

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000107
Lower Court Case No. 2013-CP-23-3989

RECEIVED

SEP 22 2015

SC Court of Appeals

Woodruff Road SC, LLC,Appellant,

v.

SC Greenville Hwy 146, LLC,Respondent.

FINAL BRIEF OF APPELLANT

Robert L. Widener
MCNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

Bernie W. Ellis
MCNAIR LAW FIRM, P.A.
Post Office Box 447
Greenville, South Carolina 29602
(864) 271-4940

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues	iv
Statement of Case	1
Standard of Review.....	1
Statement of Facts.....	2
Argument	5
I. The Easement Agreement expressly limits the scope and use of the easement to two-way traffic for ingress <u>and</u> egress	6
II. The express terms of an easement agreement are strictly enforced.....	7
III. Defendant has wrongly converted the entire 25-foot section of the easement to its exclusive use, thereby essentially taking title to Plaintiff's land and denying Plaintiff its expressly granted right to use the easement for ingress and egress.....	9
IV. The trial court erred in failing to enforce the Easement Agreement according to its express terms	10
A. Enforcing the easement is not dependent upon an obstruction to or interference with the business operations of the owner (Plaintiff) or its tenants	11
B. Enforcing the easement is not dependent upon there being any physical barriers or permanent structures	11
C. Enforcing the easement is not dependent upon an overburdening of the easement or a use that is too far removed from the purpose of the easement	12
D. The trial court erred in focusing on the existing uses of the easement as opposed to Plaintiff's right to use the easement	13
E. The trial court has invaded the sanctity of the public record.....	14
Conclusion	16
Certificate of Counsel	17

TABLE OF AUTHORITIES

Cases

<i>Binkley v. Rabon Creek Watershed Conservation Dist.</i> , 558 S.E.2d 902 (S.C. App. 2001)	2, 6
<i>Hill v. Carolina Power & Light, Co.</i> , 28 S.E.2d 545 (S.C. 1943)	10
<i>Inlet Harbour v. South Carolina Dep't of Parks, Recreation & Tourism</i> , 659 S.E.2d 151 (S.C. 2008)	1, 6
<i>Lighthouse Tennis Club Village Horiz. Prop. Regime LXVI v. South Island Pub. Serv. Dist.</i> , 586 S.E.2d 146 (S.C. App. 2003)	2, 6-9, 12, 13
<i>Martin v. Bay</i> , 732 S.E.2d 667 (S.C. App. 2012)	1, 6
<i>Plott v. Justin Enters.</i> , 649 S.E.2d 92 (S.C. App. 2007)	7, 8, 9
<i>Proctor v. Steedley</i> , 730 S.E.2d 357 (S.C. App. 2012)	2, 6, 9
<i>Ward v. Evans</i> , 693 S.E.2d 7 (S.C. App. 2010)	14, 15
<i>Xanadu Horizontal Prop. Regime v. Ocean Walk Horiz. Property Regime</i> , 410 S.E.2d 580 (S.C. App. 1991)	7, 8, 9

Other Authorities

BLACK'S LAW DICTIONARY (5 th Ed. 1979)	6
---	---

STATEMENT OF ISSUES

1. The trial court erred in finding that the drive-thru lane was a permitted use under the written and record easement agreement.
2. The easement agreement expressly limits the scope and use of the easement to two-way traffic for ingress and egress, thereby precluding use of the easement for a drive-thru lane.
3. The express terms of an easement agreement are strictly enforced, and the trial court erred in failing to enforce the easement according to the plain, ordinary, and common meaning of the terms used in the easement.
4. The trial court erroneously approved the defendant's conversion of the entire 25-foot section of the easement to the defendant's exclusive use, thereby essentially taking title to the plaintiff's land and denying the plaintiff its expressly granted right to use the easement for the ingress and egress of motor vehicle traffic.
4. Enforcing the easement is not dependent upon an obstruction to or interference with the business operations of the owner (plaintiff) or its tenants.
5. Enforcing the easement is not dependent upon there being any physical barriers or permanent structures.
6. Enforcing the easement is not dependent upon an overburdening of the easement or a use that is too far removed from the purpose of the easement.
7. The trial court erred in focusing on the existing uses of the easement as opposed to the plaintiff's permanent right to use the easement for the ingress and egress of motor vehicle traffic.
8. In allowing the defendant to use the easement for a drive-thru, the trial court has invaded the sanctity of the public record and destroyed the protection afforded thereby to subsequent purchasers without notice.

