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
(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 RESPONDENTS

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STATEMENT OF THE CASE

On January 31, 2012, Appellants filed this action seeking temporary and permanent injunctions to prohibit Respondents from using an access road known as Mustang Drive based on Appellants' claim that Appellants have the "exclusive" right to use the road pursuant to an easement agreement.

Addie Gilstrap is the predecessor-in-title to all parties. In 1989, Addie Gilstrap sold 26.3 acres to Appellants. At the same time, Addie Gilstrap and Appellants executed an "Easement Agreement" in which Gilstrap granted to Appellants (a) an easement for access across Gilstrap's property; (b) the right to construct a road across Gilstrap's property, and (c) the exclusive right to use the road constructed and maintained by Appellants.

Respondents' Answer and Counterclaim asserted that the Easement

Agreement was void for lack of consideration; the use of the word "exclusive" in the Easement Agreement was the result of a mistake or typographical error; the agreement is inequitable and should be reformed to allow Respondents to use the road; Respondents have an easement by prescription over Mustang Drive; Respondents are entitled to an easement by necessity over Mustang Drive; and Appellants should be enjoined from using Respondents' property to install utility lines which service Appellants' property.

Appellants' Motion for Temporary Injunction was heard on February 16, 2012, and a Temporary Order was filed April 9, 2012, in which all parties were restrained from harassing each other and Respondents were allowed to use Mustang Drive only for ingress and egress to their homes on the property.

After a bench trial, a Final Order was filed on February 19, 2014, in which Appellants were held to have the exclusive and sole right to use a defined portion of Mustang Drive; Appellants and Respondents were held to have the joint right to use a defined portion of Mustang Drive; all parties were restrained from harassing any other party; and all other requests for relief were denied.

Each party filed motions to reconsider or amend the Final Order.

An ORDER on Motions to Amend was filed May 7, 2014, in which the Final Order filed February 19, 2014, was amended to hold that the use of the word "exclusive" in the Easement Agreement shall not operate to prevent Respondents from using Mustang Drive for access to Respondents' property. Respondents were granted the limited right to use the entire length of Mustang Drive, but only when necessary, and during reasonable hours, for access to Respondents' respective

properties. Restraining orders were continued in force by the amended order.

Appellants then filed their Notice of Appeal.

STATEMENT OF FACTS

Respondents own one hundred ten (110) acres, which has been in the Gilstrap family since 1939 (R. p. 309). The Pickens County Assessor's map shows that Respondents' property fronts on Old Dacusville Road, a public road, with Ed Gilstrap Way and Mustang Drive, both private, running through Respondents' property. Appellants' property does not front on a public road, with Mustang Drive providing Appellants with access to Old Dacusville Road and Sula Drive providing other access (R. p. 33).

Addie Gilstrap, who died in 2008, is the deceased predecessor-in-title to all parties (R. p. 7). In 1986, Addie Gilstrap and Appellants entered into a Purchase and Sales Contract in which Addie agreed to sell and Appellants agreed to buy 15 acres, to be determined by a survey. This contract also provided that Addie as Seller would grant to Appellants as Purchaser an easement of egress and ingress "to the County Road" (R. p. 17). There is no provision in the contract that the easement would be "exclusive" to Appellants (R. p. 169).

In 1989, Addie Gilstrap executed a deed to Appellants for 26.3 acres in consideration of $35,505.00 (R. p. 202). At the same time, Addie executed an Easement Agreement "for valuable consideration" which granted to Appellants "an

easement of ingress of (sic) egress across property owned by me" for the following purposes:

1. To construct a twenty (20') foot road from property to be deeded to Appellants through Addie's property to give access to Old Dacusville Road.

2. For the consideration paid by Grantee (Appellants) to Grantor (Addie), Grantor granted to Grantee the exclusive right to use the road constructed by and maintained by Grantees (R. p. 174).

