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PROPERTY LAW

I. CONDOMINIUM BUYER BOUND BY RESTRICTIONS IN MASTER DEED AND BYLAWS

In *Ortega v. Kingfisher Homeowners Ass'n*[1] the South Carolina Court of Appeals made it clear that a buyer of a timeshare condominium is bound by provisions and restrictive covenants contained in the master deed and accompanying bylaws by signing a sales contract and indenture deed[2] that incorporate those provisions. Despite state statutes requiring timeshare sellers to reveal certain information to prospective buyers in an effort to discourage fraud, the court's ruling should not have surprised the plaintiff because it reflects a well-established tendency to hold the parties in a condominium sale to provisions and restrictive covenants in the master deed and bylaws.

Kingfisher Homeowners Association (Association) was formed as a nonprofit corporation in January 1983 to represent the interests of about 2,000 owners of timeshare units at the oceanfront Kingfisher Inn (Inn) in Garden City, South Carolina. The Inn was organized as a horizontal property regime under the South Carolina Horizontal Property Act.[3] Each owner held title forever to a space of time of one week or more per year at the Inn. Four new members were elected in 1987 to the governing board of the Association, which maintained the common elements of the property. The election was invalidated, however, after participants realized that a quorum of voting units was not present. During the next several years, a small group of disgruntled owners who wanted to oust existing board members filed four lawsuits protesting election tactics and various provisions of the bylaws.[4]

Betty Ortega filed her lawsuit in January 1991, a month after board candidates supported by her and other dissatisfied owners were not chosen during a special election. She alleged that the board vote provision in the

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1. ___ S.C. ___, 442 S.E.2d 202 (Ct. App. 1994) (per curiam).

2. An indenture deed is one in which two or more parties enter into reciprocal and corresponding grants or obligations toward each other. BLACK'S LAW DICTIONARY 770 (6th ed. 1990). An indenture deed is distinguishable from a deed poll which is signed by only the grantor. In the days before carbon paper and copying machines, grantor and grantee signed duplicate copies of a deed written on the same piece of parchment. The parchment was then cut in half in an irregular manner to leave a jagged, or indented. The owners could prove the authenticity of the deeds at a later date by fitting the two pieces together. 23 AM. JUR. 2D *Deeds* § 3 (1983); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 631 (3d ed. 1993).

3. S.C. CODE ANN. §§ 27-31-10 to -440 (Law. Co-op. 1991 & Supp. 1994).

4. Brief of Appellee at 2-12. The Association agreed in a consent order in December 1991 to hold a special election in which the staggered board and board vote provisions would not be exercised and an entire new slate of five board members would be elected. Candidates supported by the protesting owners lost by a 4-1 margin. *Id.* at 21.

bylaws violated state corporate law because it was neither a proxy provision,[5] a voting trust,[6] nor a voting agreement.[7] The board vote provision called for a majority of the Association's governing board to vote on behalf of owners who did not vote in person or file a proxy as allowed under the bylaws.[8]

Ortega also argued that she should not be bound by the staggered board provision of the bylaws merely by having signed a purchase agreement and indenture deed. She noted that developers organize timeshare condominium projects to ensure that they will exert control over it until the last unit is sold. Timeshare units are sold on a take it or leave it basis, and Ortega believed she should not be bound by obscure voting provisions favoring the developer's interests when those provisions are buried in the fine print of eighty-six pages of organizational documents.[9] Moreover, Ortega claimed that the Association's bylaw provision did not meet South Carolina statutory requirements[10] and therefore the terms of all members had to expire at each annual meeting. The trial court dismissed Ortega's action, concluding that neither the board vote nor the staggered board provision violated state law.[11]

The court of appeals upheld the trial judge's decision in a two-page per curiam opinion. The court did not discuss the plaintiff's argument that such provisions usually are buried in lengthy documents and ignored during high-pressure sales presentations,[12] but instead pointed to the statutes governing horizontal property regimes, which mandate condominium owners' compliance with administrative regulations set forth in the master deed and bylaws.[13] The board vote provision was a valid voting agreement because it was in writing and signed by the parties, and a shareholder may give an irrevocable proxy to vote her shares under such an agreement.[14] Furthermore, "[h]orizontal

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5. *See* S.C. CODE ANN. § 33-7-220 (Law. Co-op. 1990).

6. *See* S.C. CODE ANN. § 33-7-300 (Law. Co-op. 1990).

7. *See* S.C. CODE ANN. § 33-7-310 (Law. Co-op. 1990).

