

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAR 28 2019

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2016-001104

Heather Rousey Piper,

Respondent,

v.

Kerry Grissinger,
William P. Hardee, and
Paul E. Lesondak,
of whom:
Kerry Grissinger and
Paul E. Lesondak,
are the

Petitioners.

PETITION FOR WRIT OF *CERTIORARI*

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Pursuant to Rule 242, S.C.A.C.R, the Petitioners petition for the issuance of a writ of *certiorari* to review the final decision of the Court of Appeals in the matter above.

This Petition is based upon those certain points, factual and legal, which the Petitioner believes the Court of Appeals to have overlooked or misapprehended, as set out herein.

The Petitioners contend the decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court

To the extent allowed, the Petitioner restates and by this reference reargues all matter set out in his Briefs and referenced in the Record on Appeal and in the Appendix submitted herewith.

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing herein was made and finally ruled on by the Court of Appeals on February 21st; 2019.

BACKGROUND

This action concerns the right to an easement over real property for the purpose of access. In 1951, the real property in question was divided by Taylor, and a common roadway was platted between real property retained by Taylor and that conveyed to Severance. A copy of the 1951 Plat showing the roadway, which lies over both Taylor and Severance, is incorporated in the RECORD ON APPEAL, p.328.

The 1951 Severance property has now been divided, the present owners being GRISSINGER (Tax Map No. 080-03-04-009) and LESONDAK (Tax Map No. 080-03-04-008). The Taylor property over which the common road was platted in part is now owned by HARDEE (Tax Map No. 080-03-04-007). The 1988 Plat for B.P. Severance and the 2012 Plat for Dennis and Rosemary Rousey are also incorporated in the RECORD ON APPEAL, pp.334-335, 332.

The Respondent Ms. ROUSEY is the owner of the tract in the rear of these properties (Tax Map No. 080-034-04-010). That tract is without access to any public road. By this action, ROUSEY sought to have her right to the use of an easement granted or declared.

As shown by the 1988 Plat, a Dirt Drive then existed going to the South of the house on the LESONDAK property, continuing through the GRISSINGER tract and on to the ROUSEY property. A copy of the 1997 Plat showing that configuration is incorporated in the RECORD ON APPEAL, p.337.

Sam Austin, the former owner of the LESONDAK tract, testified that he and his wife

bought that land in December, 1997. RECORD ON APPEAL, p.193, l.6-11. Austin further testified that, as of the time of their purchase, the portion of the Dirt Drive running to the ROUSEY tract (referenced in the Court's Order as "the Piper Parcel") was overgrown and unused. RECORD ON APPEAL, p.194, l.22-23; 0.242, l.11-22. Except for the attempted use of this area for access by the Respondent and her parents in or after 2012 (which resulted in this action), no evidence of use of that Dirt Drive or the portion thereof leading to the ROUSEY tract was presented. RECORD ON APPEAL, generally.

Mr. Austin further testified that, with the consent of the neighboring landowners, he moved the access road to that area now shown as Severance Drive on the Plat for Dennis and Rosemary Rousey, the Respondent's parents, dated 2012. RECORD ON APPEAL, p.239, l.18 – p.240, l.12. This change was made during his ownership of the present LESONDAK tract and prior to his sale thereof in February, 2009. RECORD ON APPEAL, p.239, l.18 – p.240, l.12; p.241, l.2-15. A copy of the 2012 plat is incorporated in the RECORD ON APPEAL, p.332. This plat shows no extant road or easement to the ROUSEY property other than Severance Drive, which drive is the original common roadway of 1951 with some adjustments.

The Respondent ROUSEY sought to establish her right to access her property by a) either the roadway shown on the 1988 Plat (hereafter "the claimed LESONDAK or GANDY easement") or b) by using Severance Drive and going past GRISSINGER's front door (hereafter "the claimed GRISSINGER or 'Current' easement"). She alleged theories of easement implied by prior use, by necessity and prescriptive easement.

The Petitioners LESONDAK and GRISSINGER sought a declaratory judgment as to any existing easements, claimed trespass to their properties, and waiver as to use of the 1951 common roadway.

This matter came on for trial before the Circuit Court sitting without a jury on March 14th, 2016. The Circuit Court issued its Order dated May 3, 2016 and filed May 9, 2016. That Order characterizes the issues as being "to determine the most appropriate and feasible means of access to the Piper Parcel". RECORD ON APPEAL, p.2. It finds that the "GANDY" or LESONDAK easement is "the most appropriate means of access" to and from the Piper or ROUSEY tract. RECORD ON APPEAL, p.2.

