

State of South Carolina)
 County of Beaufort)
)
 Julia Tompkins Ewing,)
 Plaintiff)
 vs.)
)
 Keith A. Guest and Stephanie)
 C. Guest and Pleasant Point)
 Property Owners Association,)
 Inc.)
 Defendants)

Court of Common Pleas
 Case No. 2015-CP-07-1931

**Special Referee's Supplemental
 Second Final Order Aug 8, 2016**

RECEIVED

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SC Court of Appeals

2016 AUG 12 PM 4:51
 STATE AND COUNTY CLERK
 BEAUFORT COUNTY, S.C.

As background, this case was referred to me to become the Special Referee, by both the consent of the parties and by Circuit Court Order. I held a hearing on Jan 20, 2016; the Plaintiff and the Defendants and their respective counsel were all present and each side presented evidence and exhibits and arguments.

On or about March 25, 2016, I filed of record an Original Order (Hereinafter "First Final Order") resolving the case. Subsequently, both sides timely filed Motions to Reconsider. On May 20, 2016, I held a second hearing on the Post-Trial Motions, where again each side presented a variety of arguments and introduced a number of exhibits.

Thereafter, Plaintiff's filed a "Memorandum with Regard to Post-Trial Motions" on or about June 27, 2016 and then the Defendants, Keith A. Guest and Stephanie C. Guest filed a "Post-Trial Brief of Defendants, Keith and Stephanie Guest" on or about July 22, 2016. All motions were filed in a timely manner as I granted some minor extensions of time due to various circumstances that, at least in my opinion, fully warranted brief extensions of time under the specific circumstances.

As one would fully expect, because this case has excellent lawyers on both sides of the case, the post-trial memorandums by each side are very well briefed, well-written, and well-argued. I commend the lawyers in this case for being very cordial with each other, highly professional at all-times, and very skilled and competent at their craft throughout these proceedings. It has been a professional and personal pleasure to be a Special Referee.

SAS, Pg 1

I have now had the opportunity to carefully review the arguments and evidence introduced at the May 20th hearing and to read all the Memorandums of Law and exhibits referenced by both sides and this Supplemental Order (Hereinafter the "Second Final Order") follows.

This Second Final Order is designed to discuss and explain various aspects of my prior First Order and it also addresses some new arguments made by each party¹ at the May 20, 2016 hearing and in their subsequent Memorandums of Law.

Turning to those arguments and concerns:

1. The Defendants Guests argue that Lot 1's true intended access was exclusively from Sussex Court. While I think this argument is well done, I respectfully disagree. I continue to find, as I did in the First Order, that there is credible evidence in the record --- that as depicted on the original subdivision plat of the entire subdivision --- an easement existed, as claimed by the Plaintiff. See, merely as one of several examples in support of this conclusion the uncontested testimony of a licensed land surveyor called by the Plaintiff in support of her position. I also note that the Plaintiff testified that access was never through Sussex Court. See Trial Transcript, Pgs. 113 and 114.

2. The Defendants also argue that the grant to General Tompkins of an easement in 1974 changed what the Plaintiffs had been using at the time of their purchase and was, in effect, a replacement or a substitute for the easement created by the original subdivision plat. Again, I continue to disagree with this argument. In general, property rights are fixed at the time of purchase. And, when something is intended to substitute or replace a prior vested existing property right, words expressing that very specific intent are needed in any subsequent document. In the absence of such specific intent, and words clearly hinting that a substitution was intended, I find that intent and the specific words needed lacking in the 1974 trapezoid easement, and thus I continue to agree with the Plaintiff that the 1974 easement was not ever intended to be a true substitute for the original easement².

¹ Pleasant Point Property Owners Association, Inc. is still very much a part of this case, should they choose to further participate hereafter on appeal but they were not present at the post-trial May 20, 2016 hearing.

² Of course, the easements are vastly different. One is merely a life estate while the other appears to be an easement appurtenant that runs with the land and runs to subsequent owners and purchasers.

3. The Defendants Guests next argue that a number of subsequent plats do not show the original easement found on the original plat. There is no question but the Defendants arguments on this point are factually accurate – there are a number of subsequent plats that do not show the road.

3a. But, the question of law that is then raised, deals with parties, like the Plaintiffs, who continue to reply upon an original plat which they initially acquired their property. Can subsequent plats, by others that the Plaintiffs have not been parties to or agreed with or consented to dislodge and displace a prior property right that a purchaser acquired in their initial purchase? In some instances, the answer to this question may be “yes” based upon express mutual consent by all relevant parties, including the original purchaser, or by adverse possession, or by subsequent acts of eminent domain, or so on. However, is there anything in this specific record that qualifies to divest and displace a prior vested property right? I don’t find that merely subsequent plats placed on the record **by others** without the prior person’s consent has that legal effect.