8. *Ortega*, ___ S.C. at ___, 442 S.E.2d at 203.

9. Brief of Appellant at 4 (citing SCN Mortgage Corp. v. White, 309 S.C. 146, 148, 420 S.E.2d 514, 515 (Ct. App. 1992), *aff'd*, ___ S.C. ___, 440 S.E.2d 868 (1994) for the proposition that an agreement to waive provisions of the law intended to protect the waiving party should be closely scrutinized).

10. *See* S.C. CODE ANN. §§ 33-8-105 to -106 (Law. Co-op. 1990) (governing terms of directors and staggering of terms). Section 33-8-106 was subsequently modified by 1994 Acts 461, § 6, effective June 29, 1994, reducing the number of directors required for a staggered board from nine to six. S.C. CODE ANN. § 33-8-106 (Supp. 1994). Under the Association's bylaws, the board of directors was limited to no more than five persons.

11. *Ortega*, ___ S.C. at ___, 442 S.E.2d at 203.

12. Brief of Appellant at 4.

13. *Ortega*, ___ S.C. at ___, 442 S.E.2d at 204. Nor did the court of appeals discuss the Association's lengthy argument that the doctrines of res judicata, laches and estoppel stemming from the previous suits brought by dissatisfied owners mandated dismissal of Ortega's action. Brief of Appellee at 12-22.

14. *Ortega*, ___ S.C. at ___, 442 S.E.2d at 203-04 (citing S.C. CODE ANN. §§ 33-7-310 and

property regimes are administered by the bylaws incorporated into the master deed or lease. . . . [and] [e]ach co-owner must comply with the bylaws and with the administrative rules and regulations set forth in the master deed."[15]

The court indicated that a staggered board provision is usually valid, but in this case the Association's provision in its bylaws did not meet the statutory requirements because it provided for only a five member board instead of the mandated nine.[16] In addition, the provision was internally inconsistent because it would be impossible for at least two members to serve three-year terms, at least two members to serve two-year terms, and all other members to serve one-year terms if the number of board members ever dropped to the minimum of three. Thus, the court upheld the board vote provision, but invalidated the staggered board provision.[17]

South Carolina passed statutes governing vacation time sharing plans in 1978.[18] The legislature recognized that high-pressure sales tactics are common in the sale of timeshares and the law reflects a clear intent to protect potential buyers.[19] Timeshare sellers must register with the South Carolina Real Estate Commission.[20] Sellers must keep copies of all sales contracts and records of all employees for the previous three years.[21] Sellers must disclose specific information in a sales contract, including the total price, and may not misrepresent the use of promotional devices.[22] Perhaps the strongest protection for a buyer is the so-called "cooling-off period." A buyer has four days in which to cancel a contract, and a seller must refund all payments made by a buyer within 20 days.[23] Furthermore, a sales contract must explain a buyer's right of cancellation in specific language set in bold, capitalized type

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33-7-220(d)(5) (Law. Co-op. 1990)). An irrevocable proxy is proper under § 33-7-220(d)(5) when the appointment form conspicuously states that it is irrevocable and the appointee is a party to a voting agreement created under § 33-7-310. S.C. CODE ANN. § 33-7-220(d)(5) (Law. Co-op. 1990). The court of appeals did not discuss whether Ortega had signed away her proxy on a form that "conspicuously" made her aware of that fact.

15. *Ortega*, ___ S.C. at ___, 442 S.E.2d at 204 (citing S.C. CODE ANN. §§ 27-31-150, -170 (Law. Co-op. 1991)).

16. *Id.* at ___, 442 S.E.2d at 204.

17. *Id.* at ___, 442 S.E.2d at 204. The Association's staggered board provision would be valid today under the South Carolina Nonprofit Corporation Act of 1994, which does not require a specific number of members in order to have a staggered board. S.C. CODE ANN. §§ 33-31-805, -806 (Law. Co-op. Supp. 1994).

18. S.C. CODE ANN. §§ 27-32-10 to -250 (Law. Co-op. 1991 & Supp. 1994).

19. For a detailed discussion of the timeshare statutes, see Michelle D. Brodie, Note, *Regulation of Time Sharing in South Carolina*, 37 S.C. L. REV. 527 (1986).

