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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Circuit Court Case No. 2019-CP-23-02476

Appellate Case No. 2020-001051

Thomas C. Skelton..... Appellant,

v.

First Baptist Church of Travelers Rest, South Carolina, a non-profit Corporation Respondent.

**APPELLANT'S PETITION AND MEMORANDUM
FOR REHEARING**

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Attorneys for Appellant Thomas C. Skelton

TO: THE HONORABLE COURT OF APPEALS OF SOUTH CAROLINA

Thomas Craig Skelton, by and through his undersigned counsel, and under Rule 221 of the South Carolina Rules of Appellate Procedure, respectfully petitions this Court for a rehearing. The opinion has the effect of finally deciding Skelton's appeal. Petitioner respectfully shows the Court as follows:

I. INTRODUCTION

Thomas Craig Skelton has spent a lifetime in service to America: first as an Army Ranger, then as an Honor Guard at Arlington National Cemetery, and finally, a SWAT team member for the Greenville City Police. Craig then purchased a home for his young family in 1992, formerly owned by a blacksmith, whose only access to his business was a dirt road on the neighboring property. Craig's only access to his back property, including the blacksmith's building, was the same dirt road for two years before starting his own landscaping business. Then, he used it for his trucks and equipment for a new business since 1994.

The next door land was purchased two years after Craig's ownership by Respondent in 1994. Craig continued to use this property as his own, greatly exceeding any permission given for years. It was only when, for no apparent reason, the Respondent refused to let Craig and his family continue to use the property years later, was this lawsuit required. Now, Craig, deprived of a trial, faces financial disaster with the complete loss of his business if this matter is not reversed.

II. THE COURT MISAPPREHENDED AND OVERLOOKED THE FOLLOWING POINTS:

A. The Failure to Apply the Scintilla Rule to the Standard of Review in the Granting of a Motion for Summary Judgment Regarding Easement by Necessity

Summary Judgment is a drastic remedy and “should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed facts.” *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1990), quoting *Watson v. Southern Ry. Co.*, 420 F. Supp. 486, 486 (D.S.C. 1975)

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). Summary judgment should only be granted when plain, palpable and undisputed facts exist on which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co.*, 314 S.C. 542, 431 S.E.2d 565 (1993).

In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-S Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E. 2d 801, 803, 2009. Craig has presented a “mere scintilla” of evidence for his cause of action for easement by necessity. If the proper standard is applied, then Craig is entitled to his day in court.

B. Appellant Presented a Mere Scintilla of Evidence of Easement by Necessity

South Carolina has long recognized the acquisition of an easement of right of way over another's land by necessity. *See Brasington v. Williams*, 143 S.C. 223, 238, 141 S.E. 375, 380 (1927). The elements of a claim for easement of necessity are 1) unity of title, 2) severance of title and 3) necessity. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 418-19, 633 S.E.2d 136,

140-41 (2006). There is no dispute in the Record regarding unity of title or that the two properties were severed from a single tract.¹

The Opinion stated:

The record is clear that Skelton purchased his property in 1992 while he was employed as a police officer. Skelton left the police force two years later in 1994 and began his landscaping business. Skelton then created a workshop for this business at the rear of his lot, which required use of Church's land for access. Thus, the "necessity" did not exist at the time of severance, and Skelton subsequently created the necessity. Because there is no genuine factual issue as to whether the necessity existed at the time of the severance of the property, summary judgment on Skelton's easement by necessity claim was proper.

This finding overlooks that "necessity" looks at the issue of access and not the purpose for which access is required and that South Carolina requires only "reasonable necessity" to imply an easement.

