RECEIVED

May 12 2022

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

Opinion No. 5588 (S.C. Ct. App. withdrawn, substituted, and refiled February 27, 2019)
Case No. 2010-CP-10-10490
Appellate Case No.: 2019-000968

I'On Assembly, Inc., Brad J. Walbeck, and Lea Ann Adkins, individually and derivatively on behalf of I'On Assembly, Inc.,
Petitioners,

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-RESPONDENTS' BRIEF IN RESPONSE TO RESPONDENTS-PETITIONERS' BRIEF ON RESPONDENTS' CERTIFIED QUESTIONS

JUSTIN O'TOOLE LUCEY, P.A.
Justin O'Toole Lucey, Esquire (Bar: 15438)
Joshua F. Evans, Esquire (Bar: 77448)
Dabny Lynn, Esquire (Bar: 78703)
415 Mill Street
Mount Pleasant, South Carolina 29464
Phone: (843) 849-8400
Facsimile: (843) 849-8406
jlucey@lucey-law.com
jevans@lucey-law.com
dlynn@lucey-law.com
Attorneys for all Petitioners-Respondents

May 12, 2022
Mt. Pleasant, SC

Other Counsel of Record:

Shawn Willis (Bar: 71155)
NELSON MULLINS
Liberty Center
151 Meeting Street, Suite 600
Charleston, SC 29401
(843) 534-4230
(843) 722-8700 (fax)
shawn.willis@nelsonmullins.com
Attorney for I'On Assembly, Inc.

Brian Duffy (Bar: 16247)
Julie Moore (Bar: 78677)
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044
(843) 720-2047 (fax)
bduffy@duffyandyoung.com
jmoore@duffyandyoung.com
Attorneys for all Respondents-Petitioners

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

COUNTER-STATEMENT OF ISSUES ON APPEAL

Respondents present two, principal issues to this Court: (1) whether Respondents' *theoretical control* (perhaps addressing the developer's veto power and ignoring the COA's finding of actual control) gave rise to a fiduciary duty to act in the HOA's best interest; and, (2) whether the COA properly applied the two-issue rule in affirming the Trial Court's declaration that the 2000 Recreational Easement was invalid (because Respondents failed to appeal all grounds the Trial Court specifically listed in support of this declaration).

Respondents only address the second issue in their Brief on Certiorari and are waiting to address the first issue in their Response to Petitioners' Brief on Certiorari. (Resp. Cert. Br., p. 2).[1] Petitioners have addressed the Trial Court's correct rulings on the fiduciary duty owed by Respondents in Petitioners' Brief on Certiorari, and will again do so in their Reply Brief, both of which briefs' sections on the issues related to fiduciary duty are hereby incorporated by reference as if set forth at length herein.[2] The balance of this Response Brief will focus on the second issue presented by Respondents.

This issue, as argued by Respondents, includes five subparts. Broken down, the questions presented to this Court are:

1) Whether the COA Properly Applied the Two-Issue Rule to Affirm the Trial Court's Ruling that the 2000 Recreational Easement was Invalid;

2) Is the After-Acquired Title Doctrine Applicable in this Context;

3) Do Respondents' Unclean Hands Preclude Them from Relying on The After-Acquired Title Doctrine;

---

[1] "[T]he I'On Defendants will address the first issue in their Return to Plaintiff's Initial Brief and will not include that discussion in this Brief. Accordingly, the I'On Defendants address only the second issue. . ." (Resp. Cert. Br., p. 2).

[2] Again, it's worth noting that the Trial Court's principal ruling on fiduciary duties was completely in accordance with the law that was charged to the jury on Respondents' fiduciary duties without objection from Respondents. (App. pp. 2165-67).

4) Do Respondents' Admissions and the Easement's Language Evidence that the Easement's Term was Intended to be Limited as Opposed to Perpetual; and,

5) Whether the After-Acquired Title Doctrine Decided Post Trial Cannot Alter the Petitioners' Damage Model Presented During Trial?

