

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
No. 2016-002059

RECEIVED

FEB 16 2017

SC Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Clyde N. Davis, Jr., Special Referee

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, Christine Powell, Lane Reavis, Kym Reavis, James Seidel, Deborah Seidel, David Templeton, Jennifer Templeton, Elizabeth Yegge
.....Respondents,

v.

Jeffery Horning and Janet Shander-HorningAppellants.

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

NOW COME Defendants-Appellants Jeffery Horning and Janet Shander-Horning (the "Appellants"), by and through their undersigned counsel, and submit this reply (a) in further support of their motion (the "Motion for Leave and Stay of Appeal") for leave to file a motion for reconsideration (the "Rule 60 Motion") in the Court of Common Pleas, County of Lancaster (the "Trial Court"), pursuant to Rule 60 of the South Carolina Rules of Civil Procedure and (b) in response to Respondents' Return to Appellants' Motion for (I) Leave to File Rule 60 Motion and (II) Stay of Appeal Pending Determination of Rule 60 Motion (the "Response").

Respondents make several misstatements in the Response which Appellants are compelled to address. First, Respondents incorrectly state at ¶ 4 of the Response that the undersigned had not yet been added as counsel in this case when Appellants filed the Motion for Leave and Stay of Appeal. That is incorrect. The undersigned appeared in this case as counsel for Appellants on December 30, 2016. The undersigned, on behalf of Appellants, then filed the Motion for Leave and Stay of Appeal on January 19, 2017.

Second, counsel for Respondents did question Appellants as to why Appellants were proceeding in two courts simultaneously for what Respondents' counsel misunderstood to be the "same relief." Response at ¶ 5. Respondents mischaracterize Appellants response to this inquiry. First, Appellants were aware of the motion to stay filed in the Trial Court (or at least served) by Mr. Whitt and told counsel for Respondents on several occasions that once Mr. Whitt withdrew as counsel in the Trial Court, Appellants could and would withdraw that motion to stay the order pending appeal (which Appellants promptly did last week contemporaneous with filing their substitution of counsel). Second, and although it is now a moot point, the relief requested by Mr. Whitt in the Trial Court is not the same relief being sought by Appellants in the Motion for Leave and Stay of Appeal. Mr. Whitt sought a stay of the order of the Trial Court pending

prosecution of this Appeal. The undersigned counsel is seeking leave of this Court to file the Rule 60 Motion in the Trial Court and a stay of this appeal pending the Trial Court's determination of the Rule 60 Motion.

Third, Respondents misstate and mischaracterize Appellant Janet Shander-Horning's testimony in the Trial Court. When Ms. Shander-Horning observed the children walking on the path beside her home, it was during the 2015-2016 school year. Pursuant to the Trial Court's Order Granting Partial Summary Judgment dated October 20, 2015:

[p]ending final resolution of the developer's intent ... no use shall be made of the easement for purposes of going to and coming from Harrisburg Elementary School by ... persons ... from the hours 6:45 a.m. to 8:00 a.m. and 1:45 p.m. to 3:00 p.m."

Summary Judgment Order at p. 2. A true and correct copy of the Summary Judgment Order is attached hereto as Exhibit A. The Summary Judgment Order enjoining use of the path was entered in the beginning of the 2015-2016 school year, and not reversed until after the close of the 2015-2016 school year and before the start of the 2016-2017 school year by the Amended Order of the Special Referee (the "Amended Order"). Therefore, it was not possible for Ms. Shander-Horning (or anyone) to measure the volume of usage on the path (and assess whether such usage was burdensome) because no one was permitted to use it for the purpose of walking to/from school for almost the entire school year. Since the Summary Judgment Order's injunction was reversed by the Amended Order, and as Appellants will show with greater detail and evidentiary support in the Rule 60 Motion, upwards of 60 people per day began to use the path to walk to/from school and dangerous conditions have arisen on the Hornings' property and Norwalk Lane as a result of the burdensome use. The Special Referee specifically stated in his Amended Order that:

the existence of the elementary school has not been proven to be any burden on the easement... 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 ... access to Harrisburg Elementary School.