20. S.C. CODE ANN. § 27-32-20 (Law. Co-op. Supp. 1994).

21. S.C. CODE ANN. § 27-32-30 (Law. Co-op. 1991).

22. S.C. CODE ANN. §§ 27-32-100, -110 (Law. Co-op. 1991).

23. S.C. CODE ANN. §§ 27-32-50, -60 (Law. Co-op. 1991).

next to a contract's signature line and on a separately signed acknowledgement.[24]

In view of the foregoing provisions, buyers may reasonably believe that they should not be bound by obscure voting provisions inserted in a master deed and bylaws by developers who are obviously motivated to some degree by self interest. The court of appeals in *Ortega*, however, did not focus on the timeshare statutes. Indeed, the outcome in *Ortega* is consistent with the approach taken by South Carolina appellate courts in the dozen or so decisions handed down since 1974 in which those courts have discussed master deed or bylaws provisions in a condominium setting.

Courts have repeatedly examined and enforced such provisions. In *Roundtree Villas Ass'n v. 4701 Kings Corp.*,[25] for example, individual condominium owners in a project that went into default disagreed with the developer and the bank over who would pay to replace an improperly built roof. The supreme court noted that "[t]he rights and authority of the [horizontal property] Regime must be gleaned from the Horizontal Property Act and from the master deed."[26]

A court is not likely to consider extrinsic evidence when documents incorporated by reference into a master deed make that deed unambiguous. In *Walters v. Summey Building Systems, Inc.*[27] the buyer objected to paying annual fees for a three-bedroom unit when he owned only a two-bedroom unit. The court concluded that the buyer was on constructive notice of the size and floor plan of the condominium bought at auction, but lowered his fees because it was unfair for the management to charge him for square footage he did not own. Plats and documents referred to in the master deed became part of the deed, and thus made it unambiguous. "The construction of an unambiguous deed is a question of law, not fact. The terms of such a deed may not be varied or contradicted by evidence drawn from sources other than the deed itself."[28]

Because of judicial reluctance to use extrinsic evidence, a court is likely to enforce the precise terms of provisions and covenants in a master deed and bylaws. In *Lovering v. Seabrook Island Property Owners Ass'n*[29] the bylaws gave the condominium owners association the power to levy annual maintenance fees based on the assessed value of each owner's property. The association's board tried to charge an emergency assessment for beachfront

24. S.C. CODE ANN. § 27-32-40(3) (Law. Co-op. 1991).

25. 282 S.C. 415, 321 S.E.2d 46 (1984).

26. *Id.* at 421, 321 S.E.2d at 49.

27. ___ S.C. ___, 429 S.E.2d 854 (Ct. App. 1993).

28. *Id.* at ___, 429 S.E.2d at 856 (quoting Vause v. Mikell, 290 S.C. 65, 68, 348 S.E.2d 187, 189 (Ct. App. 1986)).

29. 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986), *aff'd as modified*, 291 S.C. 201, 352 S.E.2d 707 (1987) (per curiam).

renourishment and the rebuilding of bridges damaged by salt water. The court agreed with the protesting owners that the bylaws as written gave the association's board the power to levy annual maintenance fees, but not emergency fees:[30]

> [A] similar rule of strict construction applies to the enforcement of covenants against real property. Covenants purporting to impose affirmative obligations on the grantee are to be strictly construed and not enforced unless the obligation is imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application . . . The general statement of corporate purposes relied on is not sufficient, standing alone, to authorize the levying of special assessments on property owners. In order to constitute an enforceable power of assessment in the Association, an assessment provision must: (1) express a sufficiently definite standard by which to measure liability for the assessment; (2) describe with particularity the property to be maintained; and (3) provide an ascertainable standard by which the purpose for which the assessment is levied can be objectively determined . . . A standard such as "any other thing necessary or desirable in the opinion of the Board of Directors" is too vague to be enforceable.[31]

In affirming the court of appeals' decision in *Lovering*, the supreme court explained that "[i]mplied or incidental powers are those which are reasonably necessary to the execution of the corporation's express powers, not those which are merely convenient or useful."[32]

On the other hand, a court will likely uphold a decision to levy an emergency fee when an association's governing board clearly has that power and follows the required procedures. Before the court will overturn the board's decision, a protesting owner must demonstrate that the board acted fraudulently or in bad faith. A court, adhering to the business judgment rule, should not overrule the board simply because it believes the board made a bad decision.[33]

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30. *Id.* at 81-82, 344 S.E.2d at 864-65.

31. *Id.* at 82-83, 344 S.E.2d at 865-66 (citing Snug Harbor Property Owners Ass'n v. Curran, 284 S.E.2d 752 (N.C. Ct. App. 1981), *cert. denied*, 291 S.E.2d 151 (1982) and Beech Mountain Property Owners Ass'n v. Seifart, 269 S.E.2d 178 (N.C. Ct. App. 1980)).

