THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. S. Jackson Kimball, III
Master in Equity

Appellate Case No. 2014-000730

EARL DUKES, ...Appellant,

vs.

KENNITH W. FARRELL, MARY C. FARRELL and
MARTIN BROGDONOVITCH, Defendants,

of whom
KENNITH W. FARRELL and MARY C. FARRELL are the .....Respondents

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APPELLANT FINAL REPLY BRIEF

J. Cameron Halford
Halford Niemiec & Freeman, LLP
238 Rockmont Drive,
Fort Mill, South Carolina 29708
803-547-6618
803-547-6638 fax

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STATEMENT OF THE CASE

KENNITH W. FARRELL and MARY C. FARRELL own a "river view" house and lot in York County. They acquired said property under deed of Robert J. Edwards dated August 12, 2005, and recorded August 16, 2005 in Record Book 7331, at Page 102 in the Office of the Clerk of Court for York County. The vesting deed into FARRELL cites by references a plat book Book D-18 at Page 9. It does not cite a plat of Fisher-Sherer dated May 15, 2001 (four years prior to Farrell's acquisition of his property).

By the vesting deed described above Respondents claim to be successors in title from a deed of A.F. Fewell and Edward Fewell, Jr. to W.A. Bigham, dated and recorded March 2, 1965 in Deed Book 334 at Page 414. The language of this deed provides, in relevant part, "*It being understood that the Grantee herein, His heirs and assigns, shall have access to the backwater in the cove on which the above described property is located, subject to the rights of Wateree Power Company, or its successors, and other Grantees from Grantors herein, A.F. Fewell and Edward Fewell, Jr.*"

Earl Dukes acquired his tract from the same grantors by deed dated May 22, 2002. As such, he has the senior parcel. (By contrast, Respondents acquire their parcel in year 2005). Stipulated fact in this case evidences that neither party questions the chain of title

of the other, and it is conceded that both claim from a common grantor – A.F. Fewell and Edward Fewell, Jr. Relevant portions of the boundary of the Dukes tract 057-00-00-057 lies, as staked, under the waters of Lake Wylie. Other portions exist between Farrell and the water, including the 30' foot strip described by Respondent between the Farrell boundary and the waters of Lake Wylie. The dock and its plank walk are situated partly above the thirty feet and partly above the water, both of which are (underneath) Duke's property.

By complaint filed August 19, 2011, DUKES claimed trespass and nuisance against the FARRELLS. The FARRELL's motion for summary judgment was heard on March 14 and March 14, 2014 by the Master in Equity for York County, days before jury trial. By Order dated April 3, 2014 and filed April 4, 2014, the Court found and ruled that the FARRELLS owned the dock, and had an easement appurtenant to their property, which allows them to pass freely across and over the strip of land belonging to the DUKES, pursuant to the quoted easement language in the 1965 Fewell deed, or prescriptive use, allowing access to Lake Wylie. The court found and concluded in the alternative that the FARRELLS had established the necessary elements for an easement by prescription over DUKES' property for access to the waters of Lake Wylie. On both bases above, the court granted the FARRELLS summary judgment as to the existence of an easement and as to their right of access to Lake Wylie. Finally, the court found and concluded that genuine issues of material fact for trial existed as to the extent and usage of the FARRELLS' easement, despite having granted ownership of the dock to FARRELL. This appeal by DUKES followed.

Appellant here files its Reply to the Initial Brief of Respondents addressing arguments identified under Paragraphs (I) through (IV), as set forth below. Appellant would respectfully show this court the following:

I. THE STANDARD OF REVIEW ON A GRANT OF SUMMARY JUDGMENT IS WHETHER THE EVIDENCE, AND ANY REASONABLE INFERENCES THEREFROM, SHOWS THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT.

Respondent accurately sets forth the standard for summary judgment, while omitting that the trial court's review must pursuant to Rule 56 SCRCP view all facts and inferences in a light most favorable to the non-movant, here the Appellant. The Respondents' position acknowledges the on-going dispute as to the scope, *extent,* or usage by FARRELL that constitutes "*access to the backwaters in the cove*". Appellant respectfully assert the trial court below erroneously viewed the matters in a light most favorable to the movant. The order appealed from deals with two (2) issues. The first is the legal existence – or nonexistence – of an *appurtenant* easement across DUKES' property, *not just their (Farrells') right to access Lake Wylie,* as created by a common grantor. The second is the extent or scope of FARRELLS access to Dukes' lands, if at all, and hence the waters of Lake Wyle via wooden docks and pier discussed in Sections VI and VII, infra. Appellant respectfully asserts that access to the backwaters in the cove does not equate to necessary occupation of permitted items of personal property, i.e., a dock or pier, which attach physically to Appellant's land via pilings.

