

**RECEIVED**  
FEB 10 2017  
SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

Clyde N. Davis, Jr., Special Referee  
Case No. 2015-CP-29-00694

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Appellate Case No. 2016-002059

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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 ..... Respondents,

v.

Jeffery Horning and Janet Shander-Horning ..... Appellants.

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**RESPONDENTS' RETURN TO APPELLANTS' MOTION FOR  
(I) LEAVE TO FILE RULE 60 MOTION AND (II) STAY OF APPEAL PENDING  
DETERMINATION OF RULE 60 MOTION**

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Philip E. Wright, counsel for the Respondents, would respectfully show the Court that:

1. On December 14, 2016, a few days before the Appellants' Initial Brief was due, Appellants' counsel of record at trial, D. Randolph Whitt, served a Motion for Stay Pending Appeal before the Special Referee on December 12, 2016 seeking a stay of the Referee's Order dated August 17, 2016. A copy of that Motion is attached.

2. Mr. Whitt as Counsel for the Appellants also sought a delay in the period in which to file the Appellants' Initial Brief.

3. As counsel for the Respondents, I filed Respondents' Return to Appellants' Motion for Stay Pending Appeal filed by Mr. Whitt in the lower court and began the process of scheduling the motion before the Special Referee.

4. Before the hearing on the Motion could be scheduled, I was notified that Appellants were changing attorneys. Adam Horner filed a Motion for a Stay and a Rule 60 Motion in the Court of Appeals. At this point, counsel for the Appellants had not been substituted or added.

5. I questioned both counsel for the Appellants as to why they were proceeding in two Courts at the same time seeking the same relief. Apparently counsel had not conferred on the status of the case. Mr. Horner was not aware Mr. Whitt had served a Motion for a Stay in the lower court. The motion filed by Mr. Whitt was never filed in the lower court, just served on me and the Special Referee.

6. The initial filing by Mr. Horner as counsel for the Appellants reversed the caption but was accepted by the Court.

7. The Appellants have now filed a withdrawal of counsel by Mr. Whitt and Mr. Horner is proceeding as counsel for the Appellants. The Motion for the Stay in the Lower Court has been withdrawn.

The Respondents, by way of response to the Motions filed before the Court of Appeals, would respectfully show the Court:

The Appellants have submitted with their Memorandum in Support of their Motion the pleadings, exhibits and entire transcript of the trial before the Special Referee. The Respondents

adopt those documents as an accurate representation of the events of the case and do not reproduce those documents here.

The Appellants move under Rule 60(b)(2) essentially for a new trial based on evidence which they claim is new and could not have been discovered before trial.

The first evidence the Appellants assert is evidence of the frequency of the usage of the easement which they refer to as "the Path." The transcript of the hearing clearly establishes that when the Appellants bought their lot in 2011, the sidewalk was evident. The sidewalk was installed by the developer in the easement area created by the plat filed in 2004. When the new elementary school was built adjacent to the subdivision, children began to walk to school. They used the sidewalk which lies within the easement to walk to school with their parents. In the transcript at page 57, line 16 through page 58, line 5, the Appellant Janet Shander-Horning acknowledged that she saw the children walking to school in the mornings between a 20-30 minute period around 7:00 to 7:30 a.m. and that she never counted the number of people using the sidewalk as access to the school or for any other reason. Again at page 60, line 10 through line 24, the Appellant Janet Shander-Horning also testified that there were numerous people, more than 5. She concluded in the transcript at page 62, line 23 through page 63, line 10 that one child walking on the sidewalk to school was excessive and unacceptable.

The Appellants arbitrarily decided to block the sidewalk with a gate and this litigation ensued. If the Appellants' theory is that the volume of traffic on the sidewalk was excessive, they had ample opportunity before they blocked the sidewalk to film, count or otherwise document the number of people using the sidewalk for the purposes the Appellants found repugnant. That evidence could have easily been discovered before the Appellants blocked the easement. The Appellants by blocking the easement prevented the children from walking to

school and thereby created the situation by which the Appellants could no longer count the number of school walkers. They should not be given a second opportunity to try this case because they created the circumstances that stopped the children from walking. The Appellants intend to introduce evidence of usage of the easement since the ruling that made them remove the gate and prohibited them from interfering with ingress and egress on the easement. Their Motion should not be granted and there should be no reconsideration of this evidence.

Secondly, the Appellants contend there is new evidence relating to the developer's intentions in regards to the scope of the easement. At the initial hearing in this case, Appellants submitted an e-mail from Andrew McCoy, an employee of John Wieland Homes and Neighborhoods, Inc., that addressed some issues related to the issues in the case. Judge Gibbons at the initial hearing refused to consider the e-mail because it was hearsay. During the course of the litigation, both the Appellants and the Respondents attempted to obtain some evidence from the developer on the issue of the scope of the easement. The Respondents located another e-mail from Mr. McCoy dated June 2015, a copy of which is attached to this Return, which Mr. McCoy also refused to discuss. The developer and its employees and attorneys insistently refused to participate in the litigation. The developer wanted to stay out of this issue. Mr. McCoy would write one e-mail to the Appellants trying to appease them but would later write an e-mail to representatives of the Respondents taking the opposite position.

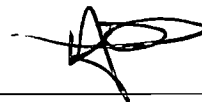
At trial, see pages 11, line 22 through page 12, line 17, the issue of the e-mails was discussed. Counsel for the Respondents moved to exclude any reference to the e-mails since they were hearsay and no witnesses had been produced to verify any information in the e-mails. Mr. Whitt acknowledged that he had no witnesses to testify regarding the contents of the e-mails

and did not intend to present any evidence in that regard. The Referee granted the Respondents' Motion to Strike any evidence related to the McCoy e-mails.

This evidence is not newly discovered. It was well known and fully investigated before trial. Neither party was able to obtain a deposition of any Wieland representative on the issue of scope of the easement. The hearing was held and the Referee ruled. The evidence sought to be introduced by the Appellants is not newly discovered and should not be allowed to be presented now. The result of an order allowing the evidence would require extensive new discovery in the case including at least the deposition of Mr. McCoy and perhaps other Wieland employees, would create undue hardship in the form of additional fees and costs for the Respondents and would not result in any new information that would influence the judgment of the Court to change its order.

The Respondents respectfully request that the Court deny the Motion made under Rule 60(b)(2) to reopen the case to receive newly discovered evidence and require the Appellants to move forward with the appeal based on the existing transcript and the evidence presented at trial.

