THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

James O. Spence, Master in Equity

Appellate Case No.: 2016-000588

Published Opinion No. 5366
(S.C. Ct. App. filed December 9, 2015)

David R. Gooldy, Petitioner,

vs.

The Storage Center – Platt Springs, LLC, Respondent.

BRIEF OF RESPONDENT

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INTRODUCTION

The Court of Appeals applied undisputed facts to well-established principles of law to conclude that Petitioner has no implied easement over Respondent's property. Petitioner's claims that he has an implied easement over Respondent's property because his deed incorporates a plat that includes a handwritten "50 road" notation outside the surveyed property boundaries therefore fail.

The Court of Appeals correctly held that well-established principles of law provide that the reference to the plat in the deeds of Petitioner and his predecessors-in-title incorporated solely the property within the boundary lines of the property being conveyed, and did not convey rights outside of those boundaries. No presumption of an implied easement ever arose as a matter of law. Additionally, there is no dispute that the common grantor had no intent to create an implied easement. The record clearly supports that the grantor intended to convey only the property that was within the property lines. This uncontroverted testimony is bolstered by the facts that (1) the deed, itself, shows no intent to create an implied easement, (2) no road was ever created, and (3) subsequent plats show no road. The law in South Carolina on implied easements is clear, and the Court of Appeals properly applied it. This Court should affirm the Court of Appeals.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals correctly rely on established precedent to hold that the deed referenced the plat merely for descriptive purposes, and therefore, Petitioner was not entitled to a presumption of an implied easement?

II. Did the Court of Appeals correctly conclude there was no evidence to support the finding of an implied easement when (1) the uncontroverted evidence establishes that the parties did not intend to create an easement; (2) the deed does not express the intent to create an easement because the deed incorporated the plat solely for descriptive purposes; and, (3) the road that Petitioner argued constituted the easement never existed?

COUNTER-STATEMENT OF THE CASE

Petitioner David R. Gooldy ("Gooldy" or "Petitioner") and Respondent The Storage Center – Platt Springs, LLC ("The Storage Center" or "Respondent") are owners of adjacent property located on South Lake Drive in Lexington County, South Carolina. Prior to the filing of this lawsuit, Gooldy was using The Storage Center's land that abuts the southern side of Gooldy's parcel as a driveway. On February 1, 2010, Gooldy filed a lawsuit against The Storage Center after The Storage Center closed off its property, thereby preventing Gooldy from using it as a driveway. (App. pp. 35 - 41.) In his lawsuit, Gooldy asserted four causes of action: (1) Declaratory Judgment, Easement by Implication or Estoppel, (2) Declaratory Judgment, Easement by Prescription, (3) Estoppel – Temporary and Permanent Injunctive Relief, and (4) Negligence/Gross Negligence/Intentional Act, Denial of Property Rights. (*Id.*) Gooldy argues that he is entitled to an easement over The Storage Center's property because his deed, along with the deeds of his predecessors-in-title, references a plat that contains a notation that says "50' road" outside of his boundary lines of the property surveyed on the plat. (App. pp. 37 - 40.)

After a bench trial, the Master-in-Equity agreed with Gooldy and concluded (1) that Gooldy had access over the "road that borders the Plaintiff's property on the southern side"; (2) that Gooldy was entitled to $2,500 for lost income; and (3) that Gooldy was entitled to $7,500 in punitive damages because The Storage Center prevented Gooldy access to the strip of land. (App. pp. 3 - 22.) The Master-in Equity denied The Storage Center's motion to alter or amend the judgment. (App. pp. 23 – 32.) The Storage Center appealed both the trial order and the order denying the motion to reconsider.

The Court of Appeals reversed, holding that (1) there was no presumption of an implied easement; (2) no evidence to support a finding of an implied easement; and (3) that no damages

should be awarded. (App. pp. 540 - 548.) Gooldy filed a petition for rehearing, which was denied. (App. p. 575.) Gooldy's petition for writ of certiorari followed. The Storage Center filed a return to the petition on April 20, 2017. This Court granted Gooldy's petition on May 30, 2017.

