

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson. – Master-in-Equity

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JUL 10 2015

SC Court of Appeals

APPELLATE CASE NUMBER 2014-002580

Clyde Morris.....Respondent,

v.

Joseph V. Johnson, III, Joseph V. Johnson, Sr., Mildred R. Johnson, Joseph V.
Johnson, Jr., William Johnson and Allen R. Barnette, Defendants,

of whom Joseph V. Johnson, Sr..... Appellant

INITIAL BRIEF OF APPELLANT

Other Counsel of Record:

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Clyde Morris
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Respondent / Pro Se

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STATEMENT OF THE ISSUES ON APPEAL

I. WAS THE JUDGE'S FAILURE TO ADDRESS THE BURDEN ON THE SERVIENT ESTATE IN DETERMINING THE SCOPE OF RESPONDENT'S EASEMENT A REVERSIBLE ERROR?

II. THE MASTER'S ORDER DESIGNATING A THIRTY (30') FOOT BEFORE THE ACTUAL SURVEY WAS COMPLETED AND REVIEWED EXCEEDED THE COURT'S AUTHORITY TO DETERMINE THE SCOPE OF THE EASEMENT WITHOUT AN ASSESSMENT OF THE NEGATIVE IMPACT ON THE SUBSERVIENT ESTATE.?

STATEMENT OF THE CASE

Joe Johnson, Sr. (hereinafter referred to as "Appellant") answered the allegations in this suit by Clyde Morris (hereinafter referred to as "Respondent") claiming that the Appellant or his agents interfered and or obstructed / blocked the access from his house to the nearest public right of way. Respondent purchased a one-acre (1) parcel of property from Effie Annie Mae Johnson and Lucius w. Johnson, said deed being recorded on Book A542 page 86 in the RMC Office for Berkeley County. No recitals in this deed granted the Respondent an easement to access the nearest public right of way. Respondent's right of access across the property of the Appellant was therefore by implication. Respondent never claimed in his complaint that he possessed an express easement only that his right of ingress and egress to his property was being obstructed by the Appellant.

Procedural History of this Case

Respondent filed a Summons and on Complaint on February 1, 2012 pursuant to the Uniform Declaratory Judgments Act prohibiting the Appellants from limiting or obstructing his use of Doodle Hill Lane and a determination as to the Respondent's rights in Doodle Hill Lane. Appellants answered and counterclaimed for a judicial determination of the scope of the Respondent's ingress and egress rights and for a survey of Doodle Hill Lane.

A hearing was held on the merits of this case on July 19, 2012, without the benefit of a court reporter. An order from this hearing was filed on August 20, 2013. An Order Appointing a Surveyor pursuant to the August 20, 2013 order was filed on January 7, 2014. Respondent filed a Motion to Determine the Boundaries of Doodle Hill Lane on May 23, 2014. A subsequent hearing was held on February 19, 2013 and a Final order was filed on August 19, 2014. The Appellant received a copy of the survey titled "MAP OF DOODLE HILL LANE SHOWING LOCATION OF THE EXISTING ROADBED WITH PROPERTY LINES, FENCES AND POWER LINE/POWER POLES AS RELATED TO THE ROADBED" dated March 11, 2014 prepared by Mason Professional Land Surveyor, LLC., pursuant to the Final Order on August 18, 2014. Thereafter, Appellant filed a Motion for Reconsideration that was held via telephone conference with the Master-in-Equity, Respondent's then counsel, and Appellant's attorney. An order denying Appellant's Motion was filed on October 17, 2014.

FACTS

The relevant facts in this matter are undisputed. The lower court's order granted the Respondent an express Twenty-Five (25') foot ingress-egress easement over the lands of the Appellant along Doodle Hill Lane to the nearest public right of way which is Betaw Road. The Appellant is a farmer who farms the property with his family and the farm income is his sole means of livelihood. A portion of the lands formerly farmed by the Appellant is now within the foot-print of the court-ordered easement.

STANDARD OF REVIEW

Actions to determine an easement are ones based in law and actions to determine the extent or scope of an easement are ones based in equity. "The determination of the existence of an easement is a question of fact in a law action..." Frazier v. Smallseed, 384 S.C.56, 64, 682 S.E.