32. Lovering v. Seabrook Island Property Owners Ass'n, 291 S.C. 201, 203, 352 S.E.2d 707, 708 (1987) (per curiam) (citing South Carolina Elec. & Gas Co. v South Carolina Pub. Serv. Auth., 215 S.C. 193, 54 S.E.2d 777 (1949) and Creech v. South Carolina Pub. Serv. Auth., 200 S.C. 127, 20 S.E.2d 645 (1942)).

33. Dockside Ass'n v. Detyens, 291 S.C. 214, 216-17, 352 S.E.2d 714, 716 (Ct. App.) (finding that the board had the power to levy an emergency fee without getting the approval of the majority of owners, where the master deed and bylaws gave the board such powers and the board followed specified procedures), *aff'd*, 294 S.C. 86, 362 S.E.2d 874 (1987) (per curiam).

Provisions and restrictive covenants in a master deed and bylaws apply with equal force to both parties to a transaction. In *Hoffman v. Cohen*[34] the original developer imposed a restrictive covenant in 1941 that allowed only residential development on oceanfront property in Myrtle Beach, South Carolina. The location grew into a neighborhood of single-family homes. A developer decided to build a 62-unit condominium project on two beachfront lots in the early 1970s. Neighboring homeowners objected. A divided supreme court concluded that the frequent rental of condominiums is a commercial-type operation that would violate the single-family scheme of the subdivision and therefore the developer's plan would violate the restrictive covenant.[35]

Sometimes judges disagree on the meaning of a covenant as pointedly as the parties in a dispute. In *Harvey v. Marsh Hawk Plantation*[36] a developer wanted to cut down most of the trees in areas where condominiums had not been built. Condominium owners protested that such an act would violate a restrictive covenant imposed on the entire 430-acre site by the master deed and referenced documents. The master-in-equity and court of appeals agreed, forbidding the developer from cutting the trees.[37] The developer argued that a provision under which it could grant permission to cut down a tree gave it the authority to waive the covenant entirely. The court of appeals disagreed. "To interpret [the provision] as espoused by [the developer] would be akin to allowing the fox to guard the henhouse."[38] On appeal, the supreme court, however, decided the hens had no reason to worry. Reassured by developer's counsel at oral argument that the developer would use "good forest management techniques" and that it had no plans to clear-cut the site, the supreme court allowed the developer to proceed because its plan was "consistent with the general goal [of the covenant] to preserve the natural environment insofar as possible."[39]

While a person may have the right to enforce a provision in the bylaws or master deed, he or she may lose that right by failing to act expeditiously.

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34. 262 S.C. 71, 202 S.E.2d 363 (1974).

35. *Id.* at 76, 202 S.E.2d at 366. The court outlined a few time-honored rules. "Restrictive covenants are contractual in nature. The cardinal rule of construction in interpreting any contract is to ascertain and give effect to the intention of the parties. Such intent should, as nearly as possible, be gleaned from the instrument itself." *Id.* at 75, 202 S.E.2d at 365 (citing Nance v. Waldrop, 258 S.C. 69, 187 S.E.2d 226 (1972)). "[R]estrictive covenants are to be construed most strictly against the grantor and persons seeking to enforce them," but the court should not apply the rule to defeat the obvious purpose of a restriction. *Id.* at 76, 202 S.E.2d at 366 (citing Sprouse v. Winston, 212 S.C. 176, 46 S.E.2d 874 (1948)).

36. 307 S.C. 255, 414 S.E.2d 588 (Ct. App. 1992), *rev'd*, 310 S.C. 355, 426 S.E.2d 792 (1993).

37. *Id.* at 258-60, 414 S.E.2d at 589-90.

38. *Id.* at 260, 414 S.E.2d at 590.

39. *Harvey*, 310 S.C. at 357, 426 S.E.2d at 793 (1993).

