THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence

Master in Equity

Case No. 2019-CP-32-00630
Appellate Case No. 2023-01417

James G. Sercu and Sherri A. Sercu,

Respondents,

v.

Douglas Steven Hart,

Appellant.

FINAL BRIEF OF APPELLANT

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s/ C. Cantzon Foster, II

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STATEMENT OF THE CASE

James G. Sercu and Sherri A. Sercu (hereinafter also referred to as "Sercu") are the owners of 462 Woods Point Road, Lexington County, SC (hereinafter also referred to as "Lot 2") and Douglas Steven Hart (hereinafter referred to as "Hart" and his wife Terri Hart (not a party to this lawsuit) are the owners of 464 Woods Point Road, Lexington SC (hereinafter also referred to as "Lot 1"). On February 11, 2019, Sercu brought this easement action alleging Appellant ("Hart") denied their use to an access easement across Lot 1. Hart denied interfering with the Sercu's access to the alleged easement and denied that a valid easement had been granted to Sercu. Hart counterclaimed that Sercu was trespassing across Hart's property by running electrical, sewer, cable, internet and power utility easements across his property without his permission.

The easement action was tried on February 8 and 10, 2023, and judgment was entered on July 27, 2023.

On August 28, 2023, Hart served the Notice of Appeal on Sercu.

STANDARD OF REVIEW

The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." *Slear v. Hanna,* 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). In an appeal of an equitable action tried before a master authorized to enter final judgment, an appellate court must review the entire record and make its own findings of fact according to its view of the preponderance of the evidence. Judy v. Kennedy, 398 S.C. 471, 474, 728 S.E.2d 484, 485 (Ct. App. 2012) The determination of the extent of a grant of an

easement is an action in equity. *Tupper v. Dorchester County*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). Sheppard v. Justin Enters., 373 S.C. 518, 521, 646 S.E.2d 177, 178 (Ct. App. 2007).

ARGUMENTS

I. THE TRIAL COURT ERRED IN FINDING THAT SERCU HAD AN EASEMENT ACROSS THE HART'S PROPERTY.

The trial court erred in determining that Sercu had a 20' implied easement for ingress and egress, utilities and improvements across Hart's property because a valid easement was never granted to Sercu, there was never a valid subdivision dedication of easements or utilities recorded of record and no evidence was introduced at trial pertaining to the joint easement alleged in the Sercu's Amended Complaint. (R. pp. 27-37, 44-728.)

Sercu Title: Sercu are the owners of 462 Woods Point Road, Lexington South Carolina 29054 ("Lot 2"). James Sercu originally acquired Lot 2 from Carl Anthony Thompson by deed Recorded with the Lexington County Register of Deeds Office on February 5, 2016, in Book 18163, at page 99 (hereinafter also referred to as the "Easement Deed") (R. pp. 709-711). James Sercu subsequently granted half of his interest in Lot 2 to Sherrie Sercu. The Easement Deed contained a grant of "a 20' Access Easement on and across Lot 1 for the benefit of Lot 2 as indicated on the Final Subdivision Plat of the Woods at Lake Murray prepared by United Design Services, Inc., dated April 7, 2008 and recorded in Book 13017 at Page 77 and further shown on a plat prepared for James G. Sercu by Nicholas A. Long of Hunsinger Lone Associates, LLC, dated January 17, 2016 and recorded on 2-5-2016 . ." (R. pp. 709) The granting of an easement language found in the Easement Deed is not included in any prior deed in the chain of title for Lot 2. (R. pp. 693-708.)

Carl Anthony Thompson acquired Lot 2 by deed from Security Federal Bank recorded on August

27, 2010 in Book 14416 at Page 45 (R. pp. 703-708.) Security Federal Bank obtained Lot 2 by Master's Deed foreclosing on Hall Builders, LLC recorded on March 4, 2010 in Book 14125 at Page 227 (R. 701-704.)

