STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell Scarborough, Master in Equity

Case No. 2011-CP-10-

Bayview Acres Civic Club . . . . . Respondent

v.

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

APPELLANTS' FINAL BRIEF

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I. FACTS AND PROCEDURAL POSTURE

The subject of this case is a 50' wide piece of land which extends from Bay View Drive to the marshes of Shem Creek. It is owned by Respondent and used, in part, b Appellants, as it is adjacent to their property. The instant appeal commenced not with the hearing from which the appeal is taken but rather in a declaratory judgment action which was filed in 1982. In 1984, in *Guerry v. Moore*, Case No. 82-CP-10-4234, the then Master in Equity, the Honorable Louis Condon, entered an order relating to the same matter which is the subject of this action.

Prior to the filing of that action, the current Appellants had constructed a carport which extends through their property and some 15 feet into the strip. Judge Condon found that this carport had been built without objection by Respondents, and Judge Condon declined to order Appellants to remove it. In his final Order, entered on April 6, 1984, Judge Condon specifically declined to order that Appellants cease all use of the strip, holding instead that they were not permitted to erect any impediments to Respondent's use of the strip and access to the marsh, nor were they permitted to allow any impediments that would interfere with that access. He held that if such impediments were found to occur "with any frequency," his Order might be modified to address new situations.

Respondent brought this action seeking to have Appellants held in contempt for, amont other matters, allowing impediments to occur on the strip.[1] Following a hearing before the Honorable Mikell Scarborough, held on March 4, 2015, the Master in Equity found that Appellants had violated the original Order. He concluded that the evidence demonstrated there was a "long history" during which Appellants had "impeded and interfered with the Plaintiff's use and enjoyment of the property regularly and frequently," thereby triggering that portion of

[1] Although the initial Rule to Show Cause complaint raised other issues as well, this is the only portion of the Order from which Appellants have taken an appeal.

the original Order the permitted for modification. Although he made no factual findings to support this conclusion, he modified the Order of Judge Condon and terminated any rights Appellants had to the continued use of the 50' strip, as provided in the original Order. In addition, Judge Scarborough permitted Respondent to erect a fence running along the property line, a fence which now cuts off one-half of Appellants' carport.

II. ARGUMENT

A. The Modification of the 1984 Order Is Clear Error.

There is a clear body of South Carolina case law which allows for the modification of a prior Order, in the same case or in an action between the same parties. There is no question but that the action from which the instant appeal is taken is an action between the same parties, and that it involves the same subject matter. *See, e.g., Holmes v. East Cooper Cmty Hosp., Inc.*, 408 S.C. 138, ___ S.E.2d ___ (2014); *Carman v. S.C. Alcoholic Beverage Control Comm'n,* 317 S.C. 1, 451 S.E.2d 383 (1994). In point of fact, Respondent filed its complaint as a Rule to Show Cause as to why Appellants should not be held in contempt for violation of the 1984 Order. As such, the standard rules of collateral estoppel apply, and that Order may be modified only if the conditions for such modification, as spelled out in the Order itself, are met.

Judge Condon's Order expressly stated that it was subject to modification upon a finding that Appellants had erected some type of permanent structure or fence over the area, or that indirect impediments existed with a "degree of frequency" and such that "they interfere[d] with free access of the lot owners." There was no evidence presented at the hearing that any of these conditions had been met.

Appellant Gerald Moore testified, consistently, that he had never parked multiple vehicles on the portion of the carport property belonging to Respondent. He further testified that

vehicles were parked there only when a visitor was unaware of the restrictions on his use of that land. He also testified that none of the personal property that was pictured by Respondent as being physically located on its portion of the property in any way impaired or impeded public access across the 50' strip. Finally, he stated that to the limited extent that there was property belonging to him located on the strip – such as shrubbery he had planted or garbage cans situated next to the carport – that property was there prior to the 1984 Order, not mentioned therein, and its situs had never altered. *See*, Trans., p. 28.

"There is a long-standing rule in this State that one judge of the same court cannot overrule another." *Charleston Cnty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother,* 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995)(*citing Tisdale v. Am. Life Ins. Co.*, 216 S.C. 10, 56 S.E.2d 580 (1950); *Dinkins v. Robbins*, 203 S.C. 199, 26 S.E.2d 689 (1943)). Although the original, 1984, Order in this action permitted for modification, it did so only in the limited situation when impediments to access across the 50' strip occurs "with any degree of frequency." Respondent showed, at the hearing, several pictures claiming to show that access was impeded. However, the testimony clearly demonstrated that any property of Appellants' located on the strip was there for only brief periods of time, or merely by the accident of a visitor parking where he was not supposed to park.

Respondent utterly failed to show conditions that would meet the requirements of the 1984 Order. The 2015 modification entered by the Master in Equity following the hearing on Respondent's Rule to Show Cause was error, in that it purports to modify the 1984 Order even though the conditions for modification have not been met.

A decision to hold a party in contempt rests in the sound discretion of the trial judge. *See., e.g., State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994). At the

same time, however, the ultimate holding of the recent Order, that permitting Respondent to erect a fence which would, among other issues, bisect the carport long-ago built by Appellants and permitted to stand since the early 1980's, significantly modifies the 1984 Order. That being the case, it is plain error to permit the erection of this fence unless Respondent has clearly demonstrated that the conditions allowing modification, as contained in the original Order itself, have been met.

Respondent has made no such showing. As a result, the modification of the 1984 Order is in error.

CONCLUSION

For the reasons set forth above, the Order of March 24, 2015, allowing the erection by Respondent of a fence through Appellants' carport should be reversed.

Respectfully submitted,

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6/17, 2016
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellants' Final Brief is in compliance with Rule 211 (b) of the South Carolina Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Appellant's Final Brief was served, via United States Mail or hand delivery, upon

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June 19, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Attention: Shelby

RE: Bayview Acres Civic Club v Gerald E. Moore, Jr, et. al , Case No. 2015-000920

Dear Shelby,

Enclosed herewith please find the Brief of the Appellant Gerald E. Moore, et.al. Please file the originals and forward a copy to me in the envelope provided

David A. Collins, Esq.

Cc: Benjamin Traywick, Esquire

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