THE STATE OF SOUTH CAROLINA
In The Court of Appeals

69135

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2008-CP-32-04362

Westside Meshekoff Family Limited Partnership ..... Appellant,

v.

South Carolina Department of Transportation; DW Properties, LLC;
Danwood LLC; Robert W. Denton; and Alpine of SC, Inc., ...Defendants
Of whom South Carolina Department of Transportation is the .....Respondent.

APPELLANT'S PETITION FOR REHEARING

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STATEMENT OF ISSUES ON REHEARING

I. THE COURT MISCONSTRUED THE ENCROACHMENT PERMIT IN FINDING THAT IT GOVERNED THE MAINTENANCE AND REPAIR OBLIGATIONS UNDER THE EASEMENT FOR LINE E AND THE DETENTION POND

II. THE COURT MISAPPREHENDED AND MISAPPLIED THE COMMON ENEMY RULE AS IT RELATES TO THE SCDOT'S RIGHT TO DISCHARGE STORMWATER ONTO WESTSIDE'S PROPERTY

III. THE COURT MISCONSTRUED THE EVIDENCE REGARDING THE USE OF CORRUGATED METAL PIPE AND FURTHER OVERLOOKED THE UN-APPEALED RULING BY THE TRIAL COURT THAT WESTSIDE IS NOT TAINTED BY THE DEVELOPER'S DECISION NOT TO USE REINFORCED CONCRETE PIPE

IV. THE APPELLATE COURT IMPROPERLY PLACED THE BURDEN ON WESTSIDE TO PROVE A MAINTENANCE AGREEMENT THAT DID NOT EXIST

V. WESTSIDE'S REMAINING ISSUES ON APPEAL, WHICH THE COURT DECLINED TO REACH, SHOULD BE ADDRESSED BY THE COURT[1]

A. Whether this Court should find, based upon its own view of the evidence, that Westside proved that it was entitled to an equitable apportionment of repair and maintenance costs?

B. Whether the trial court erred in finding an easement existed prior to 1987?

C. Whether the trial court erred in injecting causation as a required element of proof in an action under an easement for equitable apportionment of repair and maintenance costs?

D. Whether the trial court erred in finding that Westside's method of allocating the percentage of use of Line E by the DOT was an improper basis for apportioning the costs when such methods were based on widely used and accepted engineering standards?

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[1] Westside incorporates herein by reference the arguments set forth in its briefs on these issues.

E. Whether the trial court erred in finding that Westside's claim was barred by laches?

REQUEST FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant Westside Meshekoff Family Limited Partnership ("Westside") respectfully petitions this Court to rehear this appeal. As set forth below, grounds for rehearing exist as there are particular factual and legal points which this Court has overlooked, misconstrued or misapprehended in issuing its ruling filed on July 3, 2013 (Unpublished Opinion No. 2013-UP-310).

ARGUMENT

I. THIS COURT MISCONSTRUED THE ENCROACHMENT PERMIT IN FINDING THAT IT GOVERNED THE MAINTENANCE AND REPAIR OBLIGATIONS UNDER THE EASEMENT FOR LINE E AND THE DETENTION POND.

When there is no agreement between the dominant and servient users of an easement concerning maintenance and repair of the easement, *Hayes v. Tompkins* directs a court to equitably apportion repair and maintenance costs. *Hayes,* 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1988). Thus, the presence of a maintenance agreement would moot the effect of *Hayes v. Tompkins*. *See id.* This Court found that when construing the Encroachment Permit and the application for the permit (which was made part of the permit itself), the parties intended for the indemnity provision to apply to the drainage system. Based upon this, this Court appears to conclude, without specifically so stating, that the indemnity obligations in the Encroachment Permit relating to work on the SCDOT right-of-way somehow amount to an agreement that the SCDOT has no

maintenance or repair obligations for use of the easement on Westside's property. In so doing, this Court erred by effectively re-writing the Encroachment Permit to supply terms and conditions that do not exist in the Permit. *See Ecclesiastical Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) ("In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties"); *see also Low Country Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 411, 656 S.E.2d 775, 781 (Ct. App. 2008) ("Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of . . . judicial construction.") The indemnity provisions in the Encroachment Permit are clearly limited in both scope and application to the SCDOT right of way. Therefore, this Court erred by misconstruing the limited terms of this indemnity provision in a manner far beyond what the parties clearly intended.

This Court further overlooked the important testimony from the SCDOT's only witness, Clarence Blakely, on this issue. Blakely's testimony confirmed that the SCDOT understood that the indemnity obligations under the encroachment permit were limited to encroachments on SCDOT's right of way. He testified that SCDOT had not sustained any injury or damage from the storm drain pipe in its right of way and was making no claim for indemnity under the encroachment permit. [R. p. 356, lines 21-25] Blakely buttressed the point that the encroachment permit's indemnity obligation only applies on SCDOT's right of way by stating that DOT does not seek to govern storm drainage lines on private property. [R. p. 283, lines 6-10] Thus, according to Blakely, the SCDOT

employee charged with issuing encroachment permits, the encroachment permit indemnity provisions cover only the SCDOT right of way, which includes certain driveways for Westside Plaza and a very small length of storm drain pipe from a SCDOT catch basin to one located on Westside's property. [R. p. 544]

II. THE COURT MISAPPREHENDED AND MISAPPLIED THE COMMON ENEMY RULE AS IT RELATES TO THE SCDOT'S RIGHT TO DISCHARGE STORMWATER ONTO WESTSIDE'S PROPERTY.