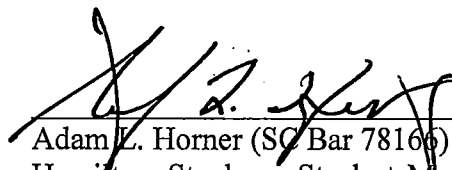
Amended Order at 9-10. Now that the injunction has been lifted and people are using the path in large volumes, compelling evidence of burden on the easement does exist, and Appellants have the right to present such evidence to the Trial Court.

Finally, the Trial Court concluded that “[t]here is no limitation of record or in the evidence in this case limiting the use of the easement.” Amended Order at 13. The Trial Court, at its ruling on Summary Judgment, urged the parties to go out and obtain evidence of the developer’s, John Wieland Homes (the “Developer”), intent when it built Karriker Court and the disputed path. While there was an email from an employee of the Developer, Mr. Andrew McCoy, clearly defining the intent of the Developer, the email was hearsay and thus inadmissible. At the time of trial of this matter, Mr. McCoy had moved to Tennessee and was still working for the Developer and unable to speak freely with the Appellants or Respondents per the direction of the Developer’s corporate counsel. Only recently Mr. McCoy has left his position at the Developer and moved back to the Carolinas and made himself available to provide evidence in this case. The Trial Court was unable to consider the email of Mr. McCoy not because it was irrelevant to the action, it was directly on point with respect to the Developer’s intent in building the path, but because the email was unverified and thus hearsay. Attached hereto as Exhibit B is a true and accurate copy of the Affidavit of Andrew M. McCoy and the email discussed herein and in the Response. If permitted to file their Rule 60 Motion, Appellants will submit this new evidence in the Trial Court. It will not, as Respondents suggest,

result in “extensive new discovery” by the Respondents. At most, Respondents can speak to Mr. McCoy informally and obtain their own affidavit or depose Mr. McCoy. The evidence provided by Mr. McCoy is newly discovered and previously unavailable evidence that Appellants are authorized to present to the Trial Court under Rule 60. Respondents cannot block this new evidence solely because it does not support their position in the case.

WHEREFORE, the Appellants respectfully request that this Court grant Appellants leave to file their Rule 60 Motion with the Trial Court and stay the above-captioned appeal pending the Trial Court’s determination of the Rule 60 Motion.

Respectfully submitted, this the 15th day of February, 2017.



Adam L. Horner (SC Bar 78166)
Hamilton, Stephens, Steele + Martin, PLLC
South College Street, Suite 2020
Charlotte, North Carolina 28244
(704) 344-1117

EXHIBIT A

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,
Zeljko Cvitkovic, Stephanie Cvitkovic, Aarik
Eberhardt, Amy Eberhardt, James English,
Socheata Koy, Carl Fleteau, Patrice Fleteau,
Keith Gonsalves, Sandy Gonsalves, 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.

CLERK OF COURT
LANCASTER, SC

2015 OCT 23 PM 12:03

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This Motion was heard on September 24, 2015. Both Plaintiffs and Defendants filed motions for summary judgment and presented affidavits and other evidence in support of their contentions. Partial summary judgment is appropriate as set forth herein, leaving a single issue of material fact to be resolved.

EXISTENCE OF THE EASEMENT

There is no basis for disputing the existence of an easement. The easement was created by the developer John Wieland Homes by depicting it on a plat showing the Bridgehampton subdivision.

THE SCOPE OF THE DISPUTED EASEMENT

An action to determine the scope of an easement is an action in equity. *Hardy v. Aiken* 369 S.C. 160, 631 S.E. 2d 539 (2006). "A grant of easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. Of Fountain Inn* 348 S.C. 58, 71; 558 S.E. 2d 902, 909

(Ct. App. 1998) (internal quotation marks omitted). In construing a deed it is axiomatic that the intent of the grantor at the time of the conveyance is paramount.

