

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

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

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

v.

Merle S. Tamsberg Defendant/Respondent,

PETITION FOR REHEARING

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Pursuant to Rules 221(a) and 240, SCACR, Appellants James Bradley Williams and Robert Blair Kline, Jr. (“Appellants”) file this Petition for Rehearing as to Opinion No. 5596 of the Court filed on September 19, 2018.

STATEMENT OF THE CASE

On April 25, 2016, Appellants filed its Notice of Appeal of the master-in-equity’s order denying their motion for summary judgment and granting Respondent Merle S. Tamberg’s motion for summary judgment (the “Order”) dated March 29, 2016. On September 19, 2018, the Court filed Opinion No. 5596, which affirmed the master’s Order. In affirming the master’s Order, the Court ruled that the easement was an easement appurtenant because there was a terminus on 47 Legare and the easement is essentially necessary to the enjoyment of 47 Legare, the dominant parcel. Appellants now move this Court for a rehearing on the Court’s ruling in Opinion 5596 based on the Court’s misapprehension and misapplication of the arguments raised by Appellants, the applicable law, and the Record on Appeal which demonstrate that the Court should reverse the findings of the master’s Order.

REHEARING STANDARD

The scope of review for deciding a Petition for Rehearing is limited to whether the Court “overlooked or misapprehended” a point in reaching its decision. Rule 221 of the South Carolina Appellate Court Rules states, “[a] petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the *points supposed to have been overlooked or misapprehended by the court.*” Rule 221(a), SCACR (emphasis added). In order to prevail on a petition for rehearing, appellants must demonstrate that the Court overlooked or misapprehended their argument. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

ARGUMENT

I. The Court misapprehended or overlooked the fact that the easement was in gross rather than appurtenant because the easement lacked a terminus on Respondent's dominant parcel.

The Court of Appeals' Opinion expressly acknowledges "[t]he easement described in the 1911 Deed was located entirely on 45 Legare and ran from Legare Street to the western lot line that bordered the Saint Peter's graveyard wall." *Williams v. Tamsberg*, Op. No. 5596 (S.C. Sup. Ct. filed Sept. 19, 2018) (Shearhouse Adv. Sh. No. 37 at 38). As a result, the Court should have held that the 1911 Deed created an easement in gross, rather than an easement appurtenant, because the easement did not have a terminus on 47 Legare.

The 1911 Deed described the easement as an "alleyway eight (8) feet wide . . . situate, lying and being immediately to the south of [47 Legare], and being the southern boundary of said [47 Legare,]" which lay entirely on the servient estate, now known as 45 Legare. (R. pp. 1-2, 157-58). The site of the original easement is confirmed by the 1971 Cummings and McCrady plat, depicting the original easement as enclosed within the letters B, E, F, G, C, H, and B (R. p. 177) and the Covenant executed by Black in 1971 (R. pp. 165-68). The 1971 Cummings and McCrady plat shows that the easement ran from Legare Street to the western lot line of 45 Legare and at no point entered 47 Legare. (R. p. 177). Thus, there was never a terminus on 47 Legare; the termini being Legare Street and the western lot line of 45 Legare. *See Shia v. Pendergrass*, 222 S.C. 342, 351, 72 S.E.2d 699, 703 (1952) ("The absence of a terminus on [the dominant estate] is fatal to [the] claim of an appurtenant easement."). Accordingly, the 1911 Deed created an easement in gross.

An easement in gross is a personal privilege to the owner of the land benefitted by the easement and is not transferable. *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873, 881 (Ct. App. 2012). As such, the easement in gross on 47 Legare expired upon Julia Dill's death in 1970. At

Julia Dill's death, the Bank, as trustee, obtained the Covenant from Black attempting to affirm the easement. (R. p. 165-68). The Covenant was given to the Bank as trustee on April 5, 1971. (R. pp. 165-68). The Bank conveyed 47 Legare to Nancy Linton on July 8, 1971, three months later. (R. p. 169). 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. (R. pp. 165-69). 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. (R. pp. 170-73).

Further, even if the language in the 1971 Covenant was effective in affirming the easement, it did not add anything to the easement. (R. pp. 165-68). Rather, the conveyance from the Bank to Black actually shortened the length of the easement, and it did not create a terminus on 47 Legare. (R. pp. 164, 177). Instead of the terminus being the western lot line of 45 Legare, the 1971 Covenant stated that the new "terminus thereof" would be "the line F, H". (R. pp. 166, 177). Line F, H lies completely on 45 Legare. (R. pp. 164-66, 177). Accordingly, the easement remained as an easement in gross because there was still no terminus on 47 Legare, the dominant parcel. Therefore, the Court erred in concluding that the easement is appurtenant to 47 Legare because there is no terminus on 47 Legare.

II. The Court misapprehended or overlooked the fact that the easement was in gross rather than appurtenant because the easement was not essentially necessary to the enjoyment of the dominant parcel.

