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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-In-Equity

Lower Court Case No. 2014-CP-10-5608
Appellate Case No. 2016-000886

James Bradley Williams and Robert Blair Kline, Jr., ... Appellants.

Merle S. Tamsberg, ... Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

James Bradley Williams and Robert Blair
Kline, Jr.,

Case No. 2014-CP-10-05608

Plaintiffs,

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT/DENYING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

vs.

Merle S. Tamsberg,

Defendant.

FILED
MAR 29 PM 2:38
J. ARMSTRONG
CLERK OF COURT

This matter is before the Court on cross-motions for summary judgment. A hearing on Plaintiffs' *Motion for Summary Judgment* was held before me on March 2, 2016, and a hearing on Defendant's *Motion for Summary Judgment* was held before me on March 11, 2016. The parties were represented by counsel at each hearing. After reviewing Plaintiffs' and Defendant's pending motions, memoranda with exhibits, and considering the arguments of counsel, the Court finds that Plaintiff's motion is denied and Defendant's motion is granted, for the reasons set forth more specifically below.

FINDINGS OF FACT

This lawsuit arises out of a dispute between Defendant and Plaintiffs regarding an easement benefiting Defendant's property at 47 Legare Street, Charleston, South Carolina (the "*Easement*") which allows the Defendant to use a portion of Plaintiffs' property at 45 Legare Street for access to the Defendant's property. Prior to 1911, 45 and 47 Legare Street were one lot. In 1911, W.G. Hinson divided the property, conveying to Julia R. Dill the portion currently identified as 47 Legare Street, and reserving for himself the portion currently identified as 45 Legare Street. In the deed, dated April 15, 1911 and recorded in the RMC Office for Charleston



County in Book W25, Page 13 (the "*Dill Deed*"), Hinson conveyed to Julia Dill an easement. The description of the Easement in the Dill Deed reads: "Also the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress, and regress, in, over, through, and upon the alleyway eight (8) feet wide as a driveway or carriageway situate, lying and being immediately to the south of the above-described property and being the southern boundary of said above described lot of land." The Easement runs to the South of, and borders, 47 Legare Street and provides access, ingress, and egress to and from Legare Street.

In 1970, title to 45 Legare Street was vested in Margarett DeSaussure Black ("*Black*"). South Carolina National Bank ("*SCNB*"), as executor of Julia Dill's estate and Trustee of her assets, held title to 47 Legare Street. SCNB conveyed the rear portion of the Easement to Black by deed dated April 5, 1971 and recorded in the Charleston County RMS Office at Book J96, Page 145. SCNB and Black also reaffirmed the Easement in a recorded document entitled "Covenant and Restriction" which was dated April 5, 1971 and recorded in RMC Office in Book J-96, page 8. (The "*Covenant*"). The Covenant provides that Ms. Black "desires to reaffirm the existence of said easement" and provides that no building, structures or other obstructions may be constructed that prevent the right of ingress, regress, and egress. The Covenant expressly binds Black and her "heirs, assigns, and successors in title."

On July 8, 1971, SCNB conveyed 47 Legare Street to Nancy Linton. The deed, which was recorded in the Charleston County RMC Office at Book A97, Page 172, specifically references the Easement. Ms. Linton conveyed 47 Legare Street to the Defendant and her husband by deed dated May 11, 1998 and recorded in the Charleston County RMC Office at Book 174, Page 108. The Plaintiffs purchased 45 Legare Street from the heirs of Margarett Black, as evidenced by the deed dated May 17, 2004 and recorded in the Charleston County

RMC Office at Book 495, Page 186.¹

The Plaintiffs testified that the owners of 47 Legare Street constructed a masonry wall along the boundary with 45 Legare Street in around the year 2004. It is uncontroverted that this wall contained a gate providing access to 45 Legare Street, and that gate has remained in the wall to the present day. The Defendant submitted an affidavit stating that her family members, Defendant's gardener, and various other tradesmen regularly use the Easement for access to the backyard of 47 Legare Street.

Plaintiff James Williams testified that he was aware of the existence of the Easement either shortly before or at the time he purchased 45 Legare Street in 2004. He also thought the Easement had been abandoned at that time. Plaintiffs did not bring the present action until September of 2014, requesting a declaratory judgment that Defendant's Easement has been abandoned, a permanent injunction preventing Defendant from removing her fence, and a declaratory judgment that the disputed Easement has been terminated. Plaintiffs further contend that Defendant's use of the Easement constitutes a trespass. Subsequent to the filing of the above-captioned lawsuit, Defendant filed a motion for a preliminary injunction/temporary restraining order in order to be able to continue to use the Easement, which was granted on February 2, 2015.

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law, Rule 56(c), SCRPC. Under Rule 56(c) the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.

¹ This deed stated that the conveyance was made subject to all recorded easements.

Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

However, the moving party need not support its motion with affidavits or other similar materials negating the opponent's claims but rather must clearly establish by the record the absence of a triable issue of fact. Id. With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the Court the absence of evidence to support the non-moving party's case. Id.

After the moving party has met his initial burden, Rule 56(e) of the South Carolina Rules of Civil Procedure requires the opposing party to "do more than simply show that there is some metaphysical doubt as to the material facts." Id. In response to a properly supported motion for summary judgment, the opposing party "must come forward with specific facts showing there is a genuine issue of material fact." Id. Thus, "the non-moving party may not rest on the mere allegations or denial of pleadings, but must set forth or point to specific facts showing there is a genuine issue of material fact." Thomas v. Waters, 315 S.C. 524, 526, 445 S.E. 2d 659, 661 (Ct. App. 1994) (quoting Dickert v. Metropolitan Life Ins. Co., 206 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1993), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993)).

CONCLUSIONS OF LAW

I find that summary judgment is appropriate as the undisputed facts showed that Plaintiffs, as a matter of law, cannot prevail on any of their enumerated causes of action:

I. The Easement is appurtenant to Defendant's property and therefore did not terminate upon the conveyance of 47 Legare Street from SCNB to Ms. Linton and, further, the restrictive covenants set forth in the Covenant run with the land and are enforceable against the grantees of 45 Legare.

A. The Easement is appurtenant as a matter of law.

The Plaintiffs assert that the Easement is an easement in gross and thus terminated upon the transfer of 47 Legare. Defendants assert that the Easement is appurtenant and therefore did

not terminate. The facts surrounding this issue are uncontradicted, and I find that, as a matter of law, the Easement is appurtenant and did not terminate upon conveyance of 47 Legare Street from SCNB to Ms. Linton.

"In construing a deed, 'the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy.'" Windham v. Riddle, 381 S.C. 192, 672 S.E.2d 578, 582-3 (2009), quoting Wayburn v. Smith, 270 S.C. 38, 41-42, 239 S.E.2d 890, 892 (1977). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." Id., quoting Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987). "The intention of the grantor must be found within the four corners of the deed." Id.

An easement in gross is a mere personal privilege to use the land of another and cannot be transferred. Windham, 381 S.C. at 201, 672 S.E.2d 583 (2009). An appurtenant easement is one that "inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof." Id.; Smith v. Commissioners, 312 S.C. 460, 441 S.E.2d 331 (Ct.App.1994); Carolina Land Company, Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975); Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965); 12 S.C. Juris. Easements § 3. An appurtenant easement passes with the dominant estate. Id. "[E]asements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate." Rhett v. Gray, 401 S.C. 478, 492, 736 S.E.2d 873, 880 (Ct. App. 2012).

Plaintiffs contend that because the Easement runs along the border between 45 and 47 Legare, and does not effectively "dead-end" into 47 Legare, it has no terminus in 47 Legare and therefore cannot be an appurtenant easement. This interpretation of the word terminus runs

contrary to South Carolina law and lead⁷ to the impractical result of effectively barring any easement that borders the dominant parcel. Under South Carolina law, the "terminus" requirement demands only that the dominant estate be contiguous or adjacent to the easement or right of way. In Whaley v. Stevens, 21 S.C. 221 (1884), the plaintiff owned Caneslatch plantation, which was separated by a public road from Seven Oaks plantation. Seven Oaks plantation bordered the Stono River. The plaintiff's easement in Whaley provided for "a right of way, by means of a road leading from the public road over the adjoining land of the said Defendant, known as the Seven Oaks plantation, to a creek leading into the said Stono River." 21 S.C. at 224. In finding that the plaintiff could not have an appurtenant easement, the Whaley court wrote:

But a more fatal objection is that, in describing the right of way in question, it is not alleged that it begins on the Caneslatch plantation, or that it even leads from said plantation. Indeed, from the description of the way as given in the complaint, it does not appear that it touches Caneslatch plantation at any point or reaches to it. The allegation is, "leading from the public road". Now, even adopting the theory that the public road being the boundary of Caneslatch plantation on the east, the plaintiff owns to the middle of the road, still the complaint cannot be construed as alleging that the way in question has one of its termini on the Caneslatch plantation; for as the creek, which is one of the termini named, lies east of the public road, and as the defendant owns the land adjoining the road on the east, and consequently the eastern half of said road, the western as well as the eastern terminus of the way, as described in the complaint, would be on the land of the defendant, and not on the land of the plaintiff. Id. at 224-5.

The Easement at issue satisfies the rule articulated in Whaley. The Easement "touches" Defendant's property "and reaches to it" at the lot line, and more specifically the area of the present gate, where it has its terminus. Id. Indeed, the "driveway" or "carriage way" referenced in the Dill Deed is the Easement itself, which continues through the gate, terminating in Defendant's backyard. In exercising use of the Easement, Defendant and her predecessors-in-title proceeded directly from Defendant's property to the Easement without a gap. Plaintiffs

argue that their claim of invalidity is supported by the fact that the Easement lies wholly on Plaintiffs' property, when by definition easement rights are confined to the servient estate by virtue of the fact that no one has need of an easement on one's own property.

Further, while an appurtenant easement must be necessary to the enjoyment of the land, an appurtenant easement does not have to be absolutely necessary, though it may not be established for mere convenience. Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 421, 633 S.E.2d 136, 141 (2006); 12 S.C. Juris Easements § 3. In Proctor v. Steedley, the Court held that an access road across the servient estate was necessary where it was the only reasonable method for accessing the northern portion of the dominant estate. 398 S.C. 561, 575, 730 S.E.2d 357, 365 (Ct.App. 2012).

The Plaintiffs presented no evidence concerning whether the Easement was "necessary" at the time of the Dill Deed in 1911 or when the Covenant was recorded in 1971. Therefore, Plaintiffs' have produced no evidence demonstrating a material fact as to that issue. Even today, Defendant has no other satisfactory method of bringing large-scale equipment and tools to the rear of 47 Legare. While there is a gate at the front of the house, it is too narrow for large appliances and other equipment to be carried through it. Further, Defendant has only one small parking spot at the front of 47 Legare Street, and this parking spot is so narrow that one can pull a modern car into the spot only with difficulty. The Easement provides access to the rear of 47 Legare Street and is the only adequate manner by which the owner of 47 Legare Street can make use of off-street parking for more than one small vehicle. This is borne out by the fact that the owners of 47 Legare Street have used the Easement for 100 years, and the parties' predecessors in title found it necessary to reaffirm the Easement in 1971.

B. The restrictive covenants set forth in the Covenant run with the land and are enforceable against grantees of 45 Legare.

As set forth above, the Covenant provides that the owner of 45 Legare Street is precluded from erecting a building or structure on the Easement and that no obstruction be placed on the Easement which prevents the right of ingress and egress over the Easement to 45 Legare. In order to run with the land, the restriction limiting the use of property must be construed to touch and concern the land and there must be an indication that the parties intended for the covenant to run with the land. Charping v. J.P. Scurry & Co., 296 S.C. 312, 314, 372 S.E.2d 120, 212 (Ct.App. 1988). In the Charping case, the court reasoned that the restriction at issue was a "real covenant" running with the land because "it affects the use of the subject land, it affects the quality and mode of enjoyment on the land, and it concerns the interest in the land that was conveyed; its purpose is to alter the legal rights which otherwise flow from the land." Id.

These covenants "run with the land," and are enforceable by and against later grantees of 45 Legare. Queens Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 360, 628 S.E.2d 902, 913 (Ct.App. 2006). The Covenant expressly provides that the restrictive covenants are to "run with the land," and on its face clearly complies with South Carolina law regarding valid restrictive covenants. Therefore, the restrictive covenants are enforceable as a matter of law.

II. There is no evidence to support Plaintiffs' claim that Defendant abandoned the Easement.

In South Carolina, "[t]he language of an easement determines its extent." Ploti v. Justin Enterprises, 374 S.C. 504, 513, 649 S.E.2d 92, 96 (Ct. App. 2007) (quoting Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 67, 558 S.E.2d 902, 906-7 (Ct.App.2001)). "Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense." Martin v.

Bay, 400 S.C. 140, 732 S.E.2d 667 (Ct. App. 2012) (quoting S.C. Public Serv. Auth v. Ocean Forest, Inc., 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981)).

To prove that a holder has abandoned an easement, the adverse party must show a clear intent on the part of the holder to abandon. In South Carolina, "the burden of proof is upon the complaining party to show the abandonment [of the easement] by clear and unequivocal evidence." Judy v. Kennedy, 398 S.C. 471, 728 S.E.2d 484 (Ct.App.2012) (quoting Carolina Land Co. v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975). "The burden is a high one that cannot be satisfied by mere nonuse." Id. (see Witt v. Poole, 182 S.C. 110, 115, 188 S.E.2d 496, 499.) (emphasis added.) "[T]o justify the conclusion there has been an abandonment, there must be some clear and unmistakable affirmative act or series of acts indicating a purpose to repudiate ownership." Witt, 182 S.C. at 112, 188 S.E.2d at 498.

Moreover, lapse of time and non-use is not sufficient to prove that an owner has abandoned an easement. "[T]he 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 a purpose inconsistent with its further existence." Carolina Land Co., 265 S.C. at 109, 217 S.E.2d at 21 (quoting Witt, 182 S.C. 110, 188 S.E.2d 496).

Plaintiffs have presented no evidence proving that Defendant has engaged in acts conclusively manifesting the present intention to relinquish the Easement or a purpose inconsistent with the existences of the Easement. Plaintiffs assert that Defendants rarely used the Easement, and not for vehicular access. The Plaintiffs further assert that the construction of the masonry wall is evidence of intent to relinquish the Easement. Neither of these assertions constitutes a material fact supporting Plaintiffs' position. First, as set forth herein, South

Carolina law explicitly provides that mere nonuse of an easement created by deed for a period however long will not amount to abandonment. Second, the fact that Defendant constructed a masonry wall along the border with the Easement is immaterial. In fact, Defendant left an access gate between 47 Legare and the Easement, an act which represents a clear intent *not* to abandon the easement. Simply put, there is no evidence to support Plaintiffs' position that the Defendant manifested either the present intention to relinquish the easement. As such, Defendant's motion for summary judgment as to Plaintiffs' abandonment claim is granted.

III. Plaintiffs' claims are barred by the statute of limitations.

Plaintiffs' claims are barred by the statute of limitations because they knew or should have known they had a cause of action long before filing their complaint on September 12, 2014. Plaintiffs have alleged that Defendant abandoned her easement, or, in the alternative, that Defendant's easement was terminated as an in gross easement upon conveyance of 47 Legare Street from SCNB to Nancy Linton in 1971. Plaintiffs further claim that Defendant is, and has been, liable for trespass.

In South Carolina, the statute of limitations for trespass or damage to real property is three years from when a person knew or by the exercise of reasonable diligence should have known that he or she had a cause of action. See S.C. Code Ann. §§ 15-3-530(3). "While the scope or extent of an easement is a question in equity, the existence of an easement is a factual question in an action at law." Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct.App. 1998); citing Slear v. Hanna, 329 S.C. 407, 496 S.E.2d 633 (1998); Smith v. Commissioners of Public Works, 312 S.C. 460, 441 S.E.2d 331 (Ct.App.1994). "It follows that termination of an easement by abandonment is a factual question in an action at law as well." Id.

In South Carolina, the "discovery rule" tolls the statute of limitations until a person

knows, or by the exercise of reasonable diligence should know, that he has a cause of action. S.C. Code Ann. §15-3-535; Barr v. City of Rock Hill, 330 S.C. 640, 645 (S.C.Ct.App. 1958). Per the discovery rule, the statute runs from the date of the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. Republic Contr. Corp. v. S.C. Department of Highways and Pub. Transp., 332 S.C. 197, 207 (S.C.Ct.App. 1998). The exercise of reasonable diligence means simply that an injured party must act with the same promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been involved or that some claim against another party might exist. Id. at 207; see also Wiggins v. Edwards, 314 S.C. 126 (S.C. 1994). The statute of limitations begins to run from this point, rather than later from when the advice of counsel is sought or a full-blown theory of recovery developed. Wiggins, 314 S.C. 126.

Plaintiff Williams testified in his deposition that he knew about the easement prior to the purchase of 45 Legare Street, possibly when Plaintiffs' realtor first showed the property to them in 2004:

Q: Do you remember when you first became aware that the property was encumbered by this easement?

A: It was early on.

Q: Okay.

A: It may have been the first day we saw it.

Plaintiffs did not bring the present action until September 12, 2014, a delay of over a decade:

Q: Okay. Why wait so many years to bring a lawsuit?

A: Why? Rob told me you would ask that. And when we bought the house, Mr. Tamsberg had terminal cancer. We knew the easement was there. It was changing hands. It would have been a good time to get it sorted out. But we didn't want to move in and sue a couple that was dealing with cancer. Then he died. Again, we could have done it. But we didn't feel comfortable suing a

widow who just lost her husband to cancer. We also noted the wall. And our position was, that easement was abandoned ever since the first day that wall went up. It was never a concern to us. It was never used by her, ever. The only time it was ever used was as -- for her landscaping people to walk down her driveway and go through her gate. It was never used as a carriage way. It was abandoned, in our opinion. So there was no reason to ever bring it up.

Plaintiffs knew of the existence of the easement and nursed doubts about its validity beginning in the spring of 2004. Defendant's husband died on March 4, 2007, seven years prior to the institution of the present action. Based on the requirements of the discovery rule, cited above, Plaintiffs did not act with reasonable diligence in pursuing their claims. The statute of limitations on their claim ran after three years. Thus, Plaintiffs' claims have been barred by the statute of limitations for over seven years.

CONCLUSION

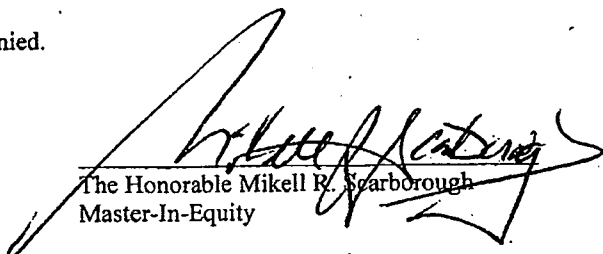
Based on the foregoing, I find:

- (1) The Easement is appurtenant to Defendant's property;
- (2) The restrictive covenants set forth in the Covenant are enforceable;
- (3) Defendant has not abandoned the Easement; and
- (4) Plaintiffs are barred from pursuing their claims by the applicable statute of limitations.

For the reasons set forth above, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant's Motion for Summary Judgment is granted, and Plaintiffs' Motion for Summary Judgment is denied.

IT IS SO ORDERED.

March 25, 2016
Charleston, South Carolina


The Honorable Mikell R. Scarborough
Master-In-Equity

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

James Bradley Williams and Robert Blair
Kline, Jr.,

Plaintiffs,

vs.

Merle S. Tamsburg,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CASE NO. 2014-CP-10-_____

) **COMPLAINT**
) (Declaratory Judgment)

) (Non-Jury)

FILED
2014 SEP 12 PM 4:48
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Plaintiffs, complaining of Defendant, allege and say:

1. They are citizens and residents of the State of South Carolina, County of Charleston and owners as tenants in common in real property located at 45 Legare Street, Charleston, South Carolina.
2. Upon information and belief, Defendant is a citizen and resident of the State of South Carolina, County of Charleston and is the owner in fee simple of real property located at 47 Legare Street, Charleston, South Carolina.
3. In this matter Plaintiffs seek a judicial declaration of the rights of the parties with respect to an easement for ingress and egress on Plaintiffs' real property which Plaintiffs contend has been abandoned.

FACTS

4. On April 15, 1911, W. G. Hinson conveyed 47 Legare Street to Julia R. Dill by deed recorded in the RMC Office for Charleston County in Book W25 at Page 313 the "Dill Deed").
5. In the Dill deed, the property is described as including:

Also, the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress, and regress, in, over, through and upon the alley-way eight (8) feet wide as a drive way or carriage way situate, lying and being

immediately to the south of the above described property and being the southern boundary of said above described lot of land.

Additionally, on April 5, 1971, the owner of 45 Legare Street executed and recorded a Covenant and Restriction in Book J 96 at Page 8 in the RMC Office for Charleston County (the "Restriction"). In the Restriction, the then owner of 45 Legare Street agreed that a strip of land located on the left side of Legare Street being 8 feet in width and 101.25 feet in depth and being more particularly shown on a plat of Number 47 Legare Street should be subject to restrictions and limitations, including no building or other structures could be erected thereon, and no obstruction should be placed or permitted to remain to prevent the right of ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriage way to the owner of Number 47 Legare Street.

6. Since the recording of the Easement and the Restriction, conditions with respect to the property encumbered have changed so as to destroy the essential objects and purposes of the Easement and the Restriction, including:

- a. Approximately ten years ago, the owners of 47 Legare Street built a concrete block wall that blocks access to their property;
- b. Prior to the erection of the concrete block wall, a chain link fence had been erected blocking access for approximately forty years; and
- c. The original grant of easement provided for access of the owners of 47 Legare to a garage in the back of that property and the garage no longer exists.

7. Under the circumstances, the owner of the easement has relinquished the easement by implied abandonment based on the acts, conduct and circumstances of the case.

8. The lack of use, erection of impediments, and demolition of the garage constitute evidence of a purpose inconsistent with the existence of the Easement and Restriction.

9. This action is brought pursuant to §15-53-10 et seq. S.C. Code Laws, 1976 as amended, the S.C. Declaratory Judgment Act as a plenary action seeking to invoke the equitable powers the powers of this Court to include injunctive relief. The parties and the subject matter of this action are within the jurisdiction of this Court.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

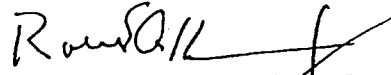
7. Plaintiffs reallege each and every allegation set forth above as if set forth fully here.
8. The parties are owners of real property subject to the Easement and Restriction. Based on the foregoing allegations, a justiciable conflict exists between Plaintiffs and Defendant.
9. The parties hereto are all persons who have or may have a direct or representative interest which may be affected by the Court's declaration and, pursuant to § 15-53-80, South Carolina Code of Laws, are proper parties to this action.
10. By reason of the foregoing, a Declaratory Judgment is both necessary and proper in order to determine the rights and obligations, if any, which exist among the parties.
11. As a result, Plaintiffs seek relief in the form of a Declaratory Judgment under the S.C. Uniform Declaratory Judgment Act and Rule 57 of South Carolina Rules of Civil Procedure, against Defendant, and seek, among other things, a declaration that
- a. The Easement has been abandoned as a result of the totality of the circumstances surrounding its use;
 - b. The Restriction has been abandoned as a result of the totality of the circumstances surrounding the use of the property burdened by the restriction; and
 - c. The property burdened by the Easement and the Restriction should revert Plaintiffs in fee simple ownership unencumbered by any interest of Defendant.

FOR A SECOND CAUSE OF ACTION
(Temporary and Permanent Injunctive Relief)

11. Plaintiffs reallege each and every allegation set forth above as if set forth fully here.
12. Upon information and belief, Defendant is in the process of selling her property and has threatened to remove the fence erected in the Easement.
13. Plaintiffs are informed that unless this Court issues an immediate temporary injunction and/or permanent injunction prohibiting Defendant's action, Defendant will start to remove the fence which will have an unjust and prejudicial effect upon Plaintiffs.
14. The removal of the fence will result in immediate and irreparable injury and loss and damage and expense to Plaintiffs.
15. Plaintiffs are likely to succeed on the merits of this action obtaining a judgment on their cause of action for a judicial declaration of rights.
16. Plaintiffs are informed and believe that no material harm will result to Defendant if she enjoined from removing the wall and the fence until such time as the Court decides the issues set forth herein.

WHEREFORE, Plaintiffs pray for the following:

1. A Declaratory Judgment setting forth the foregoing relief;
2. Injunctive and equitable relief to maintain the status quo pending the adjudication of the questions presented herein;
3. A Permanent Injunction preventing the Defendant from removing the fence in the Easement;
4. The costs of this action and reasonable attorney fees; and
5. Such further relief as the Court deems just and proper.



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Attorneys for Plaintiff

Dated: September 11, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2014-CP-10-5608
	)	
James Bradley Williams and Robert Blair	)	
Kline, Jr.,	)	AMENDED COMPLAINT
	)	(Declaratory Judgment)
Plaintiffs,	)	
	)	
vs.	)	(Non-Jury)
	)	
Merle S. Tamsberg,	)	
	)	
Defendant.	)	

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 JULIE J. ARMSTRONG
 CLERK OF COURT
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Plaintiffs, complaining of Defendant, allege and say:

1. They are citizens and residents of the State of South Carolina, County of Charleston and owners as tenants in common in real property located at 45 Legare Street, Charleston, South Carolina.
2. Upon information and belief, Defendant is a citizen and resident of the State of South Carolina, County of Charleston and is the owner in fee simple of real property located at 47 Legare Street, Charleston, South Carolina.
3. In this matter Plaintiffs seek a judicial declaration of the rights of the parties with respect to an easement for ingress and egress on Plaintiffs' real property which Plaintiffs contend has been abandoned and terminated.

FACTS

4. On April 15, 1911, W. G. Hinson conveyed 47 Legare Street to Julia R. Dill by deed recorded in the RMC Office for Charleston County in Book W25 at Page 313 the "Dill Deed").
5. In the Dill deed, the property is described as including:

Also, the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress, and regress, in, over, through and upon the alley-way eight (8) feet wide as a drive way or carriage way, situate, lying and being

immediately to the south of the above described property and being the southern boundary of said above described lot of land.

The Easement ran the length of the southern boundary of 47 Legare, from Legare Street to the western boundary line of 45 Legare Street.

6. On April 5, 1971, Margarette Black, the owner of 45 Legare Street executed and recorded a Covenant and Restriction in Book J 96 at Page 8 in the RMC Office for Charleston County (the "Restriction"). In the Restriction, Black reaffirmed the existence of the Easement "to the extent as agreed upon by the parties," and agreed that a strip of land located on the left side of Legare Street being 8 feet in width and 101.25 feet in depth and being more particularly shown on a plat of Number 47 Legare Street should be subject to restrictions and limitations, including no building or other structures could be erected thereon, and no obstruction should be placed or permitted to remain to prevent the right of ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriage way to the owner of Number 47 Legare Street.

7. The length of the Easement in the Restriction was shorter than the original Easement in the Dill Deed, because of a simultaneous conveyance to Black. When Black executed the Restriction, South Carolina National Bank as Executor and Trustee under the Last Will and Testament of Julia R. Dill, conveyed to Black a portion of the eight-foot strip that was part of the easement running from the western lot line to the terminus of the shortened easement, by a deed recorded on April 5, 1971, recorded in Book J 96 at Page 145 in the RMC Office for Charleston County. Both this deed and the Restriction reference the attached "Plat of Number 47 Legare Street and Easement" by Cummings and McCrady and dated February 1971.

8. Upon information and belief, at the time of the execution of the Restriction and the deed from South Carolina National Bank to Black, a garage was still in use as a garage at 47 Legare

Street.

9. Since the recording of the Easement and the Restriction, conditions with respect to the property encumbered have changed so as to destroy the essential objects and purposes of the Easement and the Restriction, including:

- a. Approximately ten years ago, the owners of 47 Legare Street built a concrete block wall that blocks access to their property;
- b. Prior to the erection of the concrete block wall, a chain link fence had been erected blocking access for approximately forty years; and
- c. The original grant of easement provided for access of the owners of 47 Legare to a garage in the back of that property and the garage no longer exists.

7. Under the circumstances, the owner of the easement has relinquished the easement by implied abandonment based on the acts, conduct and circumstances of the case.

8. The lack of use, erection of impediments, and demolition of the garage constitute evidence of a purpose inconsistent with the existence of the Easement and Restriction.

