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SC Court of Appeals

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

Woodruff Road SC, LLC, ... Appellant,

v.

SC Greenville Hwy 146, LLC, ... Respondent.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY ARGUMENT

I. Plaintiff's "two-way traffic" arguments are preserved for review by this Court, and Defendant's argument to the contrary is frivolous.

Defendant argues that Plaintiff's "two-way traffic" argument is not preserved for appeal, because it was not raised at trial. (Init. Resp. Br. 6-7). This argument is frivolous.

First and foremost, the easement at issue here is a 25-foot wide right of way "for *motor vehicles* to *travel onto and over* the asphalt parking area of Tract B . . . for the purpose of ingress **and** egress." (R. 0221-0222, ¶ 1) (all emphasis added). By definition, therefore, the easement is for two-way traffic. It is impossible to achieve safe or reasonable ingress and egress of motor vehicles over a 25-foot wide right of way in a commercial parking lot without two-way traffic. In short, the express language of the easement raises the issue of two-way traffic, and Defendant's error preservation argument is therefore frivolous. A review of the trial proceedings further demonstrates this frivolousness.

Throughout the trial, the attorneys and witnesses for both parties repeatedly referred to the easement as being for the "ingress and egress" of motor vehicles and vehicular traffic. (*E.g.*, R. 0076; 0079; 0086-0087; 0089; 0092; 0093; 0103; 0114; 0115; 0134; 0140; 0142-0145; 0149; 0152-0155; 0177-0184; 0200-0201; 0210; see also R. 50, 52, 53). Moreover, and also throughout the trial, the attorneys and witnesses for both parties addressed the issue of vehicles in the drive-thru lane going against "the flow of traffic." (*E.g.*, R. 0081; 0092; 0132; 0145; 0183; 0184). More specifically, the attorneys and witnesses for both parties addressed the issue of vehicles using the easement to travel in the opposite direction of the drive-thru traffic. (Tr. R. 0103; 0129; 0131-0132; 0133). Indeed, Defendant's counsel argued against the need for two-way traffic (R. 0208-0209) after Defendant's

principal witness (Bill Runge) admitted that Plaintiff could pave the easement and create lanes for standard two-way traffic. (R. 0143; 0149).

Finally, Defendant's counsel and principal witness (Runge) suggested that vehicles could travel in the opposite direction by simply driving on the other side of the easement. (R. 0094; 0131-0132; 0142). They apparently believe that, despite the American Revolution in the 18th Century, this tiny piece of South Carolina remains part of the British Empire. Plaintiff's witness (Johnson) rejected this notion, testifying that the drive-thru resulted in the easement being "changed to a *one-way*." (R. 0094) (all emphasis added).

On appeal, Defendant relies on this "one-way" testimony to argue: "[E]vidence presented at trial established that use of the drive-thru did not render two-way traffic impossible as Appellant claims." (Init. Resp. Br. at 15; see also *id.* at 11, relying on same testimony to argue "there is no obstruction or prohibition of vehicles travelling both ways across the 25 ft. easement"). It is the height of analytical hypocrisy to argue that the two-way traffic issue was not raised at trial but then argue that trial evidence showed that two-way traffic was possible, albeit by travelling on the wrong side of the road. And here again, Defendant ignores what every elementary school student in America knows – we won the American Revolution and nothing in South Carolina remains part of the British Empire.

In short, the issue of two-way traffic was raised throughout the trial – indeed, it was a pervasive issue. The trial court clearly ruled against the Plaintiff when it permitted the continued use of the drive-thru. Were one to assume the trial court did not rule on this issue, it is nevertheless preserved for appeal, because Plaintiff again raised the issue in its motion to alter or amend. (R. 0058; 0060; 0061). Accordingly, Defendant's error preservation argument is frivolous.

II. Defendant's argument on the meaning of the easement's terms turns the law on its head and is manifestly without merit.

In its Argument (B), Defendant argues that the drive-thru is a permissible use, because nothing in the easement's language precludes that use. (Init. Resp. Br. 7-18). This argument ignores the controlling inquiry here, which is a question of law subject to *de novo* review by this Court,[1] *i.e.,* whether the "plain, ordinary, and popular" meaning of the easement's terms permits the construction of a drive-thru lane in the easement such that it precludes the use of the easement for two-way traffic and converts the easement into a stop-and-go business transaction location for the sole benefit of Defendant.[2] Although Defendant pays lip-service to this controlling principle of law by acknowledging it in its brief, Defendant ignores it by arguing that the drive-thru is a permitted use unless specifically excluded by the easement agreement. (Init. Resp. Br. at 7-8)

Despite the 12-page length of Defendant's argument, it boils down to a simple and erroneous assertion: The drive-thru's preclusion of two-way traffic and its conversion of the easement into a "stop-and-go business location" is permissible unless specifically precluded by the language of the easement. This argument turns the law on its head.

