

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

APR 04 2013

Carmen T. Mullen, Circuit Court Judge

SC Court of Appeals

Case No. 2008-CP-07-3656

Ernest Alvin Timmons as Trustee of the
Ernest A. Timmons Revocable Trust,Appellant,

v.

Neil O. Gifford, Amy E. Gifford, Johnny L. Brewer, Joseph Gray Peeples,
Brian M. Hinson, Karen B. Hinson, George R. Dickey, H. Alvin Dobson, Jr.,
Kimberly A. Dobson, Gene G. Slice, Andrea C. Klucsarits, Becky P.
Hildebrand, Gregory T. Hildebrand, Marsha Dean Ford, Harriet H. Ford,
Lucas W. Durham, Marianne Durham, John D. Meyer, Meryl V. Truett,
Christian W. Kern, Russel V. Schumpert, Carlton Mark Schumpert,
Elizabeth O'Neal Schumpert, Russell C. Amick, Pamela S. Burnett,
Mary Alice Broderick, Ellen N. Gifford, Robert M. McAlister, Barbara M.
Vaughan, Margie J. Crews, Will Mills, Tracy Mills, BDM Investments, LLC,
James P. Thomas, Lillian M. Thomas, J. Wyman Wall, III, Karl A. Overcash,
Patsy V. Coppage, Steven M. Robison, Charles Schmid, Larry M. Bane,
Renee C. Bane, Robert Gallina, Margaret E. Gallina, Bert Kerwin, Richard C.
Guarneri, Maria Guarneri, and James P. Thomas; if any of these persons
living, and if not living, then their heirs, devisees or successors in title to them;
and all persons unknown having or claiming to have any right, title, interest in,
easement upon, or lien upon the real property described in the complaint herein
being designated collectively as John Doe and Mary Roe; including all persons
who may be deceased, minors, in the Armed Forces of the United States,
Non Compos Mentis or under any other disability,.....Respondents.

MOTION TO REINSTATE APPEAL AND FOR REHEARING

The Appellant respectfully moves this Honorable Court to reinstate the Appeal in accordance with Rule 260 SCACR and to further request that the matter be set for rehearing with the Trial Court in order that a transcript and record of trial can be obtained in order to prepare an appeal.

BACKGROUND FACTS

The non-jury trial on this matter was heard on the 17th day of November 2009 by the Honorable Carmen T. Mullen, Circuit Court Judge, 14th Judicial Circuit. On May 27th, 2010, the Trial Court entered a final judgment on the matter. On June 4th, 2010, the Appellant filed a Motion to Alter or Amend Judgment (SCRCP 59(e)). On June 29th, 2010, the Honorable Carmen T. Mullen filed a Form 4 Order denying the Appellant's Motion to Alter or Amend Judgment without a hearing. The Appellant received the Form 4 Order denying his Motion to Alter or Amend Judgment on July 1st, 2010. On July 9th, 2010, the Appellant filed a Notice of Appeal and served the same upon the Respondents and the Honorable Carmen T. Mullen by first class US Mail.

On July 21st, 2010, the Appellant, requested the transcript from the court reporter. By email with letter attached, the court reporter notified the Appellant that she could not produce the transcript and that the "floppy disk which contained the file for this hearing is corrupted". The court reporter also stated that she did not have backup tapes from the hearing. The original request for transcript was July of 2010 and in her letter of January 19th, 2011, the court reporter stated, "it was just recently I discovered the disk corruption" Until the Appellant received the letter of January 19th, 2011, the court reporter in question had never responded to any of the Appellant's inquires nor had she ever mentioned there was a problem with the disk or that she did not have the tape backups

from the hearing. Thereafter, and pursuant to the Appellant's Motion to Remand, this Court by order dated February 11th, 2011, remanded the case back to the Trial Court for reconstruction and certification of the record of trial.

