THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Special Referee

Appellate Case No. 2014-001233
(2012-CP-39-144)

Matthew H. Willimon, Jr and Elizabeth Willimon
. . . . . .Appellants/Plaintiffs,

V.

Jake Gilstrap, Thomas R. Gilstrap, Sr., John Gilstrap, Yvonne G. Smith, Jason A. Smith, and Patricia Gilstrap,
. . . . . .Respondents/Defendants.

REPLY BRIEF OF APPELLANTS

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Pickens, South Carolina 29671
864-898-3208
Attorney for Appellants

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TABLE OF AUTHORITIES

Moore vs. Reynolds, 285 S.C. 574, 577, 330 S.E. 2d 542, 544 (Ct. App. 1985)

Plott vs. Justin Enters, 34 S.C. 504, 649 S.E. 2d 92 (Ct. App. 2007)

Smith vs. Commissioners of Public Works of the City of Charleston, 441 S.E. 2d 331 (S.C. App. 1994)

South Carolina Electric & Gas vs. Hartough, 375 S.C. 541, 654 S.E. 2d 87, (Ct. App. 2007)

Sphere Drake Insurance Company vs. Lynchfield, 438 S.E. 2d 275 (S.C. App. 1993)

The New American Webster Handy College Dictionary, Third Edition

Townes Assoc., Ltd. vs. City Council of Greenville, S.C. Code Ann. Section 30-7-10 (Supp. 2005)

Worley vs. Yarborough Ford, Inc., 452 S.E. 2d 622 (S.C. App. 1994)

RESPONDENTS STATEMENT OF ISSUES ON APPEAL

I. Should the Trial Court's Order allowing Respondents to have reasonable use of an easement be affirmed, where Respondents own fee simple title to the property subject to the easement?

II. Should the Trial Court's Order be affirmed pursuant to Rule 220(c) because Respondents have an easement by necessity?

III. Should the Trial Court's Order be affirmed pursuant to Rule 220(c) because Respondents have an easement by prescription?

STATEMENT OF THE CASE

The Appellants set forth their statement of the case in their initial brief and reference is craved to that initial brief.

FACTS

The appellants set forth their factual allegations in their initial brief and reference is craved to that initial brief.

ARGUMENTS

I. Should the Trial Court's Order allowing Respondents to have reasonable use of an easement be affirmed, where Respondents own fee simple title to the property subject to the easement?

There were no South Carolina cases found on the specific issue of whether the property owner could be excluded permanently from the real property over which an easement runs. There are three out of state cases cited by the trial court in its order on motions to amend and respondents cite two of those cases. The Idaho case of Latham vs. Garner, 105 Idaho 854, 673 P.2d 1048 (Idaho, 1983) involved language of

"to have and to hold the said easement and right of way unto the second parties, exclusively for their use, and unto their successor and asigns forever". The court held that the mere use of the word "exclusive" is not, in and of itself, sufficient to preclude use by the owner of the servient estate, found the phrase "exclusively for their use" lends itself to a number of interpretations, that the instrument was ambiguous, and remanded the case for the lower court to view extrinsic evidence to determine the intent of the parties. The Respondents cite the North Carolina case of Hudley vs. Michael, 413 S.E. 2d 1496 (N.C. App. 1992). The language used in that document was "a permanent and exclusive easement of egress and ingress over a road 15 feet in width". The Court in that case held that absent explicit language to the contrary, the owner of land subject to an easement has the right to continue to use his land in any manner and for any purpose which is not inconsistent with the reasonable use and enjoyment of the easement. The Respondents did not cite the California case of Grey vs. McCormick, 167 Car. App. 4th 1097 (CA 2008). This case used words such as "exclusive easement of access, ingress and egress" and "(u)se of the easement by the owner of lot 6 .... shall be exclusive..." . That court held that "the language of the instrument by which the easement was created, ... clearly expresses an intention that the use of

the easement area be exclusive to the owners of lot 6...".

The language and holding in the California case more closely mirrors the law in South Carolina as to contract interpretation. In general, whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument and the grant should be construed so as to carry out that intention. Smith vs. Commissioners of Public Works of the City of Charleston, 441 S.E.2d 331 (S.C.App. 1994). Clear and unambiguous language in grants of easements must be construed according to the terms which the parties have used and taken and understood in the plain, ordinary, and popular sense. Binkley vs. Raven Creek Watershed Conservation District of Fountain Inn, 558 S.E.2nd 903 (S.C.App. 2001).