COUNTER-STATEMENT OF FACTS

While Respondents' feigned benevolence to the HOA and its interests is intriguing, their flowery description of the facts is misleading by intentional omission and Respondents' focus is completely wrong.

The first question Respondents completely dodge is what enforceable ownership or easement rights did the HOA and its members have against a future, downstream adversary. It's not that Petitioners wanted the Easement to be invalid to stir up the homeowners and inflate the damages; it's that Petitioners proved that homeowners were damaged by the Respondents' deceit – the transfer of unenforceable, non-perpetual rights in lieu of the originally promised ownership, or even in lieu of the subsequently, substituted easement rights.[3]

The second question Respondents ignore is why the Respondents failed to confirm the perpetual term of the Easement, and fix the Easement, when asked to do so by the HOA prior to the third-party transfer[4] – or at any other time prior to losing control of (transferring) the

[3] Respondents also sought to have Easement declared invalid since "their theory – from the outset of this litigation – was that the promised amenities were to be **conveyed** to the Assembly. Limited access to the deep water and dock closures on the weekends during Civitas events were not part of the bargain." (Easement Order, App. p. 513) (emphasis in original).

[4] *See* (App. pp. 1125:1-1126:2) (Tom Graham admitting that when the Commons were sold to a third-party in 2009, he knew that there was only 21 years left on the Easement, the third-party could then cancel the Easement, and Respondents did nothing to fix this); (App. pp. 3423-24) (Respondents indicating that they would not modify the Recreational Easement per the request of the request of the HOA while it was under contract for sale).

subservient parcel. Respondents' benevolence in advocating the after-acquired title doctrine to benefit the HOA is belied by their actions.

The third question dodged by the Respondents is why they did not assert the perpetual nature of the Easement when given the opportunity in their deposition, which was republished at trial. (App. pp. 1681:14-1682:15). Further, Respondents completely failed to address the context in which all of the foregoing took place, wherein a developer-controlled HOA was permitting the same developer to substitute a limited, defective easement for the previously promised ownership.

Lastly, Respondents use this purported cross-Brief on Certiorari, which is completely subsumed by the Petitioners' Brief on Certiorari, to discretely attack the amount of the verdict and the damage model on which it was based – when the amount of the verdict has never been appealed. *Compare* (Resp. Cert. Br., p. 4) (acknowledging the verdicts awarded by the jury at trial) *with* (Resp. Cert. Br., pp. 17-18) (challenging the jury's verdict based on the post-trial Easement invalidity ruling). Respondents do this with an incorrect inference, that the declaration of invalidity affects the damages; when in fact, the Easement was not declared invalid until after the verdict,[5] and the jury was left to make their own assessment of the Easement based upon the competing factual positions of the parties and the unobjected charge on the law. *Id*.; *see also* (App. pp. 2147-70).

STANDARD OF REVIEW

"The determination of the extent of a grant of an easement is an action in equity." *Proctor v. Steedley*, 398 S.C. 561, 571, 730 S.E.2d 357, 362-63 (Ct. App. 2012) (citations omitted). "Therefore, on appeal of such a determination, this Court may take its own view of the

[5] The trial of this case concluded on August 2, 2014 (Verdict Form, App. pp. 2321-28), and the Easement Order was entered almost a year later, on June 16, 2015. (Easement Order, App. p. 514).

preponderance of the evidence." *Id.* "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Id.*, *citing Pinckney v. Warren,* 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001) (citations omitted). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id.*, *citing Pinckn*ey, 344 S.C. at 387–88, 544 S.E.2d at 623.

ARGUMENT

I. THE COA CORRECTLY APPLIED THE TWO-ISSUE RULE IN AFFIRMING THE RECREATIONAL EASEMENT'S INVALIDITY

The COA rightfully applied the two-issue rule to affirm the Trial Court's ruling that the Easement was invalid because Respondents failed to appeal all grounds supporting this ruling. The Trial Court found that the Easement was "invalid for several reasons,"[6] including that:

> **(a)** The I'On Club did not hold title to the amenity property over which the 2000 Recreational Easement was granted at the time the Easement was executed; **(b)** the "perpetual" terms of the 2000 Recreational Easement are ambiguous; **(c)** the 2000 Recreational Easement was not an arms-length transaction; **(d)** the 2000 Recreational Easement was not in the best interest of the Assembly; and/or **(e)** the provisions of the 2000 Recreational Easement are effectively terminated . . .