In its opinion, the Court appears to place significance upon the Application for Encroachment Permit wherein the developer requests permission to enter onto the SCDOT right of way for purposes of connecting the Westside storm drainage system into an existing SCDOT catch basin. This request was necessary for two reasons. First, it would involve an encroachment onto the SCDOT right-of-way for which permission was required. Second, and more importantly, it constituted the agreement by which the SCDOT had a continuing right to discharge stormwater in a concentrated form upon the property that is now Westside Plaza. In addition to requesting permission to connect to the SCDOT existing catch basin, the application further states how the SCDOT stormwater will be handled and transported on the Westside property (i.e. through a newly constructed Line E discharging into the detention pond). It is the easement agreement. Prior to this agreement, the SCDOT had been discharging stormwater onto the Westside property in a concentrated form with no right to do so in violation of the Common Enemy Rule. *See Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 509-10, 598 S.E.2d 712, 714 (2004)(except by contractual or prescriptive right, an upper landowner

may not, by means of a ditch, impoundment or other artificial structure, collect surface water on his own land and cast it in a concentrated form upon lower adjoining land). The SCDOT needed the easement set forth in the Encroachment Permit in order to have the right to continue to discharge its concentrated stormwater onto the Westside property. In its analysis, and through its reliance on the cited authorities, the Court erroneously treated Dayton & Associates, the permit applicant and owner of the Westside property, as being bound to accept and transport the SCDOT's concentrated storm water in the absence of any contractual or prescriptive right of the SCDOT to do so. This is contrary to the Common Enemy Rule and fundamental private property rights.

III. THE COURT MISCONSTRUED THE EVIDENCE REGARDING THE USE OF CORRUGATED METAL PIPE AND FURTHER OVERLOOKED THE UN-APPEALED RULING BY THE TRIAL COURT THAT WESTSIDE IS NOT TAINTED BY THE DEVELOPER'S DECISION NOT TO USE REINFORCED CONCRETE PIPE.

At trial, the SCDOT's witness, Clarence Blakely, admitted that the SCDOT does not seek to control what material is used on private property, and further admitted that it would have had no right to require Dayton to use reinforced concrete pipe on its own property. [R. p. 283, lines 6-10] He further testified that the use of corrugated metal pipe instead of reinforced concrete pipe did not violate the Encroachment Permit. [R. p. 283, lines 6-21] The SCDOT simply presented no evidence that the use of corrugated metal pipe for Line E was objectionable to it. Moreover, Westside's contractor, Tim Richardson with Ideal Construction, testified that corrugated metal pipe was commonly used on commercial property at the time of construction for the Westside system. [R. p.

303, line 15-p. 305, line 9] He further testified that "[t]here is nothing wrong with corrugated metal pipe if it's properly installed." [R. p. 299, lines 13-24] Therefore, there is simply no basis upon which this Court can conclude that Westside should be denied recovery under its equitable apportionment theory based upon the decision by others to use corrugated metal pipe rather than reinforced concrete pipe for Line E. Lastly, this Court overlooked the un-appealed ruling of the trial court that the installation of corrugated metal pipe by the original developer and its contractor does not taint Westside or bar its ability to recover in equity. [R. p. 42-43]

IV. THE APPELLATE COURT MISCONSTRUES THE HOLDING OF *HAYES V. TOMPKINS* TO REQUIRE THE SERVIENT TENEMENT TO PROVE THAT THE DOMINANT TENEMENT AGREED TO BE RESPONSIBLE FOR MAINTENANCE AND REPAIR OF THE EASEMENT.

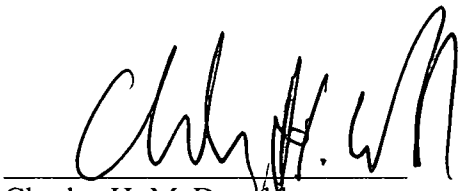
The Court concludes its opinion by finding that the record contains no evidence that the parties intended for the SCDOT to contribute to repair and maintenance of the easement. The Court seeks to put the burden of proof on Westside to demonstrate the parties (presumably the developer, Dayton & Associates, and the SCDOT) intended for the SCDOT to bear some responsibility for maintenance and repair of the easement. By taking this approach, the Court misconstrues the holding of *Hayes v. Tomkins* and the law relating to shared easements in general. In this instance, the Court would require Westside to prove that the servient and dominant tenements intended for the dominant tenement to pay for maintenance and repairs before any right of equitable apportionment would exist. However, it is only in the absence of any such agreement as to the

responsibility for maintenance and repair costs that a party may seek equitable apportionment of maintenance and repair costs for the shared easement. *Hayes v. Tomkins,* 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1988). Indeed, in *Hayes v. Tomkins*, there was clearly no evidence of the parties' intention as to apportionment of maintenance and repair costs as the easement rights were heavily disputed with the court ultimately concluding the existence of an easement by prescription. *See id.* Therefore, in this instance, the Court has unwittingly created an impossible situation for a servient tenement seeking equitable apportionment.

CONCLUSION

In conclusion, Westside petitions the Court to vacate its opinion and to issue a new opinion addressing all of the issues raised by Westside on appeal and then enter judgment in favor of Westside on its equitable apportionment claim.

Respectfully Submitted,



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PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing by having a copy hand-delivered to the Respondent's attorney of record, Patrick John Frawley, Davis, Frawley, Anderson, Ayer, Fisher & Smith, LLC, 140 East Main Street, Lexington, South Carolina, 29072.

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