18842

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAR 03 2016
SC Court of Appeals

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

Unpublished Opinion No. 2016-UP-069
Filed February 17, 2016

John S. Frick,

Appellant,

v.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin & Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

PETITION FOR REHEARING

In accordance with the previsions of Rule 221(a), SCACR, the Appellant petitions this Honorable Court for rehearing of Unpublished Opinion No. 2016-UP-069 (The Opinion) filed on February 17, 2016.

Appellant would respectfully assert that this Honorable Court misapprehended or overlooked important facts supportive of his position and/or the lack of facts supporting the Respondent's position and misapprehended the facts which were present in the Record on Appeal in this matter. Furthermore, the Appellant respectfully asserts that this Honorable Court misapprehended the

applicable legal theories supporting the Appellant's position in this matter. Attached to this Petition is a Memorandum in Support of Petition for Rehearing which identifies and analyzes the points which the Appellant contends The Opinion has overlooked or misapprehended. This Petition incorporates herein the Appellant's analysis and arguments contained in the attached Memorandum.

Wherefore, the Appellant respectfully requests that this Honorable Court re-hear the matters contained in The Opinion and reverse the judgment of the Circuit Court in the following particulars:

A. Reversing the trial Court's finding that the road in question is not a public road and that the County had properly abandoned said road;

B. Reversing the trial Court's finding that the landowners are entitled to maintain a closed and locked gate across the roadway prohibiting the Appellant from exercising free and unfettered access to his property;

C. Reversing the trial Court's finding that the roadway in question was only 14 feet wide.

Respectfully Submitted,

POPE AND HUDGENS, P.A.
W. Chad Jenkins
Post Office Box 190
Newberry, South Carolina 29108
803-276-2532
Attorneys for Appellant

March 3, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2014-001472

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

Unpublished Opinion No. 2016-UP-069
Filed February 17, 2016

John S. Frick,

Appellant,

v.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin & Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

In support of his Petition for Rehearing of Unpublished Opinion No. 2016-UP-069 (The "Opinion"), Appellant respectfully submits this Memorandum in Support.

INTRODUCTION

The Appellant submits that the Opinion misapplied the applicable legal precedent in finding that the disputed roadway is not a public road. Appellant further submits that the Opinion overlooked or misapprehended the evidence contained in the Record which supports Appellant's position that the disputed roadway is a public road and that the County of Newberry failed to take any action to properly close same.

Furthermore, the Appellant respectfully asserts that the Opinion misapprehended or overlooked the evidence and misapplied the applicable legal precedents in affirming the Circuit Court's ruling that the landowners were entitled to maintain a locked gate across the disputed roadway and that the disputed roadway was only fourteen (14) feet wide.

ARGUMENTS

I.

In affirming the lower Court's finding that the county had abandoned the disputed roadway, the Opinion ignored the fact that part of the roadway is still in use and still county maintained and that the county took no affirmative steps to close said road.

S.C. Code Ann. §57-9-10 *et. seq.* did not completely abolish the common law doctrine of abandonment, but it did establish a clear, precise mechanism for the closure of a public road. While some roadways may have been abandoned prior to the enactment of S.C. Code Ann. §57-9-10 *et. seq.*, it did not happen in this case. The clear facts are as follows:

(1) The disputed roadway was a public road which ran between Wheeland School Road and Macedonia Church Road.

(2) A portion of the road, beginning at Macedonia Church Road, is still county maintained.

(3) The portion of the roadway at issue in this action was utilized to service homes and by the public for many years after the creation of Lake Murray.

The fact that Seibert Road is, in part, still county owned and maintained means that Newberry County would have to take affirmative action to close any portion of the same roadway, specifically the segment of the roadway in question. The Record reveals that Newberry County, as late as 1997, maintained that Seibert Road was a dedicated road that would remain county maintained and that county road signs would remain in place. (R. p. 157). Although the creation of Lake Murray may have split the road into two segments, both sections of the road should be treated the same unless and until Newberry County takes steps to close them pursuant to S.C. Code Ann. §57-9-10 *et. seq.*

The Opinion misapprehends the legal precedents regarding the abandonment and/or closure of roadways. The fact that this was a public roadway in which the general public had a right to utilize, as clearly shown on county highway and road maps as well as by the county's admission, puts a higher burden upon the governmental entity for closing the road. (R. pp. 148 – 151; R. p. 157).

