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*In the Court of Special Appeals*

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September Term, 2003

No. 2619

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JAMES L. JESTER, et al.

Appellants,

v.

VERNON MCCABE,

Appellee.

*Appeal from the Circuit Court for Worcester County, Maryland  
(The Honorable J. Owen Wise, Judge)*

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**BRIEF OF APPELLANTS**

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## **STATEMENT OF THE CASE**

This appeal arises out of a property dispute between Appellants, James L. Jester, Ronald Carpenter, and Susan Carpenter (collectively, “Appellants”), and Appellee, Vernon McCabe (“McCabe” or “Appellee”). On or about October 29, 2002, McCabe, who owns property adjacent to Appellants’ respective lots (which are next to one another), filed suit in Worcester County Circuit Court, claiming a right of way over Appellants’ lots based on theories of easement by implication (specifically, by plat reference), easement by prescription, and easement by necessity. The area over which Appellee has claimed an easement is depicted on various recorded plats as an extension of Pine Street, within a development known as “Elliott’s Development.” E. 25, 30, 41. The “Pine Street extension,” as it has been referred to in this case, exists only “on paper,” and Appellants’ respective lots bound either side of it. The Pine Street extension terminates at the boundary line of Appellee’s property.

Appellants responded to Appellee’s lawsuit in due time, and, after the parties conducted discovery, Appellants filed a Motion for Summary Judgment (on June 23, 2003). On October 15, 2003, a hearing was held on Appellants’ Motion for Summary Judgment. The non-jury trial took place just two weeks later (on October 29, 2003), before any ruling had been issued on the summary judgment motion.

During the trial, Appellee abandoned his previously-asserted theories that he had obtained an easement over the subject area by necessity and/or by prescriptive use. E.

129. Accordingly, the narrow argument ultimately advanced by Appellee was that he had an implied easement over Appellants' property by virtue of a reference in his deed to a plat that depicted the Pine Street extension (as an area lying outside the boundaries of his property).

By written Memorandum Opinion and Order dated January 8, 2004, the Honorable J. Owen Wise denied Appellants' Motion for Summary Judgment, and ruled in Appellees' favor on the merits. Appellants' timely noted their appeal on February 2, 2004.

### **QUESTION PRESENTED**

Whether the trial court erred in ruling that Appellee has an implied easement by plat reference over Appellants' property.

### **STATEMENT OF FACTS**

The following facts are not in dispute:

A. The property currently owned by Appellee and identified in his Complaint (hereinafter "Appellee's property") is part of the property conveyed to Edna E. Fowler by Edna B. Elliott, by deed dated August 21, 1970, and recorded among the Land Records of Worcester County in Liber 289, folio 330 (hereinafter "Fowler Deed").

B. The Fowler Deed (E. 20-23) referred to the property being transferred therein as being "described as an entirety as follows according to survey made by William D. Pitts, Registered Surveyor, June 17, 1970, and the 'Plat of Edna E. Fowler's Part of the Gantt Farm'" (hereinafter "Fowler Plat," see E. 24).

C. The property conveyed in the Fowler Deed and shown on the Fowler Plat was described using a metes and bounds description which included Lots 27, 15, 16 and 17 from Elliott's Development Plat Number Four (E. 25), recorded in Plot Books of Worcester County in C.W.N. No. 1, folio 94 (hereinafter "Elliott's No. Four").

D. The property described in the Fowler Deed was conveyed by Edna Elliott Fowler to Robert M. Flory and Agnes R. Flory by deed dated September 1, 1977, and recorded among the Land Records of Worcester County in Liber F.W.H. No. 592, folio 5 (hereinafter "Flory Deed," see E.26-29).

E. The Flory Deed referred to the property being conveyed therein as being "described as an entirety as follows according to survey made by William D. Pitts, Registered Surveyor, June 17, 1970, and the [Fowler Plat]."

