STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	**CIVIL ACTION NO.: 2011-CP-07-00925**
WILLIAM M. RHETT, NANCY R. RHETT and WILLIAM M. RHETT, III,	
Plaintiff,	
vs.	**FINAL ORDER OF JUDGMENT**
JONATHAN H. GRAY,	
Defendant.	

Date of Trial: December 16, 2014
Presiding Judge: Honorable Terry A. Finger
Attorney for Plaintiffs: H. Fred Kuhn, Jr., Esquire
Attorney for Defendant: James J. Wegmann, Esquire
Court Reporter:

This is an easement dispute between adjoining landowners. The parties previously litigated various claims, some of which are not at issue in this matter. In the prior case, the Honorable Marvin H. Dukes, III issued an Order dated December 21, 2009. That Order was appealed by both parties. The South Carolina Court of Appeals issued a decision on December 19, 2012, which affirmed in part and reversed in part. This case was filed while the first case was pending appeal.

This case was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on February 24, 2011. In their Complaint the Plaintiffs, William M. Rhett and Nancy R. Rhett ("Rhetts") allege that they own an easement that runs across the land of the Defendant, Jonathan H. Gray ("Gray"). William M. Rhett, III, is the son of the Rhetts and lives in the Cottage. (See Finding of Fact 11 below.) Their Complaint contains two (2) causes of action. In the first cause of action, they ask the Court to declare that Gray has unreasonably interfered with their full and free use and enjoyment of their easement by placing certain

obstructions and barriers upon it and they ask that these obstructions and barriers be removed. In their second cause of action, the Rhetts request that Gray be held in contempt of court for interfering with their easement rights.

On July 24, 2014, the Rhetts filed an Amended and Supplemental Complaint. The Rhetts alleged that since the hearings held on June 25 and July 22, 2009 which resulted in the Dukes Order, there have been substantial and material changes in facts and circumstances so that a gate erected by Gray upon their easement is now an unreasonable interference with the right of passage of the Rhetts. The Rhetts request that the gate either be removed or relocated, and they further request an award of damages against Gray for their costs and attorneys' fees as a result of Gray's alleged unreasonable interference with their full and free use of their easement.

On July 24, 2014, Gray filed an Amended Answer and Counterclaim. The first defense consists of a qualified general denial. The second defense raises the affirmative defense of *res judicata*. The third defense is a counterclaim alleging that the Rhetts are in contempt of court for wrongfully subdividing or adding acreage to their property.

On August 15, 2014, the Rhetts filed a Reply to Gray's Counterclaim, denying the material allegations thereof.

In accordance with the agreement of the parties, the undersigned was appointed Special Referee to hear this case in accordance with S.C. Code Ann. §14-11-60 (1976, as amended), with authority to enter a final judgment and any appeal from my Order to be to the Supreme Court or the South Carolina Court of Appeals as provided by the South Carolina Appellate Court Rules, in accordance with S.C. Code Ann. §14-11-85 (1976, as amended).

On December 16, 2014, this case was tried before me. Appearing on behalf of the Rhetts was their attorney, H. Fred Kuhn, Jr., Esquire. Present and appearing on behalf of Gray was his

attorney, James J. Wegmann, Esquire. At the commencement of the hearing, pursuant to a motion made on behalf of the Rhetts I conducted a viewing of the property in the presence of all parties and their attorneys. At the conclusion of the viewing, the hearing reconvened and I took testimony from the parties and their respective witnesses and various documents were introduced into evidence. I personally viewed the witnesses, weighed the credibility of their testimony, and reviewed the exhibits. Pursuant to the viewing of the property, the testimony, exhibits, the allegations of the pleadings, and the prior Lower Court and Court of Appeals' Orders, I make the following findings of fact.

FINDINGS OF FACT

1. The Plaintiffs, William M. Rhett, Nancy R. Rhett, and William M. Rhett, III are citizens and residents of the County of Beaufort in the State of South Carolina.

2. The Defendant, Jonathan H. Gray, is a citizen and resident of the County of Beaufort in the State of South Carolina.

3. The Plaintiffs and the Defendant are the owners of adjoining parcels of real property located in Beaufort County, South Carolina.

4. Each of the filings referenced in Judge Dukes' Order and the Court of Appeals' Order herein is a matter of public record on file in the Office of the Register of Deeds for Beaufort County, South Carolina.

5. The chain of title and establishment of the 50′ easement at issue is thoroughly set out in the Order of Judge Dukes dated December 21, 2009 and in the Opinion of the Court of Appeals dated December 19, 2012. I adopt those finding as to the chain of title and establishment of the easement.

