THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Published Opinion No. 5366
(S.C.Ct. App. filed December 9, 2015)

David R. Gooldy .....Petitioner

vs.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that there was a published opinion of the Court of Appeals in this matter filed December 9, 2015 and the Petition for Rehearing by Petitioner was denied by the Court of Appeals on February 19, 2016.

QUESTIONS PRESENTED

I. BY CONCLUDING THAT PETITIONER GOOLDY WAS NOT ENTITLED TO THE PRESUMPTION OF AN EASEMENT BASED ON HIS DEED'S REFERENCE TO THE LOFLIN PLAT, THE SOUTH CAROLINA COURT OF APPEALS CONTRADICTS AND MISAPPLIES SOUTH CAROLINA SUPREME COURT CASE LAW AS TO CREATION OF IMPLIED EASEMENT.

II. BY CONCLUDING THAT THERE WAS NO EVIDENCE SUPPORTING THAT THE INITIAL CONVEYANCE OF THE 0.68 ACRE, MORE OR LESS, DEMONSTRATED THE GRANTOR'S INTENT TO CREATE AN EASEMENT, THE SOUTH CAROLINA COURT OF APPEALS MISAPPLIED THE STANDARD OF REVIEW OF AN APPELLANT COURT IN A CASE WHICH HAS THE ISSUE OF THE EXISTENCE OF AN EASEMENT.

STATEMENT OF THE CASE

Petitioner David R. Goodly (or "Petitioner") and Respondent The Storage Center – Platt Springs, LLC ("The Storage Center" or "Respondent") are owners of adjacent property located on South Lake Drive also known as SC Highway No., 6 (hereinafter referred to as " South Lake Drive") in Lexington County, South Carolina.

On January 24, 2002 Petitioner purchased his Property with improvements thereon. R. p. 103, lines 10-16. The deed to the Petitioner's property referenced a plat which showed a fifty (50') foot road abutting Petitioner's property on the southern side. *Id.*, p. 25, lines 14-15.

On September 27, 2007, Respondent purchased the abutting property (7.35 acres) to the Petitioner's property. Respondent's property bordered the Petitioner's property on the northern, western and southern sides. Defendants Exhibits C & J, R. pp. 392, 396.

After Respondent purchased the 7.35 acres tract, a dispute arose between Petitioner and Respondent as to the right of the Petitioner to have access for ingress/egress over the fifty (50') foot road as shown on the plat referenced in the Petitioner's deed. After an attempted resolution of the access issue by the parties, Respondent installed a metal post – wire cable barricade blocking Petitioner's access over the fifty (50') foot road. R. p. 350, Lines 17-19.

On February 1, 2010, Petitioner filed a lawsuit against The Storage Center. (Compl.) In his lawsuit, Petitioner asserted four causes of action: (1) Declaratory Judgment, Easement by Implication or Estoppel, (2) Declaratory Judgment, Easement by Prescription, (3) Estoppel – Temporary and Permanent Injunctive Relief, and (4) Negligence/Gross Negligence/Intentional Act, Denial of Property Rights. Petitioner argues that he is entitled to an easement over The Storage Center's property because his deed, along with the deeds of his predecessor-in-title, reference a plat which showed a fifty (50') foot road abutting Petitioner's property on the southern side. Complaint R. pp. 37-38.

On February 25, 2010, Petitioner filed a motion for preliminary injunction, seeking an order preventing The Storage Center from interfering with his access to the driveway. R. p. 49. On April 23, 2010, the circuit court denied Petitioner's request. *Id.*, p. 1. The circuit court also referred this matter to the Master-in-Equity ("Master"), upon the consent of both parties.

In response to Petitioner's Complaint, The Storage Center filed an answer, in which it asserted several affirmative defenses and pled a counterclaim against Petitioner for encroaching and trespassing on The Storage Center's property. *Id.*, p. 42.

Specifically, The Storage Center denied that any road ever existed and also denied that Petitioner had any easement rights over property owned by The Storage Center. *Id.*

Petitioner and Respondent both filed motions for summary judgment. *See id.*, pp. 51-52. Notice of Mot. & Motion for Summ. J. of Plaintiff, dated February 1, 2011; *id.* pp. 54-57, Notice of Mot. & Motion for Summ. J. of Respondent dated January 31, 2011. The Master denied the cross motions for summary judgment because there were material issues of fact. *Id.*, p. 2.

