

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-29-00694

John Challis, et al.

Jeffery Horning and Janet Shander-Horning

RECEIVED
OCT 03 2016
SC COURT OF APPEALS

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Philip E. Wright

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.
- 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 PUBLIC 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)
n/a		\$
		\$
		\$

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.

Philip E. Wright
Circuit Court Judge *Special Referee*

SPECIAL REFEREE
Judge Code
8-17-16
Date

For Clerk of Court Office Use Only

This judgment was entered on the 22 day of Aug, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of Aug, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

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Jeff Hammond
CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)
)
COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-29-00694

John Challis, Jennifer Challis,)
Robert Baust, Zeljko Cvitkovic,)
Stephanie Cvitkovic, Aarik)
Eberhardt, Amy Eberhardt, James)
English, Socheata Koy, Carl Flatau,)
Patrice Flatau, Keith Gonsalves,)
Sandy Gonsalves, Jonathan Hardin,)
Maia Hardin, Jay Hurley, Joanne)
Hurley, Alastair Jones, Tamara)
Jones, Mike Nickel, Chuck Powell,)
Christie Powell, Lane Reavis, Kym)
Reavis, James Seidel, Deborah)
Seidel, David Templeton, Jennifer)
Templeton, Elizabeth Yegge,)

Plaintiffs,)

vs.)

Jeffery Horning and Janet)
Shander-Horning,)

Defendants.)

**AMENDED ORDER OF THE
SPECIAL REFEREE**

FILED
MAY 24 2016
CLYDE N. DAVIS, JR.
CLERK OF COURT

DATE OF HEARING: May 24, 2016
PRESIDING JUDGE: Clyde N. Davis, Jr.
ATTORNEY FOR PLAINTIFFS: Philip E. Wright
ATTORNEY FOR DEFENDANTS: D. Randolph Whitt

This Order supersedes a previous Order I signed in this case on July 5, 2016. Counsel for the Defendants moved for a new hearing. The motion was heard by telephone, and I determined to make two modifications to the Order. Those modifications have been made and this Order is the final Order in the case.

This matter was referred to me for trial of an action in which the Plaintiffs seek a declaratory judgment and other relief as to their rights to use an ingress/egress easement in

BridgeHampton Community where they all live. The Defendants are also residents of South Carolina and live in BridgeHampton.

BridgeHampton is a residential community in northern Lancaster County developed by homebuilder John Wieland Homes and Neighborhoods, Inc. It lies on the border of North Carolina and South Carolina and is bisected by the state line.

The Plaintiffs commenced this action in May 2015. A hearing on cross motions for summary judgment was held before the Honorable Brian Gibbons. Judge Gibbons issued an Order granting partial summary judgment for the Plaintiffs on the issue of the validity of the ingress/egress easement shown on Plat 2004-60.

The easement is described on the plat as an ingress/egress easement with no further explanation or documentation filed with the easement. The developer, John Wieland Homes, established the easement in 2004 during development of the BridgeHampton Subdivision when an area known as Karriker Court was added to the Subdivision. The easement is the only pedestrian connection between Karriker Court and the other portions of BridgeHampton. The swimming pool, tennis courts, clubhouse and other primary amenities for the subdivision were built in the earlier years of the development of BridgeHampton before the addition of the Karriker Court section.

The easement in question is located entirely on Lot 659 which was owned by the developer in 2004 when the easement was established by the filing of Plat 2004-60. The easement is 7.5 feet wide and extends the length of Lot 659 for 187.41 feet. One terminus of the easement is at the public road cul-de-sac, Norwalk Lane. The other terminus of the easement is a sidewalk that connects Karriker Court to the rest of the subdivision. The developer had the right during the construction phase to add such other sections to the subdivision which were adjacent

to the subdivision. The developer also maintained the right to make such modifications to the plans by the addition of roads, easements or other rights of way under the Protective Covenants for BridgeHampton recorded June 15, 1999, at Deed Book 49 at page 52 before construction on the subdivision began. The language of the Covenants assures these improvements to be available to all residents of the subdivision for their common use.

