

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM PICKENS COUNTY
Court of Common Pleas

SC Court of Appeals

Charles B. Simmons, Jr., Special Referee

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

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

FINAL BRIEF OF APPELLANTS

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STATEMENTS OF ISSUES ON APPEAL

- I. The Special Referee erred in failing to determine that the Easement Agreement was unambiguous and failing to grant to the Appellants the exclusive and sole right to use Mustang Drive as it traverses from Old Dacusville Road to their property line and in failing to issue a restraining order preventing and enjoining the respondents or anyone on their behalf from using Mustang Drive.
- II. The Special Referee erred in finding that the word "exclusive" in the easement agreement did not operate to prevent the Respondents from using the property over which Mustang Drive traverses.
- III. The Special Referee erred in granting to all of the Respondents a limited right to use the entire length of Mustang Drive from Old Dacusville Road to Appellants' property line but only when reasonably necessary, and during reasonable hours, for access to Respondents' respective properties.
- IV. The Special Referee erred in failing to give the words "exclusive right to sue" in the Easement agreement their plain and normal and usual meaning and in failing to grant to the Appellants the "exclusive right to use" and sole use of the real property over which Mustang Drive traverses, to the exclusion of all Respondents.
- V. The Special Referee erred by considering extrinsic evidence outside the Easement agreement to determine the intent of the parties.
- VI. The Special Referee erred in reforming the Easement agreement to allow all of the Respondents a limited right to use the entire length of Mustang Drive from Old Dacusville Road to Appellants' property but only when reasonable necessary, and during reasonable hours, for access to Respondent's respective properties.
- VII. The Special Referee erred by finding that Mustang Drive provided the most practical and reasonable access to the respective properties of Respondents.
- VIII. The Special Referee erred by failing to find that the Respondents have trespassed on their exclusive easement and in failing to award actual and punitive damages for this

violation.

IX. The Special Referee erred by failing to award Appellants attorney fees and costs.

STATEMENT OF THE CASE

The Appellants filed a Summons and Complaint against the Respondents alleging that they purchased real property without public road frontage and that they also obtained an exclusive easement to use a road now known as Mustang Drive as it traverses from Old Dacusville Road to their property line. The Respondents are adjoining property owners and Appellants alleged that the Respondents were using Mustang Drive without their consent and were actively interfering with their use of Mustang Drive. They requested that the Court restrain and enjoin the Respondents from coming on or using in any way Mustang Drive. The Appellants further request judgment for actual and punitive damages against the Respondents on a cause of action for trespass for using and damaging Mustang Drive. The Respondents filed an Answer and Counterclaim alleging: (1) That the recorded easement agreement over Mustang Drive was void for lack of consideration; (2) That the recorded easement agreement which grants to Appellants the exclusive right to use Mustang Drive was the result of mistake or typographical error in the drafting of the easement agreement and should be reformed or corrected to grant to both Appellants and Respondents the non-exclusive use of Mustang Drive; (3) That the recorded exclusive easement agreement is inequitable and that the easement agreement be reformed and corrected to grant to Appellants and Respondents the non-exclusive use of Mustang Drive; (4) That Respondents are entitled to an easement by

prescription; (5) That Respondents are entitled to an easement by prior use; (6) That the Respondents are entitled to an easement by necessity; (7) That Appellants trespassed on their property by installing utility lines and requested actual and punitive damages for such trespass; and (8) That Appellants be required to survey Mustang Drive at their expense. Appellants filed a timely Reply to the counterclaims denying that Respondents were entitled to the relief requested.

This case was referred to Judge Charles B. Simmons, Jr. as a Special Referee and was tried. At trial, Reba Gilstrap, individually and as trustee, Thomas Gilstrap, Sr. As trustee, Sherry Lynn H. Gilstrap, Tyler Leigh Holder, and Andrew Austin Gilstrap were added as parties by consent. Jake Gilstrap was appointed as the guardian ad litem for any minor defendant. A Final Order dated February 7, 2014 was issued. The Trial Court found that the terms of the Easement agreement were clearly stated and were unambiguous and that Addie Gilstrap and the Appellants intended that Appellants have an exclusive easement. The Special Referee went on to find that Mustang Drive traversed from Old Dacusville Road all of the way to the Plaintiffs' property. The Trial Court further found that a road known as Ed Gilstrap Way traversed to the north off of Mustang Drive, a short distance from Old Dacusville Road. The Special Referee granted to the Appellants the exclusive and sole right to use Mustang Drive after the intersection of Ed Gilstrap Way and

