IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2014-001472

Appeal from Newberry County
Court of Common Pleas

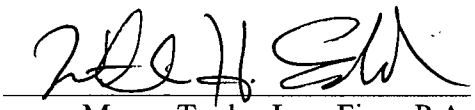
Frank R. Addy, Circuit Court Judge
Civil Action No. 2009-CP-36-415

John S. Frick, Appellant,

v.

Keith Fulmer, Eleanor F. Bush, Benny A. Bush, Joseph R. Childers, Justin Chadwick, Victoria Chadwick, S.C. Electric & Gas, and Newberry County, Respondents.

INITIAL BRIEF OF RESPONDENT KEITH FULMER



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III. **DID THE LOWER COURT ERR IN FINDING THAT THE EASEMENT FOR THE ROAD IN QUESTION WAS 14 FEET WIDE?**

STATEMENT OF THE CASE

Appellant Frick filed a Summons and Complaint against Respondent Fulmer and other defendants seeking a preliminary injunction and declaratory judgment regarding the parties rights and responsibilities in a woods road in Newberry County, South Carolina, that begins at Wheeland School Road and traverses the properties of Respondent Fulmer and the other defendants until it reaches the property of Appellant identified as Newberry County TMS 645-8. A bench trial was held before the Honorable Frank R. Addy, Jr., in Laurens County on November 1, 2013. The Court issued an initial Form Order dated November 18, 2013, and then issued its Order of Final Judgment dated February 20, 2014, which was filed with the Newberry County Clerk of Court on February 24, 2014. The Order of Final Judgment found, *inter alia*, that the road in question was a private easement appurtenant, having been abandoned as a public road if it ever were a public road, and that the easement was ten (10) to twelve (12) feet in width, and that the gate currently on Respondent Fulmer's property may be locked provided that all parties have a key or combination to the lock.

Appellant Frick filed a Motion for Reconsideration and/or Motion to Alter and Amend on March 3, 2014, and following a hearing on May 23, 2014, the trial court issued its decision dated June 9, 2014, amending its Order to provide that the road in question provided a fourteen (14) foot wide easement while denying all other relief sought by Appellant Frick.

Appellant Frick filed a timely Notice of Intent to Appeal and subsequently filed Appellant's Initial Brief dated September 5, 2014.

STATEMENT OF FACTS

The ultimate issue before the Court is whether an unimproved road in Newberry County that begins at Wheeland School Road and runs through the properties of the Respondents (other than Newberry County) to the property of the Appellant on the shores of Lake Murray is a public road or a private easement for access and egress. The road in question was once part of a longer road that connected Wheeland School Road and Macedonia Church Road before it was flooded by Lake Murray in 1929-1930 making it impossible to traverse between those two public roads. (Tr. Frick, p. 42, l. 22-24; p. 51, l. 5-16; p. 59, l. 4-6; Fulmer, p. 165, l. 16-24; Summer deposition, p. 22, l. 13-16; p. 45, l. 20-25; p. 46, l. 1-2).

The relevant facts are set forth in the Findings of Facts in the Order of Final Judgment of the lower Court. Appellant takes issue with finding number 3, asserting that when Appellant purchased the property in 2003 "...it was unimpeded and the only gate was unnoticed due to it being open and overgrown with weeds to the point that it was easily overlooked." Evidence was presented that cables and/or gates have blocked the road since the 1950's. (Tr. Fulmer, p. 141, l. 6-25; p. 146, l. 2-14; Hoffman, p. 114, l. 1-6; Summer deposition, p. 35, l. 6-9). In the early 1950's a fence blocked the entrance to the road along Wheeland School Road. (Tr. Fulmer, p. 149, l. 22-25). Appellant's predecessor in title, Champion Paper Company had cables or gates across the road on its property since the 1960's and there has been a gate or other obstruction on the Fulmer property since the 1970's. (Tr. Fulmer, p. 140, l. 21-25; p. 141, l. 1-25; p. 142, l. 1-23; p. 143, l. 1-18; Summer deposition, p. 17, l. 7-18; p. 19, l. 4-23; p 21, l. 17-25; p. 23, l. 2-21). When Appellant was given a key to the lock on the Fulmer property, he continued to complain about it and then pushed the gate over with his backhoe. (Tr. Frick p. 48, l. 2-7). When SCE&G

