IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC 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.

INITIAL REPLY BRIEF OF APPELLANTS

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STATEMENT OF FACTS

In the section of her Brief entitled "Statement of Facts" the Respondent argues that after General and Mrs. Tompkins were granted the express lifetime easement the successor developer, Pleasant Point Plantation, continued to own fee simple title to the streets, subject to the *Billings* rights of lot purchasers. Respondent's Brief, pg. 9. This assertion is inherently inconsistent. If the portion of Pleasant Point Drive which is now in dispute was still in existence at the time of the granting of the lifetime easement to General and Mrs. Tompkins in 1976, this express easement conflicted with any *Billings* rights of lot purchasers. This express lifetime easement is inconsistent with the continued existence of any *Billings* rights over the disputed portion of Pleasant Point Drive. The express lifetime easement is exclusive, given only to the Tompkins, whereas *Billings* rights would apply to all lot owners. The express lifetime easement allows the Tompkins to build, plant and otherwise place obstructions within the lifetime easement, thereby unlawfully interfering with the exercise of any *Billings* rights if they existed. Additionally, placing the express lifetime easement on top of already existing *Billings* rights is illogical, inasmuch as if the Tompkins possessed *Billings* rights, then they already had an easement for ingress and egress to their property. Finally, as the Respondent cogently illustrates in her Brief, the disputed portion of Pleasant Point Drive has been erased by the Tompkins themselves on their own plat! Respondent's Brief, pg. 9.

Respondent, in her Brief, implies that the express lifetime easement could not have been utilized for ingress and egress inasmuch as it ends on a point. Respondent's Brief, pg. 10. While the express lifetime easement has four (4) corners, two (2) of which are rather sharp points, the express lifetime easement shares a boundary approximately 81 feet in length with Lot 1, which is

plenty of room to provide vehicular access. See 1976 Trogdon plat, portion of Defendant's Exhibit 1, part 4 and Respondent's Brief, pg. 9.

The Respondent attempts to characterize the lifetime express easement as a "landscaping" easement. By its express terms, however, the lifetime easement granted to the Tompkinses is "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 . . .. Defendant's Exhibit 1, pg. 21. (Emphasis added). Additionally, this easement is granted by Pleasant Point Plantation and signed on behalf of the grantor by its general partner, Cloide C. Branning. Mr. Branning testified at the trial and confirmed that this lifetime easement was given so that General and Mrs. Tompkins could use it for purposes of ingress and egress inasmuch as the disputed portion of Pleasant Point Drive had long since been abandoned. Tr., pg. 160, line 5 to pg. 161, line 8; and pg. 171, lines 9 – 19.

In her Statement of the Case, the Respondent notes that in Mr. Trogdon's 1974 plat the disputed portion of Pleasant Point Drive has disappeared. Respondent states that the successor developer had no reason to "erase" the disputed portion of Pleasant Point Drive on Mr. Trogdon's 1974 plat, hoping to convince this Court that this action is simply an unsolved mystery. Respondent's Brief, pg. 11. There is, however, no mystery. As Mr. Branning explained at trial, the old Manor House was originally intended to be the Club House for the subdivision, and the disputed portion of Pleasant Point Drive was intended to provide access to the Manor House property. When it was decided to locate the Club House elsewhere, the disputed portion of Pleasant Point Drive no longer had any reason to exist. It was, accordingly, never paved, never used, and not shown on any subsequent subdivision plat. Tr., pg. 60, line 5 to pg. 61, line 8 and pg. 71, lines 9 – 19.

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.

The Respondent appears to interpret *Billings v. McDaniel*, 217 S.C. 261, 60 S.E.2d 592 (1950) and its progeny line of cases as absolutely vesting an easement in favor of a grantee where property is sold and described with reference to a plat or map upon which streets and ways are shown. Respondent's Brief, pp. 12 – 14. It is worth emphasizing that the rule applied in these cases "is nothing more than a **presumption** that when a grantor conveys property with reference to a plat showing streets or other ways of passage, the grantor intends to allow the grantee the use of the delineated streets and ways of passage." *Murrells Inlet Corp. v. Ward,* 378 S.C. 225, 235, 662 S.E.2d 452, 457 (Ct. App. 2008) (emphasis added). As this Court has noted, "as a starting point, we note that the intentions of the parties to the transaction are the overriding focus when examining implied easements." *Id.*, 376 S.C. at 235, 662 S.E.2d at 456-57. In this case, the presumption that the disputed portion of Pleasant Point Drive was never intended to serve as access to Lot 1 has been overcome. The testimony of Mr. Branning that this roadway was intended to serve a Club House that never came into being, was undisputed. Mr. Branning is an impartial witness, who has no loyalty or bias in this case. The Special Referee summarily rejected Mr. Branning's testimony without reason, simply stating that it "contradicted" the plat. This is nonsense. Mr. Branning's testimony does not contradict the plat. To the contrary, it explains the plat, as well as everything that occurred thereafter. The plat shows Lot 1 with an otherwise incongruous extension onto Sussex Court, which was obviously intended to be the location of Lot 1's driveway. Mr. Branning's testimony explains why the disputed portion of Pleasant Point Drive

was never paved along with the rest of the subdivision's streets. His testimony explains why shortly after the 1969 plat, a new plat was done on which the disputed portion of Pleasant Point Drive was "erased." It explains why Pleasant Point Drive as it approaches the Manor House was rerouted so as to serve the newly created lots. It explains why the Respondent's predecessors in title, her parents, sought and obtained the express lifetime easement.