Mustang Drive for the entire distance of Mustang Drive to the real property owned by the Appellants, requiring Appellants to be solely responsible for maintenance. The Special Referee issued strict restraining orders as to conduct. The Special Referee granted to the Appellants and Respondents the joint right to use Mustang Drive as it traverses from Old Dacusville Road to Ed Gilstrap, with both parties jointly responsibility for maintenance. The Special Referee denied Appellants claim for damages based on the trespass cause of action, denied Respondents request for relief as to the recorded Easement agreement for lack of consideration and because of a mistake or typographical error, denied the Respondents' claim for an easement by prescription, necessity, or by prior use, denied Respondents request for the right to use Mustang Drive for a limited purpose, and denied Respondents claim for damages based on their trespass cause of action.

Thereafter, Appellants timely filed a Motion for Reconsideration and to Alter and Amend Judgment pursuant to Rule 59(e) which requested the Court reconsider its ruling which granted to Respondents the joint right to use Mustang Drive as it traversed from Old Dacusville Road to Ed Gilstrap Way and issue an order granting to Appellants the exclusive and sole right to use Mustang Drive as it traverses from Old Dacusville Road to their property line. Respondents timely filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e), requesting that the

Court reconsider its finding that the Appellants have the exclusive and sole right to use Mustang Drive immediately after the intersection of Ed Gilstrap Way and Mustang Drive for the remaining distance of Mustang Drive to Appellants' property and grant joint use for the entire distance of Mustang Drive, reconsider its findings that they have failed to establish an easement by prescription or an easement by necessity, and reconsider its denial of the request for reformation of the Easement agreement based on a mutual mistake.

The Trial Court heard the Motions for Reconsideration and issued an Order on Motions to Amend dated May 7, 2014. The Trial Court amended its Final Order and found that the word "exclusive" in the easement agreement shall not operate to prevent Respondents from using Mustang Drive for access to their property and granted to Respondents the limited right to use the entire length of Mustang Drive from Old Dacusville Road to Appellants' property but only when reasonably necessary, and within reasonable hours, for access to Respondents' respective properties. The Special Referee reserved the right, upon a finding of contempt by any respondent or anyone acting on their behalf to further limit and/or eliminate the right of that respondent to use Mustang Drive. The Special Referee affirmed all other rulings which were not inconsistent with this order. The Appellants timely filed and served a Notice of Appeal from both Orders issued by the Trial Judge.

FACTS

The Plaintiffs own real property in Pickens County which does not have frontage on a public road. The Plaintiffs purchased their property from Addie Gilstrap by virtue of a purchase and sales contract dated July 8, 1986, which involved owner financing. The Plaintiffs negotiated this contract through Respondent Thomas Gilstrap, Sr. who is the nephew of Addie Gilstrap and made payments to the owner, Addie Gilstrap, through him. The Appellants eventually paid the purchase price and Addie Gilstrap conveyed 26.03 acres to the Plaintiffs by deed dated March 14, 1989 and recorded in Deed book 60 at page 70 in the Pickens County Register of Deeds Office on March 17, 1989. The purchase and sales agreement (R. p. 169) stated that the "seller to grant purchaser, their heirs and assigns, an easement of egress and ingress to the County road". The purchase and sales contract also stated that only 15 acres were being purchased. At the same time that the deed was executed, a separate Easement agreement was also executed and recorded. (R. p. 174) Addie Gilstrap granted to the Appellants in this Easement agreement the right: "1. To construct a twenty (20) foot road from property to be deeded to Matthew H. Willimon, Jr. and Elizabeth Willimon by deed of even date to the property above described to give access to Old Dacusville Road. 2. 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 grantees, including the right to fence or place gates on or along the said access road". (R. p. 174) (underlining provided by the undersigned)

