

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUN 26 2017

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

S.C. SUPREME COURT

Lower Court Case No. 2013-CP-23-3989
S.C. App. Appellate Case No. 2015-000107
S.C. App. Op. No. 2017-UP-002
Sup. Ct. Appellate Case No. 2017-000898

Woodruff Road SC, LLC, Petitioner,

v.

SC Greenville Hwy 146, LLC, Respondent.

REPLY TO RETURN TO
PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

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REPLY ARGUMENT

I. The easement creates a right of way for two-way commercial traffic for travelling to, from, and between the commercial tracts.

The principal argument of Respondent (Defendant) is that nothing in the easement restricts the use of the easement to two-way commercial traffic travelling on the correct (American) side of the road. Rather, Defendant argues that nothing in the easement requires two-way traffic, and nothing requires the traffic to travel on a particular side of the road. Thus argues Defendant, it is free to use the easement for conducting a business operation in the easement on the wrong side of the roadway created by the easement.

As set forth in Petitioner's (Plaintiff's) certiorari petition, and not disputed by Defendant, the scope of a written easement is to be determined by the intent of the parties creating the easement. The undisputed circumstances giving rise to the easement are the following: (1) the easement agreement was entered by the owners of adjoining commercial tracts; (2) the language of the easement makes it indisputable that the purpose of the easement was for the ingress and egress of vehicular traffic to, from, and between the adjoining commercial tracts; (3) the right to use the easement for its stated purposes is a mutual right held by both parties; and (4) there is no evidence that the original parties to the easement intended that the easement be used for conducting a drive-thru business operation in the easement or for any purpose other than the ingress and egress of vehicular traffic to, from, and between the adjoining commercial tracts.

The easement is for the ingress and egress of vehicular traffic, which itself establishes the intended use of two-way traffic. Moreover, the disputed portion of the easement is 25 feet wide, the standard width for a two-lane road. Thus, the undisputed facts and circumstances of this case, combined with the express language of the easement, establish that the disputed portion of the easement was intended to be a right of way for two-way commercial traffic travelling to, from,

and between the commercial tracts. There is no other reasonable reading of the easement under the undisputed facts and circumstances of this case.

Here, Defendants direct travel onto the wrong (English) side of the roadway created by the easement. Defendants therefore necessarily argue that nothing in the easement requires the vehicular traffic to travel on a particular side of the easement. There simply is (and was) no need to specify that traffic travel on a particular side of the roadway, because it is known absolutely that American traffic travels on the American side of the road, not the English side of the road. If there was an intent to do otherwise, it would have to be specified in the easement itself or at least evidenced by something existing at the time that the parties created the easement. There is no such evidence. Moreover, accepting Defendant's argument that the easement permits two-way traffic on the wrong sides of the road creates a danger to the travelling public that cannot and should not be accepted by any court, at least in the absence of any specific language in the easement that permits two-way traffic on the wrong side of the roadway.

II. Conducting a drive-thru business operation in the easement is not a permitted use.

Were it true that the easement does not create a right of way for two-way commercial traffic, Defendant's drive-thru business operation is nevertheless not a permitted use of the easement. The easement expressly states its sole purpose as the ingress and egress of vehicular traffic to, from, and between the commercial tracts, a mutual right held by Plaintiff and Defendant. Nothing in the easement, nor anything in the evidence, supports any reading of the easement as permitting Defendant to use the easement as a location for actually conducting business operations rather than the simple and straightforward movement of vehicular traffic to, from, and between the commercial tracts.

III. Defendant’s “use” arguments are irrelevant.

Defendant argues that its drive-thru business operation use of the easement is permitted, because Plaintiff has not used, does not use, and has no current need to use the disputed portion of the easement. This simply is not the question. Rather, the question is whether the language creating the easement allows this use. If it does not (and it does not), then the absence of any interference with Plaintiff’s use of the easement is irrelevant. Defendant’s right to use the easement is limited to the right granted by the easement, even if its actual use does not interfere with Plaintiff’s mutual right to use the easement. The fact that Plaintiff does not currently use or need to use the easement does not and cannot expand the right granted by the easement. Rather, as the owner of the servient estate, Plaintiff has the absolute right to insist that Defendant’s use of the easement be limited to the right expressly granted by the easement. And as shown above and explained more fully in Plaintiff’s certiorari petition, Defendant’s right to use the easement does not include the right to use the easement as a site for actually conducting business operations, nor does it include the right to direct two-way commercial traffic onto the wrong side of the road, thereby completely destroying any reasonable use of the disputed portion for two-way commercial traffic to, from, and between the commercial tracts.

