RECEIVED
JAN 08 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Berkeley County
Honorable Dale E. Van Slambrook, Master-In-Equity
Civil Action No.: 2018-CP-08-344
Appellate Case No.: 2023-000405

BEC 2015, LLC **Appellant,**

v.

YVONNE C. KNIGHT and ELEANOR C. BROWN. **Respondents.**

FINAL BRIEF OF THE RESPONDENTS, YVONNE C. KNIGHT and ELEANOR C. BROWN

H. Ronald Stanley, Esquire (SC Bar #: 5304)
THE STANLEY LAW GROUP, P.A.
1418 Park Street
Post Office Box 7722
Columbia, South Carolina 29202
Telephone: (803) 799-4700
Telecopier: (803) 799-3036
Email: hrstanley@stanleylawsc.com
ATTORNEY FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

I. Whether the Master-In-Equity incorrectly concluded that BCE 2015, LLC failed to demonstrate that BCE 2015, LLC was entitled to an implied easement by necessity across the Respondents' property?

II. Whether the Master-In-Equity incorrectly concluded that BCE, LLC failed to demonstrate that BCE 2015, LLC was entitled to an easement by prior use across the Respondents' property?

III. Whether the Master-In-Equity incorrectly concluded that BCE 2015, LLC failed to demonstrate that BCE 2015, LLC was entitled to an easement by prescription across the Respondents' property?

IV. Whether the Master-In-Equity incorrectly denied admission of photographs taken by the appellant after the close of testimony and evidence and after the trial had ended.

V. Whether the Master-In-Equity incorrectly denied BCE 2015, LLC's Post-Trial Motion made pursuant to Rule 52(b) and 59(e), SCRCivP?

I. THE MASTER-IN-EQUITY WAS CORRECT IN FINDING THAT THE APPELLANT WAS NOT ENTITLED TO AN EASEMENT BY NECESSITY OVER AND THROUGH RESPONDENTS' PROPERTY.

In the complaint commencing this action, the appellant alleged that it had no access to its property except over and through an unimproved dirt road running through the property owned by the respondents. The appellant further alleged that it was entitled to a judicial declaration granting it a fifty (50') foot easement for ingress and egress. The appellant did not plead, allege, or assert in its complaint the legal principle or theory under which it was entitled to an easement over and through the respondents' property.

After the trial of this case, the Master-In-Equity concluded, based upon the testimony of appellant's managing member, Jason Maxwell, that appellant's claim for entitlement to an easement was based upon the law of implied easement by prior use and upon appellant's claim to a prescriptive easement.

In the initial order issued by the Master-In-Equity on October 31, 2022, the master found and concluded that the appellant was not entitled to a fifty (50') foot ingress and egress easement over and through respondents' property based upon the law of implied easement by prior use or based upon appellant's claim to a prescriptive easement. In the initial order, the Master-In-Equity did not address whether the appellant

was entitled to an easement by necessity.

After the initial order was issued by the Master-In-Equity, the appellant filed a motion for reconsideration which included a request that the Master-In-Equity find that the appellant was entitled to an easement by necessity. At the hearing held by the Master-In-Equity on appellant's post-trial motions, the appellant called to the court's attention that there was testimony at trial by appellant's managing member, Jason Maxwell, which showed that appellant was also asserting entitlement to an easement by necessity. The appellant directed the court to the Tiverton Lawn Plantation Plat which had been entered into the record at trial as exhibit 23 as primary support for its claim to entitlement to an easement by necessity. The Master-In-Equity agreed that the testimony of Jason Maxwell did appear to assert entitlement to an easement by necessity and the court then gave due consideration to the Tiverton Lawn Plantation Plat (exhibit 23) that was being relied upon by appellant. The Master-In-Equity determined that this plat did not provide proof that appellant's property was without other reasonable means of ingress and egress at the time the property was severed which must be shown by a party claiming the right to an easement by necessity.

The Master-In-Equity issued an Amended Order on March 1, 2023 which addressed appellant's claim to entitlement to an easement by necessity and the master declared in the amended order that the appellant was not entitled to an easement by necessity due to appellant's failure to

prove that appellant's property was without other reasonable means of ingress and egress at the time of severance.