Respectfully submitted,



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Philip E. Wright  
408 North Main Street  
Lancaster, SC 29720  
(803) 286-4343

ATTORNEY FOR RESPONDENTS

February 8, 2017  
Lancaster, South Carolina.



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LANCASTER

Case No. 2015-CP-29-00694

John Challis, Jennifer Challis, Robert Baust,  
Zeljko Cvitkovic, Stephanie Cvitkovic,  
Aarik Eberhardt, Amy Eberhardt, James  
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Jonathan Hardin, Maia Hardin, Jay Hurley,  
Joanne Hurley, Alastair Jones, Tamara  
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Powell, Lane Reavis, Kym Reavis, James  
Seidel, Deborah Seidel, David Templeton,  
Jennifer Templeton and Elizabeth Yegge

Plaintiffs,

vs.

Jeffery Horning and Janet Shander-Horning,

Defendants.

**Motion For Stay Pending Appeal**

**NOTICE OF MOTION**

**YOU WILL PLEASE TAKE NOTICE** that Defendants Jeffery Horning and Janet Shander-Horning will move before the Hon. Clyde N. Davis, Jr., Special Referee for Lancaster County, South Carolina, within ten (10) days of the date of this Notice, or as soon thereafter as counsel may be heard, for an Order on the issues set forth herein, pursuant to Rule 241 of the South Carolina Appellate Court Rules (SCACR).

**Factual Basis**

The Order dated August 17, 2016 and filed August 22, 2016 was appealed and the appeal remains pending. The affidavits of Janet Shander-Horning and of Bill Murphy that are served with this motion provide additional relevant evidence.

### **Motion Pursuant to Rule 241**

Rule 241 SCACR provides that an appeal “acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.” A list of exceptions to this general provision is provided in SCACR 241(b) as follows:

**(b) Exceptions.** The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is:

- (1) Money judgments as provided in S.C. Code Ann. § 18-9-130.
  - (2) Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150.
  - (3) Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. § 18-9-160.
  - (4) Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170.
  - (5) Judgments directing the sale of perishable property as provided in S.C. Code Ann. § 18-9-220.
  - (6) Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. § 63-3-630.
  - (7) Worker’s compensation awards as provided in S.C. Code Ann. § 42-17-60.
  - (8) An appeal from an order granting an injunction or temporary restraining order.
  - (9) Family court orders awarding temporary suit costs or attorney’s fees as provided in S.C. Code Ann. § 63-3-530(A)(2).
-

(10) Ejectment orders as provided in S.C. Code Ann. § 27-37-130 and S.C. Code Ann. § 27-40-800.

(11) Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600 (G)(5).

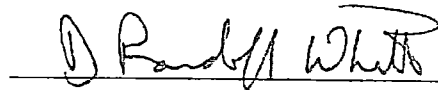
None of the enumerated exceptions apply, nor are Appellants aware of any other exception that would apply to the case at hand. The Order dated August 17, 2016 and filed August 22, 2016 should be stayed for the duration of the appeal in this matter.

#### **Discretionary Stay**

An additional basis for a stay exists in the conditions described in the affidavits served with this motion. There has been a substantial increase in traffic, over and above the increase that had occurred at the time of the hearing in this matter. Additionally there are safety issues because of parked cars and the volume of foot traffic obstructing driveways and making the streets themselves more dangerous.

#### **Conclusion**

A stay pending appeal would be appropriate on either of the grounds set forth in this motion and the supporting affidavits. Therefore, Appellants respectfully request that the Court enter an Order addressing these issues, and grant a stay for the duration of the appeal..



D. Randolph Whitt  
Fleming & Whitt, P.A.  
344 Blossom View Ct.  
West Columbia, SC 29170  
(803) 422-2176

Dwhitt2001@aol.com

12/12, 2016

STATE OF SOUTH CAROLINA  
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS  
Case No. 2015-CP-29-00694

John Challis, Jennifer Challis, Robert Baust,  
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John Harden, Maia Harden, 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 and Elizabeth Yegge

Plaintiffs,

vs.

Jeffery Horning and Janet Shander-Horning,

Defendants.


#### AFFIDAVIT OF BILL MURPHY

Personally appeared before me, Bill Murphy who on oath says, deposes and says that he is over the age of eighteen years and makes this Affidavit based on his personal knowledge, Affiant is competent to testify as to the matters stated herein, and he hereby declares under the penalties of perjury, and states as follows:


1. My name is Bill Murphy, and I am a Deputy with the Lancaster County Sheriff's Office.
2. The attached email is a true and authentic copy of my communication regarding the Norwalk cul de sac.

If testifying before the Court, I would so testify as above and my statements are true and correct.

Further Affiant sayeth not.

  
Bill Murphy

November \_\_, 2015

 Julie R. Durnery, Notary Public, State of SC  
Commission expires April 11, 2023

SWORN to and subscribed before me

this 18 day of Nov, 2016

**From:** Bill Murphy [<mailto:bmurphy@lacoso.net>]  
**Sent:** Monday, November 14, 2016 9:15 AM  
**To:** [jkshmom5@gmail.com](mailto:jkshmom5@gmail.com)  
**Subject:** Norwalk Cul Desac

Dear Board Members,

It has come to my attention that the ruling came down regarding the side walk issue at the end of Norwalk that leads to the school. I understand that people can now use this side walk to walk back and forth to wherever. The Lancaster County Sheriff's Office has now began to receive complaints that Norwalk cul desac is now being used as a regular bus stop and is creating traffic issues for the residents who live on Norwalk. I had a Deputy review this area and he stated that it did seem that people had turned this area into a drop off point for kids going to school at Harrisburg Elem. . I would appreciate any consideration that you would give to this matter before someone is injured due to the level of traffic. I have been told that people are blocking driveways and stepping out in front of people's vehicles.

Deputy Bill Murphy  
Crime Prevention Officer  
Lancaster County Sheriff's Office  
803-313-2148 Office  
803-288-2734 Cell



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**NOTICE:** All email correspondence to and from this address may be subject to public disclosure under the SC Freedom of Information Act.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LANCASTER

Case No. 2015-CP-29-00694

John Challis, Jennifer Challis, Robert Baust,  
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Plaintiffs,

vs.

Jeffery Horning and Janet Shander-Horning,

Defendants.

