatively on behalf of The I'On Assembly, Inc., and I'On Assembly, Inc. (collectively, the "Plaintiffs"). The I'On Defendants' Petition seeks review of only the two discrete issues identified above, whereas the Plaintiffs' Petition seeks review of numerous issues and challenges most of the holdings in the Court of Appeals' opinion. Thus, although the I'On Defendants are Petitioners for purposes of the two issues identified above, the I'On Defendants are primarily in the position of "Respondents" for purposes of this Court's review of the Court of Appeals' opinion.

The first issue raised in the I'On Defendants' Petition—the Court of Appeals' extraneous discussion relating to fiduciary duty law—is fully subsumed by issues raised in Plaintiffs' Petition. *See* Plaintiffs' Petition (asking this Court to reverse the Court of Appeals' decision because, *inter alia*, the Court of Appeals misstates and misapplies the law relating to fiduciary duties). For the sake of efficiency, and to avoid having parallel sets of briefs addressing the same issue and making the same arguments, the I'On Defendants will address the first issue in their Return to Plaintiffs' Initial Brief and will not include that discussion in this Brief. Accordingly, the I'On Defendants address only the second issue, which relates to the validity of the 2000 Recreational Easement, in this Brief.

For more than a decade after the execution of the 2000 Recreational Easement, Plaintiffs and the I'On Defendants operated under the terms of the 2000 Recreational Easement, and Plaintiffs enjoyed access to certain docks, boating facilities, and a

parking lot pursuant to the 2000 Recreational Easement. Plaintiffs, however, have taken the position in this litigation that the 2000 Recreational Easement was invalid and void *ab initio* initially to drum up support for the improper derivative action, as an attempt to create actionable conduct by the developer, and ultimately to increase artificially their alleged damages. Plaintiffs argued that, because the 2000 Recreational Easement was invalid, their damages are equal to the value of the property that allegedly should have been conveyed to them, and Plaintiffs did not reduce their alleged damages based on the value of their rights of access pursuant to the 2000 Recreational Easement. Thus, this case presents the unusual situation where the grantee of an easement—which unquestionably received a benefit from having access to certain amenities pursuant to the easement—has sought a declaration that it did *not* have access rights pursuant to the easement. Moreover, Plaintiffs have advanced this argument that is contrary to their interests even though all parties operated under the terms of the easement for more than a decade. Ultimately, as a result of a settlement with another defendant on the eve of trial, the Plaintiffs became owners of the property at issue. Should the Court remand this matter for further proceedings, Plaintiffs should not benefit from its incorrect, litigation-driven position that the 2000 Recreational Easement was not valid, and this Court should reverse the Court of Appeals' holding that the 2000 Recreational Easement was invalid and void *ab initio*.

STATEMENT OF THE CASE

This Court granted the parties' respective Petitions for Writ of Certiorari seeking review of a decision from the South Carolina Court of Appeals issued on February 27, 2019, and the Court of Appeals issued that decision after an appeal from

a jury trial that reached a verdict on August 1, 2014, in the Charleston County Court of Common Pleas. This case involves a dispute between property owners and a developer regarding a promise made in 1998 to convey a community dock and a park to the homeowners association upon completion of construction. The I'On Defendants contend that the developer fulfilled this promise in 2001 upon completion of construction and conveyance of those amenities, whereas Plaintiffs contend that the developer should have conveyed different property.

Construction of the amenities on the property at issue was completed by April of 2001, but no Plaintiff brought suit until December 22, 2010, when Plaintiff Brad J. Walbeck initiated this litigation. (R. pp. 116-128.) Walbeck filed an amended summons and complaint on March 8, 2011, alleging violation of the Interstate Land Sales Full Disclosure Act ("ILSA"), breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation. (R. pp. 129-40.) On February 7, 2012, Plaintiff Lee Ann Adkins joined Walbeck in a second amended complaint, asserting claims individually and for the first time derivatively on behalf of the I'On Assembly, Inc., which is the homeowners association for the I'On development (the "Assembly"), and adding the Assembly as a defendant to the action. (R. pp. 151-67.) On January 2, 2014, Walbeck and Adkins filed a third amended summons and complaint. (R. pp. 183.)

