THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Jan 24 2024
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2023-001753

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

Thomas C. Skelton..... Petitioner,

v.

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

PETITIONER'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990
ATTORNEYS FOR PETITIONER

Other Counsel of Record:

O. W. Bannister, Esq. (SC Bar No. 506)
Bannister, Wyatt & Stalvey, LLC
Post Office Box 10007
Greenville, South Carolina 29603
864.298.0084
ATTORNEY FOR RESPONDENTS

INDEX

TABLE OF AUTHORITIES

Cases

PETITIONER'S REPLY TO RESPONDENT'S COUNTER ARGUMENTS

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

Respondent, like the Court of Appeals, incorrectly focuses on the use of the property in its Return rather than the access to the property at the time of severance. An easement by necessity does not require a preexisting use during unity of title. *Boyd v. Bellsouth Telephone,* 369 S.C. 410, 633 S.E.2d 136, 141 (2006). The Church fails to address Craig's argument that the dirt road was necessary to access the rear of the property at the time the property initially was severed.[1] 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.[2]

"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).

Crucially, both Respondent and the Court of Appeals have overlooked that only a scintilla of evidence is required to overcome a motion for summary judgment. *Hancock v. Mid-S Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E. 2d 801, 803 (2009). They have also failed to consider 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.*,

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

301 S.C. 418, 392 S.E.2d 460 (1990).

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.[3] 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).

II. CRAIG PRESENTED A SCINTILLA OF EVIDENCE OF EASEMENT BY NECESSITY

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.[4] He 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.[5]

Craig does not confuse the dirt road shown on the plat with the driveway on the Vacant Lot used to access the rear of his property. Craig references a "dirt drive" shown on the plat for his property. He separately identifies a "way to go back and forth here" that is not marked or more specifically identified in his deposition.[6] The lack of clear identification in the deposition testimony

[3] App. 159, ll. 10-14.
[4] App. 158, ll. 9-22.
[5] App. 159, l. 21- App. 160, l. 12.
[6] App. 159, ll. 7-9.

requires the denial of summary judgment as there is a need for further inquiry into the facts to clarify the application of the law.

Craig did not testify, as Respondent argues, that he does not know how the blacksmith got to the shop at the rear of Craig's property. Rather he stated that he didn't know how Doc Smith accessed a house that was located on the Church's property.[7]

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.*, 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.

III. THERE IS EVIDENCE THAT CRAIG EXCEEDED ANY PERMISSION GRANTED

Respondent admits in its Return that any permission the Church gave to Craig was to use a portion of the Vacant Lot for ingress and egress to Craig's property. Respondent also states it gave permission for Craig to mow a portion of the Vacant Lot. Respondent's reference to a letter that Craig was donating his labor in mowing the Vacant Lot does not alter his other acts exceeding the Church's permissive use.

Craig has presented evidence that he used the Vacant Lot in excess of any permission given. This use 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.*

[7] App. 159, ll. 14-18.

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.)

Craig presented a question of material fact regarding his open and notorious use of the property in question without permission when he:

1. built a berm[8];
2. landscaped the property[9];
3. planted trees[10];
4. installed power conduits[11];
5. placed an out-building[12]; and
6. installed a dog fence encompassing 41,300 sq. ft.[13] in addition to simply using the driveway for ingress and egress.

These open and notorious activities exceeded any permission to drive across or mow a portion of the Vacant Lot.

Respondent cites *McDaniel v. Kendrick*, 386 S.C. 437, 888 S.E.2d 852 (Ct. App. 2009) for the proposition that Craig's use of the Vacant Lot must be "hostile". *McDaniel* addressed adverse possession rather than a prescriptive easement. Unlike adverse possession, hostility is not required to establish the right to an easement. Rather when a party establishes that the use of the disputed property was "open, notorious, continuous, and uninterrupted," the use will be presumed adverse

[8] App. 140, ll. 12-14; App. 32, ¶ 15.
[9] App. 141, ll. 4-5; App. 32, ¶ 15.
[10] App. 145, ll. 11-12; App. 32, ¶ 15.
[11] App. 33, ¶ 19.
[12] App. 33, ¶ 19.
[13] App. 144, ll. 4-6; App. 33, ¶19. Respondent admitted the dog fence was open and obvious and that it was aware of its presence. (App. 239, ll. 2-10).

or contrary to the property owner's rights. *Kelley v. Snyder*, 396 S.C. 564, 573, 722 S.E.2d 813, 818 (Ct. App. 2012).

Respondent argues that a 2011 email that Craig is not claiming "squatters rights" on the Vacant Lot demonstrates his use of the Vacant Lot was not adverse to the Church's ownership of the land. Respondent overlooks that there is no requirement of exclusivity of use to establish a prescriptive easement. *Kelley v. Snyder*, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012) Such a statement speaks to whether Craig has adversely possessed a portion of the Vacant Lot, and not to the issue of an easement. The meaning of Craig's statement, as well as whether his actions exceeded any permission he was granted, creates an issue of fact for a jury.

The lower court was required to draw all inferences from the testimony presented most strongly in favor of Craig. *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991) Further inquiry is required to clarify the application of the law; making summary judgment inappropriate.

CONCLUSION

The lower court incorrectly applied the standard for proving an easement by use rather than an easement by necessity. The lower court and the Court of Appeals considered the manner in which Craig used the property rather than inquiring whether an easement on Respondent's property was necessary to physically access the back portion of the property at the time of severance. This conflicts with prior decisions 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. Again, Craig presented at least a scintilla of evidence for a jury that his use of the Vacant Lot was adverse to the Church and 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,

January 24, 2024

Bradford N. Martin, SC Bar No. 3658
Laura W. H. Teer, SC Bar No. 16698
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990
ATTORNEYS FOR PETITIONER