#### AFFIDAVIT OF JANET SHANDER-HORNING

Personally appeared before me, Janet Shander-Horning who on oath says, deposes and says that she is over the age of eighteen years and makes this Affidavit based on her personal knowledge, Affiant is competent to testify as to the matters stated herein, and she hereby declares under the penalties of perjury, and states as follows:

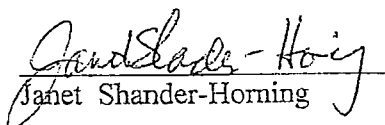
1. My name is Janet Shander-Horning, and I own the property located at 23004 Norwalk Lane jointly with my husband Jeff.
2. The easement that is in dispute passes through our property.
3. An appeal has been filed from the court's order allowing use of the disputed easement for school traffic, among other uses.
4. Cars are frequently parked in our cul de sac related to school traffic. A photograph of such cars is attached as Exhibit A.

5. Since school traffic has been allowed, my family and I have been subjected to several burdensome conditions, including excessive noise at early morning hours, excessive pedestrian traffic that has made exiting my driveway by the various drivers in my household very difficult and unsafe. At times, it is difficult to travel down Norwalk Lane on my way to work or school as pedestrian traffic is walking in the roadway, impeding vehicular traffic.
  6. On several occasions on days off or when one of my children has been home sick, member(s) of my household has been awakened by excessive noise caused by school traffic on the pathway to the private road on the way to school.
  7. On one occasion, I was impeded from exiting my driveway on my way to work by one of the plaintiffs, Jay Hurley. While approaching the sidewalk area from the Norwalk cul de sac Mr. Hurley altered his path and approached my vehicle as I was backing out of my driveway, and deliberately stood approximately 6 inches behind vehicle so that I was not able to exit my driveway.
  8. On another occasion, another plaintiff, Aarik Eberhardt, stood stationary in front of my vehicle at the stop sign closest to my home, and refused to move.
  9. On a third occasion, Mr. Eberhardt deliberately stepped away from the side of the road (Norwalk Ln.), stepped directly in front of my moving vehicle as I was progressing down the right hand side of Norwalk Lane on my way to work, causing me to slow to almost a complete stop so as to avoid hitting himself or his young child. As I drove by, Mr. Eberhardt attempted to hit my vehicle with his hand as I passed
  10. All of these instances were reported to the Lancaster County Sheriff's department.
  11. The daily traffic on the easement has been far heavier than it has ever been, prior to the building of the school. On most days, approximately 50-70 individuals walk to the school, as early as 6:45 a.m., using the
-

walkway. This number does not include pedestrian traffic returning from school. A series of photographs, showing the volume are attached as exhibit B.

If testifying before the Court, I would so testify as above and my statements are true and correct.

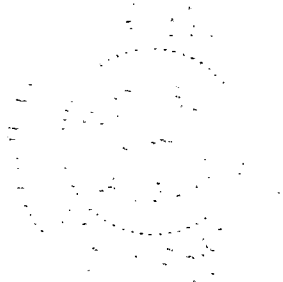
Further Affiant sayeth not.

