THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2020-001051

Opinion No. 2023-UP-260
Submitted May 1, 2023 – Filed July 12, 2023

Thomas C. Skelton..... Appellant,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Petitioner, Thomas C. Skelton, certifies the following: the Court of Appeals entered an Order on July 12, 2023 affirming the lower court's grant of summary judgment. A Petition for Rehearing was filed on July 24, 2023 and denied on October 13, 2023. This Petition for Writ of Certiorari follows.

Bradford N. Martin

QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS ERR IN APPLYING THE STANDARD FOR EASEMENT BY USE RATHER THAN EASEMENT BY NECESSITY?**

II. **DID THE COURT OF APPEALS ERR IN FAILING TO APPLY THE SCINTILLA RULE TO THE STANDARD OF REVIEW FOR A MOTION FOR SUMMARY JUDGMENT?**

III. **DID THE COURT OF APPEALS ERR IN FAILING TO FIND PETITIONER PRESENTED A SCINTILLA OF EVIDENCE OF EASEMENT BY NECESSITY?**

IV. **DID THE COURT OF APPEALS ERR IN FAILING TO FIND PETITIONER PRESENTED A SCINTILLA OF EVIDENCE OF PRESCRIPTIVE EASEMENT AND ADVERSE POSSESSION?**

V. **DID THE COURT OF APPEALS ERR IN FAILING TO ADDRESS THE NOVEL ISSUE THAT EXCEEDING PERMISSION CREATES A QUESTION OF FACT FOR BOTH PRESCRIPTIVE EASEMENT AND ADVERSE POSSESSION?**

STATEMENT OF THE CASE

Thomas Craig Skelton purchased a home for his young family in 1992, formerly owned by a blacksmith, whose only access to his business located on the back of the lot was a dirt road on the neighboring property. His access started in 1922 when the property was severed. Craig's only access to his back property (since his purchase in 1992), including the blacksmith's building, was the same dirt road.

The adjacent property was purchased by Respondent a year later, in 1993. For almost 30 years, Craig has openly maintained a portion of the Vacant Lot as his own: building a berm to prevent flooding on his property[1], landscaping and planting trees[2], and placing an outbuilding in part on the

[1] App. 140, ll. 12-14; App. 32, ¶ 15.
[2] App. 141, l. 15-R. 142, l. 10; App. 145, ll. 8-20; App. 32, ¶ 15.

Vacant Lot.[3] Skelton installed a dog fence in 2000, which encompassed 41,300 sq. ft. onto the Vacant Lot.[4] This adverse use is in addition to any permissive use of the dirt road on the Vacant Lot or mowing to prevent infestations of mice and snakes, and performed without permission.[5] Respondent did not object to Craig's partial use of the Vacant Lot until 2019, when it claims it revoked its permission, for no apparent reason. Now, Craig, deprived of a trial, faces financial disaster with the complete loss of his business if this matter is not reversed.[6]

Craig initiated this action seeking judicial confirmation of his 30-year partial use of the adjacent Vacant Lot owned by Respondent, with the filing of a Complaint May 1, 2019. Respondent filed its Answer denying Craig's right to use the property and counterclaiming for attorneys' fees pursuant to S.C. Code § 15-36-10.

Respondent filed a Motion for Summary Judgment April 14, 2020 which was briefed by both parties and heard before the lower court on June 11, 2020. Respondent filed a supplemental memorandum on June 18, 2020. The lower court granted Respondent's Motion for Summary Judgment later that day. Craig filed a Motion to Alter or Amend on June 26, 2020 which was denied on July 13, 2020. Craig subsequently filed his appeal July 23, 2020, requesting the right to a trial on the merits to continue using the adjacent property. Court of Appeals affirmed and entered an Order on July 12, 2023. A Petition for Rehearing was filed on July 24, 2023 and denied on October 13, 2023.

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[3] App. 33, ¶ 19.
[4] App. 144, ll. 4-6; App. 33, ¶19.
[5] App. 140, l. 9 – App. 141, l. 5; R. 144, ll. 12-14, App. 154, ll. 10-14.
[6] Craig has used the dirt road for his trucks and other equipment to access his landscaping business.

ARGUMENTS

I. THE COURT OF APPEALS FAILED TO LOOK AT THE TIMING OF ACCESS RATHER THAN ITS PURPOSE IN CONSIDERING EASEMENT BY NECESSITY

There is no dispute in the Record regarding unity of title or that the two properties were severed from a single tract. (App. 189, ll. 5-13; App. 22, ¶14) The Court of Appeals overlooks that "necessity" considers the access available at the time of severance and not the purpose for which access is required.[7] This places the discussion of the Court of Appeals in conflict with prior decisions of the South Carolina Supreme Court. Rule 242(b)(3), SCRAP. The Court of Appeals erred in focusing on the use of the property at the time of Craig's purchase rather than the question of physical access:

> 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.