6. In 2008, an action between these parties was commenced in the Beaufort County Court of Common Pleas, captioned *William M Rhett and Nancy R. Rhett v. Jonathan H. Gray*, bearing Case Number 2008-CP-07-1034.

7. The 2008 case was tried before the Honorable Marvin H. Dukes, III, Beaufort County Master-in-Equity, and on December 21, 2009, Judge Dukes issued his Order, concluding in relevant part to this case as follows:

a. The 30' easement had been abandoned by Rhetts;

b. The 50' access easement, appurtenant to the 1.25 acre O'Kelley parcel now owned by the Rhetts, had not been abandoned and was still viable;

c. Gray's gate at the entrance of the 50' access easement at Trotters Loop was necessary for Gray's preservation and use of his property and the gate was so located, constructed, and maintained that it did not unreasonably interfere with the Rhetts' right to use the 50' access easement for access to the 1.25 acre O'Kelley parcel;

d. Gray could keep the gate locked so long as he provided the Rhetts a key or other means for the Rhetts to open the gate when the Rhetts desired to use the 50' access easement for access to the 1.25 acre O'Kelley parcel;

e. The Gray's mailboxes do not constitute an unreasonable hindrance to the Rhetts' use of the easement; and

f. The Rhetts were not entitled to use the easement except for access to the original 5.97 acres (which includes the 1.25 acres).

8. As a result of a hearing held before the Honorable Carmen T. Mullen on January 6, 2012, this case was temporarily stayed until the appeals in the 2008 case had been concluded, noting that the "the decision on appeal as to what land is served by the easement could potentially affect the decision in this case." Judge Mullen noted that the decision by the Court of Appeals could make it necessary for the parties to amend their pleadings in this case, and granted to the parties leave to amend their pleadings based on the final decision by the Court of Appeals.

9. Among other things, the South Carolina Court of Appeals affirmed Judge Dukes' finding that the Rhetts had not abandoned the 50′ easement.

10. The South Carolina Court of Appeals reversed Judge Dukes' finding that the Rhetts had abandoned the 30′ access easement, and reinstated this easement.

11. The South Carolina Court of Appeals confirmed that the Rhetts could utilize both the 30′ access easement, as well as the 50′ access easement, to access not only the 1.25 acre parcel, but also the entire 5.97 acre parcel from which the 1.25 acre parcel had originally derived. This is significant because there is a single family residence, which the parties referred to as the Cottage in which the Rhetts' son, William, and his fiancé, Jamie Thompson, now reside. These easements[1] serve as the driveway to their residence.

12. Since the hearings held on June 25 and July 22, 2009 which resulted in Judge Dukes' Order, there have been substantial and material changes in facts and circumstances.

13. In contrast to the testimony introduced at the 2009 trial before Judge Dukes, there was no evidence of any significant criminal activity in the neighborhood introduced at the trial before me in 2013.

[1] Since the 50′ easement lies on top of and encompasses the 30′ easement for the sake of simplicity, I will hereafter refer only to the 50′ easement.

14. As a result of the decision by the South Carolina Court of Appeals, the 50' access easement may be used to access the entire 5.97 acre parcel out of which the 1.25 acre parcel was derived. As a result, as noted above, the 50' access easement is now the driveway to the Cottage in which William and Jamie reside.[2] The fact that this easement is now a residential driveway means that instead of being rarely used to access an unimproved 1.25 acre parcel, it is now capable of being utilized on multiple occasions every day.

15. The existence of a locked gate on the easement is clearly inconvenient, to put it mildly. When going to the Cottage, an individual must park his car, exit his vehicle, unlock the gate, reenter his vehicle, drive onto the easement, park his vehicle again, get out of their vehicle a second time, lock the gate, and then reenter his vehicle and drive to the Cottage. When leaving the Cottage, this process must be repeated, but in reverse. The presence of rain or inclement weather during this process only serves to aggravate the situation. Access after dark is most difficult.

16. Not only is the above process inconvenient, but unsafe. There are no shoulders on Trotters Loop onto which a car can be parked, and there is no room on the Trotters Loop side of the gate to safely park your car. Accordingly, when parking your vehicle to unlock the gate when approaching the Cottage, or conversely, when parking your vehicle to relock the gate upon leaving the Cottage, you have no choice but to park your car on the traveled portion of Trotters Loop. Only a few feet away is a 90 degree curve which is essentially a blind curve due to the growth of trees. The danger of parking a car in the traveled roadway is obvious. See, CF, S.C. Code Ann. §56-5-

[2] Although it is possible to access the Cottage through another route, I personally travelled this alternative route and it is much long, much more circuitous, and traverses across the yard of the Rhetts. Furthermore, if you are not familiar with the woods, it would be easy to get lost. The easement, on the other hand, leads directly to the Cottage.

