IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

STEPHEN A. SPITZ, SPECIAL REFEREE

APPELLATE CASE NO.: 2016-001878
CASE NO.: 2015-CP-07-1931

JULIA TOMPKINS EWING,

Respondent,

vs.

KEITH A. GUEST and STEPHANIE C. GUEST and
PLEASANT POINT PROPERTY OWNERS ASSOCIATION, INC., Defendants

OF WHOM

KEITH A. GUEST and STEPHANIE C. GUEST are Appellants.

AMENDED
INITIAL BRIEF OF APPELLANTS

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QUESTIONS PRESENTED ON APPEAL

I. The Special Referee erred in finding and concluding that the scope of the implied easement in the roadway to the west of Lot 1, created by the recording of the plat for Pleasant Point Plantation in 1969, was to provide ingress and egress to Lot 1.

II. The Special Referee erred in failing to find and conclude that the roadway to the west of Lot 1 was abandoned.

III. The Special Referee erred in failing to find and conclude that an accord and satisfaction had been reached between the parties' predecessors in title, pursuant to which any right to use the roadway to the west of Lot 1 was replaced with an express lifetime easement.

IV. The Special Referee erred in finding and concluding that the Respondent was entitled to a prescriptive easement where the issue of a prescriptive easement was neither pled nor tried.

V. The Special Referee erred in finding and concluding that the Respondent was entitled to a prescriptive easement where the elements of a prescriptive easement were not proven by clear and convincing evidence.

STATEMENT OF THE CASE
A. PROCEDURAL HISTORY

This easement dispute between neighbors was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on August 11, 2015. The Respondent, Julia Tompkins Ewing ("Ewing") and the Appellants Keith A. Guest and Stephanie C. Guest ("Guest") are neighbors in the Pleasant Point Plantation Subdivision in Beaufort County, South Carolina.[1]

In her Complaint, the Respondent alleges that she is the owner of 6 Sussex Court and the Appellants own the adjacent parcel, known as 335 Pleasant Point Drive. The Respondent alleges that, as a result of the recordation of the original subdivision plat for Pleasant Point Plantation Country Club, she is entitled to utilize a forty (40') foot wide right of way located at the end of Pleasant Point Drive to access her property at 6 Sussex Court. She alleges that the Appellants have wrongfully blocked or impeded her use of the alleged easement. She requests that the Court declare the rights of the parties to the easement, award damages to her for the Appellants' wrongful interference with her use of the easement, and for an injunction prohibiting the Appellants from blocking or impeding her use of the alleged easement.

On August 21, 2015, the Appellants filed their Answer and Counterclaim. In addition to denying the material allegations of the Complaint, the Appellants allege that the Respondent's access to her property located at 6 Sussex Court is directly off of Sussex Court, as shown on the same 1969 plat referenced in the Complaint, and that the portion of Pleasant Point Drive located to the west of Lot 1 was intended to provide access to Appellants' property – not Respondent's property. The Counterclaim asserts causes of action for trespass and slander of title, as well as a

[1] Pleasant Point Plantation has a homeowner's association, known as the Pleasant Point Property Owners Association, Inc., the Co-Defendant herein, which is not a party to this appeal.

cause of action seeking an injunction barring the Respondent from traversing over the Appellant's property in order to access 6 Sussex Court.

On September 2, 2015, the Respondent obtained an *ex parte* temporary restraining order, prohibiting certain further actions by the Appellants, and setting a hearing on the temporary restraining order for September 4. As a result of the hearing, a Consent Order was entered by the Honorable Michael G. Nettles, Presiding Judge, ordering that the *status quo* be maintained and referring the case to a Special Referee.

On December 3, 2015, a Consent Order was filed appointing Stephen A. Spitz, Esquire, to serve as Special Referee to decide all matters contained in the parties' pleadings, with any appeals directly to the Court of Appeals, his decision having the same force and effect as a judgment from the Circuit Court.

On January 20, 2016, this case was tried before Special Referee Spitz.

On March 29, 2016, Special Referee Spitz's Final Order was filed with the Beaufort County Court of Common Pleas.

On April 8, 2016, the Appellants filed a Motion for Reconsideration, Amendment and a New Trial.

On April 11, 2016, the Respondent filed a Motion to Alter or Amend the Judgment.

The post-trial motions were heard by Special Referee Spitz on May 20, 2016 and his Order resolving these motions, entitled "Special Referee's Supplemental Second Final Order August 8, 2016" was filed with the Beaufort County Court of Common Pleas on August 12, 2016. In this Order, the Special Referee ordered and concluded as follows:

> "(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 December 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 forty (40) foot area in controversy at the southern end of Pleasant Point Drive (hereinafter referred to as "the forty (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 her carport extending nine (9) feet beyond the platted end of the forty (40) foot easement area for the width of the platted easement (hereinafter referred to as 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 . . . ."

Order, pg. 7.

On September 7, 2016, the Appellants duly filed their Notice of Appeal to the South Carolina Court of Appeals.

B. FACTUAL BACKGROUND

On December 5, 1969, Pleasant Point Plantation, Inc., pursuant to two (2) deeds, deeded to General and Mrs. Tompkins (the Respondent's parents) Lots 1, 2 and 3 in the newly created Pleasant Point Plantation Subdivision. General and Mrs. Tompkins moved into the residence located on Lot 1. Lots 2 and 3 were unimproved, and remain unimproved to the present day.

The deeds into General and Mrs. Tompkins each reference the Pleasant Point Plantation Subdivision plat, which was recorded a few days later on December 9, 1969, in Plat Book 18 at

Page 45. (Cite Plat) This plat depicts a forty (40) foot wide road to the west of Lot 1 which is the southern terminus of Pleasant Point Plantation Drive. The dispute between the parties to this appeal focuses on whether or not this portion of Pleasant Point Plantation Drive immediately to the west of Lot 1 continues to exist, and if it does, does it provide ingress and egress to Lot 1.

The subdivision plat shows access to Lot 1 directly off Sussex Court. The address of Lot 1 is 6 Sussex Court.

