THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

CASE NO. 2014-CP-10-5608
APPELLATE CASE 2016-000886

James Bradley Williams and Robert Blair Kline, Jr..... Plaintiffs/Appellants,

v.

Merle S. Tamsberg,..... Defendant/Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal of an Order Granting Defendant's Motion for Summary Judgment/Denying Plaintiff's Motion for Summary Judgment entered by Charleston County Master-in-Equity Mikell Scarborough and filed on March 29, 2016 ("Summary Judgment Order"), by which the Appellant's efforts to obtain an order terminating a recorded appurtenant easement were dismissed as a matter of law under Rule 56, SCRCP. The recorded easement at issue encumbers 45 Legare Street in Charleston, South Carolina, which is real property currently owned by the Appellants. The dominant parcel is 47 Legare Street, an adjoining parcel currently owned by the Respondent.

The Appellants filed their Complaint on September 12, 2014. (Complaint) The Appellants subsequently amended their Complaint, and asserted the following causes of action: (1) a claim for declaratory judgment ruling that the easement was abandoned; (2) injunctive relief; (3) termination of the easement; and (4) trespass. (Amended Complaint). On February 10, 2016, the Appellants filed a Motion for Summary Judgment and supporting memorandum. (Plf. Mot. Summ. Judg.) On February 22, 2016, Respondent filed and served its Motion for Summary Judgment. (Def. Mot. Summ. Judg.). Respondent then filed and served its memorandum in support of its own Motion for Summary Judgment and in opposition to Appellants' Motion for Summary Judgment on March 1, 2016. (Def. Memo.) Thus, cross-motions for summary judgment were before the Master-in-Equity. The Master-Equity conducted a hearing on Appellant's motion on March 2, 2016 and on Respondent's motion on March 11, 2016. Following these hearings, the Master-in-Equity entered the Summary Judgment Order, by which all

of the Appellants' causes of action were dismissed. Neither party filed a motion to alter or amend. Appellants instituted this appeal.

STATEMENT OF THE FACTS

The Appellants are the current owners of 45 Legare Street, which is adjacent to, and to the south of, 47 Legare Street. (Amended Complaint, ¶ 11) 47 Legare Street is currently owned by the Respondent. (Amended Complaint, ¶ 11) The properties formerly constituted a single parcel until 1911. (Def. Memo Ex. A)

By operation of a deed recorded in RMC Office for Charleston County ("RMC Office") on April 15, 1911, W.H. Hinson divided the property and conveyed 47 Legare Street to Julia Dill ("Dill Deed"). (Def. Memo. Ex. A.) Hinson retained 45 Legare Street. (Def. Memo. Ex. A.). The Dill Deed created an easement over 45 Legare Street for the benefit of 47 Legare Street (the "Easement"). The deed provides:

> Also the full and free use and enjoyment as an easement to run with the land of the right of ingress, egress, and regress, in, over, through, and upon the alleyway eight (8) feet wide as a driveway or carriageway situate, lying and being immediately to the south of the above-described property and being the southern boundary of said above described lot of land.

(Def. Memo. Ex. A.) At this time, the Easement was eight feet wide, and ran the entire length of the border between 45 Legare Street and 47 Legare Street from the public right-of-way to the rear property line of 45 Legare. (Def. Memo. Ex. A.)

By 1971, 45 Legare Street and 47 Legare Street had changed hands. That year, the Easement area was reduced by the owners of the properties. By deed dated April 6, 1971, the owner of 47 Legare Street deeded the rear portion of the Easement to the owner of 45 Legare Street, leaving approximately one-half of the original length of the Easement in place. (Pl. Mot. Summ. Judg. Ex. D, E) The owners intended to leave the

remaining portion of the Easement in place, as set forth in a contemporaneous recorded document entitled "Covenant" ("1971 Covenant"), by which the owner of 45 Legare Street reaffirmed the remaining portion of the Easement and instituted restrictive covenants on 45 Legare Street. (Def. Memo. Ex. B) Specifically, the 1971 Covenant provides that the owner of 45 Legare Street "desires to reaffirm the existence of said easement, to the extent as agreed upon by the parties, by the execution of the [Covenant]." (Def. Memo. Ex. B) The 1971 Covenant then referenced a plat defining the boundaries of the Easement and provides that no buildings or other obstructions shall be constructed in the Easement. (Def. Memo. Ex. B) The 1971 Covenant also provides that "[t]he aforesaid covenants, restrictions and limitations shall be covenants running with the land and shall be binding on the [owner of 45 Legare Street], her heirs, assigns and successors in title." (Def. Memo. Ex. B.)