As noted in *Rhett. v. Gray* (Opinion No. 5066, S.C. App. 12/19/2012) : "A fundamental principle is that an easement for the benefit of a particular piece of land cannot be enlarged and extended to other parcels of land, whether adjoining or distinct tracts, to which the right is not attached. The purpose of this rule is to prevent an increase in the burden upon the servient estate, and it applies whether the easement is created by grant, reservation, prescription, or implication." (citing *Adams v. Winnett* 156 S.W. 2d 353, 357 (Tenn. Ct. App. 1941)(internal quotation marks omitted).

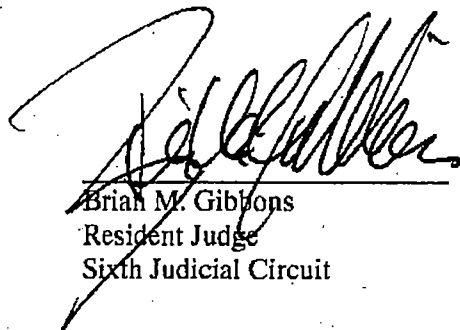
Plaintiffs cannot expand the disputed easement beyond the alleged original use intended at the time of the grant of the easement. That is an issue of material fact left to be developed in this litigation.

INTERIM USE OF THE DISPUTED EASEMENT

Pending final resolution of the question of the developer's intent, the Court imposes the following limitations on use of the disputed easement. No use shall be made of the easement for purposes of going to and coming from Harrisburg Elementary School by children and/or persons accompanying them to Harrisburg Elementary School from the hours of 6:45 a.m. to 8:00 a.m. and 1:45 p.m. to 3:00 p.m. on days that school is in session. Defendants are required to refrain from interfering with reasonable use of the disputed easement outside of the time frames listed above.

CONCLUSION

Ruling on the standing issues raised by the Defendants is deferred at this time. For the reasons stated above, partial summary judgment is granted.



Brian M. Gibbons
Resident Judge
Sixth Judicial Circuit

10/20, 2015

EXHIBIT B

AFFIDAVIT OF ANDREW M. MCCOY

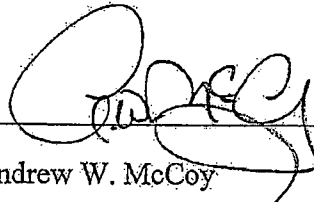
ANDREW M. MCCOY, being duly sworn, states as follows:

I am an adult citizen of North Carolina over the age of eighteen (18) years and am competent to testify. I make this Affidavit based on my own personal knowledge.

1. I am currently a project manager for a large private home builder in Charlotte, North Carolina.
2. Previously, I was a Division President of John Wieland Homes and Neighborhoods in Nashville, Tennessee. I held that position from July of 2015 to approximately January 2016.
3. I am the author of the email attached hereto as Exhibit A dated November 12, 2014, 4:50 P.M., EST to Janet Shander-Horning and copying Jeffery Horning, Tanya Baust and other parties (the "Email"). The version of the Email attached hereto is a true and accurate copy of same.
4. At the time I wrote the Email, I was a Vice President of Construction at John Wieland Homes and Neighborhoods in Charlotte, North Carolina. I held that position from October of 2008 until I moved to Nashville, Tennessee to become a Division President.
5. John Wieland Homes and Neighborhoods is a developer and homebuilder in the Southeastern United States and planned and built the development known as the Bridgehampton Community, which is the subject of the Email.



THIS the 25th day of January, 2017.



Andrew W. McCoy

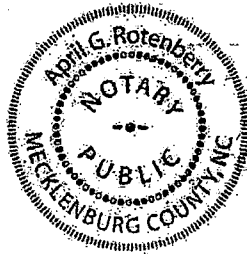
Sworn to and subscribed before

me this 25th day of January, 2017.