(Easement Order, App. p. 514) (emphasis added). On appeal, Respondents only challenged one of these five reasons – that the Easement's grantor, I'On Club, did not own the property subject to the Easement. (Resp. COA Br., App. pp. 246-48) ("The trial court held that the 2000 Recreational Easement was invalid solely because it was executed prior to the transfer of the servient property to The I'On Club, LLC.").[7]

---

[6] (Easement Order, App. p. 509) ("Based on the evidence presented and a plain reading of the 2000 Recreational Easement, this Court finds the 2000 Recreational Easement is invalid for several reasons").

[7] As explained in Section III below, Respondents ultimately concede that the I'On Club did not, in fact, own the property subject to the Easement at the time the Easement was granted.

The COA therefore correctly found that Respondents "did not appeal all of the grounds specifically listed by the circuit court to support its declaration of invalidity" and properly applied the two-issue rule to affirm this ruling:

> Appellants maintain the circuit court erred in (1) finding that section 4.2 of the Recreational Easement limited the term of the easement to thirty years, superseding previous language stating the easement was perpetual, and (2) concluding that the Recreational Easement was invalid. However, Appellants did not appeal **all** of the grounds specifically listed by the circuit court to support its declaration of invalidity. Namely, they failed to challenge the circuit court's conclusion that the Recreational Easement was not an arms-length transaction. Therefore, this court will affirm the circuit court's declaration under the two-issue rule. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the [two-issue] rule, [when] a 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."); *id.*, 692 S.E.2d at 903–04 (noting that the two-issue rule can be applied to situations not involving a jury); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (affirming the trial court's decision because the plaintiff did not appeal all grounds for the decision); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 214 (3rd ed. 2016) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.").

(2019 Op., App. p. 110) (emphasis added). This Court should find the same.

II. RESPONDENTS' ATTEMPT TO PARSE THE COA'S STATEMENTS AND FOCUS ON WHETHER AN EASEMENT IS VOID OR VOIDABLE SOLELY BECAUSE IT WAS NOT AN ARMS' LENGTH TRANSACTION IGNORES THE ACTUAL CONTENT OF THE COA'S HOLDING

Respondents' sole argument as to the two-issue rule is that although the COA "is correct that Appellants did not separately and expressly argue the trial court's reference to the 'arms-length transaction' in its briefing," (Resp. 2018 Pet. for Reh'g., App. p. 52) (emphasis added), that this was not a "stand alone" ground supporting the COA's and Trial Court's ruling. (Resp. Cert. Br., pp. 9-13). This argument fails for multiple reasons.

A. Respondents' Misrepresent the COA's 2019 Opinion

Respondents incorrectly assert that the COA "held that the two-issue rule applied here because the I'On Defendants 'failed to challenge the circuit conclusion's that the Recreational Easement was not an arms-length transaction.'" (Resp. Cert. Br., p. 9). This is not what the COA held. Rather, the COA principally held that Respondents failed to appeal "all" grounds "specifically listed" in the Trial Court's "declaration of invalidity" and pointed to the unappealed, arms-length ground as a supporting example. (2019 Op., App. p. 110). This supporting example does not make the COA's principal holding erroneous, and even if could, this error was harmless as discussed in Section III.

