THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2011-CP-10-2444
Appellate Case No. 2014-000155

Stow Away Storage, LLC...Respondent

vs.

George W. Sisson, 4.0, LLC, The Sisson Foundation
Limited Partnership, Sweetgrass Hardware, Inc.,
and Timarand, Inc., Defendants,

Of whom George W. Sisson, 4.0, LLC, The Sisson
Foundation Limited Partnership, and Sweetgrass
Hardware, Inc., are...Appellants.

RESPONDENT'S FINAL BRIEF

G. Dana Sinkler, Esq.
S.C. Bar No. 5138
Gibbs & Holmes, PC
171 Church Street, Suite 110
Charleston, SC 29401
(843) 224-1758

Attorney for Respondent

RECEIVED

SEP 11 2014

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities ii

Statement of Facts 1

Standard of Review 1

Argument 2

Conclusion 8

TABLE OF AUTHORITIES

Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873 8

Slear v. Hannah, 329 S.C. 407, 496 S.E.2d 633 (Ct. App. 1998) 1

Ward v. Evans, 387 S.C. 401, 693 S.E.2d 7 1

OTHER AUTHORITIES

Law of Easements and Licenses § 202[3] Expanding Dominant Estate 4

Statement of Facts

The facts agreed to by the parties as the facts upon which this case should be considered are set forth in Judge Nicholson's Order, are adopted by the Respondent, and need not be replicated in the Respondent's Brief. In addition, the parties and the Court agreed that the Easement to Mr. Sisson was an Easement Appurtenant. Given the stipulation of the parties, counsel for the Respondent will proceed with consideration of the issues.

Standard of Review

The Appellant's assertion that: "This is an action in equity" is not supported by the evidence. To the contrary: "Determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Ward v. Evans, 387 S.C. 401, 693 S.E. 2d 7; Slear v. Hannah, 329 S.C. 407, 410, 496 S.E. 2d 633, 635 (Ct. App. 1998)

The parties have stipulated that the easement is an easement appurtenant to Sisson's property and the extent of Sisson's property is not at issue and can readily be ascertained by the legal description of the easement in the Access Easement itself. The determination of the right of Sisson to extend the Easement beyond the confines of the Servient Estate and the efficacy of the License Agreement to allow the patrons of Sweetgrass to use the Access Agreement are likewise questions of law, not of fact and subject to an any evidence standard of review.

Argument

Given the stipulations of the parties, the first order of business should be to establish the identity of the Dominent and Servient Estates. The Servient Estate is depicted on a plat or drawing entitled "Access Easement for Sisson's Property" attached to the Access Easement. By description in the Access Easement it encompasses the entire tract owned by Stow Away. One can then turn to the County Map (Memorandum in Support of Plaintiff's Motion for Temporary Injunction and Motion for Partial Summary Judgment and Permanent Injunction, R. p. 194) depicting the relative location of Sisson's property which is the Dominent Estate, Stow Away's property which is the Servient Estate and Sweetgrass' 20 year Leasehold from Timarand which was obtained on January 3, 2007, (more than 6 years after the signing of the Access Easement and Abandonment of Encroachment Permit).

Paragraph 15 of the Facts provides:

> Following several telephone conversations with Stow Away's member, Bert Pooser, on September 27, 2006, Tim Askins, the sole shareholder of Timarand, had his wife fax a sketch to Pooser, depicting a proposed extension of the Access Easement previously provided to Sisson which would have allowed access over Stow Away's Access Easement to Timarand's property, which he subsequently leased to Sweetgrass. (See Exhibit 3) Pooser never agreed to the proposed extension. (Emphasis added)

All Defendants including Timarand, Inc., which was held in default, were defended by the same counsel who attempted, in vain, to lift the default. It seems obvious that, had Mr. Sisson thought he had rights he could assign to

Sweetgrass he would have asserted them then or at least at the time the use of the Easement was challenged.

Be that as it may, Judge Nicholson, in his conclusion of law, in addressing the provisions of the Easement vis-à-vis the Defendants' position that the language in the Easement Agreement contemplated a material change in the scope of the Easement held:

> . . . in reading the Easement Agreement as a whole as required by South Carolina precedent, the Court finds that this language refers specifically to the assignment of rights held by the dominant estate holder and does not address a change in the scope of the easement. The Court further finds that in order for there to be a finding that the Easement Agreement contemplates the material increase in the scope of the Easement and the burden over the servient estate by the dominant estate holder, there must be specific language indicating such and none exists.