3b. So, although the number of subsequent plats that no longer show the former road is admittedly of some concern, it is simply – by itself – insufficient in my own mind to displace a prior vested property right. If I am wrong (and I certainly do not claim to always be right in all property matters) an appellate court will undoubtedly correct my error(s).

4. Did I, as claimed by the Defendant’s excellent counsel, make a further error by **sua sponte** granting the Plaintiff’s a prescriptive easement that was neither pled nor proven? First, if I did in fact do this and further if it is a true error, I genuinely and personally apologize to the Defendants and their counsel and I would immediately correct the First Order by ordering in this Second Order the deletion of the entire discussion of prescriptive rights found in the First Order. But, I am not at all sure that this act really was done by me in a sua sponte manner for all of the following reasons:

4a. First, I am absolutely certain that I did not come up with this argument on my own. I very carefully read and reviewed the closing arguments in the original trial (by both sides) and I immediately noticed the argument, albeit a brief one, by the Plaintiff’s counsel, Mr. Tedder, that there was “probably a prescriptive easement” Trial Hearing, Closing Argument Pg. 261: 13. The argument about prescriptive easement, in short, came from the Plaintiffs not this Special Referee.

4b. I also reviewed the Beaufort County Court Records concerning this case filed on the Internet. I found and read the Summon and Complaint in this case and I noticed that the Plaintiff's Complaint pled, as its very First Cause of Action, a Declaratory Judgment (See Plaintiff Original Complaint, Paragraph 33). I find of further great significance that the Defendant Guests, in their filed Answer and Counterclaim, admitted the allegations found in Plaintiff's paragraph 33 found in her Complaint and that the Defendants actually "join[ed] in the request that this Court declare the respective rights of the parties." See Defendants First Defense to the First Cause of Action. Defendants Answer and Counterclaim, Pg. 5, Paragraph 33. This also strongly supports that this is not a Sue Sponte act by this special Referee but an act taken with the express consent of both parties.

4c. Am Jur.2d, Declaratory Judgments, Section 153 states, "that declaratory judgments are commonly used in resolving controversies over easements." And that "a declaratory judgment may be brought to determine right to an easement or determine the relative rights of the parties affected by an easement." Id. at Section 153. This is what the First Order did and it further undercuts the Defendants argument.

4d. In summary, this issue was raised in the pleadings and both sides agreed and mutually requested for a Court to determine their respective property rights. Moreover, as for the scope of this agreement, it is not only common place to ask for declaratory relief to determine the scope and rights and duties of easement holders, but this issue was specifically discussed by one of the parties in her attorneys closing arguments at the conclusion of the trial hearing (without objection at that time). Collectively, when you place 4a / 4b / 4c together, I decline to find that this was an issue improperly raised as an inappropriate sua sponte action. Naturally, if an Appellate Court should disagree, I very humbly apologize to all concerned.

5. The follow-up question is whether or not a prescriptive easement was actually proven by the Plaintiff. I find from my own view of the evidence that the 20 years of continuous use, under a claim of right, along with all the other necessary elements of a prescriptive easement were all well-proven on the record. At the very same time, I am fully and totally aware that an Appellate Court may take a different view than my own.

In this regard, I think it is appropriate to specifically address the Defendants arguments dealing with Mr. Cloide Branning who testified on the Defendant's behalf. Although I do not personally know Mr. Branning, his testimony under oath

has every appearance of being delivered in all good faith. It clearly merits consideration. At the very same time, he did acknowledge on cross examination that he moved away from the property in 1979 and had no personal knowledge of anything that may have occurred thereafter. See Trial Transcript, Pg. 174:1-8. ("I don't know what happened" referring to all events after 1979).

5a. Between 1979 and 2015 is an extremely long period of time, far beyond the 20 years necessary for a prescriptive easement. The Plaintiff testified directly about her extensive contacts with the property during this very time period and testified again, in apparent good faith and under oath, as to her personal contacts with the property since she was 18 years of age. On the whole, just like Mr. Branning, her testimony appears to be highly logical, reasonable, and in good faith.

In short, if we have two credible witnesses (which it appears to me that we do) and if one does have to weigh a witness who admitted he lacked all personal knowledge of everything that may have happened after 1979 with another witness who, without apparent contradiction from any other witness in the record, appears to have had very extensive personal knowledge far beyond the necessary time period for a prescriptive easement, I can find that these two witnesses do not necessarily contradict each other and I can accept their respective testimony and easily reconcile what they say under the facts and circumstances of this case.

