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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
Court of Common Pleas, Ninth Judicial Circuit
Hon. Judge Bentley D. Price, Circuit Court Judge, Presiding

2020-001030

Maybank 2754, LLC…….Appellant,

Versus

Eugene Zurlo, Individually and as co-trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe…….....…...……Respondents.

RETURN TO RESPONDENT SEAMON, WHITESIDE & ASSOCIATES, INC.'S PETITION FOR REHEARING, and RETURN TO THE JOINT PETITION FOR REHEARING BY RESPONDENTS EUGENE ZURLO, INDIVIDUALLY AND AS CO-TRUSTEE OF THE EUGENE J. ZURLO LIVING TRUST DATED DECEMBER 11, 1997; 1776, LLC; BEACH FENWICK, LLC; THE BEACH COMPANY [sic]; AND PENNY CREEK ASSOCIATES, LLC.

Scarlet B. Moore, #72534
Attorney for Appellant, Maybank 2754, LLC
P.O. Box 17615
Greenville, S.C. 29606
(864) 214-5805
(864) 752-0930 (FAX)

September 5, 2024.

NOW INTO COURT, comes the Appellant Maybank 2754, LLC, who submits the following RETURN to the Joint Petition for Rehearing by Respondents Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company [sic]; and Penny Creek Associates, LLC; and RETURN to the Respondent Seamon, Whiteside & Associates, Inc.'s Petition for Rehearing, pursuant to Rule 221(a), SCACR. As an initial matter, the Joint Petitioners have fully incorporated and adopted all arguments furthered by the Petition for Rehearing submitted by Respondent Seamon, Whiteside & Associates, Inc. in its Joint Petition for Rehearing. Likewise, Respondent Seamon, Whiteside & Associates, Inc. has fully incorporated and adopted all arguments furthered by the Joint Petition for Rehearing. Therefore, the Appellant's Return shall incorporate and adopt all arguments as to all Respondents in this matter, although the individual sections, below, are addressed pursuant to the designations in the respective petitions. The Appellant fully incorporates all legal and factual arguments, legal principles and legal authorities previously cited in the Appellant's Final and Reply Briefs into this Return, and urges this Honorable Court to deny both petitions for rehearing.

Return to Joint Petition

Contrary to the assertions and somewhat dramatic hyperbole of the Respondents in their Joint Petition, this Court's Opinion does not upend fundamental aspects of property law and set bad precedent. To the contrary – this Court's Opinion is consistent with prevailing law, as discussed *infra.* Additionally, this Court did not hold that a genuine issue of material fact exists as to whether the Resolution, Assignment and Assignment Contract create an easement as Respondents state in their Joint Petition. Instead, this Court ruled that the character of "the easement" is a genuine issue of material fact. Further, the South Carolina Supreme Court has held

that the purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933); *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (S.C. 2001). The Respondents' petitions are entirely without merit and should be denied by this Honorable Court. This Court's Opinion is well-reasoned and completely consistent with established precedent. This Court did not overlook or misapprehend any matters of law as argued by the Respondents.

A. The Easement Language in the Resolution, Agreement, and Assignment Contract is Not "Far Too Vague" to Constitute an Enforceable Easement

Respondents argue that the description of the easement does not sufficiently identify its location, and that the language is far too vague to constitute an enforceable easement. This argument is simply a regurgitation of the same prior argument, which has been thoroughly addressed by Appellant in brief and which this Court correctly rejected. The Respondents assert that the Resolution, Assignment and Assignment Contract specifically fails to identify the location of the easement and erroneously asserts that "location" is an explicit requirement in easement law in South Carolina. The Appellant wholly agrees with this Court's Opinion in Footnote # 9 that the Circuit Court had no legal basis to reach the conclusion that the Resolution could not create an easement because it did not include the "essential elements" necessary to create a property right.