It is well settled under our law that a party asserting the right to an easement by necessity must show: (1) unity of title, (2) severance of title, and (3) necessity. ***Kennedy v. Bendenbaugh,*** *352 S.C. 56, 572 S.E. 2d 452 (2002);* ***Boyd v. Bellsouth****, 369 S.C. 410, 633 S.E. 2d 136 (S. Ct. 2006).* While in the case at bar, the Master-In-Equity found that there was unity of title and severance of title, the court held that the third element which is necessity must be shown to exist at the time that the severance of title occurs. The Master-In-Equity found that the unity of title occurred when the appellant's property and the respondents' property were both part of a 300 acre tract of land owned by P. D. Meree, also known as Paul D. Meree. The Master-In-Equity found that on February 6, 1882, Paul D. Meree conveyed 30 acres out of the 300 acre tract of land to Nero Smalls which is the same property now owned by the respondents which is subject of this action. On February 29, 1884, P. D. Meree conveyed out of the 300 acre tract of land 29¾ acres to Jupeter Tate. The 22 acre tract of land that was purchased by the appellant at a Berkeley County tax sale on November 16, 2015, and which was conveyed to the appellant by the Berkeley County Treasurer on March 9, 2017, is a part of the 29¾ acres that was conveyed to Jupeter Tate on February 29, 1884. The Master-In-Equity found that the severance of the property now owned by the appellant and the property now owned by the respondents occurred on

February 6, 1882 when the 30 acre tract of land was conveyed to Nero Smalls.

In the case at bar, the court found that there was unity of title and severance of title but there was no evidence of necessity existing at the time of severance. It is undisputed under our law and by the parties in this case that the necessity element must be established by showing that the necessity existed at the time of severance. ***Clemson Univ. v. First Provident Corp.***, *260 S.C. 640, 197 S.E. 2d 914 (1973);* ***Boyd v. Bellsouth***, *supra.* It is clear that the burden of proof for showing that the necessity existed at the time of severance lies with the party claiming entitlement to the easement, which, in our case, is the appellant. There is no testimony in the record of this case from anyone, including prior owners, showing that the necessity existed at the time of severance on February 6, 1882. Inherent in proving the existence of necessity at the time of severance is the need for the appellant to show that there was no other reasonable means of ingress and egress at the time of severance. The appellant appears to attempt to shift this burden of proof to the respondents by arguing in its brief that the respondents have not shown that there was other reasonable means of ingress and egress for the appellant's property. This is not the respondents' burden. The burden of proof is on the appellant and the Master-In-Equity found that the appellant failed to provide sufficient proof as to the necessity element for establishing entitlement to an easement by necessity.

The appellant is relying upon the Tiverton Lawn Plantation Plat (Exhibit 23) to establish its claim that necessity existed at the time of severance and as proof that these was no other reasonable means of ingress and egress for appellant's property at the time of severance other than over and through the property now owned by the respondents. The Master-In-Equity did not find this plat to be supportive in establishing appellant's burden of proof of showing necessity at the time of severance and in showing that at the time of severance there was no other reasonable means of ingress and egress for appellant's property other than over and through respondent's property. It is unclear to the respondents as to exactly what the Tiverton Lawn Plantation Plat is intended to depict but it is clear that the Tiverton Lawn Plantation Plat was not a plat that was prepared at the request of, or for the use and benefit of, Paul D. Meree, the common grantor. There was no testimony from a surveyor or other expert witness clarifying or interpreting for the court the Tiverton Lawn Plantation Plat and how it impacts or is related to the property which is subject to our action.

II. THE MASTER-IN-EQUITY WAS CORRECT IN FINDING THAT THE APPELLANT WAS NOT ENTITLED TO AN EASEMENT BY PRIOR USE OVER AND THROUGH RESPONDENTS' PROPERTY.

A party claiming entitlement to an easement by prior use must establish the following elements: (1) unity of title; (2) severance of title; (3) the prior use was in existence at the time of unity of title; (4) the prior use was not merely temporary or casual; (5) the prior use was apparent or known to the parties; (6) the prior use was necessary in that there could be no other reasonable mode of enjoying the dominant tenement without the prior use; and (7) the common grantor indicated an intent to continue the prior use after severance of title.