5b. In short, applying the standard demanded by the South Carolina Supreme Court in prescriptive easement cases found in the recent Bundy v. Shirley case, in light of the Plaintiff's uncontested testimony about her parents and then her use of the property for almost 36 consecutive years, long after Mr. Branning left the scene, I still continue to find and conclude that Plaintiff has proven a prescriptive easement.

5c. Accordingly, I decline to withdraw that part of the First Order that finds a prescriptive easement.

6. Other questions raised by the Post-Trial Motions. With regard to other matters that the parties have raised in their respective post-trial motions, I fully and totally agree with the Plaintiff's counsels comment about the rights (or much more accurately the lack of rights) of non-parties and the HOA in the matters at issue here. I have made no determinations of any kind that anyone else has any rights at all in this easement. Let's leave it that – and reserve for future litigation, if any is ever needed, the rights of others. This is an easement appurtenant with a terminus

on one tract but which crosses another tract and it is limited to access. There is no issue of fact or law concerning anyone else.

7. The Plaintiff filed a very extensive Motion to Reconsider with claims of errors in many many particulars in the First Order. I have reviewed all of those claims, and to make absolutely certain that it is clear – even if not discussed in specific terms in this Second Supplemental Order --- I have considered and deny all those matters so that they are properly reserved and preserved for further appellate review, if that should take place. Similarly, the Defendant has raised a large number of claims to redo many aspects of the First Order. To make certain that all these issues are properly reserved and preserved for further appellate review, if that should occur, unless they are specifically discussed in this Second Order, I have considered and denied all those matters as well. The purpose of this paragraph seven is to make certain that both parties can properly assert to an Appellate Court that I did consider and deny their Post -Trial Motions, unless specifically addressed herein. Unless specifically changed by this Order, I reaffirm the First Order for the reasons stated herein and in that Order itself.

8. In regard to the Plaintiff's request for an injunction and decretal provisions. In its prior Post Trial Memorandum, the Plaintiff ends its Memorandum with a suggested set of proposed Orders and Decrees. I have somewhat modified what Plaintiff has requested but I am in general agreement that the more certain an Order can be the more that Order may be of assistance to the parties who should be in a position to know what they should and should not do – if that is possible. Therefore,

It Is Ordered, Adjudged, And Decreed:

(1) The Plaintiff and The Defendants have the use of a permanent, nonexclusive right of ingress and egress over and upon the streets and other ways of passage of the Pleasant Point Subdivision as depicted on the initial subdivision plat dated Dec 4, 1969 and recorded in the Beaufort County RMC Office in Plat Book 18 at page 45, including granting the Plaintiff the right to use the 40 foot area in controversy at the southern end of Pleasant Point Drive (hereinafter referred to as the "40 foot area") and

(2) The Plaintiff has the use of a permanent prescriptive easement appurtenant for ingress and egress over the dirt driveway shown on the 1997 plat recorded in the Beaufort County RMC Office in Plat Book 60 at Page 190 (hereinafter the dirt driveway) including the entrance to the southern half of her carport extending nine

feet beyond the platted end of the forty foot easement area for the width of the platted easement (hereinafter referred to the "Extension Area") which she and her predecessor in interest has used as a driveway and carport entrance for more than twenty years prior to the commencement of this action, and

(3) That the Plaintiff is authorized to remove any obstructions presently existing in the 40-foot area and in the dirt driveway and extension area which impede the normal use of the driveway, to avoid obstructions of the 40 foot area and the dirt driveway in the future, and to restore the dirt driveway to its original location (subject to (5) in this Order, please read below) and

(4) That the Defendants are permanently enjoined from obstructing or interfering with the normal driveway use of the 40-foot area or the dirt driveway and extension area

(5) Notwithstanding all of the above, any part of this Second Final Order that requires affirmative action by the Defendants to physical change the existing situation, such as restoring a driveway, is stayed and the parties are instructed to carry on with current status quo as to that matter, until and unless either:

(A) This Order becomes truly final because there is no appeal by any and all parties or

(B) This Order is appealed and the Appellate Court(s) of this State have ruled upon the validity of the First Final Order of March, 2016 and this Second Final Order of August, 2016³ and then, of course, the parties should proceed as the Appellate Court(s) so instructs.

³ It certainly seems (at least to me) it would be the wise and prudent not to Order the return of a driveway to its original condition, until that Order was reviewed, if appropriate, by the proper authorities on appeal.

Very Respectfully Submitted,



Stephen Spitz

Appointed Special Referee

Of Counsel

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Dated this August 8, 2016

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August 8, 2016
Jerri Ann Roseneau
Beaufort County
Clerk of Court
P.O. Drawer 1128
Beaufort County, S.C. 29901

Ewing vs. Guest
Case No: 2015-CP-07-1931

Dear Jerri:

I am enclosing an original Form 4 Order and an attached original Order ruling on both parties post-trial motions in the above captioned case. This order ends this case. By email, I have copied all the lawyers, and our excellent court reporter, and some staff in various lawyer's offices with a copy of this letter and with a copy of the attached order. Please do not hesitate to have your office contact me if you need any further or additional information.