STATEMENT OF CASE

This appeal involves the application of an express, written, and recorded easement agreement that created a mutual and permanent “right of way” for the ingress and egress of motor vehicle traffic. The trial court held that the Respondent (Defendant) could build a drive-thru service lane in the easement, even though it was designed to and in fact required traffic to stop and sit in the “right of way” easement, even though it was designed to and in fact caused traffic to stop in the easement and transact business with a tenant of Tract A while stopped in the easement, and even though it required traffic to drive on the wrong side of the ingress and egress easement. (R. 001-006). The Appellant (Plaintiff) made a timely 59(e) motion, which the trial court denied. (R. 0057-0062; 0010-0011). Plaintiff timely appealed.

STANDARD OF REVIEW

Determining the existence of an easement is a question of fact in an action at law. *Inlet Harbour v. South Carolina Dep’t of Parks, Recreation & Tourism*, 659 S.E.2d 151, 153 (S.C. 2008). Here, it is undisputed that the easement exists – it was created by a written and recorded easement agreement. (R. 0221-0232). The size and location of the easement is also undisputed, as they are established by the written easement agreement. (R. 0222, ¶ 3). It is also undisputed that the Defendants built a drive-thru lane in the easement.

The only dispute is whether the construction of a drive-thru lane in the easement is a permitted use under the easement agreement, which granted both parties a permanent right of way for the ingress and egress of vehicular traffic. Resolution of this dispute depends upon the meaning of the language used in the easement agreement. *Martin v. Bay*,

732 S.E.2d 667, 672 (S.C. App. 2012); *Binkley v. Rabon Creek Watershed Conservation Dist.*, 558 S.E.2d 902, 906-907 (S.C. App. 2001).

Here, the easement agreement is unambiguous – neither party contends otherwise, and there is no evidence of the intent of the parties that created the easement except the easement agreement. Determining the parties’ intent under an unambiguous easement agreement is a question of law for the court, which an appellate court reviews *de novo* with no deference to the trial court. *Proctor v. Steedley*, 730 S.E.2d 357, 363 (S.C. App. 2012). Resolution of this issue depends upon the plain, ordinary, and popular meaning of the terms used by the parties at the time the easement was created. *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist.*, 586 S.E.2d 146, 148 (S.C. App. 2003); *Binkley*, 558 S.E.2d at 906.

In short, this appeal presents the following question of law for this court: Does an express easement for a mutual and permanent right of way for the ingress and egress of vehicular traffic permit one party to build a drive-thru lane in the easement? It does not.

STATEMENT OF FACTS

The relevant facts are undisputed. Plaintiff owns Tract B in a shopping center. Defendant owns Tract A in the same shopping center.

In 1986, the former owners of Tracts A and B entered and recorded a written easement agreement (“the Easement Agreement”) that created several easements: (1) Tract A and Tract B granted each other the right to use each other’s parking areas; (2) Tract B granted Tract A the right to place an advertising sign on a specified pole for a defined time; and (3) Tract B granted Tract A certain water and sewer rights. (R. 0222-0224, ¶¶ 2, 4-7).

The Easement Agreement also created the ingress and egress easement at issue here and expressly described it as follows:

[Tract A] shall have a *right of way at all times, in common with* [Tract B] for motor vehicles to *travel onto and over* the asphalt parking area of Tract B as shown on the [attached plat] *for the purpose of ingress and egress to Tract A* from Woodruff Road (SC Hwy. 146).

(R. 0221-0222, ¶ 1) (all emphasis added). This “right of way” for ingress and egress was specifically made “[s]ubject to the limitations set forth below” (R. 0221):

The *right of way* and parking easement described [above and shown on the attached plat] shall be an easement appurtenant to and a covenant running with the land. The easement is to be within the existing driveway and parking area on Tract B and, as illustrated on [the attached plat] shall be *25 feet along the rear property line of Tract A* and shall be *45 feet along the western most property line of Tract A*.

(R. 0222, ¶ 3) (emphasis added). The Easement Agreement later referenced this ingress and egress easement as a “permanent right of way” and as “the *right of way* hereby granted.” (R. 0223-0224, ¶¶ 5 and 7) (all emphasis added).