Both the deed and the easement agreement were clocked in at 10:25 A.M. on March 17, 1989. Addie Gilstrap retained ownership of the remaining portions of her property over which Mustang drive traversed. The Appellants then constructed a driveway over an existing dirt trail from Old Dacusville Road to their property which is now known as Mustang Drive. The Appellants paid Respondent Thomas Gilstrap, Sr. to work on the driveway and assist in constructing the driveway. Testimony reveals that Appellant Matthew Willimon discussed the location of Mustang Drive with Thomas Gilstrap, Sr. This work was performed in August and September of 1986 (R. p. 58, line 4-p. 59, line 11). It should be noted that the Special Referee made a finding in the Final Order that "uncontradicted evidence established that defendant (respondent) Thomas Gilstrap, Sr. was very much involved in the negotiations related to the purchase of the property by plaintiffs and the location of the road for the exclusive easement and that he was paid by the plaintiffs (appellants) to work on the road". As noted, the road did follow the existing dirt trail/road and that this was agreed to by defendant (respondent) Thomas Gilstrap, Sr. on behalf of Addie Gilstrap". (R. p. 20) (parentheses and designation by name for this appeal was added by undersigned) All respondents own certain

real property in the general area. Respondents Thomas Gilstrap, Sr. and Reba Gilstrap, either individually or as trustee, purchased the property over which Mustang Drive traverses from Addie Gilstrap after the recording of the Easement agreement. (R. p. 289)

After the Appellants constructed Mustang Drive and the grading work was done in 1986 by Respondent Thomas Gilstrap, Sr., the Appellants eventually moved to the property in 1994. (R. p. 59, lines 18-19) Appellant Homer Willimon testified that he is the one who named the road as Mustang Drive approximately ten (10) years ago. (R. p. 60, lines 21-25) He testified that the old dirt path over which Mustang Drive was constructed was not used at all when he constructed his driveway. He stated it was all grown up in timber and the land surrounding Mustang Drive was not used for anything by Addie Gilstrap or any other member of the Gilstrap family. He did state that there was a small garden adjoining Old Dacusville Road but no one lived in that area at that time. (R. p. 62 lines 5-8) He testified that he paid the entire costs of the driveway and that immediate problems began from the Gilstrap family after moving onto his property. He stated that he came home late one night and the road was completely impassable by dead tree stumps and limbs and that he had to clear it off before he could even get to his house. (R. p. 64, lines 17-21) He testified problems included people driving down Mustang Drive and parking and smoking and that the security

light that he had near his property line has been shot out at least three (3) times. (R. p. 67, lines 10-15) He stated that he personally found two of Respondent Thomas Gilstrap's grandchildren named Andrew and Chase using the road on four-wheelers and dirt bikes. He stated that they were using it like a racetrack and tearing Mustang Drive up. (R. p. 68, lines 10-15) He stated that he put a cable gate up across the driveway, which disappeared before he moved there. (R. p. 69, lines 3-7) He identified photographs of Chase and Andrew on the four-wheeler and the dirt bike using Mustang Drive. He stated that after 1994 Respondent Thomas Gilstrap, Sr. cleared part of his property and placed fences along Mustang Drive on his property so that he could have cows on his property. (R. p. 71-72) He stated that he got aggravated with all the four-wheeler riding and blocked the driveway with his truck, which lead to a confrontation with Respondents Thomas Gilstrap, Sr. and Jake Gilstrap. Law Enforcement was called and responded. He stated that Respondent Jake Gilstrap threatened to put nails in the road and that he (appellant) constantly complained to Respondent Thomas Gilstrap, Sr. He stated that Thomas Gilstrap, Sr. finally told him that he could not do anything with them and the constant use and abuse by four-wheelers and dirt bikes continued. (R. p., 79, lines 8-23) He testified that the harassment was so bad that they obtained temporary permission to use other access to their property so that they could avoid the Gilstrap family. He stated that their