Notary Public

My commission expires: 01/04/19





May, Julia

From: Andrew McCoy <Andrew.McCoy@JWHOMES.com>
Sent: Wednesday, November 12, 2014 4:50 PM
To: Janet Shander-Horning
Cc: 'Jeff Horning'; 'Tanya Baust'; 'John & Rachel McKenzie'; Covenants Committee; Jeffery D. Catoe; Penelope Karagounis; JUDY E BOONE
Attachments: MB 2005 PG 94.tif; MB 2004 PG 60.tif

Janet,

Please be aware this will be my last correspondence on this issue. I have also copied some of the key folks with Lancaster County. I have included the plats for everyone's review.

John Wieland was developer and owner of the lands in the Bridgehampton community at the time plats were recorded or subsequently amended. As owner and developer we record countless easements across our property which is later transferred and becomes the property of each subsequent buyer. The easements range from Sanitary Sewer easements, to Storm Sewer easements, to Landscape easements, and in your case, an ingress/egress easement. Since we are/were the owners of the land, the easement rights are established by the recorded plat and we do not in turn record easement agreements with ourselves.

The easements are clearly labeled on the recorded plats and by those labels each subsequent buyer can identify the easement on their property and for whose benefit the easement was recorded. A Storm Sewer easement is established for access for future maintenance and repair of the storm system. A Sanitary Sewer easement is established for access for future maintenance and repair of sanitary sewer lines. An ingress/egress easement is establish for access in and over the land it encumbers and for future maintenance and repairs that may be required to keep the ingress/egress passable.

In your particular case, the ingress/egress easement was record to establish access from Karriker Court to Norwalk Lane. Thereby, the easement was recorded in favor of John Wieland Homes and the future owners of property on Karriker Court. Along these lines, all ownership, maintenance, and repair of public sidewalks and areas of ingress/egress within the South Carolina portion of Bridgehampton are fully the responsibility of the Homeowners Association.

Lastly, John Wieland Homes established the easement and installed the sidewalk in early 2004. As a subsequent owner, you closed on the home in June of 2011. I can only assume that you did not raise any objection to the sidewalk at the time of purchase or any objections over the last three plus years since the purchase. I also assume your objection now is not over the use and access of the easement by the residence on Karriker Court but rather by



elementary aged children using the access in the early morning hours to walk to the new school behind Bridgehampton. I can certainly sympathize with you and I also think parents and children are at risk because of the current situation. I feel that during the planning process for the school one of two things should have occurred. Either a well marked and potentially signalized crosswalk should have been installed or a documented position from the school system administrators restricting walking access to the school.

My hope is the parties involved will communicate with one another and that the residence along Karriker Court will not be arbitrarily cut off from walking access to the community and the community amenities. Across an easement establish solely for their benefit.

Common ground exist, I hope you all are able to find it.

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

jwhomes.com

From: Janet Shander-Horning [mailto:jkshmom5@gmail.com]

Sent: Wednesday, November 12, 2014 11:05 AM

To: Andrew McCoy

Cc: 'Jeff Horning'; jkshmom5@gmail.com; 'Tanya Baust'; 'John' & Rachel McKenzie'

Subject: RE:

Importance: High

Andrew -

We have tried to no avail to locate the Easement Agreement that is associated with the Ingress-Egress easement shown on this drawing (lot 659), as well as any of the Easement Agreements for the houses on Karriker Court, specifically lots # 762 and 761).

Have these documents been filed at the SC Register of Deeds? If so, can you please provide copy of these documents as well as date of file, or let me know where I can get these documents?

Thank you -

Janet

From: Andrew McCoy [mailto:Andrew.McCoy@JWHOMES.com]

Sent: Wednesday, September 03, 2014 1:16 PM

To: jkshmom5@gmail.com

Subject: FW:

Plats are attached



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
jwhomes.com

From: Todd Bailey [<mailto:tbailey@espassociates.com>]
Sent: Friday, August 29, 2014 9:37 AM
To: Andrew McCoy
Cc: Dave Weirich; Scott Hunter; Cathy McGinnis
Subject: RE:

Andrew I have found the Plats you were asking about. If you have any further questions please let us know.