Hall Builders, LLC acquired Lot 1 from Richard MB Hanson by deed dated April 29, 2008 and recorded on September 3, 2008 in Book 13126 at page 53. (R. pp. 695-701.) Richard MB Hanson acquired a larger tract of land which the Hart's home and all of what would become Lot 1 and Lot 2 by deed from Leonard R. Wall dated January 11, 1996, and filed on January 12, 1996 in the Office of the Register of Deeds for Lexington County in Book 3597 at Page 292. (R. 691-695.)

Hart's Title: Douglas Hart and Terry Hart are the co-owners of 464 Woods Point Road, Gilbert, SC 29054 ("Lot 1") having acquired the property from Aurther State Bank by deed filed on August 9, 2011, filed with the Lexington County Register of Deeds Office in Book 14996 at page 294. (R. pp. 716-719.)

Arthur State Bank acquired Lot 1 from Capital Properties of SC, LLC, a/k/a Capital Properties, LLC by Deed in Lieu of Foreclosure filed on February 5, 2010, filed with the Lexington County Register of Deeds Office in Book 14086 at page 116. (R. pp. 720-721.)

Capital Properties of SC, LLC, a/k/a Capital Properties, LLC acquired Lot 1 from Richard MB Hanson by deed dated April 29, 2008, and filed on September 3, 2008, with the Lexington County Register of Deeds Office in Book 13126 at page 32. (R. pp. 722-725.)

Richard MB Hanson acquired a larger tract of land which the Hart's home and all of what would become Lot 1 and Lot 2 by deed from Leonard R. Wall dated January 11, 1996, and filed on January 12, 1996 in the Office of the Register of Deeds for Lexington County in Book 3597 at Page 292. (R. pp. 693-696.)

Legal Description Plat Discrepancies: The legal description for all of the above referenced deeds conveying Lot 1 and Lot 2 reference described as "a plat of "464 Woods Point Road" by United Design Services, Inc. dated March 19, 2008, and recorded in the Office of the RMC for Lexington County in Plat Book 13017, at Page77, . . ." In the deeds where MB Hanson first conveyed Lot 1 and Lot 2 described above, the Book and Page numbers were originally left blank and the book and page numbers for the plat recording information was subsequently filled in by hand.

The Plat that was actually recorded in Book 13017 at Page 77 (hereinafter referred to as the "Subdivision Plat") bears a different name and date from the one described in the above referenced deeds describing Lots 1 and Lot 2. (R. p. 726.) The Subdivision Plat is titled "The Woods at Lake Murray" and dated April 7, 2008 and filed July 8, 2008. (R. p. 726.)

The Subdivision Plat contains owner's certification signed by Cliff Hall on June 30, 2008, which states in relevant part ***"OWNER'S CERTIFICATION- SUMMARY APPROVAL PLAT Whereas I am the owner of the property shown and described herein as "The Woods at Lake Murray" Subdivision, I hereby certify that I Adopt this Plan of Subdivision with my Free Consent; Establish and Dedicate Easements and Rights -OF-Way as shown on this Plat and Certify that All Current State and County Taxes or other Assessments Relative to this Property have been paid.***" (R. p. 726.) The problem with this Owner's certification is that the record is devoid of any evidence that Cliff Hall was ever an owner of Lot 1, Lot 2, or any other Lot referenced on the Subdivision Plat. (R. pp. 43-728.) The evidence at trial clearly indicates that at the time Cliff Hall signed the certification on the Subdivision Plat dedicating easements and right-of-ways, (R. p. 726) Lot 1 had already been conveyed by Richard MB Hanson to Capital Properties of SC, LLC and Lot 2 had already been conveyed by Richard MB Hanson to Hall Builders, LLC (R. pp. 695-701, 722-725.) Additionally,

because Cliff Hall was never an owner of Lot 1, he had no authority to transfer or obligate any property rights of Lot 1 to Lot 2. On page 10 of the Trial Order, Judge Spence correctly finds that Cliff Hall was not the owner of Lot 1 at the time but he errs in finding that Hall Builders was ever an owner or grantor on any deed pertaining to Lot 1. (R. p 13)

Based upon the aforementioned discrepancies the Plat referred to in the legal description of the deeds originally creating and conveying Lot 1 and Lot 2, there clearly is no clear indication that Richard MB Hanson or any prior or subsequent owner of Lot 1, ever intended to create a subdivision or to deed an easement over Lot 1 for the benefit of Lot 2.