The case originally proceeded to trial in January of 2014 but ended in a mistrial. On May 12, 2014, The I'On Company and The I'On Club filed a separate suit against Plaintiffs seeking a declaration that the 2000 Recreational Easement was valid and that the easement for use of the boating facilities contained therein was perpetual. (R. pp.

199-312.) The trial court consolidated that declaratory judgment action with the present action. (R. p. 18.)

The case was tried to verdict from July 28 to August 1, 2014. The jury returned a verdict in favor of the I'On Defendants as to all claims for fraud and violation of the South Carolina Unfair Trade Practices Act, and as to all claims brought by Adkins. (R. pp. 1855-62.) The jury returned a verdict in favor of Walbeck in the amount of $1.00 for his claim for violation of ILSA; $10,000.00 for breach of contract; and $20,000.00 for negligent misrepresentation. (*Id.*) The jury returned a verdict in favor of the Assembly in the amount of $1,000,000.00 for breach of contract; $1,750,000.00 for breach of fiduciary duty; and $1,000,000.00 for negligent misrepresentation. (*Id.*) The trial court entered judgment on August 11, 2014. (R. pp. 19-20.)

In August 2014, the parties filed several post-trial motions. On August 11, 2014, the I'On Defendants filed a Motion for Judgment Notwithstanding the Verdict (JNOV). (R. pp. 1863-68.) On the same date, Plaintiffs filed a Memorandum in Support of Plaintiffs' Declaratory Action, in which Plaintiffs asked the trial court to declare that the 2000 Recreational Easement was invalid and void *ab initio*. (R. pp. 1903-09.) On August 25, 2014, the I'On Defendants filed a Memorandum in Opposition to Plaintiffs' Memorandum in Support of Plaintiffs' Declaratory Action, requesting that the trial court deny Plaintiffs' motion and instead enter an order declaring that the 2000 Recreational Easement was valid and perpetual. (R. pp. 1915-22.) On June 15, 2015, the trial court entered an Order denying the I'On Defendants' Motion for Judgment Notwithstanding the Verdict and a new trial. (R. pp. 21-63.) On June 16, 2015, the trial

court entered an Order declaring the 2000 Recreational Easement invalid and void *ab initio*. (R. pp. 70-78.)

On July 20, 2015, the I'On Defendants timely served notice of appeal, and on February 27, 2019, the Court of Appeals issued an opinion reversing the trial court in favor of the I'On Defendants on most issues. The Court of Appeals, however, affirmed under the two-issue rule the trial court's declaration that the 2000 Recreational Easement was invalid and void *ab initio*. (App. pp. 23-25.) The Court of Appeals also ruled that, even if the two-issue rule did not apply, the 2000 Recreational Easement was invalid because the South Carolina Supreme Court has not addressed whether the after-acquired title doctrine applies to the grant of an easement. (*Id.*)

On March 22, 2019, the Court of Appeals denied the petitions for rehearing filed by Plaintiffs and the I'On Defendants. (R. pp. 29-30.) Plaintiffs and the I'On Defendants each petitioned this Court to grant certiorari, and on March 15, 2022, this Court granted both petitions.

STATEMENT OF THE FACTS[1]

The I'On subdivision, located in Mount Pleasant, South Carolina, was developed by The I'On Company and was the vision of Vince Graham and his father, Tom Graham. On February 9, 2000, which was in the early stages of I'On's development, the I'On Company, the I'On Club, and the Assembly executed a "Recreational Easement and Agreement to Share Costs" (the "2000 Recreational Easement"). (R. pp. 3131-45.) The 2000 Recreational Easement provided the Assembly

[1] In this Initial Brief, the I'On Defendants discuss only the facts relevant to the 2000 Recreational Easement. The I'On Defendants will provide a more comprehensive discussion of the facts in their Return to Plaintiffs' Initial Brief.

rights to access certain docks, boating facilities, and a parking lot. (*Id.*) The Recreational Easement was recorded in Deed Book M342, Page 051 at the RMC Office for Charleston County, and indexed to I'On's Declaration of Covenants, Conditions and Restrictions, rendering it a matter of public record contained in all subsequent lot purchasers' chains of title. (*Id.*) When the 2000 Recreational Easement was executed, the same individual served as manager of The I'On Company, manager of The I'On Club, and President of the Assembly's board of directors and executed the document on behalf of each entity. (*Id.*)