The Master-In-Equity found that the appellant had established elements 1 and 2 but had failed to provide sufficient evidence or testimony to establish elements 3, 4, 5, 6 and 7.

As to element 3 which requires proof that the prior use was in existence at the time of unity of title, the court found that there was no testimony or evidence showing that the dirt road which now runs through the respondent's property was even in existence at the time of unity of title which, in this case, would be prior to February 6, 1882. The court also found that even if the dirt road existed prior to February 6, 1882, there was no evidence or testimony to show who, if anyone, was using the

unimproved dirt road prior to February 6, 1882 for ingress and egress to the property now owned by appellant. It is important to note that what must be shown by the appellant is not that the dirt road running across respondent's property was being used prior to the severance on February 6, 1882, but that the dirt road was being used for ingress and egress to the property now owned by appellant. Use of the dirt road for ingress and egress to appellant's property prior to February 6, 1882, has not be shown by appellant.

As to elements 4, 5, and 6, the appellant has no personal knowledge as to whether any prior use of the dirt road running through respondents' property was for ingress and egress to the property now owned by appellant. The appellant purchased its property at a Berkeley County Tax Sale on November 16, 2015 and obtained title to the said property on March 9, 2017. The appellant has no personal knowledge that any prior owners of the property now owned by appellant, were using the dirt road that runs across the respondents' property for ingress and egress to their property. Additionally, the appellant has no personal knowledge as to whether any prior use of the dirt road for ingress and egress by prior owners was not merely temporary or casual, whether the use was apparent or know to the parties and whether the use was necessary in that there could be no other reasonable mode of enjoying their property without the use of the dirt road. Since the appellant had no personal knowledge to provide the proof required by elements 4, 5 and 6,

it was incumbent upon the appellant to provide testimony from some of the prior owners of the property now owned by the appellant as to how they were gaining ingress and egress to and from their property. No such testimony was presented by the appellant.

The respondent, Eleanor Cooper Brown, testified that there is an iron gate in place on their property at the point where the dirt road that runs across their property intersects with Old Cherry Hill Road. She testified that this iron gate has been in place since 1995. She testified further that prior to the placement of the iron gate, there was a wooden gate which she believes was installed in or about 1950. She testified that the wooden and iron gates have been in place for 72 years to restrict access to the dirt road crossing their property. (TR. 278, lines 1-19.)

Element Number 7 requires proof that the common grantor indicated an intent to continue the prior use after severance of title. In the case at bar, the common grantor was Paul D. Meree. The appellant has failed to present any evidence or testimony that Paul D. Meree knew, stated or acknowledged that there was a dirt road running across the property now owned by the respondents that was providing ingress and egress to the property now owned by the appellant and that it was his intent that the dirt road would continue to provide ingress and egress after the severance of the property. There is no language or any reference of any kind in the deed from Paul D. Meree to Nero Smalls reserving an easement over or through the property now owned by the respondents.

Likewise, there is no language or any reference of any kind in the deed from P. D. Meree to Jupeter Tate granting to Mr. Tate an easement across or through the land conveyed by Paul D. Meree to Nero Smalls. The deed from P. D. Meree to Jupeter Tate does not even make reference to the subdivision plat mentioned by appellant in its brief which allegedly shows the dirt road running across the property of Nero Smalls. The land conveyed by P. D. Meree to Jupeter Tate is the property now owned by the appellant. The appellant has failed to provide any proof to satisfy element Number 7.

III. THE MASTER-IN-EQUITY WAS CORRECT IN FINDING THAT THE APPELLANT WAS NOT ENTITLED TO AN EASEMENT BY PRESCRIPTION ACROSS THE RESPONDENTS' PROPERTY.

It is clear in South Carolina that a party claiming the right to a prescriptive easement must show (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) the use is either adverse or under a claim of right. The burden of proof is on the party claiming the prescriptive easement. *Horry County* v. *Laychur*, 315 S.C. 364 (1993), *Boyd v. Bellsouth, Supra; Shia* v. *Pendergrass*,. 222 S.C. 342 (1952). A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner which in this case is the appellant.