9. The reservation of easement in the Dill Deed was the reservation of an easement in gross and, despite its reaffirmation in the Restriction, it has terminated as a matter of law.

10. This action is brought pursuant to §15-53-10 et seq. S.C. Code Laws, 1976 as amended, the S.C. Declaratory Judgment Act as a plenary action seeking to invoke the equitable powers the powers of this Court to include injunctive relief. The parties and the subject matter of this action are within the jurisdiction of this Court.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

10. Plaintiffs reallege each and every allegation set forth above as if set forth fully here.

11. The parties are owners of real property subject to the Easement and Restriction. Based

on the foregoing allegations, a justiciable conflict exists between Plaintiffs and Defendant.

12. The parties hereto are all persons who have or may have a direct or representative interest which may be affected by the Court's declaration and, pursuant to § 15-53-80, South Carolina Code of Laws, are proper parties to this action.

13. By reason of the foregoing, a Declaratory Judgment is both necessary and proper in order to determine the rights and obligations, if any, which exist among the parties.

14. As a result, Plaintiffs seek relief in the form of a Declaratory Judgment under the S.C. Uniform Declaratory Judgment Act and Rule 57 of South Carolina Rules of Civil Procedure, against Defendant, and seek, among other things, a declaration that

- a. The Easement has been abandoned as a result of the totality of the circumstances surrounding its use;
- b. The Restriction has been abandoned as a result of the totality of the circumstances surrounding the use of the property burdened by the restriction; and
- c. The property burdened by the Easement and the Restriction should revert Plaintiffs in fee simple ownership unencumbered by any interest of Defendant.

FOR A SECOND CAUSE OF ACTION
(Temporary and Permanent Injunctive Relief)

11. Plaintiffs reallege each and every allegation set forth above as if set forth fully here.

12. Upon information and belief, Defendant is in the process of selling her property and has threatened to remove the fence erected in the Easement.

13. Plaintiffs are informed that unless this Court issues an immediate temporary injunction and/or permanent injunction prohibiting Defendant's action, Defendant will start to remove the fence which will have an unjust and prejudicial effect upon Plaintiffs.

14. The removal of the fence will result in immediate and irreparable injury and loss and damage and expense to Plaintiffs.

15. Plaintiffs are likely to succeed on the merits of this action obtaining a judgment on their cause of action for a judicial declaration of rights.

16. Plaintiffs are informed and believe that no material harm will result to Defendant if she enjoined from removing the wall and the fence until such time as the Court decides the issues set forth herein.

FOR A THIRD CAUSE OF ACTION
(Termination of Easement)

17. Plaintiffs reallege each and every allegation set forth above as if set forth fully here.

18. Both the grant of easement in the Dill Deed and the Restriction were easements in gross, and could not be transferred to subsequent purchasers.

19. Both Plaintiffs and Defendant are subsequent owners of their respective properties, neither being a party to the Restriction.

20. As such the easement in gross has terminated as a matter of law and is of no force or effect.

FOR A FOURTH CAUSE OF ACTION
(Trespass)

21. Plaintiffs reallege each and every allegation set forth above as if set forth fully here.

22. The Easement was originally granted as a "drive way or carriage way," a use that no longer is necessary or feasible.

23. Defendant has attempted to change the nature of the Easement into a walkway, primarily for the use of tradesmen, invitees and licensees.

24. This usage is beyond the original scope of the Easement and is being used in such a

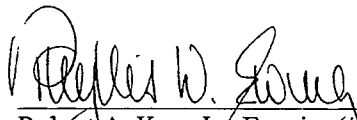
reckless manner than can only be considered harassment, and threatens the life and well-being of Plaintiffs' dogs.

25. Plaintiffs request that the Court find that each such usage is a separate act of trespass, and provide appropriate relief.

WHEREFORE, Plaintiffs pray for the following:

1. A Declaratory Judgment setting forth the foregoing relief;
2. Injunctive and equitable relief to maintain the status quo pending the adjudication of the questions presented herein;
3. A Permanent Injunction preventing the Defendant from removing the fence in the Easement;
4. A Declaration that the disputed easement terminated when the current owners of 45 and 47 Legare purchased their properties;
5. Enjoin the Defendant from usage of the Easement by her tradesmen, invitees and licensees as trespass upon 45 Legare Street;
6. The costs of this action and reasonable attorney fees; and
7. Such further relief as the Court deems just and proper.

August 11, 2015
Charleston, SC


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Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2014-CP-10-05608

JAMES BRADLEY WILLIAMS and
ROBERT BLAIR KLINE, JR.,

Plaintiffs,

v.

MERLE S. TAMSBERG,

Defendant.

PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT

FILED
2016 FEB 10 PM 2:48
JULIE J. ARMSTRONG
CLERK OF COURT

TO: DAVID M. SWANSON, ESQ., JANE C. BOUCH, ESQ., AND MATTHEW TILLMAN,
ESQ. ATTORNEYS FOR MERLE S. TAMSBERG:

PLEASE TAKE NOTICE THAT Plaintiffs, James Bradley Williams and Robert Blair Kline, Jr., by and through their undersigned counsel, will move before the Master-in-Equity in Charleston County, at the Charleston County Courthouse, Charleston, South Carolina, on March 2, 2016, or as soon thereafter as counsel may be heard, for summary judgment, pursuant to Rule 56, SCRPC.

This motion is based on the entire record in the within matter, supporting affidavits filed with this motion, and any memorandum of law to be filed in support of this motion.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

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RECORD 024

9 Feb, 2016
Charleston, SC

ATTORNEYS FOR PLAINTIFFS
JAMES BRADLEY WILLIAMS and
ROBERT BLAIR KLINE, JR.

CHARLESTON627012v1

RECORD 025

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES BRADLEY WILLIAMS and
ROBERT BLAIR KLINE, JR.,

Plaintiffs,

vs.

MERLE S. TAMSBERG,

Defendant.

Case No. 2014-CP-10-05608

**DEFENDANT MERLE S.
TAMSBERG'S MOTION FOR
SUMMARY JUDGMENT**

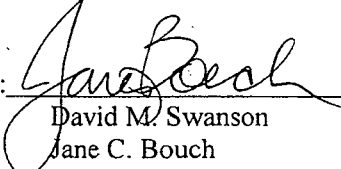
TO: ROBERT A. KERR, JR. AND PHYLLIS W. EWING, ATTORNEYS FOR
PLAINTIFFS:

PLEASE TAKE NOTICE that the Defendant Merle S. Tamsberg ("Defendant"), above named, will move at a time and place to be arranged by the court and counsel involved for an Order granting her Summary Judgment. This motion is made pursuant to Rule 56 of the S.C.R.C.P. on the grounds on the ground that there are no material issues of fact and Petitioner is entitled to judgment as a matter of law.

This Motion will be supported by discovery in this case, the depositions in this case, a memorandum of law to be submitted to the court by counsel in advance of any scheduled hearing, the arguments of counsel, and any other material the court may receive.

WE MOVE:

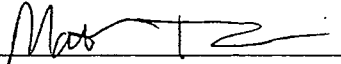
HAYNSWORTH SINKLER BOYD, P.A.

By: 

David M. Swanson
Jane C. Bouch

Attorneys for the Defendant

WOMBLE CARLYLE SANDRIDGE &
RICE, PLLC

By: 

Matthew E. Tillman

Attorneys for the Defendant

February 22, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2014-CP-10-05608

JAMES BRADLEY WILLIAMS and)
ROBERT BLAIR KLINE, JR.,)

Plaintiffs,)

v.)

MERLE S. TAMSBERG,)

Defendant.)

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT

FILED
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CLERK OF COURT

This is a dispute over the existence of an easement. The properties involved are located at 45 and 47 Legare Street in the City of Charleston, which, prior to 1911, comprised one property. In 1911, the owner W.G. Hinson divided the property, conveying to his niece Julia R. Dill the northern portion of the property, the parcel currently being identified as 47 Legare, and reserving for himself the southern portion, now known as 45 Legare. In the conveyance to Julia Dill, Hinson also conveyed "the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress, and regress, in, over, and through and upon the alleyway eight (8) feet wide, as a drive way or carriage way, situate, lying being immediately to the south of the above described property, and being the southern boundary of said above described lot of land." (Exhibit A, hereto.) This language is the genesis of the dispute. By its terms, the easement ran from Legare Street to the western property line of 45 Legare.

Hinson died in 1917, and in 1919, his estate conveyed 45 Legare to his nieces Julia Dill, Pauline Dill and Frances Dill. (Exhibit B, hereto.) Julia Dill and Frances Dill conveyed their interests to Pauline Dill, and on November 2, 1936, Pauline Dill conveyed 45 Legare to Henry deSaussure, by deed recorded in Book F39 at Page 461 in the Charleston County R.M.C.

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(Exhibit C, hereto.) There is no reference to the easement in the conveyances. Julia Dill remained the owner of 47 Legare.

45 Legare descended through the deSaussure family. When Julia Dill died in 1970, title to 45 Legare was vested in Margarette deS. Black, one of Henry deSaussure's daughters (hereinafter "Black"). South Carolina National Bank (the "Bank") was named executor of Julia Dill's estate and Trustee of all assets. In 1971, stating that "a question ha[d] arisen as to the extent of said easement," the Bank conveyed the western portion of the easement to Black for consideration of One Hundred (\$100) Dollars. The deed references a Cummings and McCrady plat for the description of the conveyance. (Exhibit D, attached hereto.) On the referenced plat, the section severed from the former easement is enclosed within the letters F, C, G, H, F. (Exhibit E, attached hereto.)

On the same day, Black executed a Covenant for 45 Legare, which "reaffirm[ed] the existence of said easement, to the extent as agreed upon by the parties," referencing the same Cummings and McCrady plat the Bank did in its conveyance of the same date to her. (Exhibit F, attached hereto.) Black also covenanted that no structure would be erected within the easement and no obstruction would be placed thereon. The area encumbered by the easement is shown "enclosed within the letters B, E, F, H, B, the line F, H being the terminus thereof."

On July 8, 1971, the Bank conveyed 47 Legare to Nancy Linton, including the easement over 45 Legare, defined as enclosed by the letters B, E, F, H, B on the Cummings and McCrady plat, for a driveway or carriageway as previously conveyed by W.G. Hinson to Julia Dill. (Exhibit G, attached hereto.) Linton conveyed 47 Legare to Merle and William Tamsberg on May 11, 1988, and the deed included the following: "Together with an easement, to run with the land, over an adjoining strip of land shown on [the Cummings and McCrady] plat as enclosed

within the letters B, E, F, H, and B, for ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriageway for the owner of Number 47. Merle Tamsberg, Defendant in this action, is the current owner of 47 Legare.

Black died testate in 1997. Her sons and legatees conveyed 45 Legare to James Bradley Williams and Robert Blair Kline, Jr. ("Williams and Kline"), Plaintiffs in this action, on May 17, 2004. (Exhibit H, attached hereto.) The easement was not mentioned in the deed to Williams and Kline.

Plaintiffs believe that the easement, as originally granted, and as renewed by Black, was at all times an easement in gross.

ARGUMENT

1. Easements.

Easements are either appurtenant or in gross.¹ An easement in gross is a mere personal privilege to use the land of another and cannot be transferred. *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578, 583 (2009) *accord*. *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873, 881 (Ct. App. 2013). An appurtenant easement is one that "inheres in the land to which it is appurtenant, is essentially necessary to its enjoyment, and passes with it. An essential feature of a right of way appurtenant is that it must have one of its termini on the land to which it is claimed to be appurtenant." *Whaley v. Stevens*, 21 S.C. 221 (S.C. 1884), *accord*. *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578, 583 (2009); *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 420, 143 S.E.2d 803, 806 (1965); *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873, 881 (Ct. App. 2013); *Ballington v. Paxton*, 327 S.C. 372, 488 S.E.2d 882, 887 (Ct. App. 1997).

¹ A third type of easement is a commercial easement in gross, but that is not applicable to this dispute.

It is instructive that the Bank asked Black for an affirmation of the easement in 1971, an act that leads to the inference the Bank was uncertain the original easement granted in 1911 by Hinson was transferable, or in other words, whether the original easement was a mere easement in gross. Black reaffirmed the existence of the encumbering easement in 1971 "to the extent as agreed upon by the parties." (Exhibit G.) What was the extent of the original grant of easement and was it in gross or appurtenant? Was it transferable?

"An appendant or appurtenant easement must inhere in the land, concern the premises, have one terminus on the land of the party claiming it, and be essentially necessary to the enjoyment thereof." *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 420, 143 S.E.2d 803, 806 (1965). "Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross." *Springob v. Farrar*, 334 S.C. 585, 589, 514 S.E.2d 135 (Ct. App. 1999) (citing *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997)). "An essential feature of an appurtenant easement is that it must have one of its termini in the dominant property." *Moore v. Reynolds*, 330 S.E.2d 542, 285 S.C. 574 (Ct. App. 1985). "The absence of a terminus on [the dominant estate] is fatal to [the] claim of an appurtenant easement." *Shia v. Pendergrass*, 222 S.C. 342, 351, 72 S.E.2d 699 (1952); *see also Springob*, 334 S.C. at 589; *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578, 583 (2009) (finding an easement to be in gross because the requirement of a terminus on the dominant estate was not met).

Hinson's original grant of easement was an "alleyway eight (8) feet wide . . . situate, lying being immediately to the south of the above described property [now 47 Legare], and being the southern boundary of said above described lot of land," which lay entirely on the reserved portion of the property, now known as 45 Legare. The northern boundary of the alleyway and

the southern boundary of 47 Legare were indistinguishable; at no point did the easement enter 47 Legare, but instead ran from Legare Street to the interior western lot line. There was no terminus on 47 Legare, the termini being Legare Street and the western lot line of 45 Legare. The site of the original easement is confirmed by the 1971 Cummings and McCrady plat, showing the area as enclosed within the letters B, E, F, G, C, H, and B (Exhibit E) and the Covenant executed by M. deS. Black in 1971 (Exhibit F). The absence of a terminus on 47 Legare, the dominant estate, is fatal to the claim the easement is appurtenant.

In a dispute in Spartanburg over a reserved alleyway from street to lot line, the alleyway lying totally on the servient estate, the Supreme Court found that the easement was in gross for lack of a terminus on the purported dominant estate. *Steele v. Williams*, 28 S.E.2d 644 (S.C. 1944). The easement was created by reciprocal deeds, and both the grantor and the grantee stated the easement was "being reserved for the joint use of the grantor and grantee, their heirs and assigns forever." The property under easement was an alley, twelve feet wide that entered the servient estate from the street and ended at the lot line opposite the point of entry. 28 S.E.2d at 645. A dispute arose when the property was subdivided, and the owner of one of the new lots sought to maintain access to his property via the alleyway. After finding the easement could not be an appurtenant easement because its terminus was not on the proposed dominant estate, the court then addressed the reservation language in the deeds:

The fact that the words "heirs and assigns forever" were used does not and cannot change an easement in gross to an easement appurtenant to land. Even if it were admitted that the use of the words "heirs and assigns forever" connoted an intention of the parties to create an easement appurtenant to land, it would bring no advantage to the appellant. For to so do would contravene an established rule of law, and whatever may have been the intentions of the parties, it must yield to this rule of law so well established in this State. This alley way lies wholly on the land of respondent. It touches appellant's lot only as a boundary. To hold that said alley was appurtenant to appellant's land would be to disregard well established

rules of law, and condemn land owned solely by respondent to the perpetual use of others. 28 S.E.2d at 647.

See also Ballington v. Paxton, 327 S.C. 372, 381, 488 S.E.2d 882 (Ct. App. 1997). Plaintiffs believe just as an easement cannot be transformed from an easement in gross to an appurtenant easement by the words "heirs and assigns forever," the grantor cannot change the nature of an easement in gross, by the words "to run with the land." The easement does not terminate on the proposed dominant estate, and thus, cannot be an appurtenant easement; the words "to run with the land" cannot make up for that fatal flaw. To find otherwise would disregard established law requiring an appurtenant easement to have a terminus on the dominant estate.

Black's affirmation in the Covenant of April 5, 1971 (Exhibit F) was a limited to "the extent as agreed upon by the parties"; it did not add anything to the existing easement. On the contrary, the conveyance from the Bank to Black of the same date diminished the area of the easement by shortening its length, and instead of the western lot line, the line F, H on the Cummings and McCrady plat became the new terminus. Line F, H lies completely on 45 Legare. There still was no terminus on the purported dominant estate, and thus, the easement remains an easement in gross.

2. Lack of Necessity

Not only must an appurtenant easement have a terminus on the dominant estate, it must "be essentially necessary to the enjoyment thereof." *Ballington v. Paxton*, 488 S.E.2d at 887. *See also, Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 420, 143 S.E.2d 803, 806 (1965). When the property was severed in 1911, it appears that there was a garage or carriage house to the rear of 47 Legare. The 1911 deed stated the purpose of the eight foot alleyway was to provide a driveway or carriage way for 47 Legare. A garage is shown on the Cummings and McCrady plat and is designated by the letter "G." In 1988, prior to N. Linton's conveyance of 47 Legare to the

Tamsbergs, Charles L. Dawley, Jr. provided a plat of the property (the "Dawley plat"). Where the garage was situated on the Cummings and McCrady plat, the notation on that same spot on the Dawley plat is for a "1-Story Stucco" structure. (Exhibit I, attached hereto.) Whether the one-story stucco structure was still a garage is unknown.

What is known is after the Tamsbergs purchased 47 Legare, they renovated the area where the garage was, and it is now part of the house, as shown in an undated plat by Palmetto Land Surveying. (Exhibit J, hereto.) When Williams and Kline purchased 45 Legare in 2004, the work on the house was finished and the Tamsbergs were building the wall which appears on the southern property line next to the foot gate, also on the line. (Affidavit of Robert Blair Kline, Jr. attached hereto.) The gate is not wide enough for a vehicle or carriage to pass, and is used primarily by workmen, on foot, accessing the back of 47 Legare.

The Palmetto Land plat shows another foot gate at the end of the concrete driveway running from Legare Street onto 47 Legare immediately to the south of the house. The gate provides access to the rear of 47 Legare, negating any need for the workmen or anyone else to access 47 Legare by the easement at 45 Legare. Currently, no vehicles or carriages are able to access 47 Legare via the easement because of the wall and the narrow opening left between the properties on the property line. *See Ballington v. Paxton*, 488 S.E.2d at 887 (where there were other means of access other than that provided by the easement, the easement is not necessary to the estate). The purported easement is no longer essentially necessary to the enjoyment of 47 Legare, and thus, fails to satisfy another one of the four prongs required to qualify as an appurtenant easement.

3. Transferability

An appurtenant easement inheres with the land and may pass with the dominant estate upon conveyance. *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873, 881 (Ct. App. 2013). An easement in gross is a personal privilege to the owner of the land benefitted by the easement and is not transferable. *Id.*

At Julia Dill's death, the Bank, as trustee, acquired the Covenant from Black affirming the easement. The Covenant was given to the Bank as Trustee on April 5, 1971. The Bank conveyed 47 Legare to Nancy Linton on July 8, 1971, three months later. The language in the deed conveying the use of the easement to Nancy Linton was ineffective, as the affirmation in the Covenant was directed to the Estate of Julia Dill, and an easement in gross is not transferable. Similarly, the language in the deed from Linton to the Tamsbergs conveying the use of the easement fails because the easement was in gross and not appurtenant.

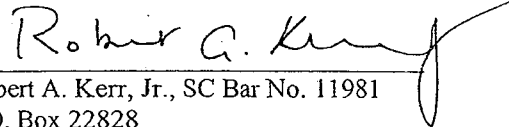
CONCLUSION

The right-of-way easement allowing vehicular traffic from 47 Legare passage over 45 Legare lacks two requirements of an appurtenant easement: (1) it does not terminate on 47 Legare, the dominant estate; and (2) it is not necessary for the enjoyment thereof. Thus, the easement must be classified as an easement in gross and not an appurtenant easement, and is a personal privilege to the parties to the original grant of easement. It did not survive Julia Dill's death in 1970, and the Bank's efforts to have it reaffirmed lend credence to the theory that the Bank was aware the easement was not appurtenant, and thus, non-transferable. The Covenant was between Black and the Bank, reaffirmed what was originally agreed, and could not be conveyed to Nancy Linton as it was personal to Black and the Bank as Trustee of the Estate of Julia Dill. Nancy Linton could not convey use of the easement to the Tamsbergs for the same reasons.

Plaintiffs pray that this Court:

- (1) find the original easement was an easement in gross, that the reaffirmation of the easement was effective between only the Bank and the Estate, and that the easement expired as none of the parties to the original grant of easement or to the Covenant are in possession of 45 and 47 Legare;
- (2) order Defendant, her agents, and her workmen, to cease and desist immediately from using the easement, now and forevermore; and
- (3) declare the property known as 45 Legare free and clear of the encumbrance of the right-of-way easement in favor of 47 Legare, for now and forevermore.

MOORE & VAN ALLEN, PLLC



Robert A. Kerr, Jr., SC Bar No. 11981
P.O. Box 22828
Charleston, SC 29413
(843) 579-7000
robertkerr@mvalaw.com

9 Feb, 2016

Charleston, SC

ATTORNEYS FOR PLAINTIFFS
JAMES BRADLEY WILLIAMS and
ROBERT BLAIR KLINE, JR.

Exhibit "A"

The State of South Carolina

KNOW ALL MEN BY THESE PRESENTS THAT

J. W. Hinson in the State aforesaid
in consideration of the sum of Five (\$5.00) Dollars and other valuable consideration Dollars,
to me in hand paid at and before the sealing of these Presents by Julia R. Dill

in the State aforesaid the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do
grant, bargain, sell and release unto the said Julia R. Dill

All that piece, parcel or lot of land with the buildings and
improvements thereon, situate lying and being in the City of
Charleston, State aforesaid, on the West side of Legare Street, for-
merly Friend Street, being the northernmost part of lot now or for-
mally known as # 47 Legare Street. Measuring and containing
in front on Legare Street thirty-eight (38) feet eight (8) inches,
and the same on the back line, on the North line one
hundred and eighty-four (164) feet eight (8) inches, and on
the South line one hundred and eighty-three (163) feet
six (6) inches. Butting and bounding north on the property
formerly of William Wilkinson and more recently occupied
or owned by C. F. Middleton; East on Legare Street, formerly
Friend Street aforesaid; South on the southernmost portion
of the lot now or formerly known as # 47 Legare Street, and
belonging to me, the said J. W. Hinson, and to the West
on the rear yard of St. Peter's Church.

Also, the full and free use and enjoyment, as an
easement to run with the land of the right of ingress,
egress and regress, in, over, through and upon the alley
way eight (8) feet wide, as a drive way or carriage way,
situate lying and being immediately to the South of the
above described property, and being the southern boundary
of said above described lot of land.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or
appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said Julia R. Dill, her
Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators to warrant and
forever defend all and singular the said premises unto the said Julia R. Dill, her
Heirs and Assigns, against me and my Heirs,
and all persons whomsoever lawfully claiming, or to claim the same, or any part thereof.

WITNESS my Hand and Seal this 15th day of April

in the year of our Lord one thousand nine hundred and eleven
and in the one hundred and thirty-fifth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered
in the presence of
W. H. Hinson (L.S.)
Julia R. Dill (L.S.)

Exhibit "B"

STATE OF SOUTH CAROLINA,

IN THE EASE OF GOD, AMOS.

I, William D. Bishop of South Carolina, in the State aforesaid, being of sound and disposing mind and memory, revoking all wills heretofore made and executed by me, do now make, publish and declare my last will and testament as follows:

After the payment of my debts, I give and bequeath to my friend, Ellen Pitts Hinton, librarian of the Charleston Library, and to her successors in office, my private library contained in my home at White Point, near Jacksonville, consisting of books, magazines, manuscripts and other papers; giving unto my said friend full power and authority in the exercise of her discretion to take for this purpose my entire library as storehouse of such books, magazines, manuscripts and other papers as in her good judgment may prove an addition or may prove of value to the said Charleston Library. And in carry out my purpose touching this bequest, I further give to my said friend, Ellen Pitts Hinton, her successors in office, the sum of One Thousand and no/100 (\$1,000.00) dollars, the same to be used in purchasing suitable books in which to shelve and keep said library, and to her to bind or rebind any of said volumes so may be necessary and further to meet any and all expenses which

be found necessary in the full discharge of this duty. The foregoing gifts and all duties attached thereto are upon the following trust, that is to say: in trust for the Charleston Library and its successors in office.

said William should die without issue living at the time of his death, then I give the above plantations to his brother, Lee McKell, absolutely. Also I give to my great nephew William absolutely all the furniture and household appliances, including silver and books, except as above disposed, in my residence at "Still Point"; also all the stock on said plantation including horses, mules and cattle and all plantation tools, including hoes and rakes and all provisions and cotton seed on said plantation at the time of the division of my estate.

3. I give, devise and bequeath to my nieces, Julia H. Dill, Frances H. Dill and Pauline H. Dill, daughters of my sister, Frances A. Dill, Ten Thousand (\$10,000.00) Dollars; also my plantation on the West side of the Secessionville Road, adjoining the lands of the estate of T. H. Grissell, containing about three hundred and eighteen (318) acres; also all of my real estate in Henderson and York Counties, in the State of North Carolina; also my house and lot on Legare Street, in the City of Charleston, known as #85.

4. I give, devise and bequeath to my niece, Lena McKell, my plantation on James Island known as "Orange Grove", containing about two hundred (200) acres; also my plantation known as "Mikelle", containing about two hundred (200) acres; also that known as "Wolstead", containing about two hundred (200) acres; also one acre of land, the same being a portion of the tract of land containing about forty (40) acres, lying between the lands owned by Robert Bee on the East and by the estate of Robert Leiby on the West, which said tract of land I

power and authority to sell and convey both real and
personal property, and to perform all other acts nec-
essary to carry into effect the provisions of each
chapter as to their judgment for the benefit or dis-
benefit of the said estate, or the interest of the parties
interested, or either of the above named parties (all of
whom, or either of them, shall be parties having notice
that, when I invest the said estate in or the said parties
with all the powers herein given to my executors and
administrators, or if neither shall qualify or shall die
and I appoint my executor or administrator or
administrators with the will annexed, then I invest them
with all the powers herein given to my said executor

in the year of our Lord thousand nine hundred and seventeen

John H. [illegible]

Witness my hand and seal this [illegible] day of [illegible]
in the year of our Lord one thousand nine hundred and [illegible]
and of the independence of the United States the [illegible]

John H. [illegible]
John H. [illegible]
John H. [illegible]

Exhibit "C"

PAULINE R. DILL

BOOK FOR TITLE TO REAL ESTATE

461

TO

HENRY W. DeSAUSSURE, M.D.

STATE OF SOUTH CAROLINA.

KNOW ALL MEN BY THESE PRESENTS, THAT

I, Pauline R. Dill, in the State aforesaid
in consideration of the sum of Seventy-five Hundred (\$7500.00) Dollars
to me in hand paid at and before the sealing of these Presents by Henry W. DeSaussure, M.D.
in the State aforesaid, the receipt whereof is hereby acknow-
ledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said

Henry W. DeSaussure, M.D., his heirs and assigns:

All that piece, parcel or lot of land with the buildings and improvements thereon, situate,
lying and being in the City of Charleston, State aforesaid, on the West side of Legare Street,
formerly Friend Street, being the Southern part of the lot formerly known as #47 Legare
Street. The property hereby conveyed being now known as #45 Legare Street. "Measuring and
and containing in front on Legare Street Forty-five (45) feet Four (4) inches, and the same
on the back line; on the North line One Hundred and Sixty-three (163) feet Six (6) inches, and
on the South line One Hundred and Sixty-two (162) feet be the said dimensions more or less.
Mutting and Bounding North on the property formerly of William G. Hinson, deceased, but now of
Julia R. Dill Rogers; East on Legare Street, formerly Friend Street aforesaid; and South on
the property formerly of Henry Deas and now or lately of Henry J. O'Neill; and on the West
on the grave yard of St. Peter's Church. The said property having been devised to Julia
R. Dill Rogers (born Dill); Pauline R. Dill and Frances H. Dill by the late William G. Hinson
by Will dated 28th May 1917, admitted to Probate in Common Form by the Court of Probate for
Charleston County July 17th, 1919.