The Opinion, citing K&A Acquisition Group v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252 (2009), misapprehends the Supreme Court's ruling in

that case. The Opinion fails to consider that the case stands for the preposition that once a road is dedicated to the public for public use, the public easement in same is not revoked upon the governmental entity no longer utilizing or maintaining said roadway. The Supreme Court found that the mere act of relocating toll road that was dedicated to the public did not have the effect of abolishing the public easement created in the original route. K & A Acquisition Group v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252 (2009). If completely rerouting a road does not extinguish the public nature of said road, then certainly blocking a small portion of that road does not extinguish the public's right to utilize same.

The Opinion also failed to consider the S.C. Supreme Court's holdings in South Carolina Dept. of Transportation v. Hinson Family Holdings, LLC, 361 S.C. 649, 606 S.E. 2d 781 (2004). In that matter, the South Carolina Department of Transportation effectively abandoned "Water Tower Road" in 1994 when it actually closed the road and deeded it to another entity. The Supreme Court found that failure to follow the formal judicial procedure for terminating a public right of way over land as set forth in S.C. Code Ann. §57-9-10, coupled with the fact that the county still claimed ownership in another portion of Water Tower Road, lead to the conclusion that the roadway was still a public road. The basic facts of Hinson are almost identical to those in this case.

The Opinion misapprehended and misconstrued the law and the facts pertinent to the disputed roadway. The Opinion further failed to distinguish between the acts necessary to close a road that is merely utilized via an easement

and a road which was, at one time, a public road as shown on numerous maps and by the county's own admission. The Court should grant the Petition for Rehearing and reverse the lower court's findings finding that the disputed roadway is not a public road.

II.

In ruling that the landowners are entitled to maintain a closed and locked gate across the disputed roadway, the Opinion misapprehended or ignored the repeated statements and evidence contained within the record showing that there was no need for the gate and that it only served to harass the Appellant and limit his access to the property.

If a gate or blockade is erected that is not necessary to protect the land, it is merely to restrict human traffic and is improper. Brown v. Gaskins, 284 S.C. 30, 324 S.E.2d 639 (Ct. App. 1984). To be proper, there must be a necessity for the gate for the "preservation of the servient estate." Id at 34. In this matter, the only history of any trespassing was from many years ago. The most telling fact, which was misapprehended or ignored by the Opinion, was Defendant Fulmer's testimony that the instances of trespassing were a thing of the past. (R. p. 133, ll. 4-18). Also, the gate remained opened for a period of over four years beginning in 2009 with no instances of trespassing or vandalism. (R. p. 132, l. 25 – p. 133, l. 18). At this point, the gate is merely being utilized to harass the Appellant and to impede human traffic to Appellant's property.

The Opinion states that the Appellant has always been provided with a key to the gate, and while this may be true, the Opinion overlooked or misapprehended the facts showing that the locks would often be placed in such a

way that Appellant's key would not work and that same was likely an intentional plot to deny him access to his land so that he could not develop it. (R. p. 63, l. 17 – p. 64, l. 20). Also, SCE&G employees indicated that the gate was always open prior to the Appellant purchasing the land in question. (R. p. 101, ll. 11-16). Therefore, it served no useful purpose other than the harassment of the Appellant and is improper.

III.

In affirming the lower court's finding that the disputed roadway is only 14 feet wide, the Opinion misinterpreted or misapplied the facts contained in the Record and misconstrued the case of Rhett v. Grey, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012) as cited in the Opinion.

First and foremost, the Opinion incorrectly asserts that the Appellant's use of the roadway is by easement. As stated above in Argument I, the roadway is a public road which has been utilized since before the creation of Lake Murray and which once connected two other public roads.

Secondly, the Appellant has not sought to increase the width of the road, but merely wishes to utilize the full width of the road as it was on the date he purchased his property. The testimony contained in the Record shows that the road is 20 feet wide and that a 14-foot gate does not cover the entire roadway at its most narrow point. (R. p. 123, ll. 11-21; R. p. 130, l. 18 – p. 131, l. 10; R. p. 173-174).

