RENDERED: JUNE 15, 2018; 10:00 A.M.
TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-001718-MR

KIRBY W. HOLLADAY, JR;
AND PAMELA J. HOLLADAY — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 13-CI-004714

FRANK L. ALEXANDER, II;
AND ROYA ALEXANDER — APPELLEES

AND NO. 2015-CA-001771-MR

FRANK L. ALEXANDER, II;
ROYA ALEXANDER; AND
MICHAEL JOHNSON — CROSS-APPELLANTS

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 13-CI-004714

KIRBY W. HOLLADAY, JR;
AND PAMELA J. HOLLADAY — CROSS-APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, DIXON, AND NICKELL, JUDGES.

DIXON, JUDGE: Appellants/Cross-Appellees, Kirby and Pamela Holladay, appeal from an order of the Jefferson Circuit Court ruling that their improvements to a parking easement located on neighboring property owned by Appellees/Cross-Appellants, Frank and Roya Alexander, exceeded the scope of the easement. The Alexanders have filed a cross-appeal challenging the trial court's earlier order finding that the easement was valid.

In July 2007, the Holladays purchased property located at 1407 St. James Court in Louisville, Kentucky. At the time of the purchase, the property had two separate easements providing alley access. It is the easement over the Alexanders' property located at 416 West Magnolia Avenue that is the subject of this appeal.[1] The easement was granted by the Alexanders' predecessors in interest (Wards) to the Holladays' predecessor in interest (Shewmaker) on June 7, 1998, and provided as follows:

> WHEREAS, the Grantors and Grantee are the owners of adjacent properties and desire to cooperate to provide a parking and access area for the benefit of both the Grantors and Grantee, whereby access is given to the

[1] The Alexanders, who are residents of California, purchased the Magnolia Avenue property in 2007 for rental income purposes and have never lived there.

> Grantee across the property of the Grantors, and parking area is provided on the property of the Grantors; and
>
> WHEREAS, the property described in the attached Exhibit "A", is owned in fee simple by the Grantors, and is hereby referred to as Tract "A" [416 W. Magnolia], and the property described in Exhibit "A" is owned in fee simple by the Grantee, and is hereinafter referred to as Tract "B" [1407 St. James Ct.];
>
> Therefore, in consideration of One Dollar and other good and valuable consideration, consisting of Grantee's performance of work in developing the parking area and the access way and the Grantee's agreeing to bear the cost of same, the Grantors hereby grant, assign and convey this easement in, to and upon and over that portion of Tract A, described as follows:
>
> > Consisting of the southernmost fifteen (15) feet of Tract A, extending from the east boundary of Tract A, which is contiguous with the east boundary line of Tract B.
>
> The purpose of the easement is to provide pedestrian and vehicular access, ingress and egress from the alley between Fourth Avenue and St. James Court, which is contiguous with the east boundary line of Tract A, across Tract A for the benefit of Tract B.
>
> The Owner of Tract B, in further consideration of the granting of this easement, hereby covenants to maintain and make necessary repairs to the paving and landscaping and to develop parking spaces for the benefit of Tract B.

Evidently, the original condition of the easement made it inaccessible to vehicles. The original grantee, Mr. Shewmaker, removed a retaining wall and cleared away brush so that a four-wheel drive vehicle could access and park in the easement

area. When the Holladays purchased the property, they graded the easement area to the alley and graveled it. Subsequently, in 2012, the Holladays poured a flat concrete pad for parking, and later erected retaining walls and landscaped around the pad.

Apparently, sometime in 2013, the Alexanders rejected an offer by the Holladays to purchase the easement property and, for the first time, declared that they did not recognize the validity or existence of an easement. Soon thereafter, the Alexanders began leaving a rental car parked in the easement area, as well as spray painted their Magnolia Avenue address on the concrete pad and posted a sign that any car parked there would be towed. In response to the Alexanders' actions, the Holladays filed the instant action in the Jefferson Circuit Court in September 2013, seeking a declaration of rights establishing their dominant estate property rights in the easement, an injunction prohibiting the Alexanders from interfering with those property rights, and damages. The Alexanders thereafter filed a motion for judgment on the pleadings or, in the alternative, a motion for summary judgment arguing that the easement (1) was an invalid executory contract; (2) was only binding upon the parties to the contract and not their successors in interest; (3) violated the statute of frauds because the Alexanders did not sign the agreement; and (4) did not run with the land. The Holladays also filed a motion for a partial summary judgment.