replaced the gate on the road and tried to give Appellant a key, he told Van Hoffman, "I don't want a key, I want the gate down." (Tr. Defendant's Exhibit 10, letter from Hoffman to Hudgens dated September 8, 2006).

Appellant testified that there had been two occupied homes on the property with mail delivery, but Respondent Fulmer testified that there were no residents on the property or mail delivery since the 1950's. (Tr. p. 15, l. 12-25). Appellant testified that "...the road was utilized by Boy Scouts and others as access to the lake and camping sites," but acknowledged that only family or friends of the property owners used the road. (Tr. p. 52, l. 12-21). Fulmer testified that family and friends, including the Boy Scouts, were permitted to use the road for camping and recreational purposes, and that the chains and gates blocking the road were to keep trespassers out. (Tr. pp. 140-142, l. 21-25, 1-25, 1-23). Other than trespassers, there is no evidence that the road was ever used by the public after being flooded in 1929-1930.

Appellant testified that some of the property adjoining the road may have been in the South Carolina Wildlife Management Area program. Van Hoffman testified that SCE&G property may have been designated WMA lands in the past, but even if they were, they did not have to be accessed by a public road if accessible by boat, such as this property was. (Tr. pp. 130, 131, l. 13-25, 1-25).

Appellant testified that he was familiar with the property he purchased and that there could have been access problems at the time of his purchase (Tr. p. 13, l. 2-6; p 79, l. 4-7); he relied entirely on the road in question being a public road and denied the need for an easement for access to his property at the time he purchased it. (Tr. p 33, l. 7-20). See also Tr. Defendant's Exhibit 9, letter from Beth Trump to Appellant Frick, dated March 14, 2003.

Appellant challenged finding number 5 of the lower Court that the roadway was 10 to 12 feet wide, claiming "...the roadway was at least 20 feet wide, and wider in other spots, and that it ran 25 feet or more from 'ditch to ditch.'" There was testimony that the width of the road varied from 8 to 14 feet in most places to as much as 20 feet where necessary to accommodate heavy equipment needed to install transmission lines on SCE&G's right of way. (Tr. Hoffman, l. p. 115, l. 14-24; p. 119, l. 9-17; Fulmer, p. 151, l. 7-10; p. 154, l. 5-8; p. 156, l. 3-21). Following a hearing on Appellant's Motion to Reconsider, the lower Court modified its Order of Final Judgment and expanded the width of the easement appurtenant from 10-12 feet to 14 feet in a Form 4 Order dated June 9, 2014.

ARGUMENTS

I. The findings of fact and the conclusions of law of the lower Court are supported by the evidence of record and applicable law.

The Appellate Court must review the Order of the lower Court for errors of law and for evidence to support its findings of fact. Such a review will confirm that the findings of fact and the conclusions of law of the lower Court are fully supported by the evidence of record and applicable law.

II. The Court did not err in finding the road in question was abandoned under the common law after Lake Murray permanently flooded the original road that once connected two public roads.

The question of law before this Court is whether the abandonment of a public or neighborhood road must be accomplished by statute or whether the common law doctrine of abandonment remains applicable law. Appellant Frick argues that the failure of Newberry County to close the road in question pursuant to S.C. Code of Laws Section 57-9-10 *et seq.*

resulted in the two separated portions of the road having the same status as the original road, which had, prior to 1929-1930, connected two public roads, Wheeland School Road and Macedonia Church Road. The statutory provision for abandonment first appeared in the 1962 Code of Laws as Section 33-521 et seq., 47-1327, and provides: "This chapter shall not be construed to repeal any other provisions of law but shall be cumulative thereto."

