THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

CASE NO. 2014-CP-10-5608
APPELLATE CASE 2019-000043

James Bradley Williams and Robert Blair Kline, Jr..... Petitioners,

v.

Merle S. Tamsberg,..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. IS THERE ANY LEGAL BASIS FOR THE COURT TO REVIEW THE COURT OF APPEALS DECISION PURSUANT TO RULE 242, SCACR?

II. DID THE COURT OF APPEALS PROPERLY INTERPRET ESTABLISHED SOUTH CAROLINA LAW BY AFFIRMING THE TRIAL COURT'S HOLDING THAT THE EASEMENT IS AN EASEMENT APPURTENANT AS A MATTER OF LAW?

ARGUMENTS AND AUTHORITIES

I. THE APPELLANTS HAVE FAILED TO CITE ANY BASIS FOR REVIEW OF THE COURT OF APPEALS DECISION.[1]

Both the Appellate Court Rules and this Court's precedent provide that certiorari review is the exception, not the rule, and that it is only available in cases that present unique or meaningful issues. *See, e.g.*, *State v. Lyles*, 381 S.C. 442, 443–44, 673 S.E.2d 811, 812 (2009) (emphasizing that certiorari review is available "only where special reasons justify the exercise of that power"); Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons."). The Rule provides for certain reasons that warrant review, including:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Id.

This case falls far short of the high threshold for certiorari review. In fact, the Appellants have cited no "special reason" justifying this Court's review of the Court of Appeals holding. Rather, the Appellants appear to simply disagree with the Court of Appeals decision, as the entirety of their argument only rehashes the arguments made before the trial court and Court of Appeals without citing any support for certiorari review.

[1] The facts as stated in Appellants' Statement of Facts are undisputed, and Respondent does not include a Counterstatement of Facts.

The Court of Appeals Opinion was unanimous, and there were no novel questions of law or conflicts with a prior decision of the Supreme Court. The Court of Appeals applied one Supreme Court case - *Whaley v. Stevens*, 21 S.C. 221 (1884) - and properly distinguished another - *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944) - in reaching their decision that the subject easement has a terminus on the estate owned by the Respondent. Likewise, the Court of Appeals did not distinguish or create new law in reaching its conclusion that there was no evidence that the subject easement was not necessary at the time it was established, or presently. Therefore, since there is no special reason warranting the exercise of the Court's certiorari power, the Appellant's petition must be denied.

II. THE COURT OF APPEALS PROPERLY INTERPRETED AND APPLIED ESTABLISHED SOUTH CAROLINA LAW BY AFFIRMING THE TRIAL COURT'S HOLDING THAT THE SUBJECT EASEMENT IS AN EASEMENT APPURTENANT WHICH RUNS WITH THE LAND.

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.*; *Smith v. Comm'rs of Pub. Works of City of Charleston*, 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).

The Appellant does not appear to contest that in the original grant of easement in 1911, and modification in 1971, the owner intended to grant an easement running with the land. The 1911 deed conveying 47 Legare from W.H. Hinson to Julia Dill ("1911 Deed") described it as an "easement to run with the land." (R. pp. 77-78). The 1971 covenant from Margaret Black to the owner of 47 Legare, in which the easement was reaffirmed, described the easement as "running with the land and shall be binding on the [owner of 45 Legare Street], her heirs, assigns and successors in title." (R. 80). Both statements demonstrate the owners' unambiguous intent that the easement be appurtenant to 47 Legare.

The Appellants argue that, despite the clear intent of the owners of 45 Legare in 1911 and 1971, the easement cannot be considered appurtenant because it has no terminus in the dominant parcel or, in the alternative, is no longer necessary to the enjoyment of the dominant estate. The Appellants are incorrect from both a factual and legal standpoint.

A. The Court of Appeals correctly held that the subject easement has a terminus on 47 Legare.

The facts in this matter are uncontradicted. The easement was created by operation of the 1911 Deed, and ran the entire length of the boundary between 45 Legare and 47 Legare. (R. pp. 77-78). In 1971, the easement was shortened to approximately half the length of the boundary when the then-owner of 45 Legare Street reaffirmed the easement in the 1971 Covenant. (R. pp. 79-81). As set forth above, the language of both easement documents clearly evidences the intent to create an appurtenant easement running with the land.

The Appellants contend that the easement did not have a terminus on 47 Legare Street simply because it runs parallel to 47 Legare on the border between the two parcels. Apparently, the Appellant contends that, for an access easement to be appurtenant, it 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 is nonsensical, has no support in the law, and would frustrate the clear intention of the parties' predecessors in title.

The "terminus" requirement is in place to ensure that the easement actually touches the dominant parcel. Indeed, an appurtenant easement is one that "inheres in the land [and] concerns the [dominant] premises . . .." *Windham*, 672 S.E.2d at 582-3 (2009). The terminus requirement is in place to preclude a property owner from obtaining an appurtenant (and therefore permanent) easement that does not concern the dominant parcel.[2] Thus, the Court of Appeals correctly determined that an easement that touches the dominant parcel and does not extend past the lot line of the dominant estate has a terminus in the dominant parcel and is an appurtenant easement. *Williams v. Tamsberg*, 821 S.E.2d 494, 502 (S.C. App. 2018).

The Court of Appeals properly relied on the *Whaley* decision for support. In *Whaley*, the Supreme Court of South Carolina made it clear that an easement must "touch" or "reach to" to the dominant parcel:

> 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.

