THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell E. Scarborough, Master-in-Equity

Case No. 2011-CP-10-95

Bayview Acres Civic Club,

Respondent,

v.

Gerald E. Moore, Jr. a/k/a Gerald Moore and Margaret Bates Moore,

Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Appellants assert that the trial judge committed two errors:

1. He exceeded his authority by modifying the 1984 order.

2. He issued the order under appeal without an adequate factual basis.

Respondent rejects both arguments, and respectfully asserts that the Order under appeal is supported by sufficient factual basis, and was issued within the trial judge's authority.

STATEMENT OF THE CASE

In this 2011 civil action, Respondent petitioned the Court for injunctive and declaratory relief, and for money damages, Respondent's core allegation being that Appellants had exceeded their specific right to use a strip of community property in the Bayview Acres neighborhood, in Mt. Pleasant, South Carolina (the "Property"). Respondents own the Property.

Appellants' limited rights to use the Property had been defined by an order of the deceased Master-in-Equity, Judge Condon, issued on April 6th, 1984 (the "1984 Order"). On November 5th, 2013, the trial judge entered an order (the "2013 Order") which memorialized an agreement of the parties to resolve the dispute. Among the order's mandates were that Appellants: remove all debris and personal belongings from the Property and remediate the landscaping (2013 Order, Paragraphs 5 and 6); keep their dogs off of the Property (Paragraph 7); refrain from using vehicles on the Property (Paragraph 8).

On May 23rd, 2014, Respondents filed the first of what ultimately would be—rather, what as of the time of this filing thus far has been—three motions for rule to show cause why Appellants had not violated the preceding orders. Respondents' motion includes a detailed affidavit of Graham Stone (Exhibit B to Motion), which outlines the myriad violations of both the 1984 Order and the 2013 Order. The motion also attaches dozens of photographs depicting the violations outlined by Mr. Stone. (Exhibit C to Motion.)

On June 25th, 2014, the trial judge issued an order (the "2014 Order"), in which he found that Appellants were in contempt of the 2013 Order, imposed a monetary sanction, and clarified Appellants' rights to use the Property, as follows: that Appellants use the Property solely for ingress and egress to their carport (Paragraph 1), and that they use the Eastern bay of the carport solely for storage of a single vehicle (Paragraph 2). Additionally, he authorized Respondents to build a fence down the property line that separates Respondents' property from Appellants' property. Importantly, the 2014 Order which authorized the fence never was appealed and is the law of the case. Also importantly: the right to build a fence down the property line already was within Appellants' rights (as it is within any citizen's), and in no way contravened any preceding order of the Court or law cited by the Appellants.

On January 15th, 2015, Respondents filed a second motion for rule to show cause, which was supported by an affidavit and photographic evidence of continued violation of the 1984, 2013 and 2014 Orders. Having considered the parties' filings, and having conducted an evidentiary hearing, the Court ruled as follows:

- That Appellants were in violation of the 2014 Order as a result of: having failed to pay the fine levied in that Order; having continued to store their personal belongings

in the Property, in violation of the Order, having continued to park their vehicles on the Property, in violation of the Order, and in other particulars. These findings were supported by Respondent's filings and testimony given at the hearing. (Paragraph 1 of Order.);

- That "the long history of this matter" establishes that the Defendants have impeded and interfered with the [Respondent's] use and enjoyment of the property regularly and frequently, triggering "the portion of the 1984 Order which asserts that this Court 'shall forthwith issue such an order as may be appropriate.'" The trial judge concluded that "this triggering—along with the repeated violations of my orders—justifies a modification of rights allocated under prior orders on this matter." (Paragraph 2.)

Having so concluded, the trial judge ordered a further fine; "reiterate[d] the Court's finding that good fences make good neighbors...[and that]per my June 25th, 2014 Order, a consequence of the Defendants' violations of that order is that the Plaintiff is now entitled to erect a fence along the length of the subject property line" (emphasis added); and terminated Appellants' remaining rights under the 1984 Order.

On September 16th, 2015, the trial judge issued an order on Respondents' third motion for rule to show cause: he once again sanctioned Appellants for non-compliance—this time with the March, 2015 order—and ordered Appellants to pay a further fine and attorney's fees. As of the date of this Brief's filing, Appellant has paid neither the fine nor the attorney's fees.

ARGUMENT

I. The order that authorized the fence was not appealed, it is the law of the case, and Appellants have waived any objection thereto.

As noted above and reflected in the Record, the trial judge authorized the fence in the 2014 Order, which never was appealed, and which therefore is the law of the case, not subject to attack by Appellants. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). This issue is dispositive as to the issue of the fence construction.

II. The trial judge's ruling is founded upon substantial evidence sufficient to support the ruling.

Appellants acknowledge that the 1984 Order, by its terms, was subject to modification upon a finding that Appellants had imposed any of the following with "any degree of frequency": threatening or interfering "in any way" with Respondent's right to use and enjoyment of the property; or imposing any sort of direct or indirect impediments to such use, including an impediment as minor as "barking dogs allowed to roam the [Property]".