  
Janet Shander-Horning

December 2, 2016

SWORN to and subscribed before me

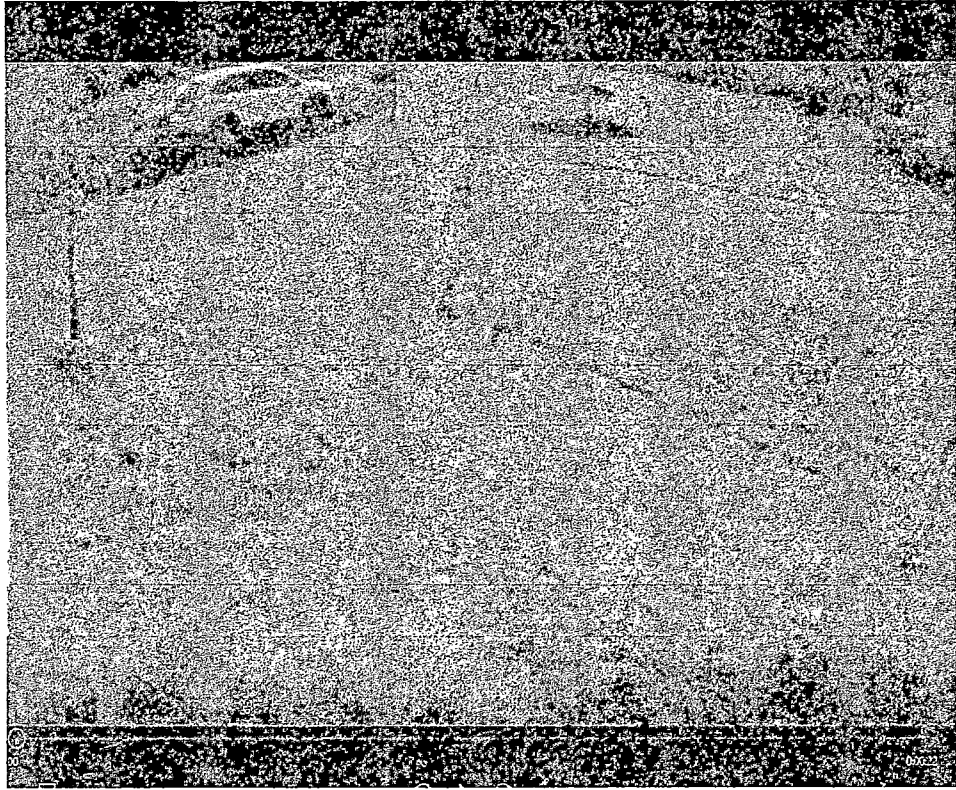
this 02 day of Dec, 20 16