Appellant presented a scintilla of evidence to the lower court that a necessity existed at the time of severance. Appellant testified in deposition that he purchased his home in 1992 with an existing back building formerly used as a blacksmith shop.² He also testified that the previous owner (a blacksmith who owned the property since 1922) may have used the driveway on the Vacant Lot as his access.³ Testimony was additionally presented that the driveway on the Vacant Lot was not for the purpose of accessing the house that originally stood on the Lot.⁴ The previous owner, a blacksmith, was the one who severed the property.⁵ The inference, taken in the light most favorable to Appellant, is that the driveway was necessary to access the blacksmith shop at the rear of what is now Appellant's property at the time that the property was severed.⁶

¹ R. 189, ll. 5-13; R. 22, ¶14.

² R. 158, ll. 9-22.

³ R. 158, l. 19- 159, l. 20.

⁴ R. 191, ll. 17-24.

⁵ R. 261.

⁶ R. 159, ll. 10-20.

Further inquiry into the facts is desirable to clarify the application of the law. *Standard Fire, supra.*

At least a scintilla of evidence in the Record supports that at the time Appellant purchased his property, vehicular access to the back portion was only available through the Vacant Lot.⁷ The whole point of the easement by necessity doctrine is to ensure that landlocked parcels have access to a public road. *Brasington*, 143 S.C. at 238-39, 141 S.E. at 380. It is the necessity of access, rather than the use of the property that is relevant to an easement by necessity.

Appellant testified that a septic tank and several pre-existing buildings on the property necessitated the use of the driveway on the Vacant Lot to access the rear of the property.⁸ He also testified that he “used the strip of land that adjoins [Respondent] “since 1992.”⁹ This presents a “mere scintilla” of evidence that Craig used the strip of land out of necessity. Further inquiry of the use is called for. The necessity to access the rear of Appellant’s property from the Vacant Lot was not created by Appellant.¹⁰ The inferences to be drawn in Appellant’s favor are that access to the back of Craig’s property was cut off when the single tract was severed into two parcels without the continued use of the strip of land.

This is analogous to *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012) in which Proctor's property was bisected by a creek and ravine preventing vehicular access to the north side of the property, absent use of the access road through Steedley's property. Proctor was able to access the southern part of her property from an unpaved road on the Steedley’s property. The South Carolina Court of Appeals affirmed the special referee’s conclusion that the use of the

⁷ R. 159, ll. 10-20.

⁸ R. 159, l. 21- R. 160, l. 12.

⁹ R. 138, ll. 18-22.

¹⁰ R. 158, l. 9 – R. 159, l. 20.

road to access Proctor’s property was necessary for the enjoyment of the dominant estate. *Id.* 398 S.C. at 575, 730 S.E.2d at 364. Likewise, Appellant’s use of the access road was necessary for the enjoyment of his dominant estate even before his business began in 1994.

The Opinion recognized that “the necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible,” citing *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012). South Carolina requires only ‘reasonable necessity’ to imply an easement: while the owner of the servient estate must prove more than convenience, he need not show the [easement] is absolutely necessary.”¹¹

Appellant presented at least a scintilla of inferences which support a genuine issue of material fact of a reasonable necessity for access across the Vacant Lot to the rear of his property from the time of severance and inquiry into the facts of the case is desirable to clarify the application of the law. *Standard Fire Ins. Co., supra*. Appellant therefore respectfully requests this Court reconsider its Opinion and remand the case to allow a trial.

C. The Opinion’s Failure to Address that Exceeding Permission Creates a Question of Fact for Both Prescriptive Easement and Adverse Possession

The issue before the lower court as to a prescriptive easement and adverse possession was whether Appellant exceeded any permission arguably granted by Respondent. The Opinion overlooks the inferences from the evidence that must be construed most strongly against the Respondent. Craig presented a question of material fact that he possessed the property in question without permission when he:

¹¹ Steedley contended that Proctor could build a bridge over a creek on his land to gain access. The Appellate Court concluded that Proctor did not testify that such an option was reasonable or affordable. *Proctor*, 398 S.C. at 575, 730 S.E.2d at 365. Likewise, Respondent’s alleging Craig can access his back property from the front of his lot is not necessarily reasonable or affordable, as a matter of law. Further inquiry is called for. *Standard Fire, supra*.