F. Robert M. Flory and Agnes R. Flory commissioned a new survey and plat of their lands as shown in the Fowler Plat, which new plat is entitled the "Plat of Survey of the Lands of Robert M. Flory & Wife," and is recorded among the Plot Books of Worcester County in W.C.L. No. 108, folio 51 (hereinafter "Flory Plat," see E. 30).

G. All of the property conveyed in the Flory Deed and shown on the Flory Plat was conveyed by Robert M. Flory and Agnes R. Flory to Eugene R. Parker by deed dated September 30, 1986, and recorded among the Land Records of Worcester County in Liber No. 1235, folio 151 (hereinafter "Parker Deed," see E. 31-34).

H. The Parker Deed referred to the property being transferred therein as

being “described as an entirety as follows according to [the Flory Plat].”

I. The property conveyed in the Parker Deed and shown on the Flory Plat was described using a metes and bounds description which included lots 27, 15, 16 and 17 from Elliott’s No. Four and the remaining property from the Flory Plat.

J. Eugene R. Parker, Jr., recorded a “Resubdivision of Lots 15, 16 and 17 and part of Charles Street of ‘Elliott’s Development Plat No. Four’.”

K. The re-subdivision of Lots 15, 16 and 17 did not affect Lot No. 27 in Elliott’s No. Four.

L. By deed dated March 31, 1987 (hereinafter “McCabe Deed,” see E. 35-40), Eugene R. Parker, Jr., conveyed to Vernon W. McCabe, Jr. and Carol P. McCabe all of the property described in the Parker Deed except for the re-subdivided lots 15A, 16A and 17A.

M. The property conveyed in the McCabe Deed was described “with reference to [the Flory Plat].”

N. Lot No. 27, as described in the McCabe Deed, is shown on Elliott’s No. Four, but is not shown on Elliott’s Development Plat No. Three (“Elliott’s No. Three”).

O. The area over which Appellee claims an easement was first depicted, as an extension of Pine Street located between Lots 22 and 11 and abutting the property eventually acquired by McCabe, on the original Plat for Elliott’s No. Three (E. 41). It

was thereafter depicted on the Fowler Plat, the Flory Plat, and the Plat for Elliott's No. Four, as an extension of Pine Street, located between Lots 11 and 22 in Elliott's No. Three, which abuts Appellee's property. Appellant James Jester is the owner of Lot 22 and Appellants Ronald and Susan Carpenter are the owners of Lot 11. By separate quitclaim deeds to James Jester and the Carpenters' predecessor in title (Gary Withers), dated April 2, 2002, and March 27, 2002, the Worcester County Commissioners expressly abandoned the Pine Street extension, which had never been accepted by the County into its inventory of roads. E. 45-47.

The Fowler Plat depicts Lots 27, 15, 16 and 17 as being a part of the entire tract of land shown therein. The only references in the Fowler Deed to the Plat for Elliott's No. Three (E. 41) and the Plat for Elliott's No. Four (E. 25) are found in the metes and bounds description as follows:

BEGINNING for said description at a cement boulder set in the ground at the southerly corner of Lot No. Seventeen (17) and the east corner of Lot No. Eighteen (18) of Section "C" as laid down on the plat of Elliott's Development - Plat No. Four, recorded among the land records of Worcester County, Maryland, in Plat Book C.W.N. No. 1, folio 94 . . .

(47.70) feet to a cement boulder set in the ground at the figure "7" on said plat; the same being a corner for Lot No. 22 as laid down on the Plat of "Elliott's Development - Plat No. Three", recorded among the aforesaid land records in Plot Book C.W.N. No. 1, folio 50; thence running South 21° 15' West by and with the southeasterly lines of said Lot No. 22 and of Lots Nos. 11 and 12 as laid down on said Elliott's Development - Plat No. Three, and of Lots Nos. 25 and 26 as laid down on said Elliott's Development, Plat No. Four,