The plat prepared for Appellants in 1986 shows a "20' easement along existing old farm road to Old Dacusville Road" (R. p. 254). Appellants made some improvements to the old farm road, now known as Mustang Drive, but Appellant Matthew Willimon admitted that Mustang Drive still is, and always has been, a dirt road (R. p. 94, lines 3 to 5).

Addie Gilstrap continued to use Mustang Drive after the conveyance to Appellants and Respondents continue to use it on a daily basis for access to Respondents' homes, pastures, farmland, and timberland. (R. p. 134, lines 9 to 11; R. p. 124, lines 24 to 25; and R. p. 125, lines 1 to 22). Respondent Jake Gilstrap testified that Respondents have used Mustang Drive for access to Respondents' property for over thirty (30) years. (R. p. 124, lines 14 to 15). Appellants' counsel stipulated that Respondents own fee simple title to the property where Mustang Drive lies (R. p. 50, lines 19 to 25).

Appellants filed this action in 2012 as a result of disputes which arose between the parties concerning the use of Mustang Drive (R. p. 37).

ARGUMENTS

Standard of Review

The determination of the scope of an easement is a question in equity. On appeal in an action in equity, the appellate court may find facts in accordance with its view of the preponderance of the evidence. Town of Kingstree v. Chapman, 405 S.C. 282, 747 S.E.2d 494 (S.C.App. 2013).

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?

A. Background

This case involves the right to use an access easement in Pickens County known as Mustang Drive.

Most litigation concerning easements pits the holder of the dominant estate (the property benefitting from the easement) against the holder of the servient estate (the property burdened by the easement) because the servient estate has hindered or prevented the dominant estate from using the easement.

In this case, Appellants hold the dominant estate and Respondents hold the servient estate, but Appellants sued Respondents to prevent Respondents from setting foot on Mustang Drive, even though Respondents own fee simple title to Mustang Drive and need to use it for access to Respondents' surrounding property.

The basis for Appellants' claim is the 1989 Easement Agreement between Addie Gilstrap and Appellants which provides that Appellants have an easement for access across Addie's property, Appellants may construct a road over the easement, and Appellants have the "exclusive" right to use the road constructed by and maintained by Appellants.

Respondents do not contest Appellants' right to use Mustang Drive, but Respondents deny that the Easement Agreement prohibits Respondents from using Mustang Drive for access to Respondents' surrounding property.

The ORDER on Motions to Amend under appeal held that the use of the word "exclusive" in the Easement Agreement shall not operate to prevent Respondents from using Mustang Drive for access to Respondents' property.

B. Analysis

1. The trial court cited Latham v. Garner, 105 Idaho 854, 673 P.2d 1048 (Idaho, 1983), which involved easements granted to the dominant landowner "exclusively for their use."

The Idaho Supreme Court began in Latham with the observation that an exclusive easement is an unusual interest in land and has been said to amount to almost a conveyance of the fee. Because an exclusive grant in effect strips the servient estate of the right to use his land for certain purposes, thus limiting his fee, exclusive easements are not generally favored by the courts. Nevertheless, if the parties agree to do so, exclusive easements can be created. *Id.* 673 P.2d at 1050.

The Idaho Court cited cases which illustrate that exclusive easements are recognized servitudes on land which may be created when the parties so intend.

Other cases were cited which acknowledge the possibility that an easement may exclude use by the servient estate holder, but construed the easements involved to be non-exclusive in nature. *Id.* 673 P.2d at 1050 and 1051.

The Latham Court concluded that the easement before the Court was ambiguous and held that the mere use of the word "exclusive" in creating an easement is not, in and of itself, sufficient to preclude use by the owner of the servient estate. *Id.* 673 P.2d at 1051. Latham cites a Utah case in which the court determined that to make the easement exclusive in the dominant estate would burden the servient estate to a greater degree than was intended or necessary to satisfy the purpose of a private driveway. *Id.* 673 P.2d at 1052.

