18394

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-in-Equity

James O. Spence, Master-in-Equity

Appellate Case No.: 2014-000741

David R. Gooldy ..... Respondent,

v.

The Storage Center – Platt Springs, LLC ..... Appellant,

PETITION FOR REHEARING

YOU WILL PLEASE TAKE NOTICE that the Respondent David R. Gooldy, by and through his undersigned attorneys, hereby Petition for Rehearing before the South Carolina Court of Appeals pursuant to Rule 240 of the South Carolina Rules of Civil Procedure.

Counsel for Respondent

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ATTORNEYS FOR RESPONDENT

Lexington, South Carolina
January 11, 2016

I.

The Master was correct in determining that Respondent was entitled to the presumption of an easement based on the deed's reference to the Loflin plat. The Court of Appeals initially relied on the prior decisions of *Lancaster* and *Bennett* to indicate there was not a presumption. See *Lancaster v. Smithco, Inc.*, 246 S.C. 464, 468, 144 S.E.2d 209, 211 (S.C. 1965); *Bennett v. Investors Title Insurance Co.*, 370 S.C. 578, 635 S.E.2d 649 (S.C. App. 2006). Those cases held that "a plat 'is not an index to encumbrances,' and a deed that references a plat 'for descriptive purposes does not incorporate a notation thereon as to an easement held by a third party so as to excluded such easement from the covenant against encumbrances in the absence of a clear intention that it so operate.'" *Lancaster*, at 469. The Court of Appeal's reliance on Lancaster is misplaced.

The Gooldy implied easement is not an encumbrance, and is not an easement to a third party. The fact situation in *Lancaster* and *Bennett* are not analogous to our set of facts. Our easement creates by law an additional benefit to the Gooldy property (access over a road); in contrast, the Department of Transportation right-of-way and the gas line easements considered in *Bennett* and *Lancaster* are burdens on the subject property. Id. Also, the easement owners in those cases are third parties, and not a grantee, as is the Respondent.

The Court in *Lancaster*, in no uncertain terms, identified the issue it sought to address as "whether the mere reference in the description of the property to the recorded plat, upon with the easement was shown, constitutes ***an exclusion of the easement from the covenant against encumbrances***." *Lancaster*, at 211. The reasoning of the Court in *Lancaster* which discounts a plat as an index of encumbrances, does so under the context that the incorporation of that plat and its easement notation ran contrary to covenant against encumbrances also at issue in

understanding the rights of the parties. Id. The utilization of that reasoning was specific to the circumstances where one document incorporated an encumbrance against the ***express*** intention to the contrary set forth by separate document. The Court of Appeals fails to read this reasoning in the context for which it was intended.

Here, there is not separate document demonstrating any intent other than a provision of an easement for purposes of a private roadway for the property. This intent was accounted for in the developer's efforts in 1984 (See Appellant's Exhibit GG), confirmed in the 1985 Loflin Plat (See paragraph 14 and 15 of Intent Proof section of Order of Reconsideration, pg. 76), and reiterated to every subsequent grantee for the past 30 years. The only evidence of intent to the contrary comes from Appellant's testimony years after the fact.

The Court of Appeals further argues that the ".68 acre" language on the face of the incorporated Plat in the Gooldy case confirms that the plat incorporation in the Gooldy deed, "references the Loflin Plat only for descriptive purposes – to show metes and bounds of the .68 acre tract – not for the purpose of granting an easement in favor of the .68 acre tract over an alleged road depicted outside the boundaries of the property." This determination is inconsistent with the holding in *McAllister*. *McAllister v. Smiley*, 301 S.C. 10, 389 S.E.2d 857 (S.C. 1989). The deed description in *McAllister* is identical to our deed description. The Gooldy deed describes the property as a .68 acre parcel on the face of the Gooldy Plat, and the McAllister Plat references the conveyed parcel as "Tract 2" on the face of the plat. Both deeds reference the plat in question. In *McAllister*, The Supreme Court case held the following:

> "Where a conveyance of land describes the parcel as bounded by a street designated in the conveyance, or refers to a map on which spaces for streets, parks, or other common uses are shown, but the conveyance says nothing about the creation of an easement or a dedication to public use, the conveyee of the land acquires an easement with respect to the street or the areas shown on the map." *Id.* at 857 (Emphasis added).

