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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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FEB 10 2017

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

SC Court of Appeals

Stephen Spitz, Special Referee

Appellate Case No. 2016-001878

Julia Tompkins Ewing Respondent,

v.

Keith A. Guest, Stephanie C. Guest, and
Pleasant Point Property Owners Association, Defendants,

of whom

Keith A. Guest and Stephanie C. Guest are the Appellants.

MOTION TO STRIKE

TO: THE HONORABLE CHIEF JUDGE AND ASSOCIATE JUDGES
OF THE SOUTH CAROLINA COURT OF APPEALS:

Respondent moves for an Order striking from appellants' Designation of Matter and from appellants' Initial Brief material contained in those documents in violation of the rules of this Court, and requiring the appellants to amend their Designation and their Initial Brief so as to comply with the rules. As grounds for the motion, respondent would respectfully show as follows:

1. The Appellate Court Rules prohibit the inclusion in the Record on Appeal and in the parties' briefs of any material not presented to the lower court.¹

¹ **Rule 209(b) Content.** The Designation * * * may only propose to include portions of the transcript, pleadings,

(continued...)

2. The appellants' Designation of Matter contains material not presented to the circuit court, in violation of the rules. This material is identified on Exhibit "A".

3. The appellants' Initial Brief contains references to material not presented to the circuit court, in violation of the rules. This material is identified on Exhibit "B".

4. The appellants' Initial Brief contains factual assertions unsupported by any evidence. These assertions are identified on Exhibit "C".

5. The appellants were the defendants in circuit court. They offered in evidence fifty-two exhibits. Several of these exhibits contained more than one deed or plat. In some cases but not all, the appellants separated multiple documents in a single exhibit by labeling them with a second number in addition to the Exhibit Number. For example, the fourth deed in Defendants' Exhibit 1 might be labeled "4".

6. In the appellants' Designation of Matter, the documents proposed for inclusion in the Record on Appeal are not identified by exhibit number but only by a reference to the date of the document or its recording information. To determine whether the designated documents were entered into evidence, the information contained in the Designation of Matter must be compared to the Exhibit List and the copy of the exhibits supplied by the court reporter. That has been done. The documents identified in Exhibits "A" and "B" to this motion are not found in the Exhibits List or in the copy of the exhibits supplied by the court reporter. These materials may

¹(...continued)

orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)].

Rule 210(c) Content. * * * The Record shall not, however, include matter which was not presented to the lower court or tribunal.

Rule 208(b)(4) References to Record. The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] * * * .

be submitted to the Court for review if necessary.

7. The factual assertions made in the appellants' Initial Brief and identified in Exhibit "C" to this motion are, as noted above, unsupported by any evidence. These assertions in some instances are not only unsupported but false and highly prejudicial. Rather than submit the entire trial transcript to the Court for resolution of this objection, your respondent suggests that the appellants be required to identify any portions of the evidence which they contend will provide support for the assertions found in Exhibit "C".

8. The respondent has brought these objections to the attention of appellants' counsel but has received no response.

9. For these reasons the respondents move the Court for an Order requiring the appellants to amend their Designation of Matter and their Initial Brief so as to bring them into compliance with the Rules of Appellate Procedure.

Respectfully submitted,

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by: James B. Richardson, Jr.
Attorneys for Respondent.

February 8, 2017.

Exhibit "A"

Designation of Matter

1. In the "Deeds" section of appellants' Designation of Matter, Items 1, 2, 3, and 9 are not in evidence.
2. Also in the "Deeds" section of the Designation, the description of the deed in Item 15 of the Designation is similar to but not the same as one or both deeds in evidence as Defendants' Exhibit 1, part 7 and part 8.
3. No mortgages identified in the "Mortgages" section of the Designation are in evidence.
4. In the "Transcripts" section of the Designation, the designation of the Rule 59 motions hearing "with exhibits" is incorrect since no new evidence may be offered in connection with a Rule 59 hearing and none was.

Exhibit "B"

Appellants' Initial Brief

1. On page 5 of the appellants' Initial Brief is a sentence reading:

On August 2, 1982, Pleasant Point Plantation Associates conveyed to Jones Properties Lot 28. The deed references Plat 130/141 (cite deed).

This deed is not in evidence.

2. On page 6 of the appellants' Initial Brief are paragraphs reading:

On October 29, 1986, Pleasant Point Plantation Associates deeded to Howard N. Jones several lots in the subdivision, plus a 1.487 acre parcel in the subdivision, which is shown on a plat attached to the deed, recorded in Deed Book 462 at Page 1266. This plat shows the northern ends of Lot 2, the Manor House lot and Lot 28. Significantly, the disputed road is nonexistent on this plat. (Cite Deed)

On that same date (October 29, 1986) Howard N. Jones conveyed to Robert and Lewis White the exact same property just received from Pleasant Point Plantation Associates. The same plat recorded in Deed Book 462/1266, is re-recorded in Deed Book 462/1271. The deed from Howard N. Jones into Robert and Lewis White, however, adds the following clause to the legal description:

"This 1.487 acre tract is being conveyed to the grantee in order that this tract may be attached and become part of the property containing the Manor House previously conveyed to the grantee. This parcel is attached to the Manor House property and is to be considered one lot for restrictive covenant purposes. It is intended that this property shall remain open space and undeveloped."