STATEMENT OF THE FACTS

I. The Acquisition of Parcels by Gooldy and The Storage Center

Gooldy's property consists of approximately 0.68 acres, ("Gooldy Parcel") and was acquired by him on January 24, 2002. (App. pp. 375 - 376.) Gooldy operates a chiropractic practice from this location. (App. pp. 115:16-18.). The Storage Center owns property that surrounds Gooldy's Parcel on three sides ("Adjoining Property"). (App. pp. 380-381 & 396-398.) The deed conveying the property to Gooldy describes the property being conveyed by reference to a plat entitled "Plat Prepared for James Loflin" ("Loflin Plat"). (App. pp. 375-376.) The Loflin Plat was prepared on December 10, 1985 and was recorded in the Office of the Register of Mesne Conveyances for Lexington County on September 11, 1986 in Plat Book 212-G at Page 204. (App. p. 377.) The Loflin Plat contains the hand-written notation "50' ROAD" on a portion of the Adjoining Property.[1] (*Id.*) The purported "road" is not surveyed and its beginning, end, boundaries, and other dimensions are not shown on the Loflin Plat. (*Id.*) At the time the Loflin Plat was recorded, the Adjoining Property was owned by Congaree Associates, which was also the grantor of the property to Loflin that is now the Gooldy Parcel. (*See id.*; App. pp. 394 - 395.) The Adjoining Property is now owned by The Storage Center. (App. pp. 392 - 393.) The Loflin Plat was only a survey of the property being conveyed to Loflin, *i.e.* the Gooldy Parcel, and was not a

[1] The Loflin Plat does not depict all of the Adjoining Property or any of its boundaries except those shared with the Gooldy Parcel.

survey of the surrounding property. (App. p. 212:8-14; App. p. 295:15-17.) Every deed in Gooldy's chain of title describes the property by reference to the Loflin Plat. (App. pp. 379 - 391.)

In 2007, Congaree Associates sold the Adjoining Property to The Storage Center. (App. pp. 392 - 393.) Prior to the sale, Frank Strasburger of Congaree Associates had the Adjoining Property surveyed and a plat prepared. The result was the "Strasburger Plat," which was drawn by Charles Meeler on October 26, 2006 and recorded in the Office of the Register of Deeds for Lexington County on October 27, 2006 on Slide 918 at Page 2. (App. pp. 396-399.)[2] The Strasburger Plat does not show any road adjacent to the Gooldy Parcel or anywhere else on the Adjoining Property, and does not contain any references to an easement across the Adjoining Property in favor of Gooldy or anyone else. (*Id.*) When conveyed by Congaree Associates to The Storage Center, the Adjoining Land was described by reference to the Strasburger Plat, which was incorporated for descriptive purposes into the deed from Congaree Associates to The Storage Center. (App. pp. 392 - 393.)

II. Dispute Arises Between Gooldy and The Storage Center

Prior to the filing of this lawsuit, Gooldy was using The Storage Center's land that abuts the southern side of Gooldy's Parcel as a driveway. The present dispute arose when The Storage Center informed Gooldy that he could not use The Storage Center's property to access his parcel. The Storage Center attempted to settle the property dispute with Gooldy through a shared access agreement and a cash payment. (App. pp. 338:6 – 340:21.) These efforts to settle continued for approximately two years; however, Gooldy never agreed to any of The Storage Center's offers. (App. pp. 340:22 – 341:5.)

[2] Unlike the Loflin Plat, the Strasburger Plat was prepared for Congaree Associates.

After its several attempts to resolve the matter, The Storage Center informed Gooldy in July 2009 that he did not have permission to use its land as a driveway and installed a wire fence to prevent entry. (App. p. 125:3-5; App. p. 166:3-11; App. p. 341:6-14.) At all times, The Storage Center was acting under its good faith belief that it had the unfettered right to control all of the property it owned. (App. p. 356:8-12.) Moreover, The Storage Center did not prevent Gooldy from accessing his property, as was recognized by the circuit court when it denied Gooldy's motion for preliminary injunction. (App. p. 1.) Gooldy always has had the ability to access his property from its northern side, as well as directly from Highway 6. (App. pp. 172:22 – 173:1.)

