

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph R. Strickland, Master-in-Equity

Trial Court Case No.: 2013-CP-40-05740
Unpublished Opinion No.: 2018-UP-211 (S.C. Ct. App. Filed May 16, 2018)
Appellate Case No. 2018-001334

Hamilton Duncan, Individually and Hamilton Duncan, as
Personal Representative of the Estate of Christine A. Duncan.....Respondent,

v.

Roy Drasites and Elizabeth DrasitesPetitioners.

**REPLY TO RETURN TO
PETITIONERS' WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. THE MASTER-IN-EQUITY-IN-EQUITY ERRED IN RULING THAT THE PURPOSE OF THE EASEMENT IS TO ACCESS LAKE MURRAY AND BURDENS THE ENTIRE SOUTHERN PROPERTY LINE OF PETITIONERS' PROPERTY.

2. THE MASTER-IN-EQUITY-IN-EQUITY ERRED IN RULING THAT RESPONDENT MAY UTILIZE THE EASEMENT FOR VEHICULAR USE TOWING LIGHT WATERCRAFT?

- a. PETITIONERS' ARGUMENT IS NOT RESERVED FOR APPELLATE REVIEW, OR HAS BEEN ABANDONED.**
- b. THE EASEMENT IS FOR USE INCLUDING VEHICULAR TOWING OF LIGHT WATERCRAFT.**

I. Did the Master-in-Equity and S.C. Court of Appeals err in ruling that the purpose of the Easement is to access Lake Murray and burdens the entire southern property line of Petitioners' Property?

Respondent contends Petitioners' argument disproving this finding is flawed because the Respondent's easement burdens the entire length of Petitioners' property's southern boundary. (R. p. 95, Lines 17-25). This contention does not defeat Petitioners' argument that the easement did not grant access rights to Lake Murray.

Obviously, the burden of proving the purpose of an easement is on the party claiming it. "The general rule is that the character of an express easement is determined by the nature of the right and intention of the parties creating it." *Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct.App.1994). To determine the purpose of the easement, we must evaluate the intention of the parties when the easement was granted. In doing so, the "[c]lear and unambiguous language in grants of easement[s] must be construed according to terms which parties have used, taken, and understood in their plain, ordinary, and popular sense." *S.C. Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). Moreover, we must effectuate the parties' intention "unless that intention contravenes some well-settled rule of law or public policy." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987). The evidence in this case is uncontroverted that at the time of the creation of the easement, there are deeds and plats showing that a road existed at the termination point of the easement since 1960. Furthermore, Lexington Water Power Company, a predecessor-in-title to the easement, has specifically reserved, in its deed grant, easement rights in said road and there is no evidence in the record that those easement rights had been terminated by Lexington Water Power Company. When R. J. Marsh, as owner of Woodberry Utilities

executed the easement in 1976, he had actual and constructive knowledge of this road and easement reservation by Lexington Water Power Company. That is why the easement only conveyed property to the 360 contour of Lake Murray and not to Lake Murray itself. Grantor owned no more than the property that reached to the 360 contour. The easement does not indicate it provides access to Lake Murray. The Court would need to consider the circumstances around this conveyance in 1976 by R.J. Marsh as owner of Woodberry Utilities (i.e. the existence of the road at termination point of this easement) when considering what his intent was in the conveyance.

Finally, even after the conveyance of the easement, R.J. Marsh still confirmed the fact that the road was in existence by showing that same road on the Woodtrail Subdivision plat in 1981 which is the earliest plat showing, physically, what was at the termination point of the easement.