attorney sent a letter to Respondent Thomas Gilstrap, Sr. dated March 16, 2009 to warn them to stay off of Mustang Drive. (R. p. 176) Appellant Elizabeth Willimon testified about an incident on the road with one of the Gilstrap grandchildren. She stated that Andrew came along side her riding on some kind of a motor bike when she was driving on Mustang Drive and started cussing her and calling her a bitch. She stated that he followed her all the way out Mustang Drive until she got to Old Dacusville Road. (R. p. 114, line 3-p. 115, line 3) It should be noted that the Special Referee made a finding in the Final Order dated February 7, 2014 when addressing the Appellants trespass cause of action that "there have clearly been hostile, harassing and inappropriate actions taken by defendants (Respondents) or their children against plaintiffs (appellants)...." (R. p. 27) (parentheses and designation by name for this appeal was added by undersigned) The Special Referee also stated in the Order on Motions to Amend: "Plaintiffs' (appellants') complaint and affidavit describe in detail the conflict and hostility which has occurred between the parties concerning the use of Mustang drive. In large part, the present action is a result of harsh bullying and other unacceptable conduct towards the plaintiffs (appellants) by certain Gilstrap sons/grandsons as the Willimon's (appellants) were lawfully and reasonably using the easement in question that runs along and is known as Mustang drive". (R. p. 7) (parentheses and designation by name for this appeal was added by

undersigned) The findings by the Special Referee in the Final Order were not objected to by the Respondents in their Motion to Alter or Amend Judgment and the Respondents did not appeal from either order. Therefore, these findings by the Special Referee are part of the established facts of this case.

Attorney Jim Sarratt of Greenville, South Carolina testified that he was the attorney who prepared the deed and Easement agreement. He stated that his file contained the 1986 purchase and sales agreement as well as a copy of the deed and easement agreement. He stated that to the best of his recollection that his office prepared all documents and that both Appellants and Addie Gilstrap appeared at his office for the signing of the documents. He stated that he did not have any personal recollection but that both his and his secretary's signatures were on both documents as a witness. He stated that his clients were the Appellants for this transaction. Mr. Sarratt stated that he does not have any other document in the file that indicated that the intent of the parties was anything other than it was to be an exclusive easement and right to use the road for the Appellants. He stated that the easement was part of the overall transaction. (R. p. 97-112)

There was testimony from Respondent Jake Gilstrap of constant and continual use of the trail that eventually became Mustang drive since he was 4 years old. (R. p. 124, lines 9-23)

All parties submitted numerous documents at the trial of

this case.

ARGUMENTS

STANDARD OF REVIEW

When legal and equitable actions are maintained in one suit, each retains its own identify as legal or equitable for purposes of the applicable standard of review on appeal. Corley vs. Ott, 326 S.C. 89, 485 S.E.2d 97, 99n.1 (1997) The reviewing Court should view the actions separately for the purpose of determining the appropriate standard of review. Jordan v. Holt, 362 S.C. 201, 608 S.E.2d 129, 131 (2005) The determination of the extent of a grant of an easement is an action in equity. Moore v. Reynolds, 285 S.C. 574, 577, 330 S.E.2d 542, 544 (Ct.App. 1985) Therefore, the Court may make its own view of the evidence as to the extent of Appellants' easement. Townes Assoc., Ltd. v. City Council of Greenville, On the issue of damages regarding the trespass cause of action asserted by Appellants, Appellants believe that this would be a question of fact in an action at law and subject to an any evidence standard of review since the case was tried by a Judge without a jury. Jordan v. Holt, 362 S.C. 201, 608 S.E.2d 129 (2005)

- I. The Special Referee erred in failing to determine that the easement agreement was unambiguous and failing to grant to the Appellants the exclusive and sole right to use Mustang Drive as it traverses from Old Dacusville Road to their property line and in failing to issue a restraining order preventing and enjoining the respondents or anyone on their behalf from using Mustang Drive.
- II. The Special Referee erred in finding that the word "exclusive" in the easement agreement did not operate to prevent the Respondents from using the property over which Mustang Drive traverses.
- III. The Special Referee erred in granting to all of the Respondents a limited right to use the entire length of Mustang Drive from Old Dacusville Road to Appellants' property line but only when reasonably necessary, and during reasonable hours, for access to Respondents' respective properties.
- IV. The Special Referee erred in failing to give the words "exclusive right to use" in the Easement agreement their plain and normal and usual meaning and in failing to grant to the Appellants the "exclusive right to use" and sole use of the real property over which Mustang Drive traverses, to the exclusion of all Respondents.
- V. The Special Referee erred by considering extrinsic evidence outside the Easement agreement to determine the intent of the parties.
- VI. The Special Referee erred in reforming the Easement agreement to allow all of the Respondents a limited right to use the entire length of Mustang Drive from Old Dacusville Road to Appellants' property but only when reasonable necessary, and during reasonable hours, for access to Respondent's respective properties.
- VII. The Special Referee erred by finding that Mustang Drive provided the most practical and reasonable access to the respective properties of Respondents.