The Appellants took title to 45 Legare Street by operation of a deed dated May 17, 2004. (Plf. Mot. Summ. Judg. Ex. H) The Appellants had notice of, and actually knew of the Easement prior to purchasing 45 Legare. (Def. Memo Ex. D; Williams Tr. 34:12 – 35:5). They then waited until 2014 to institute this action seeking, among other things, an order that the Easement is terminated. (Complaint)

ARGUMENT

This appeal is to be determined using summary judgment standard applied by the circuit court. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). In evaluating a motion for summary judgment, a court must view "the evidence and all reasonable inferences . . . in the light most favorable to the non-moving party." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007). However, if, after

granting such deference to the non-moving party, it is apparent to the court that "there is no genuine issue as to any material fact,"' and the moving party is entitled to judgment "'as a matter of law,'" the court should grant summary judgment. *Id.* (quoting S.C. R. Civ. P. 56(c)).

I. THE MASTER-IN-EQUITY DID NOT ERR IN HOLDING THAT THE EASEMENT IS APPURTENANT AS A MATTER OF LAW.

To determine whether an easement is in gross or appurtenant, the court must determine the intent of the parties. "In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578, 582-3 (2009), *quoting Wayburn v. Smith*, 270 S.C. 38, 41–42, 239 S.E.2d 890, 892 (1977). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." *Id.*, quoting *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391–92 (1987). "The intention of the grantor must be found within the four corners of the deed." Id.

An appurtenant easement is one that "inheres in the land, concerns the premises, has one terminus on the land ***of the party claiming it***, and is essentially necessary to the enjoyment thereof." *Id. (emphasis added)*; *Smith v. Commissioners*, 312 S.C. 460, 441 S.E.2d 331 (Ct.App.1994); *Carolina Land Company, Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975); *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965); 12 S.C. Juris. *Easements* § 3 (2015). An appurtenant easement passes with the dominant estate. *Id.* "[E]asements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate." *Rhett v. Gray*, 401 S.C. 478, 492, 736 S.E.2d 873, 880 (Ct. App. 2012).

A. The Master-in-Equity correctly held that the Easement has a terminus onto 47 Legare Street.

The facts in this matter are uncontradicted. The Easement was created by operation of the Dill Deed in 1911 and provides that it was to "run with the land of the right of ingress, egress, and regress, in, over, through, and upon the alleyway eight (8) feet wide as a driveway or carriageway situate . . .." (Def. Memo. Ex. A) In 1971, the Easement was shortened, and the then-owner of 45 Legare Street reaffirmed the Easement in the 1971 Covenant, which provided that the easement and covenants continued to run with the land and were binding on the owner of 45 Legare Street. (Def. Memo Ex. B).

The Appellants contend that the Easement did not have a terminus in the dominant estate – in this case, 47 Legare Street. Their argument is that the Easement simply borders 47 Legare Street, and that an appurtenant easement can never border the dominant estate. According to the Appellant, an appurtenant easement must run across the servient estate and have a clear dead-end in the dominant estate, presumably with no other portion of the easement touching the dominant estate. This argument has no basis in law or the facts of this case.

First, as set forth above, the 1971 deed reduced the length of the Easement such that it runs from the public right-of-way approximately halfway down the western boundary of 47 Legare Street, where it ends. This is a clear terminus. The owner of 47 Legare Street accesses the easement at the public right-of-way and exits the easement at the rear of 47 Legare Street. If this is not a terminus, there is no such thing. Indeed, it makes no difference whether the easement borders the dominant parcel, runs diagonal

across the servient parcel, or has a less direct route – if the easement touches the dominant parcel and provides access, it has a terminus in the dominant parcel.

