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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2026-000507
Trial Court Case No. 2025-CP-10-03402

Laura Schaible and Russell Schaible, ... Respondents,

v.

Ilonka Sonja Taylor and David Abdo, ... Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Appellants explained in their primary brief why the orders on appeal are void for lack of subject matter jurisdiction and also why, if the master in equity did have jurisdiction, the trial court made reversible error. Respondents' brief does not change those conclusions. Respondents rest on conclusory arguments and cite no controlling authority that refutes Appellants' positions.

The arguments Respondents raised in their response brief have already been preemptively addressed in Appellants' primary brief. However, some points in Respondents' brief warrant reply.

ARGUMENT

II. The orders on appeal are void due to lack of subject matter jurisdiction of the Master in Equity.

A. The dismissal of the First Action ended the reference to the Master in Equity

Respondents argue that the order of reference issued in civil action 2018CP1000440 (the "First Action")(the "Order of Reference") extended to civil action 2025CP1003402 (the "Second Action") because the Order of Reference was "suspended" when the Master in Equity issued the order striking the First Action pursuant to Rule 40(j), SCRCP (the "Dismissal Order"). Respondents also argue that the Master in Equity's duties did not conclude when he dismissed the First Action and that the Order of Reference was a "standing" reference that either "remained operative" or was "revived" when the Master in Equity issued the June 12, 2025 consent order restoring the case (the "Order to Restore"). However, Respondents cite no authority that supports those arguments.

Respondents attempt to distinguish *Bunkum v. Manor Props.*, 321 S.C. 95, 467 S.E.2d 758 (Ct. App. 1996) and *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013) by arguing that the Dismissal Order was not an adjudication on the merits. However, Respondents overlook that adjudication on the merits was not required for the Master in Equity's duties to be concluded under the Order of Reference. As discussed in Appellants' primary brief, the Dismissal Order was a final order dismissing the First Action and there was no longer any pending proceeding capable of being referred to the Master in Equity pursuant to Rule 53, SCRCP after the First Action was dismissed. Notably, Respondents' brief does not cite to Rule 53, SCRCP even once despite that rule being the basis for orders of reference.

Respondents also attempt to distinguish *Personal Care, Inc. v. Theos*, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) by arguing that it should be limited to the "procedural effect of Rule 40(j) for limitations and tolling purposes." Respondents' argument is paradoxical to their position. The procedural effect of Rule 40(j) is precisely the support for Appellants' argument. This Court articulated in *Personal Care* that a strike under Rule 40(j) ***is*** a dismissal: "[n]evertheless, we believe this argument ignores the procedural posture of the case as 'dismissed'….[The] motion to restore [pursuant to Rule 40(j)] was, in essence, equivalent to filing a new lawsuit." *Personal Care*, 426 S.C. at 87, 825 S.E.2d at 285. *Personal Care* relies on *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003), which also articulates that a strike under Rule 40(j) is a dismissal and illustrates that the inclusion of the statute of limitations tolling provision in the rule is due to the procedural effect of the strike being a dismissal:

> "Rule 40(j) does not require that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, if the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period. This conclusion is supported by the Notes to Rule 40 ('Rule 40(j) now requires all adverse parties to consent to *the dismissal* in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party.')…. [2]We note that the Maxwells assert that, since Genez and Doe agreed to the *Rule 40(j) dismissal* after the statute of limitations had expired, they waived their right to oppose the motion to restore on grounds of the expiration of the statute of limitations. We disagree. Parties who consent

> to strike a claim pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year."

Id., at 620-621, 621 n.2, 591 S.E.2d at 28, 28 n.2. (Emphasis added.)

Personal Care also relies on *Goodwin v. Landquest Dev.*, LLC, 414 S.C. 623, 779 S.E.2d 826 (Ct. App. 2015), in which this Court comprehensively examined the procedural effect of Rule 40(j) as a dismissal. In light of Respondents' argument regarding the effect of the strike, the discussion in *Goodwin* is worth reproducing in detail here:

> "…[T]he requirement of complying with the statute of limitations after a case is stricken pursuant to Rule 40(j) depends on the event of "striking" being considered a dismissal. While our rules do not clearly provide that striking a case pursuant to Rule 40(j) is a dismissal, there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of dismissed. In the notes to the 1994 amendments to the South Carolina Rules of Civil Procedure, Rule 40(j) is described as " substantially revis[ing] the procedure for dismissing a case previously found in Rule 40(c)(3)." Rule 40, SCRCP Notes, Notes to 1994 Amendments (emphasis added). The notes go on to state, "Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken.... Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored...." *Id.*; see also [*Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 28 (2003)] (relying on the notes in interpreting Rule 40(j)). Moreover, the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal. See *Maxwell*, 356 S.C. at 620, 591 S.E.2d at 27…. There is also an historical basis for considering a case stricken pursuant to Rule 40(j) as the equivalent of dismissed. We adopted our Rules of Civil Procedure in 1985. See Rule 86(a), SCRCP ("These rules shall take effect on July 1, 1985."). Before then, the circuit court had the power to dismiss an action without prejudice if it was called for trial and the parties were not ready to proceed. See *Small v. Mungo*, 254 S.C. 438, 441, 443, 175 S.E.2d 802, 803, 804 (1970) (holding the inability of counsel "to contact plaintiff and his witnesses and be ready for trial" and "the failure of plaintiff and his counsel to appear when the case was called for trial constituted a failure to proceed with the cause ... and a ground for dismissal of the action"). When the supreme court decided *Small*, former Circuit Court Rule 81 was in effect. The rule provided, "When a case is reached on the Common Pleas trial roster and is called for trial, ... if counsel are not ready to go forward with the case it shall be placed ... at the foot of the calendar." S.C. Code Ann. Vol. 22, Circuit Court Rule 81 (Supp. 1984) (repealed 1985). In 1985, former Rule 40(c)(3), SCRCP, took effect. Similar to the procedure described in *Small*, Rule 40(c)(3) applied only if the parties were

> not prepared to proceed when the case was called for trial. However, the rule allowed the circuit court to "strike" the action. The rule provided: When an action is reached on the trial roster and is called for trial, it shall not be continued by consent, and if counsel are not ready to go forward the court shall strike the action from the calendar (file book) with leave to restore, unless continuance is granted for good cause shown. Rule 40(c)(3), SCRCP (West 1994) (repealed 1995). The rule did not use the word "dismissed," but tracking the language of former Circuit Court Rule 81, it did require a restored case to "be placed at the foot of the calendar (file book) and a new case number assigned." Rule 40(c)(3); see Rule 40(c)(3), Notes ("This Rule 40 is substantially a compendium of present circuit court Rules...."). Our law treated the striking of a case pursuant to Rule 40(c)(3) as the equivalent of a dismissal,[6] and our courts required the plaintiff to comply with the statute of limitations upon restoring the case. See *Graham v. Dorchester Cnty. Sch. Dist.*, 339 S.C. 121, 122, 125 n. 1, 528 S.E.2d 80, 81, 82 n. 1 (Ct. App. 2000) (stating in a case "struck ... from the trial roster ... pursuant to former Rule 40(c)(3), SCRCP" that "the statute of limitations clearly expired" before the motion to restore was filed)…. [6]See Rule 40, SCRCP Notes, Notes to 1994 Amendments (referring to "the procedure for dismissing a case previously found in Rule 40(c)(3)")."

Goodwin, at 630-632, 632 n.2, 779 S.E.2d at 830-831, 831 n.2.

Precedent requires this Court to treat the Rule 40(j) strike as a dismissal of the First Action. Respondents have not cited any authority that supports their argument that the Master of Equity's duties under the Order of Reference did not conclude when he dismissed the First Action. Respondents cannot circumvent the fact that no such authority exists by asking this Court to read limitations into *Personal Care* that simply are not there.

B. Appellants are not procedurally barred from challenging subject matter jurisdiction

Respondents argue that Appellants are prohibited from challenging the orders on appeal (the January 13, 2026 "Trial Order" and the February 5, 2026 "Motion to Reconsider Order") for lack of subject matter jurisdiction because the Order to Restore provided "the procedural authority for the Master to proceed" and the Appellants did not appeal the Order to Restore. Respondents cite no authority for these positions, and no supporting authority exists.

Subject matter jurisdiction can be raised at any time and Appellants have raised the Master in Equity's subject matter jurisdiction in this appeal. Subject matter jurisdiction is so fundamental that appellate courts should take notice of it even if it is not raised by the parties. "Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court *ex mero motu." Chabek v. Nationwide Mut. Fire Ins. Co.*, 303 S.C. 26, 29, 397 S.E.2d 786, 788 (1990).

