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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable Joseph M. Strickland, Master-in-Equity
Civil Action Number: 2014-CP-40-01805

Appellate Case No.: 2017-001795

Raglins Creek Farms, LLC .....Respondent,

vs.

Nancy Dunn Martin .....Appellant.

PETITION FOR REHEARING

Respondent, Raglins Creek Farms, LLC, hereby petitions the Court of Appeals for rehearing pursuant to Rule 221, SCACR. Respondent respectfully submits that this Court overlooked or misapprehended the following points:

1. **The applicable "any evidence" standard of review requires affirmation of the trial court's rulings.**

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). "In an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is *no evidence* to support the judge's finding." Jowers v. Hornsby, 292 S.C. 549, 552, 357 S.E.2d 710, 711 (1987) (emphasis added).

Where the trial court's findings of fact are susceptible to support the conclusions of law, the appellate court is bound by his findings of fact. Chapman v. Allstate Ins. Co., 263 S.C. 565, 568, 211 S.E.2d 876, 877 (1975).

The appellate court "reviews for errors of law and reviews factual findings *only* for evidence that reasonably supports the court's findings." Town of Kingstree v. Chapman, 405 S.C. 282, 300, 747 S.E.2d 494, 503 (Ct. App. 2013) (emphasis added). The appellate court's task is not to weigh evidence, but to decide if *any* evidence exists to support the trial court's ruling. McNaughton v. Charleston Charter Sch. For Math and Science, Inc., 411 S.C. 249, 768 S.E.2d 389 (2015) (emphasis added).

It is undisputed that this matter was an action to determine the existence of an easement. (Final Br. of App., p. 3). Respondent presented copious evidence to support the trial court's finding of an easement by express grant and prescriptive easement. While Appellant may have presented contrary evidence, this Court is constrained to determine, only, whether there is *any evidence* that establishes an easement. See Felts v. Richland County, 303 S.C. 354, 357, 400 S.E.2d 781, 782-783 (1991) (emphasis added) (holding that where any evidence exists to support the trial court's finding, that finding is not reviewable). As argued more fully herein, the evidence presented at trial is more than capable of supporting the trial court's ruling. Therefore, this Court should affirm the ruling below.

2. This Court should affirm the trial court's finding of an easement by express grant because there is substantial evidence that an express easement exists and Appellant had constructive notice of that easement.

Respondent presented substantial evidence to the trial court demonstrating that an express easement was reserved across Appellant's property, specifically Partition Tracts C, D and E, to allow Respondent's predecessors to access Respondent's current property. The evidence also

demonstrates that Appellant was on constructive, if not actual, notice of that easement. Therefore, this Court should affirm the trial court's finding of an easement by express grant.

Chain of Title – Partition Tracts C and D

The record indicates that Appellant is the owner of land substantially similar to the land identified as Partition Tracts C, D, and E on the 1884 Partition Plat. (R. p. 683). While all three tracts were originally owned by three separate sisters, Partition Tracts C and D came into common ownership under Appellant's great-grandmother, Ossie Martin, in 1918. Specifically, Ossie obtained Partition Tract C in 1911 and Tract D in 1918. (R. p. 684; R. p. 706). The deed to Partition Tract D specifically reserved a twenty-foot easement for access to properties to the east of Partition Tract D. (R. p. 706). Thereafter, Ossie lost the property at a tax sale. (R. p. 705). In 1923 the tax collector issued a deed to Ossie's daughter, Florence Martin Van Horton. (Id.) Beginning with the 1923 Van Horton deed, the legal description of the properties was combined and referenced the twenty-foot easement. (Id.) Thereafter, Van Horton conveyed that same property to Appellant's grandfather, Edward Frank Martin, Sr., by a deed that also specifically referenced the twenty-foot easement. (R. p. 704). Appellant ultimately took title to this same property in 2007, at which time the Van Horton and Martin, Sr. deeds would have both placed Appellant on notice of the existence of the easement. (R. p. 694).

Chain of Title – Partition Tract E

Appellant did not obtain Partition Tract E until 2012. (R. p. 709). By 2012, she was already on notice of the easement by virtue of the chain of title for Partition Tracts C and D, as discussed herein. Additionally, the chain of title does reveal a permanent right of way from the public road to Respondent's land. Partition Tract E is ultimately traced back to Mattie LeCompte DesPortes by virtue of the 1884 partition order. (R. pp. 670 and 707). Thereafter, on November 10, 1927,

Mattie died and Partition Tract E was conveyed to her heirs. (R. p. 724). However, before she died and while she still owned Partition Tract E, Mattie conveyed an easement over Partition Tract E to the purchaser (Kinsland) of Partition Tracts 1, 2 and 4. (R. pp. 667 and 668). The language in this deed was clear that it conveyed an easement for,