The case of *Rogers v. River Hills Limited Partnership*, No. 4:09-CV-01540-JMC, 2011 WL 4808207 (D.S.C. Oct. 7, 2011), aff'd, 514 F. App'x 276 (4th Cir. 2013), which is cited by the Respondents in their Petition (and which appears to be cited for the very first time in this appeal), is wholly inapplicable and irrelevant to the case at bar because it is a federal district court order

and not binding upon this Court. However, the language cited in *Rogers* is not contrary to the position of Appellants. In *Rogers*, the federal district court had to determine whether the contested easement – purportedly created via a Resolution identified in minutes of a corporate partnership meeting – violated the Statute of Frauds. The district court held that the minutes did not qualify as a sufficient written memorandum to satisfy the Statute of Frauds. The district court cited *Binkley v. Rabon Creek Watershed Conservation Dist. Of Fountain Inn,* 348 S.C. 58, 71, (Ct. App. 2001). In relevant part, *Binkley* states the following: "A description of an easement *in a recorded document* is sufficient when it contains language that acts as a *guide to the location* of the easement on the land such that the easement is 'capable of being rendered to a certainty [by reference] to something extrinsic… to which it refer[s]." (footnote and citations omitted) (emphasis added). The *Binkley* opinion dealt with a description of an easement in a recorded document. In the instant case, the documents creating the easement were not recorded and Appellant asserted that all Respondents had actual knowledge of the easement, which this Court's Opinion acknowledges.

Assuming arguendo that there is a strict requirement for language that acts a guide to the location of the easement in an unrecorded (or recorded) document (which there is not), the specific inclusion of Pitch Fork Road in the Resolution, Assignment and Assignment Contract is clearly "something extrinsic" for reference, which acts as a guide to the location of the easement on the servient estate. (See R. pp. 1806-1807; p. 1811; p. 1818-1819). Furthermore, Respondents ignore the fact that the Affidavit of Michel F. LaPlante describes the intended location of the easement over the servient estate to connect with Pitchfork Road once it was completed. (R. pp. 1946 – 1948). Furthermore, a plat recorded after the creation of the Resolution, Assignment and Assignment Contract, shows the route of "Northern Pitchfork Road" across the servient estate. (R. p. 1078.)

B. <u>The Resolution Does Not Amount to an Unenforceable Agreement to Agree.</u>

Contrary to the assertions of the Respondents, the Resolution is simply not an unenforceable agreement to agree, which is addressed by the Appellant in reply brief and which assertion was rejected by this Court in its Opinion. The Appellant incorporates the arguments in brief and in Paragraph A, *supra,* in Return.

C. <u>The Foreclosure Order Did Not Extinguish the Easement.</u>

Contrary to the assertions of the Respondents, the Foreclosure Order did not extinguish the easement, which is addressed by the Appellant in brief and which assertion was rejected by this Court in its Opinion. The Appellant incorporates the arguments in brief in Return to the Respondents. Further, the Respondents rely on case law from North Carolina, Illinois, and Kansas which cases are not binding upon this Court.

D. <u>This Honorable Court Correctly Found that the Sale of Property Was Subject to "Existing Easements, and Easements and Restrictions of Record."</u>

The Appellant incorporates the arguments in brief in Return to the Respondents. .Further, this Court should disregard case law from Alabama as it is not binding precedent nor applicable in South Carolina. It is important to note that Respondents do not cite a single South Carolina case for this specific argument. Lastly, an entity cannot be bound to an order without due process of law as discussed by the Appellant in brief.

E. <u>Respondents Erroneously Assert that the Appellants Should Be Estopped for Failing to Raise the Purported Easement's Existence in the Foreclosure Action, as the Appellant was not a party to the Foreclosure Action.</u>

The Respondents erroneously assert that because Michel Laplante was in the first instance

a party to the foreclosure action at issue in this case, the Appellant Maybank 2754, LLC should be estopped from raising the existence of the easement. As this Honorable Court has found, the Appellant Maybank 2754, LLC was never a party to the foreclosure action and was not provided due process. The Appellant has also addressed this issue in brief, and incorporates such in Return to Respondents. Furthermore, the Respondents cite to cases from Illinois and Maine, which is not binding precedent.

F. <u>Respondents Erroneously Assert That the Easement is an Easement in Gross.</u>

The Respondents erroneously assert that the easement is an easement in gross, which has been addressed by the Appellant in brief and also rejected by this Court. The Appellant incorporates the legal and factual arguments in this Return and urge this Court to deny the petitions for rehearing of the Respondents. Furthermore, in Footnote # 12 of the Joint Petition, Respondents incorrectly represent that "the record contains no evidence Appellant was ever transferred any right to this purported easement." However, the Affidavit of Mitch LaPlante states in Paragraph # 35, "Maybank was assigned rights to the easement." (R. pp. 1949).

Return to Seamon, Whiteside & Associates, Inc.