In *Janasik v. Fairway Oaks Villas Horizontal Property Regime*[40] the manager of a Hilton Head development tried to force a condominium owner to remove certain landscaping plants and fixtures. The owner had talked to the managers about the clearly visible improvements at least once. The court agreed that the covenant was valid, but upheld the master-in-equity's ruling in favor of the owner because the manager had waited four years to enforce the covenant. The manager was equitably estopped from trying to enforce the covenant because he had waived the right of enforcement.[41]

Sometimes a homeowners association wishes to change a covenant for worthwhile reasons, but the court rejects such an effort because the covenant still serves its intended purpose. In *Shipyard Property Owners' Ass'n v. Mangiaracina*[42] the association sought authority through a declaratory judgment action to alter a disparate fee structure contained in thirty-two separate sets of restrictive covenants adopted since the mid-1970s at the Hilton Head development. About fifteen percent of the condominium owners paid an annual fixed fee of $50 to $100 a year to maintain common property while everyone else paid a variable fee which, on average, was $385. The association argued that conditions had changed so much that the fixed-rate covenant should no longer apply, but the court disagreed. "To defeat enforcement of covenants restricting the use of land, changed conditions must be so radical as to practically destroy the essential objects and purposes of the covenants."[43]

The principles outlined above apply to a transaction regardless of the manner in which the buyer purchased the condominium, whether at an auction or a court-ordered sale. In *Harrington v. Blackston*[44] the master-in-equity ordered a bankrupt condominium project to be sold subject to provisions contained in the master deed. The court rejected the buyer's argument that he purchased the site free of master deed restrictions, but remanded the case to determine whether the deed should be reformed so that the restrictions applied only to portions of the property already devoted to condominiums.[45]

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40. 307 S.C. 339, 415 S.E.2d 384 (1992).

41. *Id.* at 345, 415 S.E.2d at 388.

42. 307 S.C. 299, 414 S.E.2d 795 (Ct. App. 1992).

43. *Id.* at 308, 414 S.E.2d at 801 (citing Pitts v. Brown, 215 S.C. 122, 54 S.E.2d 538 (1949)). The court also rejected the association's effort to prove that the variable-rate covenant was a reciprocal negative easement that applied to all the property. To do so the association had to show (1) a common grantor, (2) designation of land subject to restriction, (3) a general scheme of restrictions, and (4) covenants running with the land in accordance with that scheme. The association failed to prove there was a general scheme because, although every lot does not have to be restricted in exactly the same way, extensive omissions such as the ones in question tend to show no scheme existed. Furthermore, a reciprocal negative easement is never retroactive. *Id.* at 309, 414 S.E.2d at 801-02 (citing Sanborn v. McLean, 206 N.W. 496 (Mich. 1925)).

44. ___ S.C. ___, 429 S.E.2d 826 (Ct. App. 1993).

45. *Id.* at ___, 429 S.E.2d at 830.

In fact, a court may apply the Horizontal Property Act[46] and accompanying principles in a condominium setting even though a technicality prohibits a development from falling within the Act. In *Battery Homeowners Ass'n v. Lincoln Financial Resources, Inc.*[47] the master deed did not mention the term "horizontal property regime," as required by statute.[48] Nevertheless, the supreme court looked to the master deed and bylaws to decide that the association had the power to assess and collect fees from the builder of ten new units.[49]

Provisions in a master deed and bylaws may at times give way to overriding government powers. In *Anchor Point, Inc. v. Shoals Sewer Co.*[50] condominium owners claimed the state Public Service Commission did not have the power to set rates for the project's sewer system because the master deed placed those rates in the hands of the owners' association. The owners argued that allowing the commission to set rates would violate their constitutional right to contract. The supreme court disagreed and concluded that the sewer company was a public utility in which there was a public interest. "[T]he right to contract is not absolute; it is subject to the state's police powers which may be exercised for the protection of the public's health, safety, morals, or general welfare."[51]

When a person violates a bylaw or covenant, an aggrieved party usually seeks an injunction to force compliance with the rule. Courts generally grant injunctive relief regardless of whether the plaintiff has suffered any actual damages. In *Houck v. Rivers*[52] the plaintiff owned a carriage house, which he leased to a third party, behind a three-story home in historic downtown Charleston, South Carolina. The seller had designated the property as a condominium regime in order to subdivide it, and bylaws incorporated into the master deed stated that the units could be used only as residences. Houck brought a declaratory action seeking to prevent the defendant from running a bed and breakfast business in the main house.[53]

In discussing its decision to order the defendant to eliminate the bed and breakfast operation, the court noted that "an injunction, like all equitable remedies, is granted as a matter of sound judicial discretion, and not as a matter of legal right."[54] However,

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46. S.C. CODE ANN. §§ 27-31-10 to -440 (Law. Co-op. 1991 & Supp. 1994).

47. 309 S.C. 247, 422 S.E.2d 93 (1992).

48. S.C. CODE ANN. § 27-31-100(e) (Law. Co-op. 1991).

49. *Battery Homeowners*, 309 S.C. at 250, 422 S.E.2d at 95.