Latham observed that the phrase "exclusively for their use" lends itself, without contortion, to a number of interpretations. The instrument could be interpreted as (1) the grant of an easement right-of-way to the grantee, to the exclusion of all others, except the grantor; or (2) the grant of an easement right of way excluding all others, including the grantor; or, (3) the grant of a fee simple estate to the grantee. *Id.* 673 P.2d at 1052.

Because the instrument was ambiguous, the Idaho Supreme Court remanded Latham to the trial court to make a finding of fact regarding the intentions of the parties to the instrument of conveyance. *Id.* 673 P.2d at 1052.

The Easement Agreement in this case is ambiguous for the same reasons noted in Latham. This Easement Agreement becomes more ambiguous when compared to the Purchase and Sales Contract, which provided an easement for

Appellants, but not an "exclusive" easement.

An easement is a right which one person has to use the land of another for a specific purpose. A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments. Frierson v. Watson, 371 S.C. 60, 636 S.E.2d 872 (S.C. App. 2006).

The main object in construing a deed is to ascertain the intention of the grantor from the language used in the deed. Slear v. Hanna, 321 S.C. 100, 467 S.E.2d 761 (S.C. App. 1996).

If a contract is ambiguous, extrinsic evidence can be considered to determine the intent of the parties. Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (S.C. 2005).

The intent of the parties that the use of the word "exclusive" in the Easement Agreement was not intended to prevent Respondents from using Mustang Drive is shown by Addie Gilstrap continuing to use the road after the conveyance to Appellants and by Respondents continuing to use the road on a daily basis from 1989 to 2012 (when this litigation filed) and even to this date.

In summary, (1) the mere use of the word "exclusive" in an easement should not, in itself, operate to prevent the servient estate from using the easement for the same purpose used by the dominant estate; (2) the use of the word "exclusive" in the Easement Agreement is ambiguous; and (3) the intention of the parties is shown by the grantor's continued use of the easement after the conveyance.

2. The unrestricted grant of an easement conveys all such rights as are incident or are necessary to its reasonable enjoyment, but the right to use the land and the space overhead remains in the owner of the fee so far as such right is

consistent with the purpose and character of the easement. The right of an easement owner and the right of the landowner are not absolute, but are so limited, each by the other, that there may be a reasonable enjoyment of both.

A grant of an easement is limited to a use reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated. Hill v. Carolina Power and Light Company, 204 S.C. 83, 28 S.E.2d 545 (S.C. 1943).

In determining what uses the servient tenement may make of the land within the easement, the court should look to the words of the deed creating the easement.

One must look at the language of the deed rationally and construe the language consistent with reason and common sense. If there is any doubt as to the parties' intentions, an interpretation should be adopted which conforms more to the presumed meaning, one that does not produce an unusual or unjust result.

To exclude the servient owner from using the property within the easement here would produce an unusual and unjust result. The term "exclusive" cannot be interpreted so as to exclude the owner of the servient estate from using the property within the easement consistent with the purpose of the easement. Hundley v. Michael, 413 S.E.2d 296 (N.C. App. 1992).

Respondents own fee simple title to the land where Mustang Drive lies. It would be unreasonable and unjust to prohibit Respondents from using Mustang Drive for the same purpose it is used by Appellants, especially where a prohibition would prevent Respondents from having access to Respondents' adjacent property,

including their homes.

The ORDER on Motions to Amend held that the use of the word "exclusive" in the Easement Agreement shall not operate to prevent Respondents from using Mustang Drive for access to Respondents' property. That is, Respondents should have the right to use the entire length of Mustang Drive from Old Dacusville Road to Appellants' property for access to Respondents' properties.

The trial court's ORDER on Motions to Amend should be affirmed so that Respondents have the reasonable use of Mustang Drive.

II. SHOULD THE TRIAL COURT'S ORDER BE AFFIRMED PURSUANT TO RULE 220(C) BECAUSE RESPONDENTS HAVE AN EASEMENT BY NECESSITY?