2510 (2014); *Jeffers v. Hardeman*, 231 S.C. 578, 583, 99 S.E.2d 402, 404 (1957). ("The danger of leaving a vehicle standing on the traveled portion of a highway is well known.").

17. Perhaps the most significant change in circumstance since the 2009 trial has been the installation of additional fencing on each side of the gate and along the edge of the easement so that Gray's property adjoining the easement is now completely fenced off from the easement. This fencing now blocks passage from the easement onto the rest of Gray's property and Gray has installed on this fence two (2) gates that are each wide enough for vehicular access and which he keeps locked. On one side of this fence is the easement and on the other is Gray's horse pasture. Gray's property and the horse pasture are now completely enclosed by, and protected by, fencing that is independent of the gate that blocks the easement.

18. I find that the gate, as presently configured, on the easement is no longer necessary for Gray's preservation of, or Gray's use and enjoyment of, his property. I specifically do not give any credit to Gray's claim that the gate on the easement is necessary for his security. Rather, I find that Gray's purpose in maintaining the gate is to make the Rhetts' use of the easement so cumbersome that they will stop utilizing the easement and utilize alternative means of access to their property. It is clear that Gray does not like the Rhetts using the easement. The initial lawsuit was necessitated as a result of a Gray's attempt to block the easement by dumping loads of dirt, bales of hay and other obstructions on the easement. He then unsuccessfully attempted to close the easement by asking the Court to declare that it had been abandoned. He is now attempting to make the Rhetts' use of the easement as unpleasant for them as possible. In making this finding, I am relying upon several facts, set forth below.

19. The locking mechanism that Gray has installed on the gate can only be accessed from the easement side. It is not a padlock, but rather, is an integral part of the gate. During the

viewing, I personally attempted to unlock the gate from the Trotters Loop side and was unable to do so. This is due to the placement of the lock on the gate and the fact that the key can be inserted into the lock only from one direction which cannot be reached by a person of normal height when standing on the Trotters Loop side of the gate.

20. To make locking and unlocking the gate even more difficult, Gray has erected fencing that is adjacent to the gate on both sides. This fencing has been added since Judge Dukes' decision. The new fencing on the northern side of the gate ties into the fencing that now surrounds Gray's horse pasture. The new fencing on the south side of the gate turns to run along the easement along its southerly border deep in the woods. Prior to this fencing, there were only posts which allowed pedestrian access to unlock the gate. (See Plaintiff's Exhibit 13.) The end result is that someone who wishes to enter onto the easement from Trotters Loop, if they, like me, were unable to unlock the gate, must traverse through the woods on the Rhetts' property the entire length of the easement (in addition to the fence erected by Gray there is a drainage ditch that parallels the easement on its southern side) and then walk back down the easement to the gate in order to unlock it from the easement side. If an individual were athletic and nimble, it would be possible to avoid this hike through the woods by simply climbing over the gate or the fencing immediately adjacent to the gate, but during my visit to the scene, I observed that someone has smeared a heavy coat of a greasy tar like substance across the top of the fencing in this area to effectively discourage climbing over.

21. Also belying Gray's security claim is the fact that he has a gate on the driveway to his own home, as well as his mother's home, a short distance from the easement, which he leaves not only unlocked, but standing wide open.

22. There was testimony that Gray has harassed the Rhetts with air horns and threatening gestures during their use of the easement. Gray has gone out of his way to make the easement as unattractive visually as possible. Although this is a relatively scenic area, Gray has painted the fencing (only on the side visible from the easement or the Rhetts' property) garishly bright colors and has erected several dozen "No Trespassing/Keep Out" signs where only a few would be sufficient. From my observation of the parties during their testimony, as well as during the viewing, it is clear that a Restraining Order between these parties would be wise.

23. Both parties have incurred attorneys' fees and costs which they request that the other party be ordered to reimburse. Gray alleges that the Rhetts are in contempt as a result of filing two (2) plats in Plat Book 130 at Page 7 and in Plat Book 133 at Page 184 [sic. 104] which depict a subdivision of the original 5.97 acres to create four (4) lots. Gray asserts that this violates the decision of the Court of Appeals in that it would overburden the existing 50′ easement which can be used only for access to the original 5.97 acres. A review of these plats, however, does not support the conclusion that the combination or recombination of acreage or lots as shown thereon would in any way overburden the 50′ easement which is the subject of this lawsuit. To the contrary, these plats show that the four (4) lots depicted would be accessed by a completely different 50′ easement, which is labeled as "Conch Point Lane." The decision of Judge Dukes and the Court of Appeals set out in Finding of Fact 7(f) above has not been violated by the filing of these plats.