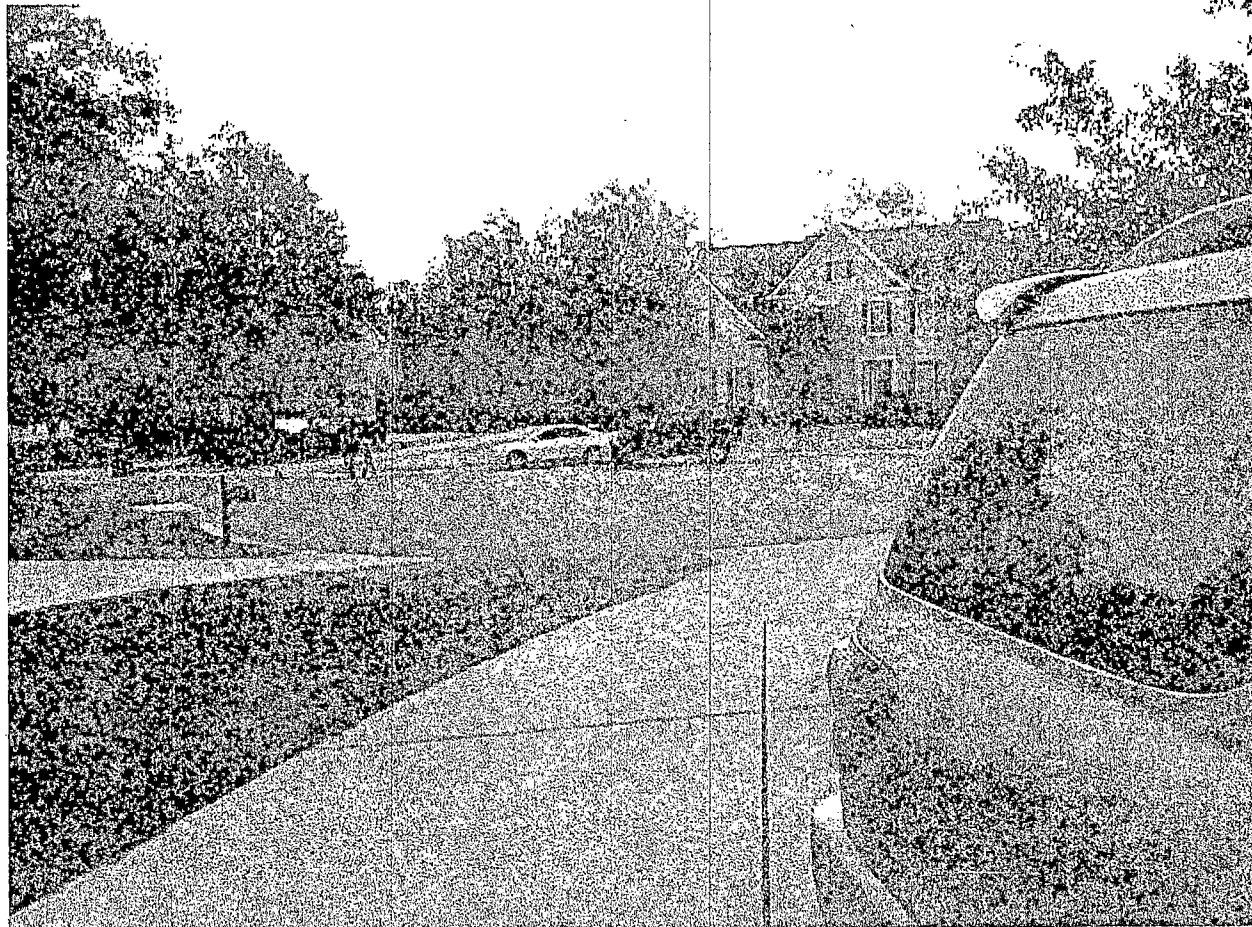




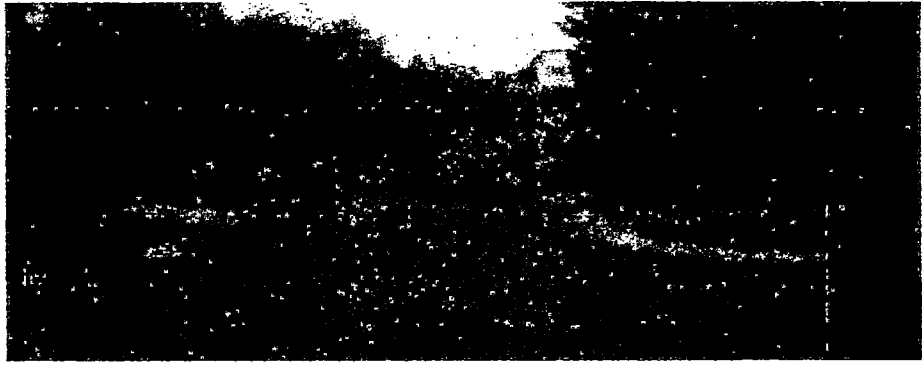
MY COMMISSION EXPIRES APRIL 10, 2024

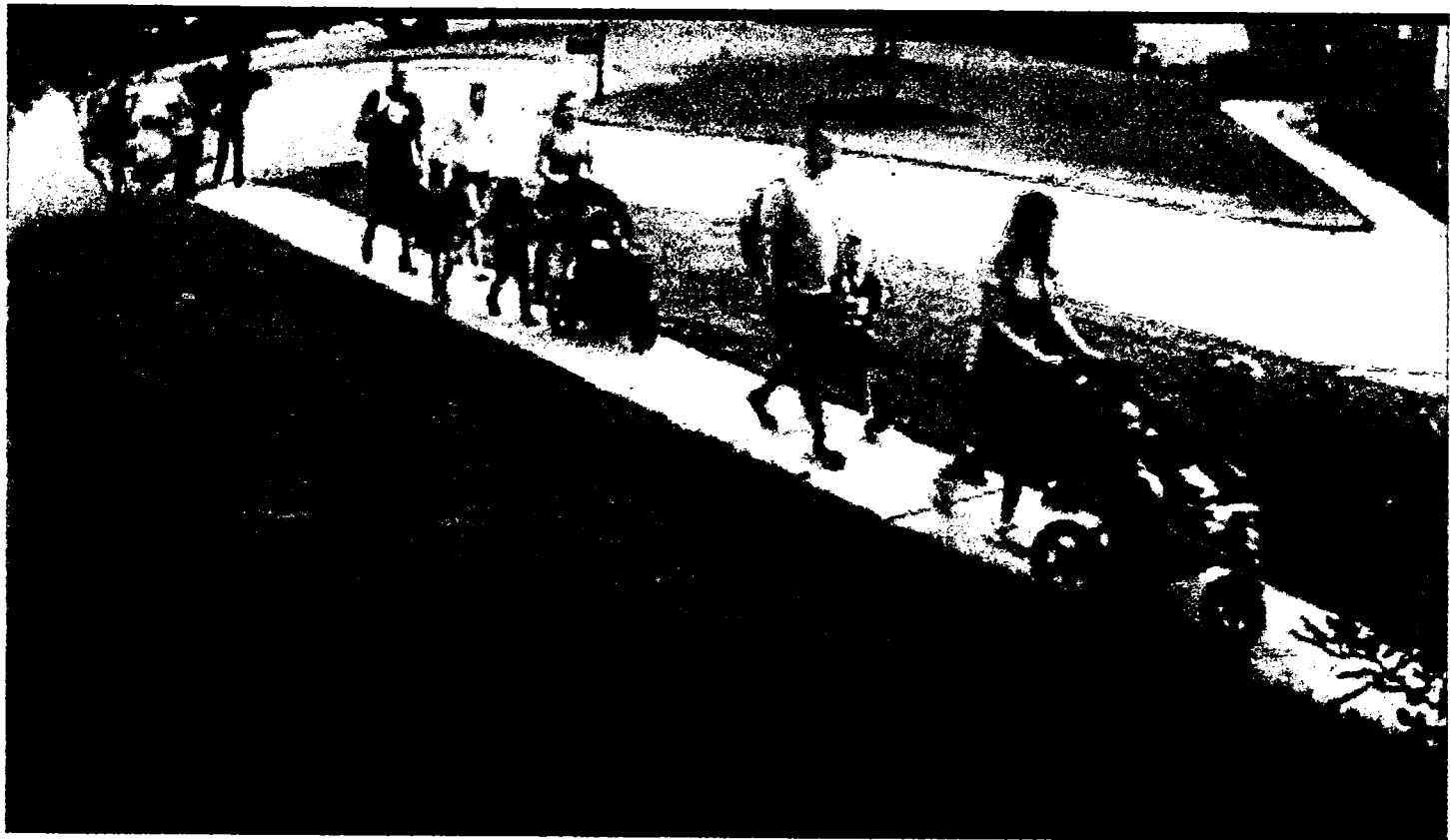