As discussed in Appellants' primary brief, the Order to Restore could not have provided the Master in Equity the authority to proceed. The Order to Restore was issued by the Master in Equity rather than a Circuit Court judge and the Master in Equity no longer had subject matter jurisdiction at the time he issued the Order to Restore. "We think it elementary, with no need for citation of authority, that the acts of a court with respect to a matter as to which it has no jurisdiction are void." *State v. Funderburk*, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972). Regardless of whether Appellants appealed or otherwise challenged the Order to Restore, the question of the Master in Equity's subject matter jurisdiction for the orders on appeal has been properly raised to, and must be determined by, this Court.

Respondents argue that since Appellants did not directly appeal the Order to Restore, Appellants need a vehicle to challenge the Order to Restore in order to challenge the orders on appeal for lack of subject matter jurisdiction. That assertion is incorrect because subject matter jurisdiction can be raised at any time. Regardless, Appellants have in fact sought to challenge the Order to Restore under an appropriate vehicle, Rule 60(b)(4), SCRCP. Once Appellants served their notice of appeal, this Court obtained exclusive subject matter jurisdiction over matters affected by the appeal pursuant to Rule 205, SCACR, which would include the question of the Master in Equity's subject matter jurisdiction. See *Stokes-Craven Holding Corp. v. Robinson*, 416

S.C. 517, 787 S.E.2d 485 (2016)("[f]urthermore, Rule 205 divests the lower court or administrative tribunal of jurisdiction over 'matters affected by the appeal'….") In light of this Court's exclusive jurisdiction over the issue of the Master in Equity's subject matter jurisdiction, Appellants filed a motion a few weeks after serving their notice of appeal requesting leave from this Court to file a Rule 60(b)(4) motion with the lower court seeking to vacate the orders on appeal and the Order to Restore as void based on lack of subject matter jurisdiction in accordance with Rule 60, SCRCP ("[d]uring the pendency of an appeal, leave to make the motion must be obtained from the appellate court.") Since the Order to Restore was issued on June 12, 2025, Appellants were well within the reasonable time frame allowed for filing a Rule 60(b)(4) motion with regard to the Order to Restore when they sought leave from this Court and they still are.[1] This Court denied Appellants' motion, however noting in its order that "nothing prevents the parties from raising the issue of subject matter jurisdiction in their briefs." (Ct. App. Or. Denying Mot. for Leave.)

Respondents' unsupported argument that Appellants cannot challenge Master in Equity's subject matter jurisdiction for the orders on appeal without having appealed the Order to Restore does not align with the fundamental nature of subject matter jurisdiction, especially in light of this Court's denial of Appellants' request for leave to file their proposed Rule 60(b)(4) motion with the lower court. "It is settled, however, that lack of subject matter jurisdiction is fundamental and may not be waived even by consent of the parties. A judgment by a court cannot be affirmed where the court had no right to act." *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211 (2003), overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Simply put, Appellants are not procedurally barred from raising the issue of subject matter jurisdiction.

[1] "Motions under Rule 60(b)(1), (2), or (3) must be made within a reasonable time, but not later than one year of the order taken, and those under (4) and (5) are subject only to the reasonable time limitation." *Narruhn*, 404 S.C. at 340, 745 S.E.2d at 90.

C. Appellants have not requested dismissal based on the Master in Equity's lack of subject matter jurisdiction

Respondents state in their brief that Appellants have requested that this Court dismiss Respondents' claims and rule in favor of Appellants based on the Master in Equity's lack of subject matter jurisdiction. Respondents misread Appellants' request for relief. Appellants have in fact requested that this Court reverse the lower court, dismiss Respondents' claims and rule in favor of Appellants. However, that request is an alternative request based on reversible error if this Court determines that the Master in Equity did have subject matter jurisdiction. Appellants' request for relief with respect to the Master in Equity's lack of subject matter jurisdiction is for this Court to vacate the orders on appeal as void. If this Court vacates the orders on appeal as void, Appellants presume that this Court will remand this matter to the Circuit Court for further proceedings in accordance with this Court's order.

D. Vacating the orders on appeal as void is not a windfall to Appellants

Respondents argue in their brief that vacating the orders on appeal as void for lack of subject matter jurisdiction would be a windfall for Appellants since the Appellants consented to restoration and participated in the trial. Respondents' assertion is incorrect and also ignores precedent.

