IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

Case No.: 2013-CP-40-5740
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 Drasites..... Appellants.

NOTICE OF MOTION AND MOTION TO RECONSIDER PURSUANT TO SC RULES OF APPELLATE COURT RULE 221

DAVIS | FRAWLEY, LLC
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BY: _____
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Lexington, South Carolina
May 31, 2018

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CASES ***PAGE***

OTHER AUTHORITIES

A petition for rehearing shall be in accordance with Rules 221 and 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the Court.

BACKGROUND

On appeal from an action in equity, [the appellate court] may find facts in accordance with its view of the preponderance of the evidence."); *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 111 (Ct. App. 2004) ("However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the [master] was in a better position to assess the credibility of the witnesses.")

By Order dated May 16, 2018, this Court ruled: "Based on the foregoing, we agree with the master that the ability to carry and launch small watercraft is incident to the enjoyment of the easement and would not be an undue burden on the Drasites' property."

The Court also ruled that: "We do not believe it was the grantor's intent to give the dominant estate a right of access to a point just shy of the lake depending on whether the water level is high or low; or, as was also argued based on a plat outside the of the parties' chain of title, for the easement to provide access to a dirt road traversing the southern boundary of the Drasites' property short of and leading away from the lake."

CASE LAW

Appellate cites the following cases in support of its Motion to Reconsider.

1. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." (quoting 28A C.J.S. *Easements* § 57 (1996))); *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

2. The rights of one claiming an easement by express grant are limited within the scope of the privilege. The extent of the servitude is determined by the terms of the grant. *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E. (2d) 420 (1950); *Gordon v. Hoy*, 211 Va. 539, 178 S.E. (2d) 495 (1971).

3. A plat can be admitted in evidence even though it was not referred to in the owner's chain-of-title. *Culbertson v. Culbertson*, 273 S.C. 103, 254 S.E.2d 558 (S.C. 1979).

LEGAL ANALYSIS

Using the standards set forth in Rule 221, Appellant argues the following to support the position that the Master's decision is not supported by preponderance of evidence:

1. Respondent's easement gives the legal right to travel (ingress/egress) the distance "extending from the property line of Respondent's property to the 360 degree contour of Lake Murray." The easement states it is an "ingress/egress" easement. The grantor of the easement, Woodberry Utilities, owns the property that contains the "to be travelled" distance. Respondent's easement involves the distance described in the document, "extending from the property line of Respondent to the 360° contour of Lake Murray. The Respondent is intending to try and change and broaden the "intent" of the Respondent from an ingress/egress easement only to one that includes "lake access" to Lake Murray. See Plaintiff's Trial Exhibit 1.

2. In order to travel from the Respondent's property to access Lake Murray requires two easements because two separate properties are involved. The Respondent's easement provides the ingress/egress to the property, owned in 1976 by Woodberry Utilities. Once at the waters of Lake Murray, one needs a second easement to access Lake Murray owned by SCE&G. It is impossible for one easement to do both tasks because the ingress/egress property is owned by a different party than the one that owns Lake Murray.

3. Respondent's deed did not reference a plat showing the termination point of the easement abutting the waters of Lake Murray. See Plaintiff's Trial Exhibit 1.

4. Respondent never testified as to his use of the access easement for launching a small watercraft. See Order of Master dated July 2015; Page 1.

5. Lake Murray is owned/controlled/managed by SCE&G and lake access to Lake Murray must be granted only by SCE&G for that property below the 360° contour. See Defendant's Trial Exhibit 3.

6. No documents were presented whereby SCE&G either granted Respondent "lake access" to Lake Murray. See Defendant's Trial Exhibit 1.

7. The easement on page 16 of SCE&G's manual gives the Drasites family their legal lake access but it does not give Hamilton Duncan an easement for lake access to Lake Murray because the easement on page 16 is for "lakefront" owners only (it doesn't apply to easement holders). See Defendant's Trial Exhibit 3, p. 16.

8. Respondent does not have the physical ability to launch a small watercraft from the granted easement distance because the easement terminates at the 360° contour and there is no granted access agreement from SCE&G for use of Lake Murray by Respondent. See Defendant's Trial Exhibit 1.

9. There are two conveyances dated October 28, 1960 (Exhibit 5) and August 14, 1973 (Exhibit 6), which indicate that there was a road, not the lake, at the time of the creation of the Respondent's easement which immediately abutted the termination point of Respondent's easement. See Plaintiff's Trial Exhibit 5; R.pp. 176, property description; Plaintiff's Trial Exhibit 6; R.pp. 179, plat referenced in deed (Plaintiff's Trial Exhibit 21 is incorporated into the legal description).

10. There is one plat (dated March 27, 1960) in the chain-of-title to Respondent's property which shows a road, not the lake, immediately abutting the termination point of Respondent's easement. See Plaintiff's Trial Exhibit 21.

11. There is one plat (dated May 1981), not in the chain-of-title to the Respondent's property which shows that in 1981 there was a road, not the lake, which immediately abutted the termination point of Respondent's easement. See Defendant's Trial Exhibit 13.

12. In this Court's Opinion, the Court indicated that: "Duncan is responsible for bearing the costs of maintaining the easement, and any improvements would be subject to SCE&G's approval." This paragraph seems to be indicating that the Court is recognizing that Respondent's use of the property beyond the termination point of his easement would have to be subject to SCE&G's approval. See Order, Ct. App., paragraph 2.

CONCLUSION

Since the easement language only indicated that it was for access purposes, it did not specify lake access and did not have a plat showing that the termination point of the easement adjoined Lake Murray. The easement is ambiguous. Circumstances beyond the face of the document are necessary to determine its purpose. To have use of Lake Murray by SCE&G by Respondent, there would have to be evidence of such which does not exist in this record. The deeds and plats referenced in this Motion are the closest in time as to the creation of the easement and reflect that this easement tied into an existing road and not Lake Murray. Preponderance of evidence supports the intent of the easement was access to the road which abutted the termination point of the granted easement.

Respectfully submitted,

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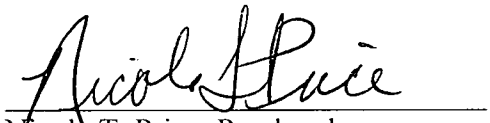
PROOF OF SERVICE

I, Nicole T. Price, paralegal with the law firm of DAVIS | FRAWLEY, LLC, do hereby certify that I have served the **NOTICE OF MOTION AND MOTION TO RECONSIDER** on Hamilton Duncan, Individually and Hamilton Duncan, as Personal Representative of the Estate of Christine A. Duncan, by depositing a copy of it in the United States Mail, postage prepaid on May 31, 2018, addressed to his attorneys of record, Michael W. Tighe, Esquire and George A. Taylor, Esquire, Post Office Box 1390, Columbia, SC 29202.



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