On March 21, 2014, the trial court rendered an opinion and order finding the easement to be valid and granting partial summary judgment in favor of the Holladays. Therein, the trial court stated:

> In order to properly interpret the language of the easement the Court should determine the intent of the parties in making the easement. To ascertain the intent of the parties regarding the deed, one turns to the language of the deed itself. "If the language is unambiguous, the intent of the parties at the time the easement agreement was executed must be determined from the context of the agreement itself." *Sawyers v. Beller*, 384 S.W.3d 107, 111 (Ky. 2012) (*quoting Texas E. Transmission Corp. v. Carman*, 314 S.W.2d 684, 687 (Ky. 1958).
>
> Here, the Wards and Shewmaker created an express easement and recorded it with the Jefferson County Clerk's Office. They created this easement with a "desire to cooperate" and for the "benefit of both" parties. They also included the language "[t]o have and to hold the said easement unto the Grantee in Perpetuity." Ordinarily, the right to use an easement lasts forever, unless, of course, terminated by an act of the parties . . . or by operation of law, as in the case of forfeiture or otherwise. 25 Am. Jr.2d Easements and Licenses § 101 et seq. (1966). Further the Easement includes a distinction between the Grantor/Grantee and Tract A/Tract B. For instance, Tract B, not Shewmaker "The Grantee," is tasked with the duty to "maintain and make necessary repairs to the paving and landscaping and to develop parking spaces." This language indicates that these duties were on the property owner not the individuals. Therefore, based on the intent of the parties in the language of the contract, the act of recording it, and relevant law the Court finds that the Wards and Shewmaker intended to create a permanent easement.

Following additional discovery and a failed mediation, the parties briefed the issue concerning the scope of the easement. After hearing oral arguments, the trial court entered an order on August 18, 2015, ruling that although the easement was valid, the Holladays had exceeded the scope of the easement:

> The improvements made to the easement parcel, rather than simple repair and maintenance, effectuated a taking of the property by Plaintiffs as against Defendants. The improvements, in particular the retaining walls adjacent to the parking pad, give the clear impression of fee simple ownership by the property owners of 1407 St. James Court. Clearly, the 1998 easement did not contemplate this.

The trial court ordered the Holladays to restore the easement property to "a flat pad with no improvements" and that such pad was "to be used by both parties, each unencumbered by the other." The trial court further ordered that neither party could use the easement property for a period of ninety days while it was being restored.

Subsequently, on November 2, 2015, the trial court entered an order granting the Alexanders' motion to make the March 21, 2014 and August 18, 2015 orders final. The trial court noted therein that "[s]aid Orders adjudicate conclusively and finally the primary issues of the instant litigation, i.e., the existence and scope of the easement at issue herein." The Holladays thereafter filed an appeal in this Court challenging the trial court's ruling regarding the scope of the easement. The

Alexanders have cross-appealed the trial court's finding that the easement was valid. Additional facts are set forth as necessary in the course of this opinion.

On appeal, the Holladays argue that the trial court erred in finding that their improvements exceeded the scope of the easement. The Holladays point out that the interpretation of unambiguous easements is limited to the four corners of the document and that there is no question herein that the easement expressly provided that a parking area was to be created on the Alexanders' property for the benefit of the Holladays' property. Further, the Holladays argue that the trial court's conclusion that because the retaining walls give the impression that they own the easement in fee simple, the Holladays have somehow exceeded the scope of the easement has no basis in Kentucky law, and that the "appearance" of the easement is irrelevant in determining its scope. In their cross-appeal, the Alexanders challenge the trial court's order granting partial summary judgment in favor of the Holladays and finding that the easement in question is, in fact, valid. We necessarily must first address the arguments raised in the Alexanders' cross-appeal, as any discussion concerning the scope of the easement is secondary to first determining whether a valid easement exists.