With the very kindest personal regards, I remain,

Very truly yours,



Stephen Spitz
Appointed Special Referee
Of Counsel
Stevens & Lee
151 Meeting Street
Suite 350
Charleston, SC 29401

MAILED
AUG 12 4:30 PM '16
U.S. DISTRICT COURT
CHARLESTON, SC

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STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-07-1931

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SEP 09 2016

SC Court of Appeals

Julia Tompkins Ewing

Keith A Guest and Stephanie C Guest

Pleasant Point Property Owners Association
Inc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Special Referee, Stephen A Spitz

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow); Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Stephen Spitz
Circuit Court Judge Special Referee

Judge Code

March 25 / 2016
Date

State of South Carolina)
 County of Beaufort)
)
 Julia Tompkins Ewing,)
 Plaintiff)
)
 vs.)
)
 Keith A. Guest and)
 Stephanie C. Guest and)
 Pleasant Point Property)
 Owners Association, Inc.)
 Defendants)
 _____)

Court of Common Pleas
 Case No. 2015-CP-07-1931

**Special Referee's Final Order
 of March 25, 2016**

2016 MAR 29 PM 2:41
 CLERK OF COURT S.C.

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 SC Court of Appeals

Both by the consent of the parties, and by prior Order of the Circuit Court, I was appointed to be a Special Referee to hear the evidence in this case and to enter a Final Order¹. I have found this to be an interesting, but challenging assignment, for the reasons discussed subsequently in this opinion.

Initial Comments

This case was very well tried by four highly experienced and competent lawyers: David Tedder, Esq. and Chris Inglese, Esq. for the Plaintiff, Julia Tompkins Ewing; H. Fred Kuhn, Jr, Esq. for the Defendants, Keith A. Guest and Stephanie C. Guest; and James A Grimsley, III, Esq., for the Defendant Pleasant Point Property Owners Association. The lawyers are to be commended for their professional skill and professional curtesy throughout the trial. In my opinion, all the parties in this case were superbly represented by their respective counsel.

¹ It is unfortunate that the parties virtually had this entire case settled by a prior mediation but, for whatever reason, everyone agrees that this mediation failed to resolve the property dispute between the Guests and the Plaintiff. I have not been asked by either party to enforce the failed mediation. Nor does the record reflect the reasons for this failure. Under these circumstances, I do not feel bound by that prior mediation, particularly because I was not asked by either party to enforce any alleged agreement(s) flowing from this prior mediation. Accordingly, I am basing this Order totally and completely upon the properly introduced evidence at the hearing on Jan 20, 2016.

The Key Question in This Case

The key question before me is whether or not an alleged forty foot roadway, depicted on a recorded plat for the Pleasant Point Plantation in 1969 (Plat Book 18, Pg. 45), does or does not still currently exist for the benefit of the Plaintiff? (See Exhibit No. D-52 and the highlighted area in yellow)

Overview of Plaintiff's Arguments

Summarizing the opposing positions, as I understand them: the Plaintiff argues that the 40 foot roadway easement that clearly seems to exist in 1969 on a recorded plat, this same easement is referenced in subsequent plats, and also referenced in various subsequent deeds, including a plat recorded in 1999, strongly suggesting that the easement remains in existence.

The Plaintiff also noted that the 40 foot roadway is shown on the Defendant Guest's own plat and deed. Moreover, the Plaintiff argues that she has a prescriptive easement to continue to access the property in the same manner she and her late father have previously been doing for many years. For any or all of these reasons, the Plaintiff argues that the roadway cannot now be unilaterally changed by the Defendant Guests.

Overview of Defendants' Guests Arguments

In opposition, the Defendants Guests argue that Plantation Point Drive was long ago reconfigured, new lots have been added, and since virtually the ENTIRE area has been redone, and reconfigured, and since Plantation Point Drive now terminates at a different point, and since there was a subsequent express easement between General Tompkins (the Plaintiff's late father) and Mr. Branning (on behalf of the Pleasant Point Plantation) in 1979, the original 40 foot roadway shown on the 1969 Plat (ten years earlier) has been terminated, or replaced, or abandoned, or so the Defendant Guests now argue. The Defendant also argues that based upon Colin Branning's testimony that the original intent was for this easement only to serve the Manor House. See Trial Record, Pgs.148-182 for the Branning testimony.