In short, once it is understood that the disputed portion of Pleasant Point Drive was intended to serve only the Manor House converted into a Club House, but when the Club House was located elsewhere the disputed portion of Pleasant Point Drive was abandoned, then everything about this case makes sense. On the other hand, if the Respondent's claim that the disputed portion of Pleasant Point Drive was intended to be a public road stands, then nothing about this case makes sense, i.e., the shape of Lot 1, the fact that this was the only part of the subdivision roadway system that was never paved nor used by any other members of the subdivision, the almost immediate erasure of this portion of Pleasant Point Drive from the subdivision plat, and the granting of the express lifetime easement to General and Mrs. Tompkins.

Respondent argues that the "scope" of the easement is not an issue in this case. Respondent's Brief, pg. 18. To the contrary, however, the scope of the easement is relevant. The "scope" of the implied easement created in this case was to utilize the disputed portion of Pleasant Point Drive for ingress and egress to the Manor House property, where it was originally intended that the Manor House would be converted into a Club House for the subdivision. When this intended conversion did not happen, the easement failed of its essential purpose and never came into being.

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

In her Brief, Respondent repeatedly refers to the express lifetime easement granted to General and Mrs. Tompkins as a "landscaping easement" and rather creatively lists seven (7) reasons why this easement "had nothing to do with vehicular access." Respondent's Brief, pg. 23.

First, Respondent argues that General and Mrs. Tompkins did not need the lifetime easement in order to have vehicular access because they already had it over the disputed portion of Pleasant Point Drive. This type of circular reasoning actually supports the Appellant's position. If General and Mrs. Tompkins already had the right to utilize the disputed portion of Pleasant Point Drive, then they would not have needed the express lifetime easement. The express lifetime easement only makes sense if General and Mrs. Tompkins did **not** have the right to utilize the disputed portion of Pleasant Point Drive for access to their property.

Second, Respondent argues that the lifetime easement ends with a point not the width of a car. As previously noted, the lifetime easement shares the boundary of approximately 81 feet in length with Lot 1, plenty of room for vehicular access.

Third, Respondent notes that the lifetime easement area falls short of the Tompkins' carport. This is true. The lifetime easement, however, allowed the Tompkins to reach their own property, and from their own property they can easily travel the additional 20 feet to reach their carport. In order to have ingress and egress to their property, the easement need only reach their property, not their carport.

Fourth, Respondent notes that the easement ended with the death of the grantees. This, also, is true. As Mr. Branning testified, General Tompkins was a personal friend of his and this was the primary motivation in granting the lifetime easement. Once the lifetime easement expired,

any subsequent owner of Lot 1 would have to access Lot 1 over its **originally intended point of access**, on Sussex Court over the extenuated arm of Lot 1 as shown on the original subdivision plat.

Fifth, Respondent notes that General and Mrs. Tompkins were utilizing the lifetime easement area prior to the granting of the express easement. This is true. As Mr. Branning testified, General Tompkins was his friend and he was utilizing the area encompassed by the lifetime easement with his permission. The lifetime easement document was executed so that General Tompkins could continue to utilize the subject area in the event Mr. Branning sold his property. Tr., pg. 160, line 5 to pg. 161, line 8; and pg. 171, lines 9 – 19.

Sixth, Respondent notes that the easement recites that the grantor, Pleasant Point Plantation, is the owner of the property shown on Mr. Trogdon's 1969 plat. This is a true statement. It does not, however, mean that the lifetime easement "had nothing to do with vehicular access," as Respondent argues. It is respectfully submitted that it is more important to look at the actual plat which is attached to the lifetime easement. This plat is inconsistent with the 1969 plat, and consistent with the 1974 plat which truncates Pleasant Point Drive. In other words, the disputed portion of Pleasant Point Drive is not shown on the plat depicting the lifetime easement – a plat which was prepared by and for General and Mrs. Tompkins.

Seventh, and lastly, Respondent states that the instrument granting the lifetime easement names three (3) kinds of things which the grantee is permitted to do within the easement area, none of which is ingress and egress. This is incorrect. As previously noted, the easement expressly allows for the establishment of "driveways." Defendant's Exhibit 1, pg. 21.

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.

The Appellants offer no additional argument in reply as to Issue III, above, and the Court's attention is respectfully directed pp. 22 – 24 of Appellants' Brief.

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 Appellants offer no additional argument in reply as to Issue IV, above, and the Court's attention is respectfully directed pp. 25 – 26 of Appellant's Brief.

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.

The Appellants offer no additional argument in reply as to Issue V, above, and the Court's attention is respectfully directed pp. 27 – 31 of Appellant's Brief.

CONCLUSION

It is accordingly respectfully 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
June 16, 2017

CERTIFICATE OF SERVICE

Undersigned certifies that the Appellants' Initial Reply Brief, 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:

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Beaufort, South Carolina 29902

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in a post office or official depository under the exclusive care and custody of the United States Postal Service, on June 16, 2017.

MOSS, KUHN & FLEMING, P.A.

By: Sue Radford
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June 16, 2017

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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 the Appellants' Initial Reply Brief regarding the above-referenced matter. By copy of this letter I am serving a copy of this motion on all counsel of record.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

H. Fred Kuhn, Jr.
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cc: David L. Tedder, Esquire (w/enclosure)
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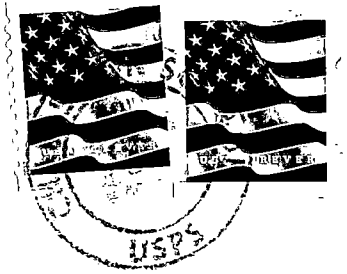

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