Opinion No. 2023-UP-260, p. 6.

South Carolina requires only "reasonable necessity" to imply an easement.[8] An easement

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[7] 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). In comparison, an easement by prior use exists when: (1) the dominant and servient tracts of land originated from a common owner; (2) the use was in existence at the time the original grantor severed the tracts; and (3) the use was apparent, continuous, and necessary for enjoyment of the dominant tract." *Id.*, 633 S.E.2d at 139.

[8] 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." Opinion No. 2023-UP-260, p. 6, citing *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 589, 735 S.E.2d 528, 540 (Ct. App. 2012).

by necessity does not require a preexisting use during unity of title, whereas an easement by prior use does impose this requirement. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 418-19, 633 S.E.2d 136, 141 (2006), citing 25 Am. Jur.2d Easements and Licenses § 32; 28A C.J.S. Easements § 92. Unlike an easement by prior use, where the use must be continuous, an easement by necessity only requires that the necessity exist at the time of the severance.[9] *Boyd,* 369 S.C. at 418-419, 633 S.E.2d at 140-141.

"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." *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528, 540 (Ct. App. 2012). Additionally, the necessity may apply to only a portion of the property. *See Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012). Respondent does not dispute that the dirt road was necessary to access the blacksmith shop at the rear of what is now Craig's property at the time that the property was severed. Craig testified that a septic tank and several pre-existing buildings on the property necessitated the use of the dirt road on the Vacant Lot to access the rear of the property.[10]

Therefore, the inference to be drawn most strongly in Craig's favor is that the easement by necessity to access the back of his property existed from the time when the single tract originally was severed.[11] The Court of Appeals erred in affirming summary judgment when evidence existed regarding the necessity to access the rear of the property through the adjoining tract at the time the property was severed (1922).

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[9] Evidence was presented that the severance occurred in 1922 when the blacksmith purchased the property. (App. 261)
[10] App. 159, l. 21- R. 160, l. 12.
[11] App. 159, ll. 10-14.

II. THE COURT OF APPEALS FAILED TO APPLY THE SCINTILLA RULE TO THE STANDARD OF REVIEW FOR A SUMMARY JUDGMENT MOTION

The lower court and the Court of Appeals have failed to apply the standard that only a scintilla of evidence is required to overcome a motion for summary judgment. They have also overlooked that 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). The non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof. *Hancock v. Mid-S Mgmt. Co.,* 381 S.C. 326, 330, 673 S.E. 2d 801, 803, 2009. The Court of Appeals failed to apply the scintilla of evidence standard. Therefore, the lower court's grant of summary judgment should be reversed.

A. Craig Presented a 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. (App. 189, ll. 5-13; App. 22, ¶14)

Craig presented a scintilla of evidence to the lower court that a necessity existed at the time of severance (1922). Craig testified in deposition that he purchased his home in 1992 with an existing back building formerly used as a blacksmith shop.[12] He also testified that the previous owner (a blacksmith who owned the property since 1922) may have used the dirt road on the Vacant Lot

[12] App. 158, ll. 9-22.

as his access.[13] Testimony was additionally presented that the dirt road was not for the purpose of accessing the house that originally stood on the Lot.[14] Evidence exists that the previous owner, a blacksmith, was the one who severed the property.[15]

The inference, taken in the light most favorable to Craig, is that the dirt road was necessary to access the blacksmith shop at the rear of what is now Craig's property at the time that the property was severed.[16] Further inquiry into the facts is desirable to clarify the application of the law. *Standard Fire Ins. Co., supra.*

At least a scintilla of evidence in the Record supports that at the time the property was severed, vehicular access to the back portion was only available through the Vacant Lot.[17] The whole point of the easement by necessity doctrine is to ensure that landlocked parcels have access to a public road. *Brasington, supra.* 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.

Craig testified that a septic tank and several pre-existing buildings on the property necessitated the use of the dirt road to access the rear of the property.[18] The necessity to access the rear of Craig's property from the Vacant Lot was not created by him.[19] The inferences to be drawn in Craig's favor are that the easement was necessary to access the back of Craig's property when the single tract originally was severed.

Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law. *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*,

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[13] App. 158, l. 19- 159, l. 20.
[14] App. 191, ll. 17-24.
[15] See App. 261 referencing the property was conveyed as lot 3 to D.E. Smith May 11, 1922.
[16] App. 159, ll. 10-20.
[17] App. 159, ll. 10-20.
[18] App. 159, l. 21- App. 160, l. 12.
[19] App. 158, l. 9 – App. 159, l. 20.

301 S.C. 418, 392 S.E.2d 460 (1990). Taken in the light most favorable to Craig, the inference that the blacksmith was required to use Respondent's property to access his shop requires a denial of summary judgment. At a minimum, further inquiry into the facts is desirable to clarify the application of these facts to the law.

The lack of access to a portion of the property can support an easement by necessity. The present case 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 road to access the north side of 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, Craig's use of the access road was necessary for the enjoyment of the rear of his dominant estate even before his business began in 1994.

Craig presented at least a scintilla of evidence. Drawing all inference in the light most favorable to Craig supports a genuine issue of material fact of a reasonable necessity for access across the Vacant Lot to the rear of his property at 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.* Craig therefore respectfully requests this Court grant the Writ, vacate the Order of the lower court, and remand the case to allow a trial.

B. Craig Presented a Scintilla of Evidence as to Prescriptive Easement and Adverse Possession

The Court of Appeals erred in affirming the lower court's finding that there was no prescriptive easement or adverse possession because Craig had permission to use the dirt road on

the Vacant Lot for egress and ingress and to mow the lot (App. 7, Order, p. 7). This finding overlooks the fact that he did not receive permission for any other adverse uses of the property.[20] Craig presented evidence that he exceeded any permission granted by Respondent for the use of Respondent's property to support a genuine issue of material fact as to an easement or adverse possession. Additionally, a genuine issue of material fact exists as to the scope of any permission.[21]

Respondent itself submitted Craig's testimony to the lower court that he was not given permission to erect a dog fence on the Vacant Lot.[22] There is also no evidence that Craig received permission for the extensive landscaping that was performed or for the installation of power conduits across the Vacant Lot.[23]

Respondent presented an unsigned document offering permission for Craig to use a forty (40) by three hundred (300) foot strip of the Vacant Lot (12,000 sq. ft.) (the dirt road) for the "purpose of occasional light vehicle traffic access."[24] When asked to define the scope of his prescriptive easement, Craig responded that he maintains a one hundred twenty-two (122) by three hundred (300) foot area (36,600 sq. ft.).[25] The dog fence encompasses 41,300 square feet of the Vacant Lot.[26] It is undisputed that Carig's use exceeds the unsigned agreement and further inquiry into the facts is desirable to clarify the application of the law. *Baugus v. Wessinger,* 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991).

Craig's actions go beyond an easement for ingress and egress and constitute inferences that

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[20] App. 140, l. 9 – R. 141, l. 5; App. 144, ll. 12-14; App. 154; ll. 10-14.
[21] Respondent's representative (App. 184, ll. 18-20) was unable to speak to the scope of any permission sought or granted. (App. 214, l. 9 – App. 215, l. 14).
[22] App. 73; App. 144, ll. 12-14.
[23] App. 33, ¶ 19.
[24] App. 285, Exhibit 5.
[25] App. 146, ll. 15-22.
[26] App. 33, ¶ 19.

support adverse possession of a portion of the Vacant Lot. "[W]hen 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." *Williamson v. Abbott*, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917).

The parties agree that Craig cultivated a portion of the Vacant Lot, not only by mowing but also planting shrubs and trees[27]. Craig also erected a dog fence on the Vacant Lot[28]. This supports the inference that Craig exercised open and exclusive control of these portions of the Vacant Lot. These activities constitute adverse possession pursuant to S.C. Code §15-67-230. The lower court improperly found that these activities did not rise to the level of possession necessary to support adverse possession. The lower court does not provide any reasoning for this finding. (App. 7)

Craig presented sufficient evidence to support an inference of a genuine issue of material fact and further inquiry into the facts of the case is desirable to clarify the application of the law. The lower court's grant of summary judgment should, therefore, be vacated and the case remanded for further proceedings.

III. THE COURT OF APPEALS FAILED TO ADDRESS THAT EXCEEDING PERMISSION CREATES A NOVEL 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 Craig exceeded any permission arguably granted by Respondent. The Court of Appeal's 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:

[27] App. 145, ll. 8-14; App. 32, ¶ 15.
[28] App. 144, ll. 4-6; App. 33, ¶ 19.

1. built a berm[29];
2. landscaped the property[30];
3. planted trees[31];
4. installed power conduits[32];
5. placed an out-building[33]; and
6. installed a dog fence encompassing 41,300 sq. ft. [34] in addition to simply using the driveway for ingress and egress.