III. Evidence Relating to the Alleged 50' Road and Easement

Gooldy contends that he is entitled to an easement over the "road" shown on the Loflin Plat. But there is no fifty-foot-wide road adjoining the Gooldy Parcel, and the Loflin Plat does actually depict such a road. (App. p. 404; App. pp. 377-378; App. pp. 160:14- 161:2.) Nor did Congaree Associates intend to grant Loflin or his successors-in-title any right to use any portion of the Adjoining Property for ingress, egress, or any other purpose. (App. p. 224:16-20.) It is undisputed that Congaree Associates did not intend to create an easement by referencing to the Loflin Plat in the deed to James Loflin. (*Id.*) The deed from Congaree Associates to Loflin referred to the Loflin Plat only for the purpose of describing the property being conveyed to Loflin, and only conveyed the property within the boundary lines shown on the Loflin Plat, *i.e.* the Gooldy Parcel. (App. pp. 228:8 – 229:13; App. pp. 394 – 395.) The subject of the "road" or any easement rights was never even mentioned or discussed. Congaree Associates' principal Carroll McGee testified: "Let me make this clear. I never discussed that road with Mr. Loflin or the successors to him. It never came up. Nobody ever asked me." (App. p. 224:12-15.) McGee's testimony is unequivocal that by delivering the deed Loflin to be recorded, Congaree Associates did not intend

to create an easement. (App. pp. 228:13 – 229:13.) Additionally, Congaree Associates would not have incorporated the Loflin Plat in the legal description of the deed to Loflin if it knew that one of Loflin's successors would claim rights to any easement in connection with the Gooldy Parcel. (App. p. 229:17-21.)

In addition to McGee's testimony, plats of the Adjoining Property prepared for Congaree Associates subsequent to the conveyance to Loflin also establish that there was never an intent to create or convey any easement rights to Loflin and his successors. Robert Collingwood, the same surveyor who prepared the Loflin Plat, drew plats of the Adjoining Property for Congaree Associates in 1998 and 2002. (App. pp. 399 – 401 & 403.) Those plats, which reflect surveys of the property of Congaree Associates itself, do not show any road, and do not contain any reference to any easements, rights of way, or any other rights favoring the owner of the Gooldy Parcel. (*Id.*) In fact, the 2002 plat was revised on March 3, 2003 (nearly one year after Gooldy purchased his land) specifically to show easements. (App. p. 403.) Again, Collingwood did not make any references to the alleged road or easement on the revised 2002 plat. (*Id.*) Additionally, both the Strasburger Plat and the Lexington County TMS map show no references to the alleged 50' road. (App. pp. 396-398; App. p. 402.)

The only recorded plat containing any reference to the alleged road is the Loflin Plat. The Loflin Plat was not a survey of Congaree Associates' property, was not a survey of the road, and was not prepared for Congaree Associates. Collingwood also prepared a proposed plat drafted prior to the Loflin Plat. (App. p. 405.) This proposed plat (a) never received final approval from Lexington County, (b) was never recorded, and (c) reflects a contemplated project that Congaree Associates did not pursue or construct. Congaree Associates never subdivided its land or sold lots referencing a recorded subdivision plat. (App. pp. 206:16-21 & 214:24-25.) In sum, Congaree

Associates never caused a plat to be prepared and recorded that contained any reference to a 50' road.

The absence of any intention by Congaree Associates to create a road is most starkly evidenced by the fact that no road has ever existed. Neither Congaree Associates, nor any subsequent owner ever caused a road to be built. (App. pp. 208:25-209:3; App. p. 209:20-25; App. p. 232:17-19; *see also* App. p. 404.) Consequently, no road existed at the time Gooldy purchased his parcel. (App. pp. 160:14-161:2.) None of the recorded plats shows a road. Charles Meeler, who drew the Strasburger Plat and has been a registered surveyor for twenty-four years (App. p. 244:17-20), testified as follows:

> In my professional opinion, there was no road. Lexington County required road names. I couldn't find a – I couldn't find a name for that alleged road, so, you know, to my knowledge and all the research work I did, there was no road existed there. South Carolina DOT had no record of a road there. Lexington County had no record of a road there. So I just felt like that was a part of [Congaree Associates'] property.

(App. p. 249:13-22.) Meeler's manifestly correct conclusion that no road existed was based on his review of the Loflin Plat, the 1998 and 2002 plats drawn by Collingwood, and Lexington County's TMS map that showed no road. (App. pp 248:23 – 250:10; pp. 252:13 – 258:3; p. 265:14-18 & p. 271:9-16.)

The lack of intent to create or convey any easement rights is evidenced by (1) the uncontroverted testimony of Carroll McGee of Congaree Associates that no easement was intended and none was ever even discussed, (2) the subsequent plats drawn by Collingwood (the preparer of the Loflin Plat), Meeler, and Lexington County, and (3) the fact that no road ever existed.