B. Respondents Misrepresent the Support for the COA's Holding in the Trial Court's Easement Order

Respondents also mischaracterize the Trial Court's Easement Order. (Resp. Cert. Br., pp. 9-10). While the Trial Court may have only used the precise words "arms-length" twice,[8] the "body of its nine-page Order" discusses why the Easement was not arms-length and not in the HOA's best interest in numerous observations, such as:

- "On February 9, 2000, the I'On Club, LLC, the I'On Company, LLC, and the I'On Assembly (then controlled by the Defendants) executed a document entitled 'Recreational Easement and Agreement to Share Costs'". . . (App. p. 507) (emphasis added);

- "Specifically, in the 2000 Recreational Easement, the I'On Club purported to grant the Assembly and its members perpetual use and access of the 'Community Dock' and associated boat ramp. . .In the same document, the Assembly purported to grant the I'On Club and its members the perpetual right to use and access 'East Lake' and the 'Athletic Field' through consenting to a grant of easement by the Developer (The I'On Company, LLC). . .It is undisputed that the Developer controlled the Assembly at the time the Assembly allegedly consented to the Developers' grant of the East Lake easement to the Club." (App. p. 508) (emphasis added);

[8] Respondents' statement that there is one, "lone reference" to the words "arms-length" in the body of the Order is misleading. The term "arms-length" is used twice in the Opinion – first, in the Equitable Concerns Section and second, in the Conclusion Section. (App. pp. 511, 514).

- "Significantly, only one individual Joe Barnes, a general agent for the I'On Defendants, executed the 2000 Recreational Easement on behalf of all three interested parties. Mr. Barnes signed the 2000 Recreational Easement in his capacities as (1) Manager of the I'On Company; (2) Manager of the I'On Club; and (3) President of the I'On Assembly." (App. p. 508) (emphasis added);

- "The testimony and evidence presented at the trial of this case repeatedly referenced the Easement's ambiguous concerns, its non-perpetual interpretation, and its conflicted execution by the same individual, Joe Barnes, for three I'On entities. The jury considered this evidence and implicitly recognized the invalidity of the Easement in light of the Developer's fiduciary relationship with the Assembly. 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." (App. p. 511) (internal citation omitted) (emphasis added);

- "Defendants are estopped from utilizing the After-Acquired Title Doctrine because Defendants' employee signed the 2000 Recreational Easement on behalf of all parties while on notice that the I'On Club was not the legal title holder." (App. p. 512) (emphasis added); and,

- "In the trial of the underlying matter, the jury found that Defendants acted unfairly, and thus, inequitably, in carrying out the fiduciary duties they owed to the Assembly. The jury's verdicts further reflect that the I'On Defendants. . . misrepresented the availability, accessibility, and future ownership of community amenities to Plaintiffs on multiple occasions by varied means of communication for one primary purpose – profit." (App. p. 512) (emphasis added).

Each of these findings support the Trial Court's specific, standalone conclusions relied upon by the COA that:

> In sum, because. . .(c) the 2000 Recreational Easement was not an arms-length transaction; (d) the 2000 Recreational Easement was not in best interest of the Assembly. . .this Court declares the 2000 Recreational Easement invalid and void *ab initio* under South Carolina law.

(App. p. 514) (emphasis added).

These conclusions are supported by South Carolina law which recognizes that non-arms-length transactions, such as these occurring in the fiduciary context, are presumed to be invalid:

> Where is a fiduciary relation between parties, and a business transaction occurs between them, and the superior party obtains the advantage, or a possible benefit,

> equity will closely scrutinize the transaction and raise a presumption against the validity of the same and throw the burden on him to prove good faith.

Wilson v. Wilson, 117 S.C. 454, 117 S.E. 330 (1921) (emphasis added). Respondents did not meet their burden to prove the fairness of the Easement; rather, the preponderance of the evidence shows that Respondents acted in bad faith in many ways in enacting the Easement. *See* Petitioners' Brief on Certiorari. Therefore, the Trial Court did not err in relying on the non-arm's length nature of the Easement, in conjunction with the fact that the Easement's defective nature harmed the HOA, as one of the COA's bases for concluding that the Easement is invalid as a matter of South Carolina law.

C. Respondents Cannot Relitigate the Arms-Length Issue or Prove the Easement Was Supported by Valuable Consideration

Respondents try to reargue the merits of what constitutes an "arms-length" transaction by comparing the Easement transaction to property transfers among family members and incorrectly claim that our courts "hold that a transfer is valid so long as some consideration is provided." (Resp. Cert. Br., pp. 10-11) (emphasis added). This is not what our law provides. For example, Section 27–23–10(A) of the South Carolina Code, commonly known as the Statute of Elizabeth, provides:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels, or of any of them, or of any lease, rent, commons or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures must be deemed and taken. . .to be clearly and utterly void. . .