Exhibit “D” to the Easement Agreement depicted this easement as a hash-marked area on a plat of the property. (R. 0232). This exhibit shows that traffic would ingress to and egress from the shopping center from Woodruff Road by using the 45-foot section of the easement – the connected 25-foot section of the easement provided further ingress and egress from the 45-foot section of the easement to Tract A and Tract B. (See R. 0232; see also Pl. Exh. 10 (DVD) filed separately).¹

At the time of the Easement Agreement, there was no drive-thru service associated with Tract A or Tract B. There is no evidence that the parties to the Easement Agreement intended any “drive-thru lane” use of the easement. There is no evidence that they intended

¹ For the convenience of the Court, a copy of the DVD presented at trial is being filed separately, and is available as a “zipfile” that can be emailed to the Court if desired.

any use that, by design, would require traffic to stop in the easement. There is no evidence that they intended any use of the easement to transact business with persons while they were stopped and standing in the easement. There is no evidence that they intended any use that would require traffic to drive on the wrong side of the ingress and egress easement.

Plaintiff acquired Tract B in 2010, and its rights were specifically made subject to the terms of the recorded Easement Agreement. (R. 0237 and R. 0241, ¶ 6). Defendant acquired Tract A on June 14, 2013, and its right were also specifically made subject to the terms of the recorded Easement Agreement. (R. 0233-0234). Four days later, on June 18, 2013, Defendant entered a lease agreement with Starbuck's ("the Starbuck's Lease"). (R. 0249-0259).

The Starbuck's Lease specifically referenced the recorded Easement Agreement and made Starbuck's the "beneficiary of easement rights" granted by the Easement Agreement. (R. 0253, ¶ 1.1). The Starbuck's Lease required Defendant to provide Starbuck's with a building that had a "fully entitled drive-through" and with "the right to operate a drive-through facility." (*Id.*). It also required Defendant to build the drive-thru lane along the rear property line of Tract A, *i.e.*, within a significant portion of the 25-foot section of the ingress and egress easement. (R. 0256-0258; 0259). The deadline for delivering the leased building with an operational drive-thru and drive-thru lane was November 1, 2013. (R. 0254, ¶ 2.2).

By design, and in fact, the drive-thru lane causes cars to stop in the easement for the purpose of transacting business with a tenant of Tract A while sitting in the easement. (R. 0256-0258; 0259; Pl. Exh. 10 (DVD, filed separately)). It also causes cars to stop and sit in the easement while awaiting their turn to transact business in the easement. (*Id.*).

Finally, it also causes traffic to drive on the wrong side of the ingress and egress easement. (*Id.*).

Plaintiff objected to Defendant's announced intention to build a drive-thru lane in the easement. Defendant persisted, so Plaintiff filed the instant action and sought a temporary injunction against the construction of the drive-thru lane before the November 2013 delivery deadline in the Starbuck's Lease. (See R. 0031-0037; 0012-0030). The trial court heard and denied the motion for temporary injunction in September 2013. (R. 0007-0009). The trial court specifically held that the question of whether the drive-thru lane violated the Easement Agreement would be decided at a trial on the merits and, if Plaintiff prevailed, the trial court could provide the appropriate relief, including injunctive relief. (R. 0008-0009).

After a bench trial on the merits, the trial court held that the drive-thru lane was a permitted use under the Easement Agreement. (R. 0001-0006). This was error because, as demonstrated below, a drive-thru lane exceeds the scope of the easement granted by the Easement Agreement and is therefore not a permitted use of the easement under the express terms of the Easement Agreement.

ARGUMENT

Express easements are strictly enforced according to the plain, ordinary, and popular meaning of the terms used to create and limit the easement. Here, the Easement Agreement expressly created a mutual and permanent right of way for the ingress and egress of motor vehicle traffic. Defendant's construction of a drive-thru lane within the easement precludes any use of the easement for the egress of motor vehicle traffic. Moreover, the drive-thru requires traffic to stop in the easement and transact business with

one of Defendant's tenants while stopped in the easement. Such use is not permitted by the plain terms of the Easement Agreement, which limits the use of the easement to two-way traffic passing directly over the easement for the purpose of access, not for the purpose of transacting business while stopped in the easement. By constructing the drive-thru in the easement, Defendant has converted the easement to its exclusive use and essentially taken ownership of and title to the land in violation of Plaintiff's ownership rights and its right to use the easement for the ingress and egress of motor vehicle traffic.