Whaley, 21 S.C. at 224-5. In *Whaley*, the purported dominant parcel was 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." *Id.* at 224. In

[2] An extreme example would be the granting of a purported appurtenant easement to a family member who owns property several miles from the servient parcel.

other words, the purported easement terminated not on the dominant parcel, but on a public road, and did not touch the dominant parcel. 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 1911 Deed is the subject easement itself, which terminates in Respondent's backyard. In exercising use of the subject easement, Respondent and her predecessors-in-title proceeded directly from Respondent's property to the subject easement without a gap.

The Court of Appeals properly distinguished *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944). First, 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. Further, the Court of Appeals properly noted that the Steele easement extended beyond the property line of the parcel claiming the easement. *Id.*

The Court of Appeals properly determined that the subject easement touches 47 Legare and therefore has a terminus on the dominant parcel. This is all that is required under South Carolina law. For that reason, the Appellants' Petition for Certiorari must be denied.

B. The Court of Appeals correctly held that the subject easement was, at all relevant times, necessary to the enjoyment of 47 Legare.

As set forth above, an easement must be essentially necessary to the enjoyment of the dominant parcel to be considered appurtenant when it was created. *Smith,* 312 S.C. 460, 441 S.E.2d 331 (Ct.App.1994). The Court of Appeals, in affirming the judgment of the Master-in-Equity, properly held that, as a matter of law, the subject easement was essentially necessary at the time of its' creation in 1911 and modification in 1971. *Williams v. Tamsberg*, 821 S.E.2d 494, 503-504 (S.C. App. 2018). The Appellants, without arguing any of the traditional bases warranting certiorari, request that this Court review the finding of the Master in Equity and Court of Appeals simply because they believe the evidence demonstrates that the subject easement has become no longer necessary since 1971. That argument would require this Court to incorrectly apply South Carolina law, to second-guess the determination of the fact-finder where there is no novel question of law, conflict with a prior Supreme Court decision or other basis for certiorari, and ignore the evidence that the subject easement is essentially necessary in the present day.

First, it is uncontradicted that the subject easement was essentially necessary to provide access to a then-existing garage at the time of creation in 1911 and 1971. That finding ends the inquiry. The Appellants have urged this Court to determine that this express easement can be terminated because the easement is no longer necessary to the enjoyment of the dominant parcel.

However, the Appellant did not cite any authority for that assertion, and the assertion is not supported in applicable law.

Indeed, "[t]he circumstances under which an easement can be terminated depend upon the type of easement." 25 Am Jur 2d *Easements and Licenses in Real Property* § 83 (2018). "An express easement continues regardless of whether the dominant estate needs the easement. *Id.* "[N]either an implied easement by prior use nor a prescriptive easement or ***express easement*** can be terminated solely because the necessity for the easement ceases." *Id.* (emphasis added). In South Carolina, an easement implied by necessity may be extinguished when the necessity ends, but that rule does not extend to express easements. The Court of Appeals recognized and properly applied this principle under South Carolina law. *Williams v. Tamsberg*, 821 S.E.2d 494, 503 (S.C. App. 2018) *citing Smith*, 312 S.C. at 464 n.2, 441 S.E.2d at 334 n.2 ("However, the end of a necessity appears to terminate an easement appurtenant that is implied by necessity and will not terminate an express easement.").[3] Simply put, the subject easement met the requirements for an appurtenant easement at the time of creation and modification, and may not be destroyed even in the event that it is no longer necessary to the enjoyment of the dominant parcel.

Second, the Appellants attempt to cobble together materials from the record to show that the Respondent has an existing parking spot and gate in the front of 47 Legare which renders the subject easement no longer necessary. The Appellants contend that "while possibly less

[3] The argument set forth by the Appellants is more appropriately characterized as an argument that the Respondent has abandoned the subject easement. However, the standard for proving abandonment is very difficult. *See Carolina Land Co. v. Bland*, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975) ("[T]he mere nonuse of an easement created by deed for a period however long will not amount to an abandonment, but there must be other acts by the owner of the dominant estate conclusively manifesting either the present intention to relinquish the easement or purpose inconsistent with its further existence."). The Appellants clearly recognized this, as they did not appeal the Master in Equity's grant of summary judgment on this issue. (R. pp. 8-10).

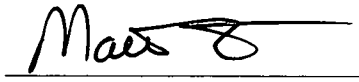
convenient, there is means of access to the rear of 47 Legare other than via the easement." This again ignores the ruling of the Court of Appeals and applicable law. The fact that the Respondent has other means of human access to the rear of 47 Legare (including through the main house) is irrelevant. The Court of Appeals held that the subject easement remains necessary to allow large equipment to the rear of 47 Legare. *Williams v. Tamsberg*, 821 S.E.2d 494, 504 (S.C. App. 2018). This finding is uncontradicted, and is in accord with South Carolina case 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, and therefore the easement appurtenant, where the road was the only reasonable method for vehicle access to the northern portion of the dominant estate due to the presence of a creek bisecting the dominant estate.).

In sum, the subject easement was reasonably necessary for the enjoyment of the dominant estate at the time of creation and modification of the easement, as well as in the present day. For these reasons, the easement is, and always has been, an appurtenant easement running with the land and remains valid and enforceable against the Appellants.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that this Court deny the Appellants' Petition for Writ of Certiorari.

Respectfully submitted,



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PROOF OF SERVICE

I do hereby certify that on the 8th day of February 2019, I served a copy of the within *Return to Petition for Writ of Certiorari* 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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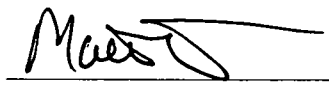

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