The "plain, ordinary, and popular" meaning of a right of way for the ingress and egress of motor vehicles is the right to pass over and through the property in both directions. It does not encompass driving on the wrong side of the road. It also does not encompass

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[1] In making this argument, Defendant correctly asserts that the scope of an easement is generally a matter in equity such that an appellate court can take its own view of the evidence but also admits that "[t]here were virtually no disputed facts presented in this case." (Init. Resp. Br. at 7 & n.2). No relevant fact is in dispute. The only question is the meaning of the easement's unambiguous terms, which is a *de novo* question of law for this Court for which no deference is given to the trial court's ruling. *Proctor v. Steedley*, 730 S.E.2d 357, 363 (S.C. App. 2012); see also "Standard of Review" section of Plaintiff's Brief of Appellant.

[2] In its brief, Defendant appears to view Plaintiff's "two-way traffic" and "stop-and-go business transaction location" arguments as inextricably intertwined. They are not. Each argument stands alone. Even if "stop-and-go" use of the easement is permitted, it cannot interfere with two-way traffic. And even if two-way traffic is not required, the easement cannot be used as a "stop-and-go" business transaction location.

using the easement as a business transaction location that requires vehicles to stop in the easement to review the pre-order menu and then stop in the easement again to place an order after pulling up to the speaker at the order menu. Contrary to Defendant's argument, any such use would have to be specifically included in the easement, not specifically excluded by it.

Defendant complains that Plaintiff cites no authority for is arguments on the meaning of "right of way." (Init. Resp. Br. 10-11). No citation of authority is needed, because Plaintiff relies on the "plain, ordinary, and popular" meaning of that term. Moreover, Plaintiff cited the 5th Edition of BLACK'S LAW DICTIONARY for the "plain, ordinary, and popular" meaning of "right of way." (Final App. Br. 6-7). This is the same authority cited by the Supreme Court for the definition of "easement" in *Inlet Harbour v. South Carolina Dep't of Parks, Recreation & Tourism*, 659 S.E.2d 151, 154 (S.C. 2008). Finally, the authorities cited by Defendant disprove its argument rather than support it.

First, Defendant cites *Ballington v. Paxton*, 488 S.E.2d 882 (S.C. App. 1997) for the proposition that a right of way is the right "to pass and repass in a reasonable manner." This proves too much. "Pass and repass," by definition, means going in and out, *i.e.*, two-way traffic. Thus, Defendant cannot interfere with the two-way traffic use of the easement here, and it would manifestly not be "reasonable" to achieve two-way traffic by requiring traffic to travel on the wrong side of the road in a commercial parking lot. Moreover, even a cursory reading of *Ballington* shows that it does not support Defendant's position.

In *Ballington*, there was a dispute between family members over the use of a private right of way in gross over a dirt road in the country used to access a swimming pond. The owner of the servient estate built a fence and gate in response to repeated and ongoing use

of the road by trespassers and vandals, including vandalism by some of the grantees' children and their friends. This Court emphasized that, under these circumstances, the erection of the gate and fence was permissible, because it did not unreasonably interfere with the right to use a dirt road in the country to access a swimming pond, and it reasonably protected the grantor's right to protect her property from trespassers and vandals.

Here, the easement is a commercial easement for traffic in a commercial parking lot. Directing traffic onto the wrong side of the road simply is not and can never be reasonable under these circumstances, particularly when other access is available by turning directly from the 45-foot easement into the parking lot of Defendant's tract. Moreover, converting a commercial right of way into a "stop-and-go" business location for the servient estate is not permitted under the plain language of the easement. Such might be convenient or desirable for Defendant's tenant (Starbucks), but it is not necessary – customers can turn directly into Starbuck's parking lot from the 45-foot easement and thereby gain access for transacting business with Starbucks.

Second, Defendant cites *Watson v. Hoke*, 53 S.E. 537 (S.C. 1906), which is of the same ilk as *Ballington*. It involved a dispute over the erection of fencing along a private easement over farm land in the country. The Supreme Court found this was reasonably necessary to protect the farm use of the servient estate while not unreasonably interfering with the access granted to the dominant estate. This case has no bearing on the present case involving a commercial right of way for two-way traffic in a commercial parking lot.

