

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

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**Appeal from Charleston County  
Court of Common Pleas**

**The Honorable Mikell R. Scarborough, Master in Equity**

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**CASE NO. 2014-CP-10-5608  
APPELLATE CASE 2016-000886**

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**RECEIVED**  
OCT 18 2018  
SC Court of Appeals

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

v.

Merle S. Tamsberg,..... Respondent.

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**RETURN TO PETITION FOR REHEARING**

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Pursuant to Rule 240, SCACR, Respondent Merle S. Tamsberg, (“**Respondent**”) submits her Return to the Petition for Rehearing submitted by Appellants James Bradley Williams and Robert Blair Kline, Jr (the “**Appellants**”) dated October 3, 2018 (the “**Petition**”).

### **STANDARD OF REVIEW**

In order to prevail on a petition for rehearing, Appellant must demonstrate the Court overlooked or misapprehended its argument. Rule 221(a), SCACR; *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001). “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001), *citing* Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (*citing* *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)).

### **ARGUMENT**

The Appellants have failed to set forth any arguments which the Court did not entertain and address in the briefs and during oral argument. The arguments made by Appellant in the Petition were discussed in detail in the the parties’ briefs and oral arguments, and were considered and rejected by this Court in its opinion. *Williams v. Tamsberg*, Op. No. 5596, 2018 S.C. App. Lexis 70 (S.C. App. Sep. 19, 2018) (the “**Opinion**”). The Court did not misapprehend or overlook any arguments or evidence presented by the parties, and therefore, the Appellants’ Petition for Rehearing should be denied.

**1. The Court did not misapprehend or overlook any of the Appellants' arguments concerning the appurtenant easement over the Appellants' property.**

The Appellants merely repeat prior arguments that were rejected in the Opinion. For example, the heading for Appellants' argument is that "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." *Appellants' Pet.* at 3. The Respondents then simply reiterate the arguments made in their Final Brief nearly verbatim. These arguments were considered and rejected by the Court. The Appellants cite no additional evidence, and point to no argument that was not address.

The Court carefully examined the record before it and properly concluded that the easement is appurtenant where, as here, the dominant estate touches the easement and has access to the easement, and the easement does not extend beyond the lot line of the dominant estate. *Williams v. Tamsberg*, Op. No. 5596, 2018 S.C. App. Lexis 70 at \*15 (S.C. App. Sep. 19, 2018). Any other result would run afoul of the decision in *Whaley v. Stevens*, 21 S.C. 221 (1884), which concerned whether the easement actually touched the dominant parcel. Indeed, the real concern is whether the party claiming the easement can access it without crossing another's property. In the present case, the dominant parcel has immediate access to the servient parcel and the easement does not extent beyond the border of the two properties. Therefore, the subject easement has a terminus at the dominant parcel owned by the Respondent.

The Court's decision also affirms a seniscal analysis of what constitutes a terminus. There is no logical reason why an access road that runs adjacent to the

dominant parcel would not be considered an appurtenant easement, whereas an access road that runs diagonally or perpendicular into the dominant parcel would be considered appurtenant. There is simply no practical distinction that may be drawn based on the distance that the easement adjoins the dominant parcel. For this reason, the Court correctly interpreted *Whaley* and its progeny to hold that the subject easement is appurtenant to the dominant parcel owned by the Respondent.

**2. The Court did not misapprehend or overlook any of the Appellants' arguments concerning the necessity of the easement.**

The Appellants argue that the Court “erred in finding the easement was necessary to the enjoyment of [the dominant parcel].” *Appellants' Pet.* at 4. Even if the Appellants believe the Court erred, that is not a basis for rehearing. Rather, the Appellants must point to some argument that the Court misapprehended or overlooked. The Appellants have not done so.

The Appellants' allegation of error focuses entirely on the contention that the easement is “no longer necessary to the enjoyment of the dominant parcel.” *Id.* The Appellants cite numerous changes to the dominant parcel as support for this contention. *Id.* at 5, 6. These changes include removal of a garage, construction of a masonry wall with an access gate, and changes to the use of the easement. *Id.* Those changes are entirely irrelevant to the determination regarding whether the easement is appurtenant or in gross. The Court correctly held that “absent termination due to circumstances such as abandonment . . . an easement appurtenant is perpetual and irrevocable.” *Williams v. Tamsberg*, Op. No. 5596, 2018 S.C. App. Lexis 70 at \*19-20 (S.C. App. Sep. 19, 2018) (citing 12 S.C. Juris. *Easements* § 29 (1992)); see also 25 Am. Jur. 2d *Easements and Licenses* § 82 (2015).

To prevail, the Appellants would have to prove that the easement was not necessary to the enjoyment of the dominant parcel *at the time it was created*. In the alternative, the Appellants would have to prove that the easement was terminated by abandonment or other applicable circumstances. The Court correctly noted that the easement was necessary to access a garage located on the dominant parcel at the time of its creation in 1911 and at the time of reaffirmation in 1971. *Williams v. Tamsberg*, Op. No. 5596, 2018 S.C. App. Lexis 70 at \*19-20 (S.C. App. Sep. 19, 2018). There is no evidence to the contrary, and the Appellants have not cited any such evidence in their Petition.

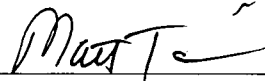
The Appellants' argument is actually that the Respondent abandoned the easement. However, the Appellants' did not appeal the order granting summary judgment as to their abandonment claim, and that order is now the law of the case. *In Re Morrison*, 321 S.C. 370, 372, 468 S.E.2d 651, 652 n.2 (1996) (noting that an unappealed ruling becomes the law of the case).

The Court correctly noted that the easement was necessary to the enjoyment of the dominant parcel at the time the easement was created, and properly affirmed the Master-in-Equity's order granting summary judgment.

### **CONCLUSION**

For the reasons set forth above, Respondent requests an Order denying the Appellants' Petition for Rehearing, and awarding the Respondent such other and further relief as this Honorable Court shall deem just and proper.

Respectfully submitted,



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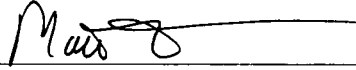
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**PROOF OF SERVICE**

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I do hereby certify that on the 17<sup>th</sup> day of October 2018, I served a copy of the within *Return to Appellant's Petition for Rehearing* in the within entitled matter by sending a copy of the same in an envelope with the correct postage prepaid addressed to:

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**VIA FEDERAL EXPRESS**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
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Re: James Bradley Williams, et al. v. Merle S. Tamsberg  
Appellate Case No. 2016-000886  
WCSR File No.:85674.0042.6

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Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of the *Respondent's Return to Petition for Rehearing* in the above-referenced matter. Please return a stamped copy to me in the self-addressed stamped envelope enclosed for this purpose.

Thank you in advance for your assistance.

Sincerely,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Matthew E. Tillman

MET/cbc  
Enclosures

cc: Robert A. Kerr, Esq.  
David M. Swanson, Esq.  
Jane C. Bouch, Esq.