Appellant respectfully asserts that the trial court has, erroneously, judicially defined the dock and pier as *the necessary access* and *terminus*, owned fee simple by the Respondents. The issue is best illustrated by "The *Farrell's pier and dock* are situated

partly above the thirty feet and party above the water, both of which are plaintiff's property" (R.p. 008 at ¶(5), lines (1)-(6); R. p.298 at 17-20); (Resp. Init. Brf. P.2 at lines 4-5). The April 3, 2014 order establishes prescriptive use can be accomplished through permitted adjuncts of personal property, not use of the land. *To reiterate*, counsel for Respondent partly sets forth in accurate form the predicament: *the dock and pier are situated partly above Dukes' property, and partly above the water covering Dukes' boundary lines*. Both "above" and 'below" being the property of the Appellant. While Appellant refutes that precisely 30' feet of boundary line separates Respondent from being "riverfront", it is acknowledged as accurate that present-day there is a boundary line of a minimum of 30 feet (more like 60 – 90 feet) between Farrell and the water. Hence the present day need to cross the Duke's property via extended plank walk above Dukes' boundary and the water. The extent of water access, and the valuation of the respective lots, turns on this issue. As cited by Farrell's affidavit it will affect the value of his lands, which he acquired under deed of a Robert Edwards dated August 12, 2005 as recorded in Record Book 7331 at Page 102 in the office of the clerk of court for York County. Noteworthy, however, is that this deed expressly cites explicit metes and bounds, referencing Plat Book D-18 at Page 9. (R.p.225*); see also* (R.p.231, ¶(2), line (10)).

Appellants respectfully assert reversible error in that the dock and pier *ipfo facto* have been judicially declared as the personal property of Farrell, attaching to the lands of Appellant, and hence error in judicially extended easement scope and extent. In refuting this assertion, Appellant would crave reference to the deed into Farrell. [1] The deed itself cites Plat Book D-18 at page 9, illustrating the need for Respondents to be declared

[1] Deposition testimony in the case by Kennith Farrell confirms that the deed into Farrell was authored by Respondent Counsel, John Martin Foster, and cites plat book D-18 at Page 9, as recorded in the office of the clerk of court for York County.

owners of the dock and pier as configured present-day. The inquiry becomes whether the dock and pier are necessary to the enjoyment of backwater now that the "cove" is no longer owned by a common grantor, but rather adjoining land owners. The 1965 deed so heavily relied upon by Respondent is devoid as to mention Dukes' parcel as a subservient estate. It is devoid as to language referencing a dock or pier. Appellant respectfully asserts the trial court erroneously viewed these matters in a light most favorable to the movant in granting summary judgment under either theory - express grant or prescriptive use.

II. THE CITATION OF LANGUAGE FROM THE MOTION ARGUMENT IS RELEVANT AS TO CONTROLLING ERROR LAW BY THE TRIAL COURT AND LACK OF EVIDENTIARY SUPPORT FOR THE COURTS DETERMINATION THAT RESPONDENTS OWN THE DOCK OR THE DOCK IS REASONABLY NECESSARY FOR ENJOYMENT OF THE ALLEGED DOMINATE ESTATE.

An abuse of discretion arises when a determination is controlled by error of law, or when the decision is without evidentiary support. Hillman v. Pinion, 347 S.C. 253, 554 S.E.2d 427 (Ct. App. 2001). There is no language, and no evidence other than inference, within the 1965 Fewell deed that a dock or pier – *in whatever form* – was necessary to W.A. Bighams' (Respondents' predecessor) enjoyment of his property. The deed is, in fact, silent as to grant of a right to cross or utilize the parcel now owned by Appellant, then (1965) held by common grantors A.F.Fewell and Edward Fewell, Jr. Had this been so, the terminus requirement of an appurtenant easement would have been well defined upon the *alleged* dominant estate. However, the deed is entirely silent as to these matters and the extent or scope access granted via adjoining tract.