recorded among said land records in Plat Book C.W.N. No. 1, at folio 94, the total distance of two hundred ninety four and seventy two hundredths (294.72) feet to a point which is a corner for said Lot No. 26 and Lot No. 27 as laid down on said Elliott's Development - Plat No. Four; thence running by and with the line dividing said Lot No. 26 from Lot No. 27 North  $68^{\circ} 45'$  West 100 feet to a cement boulder set in the ground on the southeasterly side of North Avenue as shown on both of said Elliott's Development plats; thence by and with said North Avenue and binding thereupon South  $21^{\circ} 15'$  West the distance of seventy six and fourteen hundredths (76.14) feet to a point indicated by the figure 21 at the intersection of said North Avenue and Charles Street; thence running by and with the northeasterly line of said Charles Street and binding thereupon South  $68^{\circ} 45'$  East the distance of one hundred (100) feet to a point indicated by the figure 16 on the plat filed herewith; thence running South  $21^{\circ} 15'$  West across the end of said Charles Street the distance of forty (40) feet to a point indicated by the figure "17"; thence running North  $68^{\circ} 45'$  West by and with said Charles Street the distance of one hundred (100) feet to a point which is an intersection of Charles Street and North Avenue aforesaid; thence running by and with said North Avenue and binding thereupon South  $21^{\circ} 15'$  West the distance of one hundred fifty (150) feet to a cement boulder set in the ground at a point which is a corner for Lot No. 17 and Lot No. 18 . . . E. 20-22.

The references to Elliott's No. Three and Elliott's No. Four in the Fowler Deed are simply to describe portions of the boundary lines of the property being conveyed therein.

The property conveyed in the Flory Deed and shown on the Fowler Plat was described using a metes and bounds description which included lots 27, 15, 16 and 17 from Elliott's No. Four and the remaining property shown on the Fowler Plat. The only references to Elliott's No. Three or Elliott's No. Four in the Flory Deed and the Parker

Deed are in the metes and bounds description, and are included merely to describe portions of the boundary lines of the property being conveyed.

The property conveyed in the McCabe Deed and shown on the Flory Plat was described using a metes and bounds description which included lot 27 from Elliott's No. Four. The only references to Elliott's No. Three or Elliott's No. Four in the McCabe Deed are in the metes and bounds description, and are included to describe portions of the boundary lines of the property being conveyed therein.

None of the metes and bounds descriptions in the McCabe Deed or the other deeds in McCabe's chain of title include as part of the property being conveyed therein any of the numbered lots shown on Elliott's No. Three. Lot 27 in Elliott's No. Four conveyed to Appellee in the McCabe Deed is not part of Elliott's No. Three, nor is it adjacent to or abutting the area over which Appellee claims an easement (the Pine Street extension).

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

In cases not tried before a jury, the pertinent standard of review “depends upon whether the lower court's ruling being scrutinized [on appeal] was a finding of fact or a conclusion of law.” *Medi-Cen Corp. of Md. v. Birschbach*, 123 Md. App. 765, 770 (1998) (citing *Himmelstein v. Arrow Cab*, 113 Md. App. 530, 536 (1997), *affirmed*, 348 Md. 558 (1998)). An appellate court may not “substitute its judgment for that of the trial court on its findings of fact but will only determine whether such findings are clearly

erroneous in light of the total evidence.” *Medi-Cen Corp. of Md. v. Birschbach*, 123 Md. App. at 770 (quoting *Van Wyk v. Fruitrade International*, 98 Md. App. 662, 669 (1994)). See also Md. Rule 8-131(c). The standard of review for determinations of legal questions or legal conclusions the court draws from its factual findings “is whether the trial court was legally correct.” *Medi-Cen Corp. of Md. v. Birschbach*, 123 Md. App. at 770 (citing *Himmelstein v. Arrow Cab*, 113 Md. App. at 536).

A trial court may properly grant summary judgment if “the moving party demonstrates the absence of any genuine dispute as to any material fact and that party is entitled to judgment as a matter of law.” *Singer Co. v. Baltimore Gas & Electric Co.*, 79 Md. App. 461, 466 (1988). See also Md. Rule 2-501(a); *Presbyterian University Hospital v. Wilson*, 99 Md. App. 305, 313 (1994), *affirmed*, 337 Md. 541(1995). When the moving party has advanced sufficient grounds for summary judgment, the non-moving party must “show with ‘some precision’ that there is a genuine dispute as to a material fact.” *Seaboard Surety v. Kline, Inc.*, 91 Md. App. 236, 243 (1992).