24. The Rhetts requested damages against Gray as a result of his unreasonable restriction to the Plaintiffs' full and free use of their easement in violation of Judge Dukes' Order as affirmed by the South Carolina Court of Appeals. While I find that Gray's maintenance of the locked gate on the Rhetts' easement under the present circumstances does unreasonably restrict

their full and free use of their easement, I do not find that his actions in so doing were willfully contemptuous.

In accordance with the foregoing Findings of Fact, I make the following Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction and venue in this matter.

2. Due to the changed circumstances since the first trial in 2009, the gate must be removed from the easement or modified to give the Plaintiffs the reasonable access to which they are entitled. "Generally, Courts hold that a locked gate constitutes an unreasonable interference with the use of the easement, even though the dominate owner is furnished a key. A locked gate, notwithstanding the presentation of a key, curtails the dominate owner's use by restricting deliveries and social visits." Bruce & Ely The Law of Easements and Licenses in Land, Section 8.04 (II)(d)(iii)(1995). "The installation of gates, posts, and fences by the owner of the servient estate is antagonistic to the right of ingress and egress over the right of way and is improper unless circumstances exists which make such obstructions reasonable." *Nopolous v. McCullough*, 95 111App. 3d 852, 853, 420 N.E.2d 734, 735 (1981). In the foregoing case the Court required that the gate be removed and emphasized that offering the owner of the dominant tenement, McCullough, a key to the gate, did not cure the unreasonable interference posed by the gate. The Court noted: "The gate and the padlocking of the gate, notwithstanding McCullough was offered keys are a serious deprivation of McCullough's access. Friends, relatives, deliverymen, repairmen, mechanics, artisans, firemen, and all callers alike are denied clear access." *Id.*

3. In *Stewart v. Compton*, 549 S.W.2d 832 (Ky.App. 1997), the Court required the removal of the locked gate on an easement notwithstanding an offer to provide a key. The Court stated: "The issue here is that the easement is an express reservation and is to be a free passway which means it shall be open and available for use without any hindrance or other burden.... To require such persons to resort to keys would be an unreasonable interference with their right as owners of the dominate estate." *Id.*, 549 S.W.2d at 833. See also, *Felton v. Boxer*, 68 A.D.P.2d 900, 901, 414 N.Y.S.2d 219, 219 (1979) reaching the same result and emphasizing the "hazard to public safety" that a locked gate would pose; and *Carleton v. Dierks*, 203 S.W.2d 552, 556-57 (Tex. Civ.App. 1947) ("Ordinarily locked gates across a way constitute an unreasonable burden which will not be permitted, even though the way owner is furnished with a key.").

4. "As a general rule, an owner of a servient estate may erect gates across an easement if the gates: (1) are so located, constructed and maintained as not to unreasonably interfere with the right of passage of the dominate estate, (2) are necessary for the preservation of the servient estate, and (3) are necessary for the use of the servient estate. Whether any such gates may also be locked depends upon the circumstances of the case." *Ballington v. Paxton*, 327 S.C. 372, 378-79, 488 S.E.2d 882, 886 (Ct.App. 1997). In the case *sub judice*, for the reasons noted in the Findings of Fact, *supra*, the gate is "so located, constructed and maintained" as to unreasonably interfere with the Rhetts' right of passage. No credible evidence was presented to me that the gate is necessary for the preservation of the servient estate, nor was any credible evidence presented to me that the gate is necessary for the use of the servient estate.

5. Gray has asserted *res judicata* as an affirmative defense, arguing that the Rhetts are barred from asking that the gate be removed, since this was an issue that was actually litigated and decided by Judge Dukes in the prior action. "*Res judicata* bars subsequent actions by the same

parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the Doctrine of *Res Judicata*, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). *Res judicata* does apply to Plaintiffs' request that the mailboxes be moved. Judge Dukes ruled the mailboxes do not interfere with the use of the easement and no facts have changed since the first trial.