Being the same property conveyed to me, the said Pauline R. Dill, by Julia R. Dill
Rogers and Frances H. Dill by deed dated the 2nd day of July 1920 and recorded in the R. M. C.
Office for Charleston County in Book 2-29, page 218.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise
incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said

Henry W. DeSaussure, M.D., his Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators to warrant and
forever defend all and singular the said premises unto the said Henry W. DeSaussure, M.D., his
Heirs and Assigns, against me and my Heirs,
and all persons whatsoever lawfully claiming, or to claim the same, or any part thereof

WITNESS my Hand and Seal, this 2nd day of November

in the year of our Lord one thousand nine hundred and thirty-six

in the one hundred and sixty-first year of the Sovereignty and Independence of the United States of America

Signed, Sealed and Delivered
in the Presence of

Pauline R. Dill (L.S.)
(L.S.)

E. P. Ravenel
G. J. B. Rivers

Defendant 0003

RECORD 043

THE STATE OF SOUTH CAROLINA,
CHARLESTON COUNTY

PERSONALLY appeared before me G. I. B. Rivers
and made oath that he saw the within named Paulina R. Dill
sign, seal and as her act and deed, deliver the within written Dred; and that he with E. P. Rayner witnessed the execution thereof.

SWORN to before me, this 2nd day of November
1935 A. D. 1935. G. I. B. Rivers
Julian Mitchell Jr. (Seal)
Notary Public, S.C. (NOTARIAL SEAL OF)
(JULIAN MITCHELL JR.)
(N.P. FOR S.C.)

THE STATE OF SOUTH CAROLINA,

RENUNCIATION OF DOWER

I, _____
do hereby certify unto all whom it may concern that Mrs. _____
the wife of the within named _____
did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily and without
any compulsion, dread or fear of any person or persons who-soever, renounce, release and forever relinquish unto the within named _____

Heirs and Assigns, all her interest and estate, and also all her right and claim of Dower, of, in or to all and singular the premises within men-
tioned and released.

Given under my hand and seal, this _____ day of _____ Anno Domini 19____
()

I certify that the original instrument here recorded being first endorsed as recorded by the County Auditor, was filed, indexed, and recorded
at 12:45 P. M. o'clock this 2nd day of November A. D. 1935 in Title to Real Estate Book F-39
Page 451, and delivered to Mitchell & Worlbeck U. S. I. R. Doc. Stamp \$7.50 affixed.
S. C. Doc. Stamp \$15.00 affixed.

JULIUS E. COTSWELL, Register Meane Conveyance.
Per Clk. L. C. A.

Defendant 0004

BOOK J 96 145

Form No. 106-Title to 1 Estate by a Corporation
REV. 1938

The State of South Carolina,
COUNTY OF CHARLESTON

WHEREAS, by deed dated April 13, 1911, recorded in the R. M. C. Office for Charleston County in Book W-25, Page 313, William C. Hinson conveyed unto Julia R. Dill property located in City of Charleston, South Carolina, known as 47 Legare Street, together with "Also the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress and regress, in, over, through and upon the alleyway 8 ft. wide as a driveway and carriageway, situate, lying and being immediately to the south of the above described property and being the southern boundary of said above described lot of land.", and

WHEREAS, Julia R. Dill, later Julia D. Rogers, died December 4, 1970, leaving her Last Will and Testament whereby the South Carolina National Bank of Charleston was named as Executor and Trustee, and

WHEREAS, the property over which the easement above referred to runs, known as 45 Legare Street, City of Charleston, South Carolina, is now owned by Margarette deSaussure Black, and

WHEREAS, a question has arisen as to the extent of said easement and The South Carolina National Bank of Charleston as Executor and Trustee under the Last Will and Testament of Julia D. Rogers, pursuant to the powers granted under the said Last Will and Testament, has agreed, for the consideration hereinafter expressed, to convey the property hereinafter described;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that THE SOUTH CAROLINA NATIONAL BANK OF CHARLESTON, as Executor and Trustee under the Last Will and Testament of Julia D. Rogers, pursuant to the powers granted under the said Last Will and Testament

in the State aforesaid, for/and in consideration of the sum of
ONE HUNDRED AND 00/100 (\$100.00) Dollars

to it in hand paid at and before the sealing of these presents, by Margarette deSaussure Black
of the City of Charleston, S.C.

in the State aforesaid, (the receipt whereof is hereby acknowledged)

have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release, un-

to the said Margarette deSaussure Black, her heirs and assigns forever, all the right, title and interest of the Grantor herein, including specifically an interest in the nature of an easement of right-of-way granted in deed of William C. Hinson to Julia R. Dill contained in deed dated April 13, 1911, recorded in the R. M. C. Office for Charleston County in Book W-25, Page 313, in and to the following described property, to-wit:

ALL that certain piece, parcel or lot of land, in the City of Charleston, State of South Carolina, being a strip of land eight (8') feet wide and lying shown on "Plat of Number 47 Legare Street, Charleston, South Carolina", made by Cummings & McCrady, Inc., Architects-Engineers, February 1971, as enclosed within the letters J. C. C. H. F.

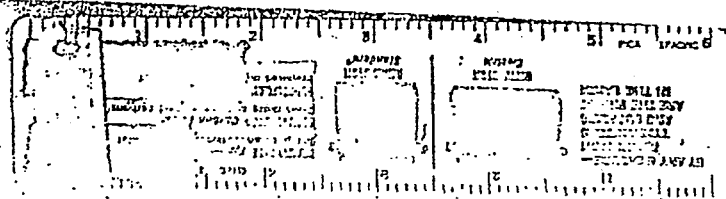
Being a portion of the property conveyed unto Julia R. Dill, later Julia D. Rogers by deed of William C. Hinson dated April 13, 1911, recorded in the R. M. C. Office for Charleston County in Book W-25, Page 313.

rear part of
easement
conveyed back to
owner of 45

See Covenant J 96/8 - same date

E. 4/5/71
R. 4/6/71

Exhibit "E"



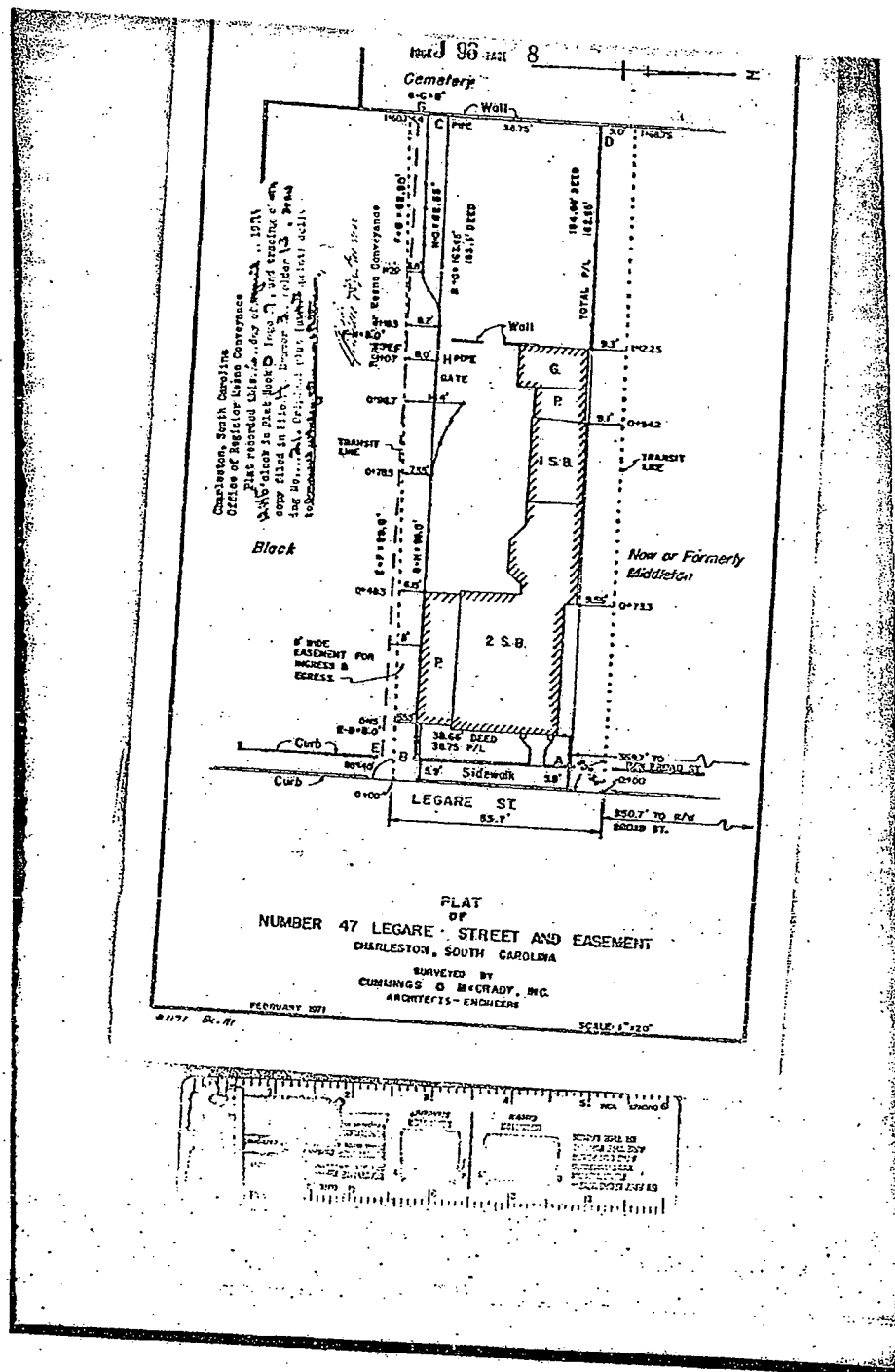


Exhibit "F"

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

J 96 8

COVENANT

WHEREAS, by deed dated April 15, 1911, recorded in the R. M. C. Office for Charleston County in Book W-25, Page 313, William G. Hinson conveyed unto Julia R. Dill property located in the City of Charleston, South Carolina, known as 47 Legare Street and a part of the premises conveyed was "Also the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress and regress, in, over, through and upon the alleyway 8 ft. wide as a driveway and carriageway, situate, lying and being immediately to the south of the above described property and being the southern boundary of said above described lot of land.", and

WHEREAS, the premises encumbered with the easement above described, known as 45 Legare Street, Charleston, South Carolina, is now vested in Margarette deSausure Black, she having acquired title to the same under the Last Will and Testament of Henry W. deSausure, who died March 13, 1955, and by various deeds recorded in the R.M.C. Office for Charleston County in Book Y-60, Page 470, and Book L-72, Page 40, and

WHEREAS, the said Julia R. Dill, later Julia Dill Rogers, died December 4, 1970, leaving her Last Will and Testament dated November 22, 1968, wherein she devised the residue of her estate unto the South Carolina National Bank of Charleston as Trustee, etc. and named the South Carolina National Bank of Charleston as Executor of her Last Will and Testament, and

WHEREAS, the area encumbered with said easement above referred to is more particularly shown on a plat of Number 47 Legare Street, Charleston, South Carolina, made by Cummings & McGrady, Inc., Engineers, February 1971, as enclosed within the letters B, E, F, G, C, H, B, and

WHEREAS, a question has arisen to the extent of said easement and Margarette deSausure Black, the owner in fee simple of the strip of land encumbered by said easement, desires to reaffirm the existence of said easement, to the extent as agreed upon by the parties, by the execution of the within covenant,

J96-8

NOV 96 12:18

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that in consideration of the premises and the further sum of ONE HUNDRED and 00/100 (\$100.00) DOLLARS paid by the South Carolina National Bank of Charleston, as Trustee and Executor under the Last Will and Testament of Julia Dill Rogers, deceased, the receipt whereof is hereby acknowledged, the undersigned, Margarette deSaussure Black, the owner in fee simple of Number 45 Legare Street, Charleston, South Carolina (more fully described in deed recorded in the R.M.C. Office for Charleston County in Book L-72, Page 40, hereby covenants and agrees that the strip of land located on the west side of Legare Street in the City of Charleston, State of South Carolina, being eight feet in width and 101.25 feet in depth and being more particularly shown on plat of Number 47 Legare Street, Charleston, South Carolina, made by Cummings & McCurdy, Inc., Engineers, dated February, 1971, as enclosed within the letters, B, E, P, H, B, the line P, H being the terminus thereof, shall be subject to the following restrictions, limitations and rights as to the future use of said strip of land:

- (1) That no building or other structure shall be erected thereon.
- (2) That no obstruction shall be placed or permitted to remain thereon so as to prevent the right of ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or earringway to the owner of Number 47 Legare Street.

The aforesaid covenants, restrictions and limitations shall be covenants running with the land and shall be binding on Margarette deSaussure Black, her heirs, assigns and successors in title.

WITNESS my hand and seal this 5 day of Apr, 1971.

IN THE PRESENCE OF:

Walter D. Lauer Margarette deSaussure Black
Judith A. Taylor Margarette deSaussure Black

Exhibit "G"

RECORD 052

A97-172

STATE OF SOUTH CAROLINA

WHEREAS Julia Dill Rogers, being seized and possessed of the property hereinafter described, died December 4, 1910, leaving of full force and effect her last Will dated November 22, 1908, by which she devised said property to The South Carolina National Bank of Charleston, an Trustee, with full power of sale, "to sell for cash, or for credit, at public or private sale," and the said Bank was also named and qualified as Executor of said Estate and was given like power of sale.

KNOW ALL MEN BY THESE PRESENTS, THAT

The South Carolina National Bank of Charleston, as Executor and as Trustee under the Will of Julia Dill Rogers, in the exercise of said power of sale and in the exercise of all other powers it hereto enabling,

in the State aforesaid in consideration of the sum of
Forty Three Thousand (\$43,000.00) DOLLARS,

to and before the sealing of these presents by Nancy M. Linton, 21
Meeting Street, Charleston, S. C.

in the State aforesaid the receipt whereof is hereby
acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release
unto the said Nancy M. Linton, her heirs and assigns forever:

All that piece, parcel or lot of land, with the buildings and improvements thereon, situate, lying and being on the West side of Legare Street, in the City of Charleston, County and State aforesaid, known in the present numbering of city streets as No. 47 Legare Street, and more particularly shown within the lines lettered AB, BC, CD, and DA, on a plat thereof by Cummings & McCrady, Inc., dated February 1911, recorded in Plat Book O, page 7, in the R. M. C. Office for Charleston County, S. C.

Said lot having such size, shape, dimensions, location, buttings and boundings as are shown on said plat.

Being the same property conveyed to Julia R. Dill by W. C. Hinson by deed dated April 15, 1911, recorded in Book W-25, page 313, in said R. M. C. Office, and by her, as Julia Dill Rogers, devised to the Grantor in her last Will and Testament dated November 22, 1908, duly admitted to probate in the Probate Court for Charleston County and of record in said Court as File No. 70-640.

Together with an easement, to run with the land, over an adjoining strip of land shown on said plat as enclosed within the letters B, E, F, H, and B, for ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriage way for the owner of Number 47 Legare Street described above, as conveyed by W. C. Hinson less a portion shown on said plat within the letters F, G, C, H and F, released by instrument recorded in Book V-88, page 145. The strip covered by said easement is also covered by restrictive covenants recorded in Book V-88, page 8.

Exhibit "H"

STATE OF SOUTH CAROLINA)
) TITLE TO REAL ESTATE
COUNTY OF CHARLESTON)

WHEREAS, by deed dated January 19, 1993, and recorded January 19, 1993, in the RMC Office for Charleston County in Deed Book R-222, at Page 843, Margarette deSaussure Black conveyed the hereinbelow described property unto the Margarette deSaussure Black Personal Residence Trust; and

WHEREAS, the Margarette deSaussure Black Personal Residence Trust is not a legal entity which can hold legal title to the hereinbelow described property, and therefore legal record title remained vested in Margaret deSaussure Black; and

WHEREAS, Margarette deSaussure Black died testate on April 11, 1997, with her Last Will and Testament filed in the Probate Court for Charleston County in File Number 97ES10-726; and

WHEREAS, pursuant to the Last Will and Testament of Margarette deSaussure Black, her entire estate including the residuary of her estate was devised unto her sons, Robert Attick Black, Jr., Henry William deSaussure Black, and William Peronneau Black; and

WHEREAS, by Deed dated December 18, 1997, and recorded March 4, 1998, in the RMC Office for Charleston County in Deed Book J-298, at page 884 Robert A. Black, Jr. a/k/a Robert Attick Black, Jr., Henry W. deS. Black a/k/a Henry D. Black a/k/a Henry William deSaussure Black and William P. Black a/k/a William Peronneau Black as Trustees of the Margarette deSaussure Black Irrevocable Trust Agreement dated November 6, 1992, conveyed to Robert A. Black, Jr., Henry W. deS. Black and William P. Black individually any interest that may be held by Margarette deSaussure Black Personal Residence Trust; and

WHEREAS, by the conveyance of Robert A. Black, Jr. a/k/a Robert Attick Black, Jr., Henry W. deS. Black a/k/a Henry D. Black a/k/a Henry William deSaussure Black and William P. Black a/k/a William Peronneau Black as Trustees to Robert A. Black, Jr., Henry W. deS. Black and William P. Black in that deed recorded in Book J-298 at page 884, and by the Last Will and Testament of Margarette deSaussure Black with her entire estate including the residuary being devised to Robert Attick Black, Jr., Henry William deSaussure Black, and William Peronneau Black, then Robert A. Black, Jr. a/k/a Robert A. Black, Jr., Henry William deSaussure Black a/k/a Henry W. deS. Black, and William Peronneau Black a/k/a William P. Black are vested with fee simple title to the hereinbelow described real estate.

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, THAT HENRY D. BLACK, ROBERT A. BLACK, JR., WILLIAM P. BLACK (Grantor) in the State aforesaid in consideration of the sum of NINE HUNDRED THOUSAND AND 00/100 (\$900,000.00) DOLLARS, to the said Grantor in hand paid at and before the sealing of these presents by JAMES BRADLEY WILLIAMS AND ROBERT BLAIR KLINE, JR. ("Grantee") in the State

aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said JAMES BRADLEY WILLIAMS AND ROBERT BLAIR KLINE, JR., the following described property:

ALL that certain lot, piece or parcel of land, with the buildings and improvements thereon, situate, lying and being on the West side of Legare Street, in the City of Charleston, State of South Carolina and being known in the present numbering system of the City of Charleston as 45 Legare Street. Measuring and containing in the front on Legare Street Forty-five feet, four inches (45'4"), the same on the back line, on the north line measuring One Hundred Sixty-three feet, Six inches (163'6") and on the south line One Hundred Sixty-Two Feet (162'), all the measurements being a little more or less. Butting and bounding to the north on the land now or formerly of Julia A. Dill, to the east on Legare Street, to the south on lands now or formerly of Charlotte and Strait Fairey, and to the west on land of

SUBJECT to all easements, restrictions, right-of-ways and matters of record.

BEING the same property conveyed to the Grantor herein by Deed of Robert A. Black, Jr. Henry D. Black a/k/a Henry W. deS. Black and William P. Black, as Co-Trustees of the Margarett Desaussure Black Irrevocable Trust Agreement Dated November 6, 1992 dated December 18, 1998 and recorded March 4, 1998 in Book J-298, Page 884, RMC Office for Charleston County, S.C.

For reference see TMS No.: 457-12-04-107

Grantee's Address: 45 Legare Street
Charleston SC 29401

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Grantee, the Grantee's Heirs, Successors and Assigns forever.

AND the said Grantor does hereby bind Grantor and Grantor's Heirs, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said Grantee, the Grantee's Heirs, Successors and Assigns, against Grantor and Grantor's Heirs, Successors and Assigns and against all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS Grantor's Hand and Seal, this 17th day of May in the year of our Lord two thousand and four and in the two hundred and twenty-ninth year of the Sovereignty and Independence of the United States of America.

WITNESSES:

[Signature]

[Signature]
Henry D. Black

[Signature]

[Signature]
Robert A. Black, Jr.

William P. Black by Louis E. Storen
William P. Black by Louis E. Storen, Jr. his
Attorney in Fact
his Attorney in Fact

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

ACKNOWLEDGMENT

THE FOREGOING instrument was acknowledged before me this 17 day of May 2004 by Henry D. Black, Robert A. Black, Jr. and William P. Black by Louis E. Storen, Jr. his Attorney in Fact.

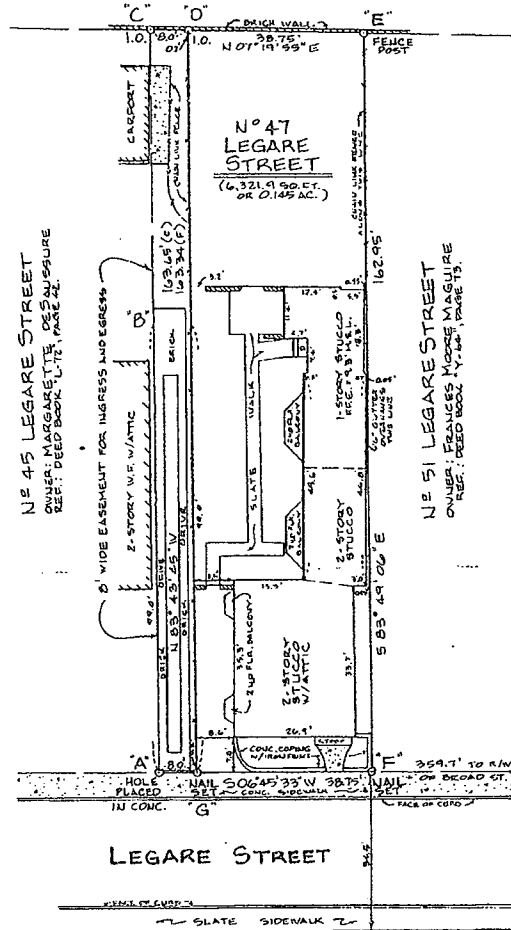
[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA
COMMISSION EXPIRES: 2/7/2010

Exhibit "I"

MAGNETIC
NORTH

ST. PETER'S CHURCH YARD

REF: PLAT BOOK "P", PAGE 66.
PLAT BOOK "AD", PAGE 100.



I certify that this plat is a true and correct copy of the original as shown to me by the owner or his agent, and that the same is in accordance with the laws of this State.

I hereby certify that the measurements on shown above are correct and there are no encroachments or projections other than shown.

PLAT

SHOWING A RE-SURVEY OF N° 47 LEGARE STREET, SITUATE AS SHOWN IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA.

ABOUT TO BE CONVEYED TO: WILLIAM T. TAMSBERG

SCALE: 1" = 20' APRIL 20, 1988



Charles F. Dawley, Jr.
CHARLES F. DAWLEY, JR., L.L.S.
S.C. REGISTRATION NO. 8814
P.O. BOX 231
MOUNT PLEASANT, S.C. 29464
(803) 884-4931

- REFERENCES: 1) PLAT BOOK "O", PAGE 7.
2) DEED BOOK "A-97", PAGE 172.
3) DEED BOOK "J-96", PAGE 145.
4) T.M.S. 437-12-04-106.

Exhibit "J"

Saint Peters Church Yard

(TMS 457-12-04-124)

brick wall

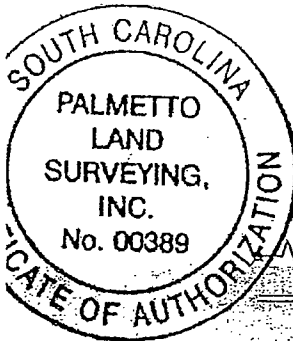
LEGEND

- 1" Iron Pipe - Old
- "X" on wall
- Nail in concrete

James B. Williams &
Robert B. Kline, Jr.

(TMS 457-12-04-107)

Robert & Karen
Symoliski
(TMS 457-12-04-105)



LEGARE STREET (35' R/W)

Defendant 0001

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
JAMES BRADLEY WILLIAMS and)
ROBERT BLAIR KLINE, JR.,)
Plaintiffs,)
v.)
MERLE S. TAMSBERG,)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2014-CP-10-05608

CERTIFICATE OF SERVICE

FILED
2016 FEB 10 PM 2:48
CLERK OF COURT

The undersigned hereby certifies that on the date set forth below, true and correct copies of the *Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment and Affidavit of Robert Blair Kline, Jr.* were served on the parties listed below, by United States, proper postage prepaid addressed as follows:

David M. Swanson, Esquire
Haynsworth Sinkler Boyd, PA
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Charleston, SC 29401

Jane C. Bouth, Esquire
Haynsworth Sinkler Boyd, PA
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Charleston, SC 29407

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MOORE & VAN ALLEN PLLC



Melissa A. Altman, Legal Practice Assistant
P.O. Box 22828
Charleston, SC 22828
Telephone (843) 579-7000

Dated: February 9, 2016
Charleston, SC

CHARLESTON632179v1

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES BRADLEY WILLIAMS and
ROBERT BLAIR KLINE, JR.,

Plaintiffs,

vs.

MERLE S. TAMSBERG,

Defendant.

Case No. 2014-CP-10-05608

**DEFENDANT MERLE S.
TAMSBERG'S MEMORANDUM OF
LAW IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant Merle S. Tamsberg ("***Defendant***") submits this memorandum of law (i) in opposition to *Plaintiff's Motion for Summary Judgment* filed February 9, 2016 by Plaintiffs James Bradley Williams and Robert Blair Kline, Jr. (together, the "***Plaintiffs***"); and (ii) in support of *Defendant's Motion for Summary Judgment* filed on February 22, 2016. Plaintiffs cannot prevail on any of their stated causes of action. In addition, the Plaintiffs' lawsuit is barred by the applicable three year statute of limitations. As such, there is no genuine issue of material fact for this Court to consider, and Defendant respectfully requests that the Court grant her motion for summary judgment.

STATEMENT OF FACTS

This case arises out of a dispute between Defendant and Plaintiffs regarding the Plaintiffs' refusal to permit Defendant to use an easement appurtenant to Defendant's property (the "***Easement***") at 47 Legare Street, Charleston, South Carolina, 29401. The Easement allows the Defendant to use a portion of the Plaintiffs' property at 45 Legare Street to access her backyard.

The Easement has been affirmed, reaffirmed, and referenced in numerous recorded

documents throughout the years. The Easement was created by a deed dated April 15, 1911 and recorded in RMC Office for Charleston County ("*RMC Office*") in Book W25, Page 13. (The "*Dill Deed*", attached hereto as *Exhibit A*.) The description of the Easement in the Dill Deed reads, "Also the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress, and regress, in, over, through, and upon the alleyway eight (8) feet wide as a driveway or carriageway situate, lying and being immediately to the south of the above-described property and being the southern boundary of said above described lot of land." (*Exhibit A*.)

The Easement was then reaffirmed in a recorded document entitled "Covenant and Restriction" which was dated April 5, 1971, and recorded in RMC Office in Book J 96, page 8. (The "*Restriction*", attached as *Exhibit B*.) The Restriction provides that no building or structures should be built on the Easement, and that no obstruction should be permitted that prevents the right of ingress, regress, and egress. (*Exhibit B*.) The Restriction is signed by Margaret DeSaussure Black, the Plaintiffs' predecessor in title. The Restriction binds Mrs. Black and her "heirs, assigns, and successors in title." (*Exhibit B*.) The Easement is also referenced in the deed conveying 47 Legare Street from Nancy M. Linton to Defendant and her late husband on May 11, 1988, and two recorded plats predating Plaintiffs' purchase of 45 Legare Street. (See attached *Exhibit C* and *Exhibit D*). Therefore, the Plaintiffs, who purchased 45 Legare Street in 2004, had ample notice of the Easement and Restriction prior to purchasing their property.

The Easement runs to the South of, and borders, 47 Legare Street. There is now a masonry wall forming a portion of the border between 47 Legare Street and the Easement. However, 47 Legare Street remains accessible from the Easement through a gate. Defendant, her family members, Defendant's gardener, and various other tradesmen regularly use the Easement for access to the backyard of 47 Legare Street.

Prior to filing this lawsuit, the Plaintiffs suddenly began to block the Defendant's continuing use of the Easement by locking their front gate. The Plaintiffs also wired the side gate shut and drove stakes into the ground, completely preventing anyone from accessing the Defendant's property from the Easement. Defendant was forced to file a motion for a preliminary injunction/temporary restraining order in order to be able to continue to use the Easement, which was granted on February 2, 2015. (See attached *Exhibit E*.)

The Plaintiffs now seek a declaration that the Easement is void *ab initio*, or, in the alternative, that Defendant has abandoned the Easement. Plaintiffs also allege trespass and request a permanent injunction.