Cite Deed.

Pursuant to a third and final deed executed on October 29, 1986, Jones Properties conveyed to Robert and Lewis White Lot 28. This deed references Plat 30/141, the plat which depicts the lifetime easement granted to the Tompkins, and does not show the disputed roadway. Cite Deed.

These deeds are not in evidence.

3. On pages 6 and 7 of the appellants' Initial Brief are sentences reading:

This deed recites that the conveyance is subject to an existing mortgage recorded in Mortgage Book 350 at Page 1441. (Cite Deed). This mortgage contains a plat, recorded in Mortgage Book 350 at Page 1450. This plat shows the lifetime easement held by General and Mrs. Tompkins, and does not show the disputed roadway. This plat shows a "crushed shell drive" which loops around between the Manor House and the Beaufort River, before merging into a "dirt drive" that leads to Pleasant Point Drive. The "dirt drive" runs beside the lifetime easement and provides access onto Lot 1 (cite Mortgage).

Neither the mortgage nor the referenced plat is in evidence.

4. On page 7 of the appellants' Initial Brief is a sentence reading:

This deed references Plat 30/141, as well as the plat recorded previously in Deed 462/1271, neither of which shows the disputed road.

The plat said to be recorded in Deed Book 462 at page 1271 is not in evidence.

5. On page 7 of the appellants' Initial Brief is a sentence reading:

On March 13, 1991 Tallahassee Neurological Clinic conveyed to the Tallahassee Neurological Profit Sharing Plan Lot 28, as shown on Plat 30/3[?], the 1.47 acre parcel as shown on the plat recorded in Deed 462/1271, and 0.20 acres as shown on the plat recorded in Deed 481/1881. Each of these three (3) separately recorded plats referenced in this deed show the absence of the disputed road. (Cite Deed).

The plat said to be recorded in Deed Book 462 at page 1271 is not in evidence.

6. On page 8 of the appellants' Initial Brief is a list reading:

| | |
|------|-------------------|
| 1974 | Plat 22/109 |
| 1976 | Deed 248/455 |
| 1982 | Plat 30/141 |
| 1985 | Mortgage 350/1450 |
| 1986 | Deed 462/1266 |
| 1986 | Deed 462/1271 |
| 1987 | Deed 481/1881 |

Neither the mortgage nor any of the last three deeds in this list are in evidence.

7. On page 9 of the appellants' Initial Brief is a paragraph reading:

On January 25, 1999 Tallahassee Neurological Profit Sharing conveyed to the Youngs Lot 28 as shown on Plat 30/141, plus the 1.487 acres shown on the plat recorded in Deed 462/1271, and the 0.20 acres shown on the plat recorded in Deed 481/1881. Again, each of these three (3) different plats shows the absence of the disputed roadway. (Cite Deed)

The plat said to be recorded in Deed Book 462 at page 1271 is not in evidence.

8. On page 18 of the appellants' Initial Brief are sentences reading:

On August 2, 1982, Pleasant Point Plantation Associates conveyed to Jones Properties Lot 28. The deed references Plat 30/141 (cite deed).

No such deed is in evidence.

9. On page 19 of the appellants' Initial Brief are paragraphs reading:

On October 29, 1986 Pleasant Point Plantation Associates deeded to Howard M. Jones several parcels, including 1.487 acres as shown on an attached plat recorded in Deed Book 462 at Page 1266. The road is not shown on this plat, confirming once again the prior abandonment of the road. (Cite deed).

On October 29, 1986 Howard M. Jones deeded several parcels, including the 1.48 acre parcel referenced above, to Robert and Lewis White. This deed references a plat recorded in Deed Book 462 a Page 1271. This plat is identical to the plat recorded in Deed Book 462 at Page 1266 providing, once again, public notice to the world, as well as to General and Mrs. Tompkins, that the road does not exist and the grantors and grantees in this chain of title are claiming fee simple ownership of the land on which the road was once located. (Cite deed and plat)

On that same date, Jones Properties conveyed to Robert and Lewis White Lot 28 of Pleasant Point Plantation. This deed references the 1982 plat (Plat Book 30 at Page 141) on which the lifetime easement to the Tompkins is shown, but the road is not.

No such deeds are in evidence.

10. On page 20 of the appellants' Initial Brief is a paragraph reading:

On June 19, 1987 the Whites conveyed to Frank and Judith Davis the Old Manor House property, aka Lot 29. This deed references an individual plat recorded in Mortgage Book 350 at Page 1450, which shows only the lifetime easement granted to the Tompkins and does not show the road. Once again, there was a publicly recorded reference 'o

a plat putting the world, and the Tompkinses, on notice that the road no longer exists, has been abandoned, and the successive owners of the Old Manor House property are claiming fee simple absolute title to the land upon which the road was once located. (Cite mortgage).