Easement Validity: "An easement is a right which one person has to use the land of another for a specific purpose and gives no title to the land on which the servitude is imposed. An easement is not an estate in lands in the usual sense. An easement may be created by reservation in a deed." Douglas v. Med. Inv'rs, Inc., 256 S.C. 440, 443, 182 S.E.2d 720, 721 (1971). At trial Sercu took the position that when Richard MB Hanson sold Lot 1 to Capital Properties of SC, LLC and Lot 2 to Hall Builders, LLC an easement was created because the Book and Page handwritten into the legal description for the Plat described in the legal description of both deeds depicted a 20' ingress and egress easement across Lot 1 for the benefit of Lot 2.

"Generally, when a deed references a plat that contains an easement, . . . a presumption of an implied easement arises unless rebutted by a specific, contrary intention by the grantor."); *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 233, 662 S.E.2d 452, 455-56 (Ct. App. 2008) ("Where land is subdivided, platted into lots, and sold by reference to the plats, the buyers acquire . . . a private easement for the use of all streets on the [plat]." (quoting *Davis v. Epting*, 317 S.C. 315, 318, 454 S.E.2d 325, 327 (Ct. App. 1994)); *id.* at 236, 662 S.E.2d at 457 (holding the dedication of the

private easement was complete when the grantor originally conveyed a lot by a deed that referenced a plat showing the easement and explaining that "[i]t would now be unfair to deny [the subsequent grantee] the right to the full use and enjoyment of the easement as indicated [*3] in the plat").

In the instant case, there is evidence of a specific, contrary intention by the Grantor. Specifically, the Plat that Richard MB Hanson referred to when he granted Lot 1 and Lot 2 was a Plat titled "464 Woods Point Road" dated March 19, 2008, which is not the same Plat that can be found recorded in Book 13013, at page 77, which is the book and page handwritten into the legal description months after the deeds were executed by the Richard MB Hanson. (R. pp. 695-701, 722-725, 726.)

There was no evidence presented at trial that Richard MB Hanson or any other owner of Lot 1 intended to create a subdivision or deed utility and easement rights from Lot 1 to Lot 2. (R. 43-728.) Richard MB Hanson's deed Capital Properties of SC, LLC (R. pp. 720-725) referenced in its legal description a plat titled "464 Woods Point Road" dated March 19, 2008 (R. p. 725) and there is no evidence that Richard MB Hanson intended to create a subdivision, deed utility and easement rights when he granted Lot 2 to Hall Builders, LLC and described Lot 2 referencing Lot 2 as described on a plat titled "464 Woods Point Road" dated March 19, 2008. (R. 43-728.)

The lack of intention to grant easement rights, rights of way, or utility easements or a subdivision on the part Richard MB Hanson is further supported by the fact that the Owner's Certification on the Subdivision Plat which does purport to grant and dedicate easement rights is fraudulently certified months after Mr. Hanson had already deeded Lot 1 and Lot 2 by a man who was never an owner of Lot 1 or Lot 2.

Hernandez v. Fields, No. 2023-UP-033, 2023 S.C. App. Unpub. LEXIS 56, at *2-3 (Ct. App.

Feb. 1, 2023)"As a general rule, to constitute a grant of an easement, any words clearly showing the intention to grant an easement are sufficient." 25 Am. Jur. 2d *Easements and Licenses* [*181] § 15, at 512 (2004). "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention." *Smith v. Comm'rs of Pub. Works of City of Charleston,* 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994). [***9] "If the language is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect." 25 Am. Jur. 2d *Easements* § 18, [**514] at 516 (2004). 1 Ten Woodruff Oaks, LLC v. Point Dev., LLC, 385 S.C. 174, 180-81, 683 S.E.2d 510, 513-14 (Ct. App. 2009).