In December 1969, shortly after the plat in Plat Book 18 at Page 45 was recorded, another plat was recorded in Plat Book 19 at Page 160. This plat is identical to Plat 18/45, with the exception that two (2) lots, Lots 23 and 24, were added. (Cite Plat)

On April 11, 1974, another plat of Pleasant Point Plantation Subdivision was recorded in Plat Book 22 at Page 109. Significantly, the disputed road to the West of Lot 1 is eliminated on this plat. New lots, including Lots 28 and 29, have been created, and a new road is created to serve the newly created lots. (Cite Plat)

On August 26, 1976, Pleasant Point Plantation, reciting that it is the owner of the real property shown in Plat Book 18/45, granted an express easement to General and Mrs. Tompkins, recorded in Deed Book 248 at Page 454. (Cite Easement) Specifically, the Tompkins were granted:

> "An easement for the right to construct walkways, driveways, install water lines and sewer lines, utility lines and poles; and ornamental exterior objects; and to plant and maintain trees, shrubbery and grass in and on" the easement area.

The easement area is depicted in a plat recorded with the easement. (Cite Plat) The easement area lies immediately to the west of Lots 1 and 2, and lies entirely within the disputed roadway that had originally been shown on Plat 18/45, but subsequently eliminated on Plat 22/109 two (2) years earlier. The easement is a lifetime easement, expiring upon the death of the survivor of General

and Mrs. Tompkins. (Cite easement). As with Plat 22/109, the plat recorded with the easement, recorded in Deed Book 248/455, does **not** show the disputed roadway.

On July 16, 1981, Pleasant Point Plantation Subdivision, excluding those individual lots which had previously been sold to individual homeowners such as the Tompkinses, was sold to Pleasant Point Plantation Associates. The deed references the plat recorded in Plat 22/109 (the subdivision plat on which the disputed roadway was **eliminated**). (Cite Deed).

On July 22, 1982, another plat of the Country Club section of Pleasant Point Plantation Subdivision was recorded, in Plat Book 30 at Page 141. This plat is consistent with Plat 22/109 in that the road to the west of Lot 1 is **not** shown. Instead, the lifetime easement previously granted to the Tompkinses is now shown in a portion of the area where the disputed road was previously located. Like Plat 22/109, Plat 30/141 shows the new road "loop" created to access the newly created lots, including Lot 28 and the Manor House lot. (Cite Plat).

On May 31, 1985, Pleasant Point Plantation Associates conveyed to Robert Lewis White the Old Manor House property, which has now become known as Lot 29. This deed references Plat 30/141 (which only the lifetime easement is depicted and the road was eliminated).The deed recites that Lot 29 is bounded on the north by Pleasant Point Drive, an impossibility under Plat 18/45, but consistent with both Plat 22/109 and Plat 30/141. The deed further recites that Lot 29 is bounded on the east by Lot 1 and "by an undesignated narrow strip of land between the subject property and Lot 2," a description which is consistent with the lifetime easement granted to the Tompkinses, but inconsistent with the continued existence of the disputed road. (Cite Deed).

On June 19, 1987 Robert Lewis White conveyed to Frank and Judith Davis the Old Manor House property, also known as Lot 29. Cite Deed.

On that same date, June 19, 1987, the Whites conveyed to Tallahassee Neurological Clinic three (3) parcels, to-wit: (1) Lot 28; (2) a 1.487 acre parcel of land; and (3) a parcel lying between Lot 28 and the aforesaid 1.487 acre tract. Exhibit D-4, pg. 1-2. This Deed describes the above third parcel as follows:

> "AND ALSO, that portion of property extending between the above-referenced 1.487 acres tract and the Manor House property and Lot 28 of the Country Club section so that the land area between the 1.487 acres tract and the Manor House property and Lot 28 would be **one contiguous tract of land** as originally reflected in the original plat of the Country Club section."

(Emphasis added).

The "original plat" of the Country Club section referenced in this Deed is the Deed recorded in Plat Book 30 at Page 141, which does not show the disputed road. Exhibit D-1, pg. 11. This Deed erroneously recites that an additional plat is attached which depicts the above-referenced third parcel. Exhibit D-4, pg. 2.

On June 22, 1987, the aforesaid deed was re-recorded as a Corrective Deed with the explanation "this Deed is being re-recorded as the plat referenced to be attached to the deed was not attached to the deed when originally recorded." [Cite Deed]. The newly attached plat, recorded in Deed Book 481 at Page 1881, depicts a 0.20 acre parcel lying between the 1.487 acre parcel to the north, Lot 28 and the Manor House lot to the south, and Lot 2 to the east. Significantly, this plat shows Pleasant Point Drive ending at the beginning of Sussex Court.

On March 13, 1991 Tallahassee Neurological Clinic conveyed to the Tallahassee Neurological Profit Sharing Plan Lot 28, as shown on Plat 30/141, 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. Two of the three separately recorded plats referred to in this deed are in evidence and show the absence of the disputed road. (Cite Deed).[2]

On August 26, 1995, General Tompkins conveyed his undivided one-half interest in Lots 1, 2 and 3 to his Trust. (Cite Deed).

On June 7, 1997, the Davises conveyed to the American Hospital Insurance Group the "Manor House Lot" a/k/a Lot 29. The deed references a May 30, 1997 plat recorded in Plat Book 60 at Page 190. On this plat, the disputed road is not shown as a road, but as a "dotted line" artifact. The disputed road is not labeled "Pleasant Point Drive" but rather is labeled "as shown on the above-referenced plat," referencing the original subdivision plat. Additionally, fee simple title to what would have been the road is clearly conveyed by the express language of the deed to the grantee. The conveyance is also made expressly subject to the lifetime easement granted to the Tompkinses as shown on the plat recorded in Deed Book 248/455.

Finally, this Deed grants an express easement for ingress and egress over the 0.20 acre parcel as shown on the plat recorded in Deed Book 481/1881, an easement which would be totally unnecessary if the disputed road still existed. (Cite Deed)

It is noteworthy that at this point in time at least no fewer than four (4) prior plats have been recorded, each consistently depicting the absence of the disputed roadway, to-wit:

1974	Plat 22/109
1976	Deed 248/455
1982	Plat 30/141
1987	Deed 481/1881 (D-4, pg. 7)

[2] The Plat recorded in Deed 262/1271 is not part of the Record.

As noted above, each of these recorded documents is referenced several times in various deeds of conveyance.

On June 6, 1997, the Davises conveyed to American Hospital Insurance Group, by Quit Claim deed, fee simple title to the land encompassed by the Tompkins' lifetime easement, which was excluded from the general warranty deed dated that same date.