The Appellants purchased real property from Addie Gilstrap by recorded deed which did not have road frontage. They also simultaneously received by a recorded Easement Agreement the right to construct a twenty foot driveway from Old Dacusville

Road to their real property frontage and then received in the same document the "exclusive right to use the road constructed by and maintained by grantees, including the right to fence or place gates on or along the said access road". (R. p. 174) (Quotations provided by undersigned). Addie Gilstrap eventually sold the real property over which this road, now known as Mustang Drive, traverses to Respondents Thomas Gilstrap, Sr. and Reba Gilstrap, individually or as trustees. The remaining respondents who are members of or have a connection to the Gilstrap family own real property in the area. The Appellants claim that they have the exclusive and sole right to use Mustang Drive to the exclusion of all Respondents based on the recorded Easement Agreement. The Special Referee tried this case without a jury and found that the work "exclusive" does not operate to prevent Respondents from using Mustang Drive for access to their property and granted to them the limited right to use the entire length of Mustang Drive from Old Dacusville Road to Appellants' property but only when reasonably necessary and during reasonable hours, for access to their property.

All seven of the statements of error deal with whether only the Appellants have the exclusive right to use Mustang Drive and whether the Respondents should be restrained and enjoined from coming on or using Mustang Drive. As such, all designated errors will be discussed together. Respondents allege that as a fee simple owner of the real property over which Mustang drive

traverses, they cannot lose the right to go on Mustang drive. Therefore, they raise an issue as to whether or not two parties can lawfully enter a contract that grants an exclusive easement over real property and which permanently prevents the fee simple owner from coming on or using in any way the real property over which the easement traverses? Appellants believe that parties can so contract and the Special Referee's order should be reversed.

An easement is a right which one person has to use the land of another for a specific purpose. Frierson vs. Watson, 636 S.C.2d 872 (S.C.App. 2006). The language of an easement determines its extent. Plott vs. Justin Enters, 374 S.C. 504, 649 S.E.2d 92 (Ct.App. 2007) In interpreting any document, the primary concern of the Court is to ascertain and give effect to the intention of the parties. Worley vs. Yarborough Ford, Inc., 452 S.E.2d 622 (S.C.App. 1994) 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. 2d 903

(S.C.App. 2001). A deed and easement agreement is a contract and "the cardinal rule of contract interpretation is to ascertain and give effect to the intent of the parties and, in determining that intention, the Court looks to the language of the contract.

Sphere Drake Insurance Company vs. Lynchfield, 438 S.E.2d 275

(S.C.App. 1993). A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one. When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. Resort to construction by a party is only done when the contract is ambiguous or there is doubt as to its intended meaning. The Court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness or the parties failure to guard their rights carefully. Jordan vs. SCC. Grp., Inc., 428 S.E.2d 705 (S.C.App. 1993). If a contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms. Bates v. Lewis, 311 S.C. 158, 161 n.1, 427, S.E.2d 907, 909n.1 (Ct.App. 1993)

The Order on Motions to Amend cites the North Carolina case of Hundley vs. Mally, 413 S.E.2d 296 (N.C.App. 1992), the California case of Grey vs. McCormick, 167 Cal.App.4th 1097 (CA 2008), and the Idaho case of Latham v. Garner, 673 P.2d 1048 (ID 1983). There were no cases found on the interpretation of the word "exclusive" in South Carolina. These out of State cases

dealt with the meaning of the word "exclusive" used in the context of permanently excluding the owner of real property from the area of a granted exclusive easement. In the North Carolina case of Hundley id, Michaels was granted "a permanent and exclusive easement of ingress and regress over a road fifteen feet in width" and claimed that they were the only persons who could use the property for the easement. This court 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 and found the easement did not exclude the landowner. In the California case of Grey id the landowner acknowledged that the language of the instrument created an exclusive easement over their property but maintained that it did not operate to exclude them from the easement area. This Court held that unless it is ambiguous, the instrument must be construed by a consideration of its own terms. The Court determined that exclusive easements were not prohibited under California law and held that the language of the instrument by which the easement was created clearly expresses an intention that the use of the surface area of the easement be exclusive to the person who was granted the easement. The easement language was detailed in this case and used phrases such as "an exclusive easement of access, ingress and egress" and "use of the easement by the owner of lot 6 and such owner's family, guests, tenants

