

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM GREENWOOD COUNTY

SC Court of Appeals

Court of Common Pleas

Hon. W. Reid Cox, Jr., Special Referee

Appellate Case No. 2025-002595

Lower Case No. 2021-CP-24-00361

James Ernest Young, Jr. Appellant

vs.

Robbie T. Boone and Paula P. Boone. Respondent

INITIAL REPLY BRIEF OF APPELLANT

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Question I

Did the Special Master err in awarding the Boones greater rights to the property they were deeded than were acquired by their predecessors in title?

The rights held by J. Ernest Young Sr. on April 1 1954, are the same rights held by J Ernest Young, Jr when he acquired the property on January 7, 2019. On April 1, 1954, the owners of lots 11 and 12 of Block C had no right to block off the access J. Ernest Young, Sr. had to access the road left open by the agreement of March 31, 1954. Mr. Young, Sr acquired those rights when he purchased lots 1, 2, 3, and a portion of 4 of Block B. Had Mr. Young, Sr. desired, on April 1, 1954, he had the right to use the unopened road as a driveway to a garage in the back of his property. No person would have had the legal right to prevent this. Mr. Young, Jr. still has this right today.

The Respondent stated, “A. S. Wilkinson, as the owner of the Strip through the 1954 Agreement acknowledged that he would allow only the portion of the Strip between Lots 11 and 12 of Block C of Green Acres Subdivision and Henrietta Street to be used as an outlet for the benefit of the owners of Lots 11 and 12 of Block C, and no others.” Br. Resp. at 7. This is not what the agreement stated. Nor is this what the law provides. The agreement, signed by all parties who owned adjoining property, acknowledged that the proposed road would be closed from Lot 10 of Block C to Cokesbury Road. The agreement left a small portion open for the benefit of Lots 11 and 12 of Block C, but did not extinguish any previously acquired rights by other property owners. In fact, the portion of the proposed road later purchased by Mr. Young Sr and his purchase of Lot 10 would have also given him access to the road left open as it adjoined the road left open. ROA at Exhibit 19. The agreement does not claim to extinguish any other

rights, acquired by Mr. Young, Sr. when he initially purchased his lots, to the road left open

The Respondent agrees Mr. Young, Sr. acquired these rights when he purchased Lots 1, 2, 3 and a portion of lot 4. As the Respondent correctly states, “[A]s between the owner, who has conveyed lots according to a plat, and his grantee or grantees, the dedication is complete when the conveyance is made, even though the street is not accepted by public authorities.” *Blue Ridge Realty Co. V. Williamson*, 247 S.C. 112, [119,] 145 S.E.2d 922, [924] (1965)” Br. of Resp. at 10. Thus, Respondent acknowledges that when Mr. Young, Sr. purchased the property, he has an easement to use the proposed road. The 1954 agreement did not extinguish the rights acquired by Mr. Young, Sr. The specific easement rights given as a matter of law to Mr. Young, Sr. cannot be lost by implication. Nothing in the 1954 agreement extinguished the legal rights acquired by Mr. Young, Sr. when he originally purchased Lots 1, 2, 3 and a portion of 4. The Respondent has only claimed it did without reference to any specific provision. As Mr. Young, Sr. had the right on April 1, 1954 to access the road left open by going over his Lot 1, J. Ernest Young, Jr. acquired that same right and has that right today. The only rights to an easement released by Mr. Young, Sr. were the rights to use the unopened road from Lot 10 to Cokesbury Road.

The Respondent incorrectly states that the 1954 agreement was an abandonment of all easement rights Mr. Young, Sr. acquired when he purchased the property. If the parties had desired to accomplish that fact, the agreement could have easily stated all parties abandon all rights to any portion of the unopened road. They did not so state. Nothing in the 1954 agreement suggests Mr. Young, Sr. intended to abandon any rights he had to access the unopened road adjoining Lot 1. And why should the parties have extinguished such a right? As the road

was left open for the benefit of Lots 11 and 12 of Block C, there was no need to extinguish the rights of Mr. Young, Sr. to use the unopened road. The intent of the 1954 agreement was to permit Lots 11 and 12 to have access to the property by the unopened road. Obviously, with such a purpose, Mr. Young, Sr. would also continue to have his legally acquired right to access his property by the unopened road.