Click [here](#) to report this email as spam.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
No. 2016-002059

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SC Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Clyde N. Davis, Jr., Special Referee

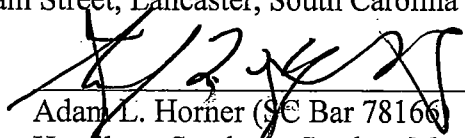
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.....Respondents,

v.

Jeffery Horning and Janet Shander-HorningAppellants.

PROOF OF SERVICE

I certify that I have served the APPELLANTS' REPLY IN SUPPORT OF MOTION FOR (I) LEAVE TO FILE RULE 60 MOTION AND (II) STAY OF APPEAL PENDING DETERMINATION OF RULE 60 MOTION on Respondents listed above by depositing a copy of it in the United States Mail, postage prepaid, on February 15, 2017, addressed to their attorney of record, Phillip E. Wright, 408 North Main Street, Lancaster, South Carolina 29720.


Adam L. Horner (SC Bar 78166)
Hamilton, Stephens, Steele + Martin, PLLC
South College Street, Suite 2020
Charlotte, North Carolina 28244
(704) 344-1117



HAMILTON STEPHENS
STEELE + MARTIN, PLLC
ATTORNEYS AT LAW

February 15, 2017

Adam L. Horner
Email: ahorner@lawhssm.com
704-227-1041

VIA FEDERAL EXPRESS, OVERNIGHT

Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
Tracking No.: 778434162923

RECEIVED
FEB 16 2017
SC Court of Appeals

Re: Jeffrey Horning, et al. v. John Challis, et al.
South Carolina Court of Appeals Case No. 2016-002059

Ms. Kitchings:

Enclosed for filing in the above-mentioned matter, please find an original and six (6) copies of *Appellants' Reply in Support of Motion for (i) Leave to File Rule 60 Motion and (ii) Stay of Appeal Pending Determination of Rule 60 Motion*. The six (6) copies are provided pursuant to Rule 240(d). A check (No. 8342) for \$25.00 is enclosed to cover the related filing fee.

Should you have any questions or concerns, please contact Adam Horner or Julia May. Thank you for your assistance.

Sincerely,

Lauren E. Griffin

Paralegal to Adam L. Horner

Enclosures

cc: Opposing counsel Phillip E. Wright (via U.S. mail; w/ enclosures)
Appellant Co-Counsel D. Randolph Whitt (via email; w/ enclosures)
Jeff Horning & Janet Shander-Horning (via email; w/ enclosures)

{00372643.DOCX V. H351.022407;}

ORIGIN ID: QWGA (704) 227-1040
LAUREN GRIFFIN
HAMILTON STEPHENS STEELE + MARTIN
201 SOUTH COLLEGE STREET
SUITE 2020
CHARLOTTE, NC 28244
UNITED STATES US

SHIP DATE: 15FEB17
ACTWGT: 0.50 LB
CAD: 105561671/NET3850

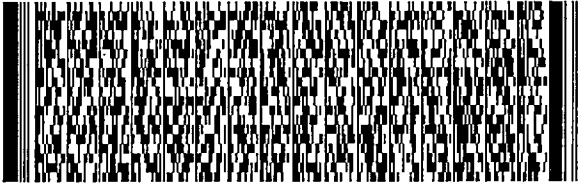
BILL SENDER

TO JENNY ABBOTT KITCHINGS
CLERK OF COURT, SC COURT OF APPEALS
1220 SENATE STREET

COLUMBIA SC 29201

(803) 734-1890 REF: H351-022407
INV: DEPT:
PO:

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FedEx Express



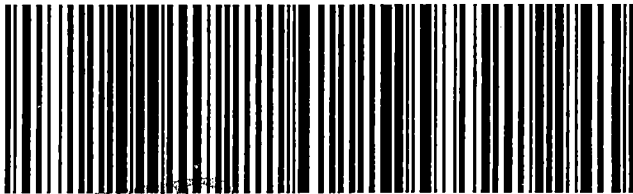
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PRIORITY OVERNIGHT

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SC Court of Appeals