> […] convenient rights of way for cart and wagon road over the lands of the parties of the first part and each of them to the Burney lands, the Martin lands, and the English lands for the purposes of ingress and egress and access from the public road to such tracts of land. Said grantee, her heirs and assigns shall also have the right to construct and use cart and wagon roads connecting the said tracts of land hereby conveyed with each other by the nearest convenient route, the present roads upon said lands to be followed where practical and convenient and no lands at present under cultivation to be taken for roads without compensation being made for the same. The said rights of way to be appurtenant to and pass by conveyance of the tracts of land above described. The said right of way not to exceed twenty feet in width […]

(Id.) At the time of this easement, "the lands of the parties of the first part" [1] referred to Mattie's land which included Partition Tract E and Ella Miller's land which included Partition Tract F. (R. pp. 669 and 724). It is worth noting that this deed granted the same right of way road easement through Partition Tract F, which is now owned by Respondent. It is no coincidence this right of way easement is also up to twenty feet in width, exactly the same dimension as the right of way easement described in the deeds to Partition Tract C and D, as discussed above.

When searching title, an abstractor starts his or her search with the current owner and traces the chain of title back the required time frame. At that point, the abstractor must then bring his or her search forward, searching the grants from each owner from the date he or she acquired the property until the day he sold it. The abstractor is searching for grants out of each prior owner that may convey some interest in the property. In this case, the chain of title from Appellant goes back to Mattie LeCompte DesPortes in 1885. Moving forward from Mattie, an abstractor would most

[1] Plural used because J.H. Miller and Ella (Black) Miller were also Grantors in this deed. (R. p. 667).

certainly find the 1926 deed granting an express easement to Respondent's predecessor in title. Further, the existence and use of a road running through Partition Tracts C, D, and E at the time Appellant or her predecessors in title acquired ownership of these tracts served as additional notice and a reminder to exercise due diligence to determine if there was an express easement of record prior to accepting title.

Constructive Notice

"An easement by grant is not required to be recorded to be valid." Frierson v. Watson, 371 S.C. 60, 68, 636 S.E.2d 872, 876 (Ct. App. 2006). "[O]ne who already has notice of the existence of any instrument will be bound by such notice whether the instrument is recorded or not." Id. at 67, 636 S.E.2d at 875. "Constructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed." Spence v. Spence, 368 S.C. 106, 120, 628 S.E.2d 876 (2006). A party "is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him." Id. at 120-121, 628 S.E.2d at 876. "There must appear to be in the nature of the case, such a connection between the facts disclosed and further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter." Id. Constructive notice is not necessarily confined to the public record. Ten Woodruff Oaks, LLC v. Point Dev., LLC., 385 S.C. 174, 683 S.E.2d 510 (Ct. App. 2009) (holding it was unreasonable for a party to ignore the circumstances known to it and rely solely on a title search in ascertaining its rights).

The record contains a plethora of evidence that Appellant had notice of Respondent's claim of easement. As discussed herein, a review of the chain of title for Partition Tracts C and D shows

an express reservation. Five years after purchasing Partition Tracts C and D, Appellant purchased Partition Tract E. At that time, she could not ignore the fact that John H. Miller retained an easement across the Partition Tract D, which lies between C and E, to access the properties now owned by Respondent. This would put a reasonable prudent person on notice that that same easement would be required to cross Partition Tracts C and E. Nor could she ignore the fact that a road ran through these tracts, as shown on number of plats in the chain of title extending from Appellant's land onto Respondent's land. (R. p. 632, p. 651, p. 655). In fact, the very plat Appellant procured prior to purchasing Partition Tract E showed the road extending onto Respondent's property. (R. p. 693).

There is ample evidence in the record supporting the trial court's findings that an express easement was granted or reserved to Respondent's predecessors to use the disputed portion of the road to access Respondent's land. The recorded deeds and plats, together with the circumstances surrounding Appellant's acquisition of the various tracts, establishes that the trial court appropriately charged Appellant with constructive notice of the express easement. Therefore, this Court should apply the correct standard of review and affirm the trial's court's ruling on easement by express grant.

3. The Court of Appeals should have affirmed the trial court's finding of a prescriptive easement because there is substantial evidence in the record to support the trial court's ruling that Respondent's use was adverse.

"In order to establish a prescriptive easement, the claimant must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years." Simmons v. Berkeley Elec. Coop., Inc., 419 S.C. 223, 233, 797 S.E.2d 387, 392 (2016). "'Open' generally means that the use is not made in secret or stealthily." Id. "'Notorious' generally means that the use is actually known to the owner, or is widely known in the neighborhood." Id. at 234, 797 S.E.2d at 392. "When it appears that claimant has enjoyed an easement openly, notoriously, continuously and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse." Carolina Center Bldg. Corp. v. Enmark Stations, Inc., 433 S.C. 144, 154, 857 S.E.2d 16, 22 (Ct. App. 2021). "Once the presumption applies, the servient owner bears the burden of rebutting the presumption, which can be done by showing permissive use." Id.

The record is replete with evidence that Respondent and its predecessors-in-title used the property openly, notoriously, and without permission of Appellant. Therefore, this Court should affirm the trial court's ruling.