On January 22, 1999, American Hospital Insurance Group conveyed to Roi and Dyan Young the Manor House parcel, aka Lot 29, as shown on Plat 60/190, and all of the land to the west of Lots 1 and 2 as shown in the plat recorded in Deed 248/454, which is the lifetime easement property. With this deed, the conveyance of title to the lifetime easement property was "upgraded," from a Quit Claim deed into a General Warranty deed. (Cite Deed)

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. Two of the three plats referred to in this deed are in evidence, and both show the absence of the disputed road. (Cite Deed)[3]

On November 1, 1999, General and Mrs. Tompkins, together with the Respondent, as Plaintiffs, filed a suit in the Beaufort County Court of Common Pleas against the Youngs, asserting the exact same claim as is asserted in the instant lawsuit, i.e., that an implied easement in the disputed roadway was created by the conveyance of lots referencing the subdivision plat recorded in Plat 18/45. In this lawsuit, the Tompkins and the Respondent acknowledged that Plat 19/160 eliminated the disputed roadway, alleging:

> "That Plaintiffs are informed and believe that on or about December 4, 1969, and recorded in Plat Book 19, at Page 160, Plaintiffs' predecessors in title recorded a plat that in effect would have, if lawful, **eliminated the portion of the road adjoining Plaintiff's property**, and included said roadway in the conveyance to the Defendants."

[3] The Plat recorded in Deed 262/1271 is not part of the Record.

Defendant's Exhibit 27, pp. 3-4 (¶6 of Complaint) (Emphasis added).

In their Complaint, the Tompkins and the Respondent also acknowledge that the Youngs were claiming fee simple title to the disputed roadway, free of any easement, alleging:

> "That the Plaintiffs are informed and believed that the Defendants now claim title to said portion of the roadway adjoining Plaintiffs' property, and they and their predecessors in title have erroneously asserted title and control over Plaintiffs' use and enjoyment of said roadway."

Exhibit D-27, pg. 4 (¶7 of Complaint).

In their Answer and Counterclaim, the Youngs, in addition to a qualified general denial and several affirmative defenses, affirmatively allege that the portion of Pleasant Point Drive which is now in dispute "was eliminated and deleted as a portion of the subdivision roadway and that the Defendants are the owners of said property."

Exhibit D-28, pg. 2 (¶5).

The Youngs asked the Court to issue an Order "determining and declaring that the Defendants are the owners of Lot 29, the property described in the plat recorded in Plat Book 60, Page 190, free and clear of any rights and claims of the Plaintiffs except the easement rights granted to the Tompkins by the easement recorded in Book 248, Page 454, which will terminate upon the death of Julia Vogel Tompkins." Exhibit D-28, pp. 9-10. This suit was dismissed on February 28, 2002 without a resolution.

On May 23, 2000 Mrs. Tompkins conveyed her undivided 50% interest in Lots 1, 2 and 3 to her Trust.

On November 8, 2000, the Youngs conveyed to Alyon, Inc. the properties that they had acquired from American Hospital and Tallahassee Neurological Associates, as shown on a plat recorded in Plat Book 68 at Page 171. As with the plat recorded in 60/190, the disputed roadway is not shown as a road nor is it labeled as a road, but is depicted by a dotted line. (Cite Deed)

The aforesaid property thereafter is conveyed back and forth several times between Alyon Inc. and the Youngs until, on July 20, 2009, it is conveyed by the Youngs pursuant to a Master's Deed to J.P. Morgan Chase Bank. (Cite Deeds)

On January 28, 2010, the above property was conveyed by J.P. Morgan Chase Bank to the Appellants, Keith and Stephanie Guest. (Cite Deed).

Finally, on September 12, 2013, General and Mrs. Tompkins' Trust conveyed Lots 1, 2 and 3 to the Respondent. (Cite Deed).

I. THE SPECIAL REFEREE ERRED IN FINDING AND CONCLUDING THAT THE SCOPE OF THE IMPLIED EASEMENT AND THE ROADWAY TO THE WEST OF LOT 1, CREATED BY THE RECORDING OF THE PLAT FOR PLEASANT POINT PLANTATION IN 1969, WAS TO PROVIDE INGRESS AND EGRESS TO LOT 1.

It is respectfully submitted that the Special Referee erred in finding and concluding that the scope of the implied easement in the roadway to the west of Lot 1, created by the recording of the plat for Pleasant Point Plantation in 1969 in Plat Book 18 at Page 45, was to provide ingress and egress to Lot 1. The evidence in this case clearly establishes that the scope of the implied easement in the roadway to the west of Lot 1, created by the recording of the subdivision plat, was to provide ingress and egress to the parcel adjacent to Lot 1 on which the original Manor House is located, which was originally intended to become the subdivision's Club House. The subdivision plat clearly and unequivocally demonstrates that access to Lot 1 is off Sussex Court.

On December 5, 1969 Pleasant Point Plantation, Inc. deeded to General and Mrs. Tompkins, by two (2) deeds, Lots 1, 2 and 3 in Pleasant Point Plantation. Each of these deeds reference a plat recorded in Plat Book 18 at Page 45 (the "1969 plat").

These deeds make no mention of an easement. Any easement, accordingly, must be implied. An implied easement can arise only if necessary to give effect to the intention of the parties. Implied easements are not favored.

> "The purpose of an implied easement is to give effect to the **intentions** of the parties to a transaction, and because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself, implied easements are **not** favored."

Inlet Harbour v. South Carolina Department of Parks Recreation and Tourism, 377 S.C. 86, 91-92, 659 S.E.2d 151, 154 (2008)(emphasis added).

The 1969 plat was recorded four (4) days later, on December 9, 1969, in Plat Book 18 at Page 45. This plat shows a forty (40') foot wide road to the West of Lot 1. This plat also shows, plainly and clearly, that access to Lot 1 is from Sussex Court.

As noted above, the intent of the parties is the key inquiry. It is respectfully submitted that in this case the issue is the scope, not the existence, of the easement. Stated somewhat differently, the issue in this case, which is an equitable issue, is what is the intended access to Lot 1?

The determination of the **existence** of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury. However, the determination of the extent of a grant of an easement is an action in equity. *Smith v. Commissioners of Public Works of City of Charleston,* 312 S.C. 460, 465, 441 S.E.2d 331, 334 (Ct.App. 1994). The Appellate Court's standard of review in equitable matters is its own view of the preponderance of the evidence. *Horry County v. Ray*, 382 S.C. 76, 80, 674 S.E.2d 519, 522 (Ct.App. 2009). In the instant case the uncontroverted evidence, much less the preponderance of the evidence, conclusively demonstrates that the scope of the easement at issue in this case was to serve the old Manor House, **not** Lot 1.