In the interim, the Court of Appeals has requested both verbally and in writing periodic updates on the Trial Court's progress in locating the file and certification of the record. The Appellant, through counsel, believes it has responded on each and every occasion. By this statement, the Appellant's counsel is not stating that the Court did not send a request for information dated November 14, 2012 as noted in the Court's Order of Dismissal. The Appellant's Counsel is merely stating that he does not recall such a request and that his failure to respond was by mistake or inadvertence on his part and not a willful or calculated action to ignore the request of the Court. This appeal has been extremely frustrating to the Appellant and very likely the Respondents in that this is uncharted territory. Appellant's counsel has never personally encountered a situation where in these modern times of computers, tape backups, etc. that a Court Reporter has failed to produce a transcript. The failure of the Court Reporter to produce a transcript in which to initiate an appeal cannot be attributable to either the Appellant or any of the Respondents. Likewise, the Appellant is informed and believes the "missing file" in the Beaufort County Courthouse is also a dilemma that cannot be attributable to either the Appellant or any of the Respondents. Furthermore, it is not within the Appellant's power to recreate and certify the record of trial.

As the Court is aware, the Beaufort County Courthouse is undergoing a complete renovation and in the Appellant Counsel's last discussion with the Trial Court, the Trial Court indicated they could find nothing more than three (3) exhibits in the basement of

the Courthouse. There were more than thirty (30) exhibits entered in to evidence at trial as well as several witnesses testified on the issues involved with the creation and use of the easement and the necessity of gating the easement, etc. Although Appellant's Counsel firmly believes the Trial Court has done everything in its power to attempt to locate the file and to recreate the testimony and record of trial, the Appellant is informed and believes that such an endeavor is out of the realm of possibility at this point and time. Appellant is also informed and believes that with more than thirty Defendants of which more than half of them are pro se; that it is futile to expect that all the Defendants and Appellant would agree on the record of trial, testimony, etc.

The Appellant is informed and believes that based on comments by all counsel concerned in this matter that regardless of the outcome at the Trial Court level, this matter was going to be appealed by someone if not multiple parties. The Appellant is informed and believes that given the prior case law on appurtenant easements and more particularly the Courts recent findings and rulings in Appellate Case No. 2010-159966 that there are genuine issues for appeal. Consequently, the Appellant respectfully requests that the Court reinstate the appeal for good cause shown and, given the fact that it does not appear that the Trial Court will be able to find enough of the file to put together a transcript or certify the record on appeal, that the Court order a new hearing on the matter.

Respectfully Submitted,

Mikell, Weidner, Wegmann & Harper, LLC

By: 

James J. Wegmann
6 Professional Village Circle

Beaufort, South Carolina 29907
(843) 521-0004
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

67907

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2008-CP-07-03656

Ernest Alvin Timmons as Trustee
Of the Ernest A Timmons Revocable
Trust,.....

Appellant.

v.

Neil O. Gifford, Amy E. Gifford,
Johnny L. Brewer, Joseph Gray
Peeples, Brian M. Hinson, Karen B.
Hinson, George R. Dickey, H. Alvin
Dobson, Jr., Kimberly A. Dobson,
Gene G. Slice, Andrea C.
Klucsarits, Becky P. Hildebrand,
Gregory T. Hildebrand, Marsha
Dean Ford, Harriet H. Ford, Lucas
W. Durham, Marianne Durham,
John D. Meyer, Meryl V. Truett,
Christian W. Kern, Russell V.
Schumpert, Carlton Mark
Schumpert, Elizabeth O'Neal
Schumpert, Russell C. Amick,
Pamela S. Burnett, Mary Alice
Broderick, Ellen N. Gifford,
Robert M. McAlister, Barbara
M. Vaughan, Margie J. Crews,
Will Mills, Tracy Mills,
BDM Investments, LLC, James
P. Thomas, Lillian M. Thomas,
J. Wyman Wall III, Karl A.
Overcash, Patsy V. Coppage,
Steven M. Robison, Charles Schmid,
Larry M. Bane, Renee C. Bane,
Robert Gallina, Margaret E. Gallina,
Bert Kerwin, Richard C. Guarneri,
Maria Guarneri, and James P.

RECEIVED

APR 04 2013

SC Court of Appeals

Thomas, if any of these persons are not living, and if not living, then the heirs, devisees, or successors in title to them; and all persons unknown having or claiming to have any right, title, interest in, easement upon, or lien upon the real property described in the complaint herein being designated collectively as John Doe and Mary Roe; including all persons who may be deceased, minors, in the Armed Forces of the United States, Non Compos Mentis or under any other disability,.....Respondents.