IV. Expert Testimony of Rosser W. Baxter Jr.

Rosser W. Baxter Jr. is The Storage Center's well qualified expert. Baxter has been a surveyor for forty-seven years and a registered surveyor for thirty-three years. (App. p. 275:9-10; App. p. 280:2-9). In preparation for his testimony in the case, Baxter reviewed all of the relevant plats,[3] deeds,[4] and documents. (App. pp. 305:14 – 307:18.) Baxter also visually inspected the property (App. pp. 287:12 – 288:14; App. pp. 305:14 - 307:18). Based upon this extensive body of information, as well as his forty-seven years of experience as a surveyor, Mr. Baxter testified as follows:

1. The notation of the "50' Road" on the Loflin Plat is not a survey of a road (App. p. 291:14-17; App. p. 296:21-23; App. p. 302:19-21), in part, because it fails to show any dimensions of the road (App. p. 301:14-17).

2. The "50' Road" notation on the Loflin Plat did not create a road (App. p. 291:18-23), and it was an error for the Loflin Plat to have included a reference to the alleged 50' Road when such a road never existed (App. p. 301:7-13; App. p. 312:12-15).

3. The Loflin Plat fails to meet surveying practices and standards by including the "50' Road" notation when it is not part of the Gooldy Parcel and such a road did not exist (App. pp. 302:19 – 303:2).

4. The "50' Road" notation on the Loflin Plat does not mean that, as a matter of surveying principles that a 50' road actually exists on the property (App. pp. 291:24 – 292:3).

5. The Loflin Plat is only a survey of the 0.68 acres conveyed to Loflin from Congaree Associates and not a survey of anything outside the 0.68 acres (App. pp. 292:24 – 293:10; App. p. 294:3-6).

6. The Loflin Plat is an individual lot plat, not a subdivision plat (App. p. 296:8-13).

7. The Loflin Plat does not indicate whether the alleged road is public or private (App. p. 297:23-25).

8. The Loflin Plat does not show any access from the Gooldy Parcel to the alleged 50' road (App. p. 298:8-14) and creates no rights of access in the owner of the Gooldy

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[3] App. p. 377 & App. p. 396 -398, App. p. 399-401, App. p. 403 & App. p. 404.

[4] App. p. 379 – 391 & App. p. 392 – 393.

Parcel (App. p. 315:2-7) and that even if the alleged road existed, the Loflin Plat does not establish that the owner of the Gooldy Parcel had the right to use the road (App. p. 298:15-18).

9. The Loflin Plat is the only public record he viewed that made any reference to an alleged 50' road (App. p. 308:13-22).

Regarding further insufficiencies contained in the Loflin Plat, Baxter testified that the Loflin Plat does not identify Congaree Associates as the owner of the Adjoining Property. (App. pp. 298:19 – 299:21.) Baxter further testified that it is improper for a surveyor to reflect conditions on property that adjoins the property being surveyed. (App. p. 300:3-14.) Gooldy offered no testimony – expert or otherwise – to dispute Baxter's expert opinion testimony.

STANDARD OF REVIEW

"The determination of the existence of an easement is a question of fact in a law action and subject to any evidence standard of review when tried by a judge without a jury." *Pittman v Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 482 (2005). However, an appellate court must correct any error of law and factual finding when "'there is no evidence that reasonably supports those findings.'" *Linda Mc Co , Inc v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) (quoting *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997)).

ARGUMENT

The Court of Appeals correctly held that no implied easement was created by the incorporation of the Loflin Plat because it was incorporated solely for the purposes of describing the boundaries of the property. South Carolina law is clear that easements shown on a plat do not become part of the deed when the plat is incorporated for the purpose of describing the property conveyed. *Lancaster v. Smithco, Inc.*, 246 S.C. 464, 469, 144 S.E.2d 209, 211 (1965). The Loflin Plat conveyed the property inside the boundary lines – nothing more, nothing less.

Additionally, the Court of Appeals correctly concluded there was no evidence to support a conclusion that the parties intended to create an implied easement. To the contrary, the record is replete with evidence that the parties did not intend to create an easement. Congaree Associates' principal testified there was no intent. The deed, as a matter of law, reveals there was no intent. The fact that no road ever existed shows there was no intent to create an implied easement. The application of the undisputed facts to these uncontroversial principles of property law compelled the Court of Appeals' well-reasoned and amply supported decision.