The analysis begins with determining if an easement in the road is created. In *Inlet Harbour*, supra, the South Carolina Supreme Court noted:

> "One such presumption arises when an owner subdivides his land and has the land platted into lots and streets. This Court has recognized the general rule that when an owner conveys subdivided lots and references the plat in the deed, the owner grants the lot owners an easement over the streets appearing in the plat."

Inlet Harbour, supra, 377 S.C. at 92, 659 S.E.2d at 154.

The foregoing legal principle is the sole cause of action asserted by the Plaintiff in her Complaint, and is the foundation upon which the Special Referee's Order is based. It is respectfully submitted, however, that the Special Referee overlooked the fine, but critical,

distinction between the **creation** of an easement and the **extent or scope** of the easement. Simply because an easement exists, does not mean that it can be used for any and every purpose imaginable. Every easement has a limited scope. For example, in *Inlet Harbour*, supra, the platted roads referenced in the deeds were limited to purposes necessary to maintain an inlet navigation project.

The issue in the case *sub judice*, accordingly, is, assuming the reference to the 1969 plat in the deeds into General and Mrs. Tompkins created an easement over the forty (40') foot road to the West of Lot 1, what is the extent or scope of the easement granted?

The determination of the extent or scope of an implied easement is an equitable issue. The issue is resolved by examining the intentions of the parties.

> "Our guidepost must be what the parties intended, and the best evidence of the parties' intentions are the facts and circumstances surrounding the conveyance."

Inlet Harbour, supra, 377 S.C. at 93, 659 S.E.2d at 155.

As applied to this case, what did the parties intend to be the access to Lot 1? ("The parties" being Pleasant Point Plantation Associates and the Tompkins at the time the deed and plat were recorded.)

The best evidence of the intention of the parties at the time the deed and the plat were recorded is the plat itself. An examination of the 1969 plat shows that the obvious intended access to Lot 1 is from Sussex Court. The configuration of Lot 1 makes absolutely no sense otherwise. There is no other possible explanation for the configuration and extenuation of Lot 1 onto Sussex Court other than Sussex Court was intended to be the point of access for Lot 1.

This conclusion is reinforced by the fact that the address for Lot 1 is, and always has been, 6 **Sussex Court.**

Bolstering this conclusion is the uncontradicted testimony of Mr. Branning, the developer of Pleasant Point, that the original intent was for the Manor House (in which the Guests now reside) to be the Club House for Pleasant Point Plantation, and the forty (40') foot road immediately to the West of Lot 1 existed solely for the purpose of serving the future Club House, and when Mr. Branning decided not to make the Manor House the Club House this road was "abandoned." Tr., pg. 172, line 25 to pg. 173, line 23. The Special Referee rejects Mr. Branning's testimony *in toto*, contending that it contradicts the 1969 plat. To the contrary, it is respectfully submitted that his testimony corroborates and is entirely consistent with the 1969 plat. His testimony explains why the boundaries of Lot 1 were contorted so as to extend to Sussex Court.

It is worth pointing out that Mr. Branning has no dog in this fight. He has nothing to gain or lose. The Guests are strangers to him and he would not recognize them if he ran into them on the street. If he has any bias, his bias would be in favor of the Plaintiff, inasmuch as her parents were his neighbors for many years and he described her father, General Tompkins, as one of his closest friends.

Subsequent circumstances also corroborate Mr. Branning's testimony, inasmuch as the Manor House did not become the Club House, which was located elsewhere. The forty (40') foot road to the West of Lot 1 never came into existence. When all the other roads in the subdivision were paved, it was untouched. The subsequent deeds and plats (which will be referenced more specifically later herein) erased and eliminated this road.

In sum, Mr. Branning's testimony is consistent with and explains perfectly the 1969 plat, is highly credible, and is corroborated by all of the surrounding facts and circumstances.

Pursuant to the greater weight or preponderance of the evidence it is clear that the intent of the parties was for Lot 1's intended access to be off Sussex Court and the forty (40') foot road to

the West of Lot 1 was intended only to access the Manor House parcel. If an easement in the road still exists, the **scope** of the easement is to serve the Manor House property, not Lot 1.

II. THE SPECIAL REFEREE ERRED IN FAILING TO FIND AND CONCLUDE THAT THE ROADWAY TO THE WEST OF LOT 1 WAS ABANDONED.

It is respectfully submitted that the Special Referee erred in failing to find and conclude that the roadway to the west of Lot 1 had been abandoned many years earlier by the Plaintiff's predecessors in title.

As noted in Argument I, supra, if the forty (40') foot road to the west of Lot 1 still exists, the scope of the easement is to serve the Manor House property, not Lot 1. The road, however, no longer exists. It was abandoned almost immediately after the 1969 plat was recorded. Moreover, the road was never used and never even came into existence. When the other roads in the subdivision were cleared and paved, the area for the road to the west of Lot 1 was neither cleared nor paved.

"It is well settled that an easement may be lost by abandonment and in determining such question the intention of the owner to abandon is the primary inquiry. The intention to abandon need not appear by express declaration, but may be inferred from all of the facts and circumstances of the case. It may be inferred from the acts and conduct of the owner and the nature and situation of the property, where there appears some clear and unmistakable affirmative act or series of acts clearly indicating either a present intent to relinquish the easement, or a purpose inconsistent with its further existence." *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975).

The Special Referee correctly noted that "mere nonuse" of the road does not equate to abandonment. The South Carolina Supreme Court has held that "the mere nonuse of an easement created by deed for a period however long will not amount to an abandonment, but there must be

other acts by the owner of the dominant estate conclusively manifesting either the present intention to relinquish the easement or purpose inconsistent with its further existence." *Id.*

In the instant case, there is overwhelming evidence of abandonment, aside from the simple, but important, fact that the road was never used.

As previously noted, when the Pleasant Point Plantation Subdivision was created and its roads paved, the forty (40') foot road to the West of Lot 1 was never made part of the Plantation's roadway system and was never cleared nor paved. A plat recorded on April 11, 1974 in Plat Book 22 at Page 109 shows that the road to the West of Lot 1 was no longer in existence. The abandonment of the road, at the latest, has clearly begun at this point in time. This plat shows new lots being created in Pleasant Point Plantation, including Lot 29, which is the Manor House lot, and its adjoining Lot 28. Significantly, a new road is created to serve the new lots. This plat plainly and clearly put the Tompkins on constructive notice that the road had been removed and eliminated from the roadway system. (Cite Plat).