Under South Carolina law, the terminus element requires one terminus on the land of the party claiming it. *Smith v. Commr's of Pub. Works*, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994). This is clearly intended to preclude a property owner from obtaining an appurtenant easement that ends on a parcel owned by another, thereby allowing the owner of the dominant parcel to piggyback on access from a public road or another easement over separate property. This principle is outlined in *Whaley v. Stevens*, 21 S.C. 221 (1884), in which the Supreme Court of South Carolina made it clear that an easement may not terminate on property other than the dominant parcel. Indeed, in *Whaley*, the plaintiff owned Caneslatch plantation, which was separated by a public road from Seven Oaks plantation. Seven Oaks plantation bordered the Stono River. The plaintiff's easement in *Whaley* provided for "a right of way, by means of a road leading from the public road over the adjoining land of the said Defendant, known as the Seven Oaks plantation, to a creek leading into the said Stono River." 21 S.C. at 224. In other words, the purported easement terminated not on the dominant parcel, but on a public road. In finding that the plaintiff did not have an appurtenant easement, the *Whaley* court wrote:

> But a more fatal objection is that, in describing the right of way in question, it is not alleged that it begins on the Caneslatch plantation, or that it even leads from said plantation. Indeed, from the description of the way as given in the complaint, it does not appear that it touches Caneslatch plantation at any point or reaches to it.

Id. at 224-5. South Carolina courts have reiterated the principal that the easement must touch the land of the party claiming the easement where the court found an easement to be in gross where the person reserving an easement did not actually own the dominant parcel. *Springob v. Farrar*, 334 S.C. 585, 588-589, 514 S.E.2d 135, 137 (Ct. App. 1999).

The Easement at issue satisfies the rule articulated in *Whaley*. The Easement "touches" Respondent's property "and reaches to it" at the lot line, and more specifically the area of the present gate, where it has its terminus. *Id.* Indeed, the "driveway" or "carriage way" referenced in the Dill Deed is the Easement itself, which terminates in Respondent's backyard. In exercising use of the Easement, Respondent and her predecessors-in-title proceeded directly from Respondent's property to the Easement without a gap.

The Appellants urge the Court to analogize the holding in *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944) to the present case. In *Steele*, the court was not faced with a question regarding the enforceability of an easement between the owners of the original servient and dominant parcels. Rather, the appellant was the purchaser of a subdivided portion of the servient parcel which happened to border the driveway easement crossing both properties. Thus, the appellant was not even an owner of the dominant parcel, but rather was trying to piggyback on an easement to provide an alternative route to the back of the servient parcel, which already had a 70 foot frontage on a public road. Had the owner of the dominant parcel instituted the case, the result likely would have been different. Simply put, the *Steele* case is not properly analogized to this matter. The Respondent is the owner of the dominant parcel, and the Easement clearly terminates on her property as a matter of law.

B. The Master in Equity properly held that the easement was and is necessary to the enjoyment of 47 Legare Street.

The Appellants contend that the Easement is not appurtenant because it is not essentially necessary to the enjoyment of 47 Legare Street. The Appellants support this argument by citing plats which appear to show the changing configuration of 47 Legare

Street in the years after the Easement was created by deed in 1911 and affirmed by the 1971 Covenant. The Appellants provided no evidence or argument concerning whether the Easement was essentially necessary in either 1911 or 1971.

The Appellants' argument runs contrary to the very nature of an appurtenant easement. An appurtenant easement is perpetual, and may not be destroyed. 25 Am Jur 2d *Easements and Licenses* § 82 (2015) ("In general, an easement appurtenant conveys a good and rightful title."). Therefore, the fact that the configuration of 47 Legare Street may have changed over the years is irrelevant. The "essential necessity" must have existed at the time the Easement was conveyed. The Appellants provided only evidence that the Cummins & McCrady plat shows a garage existed as of 1971, demonstrating that the driveway was necessary as late as that date. (Plf. Mot. Summ. Judg. Ex. H)

Further, South Carolina law provides that an appurtenant easement does not have to be absolutely necessary, though it may not be established for mere convenience. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 421, 633 S.E.2d 136, 141 (2006). The only evidence presented during either summary judgment hearing supports the Master-in-Equity's finding that the Easement is necessary, and not merely a convenience, even today. Indeed, the Respondent has no other satisfactory method of bringing large-scale equipment and tools to the rear of 47 Legare Street. (Tamsberg Aff., ¶ 3) While there is a gate at the front of 47 Legare Street, it is too narrow for large appliances and other equipment to be carried through it. (Tamsberg Aff., ¶ 3) Further, Respondent has only one small parking spot at the front of 47 Legare Street, and this parking spot is so narrow that one can pull a modern car into the spot only with difficulty. (Tamsberg Aff., ¶ 3) This is without question sufficient necessity to support an appurtenant easement under

South Carolina law. *See Proctor v. Steedley*, 398 S.C. 561, 575, 730 S.E.2d 357, 365 (Ct. App. 2012) (holding that an access road across the servient estate was necessary where it was the only reasonable method for accessing the northern portion of the dominant estate.).