Importantly for purposes of this appeal, the 2000 Recreational Easement provided that the I'On Club granted the Assembly an easement, but the servient property was owned by the I'On Company, not the I'On Club. In other words, although the owner of the servient property (the I'On Company) was a party to the 2000 Recreational Easement, the party that granted the easement to the Assembly (the I'On Club) was not yet the owner of the servient property. On August 15, 2000, approximately six months after the 2000 Recreational Easement's execution, the I'On Company conveyed the servient property to the I'On Club. (R. pp. 3146-51.)

Under the terms of the 2000 Recreational Easement, the easement for the use and enjoyment of the servient property was a "perpetual, nonexclusive easement" (R. p. 3133.) The 2000 Recreational Easement also contained cost sharing provisions which were limited to a 30-year term. (R. pp. 3136-38.)

Notably, the I'On Club, as servient landowner, and the Assembly, as easement holder, operated under the terms of the 2000 Recreational Easement—with respect to both use of the boating facilities and the Assembly's maintenance

contributions—for over a decade after the conveyance of the servient property to the I'On Club. (R. p. 615:8-25; R. p. 1074:1-10; R. p. 1329:16-24.) The Assembly budgeted and paid dock usage and rental fees to the I'On Club pursuant to its access rights under the 2000 Recreational Easement. (R. pp. 3175-3186.) The Assembly also engaged legal counsel to advise it as to the easement, but never suggested any problem with its validity or term. (R. p. 614:5-11; R. p. 1075:13-1076:6; R. pp. 3436-40; R. pp. 3451-53; R. pp. 3459-61; R. pp. 3464-67; R. pp. 3600-01.)

On January 13, 2014, Plaintiffs reached a settlement with certain defendants in this litigation, and through that settlement, the Assembly acquired title to the same boating facilities that it had been accessing for many years pursuant to the 2000 Recreational Easement. (R. pp. 2968-71.) It is undisputed that, upon the Assembly obtaining title to these boating facilities, the provision in the 2000 Recreational Easement granting the Assembly an easement with respect to those boating facilities merged into the deed, terminating that portion of the easement. The validity of the 2000 Recreational Easement between its execution and the Assembly's acquisition of this property is nevertheless important because, in the event this Court remands this case for further proceedings, the I'On Defendants expect Plaintiffs to argue that the alleged failure to provide access pursuant to a valid easement was a breach of duty by the developer. Moreover, the validity or invalidity of the 2000 Recreational Easement could affect Plaintiffs' measure of damages.

<u>STANDARD OF REVIEW</u>

Because the I'On Defendants' Petition raises only questions of law, this Court applies a *de novo* standard of review. *Lightner v. Hampton Hall Club, Inc.*, 419 S.C.

357, 363, 798 S.E.2d 555, 558 (2017) ("[T]his Court reviews questions of law de novo.").

ARGUMENT

I. The Court of Appeals erred in applying the two-issue rule.

Under the two-issue rule, where a trial court's decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), *abrogated on other grounds by Repko v. Cty. of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018). The Court of Appeals held that the two-issue rule applied here because the I'On Defendants "failed to challenge the circuit court's conclusion that the Recreational Easement was not an arms-length transaction." (App. p. 24.) This was error.

It is undisputed that the three parties to the 2000 Recreational Easement—the I'On Company, the I'On Club, and the Assembly—were related parties that were not operating at "arms-length" when executing the 2000 Recreational Easement. But this was not—and could not be—a separate ground for finding the 2000 Recreational Easement invalid. This is true for several reasons.