The easement language contained in the Easement Deed clearly shows that Carl Anthony Thompson intended to Grant an easement for ingress and egress over Lot 1 for the benefit of Lot 2 and added language to the Easement Deed for this purpose. (R. pp. 709-711.) However, the record and the evidence of the chain of title for Lot 1 and Lot 2 clearly shows that Carl Anthony Thompson was never an owner of Lot 1 and never was granted a 20' access easement over Lot 1 for the benefit of Lot 2. (R. pp. 693-711, 716-726.) Therefore, Carol Anthony Thompson did not have a legal right to grant such rights to the Respondents and the easement language in the Easement Deed is unenforceable. Similarly, the designation of easement rights by Cliff Hall in the Subdivision Plat is not a valid or enforceable grant of easement rights because the record and the evidence of the chain of title for Lot 1 and Lot 2 clearly shows that Cliff Hall did not have an ownership interest in Lot 1 or Lot 2 and therefore lacked the authority to dedicate easement rights over property he did not own.

Joint Easement: In their Amended Complaint (R. pp. 27-37), Sercu alleges that they have easement rights which they acquired pursuant to a joint grant of easement recorded in the Register of Deeds Office for Lexington County in Book 16461 at Page 268 ("Joint Easement"). Hart denied this allegation in his Answer and Counterclaim (R. pp. 36-42.) No evidence was introduced at trial pertaining to the existence or validity of this easement. (R. pp. 43-729.) Therefore, Sercu does not have easement rights derived from the Joint Easement recorded in the Register of Deeds Office for Lexington County in Book 16461 at Page 268.

Sercu alleges in their complaint and at trial that they had easement rights of ingress and egress granted to them in their Easement Deed. They never claimed in their Pleadings (R. pp. 27-729) or at trial (Transcript) that they had implied easement rights. However, the chain of title clearly shows that Carl Anthony Thompson was never granted the same easement rights that were granted to Sercu and therefore his grant of an easement is invalid. (R. pp. 693-711, 716-726.) Additionally, no owner of Lot 1 ever granted subdivision rights, ingress and egress easement rights, or utility easements to Lot 2. Therefore, the Court's grant of an implied 20' easement for ingress and egress and to make improvements to the easement area should be reversed because it was not plead and it was not proven at trial.

II. THE TRIAL COURT ERRED IN DENYING HART'S TRESPASS CLAIMS AND GRANTING THE RESPONDENTS AN EASEMENT TO RUN UTILITIES ACROSS HART'S PROPERTY.

The Court erred in finding that Sercu had utility easements in the 20' easement area when the record did not reflect that any such easement had ever been granted.

The causes of action of trespass and nuisance are limited to one's property rights. A **trespass** is an invasion of the interest in the exclusive possession of land, as by entry upon it. A nuisance is an

interference with the interest in the private use and enjoyment of the land. "Interest in use and enjoyment" also comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using lands is often as important to a person as freedom from physical interruption with his use or freedom from detrimental change in the physical condition of the land itself. This interest in freedom from annoyance and discomfort in the use of land is to be distinguished from the interest in freedom from emotional distress. The latter is purely an interest of personality and receives limited legal protection, whereas the former is essentially an interest in the usability. *Babb v. Lee Cty. Landfill SC, LLC*, 405 S.C. 129, 135, 747 S.E.2d 468, 471 (2013).

It is undisputed that Sercu are running cable, sewer, internet, water and gas utility lines across the Hart's property Lot 2. (R. pp. 256-258, 300-316, 338-345, 410-437). Sercu asserts that he was aware that utility lines were running through Lot 1 when he purchased Lot 2. (R. pp. 145-150.) Hart asserts that he discovered the utility lines while moving a fence shortly after this action was served on him. (R. pp. 244-483.) The Subdivision Plat (R. p. 726) does not depict any water, telephone, cable, internet, sewer, gas, or other such utility easements over Lot 1 for the Benefit of Lot 2 and the record is completely devoid of any evidence that an owner of Lot 1 ever granted any water, telephone, cable, internet, sewer, gas, or other such utility easements over Lot 1 for the Benefit of Lot 2. (R. pp. 43-730.)