If this Court vacates the orders on appeal as void, Appellants would be faced with another trial and potentially more appeals following that trial. That would hardly be a windfall to Appellants. A decision by this Court in Appellants' favor based on reservable error would provide a swifter, less burdensome and less costly resolution to Appellants.

But more importantly, Respondents' assertion simply ignores our appellate courts' view of the fundamental nature of subject matter jurisdiction, regardless of consent or participation in trial, which was clearly articulated by the South Carolina Supreme Court in *Chabek*:

> "We deem as irrelevant the fact that both parties consented to the reference of the matter and, indeed, tried the matter before the master. Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court *ex mero motu*."

Chabek v. Nationwide Mut. Fire Ins. Co., 303 S.C. 26, 29, 397 S.E.2d 786, 788 (1990). Contrary to Respondents' argument, this Court's acknowledgement of and adherence to a foundational aspect of our jurisprudence simply cannot be fairly characterized as a windfall.

III. The Palmer Deed validly created an express easement.

A. <u>The standard of review does not require this Court to defer to the trial court</u>

Respondents argue that the standard of review requires this Court to defer to the trial court and prohibits this Court from interpreting the Palmer Deed because the trial court's order contains a factual finding on location. That is incorrect and unsupported by authority. Respondents cannot hide behind the standard of review by recasting the trial court's interpretation of the deed as a factual determination.

First, Respondents misstate the standard of review applicable to the determination of the location of an easement. Respondents incorrectly cite to *Slear v. Hanna*, 329 S.C. 407, 496 S.E.2d 633 (1998) for the standard of review for the determination of an easement's location. Instead, the determination of the location of an easement is a determination of the extent of the easement, which is an action in equity with a *de novo* standard of review. *Sheppard v. Justin Enterprises*, 373 S.C. 518, 646 S.E.2d 177 (Ct. App. 2007).

Second, Respondents omit a material portion of the standard of review applicable in this case to the determination of whether an easement exists. Respondents correctly cite to *Slear* for a portion of the standard of review: "[t]he 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*, at 410, 496 S.E.2d at 635. However, Respondents ignore that *Slear* is not the only part of the standard of review. The determination of whether an express easement was created by an unambiguous deed is not a factual determination but instead is a matter of law. "The determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court." *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012) "[I]f the language of the deed is unambiguous, then its interpretation is a question of law to be resolved by the reviewing court without resort to extrinsic evidence." *Hunt v. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848 (Ct.App.2004). "If…the language in a deed is ambiguous, the determination of the grantor's intent then becomes a question of fact." *Santoro v. Schulthess*, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct.App.2009).[2]

Hynes Family Trust v. Spitz, 384 S.C. 625, 682 S.E.2d 831 (Ct. App. 2009) illustrates the correct application of the standard of review to the existence of express easements created by unambiguous instruments. In *Hynes*, the trial court determined that a set of restrictive covenants did not create an express easement. *Hynes* cited the *Slear* standard and articulated the appellate court's role by explaining "[i]f a contract's language is clear and capable of legal construction, this Court's function is to interpret its lawful meaning and the intent of the parties as found in the

[2] The *Slear* standard originated in *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987), in which the South Carolina Supreme Court resolved the question of whether the existence of an easement was legal or equitable in nature. The easement at issue in *Jowers* was an implied easement by necessity, not an express easement. Since implied easements by necessity are not created by grants or reservations in deeds, the determination of the existence of the easement *Jowers* did not involve the interpretation of a deed.

agreement. A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary and popular sense." *Id.*, at 629, at 682 S.E.2d 834. In reversing the trial court, the *Hynes* Court did not determine whether any evidence existed in the record to support the trial court's ruling but instead based its ruling on its own interpretation of the restrictive covenants.