I. The Easement Agreement expressly limits the scope and use of the easement to two-way traffic for ingress and egress.

The language of an express easement determines the purpose, extent, and scope of the easement. *Martin*, 732 S.E.2d at 672; *Lighthouse*, 586 S.E.2d at 148; *Binkley*, 558 S.E.2d at 906-907. That language is applied according to the terms used by the parties as understood in their "plain, ordinary, and popular sense." *Id.*

An easement is a "right of use over the property of another." BLACK'S LAW DICTIONARY 457 (5th Ed. 1979), *cited and applied in Inlet Harbour v. South Carolina Dep't of Parks, Recreation & Tourism*, 659 S.E.2d 151, 154 (S.C. 2008). This right of use is "for a *specific purpose*." *Proctor v. Steedley*, 730 S.E.2d 357, 363 (S.C. App. 2012) (emphasis added). Here, the Easement Agreement sets forth the specific purpose of the easement as being a "right of way" (R. 0221, ¶ 1), which is "a right belonging to a party *to pass over* another's land." BLACK'S, *supra* at 1191 (emphasis added). The Easement Agreement expressly describes and limits this "right of way" as being for the "ingress and egress" of motor vehicles. Ingress means the "act, or right of, entering," and egress means the "act of going out." *Id.* at 463, 703. In short, the specific purpose of the easement is for motor vehicles to enter, pass over, and exit the easement.

The plain, ordinary, and popular meaning of a right to “pass over” the land of another does not include the act of stopping in the easement to transact business while stopped in the easement. It also does not include the act of stopping in the easement and waiting in line to later stop in the easement and transact business while stopped in the easement. Thus, the easement cannot be used for a “drive-thru” lane and, therefore, the trial court erred in finding that the “drive-thru” was a permitted use under the Easement Agreement.

Moreover, the plain, ordinary, and popular meaning of ingress and egress of motor vehicle traffic is two-way traffic in the easement. Here, the drive-thru and its signage directs traffic onto the wrong side of the easement, making it impossible to use the easement for the ingress and egress of motor vehicle traffic, *i.e.*, two-way traffic. Thus, the easement cannot be used for the “drive-thru” lane and, therefore, the trial court erred in finding that the “drive-thru” was a permitted use under the Easement Agreement.

II. The express terms of an easement agreement are strictly enforced.

The terms of an express easement, including any limitations imposed thereon, are strictly enforced, even if the deviation from those terms is slight or does not impose any significant burden on the easement or the servient estate (Tract B here). *Plott v. Justin Enters.*, 649 S.E.2d 92 (S.C. App. 2007); *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist.*, 586 S.E.2d 146 (S.C. App. 2003); *Xanadu Horizontal Prop. Regime v. Ocean Walk Horizontal Property Regime*, 410 S.E.2d 580 (S.C. App. 1991).

In *Plott*, the deeds in a development granted the lot owners a “perpetual, non-exclusive appendant and appurtenant easement for ingress and egress upon, over and

across” a roadway. 649 S.E.2d at 94. The defendants planted shrubs and built a wire fence along part of the roadway’s boundary, blocking access across the roadway at several points. *Id.* at 94, 97. This Court affirmed the trial court’s ruling that the fence and shrubbery had to be removed, even though the plaintiffs could cross the roadway at other points. *Id.* at 97.

In *Lighthouse*, a condominium developer (“the Developer”) conveyed existing water and sewer systems to the public service district (“the District”). The Developer also granted the District an ingress and egress easement over the condominium property to access and maintain the water and sewer systems, which included a water tower. 586 S.E.2d at 146-147. The District leased space on the water tower to a telecommunications company for the placement of antennae and related equipment, and it also leased the company the right to use the easement to access the water tower for installing and maintaining the telecommunications equipment. *Id.* at 147. This Court affirmed the trial court’s ruling that the easement was limited to its stated purpose of ingress and egress for accessing and maintaining the water and sewer system. *Id.* at 148. The easement therefore could not be used to access the water tower for the purpose of installing and maintaining telecommunications equipment, even though the ingress and egress used was identical to that used to maintain the water and sewer systems, and even though there was no evidence that such use caused any problems in the easement or imposed any additional burdens on the servient estate. *Id.*