The Respondents rely on common law abandonment, and cases since the enactment of the statute confirm that the statutory process did not abrogate common law abandonment. Appellant has cited South Carolina DOT vs. Hinson Family Holdings, LLC, 361 S.C. 649, 606 S.E.2d 781 (2004). That case involved a summary judgment in a condemnation proceeding, with an issue being whether a road on the property (Watertown Road) was abandoned by the public. On review, the Court rejected the argument of SCDOT that the old Watertown Road had been abandoned when SCDOT opened a re-located road since the old road remained accessible to the public. Id. at 655, 606 S.E.2d at 783-84. The Supreme Court found no evidence of either a common law or statutory abandonment of what was admittedly a public road, finding "(t)he Watertown Road is an admittedly public road, although the record does not reveal whether it became public by dedication or through prescription or long-established use. It is undisputed that no interested person has instituted an action under the statutory process to effect an abandonment of old Watertown Road." And the Court concluded: "We affirm the circuit court's ruling old Watertown Road remains publicly accessible." Id. at 655, 656, 606 S.E.2d at 785. In the case before this Court, there is no evidence that the road in question remained accessible to the public after being flooded by Lake Murray.

Appellant also cites Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875, (Ct.

App. 1992), which is easily distinguished since in that case the Court focused on issues of title, not public use. In neither Hinson nor Hoogenboom did the Court address whether the statutory procedure for abandonment abrogated common law abandonment. S.C. Code Section 57-9-40 addresses that issue by providing: "This chapter shall not be construed to repeal any other provisions of law but shall be cumulative thereto."

Appellant also cites City of Myrtle Beach v. Parker, 260 S.C. 475, 486, 197 S.E.2d 290, 295 (1973), which holds: "(w)ith respect to the abandonment of a public, as opposed to a private easement [by common law], the following general principles of law seem to be firmly established: 'An abandonment occurs where the use for which the property is dedicated becomes impossible of execution, or where the object of the use for which the property is dedicated wholly fails.' Id. at 486, 197 S.E.2d at 296, citing 26 C.J.S. Dedication § 63 at 552. '...An easement created by dedication may be abandoned by unequivocal acts showing a clear intent to abandon. To constitute abandonment, the use for which the property is dedicated must become impossible of execution, or the object of the use must wholly fail. Generally, a mere misuser or nonuser does not constitute abandonment of land dedicated to public use.'" Id., citing 23 Am.Jur. 2d 57 Dedication § 66.

The City of Myrtle Beach Court found that the road in question was initially dedicated to the City by a developer in 1937. Even after a bridge burned in the 1940's there was evidence of continued public use, and the City of Myrtle Beach paved a portion of the road and used it to access sewer facilities until a developer fenced off the part of the road in question for an amusement park between 1966 and 1970. The City brought an action in 1970 to determine its rights in the road, and the Developer claimed the City had abandoned the road. Id. at 477-83, 197

S.E.2d at 292-94. The Court held that the City of Myrtle Beach never abandoned the dedicated road, which "...in the controverted area has been and still was being used, at least to a limited extent, when this controversy arose for usual street purposes, and for other consistent lawful purposes." Id. at 487-88, 197 S.E.2d at 296.

The City of Myrtle Beach case is distinguished from the case before this Court since there is no evidence that the road in question was ever dedicated to public use or maintained by Newberry County and no evidence that there was any public use of the road in question after Lake Murray flooded the original road in 1929-1930, making it impossible to traverse the road from its original intersections with Macedonia Church Road and Wheeland School Road. As a result any public use of the road in question that may have existed before it was flooded by Lake Murray in 1929-1930 ceased and any use of the road as a public way became impossible of execution and wholly failed. See Id. at 486, 197 S.E.2d at 296, citing 26 C.J.S. Dedication § 63 at 552.