2d 8, 12 (Ct. App. 2009) (citation omitted). “However, the determination of the extent of a grant of an easement is an action in equity.” *Id.* “In an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence.” Fesmire v. Digh, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct.App. 2009) 324 S.C. 570, 576, 479 S.E.2d 510, 513 (1996) (citations omitted) In an action in equity, while this Court is free to take its own view of the preponderance of the evidence, this does not require us to disregard the findings of the trial judge who saw and heard the witnesses and, accordingly, was in a better position to judge their credibility. Donnan v. Mariner, 339 S.C. 621, 626, 529 S.E.2d 754, 757 (Ct.App.2000). Great deference is given to the trier of the fact in determining the scope of implied easements given their better position to interpret the evidence, including witness testimony. This deference to the trier of fact does not come unfettered however the South Carolina courts have resisted the grant of implied easements to that which is reasonable, necessary and less burdensome to the servient estate. The prevailing view supports this conclusion.

“An easement is a right of use over another’s property.” *Inlet Harbour v. S.C. Dep’t of Parks, Recreation, and Tourism*, 377 S.C. 86,91,659 S.E.2d 151,154 (2008). “Easements can arise by both express creation and by implication.” *Id.* “Implied easements are based upon the theory that whenever one conveys property he intends to convey whatever is necessary for the property’s use and enjoyment.” *Id.* “(T)he intentions of the parties to the transaction are the overriding focus when examining implied easements.” *Id.* at 92, 659 S.E.2d at 154. (1943). “In other words, a grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use of the contemplated.” *Id.*

“However, the determination of scope of the easement is a question in equity.” *Hardy*, 369 S.C. at 165, 631 S.E.2d at 541. On appeal in an action in equity, the appellate court may find facts in accordance with its views of the preponderance of the evidence. *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E. 2d 833, 834 (2005). Thus, this court may reverse a factual finding by the trial court in such cases when the appellant satisfies us the finding is against the greater weight of the evidence. *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). This broad scope of review does not require the appellate court to disregard the findings of the trial

court, which saw and heard the witnesses and was in a better position to evaluate their credibility. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291, (2000). Furthermore, the appellant is not relieved of the burden of convincing this court the trial committed error in its findings, *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001).

The scope of an easement is clearly an issue resolved in equity with substantial, but not unfettered, deference given to the trier of the fact.

ARGUMENTS

I. DID THE MASTER FAIL TO ADDRESS THE ALTERNATIVE THAT WOULD BE LESS BURDONSOME TO THE SERVIENT ESTATE IN DECIDING THE SCOPE OF THE EASEMENT?

The court issued an order filed on August 20, 2013 pursuant to a hearing on the merits that fully adjudicated the issues presented in the Respondent's complaint, specifically, whether the Appellant so restricted or obstructed the Respondent's use of the implied ingress-egress easement so as to impair the Respondent's right of access to access his house. The hearing was held July 19, 2012 without a court reporter so the actual testimony of the parties was not preserved.

The August 20, 2013 Order concluded that 1) "...Doodle Hill Lane as its presently being used is reasonable necessary and convenient for the Plaintiff to have access to his property with as little burden to the servient estate as possible...", 2) the Master found and that a surveyor should be retained to survey Doodle Hill Lane to determine its width as it was being used at the time of the hearing and, 3) that Appellant remove all metal posts from in front of the Respondent's property.

A survey was completed on Doodle Hill Lane by Homer P. Mason, a licensed surveyor, pursuant to the Master's Order that showed the established road bed and any possible obstructions that would hinder Respondent's access to his property. The Respondent then

brought a Motion to Determine the Boundaries of Doodle Hill Lane, said Motion as heard on July 8, 2014 pursuant to which a Final Order was filed on August 19, 2014.