(emphasis added). In interpreting this statute, our courts have held that transfers may be voided both when there is and is not "valuable" consideration – it all depends on the circumstances surrounding the transaction. *See, e.g., Judy v. Judy*, 403 S.C. 203, 209, 742 S.E.2d 672, 675-76

(Ct. App. 2013); *Albertson v. Robinson*, 371 S.C. 311, 316, 638 S.E.2d 81, 87 (Ct. App. 2006) *citing McDaniel v. Allen,* 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975).

In the family transfer context that Respondents' argument relies upon, it is Respondents' burden to "clearly and convincingly" prove the bona fides of the Easement, including the fact that it was supported by "valuable" consideration. *First Union Nat'l Bank v. Smith*, 314 S.C. 459, 462, 445 S.E.2d 457, 459 (Ct. App. 1994) ("Where transfers to members of the family are attacked either upon the ground of actual fraud or on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the *bona fides* of the transaction by clear and convincing testimony.") (internal citations and quotations omitted);[9] *see also Campbell v. Haddock (In re Haddock)*, Adv. Pro. No. 99-80266-W (Bankr. D.S.C. 2000) (holding that valuable consideration was not provided when mother transferred property to her daughter for $5.00 with love and affection, while maintaining a life estate herself). Moreover, Respondents fail to cite a single piece of *evidence* supporting their *theory* that this non-arms-length transaction was supported by "valuable" consideration. Therefore, Respondents have again failed to meet their burden.

D. Respondents' Attempts to Neutralize Their Preservation Error are Unsupported

Respondents' argument that Petitioners did not raise the non-arms-length nature of the Easement, or the two-issue rule is without merit. Petitioners' "Brief in Support of Judgment in I'On Assembly's Favor on Invalidity of the 2000 Recreational Easement" expressly states that the Easement "was not an arms' length transaction." (App. p. 2370) (emphasis added). Further,

[9] In the Easement, the I'On Club was the express transferee of the Eastlake easement and agreement to share costs. (App. pp. 3628, 3630, 3632). In the entirety of the transaction, the I'On Club was also the transferee of the ownership rights to the Commons which had been previously promised to the HOA.

Respondents have repeatedly conceded that the Easement was not an arms-length transaction and thus there was no need for Petitioners to argue this point on appeal:

> 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.

(Resp. Cert. Br., p. 9) (emphasis added).

Petitioners are not required to argue the two-issue rule because it is doctrine created by our appellate courts to *sua sponte* consider and apply. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("[W]here a 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 also Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("We therefore agree that we are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us. In fact, a rule which would permit such an 'appeal by consent' is contrary to the very core of our preservation requirement: 'Issue preservation rules are designed to give the trial court fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.'") (Internal citations omitted) (emphasis added).

E. The Trial Court's "and/or" Easement Invalidity Conclusion is Not Ambiguous

The "and/or" language about which Respondents complain is perfectly clear; the Trial Court was indicating that each of the foregoing grounds, singularly, and all of the foregoing grounds collectively, support the Trial Court's ultimate ruling. (App. p. 514). Furthermore, if Respondents believed the Easement Order needed clarification after it was entered, they should have either brought this up to the Trial Court or appealed all rulings to err on the "preservation" side of caution – they did neither.

III. ANY ERROR PURPORTEDLY COMMITTED BY THE COA IS HARMLESS

Even assuming the COA somehow erred despite all the foregoing, this Court should find any such error harmless because there is at least one, other ground supporting the Trial Court's declaration of invalidity that Respondents factually concede – that I'On Club, the grantor of the Easement, did not own the property subject to the Easement at the time it was granted:

> At the time the [Easement] was executed, the I'On Company still held title to [the property], . . . the I'On Club …acquired ownership of the same on August 15, 2000.