RELEVANT SECTIONS OF PROTECTIVE COVENANTS

In the table of exhibits to the Covenants, Exhibit C is captioned "ADDITIONAL PROPERTY WHICH MAY BE UNILATERALLY SUBMITTED BY DECLARANT [DEVELOPER]." That exhibit includes language that identifies "additional property" as "all that tract or partial of land lying and being . . . in Lancaster County South Carolina, contiguous (excluding roads) to that real property described above or contiguous (excluding roads) to other real property hereinafter subjected to the Declarations of Protective Covenants for BridgeHampton and being within one mile of any boundary of the real property described above" (Deed Book 49 at Page 99).

In Deed Book 49 at Page 57, under the section captioned "BACKGROUND STATEMENT," the property owner /Declarant (John Wieland Homes and Neighborhoods of North Carolina Inc., a Georgia Corporation) includes the following language:

"NOW, THEREFORE, Declarant hereby declares that the real property described in Article II, Section 1 of this Declaration, including the improvements constructed or to be constructed thereon, is hereby subjected to the provisions of this Declaration and shall be held, sold, transferred, conveyed, used, occupied and mortgaged or otherwise encumbered subject to the covenants, conditions, restrictions, easements, assessments, and liens, hereinafter set forth, which are for the purpose of protecting the value and desirability of, and which shall run with the

title to, the real property hereby or hereafter made subject hereto, shall be binding on all persons having any right, title or interest in all or any portion of the real property now or hereafter made subject hereto, their respective heirs, legal representatives, successors, successors-in-title and assigns, and shall inure to the benefit of each and every owner of all or any portion thereof."

In Deed Book 49 at Page 64, the Declarant gives the Association (BridgeHampton Homeowners Association) authority to maintain "a blanket easement upon, across, over and under all property within the community for access, ingress, and egress as necessary to permit the Association to perform its maintenance responsibilities hereunder."

In Deed Book 49 at Page 86, first paragraph, the Covenants provide that "Further, so long as Declarant has the right unilaterally to subject additional property to this Declaration as provided in Article IX hereof, Declarant may not amend this Declaration for any other purpose. . . ."

In Deed Book 49 at Page 87, Section 8, captioned "CONVEYANCE OF PROPERTY TO ASSOCIATION: ASSIGNMENT OF CONTRACTS," provides that "The Declarant and its affiliates may transfer and convey to the Association any personal property and any improved or unimproved property, leasehold, easement or other property interest."

In Deed Book 49 at Page 87, Section 11, captioned "CONSTRUCTION AND SALE PERIOD" (Section A) "The Declarant reserves an easement for the benefit of the Declarant to allow it to take all actions related to or connected with instruction, installation, relocation, development, sale, maintenance, repair or replacement in the community and any other property now owned or which may in the future be owned by the Declarant (such other property is hereinafter referred to as "Additional Property"). The reserved easement shall constitute as a burden on the title to the Community and specifically includes, but is not limited to:

- (a) the right of access, ingress and egress for vehicular and pedestrian traffic over, under, on, or in the Community; and the right to tie in to any portion of the Community with streets, driveways, parking areas, and walkways. . . ."

The issue before me as Special Referee is to determine the extent or scope of the easement and to consider the issues of declaratory relief sought by the Plaintiffs. Since there are no other recorded documents that explain or define the easement, I must interpret the easement in this equity case using common, popular definitions or the terms which established the easement.

RELEVANT CASE LAW ON DEFINING SCOPE OF EASEMENT

The Plaintiffs contend that the language on the plat establishing the easement is clear and unambiguous. The easement is for "ingress and egress." There are no other words of limitation or definition.

