

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

APR 27 2016

SC Court of Appeals

Joseph R. Strickland, Master-in-Equity

Trial Court Case No.: 2013-CP-40-05740
Appellate Case No.: 2016-00046

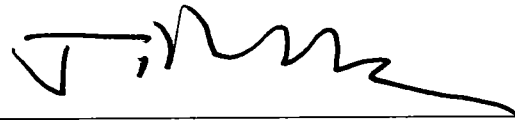
Hamilton Duncan, Individually and Hamilton Duncan, as
Personal Representative of the Estate of Christine A. Duncan.....Respondent,

v.

Roy Drasites and Elizabeth DrasitesAppellants.

REPLY BRIEF OF APPELLANTS

By: _____



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I. The Master-in-Equity-in-Equity erred in ruling that the purpose of the Easement is to access Lake Murray and burdens the entire southern property line of Appellants' Property.

Respondent contends Appellants' argument disproving this finding is flawed because the Woodtrail plat shows the easement burdening the entire length of Appellants' property's southern boundary. (*Trial Transcript p. 54, lines 17-25*) This contention does not defeat Appellants' argument that the easement did not grant access rights to Lake Murray because when you look at the Woodtrail plat you see that the road in question is contiguous to the termination point of the easement and the waters of Lake Murray were on the opposite side of the road. (*Defendant's Trial Exhibit 13*) The waters of Lake Murray, in 1976, did not reach this road area. This Woodtrail plat does not contradict or vary the easement Respondent relies upon; only visibly confirms the purpose of the easement (i.e. access to the road). (*Defendant's Trial Exhibit 13*) Respondent then argues on this point that implicit in the easement language is access to Lake Murray and states easement referenced to Lake Murray. This is misplaced. The easement language does not have language stating there is access to Lake Murray. (*Plaintiff's Trial Exhibit 1*) The only reference to Lake Murray is to the fact the easement terminates at the 360° contour of Lake Murray. (*Plaintiff's Trial Exhibit 1*) The only logical reason that the easement states this is that the grantor only owned the property to the 360° contour of Lake Murray. (*Trial Transcript, p. 63, lines 5-7*)

The burden of proving an easement is on the party claiming it. *David v. Gowen*, 83 Isaho 204, 360 P2s 403, 88 ALR2d 1192; *Schnider v. M. E. H. Realty Invest. Co.*, 239 Mo App 546, 193 SW 2d 69; *Hollingsworth v. Williamson* (Tex Civ App) 300 SW2d 194. Accordingly, the burden of proof rests with the person asserting it to show the existence of all facts necessary to

create by an easement appurtenant to his estate. *Brown v. Fuller*, 165 Mich 162, 130 NW 621; *Schnider v. M. E. H. Realty Invest. Co.*, 239 Mo App 546, 193 SW 2d 69; *Trater v. Rauch*, 154 Ohio St 286, 43 Ohio Ops 186, 95 NE2d 685; *Othen v. Rosier*, 148 Tex 485, 226 SW2d 622.

Implicit in Respondent's burden would be to prove that it can actually use the easement for the purpose intended. Respondent cannot prove that it has legal access to Lake Murray with SCE&G. The language of the Master-in-Equity's Order indicates Respondent had a legal right for access to Lake Murray for the purposes stated in the Order (i.e. launching a light watercraft into Lake Murray). (*Master-in-Equity's Order*, p. 12, dated July 20, 2015) The testimony of Tommy Boozer, Manager of South Carolina Electric & Gas Company's Lake Murray Shoreline Management Program, testified that the property owned by South Carolina Electric & Gas Company below the 360° degree contour came under the jurisdiction of SCE&G. (*Trial Transcript p. 83, lines 4-5*) Larry Smith, former surveyor employee of South Carolina Electric & Gas Company who had dealt with fringe land issues during his professional career, indicated the same. Trial Transcript p. 65, lines 23-25. The Lake Murray Shoreline Management Plan makes South Carolina Electric & Gas Company responsible for enforcing Federal Energy Regulatory Commission Directives regarding unauthorized uses of Lake Murray waters and land below the 360° degree contour elevation. (*Defendant's Trial Exhibit 3*) The easement rights that the Respondent would have would end at the 360° degree contour because that is the termination point of the easement by the language description in the easement. (*Plaintiff's Trial Exhibit 1*) The Respondent would be subject to approval from South Carolina Electric & Gas Company as to its access to Lake Murray and any use of the waters of Lake Murray.

Although the Master-in-Equity did view the property in question, there is no findings of fact in his Order as to his viewing of the property.

Appellant restates its facts as to this error by the Master-in-Equity and its argument which is set forth in the Initial Appellants' Brief which is denoted as "Facts as to Argument II" and "Argument II".

II. The Master-in-Equity-in-Equity erred in ruling that Respondent may utilize the easement for vehicular use towing light watercraft?

a. Appellants' argument is not reserved for Appellate review, or has been abandoned.

The Master-in-Equity found and concluded that the intention of the parties to the easement was that the Respondent be granted the right of ingress/egress and access to Lake Murray, including by vehicle towing and launching light watercraft. (*P. 11 and P. 12, Order of the Master-in-Equity dated July 20, 2015*) Respondent contends that Appellant did not reserve, for Appellant review, this ruling by the Master-in-Equity. This contention is based on the argument that this issue was raised by the Appellant for the first time on Appellants' Rule 52 and 59 Motion. This contention is misplaced. Respondent's Amended Complaint alleged he had a right to use the easement for vehicular use towing light watercraft. Appellants' Answer denied this allegation. (*Answer to Amended Complaint*) This issue was therefore before the Court and Respondent had the obligation to prove, by preponderance of evidence, this allegation. Respondent has failed to prove by preponderance of evidence this allegation. Appellants' Brief will hereafter state its argument on that particular matter.