Formal denials or general allegations are insufficient to prevent the trial court from awarding summary judgment. *Id.* “By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (emphasis in original). See also *Seaboard Surety v. Kline, Inc.*, 91 Md. App. at

244 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247-248).

**II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THAT APPELLEE HAS AN IMPLIED EASEMENT BY PLAT REFERENCE OVER APPELLANTS' PROPERTY.**

**A. Whether the quitclaim deeds from the County Commissioners to Appellants were effective has no bearing on whether Appellee can claim an easement by implication.**

In its written Memorandum Opinion and Order, the trial court held, for a number of reasons, that the quitclaim deeds given to Appellants from the Worcester County Commissioners (E. 45-47) were ineffective as a means of conveying to Appellants title to the Pine Street Extension. E. 132-134. Specifically, the trial court held as follows: “Pine Street Extended is a right of way dedicated for the public’s use on plats but never accepted by the public authorities as a public right of way. The meaningless and ineffective quitclaim deed . . . did not change its status. Plaintiff, and any others who purchased property included in any of the plats on which Pine Street Extended is shown, have a right to use it as a street, until and unless the public authorities, by valid action, formally abandon it.” E. 138.

First, it has never been Appellants’ position that they have title to Pine Street extended by virtue of the quitclaim deeds given by the County Commissioners. Appellants’ title to the subject property, on which Pine Street extended is located, derives from statutory law. Under section 2-114(a) of the Real Property Article of the Maryland Code, any conveyance of land binding on a highway or street carries with it title to the

center of such street or highway, in the absence of an express provision to the contrary.

Md. Code, *Real Property*, §2-114(a); *Callahan v. Clemens*, 184 Md. 520, 526 (1945).

The question in this case is not whether Appellants, as the owners of the two lots binding on Pine Street extended, have title to such area — under settled Maryland law, they clearly do. Rather, the issue at hand is whether Appellants' ownership of the subject area is burdened by an implied easement benefitting Appellee.

Accordingly, the trial court acted erroneously to the extent that it relied, as support for its ruling below, upon a finding that the quitclaim deeds were ineffective. Even if true (which it is not), that fact would not in any way support or militate in favor of a finding that Appellee has an easement over Pine Street extended.<sup>1</sup>

**B. Pine Street extended is not a public right-of-way because it has never been accepted by the County into its inventory of public roadways.**

It has never been Appellee's contention that he has a right to use Pine Street

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<sup>1</sup> Appellants disagree with the trial court's analysis regarding the quitclaim deeds. Judge Wise held in his written Opinion that, in order for a quitclaim deed to be effective as a release of some claim the County might have to the property, the provisions of the Maryland Code governing "closing" of roads must be followed. E. 134. This is not so. The County Commissioners were not "closing" the Pine Street extension; they were merely waiving and releasing any claim the County might have to such "paper road" by virtue of the developer's offer of dedication. Judge Wise held further that "[t]he Quitclaim deeds in question cannot be construed to be the basis of title." E. 133. As stated, Defendants have never contended that their title to the property in question hinges upon the quitclaim deeds. To the contrary, their title derives from statutory law, as discussed above. The bottom line is that the quitclaim deeds have nothing to do with the issue presented in this case — whether McCabe has an implied easement over property owned by Appellants.

extended on the ground that it constitutes a public right-of-way. Indeed, Appellee's counsel stated unequivocally during the trial that the only argument Appellee was advancing at that time was that he possesses a right to use Pine Street extended based on a theory of implied easement by plat reference. E. 123 (Tr. of trial at p. 70). Nevertheless, Judge Wise stated as part of his declaratory ruling that "Plaintiff and other members of the public have the same rights to Pine Street they had prior to the execution and recording of the quitclaim deeds from the County Commissioners." E. 139. Judge Wise's Opinion suggests, although does not directly state, that Pine Street extended constitutes a public right-of-way, or that the public in general has some right to use Pine Street extended, simply by virtue of the fact that it appears in several recorded plats. E. 138-139 (Opinion, at pp. 10-11).