First, the body of the trial court's order does not hold that the 2000 Recreational Easement was invalid by virtue of not being an arms-length transaction. (*See generally* Trial Court Order, R. pp. 70-78.) Rather, the body of the order holds that the 2000 Recreational Easement was invalid and void *ab initio* for one reason: the grantor of the easement did not own the servient property at the time of the easement's execution. (R.

p. 73.)[2] Indeed, the trial court only references the 2000 Recreational Easement not being an "arms-length" transaction *one time* in the body of its nine-page Order, and when making this this lone reference, the trial court does not provide any factual or legal discussion and, most importantly, does *not* hold that the 2000 Recreational Easement was invalid by virtue of not being an arms-length transaction. Instead, the trial court merely states that the 2000 Recreational Easement not being an arms-length transaction "give[s] this court pause." (R. p. 75 ("While this lack of an arms-length Easement transaction and the Easement's ambiguous terms alone *are sufficient to give this court pause*, other concerns come into play when Defendants seek the benefit of equitable relief.") (emphasis added). Giving the trial court "pause" is different from providing a standalone ground for finding the 2000 Recreational Easement invalid.[3]

Second, holding that an easement is invalid because it was created through a transaction that was not "arms-length" would be nonsensical and unsupported by the law. Thus, the trial court order should not be interpreted as including such a holding.

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[2] The body of the trial court's order also held that a portion of the easement was terminated in 2014 when the Assembly obtained title to the servient property. (R. p. 74.) The I'On Defendants do not dispute and have not appealed this holding and, instead, appeal only the trial court's holding that the 2000 Recreational Easement was invalid (and void *ab initio*) for the time period between its execution and the Assembly's acquisition of the boating facilities in 2014. (*See* I'On Defendants' App. Br., App. 155-56.)

[3] The lone reference to the 2000 Recreational Easement not being an "arms-length" transaction in the body of the trial court's order appears under the heading "Equitable Concerns." (R. p. 75.) By contrast, the heading used for the trial court's actual basis for finding the 2000 Recreational Easement invalid is as follows: "The 2000 Recreational Easement is Invalid Because the Granting Party Did Not Own the Subject Property at the Time of Execution." (R. p. 73.) In that section, the trial court explicitly holds that, because the I'On Club did not own the servient property on the date the easement was executed, "the 2000 Recreational Easement is invalid as a matter of South Carolina law, and thus, void *ab initio*." (R. p. 74.)

There is no South Carolina case or statute remotely suggesting that a transaction can be voided—much less be deemed void *ab initio*, as the trial court held here—merely because it was not "arms-length." Of course, thousands of transfers of property among family members and business partners occur every year which are not arms-length transactions. South Carolina courts hold that a transfer is valid so long as some consideration is provided, regardless of whether the parties to the transaction are at "arms-length." *See, e.g.*, *Albertson v. Robinson*, 37 S.C. 311, 316, 638 S.E.2d 81, 83 (Ct. App. 2006) ("South Carolina courts have held that . . . conveyances may be set aside under two conditions: first, where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without valuable consideration."); *Hemingway v. Small,* 284 S.C. 42, 46, 324 S.E.2d 335, 338 (Ct. App. 1984) ("Inadequate consideration is not ground for rescission of a deed unless it is so palpably disproportionate to the real and market value of the property as to constitute an unconscionable contract.") (internal quotations omitted).

Third, Plaintiffs did not even challenge the 2000 Recreational Easement based on it not being arms-length. (*See generally* Plaintiffs' Memorandum in Support of Plaintiffs' Declaratory Action, R. pp. 1903-09 (referencing the transaction not being arms-length only in the context of arguing that all parties to the 2000 Recreational Easement had notice that the grantor of the easement did not own the servient property,

not as a standalone ground for finding it invalid).) Nor would such an argument have found any support in the law.

Fourth, the lone reference in the body of the trial court's order to the transaction not being "arms-length" was in the context of the trial court identifying its "equitable concerns," and the I'On Defendants addressed equitable issues relating to the Recreational Easement at length in their appellate brief. (*See generally* App. pp. 155-60.)

Fifth, the "Conclusion" paragraph of the trial court's order, which includes the only other reference to the 2000 Recreational Easement not being an "arms-length" transaction, is ambiguous. It lists several findings relating to the 2000 Recreational Easement and connects them with the conjunctions "and/or," indicating that one of these findings, or perhaps some unspecified combination of these findings, supports the trial court's holding that the 2000 Recreational Easement was invalid and void *ab initio* under South Carolina law. This ambiguous paragraph, which is inconsistent with the body of the trial court's order, Plaintiffs' arguments to the trial court, and South Carolina law, is not sufficiently clear to support application of the two-issue rule. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation."); *id.*, 398 S.C. at 329, 730 S.E.2d at 285 (stating that the majority "certainly share[s] [Chief Justice Toal's] concerns about a hypertechnical application of a procedural bar to appellate arguments").