In the case at bar, the appellant has only owned its property for 6 years and, therefore, cannot satisfy the 20 years continued use requirement through any alleged use on its part. Although, a party may "tack" the period of use of prior owners, the appellant has not provided any testimony from any prior owners showing that they used the dirt road across respondents' property for a period of time and that with the previous owners continuous use, there was 20 years of continued use to satisfy the first element for a prescriptive easement.

The appellant provided circumstantial evidence which it alleged showed continuous use of the dirt road over a number of years. This

evidence cannot be relied upon and has no probative value in this case because there is no identity as to who was using the road, exactly what period of time a particular person used the road and whether that person's use was adverse or under a claim of right as opposed to their use being permissive.

The evidence and testimony presented by the appellant falls well short of proving the three elements necessary for establishing entitlement to a prescriptive easement.

IV. THE MASTER-IN-EQUITY WAS CORRECT IN DENYING INTO EVIDENCE THE ADMISSION OF PHOTOGRAPHS TAKEN BY THE APPELLANT AFTER THE RECORD IN THIS CASE WAS CLOSED ON SEPTEMBER 15, 2022.

The trial of this case ended on September 15, 2022. The order issued by the master-In-Equity ruling in favor of the respondents was issued on October 31, 2022. The appellant filed a motion for reconsideration on November 8, 2022. On February 2, 2023, five days before the hearing on appellant's motion for reconsideration, the appellant went out to the scene of the property and took additional photographs, which the appellant sought to submit into evidence at the hearing on February 7, 2023. The record in this case was closed on September 15, 2022 and there was nothing new or different occurring on the property which is subject of this case after the record was closed on September 15, 2022, which would entitle the appellant to introduce supplemental evidence into the record. The same way that the appellant took the photos that it took on February 2, 2023, the appellant could have taken the same photos prior to September 15, 2022, and could have submitted these photos into evidence at the trial of this case on September 15, 2022. The after acquired photos taken by the appellant adds nothing to the merits and to the applicable law in this case. The appellant has shown no good cause for submitting new photos into the records that were taken

almost 5 months after the record was closed and the trial had ended. The Master-In-Equity was correct in denying the admission of these after trial photos into the record of this case.

V. THE MASTER-IN-EQUITY WAS CORRECT IN DENYING THE APPELLANT'S MOTION FOR RECONSIDERATION

At the hearing on appellant's post-trial motion for reconsideration that was held on February 7, 2023, the Master-In-Equity permitted the appellant to fully argue all 22 grounds upon which the appellant asked the court to alter or amend its previous judgment in favor of the respondents. The court, upon due consideration, determined that grounds 1-3 and grounds 5-22 were without merit. The court granted appellant's ground number 5 which asked the court to consider easement by necessity as a legal basis for appellant's claim to an easement over and through respondent's property. The court did fully consider whether appellant was entitled to claim an easement by necessity and issued an amendment to its order dated October 31, 2022, denying appellant's request for an easement by necessity. The Master-In-Equity as the fact finder and interpreter of the law correctly held that appellant was not entitled to claim an easement by necessity.

CONCLUSION

For the reasons stated herein, the three (3) orders issued by the Master-In-Equity dated October 31, 2022 and March 1, 2023 should be affirmed.

Respectfully Submitted

BY: H. Ronald Stanley

H. Ronald Stanley
Attorney for Respondents
1418 Park Street
Post Office Box 7722
Columbia, South Carolina 29201
Phone: (803) 799-4700
hrstanley@stanleylawsc.com

Columbia, South Carolina

Dated: January 8, 2024

RECEIVED
JAN 08 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Berkeley County
Honorable Dale E. Van Slambrook, Master-in-Equity
Civil Action No.: 2018-CP-08-344

BCE 2015, LLC

Appellant,

v.

YVONNE C. KNIGHT and ELEANOR C. BROWN,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that Respondents' Final Brief complies with Rule 211(b), SCACR.

H. Ronald Stanley
THE STANLEY LAW GROUP, P.A.
Attorneys for Respondents
1418 Park Street
Post Office Box 7722
Columbia, South Carolina 29202
hrstanley@stanleylawsc.com

January 8, 2024