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. Rule 56(c), SCRCP. Under Rule 56(c) the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). However, the moving party need not support its motion with affidavits or other similar materials negating the opponent's claims but rather must clearly establish by the record the absence of a triable issue of fact. *Id.* With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the Court the absence of evidence to support the non-moving party's case. *Id.*

After the moving party has met his initial burden, Rule 56(c) of the South Carolina Rules of Civil Procedure requires the opposing party to "do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* In response to a properly supported motion for

summary judgment, the opposing party “must come forward with specific facts showing there is a genuine issue of material fact.” *Id.* Thus, “the non-moving party may not rest on the mere allegations or denial of pleadings, but must set forth or point to specific facts showing there is a genuine issue of material fact.” *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E. 2d 659, 661 (Ct. App. 1994) (quoting *Dickert v. Metropolitan Life Ins. Co.*, 206 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1993), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993)).

ARGUMENT

Plaintiffs request a declaratory judgment that Defendant’s Easement has been abandoned, a permanent injunction preventing Defendant from removing her fence, and a declaratory judgment that the disputed Easement has been terminated. Plaintiffs further contend that Defendant’s use of the Easement constitutes a trespass. The Plaintiffs cannot succeed on any of their enumerated causes of action, and can certainly not succeed on their motion for summary judgment. In addition, Plaintiffs’ claim is barred by the applicable statute of limitations. For these reasons, Defendant respectfully requests that the Court grant her motion for summary judgment and deny Plaintiffs’ motion for summary judgment.

- I. The Plaintiff’s motion must be denied, and Defendant’s motion for summary judgment must be granted because the undisputed facts show that the Easement is an enforceable appurtenant easement and the Defendant has not abandoned the Easement.

In South Carolina, “[t]he language of an easement determines its extent.” *Plott v. Justin Enterprises*, 374 S.C. 504, 513, 649 S.E.2d 92, 96 (Ct. App. 2007) (quoting *Binklev v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 67, 558 S.E.2d 902, 906-7 (Ct.App.2001)). “Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense.” *Martin v. Bay*, 400 S.C. 140, 732 S.E.2d 667 (Ct. App. 2012) (quoting *S.C. Public Serv. Auth v. Ocean Forest, Inc.*, 275 S.C. 552,554, 273 S.E.2d 773,774 (1981)).

To prove that a holder has abandoned an easement, the adverse party must show a clear intent on the part of the holder to abandon. In South Carolina, "the burden of proof is upon the complaining party to show the abandonment [of the easement] by clear and unequivocal evidence." Judy v. Kennedy, 398 S.C. 471, 728 S.E.2d 484 (Ct.App.2012) (quoting Carolina Land Co. v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975). "*The burden is a high one that cannot be satisfied by mere nonuse.*" Id. (see Witt v. Poole, 182 S.C. 110, 115, 188 S.E.2d 496, 499.) (emphasis added.) "[T]o justify the conclusion there has been an abandonment, there must be some clear and unmistakable affirmative act or series of acts indicating a purpose to repudiate ownership." Witt, 182 S.C. at 112, 188 S.E.2d at 498.

Moreover, lapse of time and non-use is not sufficient to prove that an owner has abandoned an easement. "[T]he 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 a purpose inconsistent with its further existence." Carolina Land Co., 265 S.C. at 109, 217 S.E.2d at 21 (quoting Witt, 182 S.C. 110, 188 S.E.2d 496).

Plaintiffs are unable to show that Defendant has abandoned the Easement. The Easement was recorded and indexed, shown on recorded surveys, and the Plaintiffs had actual and record knowledge of its existence. The written language of the Easement is unambiguous and explicit as to the rights afforded to the Easement holder. Martin at 150, 732 S.E.2d at 673. The side wall and gate were not constructed across the Easement and do not prevent ingress, egress, and regress.

The Defendant has made continuous use of the Easement for its intended purpose, access, for decades, as did her predecessors in title. She has evidenced absolutely no intent to abandon

the Easement. Plaintiffs have owned 45 Legare Street for twelve years, and previously acknowledged the Easement until such time that they discovered the value of 45 Legare Street would increase if the Easement were removed. Plaintiffs are unable to meet the burden of proof required to show Defendant has abandoned the Easement. Plaintiffs' cite Defendant's erection of the masonry wall as evidence of Defendant's abandonment, but admit that the masonry wall merely replaced a pre-existing chain link fence in the same location. (Williams Depo. 20:22-21:15, attached hereto as *Exhibit F*.)¹

Further, Plaintiffs are unable to offer satisfactory testimony as to the use of the Easement, as Plaintiffs spend months out of the year vacationing in Provincetown, MA:

Q. All right. How much time a year, or over the year, I guess, do you spend in Cape Cod? Is it a rental property? Or how often do y'all go up there?

A. We don't rent it. We're there three or four months in the summertime.

(Williams Depo, 7:18 to 7:22).

Plaintiffs have offered no evidence as to abandonment other than their own testimony, which they admit is necessarily limited to Defendant's use of the Easement for only a portion of the year. Simply put, Plaintiff's claim of abandonment fails as a matter of law, and Defendant is entitled to summary judgment.

II. As a matter of law, the Easement is an appurtenant easement.

Plaintiffs base their argument in their *Memorandum in Support of Plaintiffs' Motion for Summary Judgment* in large measure on an erroneous reading of *Steele v. Williams*, 28 S.E.2d 644 (1944). Plaintiffs argue that in order for an easement to be deemed appurtenant in South Carolina, the easement or right of way must have a "terminus" on the dominant estate. However, Plaintiffs misconstrue the *Steele* decision and the legal import of the word "terminus."

¹ Further, as set forth in the Affidavit of Defendant to be supplied to the Court, the Defendant and her invitees have always used the Easement, and continue to do so.

The Steele court based its logic on the earlier case of Whaley v. Stevens, 21 S.C. 221 (1884), which is quoted in the Steele opinion at length. A close reading of Whaley reveals that the “terminus” requirement demands that the dominant estate be contiguous or adjacent to the easement or right of way, not, as Plaintiffs argue, that access to the dominant estate from an appurtenant easement must be of a vertical rather than a horizontal nature.

In Whaley, the plaintiff owned Caneslatch plantation, which was separate by a public road from Seven Oaks plantation. Seven Oaks plantation bordered the Stono River. The plaintiff’s easement in Whaley provided for “a right of way, by means of a road leading from the public road over the adjoining land of the said Defendant, known as the Seven Oaks plantation, to a creek leading into the said Stono River.” 21 S.C. at 224. In finding that the plaintiff could not have an appurtenant easement, the Whaley court wrote:

But a more fatal objection is that, in describing the right of way in question, it is not alleged that it begins on the Caneslatch plantation, or that it even leads from said plantation. Indeed, from the description of the way as given in the complaint, it does not appear that it touches Caneslatch plantation at any point or reaches to it. The allegation is, “leading from the public road”. Now, even adopting the theory that the public road being the boundary of Caneslatch plantation on the east, the plaintiff owns to the middle of the road, still the complaint cannot be construed as alleging that the way in question has one of its termini on the Caneslatch plantation; for as the creek, which is one of the termini named, lies east of the public road, and as the defendant owns the land adjoining the road on the east, and consequently the eastern half of said road, the western as well as the eastern terminus of the way, as described in the complaint, would be on the land of the defendant, and not on the land of the plaintiff.

Id. at 224-5.

Clearly, the Easement at issue satisfies the rule articulated in Whaley. The Easement “touches” Defendant’s property “and reaches to it” at the lot line, where it has its terminus. Id. The “driveway” or “carriage way” referenced in the Dill Deed is the Easement itself, which continues through the gate, terminating in Defendant’s backyard. In exercising use of the Easement, Defendant and her predecessors-in-title proceeded directly from Defendant’s property to the Easement without a gap. Plaintiffs argue that their claim of invalidity is supported by the

fact that the Easement lies wholly on Plaintiffs' property, when by definition easement rights are confined to the servient estate by virtue of the fact that no one has need of an easement on one's own property.

The Steele opinion also stands for the proposition that the mere addition of the words "heirs and assigns forever" is insufficient to convey an appurtenant easement. Plaintiffs rely on this to argue that the words "to run with the land," the language in the Dill Deed, is similarly insufficient. Plaintiffs' reliance is misplaced. The Steele court offered no opinion as to the use of the words "to run with the land" in an express grant, rendering Plaintiffs' analogy purely speculative and wholly inapplicable to the Easement at issue. Further, while the phrase "heirs and assigns" will not convert an easement in gross into an appurtenant easement, South Carolina courts hold that such language is evidence of the grantor's intent. *Douglas v. Medi Investors, Inc.*, 256 S.C. 440, 448, 182 S.E.2d 720, 724; (1971) *Sandy Island*, 246 S.C. at 423, 143 S.E.2d at 808; *see also Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 468, 441 S.E.2d 331, 336 (Ct.App.1994).

Next, Plaintiffs argue that the Easement fails for lack of necessity. While an appurtenant easement must be necessary to the enjoyment of the land, an appurtenant easement does not have to be absolutely necessary, though it may not be established for mere convenience. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 421, 633 S.E.2d 136, 141 (2006); 12 S.C. Juris *Easements* § 3. In *Proctor v. Steedley*, the Court held that an access road across the servient estate was necessary where it was the only reasonable method for accessing the northern portion of the dominant estate. 398 S.C. 561, 575, 730 S.E.2d 357, 365 (Ct.App. 2012).

Defendant has no other satisfactory method of bringing large-scale equipment and tools to the rear of her property. While there is a gate at the front of the house, it is too narrow for large appliances and other equipment to be carried through it. Further, Defendant has only one small parking spot at the front of 47 Legare Street, and this parking spot is so narrow that one

can pull a modern car into the spot only with difficulty. The Easement provides access to the rear of 47 Legare Street and is the only adequate manner by which the owner of 47 Legare Street can make use of off-street parking for more than one small vehicle. This is borne out by the fact that the owners of 47 Legare Street have used the Easement for 100 years, and the parties' predecessors in title found it necessary to reaffirm the Easement in 1971. Indeed, Defendant purchased the home based in part on the fact that the Easement could provide such parking, and the purchase price paid by Defendant for the home reflected the value of off-street parking in downtown Charleston.

Further, in the event this Court finds the Dill Deed defective, which Defendant vigorously contends is incorrect, the Restriction is undoubtedly a valid, binding restrictive covenant. In South Carolina, restrictive covenants "run with the land," meaning that they are enforceable by and against later grantees. Queens Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 360, 628 S.E.2d 902, 913 (Ct.App. 2006). In order to run with the land, the restriction limiting the use of property must be construed to touch and concern the land and there must be an indication that the parties intended for the covenant to run with the land. Charping v. J.P. Scurry & Co., 296 S.C. 312, 314, 372 S.E.2d 120, 212 (Ct.App. 1988). In the Charping case, the court reasoned that the restriction at issue was a "real covenant" running with the land because "it affects the use of the subject land, it affects the quality and mode of enjoyment on the land, and it concerns the interest in the land that was conveyed; its purpose is to alter the legal rights which otherwise flow from the land." Id.

The Restriction cites the Easement grant in the Dill Deed, and Margarette Black, Plaintiffs' predecessor in title, agreed to abide by certain additional restrictions on the Easement area. It provides that the covenants therein are to "run with the land," and on its face clearly complies with South Carolina law regarding valid restrictive covenants. Therefore, even if the

Dill Deed did not properly grant an appurtenant easement, Defendant's rights to the Easement are protected by the language of the 1971 Restriction.

III. The Defendant is entitled to summary judgment because Defendant has established prescriptive rights over the Easement.

Regardless of Plaintiffs' theory, Defendant and Defendant's predecessors in title clearly meet the test for prescriptive easement rights.

In South Carolina "[t]o establish a prescriptive easement, the party asserting the right must show: (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under a claim of right." Boyd v. BellSouth Tel. Tel. Co., 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006); citing Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993); Shia v. Pendergrass, 222 S.C. 342, 351, 72 S.E.2d 699, 703 (1952). "To establish an easement by prescription, one need only establish either a justifiable claim of right or adverse and hostile use." Kelley v. Snyder, 396 S.C. 564, 572, citing Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct.App.2005). There is no requirement of exclusivity of use to establish a prescriptive easement. Jones at 317, 609 S.E.2d at 600. The party claiming a prescriptive easement bears the burden of proving all of the elements. Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App.1997).

There is no issue of material fact concerning the identity of the Easement. As to the first requirement, "[in] order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant." Jones at 318, 609 S.E.2d at 601. "When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." Boyd, 369 S.C. at 419, 633 S.E.2d at 141. Further, "[a] party may 'tack' the period of use of prior owners in order to satisfy the 20-year requirement." Morrow, 328 S.C. at 527, 492 S.E.2d at 423 (citing 25 Am.Jur.2d Easements and Licenses § 70 (1996)). "[T]he time of possession may be tacked not

only by ancestors and heirs, but also between parties in privity in order to establish the 20-year period." Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 430, 489 S.E.2d 223, 226 (Ct.App.1997). If tacking is used, the use by the previous owners must have also been adverse or under a claim of right. Kelley at 575, 819. See Morrow, 328 S.C. at 528, 492 S.E.2d at 424.

"A party claiming a prescriptive easement under a claim of right "must demonstrate a substantial belief that he had the right to use the parcel or road based on the totality of the circumstances surrounding his use." Kelley, 396 S.C. at 574, 722 S.E.2d at 818; citing Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct.App.2003); see also Revis v. Barrett, 321 S.C. 206, 209, 467 S.E.2d 460, 462 (Ct.App.1996).

Defendant Tamsberg and her husband bought 47 Legare Street on May 12, 1988, twenty-six years prior to the Plaintiffs' suit. The Defendant's use may be tacked onto the use by her predecessor in title, Nancy Linton, for a total of forty-three years of use. The Defendant's use of the Easement during that time was indisputably under a claim of right, based on the express grant of easement in the Dill Deed and other recorded documents found in her chain of title. Use by Defendant and Nancy Linton was indisputably open and continuous. Thus, Defendant has established a valid prescriptive easement, and Plaintiffs' request for a declaration otherwise should be denied.

IV. The Defendant is entitled to summary judgment because Plaintiffs' actions are barred by the applicable statute of limitations.

Plaintiffs' claims are barred by the statute of limitations because they knew or should have known they had a cause of action long before filing their complaint on September 12, 2014. Plaintiffs have alleged that Defendant abandoned her easement, or, in the alternative, that Defendant's easement has never been valid. In South Carolina, the statute of limitations for trespass or damage to real property is three years from when a person knew or by the exercise of

reasonable diligence should have known that he or she had a cause of action. See S.C. Code Ann. §§ 15-3-530(3).

In South Carolina, the "discovery rule" tolls the statute of limitations until a person knows, or by the exercise of reasonable diligence should know, that he has a cause of action. S.C. Code Ann. §15-3-535; Barr v. City of Rock Hill, 330 S.C. 640, 645 (S.C.Ct.App. 1958). Per the discovery rule, the statute runs from the date of the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. Republic Contr. Corp. v. S.C. Department of Highways and Pub. Transp., 332 S.C. 197, 207 (S.C.Ct.App. 1998). The exercise of reasonable diligence means simply that an injured party must act with the same promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been involved or that some claim against another party might exist. Id. at 207; see also Wiggins v. Edwards, 314 S.C. 126 (S.C. 1994). The statute of limitations begins to run from this point, rather than later from when the advice of counsel is sought or a full-blown theory of recovery developed. Wiggins, 314 S.C. 126.

Plaintiff Williams testified in his deposition that he knew about the easement prior to the purchase of 45 Legare Street, possibly when Plaintiffs' realtor first showed them the property:

Q: Do you remember when you first became aware that the property was encumbered by this easement?

A: It was early on.

Q: Okay.

A: It may have been the first day we saw it.

Plaintiffs did not bring the present action until September 12, 2014, a delay of over a decade:

Q: Okay. Why wait so many years to bring a lawsuit?

A: Why? Rob told me you would ask that. And when we bought the house, Mr. Tamsberg had terminal cancer. We knew the easement was there. It was changing hands. It would have been a good time to get it sorted out. But we didn't want to move in and sue a couple that was dealing with cancer. Then he died. Again, we could have

done it. But we didn't feel comfortable suing a widow who just lost her husband to cancer. We also noted the wall. And our position was, that easement was abandoned ever since the first day that wall went up. It was never a concern to us. It was never used by her, ever. The only time it was ever used was as -- for her landscaping people to walk down her driveway and go through her gate. It was never used as a carriage way. It was abandoned, in our opinion. So there was no reason to ever bring it up. (Williams Depo, 34:12-35:5).

Plaintiffs knew of the existence of the easement and nursed doubts about its validity beginning in the spring of 2004. Defendant's husband died on March 4, 2007, seven years prior to the institution of the present action. Based on the requirements of the discovery rule, cited above, Plaintiffs did not act with reasonable diligence in pursuing their claims. The statute of limitations on their claim ran after three years. Thus, Plaintiffs' claims have been barred by the statute of limitations for over seven years.

V. The Defendant is entitled to summary judgment because Plaintiffs' actions are barred by the equitable doctrine of laches.

The Plaintiffs' purchased 45 Legare Street in the spring of 2004. They filed the underlying action on September 12, 2014, a delay of over a decade. For the reasons set forth below, the Plaintiffs' are barred by the equitable doctrine of laches.

"Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in the assertion of a right does not constitute laches." *Hallums v. Hallums*, 296 S.C. 195, 371 S.E.2d 525, 527 (1988). In South Carolina, a laches defense consists of five elements: (1) delay by one party; (2) for an unreasonable or unexplained length of time; (3) knowledge of rights by the party; (4) reliance on the non-assertion by the other party; and (5) prejudice to that other party if the right is now asserted. S.C. Juris *Equity* §25 (1992).

The Plaintiffs knew about the Easement and formed the basis of their current theory of

recovery in 2004, but chose to do nothing about it for over ten years. During that time, Defendant relied on this inaction, continuing her use of the property in its present configuration. Until the months preceding this action, Plaintiffs never complained to Defendant regarding the use of the easement. The Defendant has been greatly prejudiced by the actions of Plaintiffs, as she lost a prospective buyer for the house when Plaintiffs decided after a ten year delay to object to her exercise of her Easement rights. Plaintiffs' claims are therefore barred by the doctrine of laches.

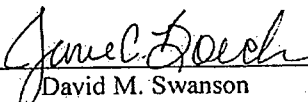
CONCLUSION

As shown above, Plaintiffs cannot prevail on any of their stated causes of action. Further, if the Court finds that there is a genuine issue of material fact surrounding Plaintiffs' underlying causes of action, which Defendant contends there is not, the Plaintiffs' lawsuit is barred by the applicable three year statute of limitations. As such, there is no genuine issue of material fact for this Court to consider, and Defendant respectfully requests that the Court grant her motion for summary judgment.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By:


David M. Swanson
Jane C. Bouch

Attorneys for the Defendant

March 1, 2016
Charleston, South Carolina

WOMBLE CARLYLE SANDRIDGE &
RICE, PLLC

By:


Matthew E. Tillman

Attorneys for the Defendant

The State of South Carolina,

KNOW ALL MEN BY THESE PRESENTS, THAT

I, W. H. Hinson, to the State aforesaid
in consideration of the sum of Five (\$5.00) Dollars and other valuable consideration Dollars,
to me in hand paid at and before the sealing of these Presents by Julia R. Dill

in the State aforesaid the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do
grant, bargain, sell and release unto the said Julia R. Dill

All that piece, parcel or lot of land with the buildings and
improvements thereon, situate, lying and being in the City of
Charleston, State aforesaid, on the West side of Legare Street, for-
merly Friend Street, being the northernmost part of lot now or for-
mally known as #47 Legare Street, measuring and containing
in front on Legare Street thirty-eight (38) feet eight (8) inches,
and the same on the back like; On the North line one
hundred and eighty-four (184) feet eight (8) inches, and on
the South line one hundred and eighty-three (183) feet
five (5) inches. Cutting and bounding north on the property
formerly of William Wilkinson and now, or being, occupied
or owned by C. F. Middleton; East on Legare Street, formerly
Friend Street aforesaid; South on the northernmost portion
of the lot now or formerly known as #47 Legare Street, and
belonging to me, the said W. H. Hinson, and to the West
on the grave yard of St. Peter's Church.

Also, the full and free use and enjoyment as an
easement to run with the land of the right of ingress,
egress and regress, in, over, through and upon the alley
twenty-eight (28) feet wide as a drive way or carriage way,
situate, lying and being immediately to the South of the
above described property, and being the Southern boundary
of said above described lot of land.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or
appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said Julia R. Dill, her

Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators to warrant and
forever defend all and singular the said premises unto the said Julia R. Dill, her

Heirs and Assigns, against me and my Heirs,

and all persons whomsoever lawfully claiming, or to claim the same, or any part thereof.

WITNESS My Hand and Seal this 18th day of April

in the year of our Lord one thousand nine hundred and eleven

and in the one hundred and thirty-fifth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered
in the presence of

J. Almon Ball
Wm. R. Dill

W. H. Hinson (L.S.)
(L.S.)

EXHIBIT

A

THE STATE OF SOUTH CAROLINA,

Charleston County

PERSONALLY appeared before me J. Alwyn Ball
and made oath that he saw the within named W. G. Hinson
sign, seal and as his act and deed, deliver the within written Deed; and that he with John R. Riche
witnessed the execution thereof.

SWORN to before me this 15th day of April
A. D. 1911

J. Alwyn Ball

G. Lee Holmes (Seal)
Notary Public

Notary Seal

THE STATE OF SOUTH CAROLINA,

Renunciation of Dower.

I, _____
do hereby certify unto all whom it may concern that My
the wife of the within named _____
did this day appear before me, and upon being privately and separately examined by me did declare that she does freely, voluntarily, and without
any compulsion, dread or fear of any person or persons whatsoever, renounce, release and forever relinquish unto the within named _____
Heirs and Assigns, all her interest and estate, and also all her right and claim Dower, of, in or to all and singular the premises within mentioned
and released.

Given under my hand and seal, this _____ day of _____ Anno Domini 19____

Recorded herein this 25th day of March A. D. 1912 and
delivered to Dill Ball Company being first endorsed as recorded by County Auditor.
Julius E. Cogswell
Register Mesne Conveyance, Charleston County, S. C.
per clerk M. C. S.

Mar 96 1971 8

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

C O V E N A N T

WHEREAS, by deed dated April 15, 1911, recorded in the R. M. C. Office for Charleston County in Book W-25, Page 313, William G. Hinson conveyed unto Julia R. Dill property located in the City of Charleston, South Carolina, known as 47 Legare Street and a part of the premises conveyed was "Also the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress and regress, in, over, through and upon the alleyway 8 ft. wide as a driveway and carriageway, situate, lying and being immediately to the south of the above described property and being the southern boundary of said above described lot of land.", and

WHEREAS, the premises encumbered with the easement above described, known as 45 Legare Street, Charleston, South Carolina, is now vested in Margarette deSaussure Black, she having acquired title to the same under the Last Will and Testament of Henry W. deSaussure, who died March 13, 1955, and by various deeds recorded in the R.M.C. Office for Charleston County in Book X-60, Page 470, and Book L-72, Page 50, and

WHEREAS, the said Julia R. Dill, later Julia Dill Rogers, died December 4, 1970, leaving her Last Will and Testament dated November 21, 1968, wherein she devised the residue of her estate unto the South Carolina National Bank of Charleston as Trustee, etc. and named the South Carolina National Bank of Charleston as Executor of her Last Will and Testament, and

WHEREAS, the area encumbered with said easement above referred to is more particularly shown on a plat of Number 47 Legare Street, Charleston, South Carolina, made by Cummings & McCrady, Inc., Engineers, February 1971, as enclosed within the letters B, E, F, G, O, H, B, and

WHEREAS, a question has arisen to the extent of said easement and Margarette deSaussure Black, the owner in fee simple of the strip of land encumbered by said easement, desires to reaffirm the existence of said easement, to the extent as agreed upon by the parties, by the execution of the within covenant.

EXHIBIT

B

1001J 96 123 8

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that in consideration of the premises and the further sum of ONE HUNDRED and 00/100 (\$100.00) DOLLARS paid by the South Carolina National Bank of Charleston, as Trustee and Executor under the Last Will and Testament of Julia Dill Rogers, deceased, the receipt whereof is hereby acknowledged, the undersigned, Margarett deSausure Black, the owner in fee simple of Number 45 Legare Street, Charleston, South Carolina (more fully described in deed recorded in the R.M.C. Office for Charleston County in Book L-72, Page 40, hereby covenants and agrees that the strip of land located on the west side of Legare Street in the City of Charleston, State of South Carolina, being eight feet in width and 101.25 feet in depth and being more particularly shown on plat of Number 47 Legare Street, Charleston, South Carolina, made by Cummings & McCrady, Inc., Engineers, dated February, 1971, as enclosed within the letters, B, E, F, H, B, the line F, H being the terminus thereof, shall be subject to the following restrictions, limitations and rights as to the future use of said strip of land:

(1) That no building or other structure shall be erected thereon.

(2) That no obstruction shall be placed or permitted to remain thereon so as to prevent the right of ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriageway to the owner of Number 47 Legare Street.

The aforesaid covenants, restrictions and limitations shall be covenants running with the land and shall be binding on Margarett deSausure Black, her heirs, assigns and successors in title.

WITNESS my hand and seal this 5 day of April, 1971.

IN THE PRESENCE OF:

Gina D. Jones

Margarett deSausure Black
Margarett deSausure Black

Judith A. Taylor

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PERSONALLY appeared before me Glenn D. Fuller
and made oath that she saw the within named Margarette
deSaussure Black sign, seal, and as her act and deed, deliver
the within written Deed, and that she with Judith A.
Taylor witnessed the execution thereof.

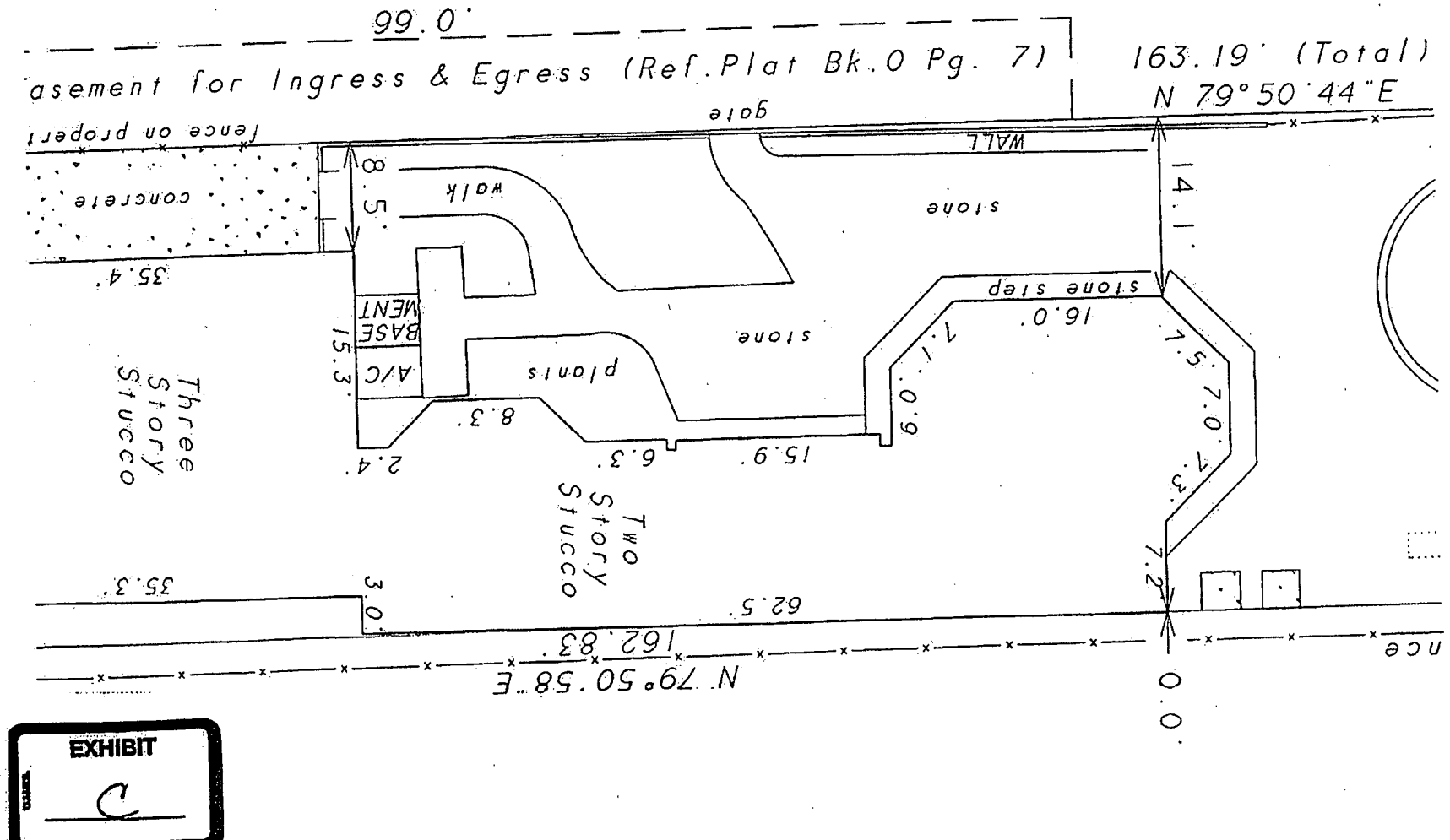
SWORN to before me this Glenn D. Fuller
5 day of April, 1971.