On August 26, 1976 Pleasant Point Plantation and General and Mrs. Tompkins entered into an agreement pursuant to which General and Mrs. Tompkins were granted a lifetime easement as shown on a plat recorded in Deed Book 248 at Page 455. (Cite Easement) This lifetime easement, which lies completely within the boundaries of the road shown on the 1969 plat, is totally and completely inconsistent with the continued existence of the road, for several reasons: (1) The lifetime easement is exclusive, given only to the Tompkins. If the road continued to exist, the Tompkins would not have the right to bar others from using the lifetime easement area. (2) The lifetime easement allows the Tompkins to build, plant and obstruct within the lifetime easement. The Tompkins would not have this ability to block the road if it continued to exist. (3) Placing an easement on top of an already existing easement is illogical. If the Tompkins already had an

easement by virtue of the road, there would be no need for an easement to be placed on top of that easement. (4) The road is not shown on the lifetime easement plat!!

In short, the foregoing transaction could only have taken place if the road had previously been abandoned.

This is corroborated by the testimony of Mr. Branning, who testified point blank that this lifetime easement was given because they recognized that the road had been abandoned. General Tompkins was his friend and Mr. Branning didn't mind General Tompkins driving across his lawn and General Tompkins had his permission to do so. Mr. Branning gave General Tompkins the easement so that he would have the right to continue to do so if he, Mr. Branning, ever sold his property. Tr., pg. 160, line 5 to pg. 161, line 8; and pg. 171, lines 9-19.

On July 16, 1981, Morprop, which had been developing Pleasant Point Plantation, sold the balance of Pleasant Point Plantation to Pleasant Point Plantation Associates. This deed excludes Lots 1, 2 and 3 which previously had been sold to the Tompkinses. Significantly, this deed references the 1974 plat (on which the road is gone) rather than the 1969 plat. (Cite deed and plat).

On July 21, 1982 a new plat of the subdivision area was recorded in Plat Book 30 at Page 141. This plat is consistent with the 1974 plat. The lifetime easement previously given to General and Mrs. Tompkins is shown. Most importantly, the road to the West of Lot 1 is once again totally absent. This plat shows that lots have been added to the subdivision, including Lot 28 and the Manor House lot and a new road "loop" has been created to access these newly created lots. (Cite plat)

On May 31, 1985 Pleasant Point Plantation Associates deeded the Old Manor House property, which had become known as Lot 29, to Robert and Lewis White. The deed describes this property as being bounded on the North by Pleasant Point Drive, which would be impossible

if the road shown on the 1969 plat was still in existence, but is consistent with the 1974 plat on which the road is absent. This deed further describes Lot 29 as being bounded on the East by Lot 1 and a "narrow strip," which is the lifetime easement granted to the Tompkins, **not** by the road. This deed references the 1982 plat, on which the road is absent. (Cite deed)

In short, this deed confirms, yet again, that the road is gone, re-enforcing once more the fact that the road has been abandoned.

Also on June 19, 1987 the Whites, by deed and a subsequent corrective deed, conveyed to the Tallahassee Neurological Clinic Lot 28, the 1.487 acres, and all property between the Manor House and the foregoing properties, making them "all one contiguous tract." The plat, recorded in Deed Book 481 at Page 1881, shows the road to the West of Lot 1 to be nonexistent. (Cite deeds).

Four (4) years later, on March 13, 1991, Tallahassee Neurological Clinic deeded the foregoing property to Tallahassee Neurological Profit Sharing. No less than **THREE (3)** plats are referenced, as part of this transaction. Each of these plats shows **NO** road. (Cite deeds)

On August 26, 1995 General Tompkins conveyed his fifty (50%) percent undivided interest in Lots 1, 2 and 3 to his Trust.

On June 6, 1997 the Davises deeded the Manor House property to American Hospital Insurance Group. The deed references a plat recorded in Plat Book 60 at Page 190. Significantly, the forty (40') foot road is not shown as a road, but as a dotted line. Likewise, it is not labeled "Pleasant Point Drive" but is labeled "as shown on the above referenced plat" (the 1969 plat). The language of the deed itself clearly conveys fee simple title to the dirt upon which the road was once located to the grantees. Likewise, the deed expressly references that it is subject to the lifetime easement previously granted to the Tompkinses. Finally, the deed grants an easement for

ingress and egress over 0.20 acres as shown in Deed Book 245 at Page 455, which would be totally unnecessary if the forty (40') foot road still existed. (Cite deed).

By this point in time, more than twenty (20) years has run since the 1974 plat. By this point in time four (4) 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, and 1987 Deed Book 481 at Page 1881.

Each of the above referenced plats has been referenced several times in publicly recorded deeds.

Likewise, by this point in time, no less than ten (10) deeds have been recorded, conveying fee simple absolute title from grantor to grantee of the dirt upon which the road had been located.

On June 6, 1977 the Davises gave a quitclaim deed to American Hospital Insurance Group for the land encompassed by the lifetime easement. (Cite Deed).

On January 22, 1999 American Hospital deeded to Roi and Dyan Young the Manor House property, as well as all land to the West of Lots 1 and 2 which includes the lifetime easement property. This deed, which is a general warranty deed, is an upgrade from the prior quitclaim deed insofar as the lifetime easement property is concerned. (Cite Deed).

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, to wit: Plat 30/141 for Lot 28, Deed 462/1271 for the 1.487 acre parcel, and Deed 481/1881 for the 0.20 acre parcel. Cite Deed, located in Defendants' Exhibit 4 at pp. 11-16.

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. This action was dismissed. There is no evidence of the basis for the dismissal. (Cite pleadings and court record).

On May 23, 2000 Mrs. Tompkins conveyed her undivided one-half (1/2) interest in Lots 1, 2 and 3.

Between November 8, 2000 and December 23, 2002, the Youngs deeded the property back and forth several times, between themselves and Alyon, Inc. This ended with a foreclosure against the Youngs and the property being conveyed to J.P. Morgan Chase Bank on July 20, 2009. (Cite Deeds).

On January 28, 2010, J.P. Morgan Chase deeded the property to the Defendants Keith and Stephanie Guest. (Cite Deed).

On September 12, 2013 General and Mrs. Tompkins' Trust deeded Lots 1, 2 and 3 to Respondent Julia Ewing. (Cite Deed).

In sum, it is clear that there is more than "mere nonuse" of the forty (40') foot road and it was abandoned as soon as it was put down on paper. 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 expressly provides that it is for a driveway), plus the right to build, plant and improve within their lifetime easement, an arrangement which would have been impossible if the road had not been previously abandoned.