and invitees shall be exclusive and in connection with such use". Grey v. McCormick, id, page 476. In the Idaho case of Latham v. Garner, id, a person was granted an easement "exclusively for their use, and to their successors and assigns forever". The Court held by a 2-1 vote that exclusive easements are recognized servitudes on land which may be created when the parties so intend but went on to hold that the mere use of the work "exclusive" in creating an easement is not, in and of itself, sufficient to preclude use by the owner of the servient estate. The Court found that the granting instrument was ambiguous, that the trial court should have considered extrinsic evidence to determine the intent of the parties, and remanded the case for further proceeding.

The Special Referee's Order on Motions to Amend holds that the Court must construe the language in a manner consistent with the parties' intent, reason and common sense and held that the parties use of the easement after the Easement agreement was signed may also provide insight into what the parties intended. The Special Referee considered extrinsic evidence rather than just the terms of the Easement Agreement. The Special Referee held that if there is any doubt as to the parties' intentions, an interpretation should be adopted which conforms more to the presumed meaning and one that does not produce an unusual or unjust result and then held that such a result would occur since

it would prohibit the respondents use of the most practical and reasonable access to their respective properties.

Appellants believe that the Special Referee erred by: (1) Failing to find that the Easement Agreement was unambiguous; (2) In considering extrinsic evidence rather than only the terms of the document itself; (3) Failing to give the words "exclusive right to use the road constructed by and maintained by grantees, including the right to fence or place gates on or along the said access road" their plain and ordinary and popular sense; (4) Failing to hold that the Appellants have the exclusive right to use Mustang drive and fence and gate it off if they desire, to the exclusion of Respondents; and (5) Failing to issue the requested restraining order and injunction against the Respondents.

The terms and provisions of the Easement Agreement signed by Addie Gilstrap to the Appellants were clearly stated and are unambiguous. The Easement agreement did not just grant an exclusive easement for ingress and egress, but granted "the exclusive right to use the road constructed by and maintained by grantees, including the right to fence or place gates on or along the said access road". This is very clear language that it was the intent of Addie Gilstrap and the Appellants that only the Appellants could use the land over which this easement traversed. The Easement Agreement gave appellants the right to fence off or

place gates on or along the road, which would prevent any other person from using Mustang drive. The Easement Agreement is not ambiguous. Binkley id holds that words must be given their ordinary, plain, and common sense meaning. The New American Webster Handy College Dictionary Third Edition defines exclusive as shutting out all others or all else from admission or consideration and incompatible with something else. The language of an easement determines its extent. Plott v. Justin Enters., id. Since the grantor of the easement gave the grantees the exclusive right to use the road and authority to fence off and put gates up on or along this road, the intent is very clear that the easement is only for the Appellants use only, to the exclusion of all others, even the property owner. It is apparent that this exclusive easement was a significant part of the transaction relating to Appellants purchase of the property, since, the property did not have any frontage on a public road.

There is a factual dispute as to the nature and extent of use by the Respondents of Mustang drive after the Easement Agreement was signed. However, this issue should not be reached as the Easement Agreement was not ambiguous and the Special Referee erred by considering extrinsic evidence.

The Easement Agreement was drafted by an attorney, was properly executed by both parties and witnesses in that attorney's office, and was properly recorded in Register of Deeds

Office for Pickens County.