Appellant has also cited K & A Acquisition Group, LLC v. Island Pointe, LLC et al., 383 S.C. 563, 682 S.E.2d 252 (2009), in which the Court found an abandonment had taken place and affirmed the applicability of the above principles of common law abandonment that were cited in City of Myrtle Beach *supra*, negating the principle of law advanced by Appellant that common law abandonment was abrogated by statutory provisions of S.C. Code 57-9-10 *et seq.*, as the exclusive means of abandoning public roads. Id. at 563, 682 S.E.2d at 259, 260. There was no statutory abandonment used by SCDOT in K & A Acquisition Group, LLC, and the Court also noted, "...once the public easement on the...road was abandoned, we find it could not be "rededicated" as contended by K & A through nominal use by two or three...landowners or the

placement of utilities during the 1970's or 1980's." Id. at 563, 682 S.E.2d at 260.

In both K & A Acquisition Group, LLC, and City of Myrtle Beach, the roads in question had been dedicated to a government entity. The facts and holding in the above cases are distinguishable from the present case, but both cases affirm that common law abandonment is still recognized law in South Carolina. In the case before this Court there was no evidence that the road in question was ever dedicated to Newberry County or that the County ever maintained it as a public road, and the County did not dispute the abandonment of the road in question.

Appellant argues that an improved segment of the original road on the other side of Lake Murray that was apparently maintained by Newberry County in a limited capacity is evidence that the road in question on Respondent Fulmer's side of the Lake is a public road. While named "Seibert Road", this marginally improved segment is a single-lane, milled-asphalt driveway for two private residences that extends approximately 500 feet from Macedonia Church Road to a gate that blocks further public access to the old roadbed that runs into the Lake. (Tr. Fulmer, p. 160, l. 6-25; p 161, l. 1-25; p. 162, l. 1-23). There are no county records of the original road being a public road before 1929, and no county records or any other evidence that since 1929 the road in question on Appellant's side of the Lake was or is a public road. (Tr. Renwick, p. p 98, l. 16-25; p. 99, l. 1-25; p. 162, l. 1-23). Whether any part of the original road on the opposite side of the Lake is now a public or publically maintained road is not relevant to determining the status of the road in question because the two roads have been separated since Lake Murray was created in 1929-1930.

Appellant further argues on p. 8 of his brief that the road in question "...was utilized as late as the 1950's for mail delivery and access to two homes," and "...was more recently used by

the public via the Boy Scouts and other groups using it to access camping areas." Keith Fulmer testified that since 1951, when his father purchased the property that is now his, there were no residents or mail service on the property and no county maintenance of the road. (Tr. p. 152, l. 5-25). He recalled that the road at that time was blocked by a barbed wire fence along Wheeland School Road. (Tr. p. 149, l. 22-25). There was extensive testimony of Keith Fulmer, Van Hoffman and Randy Summer that since the 1960's there were cables or gates on the road as it entered the Champion Paper Company property (now Appellant's property) and later in the 1970's on the Fulmer property to keep out trespassers. (Tr. Fulmer, p. 140, l. 21-25; p. 141, l. 1-25; p. 142, l. 1-23; p. 143, l. 1-18; p. 146, l. 2-14; Hoffman, p. 114, l. 1-6; Summer deposition, p. 17, l. 7-18; p. 19, l. 4-23; p 21, l. 17-25; p. 23, l. 2-21p. 35, l. 6-9). Thereafter, family, friends and neighbors had permission to use the road for hunting and fishing purposes, and there was no evidence of public use of the road, other than by trespassers. (Tr. Fulmer p. 159, l. 6-10; Frick p. 52, l. 12-25; p. 53, l. 1-2). Even if there were residents on the property and mail service and neighbors who used the road for recreational purposes with the consent of the property owners, those uses are consistent with the road being a private rather than a public road.