The Sewer Easement granted by Carl Anthony Thompson to the Town of Lexington (R. pp. 490-493) is a specific easement running through Lot 2, 462 Woods Point Road, Gilbert, SC 29054 and does not mention or apply to an easement running through Lot 1 for the benefit of Lot 2. Additionally, there is no evidence that Carl Anthony Thompson ever owned Lot 1 and therefore Carl

Anthony Thompson lacked authority to grant such easement through Lot 1. (R. pp. 43-730.) In support of their position that Sercu have an easement to run utility lines through Lot 1 for the benefit of Lot 2, Sercu produced a right of way indenture (R. pp. 496-499) wherein a right of way was granted to SCE&G for the maintenance of electrical lines along the Northern Boundary property line which run parallel to Woods Pont Road. Hart does not dispute that SCE&G may have a right-of-way along the northern property boundary parallel to Woods Point Road but asserts that the SCE&G Power Lines stop at the northern boundary and that the electrical lines coming through Lot 1 for the benefit of Lot 2 are private power lines and not placed or maintained by SCE&G. (R. p. 258).

"[A] trespass is any interference with one's right to exclusive, peaceable possession of his property." Ravan v. Greenville County, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993). Additionally, "[t]he essence of trespass is the unauthorized entry onto the land of another." Id., 315 S.C. at 464, 434 S.E.2d at 306. Sercu admits that he knew even before he purchased Lot 2 that the Lot 2 utility lines were run through Lot 1 for the benefit of Lot 2 and Sercu have intentionally, knowingly and willingly run their electric, gas, water, sewage and cable utilities across Hart's property without Hart's consent or permission. Hart asserted at trial that he had suffered damages by the Sercu' trespass and that he is entitled to a judgment against the Sercu for actual, special, and consequential damages including diminution of property value, the costs to remove the utilities and clean any contaminations caused by their presence on his property, the costs to return his property to the condition it should have been had the Sercu not run their utility lines over his property. (R. pp. 75-83, 116, 128-130, 146-151, 185-187.)

Hart testified that learned of the utility lines on his property shortly after this suit was filed, which is well within the applicable statutes of limitations, when he was digging fence post holes and put

the Sercu on notice that the utilities were on his property without permission and needed to be moved. (R. pp. 338-340.) The Court's ruling that the statue of limitations had run because Hart was aware that Sercu had utilities running to his house is an error. (R. pp. 3-28.) The fact that Hart was aware the Sercu had utilities running to his house is not the same as being aware that Sercu's utilities were running through Hart's property without Hart's express permission. The only evidence produced at trial was that Hart was not aware that the Sercu utilities were running through Hart's property until he was digging fence holes in his year, which is well within the three-year statute of limitations. (R. pp.338-340.) S.C. Code Ann. § 15-3-530(8). Sercu have refused to move the utility lines. Sercu did not plead that they had implied utility easements and they did not testify that they had implied utility easements. Therefore, the Court erred in finding that Sercu had utility easements for any utility running through the 20' access easement area. The Court erred in finding that Sercu has utility easements rights over Lot 1 for the benefit of Lot 2 (R. p 26.). The Court erred in finding that Sercu had a broad easement over the 20' easement area for virtually any utility running to Sercu's home. (R. p 26.) Finally, the Court erred in not awarding Hart damages for Sercu's utility trespass to include the costs for removing their utility lines from the Harts property and pay a reasonable fee in the amount of $1,000 rent beginning August 1, 2023, until such time as the utilities (water, sewer, cable, internet, gas and electricity) are removed from Hart's Property and Lot 1 is restored to the condition it was in before the Utilities were excavated.