B. Pearson Moore (L.S.)
Notary Public for South Carolina
My Commission expires 5 Dec., 1980

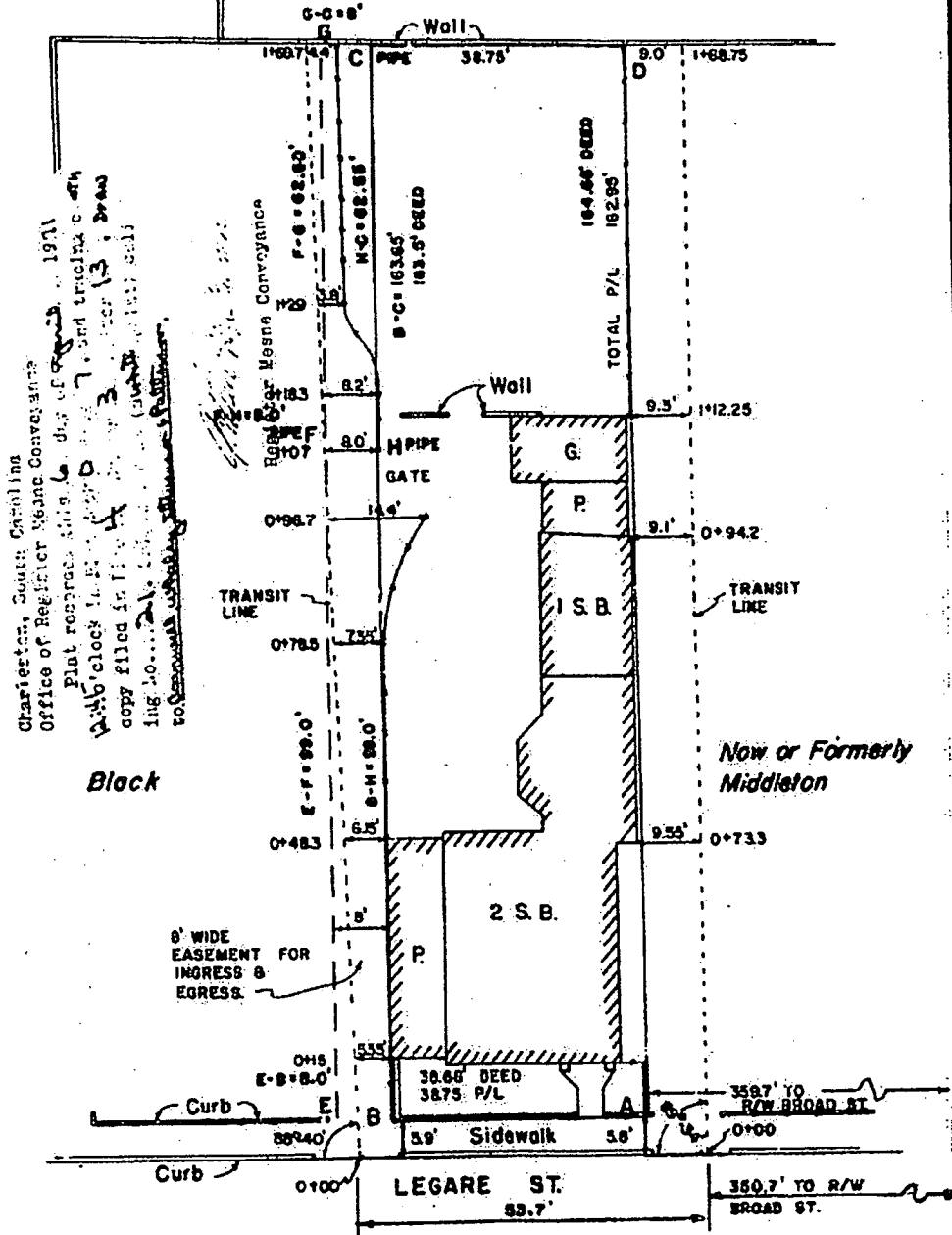
James B. Williams &
Robert B. Kline, Jr.

(TMS 457-12-04-107)

RECORD 082



Cemetery



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

James Bradley Williams and Robert Blair
Kline, Jr.,

Case No. 2014-CP-10-05608

Plaintiffs,

**ORDER GRANTING DEFENDANT'S
MOTION FOR A TRO/PRELIMINARY
INJUNCTION**

vs.

Merle S. Tamsberg,

Defendant.

FILED
2015 FEB -2 PM 3:20
JULIE J. ARMSTRONG
CLERK OF COURT

This matter is before the Court on Defendant's Motion for a TRO/Preliminary Injunction seeking to prohibit Plaintiffs from improperly obstructing Defendant's easement during the pendency of the above-captioned lawsuit. A hearing was held before me on January 16, 2015. The parties were represented by counsel at the hearing. After reviewing Defendant's pending motion with exhibits and considering the arguments of counsel, the Court finds that the Defendant is entitled to a preliminary injunction pursuant to Rule 65, SCRCP, as set forth more specifically below.

This lawsuit arises out of an easement appurtenant to Defendant's property at 47 Legare Street, Charleston, South Carolina which allows the Defendant to use a portion of Plaintiffs' property at 45 Legare Street for access to the rear of Defendant's property. I find that the facts and circumstances warrant the award of a preliminary injunction allowing the Defendant to make use of the easement in the same manner in which she did prior to the filing of this lawsuit. The Defendant has shown that she has suffered and will continue to suffer irreparable harm, that she lacks an adequate remedy at law, and that she is likely to prevail on the merits. Therefore, I find

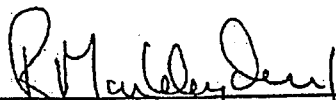
mdj,



that an injunction preserving the status quo ante is appropriate.

For the reasons set forth above, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant's Motion for a TRO/Preliminary Injunction is granted.

IT IS SO ORDERED.


The Honorable R. Markley Dennis, Jr.
Judge of the Ninth Judicial Circuit

January 27, 2015
DM: 3948901 v.1

mdj

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 2 COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

3 James Bradley Williams and)
 4 Robert Blair Kline, Jr.,)
 5 Plaintiffs,) Case No.:
 6) 2014-CP-10-5608
 7 v.)
 8 Merle S. Tamsberg,)
 9 Defendant.)

10 *****

11 DEPOSITION OF: JAMES BRADLEY WILLIAMS

12 DATE TAKEN: Thursday, November 5, 2015

13 TIME: 10:00 A.M.

14 PLACE: Moore & Van Allen
 15 78 Wentworth Street, Suite 200
 16 Charleston, South Carolina

17 REPORTED BY: MARY ANN RIDENOUR, RPR, CLR
 18 Registered Professional Reporter,
 19 Certified LiveNote Reporter
 20 and Notary Public

21

22

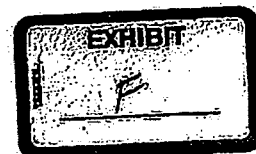
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Carolina Reporting



1 how the layout here morphed into the layout we see
2 today, that was shown in Exhibit 2?

3 A. I asked that question in discovery, and I
4 don't know that it was answered. It was asked of
5 Merle. She would know that more than I would.

6 Q. Okay.

7 A. I don't know if she was the one that tore it
8 down when she built her addition or if it's a previous
9 owner here.

10 Q. Okay. Have there been any changes to the
11 configuration of, I guess, the backyard of 47 Legare
12 since you have owned the property?

13 A. There's a wall running the whole length of
14 the easement, which blocks the easement --

15 Q. Okay.

16 A. -- that she put up, an eight-foot stucco
17 wall. That's a significant change.

18 Q. Do you know when that was put up?

19 A. Yep.

20 Q. When was it put up?

21 A. The same year we bought the house.

22 Q. Okay. Do you know what was there previously?

23 A. Chain link fence.

24 Q. Okay. And did the chain link fence also run
25 the length --

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1 A. The entire length. It was probably there 40
2 years.

3 Q. Okay. And I know the wall that's there now
4 has a little opening, correct?

5 A. It has a three-foot opening.

6 Q. Okay. Do you know -- and I don't know the
7 answer to this question. Do you know if the chain link
8 fence had an opening?

9 A. It appears that it has a gate, when you look
10 at this.

11 Q. Okay.

12 A. I didn't see it prior to it being torn down.

13 Q. Okay.

14 A. But it says "gate" on this plot, so I guess
15 that's what that is.

16 Q. I see it. Okay.

17 So if we could go back to Exhibit 2, which is this
18 2004 survey.

19 A. Okay.

20 Q. Is the carport -- this obviously shows
21 y'all's survey. I guess my first question would be,
22 commissioned in 2004, was this commissioned by y'all
23 around the -- when you were going to purchase the
24 property?

25 A. Yes.

Carolina Reporting

1
2 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON) Case No. 2014-CP-10-05608
4
5 JAMES BRADLEY WILLIAMS AND)
6 ROBERT BLAIR KLINE, JR.,)
7 Plaintiffs,)
8 -vs-) Hearing
9 MERLE S. TAMSBERG,) Judge Mikell Scarborough
10 Defendant.)

11 Given before Karen Nellius, Court Reporter
12 and Notary Public, at the Charleston County Courthouse,
13 100 Broad Street, Charleston, South Carolina, on
14 Wednesday, March 2, 2016, commencing at 10:30 a.m.
15
16
17
18

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20 **-Professional Court Reporters-**

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A P P E A R A N C E S

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For the Plaintiffs: Moore & Van Allen, PLLC
By: Robert A. Kerr, Jr., Esquire
78 Wentworth Street
Charleston, SC 29401

For the Defendant: Haynsworth, Sinkler, Boyd, P.A.
By: David M. Swanson, Esquire
Jane C. Bouch, Esquire
134 Meeting Street
3rd Floor
Charleston, SC 29401

Law Offices of Matthew E. Tillman
By: Matthew E. Tillman, Esquire
5 Exchange Street
Charleston, SC 29401

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HEARING

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THE COURT: All right. So this morning we have got the case captioned James Bradley Williams and Robert Blair Kline, Junior, as plaintiffs, versus Merle Tamsberg, the defendant, case No. 2014-CP-10-05608.

Mr. Rob Kerr, are you present for the plaintiffs?

MR. KERR: I am present for the plaintiffs, Your Honor. Good morning.

THE COURT: All right. We've got Mr. Tillman, we've got Ms. Bouch, we've got Mr. Swanson, all for the defendant?

MR. TILLMAN: That's right, Your Honor. We have cross motions for summary judgment.

THE COURT: All right. Very good. I've been back there reading a little bit about it. So it's an interesting case. You've got an easement on Legree Street, downtown Charleston.

All right. Who filed first? Whoever filed first, I'll be glad to hear from you.

Tell me about it, Mr. Kerr.

MR. KERR: Yes, Your Honor. Thank you. Robert Kerr, again, for the plaintiffs.

This is an easement dispute concerning two

1 properties in the city of Charleston located at 45 and 47
2 Legree Street. I just want to walk you through a couple
3 of background aspects to the case.

4 We initially filed the case seeking
5 declaratory judgment that there was an abandonment of an
6 alleged easement and seeking an injunction as a second
7 cause of action.

8 The defendants timely filed. They also,
9 because of some un-neighborly behaviors, which are not
10 pertinent to today, there was a motion and a preliminary
11 injunction that was entered to maintain the status quo as
12 between these two neighboring parties.

13 There was paper discovery that was
14 exchanged, and plaintiffs filed an amended complaint in
15 September of 2015, adding a couple of different causes of
16 action, including a cause of action for a declaratory
17 judgment declaring that the easement had been terminated,
18 which is different than abandoned, and a trespass cause
19 of action.

20 The case was then referred to Your Honor by
21 order of reference. And on November 30th, you entered
22 your scheduling order setting a pretrial hearing for
23 today, at this time, in this place.

24 What we filed -- as you mentioned, there are
25 two motions for summary judgment. We filed our motion

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1 for summary judgment on February 10. With that motion,
2 we filed an affidavit and a brief for Your Honor's
3 consideration and served that on opposing counsel.
4 Plaintiffs filed their motion -- or defendant filed their
5 motion for summary judgment on Monday the 22nd, nine days
6 before this hearing.

7 Yesterday afternoon, I received an affidavit
8 and a memorandum in support of their motion for summary
9 judgment, and containing in the same memorandum points of
10 law in opposition to our motion for summary judgment.

11 And so, Your Honor, I'm left at 4:00
12 yesterday afternoon trying to figure out what to do about
13 this hearing. I have your order that this hearing is
14 going to take place, and that order was entered months
15 ago.

16 We timely filed. We timely provided
17 information and notice of our argument of their argument
18 that on that third cause of action easement has been
19 terminated. I get nine days ago a motion for summary
20 judgment that does not identify a single legal issue that
21 they intend to argue. It is nine days before this
22 hearing, and the rules require 10.

23 The affidavit that was served yesterday
24 afternoon, if served in opposition, is late filed because
25 it's required under Rule 6 to be filed two days before

1 the hearing. And the affidavit, if it is in support of
2 their motion for summary judgment, shouldn't be
3 considered because it needed to be filed under the rules
4 with the motion. And so at 4:00 yesterday afternoon, I
5 knew what filing the defendants were going to argue.

6 The motion under -- the motion for summary
7 judgment that they filed with nothing else doesn't meet
8 the technical requirements of Rule 7(b)(1), which
9 requires motions to have information that puts a party on
10 notice what they need to prepare for.

11 And so in having received a motion nine days
12 before the hearing without any supporting information,
13 with no specificity to it, and then having received
14 documents yesterday afternoon, I'm left with 16 hours to
15 try and figure out is my client going to be able to have
16 time to read the affidavit, do we need to do a responsive
17 affidavit, am I going to have time to pull the cases that
18 they intend to rely on to support their motion?

19 So, Your Honor, I'm left in the lurch.
20 These are my colleagues. I know them. I know them to be
21 fair. I'm left in a position where I have cross motions,
22 and I had no idea how to prepare for the hearing to
23 defend theirs. So, Your Honor, I would ask that because
24 of the untimeliness of the motion, the lack of support
25 for it, and timeliness of the affidavit, my inability to

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1 prepare any kind of response, get my clients to possibly,
2 if appropriate, sign a responsive of affidavit, I would
3 ask that the Court disregard the plaintiff's -- or the
4 defendant's motion altogether.

5 Alternatively, I'm willing to tilt with
6 these people, despite their three against one. But I'm
7 willing to tilt. Alternatively, I'd ask that the hearing
8 be set at a time so that I have the opportunity to do the
9 things that you expect a good lawyer to do in response to
10 a motion for summary judgment.

11 THE COURT: Okay. All right. That's in
12 response to their motion.

13 How about your motion for summary judgment?

14 MR. KERR: All right.

15 THE COURT: Let me stop. Any objection to
16 his motion for summary judgment?

17 MR. TILLMAN: No, not at all. Your Honor,
18 we had no intention to ambush him. If we want to push
19 ours off, that's fine.

20 THE COURT: All right. Let's go forward
21 with that. I've got an audience here. That was an
22 excellent presentation of what the rules are and when you
23 should be filing motions. There's usually got to be some
24 sort of prejudice. What I heard you say is you've been
25 prejudiced because you hadn't had a chance to really

1 respond with your clients; is that right?

2 MR. KERR: That is correct, Your Honor. I
3 haven't had an opportunity to pull and read all the cases
4 that they cite on issues.

5 THE COURT: They had a bunch of them in
6 there, didn't they?

7 MR. KERR: Yes, Your Honor. It was an
8 excellent brief. I commend them on a well-written work
9 product, on the one hand. On the other hand, if I had
10 gotten it at some point -- or if I had at least been put
11 on notice that we were going to argue about a
12 prescriptive easement, I could have done some research
13 myself. But not knowing until 4:00 yesterday afternoon,
14 I'm hamstrung.

15 THE COURT: All right. Very good.
16 Go ahead. Let's hear your argument, and
17 then we'll cover whether or not they have got a right to
18 move forward today or not.

19 Mr. Kerr?

20 MR. KERR: You want to hear --

21 THE COURT: Tell me why I should grant your
22 motion for summary judgment.

23 MR. KERR: You should grant my motion for
24 summary judgment because the easement rights at issue are
25 easements in gross as opposed to appurtenant to the

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1 property.

2 THE COURT: Is that your argument?

3 MR. KERR: That is the argument.

4 THE COURT: I looked at a deed, and I looked
5 at -- what did they call that other document?

6 MR. TILLMAN: It was a restrictive covenant
7 to reaffirm easement.

8 THE COURT: I looked at a deed from 1911.

9 MR. KERR: Yes, sir.

10 THE COURT: And it says: Also the full and
11 free use and enjoyment as an easement to run with the
12 land of the right of ingress, egress, and regress, in,
13 over, through, and upon the alleyway eight feet wide as a
14 driveway or carriageway, I think, such way being
15 immediately to the south of the above-described property
16 and being the southern boundary of said above-described
17 lot of land. That's a 1911 deed. And then I saw a
18 covenant that Ms. Dessauer Marguerite Black said is a
19 covenant that will run with the land and be binding on
20 her, her heirs, assigns, and successors.

21 Your argument is it's an easement in gross?

22 MR. KERR: Yes, sir.

23 THE COURT: All right. We don't need to go
24 any further, I don't think, unless you have got some
25 other argument. That's about as appurtenant attached as

1 I can imagine. If you've got -- if you want to make a
2 record, I'll be glad to hear about it.

3 MR. KERR: I would like to make a record,
4 Your Honor.

5 THE COURT: All right.

6 MR. KERR: Thank you very much.

7 THE COURT: All right. I'm putting you on
8 notice I'm probably going to deny your motion, but go
9 ahead. But I'll hear from you. I don't want to jump the
10 gun on you.

11 Tell me why it's an easement in gross and
12 expired at the time Ms. Black died, since she brought a
13 covenant that runs with the land in perpetuity.

14 MR. KERR: That covenant, Your Honor, is a
15 reaffirmation of an easement that no longer existed. The
16 difference between an appurtenant easement and an
17 easement in gross is one is personal and permissive, the
18 easement in gross: Judge Scarborough, feel free to park
19 your car in my driveway as long as you like.

20 THE COURT: Okay.

21 MR. KERR: That is permissive, and it allows
22 you, but not those -- or anyone else to do it, and it
23 expires -- if I haven't terminated it before, it expires
24 when you expire. Lord knows we don't want that to happen
25 soon. But the point is, it is not something that runs

1 with the land.

2 But because a real estate document says
3 something doesn't mean it's necessarily so. Because the
4 law requires an appurtenant easement to have -- there are
5 four factors, four requirements, and those four
6 requirements are that the easement inheres in the land,
7 concerns the premises, has one terminus or end point on
8 the land of the party claiming it, and be essentially
9 necessary to the enjoyment of the property.

10 THE COURT: Okay.

11 MR. KERR: Okay? So we have four factors
12 that we have to look at. Our point is, two of the
13 factors the defendants can't make -- can't make out.
14 They don't have evidence that can support two of the
15 factors, and the case law says that all four must be
16 present.

17 The first factor is the terminus. And, Your
18 Honor, you will see that there are plats that are
19 attached to our memorandum in support of the motion for
20 summary judgment. Those plats describe the easement.
21 There is a 1971 Cummins and McCrady plat that is
22 attached, and it shows that the easement begins at Legree
23 Street and goes down that 8-foot alleyway and terminates
24 at the western boundary of the property.

25 And when I say the property, it's the

1 western boundary of 45 Legree, our client's -- not then,
2 but currently our client's property.

3 THE COURT: Okay.

4 MR. KERR: So our position is there is no
5 terminus on the dominant parcel, the 47 Legree. The
6 easement on those plats is shown by pinpoints and
7 letters, and we have an easement that is completely on
8 our property. It starts at Legree Street, and it
9 terminates at the west end of the property line of 45
10 Legree, which I think is a cemetery.

11 THE COURT: What church is that back there?

12 MR. KERR: I'm not sure.

13 THE COURT: All right.

14 MR. KERR: And so our position is, and we
15 believe the case law supports us here, that the absence
16 of a terminus on 47 Legree, the dominant estate, is fatal
17 to the claim.

18 And we have got a case that we cite in our
19 brief here, Your Honor, that addresses this issue. It's
20 a set of facts that are substantially similar to Steele
21 versus Wilson, a 1944 Supreme Court of South Carolina
22 case. In that case, the court reaffirms the longstanding
23 law of this jurisdiction, which is: There must be a
24 terminus on the dominant parcel.

25 Likewise in that case, there was an alleyway

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1 between two parcels of property that were subdivided.
2 Same thing here. That 1911 deed that you referred to is
3 a deed out of an uncle to a niece and included language:
4 Hey, you can use this roadway. We think that that, being
5 a nice family approach to sharing property, is all fine,
6 but there has to be a terminus of the easement on the
7 dominant estate, and there is not.

8 You'll also see that in 1971, when you refer
9 to the covenant, that covenant in its very language says
10 there is a question about this easement, and so we want
11 to have this easement reaffirmed. And it was reaffirmed
12 in two ways. One, there was a hundred dollars
13 consideration and, two, the actual easement was
14 shortened. So it no longer terminated on the western
15 boundary of 45, but it was brought back -- I can't tell
16 you how many feet, but it was shortened.

17 THE COURT: Right.

18 MR. KERR: But the terminus was still on 45
19 Legree Street.

20 So, Your Honor, with respect to a terminus
21 on the dominant party -- on the dominant estate, it is
22 our position that there is no such terminus, and that
23 just because the easement runs down the battery line does
24 not meet the technical legal requirement that there is a
25 terminus on the dominant estate.

1 Additionally, Your Honor, one of the four
2 factors is the necessity of the easement for the
3 enjoyment of the property.

4 Would you like me to wait for a second?

5 THE COURT: No. Go ahead.

6 MR. KERR: Okay. If you look at the 1911 --

7 THE COURT: Well, let me ask this question.

8 In the Steele case, was it the same owner that subdivided
9 his property and put the easement down the middle --

10 MR. KERR: Yes. I believe --

11 THE COURT: -- as Mr. Henson did here?

12 Mr. Henson said he owned 45 and 47. He put the --

13 MR. KERR: He subdivided and conveyed to
14 Julia Dill 45 with that easement language.

15 THE COURT: I think he conveyed here 47.

16 That's all right. Go ahead. Go ahead.

17 MR. KERR: Yes, sir. That's right.

18 The other point, Your Honor, is that a
19 second requirement for the easement to be appurtenant is
20 that it is essentially necessary to the enjoyment of the
21 property. And we have mentioned to you that there was a
22 garage in the back -- in the back of the 47 Legree
23 property, and that the easement language from Mr. Henson
24 stated that it was for a driveway or carriageway. And I
25 think the proper inference is that so you can get a car

1 back to your garage, you can use this strip of land. The
2 garage is shown on that Cummins and McCrady plat from
3 1971, and it's designated as letter G on the plat.

4 THE COURT: Something I couldn't find. G is
5 back in the back underneath the cemetery, right?

6 MR. KERR: G would have been on the 47
7 Legree footprint in the back by the cemetery; that is
8 correct.

9 THE COURT: Okay.

10 MR. KERR: In 1988 there is a plat to the
11 property prior to the conveyance to the Tamsbergs. And
12 if you look at that plat, it says that there is a
13 one-story stucco structure there. What we know is that
14 after the Tamsberg parties -- after the Tamsbergs
15 purchased 47 Legree, they renovated that area, and we
16 have included an undated plat from Palmetto Land
17 Surveying that shows you what it looks like now. The
18 point is, there is no garage. There is no carriage
19 house, so to speak.

20 And we also note that when our clients
21 purchased 45 that the Tamsbergs were building a wall
22 along the property line and left a gate that was not wide
23 enough for any vehicle or carriage to pass.

24 We also can -- we can also see from the
25 plats that there is access on the 47 Legree property

1 through a gate to the back of the house. And while it
2 may not be as convenient as having the ability to walk
3 down this 8-foot pathway, there is access, and so they
4 are not being denied access. So for that reason --

5 THE COURT: It's not necessary for the use
6 and enjoyment of the property.

7 MR. KERR: That's right. So that's the
8 argument, that it simply is not -- it's not necessary.

9 So we have got two of the four requirements:
10 no terminus, not necessary for the enjoyment of the
11 party, and without those two requirements, an appurtenant
12 easement fails and is merely an easement in gross.

13 THE COURT: All right.

14 MR. KERR: I would also point out that in
15 the deed into our clients, there is no reference to the
16 easement. They purchased in 2004. And that they have a
17 gate that is currently in front of the 8-foot easement,
18 and part of the trouble that came about was the pets
19 getting away when the gate got opened. So we don't have
20 happy neighbors, and that's also an issue that --

21 THE COURT: That's what walls are for.

22 MR. KERR: Yes. That's right.

23 THE COURT: You said Tamsbergs built the
24 wall?

25 MR. KERR: Correct.

1 THE COURT: When was that?

2 MR. KERR: At or near the time -- it was
3 completed at or near the time that our clients purchased,
4 which was 2004.

5 THE COURT: 2004?

6 MR. KERR: Yes, sir.

7 THE COURT: All right.

8 MR. KERR: Your Honor, so what we are asking
9 for you to do is look at our brief, look at the public
10 record, look at the cases about an appurtenant easement,
11 and we would ask you to conclude that there is no
12 easement appurtenant. Any rights were permissive in
13 nature, any rights expired a long time ago, and that, as
14 a result of that, this encumbrance needs to be lifted
15 from 45 Legree by your order.

16 THE COURT: Okay. Tell me how, if you know,
17 your clients didn't know about this easement when they
18 purchased.

19 MR. KERR: Well, as I mentioned --

20 THE COURT: That was in 2004?

21 MR. KERR: Yes.

22 As I mentioned, we have a deed into our
23 clients, which is attached to our memorandum -- I think
24 it's Exhibit J -- and it is silent on the existence of
25 any easement. So when they closed, they get a deed.

1 They don't know that part of their property is subject to
2 some alleged other interest.

3 THE COURT: It wasn't in the chain of title?
4 It wasn't found in the chain of title? They had no
5 knowledge?

6 MR. KERR: It's not in the deed.

7 THE COURT: So I would imagine it was
8 shortly after they purchased that the problems started;
9 is that right?

10 MR. KERR: I don't have --

11 THE COURT: It only took 10 years to get
12 this case filed?

13 MR. KERR: I don't have anything in the
14 record that addresses that, Your Honor, and one of the
15 things that, frankly, I would have had to do is address
16 some of those issues raised by counsel in their brief and
17 in their affidavit.

18 Our clients in their deposition testimony
19 said they built a wall. The easement couldn't -- there
20 could be no purpose for an easement; they built a wall.

21 THE COURT: Well, that might be some
22 evidence. Is that what led to the amendment in your
23 complaint? You argued abandonment. That was your
24 determination of the amended complaint, right?

25 MR. KERR: That's right.

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1 THE COURT: That's not the argument of the
2 day. The argument of the day is that it's an easement in
3 gross that expired.

4 MR. KERR: We think an abandonment is a
5 question of fact. We think the statute of limitations
6 issues are generally fact-intensive, and that it's not
7 proper on a summary judgment. And if I got something
8 4:00 yesterday afternoon that addresses that issue, I
9 should have the opportunity to address that issue.