In responding to whether the Boones acquired greater rights than their predecessor in title had, the Respondent contends Mr. Young, Jr. is insinuating a “silent reservation of rights” by Mr. Young, Sr. in the 1954 agreement. Mr. Young, Sr. did not need a “silent reservation of rights.” He had an expressed legal right to access his property by the use of the portion of the road left open just as he did before the 1954 agreement. That right cannot be taken away from him unless it is expressly done. The 1954 agreement does not state specifically or by implication, that Mr. Young, Sr. lost his right to access his property through the use of the portion of the road left open. As the Georgia courts have held, “The law does not favor the extinguishment of easements, and an easement acquired by grant is not extinguished merely by nonuse; there must be clear, unequivocal, and decisive evidence of an intent to abandon the easement.” *Whipple v. Hatcher*, 283 Ga. 309, 310, 658 S.E.2d 585, 586 (2008). If the servient estate seeks to establish that the dominant estate has relinquished their rights, this must be clear. Such clear evidence is not demonstrated in the 1954 agreement.

The Respondent further argues, “The only retained right was by A. S. Wilkinson as the owner of the strip to fulfill his obligation to allow access for the owners of Lots 11 and 12 to East Henrietta Street.” Br of Resp. at 8. This is simply not correct. Prior to the 1954 agreement, A. S. Wilkinson had the legal obligation to permit Mr. Young, Sr. to use the unopened road to

access his property by going across Lots 1, 2, 3, and a portion of 4. The only rights given up by Mr. Young, Sr. was to access his property from the back portion of Lots 2, 3, and 4. The 1954 agreement did not give up the right of Mr. Young, Sr. to access his property from the back of Lot 1 that still abutted the portion of the road left open. The agreement itself specifically left open that portion of the proposed road that adjoins Lots 11 and 12 of Block C. The plat clearly shows the road still adjoins a portion of Lot 1 of Block B and thus the easement for the access to the use of the road is not extinguished for Mr. Young, Sr. ROA Exhibit 2-B.

As noted in the opening brief, the Appellant has never contended that the road was ever a dedicated public road. Any argument by respondent on this issue is simply not relevant to the issues in this appeal.

The Respondent then concludes that the conclusions of the Special Referee as to agreement, which is a contract to be interpreted as a matter of law, should be given special weight. Br. of Resp. at 11. This Court is in an equal position to interpret the agreement. The Special Referee is not entitled to special deference as to this document.

In discussing the issue of abandonment, the Respondent improperly relies upon *Hodge v. Manning*, 241 S.C. 142, 127 S.E.2d 341 (1962). Br. of Resp. at 12. As noted in the Opening Brief of Appellant, this case involved the owner of all the property which contained the original road shown on the plat, building a barn and fence lone on the road. Such an affirmative act did not take place in this case. No person in the chain of title of Mr. Young, Jr. ever took any affirmative action to close the easement.

Question II

Did the Master err in finding James Ernest Young, Sr., the predecessor in title,

abandoned the easement in a 1954 agreement when the agreement specifically left open the road adjoining the property of James Ernest Young, Sr. and no language in the agreement abandoned Mr. Young's implied easement rights?

The Respondents in their brief correctly state that the 1954 agreement closed a portion of the proposed road and left a small portion open. Br. of Resp. at 13. By leaving a small portion open, the agreement left any and all rights acquired by the adjoining property owners intact. Nothing in the agreement took away any rights of the property owners adjoining the portion of the road left open. Respondent has cited no portion of the agreement that takes away the rights of anyone to the portion left open. The agreement stating that a small portion would be left open for Lots 11 and 12 was simply stating the obvious. The agreement simply recognized their rights to use the remaining portion of the road.

The Respondents argue, "Because Appellant's predecessor participated in the recorded agreement closing the roadway, Appellant cannot now revive rights that were expressly relinquished by his predecessor seventy years ago." Br. of Resp. at 14. The only rights to a road that were expressly relinquished were to the portion of the proposed road that was expressly closed. No rights were relinquished to that portion of the proposed road that was expressly left open. The Respondent has not pointed to any provision of the agreement that expressly relinquished any rights of Mr. Young, Sr. to the portion left open.

The Respondents then argue that the rights of Mr. Young, Jr. were extinguished by merger. Br. of Resp. at 14. The Respondent's reliance upon *Immanuel Baptist Church v. Barnes*, 274 S.C. 125, 264 S.E.2d 142 (1980) is misplaced. In *Immanuel Baptist Church*, the developers of the property decided to abandon the plans for a subdivision. When this occurred,

the children of the original developers and Immanuel Baptist Church agreed to close the entire road shown on the plat as Benson Drive. This agreement was made in 1959 and recorded in 1963. The agreement provided record notice of the closing of Benson Drive to any subsequent purchaser. The court noted, "This agreement reflected the intention of the parties to close Benson Drive and declared that it shall no longer be recognized or used for street purposes. However, that portion of the roadway which divided the church property and which was used by respondent as a driveway was left open by the agreement." *Id.* at 129, 264 S.E.2d at 144. Mr. Barnes did not purchase his property until 1964, after the agreement to close the entire street was recorded. The court finally concluded, "The Agreement for Closing Streets was of record and within appellant's chain of title at the time appellant originally purchased the property from the Toole children. This was sufficient to put him on notice of the agreement and impute to him the recitals contained therein." *Id.* at 132, 264 S.E.2d at 145.