Our standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment shall be granted

"if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.*

Easements are created by express written grant, implication, prescription or estoppel. Under Kentucky law, the rights created by an easement depend upon its classification. *Loid v. Kell*, 844 S.W.2d 428, 430 (Ky. App. 1992). An express easement is created by a written grant with the formalities of a deed. *Id.* at 429-30. The nature of an easement is distinguishable from a mere license in that it is an incorporeal right, which is always separate and distinct from the right to occupy and enjoy the land itself. *Lyle v. Holman*, 238 S.W.2d 157, 159 (Ky. 1951). Further, in contrast to a restrictive covenant that restricts the use and enjoyment of property, an easement confers a right upon the dominant tenement to enjoy a right to enter the servient tenement. *See Scott v. Long Valley Farm Kentucky, Inc.*, 804 S.W.2d 15, 16 (Ky. App. 1991). It is a privilege or an interest in land and invests the owner with "privileges that he cannot be deprived of at the

mere will or wish of the proprietor of the servient estate." *Louisville Chair & Furniture Co. v. Otter*, 219 Ky. 757, 294 S.W. 483, 485 (1927) (citation omitted).

Easements can also be in gross or appurtenant, the distinction being that "in the first there is not, and in the second there is, a dominant tenement to which it is attached." *Meade v. Ginn*, 159 S.W.3d 314, 320 (Ky. 2004) (quoting 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 11 (1996)). An easement appurtenant inheres in the land exists forever unless "terminated by an act of the parties (for example, abandonment, merger, or conveyance) or by operation of law, as in the case of forfeiture or otherwise." *Scott*, 804 S.W.2d at 16.

In the case of an express easement, such as is present in the instant case, the terms of the conveyance determine the rights and liabilities of the parties. *See Texas Eastern Transmission Corp. v. Carman*, 314 S.W.2d 684, 687 (Ky. 1958) (citing *Puckett v. Hatcher*, 307 Ky. 160, 209 S.W.2d 742, 744 (1948)). If the language is unambiguous, the intent of the parties at the time the easement agreement was executed must be determined from the context of the agreement itself. *Id.* While an easement holder may not expand the use of the easement, it is equally true that the easement grantor may not interfere with the easement holder's use of the easement. *See Commonwealth, Dep't of Fish and Wildlife Resources v. Garner*, 896 S.W.2d 10, 13-14 (Ky. 1995).

The Alexanders first argue that the easement was merely an executory contract with a condition precedent. Specifically, they contend that Shewmakers

actual performance of work necessary to develop the ingress/egress area was a condition precedent to creating the easement, and because he did not perform such work, the easement agreement was never finalized. As such, the Alexanders conclude that Shewmaker had no valid easement to convey when the Holladays purchased the property. We disagree.

An executory contract is defined as one that is not complete because it awaits performance of a condition precedent and, as such, is not final and binding. *Hopkins v. Performance Tire & Auto Service Center, Inc.*, 866 S.W.2d 438, 441 (Ky. App. 1993) (citation omitted). However, "[c]onditions precedent are not favored and the courts will not construe stipulations to be precedent unless required to do so by plain, unambiguous language or by necessary implication." *A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co.*, 650 F.2d 118, 121 (6th Cir. 1981) (quoting 17 Am. Jur. 2d, *Contracts*, § 321, p. 752 (Supp. 1980)). Further, it must be shown that the parties have no agreement in the absence of the condition precedent. *See Horn v. Ranier*, 560 S.W.2d 233 (Ky. App. 1977).