Appellants believe that the Special Referee erred by relying on the North Carolina case of Hundley id, the Idaho case of Lathan id, and the California case of Grey id. in granting a limited easement to Respondents over Mustang drive. Hundley turned on whether explicit language was used to grant the exclusive easement. The Hundley language was "a permanent and exclusive easement for of ingress and regress". (Underline added by the undersigned) In this case, Appellants were granted "the exclusive right to use the road constructed by and maintained by grantees, including the right to fence or place gates on or along the said access road". (Underline added by undersigned) Appellants' use was not limited to ingress and egress but they have the right to unconditionally use the road and fence off and gate off Mustang drive so that no one else can use it. This is clear and explicit language. The same logic applies to the Idaho case of Lathan id which turned on the mere use of the work "exclusive". The California case of Grey, id is directly on point with the facts in this case and the law in this State. Grey id recognized that exclusive easements are not prohibited under California law and held that unless an instrument is ambiguous, it must be construed by a consideration of its own terms. That Court went on to find that the instrument clearly expresses an intention that the surface use of the property was to be

exclusive, to the exclusion of the property owner.

The Special Referee relied on extrinsic evidence even though the Easement Agreement was clearly unambiguous, which is error. The law of South Carolina is clear that two parties can contract for any lawful reason to terms which they agree upon. Binkley id indicates that if the language in an easement is clear and unambiguous, that the words must be construed according to the terms for which the parties have used, taken and understood in the plain, ordinary, and popular sense. The easement agreement is clearly unambiguous and grants to the Appellants the "exclusive right to use the road constructed by and maintained by grantees, including the right to fence or place gates on or along the said access road". (R. p. 174) The Court's obligation is to determine the intent of the parties and issue relief based on that intent. The clear intent of Appellants and Addie Gilstrap was for Appellants to be granted the exclusive right to use the road that they constructed, to the exclusion of the property owner, and the Special Referee erred by failing to make that finding and failing to grant Appellants their requested relief. As stated in Jordan id, the Court's duty is to enforce a contract made by the parties regardless of its wisdom or folly, apparent or reasonableness, or the parties' failure to guard their rights carefully. The Easement Agreement should be enforced as written.

One other factor to consider is that this easement agreement had been recorded prior to the purchase by the Respondents Thomas Gilstrap, Sr. and Reba Gilstrap of the property over which Mustang Drive traverses. Statutorily, they were on notice of this easement yet they choose to purchase the property anyway and they are bound by this easement agreement and other matters of record which come with their property. S.C.Code Ann. section 30-7-10 (Supp.2005) Frierson vs. Watson, 636 S.E.2d 872 (S.C.App. 2006)

The Special Referee erred by failing to find and issue an order that the Appellants have the exclusive use of Mustang Drive, to the exclusion of the Respondents, and that Respondents are restrained and enjoined from coming on or using Mustang drive in any way. Appellants request that the decision of the Special Referee on that issue be reversed.

VIII. The Special Referee erred by failing to find that the Respondents have trespassed on their exclusive easement and in failing to award actual and punitive damages for this violation.

This ground for appeal depends on the Court's decision on the issue of an "exclusive easement". If a trespass is shown to exist, at least nominal damages may be recovered to protect the right. Johnson v. Phillips, 458 S.E.2d 427 (Ct.App. 1993) Punitive damages for willful trespass may be recovered from individuals but not from a municipality. Clarke vs. City of Greer, 98 S.E.2d 751 (1957) Punitive damages can be recovered for

trespass when defendant's acts have been willful, wanton, or in reckless disregard of right of another. Hunt v. Jordan, 286 S.C. 340, 333 S.E.2d 569 (Ct.App. 1985)

The Special Referee found in the Final Order that while there have clearly been hostile, harassing and inappropriate action taken by defendants (respondents) or their children against plaintiff, he found that appellants have not presented sufficient evidence by which the court can quantify an amount of money and denied the requested relief as to monetary damages. (R. p. 27) Appellants believe that this is in error.

In additional to the above findings, the Special Referee found that the present action is a result of harsh bullying and other unacceptable conduct towards the Appellants by certain Gilstrap sons/grandsons as the Appellants were lawfully and reasonably using the easement. (R. p. 7) The Appellant Matthew Willimon testified that Respondents Thomas Gilstrap, Sr. and Jake Gilstrap were on the easement and an altercation occurred for which law enforcement officers were called. Pictures were introduced that show grandsons riding on the easement and a vehicle with Respondents Thomas Gilstrap, Sr. and Jake Gilstrap in the vehicle on the easement. (R. p. 77, r. P. 178) Testimony of Elizabeth Willimon revealed that a grandson cursed her and harassed her as she was merely driving on Mustang drive. (R. p. 114, line 8-p. 115, line 3) In fact, the Respondents did not deny

that they continually were on Mustang drive. The Appellants are entitled to at least nominal damages as a result of this trespass and an award of punitive damages for the willful and wanton conduct by Respondents and the reckless disregard for their rights. The Special Referee's finding on harsh bullying and other unacceptable conduct when Appellants were lawfully and reasonably using Mustang drive alone justifies an award of punitive damages.