An appurtenant easement must "be essentially necessary to the enjoyment thereof." *Ballington v. Paxton*, 327 S.C. 372, 380, 488 S.E.2d 882, 887 (Ct. App. 1997). This Court erred in finding the easement was necessary to the enjoyment of 47 Legare for various reasons. Specifically, the use of the easement is no longer essentially necessary to the enjoyment of 47

Legare because the garage for which the easement was created no longer exists; the easement is no longer used as a driveway to access a garage but is used primarily by workmen as a footpath; Respondent's gate at the rear of 47 Legare is too narrow to allow the passage of any vehicle, including a golf cart; Respondent and workmen can access the rear of 47 Legare from the front gate on 47 Legare; Respondent can just as easily utilize the front gate on 47 Legare, as she does the rear gate on 47 Legare, to bring large-scale equipment and tools to the rear of 47 Legare; and the parking spot on the front of 47 Legare provides adequate space to park a car.

In *Windham v. Riddle*, the South Carolina Supreme Court held it was questionable whether an easement for access to a pond for irrigation was essentially necessary when the dominant parcel was bordered by a river that provided a reasonable alternative for irrigation. *Windham v. Riddle*, 381 S.C. 192, 204, 672 S.E.2d 578, 584 (2009). Similar to the *Windham* court, the Supreme Court in *Tupper v. Dorchester County*, held there was a genuine issue of material fact as to whether an easement was essentially necessary to the enjoyment of the Tupperts' estate, the dominant parcel, where the Tupperts asserted they had no means of access to their property other than via the easement, but testimony at a hearing showed that alternative routes were merely inconvenient. *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997).

In affirming the master, the Court mistakenly held that there was no genuine issue of material fact as to whether the easement was necessary to the present enjoyment of 47 Legare on the following grounds: (1) Respondent "has continuously used the easement since purchasing [47 Legare]"; (2) Respondent "has driven a golf cart down the easement to the rear of 47 Legare"; (3) Respondent "uses the easement for off-street parking"; and (4) Respondent "needs the easement to bring large equipment and tools to the rear of 47 Legare." *Williams v. Tamsberg*, Op. No. 5596 (S.C.Sup.Ct. filed Sept. 19, 2018) (Shearhouse Adv.Sh. No. 37 at 50).

In 2004, Respondent began building a masonry wall on the property line between 45 and 47 Legare, which ran the length of the easement and blocked access to 47 Legare from the easement. (R. pp. 64, 87-88, 154). When the masonry wall was completed, the only entrance to 47 Legare from the easement on 45 Legare was a foot gate, between three and four feet in width. (R. pp. 64, 87-88, 154). Respondent's gate at the rear of 47 Legare, a three-to-four foot gate, is not wide enough for any vehicle, including a golf cart, to pass through. (R. p. 88, 154). Further, the Record on Appeal establishes that the parking spot on 47 Legare, which fronts 47 Legare Street, provides adequate space to park a car and the front gate on 47 Legare, which is immediately behind the parking spot on 47 Legare, provides reasonable alternative means of access to the rear of Respondent's house. (R. pp. 82-83, 177-79). Recorded plats of 47 Legare show that the width of the parking area on 47 Legare is 8.5 - 8.6 feet wide. (R. pp. 82-83, 177-79). The various plats also show that the width of the front gate on 47 Legare is either the same width as the width of the rear gate on 47 Legare, or that the difference in width of these gates is merely negligible. (R. pp. 82-83, 177-79). A recorded plat of 47 Legare, dated April 20, 1988, while some of the measurements are somewhat indecipherable, shows the width of the front gate of 47 Legare being at least three feet in width. (R. p. 178).

Like *Tupper*, Appellants have shown, that while possibly less convenient, there is means of access to the rear of 47 Legare other than via the easement. Accordingly, while Appellants contend that the Court erred in failing to find outright that the easement was not necessary to the enjoyment of 47 Legare, the Court, under *Tupper*, clearly erred in not finding that there was at least a genuine issue of material fact as to whether the use of the easement was essentially necessary to the enjoyment of 47 Legare.

CONCLUSION

For the aforementioned reasons, Appellants request that the Court order a rehearing as prayed above, reverse the Court's decision in Opinion No. 5596 filed on September 19, 2018, and reverse the master's Order.

Respectfully submitted,



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v.

Merle S. Tamsberg, Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on October 3, 2018, I served counsel of record in the foregoing matter with a copy of the **Petition for Rehearing** by depositing same in the United States Mail with proper postage affixed, addressed as follows:

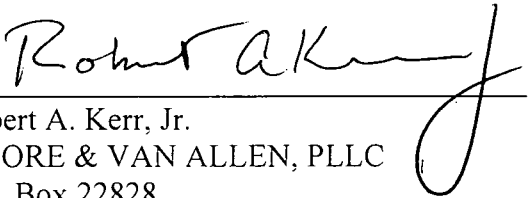
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Appellate Case No. 2016-000886
MVA file No. 039530.1**

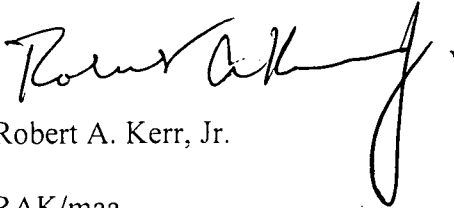
Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Petition for Rehearing in the above-referenced matter. Please file the original and return a filed stamped copy to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance in this matter and please call me with any questions.

Yours very truly,

MOORE & VAN ALLEN PLLC



Robert A. Kerr, Jr.

RAK/maa
Enclosures

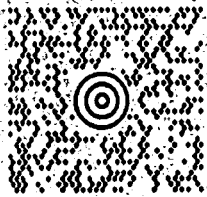
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