We are of the opinion that the granting language in the easement herein is absolute and in the present tense: "the Grantors hereby grant, assign, and convey this easement . . . ." Significantly, the easement does not refer to the specific parties but rather to the tracts of land to be affected, and the grantors and grantees of the property rights. Nothing in the language suggests that the formation of the agreement is in any manner contingent upon the construction of any specific

improvement nor does it state that time is of the essence. As a result, there is no basis to conclude that Shewmaker's act of initially clearing the area so that a four-wheeled vehicle could park was insufficient under the language of the easement. Further, although the easement states that "[t]he owner of Tract B, in further consideration of the granting of this easement, hereby covenants to maintain and make necessary repairs to the paving and landscaping[,]" the language clearly indicates that it was "in further consideration" and was not the primary or only source of consideration for the easement. We agree with the trial court that the easement is not an executory contract.

We likewise find no merit in the Alexanders' argument that the easement agreement, like any other contract, was binding only upon the parties to it, and that the statute of frauds necessarily invalidates the easement. Because the easement was created solely for the purpose of providing parking and access across 216 W. Magnolia for the benefit of 1407 St. James Court, it is clearly appurtenant to the latter and runs with the title to that property. "If an easement is to be exercised in connection with the occupancy of particular land, then ordinarily it is classified as an easement appurtenant." *Martin v. Music*, 254 S.W.2d 701,703 (Ky. 1953). As previously noted, an easement appurtenant inheres in the land and cannot be "terminated by an act of the parties (for example, abandonment, merger, or conveyance) or by operation of law, as in the case of forfeiture or otherwise." *Scott*, 804 S.W.2d at 16. Even if the easement is not referenced in the deed, "[a]

person who purchases land with knowledge or with actual, constructive, or implied notice that it is burdened with an easement in favor of other property ordinarily takes the estate subject to the easement." *Dukes v. Link*, 315 S.W.3d 712, 716 (Ky. App. 2010) (citation omitted). Proper recordation of the instrument containing the grant of the easement is considered sufficient notice to the purchaser. *Id.* Accordingly, it is irrelevant that the Alexanders were not parties to the agreement. They are nonetheless bound by the easement that runs with the title to their property.

Finally, the Alexanders argue that the easement is void because it violates public policy. Their position, which is convoluted at best, essentially is that the development contemplated by the agreement is in violation of land use regulations and local building codes. Although construction and building issues may or may not eventually be a concern in this matter, the only issue on appeal is the validity and scope of the easement. Clearly, a party making improvements to an easement has the obligation regarding applicable laws and regulations and would be responsible for any repercussions stemming from his failure to comply. The Holladays acknowledge that they are required to follow all applicable laws in developing the easement, as well as their liability for any failure to do so. Notwithstanding, such issues do not affect the validity of the easement under Kentucky law.

Having concluded that the trial court properly found a valid easement existed, we must now turn to the Holladays' argument that the trial court nevertheless erred in finding that they had exceeded the scope of the easement. The Holladays contend that two questions arise from the trial court's August 18, 2015 order. First, does the flat concrete pad exceed the scope of the express easement that referenced paving a 15-foot area? Second, does the dominant estate holder (Holladays) have superior parking rights under the easement?

A trial court's ruling with respect to the scope of an easement is reviewed *de novo*. Construction of a deed is a matter of law for the court and, if the language is unambiguous, the intent of the parties at the time the easement agreement was executed must be determined from the four corners of the document. *Gabbard v. Short*, 351 S.W.2d 510, 511 (Ky. 1961); *Sawyers v. Beller*, 384 S.W.3d 107, 110 (Ky. 2012). This analysis is equally applicable to easements, and if the document is capable of two constructions it will be construed against the grantor. *Smith v. Vest*, 265 S.W.3d 246, 249 (Ky. App. 2007).

An easement "should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument . . . ." RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.1 (2000). We are of the opinion that the language of the easement herein unambiguously provided that (1) a parking area on the servient estate (Alexanders' property) was to be established; (2) the dominant estate holder (Holladays and their predecessor) were tasked with the

responsibility of creating and maintaining the parking area; and (3) the parking area was for the benefit of the dominant estate (Holladays).