Martin v. Bay, 400 S.C. 140, 732 S.E.2d 667 (S.C. App., 2012), relates directly to the extent or scope of an easement. The court held that the easement was not ambiguous and that it was to be "construed according to the terms which parties have used, taken and understood in plain, ordinary and popular sense." Id., p. 672

The easement in the present case was created by the developer before the sale of the lot in question for the benefit of the Community under the terms of the Protective Covenants. It was created by the filing of a plat. It has been recognized by the Circuit Court in the prior hearing as a valid ingress/egress easement. The only issue is the extent of the easement. The extent of the easement is to allow members of the Community to go in and out across the sidewalk that constitutes the easement. That is the plain and popular meaning of the language on the plat. There is no other recorded document that further defines the easement.

The Plaintiffs interpret the easement to mean they can use the easement to go across the Defendants' land within the confines of the easement on the sidewalk which constitutes a portion of the easement for any purpose whatsoever, so long as it is a legal purpose. Walking their children to an elementary school across an easement designed to protect the Community is clearly a legal use of the easement. The Defendants' restriction of use clearly prohibits a legal use by the Plaintiffs.

Binkley v. Rabon Creek Watershed Conserv., 348 S.C. 58, 558 S.E.2d 902 (S.C. App., 2001), also addresses the standard that a court in equity should use in defining the extent or scope of an easement. "A description of an easement in a recorded document is sufficient when it contains language that acts as a guide to the location of the easement on the land such that the easement is capable of being rendered to a certainty." Id., p. 72. The location of the easement is clearly set out on the 2004 plat.

The court in Binkley, supra, also noted that "[t]he scope of an easement is an equitable matter in which a reviewing court may take its own view of a preponderance of the evidence. The language of an easement determines its extent. "Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense." [citing South Carolina Public Service Authority v. Ocean Forest, Inc., 275 S.C. 552, 554, 273 S.E.2d 773, 774, 777 (1981)]. We must first decide if the language used by the grant here is plain and unambiguous and, if so, what does that language mean." Binkley, supra, p. 67.

FINDINGS

Based on the evidence presented at trial, I find that the paved sidewalk has been in existence within the platted easement since 2004. The sidewalk was open and obvious and used

by many members of the BridgeHampton Community without objection for various uses to move from one portion of the subdivision to another until 2014. Some of the Plaintiffs testified concerning their use of the easement for jogging, walking or riding bicycles. They also testified concerning numerous confrontations with the Defendants, some of which resulted in law enforcement intervention.

After the recording of Plat 2004-60 which established the easement found by Judge Gibbons to be a valid easement for ingress and egress, the developer sold Lot 659 to Alain Jendly and Catherine Jendly (Trial Exhibit 4). When the Jendlys bought the lot, the sidewalk was in place and was used by members of the Community as a pedestrian access for walking, jogging, biking and general access to areas connected by the sidewalk. The Jendlys owned the lot subject to the easement until 2011.

In 2011, the Jendlys sold the lot to the Defendants (Trial Exhibit 5). The sidewalk was still open and obvious and was in use by many members of the Community without incident. The Defendants admit seeing and being aware of the sidewalk and easement prior to purchase.

The deed from Jendly to Horning that conveyed Lot 659 includes the following specific language:

"The premises are conveyed subject to all restrictive covenants, easements and rights of way of record or apparent upon a reasonable inspection of the premises."

The concrete sidewalk ran the length of the Hornings' property. It was open and notorious. The Defendants were on notice that the easement was in place and was being used by residents of the Community to cross between the sections of the Community.

After the building of Harrisburg Elementary School across the street from BridgeHampton during 2013 and 2014, the Defendants decided to block the easement by the

erection of a fence and signs prohibiting traffic through the easement. For various reasons, the Defendants contended the easement was on their lot and was private. The decision of Judge Gibbons recognized the existence and validity of the easement over the Defendants' objections. At the summary judgment hearing, the Defendants conceded the easement was in fact a valid easement. Judge Gibbons did not rule on the scope of the easement. This case was then referred to me for trial.