Third, Defendant cites *Hill v. Carolina Power & Light Co.*, 28 S.E.2d 545 (S.C. 1944) for the proposition that an easement owner's use of an easement (Defendant here) is limited to a use that is reasonable and as little burdensome to the servient estate as possible.

This again proves too much. It is not reasonable to direct traffic onto the wrong side of the road in a commercial parking lot or to use the easement for transacting business when such access is otherwise available. And these uses are not "as little burdensome" as possible to Plaintiff's right to use the easement for two-way traffic in a commercial parking lot.

In short, the "plain, ordinary, and popular" meaning of the ingress and egress right of way granted by the easement does not permit the drive-thru built by the Defendant. To avoid this, Defendant asks this Court to turn the law on its head and require the specific exclusion of a use that would preclude the two-way traffic contemplated by the easement and convert the right of passage into a right of using the easement as a "stop-and-go" business transaction location for the sole benefit of Defendant's tenant (Starbucks). Such uses are not within the meaning of the easement's language and, therefore, any right to so use the easement must be specifically included in it, not specifically excluded from it.

III. The trial court failed to enforce the Easement Agreement according to its express terms.

As set forth in Argument IV of the Brief of Appellant, the trial court failed to enforce the Easement Agreement according to its express terms and instead 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. (Final App. Br. at 10-15). In its Argument C, Defendant attempts to defend the trial court's erroneous analytical framework. (Init. Resp. Br. 18-21). This defense fails for several reasons.

First, Defendant argues that the trial court expressly relied on the terms of the Easement Agreement to reach its conclusion. While it is true that the trial court cited to

the Agreement in its analysis, it ignored or erroneously construed the plain, ordinary, and popular meaning of the terms used in the Agreement.

Second, in considering relative burdens created by the drive-thru, the trial court focused on reasonableness and the like. As shown earlier, the drive-thru not only burdens but completely destroys the two-way traffic use of the easement contemplated by the Easement Agreement. Moreover, while relative burdens might be relevant in some cases, the perceived absence of an unreasonable burden simply cannot change the plain, ordinary, and popular meaning of an easement's terms to expand the granted use. Thus, the drive-thru does not become permissible simply because it does not presently interfere with Plaintiff's present use of the easement. The plain meaning of the right of way granted by the easement is for passage over and through the property – it simply does not contemplate or permit using the easement as a "stop-and-go" business transaction location for the sole benefit of Defendant's tenant (Starbucks).

The final paragraph of Defendant's Argument C highlights the fatal flaw of its arguments and the trial court's ruling. First, Defendant agrees "*in the broad sense* that the plain meaning and usage of the Easement Agreement's terms control the determination of its scope and purpose." (Init. Resp. Br. 21) (all emphasis added). The law is precisely the opposite. The plain meaning of easement's terms does not control "in the broad sense." Rather, it controls in the express sense and limits the permissible uses, even if the use does not unduly burden the servient estate.[3] If the use is not granted by the easement, it does not become permissible simply because it is not unduly burdensome – this is the teaching

[3] In any event, as demonstrated earlier, the drive-thru at issue here in fact unduly burdens Plaintiff's right to use the easement for two-way traffic, *i.e.*, the right of way for the ingress and egress of motor vehicle traffic, and it unlawfully converts the mutually held right of way for passage into a "stop-and-go" business transaction location for the sole benefit of Defendant's tenant.

of this Court's opinion in *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist.*, 586 S.E.2d 146 (S.C. App. 2003). There, nothing indicated that using the easement for telecommunication purposes unduly burdened the easement granted for water and sewer purposes. Nevertheless, and rightly so, this Court held that the easement was limited to water and sewer purposes by the plain meaning of its express terms. The same is true here, even were it assumed that the drive-thru does not burden Plaintiff's right to use the easement (which it does as shown earlier).

Second, Defendant asserts that "[i]t is perplexing that the owner of the servient estate [Plaintiff here] would take issue with consideration of these factors [*e.g.*, burdens] as they ensure protection of its rights." (Init. Resp. Br. 21). There is nothing "perplexing" here. It may be true that unduly burdensome uses can be precluded even if they are within the meaning of the easement (though this seems questionable), but that is not the situation here. Rather, the drive-thru imposes the ultimate burden by precluding Plaintiff's right to use the easement for two-way traffic, and it converts the easement into a business location and business asset for the sole benefit of Defendant's tenant to the exclusion of Plaintiff.