Implicit in Respondent's burden would be to prove that it can actually use the easement for the purpose intended. Respondent cannot prove that it has legal access to Lake Murray with SCE&G. The language of the Master-in-Equity's Order indicates Respondent had a legal right for access to Lake Murray for the purposes stated in the Order (i.e. launching a light watercraft into Lake Murray). (R. p. 24) The testimony of Tommy Boozer, Manager of South Carolina Electric & Gas Company's Lake Murray Shoreline Management Program, testified that the property owned by South Carolina Electric & Gas Company below the 360° degree contour came under the jurisdiction of SCE&G. (R. p. 124, Lines 8-9). Larry Smith, former surveyor employee of South Carolina Electric & Gas Company who had dealt with fringe land issues during his professional career, indicated the same. (R. p. 106, Lines 23-25). The Lake Murray Shoreline Management Plan makes South Carolina Electric & Gas Company responsible for

enforcing Federal Energy Regulatory Commission Directives regarding unauthorized uses of Lake Murray waters and land below the 360° degree contour elevation. (R. p. 213). The easement rights that the Respondent would have would end at the 360° degree contour because that is the termination point of the easement by the language description in the easement. (R. p. 166). The Respondent would be subject to approval from South Carolina Electric & Gas Company as to its access to Lake Murray and any use of the waters of Lake Murray.

Respondent raised the issue as to whether the Petitioners' have standing to raise the issue that South Carolina Electric & Gas Company controls access to the waters of Lake Murray based on SCE&G's Lake Murray Shore Line Management Program. Standing issue has been waived since there was no objection entered at trial on this particular matter.

Notwithstanding the above, "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." Powell ex rel. Kelley v. Bank of Am., 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct.App.2008). "It concerns an individual's sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." *Id.* Petitioners' property is adjacent to the shore line and therefore they are a real party in interest in regards to the rights to Lake Murray. Furthermore, the easement itself is located on the property owned by the Petitioners.

III. The Master-in-Equity-in-Equity erred in ruling that Respondent may utilize the easement for vehicular use towing light watercraft?

a. Petitioners' argument is not reserved for Appellate review, or has been abandoned.

The Master-in-Equity found and concluded that the intention of the parties to the easement was that the Respondent be granted the right of ingress/egress and access to Lake

Murray, including by vehicle towing and launching light watercraft. (R. p. 12) Respondent contends that Petitioners did not reserve, for Petitioners review, this ruling by the Master-in-Equity. This contention is based on the argument that this issue was raised by the Petitioners for the first time on Petitioners' Rule 52 and 59 Motion. This contention is misplaced. Respondent's Amended Complaint alleged he had a right to use the easement for vehicular use towing light watercraft. Petitioners' Answer denied this allegation. (R. p. 33) This issue was therefore before the Court and Respondent had the obligation to prove, by preponderance of evidence, this allegation. Respondent has failed to prove by preponderance of evidence this allegation.

Even though this issue was raised, Rule 52(b) specifically states that the sufficiency of the evidence in a non-jury matter may be raised in the appellate courts even though there was no motion challenging these findings or a motion for a directed verdict or a motion for judgment. *Norell Forest Prods. v. H&S Lumber Co.*, 308 S.C. 95, 417 S.E.2d 96 (Ct. App. 1994).

b. The easement is for use including vehicular towing of light watercraft.

The easement in question is for ingress and egress from the grantor's property to the 360° contour of Lake Murray but is not specific as to access purpose. There is no plat to show what is located at the termination point of the easement or the location of the 360° contour. (R. p. 166)(R. p. 69, Lines 20-23). Petitioners believe these facts trigger the need for the Court to look beyond the easement itself for interpretation of the intent of the parties. The testimony of Respondent's expert indicated the same. The Respondent's expert testimony indicated the 360° contour moved inward from Lake Murray. (R. p. 61, Lines 1-2) Respondent's expert further indicated if there was a survey involved we would not be here today. (R. p. 61, Lines 17-18)

“If the language is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect.” 25 Am.Jur.2d *Easements* §18, at 516 (2004). Cited as *Ten Woodruff Oaks, LLC v. Point Development, LLC*, 385 S.C. 174, 638 S.E.2d 510.

Circumstances surrounding the origin of the easement may also be considered in construing the easement. *Nance v. Waldrop*, 258 S.C. 69, 187 S.E.2d 226 (1972)(case applies to restrictions but restrictions are contractual in nature as are easements).

Respondent has failed to prove by preponderance of evidence the easement is for use including vehicular towing of light watercraft. Respondent and Petitioners both presented evidence “outside the four corners of the easement”, without objection, from three surveyors to help the Court in interpretation of this easement. Any desire by the Respondent to limit the Court’s interpretation of easement to the easement language itself has been waived.