Open, Notorious, Continuous and Uninterrupted

At trial, several witnesses testified that they used the disputed portion of the road to access Respondent's property. All of those witnesses stated that they did not sneak on to the road and accessed the road openly. Specifically, Harold Pickrell and Jamie Guy both testified that they used the disputed portion of Shady Grove Road each time they accessed Respondent's property and both denied sneaking onto the property. (R. 209, ll. 16-24; R. p. ll. 6-10). Angus Lafaye and Gordon Baker testified that at least two timber companies used the road to haul timber from

Respondent's property out to Highway 601. (R. p. 325, ll. 11-24; R. p. 338, ll. 16-21; R. p. 339, l. 11- p. 340, l. 23). As the trial court noted, there can hardly be a use more open than timber trucks driving down a road with a load of cut timber. (R. p. 25). Timothy Dargan even testified that he published public advertisements citing use of the road to access Respondent's property. (R. p. 310, l. 12 – p. 311, l. 2).

Multiple witnesses testified that the road was widely known in the neighborhood and even known by Appellant. Appellant testified that it was obvious that "people were entering [her property] without permission . . ." (R. p. 560, ll. 20-22). Angus Lafaye testified that he had always believed the disputed road was "a community road that everybody used." (R. p. 326, ll. 2-3).

Jamie Guy testified that his father obtained a 412-acre portion of what is now Respondent's property in the 1940s. (R. p. 661; R. p. 249, ll. 18-20). Mr. Guy further testified that the disputed road was his family's only access to the 412-acre tract. (R. p. 261, ll. 19-24). Mr. Guy also testified that his family used the disputed portion of the road to access that 412-acre tract through the from 1944 through the 1980s. (R. p. 259, ll. 12-20). Respondent later obtained this same 412-acre tract of land. (R. p. 630).

This evidence demonstrates that Respondent's predecessor-in-title established continuous, uninterrupted use of the disputed road for more than thirty years. No evidence was presented to the trial court showing any interruption in Edwin Guy's use of the disputed road. The evidence further demonstrated that the parties holding title to the property after Mr. Guy also continued to use the disputed road. The evidence in the record is susceptible of the trial court's conclusion that Respondent and its predecessors retained access to the road despite the gate installed in 1970. It would be reasonable for the court to find that the gate was intend to keep out parties other than

those legally entitled to use the road, like Respondent and its predecessors. Accordingly, the trial court correctly held that Respondent established the first three elements of a prescriptive easement.

Adverse

Because Respondent established that its use was open, notorious, continuous and uninterrupted, Appellant bore the burden at trial of establishing Respondent or its predecessors' use was permissive. Carolina Center Bldg. Corp. v. Enmark Stations, Inc., 433 S.C. 154, 857 S.E.2d 22. Appellant does not contest that Respondent's use has been without her permission. (Final Br. of App. P. 20). Appellant also testified that, other than Santee Cooper and the Dunn Mountain Hunt Club, she knew people were entering the property without permission and cutting off permissive locks and that she considered these people to be trespassing. (R. p. 560, ll. 20-22; R. p. 476, l. 13; R. p. 477, ll. 2-3). Appellant was adamant that she, her father, nor her grandparents ever gave Respondent or its predecessors permission to use the disputed portion of the road. Conversely, all of Respondent's witnesses testified that they used the property without ever asking permission from the owner of what is now the lands of Appellant. (R. p. 193, l. 23 – p. 194, l. 15; R. p. 210, ll. 2-11; R. p. 230, ll. 14-16; R. p. 240, ll. 3-4; R. p. 260, ll. 2-10; R. p. 278, ll. 15-18; R. p. 293, ll. 20-22; R. p. 304, ll. 4-10; R. p. 312, ll. 21-24; R. p. 325, l. 20 – p. 326 l. 3; R. p. 327, ll. 5-7; R. p. 332, ll. 12-16; R. p. 339, ll. 11-24; R. p. 347, ll. 9-17; R. p. 329, l. 8; R. p. 432, ll. 8-23). There was also testimony that predecessors who visited the property found the gate to be unlocked at various times. (R. p. 225, ll. 2-11). This mountain of testimony is more than sufficient to meet the "any evidence" standard such that it compels this Court to affirm the trial court's ruling finding Respondent established proof of a prescriptive easement over Appellant's land.

Unenclosed Woodlands

This Court's opinion incorrectly states that the woodland nature of the property was undisputed by the parties. To the contrary, there was no evidence presented at trial by either party as to whether the property consisted of "cultivated lands" or "unenclosed woodland property," likely because the Appellant did not litigate this matter before the trial court. "An issue must be raised to and ruled on by the trial court for an appellate court to review the issue." S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 343, 554 S.E.2d 870, 875 (Ct. App. 2001). Because Appellant never raised the issue of the wooded nature or the corresponding presumption of permissive use to the trial court it was not preserved for appellate review and cannot be used by this Court to reverse the trial court.

CONCLUSION

As our Supreme Court stated in Slear v. Hanna, "the outcome here is based on the proper scope of review." 329 S.C. at 411, 496 S.E.2d at 635. Because there is reasonable evidence in the record capable of supporting the trial court's conclusions, this Court should affirm the trial court's ruling.

Respectfully submitted,

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