In *Xanadu*, the grantor granted a “perpetual non-exclusive easement of ingress and egress located on a portion of [its] property” to several grantees. 410 S.E.2d at 581. The instrument specifically set forth the size and location of the easement. *Id.* One grantee planned to construct parking spaces on a portion of the easement. Another grantee objected

and brought suit for interference with its ingress and egress rights under the easement. The trial court agreed that the parking spaces would narrow the ingress and egress passage way but found the parking spaces were nevertheless not unlawful, because the ability to ingress and egress remained intact. *Id.* This Court reversed and ordered the removal of the parking spaces: (1) the easement was “specific in its terms as to the easement’s width, length, and location”; and (2) therefore, “the easement cannot be constricted to *any degree* by the placement” of the parking spaces.” *Id.*

Here, the plain language of the easement establishes that the sole purpose of the easement is to provide direct, two-way traffic access to and from Tract A and Tract B. Defendant’s construction of a drive-thru lane renders two-way traffic impossible, and it has converted the easement into a business transaction location that causes stop and go traffic in an easement intended for direct, non-stop traffic. Thus, the trial court erred in finding that the drive-thru was a permitted use under the Easement Agreement.

III. Defendant has wrongly converted the entire 25-foot section of the easement to its exclusive use, thereby essentially taking title to Plaintiff’s land and denying Plaintiff its expressly granted right to use the easement for ingress and egress.

An easement is the right to use the land of another for a specific purpose. *Proctor*, 730 S.E.2d at 363; *Lighthouse*, 586 S.E.2d at 148. The grantee of an easement, however, cannot use the easement in a manner that deprives others of their right to use the easement for the same specific purpose. *Plott, supra*; *Xanadu, supra*. Moreover, the grantee of an easement does not receive any title to the land of the grantor. *Proctor*, 730 S.E.2d at 363; *Lighthouse*, 586 S.E.2d at 148. The grantor remains the owner of the land and is free to use the land in any manner whatsoever, provided that such use does not interfere with the

grantee's right to use the easement for its stated purpose. *Hill v. Carolina Power & Light Co.*, 28 S.E.2d 545, 549 (S.C. 1943).

Here, Defendant's construction of the drive-thru lane in the easement is essentially a taking of ownership and title to Plaintiff's land, because Defendant has converted the land to its exclusive use for the exclusive benefit of one of its tenants. Thus, Defendant has exceeded the plainly stated scope of the easement granted by the Easement Agreement and wrongly asserted sole ownership rights over Plaintiff's land.

The Easement Agreement expressly stated that the right of way for the ingress and egress of vehicular traffic was a right held in common by both Tract A and Tract B. (R. 0221, ¶ 1, stating: "[Tract A] shall have a *right of way* at all times, *in common with* [Tract B]" (emphasis added)). Defendant's construction of the drive-thru lane has converted that portion of the easement to Defendant's exclusive use in clear violation of Plaintiff's expressly reserved and mutual right to use the easement for ingress and egress, and it has completely destroyed any use of the easement for the ingress and egress of motor vehicle traffic. Thus, Defendant has exceeded the plainly stated scope and purpose of the easement as set forth in the Easement Agreement.

IV. The trial court erred in failing to enforce the Easement Agreement according to its express terms.

The trial court focused on there being no interference with the business operations of the tenants of Tract B, no permanent or physical obstructions in the easement, no overburdening of the easement, and nothing that was "too far" removed the easement from its intended use:

[T]he current tenants of Tract A *have not overburdened the easement through their operations [i.e., the drive-thru lane]*, because there *does not appear to be any obstructions to business operations* of the tenants of Tract

B. Prior cases that have found an easement's scope to be exceeded *all involve physical barriers or permanent structures*. In this case, the owners and tenants of Tract A have merely improved the property by leveling and paving it. There is *no physical obstruction*, such as a gate, which prevents the owners or tenants of Tract B from accessing that portion of the property in question. Furthermore, the fact that vehicles may sit idling for a period of time up to ten minutes does *not constitute such a permanent obstruction that overburdens the easement, or too far removes the easement from its intended use*.