Though easements were not at issue in *Griffin v. Giovino*, 446 S.C. 553, 553-554, 920 S.E.2d 418, 428 (2025), that opinion also illustrates the correct application of the standard of review that is applicable here. In *Griffin*, this Court determined that a master deed for a horizontal property regime was ambiguous and that evidence existed in the record to support the jury's factual finding that the roof terrace was not a common element of the regime. *Griffin* applied a standard of review nearly identical to the *Slear* standard, with the only difference being the finder of fact: "[i]n an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Id*. (citing *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006). Notably, *Griffin* articulated that the Court's role under the standard of review was to "only determine whether an ambiguity existed in the deed and if there was *any evidence* to support the jury's finding that the roof terrace, tenth-floor elevator lobby, and planters were common elements." *Id.* (Emphasis in original.) In affirming the trial court, the *Griffin* Court recognized that the question of whether roof terrace was a common element of the regime became a factual determination only because the master deed was ambiguous: "We find either interpretation [of the master deed] is reasonable and accordingly there was an ambiguity in the master deed. We agree with the circuit court's finding that there existed ambiguities….Accordingly, the extrinsic evidence was properly admitted." *Id.*, at 554, 920 S.E.2d at 429-430.

Here, the express easement in question was created by the Palmer Deed. The trial court determined that the Palmer Deed was unambiguous and interpreted the Palmer Deed. Since the trial court determined the language of the deed was unambiguous, its interpretation is a question of law to be resolved by this Court, which is a *de novo* review. *Hunt, supra*. This Court is simply not required to defer to the trial court.

B. Location is not essential to the creation of an easement.

Respondents concede in their brief that the Palmer Deed must be read as a whole. However, Respondents also argue that Appellants' position regarding the entirety of the Palmer Deed amounts to reformation rather than interpretation and that the trial court was "entitled to conclude that the deed's specific location language still fails because it identifies a non-existent strip between Lots 4 and 5." That argument is demonstrably wrong.

Respondents again cite no authority to support their position. That is because no such authority exists. In fact, this Court recently acknowledged that no such authority exists in explaining that location is *not* an essential element to the creation of an easement:

> "We note Maybank also argued the circuit court erred in concluding the Resolution could not create an easement because it did not include the "essential elements" necessary to create a property right, specifically duration, scope, nature, and location. We agree with Maybank. We are uncertain as to what legal basis the circuit court was relying on in reaching its conclusion. We have not found an example of our courts holding that the creation of an easement requires all of these elements. To the contrary, our court has upheld express easements that did not include those elements. See [S*mith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 468, 441 S.E.2d 331, 336 (Ct. App. 1994)](stating the court must interpret an "unlocated easement ... in light of good faith, reasonableness and what was necessarily the intent of the parties")."

Maybank 2754, LLC v. Zurlo, 444 S.C. 47, 76 n.9, 906 S.E.2d 94, 110 n.9 (Ct. App. 2024). Not only does Respondents' brief ignore the authority cited in Appellants' primary brief regarding the applicable rules of construction for express easements created by deeds, but Respondent is asking this Court to affirm the trial court's ruling based on law that simply does not exist.

IV. The express easement created by the Palmer Deed was an appurtenant easement instead of an easement in gross.

A. The easement was necessary at the time of its creation

Respondents concede in their brief that the necessity required for an express easement to be an appurtenant easement is determined at the time of the easement was created. However, Respondents' brief still inexplicably focuses on evidence presented at trial regarding current necessity and speculative future necessity. The evidence presented at trial regarding anything other than necessity at the time of the Palmer Deed is irrelevant for the determination of whether the necessity element for an appurtenant easement is met.[3] *Williams v. Tamsberg*, 425 S.C. 249, 256-266, 821 S.E.2d 494, 503 (Ct. App. 2018)(grant of summary judgment is proper when the party challenging an appurtenant easement does not present any evidence that the easement was not necessary at the time of creation.)

Moreover, Respondents completely disregard *Tamsberg's* holding on the necessity required for an appurtenant easement. *Tamsberg* involved the grant of an express easement over a shared driveway that ran parallel to the boundary of the dominant estate and provided access to a garage. The *Tamsberg* Court held that the express easement in question was essentially necessary to the enjoyment of the dominant estate at the time of its creation, and thus an appurtenant

[3] Respondents' brief repeatedly refers to "27 Broughton Road", which is irrelevant to all of the issues on appeal. In addition to owning Lot 6, which has an address of 29 Broughton Road, Appellants also own Lot 7, Block K which has an address of 27 Broughton Road.

easement, because the parties intended for the easement to provide access to the garage located on the dominant estate: "Upon our review of the record, we find the easement was necessary at the time of its creation in 1911 and also at the time of its reaffirmation in 1971 because the parties to the 1911 Deed and the 1971 Covenant intended the easement provide access to a then-existing garage." *Id.*, at 266, 821 S.E.2d 503. The *Tamsberg* Court explained that the subsequent removal of the garage from the dominant estate did not defeat the necessity element for appurtenance, because once the necessity element was established at the time of creation, the easement became permanent and irrevocable. The fact that the garage no longer existed had no bearing whatsoever on the appurtenant character of the easement.

