STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Robert E. Watson. – Master-in-Equity

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. and Joseph V. Johnson Jr.,
are the ..... Appellants

FINAL BRIEF OF APPELLANT

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II. THE MASTER'S ORDER DESIGNATING A TWENTY-FIVE (25') FOOT EASEMENT BEFORE THE ACTUAL SURVEY WAS COMPLATED 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 in 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 the boundaries 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 (R. pp. 13). An Order Appointing a Surveyor pursuant to the August 20, 2013 order was filed on January 7, 2014 (R. pp. 21). Respondent filed a Motion to Determine the Boundaries of Doodle Hill Lane on May 23, 2014 (R. pp. 33). A subsequent hearing was held on February 19, 2013 and a Final order was filed on August 19, 2014 (R. pp. 17). . 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. (R. pp. 79), pursuant to the Final Order on August 18, 2014. Thereafter, Appellant filed a Motion for Reconsideration (R. pp. 33) 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 (R. pp. 36).

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 (R. pp. 27) . 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 Appellants are 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, at 303, 683 S.E.2d 803, at 807 (Ct. App. 2009), 324 S.C. 570, at 576, 479 S.E.2d 510, at 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, at 626, 529 S.E.2d 754, at 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. at* ____

"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 to be 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 his house on Doodle Hill Lane. The hearing was held July 19, 2012, without the benefit of a court reporter, so the actual testimony of the parties at that hearing was not preserved.

The August 20, 2013 Final 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 (R. pp. 27) .

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 (R. pp. 79). The Respondent then brought a Motion to Determine the Boundaries of Doddle Hill Lane and said Motion as heard on July 8, 2014 (R. pp. 21) pursuant to which the Final Order dated August 19, 2014. The Final Order made the following findings: 1) All prior Orders are incorporated without modification, 2) The parties have stipulated that Doddle 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 eructing 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 (R. pp. 27).

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 inquiry at the July 18, 2014 motion 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 (R. pp. ___). 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 MASTER'S FINAL 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. The final order of the court made a determination that the scope of the ingress-egress easement was to include permanent fencing, utility power poles and other permanent structures within its boundaries. The newly created easement contains areas which could not have been possibly utilized by the Respondent to access the nearest public 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 that denoted the twenty-five foot easement was never reviewed by the court nor assessed to see if it was in fact the least burdensome alternative for dominant parcel. (Transcript-Motion Hearing, July 8, 2014`)

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 form 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 was 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,

October 15, 2015

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The undersigned hereby certifies that the Final Brief of Appellant contains all material proposed to be included by the parties and not any other material under Rule 211(b), SCACR.

SIGNATURE PAGE FOLLOWS

October 15, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is the Legal Assistant for Attorney Willie B. Heyward, Heirs Property Law Center, LLC for the above-named Plaintiffs and that she is a person of such age and discretion as to be competent to serve papers.

That on October 15, 2015, she served a copy of the following document(s) in the above-entitled case by placing said copy in a post-paid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail in Charleston, South Carolina.

DOCUMENTS:

Final Brief of Appellant

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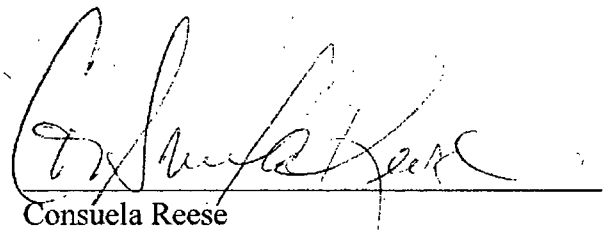

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