To the extent that Judge Wise has relied, as support for his ruling in Appellee's favor, on a finding that the public in general has some right to use Pine Street extended, such reliance is mis-placed. It is well-settled under Maryland law that "a completed common law dedication 'requires an offer and an acceptance.'" *Gregg Neck Yacht Club, Inc. v. County Commissioners of Kent County*, 137 Md. App. 732, 755 (2001) (quoting *Washington Land Co. v. Potomac Ridge Development*, 137 Md. App. 33, 40 (2001)). When the plat establishing and depicting Pine Street extended was recorded, an offer of dedication was made to the County. However, such offer has never been accepted by the County, therefore, there has never been a *completed* dedication of the Pine Street

extension. Indeed, the quitclaim deeds given by the County Commissioners to Appellants, even if they are ineffective (which they are not), nevertheless constitute conclusive evidence that the County has no intention of accepting the offer of dedication of Pine Street extended.

**C. Appellee is not entitled to an easement by plat reference under the facts of this case and settled Maryland law.**

Appellee argues, and the trial court held, that Appellee has an “easement by implication” over Appellants’ respective lots, because the purported easement area — the Pine Street extension — is depicted on the Flory Plat (E. 30), to which Appellee’s deed refers. Appellee and the trial court rely principally on the case of *Boucher v. Boyer*, 301 Md. 679 (1983), in which the plaintiff (Boucher) claimed an easement over a right-of-way that abutted his property, just as in the present case. The Court of Appeals held, in pertinent part, that:

The Bouchers’ deed describes the conveyed property by a metes and bounds description. The deed, however, does so in reference to the entire original Piper tract, including Lot Nos. 1 and 2, which had been conveyed previously to the appellees. The deed contains an “exceptions clause,” which expressly excludes these lots from the grant by reference to the Piper Estates plat. Appellees challenge this clause by arguing that it cannot be relied upon for this purpose. We disagree. It seems clear to us that the exceptions clause describes the conveyed property as much as the metes and bounds description. Without both, the description of the Bouchers’ property would be incomplete. As we see it, a deed that is silent as to the right of way but refers to a plat that establishes such a right of way creates a rebuttable presumption that the parties intended to incorporate the right of way in the transaction.

*Boucher v. Boyer*, 301 Md. at 689.

*Boucher* is distinguishable from the present case, however, and the differences between the two cases make *Boucher* persuasive authority in support of Appellants' position. In *Boucher*, the property in question was originally a single tract of land. The owner subdivided the front portion of the tract into two separate lots with a roadway separating them, which roadway terminated at the boundary line of the remaining portion of the entire original tract. When the original owner sold the remaining parcel, the property was described in the deed using a metes and bounds description *of the entire original tract* with reference to a plat thereof, *saving and excepting* the front portions which were previously subdivided and conveyed to other parties. In other words, based on the legal description in the plaintiff's deed, the property conveyed to the plaintiff in *Boucher* included the entire original tract of land, including the right-of-way shown on the plat, saving and excepting the previously subdivided lots. On that basis, the Court held that, under the theory of easement by implication (or easement by plat reference), the grantee in *Boucher* was entitled to a right-of-way over the roadway shown on the plat.

As the undisputed facts establish, however, this case is different than *Boucher*. The property conveyed to Appellee in the present case, as described in the McCabe Deed, does not include the entire original tract of land, or any part of the area known as Elliott's No. Three, where the Pine Street extension is located. If, based on the metes and bounds legal description and/or a plat reference, the McCabe Deed had conveyed some or all of Elliott's No. Three, *saving and excepting* the numbered lots therein, then the facts of this



case would arguably mirror the facts of *Boucher*, and McCabe would arguably have a claim to an easement over the forty-foot “right-of-way” at issue. As stated, however, that is clearly not the case.