The easement agreement in this case does not just use the words "exclusive use or right" but states as follows: "For the consideration paid by grantee to grantor, grantor grants to grantee, their heirs and assigns the exclusive right to use the road constructed by and maintained by grantee, including the right to fence and place gates on or along the said access road". In addition to exclusive use, the appellants were granted actual authority to fence off and gate off the access road, which precludes use by any other person. This language

expresses a clear explicit intent for the Appellants to have the sole right to use Mustang Drive, to the exclusion of any other person, including the property owner. This instrument is not ambiguous. Giving the granting words their plain and ordinary and popular meaning, appellant have the right to use Mustang drive to the exclusion of any other person, including the property owner. Even under the rulings of the Idaho case of Latham vs. Garner and the North Carolina case of Hudley vs. Michael, the language used requires a conclusion that precludes use of the easement by the property owner, since that was the clear intent of the parties to the easement agreement.

II. Should the Trial Court's Order be affirmed pursuant to Rule 220(c) because Respondents have an easement by necessity?

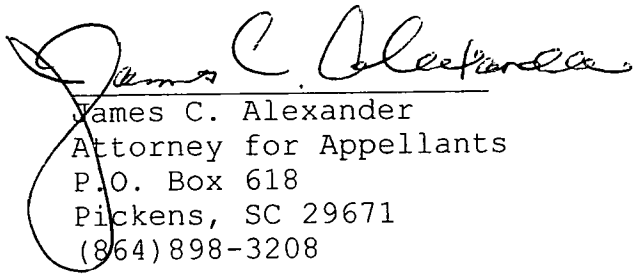
III. Should the Trial Court's Order be affirmed pursuant to Rule 220(c) because Respondents have an easement by prescription?

The only appeal before this Court is the appeal by the Appellants. The provisions of the Final Order dated February 7, 2014 denied the requested relief by respondents for declaration of an easement by prescription or by necessity in favor of respondents. The subsequent Order on the Motions to Amend did not change these rulings. The Respondents did not

appeal from these rulings. Rule 220(c)of the Appellant Court Rules allows the Appellant Court to affirm any ruling, order, decision or judgment upon any grounds appearing in the record on appeal. However, since the Respondents did not appeal from the provisions of the Final Order denying their request for relief for a declaration of an easement by prescription or by necessity, then the provisions of that order relating to these two issues became the law of this case. The case of In re Morrison, 321 S.C. 370 n.2, 468 S.E.2d 651 n.2 (1996) notes that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal. A party may not seek relief of a prior unappealed order of the Circuit Court because the ruling has become the law of the case. Judy v. Martin, 381 S.C.455, 458, 674 S.E.2d 151, 153 (2009). The trial Court declared by Final Order that the respondents did not have an easement by prescription or by necessity. Since the Respondents did not appeal from these rulings in the Final Order, these findings are the law of the case. Since the law of the case is that respondents do not have an easement by necessity or prescription, these grounds cannot be used as grounds to affirm as suggested by respondents.

CONCLUSION

Appellants requests the relief as set forth in detail in the Conclusion section of their initial brief be granted.



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October 23, 2014

THE STATE OF SOUTH CAROLINA
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Matthew H. Willimon, Jr. And Elizabeth Willimon

. . . . . Appellants,

V.

Jake Gilstrap, Thomas R. Gilstrap, Sr., John Gilstrap, Yvonne G. Smith, Jason A. Smith, and Patricia Gilstrap,

. . . . . Respondents.

PROOF OF MAILING

I certify that I have served the Reply Brief of Appellants on the respondents, Jake Gilstrap, Thomas R. Gilstrap, Sr., John Gilstrap, Yvonne G. Smith, Jason A. Smith, and Patricia Gilstrap, by depositing a copy of both documents in the United States Mail, postage prepaid, on the 23rd day of October, 2014, addressed to their attorney of record, Mr. James M. Robinson, Robinson Law Firm, Attorney at Law, P.O. Box 738, Easley, S.C. 29641.

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Dated: October 23, 2014

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October 23, 2014

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

RE: Mathew H. Willimon, Jr. And Elizabeth Willimon vs. Jake Gilstrap, Thomas R. Gilstrap, Sr., John Gilstrap, Yvonne G. Smith, Jason A. Smith, and Patricia Gilstrap
Case No.: 2012-CP-39-144

Dear Ms. Kitchings:

I have enclosed one copy of the Appellant's Reply Brief and the original and one copy of Proof of Service on Mr. Robinson. Please return a filed copy of the Proof of Service in the enclosed envelope.

Thank you for your cooperation and assistance.

Sincerely yours,

ALEXANDER LAW FIRM

James C. Alexander

enclosures

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