10 THE COURT: Very good. All right, Mr. Kerr.
11 Thank you.

12 Mr. Tillman, you want to respond?

13 MR. TILLMAN: Yes, sir.

14 THE COURT: I think what we are going to do
15 today, I'm going to give him an opportunity to be able to
16 respond to you all's motion and we'll come back another
17 day. But let's just talk about his motion and his
18 argument that it's an easement in gross.

19 MR. TILLMAN: Your Honor, in all fairness to
20 Mr. Kerr, he is taking over for a retired lawyer on this
21 case very recently, and so some of the testimony, things
22 that happened in the case, he is getting caught up. But
23 I will say --

24 THE COURT: He is a sharp guy. He can catch
25 on quickly.

1 MR. TILLMAN: He is.

2 THE COURT: He had 16 hours to prepare his
3 client.

4 MR. TILLMAN: One of the things that was
5 clear from the testimony from Mr. Kerr's client is that
6 he knew about the easement very early on. So I would
7 like to correct that. He either knew about before they
8 bought the property or right after they bought the
9 property back in 2004. The deposition testimony is:

10 Do you remember when you first became aware
11 that the property was encumbered by the easement.

12 It was early on. It may have been the first
13 day we saw it, which would indicate to me -- I don't
14 remember exactly what he said in the deposition, but that
15 would indicate to me he knew about it while he was
16 looking at the property.

17 THE COURT: Okay.

18 MR. TILLMAN: I have actually got a plat
19 that was drafted by Matt Tillman.

20 MR. KERR: Well, Your Honor. I would object
21 to Mr. Tillman's --

22 MR. TILLMAN: Well, the problem --

23 THE COURT: He is using that as a
24 demonstrative.

25 MR. TILLMAN: That's right. The problem

1 with the Cummins plat that you are looking at, I have a
2 hard time even figuring out what's going on with that
3 plat.

4 THE COURT: Took me a while, but I finally
5 found F and H while Mr. Kerr was talking, so...

6 MR. TILLMAN: This is just my understanding
7 of what's going on here. This used to be one parcel.
8 They split it into 45 and 47. Back in 1911, the owner of
9 both parcels arranged this easement that goes all the way
10 back to 47. And then in 19 -- Ms. Dill, who in '47 dies.
11 In 1947, now Ms. Black, who now owns 45 -- did I say '47?
12 1971. I'm sorry. Ms. Black, who now owns 45, decides
13 we're going to reaffirm the easement, and the bank as
14 executor for Ms. Dill essentially grants this piece back
15 to the owner of 45, who is Ms. Black.

16 So now, the easement is from here to
17 wherever this line is.

18 THE COURT: Right.

19 MR. TILLMAN: There used to be a garage
20 right here. But the issue with the terminus is fairly
21 simple. I mean, you don't have to have a T going into
22 the property, a road going from a public road straight
23 across the middle of the piece of property into your
24 property, to have a terminus. This is a terminus. I
25 mean, the easement goes here, and it terminates here. It

1 was access for vehicles, for pedestrian traffic, and all
2 that. There is no difference --

3 THE COURT: They had carriages back in 1911.

4 MR. TILLMAN: Yes. There is no difference
5 than if it started here and went across that way. It
6 still has got a terminus, and that terminus is right here
7 where the garage used to be.

8 So if you look at the Steele case that they
9 cited in their brief, number one, it's impossible to
10 figure out what they are even talking about in that case.
11 I tried to map it out as best I could. And I did it for,
12 like, an hour last night, and I could not figure out what
13 was going on. I don't know whether I'm stupid or whether
14 it's a poorly written decision or whether they transposed
15 some names in the decision, I just don't know.

16 But what it appears to me is that in that
17 case you had two adjacent property owners. One sold the
18 very back portion of their property to the other, and
19 then they granted like reciprocal easements to each other
20 going across. But there is nothing in that decision
21 talking about the necessity of this access because, you
22 know, they have got the access up here. There is nothing
23 talking about the elements, essentially, of an
24 appurtenant easement. So I don't think it's applicable
25 to this case, and, further, if you go back and read the

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1 Steele case --

2 THE COURT: You have got two separate
3 property owners.

4 MR. TILLMAN: Two separate property owners
5 right here.

6 If you go back and look at that case, number
7 one, like I said, it's impossible to understand what's
8 going on, but, number two, it's also pretty clear that
9 that case is not based on terminus. It's based on
10 necessity.

11 And if you look at the case that the Steele
12 case sites, it's the Whaley case from back in the 1800s,
13 this is for the terminus point. And in that case, you've
14 got -- this is John's Island, I think -- you have got a
15 road, Stono River, you had Cain's Latch Plantation, Seven
16 Oaks Plantation, separated by the road, although there
17 was some on Seven Oaks. But anyway, for our purposes,
18 they are separated by the road.

19 And the guy who owns Cain's Latch is trying
20 to claim an easement -- is trying to say that he's got an
21 appurtenant easement starting at this road, which he
22 doesn't own, going back to a creek on Seven Oaks. The
23 court said: Wait a minute. That road doesn't even go to
24 your property; it doesn't even terminate on your
25 property. That's a whole different set of facts than

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1 what we have got in this case.

2 So I think the terminus issue is pretty
3 clear, that it doesn't matter whether it comes from the
4 road here, here, back here, or nine miles this way, if it
5 terminates in a place giving you access to your property,
6 the terminus element is met. And then I certainly think,
7 if nothing else, there is an issue of fact there.

8 And, also, I'll point out for the Court, I'm
9 sure you heard this over and over and over, but the
10 easement in gross --, easements in gross are disfavored by
11 the court. The court, if it can, is supposed to find
12 easements appurtenant.

13 And the necessity issue, I'll remind Your
14 Honor that this easement was first granted in 1911. Then
15 whatever happened in 1971 happened. I'm not sure. But
16 in 1971, Ms. Black now owns 45. The bank for Ms. Dill --
17 the bank as the executor for Ms. Dill owns 47. And so
18 Ms. Black is reaffirming this easement in 19 -- 1971,
19 excuse me, and she is using easement appurtenant
20 language, like run of the land and so forth, and that's
21 what the original easement said.

22 And --

23 THE COURT: Let's talk about that covenant
24 for a second. I mean, isn't that -- isn't that what the
25 bank is trying to do, is make sure there is access to the

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1 rear of the lot?

2 MR. TILLMAN: Well, absolutely. I was about
3 to get into the timing of this. What you have is, they
4 are reaffirming this easement in April of 1971. I think
5 that's right. The bank owns 47 at that point. So we
6 have got this reaffirmation. The bank is giving up a
7 little something here in the back.

8 And then literally in July, what is that,
9 three months later, the bank sells the property, and it's
10 their argument that it terminated at that point -- I
11 think that's their argument -- because it was an easement
12 in gross for the bank. That wouldn't make any sense.
13 Why would they do this deal just so the bank can turn
14 around and sell it and have the easement go away? I'm
15 sure when they were marking the property, they are
16 saying: We -- look, we have got this easement going back
17 here to this garage.

18 The other issue with the necessity is -- the
19 argument you've heard today is about the necessity of the
20 easement today. That's an abandonment issue, an issue of
21 fact. That's not an issue about whether this was an
22 easement appurtenant or an easement in gross at the time.
23 In 1911 and in 1971, all the evidence we have shows that
24 there was a garage back here. This was vehicular
25 traffic. So just because you stopped using that for

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1 vehicular traffic doesn't make it an easement that no
2 longer runs with the land or that was personal to the
3 grantee. It does, however, become possible, although we
4 dispute that, an abandonment issue, which is their other
5 argument. So we think that the issue as between gross
6 and appurtenant is a red herring. We think they haven't
7 shown certainly that there is no issue of fact as to
8 whether there is a terminus at 47 or that it was
9 unnecessary at the time the grant was made. So we think
10 that the motion should be denied.

11 THE COURT: What about the building of the
12 wall? What's all that about?

13 MR. TILLMAN: Well, again, that will go to
14 -- certainly to abandonment, Your Honor, but we don't
15 think that that is -- to show abandonment, you have to
16 show affirmative intent to literally give up on your
17 easement. Our argument on that at trial, the decision is
18 going to be, look, these guys are still using this for
19 access to 47. It may not be vehicular access, but, for
20 instance -- I wish I had brought a picture for you. But
21 the space between the house at 47 -- you know, this would
22 be the house -- this space right here on the side of the
23 house --

24 THE COURT: Right.

25 MR. TILLMAN: -- is negligible. You can't

1 get equipment back through that. So having the easement
2 on 45 is still necessary for a lot of things: for
3 getting equipment back there, for getting labor back
4 there, for carrying landscaping materials back there.
5 And that doesn't evidence affirmative intent to abandon
6 the easement. They may be using it for a less intrusive
7 purpose, but that's okay, as long as -- the law is that
8 you can't overburden the easement. There is no law about
9 under-burdening the easement, except you get to the point
10 where I've given it up. They certainly haven't done
11 that. There is certainly no evidence that would permit
12 -- there is certainly not such a lack of evidence that
13 would permit granting a summary judgment on that issue.

14 THE COURT: Any evidence in the record of
15 them having used it during this time period?

16 MR. TILLMAN: Well, that's in Ms. Tamsberg's
17 affidavit that we submitted. I realize he stated that
18 that was untimely. But, again, on that issue about
19 abandonment, I don't even think we need a factual
20 statement. I mean, I think that that's essentially --
21 they didn't even make that argument, really, that they
22 are entitled to summary judgment on that point.

23 THE COURT: All right. Got it. Okay.

24 Ms. Bouch or Mr. Kerr -- I don't want you to
25 get triple teamed, but, Ms. Bouch, do you have anything

1 to add here?

2 MS. BOUCH: I have, Your Honor, one or two
3 things to add.

4 As far as the masonry wall, which is between
5 the properties now that the Tamsbergs put up, it replaced
6 an existing chain link fence that was at the same
7 location. We believe that chain link fence dated
8 probably back to Ms. Nancy Linton's time in the 1970s,
9 who took the property from the bank. The masonry wall, I
10 don't want us to get distracted by that because it really
11 did just replace a fence that was in that same location.

12 And as to Ms. Tamsberg's use of the easement
13 and the necessity argument, I'll put out that she was
14 using the easement such that the plaintiff put down
15 stakes and tried to prevent her from using it, which led
16 to us getting the TRO in circuit court in 2015. So I
17 just want to point out the incongruity in saying that an
18 easement is abandoned and then putting down stakes and
19 forcing us to get our TRO so that we can no longer use
20 it.

21 That's all.

22 THE COURT: Mr. Kerr.

23 MR. SWANSON: Your Honor, if I can just say
24 one thing.

25 THE COURT: I'm sorry.

1 MR. SWANSON: It takes three when you've got
2 Mr. Kerr on the other side. It just has to do with the
3 knowledge.

4 Yes. It may not have been in their deed,
5 but as we all know, there is no requirement for the deed
6 to show what the permitted encumbrances are on a piece of
7 property. That's why they hired a lawyer. And
8 presumably their lawyer told them all about this. I
9 think it showed up on the title policy that we saw that
10 was part of a deposition. So there is really no question
11 about the knowledge issue. They knew there was an
12 easement on that -- or they should have known that there
13 was an easement on that property when they purchased it.

14 THE COURT: It wasn't a deed. There wasn't
15 some sort of a title policy?

16 MR. TILLMAN: That's subject to all
17 easements.

18 THE COURT: Okay.

19 Mr. Kerr.

20 MR. KERR: Very briefly, Your Honor.

21 Of course, I don't need to point out the
22 fact that both Ms. Bouch and Mr. Swanson are arguing
23 facts not in evidence, and so you should disregard those.

24 But one thing that Mr. Tillman mentioned --
25 and I thank him for actually bringing that demonstrative.

1 It is helpful. But one thing that he mentioned is the
2 Steele case is inscrutable and difficult to interpret.
3 But I can tell you that in that case there is an
4 alleyway, and the court says this alleyway lies wholly on
5 the land of respondent. It touches appellant's lot only
6 as a boundary. To hold that said alley was appurtenant
7 to appellant's land disregards well established rules of
8 law.

9 I think it's clear that the terminus is the
10 end point. I believe counsel wants to argue that the end
11 point is from whip to whip. But this case says a
12 boundary that is running along one property line with the
13 so-called appurtenant easement wholly on the other
14 doesn't constitute a terminus. This case says the
15 terminus was the backside of the property line and the
16 street that the two properties were on, which sounds a
17 lot like what's happening at 45 and 47 Legree Street.

18 So, Your Honor, I would ask you to take a
19 close reading of Steele vs. Williams and come to your own
20 determination on that.

21 THE COURT: I will be glad to do that.

22 MR. TILLMAN: Your Honor, I'll just point
23 out on that one, because I anticipated that argument, the
24 Steele case doesn't make any mention of was there an
25 access point from the easement into the dominant parcel

1 like we have here. There is not a lot of discussion on
2 it. It just basically said there is a driveway that runs
3 from the street back to the property line. There wasn't
4 any discussion on whether it was being used or whether it
5 was an access point from the dominant parcel into the
6 easement, whereas we have that here. I mean, it's clear.

7 Again, I don't see any difference that the
8 easement is starting out on the other side on what would
9 be the -- let's see -- on the north side of number 45 and
10 running diagonally across to where the garage used to be
11 or whether it runs straight down the side. There is no
12 difference. The bottom line is that there was an access
13 point off of 47 into 45, and that's a terminus.

14 THE COURT: Got you. Thank you. There was
15 one thing on that diagram that got my attention. It
16 looks like there is a line that kind of jogs at a
17 diagonal to the property. I'm looking at the Cummins and
18 McCrady 1971 plat, and I'm trying to -- this is one thing
19 that jumped out at me. So...

20 MR. KERR: Just below H, Your Honor?

21 THE COURT: No. That's not what I have.
22 Just below H, that's a wall back there. I see where it
23 says wall. Looking at the Cummins and McCrady plat,
24 right where it says Legree Street -- right above where it
25 says Legree Street, there is a mark and an arrow, and it

1 looks like 0100 to me. There is a dashed line that's
2 moving towards the -- I'm assuming that -- that's toward
3 the west?

4 MR. KERR: Correct.

5 THE COURT: What is that dashed line? Do
6 you have any idea what that is?

7 MR. TILLMAN: It must be some sort of
8 utility line, but I don't know, Your Honor.

9 THE COURT: I don't know what it is, either.
10 It cuts across whatever this -- I think this is trying to
11 show the 8-foot easement. That is what it's trying to
12 show. It runs from up on the sidewalk of Legree Street
13 back to the back to the -- ends just at the left of the G
14 on the back wall underneath the cemetery.

15 MR. KERR: Your Honor, if you see -- if you
16 come up Legree Street and you are heading west toward the
17 back of the property line --

18 THE COURT: Uh-huh.

19 MR. KERR: -- you see where it first
20 identifies the 8-foot, approximately an inch up?

21 THE COURT: Yes.

22 MR. KERR: Okay. So the 8-foot is the solid
23 line on the defendant's side, and then the dashed line on
24 the plaintiffs' side. And I would agree with
25 Mr. Tillman, that the shorter dashed lines, which seem to

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1 cross through the easement and then back across the
2 8-foot easement, is likely some sort of utility.

3 MR. SWANSON: It says transit line. It
4 looks like it's halfway up there --

5 THE COURT: I see that. I see that.

6 MR. SWANSON: Surveyors put that in there.

7 MR. KERR: So that would be SCE&G?

8 MR. SWANSON: No. I think it's a transit
9 line the surveyors use. It means something to a
10 surveyor.

11 THE COURT: I couldn't figure out what that
12 was. It just says transit line. I wonder if that's a
13 true direction of some sort. He's trying to show -- I
14 don't know what he is trying to show. He is showing
15 something. If you look at the right of 47 on the middle
16 of the property, you see a transit line over there. So
17 he is trying to line something up. I don't know what
18 Mr. McCrady --

19 MR. TILLMAN: Might have realized all these
20 property lines on the street are messed up, and --

21 THE COURT: That would be consistent with
22 everything else I've seen around town. Okay. I just
23 wondered if you all knew.

24 There is a back wall to the church cemetery
25 at the back. If you come down an inch and it says wall

1 there, that's, I assume, where the old garage used to be?
2 Is that --

3 MR. TILLMAN: It's the approximate location.

4 THE COURT: Approximate location where that
5 used to be. And then you come on down, it says gate. It
6 says gate. Is that gate still there? Is that the gate
7 you are talking about or is that a different gate? Do
8 you know?

9 MR. TILLMAN: My understanding is that's a
10 different gate, but I don't know that to be true. We
11 can't find anybody from way back then.

12 THE COURT: Next to the H, there is a pipe,
13 and then there is a gate, and then I don't know what that
14 line is that takes a jag to the right. It's 14 feet to
15 the edge of the line there. I don't know what all that
16 means. And then I'm assuming the structure itself is
17 shown by the dashed line mark; is that right?

18 MR. TILLMAN: That's correct.

19 Now, I will say where you see P, I don't
20 believe that's the structure. I think that's that narrow
21 area that I was telling you about, but I'm going to have
22 to verify that by looking -- to be honest with you, Your
23 Honor, I haven't tried to figure out what P is. Maybe
24 that's porch, actually.

25 MR. KERR: I think that G, Your Honor, as we

1 state in our brief, that G was in '71 the garage that's
2 no longer there, if you go to the subsequent plats.

3 THE COURT: Okay. The way back in the back
4 next to that wall would be the garage. Okay. Garage,
5 single story, double story. Is that what that is? I
6 think that's single story, double story? Is that what
7 two SD is?

8 MR. KERR: Two-story building, one-story
9 building?

10 MR. TILLMAN: I think that's right.

11 THE COURT: I'm trying to get their code.

12 MR. TILLMAN: P almost has to be a porch.

13 MR. KERR: Or parking.

14 MR. TILLMAN: If you look --

15 THE COURT: You have got a P in the back,
16 too. All right.

17 Mr. Kerr, I'll take your motion under
18 advisement. I will read the case. I've read Steele
19 before, but it's been a while. I'll take a look at
20 Steele and of course the Whaley case it cites. And I did
21 a fair number of easement cases in here. I've done a
22 good job of arguing why it should be an easement in gross
23 and not an easement appurtenant, but...

24 MR. KERR: Well, I'm one-third the lawyer
25 that my opponents are, so I do my best.

1 THE COURT: We all know that. That's all
2 right.

3 I'm going to have to work to try to get you
4 all in here another time.

5 How much time do you need to respond,
6 Mr. Kerr? You want your 10 days --

7 MR. KERR: I would like 10 days, if I could.

8 THE COURT: -- chance to respond?

9 MR. KERR: Your Honor, I hate to say it. I
10 can probably find someone else to cover this, but I would
11 like to be here. I'm on vacation the week of the 14th of
12 March.

13 THE COURT: Okay.

14 MR. KERR: The final spring break for my
15 college son.

16 THE COURT: Okay.

17 Would you be available Friday the 11th?

18 (Discussion off the record.)

19 MR. KERR: Your Honor, I would waive 10
20 days, but I would like at least seven. So the 10th or
21 the 11th.

22 THE COURT: Friday the 11th I can get you
23 all on in the morning. Does that work for you all?

24 MR. TILLMAN: That works for me.

25 THE COURT: 9:30, Friday, March 11th?

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1 MR. KERR: That would work for me.

2 THE COURT: Let's do that. Let's put that
3 on, and then we'll come forward with a motion at that
4 time and your response. Okay?

5 MR. TILLMAN: Your Honor, without further
6 complications, do you want to set the trial date now
7 or do you want --

8 THE COURT: I'll set it then. We'll talk
9 about it.

10 MR. TILLMAN: Thank you.

11 MR. KERR: Thank you.

12 THE COURT: Thank you all.

13 Adjourned.

14 (The deposition was adjourned at 11:20 a.m.)
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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF BERKELEY): C-E-R-T-I-F-I-C-A-T-E
3

4 I, Karen Nellius, Court Reporter and Notary
5 Public, certify that the pages constitute a true and
6 accurate transcript of the hearing at that time and
7 place.

8 I further certify that I am not of counsel
9 or kin to any of the parties to this cause of action, nor
10 am I interested in any manner in its outcome.

11 IN WITNESS WHEREOF, I have hereunto set my
12 hand and seal this the 9th day of May, 2016.

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Karen Nellius
Notary Public for South Carolina
My Commission Expires:
November 14, 2024

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RAY SWARTZ & ASSOCIATES OF SOUTH CAROLINA 1-800-822-8711

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON

4 James Bradley Williams and
5 Robert Blair Kline, Jr.,

6 Plaintiffs,

7 vs. CASE NO. 2014-CP-10-05608

8 Merle S. Tamsberg,

9 Defendant.

10
11
12 Hearing before the Honorable Mikell R.
13 Scarborough, reported by Christine A. Smith, Court
14 Reporter and Notary Public, at 9:40 a.m. on
15 March 11, 2016 at 100 Broad Street, Charleston,
16 South Carolina.

17
18 **COPY**
19

20
21 Christine A. Smith, Court Reporter

22 Master-in-Equity

23 P.O. Box 30276

24 Charleston, South Carolina, 29417

25 (843) 958-5071

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P R O C E E D I N G S

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3 THE COURT: We're back on the record in the
4 case of Williams versus Tamsberg, 2014-5608. For the
5 Plaintiffs is Mr. Rob Kerr, and for the Defendant is
6 Mr. Matt Tillman and Ms. Jane Bouch. This is --
7 let's see.

8 We met, what, about ten days ago? We heard, I
9 think, the Plaintiffs' Motion for Summary Judgment
10 the Defendant's had recently filed. So we're really
11 sort of back on Defendant's Motion for Summary
12 Judgment.

13 Anything else that I might be missing in that
14 regard?

15 MR. TILLMAN: That's correct, Your Honor. The
16 only other thing is if you deny both or if the case
17 goes forward, I guess we set the trial -- I'm not
18 sure. I think the first hearing date was actually
19 supposed to be a pretrial?

20 THE COURT: Yes.

21 MR. TILLMAN: Obviously that's up to you, but
22 I did want to remind you of that.

23 THE COURT: I did get this week from Mr. Kerr
24 his Memo in Opposition to Defendant's Motion for
25 Summary Judgment, so I've had a chance to review

4

1 that, and you've had a chance to prepare for that. I
2 think that's what got us to this point, did it not?

3 MR. KERR: It did, Your Honor. The one thing,
4 for what it's worth is I do kind of reserve the right
5 to say that the motion that is being argued this
6 morning was late filed under the scheduling order. I
7 would simply make the record on that, please.

8 THE COURT: So noted. I'm going to let them
9 move forward.

10 MR. KERR: Thank you, Your Honor.

11 THE COURT: If you tell me that there's a
12 question, a genuine issue of material fact in this
13 case, I'll be glad to listen to that point as well.

14 So my notes say we were here on 3/2. Today is
15 3/11. That was nine days ago.

16 Who's going to argue the motion this morning?
17 Mr. Tillman?

18 MR. TILLMAN: Yes, sir.

19 THE COURT: Very good.

20 MR. TILLMAN: Just to refresh your memory this
21 is 45 and 47 Legare Street. Mr. Kerr's client owns
22 45. 47, obviously, my client owns. There is a
23 driveway easement right there on the border which
24 terminates where there used to be a garage in the
25 back of 47. I think everybody agrees that at the

1 present time there is a wall running down the border,
2 but there remains a gate in between 45 and 47, sort
3 of where the garage used to be, kind of where the
4 parking area would be. That's where we are today.

5 The relevant dates here are -- in 1911 you
6 have a deed when the property is split, and 47 --

7 THE COURT: There's a subdivision of the
8 property in there; is that right?

9 MR. TILLMAN: That's correct. Yes, Your
10 Honor. So back in 1911 that occurs when it's
11 conveyed that Ms. Dill, who at that time owned 47
12 Legare, the easement -- part of that deed -- as Your
13 Honor knows it's okay to put an easement in a deed.
14 It's perfectly enforceable just like a stand-alone
15 document. That deed importantly says that the
16 easement -- ingress/egress is to run with the land.

17 In 1971 something happened. I'm going to tell
18 you what I think happened based on what the documents
19 appear to show me. There is a 1971 covenant where
20 the owner of 45, Ms. Black, and the owner of 47, who
21 the bank has as trustee or executor for Ms. Dill, who
22 was the owner of 47, entered into this agreement.

23 It appears to me that at that time there must
24 have been some sort of question as to the extent of
25 the easement because the covenant says, and I won't

1 bore you with the exact language unless you want me
2 to, says that the owner of 45 Legare wishes to --
3 this is Ms. Black -- wishes to reaffirm the easement
4 to the extent agreed by the parties, so that would be
5 a reaffirmation of the 1911 deed reservation.

6 It also places restrictive covenants -- it
7 says, Running with the land, and provides that there
8 should be no buildings or obstructions precluding the
9 ingress/egress easement across 45. Again, that
10 covenant language, restrictive covenant language,
11 specifically says, It runs with the land.

12 So I think when we were here last time, the
13 argument was -- well, this isn't an easement in
14 gross. It's actually an easement appurtenant and the
15 reason is because there's no terminus. There may be
16 some other arguments, but it doesn't fit the elements
17 required for appurtenant easement. It's clear to me
18 that at this time Ms. Black, the owner of 45 Legare,
19 must have been somehow impeding the easement.

20 So they find it necessary to resolve whatever
21 dispute they had by reaffirming the easement, placing
22 these restrictive covenants on the property, and I'll
23 remind Your Honor from last time that as part of this
24 deal -- apparently the back part of the easement, the
25 back third or so -- the easement used to run all the

1 way down the property line -- the back third or so of
2 the easement was reconveyed from the bank over to 45,
3 so we have a shorter easement.

4 It's still there. It's reaffirmed. It
5 attaches -- it is part of a restrictive covenant that
6 specifically runs with the land. So to me that leads
7 to only one conclusion, that it's clear at the time
8 the parties intended to not only acknowledge the
9 existence of the easement but also to affirm that it
10 runs with the land, that it is an appurtenant
11 easement. It is not an in gross easement. There's
12 two reasons why I think that that is actually the
13 case as a matter of law such as we should get summary
14 judgment on the issue.

15 The number one reason is, why in the world
16 would they add restrictive covenants to this document
17 that run with the land that prevent obstruction of
18 the ingres/egress easement? If they didn't intend
19 the easement run with the land it would be a -- that
20 would be a waste. Number two, less than like
21 three months after the covenant is entered into
22 between the bank and Ms. Black the bank sells the
23 property.

24 Why in the world would they enter into an in
25 gross easement if they were going to turn around and

1 sell it? No doubt telling the buyer that you're
2 getting an easement. That doesn't make any sense at
3 all. I think there is really no issue of fact as to
4 whether this was intended to be an in gross or
5 appurtenant easement.

6 Also, one of the arguments that Mr. Kerr
7 brought up last time was the fact that there is no
8 terminus on the property and he cited the Steele
9 case. I'll just remind Your Honor that my argument
10 on that is -- it clearly has a terminus because
11 that's where the garage used to be. Just because an
12 easement happens to run down the property line
13 doesn't mean it doesn't terminate.

14 In 47 it's the same thing as the easement
15 running straight across the middle of the property or
16 to the back of the property at an angle. It ends at
17 the same place.

18 THE COURT: It touches on the entire southern
19 boundary, or whatever boundary it is, does it not?

20 MR. TILLMAN: Right. It does. The Steele
21 case -- I don't think it controls or is even helpful
22 because the Steele case, to me, was decided on the
23 actual necessity of the easement, not on the
24 terminus, and also, there's not a lot of discussion
25 about the terminus in the Steele case. Frankly, it

1 wouldn't make any sense. That kind of ruling, just a
2 general ruling that you can't have an easement
3 running down the border of your property would mean
4 you can never grant an easement that simply runs down
5 the border of your own property.

6 I think as a matter of law the Court ought to
7 find that we have appurtenant easement not in gross.
8 And then that brings us to the next issue, so
9 assuming that that's the ruling then we get to, well,
10 has the owner of 47 abandoned the easement? So
11 that's -- abandonment is a very, very difficult thing
12 to prove. The burden is on Mr. Kerr's client to show
13 abandonment by clear and unequivocal evidence.

14 The case we cited in our brief, Carolina Land
15 Company and also Judy versus Kennedy say, Lapse of
16 time and nonuse are not sufficient to prove
17 abandonment. There must be actual, "conclusively
18 manifesting present intention to relinquish the
19 easement or a purpose inconsistent with its further
20 existence."