The language cited from the record likewise illustrates lack of evidentiary support forming the basis of the court's ruling that Farrells (or a predecessor to Farrells) owned the dock. This is so even when candidly advised by Respondents' counsel of the following: "[*L*]*et me acknowledge the fact that this deed (A.F. Fewell to W.A. Bigham) says you have access to the water. It doesn't say you have the right to get to the pier*; "...because *It is not clear from the Fewell deed that a pier is intended."* (R.p. 304 at 2-3). *"We cannot establish it (the dock) existed at the time of the deed between Bigham and Fewell, we would need to rely upon the elements of adverse possession*" (Id. at 20-21). Nevertheless, under Rule 56 SCRCP, the court judicially declared ownership of the dock in Farrell, and granted summary judgment viewing alleged prescriptive rights, erroneously, in favor of the moving party. The court largely ignores that the permitted dock is not land. "*It is not real property*". (R.p.291 at 11-14); *see also* (R.p.333 at 5-10). *See also* (R.p.281 at 1-7). The court ignores that use of the adjunct (dock) is not use of the real property, i.e. the land. (R.p. 291 at 16-20). As noted by both parties, most of the disputed land is under water, not capable of prescriptive use, much less exclusive or adverse possession. While recognizing that Appellant's property lines uniquely lie underneath the water, the court inquired: "*How does that apply to a dock over the water*?" (R.p. 281 at 5-6). It applies precisely because of the state of affairs confirmed by Respondent in deposition: Respondents have never utilized the property itself. (R.p.99 at 12-15, Depo. Kennith Farrell). *See also* (R.p.333 at 16-24).

The factual matters are conceded by the Respondents yet ignored by the court in analyzing the facts in a light most favorable to the movant. Respondent sets forth in argument that, to their knowledge, there is no dispute over the facts in this case. This is

evidenced by factual admissions in the case through discovery under SCRCP 36. The admissions of fact include, but not limited to, admissions of fact (10) through (18). (R.p.71 at (11) – (18). The deed into Farrell from Edwards does not identify a waterfront dock as part of the legal description; nor does the Plat at Book D-18 at Page 9 cited by Farrells' August 12, 2005 deed depict "waterfront or water access" or a dock attached to Respondents' tract. (R.p.225). Despite admitted facts of record in this case, the court nevertheless defined the extended incarnations of the dock as wholly owned by Respondents, erroneously converting said ownership into prescriptive easement rights where no record evidence exists in the case to suggest the dock or pier *ever* attached to the parcel of land now owned by Respondent (or a Respondent predecessor in title). Without extension to the dock, the parcel is not "riverfront" as claimed by Respondent; by contrast it is 'river-view" with no terminus, as the water does not touch, exist or reside upon Respondents' parcel, pursuant to the boundary survey attached to the vesting deed. (R.p. 225). *See also* (R.p.193 ¶(2) at line 10).

III. THE EVIDENCE FAILS TO CLEARLY DEMONSTRATE THE EXISTENCE OF AN APPURTENANT EASEMENT BECAUSE THE EXPRESS LANGUAGE OF THE GRANT FAILS THE TERMINUS REQUIREMENT AND GRANTS PRIVATE RIGHTS INCAPABLE OF TRANSFER.

The determination of the scope of [an] easement is a question in equity. Hardy v. Aiken, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006). On an appeal in an action in equity, the appellate court may find facts in accord with its views of the preponderance of the evidence. Grossheusch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). Thus, this court may reverse a factual finding by the trial court in such cases when the appellant satisfies [the court] the finding is against the greater weight of the evidence.

Campbell v. Carr, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001). Determining whether an easement is in gross or appurtenant is a question in equity because it involves the *extent of a grant of an easement.*

"The general rule is the character of an express easement is determined by the nature of the right and the intention of the parties creating it." Plott v. Justin Enters., 374 S.C. 504, 514, 649 S.E.2d 92, 96 (Ct. App. 2007). There can be no denying that nature of the right was access to the backwater in the cove. The intent is show by the clear unambiguous language of the grant. The language, however, clearly omits reference of the grantor's parcel. It does not show an intent to make the adjacent property (or a dock) subservient. The language omits reference of adjuncts like a pier, plank walk or dock. Noteworthy is that the grant does, in fact, reference a private road for ingress and egress. (R.p. 295 at ¶(4)). And, it explicitly defines Lot (16) being "on the backwater of Little Allison Creek". Id. The access to the backwater is referenced as "on which the above described property, (specifically Lot (16) now forming the Farrell tract), is located...." stemming from use of that certain private road as a means of ingress and egress from the County road to said lot. Id.