Respondent presented no evidence from the grantor of the easement as to its meaning. Respondent presented no evidence as to his interpretation of the easement nor as to his use of it, including vehicular towing. Respondent placed into evidence the easement document in question (R. p. 166) a plat prepared by Douglas Platt, surveyor that shows the Respondent’s lot but not the easement (R. p. 205) and a plat prepared by Site Consultants in 1988 showing the easement in question (R. p. 199). None of these plats corroborate the right of the Respondent to use the easement for vehicular towing of light watercraft. The Master-in-Equity’s Order only bases his decision, as to the specific access use of the easement, on the physical existence of Lake Murray at the time of the execution of the easement and that it was twenty (20’) feet wide (R. p. 24). The plat which is closest in time to the easement execution is the Woodtrail Plat

prepared in 1981. (R. p. 235) This plat shows a road connected to the easement in issue. The physical presence of said road was questioned by the Respondent. However, that portion of the Petitioners' property, which is fringe land, was conveyed to Petitioners' predecessor-in-title shows the same road in existence in 1960, Defendant's Trial Exhibit 7, and SCE&G reserved an easement in said road. (*Defendant's Trial Exhibit 9*).

RULE 242(b) CONSIDERATIONS

Petitioner contends that the decision of the Master-in-Equity and Court of Appeals is in conflict with prior decisions of the South Carolina Supreme Court and South Carolina Court of Appeals. "The general rule is that the character of an express easement is determined by the nature of the right and intention of the parties creating it." *Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct.App.1994). To determine the purpose of the easement, we must evaluate the intention of the parties when the easement was granted. In doing so, the "[c]lear and unambiguous language in grants of easement[s] must be construed according to terms which parties have used, taken, and understood in their plain, ordinary, and popular sense." *S.C. Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). Moreover, we must effectuate the parties' intention "unless that intention contravenes some well-settled rule of law or public policy." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987). The Master-in-Equity and Court of Appeals have placed undue weight on evidence which is inconsistent with these Court decisions. Their evidence that there was no testimony by the Respondent himself; there was only testimony of two surveyors for Respondent; one surveyor who had surveyed the property only during the litigation period and the other had not done any survey of the property but rendered an opinion. The chain-of-title evidence existing at the time of the execution of the easement and before the execution and the

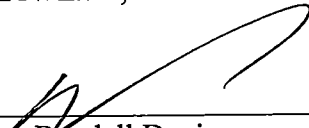
earliest after the execution all prove the fact by preponderance of evidence that the easement was not for the purpose of access to Lake Murray.

CONCLUSION

Petitioners contend that that the preponderance of the evidence does not support the conclusions by the Master-in-Equity that the use of the easement includes access to Lake Murray by vehicular towing and launching of watercraft. Preponderance of the evidence supports that the purpose of the easement was to gain access to a dirt road shown on a plat of Woodtrail Subdivision which road connected to Johnson Marina Road and the easement does not run the entire length of the Petitioners' southwest property line, leaving some portion of Petitioners' property free from the burden of the easement, which would prevent Respondent from reaching the lake without trespassing on the Petitioners' property. Petitioners contend that any access to Lake Murray by the Respondent for vehicle towing and launching of watercraft would be determined by South Carolina Electric & Gas Company based on its mandate from the Federal Energy Regulatory Commission if the Respondent wishes to access the property owned by South Carolina Electric & Gas Company which is below the 360° degree contour along the Petitioners' property.

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PROOF OF SERVICE

I, Nicole T. Price, a paralegal with the law firm of DAVIS | FRAWLEY, LLC, do hereby certify that I have served the following with the foregoing **REPLY TO RETURN TO PETITIONERS' WRIT OF CERTIORARI**, on Hamilton Duncan, Individually and Hamilton Duncan, as Personal Representative of the Estate of Christine A. Duncan, by hand delivering a copy of the same to the following address:

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on this 8th day of October, 2018 all in accordance with Rule 5 (b)(1) of the South Carolina Rules of Civil Procedure.



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