In the present case, there was no agreement to close the entire road. There was a specific agreement to leave a small portion of the road open. This small portion bordered the property of Mr. Young, Sr. As such, he retained all the rights to ingress and egress over the portion of the road left open.

The Respondents further argue that the doctrine of merger vests greater rights in the Boones than their predecessors in title had. This is simply not correct. As stated by the Colorado court, "As it pertains to easements, the doctrine of merger provides that when the land burdened by the easement and the land benefited [sic] by the easement come into common ownership, the need for the easement is destroyed and the easement is extinguished." *Brush Creek Airport, L.L.C. v. Avion Park, L.L.C.*, 57 P.3d 738, 747 (Colo. App. 2002). The easement of concern in

this case is the easement Mr. Young, Jr. has to use the plated but unopened road to access his property. This easement was granted when the property was purchased and not taken away in the 1954 agreement. Mr. Young, Jr. owns the dominant estate and the Boones own the servient estate in the form of the unopened road. For any merger to impact the rights of Mr. Young, Jr., the property owned by Mr Young, Jr. would have to be included in the merger. The fact that the unopened road and Lots 11 and 12 were eventually owned by the same person cannot impact the rights of the adjoining property to have an easement for ingress and egress across the plated but unopened road. The dominant estate owned by Mr. Young, Jr. continues to exist. The action of the predecessors in title to the Boones does not negate any rights acquired by the predecessors in title to Mr. Young, Jr.

Question III

Did the Master err in holding that James Ernest Young, Jr. abandoned the property through non-use when the Master never found Mr. Young took any affirmative action to abandoned his interest in the easement as required by the case law in South Carolina?

As to the issue of alleged abandonment generally, one treatise has said

An easement is an interest in land which entitles the easement holder to limited enjoyment over another person's property. The vast majority of cases take the position that an easement, whether by grant or by prescription, cannot be lost by mere nonuse, however long continued, unless accompanied by an affirmative act on the part of the owner of the easement indicating an unequivocal intention to abandon it, and the acts claimed to constitute the abandonment must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement.

Annot., Loss of private easement by nonuse, 62 A.L.R.5th 219 (1998)

Our court has said, "The authorities are harmonious in holding that mere nonuser of an easement created by deed for a period however long will not amount to an abandonment, except

where otherwise provided by statute, or by the deed itself. There must be in addition other acts by the owner of the dominant estate conclusively manifesting, either a present intent to relinquish the easement, or a purpose inconsistent with its further existence.” *Witt v. Poole*, 182 S.C. 110, 188 S.E. 496, 498 (1936). As noted in the opening brief, when the Appellant asked the Special Master in a Rule 59 motion for proof of such additional affirmative facts to justify an abandonment, the answer was “denied.” Respondent has cited no such additional factors by Mr. Young, Jr. or his predecessors in title to justify a finding of abandonment. The reason is simple - none exist.

The Respondent failed to prove an abandonment. “The burden of proof is upon the party asserting abandonment to show the abandonment by clear and unequivocal evidence. Mere nonuse of an easement created by deed will not amount to an abandonment.” *Town of Kingstree v. Chapman*, 405 S.C. 282, 309, 747 S.E.2d 494, 508 (Ct. App. 2013)(internal citations omitted)

Question IV

Did the Master err in finding James E. Young is not entitled to easement under adverse possession when none of the necessary elements of adverse possession were established by the Boones?

In addressing this issue the Respondents again raise the issue of merger. Again, the Respondent appears to argue that the mere fact that the portion of the road left open was acquired by the owners of lots 11 and 12, the easement rights of the predecessor in title of Mr. Young to use the road left open for ingress and egress were not diminished. The Respondents incorrectly argue, “[A]ny surviving easement was extinguished by merger decades ago, and the Court was