21 Now, I can anticipate what Plaintiff is going
22 to say in response to that. They're going to say,
23 Well, they built this wall. The wall was built at
24 some point. There's no doubt about that, but the
25 fact of the matter is that they kept an access there.

1 between 47 and 45. There's a gate there. If there
2 was an intentional act to relinquish the easement,
3 why would they have any access at all? I don't have
4 access to my neighbor's yard through the fence. My
5 neighbor doesn't have access to my yard through the
6 fence. If anything, that is a demonstration that
7 they intended that the easement remain in use.

8 If you look at the cases we've cited, the
9 Carolina Land Company, that easement had been
10 reserved in a development deed in 1945. In 1973 the
11 owner of some lots in that development -- I'm sorry,
12 that easement I believe was a 30-foot road easement.

13 THE COURT: It's a road case, but basically it
14 stands for the proposition that when you plat out the
15 roads, easements, whatever they are, subdivided based
16 upon that, everybody in the subdivision has a right
17 to use it, correct?

18 MR. TILLMAN: Right. And another part of that
19 case was the abandonment issue. That was, look, you
20 waited from 1945 to 1973, however many years that
21 is -- I guess that's 18?

22 THE COURT: 28.

23 MR. TILLMAN: Whatever it is. So they waited
24 18 (sic) years and nobody even bothers to plat out the
25 road, and then 18 (sic) years later they go in there

1 and they grade it. They say, all right. We're
2 pushing this road right through your property. The
3 guy says, Wait a minute. You-all never even built
4 the easement or used it in any way. The Court said,
5 They don't have to. You have to show an intentional
6 act to relinquish your rights to the easement, and so
7 the abandonment argument was denied there.

8 In Judy versus Kennedy, it's sort of similar
9 although the actual road was being used. It just
10 happened to be not being used on the exact -- it
11 crisscrossed and crossed back and forth across the
12 easement, but the Court said, the easement doesn't
13 have to be used precisely as platted in order for
14 them to evidence their intent to continue using it as
15 an easement, and that's helpful in this case because
16 their argument is, well, all you're using it for is
17 access for mechanics and air conditioning people and
18 landscapers and that sort of thing to walk down the
19 easement.

20 Well, as we discussed last time, there's no
21 such thing as underburdening an easement. There is
22 such a thing as overburdening one. This would be an
23 underburdening of the easement. It would still be a
24 use of the easement. It would still be a fact
25 supporting the present intent to continue to use it

1 and not an abandonment.

2 I don't think there are any facts that show
3 what they need to show, and that is an actual act
4 evidencing the intent to abandon the easement. If
5 that was the case then a wall would have been
6 constructed straight down the line, and there would
7 have been no gate, and there would have been no
8 access.

9 Our next argument is on the Statute of
10 Limitations issue. I think the main issue here is --
11 I've noted in Mr. Kerr's brief that -- I think he
12 argues that this is not a legal issue. It's an
13 equitable issue. Therefore it's controlled by
14 laches. However, the existence of an easement is a
15 legal issue. The scope of an easement is equitable.
16 I don't think we have a scope issue here.

17 In other words, I don't think we -- if we have
18 an argument we have an argument as to, was it
19 terminated or was it not? Is it an easement or is it
20 not? It's a legal issue. If you look at a case I
21 cited, Eldridge versus the City of Greenwood in my
22 brief -- and I'm happy to bring up copies of any of
23 these if Your Honor needs them.

24 THE COURT: That's the railroad track case out
25 of Greenwood, right?

1 MR. TILLMAN: Right. The only thing I cited
2 that for was -- it says, Abandonment is also a legal
3 issue. So we have existence of an easement,
4 abandonment, legal issues, and therefore they're
5 governed by the Statute of Limitations. Well, they
6 pled declaratory judgment, trespassing, and
7 abandonment. The Statute of Limitations for trespass
8 is three years. There's no doubt about that. The
9 statute says it.

10 What we have here is they bought the property
11 in 2004. The Plaintiff, Mr. Williams, knew right
12 away that the easement existed, and he also knew that
13 he had a claim for abandonment. He said in
14 Paragraph 34 of his deposition -- and some of this is
15 paraphrased, Your Honor. I'll read all the language
16 if you need me to. He said, Generally, we also knew
17 that the wall -- our position was that the easement
18 was abandoned ever since the first day that the wall
19 went up. It was never a concern to us. It was never
20 used by her ever. And then later on in the same
21 answer he says, It was abandoned by her in our
22 opinion.

23 So they knew really early on that, number one,
24 they have an easement that they think's not valid,
25 and number two, they have an easement that they think

1 has been abandoned. They didn't bring this case
2 until -- whenever it was --

3 THE COURT: 2014.

4 MR. TILLMAN: I can't believe I don't know
5 that off the top of my head. 2014. So we've got ten
6 years with what I think is a three-year Statute of
7 Limitations. Now, in all fairness there's no
8 specific mention of abandonment in the Statute of
9 Limitations, but I think all of the general
10 principals behind such a statute apply here.

11 I mean, for instance, if you've got an
12 abandonment claim in 2004 and you hold onto it
13 strategically until the person who -- the owner of
14 the dominant parcel goes to sell the property, you
15 can drop it on them right there. They're in a bad
16 spot and you can extract pretty big concessions at
17 that point depending on how desperate they are. So I
18 think there's a real reason why the three-year
19 Statute of Limitations ought to be applied both to
20 the trespass and to the abandonment cause of action.

21 Frankly -- although I think it doesn't matter
22 because it's clearly an appurtenant easement to the
23 easement termination issue as well. And then we also
24 have two other arguments -- prescriptive easement.
25 Prescriptive easement only comes into play if you

1 rule that we don't have an actual easement. I don't
2 know whether you want me to reserve that?

3 THE COURT: Just reserve that.

4 MR. TILLMAN: And then laches -- again, I
5 don't think there's -- the only equitable issue here
6 would be the actual scope of the easement. I don't
7 think there's an argument to that.

8 THE COURT: Isn't it pretty clearly eight
9 foot, and it just shows it's eight foot running to --
10 originally all the way to the back and then in '71 it
11 runs to whatever it is, Points F and G, or whatever
12 they are?

13 MR. TILLMAN: Right. And you know, if
14 something comes up with the scope I'll reserve that
15 for trial. I just don't see laches as something that
16 I really can get a lot of traction on at this point.

17 THE COURT: Your argument is it's a legal
18 question?

19 MR. TILLMAN: Right. Exactly, Your Honor. I
20 think that's all we have on that. I appreciate your
21 time.

22 THE COURT: Very good. Mr. Kerr?

23 MR. KERR: Thank you, Your Honor. Mr. Tillman
24 may be bad at math, but he's very good at advocacy.
25 I'll give him that, however I think that there is --

1 THE COURT: Well, you've only got two to fight
2 with today.

3 MR. KERR: That's true. I do feel a little
4 better about my opportunity here.

5 Your Honor, I think that one of the hard parts
6 of this case is that we are arguing what is to
7 Counsel, to the Court, a pretty archaic principal of
8 law about the terminus of an easement. Regardless of
9 how we feel about it, and whether it is appropriate,
10 it is the sum of law of the state. An appurtenant
11 easement has four factors, two of which we've argued.
12 One is the necessity --

13 THE COURT: Let me ask you this. We beat
14 that pretty good last time, and I don't want to cut
15 you off, but in thinking about this case and
16 preparing for today I started thinking about this in
17 terms of the Carolina Land case and the fact that
18 this easement originated with the original owner of
19 both lots, correct?

20 MR. KERR: Correct.

21 THE COURT: And in fact, the easement was
22 created at the time that that original owner, who I
23 believe was Dill?

24 MR. KERR: Hinson.

25 THE COURT: Hinson? Hinson was conveying to

1 Dill maybe?

2 MR. KERR: Yes. Uncle and niece.

3 THE COURT: And created this easement at the
4 time he created this subdivision?

5 MR. KERR: Yes, sir.

6 THE COURT: How is this not then covered by
7 the Carolina Land case?

8 MR. KERR: Your Honor, we still think that a
9 terminus of the easement, as it's described in these
10 plats, does not end, which the Latin word for end is
11 terminus.

12 THE COURT: Right.

13 MR. KERR: It doesn't end at the dominant
14 parcel. Your Honor, just mentioned how F and H
15 became the new terminus.

16 THE COURT: You better watch how you say that.
17 Letters F and H.

18 MR. KERR: It's like the Republican debates.

19 The terminus easement was initially the back
20 side of the property at 45 and 47. The front was --

21 THE COURT: And went all the way down that
22 line; did it not?

23 MR. KERR: And ended at Legare Street, a
24 public thoroughfare.

25 THE COURT: Right.

1 MR. KERR: And it was described as such. Even
2 in 1971 when it was truncated, it was truncated back
3 to two points on a plat that were not terminating on
4 47. So while this may be sort of archaic, it is the
5 law of South Carolina. I've beat it around a good
6 bit, too, since we were last here, and one of the
7 things that's not in evidence, but I'll mention it,
8 is that the means on property outlined from the
9 University of South Carolina School of Law addresses
10 this, and it shows three rectangles, essentially this
11 case, as not constituting an easement appurtenant.

12 We've put it to property lawyers who say it's
13 a subtle proposition. You have to have a description
14 of the easement that shows that the terminus -- not
15 that it runs as a battery, and that frankly is the
16 Steele case that Counsel mentioned that we rely on in
17 our brief.

18 So I think that there is a very hyper
19 technical argument here based on several maybe
20 archaic laws in the State of South Carolina that
21 regardless of 1911 or 1971, there's no terminus.
22 That's what's required to be an easement appurtenant.
23 Of course there's the necessity which we talked about
24 last week and how -- maybe it is not some necessity
25 at this point given the fact that the garage was down

1 and the easement, the eight foot strip, is not being
2 used as some sort of carriageway or driveway.

3 Your Honor, further with respect to 1971, I
4 agree with Counsel that something was afoot. There
5 was something wrong in 1971 that the bank sought to
6 cure. I liken that to putting lipstick on a pig.
7 They reaffirm an easement that doesn't have a
8 terminus as required on the dominant property. They
9 then employ the use of a covenant.

10 Your Honor, of course, a covenant is an
11 agreement to do or refrain from doing something to
12 real property. An easement is an interest that gives
13 one person a right to use the property. So one is a
14 prohibition and one is the ability to actively use.
15 Using the covenant doesn't get them to where they
16 need to be because they're left with this alleged
17 easement that doesn't have a terminus on the dominant
18 estate, and moreover they have a covenant that simply
19 precludes the use of that eight-foot strip to build
20 anything or to block it.

21 That doesn't give, by it's plain language, and
22 by the actual definition of a restrictive covenant --
23 that doesn't give a right to access or use. So I
24 think they saw that there was something wrong.
25 Mr. Tillman speculates what might have happened. I

1 speculate as well. I think -- I have looked at it
2 and said, uh-oh, this is not an easement that runs
3 with the land. This is an easement in gross that was
4 personal between Hinson and Dill, and let's figure
5 out a way to cure that.

6 They attempted to reaffirm something that was
7 no longer in existence and then used a covenant which
8 restricts the use but doesn't provide access or the
9 ability to use. So I think that the bank saw
10 something was wrong and they made a mistake in trying
11 to fix it.

12 With respect to the covenant issue, Your
13 Honor, we don't think Summary Judgment on the fact
14 that the covenant exists. We don't think that there
15 are any legal points to support the argument that the
16 covenant somehow rode to the rescue. It did not.

17 THE COURT: How about the language at the
18 bottom of the first page of the covenant where it
19 says that the -- as you say, the question has arisen
20 to the extent of said easement and Margarete
21 DeSaussure Black, the owner in fee simple of this
22 land encumbered by said easement, "Desires to
23 reaffirm the existence of said easement," -- that's
24 pretty straightforward -- to the extent as agreed
25 upon by the parties by the exertion of the with

1 incoming. She's clearly reaffirming the existence of
2 the easement at that time.

3 MR. KERR: But if the easement didn't exist at
4 that time, there's nothing to reaffirm. Our position
5 is that Hinson to Dill was an easement in gross.

6 THE COURT: Very good. I'm going to grant
7 Defendant's Motion for Summary Judgment and deny the
8 Plaintiffs' Motion for Summary Judgment.

9 What do you have -- let me ask this question
10 just for the record. Your client's been there since
11 2004. The Defendants have been there for how long?

12 MS. BOUCH: May 11, 1988 is the date of the
13 deed.

14 THE COURT: 16 years at the time the case was
15 brought. I think it's an easement appurtenant. I
16 think it's under the Carolina Land case applicable as
17 an easement appurtenant and further that it's not
18 been abandoned. I would be glad to hear from you if
19 you've got some evidence on abandonment, but I see
20 that as a question of law and I find that the
21 easement is there. It was set forth in 1911. It was
22 reaffirmed in '71.

23 Furthermore, I think the Plaintiffs have
24 waited too long to bring the case. I don't know why
25 they waited ten years to bring it, so I think if

1 their question was it abandoned or should have been
2 abandoned, it should have been brought prior to that
3 time.

4 I'm sorry to do that to you, Mr. Kerr, but
5 that's my ruling.

6 MR. KERR: I understand.

7 THE COURT: Mr. Tillman, can you prepare me an
8 order and run it by Mr. Kerr so he knows what we're
9 doing?

10 MR. TILLMAN: Yes, sir, I will.

11 THE COURT: Very good.

12 (The proceedings were concluded at 10:04 a.m.)
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1 State of South Carolina)
2 County of Charleston) C E R T I F I C A T E
3

4 I, Christine A. Smith, Court Reporter and
5 Notary Public for the State of South Carolina at
6 Large, do hereby certify that the foregoing
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to
9 nor counsel for any party to the cause pending or
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 13th day of May, 2016 at
13 Charleston, Charleston County, South Carolina.
14

15
16
17 

18 Christine A. Smith
19 Notary Public
20 My Commission Expires
21 May 12, 2021
22
23
24
25

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

James Bradley Williams and)
Robert Blair Kline, Jr.,)
Plaintiffs,)
v.) Case No.:
Merle S. Tamsberg,) 2014-CP-10-5608
Defendant.)

DEPOSITION OF: JAMES BRADLEY WILLIAMS

DATE TAKEN: Thursday, November 5, 2015

TIME: 10:00 A.M.

PLACE: Moore & Van Allen
78 Wentworth Street, Suite 200
Charleston, South Carolina

REPORTED BY: MARY ANN RIDENOUR, RPR, CLR
Registered Professional Reporter,
Certified LiveNote Reporter
and Notary Public

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RECORD 150

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25 STIPULATIONS

It is hereby stipulated and agreed by and between
the parties hereto, through their respective counsel,
that the reading and signing of the transcript is
waived by the Deponent.

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1 A. Does not insure.

2 Q. So are -- and you're not -- are you familiar,
3 I suppose, with this title policy or the fact that
4 it -- the title company seems to have taken an
5 exception to that easement in insuring your property?

6 A. I was not aware of that, until we saw this
7 document recently.

8 Q. Okay.

9 A. At the time, I don't remember seeing it. I
10 mean, title insurance policy, it insures your title. I
11 don't know that we even read it.

12 Q. Okay. Why wait so many years to bring a
13 lawsuit?

14 A. Why? Rob told me you would ask that. And
15 when we bought the house, Mr. Tamsberg had terminal
16 cancer. We knew the easement was there. It was
17 changing hands. It would have been a good time to get
18 it sorted out. But we didn't want to move in and sue a
19 couple that was dealing with cancer. Then he died.
20 Again, we could have done it. But we didn't feel
21 comfortable suing a widow who just lost her husband to
22 cancer.

23 We also noted the wall. And our position was,
24 that easement was abandoned ever since the first day
25 that wall went up. It was never a concern to us. It

Carolina Reporting

1 was never used by her, ever. The only time it was ever
2 used was as -- for her landscaping people to walk down
3 her driveway and go through her gate. It was never
4 used as a carriage way. It was abandoned, in our
5 opinion. So there was no reason to ever bring it up.

6 Q. Okay.

7 A. Last year, she walked over and said, Your
8 fence is coming down. We'll be using your driveway as
9 easement to the back.

10 And, you know, we said, We'll have to let a judge
11 decide that. We don't agree that. We'll have a judge
12 decide it.

13 Her response was, There will be a lot of lawyers
14 involved and a lot of money involved, if we didn't do
15 what she said. So here we are.

16 Q. Okay. So back to Ms. Tamsberg's use of the
17 easement. You say she never used it, but then that
18 some landscapers used it. How exactly -- can you give
19 me some more detail about her use over the years?

20 A. She never trespassed on our property without
21 our permission. She would ask, Is it okay if the
22 landscapers walk through? We're good neighbors. Sure.
23 No worries with that. That's the extent of it.

24 Q. Okay. So you --

25 A. We were neighborly. If she wanted -- needed

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

2014-CP-10-05608

JAMES BRADLEY WILLIAMS and
ROBERT BLAIR KLINE, JR.,

Plaintiffs,

v.

MERLE S. TAMSBERG,

Defendant.

AFFIDAVIT OF ROBERT BLAIR KLINE

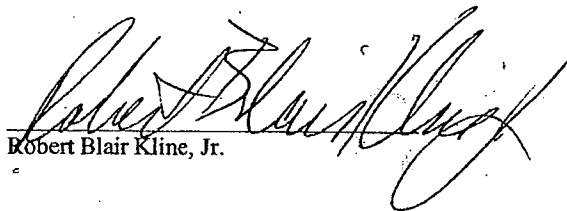
JR.

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CLERK OF COURT

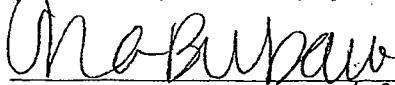
Personally appeared before me Robert Blair Kline, Jr., who being duly sworn, deposes and states the following:

1. That he is over eighteen years of age and is of sound mind;
2. That he and James Bradley Williams bought 45 Legare Street on May 17, 2004;
3. That when they bought 45 Legare, the garage no longer existed at 47 Legare, and the area where the garage appears to have been, was residential space;
4. That when they first saw the property prior to purchase, the Tamsbergs, the owners of 47 Legare, were in the process of replacing a fence on the property line between 45 Legare and 47 Legare with a masonry wall;
5. That the wall was completed either shortly before or shortly after they purchased 45 Legare; and
6. That when the wall was completed, the only entrance to 47 Legare from 45 Legare was a foot gate, between three and four feet in width.

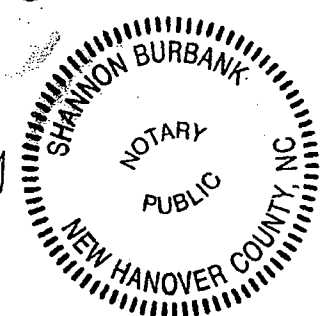
FURTHER AFFIANT SAYETH NOT.


Robert Blair Kline, Jr.

Sworn to me before me this
23 day of December 2015


Shannon Burbank

Notary Public for South Carolina North Carolina New Hanover County
My commission expires 05/27/19



CHARLESTON\626947v1

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

JAMES BRADLEY WILLIAMS and
ROBERT BLAIR KLINE, JR.,

Plaintiffs,

vs.

MERLE S. TAMSBERG,

Defendant.

Case No. 2014-CP-10-05608

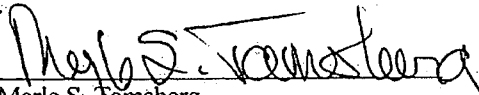
**AFFIDAVIT OF MERLE S.
TAMSBERG**

PERSONALLY APPEARED before Merle S. Tamsberg who, first being duly sworn,
deposes and says:

1. I own the property located at 47 Legare Street, Charleston, South Carolina.
2. The Easement at issue in this case has been used continuously by me, members of my family, and various guests, tradesmen, and other permittees since my late husband and I purchased the home in 1988.
3. The Easement provides the only method of bringing large-scale appliances, equipment, and machinery to the rear of the property at 47 Legare Street.
4. The Easement provides access to the only area suitable for off-street parking for more than one vehicle for 47 Legare Street. I have only one small parking spot at the front of 47 Legare Street, and this parking spot is so narrow that one can pull a modern car into the spot only with difficulty. I purchased the home based in part on the fact that the Easement could provide such parking
5. In addition to foot traffic, my family and I have driven a golf cart down the

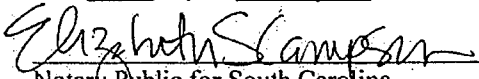
Easement, parking it in the rear of 47 Legare Street.

FURTHER THIS AFFIANT SAYETH NOT.


Merle S. Ramsberg

SWORN TO AND SUBSCRIBED BEFORE ME

This 1st day of March, 2016


Notary Public for South Carolina
My Commission Expires: 11/12/19

The State of South Carolina,

KNOW ALL MEN BY THESE PRESENTS, THAT

I, W. H. Hinson, do hereby certify that the sum of Five (\$5.00) Dollars and other valuable consideration Dollars, to me in hand paid at and before the sealing of these Presents by Julia R. Dill in the State aforesaid the receipt whereof is briefly acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Julia R. Dill

All that piece, parcel or lot of land with the buildings and improvements thereon, situate, being and being in the City of Charleston, State aforesaid, on the West side of Legare Street, formerly Friend Street, being the northernmost part of lot now or formerly known as #47 Legare Street, measuring and containing in front on Legare Street thirty-eight (38) feet eight (8) inches, and the same on the back line; On the North line one hundred and eighty-four (164) feet eight (8) inches, and on the South line one hundred and eighty-three (163) feet six (6) inches. Cutting and bounding north on the property formerly of William Wilkinson and now, recently occupied or owned by C. F. Middleton; East on Legare Street, bounded by Friend Street aforesaid; South on the northernmost portion of the lot now or formerly known as #47 Legare Street, and belonging to me, the said W. H. Hinson, and to the West on the share yard of St. Peter's Church.

Also, the full and free use and enjoyment, as an easement to run with the land of the right of ingress, egress and regress, in, over, through and upon the alley, being eight (8) feet wide, as a drive way or carriage way, situate, being and being immediately to the South of the above described property, and being the southern boundary of said above described lot of land.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said Julia R. Dill, her Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators to warrant and forever defend all and singular the said premises unto the said Julia R. Dill, her Heirs and Assigns, against me and my Heirs, and all persons whomsoever lawfully claiming, or to claim the same, or any part thereof.

WITNESS my Hand and Seal this 16th day of April in the year of our Lord one thousand nine hundred and eleven and in the one hundred and thirty-fifth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered in the presence of

J. Almon Ball
Geo. W. Dill

W. H. Hinson (L.S.)
(L.S.)

EXHIBIT

A

THE STATE OF SOUTH CAROLINA,

Charleston County

PERSONALLY appeared before me J. Alwyn Ball
 and made oath that he saw the within named W. G. Hinson
 sign, seal and as his act and deed, deliver the within written Deed; and that he with John R. Rouse
 witnessed the execution thereof.

SWORN to before me this 15th day of

AprilA. D. 1911

G. Lee Holmes (Seal)
Notary Public

(Notarial
Seal)

THE STATE OF SOUTH CAROLINA,

Renunciation of Dower.

I, _____
 do hereby certify unto all whom it may concern that Mrs. _____
 the wife of the within named _____
 did this day appear before me, and upon being privately and separately examined by me did declare that she does freely, voluntarily, and without
 any compulsion, dread, or fear of any person or persons whatsoever, renounce, release and forever relinquish unto the within named _____
 Heirs and Assigns, all her interest and estate, and also all her right and claim Dower, of, in or to all and singular the premises within mentioned
 and released.

Given under my hand and seal, this _____ day of _____ Anno Domini 19____

Recorded herein this 25th day of March A. D. 1912 and

delivered to Dill Ball Company being first endorsed as recorded by County Auditor.

Julius E. Cogswell
 Register Meane Conveyance, Charleston County, S. C.

per clerk M. C. V.

STATE OF SOUTH CAROLINA:

IN THE NAME OF GOD, AMEN.

I, William O. Hinson of James Island, in the State aforesaid, being of sound and disposing mind and memory, revoking all wills heretofore made and executed by me, do hereby make, publish and declare my last will and Testament as follows:

After the payment of my debts, I give and bequeath to my friend, Ellen Pitt Hinson, Librarian of the Charleston Library, and to her successors in office, my private library contained in my home at "Stiles Point" upon James Island, consisting of books, magazines, pamphlets and other papers; giving unto my said friend full power and authority in the exercise of her discretion to take for this purpose my entire library as aforesaid or such books, magazines, manuscripts and other papers as in her good judgment may prove an addition or may prove of value to the said Charleston Library. And in carry out my purpose touching this bequest, I further give to my said friend, Ellen Pitt Hinson, her successors in office, the sum of One thousand and no/100 (\$1,000.00) Dollars, the same to be used in purchasing suitable books in which to shelve and keep said library; and I give to bind or rebind any of said volumes so far as may be necessary and further to meet any and all expenses which may be found necessary in the full discharge of this duty.

The foregoing gifts and all duties attached thereto are upon the following trust, that is to say: in trust for the Charleston Library and its successors in office.

said William should die without issue living at the time of his death, then I give the above plantations to his brother, Lee Mikell, absolutely. Also I give to my great nephew William absolutely all the furniture and household appliances including silver and books, except as above disposed, in my residence at "Stiles Point"; also all the stock on said plantation including horses, mules and cattle and all plantation tools, including boats and flats and all provisions and cotton seed on said plantation at the time of the division of my estate.

3. I give, devise and bequeath to my nieces, Julia H. Dill, Frances H. Dill and Pauline R. Dill, daughters of my sister, Frances A. Dill, Ten Thousand (\$10,000.00) Dollars; also my plantation on the West side of the Secessionville Road, adjoining the lands of the estate of T. H. Grisham, containing about three hundred and eighteen (318) acres; also all of my real estate in Henderson and Polk Counties, in the State of North Carolina; also my house and lot on Legare Street, in the City of Charleston, known as #85.

4. I give, devise and bequeath to my niece, Lena Mikell, my plantation on James Island known as "Orange Grove", containing about two hundred (200) acres; also my plantation known as "Mikell's", containing about two hundred (200) acres; also that known as "Moleads", containing about two hundred (200) acres; also one acre of land, the same being a portion of the tract of land containing about forty (40) acres, lying between the lands owned by Robert Hec on the East and by the estate of Robert Leiby on the West, which said tract of land I

power and authority to sell and convey both real and
personal property, and to perform all other acts nec-
essary to carry into effect the intent of each
member as in their judgment for the judgment or either
of them will best promote the interest of the parties
interested. If either of the above named shall fail to
qualify, or either of them shall die or have qualifi-
cation, then I invest the one qualified or the survivors
with all the powers herein given to the executors and
administrators. If neither shall qualify or shall die
and it becomes necessary to appoint administrators or
administratrix with the will annexed, then I invest them
with the powers herein given to the said executors.

Witness my hand and seal this 10th day of May
in the Year of Our Lord Nineteen Hundred and Eighteen.

Wm. H. Sullivan

Signed, sealed, published and declared by William
H. Sullivan, to his last will and testament, in our presence
and at his request, and in the presence of the presence
of each other, subscribed and sworn to at Kingston, New York.

William H. Sullivan

Wm. H. Sullivan

Wm. H. Sullivan

PAULINE R. DILL

461

BOOK 2-39-TITLE TO REAL ESTATE

TO

HENRY W. deSAUSSURE, M.D.

STATE OF SOUTH CAROLINA.

KNOW ALL MEN BY THESE PRESENTS, THAT

I, Pauline R. Dill,

in the State aforesaid

in consideration of the sum of Seventy-five Hundred (\$75.00.00) Dollars
to me in hand paid at and before the sealing of these Presents by Henry W. deSausure, M.D.

in the State aforesaid the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said

Henry W. deSausure, M.D., his heirs and assigns:

All that piece, parcel or lot of land with the buildings and improvements thereon, situate, lying and being in the City of Charleston, State aforesaid, on the West side of Lagere Street, formerly Friend Street, being the Southern most part of the lot formerly known as #47 Lagere Street. The property hereby conveyed being now known as #45 Lagere Street. Measuring and containing in front on Lagere Street Forty-five (45) feet Four (4) inches, and the same on the back line; on the North line One Hundred and Sixty-three (163) feet Six (6) inches, and on the South line One Hundred and Sixty-two (162) feet be the said dimensions more or less. Putting and Bounding North on the property formerly of William C. Hinson, deceased, but now of Julia R. Dill Rogers; East on Lagere Street, formerly Friend Street aforesaid; and South on the property formerly of Henry Deas and now or lately of Henry J. O'Neill; and on the West on the grave yard of St. Peters Church. The said property having been devised to Julia R. Dill Rogers (born Dill); Pauline R. Dill and Frances H. Dill by the late William C. Hinson by Will dated 23th May 1917, admitted to Probate in Common Form by the Court of Probate for Charleston County July 17th, 1919.