II. THE MASTER-IN-EQUITY PROPERLY HELD THAT THE RESTRICTIVE COVENANTS SET FORTH IN THE 1971 COVENANT ARE VALID AND ENFORCEABLE AS A MATTER OF LAW.

The 1971 Covenant unambiguously provides for restrictions on 45 Legare Street designed to protect the Easement rights. It provides:

> (1) That no building or other structure shall be erected [on the Easement].
>
> (2) That no obstruction shall be placed or permitted to remain [on the Easement] so as to prevent the right of ingress, egress, and regress, in, over, or through, and upon the said strip of land as a driveway or carriageway to the owner of Number 47 Legare Street.

(Def. Memo. Ex. B). The 1971 Covenant further provides that "the aforesaid covenants, restrictions, and limitations shall be covenants running with the land and shall be binding on Margarette deSaussure Black, her heirs, assigns and successors in title." (Def. Memo Ex. B).

There is no issue of fact concerning the enforceability of the restrictions set forth in the 1971 Covenant. First, it is settled law that restrictive covenants may be created in a declaration such as the 1971 Covenant. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 362, 628 S.E.2d 902, 913 (Ct. App. 2006). Further, "[r]estrictive covenants differ from contracts in that they run with the land, meaning that they are enforceable by and against later grantees." *Id. at* 61, 628 S.E.2d at 913. In order to run with the land, the restriction limiting the use of property must be construed to touch and concern the land and there must be an indication that the parties

intended for the covenant to run with the land. *Charping v. J.P. Scurry & Co.*, 296 S.C. 312, 314, 372 S.E.2d 120, 212 (Ct. App. 1988). In the *Charping* case, the court reasoned that the restriction at issue was a "real covenant" running with the land because "it affects the use of the subject land, it affects the quality and mode of enjoyment on the land, and it concerns the interest in the land that was conveyed; its purpose is to alter the legal rights which otherwise flow from the land." *Id.*

Here, the 1971 Covenant cites the Easement grant in the Dill Deed, and Margarette Black, Appellants' predecessor in title, agreed to abide by certain additional restrictions on the Easement area. It provides that the covenants therein are to "run with the land," and on its face clearly complies with South Carolina law regarding valid restrictive covenants. Further, there is no dispute that the 1971 Covenant affects the use of 45 Legare Street, in that it specifies activities which may not be undertaken to interfere with the Easement. It therefore touches and concerns the land. For these reasons, there is no issue of fact concerning the enforceability of the restrictive covenants.

The Appellants' contention that the 1971 Covenant provides no access rights to the owner of 45 Legare Street runs contrary to the plain language of the document and South Carolina law. The 1971 Covenant clearly reaffirmed the Easement that was set forth in the Dill Deed and further declares the restrictive covenants. Therefore, if the Court were to give effect to the intent of the parties as determined from the entire document, as suggested in the Appellant's brief, there exists only one reasonable conclusion. In 1971, the parties reaffirmed the existing Easement and added restrictive covenants to preclude the owner of 45 Legare Street from impeding the Easement. Any other interpretation would be nonsensical.

Therefore, the Master-in-Equity properly held that the 1971 Covenant sets forth restrictive covenants that are valid and enforceable as a matter of law.

III. THE MASTER-IN-EQUITY PROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' TRESPASS CAUSE OF ACTION BECAUSE THAT CAUSE OF ACTION IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

The Appellant asserted the following causes of action: (1) a claim for declaratory judgment ruling that the easement was abandoned; (2) injunctive relief; (3) termination of the easement; and (4) trespass. The Appellants did not appeal the portion of the Master-in-Equity's order concerning abandonment and it is now the law of the case. *In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting an unappealed ruling becomes law of the case and precludes further consideration of the issue on appeal). Further, the Summary Judgment Order did not address the Appellant's claim for injunctive relief. Therefore, neither cause of action is implicated by this appeal.