Appeal followed. The unreported decision of the Court of Appeals affirming the decision of the Circuit Court was filed January 16, 2019. The Petitioners' Motion for Rehearing was filed by mailing of January 30, 2019. The Court of Appeals issued its Order denying Rehearing on February 21, 2019.

GROUND FOR APPELLATE DECISION

The decision of the Court of Appeals panel disposes of the argument of the Petitioners as stated in the following notations (citations of cases omitted):

We affirm pursuant to Rule 220(b), SCACR, and the following authorities: . . . ("An issue is deemed abandoned if the argument in the brief is only conclusory."); . . . (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned). . . , Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered [that] is not set forth in the statement of the issues on appeal."); . . . ("An unappealed ruling is the law of the case and requires affirmance.' Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case." . . . ("A ruling not challenged on appeal is the law of the case, regardless of the correctness of the ruling."); . . . ("An appellant may not use ... the reply brief as a vehicle to argue issues not argued in the appellant's brief."); . . . ("The appellants have the responsibility to identify errors on appeal, not the [c]ourt. . . '[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.'" (last alteration by court) . . . ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal."); . . . ("Declaratory judgment actions are neither legal nor equitable[,] and[] therefore, the standard of review depends on the nature of the underlying issues.") . . .

[*Piper v., Grissinger, ET AL.*, Unpublished Opinion No. 2109-UP-030.]

Counsel for Petitioners must confess that he lacks the ability to understand the application of the grounds cited to this appeal. The cited grounds seem to be no more than a grab-bag of grounds to affirm without any application of any reason to the facts of the case or to the grounds of appeal. Counsel cannot adequately respond to a general statement of precedents, nor can this Supreme Court, as required, determine how the stated precedents apply to this case. By this Petition, he attempts to respond to what he intuitively feels to be the Court of Appeal's rationales.

The Petitioners reiterate their arguments stated in the Reply Brief. The Respondent argues that the Petitioners failed to specifically argue or raise the issue of easement by necessity at trial. BRIEF OF RESPONDENT, p.13. Precedent requires the Respondent, as the proponent of an easement, must prove all elements of an easement, as argued in Petitioners' Reply Brief.

The Petitioners would note that both parties were requested to submit proposed Orders to the Circuit Court. RECORD ON APPEAL, Form 4 Order, p.5. This was done by both parties. A copy of the e-mail of Petitioners' counsel, with its attachments, is attached to the Petitioners' Motion for Rehearing and made a part hereof. The Court will note that, in addition to other

arguments, the Petitioners in fact raised in its proposed Order all issues which form the basis for their appeal.

The citations see to refer to the lack of a Rule 59 Motion directed to the Circuit Court, or to maintain that the issues briefed by Petitioners were not raised below. It is Petitioners' contention that the requirements for a Rule 59 Motion apply when an issue has not been raised before the Court below or where the Trial Court has failed to deal, adequately or in part, with an issue or fact.

The issue before the Trial Court was whether the Respondent has proven her case for an easement. The Petitioners' contention, by its proposed Order and by its Briefs on Appeal, was the lack of proof for such easement under long-standing South Carolina law. No new issue remained for the Trial Court to consider after its Order was issued: the Trial Court is presumed to know the relevant precedent, and its Order either followed that precedent or not.

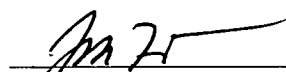
In the case at hand, all arguments were in fact before the Circuit Court. However, regardless of that fact, the precedent on easement requires the proponent to bear the burden of proving all elements of an easement, under whatever grounds. Those elements are not present in the Record, and no evidence of them exists, as argued at length in the Petitioners' Briefs.

The Circuit Court dealt with all issues before it by finding a factual and legal basis for an easement in its Order of May 3, 2016. That basis does not exist in the Record. This Appeal did not require the Petitioners to re-argue the issues already decided by the Circuit Court in its Order. RECORD ON APPEAL, p.1.

CONCLUSION

For all the reasons set out and referenced above, the Petitioners request that this Court issue its Writ of *Certiorari* and hear this appeal, and for any other relief to which the Petitioner may be entitled in law or equity.

Respectfully submitted,



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March 24, 2019

Rock Hill, South Carolina

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CERTIFICATE OF SERVICE

I certify that on March 25, 2019, I served the Petition for Writ of *Certiorari*, the Appendix, and this Certificate of Service on the following counsel of record, parties or persons:

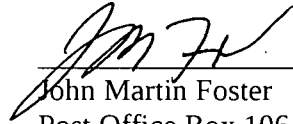
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Attorneys for Respondent

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at

that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 262(b), S.C.A.C.R.

March 25, 2019



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