Sixth, Plaintiffs did not argue that the two-issue rule applied here. Rather, the Court of Appeals applied it *sua sponte*. *See Atl. Coast Builders & Contractors, LLC*, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, C.J., dissenting) ("When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.").

Because the 2000 Recreational Easement not being executed through an "arms-length" transaction was not a standalone ground for finding the easement invalid and void *ab initio*, this Court should hold that the Court of Appeals' application of the two-issue rule was an error and should reach the merits of the I'On Defendants' appeal of the trial court's order.

II. Pursuant to the after-acquired title doctrine, the 2000 Recreational Easement was valid.

The trial court held that the 2000 Recreational Easement was invalid because it was executed prior to the I'On Company's transfer of the servient property to the I'On Club, which was the grantor of the easement to the Assembly. (R pp. 73-74.) In so holding, the trial court rejected the I'On Defendants' argument that the after-acquired title doctrine applies where, as here, the grantor of an easement acquires title to the servient property after executing the easement. The Court of Appeals affirmed the trial court's holding under the two-issue rule and, alternatively, because the South Carolina Supreme Court has not applied the after-acquired title doctrine in the context of easements. (App. p. 24.) The Court of Appeals summarily addressed the after-acquired title doctrine, opining: "Because our supreme court has not spoken on this precise issue,

we decline to apply [the after-acquired title] doctrine to the Recreational Easement." (App. p. 24.) The Court of Appeals' alternative holding constitutes an error of law.

South Carolina has long recognized the after-acquired title doctrine, which provides that, if a grantor lacks title to property conveyed in a deed but subsequently obtains title to the property, the grantor may not deny the validity of the conveyance. *See, e.g.*, *Corbin v. Carlin*, 366 S.C. 187, 192-93, 620 S.E.2d 745, 748 (Ct. App. 2005) ("The principle is settled beyond controversy in this state that if a grantor conveys land, with the usual covenants of warranty, to which at that time he has no title, but afterwards acquires a title, he is estopped from claiming that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee.") (quoting *Richardson v. Atlantic Coast Lumber Corp.*, 93 S.C. 254, 258, 75 S.E. 371, 372 (1912)). Although the South Carolina Supreme Court has not addressed whether the after-acquired title doctrine applies to easements, courts in other jurisdictions routinely hold that it does. *See, e.g.*, *Amada Fam. Ltd. P'ship v. Pomeroy*, 494 P.3d 633, 643 (Colo. Ct. App. 2021) ("[C]ourts in other states have concluded that easements may be transferred as after-acquired property . . . .") (collecting cases). As the *Amada* Court noted, the after-acquired property doctrine "serves to prevent fraud and honors the parties' intentions" by committing the parties to the obligations each agreed to. *Amada Fam.*, 494 P.3d at 643; *see also Sprinkle v. Am. Mobilephone Paging, Inc.*, 525 So. 2d 1353, 1357 (Ala. 1988) (applying the after-acquired property doctrine to an easement because enforcing the easement honored the intent of the parties).[4]

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[4] There is no indication in South Carolina case law that the after-acquired title doctrine does not apply to easements, and case law in related contexts suggests that it should. *See*, *e.g.*, *Nettles v. Cummings*, 30 S.C. Eq. (9 Rich. Eq.) 440, 448 (1857) (explaining

The principles supporting the after-acquired title doctrine apply with equal force to easements and deeds conveying a fee simple interest in property. *See Spencer v. Wiegert*, 117 So. 2d 221, 226 (Fla. Dist. Ct. App. 1959) ("Easements constitute property within the rule of estoppel as to after-acquired property."). Just as parties to a deed should be bound by promises contained in that deed, parties to an instrument creating an easement should be bound by the terms of that instrument, regardless of whether the grantor obtains title to the property after the execution of the deed or easement.