The necessity in this case is nearly identical to the necessity in *Tamsberg:* the easement granted by the Palmer Deed was essentially necessary to the enjoyment of Lot 6 at the time of its creation because the parties to the Palmer Deed intended for the easement to provide access to the garage and parking pad on Lot 6.[4] The entrance of the garage faces Lot 5 and both it and the parking pad leading into it are situated to be accessed from the driveway on Lot 5. (Def. Trial Ex. 23, Pl. Trial Ex. 11B, 11C and 11D.). Rebecca Palmer, *who was a party to the Palmer Deed*, used the driveway on Lot 5 to access the garage and parking pad in front of it. (Trial Tr. p. 30, lines 12 – 21, p. 99, line 6 – p. 100, line 6, p. 143, line 13 – p. 144, line 5.). Respondents simply ignore *Tamsberg,* which is telling because *Tamsberg* is directly on point and fatal to Respondents' position.

B. The rule in Rhett is a burden of proof rule

Respondents argue that the rule in *Rhett v. Gray,* 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012) is merely a "tie breaking principle" for when an easement may be fairly construed as either

[4] The garage on Lot 6 is an attached garage that is part of the home and still exists in its original orientation, whereas the garage in *Tambserg* was a detached garage that had been removed from the property by the time of the litigation.

an appurtenant easement under *Tupper v. Dorchester County*, 326 S.C. 318, 325-326, 487 S.E.2d 187, 190, 191 (1997) or an easement in gross. That argument ignores precedent and is without support.

Parties to a deed are presumed to intend that it grants all that is necessary to enjoy the rights conveyed. *Frierson v. Porter Acad*., 217 S.C. 168, 60 S.E.2d 82 (1950)(citing *McManaway v. Clapp*, 150 S.C. 249, 148 S.E. 18 (1929), and *Thomas v. Greenville-Carolina Power Company*, 105 S.C. 268, 89 S.E. 552 (1916)). Since *Tupper* provides that an appurtenant easement is an easement that is essentially necessary for the enjoyment of the dominant estate, the easement granted in the Palmer Deed is presumed to be appurtenant easement under *Frierson*. *Rhett* follows the *Frierson* rule by articulating the burden of proof applicable when a party seeks a determination that an easement is in gross rather than appurtenant: "[e]asements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate." *Rhett,* at 492, 736 S.E.2d at 880. *Rhett* is not a tiebreaker as suggested by Respondents but recognizes that the burden of proof is on challengers to prove that an easement is not appurtenant because the *Tupper* elements are not satisfied.

As discussed in Appellants' primary brief, the language of the Palmer Deed unambiguously reflects the intent of the parties to it for the easement to be appurtenant to Lot 6.[5] Respondents had the burden of proof under *Rhett* to prove that the easement granted by the Palmer Deed did not satisfy the *Tupper* elements, because the Palmer Deed is presumed under *Frierson* to have granted an appurtenant easement rather than an easement in gross. There was no tie to be broken. Respondents provided <u>*no*</u> evidence that the easement was not necessary at the time of the Palmer Deed and did not meet their burden of proof.

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[5] As to necessity, the language in the Palmer Deed states "said easement being necessary for the proper use of said lot".

V. Appellants' use of the express easement created by the Palmer Deed has not exceeded the scope of the easement.

Respondents argue that Appellants' use of the shared driveway exceeds the scope of the easement granted by the Palmer Deed because Appellants currently reside in the home located on Lot 7 rather than Lot 6. Again, Respondents' arguments are conclusory and without citation to any authority. Nothing in the Palmer Deed limits or conditions Appellants' use Appellants' use of Lot 6 for purposes of the easement grant. The fact that Appellants own both Lot 6 and Lot 7 does not transform Appellants' uses of the shared driveway for access to Lot 6 into use of the shared driveway for access to Lot 7. Respondents' arguments that Appellants' use of the shared driveway is for Lot 7 rather than Lot 6 are simply without merit.