The lower court and the Court of Appeals failed to consider that Craig'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.)[35] Craig'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.

It is undisputed that the berm and landscaping are open and notorious. As set out above, these activities exceeded any permission to mow a portion of the Vacant Lot. Using almost a

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[29] App. 140, ll. 12-14; App. 32, ¶ 15.
[30] App. 141, ll. 4-5; App. 32, ¶ 15.
[31] App. 145, ll. 11-12; App. 32, ¶ 15.
[32] App. 33, ¶ 19.
[33] App. 33, ¶ 19.
[34] App. 144, ll. 4-6; App. 33, ¶19.
[35] The issue of using property in excess of permission has not been decided in South Carolina, creating a novel question of law. Rule 242 (b)(1), SCRAP.

quarter of the Vacant Lot for 20 years for a dog fence creates an inference supporting a material question of fact as to the adverse possession and Respondent's knowledge and use of ordinary diligence to know of this adverse use. Respondent[36] admitted the dog fence was open and obvious and that it was aware of its presence. (App. 239, ll. 2-10).

The South Carolina Supreme Court in *Taylor v. Heirs of Taylor* stated:

> [A]cts of ownership of open land for purposes of adverse possession need not include actual residency or occupancy. Moreover, activities that do not involve the creation of permanent structures on the land can be sufficiently open and notorious as to put the legal owner on notice that his land is being adversely possessed. *Id.* (internal citations omitted).

419 S.C. 639, 651, 799 S.E.2d 919, 925 (2017).

These evidentiary facts are not in dispute; the inferences drawn from them must favor Craig and thus a further inquiry into the facts is desirable: summary judgment should be 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.").

The lower court was required to draw all inferences from the testimony presented most strongly in favor of Craig. Further inquiry is required to clarify the application of the law; therefore Craig respectfully requests this Court vacate the lower court's grant of summary judgment, and the Court of Appeal's affirmance, and remand the case for further proceedings.

CONCLUSION

The Court of Appeals applied the standard for proving an easement by use rather than an easement by necessity. This required a finding of a continuing use of the property for a certain purpose rather than inquiring whether an easement on Respondent's property was necessary to access the back portion of the property at the time of severance. This conflicts with prior decisions

[36] Gary Batson was deposed as the Respondent's representative. (App. 184, ll. 18-20).

of this Court.

Craig presented at least a scintilla of evidence that an easement by necessity exists across the property adjacent to his home and business. The Court of Appeals erred in affirming the lower court's grant of summary judgment in disregard for the proper standard of review. The lower court failed to view the facts in the light most favorable to Craig.

Finally, the Court of Appeals failed to consider that even if there was an initial grant of permission, Craig's use of the property became adverse when he exceeded any permission given. This presents a novel question in South Carolina. The Court of Appeals was required to draw all inferences strongly in favor of Craig and to deny summary judgment.

Craig requests that this Court grant it a Writ of Certiorari and hear this appeal.

Respectfully submitted,

9 November, 2023

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RECEIVED
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SC Court of Appeals

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Thomas C. Skelton..... Appellant,

v.

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

PROOF OF SERVICE

I certify that on November 9, 2023, I have electronically served Thomas C. Skelton's Petition for Writ of Certiorari via AIS email to attorney of record, O.W. Bannister, Esq.: owbannister@bannisterwyatt.com, *and* by depositing a copy in the U.S. Mail, postage prepaid, to attorney of record, O. W. Bannister, Esq., Bannister, Wyatt & Stalvey, LLC, Post Office Box 10007, Greenville, South Carolina 29603, and to The Honorable Jenny Abbott Kitchings, South Carolina Court of Appeals, via email filing only: Ctappfilings@sccourts.org.

November 9, 2023

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November 9, 2023

Via email: supctfilings@sccourts.org
The Honorable Patricia A. Howard
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
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Re: *Thomas C. Skelton v. First Baptist Church of Travelers Rest*
Appellate Case No. 2020-001051

Dear Ms. Howard:

Enclosed for filing please find Thomas C. Skelton's Petition for Writ of Certiorari, our firm's check in the amount of $250.00 for the filing fee, and a Proof of Service.

In accordance with the South Carolina Supreme Court's Order of August 25, 2021, no additional copies or Appendix are required at this time.

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

Sincerely,

Bradford N. Martin

Bradford N. Martin

cc: O.W. Bannister, Esq. owbannister@bannisterwyatt.com
The Hon. Jenny Abbott Kitchings ctappfilings@sccourts.org