6. Gray's affirmative defense of *res judicata* concerning the gate must fail because the facts and circumstances presently in existence are materially different from the facts and circumstances in existence at the time of the 2009 trial. *Res judicata* "extends only to the facts and conditions as they were **at the time** a judgment was rendered. When **new facts or conditions intervene** before a second action, establishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same, and the former judgment cannot be pleaded as a bar in a subsequent action." *Hayashi v. Illinois Department of Financial and Professional Regulation*, 388 Rl.Dec. 878, 25 N.E.3d 570, 585 (2014) *(emphasis added)*. "Neither *res judicata* nor collateral estoppel were ever intended to operate so as to prevent a reexamination of the same question between the same parties where, in the interval between the first and second actions, **the facts have materially changed** or new facts have occurred which have altered the legal rights or relations of the litigants." *Union Pacific Railway Company v. Santa Fe Pacific Pipelines, Inc. (emphasis added)*. "Collateral estoppel does not bar a later claim if new facts or changed circumstances have occurred since the prior decision." *Id.* "It is well settled that the estoppel of a judgment extends only to the facts and issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties when in the

interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." *Basmas v. Wells Fargo Bank,* _____ N.C._____, 763 S.E.2d 536, 539 (2014). Accord, *Choi v. Immanuel Korean United Methodist Church*, 327 Ga. App. 26, 28, 755 SE.2d 354, 356 (2014) (Former judgment binds only as to the facts and events existing at the time of such judgment and does not prevent a reexamination even of the same question between the same parties if in the interval the material facts have changed.); *Automotive Group, LLC v. A-I Auto Charlotte, LLC*, _____ N.C. _____, 750 S.E.2d 562, 565 (2013) ("Where subsequent to the rendition of judgment in the prior action, new facts have occurred which may alter the legal rights of the parties, the former judgment will not operate as a bar to the later action.").

7. In *Ballington v. Paxton*, 327 S.C. 372, 488 S.E.2d 882 (Ct.App. 1997), the South Carolina Court of Appeals concluded that that a gate could be placed on an easement if: (1) it did not unreasonably interfere with the rights of passage of the dominant estate and (2) it was necessary for the preservation and use of the servient estate. *Id.*, 327 S.C. at 378-79, 488 S.E.2d at 886.

8. As noted in the Findings of Fact, under the present circumstances, the gate unreasonably interferes with the rights of passage of the dominant estate. When Judge Dukes issued his Order he expressly noted that the easement would be used to access the vacant, unimproved O'Kelley parcel of land. As a result of the decision by the South Carolina Court of Appeals, however, the easement should now be used multiple times daily as a driveway to a residence.

9. When Judge Dukes issued his Order, he found that the gate was necessary for the preservation and use of Gray's property, noting that the gate secured Gray's property from the threats posed by recent criminal activity. There was no testimony of any criminal threats or activities which in any way involved the gate or the easement. More significantly, the Defendant's

completion of the fencing along the easement's northern border renders the gate redundant for security purposes. As a result of the addition of new fencing, Gray's property is now completely fenced in and secured from the easement, so that it is no longer possible to travel from the easement onto the balance of Gray's property without running into fencing or traversing through another gate. Accordingly, the gate no longer plays any role in the preservation or use of the servient estate.

10. "Generally, attorneys' fees are not recoverable unless authorized by contract or statute." *Rhett v. Gray*, 401 S.C. 478, 497, 736 S.E.2d 873, 884 (Ct. App. 2012). There is no contract or statute which would allow either party to recover attorneys' fees from the other applicable to this case. While attorneys' fees could be assessed under the contempt powers of the Court, I do not find either party in contempt. "A determination of contempt is a serious matter and should be imposed sparingly." *Miller v. Miller*, 375 S.C. 443, 452, 652 S.E.2d 754, 759 (Ct. App. 2007). "The power to punish for contempt is inherent in all Courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs, of the Courts, and consequently to the due administration of justice." *Id.* "Contempt results from the willful disobedience of an Order of the Court. A willful act is one which is done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." *Id.*, 375 S. C. at 454, 652 S. E. 2d at 759. The lots shown by the Rhetts on their "combination/recombination" plats do not violate any Court Order. Similarly, Gray's act of maintaining the gate and building fencing appurtenant to the easement up until the present time does not violate any Court Order.

IT IS, THEREFORE, ORDERED:

a. That Gray shall, within thirty (30) days of the date of this Order, remove from the easement the gate or install and maintain a functional remote opener and give no less than two (2) of the appropriate opening devices to the Plaintiffs, in good working order, so that the Plaintiffs have access to the easement without having to exit their vehicle;

b. While any party is using the easement, all parties are restrained, enjoined and prohibited from harassing or threatening the other; from making threatening or obscene gestures towards the other; from blowing air horns or other noise makers at the others; from shouting, yelling or cursing at the other; from spinning their tires or otherwise damaging the property of the other; and

c. Each party's claim for damages against the other shall be and is hereby denied and each party shall bear his own costs and attorneys' fees.

AND IT IS SO ORDERED.

Terry A. Finger

Honorable Terry A. Finger
Special Referee
Beaufort County Court of Common Pleas

Hilton Head Island, South Carolina
January 22, 2016

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