(R. p. 7) Appellants believe that the Special Referee erred in failing to award nominal and punitive damages and request that this issue be remanded for a determination of this issue.

IX. The Special Referee erred by failing to award Appellants attorney fees and costs.

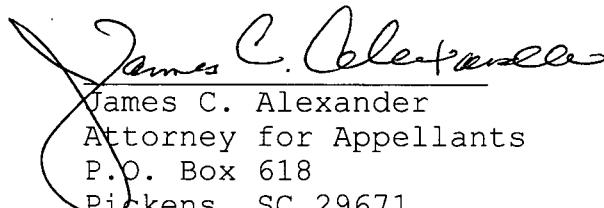
This ground for appeal depends on the Court's decision on the issue of an "exclusive easement". This action is essentially a declaratory judgment action as the Special Referee is declaring the rights of the parties as to an exclusive easement. A trial court may award costs in declaratory judgment actions as may seem equitable and just. South Carolina Elec. and Gas vs. Hartough, 375 S.C. 541, 654 S.E.2d 87 (Ct.App. 2007) Should the Court reverse the Special Referee on the "exclusive" use issue, Appellants believe that they are entitled to attorney fees and costs. They request that this issue be remanded for such a determination.

CONCLUSION

Appellants believe that the Special Referee erred by: (1) Failing to find that the Easement Agreement was unambiguous; (2) In considering extrinsic evidence rather than only the terms of the document itself; (3) Failing to give the words "exclusive right to use the road constructed by and maintained by grantees, including the right to fence or place gates on or along the said access road" their plain and ordinary and popular sense; (4) Failing to hold that the Appellants have the exclusive right to use Mustang drive, to the exclusion of the Respondents, and the authority to fence and place gates on or along Mustang drive; (5) Failing to issue the requested restraining order and injunction against the Respondents to prevent them from coming on or using Mustang drive for any reason; (6) In fashioning a remedy for a limited easement for Respondents for which there was no legal basis (7) Failing to award nominal damages and punitive damages on Appellants' trespass cause of action; and (8) Failing to award Appellants attorney's fees and costs.

Appellants request that the Orders of the Special Referee be reversed and an order issued: (1) Declaring that the Appellants have the exclusive right to use Mustang drive from Old Dacusville Road to their property line, including the right to fence or place gates on or along Mustang drive, to the exclusion of Respondents; (2) Restraining and enjoining Respondents from

coming on or using Mustang drive for any reason; (3) Restraining and enjoining Respondents from interfering with Appellants' use of Mustang drive; (4) Remanding this case for a determination of nominal and punitive damages on Appellants' trespass cause of action; and (5) Remanding this case for a determination of Appellants' request for attorney fees and costs.


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November 18, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Special Referee

Appellate Case No. 2014-001233

Matthew H. Willimon, Jr. And Elizabeth Willimon

. Appellants,

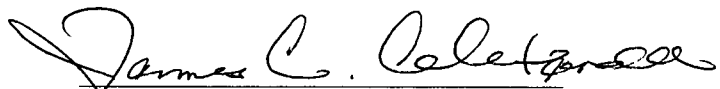
v.

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 one copy of the Final Brief of Appellants and one copy of the Final 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 in the United States Mail, postage prepaid, on the 20th day of November, 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: November 20, 2014

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Special Referee

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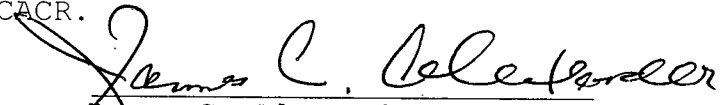
Matthew H. Willimon, Jr and Elizabeth Willimon
.Appellants/Plaintiffs,

V.

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

CERTIFICATE OF COUNSEL

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


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November 20, 2014