The Holladays point out that it is undisputed that the actual easement area herein is nothing but the flat concrete pad. Although the trial court initially ordered the area to be returned to its original condition, it subsequently agreed that the concrete pad was the equivalent of the paved area specifically provided for in the easement agreement. Nevertheless, the trial court opined that the retaining walls around the concrete pad gave the appearance that the Holladays owned the area in fee simple and thus equated to a taking of the property, which exceeded the scope of the easement. The flaw in that rationale, however, is that the retaining walls were built outside of the actual easement area. The retaining wall on the left side of the parking area is located on a separate easement granted to the Holladays by their other neighbor. The wall and steps that lead from the parking area to the Holladays' house is located entirely on the Holladays' own property. Finally, the wall built on the right side of the property is, in fact, located on the Alexanders' property and is a matter of controversy still pending in the trial court.

Regardless of the physical appearance of the parking area as a whole, the actual part within the easement complies with the language of the easement agreement. We are unconvinced that the Holladays can be forced to remove retaining walls located on their own property or that of the other neighbor, who is not a party to this action. Certainly nothing in the language of the easement

agreement prohibited the construction of retaining walls outside of the easement area. There is similarly no basis in Kentucky law to find that the appearance of the surrounding area of an easement alone dictates whether or not it exceeds the scope of the easement language.[2] Thus, we are compelled to conclude that the trial court erred in ruling as such.

In addition to the appearance of the parking area, the trial court also expressed concern that an easement is limited to ingress and egress only, and an agreement that provides parking for the benefit of only the dominant estate to the exclusion of the servient estate would constitute a taking of the property. The trial court noted in its August 18, 2015, order that the easement must be for the benefit of both properties "each unencumbered by the other." In a similar vein, the Alexanders assert in this Court that because easements are nonpossessory interests in land, any easement that permits one party to park on an easement at the exclusion of the other must be deemed unenforceable. In other words, the Alexanders' position is that parking is occupation, which equals possession, and thus the Holladays have effectively taken the Alexanders' property. We must disagree.

Under Kentucky law, an easement can be for the use of property, not simply the ingress and egress. As stated in the RESTATEMENT (THIRD) OF PROPERTY:

[2] We agree with the Holladays that to adopt such a position would arguably invalidate many railroad and utility easements. One looking at a railroad easement could certainly conclude that the rails give the impression that the railroad owns that property in fee simple.

SERVITUDES §1.2 (2000), "[a]n easement creates a nonpossessory right to enter and *use* land in the possession of another and obligates the possessor not to interfere with the *uses* authorized by the easement." (Emphasis added.) In *Meade v. Ginn*, 159 S.W.3d at 317, our Supreme Court explained that the owners of a servient estate "retain the right to use their own property so long as their use does not interfere with the use of the dominant tenement . . . ." In fact, under Kentucky law, if a servient estate owner, in this case the Alexanders, were to block the dominant estate from using the easement, the servient estate would be in violation of the dominate estate's rights under the easement. *See Baker v. Hines*, 406 S.W.3d 21, 27 (Ky. App. 2013).

Contrary to the Alexanders' argument, parking easements are not limited to commercial settings. In *Goodwyn v. Mei-Wah Cheng*, 2008-CA-001668-MR (Ky. App. Nov. 25, 2009)[3], this Court addressed a dispute between neighbors over who had the dominant right to park in an easement area. The adjoining properties were once part of a larger parcel. When the larger parcel was subdivided, a house and driveway were included in the first parcel, while a detached garage and office building were included in the second parcel. The Goodwyns owned the garage/office building that was accessible only by an easement reserved in an earlier sale of the first parcel. However, although the Goodwyns were technically the dominant estate, the easement language only provided them "[a] permanent

[3] 2009 WL 4060470.

ingress and egress from Mound Street to Carport/Office Structure across the concrete driveway, said right of ingress and egress not to interfere with the grantees[4] [sic] use of said driveway." Slip op. pg 1 (footnote added). A dispute arose when Cheng, the new owner of the house/driveway, began parking her car in the driveway and blocking the Goodwyns' access to their garage. Based upon the language of the easement, the trial court ruled against the Goodwyns.