The plat said to be recorded in Mortgage Book 350 is not in evidence, nor is any testimonial description of its content.

11. On page 21 of the appellants' Initial Brief is a paragraph reading:

By this point in time, more than twenty (20) years has run since the 1974 plat. By this point in time no less than seven (7) (! ! !) prior plats have been recorded documenting the abandonment of the road, as follows: 1974 Plat Book 22 at Page 109, 1976 Deed Book 248 at Page 455, 1982 Plat Book 30 at Page 141, 1985 Mortgage Book 350 at Page 1450, 1986 Deed Book 462 at Page 1266, 1986 Deed Book 462 at Page 1271, 1987 Deed Book 481 at Page 1881.

The plats said to be recorded in 1985 Mortgage Book 350 at Page 1450, 1986 Deed Book 462 at Page 1266, and 1986 Deed Book 462 at Page 1271 are not in evidence.

Exhibit "C"

Appellants' Initial Brief

1. On page 9 of the appellants' Initial Brief are sentences reading:

In this lawsuit, the Tompkins and the Respondent acknowledged that Plat 19/160 eliminated the disputed roadway and that the Youngs were claiming fee simple title to the disputed roadway, free of any easement. The Plaintiffs failed to prosecute this action and it was dismissed on February 28, 2002, without a definitive resolution.

The only part of these allegations supported by the record is the statement that the suit was dismissed on February 28, 2002. The rest is unsupported by any evidence.

2. On page 21 of the appellants' Initial Brief is a paragraph reading:

On January 25, 1999 Tallahassee Neurological Profit Sharing deeded Lot 28 to Roi and Dyan Young plus the 1.487 acre parcel and the 0.20 acre parcel. This deed expressly references three (3) different plats, each of which show no road. (Cite Deed).

This deed, recorded in Deed Book 1132 at page 1543, references four plats, not three. Two of the referenced plats are not in evidence. Of the two referenced plats which are in evidence, one shows the disputed road and one does not.

3. On pages 21-22 of the appellants' Initial Brief is a paragraph reading:

Between November 1, 1999 and February 28, 2002 a lawsuit was pending in the Beaufort County Court of Common Pleas, brought by the Tompkins/Ewing against the Youngs, asserting the exact same claim as is asserted in this suit, i.e., the dedication of an implied easement to the road arising from the 1969 plat. In that lawsuit, the Tompkins acknowledged that they were aware of the foregoing plats and deeds that had eliminated the road, that they were aware that the Youngs and their predecessors in title were claiming fee simple absolute title to the road, and that the Youngs and their predecessors in title had blocked and obstructed the road. The Tompkins, and Mrs. Ewing, eventually abandoned this lawsuit. (Cite pleadings and court record).

The characterization of the content of the complaint is partially correct. The remaining assertions are unsupported by any evidence.

4. On page 22 of the appellants' Initial Brief is a sentence reading in part:

Additionally, General and Mrs. Tompkins entered into an accord and satisfaction with Pleasant Point Plantation pursuant to which they acquired an exclusive lifetime easement for ingress and egress * * * .

The easement in questions, Defendants' Exhibit 1, part 7A, grants no right of ingress and egress.

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Keith A. Guest, Stephanie C. Guest, and
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of whom

Keith A. Guest and Stephanie C. Guest are the Appellants.

CERTIFICATE OF SERVICE

I certify that I served a copy of respondent's motion to strike by first class mail, postage prepaid, addressed to appellants' attorney at his address of record, namely:

H. Fred Kuhn, Jr., Esq.
Moss, Kuhn, Fleming & Smith
P.O. Drawer 507
Beaufort, SC 29901-0507

on February 9, 2017.

James B. Richardson, Jr.

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February 9, 2017.

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February 9, 2017

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SC Court of Appeals

Honorable Jenny A. Kitchings
Clerk of the S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

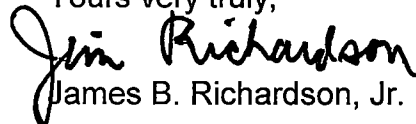
Re: Ewing v. Guest
Appellate Case No. 2016-001878

Dear Ms. Kitchings:

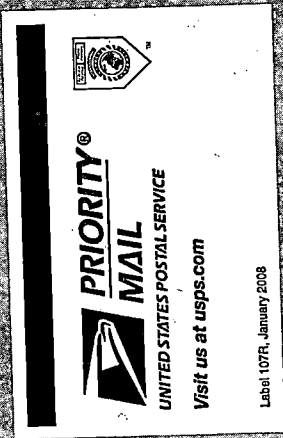
Enclosed for filing is respondent's motion to strike.

Thanking you, I remain

Yours very truly,


James B. Richardson, Jr.

cc: H. Fred Kuhn, Jr., Esq.
David L. Tedder, Esq.



James B. Richardson, Jr.
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TO:
Honorable Jenny A. Kitchens
Clerk, S. C. Court of Appeals
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