(App. p. 2382) (emphasis added); *see also* (App. pp. 3635-38) (signed February 9, 2000, six months before August 15, 2000 when the I'On Club took title to the property).

Respondents do not dispute that, as a matter of South Carolina law, an easement cannot be granted by a party who does not have any interest in the land. *Moore v. Reynolds*, 285 S.C. 574, 757 (1985) (recognizing the invalidity of an easement granted on property no longer owned by the grantor at the time the easement was executed). This basic tenant – one cannot convey something he does not own – is as old as property law itself and is recognized by virtually every jurisdiction.[10] Consequently, the Easement is invalid and *void ab initio* as a matter of South Carolina law, and any error the COA purportedly made in affirming the Trial Court's ruling recognizing this invalidity based on the two-issue rule is harmless.

[10] Indeed, this principle, *nemo dat quod non habe* (one cannot convey what he does not own), was recognized by the United States Supreme Court. *Mitchell v. Hawley*, 83 U.S. 544, 550 (1872). Also, in its Order, the Trial Court cited a non-exhaustive list of cases from other jurisdictions that acknowledge an easement cannot be granted by a party over land he does not own. (App. pp. 506-14).

IV. THE AFTER-ACQUIRED TITLE DOCTRINE DOES NOT APPLY HERE

The COA correctly noted that "[Respondents] do not cite any South Carolina authority for the proposition that this doctrine applies to the grant of an easement." (2019 Op., App. p. 110). Even if this Court were to adopt the doctrine as to easements, the doctrine itself is not applicable to the current context for the following reasons.

1. The Doctrine is Enforced Against and Not in Favor of Grantors

Our courts apply the after-acquired title doctrine to benefit a grantee who received title from a grantor under standard covenants of warranty to which the grantor did not possess title. Respondents admit this did not happen here because the Easement was executed to benefit the grantor, I'On Club. (App. pp. 506-14); *see also* (App. pp. 3627-32).

2. The Doctrine Does Not Apply in Favor of a Grantee Who Has Notice or Knowledge That the Grantor Does Not Have Title he Purports to Convey

Further, the doctrine does not apply to protect a party who has notice or knowledge that the other party does not have what they purport to convey. *Id.* Here, Respondents' employee signed for all three of the entities involved in the Easement transaction. (App. pp. 3635-39). Thus, the Trial Court found all parties to the transaction were on notice and knew that the I'On Club was granting an Easement over land it did not own. (App. p. 512) (". . .Defendants' employee signed the 2000 Recreational Easement on behalf of all parties while on notice that the I'On Club was not the legal title holder."). Accordingly, the Trial Court's ruling that the Easement cannot be ratified by the after-acquired title doctrine is legally and factually supported. *See, e.g., S.C.DOT v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008) (appellate courts do not have to ignore the findings of a trial judge who is better able to gauge the evidence and credibility).

3. The Doctrine Cannot Be Retroactively Applied to the Detriment of a Good Faith Purchaser for Value

All the cases relied upon by the Respondent are actions where the parties are in privity or the doctrine is enforced against the grantor or its privies who did not take for value and stand in the grantor's shoes.[11] Here, the original easement was invalid as the Grantor, the I'On Club, did not own what it was attempting to convey and then the subservient parcel was validly transferred out to a third party for $1,500,000.00 in value prior to the doctrine being invoked. A heretofore invalid easement cannot be forced upon the downstream purchaser; and, Respondents present no precedent otherwise.

4. The Doctrine Cannot Be Applied to an Easement that No Longer Exists

As briefed by Respondents, the after-acquired title doctrine provides that "the Grantor may not deny the validity of the conveyance." (Resp. Cert. Br., p. 14). Here, the Grantor, the I'On Club, deeded the property to a third-party in 2009, years before it was discovered in this suit that the then-Grantor, I'On Club, did not have title.[12] Keeping the Grantor, the I'On Club, from denying the validity of the Easement does not help the HOA as the property had been transferred to a stranger, 148 Civitas, LLC. Preventing the Grantor from denying the validity of the Easement is no longer relevant. The HOA had to buy the property back from the downstream purchaser to regain their rights; and, as conceded and not appealed by Respondents, once that occurred, the defective Easement was merged out of existence. (App. pp. 510-12, 514) ("[T]he terms of the 2000 Recreational Easement purporting to grant the Assembly a right to use and access the amenity