III. THE SPECIAL REFEREE ERRED IN FAILING TO FIND AND CONCLUDE THAT AN ACCORD AND SATISFACTION HAD BEEN REACHED BETWEEN THE PARTIES' PREDECESSORS IN TITLE, PURSUANT TO WHICH ANY RIGHT TO USE THE ROADWAY TO THE WEST OF LOT 1 WAS REPLACED WITH AN EXPRESS LIFETIME EASEMENT.

It is respectfully submitted that the Special Referee erred in failing to find and conclude that an accord and satisfaction had been reached between the parties' predecessors in title, pursuant to which any right to use the roadway to the west of Lot 1 was replaced with an express lifetime easement. This issue of an accord and satisfaction was discussed briefly in connection with Argument II, supra, pp. 17 – 18, because the abandonment and the accord and satisfaction are factually interwoven.

As previously noted, the forty (40') foot road to the west of Lot 1 was never made part of the Plantation's roadway system and it was never cleared nor paved. It was never used. By 1976, the subject road had been erased completely from the Plantation's subdivision plat (Cite Plat 22/109).

In 1976 the subdivision's developer Mr. Branning, was living in the Manor House. He testified the Manor House had originally been intended to be the subdivision's Club House, but he had decided to utilize the Manor House as his residence and located the Club House elsewhere. Accordingly, since the road to the west of Lot 1 had been intended to serve the Club House, it was not needed and had never been utilized, paved, and had been abandoned. At that time General and Mrs. Tompkins resided in Lot 1 as his neighbors, and they were his friends. With his permission, General and Mrs. Tompkins were driving across his lawn to access Lot 1. Mr. Branning gave General and Mrs. Tompkins the lifetime easement so that they would have the right to continue to do so if he, Mr. Branning, ever sold his property. Tr., pg. 60, line 5 to pg. 61, line 8 and pg. 71, lines 9 – 19.

"The elements of an accord and satisfaction are (1) an agreement between the parties to settle a dispute and (2) the payment of the consideration which supports the agreement." *Linda McCompany, Inc. v. Shore,* 390 S.C. 543, 556, 730 S.E.2d 499, 505 (2010).

> "(G)enerally speaking, an "accord and satisfaction" is a method of discharging a contract or a claim or cause of action whereby the parties agree to give and accept something other than that which is due in satisfaction of the existing claim. For an accord and satisfaction, the "accord" is the agreement between the parties, and the "satisfaction" is its execution or performance. An accord and satisfaction results when (1) the parties mutually intend to effect a settlement of an existing dispute by entering into a superseding agreement, and (2) there is actual performance in accordance with the new agreement."

1 AmJur 2nd Accord and Satisfaction Section 1 (November 2016 Update).

The Special Referee refused to find that an accord and satisfaction had been entered into between the Tompkins and the developer, finding that both easements "coexisted" and that the lifetime easement was never intended to be a substitute for the implied forty (40') easement. This factual finding by the Special Referee, however, makes no sense. It was impossible for these two (2) easements to coexist. These two (2) easements were mutually inconsistent and incompatible. The lifetime easement is exclusive to the Tompkins. If the implied road easement continued to exist, the right to use the lifetime easement area would not be exclusive to the Tompkins. Additionally, the lifetime easement allows the Tompkins to build, plant, and place obstructions within the lifetime easement. If the road continued to exist, the Tompkins would not have this right. Finally, placing the lifetime easement on top of an already existing implied road easement is illogical. If the Tompkins already had an implied easement by virtue of the road, it makes no sense for them to acquire an express easement simply placed on top of the already existing implied easement. The most compelling evidence, however, that the lifetime easement and the implied easement did not coexist, and that the lifetime easement was intended to be a substitute for or

replace the implied easement, is the fact that the road is not shown on the lifetime easement plat. In other words, the lifetime easement plat itself erases the existence of the road!

It is accordingly respectfully submitted that the Special Referee erred in failing to find and conclude that an accord and satisfaction was entered into between the Tompkins and the developer pursuant to which the Tompkins were granted the subject lifetime easement to settle or "satisfy" any rights they may have had to utilize the road to the west of Lot 1 for the purpose of accessing Lot 1.

IV. THE SPECIAL REFEREE ERRED IN FINDING AND CONCLUDING THAT THE RESPONDENT WAS ENTITLED TO A PRESCRIPTIVE EASEMENT WHERE THE ISSUE OF A PRESCRIPTIVE EASEMENT WAS NEITHER PLED NOR TRIED.

The Special Referee, *sua sponte,* granted to the Plaintiff a prescriptive easement. Order, pg. 26.

It is respectfully submitted that this was error, inasmuch as the Complaint of the Respondent does not contain a cause of action claiming a prescriptive easement. "The principal purpose of pleadings is to inform the pleader's adversary of the legal and factual positions which he will be required to meet on trial. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013). "The purpose of pleadings is to place the adversary on notice as to what the issues are." *Langston v. Niles,* 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975).

The Complaint of the Respondent does not contain a cause of action based upon a prescriptive easement, and the Complaint contains no allegation asserting that the Respondent has acquired a prescriptive easement. Reviewing the four corners of the Complaint, the Respondent's claim of an easement is based solely upon the reference in her predecessor's deed to the subdivision plat, or alternatively, on breach of an alleged mediated agreement. Paragraph 33 of the Complaint, which is referenced in the Special Referee's Order, is simply a request for declaratory relief and makes no reference to any claim of a prescriptive easement.

The Special Referee determined that he did not raise the prescriptive easement issue *sua sponte*, relying on two (2) facts. First, he notes that paragraph 33 of the Complaint is a request for declaratory relief. Second, he notes that Respondent's counsel, in his closing argument, stated that there was "probably a prescriptive easement." Special Referee Supplemental Second Final Order August 8, 2016, pp. 3 – 4. Quite frankly, the idea that a broadly drawn and vague cause of action for a declaratory judgment puts a Defendant on notice that the Plaintiff is claiming a

prescriptive easement defies common sense. Likewise, the idea that a passing comment made by Respondent's counsel in closing argument substitutes for pleading a cause of action is absurd.

The purpose of pleadings is to put a Defendant on notice of claims which he or she must defend. Trial by ambush should not be sanctioned. Since the parties in this case stipulated that there was no mediated agreement, the only issue on which Respondent's case was tried was her claim of an implied easement arising by virtue of the recorded subdivision plat referenced in the deed of her predecessor in title. It was fundamentally unfair for the Special Referee to rule that the Respondent prevailed on a cause of action which the Appellants did not know even existed, and accordingly had no opportunity to put up any evidence to refute.