A. Background

Addie Gilstrap is the predecessor-in-title to all parties. Mustang Drive is the only reasonable means of access to much of Respondents' property.

Respondents' Counterclaim included a cause of action for Respondents to claim an easement by necessity over Mustang Drive. The Final Order filed February 19, 2014, denied Respondents' request. Respondents' Motion to Alter or Amend Judgement requested that the Court reconsider its decision that Respondents failed to prove that Respondents are entitled to an easement by necessity. The ORDER on Motions to Amend denied Respondents request for reconsideration on the easement by necessity issue.

B. Analysis

The elements of an easement by necessity are:

1. Unity of title;

2. Severance of title; and

3. Necessity.

Paine Gayle Properties, LLC v. CSX, 400 S.C. 568, 735 S.E.2d 528 (S.C. App. 2012).

The necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible. Proctor v. Steedley, 398 S.C. 561, 730 S.E.2d 357 (S.C. App. 2012).

Unity of title existed because Addie Gilstrap was the predecessor-in-title to all parties. Severance of title occurred when Addie Gilstrap conveyed property to Appellants and to Respondents. Reasonable necessity exists because Mustang Drive is the only means Respondents have for access to much of their property.

Pursuant to Rule 220 (c), this Court should affirm the ORDER on Motions to Amend because the record shows that Respondents are entitled to an easement by necessity over Mustang Drive.

III. SHOULD THE TRIAL COURT'S ORDER BE AFFIRMED PURSUANT TO RULE 220 (C) BECAUSE RESPONDENTS HAVE AN EASEMENT BY PRESCRIPTION?

A. Background

Respondents counterclaimed for an easement by prescription. Respondent Jake Gilstrap testified that he and his family have used Mustang Drive continuously during his lifetime and for more than 20 years. Mustang Drive is well-identified by its obvious physical presence as described by testimony, tax maps, photographs, and plats. Appellants' Complaint describes actions by Respondents which are certainly hostile or adverse to Appellants and their claimed interest in the easement. Respondents have a claim of right to use Mustang Drive in that Respondents own fee simple title to it.

B. Analysis

To establish an easement by prescription, the party asserting the right must show:

1. Continued and uninterrupted use of the right for 20 years;

2. The identity of the thing enjoyed; and,

3. Use which is either adverse or under a claim of right. Simmons v. Berkeley Electric Cooperative, Inc., 404 S.C. 172, 744 S.E.2d 580 (S.C.App. 2013)

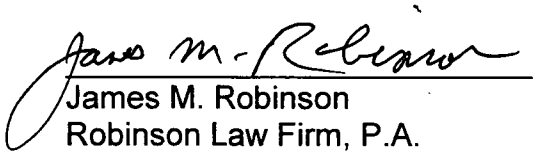
Respondents clearly presented proof sufficient to establish that Respondents are entitled to an easement by prescription over the entire length of Mustang Drive from Old Dacusville Road to Appellants' property.

CONCLUSION

This Court should affirm the trial court's ORDER on Motions to Amend filed May 7, 2014.

Respectfully submitted,

January 16, 2015



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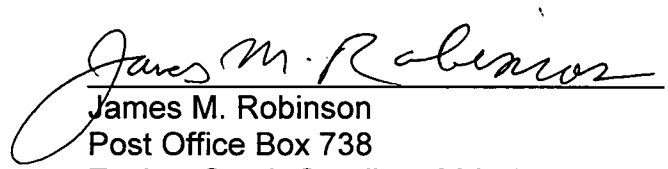
PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents on James C. Alexander by depositing a copy of the same in the United States Mail, postage prepaid, on January 23, 2015, addressed to James C. Alexander, Attorney at Law, P.O. Box 618, Pickens, SC 29671.

January 23, 2015



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Charles B. Simmons, Jr., Special Referee

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CERTIFICATE OF COUNSEL

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

January 23, 2015

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