Generally, "[E]asements in gross are not favored by the courts, and an easement will never be presumed to be personal when it may fairly be construed as appurtenant to some other estate." Smith v. Comm'rs of Pub. Works of City of Charleston, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994) (citing 25 Am. Jur. 2d Easements &

Licenses, §13 (1966)). However, to be an easement appurtenant, ***all*** necessary elements must be present to prevent the easement from being merely an easement in gross. In distinguishing easements in gross vs. appurtenant easement, the Smith court, *supra*, held in differentiating the two easement types: "In contrast, an appurtenant easement *inheres* in the land, concerns the premises, *has one terminus on the land of the party claiming it*, and is essentially necessary to the enjoyment thereof. To "inhere" in the land of the party claiming it, it must exist and be *inseparable*. Black's Law Dictionary, Fifth edition. While water access may be inseparable, a permitted dock is not; a dock is capable of being severed. It is not land, but an adjunct of the property to which it attaches - - Duke's tract, specifically. An appurtenant easement also passes with the dominant estate upon conveyance, unlike an easement in gross. In construing a deed, the intention of the grantor (backwater access to the cove) must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. The intention of the grantors in the case sub judice must be found within the four corners of the 1965 deed. Windham v. Riddle, 381 S.C. 192, 672 S.E.2d 578 (2009).

Unless an easement has *all* the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross." Smith, *supra*. The missing element in the 1965 deed is the *failure to articulate a terminus*, instead citing general access to the backwater that Respondent argues is, *ipso facto*, the "terminus". However, the position is unmeritorious and compromised by the present-day boundary lines separating Respondents from the water. Respondent Farrell must cross "above"

Appellant's property via plank walk. Further, Respondents utilization of a dock that physically attaches to the lands of Duke, with boundaries accurately cited by the deed into Farrell, illustrates the lack of terminus upon the lands of the party now claiming it, namely the Respondents. Even assuming *arguendo*, that the rights granted were appurtenant, the easement has necessarily and thus impermissibly expanded in scope and burden under Respondents' extent of usage. "As a general rule, an easement appurtenant to one parcel of land (Respondents) may not be extended by the owner of the [alleged] dominate estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant. Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873 (2012) (citing Clemson Univ. v. First Provident Corp., 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) (*quoting* 25 Am. Jur. 2d Easements and Licenses 72 at 478). "As a general rule, an easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant." *Brown v. Voss,* 105 Wash.2d 366, 715 P.2d 514, 517 (1986) (citing *Heritage Standard Bank & Trust Co. v. Trs. of Schs.*, 84 Ill.App.3d 653, 40 Ill.Dec. 104, 405 N.E.2d 1196 (1980); *Kanefsky v. Dratch Constr. Co.*, 376 Pa. 188, 101 A.2d 923 (1954); *S.S. Kresge Co. of Mich. v. Winkelman Realty Co.*, 260 Wis. 372, 50 N.W.2d 920 (1952); 28 C.J.S. *Easements* § 92, at 772–73 (1941)). "If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement." *Id.* (citing *Wetmore v. Ladies of Loretto, Wheaton,* 73 Ill.App.2d 454, 220 N.E.2d 491 (1966); " '[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.' " *Clemson Univ. v.*

First Provident Corp., 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) (quoting 25 Am. Jur. 2d *Easements and Licenses* § 72 at 478). Although to the extent of the easement, the rights of the easement owner are paramount to those of the landowner, the easement owner's rights are not absolute but are limited, so the owners of the easement and the servient tenement may have reasonable enjoyment. *Id.* (citation omitted). The owner of an easement has all rights incident or necessary to its proper enjoyment, but nothing more. Id. As conceded by Respondent counsel, "*it is not clear from the Fewell deed that a pier is intended*" [R.p. 304 at 2-3]. The accuracy of this statement is confirmed by the author of the deed who likewise, today, is Respondents' trial and appeal counsel. (R.p.311 at 16-17). The deed specifically cites Plat Book D-18, Page 9, a plat prepared by Dwayne J. Jordan, SCRLS #20466. It is confirmed as accurate in discovery admissions. (R.p.71 at (1) – (13)).