It is uncertain whether any part of the land abutting the road was part of a Wildlife Management Area, but there was testimony that WMA land did not require access by public road if it could be accessed by Lake Murray, which portions of the abutting land are. (Tr. Hoffman p. 130, l. 13-25, p. 131, l. 1-25; Summer deposition, p. 42, l. 8-11; p. 43, l. 17-19).

Van Hoffman, Randy Summers and Keith Fulmer all testified to personal knowledge of obstructions to the public use of the road in question by chains and different types of gates across the road since the 1970's, (Tr. Fulmer, p. 140, l. 21-25; p. 141, l. 1-25; p. 142, l. 1-23; p. 143, l.

1-18; p. 146, l. 2-14; Hoffman, p. 114, l. 1-6; Summer deposition, p. 17, l. 7-18; p. 19, l. 4-23; p 21, l. 17-25; p. 23, l. 2-21p. 35, l. 6-9), and there was no corroborating evidence of any public use prior to that time to support the allegations of the Appellant. The owners of property abutting the road did not intend to rededicate the road to public use, if it ever were a public road.

If the road in question was ever a public or neighborhood road, then the impossibility to use it to travel between the two public roads it once connected and its non-use by the public since it was flooded by Lake Murray in 1929-1930 constituted the abandonment of the road as a public road under the long-standing principles of common law affirmed in the cases cited above. See K & A Acquisition Group, LLC v. Island Pointe, LLC et al., 383 S.C. 563, 682 S.E.2d 252, 259, 260 (2009); City of Myrtle Beach v. Parker, 260 S.C. 475, 197 S.E.2d 290, 295, 296 (1973).

The statutory process for abandonment that first appeared in the 1962 S.C. Code of Laws did not abrogate common law abandonment as it applied to public roads. The lower Court's conclusion of law that the road in question, if ever a public road, was abandoned, is fully supported by the facts and applicable law cited above.

While the lower Court found that the road in question was not a public road, it found that Appellant had an easement appurtenant over the road for access and egress to his property from Wheeland School Road. It should be noted that Appellant did not appeal the findings of fact and conclusion of law that the road in question was never rededicated to the public use.

III. The Court did not err in finding that the gate on Respondent Fulmer's property does not unreasonably interfere with Appellant's use of his property so long as Appellant is provided a key or combination to the lock on the gate.

Appellant argues that a gate is not necessary to protect the property of Respondents from trespassers and that issues of trespassing were a "red herring." (Appellant's Brief at p. 11).

Respondent Fulmer testified that public trespassing on the road was a problem, with people dumping debris and even trying to grow marijuana on the property. (Tr. p. 141, l. 6-25, p 142, l. 1-23; p. 147, l. 12-23; p. 148, l. 2-17). Van Hoffman and Randy Summer testified that trespassing was common on similar private roads around Lake Murray. Mr. Hoffman sent a letter dated April 13, 2006, to all property owners defining the easement on the road and seeking their approval for a gate to keep out trespassers, and only Appellant Frick objected to the gate. (Tr. Defendant's Exhibit #7; pp. 109-111, l.7-22, 7-9, 10-25; pp. 127-128, l. 19-25, 1-4; Summer deposition, p. 27, l. 19-25).

Evidence of trespassing and dumping justifies a locked gate across the road to protect the property, and the gate does not unreasonably interfere with Appellant's use of the road so long as he is given a key or combination to the lock. See Brown v Gaskins, 284 S.C. 30, 33, 324 S.E.2d 639 (Ct. App. 1984); Thomas v. Mitchell, 287 S.C. 35, 336 S.E.2d 154 (Ct. App. 1985); Judy v. Kennedy, 398 S.C. 491, 728 S.E. 2d 484 (Ct. App. 2012). These cases are relied upon in the Order of the lower Court, which properly applied the law to the facts. While Appellant has not disputed the applicability of the above cases, he has questioned the finding of the Court that the locked gate was reasonable under the circumstances. (Appellant's Brief at pp. 11-13).