V. THE SPECIAL REFEREE ERRED IN FINDING AND CONCLUDING THAT RESPONDENT WAS ENTITLED TO A PRESCRIPTIVE EASEMENT WHERE THE ELEMENTS OF A PRESCRIPTIVE EASEMENT WERE NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE.

Even if a prescriptive easement cause of action had been pled, a prescriptive easement was not proven by clear and convincing evidence.

The party claiming a prescriptive easement has the burden of proof. *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App. 1997).

Not only does the party seeking a prescriptive easement bear the burden of proof, but the proof required to establish a prescriptive easement is a *stricter and higher burden of proof* than exists in a typical civil case. *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015).

As early as 1917 the South Carolina Supreme Court alluded to this heightened standard of proof when it stated, "A private way is an easement in favor of another, in derogation of the rights of the owner, and hence is not to arise without **clear, unequivocal proof** of such facts as will give the right from the owner to the claimant." *Williamson v. Abbott*, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917) (emphasis added) (citation omitted).

The "fundamental reason for applying a heightened standard of proof" is that "by claiming a prescriptive easement, a claimant seeks for a property owner to forfeit rights to the subject property." *Bundy v. Shirley*, supra, 412 S.C. at 305, 772 S.E.2d at 170. "This stricter standard of proof may be a result of the general opinion expressed by Courts and commentators that **prescriptive rights are not favored** in the law since they result in corresponding losses or forfeitures of rights of other persons." *Id,* 412 S.C. at 305-06, 772 S.E.2d at 170, quoting with approval Daniel J. Smith, Establishment of Private Prescriptive Easement, 2 Am.Jur. Proof of

Facts 3rd 125 § 3 (1988 & Supp. 2015) (emphasis added). Accordingly, the South Carolina Supreme Court has held as follows:

> "Given that a prescriptive easement results in diminished rights of the property owner, we find that a claimant seeking a prescriptive easement must be held to a **strict standard of proof**. Accordingly, we join the majority of state jurisdictions and hold that a party claiming a prescriptive easement has the burden of proving all elements by **clear** and **convincing** evidence."

Bundy v. Shirley, 412 S.C. 292, 306, 772 S.E.2d 163, 170 (2015) (emphasis added).

The Respondent has failed to carry her burden of proving by clear and convincing evidence the existence of a prescriptive easement.

An easement is a right given to a person to use the land of another for a specific purpose. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct.App. 2008). "A prescriptive easement is not implied by law, but is established by the conduct of the dominant tenement owner." *Boyd v. BellSouth Telephone and Telegraph Co,* 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006).

"To establish a prescriptive easement, one must show:

(1) Continued and uninterrupted use or enjoyment of the right for a period of 20 years;

(2) The identity of the thing enjoyed; and

(3) Use or enjoyment which is either adverse or under claim of right."

Pittman v. Lowther, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005).

A. Not Uninterrupted for 20 Years

In this case, the Respondent has failed to satisfy her burden of proof as to each of these essential elements of a prescriptive easement. More specifically, she has failed to establish continued and uninterrupted use or enjoyment of the right for a period of twenty (20) years.

Respondent asserts that use of the encroachment during this period of time was "uninterrupted." The facts in this case, however, show numerous interruptions. Respondent appears to be relying upon the erroneous premise that an interruption, when referencing a prescriptive easement, requires a physical barrier of some sort and a resulting discontinuance of use. It is true that "numerous courts have held when the potential servient owner, by either by threats or physical barriers, succeeds in causing a discontinuance of the use, no matter how brief, the running of the prescriptive period is stopped." 4 Powell on Real Property, Section 34.10(3)(b) (2000). South Carolina, however, is not one of these courts that requires threat or physical barrier. In *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005) the South Carolina Supreme Court expressly declined to adopt the analysis adopted by North Carolina and other Courts which required an actual physical discontinuance, no matter how brief, of the use. Instead, the South Carolina Supreme Court "embraced" the opinion of Justice Oliver Wendell Holmes, Jr., who stated the following in determining what a landowner must do to interrupt prescriptive use:

> "A landowner . . . is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's **impression of acquiescence** and the growth in his mind of a fixed association of ideas; or, if the principle prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact".

Pittman v. Lowther, supra, 363 S.C. at 51, 610 S.E.2d at 481, quoting *Brayden v. New York, N.H. & H.R. Co.*, 172 Mass. 225, 51 N.E. 1081, 1081-82 (1898) (emphasis added). The South Carolina Supreme Court held as follows:

> "We conclude actions are sufficient to interrupt the prescriptive period when the servient owner engages in overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant owner's use of the land, no matter how brief. **In addition to physical barriers**, verbal threats which convey to the dominant landowner **the impression the servient owner does not acquiesce** in the use of the land, are also sufficient to interrupt the prescriptive period. To adopt an interpretation of "effective interruption" which requires a servient landowner to

> take actions in addition to erecting barriers like fences and cables, would encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes".

Pittman v. Lowther, supra, 363 S.C. at 52, 610 S.E.2d at 481 (emphasis added).

In the instant case, as previously noted, General and Mrs. Tompkins admitted in their pleadings in the lawsuit filed against the Youngs that the Youngs had repeatedly in the past blocked and interfered with their access. (Cite pleadings) This occurred at unspecified points in time prior to the filing of the lawsuit in 1999. Since the Youngs contested the lawsuit, it is clear that during the pendency of the lawsuit from 1999 through 2002 the Tompkins clearly did not have "the impression that the Youngs acquiesced" in their use of their alleged easement.

Additionally, the numerous plats and deeds, referenced above, from which the alleged easement has been completely erased, and which convey fee simple absolute title to the dirt upon which the alleged easement would have been located, clearly provide notice to the Tompkins that the successive servient owners did not acquiesce in their use of the road (outside, of course, the lifetime easement).

Mr. Branning testified that the alleged prescriptive easement was physically blocked by vegetation, trees and shrubs during the time he resided in the Old Manor House. Tr., pg. 155, line 6 to pg. 155, line 14 and D-14 and pg. 180, line 15 to pg. 181, line 6.

B. Permissive

In addition to being interrupted, the prior use was permissive. In the case now before the Court, the Respondent must necessarily "tack" the periods of use by her predecessors in title (her parents) since she acquired title to the property only shortly before this suit was instituted. "A claimant cannot tack adverse use with prior adverse use when intervening parties use land with

permission. Nor is tacking permissible when it is unclear that use by claimant's predecessor was adverse." *Bundy v. Shirley,* 412 S.C. 292, 314, 772 S.E.2d 163, 175 (2015).