I. THE DEED INCORPORATED THE LOFLIN PLAT SOLELY FOR DESCRIPTIVE PURPOSES AND DID NOT CREATE AN EASEMENT.

The Court of Appeals correctly adhered to the principle that incorporation of a plat into a deed in order to describe the property does not serve to convey or incorporate easements or other encumbrances on the plat. To the contrary, "[w]hen a deed describes land as shown on a certain plat, such plat becomes part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed." *Bennett v. Investors Title Ins. Co* , 370 S.C. 561, 574, 635 S.E.2d 660, 667 (Ct. App. 2006). Thus, while the deed incorporates the plat for the purpose of showing the boundaries of the property, it does ***not*** incorporate the plat for any other purpose.

This Court addressed precisely this issue in *Lancaster v. Smithco, Inc.*, 246 S.C. 464, 144 S.E.2d 209 (1965). In *Lancaster*, a deed referenced a plat that depicted a publicly recorded gas pipeline easement that ran across the owner's property. *Id.* at 466-67, 144 S.E.2d at 210. The issue was whether the depiction of the easement on the plat that was incorporated into the deed was sufficient to give notice to the purchaser of the existence of the easement. *Id.* at 466, 144 S.E.2d at 210. This Court held that while "the reference to the recorded plat made it a part of deed ***for the purpose of showing the boundaries, metes, courses, and distances of the property conveyed***," *id.* at 469, 144 S.E.2d at 211 (emphasis added), it did not make the easement shown

on the plat part of the deed. In other words, the plat did not become part of the deed to reflect the easement even when the easement existed within the boundary lines on the plat. *Id.* This is true even though (1) the easement was properly recorded in the public records, (2) ran across the owner's property, and (3) was depicted on a recorded subdivision plat which was incorporated into the deed's legal description.[5] *Id.* This Court concluded, as follows:

> A plat . . . is not an index to encumbrances, and the mere reference in a deed . . . to a plat for descriptive purposes does not incorporate a notation thereon as to an easement held by a third party so as to exclude such easement from the covenant against encumbrances in the absence of the clear intention that it so operates.

Id. Consequently, a plat that is referenced in a deed for descriptive purposes becomes a part of the deed ***only*** to provide the boundaries of the property conveyed, and therefore, references to easements on the plat do not become part of the deed, as a matter of law.

When this principle is applied to the present case, it is clear that the reference on the Loflin Plat to the "road" did not convey any rights regarding the "road" to Loflin or to any subsequent purchaser. Like the deed in *Lancaster*, the deed to Loflin (and the deed to Gooldy) incorporates the plat solely for descriptive purposes. Thus, Congaree Associates cannot, as a matter of law, be deemed to have created a right in a non-existent road because it signed a deed that incorporated a plat that showed a "road" that was not part of the description of the property being conveyed. The incorporation of the Loflin Plat only served to convey the 0.68 acres within the boundary lines on the plat. The Court of Appeals correctly refrained from looking outside of the boundary lines on the Loflin Plat to infer the existence of a road or an easement to use it. It properly concluded the

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[5] By contrast, Gooldy's alleged easement is implied, and therefore, not recorded in the Lexington County records. His alleged easement does not run across or burden his property. Rather, it runs outside of the boundary lines of his property as depicted on the Loflin Plat. Finally, Gooldy's alleged easement was depicted on an individual lot plat, not a recorded subdivision plat.

50' road notation did not become part of the deed to Loflin. Consequently, no basis exists to conclude that Gooldy received any rights in the alleged 50' road by means of the plat. The Court of Appeals correctly concluded that no presumption of an easement arose in favor of Gooldy.[6]

Gooldy argues that the Court of Appeals' reliance on *Lancaster* and *Bennett* is misplaced. (Br. of Pet'r 9-10.) However, the comparison of *Lancaster* to the present case as outlined in footnote 5 does not support a distinction, but rather supports the application of this principle to these facts. Similarly, *Bennett* serves to strengthen, not diminish, the conclusion that no implied easement ever existed. Gooldy argues that *Bennett* only concerns the width (not existence) of an easement. But *Bennett* relies on a series of cases that stand for the principle of law that the incorporation of a plat becomes part of the deed to show "the boundaries, metes, courses, and distances of the property conveyed." *Bennett*, 370 S.C. at 594, 635 S.E.2d at 657. It then uses this unequivocal principle to conclude that the parties incorporated the plat to show the boundary lines of the property conveyed, not to warrant the width of the right of way. *Id.* at 594-95, 635 S.E.2d at 657-58.[7] There is nothing in the *Bennett* or *Lancaster* opinions to suggest that this well-