not presented with any evidence of use as to the exercise of any arguable implied reserved easement from the date of merger forward . . .” Br. of Resp. at 15. The Respondents appear to suggest that when James Klauber purchased the unopened road from the estate of A. S. Wilkinson after he purchased lots 11 and 12, any easement rights held by the predecessors in title of Mr. Young, Jr. were lost. No law is cited to support this proposition. As noted previously, for merger to extinguish an easement the merger must be between the dominant and servient estates. The Young property was and still is the dominant estate as to the express easement created by the plats used when Mr. Young, Sr. purchased his original lots. The mere fact the road left open was subsequently purchased by the owner of Lots 11 and 12 is of no consequence. When Mr. Klauber purchased the road left open, he also acquired the same obligation of his predecessor in title to leave the easement acquired by Mr. Young’s predecessor in title open. “In particular, one who purchases land expressly subject to an easement, or with notice, actual or constructive, that it is burdened with an existing easement, takes the land subject to the easement.” 28A C.J.S. Easements § 133. Mr. Klauber purchased the portion of the road left open with full knowledge that it was subject to the easement created when Mr. A. S. Wilkinson sold the lots to Mr. Young, Sr. His purchase of the road left open for Lots 11 and 12 did not and could not legally extinguish the rights Mr. Young, Sr. acquired when he purchased the lots. The plat used by Mr. Klauber and the Boones, clearly shows they purchased the unopened road with all the rights and obligations that go with it. ROA at (plat of Klauber)

The Respondent further argues, “The uncontradicted testimony revealed that neither party had knowledge of any of any title claims, objections to title, injunctions, or actions to enforce easement prior to the filing of the suit in the lower court, some 30 years after merger of title.”

Br. of Resp. at 17. The uncontradicted evidence shows there were no obstacles to the use of the easement until the Boones erected their fence. The Plaintiff's exhibit shows that prior to the Boones, the land was open permitting access to the rear of the property of Mr. Young, Jr. ROA (Google picture of easement). No need to complain exists when there is nothing to complain about.

Mr. Young did not file an action based on any prescriptive easement. Whether a prescriptive easement existed was not an issue at the hearing. The Respondent has further argued, "The cardinal rule of an action to quiet title is that the moving party must establish its claim based upon the strength of its own claim, and not the weakness of the other party's claim." Br. of Resp. at 18. The title to any property is not in dispute in this case. The plaintiff agrees the defendants own the property they claim to own. The Respondent further appears to argue that the only testimony Mr. Young presented as to an easement was the testimony of Butch Moore. If the Respondent means a prescriptive easement, which is not claimed, then the Respondent may be correct. The easement the Appellant sought to establish, which is conceded by the Respondent, is the easement established when Mr. Young, Sr. purchased the property pursuant to the plat showing roads adjoining the property purchased by Mr. Young, Sr. Adverse possession simply has no bearing on this case.

Question V

Did the Master err in finding the easement of James E. Young, Jr. was lost under the doctrine of laches when the Master improperly started the time period for laches in 1991 when James Klauber purchased the unopened street and Mr. Young notified the Boones of his claim of the easement before the Boones poured a concrete slab on the

easement?

The Respondent argue, “The Special Referee found that Appellant admitted knowledge that James Klauber claimed title to the strip in 1991. Yet neither Appellant nor his precession brought suit for nearly 30 years.” Br. of Resp. at 21. Who owned the portion of the road left open is of no consequence to this suit. What suit should have been brought in 1991? No evidence cited by Respondent shows any blocking of the easement in 1991 or for many decades thereafter. Mr. Young and his predecessors in title believed that they have an easement which they continued to use after 1991. No cause of action existed. No obstruction was occurring until the Boones erected the fence. Mr. Young notified the Boones shortly after they obstructed the use of the easement. This was a matter of months and not decades. The Boones knew they purchased an unopened road. Their title showed the unopened road was subject to the easement of Mr. Young. They made improvements at their own risk, Laches has no application in this case.

Question VI

Did the Master err in making rulings in this case on matters that were not relevant to the determination of the issue?

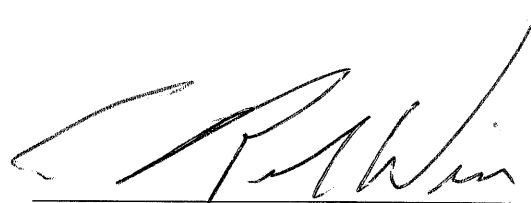
To the extent the Respondent agrees some of the ruling of the Special Referee were not dispositive of the case, the parties agree. The Respondent appears to contend that the Appellant has taken inconsistent position as to whether the portion of the road left unopened is a road or an easement. In the complaint, the Appellant referred to the property in question as a road because that is the manner in which it is mentioned on the plats. Appellant has never claimed the road is a easement. The easement was acquired by Mr. Young, Sr. when he purchased the property. Has

the special referee found the Appellant had an easement, the Appellant has never contended that the Boones did not have a right to use and enjoy the road as Mr. Young, Jr. would have the right to use and enjoy the road.

CONCLUSION

For the reasons set forth above and for the reason in the Opening Brief, James Ernest Young, Jr. requests this court to reverse the finding of the Special Referee and hold that James Ernest Young, Jr. owns the easement right to use the portion of the road left open in the 1954 agreement.

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