The Final Order made the following findings: 1) All prior Orders are incorporated without modification, 2) The parties have stipulated that Doodle Hill Lane is thirty (30') feet in width, 3) that historically the parties have used less than the entire thirty (30') feet in width, 4) that Joseph Johnson, Sr, or Joseph Johnson, Jr. have placed obstructions in the roadbed erecting fencing and fence poles and plowing and planting crops in the roadbed and 5) a finding that Doodle Hill Lane is twenty-five (25') feet in width based on the a finding that twenty-five (25') feet was necessary and convenient for the property owners along Doodle Hill Lane for ingress and egress. The Respondent's counsel never made a motion to set-aside the prior order but the Master, upon the court's own motion re-considered his ruling in the August 20, 2013 Order.

The testimony at the July 18, 2014 Motion hearing by the Respondent confirmed that he helped the Appellant erect some of the posts that he now objects to and line the roadway and additionally that his use of the road way was unimpeded except for some metal posts that were directly in front of his house that the court ordered removed. There are also electric utility poles erected within the foot print of the newly created twenty-five (25') easement some of whom have been there for over 15 years.

The court's inquire at this hearing focused on the negative impact that the widening of the easement would have on the dominant estate and not as is should inquire as to the less burdensome alternative for the servient estate. The equitable defense of "unclean hands" would act as a bar to the Respondent's assertion the his access is hindered by posts that he helped erect with the Appellant and now objects that they interfere with his right of access. Generally a party is barred form asserting an equitable claim where a "party acted unfairly in a matter that is

subject of the litigation to the prejudice of the [other party] he would not be entitled to equitable relief arising out of the same transaction. See Wilson vs. Landstrom, 281 S.C. 260, 315, S.E. 2d 130 (Ct. App.984).

II. . DID THE MASTERS ORDER AND SUBSEQUENT SURVEY CREATE AN UNDUE BURDEN ON THE SERVIENT ESTATE??.?

The re-survey of the subject easement pursuant to the final Order included approximately nine (9) feet of what was formerly farmland utilized by the Appellant for planting crops. As presently reflecting the order of the court a determination was made to include permanent fencing, utility power poles and other permanent structures within the new easement. The newly created easement contains areas which could not have been utilized by the Respondent to access the nearest right of way.

The original survey done by Homer P. Mason, dated March 19, 2013, noted no obstacles or impediments to neither Respondent's access to Betaw Road nor any limits on any of this family members or agents to his house from Betaw Road. The subsequent survey was not reviewed by the court nor assessed to see if it was in fact the least burdensome alternative for dominant parcel.

The loss of valuable farm land and a portion of this vested property rights that have been conveyed to the Appellant from his father is now lost to the Appellant as a result of the determination by the Master to give the Respondent a twenty-five (25') foot easement that was not conveyed to him expressly in his deed of conveyance. Both the prior income and full utilization of this property has been taken from the Appellant without due deliberation and a showing by the Respondent of not being able to access the nearest right of way along Doodle Hill Lane.

CONCLUSION

For the reasons set forth above, the Appellant asks that the order filed on August 20, 2014, and the subsequent survey pursuant to this order, be made the order of the case in that there is was no evidence presented that supports the contention that the Respondent could not access the nearest public right of way unitizing Doodle Hill Lane, The same right of way that he and the other property owners adjacent to Doodle Hill Lane use to access their property.

Respectfully Submitted,

July 8, 2015



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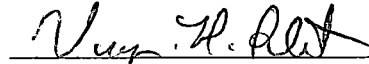
Joseph V. Johnson, III, Joseph V. Johnson, Sr., Mildred R. Johnson, Joseph V. Johnson,
Jr., William Johnson and Allen R. Barnette

of whom Joseph V. Johnson, Sr..... Appellant

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to all counsel of record by depositing copies of same in the United States Mail postage prepaid, on June 8, 2015, addressed as follows:

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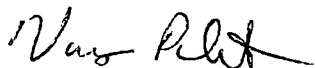
South Carolina Court of Appeals
1015 Sumter St.
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**Re: Morris vs. Joseph V. Johnson, Sr.
Appellate Case No.: 2014-002580**

Dear Sir / Madam:

Enclosed please find the Initial Brief of Appellant and Designation of Matter for the above-referenced matter.

With Kind Regards, I am



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