(R. 0005) (emphasis added). As demonstrated below, the trial court rested its ruling on an erroneous and myopic view of the law.

A. Enforcing the easement is not dependent upon an obstruction to or interference with the business operations of the owner (Plaintiff) or its tenants.

The trial court found that the drive-thru was a permitted use, because it did not obstruct or interfere with the business operations of Plaintiff or its tenants. This is not the question. Rather, the question is whether the drive-thru is a permitted use under the plain, ordinary, and popular meaning of the terms used in the express Easement Agreement. It is not, as shown above, and the trial court therefore erred in finding the drive-thru was a permitted use. Moreover, as also shown above, the drive-thru interferes with the permanent right expressly granted and reserved to Plaintiff to use the easement for the ingress and egress of motor vehicle traffic. Thus, the drive-thru is not a permitted use.

B. Enforcing the easement is not dependent upon there being any physical barriers or permanent structures.

The trial court found that the drive-thru was a permitted use, because Defendant did not erect any physical barriers or permanent structures in the easement. Here, again, this is not the question, and the drive-thru is not a permitted use under the plain, ordinary, and popular meaning of the terms used in the Easement Agreement.

The trial court also found that “all” cases finding that the scope of easement had been exceeded involved physical barriers or permanent structures. This analysis is wrong for two reasons.

First, the cases involving barriers and structures did not limit their holdings to barriers and structures. Rather, the focus was on the use by easement holder and how it interfered with the rights of others. The fact of interference was the key, not the manner of interference.

Second, it is untrue that “all” cases involved barriers and structures. In *Lighthouse, supra* (the water tower case), there were no physical barriers or permanent structures. In fact, the easement was being used in precisely the manner prescribed by the easement agreement. Nevertheless, this Court rightly held that the challenged use exceeded the scope of the express easement agreement. As shown above, the same is true here and, therefore, the trial court erred in finding that the drive-thru was a permitted use.

C. Enforcing the easement is not dependent upon an overburdening of the easement or a use that is too far removed from the purpose of the easement.

The trial court found that the drive-thru was a permitted use, because it did not overburden the easement and was not “too far” removed from the purpose of the Easement Agreement. This is wrong for two reasons.

First, the drive-thru completely destroys the plainly stated purpose of the easement, *i.e.*, a right of way for the ingress and egress of motor vehicle traffic. The drive-thru forces drivers onto the wrong side of the ingress and egress easement. It therefore completely destroys any egress use of the easement.

Second, the trial court again addressed the wrong question. The issue is whether the drive-thru is permitted under the plain, ordinary, and popular meaning of the terms used in the Easement Agreement. It is not and, therefore, it matters not whether the challenged use overburdens the easement or is “too far” removed from the purpose of the easement. This Court’s opinion in *Lighthouse* is again instructive and controlling. Using the easement in *Lighthouse* to access the water tower for telecommunication purposes did not overburden the easement and was not “too far” removed from the purpose of accessing the water tower for water and sewer purposes. Nevertheless, this Court rightly held that the easement could not be used for telecommunication purposes under the plain language of the agreement that granted the easement for water and sewer purposes.

D. The trial court erred in focusing on the existing uses of the easement as opposed to Plaintiff’s right to use the easement.

The trial court’s order reflects an erroneous focus on the existing use of the 25-foot section of the easement, *i.e.*, the fact that Plaintiff was not using the easement for ingress and egress when Defendant built the drive-thru, as opposed to the Plaintiff’s permanent right to use the easement for the ingress and egress of motor vehicle traffic. This misplaced focus resulted in the findings that the drive-thru did not obstruct or interfere with the business operations of Plaintiff or its tenants, did not overburden the easement, and was not “too far” removed from the purpose the easement. This misplaced focus also led to the following, internally inconsistent ruling by the trial court:

In equity, this Court notes that there may be times where (sic) the operation of the drive-through extends beyond the parameters of the 25 ft. portion of the easement and into the 45 ft. portion. In order to avoid the possibility of future overburdening, this Court orders that the owners or tenants of Tract A may not use this easement to impede the flow of traffic on the 45 ft. portion of the easement.

(R. 0006). Accordingly, “[t]he Defendant may not increase the use of its easement to such an extent that traffic is impeded on the 45 ft. portion.” (*Id.*). In other words, the stopping and standing of traffic in the 25-foot section of the easement is not allowed to overflow into 45-foot section and interfere with traffic flow therein.