50. 308 S.C. 422, 418 S.E.2d 546 (1992).

51. *Id.* at 428-29, 418 S.E.2d at 549-50.

52. ___ S.C. ___, 450 S.E.2d 106 (Ct. App. 1994) (per curiam).

53. *Id.* at ___, 450 S.E.2d at 107.

54. *Id.* at ___, 450 S.E.2d at 109 (citing Metts v. Wenberg, 158 S.C. 411, 155 S.E. 734 (1930)).

> the right of a plaintiff to an injunction to enforce restrictive covenants has long received special treatment. . . . As a general rule, a restrictive covenant will be enforced irrespective of the amount of damage which will result from the breach, and even though there is no substantial monetary damage to the complainant by reason of the violation.[55]

Furthermore, "[t]he difficulty of establishing damages is generally recognized as a basis for awarding an injunction."[56]

In sum, *Ortega* and earlier cases clearly demonstrate that a buyer of a timeshare condominium will receive no special treatment by the courts, despite legislative recognition of timeshare sellers' propensity to mislead potential buyers. A court will enforce provisions and covenants contained in the master deed, bylaws, and referenced documents, and will consider the buyer to be on constructive notice of those documents. Perhaps the legislature should require timeshare sellers to prominently disclose additional aspects of a project, particularly annual fee schedules and the structure of governing boards. Until that happens, however, buyers should ask more questions and read not only the glossy brochures, but also the less exciting fine print.

R. David Proffitt

II. COURT CLARIFIES APPLICABILITY OF MISTAKEN BELIEF RULE TO ADVERSE POSSESSION SUITS

In *Perry v. Heirs of Gadsden*[1] the South Carolina Supreme Court clarified when the rule of mistaken belief can be applied to claims of title through adverse possession. The supreme court affirmed the opinion of the court of appeals, but rejected the court of appeals' alternative holding that "a claim for adverse possession does not lie under a mistaken belief that the property is one's own and with no intent to claim against the property's true owner."[2] In rejecting this alternative holding, the court clearly indicated that the mistaken belief rule applies only to boundary disputes between adjacent landowners and not to disputes concerning an entire tract of land.[3]

Perry arose out of a claim brought by the daughters of Herman Gadsden against their uncle, Cecil J. Gaston, Jr.[4] (Cecil Jr.), and against the heirs of

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55. *Id.* at ___, 450 S.E.2d at 109.
56. *Id.* at ___, 450 S.E.2d at 110 (citing *Metts*, 158 S.C. 411, 155 S.E. 734).

1. ___ S.C. ___, 449 S.E.2d 250 (1994) (per curiam).
2. *Id.* at ___, 449 S.E.2d at 251.
3. *Id.* at ___, 449 S.E.2d at 251.
4. The parties inconsistently used Gaston and Gadsden as the same last name. Perry v. Heirs of Gadsden, ___ S.C. ___, ___ n.1, 437 S.E.2d 174, 176 n.1 (Ct. App. 1993) (per curiam), *aff'd*

their grandfather, Cecil J. Gadsden, Sr. (Cecil Sr.).[5] The daughters sought partition of a 110.5 acre tract of land[6] occupied by Cecil Jr., as well as punitive damages for misrepresentation and conversion of timber, and an accounting.[7] Cecil Sr. died intestate in 1929 and was survived by six children — Cornelius, Cecil Jr., Herman, John, Frances, and Carrie.[8] Frances and John died without leaving spouses or children; Herman and Carrie died leaving children. Cornelius conveyed his undivided interest in the land to Cecil Jr.[9]

In 1983 Cecil Jr. obtained a quitclaim deed to the entire 110.5 acres so that he could sell the timber on the land.[10] In obtaining the quitclaim deed, Cecil Jr. fraudulently concealed the existence of the heirs of Herman and Carrie.[11] Cecil Jr. claimed to have been deeded title to the 74 acre tract and been given the right to occupy the 41 acre tract for life by Cecil Sr. Cecil Jr. could, however, provide no documentation to support his claim.[12] Alternatively, Cecil Jr. contended that even if the deed never existed, he had title to the 74 acre tract by virtue of adverse possession.[13]

The court of appeals held that Cecil Jr.'s adverse possession claim failed due to a lack of hostile possession. In South Carolina, a claim of title through adverse possession requires that the possession of the property in question be actual, open, notorious, exclusive, continuous, and hostile for the entire time period required by statute.[14] Hostile possession is defined as "possession with intention to dispossess the owner."[15] The court of appeals found that Cecil Jr. lacked the requisite hostile intent because he had repeatedly assured Herman's heirs that he intended to share the property with them and that he was

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as modified, ___ S.C. ___, 449 S.E.2d 250 (1994) (per curiam).