RECEIVED
APR 04 2013
SC Court of Appeals

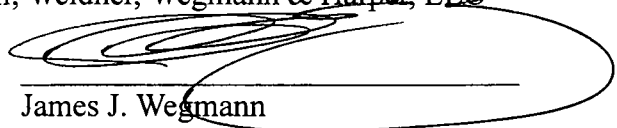
PROOF OF SERVICE

I certify that I have served the Motion to Reinstate and Rehearing on Karl Overcash, Neil O. Gifford, Amy E. Gifford, H. Alvin Dobson, Jr., Kimberly A. Dobson, Ellen N. Gifford, Robert M. McAlister, Barbara M. Baughan, BDM Investments, LLC, J. Wyman Wall III, George R. Dickey, Russell Amick, Johnny L. Brewer, Gregory & Becky Hildebrand, Steven M. Robinson, and Mary Alice Broderick by depositing a copy of it in the United States Mail, postage prepaid, on April 3rd, 2013, addressed to their attorneys of record, George H. O’Kelley, Jr., (Respondent), P.O. Box 1072, Beaufort, SC 29901, AG Solomons, Jr. (Respondent), PO Box 969, Estill, SC 29918, G. Hamlin O’Kelley (Respondent) 652 Coleman Blvd Suite #200, Mt. Pleasant, SC 29464, Karl D. Twenge (Guardian Ad Litem Nisi) 1001 Paris Avenue, Port Royal, SC 29935, Russell Amick (*Pro Se* Respondent) 252 McNeary Ferry Road, Leesville, SC 29070, Johnny L. Brewer (*Pro Se* Respondent) 96 Fort Freemont Road, St. Helena Island, SC 29920, Gregory & Becky Hildebrand (*Pro Se* Respondents) 201 Blaine Lane, Lexington, SC 29072, Steven M. Robinson (*Pro Se* Respondent) 7 Klebold Road, St. Helena Island, SC 29920, Mary Alice Broderick (*Pro Se* Respondent) 5 Fort Freemont Road, St. Helena Island, SC 29920, and to the Circuit Court Judge, The Honorable Carmen Tevis Mullen, PO Box 1128, Beaufort, SC 29901.

April 3rd, 2013

Mikell, Weidner, Wegmann & Harper, LLC

By:



James J. Wegmann
6 Professional Village Circle
Beaufort, South Carolina 29907
(843) 521-0004
Attorney for Appellant

MIKELL, WEIDNER, WEGMANN, & HARPER, LLC

"Protecting You, Your Family, & Your Business"

J. Thomas Mikell
Larry W. Weidner, II (SC & PA)
James J. Wegmann (SC & TX)
Frampton L. Harper, II

Mailbox Address:
Post Office Box 1727
Beaufort, South Carolina 29901

From the Desk of:
James J. Wegmann
wegmannj@beaufortlaw.com
Telephone (843) 521-0004
Fax (843) 521-9390

Mikell Office
14 Professional Village Circle
Beaufort, South Carolina 29907

Weidner, Wegmann, Harper Office
6 Professional Village Circle
Beaufort, South Carolina 29907

April 03, 2013

VIA OVERNIGHT MAIL

Ms. Tanya A. Gee, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Ernest Alvin Timmons, et. al. v. Neil O. Gifford, et. al.
2010166447

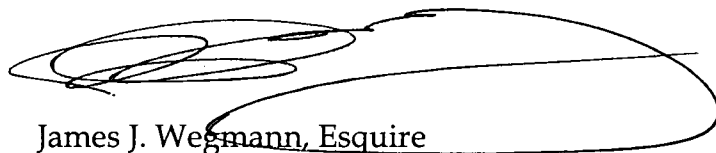
Dear Madam Clerk:

Enclosed herein for filing is an original and six (6) copies of a Motion to Reinstate regarding the above matter, along with two (2) copies to be stamped and returned in the enclosed self addressed stamped envelope. Additionally, enclosed is our check in the amount of \$25.00 for the filing fee.

By copy of this letter I have served a copy of this Motion to Reinstate upon all counsel of record and *pro se* defendants, as indicated by the attached Proof of Service.

As always, if you have any questions or I can be of further assistance, feel free to contact our office.

Sincerely,



James J. Wegmann, Esquire
6 Professional Village Circle
Beaufort, SC 29907
843-521-0004
Attorney for the Appellant

RECEIVED

APR 04 2013

SC Court of Appeals