The 25-foot section and 45-foot section of the easement are parts of one easement created with the same language, in the same agreement, at the same time, between the same parties. There is no basis in the Easement Agreement for treating the two sections of the single easement differently. Thus, if Defendant has the right to cause standing traffic in the 25-foot section, it has the right to do so in the 45-foot section. If Defendant does not have the right to cause standing traffic in the 45-foot section of the easement, it cannot cause standing traffic in the 25-foot section.

The answer to this quandary is in the Easement Agreement, which must be enforced according to plain, ordinary, and popular meaning of its terms. As shown earlier, the Easement Agreement creates a permanent and mutual right of way for the ingress and egress of motor vehicle traffic. This is the express purpose of both sections of the single easement. It does not permit any use of the easement that, by design, causes traffic to stop in the easement in order to transact business with a tenant of Tract A or Tract B. It does not permit any use of the easement that interferes with (and here destroys) the stated purpose of ingress and egress of motor vehicles, *i.e.*, two-way traffic. Accordingly, the trial court erred in finding that the drive-thru was a permitted use of the easement.

E. The trial court has invaded the sanctity of the public record.

The Easement Agreement is a recorded document. Citing *Ward v. Evans*, 693 S.E.2d 7, 11 (S.C. App. 2010), the trial court correctly noted that recorded easements “are

valid [as] to subsequent purchasers without notice.” (R. 0003). Indeed, “[t]he purpose of the recording statute is to *protect* a subsequent buyer *without notice*.” *Ward*, 693 S.E.2d at 11 (emphasis added).

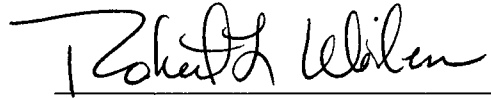
Here, the trial court has rewritten the Easement Agreement to permit the drive-thru lane despite the plain, ordinary, and popular meaning of the terms used to create, define, and limit the scope of the easement. In so doing, the trial court has destroyed the protection afforded by the recording statute to any subsequent purchaser without notice of the drive-thru use of the easement. The trial court mistakenly believed that this alteration of the public record was cured by the ability of a subsequent tenant or would-be purchaser to observe the drive-thru use of the easement upon an inspection of the property. (R. 0217-0218). The very purpose of the recording statute, however, is to protect a subsequent purchaser “*without notice*.”

The sanctity of the public record is essential to the marketability of property. It defined what Plaintiff purchased in 2010 – it defines what Plaintiff now owns –it defines what Plaintiff can sell in the future – it defines the scope of any title insurance. Plaintiff bought property having an equal and permanent right to use the easement for the ingress and egress of motor vehicle traffic. Plaintiff cannot not now sell property with that permanent right, because the trial court has allowed Defendant to convert the easement to its exclusive use and has therefore legitimized Defendant’s “private taking” of Plaintiff’s property just as surely as if Defendant had purchased the easement land. As a result, Plaintiff no longer owns what it purchased and cannot sell what it purchased despite what appears in the public record.

CONCLUSION

For all of the foregoing reasons, the appealed order should be reversed and the case remanded for the entry of judgment in favor of Plaintiff.

Respectfully Submitted,



Robert L. Widener
MCNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

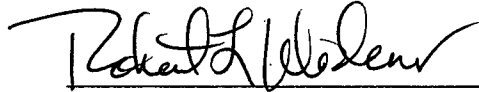
Bernie W. Ellis
MCNAIR LAW FIRM, P.A.
Post Office Box 447
Greenville, South Carolina 29602
(864) 271-4940

September 22, 2015
Columbia, SC

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



Robert L. Widener
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

RECEIVED
SEP 22 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000107

Woodruff Road SC, LLC,Appellant,

v.

SC Greenville Hwy 146, LLC,Respondent.

RECEIVED


SEP 22 2015

SC Court of Appeals

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served copies of the *Final Brief of Appellant* and *Final Reply Brief of Appellant* this 22 day of September, 2015, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to counsel for the Respondent at the following address:

James H. Cassidy, Esquire
Roe Cassidy Coates & Price, PA
Post Office Box 10529
Greenville, South Carolina 29603


Ann Shuler