Further, the facts of this case make application of the after-acquired title doctrine especially appropriate and, likewise, make a finding that the 2000 Recreational Easement was invalid by virtue of the six-month delay in transferring the property to the grantor of the easement especially inappropriate. This case presents the unusual situation where, although the grantor of the easement (the I'On Club) did not obtain title to the servient property until six months after execution of the easement, the owner of the servient property (the I'On Company) *was a signatory to the document creating the easement and was controlled by the same person as the grantor of the easement*. (R. pp. 3139-40 (signatures of the manager of the I'On Company and of the manager of the I'On Club).) Further, because the same person (Joseph E. Barnes) served as manager of the I'On Club and the I'On Company as of the date of the easement's execution, there is no question that the grantor of the easement had the ability to obtain

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that a grant of goods which were not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratifies the grant by some act done by him with that view, after he has acquired the property); *Tolar v. Marion Cty. Lumber Co.*, 93 S.C. 274, 75 S.E. 545 (1912) (allowing ratification of a deed of conveyance made during infancy after reaching age of majority).

title to the servient property—and expected to obtain title to the servient property—when the easement was executed. And, in fact, the I'On Company did convey title to the servient property to the I'On Club a mere six months after the easement's execution. (R. pp. 3146-51.)

Moreover, the I'On Club, as servient landowner, and the Assembly, as easement holder, operated under the terms of the 2000 Recreational Easement—with respect to both use of the boating facilities and the Assembly's maintenance contributions—for over a decade after the conveyance of the servient property to the I'On Club. (R. p. 615:8-25; R. p. 1074:1-10; R. p. 1329:16-24.) The Assembly budgeted and paid dock usage and rental fees to the I'On Club pursuant to its access rights under the 2000 Recreational Easement. (R. pp. 3175-86.) The Assembly also engaged legal counsel to advise it as to the easement, but never suggested any problem with its validity or term. (R. p. 614:5-11; R. p. 1075:13- 1076:6; R. pp. 3436-40; R. pp. 3451-53; R. pp. 3459-61; R. pp. 3464-67; R. pp. 3600-01.) Because the parties to the easement reasonably relied on the validity of the easement for more than a decade, it would be perverse and hyper-technical to hold that the easement was never valid merely because of the six month delay in the grantor obtaining title to the servient property. *See Amada Fam.*, 494 P.3d at 644 (holding that an easement was valid pursuant to the after-acquired title doctrine where the grantee of the easement "reasonably relied on the [grantor's] promise to allow an easement over [the servient property] if [the grantor] could acquire it"); *see also McCullough v. Wall*, 38 S.C.L. 68 (S.C. App. L. 1850) ("The parties to a deed acquiescing, a third person cannot

invalidate it by shewing what might, if urged by one of them, be considered a fraud or mistake."); *Sanders v. Hartzog*, 6 S.C. 479 (1876).[5]

Finally, Plaintiffs' position that the 2000 Recreational Easement was invalid and that the after-acquired title doctrine does not apply is contrary to the representations and interests of the Assembly, on behalf of whom Plaintiffs Walbeck and Adkins purport to bring derivative claims. The 2000 Recreational Easement gives a significant benefit to the Assembly: a perpetual right to use and enjoy the boating facilities. Prior Assembly boards determined that easement access would be *superior* to outright ownership of the boating facilities because of liability and maintenance concerns. (R. p. 1081:4-25; R. p. 1318:2-12.) By holding that the 2000 Recreational Easement was invalid, the trial court aided Plaintiffs in acting inequitably and contrary to the Assembly's best interests by rejecting this significant benefit for the litigation-driven purpose of artificially inflating their damages. Indeed, after the partial settlement of this case required the Assembly to support the other Plaintiffs, the Assembly reversed its position and began claiming that the easement "might be" invalid. (R. p. 1330:1-12.) Rather than be required to prove the difference in value between the easement and outright ownership—which, as noted above, the Assembly had previously found to be negligible *or perhaps even negative*, Plaintiffs sought to measure their damages

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[5] The present case is distinguishable from *Noronha v. Stewart*, 199 Cal. App. 3d 485, 245 Cal. Rptr. 94 (Cal. Ct. App. 1998), which the trial court cited for the proposition (stated *in dicta* in *Noronha*) that a grantee cannot invoke the after-acquired title doctrine to validate a transfer when the grantee has knowledge of a title defect. Here, *all* parties to the easement acquiesced in its validity after the title defect was cured, and during the limited window of time when the title defect existed, the grantor and grantee were controlled by the same individuals.

by taking the difference in value between no access to the boating facilities and outright ownership. This was Plaintiffs' measure of damages even though the Assembly *always had access* to the boating facilities, since all parties always believed and operated as though the easement was valid.