5. *Id.* at ___, 437 S.E.2d at 176.

6. The 110.5 acre tract of land had been formed from two separate tracts, one of approximately 74 acres, and the other of approximately 41 acres. Both tracts were eventually acquired by Cecil Sr. *Id.* at ___, 437 S.E.2d at 176.

7. *Id.* at ___, 437 S.E.2d at 176.

8. *Id.* at ___, 437 S.E.2d at 176.

9. *Perry*, ___ S.C. at ___, 437 S.E.2d at 176.

10. *Id.* at ___, 437 S.E.2d at 176.

11. *Id.* at ___, 437 S.E.2d at 176.

12. *Id.* at ___, 437 S.E.2d at 176.

13. *Id.* at ___, 437 S.E.2d at 177.

14. Wigfall v. Fobbs, 295 S.C. 59, 61, 367 S.E.2d 156, 157 (1988) ("To establish adverse possession, the Fobbs had the burden of proving their possession of the tracts had been actual, open, notorious, hostile, continuous and exclusive for a period of ten years.") (citing Davis v. Monteith, 289 S.C. 176, 345 S.E.2d 724 (1986)); *see also* Mullis v. Winchester, 237 S.C. 487, 491, 118 S.E.2d 61, 63 (1961) ("[P]ossession must be actual, open, notorious, hostile, continuous and exclusive for the whole statutory period."); Lusk v. Callaham, 287 S.C. 459, 461, 339 S.E.2d 156, 157-58 (Ct. App. 1986) ("Proof of adverse possession required Lusk to show that his possession of the property in question was actual, open, notorious, exclusive, continuous, and hostile for the entire statutory period of ten years.").

15. *Lusk*, 287 S.C. at 461, 339 S.E.2d at 158.

protecting and preserving their interests.[16] Thus, Cecil Jr. displayed no intent to dispossess the other owners.

As an alternative ground, the court of appeals found that Cecil Jr.'s claim of title through adverse possession also failed because he claimed to be under the mistaken belief that he owned the 74 acre tract. The court of appeals, relying on *Lusk v. Callaham*,[17] held that "[n]o claim for adverse possession lies under a mistaken belief that property is one's own and with no intent to claim against the property's true owner."[18] In *Lusk* the court of appeals had held that "[i]n South Carolina, unlike in most other jurisdictions, possession under a mistaken belief that property is one's own and with no intent to claim against the property's true owner cannot constitute hostile possession."[19]

The supreme court agreed that because Cecil Jr. had "repeatedly assured the heirs that he intended to share the property with them and their interest would be preserved and protected,"[20] the necessary element of hostility was not present. While the supreme court affirmed on this ground, it rejected the court of appeals' alternative holding that Cecil Jr.'s claim for adverse possession also failed because he mistakenly thought that he owned 74 acres of the tract. The supreme court found that the court of appeals had misapplied *Lusk*. According to the supreme court, the mistaken belief rule "is applicable only to cases involving boundary disputes between adjoining landowners. Here, this case involves a dispute over an entire tract of land; therefore, the mistaken belief rule set forth in *Lusk* is inapplicable."[21]

Application of the mistaken belief rule to boundary disputes has been set out in numerous South Carolina cases, the most notable of which are *Lynch v. Lynch*[22] and *Brown v. Clemens*.[23] In *Lynch* the supreme court held:

> [T]he occupancy of land beyond the true boundary line, by an encroaching owner, does not form a basis for adverse possession, unless the encroachment is made with an intention to claim and hold adversely. Where one is in the possession of land up to a supposed line [and] intends to claim only to the true line, his possession is not hostile and will not ripen into title.[24]

In *Brown* the supreme court again applied the rule that "a claim of adverse possession fails where an encroaching neighbor is under a mistaken

16. *Perry*, ___ S.C. at ___, 437 S.E.2d at 177.
17. 287 S.C. 459, 339 S.E.2d 156 (Ct. App. 1986).
18. *Perry*, ___ S.C. at ___, 437 S.E.2d at 177.
19. *Lusk*, 287 S.C. at 461, 339 S.E.2d at 158.
20. *Perry*, ___ S.C. at ___, 449 S.E.2d at 251.
21. *Id.* at __, 449 S.E.2d at 251.
22. 236 S.C. 612, 115 S.E.2d 301 (1960).
23. 287 S.C. 328, 338 S.E.2d 338 (1985) (per curiam).
24. 236 S.C. at 623, 115 S.E.2d at 306-307.