Appellee has no greater claim to an easement by plat reference (i.e., by implication) than Edna E. Fowler would have had in August of 1970. The deed to Edna Fowler refers only to the “plat of Edna E. Fowler’s part of the Gantt Farm”. The property conveyed in the Fowler Deed, which did not include the entire Gantt Farm, was described using a metes and bounds description, which referred to Elliott’s No. Three merely for reference points as to where a portion of the boundary lines for the Fowler property were drawn. All of the references in the deeds in McCabe’s chain of title to Elliott’s No. Three (or to the plats depicting Elliott’s No. Three and/or the purported easement area), are similarly included for the limited purpose of describing the boundary lines of the property.

Had Edna Elliott intended for Edna E. Fowler -- who was acquiring a portion of the Gantt Farm which did not include any of the property in Elliott’s No. 3 -- to have an enforceable right to use the Pine Street extension, then she would have described the property being conveyed to Edna Fowler by a metes and bounds description which included the original *entire* tract of land (as in *Boucher*), *saving and excepting therefrom* the subdivided lots shown on Elliott’s No. Three and Elliott’s No. Four.

As evidenced by the documentary evidence presented below, this did not occur.

The metes and bounds description used in the McCabe Deed and the other deeds in McCabe’s chain of title went along the edges and did not include any part of Elliott’s No. Three.<sup>2</sup>

In *Boucher*, the Court made clear that “[a]n implied easement is based on the presumed intention of the parties at the time of the grant or reservation as disclosed from the surrounding circumstances rather than on the language of the deed.” *Boucher v. Boyer*, 301 Md. at 688. There is, quite simply, nothing in the record relating to the transfer of property from Eugene Parker to McCabe (or the transfers to Parker and Fowler) — including the deed reference to the Elliott’s No. 3 plat — from which one could properly or reasonably presume an intention to grant a right to use the Pine Street extension. Indeed, at the time of Parker’s transfer to McCabe, Mr. Parker did not own, and was not conveying, any part of Elliott’s No. 3, in which Pine Street is located.

McCabe is and at all times has been an owner of land which is *adjacent to and outside of*

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<sup>2</sup> See also *Koch v. Strathmeyer*, 357 Md. 193 (1999), in which the Court held as follows:

the law in this State is well-settled that, when a property owner subdivides property and makes or adopts a plat designating lots as bordering streets, and then sells any of those lots with reference to the plat, an implied easement of way ‘passes from the grantor to the grantee . . . over the street contiguous to the property sold.’

*Koch v. Strathmeyer*, 357 Md. at 199. Again, the present case involves different facts — the McCabe Deed did not convey any property located within Elliott’s No. 3, where the right-of-way in question is located. The property McCabe acquired lies completely outside the development known as Elliott’s No. Three, and the plat to which the McCabe Deed refers (the Flory Plat) simply shows a portion of Elliott’s No. Three as a point of geographic reference along the boundaries of the land being conveyed. Such reference is not the type that could properly be deemed to have created an implied easement by plat reference.

the development which Pine Street is intended to serve and in which it is located.

Unlike the present case, the reported decisions involving implied easements by plat reference typically involve situations where an owner of a subdivided lot in a development is claiming an easement over streets or areas located *within the same development*. See e.g. *Koch v. Strathmeyer*, 357 Md. 193 (1999). The trial court's decision in this case has the effect of extending the doctrine of easement by plat reference beyond its established scope, to include situations where a purchaser of property located completely outside of a subdivided development takes title under a deed that happens to refer to a plat depicting a paper road within the neighboring development, but terminating (abutting) at his or her boundary line. Under this broadened notion of easement by plat reference, a grantor could create rights in surrounding paper roads located on land he never owned, and is not conveying, simply by referring in the deed to a plat depicting such roads.

Again, the intent to create an easement must be convincingly demonstrated from all of the surrounding circumstances of the conveyance at issue, and Appellants submit that there were no circumstances in this case demonstrating an intent by Eugene Parker (or any of his predecessors in title) to grant to McCabe a right to use Appellants' property.