[11] *See, e.g., Spencer v. Wiegert*, 117 So. 2d 221, 226 (Fla. Dist. Ct. App. 1959) ("The estoppel works upon the estate and binds an after-acquired title as between parties and privies."); *Corbin v. Carlin*, 366 S.C. 187, 620 S.E.2d 745 (Ct. App. 2005) (where grantor did not have legal title to property, his grantee received title through the after-acquired title doctrine).

[12] It was then merged out of existence by the HOA's repurchase of the Commons from the buyer before verdict – a holding unchallenged by Respondents.

property upon which the Community Dock, boat ramp, and parking lot are located, were effectively terminated when the Assembly acquired title to this property. . .”). Ultimately the Easement was merged out of existence, by partial settlement, after the damage was done, and before the verdict and final orders were issued in the Trial Court.

5. Respondents Cannot Bootstrap the After-Acquired Title Doctrine to Try to Change the Result of Trial

Respondents’ last argument is that this Court should adopt the after-acquired title doctrine because they belatedly disagree with the jury’s verdict that was awarded based on Petitioners’ damage model presented at trial. Neither the after-acquired title doctrine nor the Trial Court’s Easement ruling can affect the jury’s verdict because Respondents never challenged the verdict and all Easement-related rulings occurred post-trial. Because the jury’s verdict stands regardless of the Easement’s validity, the result remains the same, and thus, remand is unwarranted.

V. RESPONDENTS CANNOT RELY ON THE AFTER-ACQUIRED TITLE DOCTRINE DUE TO THEIR UNCLEAN HANDS

The Trial Court addressed Respondents’ “equitable” argument – the after-acquired title doctrine – and determined that, regardless of whether the doctrine applies to easements, the doctrine was inapplicable to the Recreational Easement due to Respondents’ unclean hands:

> Defendants cannot rely on equitable principles when the evidence, and the jury’s verdict, demonstrate Defendants acted inequitably. Defendants were aware that the I’On Club did not hold title to the amenity property when the 2000 Recreational Easement was executed, and thus, Defendants are barred from using an equitable doctrine to ‘ratify’ a defective, ineffective easement.

(App. pp. 511-12). Respondents did not challenge either of the above two findings: (1) that the Respondents acted inequitably; and (2) that the Respondents’ inequitable conduct estops them

from availing themselves of the after-acquired title doctrine.[13] The Trial Court's finding therefore is now the law of the case. As such, Respondents are precluded from relying on the after-acquired title doctrine.

VI. RESPONDENTS INTENDED ONE AGREEMENT THAT LIMITED THE EASEMENT'S TERM TO THIRTY-YEARS

If this Court reaches the issue of the Easement's term,[14] the record clearly reflects Respondents never intended the Easement to be perpetual.

Tom Graham testified he was aware the Easement was limited to 30 years when the Commons were sold. (App. p. 1125:4-25). Vince Graham also acknowledged the Easement was "flawed" and admitted to representing that the Easement only had 18 years left on it, he did not know whether it would be extended, and he had no "opinion one way or the other." (App. pp. 1680:2-1682:15); *see also Millvale Plantation, LLC v. Carrison Family Ltd. P'ship*, 401 S.C. 166, 173, 736 S.E.2d 286, 290 (Ct. App. 2012) (in construing a deed, the grantor's intention must be ascertained and effectuated, unless that intention contravenes the law).While Respondents attempt to subdivide a single document (the Easement) to benefit their own interests (arguing the 30-year term only applies to cost sharing), this Court cannot ignore Respondents' testimony or the Easement's "General" terms. *Millvale Plantation, LLC*, 401 S.C. at 174, 736 S.E.2d at 290 (a deed must be construed as a whole). Contrary to Respondents' arguments:

[13] *See also* the additional, inequitable conduct findings in the Trial Court's Order sanctioning Respondents for the destruction of evidence. (App. pp. 539-51).