I. The Court of Appeals Did Not Overlook Nor Misapprehend the Respondent's Appeal As To The Civil Conspiracy Claim; However, The Respondents Did Not Object To This Courts' Reversal of the Appellant's Motion To Amend Its Complaint Which Permits The Appellant To Amend and Supplement Its Complaint.

In Return to the Respondents, the Appellant adopts and incorporates all previous arguments of law and fact in the Appellant's briefs. In addition, the Appellant submits that this Court's Opinion reverses the trial court's denial of the Appellant's Motion to Amend its Complaint. The

Appellant has been given leave to amend its complaint, which ruling has not been challenged in the Respondents' Petition for Rehearing. Therefore, this Court's Opinion on this point serves to moot the arguments of the Respondents regarding denial of their motion to dismiss. The arguments of the Respondents are without merit and this Court should deny the Respondents' petitions for rehearing.

WHEREFORE, the Appellant prays that this Honorable Court deny the Petitions for Rehearing filed by all Respondents in this matter.

Respectfully Submitted,

s/Scarlet B. Moore

Scarlet B. Moore, #72534
Attorney for Appellant
P.O. Box 17615
Greenville, S.C. 29606
(864) 214-5805
(864) 752-0930 (FAX)

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CERTIFICATE OF SERVICE

I certify that on this date, September 5, 2024, I have served the **Appellant's Return to Petition for Rehearing,** on opposing counsel to their respective e-mail addresses, pursuant to the Order of the Supreme Court Appellate Case No, 2020-000447(g)(3):

Cheryl D. Shoun - cshoun@nexsenpruet.com

Alexandra Harrington Austin -aaustin@nexsenpruet.com

John Patrick Turner Norris - pnorris@cskl.law

Kent Taylor Stair - kstair@cskl.law

Jordan N. Teich - jteich@cskl.law

Jason S. Smith - js@hellmanyates.com

Brian A. Hellman - bh@hellmanyates.com

J. Rutledge Young, Jr. - jryoung@duffyandyoung.com

Blake Abernethy McKie - bmckie@duffyandyoung.com

Thomas Bacot Pritchard - tpritchard@pnalaw.net

Jason Tarokh – jason@tarokhlaw.com

Jennifer Canaday -- jcanaday@cskl.law

Katie Shaw – kshaw@cskl.law

Kara S. Grevy – kgrevy@duffyandyoung.com

Brian Duffy – bduffy@duffyandyoung.com

Jan Prosen – jprosen@duffyandyoung.com

Respectfully Submitted,

s/Scarlet B. Moore

_____

Scarlet B. Moore, #72534
Attorney for Appellant,
Maybank 2754, LLC
P.O. Box 17615
Greenville, S.C. 29606
(864) 214-5805
(864) 752-0930 (FAX)

Jason M. Tarokh, #72837
Tarokh Law, PLLC
P.O. Box 10827
Tampa, FL 33679
(813) 922-5510
jason@tarokhlaw.com
Attorneys for Appellant

September 5, 2024
Greenville, South Carolina

SCARLET B. MOORE, ESQ.
Attorney at Law
P.O. BOX 17615
GREENVILLE, SC 29606
(864) 214-5805
(864) 752-0930 (FAX)

September 5, 2024

Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

RE: Maybank 2754, LLC, Appellant vs. Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust dated December 11, 1997; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe, Respondents
Case Number: 2020-001030

Dear Madam Clerk,

Please find enclosed the Appellant's Return to Petition for Rehearing and a Certificate of Service.

If the Court requires further information, please do not hesitate to contact me. With kind regards, I remain

Very Truly Yours,

s/Scarlet B. Moore

Scarlet B. Moore, Esq.
Counsel for Appellant

SBM/s

Cc: ***via Email:***
Alexandra Harrington Austin, Esq. Brian A. Hellman, Esq.

scarlet28@msn.com

Blake Abernethy McKie, Esq.
Thomas Bacot Pritchard, Esq.
Jason S. Smith, Esq.
Jason M. Tarokh, Esq.
J. Rutledge Young, Jr., Esq.
Kara S. Grevy, Esq.
Miriam Peeler
Katie Shaw

John Patrick Turner Norris, Esq.
Cheryl D. Shoun, Esq.
Kent Taylor Stair, Esq.
Jordan N. Teich, Esq.
Brian Duffy, Esq.
Jan Prosen
Jenifer L. Canaday

scarlet28@msn.com