On October 25, 2012, the case was tried before the Master. The Master granted a directed verdict to The Storage Center with respect to Petitioner's claim for easement by prescription because Petitioner failed to establish use that was adverse or under a claim of right for twenty years. *Id.*, p. 193, line 3 to p. 203, line 19. On July 29, 2013, the Master issued his order, in which he found and concluded (1) that Petitioner has access over the "road that borders the Petitioner's property on the southern side"; (2) that Petitioner is entitled to $2,500 for lost income when he had to construct an alternate makeshift entrance; and (3) that Petitioner is entitled to $7,500 in punitive damages because The Storage Center prevented Petitioner access to the strip of land. *Id.*, pp. 3-22.

The Storage Center timely filed its motion to alter or amend the judgment on August 12, 2013. *Id.*, pp. 74-83. In its motion, The Storage Center set out numerous grounds as to why the Master should reconsider the Trial Order. On November 15, 2013, the Master heard The Storage Center's motion. *Id.*, pp. 407-452. On March 13, 2014, the Master issued its Order denying The Storage Center's motion to reconsider. *Id.*, pp. 23-32.

Respondent filed its Notice of Appeal to the South Carolina Court of Appeals on April 9, 2014. Oral arguments were presented on November 4, 2015. By Order dated

December 9, 2015, the South Carolina Court of Appeals reversed the decision of the Master indicating the following reasons:

> "We find the Master erred in determining Gooldy was entitled to the presumption of an easement based on the deed's reference to the Loflin plat."
>
> "We find the Master also erred in determining the evidence surrounding the initial conveyance of the .68 acre tract demonstrated the parties' intent to create an easement."

On January 11, 2016, Petition for Rehearing was filed by the Petitioner. By Order dated February 19, 2016, Petitioner's Petition for Rehearing was denied.

STATEMENT OF FACTS
(Facts Prior to Litigation)

January 24, 2002 Petitioner purchased the subject property, with improvements thereon, located on South Lake Drive (also known as S.C. Highway 6) in Lexington County. Petitioner has used the property for his chiropractic practice. R. p. 103, lines 5-11. The legal description for the Petitioner's property read as follows:

> All those certain piece, parcel of lot of land, with all improvements thereon, situate, lying and being on the western side of S.C. Highway No. 6. approximately 580 feet south of the intersection of Platt Springs Road and S.C. Highway No. 6, near the town of Lexington, in the County of Lexington, State of South Carolina, and being shown and designated on a plat prepared for James T. Loflin by Robert E. Collingwood, Jr., Reg. Surveyor, dated December 10, 1985, and recorded in the Office of the RMC for Lexington County in Plat Book 212G at page 204. The within described property contains 0.68 acre more or less.

R. p. 375, Plaintiff's Exhibit 1.

The deed to the Petitioner's property referenced a plat which showed a fifty (50') foot road abutting Petitioner's property on the southern side and on the east by S.C. Highway 6. *Id.*, p. 109, lines 14-16; *id.*, p. 377, Plaintiff's Exhibit 2. The seller's representative told Petitioner at the time of purchase that this fifty (50') foot road was the

access from S.C. Highway 6 to the purchaser's property. *Id.*, p. 114, lines 1-10. Petitioner used this access as his only access to his property until the barricading of the access by the Respondent in July 2009. *Id.*, p. 114, lines 19-21. Petitioner described the fifty (50') foot road area as having an asphalt apron coming off S.C. Highway 6 covering a culvert, followed by a gravel area on the fifty (50') foot road area, which was flat and had been maintained and went to the back of the Petitioner's property. *Id.*, p. 107, line 22 to p. 108, line 3. There was a small hedge of trees lying between the fifty (50') foot road area and an adjoining subdivision by the name of Westchester Estates. *Id.*, p. 111, lines 10-18.

On September 27, 2007, Respondent purchased the abutting property (7.35 acres) to the Petitioner's property (Respondent's property bordered the Petitioner's property on the northern, western and southern sides. Both properties bordered S.C. Highway 6. Respondent's property wrapped like a horseshoe around three sides of the Petitioner's property.). *Id.*, pp. 392-393, 396-398, Defendant's Exhibits C & J.

Petitioner's and Respondent's properties both have a common grantor, Congaree Associates, a South Carolina Limited Partnership (hereinafter referred to as "Congaree"). *Id.*, pp. 379-391, Plaintiff's Exhibit 11. Petitioner's property was subdivided from a larger tract owned by Congaree. R. p. 375, Plaintiff's Exhibit 1 (See Derivation). Congaree first conveyed the Petitioner's property to James T. Loflin by deed dated September 15, 1986, and recorded in the Register of Deeds Office for Lexington County on September 23, 1986 in Book 837 at Page 36. *Id.*, p. 394, Defendant's Exhibit D. The legal description in the Loflin deed contains the identical description as the Petitioner's deed's legal description, as does each deed in the chain-of-title to the Petitioner's

property -- all of the deeds in the chain-of-title reference the same plat referenced in Petitioner's deed. *Id.*, pp. 379-391, Plaintiff's Exhibit 11.