However, the Appellants' claim for trespass is barred by the applicable statute of limitations. The statute of limitations for trespass upon or damage to real property is three years from when a person knew or by the exercise of reasonable diligence should have known that he or she had a cause of action. S.C. Code § 15-3-530(3) (2015); *McAlhany v. Carter*, 415 S.C. 54, 63, 781 S.E.2d 105, 110 (Ct. App. 2015). In South Carolina, the "discovery rule" tolls the statute of limitations until a person knows, or by the exercise of reasonable diligence should know, that he has a cause of action. S.C. Code Ann. §15-3-535; Barr v. City of Rock Hill, 330 S.C. 640, 645 (Ct. App. 1958). Per the discovery rule, the statute runs from the date of the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. Republic Contr. Corp. v. S.C. Department of Highways and Pub. Transp., 332

S.C. 197, 207 (Ct. App. 1998). The exercise of reasonable diligence means simply that an injured party must act with the same promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been involved or that some claim against another party might exist. *Id.* at 207.

Appellant Williams' testimony clearly forecloses the trespass claim. He testified in his deposition that he knew about the easement prior to the purchase of 45 Legare Street, possibly when Appellants' realtor first showed the property to them in 2004:

> Q: Do you remember when you first became aware that the property was encumbered by this easement?
> A: It was early on.
> Q: Okay.
> A: It may have been the first day we saw it.
> Q: Okay.
> A: We knew there was an easement involved in the past or present, or whatever. But, no, we were aware of it.

(Williams Tr. at 14: 7-15). Despite knowing of the existence of the easement in 2004, the Appellants waited until September 12, 2014 to file the lawsuit, a delay of over a decade:

> Q: Okay. Why wait so many years to bring a lawsuit?
> A: Why? Rob told me you would ask that. And when we bought the house, Mr. Tamsberg had terminal cancer. We knew the easement was there. It was changing hands. It would have been a good time to get it sorted out. But we didn't want to move in and sue a couple that was dealing with cancer. Then he died. Again, we could have done it. But we didn't feel comfortable suing a widow who just lost her husband to cancer. We also noted the wall. And our position was, that easement was abandoned ever since the first day that wall went up. It was never a concern to us. It was never used by her, ever. The only time it was ever used was as -- for her landscaping people to walk down her driveway and go through her gate. It was never used as a carriage way. It was abandoned, in our opinion. So there was no reason to ever bring it up.

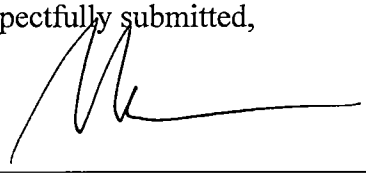
(Williams Tr. at 34:12 – 35:5). Thus, the Appellants knew of the existence of the Easement and nursed doubts about its validity beginning in the spring of 2004. Based on

the requirements of the discovery rule, cited above, the Appellants did not act with reasonable diligence in pursuing their claims as a matter of law. The statute of limitations has thus expired on their trespass claim, and the Master-in-Equity properly granted summary judgment as to that issue.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that this Court AFFIRM the Master-in-Equity's order granting summary judgment as to all claims asserted by the Appellants.

Respectfully submitted,



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Merle S. Tamsberg,..... Defendant/Respondent.

PROOF OF SERVICE

I do hereby certify that on the 19th day of August 2016, I served a copy of the within *Initial Brief of Respondent* and *Respondent's Designation of Matter* in the within entitled matter by sending a copy of the same in an envelope with the correct postage prepaid addressed to:

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August 19, 2016

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Re: James Bradley Williams, et al. v. Merle S. Tamsberg
Appellate Case No. 2016-000886
WCSR File No.:85674.0042.6

Dear Ms. Kitchings:

Enclosed for filing please find the original and two copies of the *Initial Brief of Respondents*, the *Designation of Matter of Respondents*, and *Proof of Service* in the above action. Please return a file-stamped copy to me via the enclosed self-addressed, stamped envelope.

By copy of this letter with enclosures, we are the serving the same on all parties.

Sincerely,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Matthew E. Tillman

MET/cbc
Enclosures

cc: Robert A. Kerr, Esq.
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