1. built a berm¹²;
2. landscaped the property¹³;
3. planted trees¹⁴;
4. installed power conduits¹⁵;
5. placed an out-building¹⁶; and
6. installed a dog fence encompassing 41,300 sq. ft.¹⁷

in addition to simply using the driveway for ingress and egress.

Appellant's use of the property in excess of any permission given converted the use from permissive to adverse. *See Turner v. Bouchard*, 32 A.3d 527 (Md. App. 2011) (finding a prescriptive easement was established because the Bouchards' use, beginning in 1984, exceeded the scope of the original 1975 easement). *Kerr Land & Timber Co. v. Emmerson*, 43 Cal.Rptr. 333, 351, 233 Cal.App.2d 200, 228 (Cal. App. 1965) (finding the existence of an easement does not preclude the acquisition of greater rights by prescription.); *McBride v. Smith*, 227 Cal.Rptr.3d 390, 409, 18 Cal.App.5th 1160, 1182 (Cal. App. 2018) (finding Plaintiff's allegations sufficient to support a cause of action for a prescriptive easement based on the theory that Plaintiff's daily and primary use of the easement significantly expanded the use allowed under the terms of a 1993 recorded grant.) Appellant's acts in excess of ingress and egress were open and notorious, providing Respondent with an opportunity to protect its rights, which it failed to do.

These evidentiary facts are not in dispute; the inferences drawn from them must favor Appellant and thus a further inquiry into the facts is desirable: Summary Judgment should be

¹² R. 140, ll. 12-14; R. 32, ¶ 15.

¹³ R. 141, ll. 4-5; R. 32, ¶ 15.

¹⁴ R. 145, ll. 11-12; R. 32, ¶ 15.

¹⁵ R. 33, ¶ 19.

¹⁶ R. 33, ¶ 19.

¹⁷ R. 144, ll. 4-6; R. 33, ¶19.

denied. *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991) (“all ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant.”).

CONCLUSION

It is undisputed that a blacksmith owned both properties and used the access road at the time of severance. The property was severed when Appellant purchased the property in 1992. A scintilla of evidence exists so he will not be deprived of his day in court that the road was used at the time of severance.

For almost 30 years, Appellant has exercised dominion over a portion of Respondent’s Vacant Lot, even extending his dog fence to keep trespassers off the property. This use exceeded any permission for ingress and egress or to mow the Vacant Lot. Appellant presented inferences to support a genuine issue of material fact as to a prescriptive easement or adverse possession and the lower court erred in granting summary judgment in favor of the Respondent.

Further inquiry into the facts is called for to clarify the application of the law in this case. Inferences drawn from the facts in Appellant’s favor preclude the granting of summary judgment. Therefore, Appellant requests the Court grant his Petition for Rehearing, reverse the decision of the lower court, and remand the case for trial.

Respectfully submitted,

July 24, 2023



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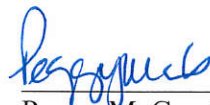
v.

First Baptist Church of Travelers Rest, South Carolina, a non-profit Corporation..... Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Petition and Memorandum for Rehearing via electronic filing and by depositing a copy in the U.S. Mail, postage prepaid, on July 24, 2023, addressed to attorney of record, O.W. Bannister, Esq., Bannister, Wyatt & Stalvey, LLC, 24 Cleveland Street, Suite 100, Greenville, SC 29601.

July 24, 2023



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SC Court of Appeals

Via electronic filing: ctappfilings@sccourts.org and US Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Thomas C. Skelton v. First Baptist Church of Travelers Rest*
Appellate Case No. 2020-001051

Dear Ms. Kitchings:

Enclosed for filing please find Appellant's Petition and Memorandum for Rehearing in the above matter along with our firm's check in the amount of \$50.00 for the filing fee, and a Proof of Service.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Bradford N. Martin

/pm
Enclosures

cc: O.W. Bannister, Esq.