**Exhibit A**





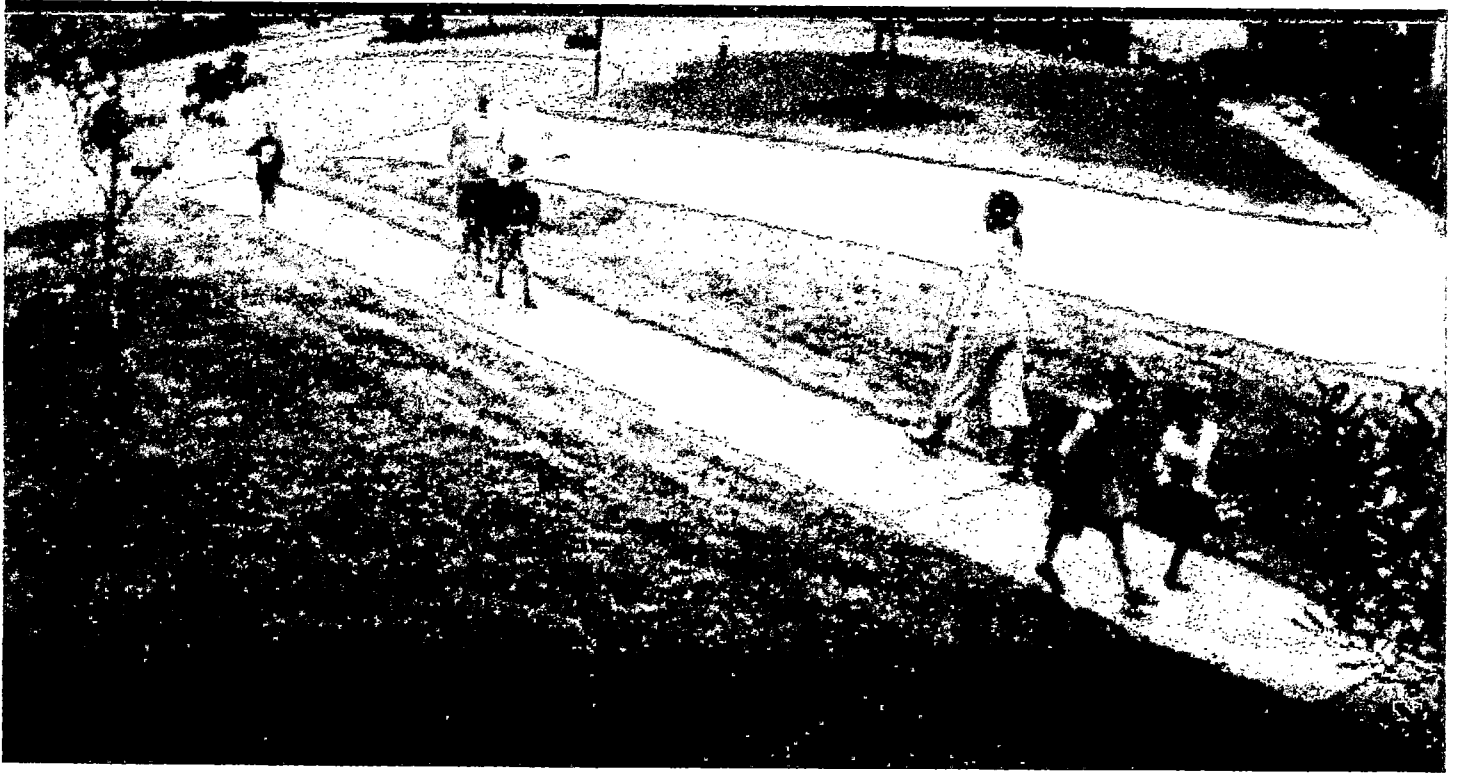
**Exhibit B**

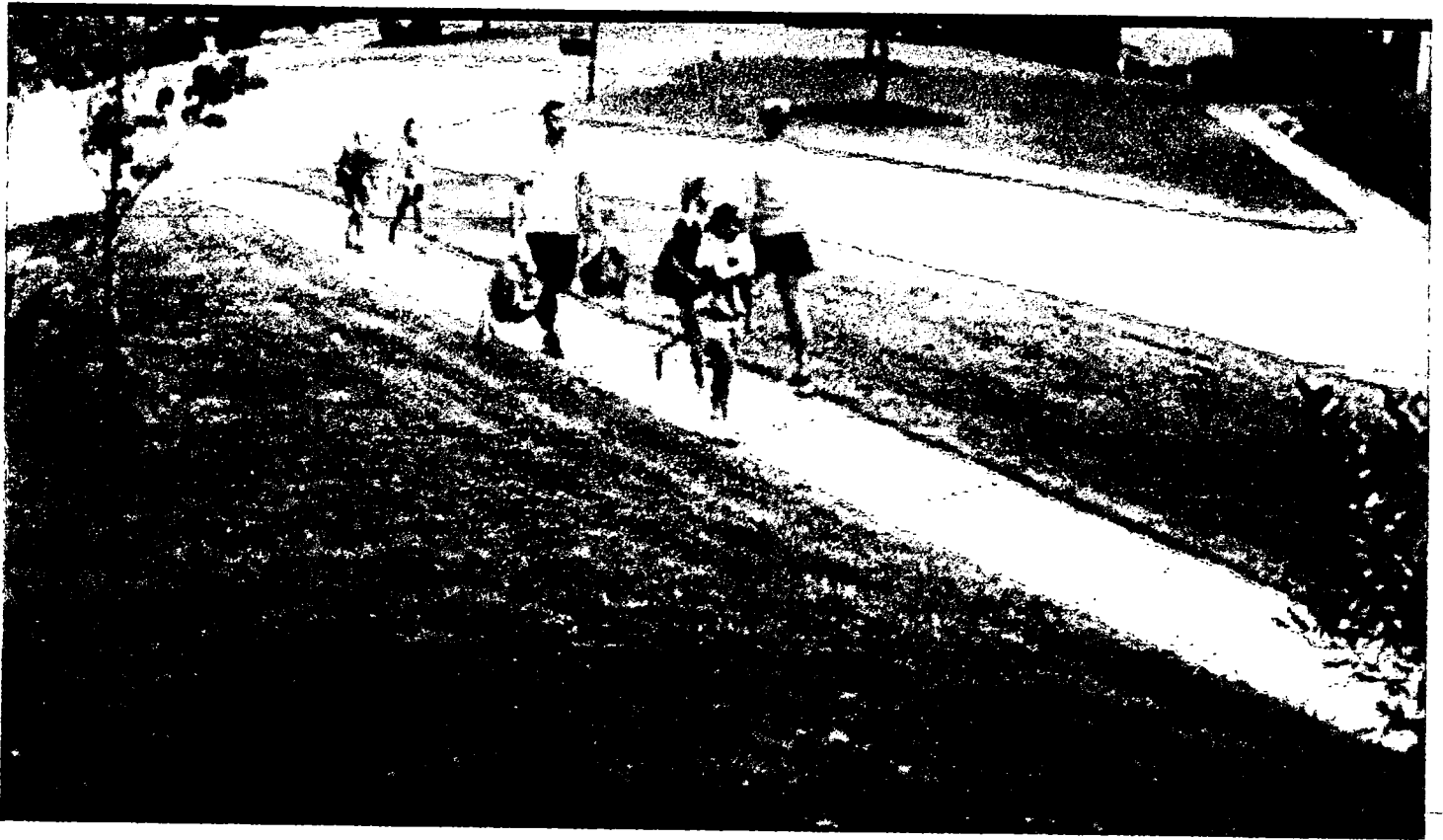




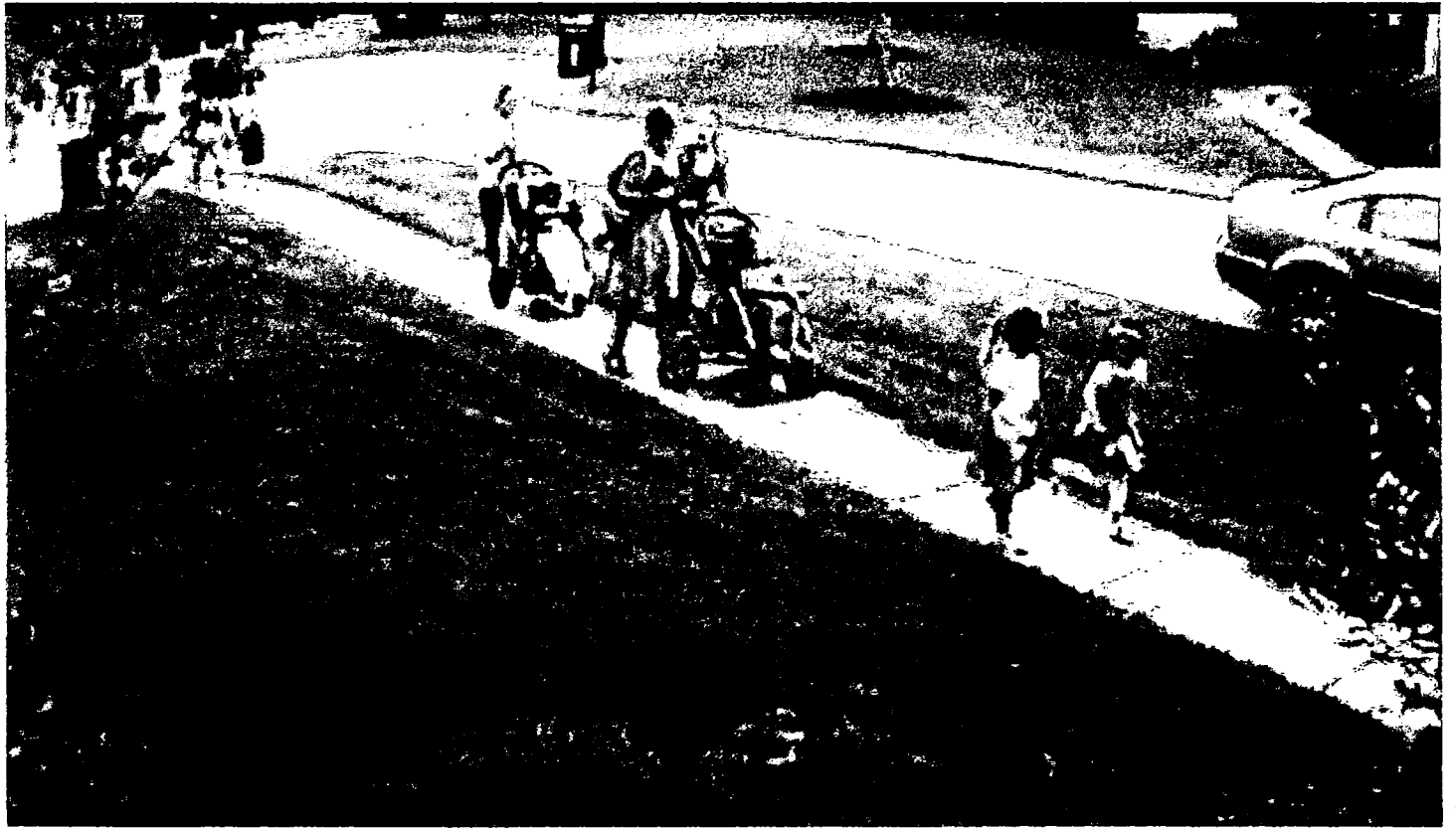