III. THE TRIAL COURT ERRED BY AWARDING THE RESPONDENTS ACTUAL AND PUNITIVE DAMAGES?

"Punitive damages are by definition punishing damages or private fines levied to punish a wrongdoer for reprehensible conduct and to deter its repetition in the future. The State of South

Carolina's interests in awarding punitive damages must remain consistent with the principle of penal theory that the punishment should fit the crime. In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (2005)." *Hale v. Finn*, 388 S.C. 79, 694 S.E.2d 51 (Ct. App. 2010)

Hart committed no action or offence that would justify an award of actual and punitive damages and Sercu produced no evidence that would support a finding that he had suffered actual damages (R. pp. 43-730.)

Sercu alleged that they had a granted 20' easement across Hart's property and that Hart interfered with Sercu's right of access to Lot 2. Although the Hart denied that the Sercu have a valid deeded easement for access over his property, he testified that he has never prevented them from driving over his property to get to their property. Hart admitted that he did remove construction material that the Sercu dumped on his property without giving Hart notice or requesting his permission or approval and that he did dig up a very small portion of pavers in the driveway with the express intention slowing cars down because they were spinning wheels in the driveway. (R. pp. 244-483.) However, the record is clear that at no time did Hart ever prevent Sercu from using the alleged 20' access easement. (R. pp. 61-224, 244-483). The demonstrative evidence that Sercu produced at trial, (R. pp. 551-567) and which were discussed by both Sercu and Hart at length in in their respective testimony (R. pp. 61-224, 244-483) showed no deliberate intention by Hart to prohibit access to the alleged access easement and clearly show that Sercu's allegation that they have suffered damages or been restricted from using the alleged access easement was unfounded.

"The general rule is that the owner of the servient estate may erect gates across an easement if they: (1) are so located, constructed, and maintained as not to unreasonably interfere with the right

of passage of the dominant estate; (2) are necessary for the preservation of the servient estate; and (3) are necessary for use of the servient estate. " *Judy v. Kennedy*, 398 S.C. 471, 474, 728 S.E.2d 484, 485 (Ct. App. 2012) . Hart erected a fence on his property line (which at no time impeded Sercu's access), stacked cinder blocks on the property line to protect his utility box from being damaged and performed routine maintenance on the alleged easement access area. None of these actions impeded Sercu's access on the alleged 20' access easement. (R. pp. 244-483.) Hart's actions fall well short of erecting a gate across the easement and are will within his rights to maintain his property. Hart, as the owner of the servient estate has the right to maintain his property and take reasonable measures to protect the servient estate. At trial the Sercu failed to provide any evidence that the Hart had ever prevented the Sercu from accessing their property. Sercu also failed to provide any evidence that they had ever been granted a valid easement which would allow them to make improvements to the 20' easement area that they claim ownership of. (R. pp. 61-224.)

Despite a record which clearly supported Mr. Hart's assertion that he never prevented Sercu from accessing their property via the 20' access easement area, the Court awarded damages for lost rent in the amount of $50,000 and punitive damages in the amount t of $100,000. (R. p. 3-27). The Court erred in awarding such an excessive amount of damages. First, there is no evidence in the record that Sercu ever tried unsuccessfully to rent his home. (R. 61-219.) The evidence at trial was that Sercu maintained the home as a primary residence and that he never tried to rent his home except when he successfully rented it when he first purchased the property and after the lawsuit commenced. (R. 61-245.) Sercu presented an expert to testify to the rental value of the home, Ronnie Wingard, who testified that he was not an expert (R. p. 230) and that at the time he inspected the home on Lot 2 it was in fact rented (R. p. 231.) Mr. Wingard did not provide any testimony that the rental value

of Sercu's home on Lot 2 would have any diminution in value because of any issues pertaining to the 20' access easement. (R. 223-245.) In short, Sercu was not damaged by a diminution of rental value, never unsuccessfully attempted to rent his home and should not be awarded damages that he did not suffer.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Master in Equity.

Respectfully submitted,

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CERTIFICATE OF COUNSEL REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR

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PROOF OF SERVICE

I certify that I have served the foregoing Final Brief of Appellant on the date given below by hand delivery to counsel of record at the address noted below.

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