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[6] Even if such a presumption existed, it is rebuttable. *See, e.g., Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 118, 145 S.E.2d 922, 925 (1965); *Inlet Harbour v. S C. Dep't of Parks, Recreation, & Tourism*, 377 S.C. 86, 93, 659 S.E.2d 151, 154-55 (2008) (stating "the rule applied in *Blue Ridge* is nothing more than a presumption" that can be overcome by the developer's intent). Any conceivable presumption was rebutted by Congaree Associates' principal's uncontradicted testimony that Congaree Associates did not intend to create or convey any easement rights to Loflin and his successors.

[7] Additionally, Gooldy tries to distinguish *Bennett* by claiming the alleged implied easement is (1) "not an encumbrance, as the SCDOT easement is in *Bennett*"; and, (2) not "held by a 'third party' so as to exclude said easement created by the deed." (Br. of Pet'r 10.) These distinctions make no difference. First, the alleged easement would still be an encumbrance. *See Black's Law Dictionary* 449 (8th ed. 2005) (defining "encumbrance" as "[a] claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest."). Second, the deed does not exclude an easement. Rather, there is no evidence to support that an easement even exists. Stated differently,

established principle may only be applied in cases involving the warranty of an easement's width. The Court of Appeals properly applied *Lancaster* and *Bennett.*

Gooldy tries to avoid the results of *Lancaster* and *Bennett* by arguing *McAllister v. Smiley*, 301 S.C. 10, 389 S.E.2d 857 (1990) controls.[8] Gooldy states the property description in this case and *McAllister* are "identical," and therefore, this Court should find that an implied easement exists in this matter, as it did in *McCallister* when a road abutted the at-issue tract. (Br. of Pet'r 11.) This argument fails for many reasons. First and foremost, no road has ever existed, thwarting the underpinning of Petitioner's argument. Moreover, *McAllister* is distinguishable because in that case (1) the deed referred to the tract as being bounded by the road in question; (2) the road had width and length dimensions shown on the plat; (3) the plat was prepared for the common grantors; and (4) the plat was of more than one parcel. *McAllister*, 217 S.C. at 10-12, 389 S.E.2d at 858-59. Here, the deed to Loflin does not refer to the "50' road," much less describe the lot as being bounded by the "50' road." The road never existed, and therefore, the road had no width or length dimensions in the Loflin Plat. The Loflin Plat was prepared for Loflin, not Congaree Associates, and the Loflin Plat was only a plat of one parcel. (App. p. 377.) *McAllister* does not support Gooldy's argument, and *Lancaster* and *Bennett* remain the controlling authorities.

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there is no easement to exclude. Moreover, it is irrelevant that a third party held the easement in *Bennett*.

[8] Gooldy also argues the 0.68 acre reference in the deed "was not for the purpose of excluding an easement to Gooldy, but to comply with the land surveying standards § 49-460(j) of the South Carolina Code of Regulations." (Br. of Pet'r 11.) Again, this statement presumes an easement exists. The Court of Appeals did not conclude that the alleged easement should be excluded. Rather, it concluded there was no evidence to support that an implied easement exists.

II. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT THE PARTIES INTENDED TO CREATE AN IMPLIED EASEMENT.

The creation of an easement is a question of intent. Easements by implication "must be determined as of the time of the severance of the ownerships of the tracts involved." *Boyd v. BellSouth Tel. Tel. Co., Inc.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006). Courts examine the intentions of the parties to the conveyance to determine whether an implied easement exists. *See Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 235, 662 S.E.2d 452, 456-57 (Ct. App. 2008) (holding "the intentions of the parties to the transaction are the overriding focus when examining implied easements."). Implied easements are not favored and must be strictly construed "because the implication of an easement in a conveyance goes against the general rule that a written instrument speaks for itself." *Inlet Harbour v. S.C. Dep't of Parks, Recreation, & Tourism*, 377 S.C. 86, 91-92, 659 S.E.2d 151, 154 (2008).