Findings of Fact & Conclusions of Law

As both the finder of fact, pursuant to SCRCP 52, and based upon the law of property in South Carolina, I find the following facts and make the following conclusions of law:

1. In the Plaintiff's chain of title there is a plat done by R.D. Trogdon, Jr., dated December 4, 1969, showing the country club section of the Pleasant Point Plantation. On this plat, the Plaintiff as of the date of this Order owns Lots 1, 2, 3 which (as I understand from her testimony) is based upon the inheritance of these three Lots from her late father. See Plat Book 18 at Page 45, lots 1, 2, 3.

2. Also found on this 1969 plat is a dotted set of lines that connect Lots 1 and Lots 2 to Pleasant Point Drive (See Exhibit marked D-52). There is testimony in the trial record that these dotted lines reflect a 40 foot roadway adjacent to both Lots 1 and 2. David Youmans, a South Carolina certified land surveyor, testified this was an "adjacent roadway" and that it was an "extension of Pleasant Point Drive" directly to the Plaintiffs property. See Trial Record, Pg. 68:8-12.

3. Mr. Youmans further testified that he relied upon and reviewed this Plat in some of his more recent survey work. See Trial Record, Pg.68: 13-15.

4. Normally, the property law of South Carolina attaches material significance to easements and roadways and other areas of passage found on a recorded plat. For example, in 1965, in **Blue Ridge Realty Co. v. Williamson**, 145 S.E.2d 922 (S.C. 1965), the South Carolina Supreme Court laid down a general principle of property law that a reference to a plat in a deed normally indicates that the plat is part of the Deed and the conveyance.

5. Specifically, as applied in the Blue Ridge case, this principle of law permitted the Court to conclude that the Lots No. 11, 12, 17 shown on the recorded plat in the Blue Ridge Case permitted the Court to conclude that "Gippy Court" was a part of the conveyance of those lots and that the abutting road to Gippy Court, which dead ended in a turn-around circle, was something that the Lot Owners could properly use as owners of adjoining lots. Lots 13 and 14 were subsequently conveyed to the Williamsons who constructed a wall preventing traffic from using the turn-around circle. In turn, the parties that owned Lots 11, 12, 17 sought to enjoin the Williamsons' obstruction to the use of the turn-around circle. Relying upon the prior South Carolina case of Cason v. Gibson, 61 S.E.2d 58 the Court in **Blue Ridge** quoted the Cason case "Where plaintiff purchased a

corner lot which reference to a recorded subdivision map which showed lot to front on a certain street, and thereafter defendants separately purchased lots which contained a portion of the street which bounded plaintiff's lot, plaintiff **had a special property interest in the street** as to entitle him to maintain suit for preservation of the street even though dedication had never been accepted by municipal authorities" **Id.** at 145 S.E.2d 922, 925. (Emphasis Added, to the words a "special property interest in the street.")

6. A subsequent case to the **Blue Ridge** case, **Murrells Inlet Corp. v. Ward, 662 S.E.2d 452 (S.C. App. 2008)** partially extended the **Blue Ridge** decision by further holding that:

The rule . . . in **Blue Ridge** is nothing more than a presumption that when a grantor conveys property with a reference to a plat showing streets **or other ways of passage**, the grantors intends to allow the grantee the use of the delineated streets and ways of passage. **Id.**, 662 S.E.2d at 457. Emphasis Added to "or other ways of passage"

7. Applying the **Murrells Inlet** case here, one of the "ways of passage to Pleasant Drive" for Lots 1 and 2 shown the 1969 Plat is the 40 foot roadway depicted on the recorded Plat². Therefore, I initially find that based upon the testimony of a certified South Carolina land surveyor, and based upon the Plat itself, and based upon the applicable case law, the 1969 Plat properly created a 40 foot roadway and/or easement "or other way of passage" for the Owners of Lots 1,2 and I further find that this Plat is squarely within the Defendants Guests chain of title giving the Guests and giving all other parties that own property near-by constructive record notice of the existence of such "other way of passage."

² I discuss subsequently the argument by the Defendants Guests that this easement was only intended to be used by the Manor House.

8. I further find that there is substantial evidence that this easement was noted and relied upon in subsequent conveyances. See, for example, Trial Record, Pg. 75:9-24 where a certified South Carolina land surveyor, David Youmans, testified as follows:

- Q. Thank you. I'm going to present you with another deed. This is also in Defendant's Exhibits and chain of title as Part of the same Tab No. 9, I believe, in Defendant's 1, and can you tell us what I've presented to you here?
- A. This is a deed from Alyon, Incorporated to Roi W. and Dyan M. Young.
- Q. And the date of that deed is?
- A. Recorded 9/27/2001
- Q. And if you would go to the property description in that deed?
- A. It's the same as the one I just read, Plat Book 68, Page 171
- Q. Do you know that as the defendants' property, in this case the Guests?
- A. Yes.