Being the same property conveyed to me, the said Pauline R. Dill, by Julia R. Dill Rogers and Frances H. Dill by deed dated the 2nd day of July 1920 and recorded in the R. M. C. Office for Charleston County in Book 2-29, page 216.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said

Henry W. deSausure, M.D., his

Heirs and Assigns forever.

And I do hereby bind myself and my Heirs Executors and Administrators to warrant and

forever defend all and singular the said premises unto the said Henry W. deSausure, M.D., his

Heirs and Assigns, against me and my

Heirs,

and all persons whomsoever

lawfully claiming, or to claim the same, or any part thereof

WITNESS my Hand and Seal, this 2nd day of November

in the year of our Lord one thousand nine hundred and thirty-six

in the one hundred and sixty-first year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered
in the Presence of

Pauline R. Dill

(L.S.)
(L.S.)

E. P. Ravenel
G.L.B. Rivers

Defendant 0003

THE STATE OF SOUTH CAROLINA,

CHARLESTON COUNTY

PERSONALLY appeared before me G. L. B. Riversand made oath that he saw the within named Paulina E. Hillsign, seal and as her as and deed, deliver the within written Deed; and that he withE. P. Ravenel

witnessed the execution thereof.

SWORN to before me, this 2nd day ofNovember A. D. 1936

G. L. B. Rivers

Julien Mitchell Jr.
Notary Public, S.C.(Seal)
(NOTARIAL SEAL OF)
(JULIAN MITCHELL JR.)
(N.P. FOR S.C.)

THE STATE OF SOUTH CAROLINA,

RENUNCIATION OF DOWER

I,

do hereby certify unto all whom it may concern that Mrs.

the wife of the within named

did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily and without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within named

Heirs and Assigns, all her interest and estate, and also all her right and claim of Dower, of, in or to all and singular the premises within mentioned and released.

Given under my hand and seal, this _____ day of _____ Anno Domini, 19__

I certify that the original instrument here recorded being first endorsed as recorded by the County Auditor, was filed, indexed, and recorded at 12:45 P. M. o'clock this 2nd day of November A. D. 1936 in Title to Real Estate Book F-39 U.S.I.R. Doc. Stamp \$7.50 affixed. Page 462, and delivered to Mitchell & Horlbeck /S. C. Doc. Stamp \$15.00 affixed.

JULIUS E. COTSWELL, Register Mesne Conveyance.
Per Clk. L.C.A.

Defendant 0004

BOOK 96 145

Form No. 100-Title to Estate by a Corporation
REV. 1938

The State of South Carolina,
COUNTY OF CHARLESTON

WHEREAS, by deed dated April 15, 1911, recorded in the R. M. C. Office for Charleston County in Book W-25, Page 313, William G. Hinson conveyed unto Julia R. Dill property located in City of Charleston, South Carolina, known as 47 Legare Street, together with "Also the full free use and enjoyment as an easement to run with the land of the right of ingress, egress and regress, in, over, through and upon the alleyway 8 ft. wide as a driveway and carriageway, situate, lying and being immediately to the south of the above described property and being the southern boundary of said above described lot of land.", and

WHEREAS, Julia R. Dill, later Julia D. Rogers, died December 4, 1970, leaving her Last Will and Testament whereby the South Carolina National Bank of Charleston was named as Executor and Trustee, and

WHEREAS, the property over which the easement above referred to runs, known as 45 Legare Street, City of Charleston, South Carolina, is now owned by Margarette deSaussure Black, and

WHEREAS, a question has arisen as to the extent of said easement and The South Carolina National Bank of Charleston as Executor and Trustee under the Last Will and Testament of Julia D. Rogers, pursuant to the powers granted under the said Last Will and Testament, has agreed, for the consideration hereinafter expressed, to convey the property hereinafter described;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that THE SOUTH CAROLINA NATIONAL BANK OF CHARLESTON, as Executor and Trustee under the Last Will and Testament of Julia D. Rogers, pursuant to the powers granted under the said Last Will and Testament

for and in consideration of the sum of
ONE HUNDRED AND 00/100 (\$100.00) Dollars

to it in hand paid of and before the sealing of these presents, by Margarette deSaussure Black
45 Legare St. Charleston, S.C.
in the State aforesaid.

(the receipt whereof is hereby acknowledged)

have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release, un-

to the said Margarette deSaussure Black, her heirs and assigns forever, all the right, title and interest of the Grantor herein, including specifically an interest in the nature of an easement of right-of-way granted in deed of William G. Hinson to Julia R. Dill contained in deed dated April 15, 1911, recorded in the R. M. C. Office for Charleston County in Book W-25, Page 313, in and to the following described property, to-wit:

ALL that certain piece, parcel or lot of land, in the City of Charleston, State of South Carolina, being a strip of land eight (8') feet wide and lying shown on "Plat of Number 47 Legare Street, Charleston, South Carolina", made by Cummings & McCrady, Inc., Architects-Engineers, February 1971, as enclosed within the letters F. C. C. R. F.

Being a portion of the property conveyed unto Julia R. Dill, later Julia D. Rogers by deed of William G. Hinson dated April 15, 1911, recorded in the R. M. C. Office for Charleston County in Book W-25, Page 313.

rear part of
easement
conveyed back to
owner of 45

See COVENANT # 96/8 - same date

E 4/5/71
R 4/6/71

Jan 96 AM 8

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

C O V E N A N T

WHEREAS, by deed dated April 15, 1911, recorded in the R. M. C. Office for Charleston County in Book W-25, Page 313, William G. Hinson conveyed unto Julia R. Dill property located in the City of Charleston, South Carolina, known as 47 Legare Street and a part of the premises conveyed was "Also the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress and regress, in, over, through and upon the alleyway 8 ft. wide as a driveway and carriageway, situate, lying and being immediately to the south of the above described property and being the southern boundary of said above described lot of land.", and

WHEREAS, the premises encumbered with the easement above described, known as 45 Legare Street, Charleston, South Carolina, is now vested in Margarette deSaussure Black, she having acquired title to the same under the Last Will and Testament of Henry W. deSaussure, who died March 13, 1955, and by various deeds recorded in the R.M.C. Office for Charleston County in Book X-60, Page 470, and Book L-72, Page 80, and

WHEREAS, the said Julia R. Dill, later Julia Dill Rogers, died December 4, 1970, leaving her Last Will and Testament dated November 21, 1968, wherein she devised the residue of her estate unto the South Carolina National Bank of Charleston as Trustee, etc. and named the South Carolina National Bank of Charleston as Executor of her Last Will and Testament, and

WHEREAS, the area encumbered with said easement above referred to is more particularly shown on a plat of Number 47 Legare Street, Charleston, South Carolina, made by Cummings & McCrady, Inc., Engineers, February 1971, as enclosed within the letters B, E, F, G, C, H, B, and

WHEREAS, a question has arisen to the extent of said easement and Margarette deSaussure Black, the owner in fee simple of the strip of land encumbered by said easement, desires to reaffirm the existence of said easement, to the extent as agreed upon by the parties, by the execution of the within covenant,

EXHIBIT

B

"NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that in consideration of the premises and the further sum of ONE HUNDRED and 00/100 (\$100.00) DOLLARS paid by the South Carolina National Bank of Charleston, as Trustee and Executor under the Last Will and Testament of Julia Dill Rogers, deceased, the receipt whereof is hereby acknowledged, the undersigned, Margarete deSaussure Black, the owner in fee simple of Number 45 Legare Street, Charleston, South Carolina (more fully described in deed recorded in the R.M.C. Office for Charleston County in Book L-72, Page 40, hereby covenants and agrees that the strip of land located on the west side of Legare Street in the City of Charleston, State of South Carolina, being eight feet in width and 101.25 feet in depth and being more particularly shown on plat of Number 47 Legare Street, Charleston, South Carolina, made by Cummings & McCrady, Inc., Engineers, dated February, 1971, as enclosed within the letters, B, E, F, H, B, the line F, H being the terminus thereof, shall be subject to the following restrictions, limitations and rights as to the future use of said strip of land:

- (1) That no building or other structure shall be erected thereon.
- (2) That no obstruction shall be placed or permitted to remain thereon so as to prevent the right of ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriageway to the owner of Number 47 Legare Street.

The aforesaid covenants, restrictions and limitations shall be covenants running with the land and shall be binding on Margarete deSaussure Black, her heirs, assigns and successors in title.

WITNESS my hand and seal this 5 day of April, 1971.

IN THE PRESENCE OF:

James D. Jones
Judith A. Taylor

Margarete deSaussure Black
Margarete deSaussure Black

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PERSONALLY appeared before me Lynda D. Fuller
and made oath that she saw the within named Margarett
deSaussure Black sign, seal, and as her act and deed, deliver
the within written Deed, and that she with Quintil A.
Taylor witnessed the execution thereof.

SWORN to before me this Lynda D. Fuller
5 day of April, 1971.

B. Pearson Moore (L.S.)
Notary Public for South Carolina

My Commission expires 5 Dec, 1980

Sumner, Wheeler, Stevenson & Patterson

1.75
Plat 1.00
2.75

4-3-13-21
07

Filed, Indexed and Recorded

april 6 1921 12:45

DATE TIME
Book 96 Page 8

Robert H. Cantor
Deputy Clerk, Court House
Charleston County, S. C.

A97-172

...JULIA DILL ROGERS, being and residing at the property hereinafter described, died on November 2, 1936, leaving of full force and effect her last Will and Testament, dated November 2, 1936, by which she devised said property to The South Carolina National Bank of Charleston, as Trustee, with full power of sale "to sell for cash, or for credit at public or private sale," and the said Bank was also named and qualified as Executor of said Estate and was given like power of sale.

KNOW ALL MEN BY THESE PRESENTS, THAT

The South Carolina National Bank of Charleston, as Executor and as Trustee under the Will of Julia Dill Rogers, in the exercise of said power of sale and in the exercise of all other powers it hereto enabling,

in the State aforesaid, in consideration of the sum of Forty Three Thousand (\$43,000.00) DOLLARS,

to and before the signing of these presents by Nancy M. Linton, 21 Meeting Street, Charleston, S. C.

in the State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said Nancy M. Linton, her heirs and assigns forever:

ALL that piece, parcel or lot of land, with the buildings and improvements thereon, situate, lying and being on the West side of Legare Street, in the City of Charleston, County and State aforesaid, known in the present numbering of city streets as No. 47 Legare Street, and more particularly shown within the lines lettered AB, BC, CD, and DA, on a plat thereof by Cummings & McCrady, Inc., dated February 1971, recorded in Plat Book O, page 7, in the R. M. C. Office for Charleston County, S. C.

Said lot having such size, shape, dimensions, location, buttings and boundings as are shown on said plat.

Being the same property conveyed to Julia R. Dill by W. G. Hinson by deed dated April 15, 1911, recorded in Book W-23, page 313, in said R. M. C. Office, and by her, as Julia Dill Rogers, devised to the Grantor in her last Will and Testament dated November 22, 1936, duly admitted to probate in the Probate Court for Charleston County and of record in said Court as File No. 70-640.

Together with an easement, to run with the land, over an adjoining strip of land shown on said plat as enclosed within the letters B, E, F, H, and B, for ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriage way for the owner of Number 37 Legare Street described above, as conveyed by W. G. Hinson less a portion shown on said plat within the letters F, G, C, H and F, released by instrument recorded in Book V-86, page 145. The strip covered by said easement is also covered by restrictive covenants recorded in Book V-86, page 8.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS, that Nancy M. Linton in the State aforesaid, for and in consideration of the sum of Three Hundred Seventy Two Thousand and 00/100 (\$372,000.00) Dollars, to her in hand paid at and before the sealing of these presents by William T. Tamsberg and Merle S. Tamsberg, in the State aforesaid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the said William T. Tamsberg and Merle S. Tamsberg, their heirs and assigns, the following described property, to-wit:

ALL that piece, parcel or lot of land, with the buildings and improvements thereon, situate, lying and being on the West side of Legare Street, in the City of Charleston, County and State aforesaid, known in the present numbering of city streets as No. 47 Legare Street, and more particularly shown within the lines lettered AB, BC, CD, and DA, on a plat thereof by Cummings & McCrady, Inc., dated February 1971, recorded in Plat Book O, Page 7, in the R.M.C. Office for Charleston County, S.C.

Said lot having such size, shape, dimensions, location, buttings and boundings as are shown on said plat.

Being the same property conveyed to the Grantor herein by Deed of The South Carolina National Bank of Charleston, as Executor and as Trustee under the Will of Julia Dill Rogers dated July 8, 1971, recorded in the R.M.C. Office for Charleston County on July 8, 1971 in Book A-97, Page 172.

Together with an easement, to run with the land, over an adjoining strip of land shown on said plat as enclosed within the letters B, E, F, H, and B, for ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriageway for the owner of Number 47 Legare Street described above, as conveyed by W. G. Hinson less a portion shown on said plat within the letters F, G, C, H and F, released by instrument recorded in Book J-96, Page 145. The strip covered by said easement is also covered by restrictive covenants recorded in Book J-96, Page 8.

T.M.S. 457-12-04-106

Grantor's Address:
59 Society St
Charleston SC 29401

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises
before mentioned unto the said William T. Tamsberg and Merle
S. Tamsberg, their heirs and assigns forever.

AND I do hereby bind myself and my heirs and assigns,
executors and administrators, to warrant and forever defend,
all and singular, the said premises unto the said William T.
Tamsberg and Merle S. Tamsberg, their heirs and assigns,
against me and my heirs, and all persons whomsoever lawfully
claiming, or to claim the same or any part thereof.

WITNESS my hand and seal, this 11 day of May, 1988.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Robert Gear
Walter L. Linton

Nancy M. Linton
Nancy M Linton

W. P. 174PG-110

STATE OF SOUTH CAROLINA

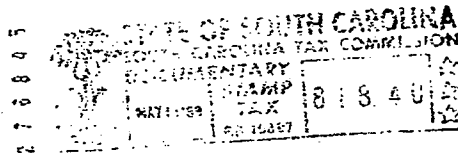
COUNTY OF CHARLESTON

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named Nancy M. Linton, sign, seal and, as her act and deed, deliver the within written deed, and that (s)he with the other witness witnessed the execution thereof.

W. P. 174PG-110

SWORN to before me this
12 day of May, 1988.

W. P. 174PG-110
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 9-16-93



RETURN TO BUYST. MOORE SMITH

A. MOORE

RECORDS INITIALS

BK P 174 PG 111

FILED, INDEXED & RECORDED

P174-108

88 MAY 11 PM 3:36

ROBERT N. KING
REGISTER MESNE CONVEYANCE
CHARLESTON COUNTY, S.C.

4.00
818.40

409.20

1,231.60

Recorded this 11 day of May 1988
On Property Record Card

Pauline S. Hoyer

Auditor Charleston County

TMS VERIFIED

BAC SL

DTD 5/12/88

457-12-04-106

8/27

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) TITLE TO REAL ESTATE

WHEREAS, by deed dated January 19, 1993, and recorded January 19, 1993, in the RMC Office for Charleston County in Deed Book R-222, at Page 843, Margarete deSaussure Black conveyed the hereinbelow described property unto the Margarete deSaussure Black Personal Residence Trust; and

WHEREAS, the Margarete deSaussure Black Personal Residence Trust is not a legal entity which can hold legal title to the hereinbelow described property, and therefore legal record title remained vested in Margaret deSaussure Black; and

WHEREAS, Margarete deSaussure Black died testate on April 11, 1997, with her Last Will and Testament filed in the Probate Court for Charleston County in File Number 97ES10-726; and

WHEREAS, pursuant to the Last Will and Testament of Margarete deSaussure Black, her entire estate including the residuary of her estate was devised unto her sons, Robert Attick Black, Jr., Henry William deSaussure Black, and William Peronneau Black; and

WHEREAS, by Deed dated December 18, 1997, and recorded March 4, 1998, in the RMC Office for Charleston County in Deed Book J-298, at page 884 Robert A. Black, Jr. a/k/a Robert Attick Black, Jr., Henry W. deS. Black a/k/a Henry D. Black a/k/a Henry William deSaussure Black and William P. Black a/k/a William Peronneau Black as Trustees of the Margarete deSaussure Black Irrevocable Trust Agreement dated November 6, 1992, conveyed to Robert A. Black, Jr., Henry W. deS. Black and William P. Black individually any interest that may be held by Margarete deSaussure Black Personal Residence Trust; and

WHEREAS, by the conveyance of Robert A. Black, Jr. a/k/a Robert Attick Black, Jr., Henry W. deS. Black a/k/a Henry D. Black a/k/a Henry William deSaussure Black and William P. Black a/k/a William Peronneau Black as Trustees to Robert A. Black, Jr., Henry W. deS. Black and William P. Black in that deed recorded in Book J-298 at page 884, and by the Last Will and Testament of Margarete deSaussure Black with her entire estate including the residuary being devised to Robert Attick Black, Jr., Henry William deSaussure Black, and William Peronneau Black, then Robert A. Black, Jr. a/k/a Robert A. Black, Jr., Henry William deSaussure Black a/k/a Henry W. deS. Black, and William Peronneau Black a/k/a William P. Black are vested with fee simple title to the hereinbelow described real estate.

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, THAT HENRY D. BLACK, ROBERT A. BLACK, JR., WILLIAM P. BLACK (Grantor) in the State aforesaid in consideration of the sum of NINE HUNDRED THOUSAND AND 00/100 (\$900,000.00) DOLLARS, to the said Grantor in hand paid at and before the sealing of these presents by JAMES BRADLEY WILLIAMS AND ROBERT BLAIR KLINE, JR. ("Grantee") in the State

aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do grant, bargain, sell and release unto the said JAMES BRADLEY WILLIAMS AND ROBERT BLAIR KLINE, JR., the following described property:

ALL that certain lot, piece or parcel of land, with the buildings and improvements thereon, situate, lying and being on the West side of Legare Street, in the City of Charleston, State of South Carolina and being known in the present numbering system of the City of Charleston as 45 Legare Street. Measuring and containing in the front on Legare Street Forty-five feet, four inches (45'4"), the same on the back line, on the north line measuring One Hundred Sixty-three feet, Six inches (163'6") and on the south line One Hundred Sixty-Two Feet (162'), all the measurements being a little more or less. Butting and bounding to the north on the land now or formerly of Julia A. Dill, to the east on Legare Street, to the south on lands now or formerly of Charlotte and Strait Fairey, and to the west on land of

SUBJECT to all easements, restrictions, right-of-ways and matters of record.

BEING the same property conveyed to the Grantor herein by Deed of Robert A. Black, Jr. Henry D. Black a/k/a Henry W. deS. Black and William P. Black, as Co-Trustees of the Margarete Desaussure Black Irrevocable Trust Agreement Dated November 6, 1992 dated December 18, 1998 and recorded March 4, 1998 in Book J-298, Page 884, RMC Office for Charleston County, S.C.

For reference see TMS No.: 457-12-04-107

Grantee's Address: 45 Legare Street
Charleston SC 29401

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Grantee, the Grantee's Heirs, Successors and Assigns forever.

AND the said Grantor does hereby bind Grantor and Grantor's Heirs, Executors and Administrators, to warrant and forever defend, all and singular, the said Premises unto the said Grantee, the Grantee's Heirs, Successors and Assigns, against Grantor and Grantor's Heirs, Successors and Assigns and against all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

WITNESS Grantor's Hand and Seal, this 17th day of May in the year of our Lord two thousand and four and in the two hundred and twenty-ninth year of the Sovereignty and Independence of the United States of America.

WITNESSES:

[Signature]

[Signature]
Henry D. Black

[Signature]

[Signature]
Robert A. Black, Jr.

[Signature]
William P. Black by Louis E. Storen, Jr. his
Attorney in Fact
[Signature]
his Attorney in Fact

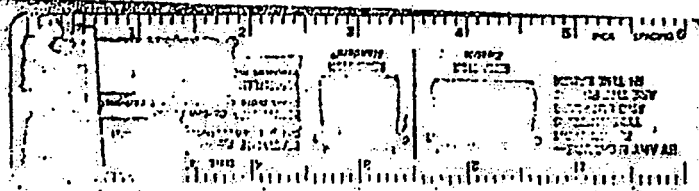
STATE OF SOUTH CAROLINA)

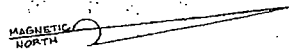
ACKNOWLEDGMENT

COUNTY OF CHARLESTON)

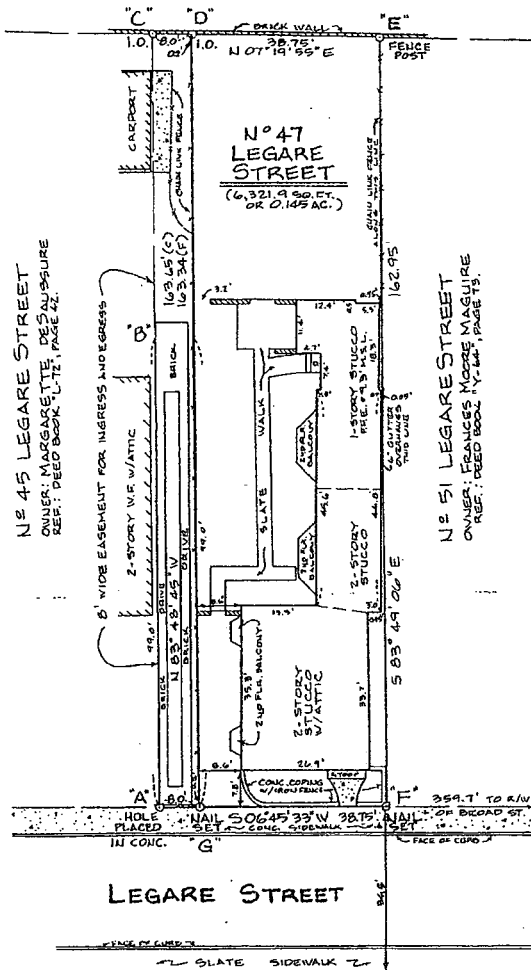
THE FOREGOING instrument was acknowledged before me this 27 day of May 2004 by Henry D. Black, Robert A. Black, Jr. and William P. Black by Louis E. Storen, Jr. his Attorney in Fact.

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA
COMMISSION EXPIRES: 2/7/2010





ST. PETER'S CHURCH YARD
REF.: PLAT BOOK "D", PAGE 60.
PLAT BOOK "AD", PAGE 100.



I certify that the property shown herein is in a special flood hazard zone, according to FIA and H.U.D. Flood hazard boundary maps.

I hereby certify that the measurements as shown above are correct and there are no encroachments or projections other than shown.

PLAT

SHOWING A RE-SURVEY OF N° 47 LEGARE STREET, SITUATE AS SHOWN IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA.

ABOUT TO BE CONVEYED TO: WILLIAM T. TAMSBERG

SCALE: 1" = 20' APRIL 20, 1988

0 10 20 40



Charles F. Dawley, Jr.
CHARLES F. DAWLEY, JR., A.L.S.
S.C. REGISTRATION NO. 9314
P.O. BOX 231
MOUNT PLEASANT, S.C. 29464
(803) 884-4431

REFERENCES: 1) PLAT BOOK "O", PAGE 7.
2) DEED BOOK "A-9", PAGE 172.
3) DEED BOOK "J-96", PAGE 145.
4) T.M.S. 457-12-04-106.

Saint Peters Church Yard

(TMS 457-12-04-124)

brick wall

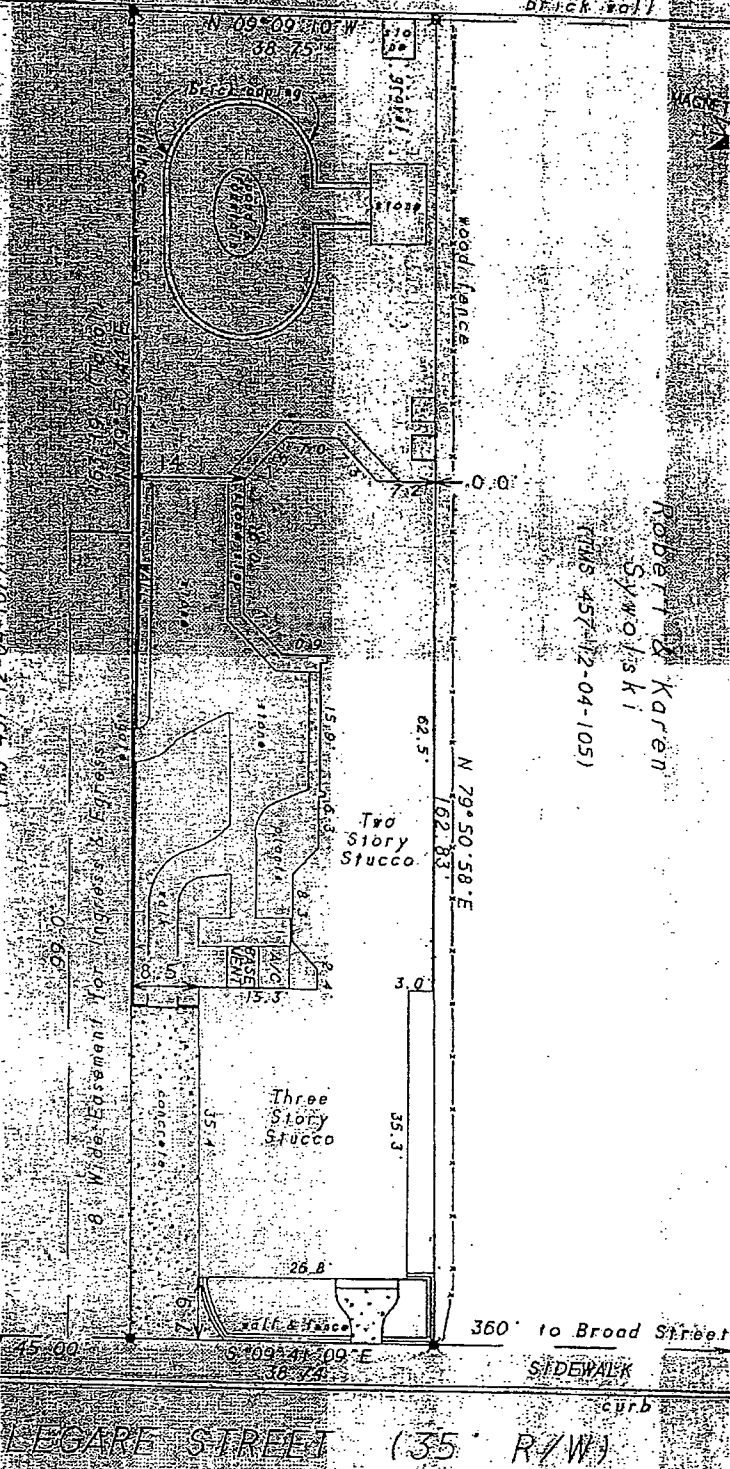
LEGEND

- ✱ 1" Iron Pipe, Old
- ✱ "X" on wall
- ✱ Nail in concrete

James B. Williams &
Robert B. Kline, Jr.

(TMS 457-12-04-107)

Robert & Karen
Sywolski
(TMS 457-12-04-105)



Defendant 0001

RECEIVED

SFP 21 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-In-Equity

Lower Court Case No. 2014-CP-10-5608
Appellate Case No. 2016-000886

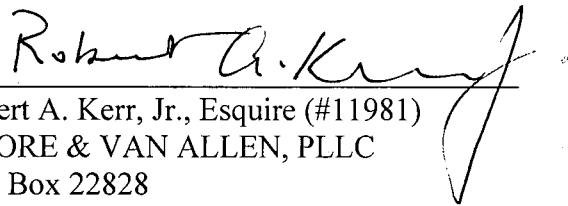
James Bradley Williams and Robert Blair Kline, Jr., ... Appellants.

v.

Merle S. Tamsberg, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.



Robert A. Kerr, Jr., Esquire (#11981)
MOORE & VAN ALLEN, PLLC
P.O. Box 22828
Charleston, South Carolina 29413-2828
Email: robertkerr@mvalaw.com
(843) 579-7000

Attorneys for Appellants

September 16, 2016

Charleston, South Carolina