These findings and conclusions are supported by the majority of courts.

> **Expanding Dominant Estate**
>
> An easement appurtenant to one parcel cannot be used in connection with another parcel. The owner of a dominant estate may not extend the easement to accommodate land that the servitude was not originally intended to serve. Hence, an easement appurtenant does not benefit nondominant land that the easement holder now owns or property that the easement holder may subsequently acquire. The purpose of this rule is to prevent an increase of the burden on the servient estate.
>
> Especially in a commercial context, the party obtaining an easement may wish to make contractual provisions for future expansion of the dominant estate. In such a case, the grant of the easement may be drafted to provide that land later acquired by

> the dominant owner will also benefit from the servitude.

See Law of Easements and Licenses § 202[3] Expanding Dominant Estate pg. 2-14, 2-15

While the "Access Easement" granted to Mr. Sisson is not a model of clarity, by adhering to the rules applicable to discerning the existence of the easement, it can be readily determined. First the Easement is identified on a plat or sketch attached as an exhibit to the Access Easement and is denominated as "Access Easement For Sissons (sic) Property". (Emphasis added) Next, its purpose is described in the Grant of Access Easement as being "for purposes of access, ingress, and egress by any and all pedestrian and passenger and delivery vehicular means between Grantee's property and U.S. High 17". (Emphasis added) The extent of the easement is then described as being "to run through property owned by the Grantor situate, lying, and being as follows: See Exhibit A attached hereto and incorporated herein by reference. (Emphasis added) Exhibit A contains the legal description of Stow Away's entire tract. Then the following language is included in the Grant of Access Easement:

> The Access Easement and all rights granted in favor of Grantee herein are limited in nature and scope, such that the use of the Access Easement shall not materially adversely affect the use, enjoyment, and operation of the Grantor or its property.

The foregoing is the entire Grant of Access Easement. The document then goes on to discuss Grantee's obligation to abandon and terminate his rights to any other access to his property.

The remainder of the paragraph deals with the event of either party dividing their property and the rights of a devisee of either party to the agreement. Once the parties stipulated that the Easement was an Easement Appurtenant that paragraph was unnecessary because conveyance to any part of property covered by an easement appurtenant would include the right to use the easement.

Nowhere in the document is there any allusion to expanding the scope of the easement beyond the confines of the dominant or servient estates. Indeed the last sentence of the Access Agreement provides that "the division of the Grantor's Property by Ownership or lease or the assignment of Grantee's rights under this Agreement, shall entitle all parties to enjoy the benefits hereby granted and shall not be deemed to be an unlawful increase or burden upon the Grantor's property or Grantee as applicable". (Emphasis added)

Stow Away's Proof of the Increased Burden

In their Argument, the Appellants criticize the testimony of the manager of Stow Away because she cited the traffic depicted on its security camera for only two days. They ignore the fact that the manager testified: "Q. Was the traffic you observed on those two days any different from the traffic you had observed for a long period of time? A. No, it is not, other than the fact that it just continues to increase as people become aware of the shortcut." (Trial Transcript, R. p. 817, lines 10-14) In addition, the affidavit of Bert Pooser states that the burden on his property increased 200-300 percent. (See Affidavit of Pooser attached to Memorandum in Support of Motion for Summary Judgment, R. p. 196) They also

fail to consider the impact of a satellite post office that Sweetgrass added to the hardware store as a further attraction for customers. (Trial Transcript, R. p. 817, lines 18-25; p. 818, line 5) Stow Away's manager testified that the post office increased traffic exponitionally. They also challenge the manager's testimony because she is not a traffic engineer. It is respectfully submitted that it does not take a traffic engineer to determine the increase of the traffic burden associated with the patrons of a hardware store and post office. Common sense associated with the impact testified to is certainly sufficient to create a factual question that Judge Nicholson resolved in Stow Away's favor.