When analyzing whether a grantor intended to create an easement, courts may look to the deed as well as other evidence of intent. *Inlet Harbor*, 377 S.C. at 91-92, 659 S.E.2d at 154. (rejecting argument that court should only look to plat reference in deed to determine whether parties intended to create an implied easement). When examining a deed, the court must focus on the intention of the parties. *See Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987); *Milton P. Demetre Family Ltd P'ship v. Beckmann*, 413 S.C. 38, 54–55, 773 S.E.2d 596, 605 (Ct. App. 2014) ("In construing a deed, the court must determine the intent of the grantor."). "One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened." *Bennett v. Investors Title Ins. Co.*, 370 S.C. 561, 570, 635 S.E.2d 660, 665 (Ct. App. 2006) (internal quotation marks omitted).

Consequently, courts must construe the deed "as a whole, and effect given to every part thereof, if such can be done consistently with the law." *Id.* at 571, 635 S.E.2d at 665.

"'The question as to the purpose and effect of a reference to a plat in a deed is ordinarily one as to the intention of the parties to be determined from the whole instrument and the circumstances surrounding its execution.'" *Id.* at 574, 635 S.E.2d at 667 (quoting *Lancaster*, 246 S.C at 468, 144 S.E.2d at 211 (emphasis added)). Therefore, a court is not limited to the deed to determine intent. It can look to "the circumstances surrounding its execution." Additionally, it can look to evidence after the execution of the deed because the subsequent evidence may show that prior intent to create an easement never existed.

Here, the Court of Appeals correctly found that there is no evidence in the record that reasonably supports a finding that the common grantor intended to create an easement. To the contrary, the uncontroverted evidence establishes that there was never any such intent. First, the incorporation of the Loflin Plat into the deed is not evidence of any intent as a matter of law. Second, the principal of the common grantor testified that there was no intent to create an easement at the time of severance. This testimony is consistent with and supported by the fact that no road was ever built, as reflected in plats drafted by the same surveyor who drafted the Loflin Plat. The record contains no evidence that there was any intent to create an easement.

A. <u>The Deed Does Not Express Intent to Convey an Easement.</u>

As previously discussed, the *Lancaster* rule provides, as a matter of law, that easements on a plat do not become part of the deed when the plat is incorporated for descriptive purposes. *Lancaster*, 246 S.C. at 469, 144 S.E.2d at 211. The reference to the Loflin Plat in the deed to Loflin is therefore not evidence of intent to create an easement.

B. The Uncontroverted Testimony of the Common Grantor Establishes the Lack of Intent to Create an Easement.

Carroll McGee, the principal of Congaree Associates, unequivocally testified that there was never any intent to establish any easement rights when Congaree Associates conveyed the Gooldy Parcel to Loflin.[9] It did not intend to create or convey any rights in a non-existent 50' road to Loflin. (App. pp. 228:13 – 229:6.) By referencing the Loflin Plat, Congaree Associates only intended to convey the property within the boundary lines, *i.e.* the Gooldy Parcel. (App. pp. 228:8 – 229:12.) By allowing the deed that referenced the Loflin Plat to be recorded, Congaree Associates did not intend to create an easement. (App. pp. 228:13 – 229:13.) There is no evidence to the contrary. No easement existed at the time Congaree Associates severed its parcel and sold the Gooldy Parcel to Loflin, and therefore, no easement exists today.

C. No Road Has Ever Existed.

The absence of intent to grant an easement over a road is most plainly evidenced by the fact that no road was ever constructed. Neither Congaree Associates nor any of its predecessors or successors in title ever caused a road to be built. (App. pp. 208:25-209:3; App. p. 209:20-25; App. p. 232:17-19; *see also* App. p. 404.) No road existed at the time Gooldy purchased his parcel. (App. pp. 160:14-161:2.) None of the recorded plats shows a survey of a road. (App. pp. 396 -

[9] The Court of Appeals properly considered the testimony of Carroll McGee with respect to the intent surrounding the alleged easement. As discussed above, because (1) an implied easement "goes against the general rule that a written instrument speaks for itself [,]" *Inlet Harbour*, 377 S.C. at 91-92, 659 S.E.2d at 154, and (2) the intention of the parties referencing a plat in a deed must be "determined from the whole instrument and the circumstances surrounding its execution[,]" *Bennett*, 370 S.C. at 574, 635 S.E.2d at 667, a court cannot limit itself to the deed to determine the parties' intent. *See also Inlet Harbor*, 377 S.C. at 93, 659 S.E.2d at 155 ("Thus, to the extent the [claimant of the easement] urges this Court to ignore everything except the deed's reference to a residential subdivision plat, this argument fails to remain true to the principles underlying implied easements.").