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals and hold that the 2000 Recreational Easement was valid by virtue of the after-acquired title doctrine.

III. The easement is perpetual, not limited to 30 years.

Because it found that the 2000 Recreational Easement was void *ab initio*, the trial court did not reach the question of whether the easement provided to the Assembly to use the boating facilities was perpetual, as the I'On Defendants contend, or limited to a term of thirty years, as Plaintiffs contend. (R. pp. 70-78.) The Court of Appeals did not reach this issue for the same reason as the trial court. (App. pp. 24-25.)

Standard rules of interpretation, as well as the language of the easement document itself, compel the conclusion that the section of the 2000 Recreational Easement granting I'On homeowners access to the boating facilities was perpetual. A court must interpret the terms of deeds and easements as a whole and give effect to all of the provisions contained therein if possible. *Millvale Plantation, LLC v. Carrison Family Ltd. P'ship*, 401 S.C. 166, 174, 736 S.E.2d 286, 290 (Ct. App. 2012); *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252, 262 (2009). Section 4.3 of the 2000 Recreational Easement reinforces this rule of

law. (R. p. 3138 (providing that, "[w]herever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid").)

The 2000 Recreational Easement document has several components. It grants perpetual easements for the use and enjoyment of the boating facilities by the Assembly, and the I'On Commons by The I'On Club. It also establishes a cost-sharing agreement that obligates the Assembly and The I'On Club to contribute to boating facilities maintenance. The easement for use and enjoyment of boating facilities is "a perpetual, nonexclusive easement." (R. pp. 3132-3133.) The section pertaining to the easement for The I'On Club's use and enjoyment of the Commons contains similar language. (R. p. 3134.)

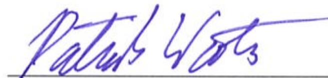
These provisions are reconcilable with Section 4.2 of the 2000 Recreational Easement, which establishes a thirty-year duration for the Assembly's financial obligations with respect to boating facility maintenance. The I'On Defendants' interpretation, unlike Plaintiffs' interpretation, gives effect to the perpetual nature of the use easement and the thirty-year term of the cost-sharing agreement. The sections describing the cost-sharing agreement and the I'On Club and Assembly's respective maintenance obligations do not contain any durational language. (*See* R. pp. 3135-38.) Finally, Section 4.2 states that "[t]his Agreement . . . shall have a term of 30 years." The Agreement is distinguishable from the perpetual easements for use and enjoyment of the boating facilities and I'On Commons. The distinction between easement and agreement is even made by the document title: Recreational Easement *and* Agreement to Share Costs. The I'On Defendants' interpretation complies with Section 4.3 and South Carolina

precedent by giving effect to all provisions of the 2000 Recreational Easement. Plaintiffs' interpretation, by contrast, requires the Court to ignore the language specifically establishing the easement contained therein as perpetual. Thus, the Court should reverse the Court of Appeals' holding that the 2000 Recreational Easement was invalid and also should hold that the easement was perpetual, not limited to thirty years.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals' holding that the two-issue rule applies to the I'On Defendants' challenge to the trial court's ruling as to the 2000 Recreational Easement, and this Court should hold that the 2000 Recreational Easement was valid and perpetual. Moreover, for reasons that the I'On Defendants will address in their Return to Plaintiffs' Initial Brief, this Court should correct the legal errors in the Court of Appeals' discussion of fiduciary duty law, or should state plainly that the dicta in the Court of Appeals' opinion discussing this issue does not constitute the law.

Respectfully submitted,



Brian C. Duffy (SC Bar #16247)
Julie L. Moore (SC Bar # 78677)
Patrick C. Wooten (SC Bar # 77985)
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044

Attorneys for Respondents-Petitioners

April 14, 2022