The Smith case went further to illustrate applicability of plat language as applicable to easements: "Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted. Smith, *supra*. The plat at D-18 Page 9 is not, however, susceptible to but one conclusion. While the 1965 deed is un-ambiguous as to the grantors' intent – *access to the backwater "in the cove" and "on which the above described property is located"* - the four corners of the Farrell 2005 deed do reference, however, clearly defined boundary lines. Nor does it depict a dock or pier for necessity to access to the water, attaching to Respondents' tract. Hence, Appellant respectfully asserts it is error for the trial court to assume these matters in a light most favorable to the movant under alleged prescriptive use. The deed into Respondent is year 2005. Whether an appurtenant

easement inclusive of a wooden dock over the Dukes land and the water (which constitutes Duke's parcel) was essentially necessary to the enjoyment of the Bigham tract is questionable. If nothing else, it is "linked" by the trial court in defining the extent of the easement, viewed erroneously in favor of the movant. No record evidence exists to confirm the dock as an adjunct of the adjacent property owner(s) (Farrell) or a predecessor in title to Farrell.

Noteworthy is that Respondent's argument cites an *entirely different* plat. (Resp. Init. Brf. at 2, ¶(1), lines 2-3, citing a May 15, 2001 plat.); *compare* vesting deed (R.p. 181) and 8/4/2005 plat "Boundary Survey for Robert J. Edwards" at R.p.225) Oddly, this is not the plat attached and referenced by the August 12, 2005 vesting deed into Farrell. Id. The plat referenced by the Farrell deed is a *boundary survey*. It was prepared by Jordan Land Surveying August 4, 2005 (very close in date to the Farrell closing). It was prepared for Farrells' predecessor in title, Robert J. Edwards. (R.p. 183). It visually illustrates the cove back waters no longer have a terminus upon Respondent's land. The deed and plat are admitted, at accurate, by Respondents' discovery admissions. The deed and plat were authored by respondents' counsel, and filed of record in Record Book 7331 at Page 102 in York County. The necessity for Respondent to reach back in time and rely upon a 1965 deed language as an express grant of *alleged* appurtenant rights becomes apparent: Respondents' parcel is no longer on the backwater of the cove as described in the 1965 deed.

For this argument to be meritorious for Respondents the 1965 grant language (A.F. Fewell and Edward Fewell, Jr. to W.A. Bigham) must, as a matter of law, contain ***all*** (emphasis) elements necessary to be an appurtenant easement. It will otherwise be

characterized as an *easement in gross*. 25 Am. Jur. 2d Easements & Licenses §13 (1966). The 1965 grant is deficient in two (2) of the four (4) requirements for it to be capable of conveyance as appurtenant; e.g., (a) it must inhere in the land, and (b) must have one terminus upon the land of party claiming it. At the time of easement creation and 1965 grant A.F. Fewell and Edward Fewell, Jr. owned **both** tracts. This is stipulated fact in the case. They were the common grantor for both parcels. They continued to own the *alleged subservient estate* until conveying it to Appellant Dukes in March 1, 2002. Over the course of some thirty plus years they failed to describe the one terminus on the land conveyed to Respondents' predecessor in title, W.A. Bigham necessary to create an appurtenant easement. They likewise fail to declare as subservient their tract. The grantors' intention that can be gleaned from the deed's four corners necessarily shows an intent to give *access to the backwaters in the cove*, but the deed is devoid of language citing a terminus, expressly making subservient the grantors' tract, or illustrating water access as *ipso facto* a wooden dock or pier. Therefore, a wooden dock cannot possibly inhere to Respondents' parcel, only water access (or access to the backwater in the cove) can inhere as part of the land now owned by Respondent – assuming appurtenance. The deed is silent as to water access specifically thru the grantors' parcel, entirely, or a dock.

IV. THE APPURTENANT EASEMENT HAS NO DEFINED TERMINUS ON THE LAND OF THE PARTIES CLAIMING IT.

The only terminus identified by the 1965 grant is "*access to the backwater in the cove*." The relevant language from the deed of Farrell's predecessor in title is as follows:

> It being understood that the Grantee herein, His heirs and assigns, shall have access to the Backwater in the cove on which the above

> described property is located, subject to the rights of Wateree Power Company, or its successors, and other Grantees from the Grantors herein. , A.F. Fewell and Edward Fewell, Jr.