The Petitioner's deed is in the chain-of-title of the Respondent's property. *Id.* After Respondent purchased the 7.35 acres tract, Respondent's representatives notified the Petitioner of their belief that the Petitioner did not have the right to have access for ingress/egress over the fifty (50') foot road as shown on the plat referenced in the Petitioner's deed, which the Petitioner disputed. *Id.*, p. 117, lines 11-25.

After an attempted resolution of the access issue by the parties, Respondent installed two metal posts in the fifty (50') foot road connected by a wire cable with "No Trespassing" signs attached to the wire cable blocking Petitioner's access over the fifty (50') foot road from S.C. Highway 6. *Id.*, p. 124, line 25 to p. 125, line 16. After Respondent blocked his access, Petitioner created a "makeshift" entrance on the northern side of his property, buying material and equipment, and doing the work himself to establish the alternate access for his patients. *Id.*, p. 125, line 23-25; p. 133, lines 1-19.

Thereafter, this litigation ensued.

Evidence as to Intent of Congaree Associates Deed to James Loflin, Predecessor-in-Title to Petitioner

Carroll McGee, general partner of Congaree Associates, a South Carolina Limited Partnership, testified that he was an experienced real estate broker for a period of 50 years. *Id.*, p. 204, lines 16-18. Congaree had been formed by the McGee organization in the early 1980's. Congaree purchased the 500 acre tract of land that contained the Petitioner and Respondent's properties and fifty (50') foot road in dispute. *Id.*, p. 205, lines 13-16; p. 206, lines 1-15.

In August 1983, Congaree recorded a subdivision plat for Westchester Phase I, containing 13 lots, which borders S.C. Highway 6. This property is immediately adjacent

to the fifty (50') foot road which borders the Petitioner's property on the southern side. (Robert E. Collingwood (hereinafter referred to as "Collingwood") was the surveyor for this plat. *Id.*, pp. 396-398, Defendant's Exhibit J.

On January 27, 1984, Westchester Phase II, prepared for Congaree, which is a second portion of Westchester Subdivision and borders Phase I, shows the disputed fifty (50') foot road on the plat for Westchester Phase II. Collingwood also prepared this plat for Congaree, which was submitted to the Lexington County Planning Commission for approval. *Id.*, p. 405, Defendant's Exhibit GG. The fifty (50') foot road abuts both Lot 13 of Westchester Phase I and what later becomes Petitioner/predecessor's property. *Id.*, pp. 396-398, Defendant's Exhibit J.

On July 15, 1985, Mike Chris, Lexington County Planning Commission, sends a letter giving provisional County approval for the proposed platted Phase II of Westchester Subdivision prepared by Collingwood. The letter contained the standard county requirements for private road subdivisions. *Id.*, p. 406, Defendant's Exhibit KK.

On December 10, 1985, James T. Loflin (Petitioner's predecessor-in-title), who was a McGee employee/agent, has a plat prepared for the purpose of living on the corner lot (Petitioner's property) next to the fifty (50') foot road entrance to proposed subdivision in a model log cabin home. Collingwood was the surveyor of the subject property. *Id.*, p. 377, Plaintiff's Exhibit 2.

On April 4, 1986, Collingwood revised the plat to show the proposed dwelling, well, septic tank and field. *Id.* Thereafter, on August 12, 1986, Collingwood again revises said plat to indicate a twenty (20') foot strip along the northern boundary of the lot. *Id.*

On September 11, 1986, Congaree, by Carroll McGee as its general partner, conveys the lot to Loflin, his employee agent, by deed incorporating the plat showing the fifty (50') foot road with plat prepared by the surveyor Collingwood. *Id.*, 379-391, Plaintiff's Exhibit 11.