The recent Court of Appeals decision in *Kobrine LLC v. Metzger*, 380 Md. 620, 846 A.2d 403 (2004), is instructive. The Court set forth in its opinion the following factual background:

Although it started out differently, this case, as it ultimately was presented for decision, was a battle between two lot owners in Section Two of the HLB subdivision. Dr. and Mrs. Kobrine own Lot 3 in Block E — a lot that directly borders the Patuxent River. Bruce Metzger owns Lot 8 in Block A — a non-riparian lot that at one time had access via an interior road to [a lot in Section 2 that had been deeded to Kobrine, LLC (“the KLLC lot”)], which was immediately to the west of the Kobrine lot and also bordered the Patuxent River. Because, on the recorded plat of Section 2, the KLLC lot was marked “Area Reserved for the Use of Lot Owners,” some of the lot owners in the subdivision used that parcel not just for access to the river, but also for picnics, parties, and other recreational uses. In 1999, the Kobrines, through [Kobrine LLC], purchased the abutting KLLC lot and precluded Metzger and other subdivision lot owners from continuing to use it. Access to the river remained available through a nearby thirty-foot road. On behalf of himself and a homeowners association that he created [(“HOA”)] . . . Metzger sued to have KLLC’s title declared invalid. HOA owns no property in the subdivision and has no contractual or other legally cognizable interest in any of the roads in the subdivision or in the KLLC lot. No other lot owner seeks to upset or impair KLLC’s title [to the KLLC lot].

*Id.* at 404-405.

In addressing the issue of whether the plaintiffs in that case had an implied easement, the Court noted preliminarily that “we seriously doubt whether HOA has any standing to assert any express or implied easement in the KLLC lot.” *Id.* at 411. As the Court had noted in its discussion of the factual background, HOA did not own any property within the subdivision, and had no contractual or other interest in the KLLC lot. The Court did not decide that issue, however, because it held that Metzger clearly had standing “as a lot-owner in Section Two” of the development. *Id.* The Court ultimately held that “there is a basis for a limited implied easement — limited to the benefit of the 39 numbered lots in Section Two and limited to the kind of recreational uses specified by the Circuit Court.” *Id.* at 412.

Consistent with the Court of Appeals' holding in *Kobrine*, there may be some limited basis for the owners of certain numbered lots located within Elliott's No. 3 to claim an implied easement over the Pine Street extension. For what purpose such lot owners would use such an easement is an open question, given the fact that they would be trespassing by crossing over onto McCabe's property. However, there is no legal or other basis for McCabe, an individual owning property wholly outside Elliott's No. 3, to claim an implied easement over any part of Pine Street.

### **CONCLUSION**

Appellants, James Jester, Ronald Carpenter, and Susan Carpenter, respectfully request this Honorable Court to reverse the ruling of the Circuit Court for Worcester County, and declare that Appellee, Vernon McCabe, has no express or implied easement over the Pine Street extension, or any other portion of Appellants' property.

This Brief has been typed  
in Times New Roman font,  
size 13-point.

Respectfully submitted,

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## **CITATION AND VERBATIM TEXT**

### **Md. Rule 8-131. Scope of Review.**

**(c) Action tried without a jury.** When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

### **Md. Code, Real Property Article**

#### **Section 2-114. Title to street or highway where land binding on it is granted.**

(a) *In general.* — Except as otherwise provided, any deed, will, or other instrument that grants land binding on any street or highway, or that includes any street or highway as 1 or more of the lines thereof, shall be construed to pass to the devisee, donee, or grantee all the right, title, and interest of the deviser, donor and grantor (hereinafter referred to as the transferor) in the street or highway for that portion on which it binds.

**CERTIFICATE OF SERVICE**

I hereby certify that, on this \_\_\_\_\_ day of August, 2004, two (2) exact copies of the foregoing Brief of Appellants were served, via first class U.S. Mail, postage prepaid, on: Brian Peter Cosby, Esq., P.O. Box 600, Ocean City, MD 21843.

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Bruce F. Bright