Black's Law Dictionary defines "terminus" as a boundary; *either a limit of space or time*. By way of illustration, the phrases "*terminus a quo*" and "*terminus ad quern*" as used, respectively, to designate the starting point and terminating point of a private driveway. The 1965 deed recognized the rights of then Wateree Power Company to raise and lower the waters of the cove, illustrating the inability to articulate a terminus capable of transfer through conveyance. Hence the personal nature of the right conveyed, subject to the rights of others including the common grantor. The deed does not expressly reference a dock or pier. The deed is silent as to the alleged servient estate, then owned by the exact same grantors that create the easement rights – A.F. Fewell and Edward Fewell, Jr. As such, grantee W.A. Bigham (Respondents' predecessor) could have only received an easement in gross, and not appurtenant easement right.

V. THE FEWELL DEED FAILED TO CREATE A DOMINANT AND SERVIENT ESTATE WHERE THE ELEMENTS OF AN APPURTENANT EASEMENT ARE NOT OTHERWISE PRESENT.

The 1965 deed is deficient in defining a terminus, or that the claimed right of access to backwaters in the cove are necessary via Appellant's property or a dock, specifically. At the time of creation, common grantors A. F. Fewell and Edward Fewell, Jr. own both tracts of land that formed the cove. It is undisputed they are the common grantor of both parcels. The grant to W. G. Bigham does not reference an intent of the grantor to subserviate their tract. By contrast, the intent which is gleaned from the four corners of the deed exhibits an intent to permit backwater access, upon which the above described property (i.e., the Farrell tract, *specifically*) is located. The deed is lacking in defining a

boundary other than the water, (reached by private drive) nor a wooden dock (permitted or not) that would form the basis of making the grantor's parcel subservient. As such, the grant fails being an appurtenant easement, and cannot therefore inhere in the land of the Respondent. The only method by which necessity is implied is the linking to the waterfront dock and its various incarnations as the manipulated extent described in the court's order, yet not depicted or described by the plat and vesting deed into Respondent. The language is devoid of language tying such matters to the Appellants' own property, then (1965) or now (2014). The trial court viewed this documentary evidence, and the grantor's intent, most favorable to the movant where no record evidence exists to establish origin or ownership of the dock. That said, Farrell's deed explicitly references plat at Book D-18 at Page 9 (not she Fisher-Sherer plat of May 15, 2001 referenced by the Respondents' initial brief at page 2). Respondent does not acquire title until August 12, 2005 by deed of Robert J. Edwards. The boundary lines conveyed (and accepted) by Respondent from Edwards are explicitly defined, and the dock attaches to Dukes' parcel TMS # 547-00-00-057. The dock is not a part of, and therefore cannot be the water access which inheres, in the land of the Respondent.

VI. THE RIGHT OF THE OWNERS OF THE ALLEGED APPURTENANT EASEMENT CANNOT MATERIALLY INCREASE THE BURDEN BY REPAIR OR REPLACING THE DOCK NOR CLAIM ADVERSE OR PRESCRIPTIVE USE THROUGH PERMITTED ITEMS OF PERSONAL PROPERTY.

It is stipulated fact in this case that the waterfront dock has undergone various incarnations, and that the grant from A.F. Fewell and Edward Fewell, Jr. to W.A. Bigham is devoid of language identifying a dock as access to the backwater in the cove. Viewing this evidence properly in a light most favorable to Appellant, it would confirm

that a dock or pier has (and remains) physically attached to the lands of the grantors, now the Appellant Earl Dukes. Assuming arguendo Respondent was granted appurtenant water access, his extensions of the dock or storing of personal property and watercraft on it would materially change or increase the burden. (Assuming, arguendo, that Appellants' property is the alleged subservient estate in the first instance). No such express language exists in the deed. To reiterate, assuming arguendo that the dock is the access which is reasonably necessary to the enjoyment of the Farrell property, which is questionable and denied by Dukes, it would only be appurtenant to the specific lands (not the person) of the party claiming it. It is undisputed in the case sub judice that the dock and pier exists attached, physically, to the lands of the Appellant, making it impossible that the permitted item of personal property inheres in the Respondents' tract as the necessity to enjoyment of the Respondents' Tract of land.