McGee testified he never discussed the road with Loflin or Collingwood or anyone else. *Id.*, p. 209, lines 14-18. McGee testified he never intended to build Phase II road shown on proposed plat given conditional approval by the Planning Commission because it costs too much. *Id.* McGee also testified that he assumed he did review the plat that was used in the Loflin deed prior to the conveyance to Mr. Loflin. *Id.*, p. 236, lines 21-25. McGee admits that Collingwood who prepared the plat for Westchester Phase II would have known when he prepared the plat for the Petitioner's predecessor-in-title (Loflin) about the fifty (50') foot road area on the Loflin plat was the same as the fifty (50') foot road on the Westchester Phase II plat. *Id.*, p. 236, lines 1-11. McGee admits Collingwood had something to go by to show the road area on the Loflin plat, that being the proposed, conditionally approved, road on the Westchester Phase II plat. *Id.*

McGee testified he did see the plat and the deed for Loflin and it was executed by him for Congaree. *Id.*, p. 236, lines 21-25. McGee confirms there was no affirmative action by anyone on behalf of Congaree that gave any information to the Petitioner to not use that area that he had been using since the purchase of the property for his access. *Id.*, p. 241, lines 13-19.

ARGUMENTS

Pursuant to Rule 242, SCAR, the Petitioner respectfully moves for a Writ of Certiorari and for this Court to review and reverse the Court of Appeals' Opinion No. 5366, which reversed the Master's decision and ruling on several issues. Review should

be granted because of the special and important issues raised by the Opinion's ruling below. The Opinion below should be reviewed because the ruling is in direct contraction with existing South Carolina Supreme Court case law as to implied easements and misapplied *Bennett v. Investors Title Ins. Co.*, 370 S.C. 561, 575, 635 S.E.2d 660, 668 (Ct. App. 2006) and *Lancaster v. Smithco, Inc.*, 246 S.C. 464, 469, 144 S.E.2d 209, 211 (1965) to implied easement case law. Lastly, the Opinion misapplies the standard of review of the Court of Appeals in that there was substantial evidence supporting the factual finding of the Master that the original grantor intended to create an implied easement in the original conveyance of the Petitioner's property.

I. Whether By concluding that the Master erred in determining Gooldy was entitled to the presumption of an easement based on the deed's reference to the Loflin plat based on the language in the Loflin deed *describing* the property as containing 0.68 acres, more or less, relying on *Bennett v. Investors Title Ins. Co.*, 370 S.C. 561, 575, 635 S.E.2d 660, 668 (Ct. App. 2006) and *Lancaster v. Smithco, Inc.*, 246 S.C. 464, 469, 144 S.E.2d 209, 211 (1965).

The Master was correct in determining that Petitioner 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, 469, 144 S.E.2d 209, 211 (1965); *Bennett v. Investors Title Ins. Co.*, 370 S.C. 561, 575, 635 S.E.2d 660, 668 (Ct. 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 exclude such easement from the covenant against encumbrances in the absence of a clear intention that is 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 Petitioner.

Bennett did not hold that the right of way did not exist. The right of way was a SCDOT right of way in the prior chain of title. *Bennett* did not hold that there was no easement as shown on the plat rather that the width as portrayed on the incorporated plat was wrong.

As opposed to the pre-existing SCDOT easement in the *Bennett* case, here the plat in question in this case incorporated the easement that was created by the grantor as he deeded the property to the grantee.

The Court of Appeals further decided 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 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 assed).

Petitioner 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* states the implied easement is created even though the conveyances state 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. Concluding that the Master also erred in determining the evidence supporting the initial conveyance of the 0.68 acre tract demonstrated the party's intent to create an easement

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 Petitioner. Petitioner respectfully argues that there is substantial 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 Petitioner.

The language in *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 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 Respondent 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 Respondent, not the Petitioner.

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).

In the Master's original Order and the Order denying Respondent's Motion for Reconsideration, the Master chronologically outlined the factors showing the objective intent of the original grantor to create an easement. Order, P 6-8; and Order Denying Motion, P. 24 - 28

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). "[Grantees 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 substantial evidence supporting the decision of the Master as to the intent issue.

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the Petition for a Writ of Certiorari and conclude that the Master was correct in determining Gooldy was entitled to the presumption of an easement based on the deed's reference to the Loflin plat; and also that the Master was correct in determining the evidence supporting the initial conveyance of the 0.68 acre tract demonstrated the party's intent to create an easement.

Respectfully submitted,

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March 21, 2016

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PROOF OF SERVICE

I hereby certify that I have served the **PETITION FOR WRIT OF CERTIORARI and APPENDIX** on the Respondent, by hand delivering a copy of the same on the 21st day of March, 2016, to Robert E. Stepp, Esquire and Bess J. DuRant, Esquire, Sowell Gray Stepp & Laffitte, L.L.C., 1310 Gasden Street, Post Office Box 11449, Columbia, South Carolina 29211.

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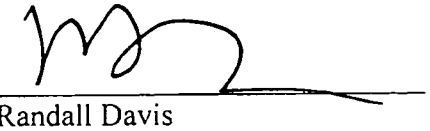

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