9. Accordingly, I find that an examination of the title would show to any perspective purchaser, such as the Guests and / or others, that there certainly appeared to be substantial evidence that the 40 foot right of way continued to exist and prior to the purchase of this property they would have the burden of inquiry to determine the rights they were purchasing.

10. There is also evidence in the trial record that the Defendant's deed itself contains a direct reference to the 1999 plat which, in turn, references the 1969 plat. See Defendant's Exhibit No. 1, Tab 12) I further note and find that the property description found in the Defendant's own deed reads as follows:

All that certain parcel of land situated on Lady's Island,
County of Beaufort, State of South Carolina, being known
And designated as follows: Consisting of 3.917 acres, more
or less, (being shown and delineated as 2.430 acres, more or
less, and 1.487 acres, more or less) a portion of County Club
Section of Pleasant Point Plantation, on that certain plat
Prepared by David S. Youmans, RLC, dated and recorded
In the Register of Deeds Office for Beaufort County, South
Carolina in Plat Book 68 at Page 171. Trial Record, Pg. 80: 1-11.

11. The Defendant's deed further provides as follows: "For a more complete description as to metes and bounds, courses, and distances, reference may be made to the afore- mentioned plat of record. This property is subject to all applicable covenants, restrictions, conditions, and easements **filed of record in Beaufort County, South Carolina.**" **Emphasis Added.** As previously discussed, this includes the Plats and Deeds that do reference the 40 foot roadway easement.

12. At this point, is important to note that the Plaintiff is not claiming a fee simple or any actual estate of land in the 40 foot roadway but merely the limited right to use that track to access her property. Quoting the Plaintiff's trial court testimony:

Q. But, you are making a claim to the 40 foot driveway shown at 18 at 45.

A. Yes, just the use of it. I'm not contesting the fact that they own land, or anything like that, just that there's an easement over it, and we should be allowed to use the easement as we have for almost the last 40 years. Tr. Record, Pg.119: 18-24.

13. Although I do find this Plaintiff's claim to certainly appear to be valid, as hinted at the very beginning of this Order, there are several matters that make this case more challenging than it may first appear. The first of these, however, can rather easily be dismissed with the apparent consent of both parties. Although there was a prior mediation in this case, both sides have acknowledged on the record that this prior mediation was unsuccessful. Mr. Tedder noted that "it failed and is irrelevant" Trial Record, Pg. 142: 4-5; and Mr. Kuhn apparently fully agreed noting that "It failed, that's for sure" Trial Record, Pg. 142: 9.

14. Accordingly, I have not considered a number of references in the Trial Record concerning this mediation³.

15. The second potentially troublesome matter is that there is testimony by Cloide Branning, that the 40 foot roadway found on the original Plat Book 18, Pg. 45 that appears to access lots 1, 2, 3, (owned by the Plaintiff for many years) to Pleasant Point Drive and adjoining land now owned by the Defendant Doctor Keith Guest, and his wife, Stephanie Guest, was probably at the time of the 1969 Plat, and for a number of years thereafter, inaccessible.

³ Among the rules concerning mediations, are the following, "Communications during a mediation settlement conference shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including, but not limited to:

- (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;
- (2) Admissions made in the course of the mediation proceeding by another party or any other person present;
- (3) Proposals made or views expressed by the mediator;
- (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or
- (5) All records, reports or other documents created solely for use in the mediation.

Mr. Branning testified that:

- Q. And why did you have to go around instead of coming up Straight up Pleasant Point Drive, that 40 foot drive that's shown on the plat?
- A. Trees and --- there were trees and hedges.
- Q. So physically, it was impossible?
- A. Physically.
- Q. Although there may have been a road drawn on a piece of Paper, there was no road in existence?
- A. Correct.

Trial Record, Pg. 180:15-25; Pg. 181: 1-4.

16. Without making a specific finding of fact about the testimony quoted above, but merely assuming that this testimony is 100% accurate, does it necessarily follow that no easement or roadway existed? I believe the law in South Carolina is otherwise.

17. **In Carolina Land Company, Inc. v. Bland**, 217 S.E.2d 16 (1975) it was argued that an easement had been abandoned for a 30' foot street because it was never opened or used. The South Carolina Supreme Court disagreed. It found that mere nonuse, by itself, was not enough to abandon easement. Applying this rule here, even if what happened in the 1970s was that the 40 foot track remained uncleared and unused for a number of years, this testimony by itself does not conclusively determine that an abandoned was actually intended.