VII. THE EVIDENCE FAILS TO CLEARLY SHOW THE EXISTENCE OF AN EASEMENT BY PRESCRIPTION.

The Respondent accurately notes the language quoted from the Fewell deed, supra: "*the Grantee herein, his heirs and assigns, shall have access to the Backwater in the cove*" (R. p. 185). The conveyance does not, however, state that it is granting access to - *or across* - real property of the grantor(s). Nor does the grant reference a dock, irrespective of the dock's former size, location, enlargement, or extensions. The most direct evidence of the grantors' intent is a the 1965 deed, specifically. As noted by Respondent, generally the phrase "heirs and assigns" will not convert an easement in gross to an appurtenant easement when ***all*** of the elements of an appurtenant easement are not otherwise present. (R.p.300 at 12-17;24-25); (R.p.302 at 7-8); (R.p.303 8-9).

However, the language is relevant to the determination of the grantor's intent, especially as it concerns the property they retained now alleged to be subservient.

CONCLUSION

The 1965 Fewell deed is devoid of language identifying a terminus, boundary, limit, point, line, or express intent declaring subservient the grantor's remaining tract, formerly forming the whole of the waterfront "cove". It is clear from the vesting deed into Farrell (and the Plat cited therein – R.p.181-183) that the Farrell tract no longer *abuts the water.* As the cove divided by conveyance in 1965, the common grantors created a right of access to backwater upon which the Farrell property (*emphasis*) is situated. At the time of creation – the grantor(s) own both the alleged dominate and alleged servient estate, simultaneously. The 1965 grant to W.A. Bigham fails to articulate all elements of an appurtenant easement, namely water access that inhered in the land. It is silent as to specifically defined terminus upon the lands of the party now claiming appurtenant rights. As the grant failed to contain all elements necessary to be an easement appurtenant, it is an easement in gross. An easement in gross is a mere personal privilege once granted to W.A. Bigham to use the land of another, common grantors A.F. Fewell and Edward Fewell, Jr. The privilege was incapable of transfer. Nor could the privilege be extended to further burden an adjoining estate through adjuncts of property constituting a wooden dock or pier. An easement is the right to use the property of another for a specific purpose, not permanently occupy the property or its adjuncts. (R.p.299 at 24); (R.p.305 at 20); (R.p.333 at 10). Accordingly, neither Trespass or Nuisance claims can ever lie where an adjoining landowner has both been judicially declared owner of express easement by grant, or alternatively prescriptive usage, and

particularly where Respondent has owned the properly *only since* August 12, 2005. (R..p.182). The error is further compounded where Respondent is judicially declared the owner of adjuncts of non-real property extending into the waters, (dock), erroneously extending the scope or extent of the thing enjoyed –*e.g., access to backwaters of the cove.* The error by the court below in giving effect to the intent of the grantors is that the judicially defined intent contravenes a well settled principle of South Carolina law. The burden on the adjoining estate cannot be materially changed or have a new burden materially imposed upon it.

Appellant therefore seeks reversal and remand of the court's order.

Submitted this 27 day of July, 2015.

Respectfully submitted,

J. Cameron Halford, Esq.
Halford Niemiec & Freeman, L.L.P.
238 Rockmont Drive
Fort Mill, South Carolina 29708
803-547-6618
803-547-6638 fax

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. S. Jackson Kimball, III
Master in Equity

Appellate Case No. 2014-000730

EARL DUKES, ...Appellant,

vs.

KENNITH W. FARRELL, MARY C. FARRELL and
MARTIN BROGDONOVITCH, Defendants,

of whom
KENNITH W. FARREL and MARY C. FARRELL are the .....Respondents

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PROOF OF SERVICE

I hereby certify that I have served the Reply Brief of Appellant on the following counsel of record by depositing the same in the United States mail, with sufficient postage attached, properly addressed as follows, this 27h day of July, 2015.

John Martin Foster, Esq.
Post Office Box 106
Rock Hill, South Carolina 29731-6106
Attorney for Appellant

July 27, 2015

J. Cameron Halford
Halford Niemiec & Freeman, LLP
238 Rockmont Drive,
Fort Mill, South Carolina 29708