IV. 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.

As demonstrated in Argument III of the Brief of Appellant, Defendant's construction of the drive-thru has converted the 25-foot easement to its exclusive use, and Defendant has thereby essentially taken title to Plaintiff's property. (Final App. Br. 9-10). In its Argument D, Defendant contends that this argument fails because: (1) there is no evidence that that Plaintiff has been denied use of the easement; (2) Plaintiff and its tenants do not use the easement; and (3) Plaintiff and its tenants have no reason to use the easement.

(Init. Resp. Br. at 22-23). Defendant thereby invites this Court to make the same fundamental error made by the trial court, *i.e.,* to focus on Plaintiff's existing use or non-use of the easement rather than the expressly granted permanent right to use the easement. This Court should decline this invitation and reverse the trial court's acceptance of it.

It is true that Plaintiff and its tenants do not currently use the easement and currently have no essential need to use the easement for its intended purpose of two-way traffic, but that is not the question here. The Easement Agreement expressly granted Plaintiff the permanent right to use the easement as a right of way for the ingress and egress of motor vehicle traffic, *i.e.,* two-way traffic. (R. 0221, ¶ 1; see also R. 0222, ¶ 3 and R. 0224, ¶ 7). As shown earlier, the drive-thru precludes the exercise of this right, and it also results in Defendant converting the easement to its exclusive use to the exclusion of Plaintiff. Even though Plaintiff does not presently use the easement, it cannot idly stand by and permit these violations of the easement, lest it be subjected to some claim of adverse possession, waiver, abandonment, or the like in the future when it needs or desires to use the easement for its expressly stated purposes.

Moreover, this is a commercial property that will be changed and reconfigured in the future such that Plaintiff or subsequent purchasers will need or desire to use the easement for its expressly stated purposes.[4] The presence of the drive-thru and its resulting interference with the purpose of the easement and Plaintiff's ownership rights will limit the flexibility in different future uses and configurations of Plaintiff's commercial property

[4] At the time of the creation of the easement, different buildings and tenants occupied Plaintiff's tract and Defendant's tract. (R. 0122-0123; 0157-0160; 0162; 0176). It is the very nature of commercial property that such changes will also be made in the future.

and thereby devalue Plaintiff's commercial property. (R. 0074-0075; 0096-0097; 0108; 0115-0116; 0182- 0183; 0202- 0204; 0212; 0216-0217; 0218).

In a related argument, Defendant contends that Plaintiff's reason for filing this lawsuit was a concern that its tenants would view the drive-thru as a breach of their lease agreements and result in claims being made against Plaintiff. (Init. Resp. Br. 23 n.4). It is true that this was "one of [Plaintiff's] concerns" (R. 0091), but Plaintiff was "more concerned" with the negative impact on flexibility in the future use and reconfigurations of the commercial property, as well as the marketability and value of the property. (R. 0115-0116; see also R. 0074-0075; 0096-0097; 0108; 0182-0183; 0202-0204; 0212; 0216-0217; 0218). For these reasons, Plaintiff cannot now allow the drive-thru to exist and operate, even if there is no current problem, because it cannot run the risk that allowing the drive-thru now would result in a claim for adverse possession, waiver, abandonment or the like that would prevent Plaintiff or its purchasers from using the easement for its express purposes in the future.

V. The trial court has invaded the sanctity of the public record and destroyed the protection intended by the public record.

As set forth in Argument IV(E) of the Brief of Appellant, the trial court invaded the sanctity of the public record and destroyed the intended protection of subsequent purchasers without notice. (Final App. Br. at 14-15). Rather than address the specifics of Plaintiff's argument, Defendant dismisses it as a "red herring" and summarily asserts that the trial court's order "enhances" the public record.

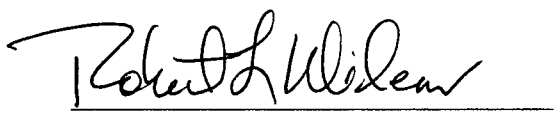
Accepting Defendant's argument and the trial court's ruling will jeopardize the property rights purchased and sold throughout South Carolina, because the language used in the present easement is commonly used to create easements for the ingress and egress

of motor vehicle traffic throughout the state. Those easements can now be converted from two-way traffic to one-way traffic without notice to anyone, and they can likewise be converted to uses that essentially take rights mutually held by multiple parties and limit that right to a single party to the exclusion of all others. This is not and should not become the law in South Carolina.

CONCLUSION

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

Respectfully Submitted,



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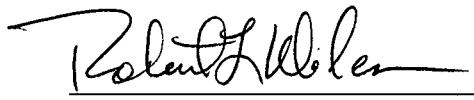
CERTIFICATE OF COUNSEL

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



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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:

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