401.) Lexington County's TMS map shows no road. (App. p. 402.) The most recent surveyor of the subject property testified that no road existed (App. p. 249:10-22), as did The Storage Center's expert (App. p. 301:7-13; App. p. 312:12-15).

D. Subsequent Plats Show No Road.

Because no road has ever existed, it is not surprising that plats drawn after the Loflin Plat do not show any road or easement. Given that these plats were prepared for the owner of the property that supposedly contained the "road," they are strong evidence that Congaree Associates never intended to create any such road. Robert Collingwood, the surveyor who drew the Loflin Plat, subsequently drew two other plats of the subject parcels in 1998 and 2002 that did not contain any references to the alleged 50' road or any associated easements. (App. pp. 399-401 & 403.) In fact, the 2002 plat, which was prepared ***after*** Gooldy purchased his parcel in January of 2002, was revised in 2003 specifically "to show easements," yet the revised plat shows no reference to the alleged 50' road or any associated easement. (App. p. 403.) Additionally, the Strasburger Plat prepared by Charles Meeler in 2006 did not include any references to the alleged 50' road or any associated easement. (App. pp. 396-398.) Finally, Lexington County's TMS map, which was created in the 2000s, shows no road abutting the southern side of the Gooldy Parcel. (App. p. 402.) In sum, the deed itself and subsequent actions of the grantor support McGee's clear testimony that Congaree Associates never intended to create or convey in easements in favor of Loflin and his successors.

E. Gooldy's Reliance on an Unrecorded Plat That Shows a Road is Misguided.

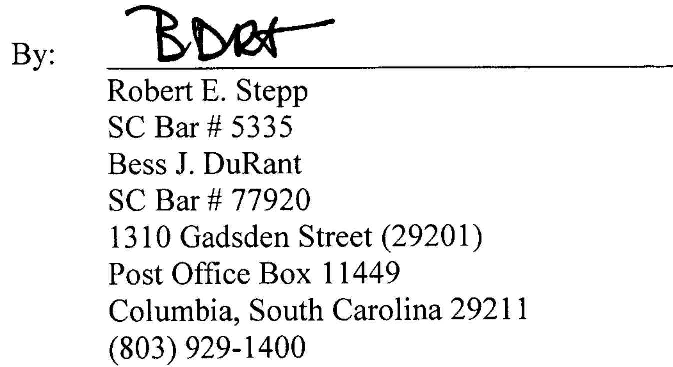
Gooldy tries to avoid the evidence discussed above by relying on an unrecorded proposed plat (App. p. 405) that shows a road to support his conclusion that Congaree Associates intended to create an easement. (Br. of Pet'r 12-16.) However, this proposed plat (a) never received final

approval from Lexington County, (b) was never recorded, and (c) reflects a project that Congaree Associates elected not to pursue. Congaree Associates never subdivided its land or sold lots referencing a recorded subdivision plat that contained any reference to a 50' road. (App. p. 206:16-21; App. p. 214:24-25.) The inclusion of a road on a ***proposed plat*** does not necessarily reflect any intent to create a road. Rather, it shows to the contrary because it demonstrates that while Congaree Associates considered creating a road, it elected not to do so. The absence of action by Congaree Associates to record the plat or to build the road should be conclusive as to its intent. Thinking about building a road is not the equivalent of intending to grant a right to use an existing road. The direct testimony of Carroll McGee is that Congaree Associates never built a road (App. pp. 208:25-209:3; App. p. 209:20-25; App. p. 232:17-19), and it never intended to convey any easement rights to Loflin (App. p. 224:16-20). Any inference of an intent to the contrary based on the proposed plat is wholly rebutted by the testimony of McGee.

CONCLUSION

For the above-reasons, The Storage Center requests that this Court affirm the Court of Appeals' decision, which is based on undisputed facts applied to well-established South Carolina law.

SOWELL GRAY ROBINSON STEPP & LAFFITTE LLC



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Columbia, South Carolina
September 7, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master in Equity

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David R. Gooldy, Petitioner,

vs.

The Storage Center – Platt Springs, LLC, Respondent.

PROOF OF SERVICE

I certify that I have caused the service of the Brief of Respondent on Petitioner David R. Gooldy by hand delivery on September 7, 2017, to his attorney of record, James Randall Davis, Esquire, Nicholson, Davis, Frawley, Anderson and Ayer, LLC, 140 East Main Street, Lexington, South Carolina 29701.

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