18. Applying the Carolina Land Company case, to the facts in this case, and reviewing the Defendants Guests deed and plat it clearly references various prior deeds and plats, including the 199 Plat recorded at Plat Book 68 at 171. In turn, that plat completed by David Youmans, Registered Land Surveyor, shows a reference to the Tompkins (Ewing) property and the original Plat done in 1969. Thus, I find that Defendant Guests were at the very least on constructive record notice, and most likely actual notice, from their own Plat, that the 40 foot easement existed and was located on their property. In turn, this knowledge is very significant legally, because, quoting again directly from the Carolina Land Company case:

Carolina Land Company had constructive notice of the Appellants easement based upon the recorded instruments in its chain of title. The law imputes to a purchaser who proposes to acquire title to real estate **notice of the recitals** contained in any properly recorded instrument of writing which forms a link in a chain of title to the property proposed to be acquired. [Citations omitted].

Emphasis Added.

19. I find that what was said in Carolina Land Co. case squarely applies here: "This plat was thus a link in the chain of title to the property so acquired and gave constructive notice of the appurtenant easement in question." *Id.*, at 217 S.E.2d 16, 20 (S.C. 1976).

20. I further note that pursuant to the **Murrells Inlet Corp.** case that the easement shown on a recorded plat is deemed completed and dedicated at the time the conveyance is made (citing a number of prior South Carolina cases) and the mere fact that it is not yet in use does not mean that it necessarily is either abandoned or not yet in existence. In short I find that the mere fact the easement was not immediately freed of trees, hedges, and other impediments does not bar the Plaintiff's claim for using the 40 foot easement today.

21. The third matter of some potential concern is the second easement created for General Tompkins and whether or not it was designed or intended to create a substitute easement for the original easement found on the 1969 Plat. The record is very clear that Pleasant Point Plantation conveyed an easement for life, to the General, his wife, and his daughter (the Plaintiff) (or the survivor of them for his or her life) a triangle tract of land on what is now the Defendants Stephanie and Doctor Guests' land. The question has now arisen as to whether or not this easement for life was intended to be a substitute for the easement found on the original 1969 Plat and referenced again on the 1999 plat? For several reasons, I find this is **not** a substitute nor an accord and satisfaction.

22. First, I note that there is no mention in the express easement document itself that it was actually intended in any way to substitute for any other pre-existing easement nor is there any reference or language whatsoever to the abandonment of any former easement by the creation of this second easement. On this ground alone, it is highly doubtful that this is a true substitute easement. I would assume that if one wanted to create a true substitute easement that would be noted on the

document itself. Second, there is affirmative testimony in the trial record from the land surveyor, David Youmans, which is not contradicted (as best as I can tell) elsewhere in the trial record, that this was not a genuine substitute for the prior easement. Specifically, land surveyor, David Youmans, testified that:

Q. Did you interpret this as it relates to the 40-foot roadway?

A. No, not at all.

Q. And, if the 40-foot roadway had not existed at the time of this [second] easement, in your opinion, would there have been a way to drive a car to the carport on Mrs. Ewing's property, absent the 40 – foot roadway?

A. No, sir.

Trial Record, Pgs. 71:14-16; Pg.71:22-25; Pg. 72:1-2.

In short, based upon the language in the easement which lacks any hint of a intention of substitution and based upon this testimony, which I find credible and trustworthy, I find that both easements co-existed for a number of years but one was never intended to be an actual substitute for the other.

23. I turn to the defendant's argument that the easement found on the 1969 plat and the 1999 plat and in a number of subsequent deeds is limited to an easement that deals only with the Manor House. I simply don't find this limitation in the documents or subsequent Plats. If a way of passage is specially limited and was not intended to be used by adjoining lots that would otherwise naturally appear to have the benefit of the "other way of passage" -- I would anticipate that would be noted on the Plat itself.

24. Moreover, I am at least somewhat leery of testimony delivered in a trial many decades after the fact that appears to squarely contradict a recorded document that has been filed of record for many decades because accepting that testimony opens the door to the impeachment of recorded documents that others have testified that they have relied upon for many years. Strictly as a policy manner, this would unsettle many previously recorded property claims.

25. I find instructive that in **Murrells Intel Corp. v. Ward**, 662 S.E.2d 452 (S.C. App. 2008), in the final paragraph of that opinion, the Court of Appeals held that the dedication of the easement was completed when an adjoining lot was originally conveyed and further held, in words in the final sentences of that opinion, that seem to me to squarely apply to this case.

It would now be unfair to deny MIC the right to the full use and enjoyment of the easement as indicated in the plat, regardless of what Ward now argues were her intentions at the time the plat was recorded. Subsequent Purchasers are entitled to rely on recorded deeds and plats to determine their rights in respect to property.