In the instant case, the use of the lifetime easement by General and Mrs. Tompkins was clearly permissive, in accordance with the express terms of the lifetime easement.

Mr. Branning testified that the Tompkins were his neighbors, and General Tompkins was his good friend. He accordingly gave them permission to travel across his property. As previously noted, Mr. Branning's testimony is uncontradicted and he is impartial, without any interest in the outcome of this case. If he has any bias, it would be in favor of the Plaintiff, inasmuch as her parents were his close friends. Appellants are strangers to him.

"It is the well-settled rule that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since user as of right, as distinguished from permissive user, is lacking, if permissive in its inception, such permissive character will continue of the same nature, and no adverse user can arise, until there is a distinct and positive assertion of a right hostile to the owner, and brought home to him." *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15, 16 (1917).

At the very least, it is crystal clear that any use of Mr. Branning's property by General and Mrs. Tompkins which fell outside the lifetime easement area, (and certainly any portion of his property which fell outside the forty (40') foot initially platted road) was with Mr. Branning's permission. Since this use was permissive in its origin, and there is no evidence of any distinct and positive assertion of a right hostile to the owner until Respondent inherited the property, a prescriptive easement was not proven by clear and convincing evidence.

CONCLUSION

The scope of the easement originally represented by the forty (40') foot road to the west of Lot 1 on the 1969 plat was to provide access to the Old Manor House, not to Lot 1. The 1969 plat, and the uncontradicted evidence, clearly demonstrates that the intended access to Lot 1 is off Sussex Court. Additionally, ignoring the scope of the intended easement, the road was abandoned almost immediately after it was drawn on paper. The abandonment of the road was confirmed, or alternatively resolved, by an accord and satisfaction, with the lifetime easement granted to General and Mrs. Tompkins. The Respondent did not plead a prescriptive easement, but even if she had, the claim of a prescriptive easement must necessarily fail inasmuch as the use was not uninterrupted nor was it adverse, but rather, it was permissive.

It is accordingly respectively requested that the South Carolina Court of Appeals reverse the Orders of the Special Referee and declare that the Respondent has no easement rights over the property of the Appellants for ingress and egress to Lot 1, also known as 6 Sussex Court.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By:_____

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Beaufort, South Carolina
May 9, 2017

CERTIFICATE OF SERVICE

Undersigned certifies that the Amended Initial Brief of Appellants, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

Christopher Inglese, Esquire
David Tedder, Esquire
604-A Bladen Street
Beaufort, South Carolina 29902

James B. Richardson, Jr., Esquire
1229 Lincoln Street
Columbia, South Carolina 29201

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on May 9, 2017.

MOSS, KUHN & FLEMING, P.A.

By:_____
Sue Radford

LAW OFFICES
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May 9, 2017

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

RE: Julia Tompkins Ewing v. Keith A. Guest and Stephanie C. Guest and Pleasant Point Property Owners Association, Inc.
Appellate Case No.: 2016-001878

Dear Mrs. Kitchings:

Enclosed please find the Amended Initial Brief of Appellants and Amended Designation of Matter to be Included in the Record on Appeal regarding the above-referenced matter. By copy of this letter and the enclosures I am serving a copy of the same on David Tedder, Esquire, Christopher Inglese, Esquire and James B. Richardson, Jr., Esquire.

With kindest regards, I am

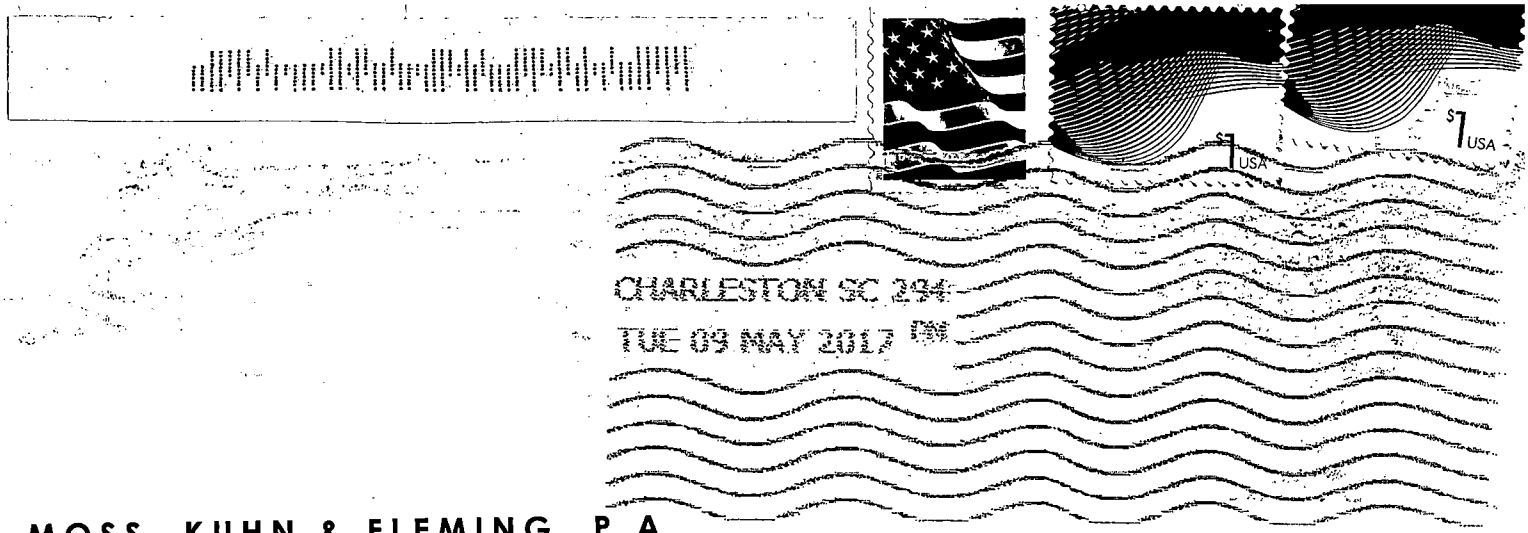
Very truly yours,

MOSS, KUHN, FLEMING & SMITH, P.A.

H. Fred Kuhn, Jr.

HFKjr:sr
Enclosures

cc: Christopher Inglese, Esquire (w/enclosures)
David Tedder, Esquire (w/enclosures)
James B. Richardson, Esquire (w/enclosures)



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Guest

To:

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