Even though this issue was raised, Rule 52(b) specifically states that the sufficiency of the evidence in a non-jury matter may be raised in the appellate courts even though there was no motion challenging these findings or a motion for a directed verdict or a motion for judgment. *Norell Forest Prods. v. H&S Lumber Co.*, 308 S.C. 95, 417 S.E.2d 96 (Ct. App. 1994).

b. The easement is for use including vehicular towing of light watercraft.

As a general rule, to constitute a grant of an easement, any words clearly showing the intention to grant an easement are sufficient. 25 Am.Jur.2d. *Easement and Licenses* §15, at 512 (2004). “Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention.” *Smith c. Comm’rs of Pub. Works of City of Charleston*, 312 S.C. 460, 441 S.E.2d 331, 335 (Ct. Appl 1994).

The easement in question is for ingress and egress from the grantor’s property to the 360° contour of Lake Murray but is not specific as to access purpose. There is no plat to show what is located at the termination point of the easement or the location of the 360° contour. Plaintiff’s Trial Exhibit 1; Transcript p. 28, lines 19-21. Appellant believes these facts trigger the need for the Court to look beyond the easement itself for interpretation of the intent of the parties. The testimony of Respondent’s expert indicated the same. The Respondent’s expert testimony indicated the 360° contour moved inward from Lake Murray. (*Transcript p. 20, lines 1-2*) Respondent’s expert further indicated if there was a survey involved we would not be here today. (*Transcript p. 28, lines 17-18*)

“If the language is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect.” 25 Am.Jur.2d *Easements* §18, at 516 (2004). Cited as *Ten Woodruff Oaks, LLC v. Point Development, LLC*, 385 S.C. 174, 638 S.E.2d 510.

Circumstances surrounding the origin of the easement may also be considered in construing the easement. *Nance v. Waldrop*, 258 S.C. 69, 187 S.E.2d 226 (1972)(case applies to restrictions but restrictions are contractual in nature as are easements).

Respondent has failed to prove by preponderance of evidence the easement is for use including vehicular towing of light watercraft. Respondent and Appellants both presented evidence “outside the four corners of the easement”, without objection, from three surveyors to help the Court in interpretation of this easement. Any desire by the Respondent to limit the Court’s interpretation of easement to the easement language itself has been waived.

Respondent presented no evidence from the grantor of the easement as to its meaning. Respondent presented no evidence as to his interpretation of the easement nor as to his use of it, including vehicular towing. Respondent placed into evidence the easement document in question (*Plaintiff’s Trial Exhibit 1*) a plat prepared by Douglas Platt, surveyor that shows the Respondent’s lot but not the easement (*Defendant’s Trial Exhibit 8*) and a plat prepared by Site Consultants in 1988 showing the easement in question (*Defendant’s Trial Exhibit 9*). None of these plats corroborate the right of the Respondent to use the easement for vehicular towing of light watercraft. The Master-in-Equity’s Order only bases his decision, as to the specific access use of the easement, on the physical existence of Lake Murray at the time of the execution of the easement and that it was twenty (20’) feet wide (*Order of the Master-in-Equity-in-Equity dated July 20, 2015, P. 11*). The plat which is closest in time to the easement execution is the Woodtrail Plat prepared in 1981. (*Defendant’s Trial Exhibit 13*) This plat shows a road connected to the easement in issue. The physical presence of said road was questioned by the Respondent. However, that portion of the Appellants’ property, which is fringe land, was conveyed to Appellants’ predecessor-in-title shows the same road in existence in 1960,


Defendant's Trial Exhibit 7, and SCE&G reserved an easement in said road. (*Defendant's Trial Exhibit 9*)

CONCLUSION

Appellants contend that that the preponderance of the evidence does not support the conclusions by the Master-in-Equity that the use of the easement includes access to Lake Murray by vehicular towing and launching of watercraft. Preponderance of the evidence supports that the purpose of the easement was to gain access to a dirt road shown on a plat of Woodtrail Subdivision which road connected to Johnson Marina Road and the easement does not run the entire length of the Appellants' southwest property line, leaving some portion of Appellants' property free from the burden of the easement, which would prevent Respondent from reaching the lake without trespassing on the Appellants' property. Appellants contend that any access to Lake Murray by the Respondent for vehicle towing and launching of watercraft would be determined by South Carolina Electric & Gas Company based on its mandate from the Federal Energy Regulatory Commission if the Respondent wishes to access the property owned by South Carolina Electric & Gas Company which is below the 360° degree contour along the Appellants' property.

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April 26, 2016

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Joseph R. Strickland, Master-in-Equity

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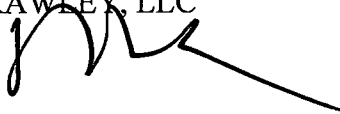
Roy Drasites and Elizabeth DrasitesAppellants.

CERTIFICATE OF COUNSEL

I hereby certify that this Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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April 26, 2016

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Court of Common Pleas

Joseph M. Strickland, Richland County Master-in-Equity

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Hamilton Duncan, Individually and Hamilton Duncan, as Personal
Representative of the Estate of Christine A. Duncan..... Respondent

v.

Roy Drasites and Elizabeth Drasites..... Appellants.

PROOF OF SERVICE

I, Nicole T. Price, a paralegal with the law firm of DAVIS | FRAWLEY, LLC, do hereby certify that I have served the following with the foregoing **REPLY BRIEF OF APPELLANTS**, by mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to them at the following address:

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on this 26th day of April, 2016 all in accordance with Rule 5 (b)(1) of the South Carolina Rules of Civil Procedure.



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