Respondent argues that *McAllister* stands for the proposition that even though the property in *McAllister* showed the property being conveyed as Tract 2 (as was the .68 entry in the Gooldy Plat) that designation does not defeat the creation of the implied easement in the matter before this Court. *McAllister* says the implied easement is created even though the conveyance says nothing else about the creation of an easement or a dedication to public use.

The *McAllister* case then cites numerous cases in Footnote 2 for the following proposition: "that such an easement inures to the benefit of the grantee and his successors in title. The Existence of the easement will be implied by law, unless it appears that the *grantor specifically intended otherwise*." 28 C.J.S Easements, §§ 39 and 40 (1941) (emphasis added). As stated in the *McAllister* case, there is no evidence whatsoever that the grantor intended to negate the creation of the easement claimed by the grantee (even though the property is described as "Tract 2").

II.

The Court of Appeals found that there was no evidence to support the Master's conclusion that Congaree and Loflin intended to create an easement for the benefit of the Respondent. Respondent respectfully argues that there is evidence supporting the Master's conclusion.

McAllister v. Smiley negates the contention that the ".68 acre" notation on the Loflin Plat incorporates the plat only for descriptive purposes, and therefore there is a presumption of the creation of an implied easement favoring Respondent.

The language in the McAllister that indicates that implied easement is created even though the conveyance says nothing about a creation of an easement, and the easement will be

implied unless it appears that the Grantor *specifically intended otherwise,* creates at least an ambiguity as to the intent of the phrase ".68 acres". The ambiguity should be construed liberally, and most strongly in favor of Respondent, as subsequent grantee of Loflin. *Myrtle Beach Lumber Company v. Willoughby,* 276 S.C. 3, 274 S.E. 2d 423.

The surveyor who prepared the plat in this case was privy to the development efforts of Appellant and Congaree, and the plans presented to Lexington County for approval included a road identical in location to the road set forth in the Loflin plat. A surveyor is obligated to indicate a private road when there is physical evidence or recorded documents suggesting the existence of a road. (Paragraph 4 of Order to Appellant's Motion for Reconsideration). This surveyor was in the best position to know whether a notation of a road was necessary. He demonstrates his knowledge of the road by creation of the January 1984 Plat included in the county approval process, in the Loflin Plat created December 10, 1985, in the revised version of the Loflin Plat dated August 12, 1986, and the recorded Loflin Plat dated September 11, 1986. It bears mentioning that the spokesperson in this article cited by the Master was the expert survey witness for the Defendant in the case. The reasonable inference here, as is supported by evidence at trial, is that the surveyor showed the road because the surveyor knew the road to be part of the included plans of the developer and added it based on his efforts for the documents submitted to the county for approval just six months earlier. The consequences of McGee's failure to correct this inclusion, if in fact his intent was not to grant the easement, should fall upon Congaree and Appellate, not the Respondent.

The Congaree representative testifies that he never discussed the road with Loflin or Collingwood, his surveyor. As the Master noted, Congaree never testified about "when or why

or how or to whom he communicated his purported change of mind about the road." (Paragraph 17 of Intent Proof Section of Order on Reconsideration, page 26 of Appeal Transcript.)

McGee, as the Congaree representative, testified that he did see the Plat, and the deed for Loflin, and it was executed by him on behalf of Congaree (*Id.*, at Paragraph 22, page 27.) "The general rule is that if a person signs a document, he or she is bound under the law to know the contents of the document." *Banks v. Evans,* 347 Ark. 383, 64 S.W.3d 746 (2002). "Further, one who signs a contract, after an opportunity to examine it, cannot be heard to say that he or she did not know what it contained." *Dobson v. Abercrombie,* 212 Ark. 918, 208 S.W.2d 433 (1948).