At trial, the Defendants insisted that the easement was not intended to be used by anyone except residents of Karriker Court and perhaps friends of Karriker Court residents who might want to use the easement to have access for social purposes. The Defendants also raised issues related to their possible liability if someone used the easement and was injured after leaving the easement and were off the Defendants' property. They voiced concern that the easement was being used for reasons beyond any appropriate use seen or unforeseen by the developer.

The real concern of the Defendants is the use of the sidewalk as an access to the new elementary school across Harrisburg Road. When the school opened, parents in BridgeHampton began to walk their children to school. The Defendants confronted people using the easement, including parents taking their children to school. Judge Gibbons in his Order prohibited use only by parents and children using the sidewalk as an access to the school until testimony could be taken on the scope of the easement. All other use for ingress and egress by members of the Community was allowed to continue unrestricted. The gate, which completely blocked the easement, has been taken down but the side posts of the gate and the signs warning persons not to use the easement were still in place at the time of this trial.

I find that the owners of the homes on Karriker Courts are members of the BridgeHampton Community and the Homeowners Association. As such, they are entitled to all

the amenities in BridgeHampton. Members of the Community, both residents of Karriker Court and other parts of the subdivision, used the sidewalk for ingress and egress to various points in the Community.

Another issue before me is whether there is any defining limitation of the use of the sidewalk across the Defendants' lot. I find that there is no limitation of record and no evidence of limitation presented at this hearing. I find that the easement was intended to connect the subdivision without obstruction. The efforts of the Defendants to interfere with that access violate the rights of the other members of the Community. I find that the gate is an obstruction to the easement and should be removed entirely, including the posts and any other structures erected by the Defendants that interfere with the 7.5 foot wide easement.

At the hearing, I ruled that the signs should be taken down. I signed a Temporary Order to that effect. No signs should be erected that limit or chill the rights of the members of the BridgeHampton Community to freely use the easement without obstruction. The Defendants shall cease and desist in their efforts to harass and confront persons using the easement. The persons using the easements are not trespassers. They are residents of a single community using a valid ingress/egress easement.

I find that the existence of the elementary school has not been proven to be any burden on the easement. The Defendant Janet Horning testified that one child walking to school on the easement was a burden and an unintended use. There is no proof at all of the number of persons using the easement for general purposes or for school purposes. Absent compelling evidence that the easement was being overburdened or used for illegal or dangerous purposes, there is no evidence that would persuade this Court to restrict the use of the easement as an access for

school children and/or their parents from using the easement to have access to Karriker Court and access to Harrisburg Elementary school.

The Plaintiffs' Amended Complaint sought declaratory relief, seeking the Court's ruling on a number of questions regarding the easement. As to those specific questions, the Court makes the following declaration of fact.

- a. The Protective Covenants apply to all residents of the BridgeHampton Community, including the Karriker Court phase of the development and give all residents of BridgeHampton equal protection under the Covenants.
- b. The Protective Covenants allow the parties and/or all residents of BridgeHampton to move freely about the Community on the sidewalks, roads and easements for ingress and egress created by the developer without obstruction or harassment by other residents of BridgeHampton or any other persons.
- c. The Protective Covenants do not include any limitations of use of the sidewalk on Lot 659 by residents of BridgeHampton. The Court does impose a limitation of use by motorized vehicles including motorcycles or motorized scooters. This limitation would not prevent use by disabled persons using motorized wheelchairs.
- d. The Protective Covenants do not address any issue related to overburdening or excessive use of any sidewalk, road or ingress/egress easement. There is no numerical or other limitation of the number of persons who may use the easement.
- e. The Protective Covenants do not contain any statements regarding development of the areas around BridgeHampton nor the effect of that development on the residents of BridgeHampton's rights to use the sidewalks, roads and ingress/egress easements.

f. No empirical evidence was presented to this Court that establishes the volume or frequency of usage of the sidewalks, roads and ingress/egress easement.