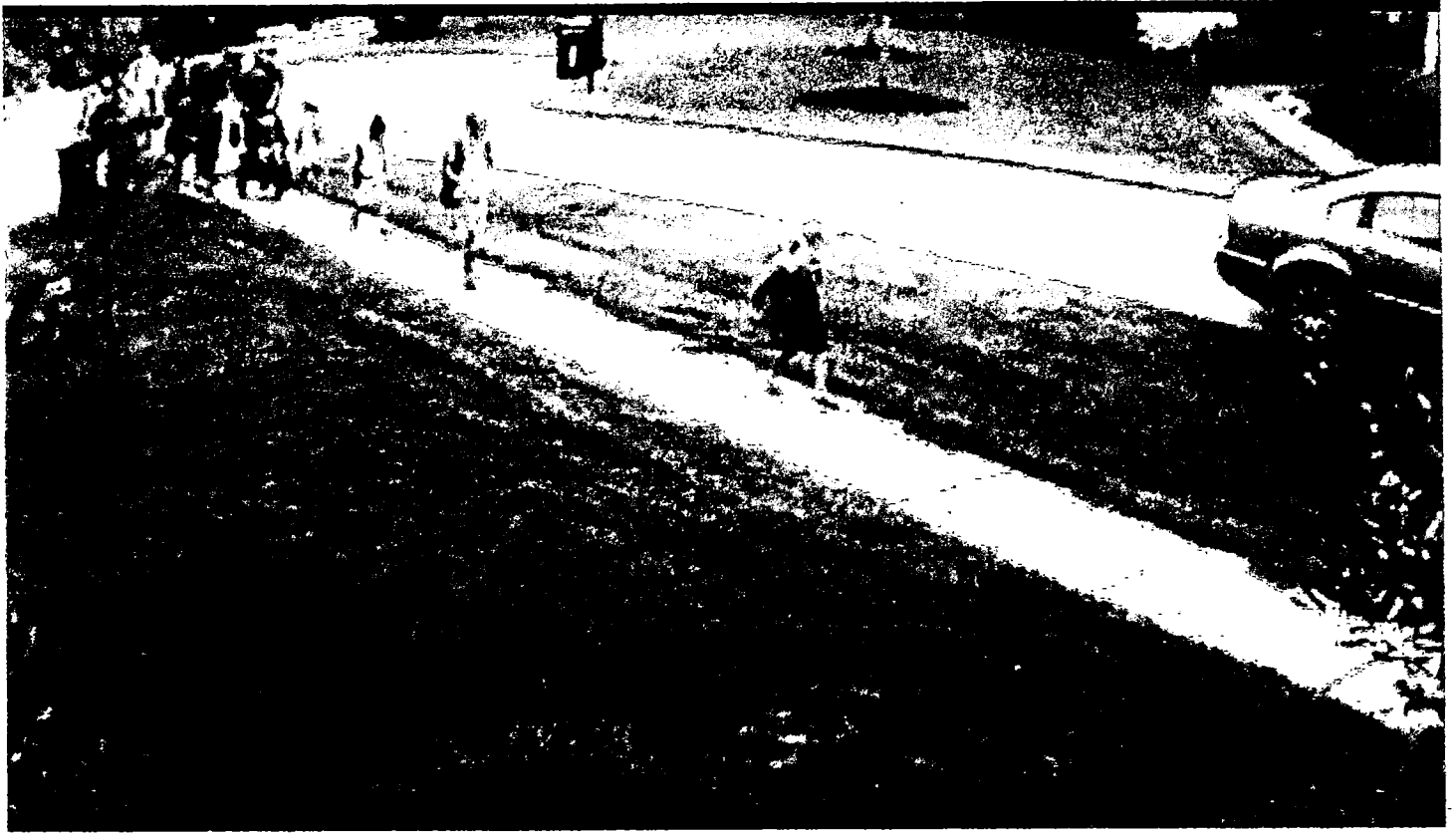
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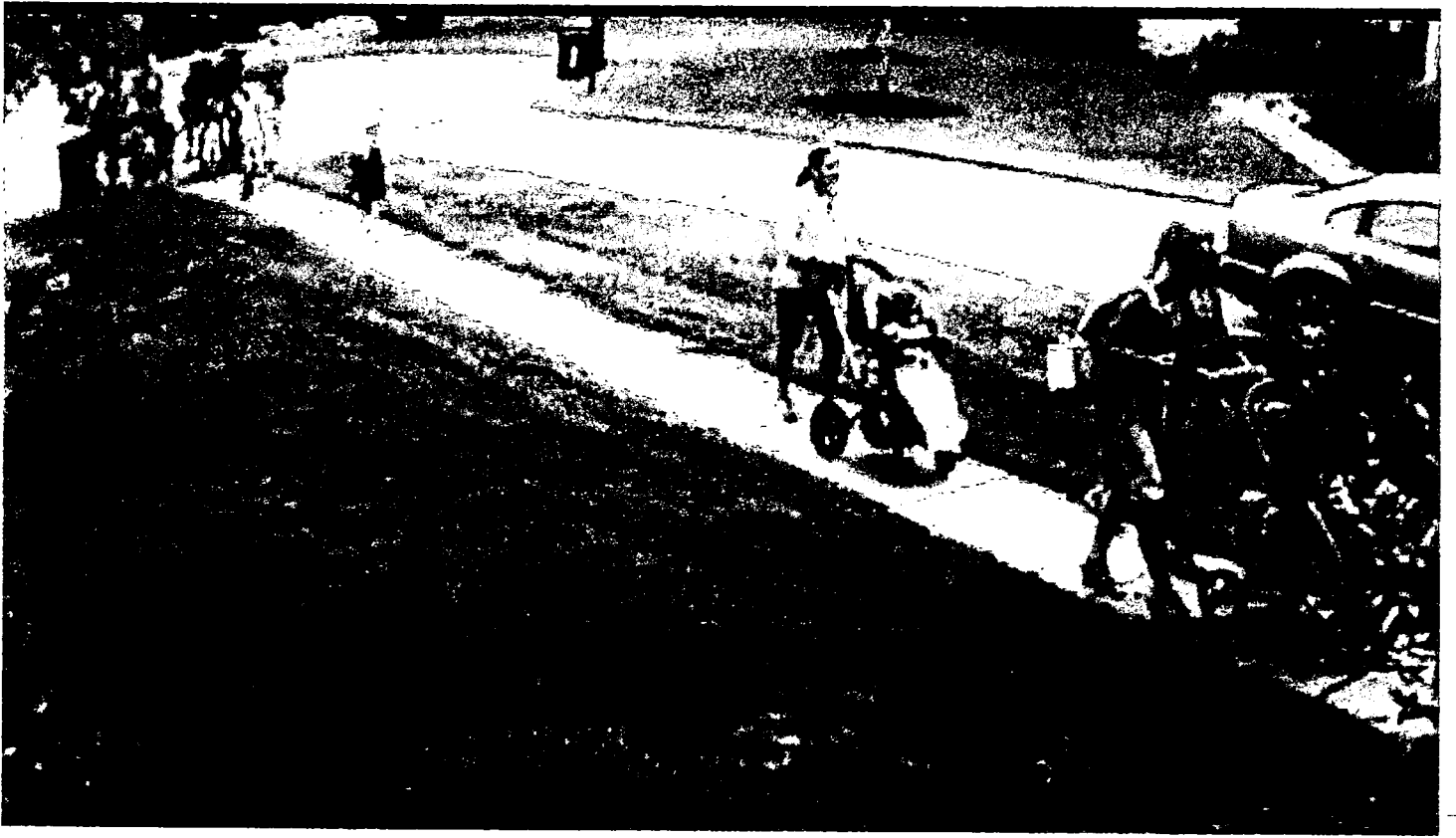