Lastly, the Opinion indicates that pursuant to Rhett v. Grey, an easement owner cannot increase the easement and the burden on the servient estate. However, the clear testimony is that SCE&G, another servient estate owner if,

arguendo, the use of the roadway is only via easement, widened and improved the road on at least two occasions. (R. p. 68, ll. 11-20; R. p. 91, ll. 14-19). Both of these occasions were prior to the Appellant purchasing his property. The widened and improved roadway is what existed at the time of purchase and the Appellant expected to utilize the improved roadway.

CONCLUSION

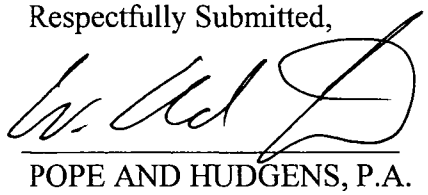
For the reasons set forth in this Memorandum, the Appellant respectfully requests that this Honorable Court grant this Petition for Rehearing and issue its Opinion:

(a) Reversing the lower court and finding that the disputed roadway is a public, county owned roadway; and,

(b) Reversing the lower court and finding that the gate erected across the disputed roadway is unneeded, unnecessary and improper; and,

(c) Reversing the lower court and finding that the disputed road way is at least 20 feet wide and not 14 feet wide.

Respectfully Submitted,



POPE AND HUDGENS, P.A.
W. Chad Jenkins
Post Office Box 190
Newberry, South Carolina 29108
803-276-2532
Attorneys for Appellant

March 3, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

Unpublished Opinion No. 2016-UP-069
Filed February 17, 2016

John S. Frick,

Appellant,

v.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin & Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the below stated pleadings on the below listed counsel of record in this matter by depositing a copy of same in the United States Mail, First Class, postage prepaid, on this the **3rd day of March, 2016**:

COUNSEL AND PARTIES SERVED:

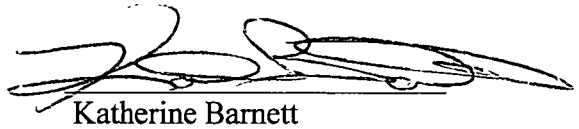
William H. Edwards, Esquire
Moore, Taylor & Thomas, P.A.
PO Box 5709
West Columbia, SC 29171
Attorney for Keith Fulmer

Rudolph C. Barnes, Jr., Esquire
156 Barnes Trail
Little Mountain, SC 29075
Attorney for Keith Fulmer

Austin J. Tothacer, Jr., Esquire
Newberry County Attorney
Courthouse Annex
1309 College St.
Newberry, SC 29108
Attorney for Newberry County

Jay Evan Bressler, Esquire
SCANA Legal Department
220 Operation Way, M.C.-C222
Cayce, SC 29033
Attorney for SCE&G

PLEADING SERVED:
Petition for Rehearing
Memorandum in Support of Petition for Rehearing



Katherine Barnett
Paralegal to W. Chad Jenkins

THOMAS H. POPE III
W. CHAD JENKINS
KYLE B. PARKER

POPE & HUDGENS ATTORNEYS. P.A.

JOSEPH W. HUDGENS
Of Counsel
THOMAS H. POPE
(1913-1999)

1508 COLLEGE STREET-P.O. BOX 190
NEWBERRY, SOUTH CAROLINA 29108
PHONE (803) 276-2532 FAX (803) 276-8684
WWW.POPEANDHUDGENS.COM

March 3, 2016

V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: John Frick, Appellant v. Keith Fulmer et al., Respondents
Appellant Case No: 2014-001472
Civil Action No. 2009-CP-36-415

Dear Ms. Allen:

Enclosed herewith for filing please find the original and six (6) copies of Appellant's Petition for Rehearing in the above referenced matter together with the Memorandum in Support of Petition for Rehearing and my Proof of Service of same.

Also enclosed is this firm's check in the amount of $25.00 for the filing fee associated with this request. Thank you for your assistance in this matter.

With kind regards.

Sincerely,

POPE AND HUDGENS, P.A.

W. Chad Jenkins

WCJ:kb
Enclosure
cc: Will Edwards, Esq.
Rudy Barnes, Esq.
Jay Tothacer, Jr., Esq.
Jay Bressler, Esq.