belief as to boundary location and therefore lacks intention to dispossess the true owner."[25]

While both *Lynch* and *Brown* made clear that the mistaken belief rule applied to boundary dispute cases, in *Wigfall v. Fobbs*[26] the supreme court declined to apply the rule to adverse possession claims involving an entire tract of land. Specifically, the supreme court stated that "[b]ecause this case does not involve a boundary dispute between adjoining landowners, the rule in *Brown* and *Lynch* is inapplicable. *Further, we decline to extend the rule to cases involving adverse possession of a tract of land.*"[27] Therefore, a mistaken belief in ownership will not prevent possession of an entire tract of land from being hostile.[28]

Historically, mistaken boundary cases have fallen under two distinct lines of reasoning. The majority rule was first set out in *French v. Pearce*,[29] which states:

> [T]he person who enters on land believing and claiming it to be his own, does thus enter and possess. The very nature of the act is an assertion of his own title, and the denial of the title of all others. It matters not, that the possessor was mistaken, and had he been better informed, would not have entered on the land.[30]

Under this objective approach, the intent of the possessor is irrelevant.

The minority rule, as expressed most notably in *Preble v. Maine Central Railroad*,[31] takes a subjective approach to border disputes. Under *Preble*, "one who by mistake occupies . . . land not covered by his deed, with no intention to claim title beyond his actual boundary, wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line."[32] Thus, the

> intention of the occupant to claim the ownership of land not embraced in his title is a necessary element of adverse possession; and in case of occupancy by mistake beyond a line capable of being ascertained this intention to claim title to the extent of the occupancy must appear to be absolute, and not conditional; otherwise the possession will not be deemed adverse to the true owner. It must be an intention to claim title to all land

25. 287 S.C. at 331, 338 S.E.2d at 339.
26. 295 S.C. 59, 367 S.E.2d 156 (1988).
27. *Id.* at 61-62, 367 S.E.2d at 157 (emphasis added).
28. *Id.*
29. 8 Conn. 439 (1831).
30. *Id.* at 445.
31. 27 A. 149 (Me. 1893).
32. *Id.* at 150.

> within a certain boundary on the face of the earth, whether it shall eventually be found to be the correct one or not.[33]

While South Carolina continues to adhere to the minority rule, other states have abandoned the reasoning of *Preble*. For example, in *Mannillo v. Gorski*[34] the Supreme Court of New Jersey articulated many of the rationale that have proven persuasive in the majority jurisdictions. In so doing, the New Jersey court stated that the *Preble* rule "rewards the possessor who entered with a premeditated and predesignated 'hostility'—the intentional wrongdoer[—]and disfavors an honest, mistaken entrant."[35] The court also noted that "the true owner does not rely upon entry of the possessor by mistake as a reason for not seeking to recover possession. Whether or not the entry is caused by mistake or intent, the same result eventuates—the true owner is ousted from possession."[36] Accordingly, the court discarded "the requirement that the entry and continued possession must be accompanied by a knowing intentional hostility"[37] and, instead, held that "any entry and possession for the required time which is exclusive, continuous, uninterrupted, visible and notorious, even though under mistaken claim of title, is sufficient to support a claim of title by adverse possession."[38]

Whatever the merits of the minority and majority views, the significance of *Perry* is that the court of appeals attempted to expand the reach of the *Preble* rule to include cases involving a dispute over an entire tract of land, not just a boundary. In rejecting this approach, the South Carolina Supreme Court made it clear that where an entire tract of land is involved, a mistaken belief of ownership will not cause a claim of adverse possession to fail for lack of hostility. Although the court did not explain why the mistaken belief rule should apply to one set of cases and not to the other, the court has reinforced the binding nature of the precedent it previously set in *Wigfall*.

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33. *Id.*

34. 255 A.2d 258 (N.J. 1969); *see also* Joiner v. Janssen, 421 N.E.2d 170, 175 (Ill. 1981) ("The difficulty with the subjective test is that it affords no protection to the landowner who innocently and mistakenly occupies and improves land beyond his boundaries. He can never acquire title thereto. Conversely, he who deliberately sets out to steal adjacent land may succeed.").

35. *Mannillo*, 255 A.2d at 261 (citation omitted).

36. *Id.* at 262.

37. *Id.*

38. *Id.*