IV. Defendant’s “strict construction” argument turns the law on its head.

Defendant correctly notes that written easements are strictly construed, and then argues that this rule supports its position, because nothing in the easement expressly forbids a drive-thru business operation and nothing expressly requires two-way traffic on a particular side of the road. Defendant has turned the law on its head.

The “strict construction” rule for written easements requires that the scope of the easement be strictly construed *against* Defendant (dominant estate) and *in favor of* Plaintiff (servient estate)

so as to impose only that burden specifically imposed by the written easement. Here, nothing in the easement agreement, and nothing in the evidence, even hints at any intent by the original parties to allow the dominant estate (Defendant) to use the vehicular traffic right of way as a stop-and-go location for actually conducting business in the easement, or for any purpose other than the simple and straightforward movement of vehicular traffic to, from, and between the commercial tracts. Thus, under the controlling “strict construction” rule, Defendant’s drive-thru business operation is not a permitted use of the easement.

Moreover, Defendant’s argument is based upon the premise that any use not precluded by the language of the easement is permitted, placing the burden on easement drafters to specify all excluded uses. Accepting this argument would make it virtually impossible to draft an easement agreement. Strict construction actually means that the grant of rights is what is strictly construed (not the absence of an exclusion). Simply stated, if the right is not granted in the easement, it does not exist. Here, the easement is limited to the ingress and egress of vehicular traffic to, from, and between the commercial tracts. Nothing in the easement permits any use that involves actually conducting business with wrong way traffic that prevents free traffic flow in the easement as opposed to the simple and straightforward movement of vehicular traffic to, from, and between the commercial tracts. Defendant’s attempt to bootstrap this “business use” right into existence as not having been specifically denied violates the strict construction rule and the common sense reading of an easement that is required by law.

V. Defendant’s arguments prove too much.

The written easement agreement created a single easement with a 45-foot section and a connected 25-foot section, not two easements. Thus, if Defendant has the right to direct commercial traffic onto the wrong side of the roadway for the purpose of actually conducting

business in the easement, it has the right to do the same thing in the 45-foot section that connects the commercial tracts to the adjoining highway. Nothing in the easement agreement draws any distinction in the rights to use the two sections of the easement. Thus, accepting Defendant's argument means that it can also convert the far left outbound lane of the 45-foot section into an inbound lane as part of its drive-thru business operation in the easement. Clearly, the easement cannot be read to allow this use of the 45-foot section and, therefore, it cannot be read to allow any such use of the 25-foot section.¹

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Plaintiff's Petition for a Writ of Certiorari, Petition for Rehearing, Final Brief of Appellant, and Final Reply Brief of Appellant, it is respectfully submitted that this Court should issue a writ of certiorari to the Court of Appeals, reverse the Court of Appeals, and remand for the entry of judgment in favor of Plaintiff.

Respectfully Submitted,



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¹ In footnote 5 at page 21 of its Return, Defendant contends that Plaintiff's reason for filing this lawsuit was a concern that its tenants would view the drive-thru as a breach of their lease agreements and result in claims being made against Plaintiff. (Init. Resp. Br. 23 n.4). It is true that this was "one of [Plaintiff's] concerns" (R. 0091), but Plaintiff was "more concerned" with the negative impact on flexibility in the future use and reconfigurations of the commercial property, as well as the marketability and value of the property. (R. 0115-0116; see also R. 0074-0075; 0096-0097; 0108; 0182-0183; 0202-0204; 0212; 0216-0217; 0218). For these reasons, Plaintiff cannot now allow the drive-thru to exist and operate, even if there is no current problem, because it cannot run the risk that allowing the drive-thru now would result in a claim for adverse possession, waiver, abandonment or the like that would prevent Plaintiff or its purchasers from using the easement for its express purposes in the future, *i.e.*, for two-way commercial traffic to, from, and between the commercial tracts.

June 26, 2017
Columbia, SC

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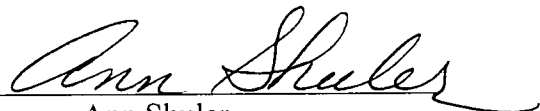
v.

SC Greenville Hwy 146, LLC,Respondent.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served a copy of the Petitioner's Reply to Return to Petition for a Writ of Certiorari to the Court of Appeals this 26th day of June, 2017, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to counsel for the Respondent at the following address:

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