As set forth above, the trial judge founded his order upon substantial findings of both indirect and direct impediments, and upon a host of instances of interference with Respondents' right to use and enjoy the Property. Graham Stone's affidavit (Exhibit B to May 23rd, 2014 Motion), a part of the Record, and to which the trial judge referred in basing his decision on "the long history of this case", includes the following evidence, among others:

- That Appellants have "intruded incessantly upon" the Property, by way of a "complete and constant obstruction" to portions of the Property in the form of an impenetrable junk heap reflected in the photographs, along with boats,

trucks, equipment, trash, cars, and miscellaneous personal property all stored upon the Property;

- That these and other actions have, for 35 years, "severely hindered...residents' access to and enjoyment of the [Property]" (Affidavit, Paragraph 4);
- That as Respondents' members walk to the Property their "progress to the waterfront is completely blocked by boats, cars, and heavy equipment which constantly sit on the Property,", rendering the Property "a nullity" from the perspective of Respondent's members, and
- That since the 1984 order, Appellants' "aggressive and intimidating behavior" has been incessant, including the Appellants' wrongful and unilateral removal of properly staked survey markers paid for by the Respondent, and a fence installed by the Respondent, and physical altercations with Mr. Stone.

This evidence—fully sufficient on its own—is supported and reinforced by testimony given at the hearing that produced the Order under appeal. Clearly the trial judge had before him ample evidence to support modification of the 1984 order, by that order's very terms. Appellants' conclusion—that there is no evidence of frequent violations of the 1984 Order—is reached by erroneously analyzing solely the testimony given by Appellant Gerald Moore. Respondents respectfully suggest that even seen through that impermissibly narrow lens, the evidence is sufficient for the trial judge, who has the authority in a non-jury matter to weigh evidence and evaluate credibility, to have ruled as he did. But certainly when the entire

record is considered, the Order is supported by competent and sufficient evidence.

III. The trial judge did not exceed his legal authority

Contrary to Appellants' position, the trial judge acted entirely within his authority. As set forth above, the trial judge ordered a modification of the 1984 order which the 1984 itself specifically contemplated. The Property is owned by Respondent; the 1984 order found that Appellants had wrongfully erected the carport onto Respondents' Property, but found that Respondents had acquiesced in the encroachment by failing to raise any objection. Judge Condon concluded that a balance of the equities required that Appellants be permitted to keep the carport rather than incur the cost of tearing it down. Judge Condon's admonition that Appellants not interfere further with Respondent's use and enjoyment of the Property reflects the very limited nature of the rights he afforded under is order.

His inclusion of specific authorization for the Court subsequently to modify the Order in the event of such interference confirms the limited, contingent nature of the rights afforded. In effect, the 1984 Order says "Appellants may keep their carport so long as—and only so long as—they refrain from any further interference with property which does not belong to them." Given the overwhelming evidence of Appellants' repeated and flagrant interferences, the trial judge's order is properly viewed not as an impermissible over-ride of the 1984 order, but as a carrying out of its specific intention, through enforcement of the specific mechanism Judge Condon adopted to prevent further encroachment.

Legal authorities cited by Appellants are unpersuasive and inapplicable. *Charleston County Dept. of Social Services v. Father, Stepmother, and Mother* involved the authority under Rule 63 of a judge who undertakes a case previously presided over by a now-disabled

judge- a circumstance entirely inapplicable to this case (though, of note, even there the Court reasoned that modifications to the prior order would be appropriate if legally and factually valid). Cases cited by *Charleston County Dep't of Social Services* are likewise inapplicable: *Tisdale v. American Life Ins. Co.* involved one judge impermissibly granting the exact same motion that a previous and still-sitting judge had denied; the *Dinkins v. Robbins* case cited by Appellants appears to be a mis-citation: furthermore, the reported cases involving those parties appear not include the question at hand as part of their rulings.

In any event, to hold that the trial judge exceeded his authority would be to announce a new principle: that a judge is prohibited from reconsidering a 35 year old order in light of new evidence and facts germane to an ongoing dispute. Leaving aside that this pronouncement would sacrifice circuit judges' broad discretion to fashion appropriate relief—at the altar of preserving a deceased judge's pronouncements in a dispute that had continued for 35 years beyond such pronouncements—it is one which is not supported in any law cited by Appellants. On similar lines, the order under appeal specifically asserts that his order is based on a violation of the 1984 order, and separately upon Appellants' violation of the trial judge's own orders. Appellants, then, would have this Court announce that a trial judge, faced with a Defendant's repeated violations of his neighbors' rights, and repeated violations of his own and previous judge's orders, lacks the authority to impose the relief he deems appropriate, simply because the appropriate relief touches generally upon the subject matter of a previously given order. No authority exists for these propositions.

Given the specific authorization for modification which appears in the 1984 order, and in light of the "broad equitable powers" to fashion an appropriate remedy, in which the

Master is clothed, the order in all ways was within the Court's discretion and authority. *See, e.g. Lane v. N.Y. Life Ins. Co.*, 147 S.C. 333, 145 S.E. 196 (S.C. 1928).

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February 5th, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served the Initial Brief of Respondent upon the following parties via:

X	United States Postal Service
	Facsimile
X	Electronic Email

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Date: February 5, 2016