VI. Reformation of the Palmer Deed depends on mutual mistake of the parties in 1959, not mistake of Appellants.

Respondents argue that this Court should not reform the Palmer Deed because not all of the recorded instruments in the chains of title to Lots 4, 5 and 6 that were listed in the exhibit list included in Appellants' pre-trial brief were introduced into evidence at trial. Appellants posit that the record on appeal is sufficient for this Court to reform the Palmer Deed.

As discussed in Appellants' primary brief, the most relevant evidence in the chains of title to Lots 4, 5 and 6 for reformation are the contemporaneous conveyances of Lot 4 and Lot 5 surrounding the September 1959 Palmer Deed from the common grantor, Charles S. Dwight, since the easement grant language in the Palmer Deed expressly states that the "easement...shall be used jointly by the owners of Lots 4, 5, and 6, Block K…for purposes of ingress and egress to and from Broughton Road". The March 1960 deed conveying Lot 5 to Jacqueline H. Stehmeyer (the "<u>Stehmeyer Deed</u>") was not only pled by Respondents in their Complaint, but Respondents recited the applicable language from the Stehmyer Deed in their Complaint. (Compl. ¶ 14).[6] The December 1959 deed conveying Lot 4 to John J. Murray and Irma J. Murray (the "Murray Deed") was plead by Appellants in their Second Amended Answer (Sec. Amd. Ans. ¶ 68) and a copy was attached as an exhibit to Appellants' motion to dismiss (Ex 2 Memo. Supp. Def.'s Mot. to Dismiss). Though copies of the Stehmeyer Deed and the Murray Deed were not admitted into evidence at trial, Appellant raised the issue of the recorded instruments in the chains of title to Lots 4, 5 and 6 and Appellant and Respondent stipulated at trial to their admissibility. (Trial Tr. p.5, lines 4-8, p.6, lines 1-6, p. 8, line 20 – p.9, line 25, p.120, line 20 – p.121, line 17). It is irrelevant to this appeal whether Respondents disputes the effect of the Stehmeyer Deed or the Murray Deed, because this Court is free to take its own view of the evidence since the standard of review is *de novo* for Appellants' reformation counterclaim. *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011)(the standard of review for equitable actions is *de novo*).

VII. The trial court's injunction exceeds enforcement of the declaratory judgments.

Respondents argue that the Master in Equity declared that Appellants have "no right to access Lot 6 over Lot 5" and that the Master in Equity "was entitled to enter an injunction preventing continued access over Lot 5 to Lot 6 after determining that no enforceable right existed".[7] The assertion that the orders on appeal affect easement rights the Appellants' may potentially have other than the express easement rights created by the Palmer Deed is incorrect.

[6] "That portion of the above described property [Lot 5] fifteen feet wide leading from Broughton Road to the main portion of said property is conveyed subject to the easements therein granted by Charles S. Dwight by deeds of conveyance conveying lots 6 and 4, Block K, The Crescent recorded in the R.M.C. Office for Charleston County in Book R-68, page 10, and Book W-68, page 122, respectively."

[7] The injunction in the Trial Order states that Appellants "are enjoined from accessing the easement located on Lot 5 to access 27 Broughton Road (Lot 6)." Lot 6 is 29 Broughton Road, not 27 Broughton Road.

Appellants agree with Respondents that an easement is a right: "[a]n 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 therefore not an estate in lands in the usual sense. An easement may be created by reservation in a deed." *Proctor*, at 571, 730 S.E.2d at 363. As discussed in Appellants' primary brief, the Master in Equity only determined Appellants' and Respondents' rights under the express easement grant contained in the Palmer Deed. No other easement rights that Appellants may potentially have to use Lot 5 for access to Lot 6 from Broughton Road, for example implied easement rights or prescriptive easement rights, were determined, or requested to be determined, by the declaratory judgment causes of action.

CONCLUSION

For the forgoing reasons and the reasons contained in Appellants' primary brief, the orders on appeal should vacated as void for lack of subject matter jurisdiction, and alternatively if this Court determines the Master in Equity had subject matter jurisdiction, the orders on appeal should be reversed, each of Respondents' causes of action should be dismissed, and Appellants should be granted a declaratory judgment reforming the Palmer Deed as described herein.

Respectfully submitted,

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