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Protecting You, Your Family, & Your Business

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December 12th, 2013

V. Claire Allen, Deputy Clerk
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Ernest Alvin Timmons, et. al. v. Neil O. Gifford, et. al.
2010166447


Dear Deputy Clerk, V. Claire Allen:

Attached is the Order issued by the Honorable Carmen T. Mullen concluding that an adequate record of the Bench Trial cannot be sufficiently reconstructed. This is not a typical situation and must admit have never encountered this problem before. Consequently, I am not sure of the exact procedural method to follow at this point but believe a new trial cannot be heard until the Court of Appeals remands the case back to the Trial Court for new hearing. If I misunderstood my prior communication with the Court, I apologize, but again, believe I was informed the Court of Appeals needed to hear from the Trial Court that a record could not be recreated before an order remanding the case for new trial would be issued.

If I am in error, please let me know. Any questions, please don't hesitate to contact me. I thank the Court for your patience in this matter.

With Warmest Regards, I am

Sincerely,



Mikell, Weidner, Wegmann & Harper, LLC
James J. Wegmann

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DEC 17 2013
SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 ERNEST ALVIN TIMMONS AS)
 TRUSTEE OF THE ERNEST A.)
 TIMMONS REVOCABLE TRUST)
)
 Plaintiff,)
)
 vs.)
)
 NEIL O. GIFFORD, AMY E. GIFFORD,)
 JOHNNY L. BREWER, JOSEPH GRAY)
 PEEPLES, BRIAN M. MINSON, KAREN)
 B. HINSON, GEORGE R. DICKEY,)
 H. ALVIN DOBSON JR., et al,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOURTEENTH JUDICIAL CIRCUIT
 CASE NO.: 2008-CP-07-03656

13 DEC -3 PM 3:49
 JUDICIAL ADMINISTRATION BUREAU
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

ORDER DETERMINING RECREATION
 OF TRIAL RECORD INCAPABLE
 WITHOUT NEW TRIAL

THIS MATTER COMES BEFORE THE COURT following an October 30, 2013, hearing to determine if the record in this matter could be reconstructed. The record of testimony from the November 17, 2009, bench trial has been lost, destroyed or otherwise determined unrecoverable due to error stemming from the assigned court reporter. Present at the October 30, 2013, hearing were James J. Wegmann, Esq., of Mikell, Weidner, Wegmann & Harper, LLC for Plaintiff Trustee Ernest Alvin Timmons, Hamlin O'Kelly, III, Esq., of Buist Byars & Taylor, LLC, for Defendant George R. Dickey, and Becky P. Hildebrand, proceeding *pro se*.

At issue in the matter originally before the court is the nature of a ten-foot pedestrian easement providing beach access to the Beaufort River in the Lands End area of Beaufort County, and the use of that easement by subsequent purchasers of land taking subject to the easement.

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SC Court of Appeals

Since the October 2013 hearing, Mr. O'Kelley has stepped down from representation in this matter, as his client, Mr. Dickey, has sold his property and no longer has standing in this matter. Also following the hearing, Mr. Wegmann and Ms. Hildebrand have provided the Court with testimony recaps compiled from their own notes and memories. The Court has also compiled the exhibits, pre-trial briefs, and additional memoranda used to determine the outcome of the November 2009 bench trial. Upon review of the file, exhibits, and testimony recaps provided by some of the interested parties, and the Court's own notes, the Court finds that the record cannot be sufficiently reconstructed.

LEGAL STANDARD

The trial court has the authority to set the record for appeal and may find that a record is sufficiently reconstructed absent a complete verbatim transcript by accepting affidavits to determine what transpired. *China v. Parrott*, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968); *State v. Ladson*, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007). A reconstructed record must allow for meaningful appellate review. *Ladson* at 326, 644 S.E.2d at 274. A reconstructed record that is largely "conclusory, with testimony, objections, and the like recalled only in summary fashion" is insufficient reconstruction, as it is not as reliable nor as complete as is necessary for appellate purposes. *Id.* at 323, 644 S.E.2d at 272.

ANALYSIS

The bench trial in this matter was held in November of 2009, four years prior to the Court's current consideration. While the exhibits have been compiled, and while some parties have submitted recaps of testimony from their personal files and memories, some parties to this



matter appeared before the Court *pro se* in the 2009 trial and did not appear at the October 2013 hearing to determine whether the record could be reconstructed. Testimony from at least three witnesses who testified during the bench trial remains absent from the testimony recaps provided to the Court. As many as twenty-seven lot owners had a potential interest in the outcome of the bench trial. The record recaps received by the Court only address testimony from two definite witnesses, and are incomplete inasmuch as is required to recreate a complete composite of the testimony offered at the November 2009 bench trial.

CONCLUSION

As set forth above, the Court finds that the record of the 2009 bench trial cannot be sufficiently reconstructed for meaningful appellate review.

IT IS SO ORDERED.



Carmen T. Mullen
Fourteenth Judicial Circuit

December 2, 2013
Beaufort, South Carolina.