26. Finally, I also do agree with Plaintiff's counsel in his opening statement that as an alternative reason for finding that a 40 foot right of way exists is that the Plaintiff has proven a prescriptive use on this record by clear and convincing evidence⁴. I find that for many years (certainly beyond the 20 year required time period) under a claim of right to use, the Plaintiff has used the same access and egress method in a clear, open, actual, notorious, visible manner, and this prescriptive right existed even before the Guests owned their property⁵. The Guests are charged with what is open and visible on their own property and they had at least constructive, if not actual, notice of the Plaintiff's prescriptive easement rights.

27. See, in general, **Hartley v. John Wesley United Methodist Church of Johns Island**, 584 S.E.2d 386 (S.C. App 2003) describing the elements of prescriptive easement (1) the continued and uninterrupted use or enjoyment of the right for the full period of twenty years (substantial evidence supports this finding

⁴ I note that both the question of the plats and deeds of record, and the question of whether or not a prescriptive right of use exists are both properly before me. See Plaintiff's First Cause of Action (See Plaintiff's Complaint, Paragraph 33 for a Declaratory Judgment) and the Defendant Guests Answer and Counterclaim (Paragraph 33) asking for similar relief.

⁵ Her testimony included her statement that she has been using the driveway / road that had been shown on many plats "since 1969 / 1970" Trial Record, Pg. 111: 20-25 and that she has been using the carport to park her car or her Dad used the carport to park his car "same amount of years." See Trial Record, Pg. 112, 1-6. See also Defendant's Exhibits, Exhibit D-15, D-16, D-17, D-18.

here) (2) identity of the thing enjoyed (the Plaintiff has testified that she has used the identical access point that her father did for many years) and (3) use or enjoyment was adverse or under claim of right (among other testimony in this case, (there is testimony by the Plaintiff that she was under the impression, she had the right to use the roadway, very similar to the facts found in **Revis v. Barrett**, 467 S.E.2d 460 (S.C.App. 1996), where a daughter's testimony as to her belief that she had a continuing right to use a roadway, originating with her father's own prior use of the roadway many years previously, was considered by the Court as a proper basis for a claim of right or under color of title analysis.

28. As I understand the law of South Carolina on this point, our courts have held in order for a party to earn a prescriptive easement under claim of right he or she must demonstrate a substantial belief that she or he has the right to use the parcel or road based upon the totality of circumstances surrounding his use. I find this test has been met on this record. The mere fact of the existence and use of the carport for well more than 20 years, by itself, is certainly at least some evidence of a prescriptive easement.

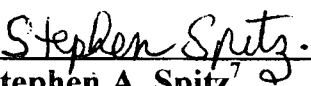
No Attorney Fees

29. But, I have concluded that the Plaintiff is not entitled to attorney fees in this case for several reasons. It needs no citation to state that the normal rule in South Carolina is that each side should pay their own attorney. Thus, it is the exception and not the normal rule that Plaintiff argues for in this case. Does the Plaintiff fall within one the limited exceptions? I don't think so⁶.

⁶ Often, "the award of attorney's fees is left to the discretion of the trial judge and will only be disturbed upon a showing of abuse of discretion." **Upchurch v. Upchurch**, 367 S.C. 16, 28, 624 S.E.2d 643, 648 (2006). Moreover, in determining the amount of attorney's fees to award, the court is often instructed to consider: (1) nature, extent, and difficulty of the case; (2) time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services. **Glasscock v. Glasscock**, 403 S.E.2d 313, 315 (S.C. 1991). And, these factors have not been fully proven on this record.

30. The Guests arguments were well-made and well-articulated. I do think I have some discretion in this area, and since the Defendants arguments were well-made and well-articulated, I simply decline to find that attorney fees should be paid by the Guests. This looks to me, especially in the absence of a controlling statute, to be a matter of some discretion for the Courts in this State and especially so since I further find that not all the factors that normally go into an award of attorney fees have been adequately demonstrated on this record, See footnote 6. At all events, I remain unconvinced that attorney fees are warranted in this specific situation.

Respectfully Submitted,



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⁷ I also want to thank Marie H. Bruegger, Registered Professional Reporter, CRR, for her excellent work at the January 20, 2016 hearing.

Dated this 25th of March, 2016

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STATE OF SOUTH CAROLINA
 COUNTY OF Beaufort
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-07-1931

RECEIVED

Julia Tompkins Ewing

Keith A Guest and Stephanie C. Guest

SEP 09 2016

Pleasant Point Property Owners Association
 Inc.

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Stephen A. Spitz, Special Referee
 S.C. Bar Number 5287
 Of Counsel
 Stevens & Lee
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Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Julia Tompkins Ewing	Keith A Guest and Stephanie C Guest	\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

Beaufort County RMC Office in Plat Book 18 at Page 45 (Subdivision Plat Dated December 4, 1969)

Beaufort County RMC Office in Plat Book 60 at Page 190 (Subdivision Plat 1997)