On appeal, this Court observed that the easement language itself was odd in that the dominant estate agreed to language that would allow the servient estate to block access. Nevertheless, we determined that the language of the easement dictated which of the parties had the right to park in the easement area. Quoting the trial court, this Court noted,

> A better drafted right of way agreement would resolve the issues in this matter clearly in favor of the [Goodwyns]. The fact, however, is that the [Goodwyns] have what they reserved in the chain of title. What they have reserved in the chain of title is a right of ingress and egress that can never interfere with [Cheng's] use of the driveway.

Slip op. p. 3. In other words, had the easement been better drafted, Cheng, as the servient estate, would have been prevented from parking in her own driveway, so that the Goodwyns, as the dominant estate, would have unfettered access to the driveway. According to the Alexander's possession/occupancy argument,

[4] It is clear from the opinion that the reference to grantee was Mei-Wah Cheng, the owner of the first parcel, who was, in fact, the grantor/servient estate.

however, if the "better drafted" agreement would have been resolved in favor of the Goodwyns, it would have violated Kentucky law.

We agree with the Holladays that *Goodwyn* illustrates that parking easements can provide parking rights to one party to the exclusion of the other without exceeding the scope of the easement. Simply because one party has the right to park in the easement, thus blocking the other party from doing so does not violate Kentucky law so long as the easement language unambiguously provides for such.

In *Blackmore v. Powell*, 150 Cal.Rptr.3d 527 (Cal. Ct. App. 2007), the California Court of Appeals addressed whether the appellee/dominant estate's construction of a garage on easement property owned by the appellants/servient estate was effectively a conveyance in fee simple of the easement property.

> Here, the deed conveyed "[a]n easement for parking and garage purposes." "In construing an instrument conveying an easement, the rules applicable to the construction of deeds generally apply. If the language is clear and explicit in the conveyance, there is no occasion for the use of parol evidence to show the nature and extent of the rights acquired." . . . As the trial court correctly observed, the term "garage," as used in the deed, means putting or storing a vehicle in a garage. (E.g. Webster's Third New Internat. Dict. Unabridged (2002) p. 935 ["garage ...*vtt.../...: to keep or put in a garage"].) Because there was no evidence that a garage ever stood on the easement, the trial court properly concluded that the express language of the deed authorized respondent to build a garage.

> The trial court further concluded that respondent was entitled to exclusive use of the garage as "a necessary incident" of the easement, reasoning that a shared garage would generate disputes about allocation of parking spaces, security, and maintenance costs. In view of the evidence presented at trial, we see no error in the determination that nonexclusive use of the garage would interfere unreasonably with respondent's rights.

*Id.* at 531-32 (citations omitted). In rejecting the appellants' contention that the right to exclusive control over the garage was inconsistent with the grant of an easement, the appellate court noted that "a 'private' easement—that is, an easement created and held by private parties—may encompass the right to maintain or use a permanent structure[,]" sometimes even exclusively if necessary to protect the easement holder's rights. *Id.* at 534.

While the Alexanders may find the current situation frustrating, they purchased the property subject to the easement and the burden it entailed. The easement language unambiguously establishes that a parking area was to be created on the Alexanders' property for the benefit of the Holladays' property. To effectuate the intent of the parties in making the easement, the easement language must be interpreted as giving the Holladays superior right to the easement area. Certainly, the Alexanders retain the right to use the easement/parking area at those times when the Holladays are not present, so long as it does not interfere with the Holladays' right to use the area.

Accordingly, we agree with the trial court's determination that the Holladays' and Alexanders' predecessors in interest intended to create a valid and enforceable permanent easement that binds the current parties in this matter. However, we further conclude that the trial court erred in determining that the current improvements violate the scope of the easement language.

For the reasons set forth herein, we affirm the trial court's March 21, 2014 opinion and order granting partial summary judgment in favor of the Holladays. We reverse the August 18, 2015 order of the trial court and remand this matter for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Janice M. Theriot
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BRIEF FOR APPELLEE:

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