g. There is insufficient evidence for the Court to determine the numbers of users that is permissible in any given hour or other period of time without overburdening the easement. The Court does find that school children and their parents using the easement to walk to and from school does not constitute overburdening of the easement.

h. The Court cannot declare the rights or obligations of people who use the easement in the abstract. The Court declines to respond of the Plaintiffs to the request for a declaration on point H.

i. The use of the ingress/egress easement on Lot 659 by 25 elementary school children and their parents or escorts walking to and/or from school during each school year period does not, in the opinion of the Court, constitute an overburdening of the easement.

j. The Protective Covenants do not establish any limits on the usage of the sidewalks, roads and easements for ingress and egress regarding the number of people that can use the easement during any particular period of time.

k. The existence of the gate and signs on the gate and fence placed there by the Defendants does chill the rights of the residents of BridgeHampton to free access and use of the easement.

l. The practice of aggressively or with the intent to prevent persons from using the easement constitutes harassment of the residents lawfully using the easement.

m. The Court must use the common, ordinary definition of the term ingress/egress as the standard for determining if the easement on Lot 659 is being overburdened by members of the BridgeHampton Community. Using that ordinary definition of going and coming across the

valid recorded platted easement, the residents of BridgeHampton are not overburdening the easement.

From the testimony presented, it is obvious there are relationships between the neighbors in the Karriker Court section of BridgeHampton and the other parts of the Community. Under the Defendants' theory, those persons not living on Karriker Court could not be visited by pedestrians from the other part of the Community. The friends of the Karriker residents would have to drive out of the subdivision and drive down Harrisburg Road to Karriker Court to socialize with their friends, in the meantime the Karriker Court residents could simply walk down the sidewalk to see their friends in the main portion of the subdivision.

I find that the developer did not intend to isolate sections of the subdivision from the amenities and other residents. The easements follow the land and bind the Defendants. A gate is not reasonable in this case when the interests of the parties are balanced.

CONCLUSION

The Defendants decided they have the unilateral right to determine who can use the sidewalk despite the fact that the sidewalk and ingress/egress easement were created by act of the developer in 2004 for the benefit of the entire BridgeHampton Community. The Defendants have stopped other members of the Community from running, walking and riding their bikes on the easement. They have posted signs that chill the rights of the other Community members to use the easement free of threats and harassment by the Defendants.


The Defendants are violating the rights of every member of the Community, including the Plaintiffs who all live in the Community, by blocking the ability of the Plaintiffs and by implication all BridgeHampton Community members to come and go through the entire Community. Whether it is to walk their child to school or to jog or walk on the sidewalk, the

Defendants have declared that they can stop these activities. Nothing in the facts or law related to the establishment and use of this easement gives the Defendants this ability. The law and facts clearly require that the Defendants stop their activities which disrupt use of the easement and that the gate and signs come down permanently.

WHEREFORE, IT IS ORDERED THAT:

- a. The easement is clearly an unlimited easement for ingress and egress across the sidewalk in the valid easement created by the developer.
- b. There is no limitation of record or in the evidence in this case limiting the use of the easement for ordinary ingress/egress across Lot 659 within the easement.
- c. The gate, side posts and signs posted by the Defendants shall be permanently removed.
- d. The Defendants shall not impede or confront persons using the easement in any fashion.
- e. The use of the sidewalk to walk children to and from school is not a prohibited use of the easement and falls within the definition of normal ingress and egress across the easement.
- f. The prior Order of Judge Gibbons related to restraint regarding the use of the easement by children and their parents as access to Karriker Court and subsequently to Harrisburg Elementary School is hereby vacated.
- g. The declarations set forth in Paragraphs A through M above are made the Order of this Court as the declaratory relief sought by the Plaintiffs.

AND IT IS SO ORDERED.


Clyde N. Davis, Jr.
Special Referee

August 17, 2016