As to the existence of the road itself, Respondent would denote the following: "It is not essential to the validity of a grant of an easement that it be described by metes and bounds or by figures given indefinite dimensions of the easement." 28 A *C.J.S. Easements* S 54 (1996). "Equity Courts have the ability to locate width and location of a road and the determination of the extent of an easement is equitable." *Plott v. Justin Enterprises,* 376 S.C. 504, 649 S.E.2d 95 (1987). "[G]rantees and any subsequent purchasers acquired the right to use [their] easement *to the full extent that it is indicated in the plat." Murrells Inlet Cop v. Ward,* 378 S.C. 225, 662 S.E.2d 452, 457 (S.C.App., 2008) (emphasis added). The Supreme Court of South Carolina has also held that even if an easement for a road goes unused or opened as such, the easement endures an argument of abandonment. See *Walker v. Guignard,* 293 S.C. 247, 359 S.E. 2d 528 (S.C. App. 1987). Here, the road in question was set forth in the Plat and used accordingly for thirty years. It, too, should certainly endure.

"The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some of characteristic demonstrate that the objective intention of the parties was to create an easement." *Inlet Harbour,* at 92. "In

evaluating the parties' intent, we note, 'the best evidence of the parties' intention are the facts and circumstances surrounding the conveyance." *Id.*, at 93. The objective intention of the parties should be looked at, at the time of conveyance, not in present tense retrospection. Using this standard as cited by the Court of Appeals, the numbered arguments above would establish there is significant evidence supporting the decision of the Master as to the intent issue.

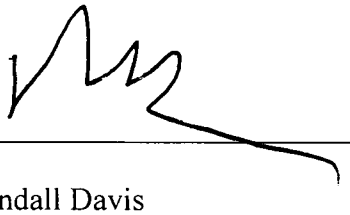
III.

The equitable principle of estoppel prevents Appellant's argument denying that an easement was created by implication. There is a history of the actual use of the 50 foot road denoted on the Loflin Plat. The affidavit of James T. Loflin, the original grantee, indicates in general substance that he did no think he had an easement on the 50 foot road area. Nevertheless, he stated in paragraph 3 of his affidavit "[B]eginning after I acquired the property, *I used the property that abutted the southern side of my property* as a driveway. (emphasis added). Therein, while he supposedly asserts a legal conclusion that he did not possess an easement, Loflin immediately and at all times afterwards used the road area as access to his property, consistent with the plat description. Appellant's plat of its property, Appellant's Exhibit J, again shows parking and gravel drive encroachment on the southern side of Appellant's property; Plat dated October 27, 2006. Respondent relied on "50 foot Road" area as access, and used it an his access until the barricading began in July, 2009. (Transcript, pg. 4). Respondent's Exhibit 3, shows road area as a open flat area. (Transcript, pg. 378). Respondent's Exhibit 11 shows chain of title to subject property with same legal description used in each deed. (Transcript, pg. 379)

Subsequent grantees of the Loflin conveyance are entitled to rely on the actions of the grantor on the creation of the easement. As cited in *Murrells Inlet* and Footnote 2 of the *McAllister* case, the initial grantee, and any subsequent purchasers acquired the right to use this

easement to the full extent that is indicated in the plat. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 662 S.E.2d 452, 457 (S.C. App. 2008); *McAllister*, at 863. An issue of unfairness develops in denying Respondent the right to full use and enjoyment of the easement. The subsequent grantees have a right to rely upon the public record as to the chain of title to the property and to the easements.

Respectfully submitted,



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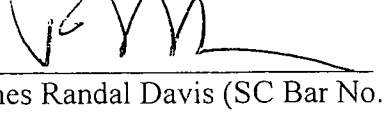
PROOF OF SERVICE

I hereby certify that I have served the Respondent's Petition for Rehearing on the Appellant, by depositing a copy in the United States Mail, postage prepaid, on the 11th day of January, 2016, addressed to its attorneys, Robert E. Stepp and Bess J. DuRant, Post Office Box 11499, Columbia, SC 29211.

Counsel for Respondent



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