Appellant had earlier complained of trouble with keys provided him and had pushed over the gate with his backhoe. (Tr. p. 48, l. 2-7). Appellant rejected the attempt of Van Hoffman of SCE&G to resolve the issue with a letter that defined the easement and sought the approval of the property owners for a gate to keep out trespassers. (Tr. Defendants's Exhibit #7; pp. 109-111, l.7-22, 7-9, 10-25; pp. 127-128, l. 19-25, 1-4). Appellant told Hoffman: "I don't want a key. I want the gate down." (Tr. Defendant's Exhibit 10). At trial, Appellant testified that he did not

need an easement over the road since it was a public road. (Tr. 33, l. 7-20).

The evidence and applicable law support the findings of the lower Court that the road was a private road and that Appellant had an easement for access and egress over the road, and that the gate was a reasonable burden on Appellant and others with an easement over the road to protect the property from trespassers. "Whether the owner of land over which a right of way runs is justified in erecting a locked gate across it depends upon the circumstances. No hard and fast rule may be prescribed. Each case must be controlled, in large measure, by the particular facts and circumstances of the case." Judy v. Kennedy, 398 S.C. 471, 728 S.E.2d 484, 486, 487 (2012), citing Thomas v. Mitchell, 287 S.C. 35, 39, 336 S.E.2d 154 (Ct. App. 1985). There is no evidence of any residents or development on Appellant's property that would make the gate an unreasonable burden on Appellant. Should any future development make the gate an unreasonable burden on Appellant or any of the other property owners who rely on the road for access and egress, then the gate may need to be removed. Meanwhile, the gate remains a reasonable burden on Appellant and the other property owners to protect their property.

The findings of the lower Court and its conclusion of law that the locked gate does not unreasonably interfere with Appellant's use of his property so long as he is provided a key or combination to the lock on the gate is fully supported by the evidence and the law.

IV. The Court did not err in finding that the easement for the road in question was 14 feet wide.

Appellant has an easement appurtenant for access and egress to his property over the road in question, and the easement is the width of the original road and cannot be widened without the approval of the owners of those lands encumbered by the easement. Andrews v. McDade, 201

S.C. 24, 21 S.E.2d 202 (1942), Hardin v. South Carolina Dept. Of Transp., 371 S.C. 598, 606, 641 S.E.2d 437, 442 (2007); Rhett v. Gray, 736 S.E.2d 873 at 881 (S.C. Ct.App. 2012, reh'g denied Jan. 25, 2013. The testimony of Keith Fulmer, Van Hoffman and Randy Summer support the width of the original road in question as being no more than 14 feet, although portions of the road were widened by SCE&G to 20 feet to accommodate logging trucks and other heavy equipment. (Tr. Fulmer, p. 151, l. 7-10; p. 154, l. 5-8; Hoffman, p. 115, l. 14-24; p. 119, l. 9-17; Summer deposition, p. 52, l. 22-24).

There is no evidence that any owners of the property encumbered by the easement agreed to any permanent widening of the easement beyond its original width of 10-14 feet. The lower Court cited Rhett in holding that such an easement is limited to a use "...as little burdensome to the servient estate as possible for the use contemplated," and that "...neither Mr. Frick, nor any of the other landowner Defendants may expand or alter the scope of the easement as set forth herein without the consent of all the landowning parties."

At a hearing on Appellant's Motion to Reconsider the Order, the lower Court modified its Order to widen the easement from 10-12 feet to 14 feet. There is no basis in fact or law to widen the easement to more than 14 feet.

CONCLUSION

Appellant appealed the conclusion of law that the road in question had been abandoned, and did not appeal the conclusion of law that the road has not been rededicated to the public use. The evidence considered by the Court at trial, including live testimony, depositions and exhibits, and the cases and statutes cited by the Court, fully support the findings of fact and conclusions of law in the Order of the lower Court, so that Appellant's appeal should be dismissed and the

Order of the lower Court affirmed.

Respectfully Submitted,

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