[14] The COA did not decide this issue given its affirmance of the Trial Court's overarching, Easement invalidity ruling under the two-issue rule. (2019 Op., App. p. 110) ("As we affirm the circuit court's declaration of invalidity, we need not address Appellants' challenge to the finding that the Recreational Easement was limited to a term of thirty years"; *see also Simmons v. Tuomey Reg'l Med. Ctr.*, 330 S.C. 115, 118 n.1, 498 S.E.2d 408, 409 n.1 (Ct. App. 1998) (holding that a court's decision on one argument may render additional arguments irrelevant and unnecessary to address).

The introductory paragraph of the Easement defines the entire document as one "Agreement" – not multiple agreements. (App. p. 3627). The Agreement's "Background Statement" does not contain the words "perpetual" as quoted by Defendants. (Resp. Cert. Br., p. 19). Rather, the "Background Statement" provides:

> WHEREAS, the Assembly desires to acquire and Club Owner is willing to grant a nonexclusive easement over the Club Property for access to and use and enjoyment of the Boating Facilities. . .

(App. p. 3628).

This paragraph is immediately followed by this paragraph which references "cost sharing" and the "Easement" in the same sentence:

> WHEREAS, the Assembly and Club Owner desire to provide for a reasonable allocation between them of the costs which Club Owner incurs in maintaining, repairing, replacing, insuring and operating those portions of the Club Property subject to the easement. . .

Id. (emphasis added).

> Article I, "Easement", also states that the "foregoing easement shall be subject to:"
>
> . . .(iv) The right of Club Owner to deny access to the Boating Facilities pursuant to this Easement for any period during which the Assembly is delinquent in paying amounts owed to Club Owner hereunder.

(App. p. 3629) (emphasis added).

If there was any doubt left, Article IV, "General," sets forth terms generally applicable to the entire "Agreement," not just cost sharing terms; Paragraph 4.1 sets forth restrictions on the modification of the "Agreement;" and, Paragraph 4.1 sets for the provision for either party to terminate the "Agreement" after thirty years. (App. p. 3635) (In addition to limiting its term to 30 years, Article IV limits the liability of the Easement's parties and contains language that purports to make the Easement binding upon all successors).

When considered as a whole, "and/or" in conjunction with Respondents' testimony,

Respondents clearly intended one "Agreement," with a term that served to temporally limit the Easement it purportedly granted – just as Respondents intended to limit the HOA's rights in the Commons.[15]

In this context, and in light of the Respondents' conscious failure to make any attempt to correct the Easement, there can be no presumption that the original invalidity of the Easement was a mistake.

CONCLUSION

For the foregoing reasons, this Court should find that the COA correctly applied the two-issue rule to affirm the Trial Court's ruling that the Easement was invalid; that the Easement was in fact (and at law and in equity) invalid; that the after-acquired doctrine does not apply here; and, that the self-dealing Easement was against the HOA's best interest, both because it was given in lieu of ownership rights and because it was limited to a thirty-year term, and therefore, invalid.

Respectfully submitted,

/s/ Justin O'Toole Lucey
Justin O'Toole Lucey, Esq. (SC Bar No.: 15438)
Joshua F. Evans, Esq. (SC Bar No.: 77448)
Dabny Lynn, Esq. (SC Bar No.: 78703)
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mt. Pleasant, South Carolina 29464
Phone: (843) 849-8400
Facsimile: (843) 849-8406
jlucey@lucey-law.com
jevans@lucey-law.com
dlynn@lucey-law.com
Attorneys for all Petitioners-Respondents

May 12, 2022
Mt. Pleasant, SC

[15] At minimum, the Easement's term is ambiguous as additionally found by the Trial Court, (App. p. 514), and this ambiguity must be construed in the HOA's favor. *See, e.g.,* (App. pp. 2150:6-8) (Trial Court's unobjected charge to the jury that ambiguities must be construed against the drafter).