Furthermore, the Appellants misconstrue the sentence relied upon to sustain their contention that the Access Agreement anticipated the expansion of the servient estate. At page 16 of their Initial Brief, Appellants represent that the Access Easement provides: "A change in ownership, lease or the assignment of Grantee's rights under the Easement shall not be deemed to be an unlawful increase or burden upon the Grantor's property, or Grantee, as applicable." That is far from the proper grammatical interpretation of the full two sentences which are:

> It is intended that the terms, conditions, easements, and rights granted and agreed to herein shall be perpetual and shall run with title to the Grantor's Property and the Grantee, respectively. It is further intended that the easements and rights herein granted and agreed to herein are, whether determined to be appurtenant or in gross, perpetual, assignable and divisible and that the division of the Grantor's property by ownership or lease or the assignment of Grantee's rights under this Agreement, shall entitle all parties to enjoy the benefits hereby

> granted and shall not be deemed to be an unlawful increase or burden upon the Grantor's property or Grantee, as applicable.

There are 2 subjects considered in these two sentences. In the first sentence the subject is the nature of the Grant of Access which is intended to be perpetual and run with title to the Grantor's and Grantee's property. That is established by the Stipulation that the Easement is an Easement Appurtenant.

The second subject is the division of the property that is the subject of the Easement and not the property of Timarand, Inc. which is owned by a total stranger to the Easement whose approach to Mr. Pooser to allow him to use the Easement was denied. Two other sentences of the paragraph the Appellants rely on completely defeat the Appellants' attempt to expand the Easement by saying:

> This Agreement may be amended, modified, or terminated only by recorded written instrument duly executed and acknowledged by Grantor and Grantee, or their respective successors and/or assigns.
>
> * * *
>
> All provisions of this Agreement, including the benefits and burdens, run with the Grantor's property and are binding upon and inure to the heirs, assigns, successors, and personal representatives of the parties hereto, as applicable.

The is no expression of any right to expand the easement beyond the confines of the Servient and Dominant estates. Nor is there any suggestion that the easement can be extended beyond the confines of the servient and dominant estates.

Conclusion

The recent case of Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873, is compelling authority for sustaining Judge Nicholson's Order that there was a substantial increase on the burden on the servient estate by subjecting it to an immense increase in traffic by virtue of the License to Sweetgrass' Hardware Store and Post Office. In that case, the Court of Appeals affirmed the Master's decision that the attempt to expand an easement for the development of a 20 acre tract of land scheduled to be subdivided should be denied because of the obvious impact it would leave on the servient estate. Here the Order of Judge Nicholson has made a similar decision and his Order should be affirmed.

Respectfully submitted,

GIBBS & HOLMES, PC
171 Church Street, Suite 110
Charleston, SC 29401
(843) 224-1758

By:
G. DANA SINKLER, SC BAR #5138

Attorney for Appellant

Charleston, South Carolina

September 8, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2011-CP-10-2444
Appellate Case No. 2014-000155

Stow Away Storage, LLC...Respondent

vs.

George W. Sisson, 4.0, LLC, The Sisson Foundation Limited Partnership, Sweetgrass Hardware, Inc., and Timarand, Inc., Defendants,

RECEIVED
SEP 11 2014
SC Court of Appeals

Of whom George W. Sisson, 4.0, LLC, The Sisson Foundation Limited Partnership, and Sweetgrass Hardware, Inc., are...Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

September 8, 2014

G. Dana Sinkler, Esq.
S.C. Bar No. 5138
Gibbs & Holmes, PC
171 Church Street, Suite 110
Charleston, SC 29401
(843) 224-1758
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2011-CP-10-2444
Appellate Case No. 2014-000155

Stow Away Storage, LLC..Respondent

vs.

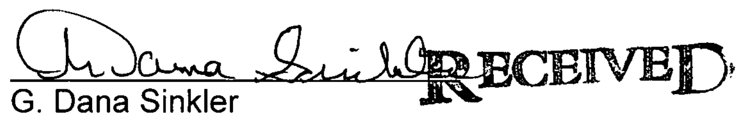
George W. Sisson, 4.0, LLC, The Sisson
Foundation Limited Partnership, Sweetgrass Hardware, Inc.,
and Timarand, Inc., Defendants,

Of whom George W. Sisson, 4.0, LLC, The Sisson
Foundation Limited Partnership, and Sweetgrass
Hardware, Inc., are...Appellants.

PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2014, addressed to their attorney of record, G. Hamlin O'Kelley, III, Esq., Buist, Byars & Taylor, LLC, 652 Coleman Boulevard, Suite 200, Mt. Pleasant, SC 29464

September 9, 2014



G. Dana Sinkler

SEP 11 2014

SC Court of Appeals