1471950534244

STATE OF SOUTH CAROLINA

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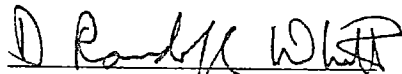
vs.

Jeffery Horning and Janet Shander-Horning,

Defendants.

The undersigned hereby certifies that I served the Defendant's Motion for Stay Pending Appeal and Affidavits on December 12, 2016 by causing a copy of said document to be placed in a sealed envelope with postage thereon fully prepaid, in the United States mail, with a return address clearly shown and addressed to :

Philip E. Wright  
408 North Main Street  
Lancaster, SC 29720



D. Randolph Whitt  
Fleming & Whitt, P.A.  
344 Blossom View Ct.  
West Columbia, SC 29170  
(803) 422-2176 Tel

December 12, 2016

**From:** Andrew McCoy <[Andrew.McCoy@JWHOMES.com](mailto:Andrew.McCoy@JWHOMES.com)>

**Date:** June 8, 2015 at 11:40:53 AM EDT

**To:** Andrew McBride <[Andrew.McBride@jwhomes.com](mailto:Andrew.McBride@jwhomes.com)>

**Cc:** Jim Seidel <[carolinafishmarket1@gmail.com](mailto:carolinafishmarket1@gmail.com)>

**Subject:** RE: Ingress/ Egress Easement Plat 2004-60 Bridgehampton filed February 2004

Mr. McBride,

Please read below. I have also copied Mr. Seidel.

I have asked that these requests be sent to you. I don't intend to respond or take any action unless specifically asked to do so by you. Over the past year I have provided electronic copies of the recorded plats depicting the easement as well as commentary on the easement's use and need. Frankly, the existence of the plats plus the County's own definition of an ingress/egress easement should be all that is required to stop the current landowner from obstructing the use of the easement by the Bridgehampton residents. Please let me know how you would like me to proceed.

Thank you,

**Andrew W McCoy**

Vice President of Construction

John Wieland Homes and Neighborhoods | JW Homes, LLC

8325-D Arrowridge Blvd. | Charlotte NC, 28273

o: 704-679-5551 | m: 704-309-8833

[andrew.mccoy@jwhomes.com](mailto:andrew.mccoy@jwhomes.com)

[jwhomes.com](http://jwhomes.com)

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

Clyde N. Davis, Jr., Special Referee  
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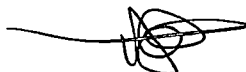
v.

Jeffery Horning and Janet Shander-Horning ..... Appellants.

PROOF OF SERVICE

I certify that I have served Respondents' Return to Appellants' Motion for (I) Leave to  
File Rule 60 Motion and (II) Stay of Appeal Pending Determination of Rule 60 Motion on  
Appellants by depositing a copy of it in the United States Mail, postage prepaid, on February 8,  
2017 to their attorney of record, Adam L. Horner, Esq., Hamilton Stephens Steele + Martin,  
PLLC, 201 South College Street, Suite 2020, Charlotte, NC 28244.

February 8, 2017



Philip E. Wright  
408 North Main Street  
Lancaster, SC 29720  
(803) 286-4343

ATTORNEY FOR RESPONDENTS

LAW OFFICE  
**PHILIP E. WRIGHT, P.A.**  
ATTORNEY AT LAW

---

TELEPHONE: (803) 286-4343

408 NORTH MAIN STREET  
LANCASTER, SC 29720  
[civil@pewpa.com](mailto:civil@pewpa.com)

February 8, 2017

FAX: (803) 286-9996

**RECEIVED**

FEB 10 2017

SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

RE: John Challis, *et al.* vs. Jeffery Horning and Janet Shander-Horning  
Appellate Case No. 2016-002059

Dear Ms. Kitchings:

I enclose the Respondents' Return to Appellants' Motion for (I) Leave to File Rule 60 Motion and (II) Stay of Appeal Pending Determination of Rule 60 Motion, together with the Proof of Service in this matter.

By copy of this letter, I am serving a copy of the foregoing documents on opposing counsel, Adam L. Horner, Esq.

Please let me know if you have any questions.

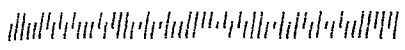
Sincerely yours,




Philip E. Wright

PEW:jb

cc: Adam L. Horner, Esq.  
Plaintiffs



**RECEIVED**  
FEB 10 2017  
SC Court of Appeals

 **Philip E. Wright, PA**  
Attorney At Law  
408 N. Main Street  
Lancaster, SC 29720

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The Honorable Jenny Kitchings  
S. C. Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211