THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

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 Appellants.

BRIEF OF APPELLANTS

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731-6106
(803) 324-8100
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA
SUPREME COURT

CASES: SOUTH CAROLINA
COURT OF APPEALS

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

1. HAS THE RESPONDENT ESTABLISHED THE ELEMENTS FOR AN EASEMENT IMPLIED BY PRIOR USE?
2. HAS THE RESPONDENT ESTABLISHED THE ELEMENTS FOR A PRESCRIPTIVE EASEMENT?
3. HAS THE RESPONDENT ESTABLISHED THE ELEMENTS FOR AN EASEMENT BY NECESSITY?

STATEMENT OF THE CASE

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 October, 2002. 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; p.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 Appellants 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 Respondent was represented by Jessica C. Crowson and Christopher Boguski of Rogers Lewis Jackson Mann & Quinn. The Appellants KERRY GRISSINGER and PAUL E. LESONDAK were represented by John Martin Foster. The Defendant WILLIAM P. HARDEE appeared *pro se*.

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.

ARGUMENT

The Appellants note first that the question of what is "the most appropriate (or feasible) means of access", without other findings of fact, is an improper ground for determining an easement. They acknowledge, however, that under the precedent of this State:

A correct decision of the trial court on the wrong ground will be affirmed on appeal. *Moorhead v. First Piedmont Bank & Trust Co.*, 273 S.C. 356, 256 S.E.2d 414 (1979). [*Weir v. CitiCorp Nat'l Serv.s*, 312 S.C. 511, ___, 435 S.E.2d 864, 868 (1993).]

This Brief proceeds, therefore, to examine the Circuit Court's determination in the light of South Carolina law as it defines easements.

There is no question as to the Respondent ROUSEY's right to access her property by the area designated as common roadway on the 1951 Plat and, basically, that shown on the 2012 Plat as Severance Road (referred to in the Circuit Court's Order as the "Hardee easement"). As stated by the Supreme Court:

> "Generally, where property sold is described with reference to a plat or map upon which streets and ways are shown, an easement therein is implied . . . There is an implied covenant that such ways exist and shall continue to exist. Easements implied in accord with such principles are deemed a part of the property to which the grantee is entitled, and neither the grantor nor any person claiming under the conveyances can repudiate the easements or deny they exist, where they are capable of existing"
>
> [*Billings* v. *McDaniel*, 217 S.C. 261, 265, 60 S.E.2d 592, 593 (1950), *quoting* 17 AM.JUR. *Easements*, ¶ 47, p.958.]

In her pleadings and at trial, ROUSEY did not deny the existence of this 1951 common roadway easement. She does not wish to use this easement. RECORD ON APPEAL, p.68, l.23 – p.69, l.8.

1. HAS THE RESPONDENT ESTABLISHED THE ELEMENTS FOR AN EASEMENT IMPLIED BY PRIOR USE?

The Respondent has claimed an easement implied by prior use. Our Supreme Court has held that:

> [A]n easement implied by prior use exists when: (1) the dominant and servient tracts of land originated from a common owner; (2) the use was in existence at the time the

original grantor severed the tracts; and (3) the use was apparent, continuous, and necessary for enjoyment of the dominant tract.

[*Boyd* v. *Bellsouth Telephone*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006).]

In the case at hand, there was no evidence to show the existence of either the claimed LESONDAK easement or the GRISSINGER easement as of the time when the original grantor severed the tracts. Further, no evidence was presented to show any continuous use of either the LESONDAK or the GRISSINGER easement as access to the ROUSEY property. Any claim of an easement implied by prior use of these claimed easements over LESONDAK or GRISSINGER must fail.

2. HAS THE RESPONDENT ESTABLISHED THE ELEMENTS FOR A PRESCRIPTIVE EASEMENT?

The Respondent claimed the existence of a prescriptive easement. In the same case cited above, the Supreme Court set outs the elements of prescriptive easement::

To establish a prescriptive easement, the party asserting the right must show: (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under a claim of right. *Horry County v. Laychur*, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993); *Shia v. Pendergrass*, 222 S.C. 342, 351, 72 S.E.2d 699, 703 (1952). When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse. *Poole v. Edwards*, 197 S.C. 280, 283, 15 S.E.2d 349, 350 (1941).

[*Boyd* v. *Bellsouth Telephone*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006).]

Again, there is no evidence of continued use for the required period of twenty (20) years. In addition, no evidence was presented that would show use of the designated GRISSINGER easement prior to the purchase of the ROUSEY property by the Respondent's parents in 2012. The Respondent's claim of prescriptive easement fails.

3. HAS THE RESPONDENT ESTABLISHED THE ELEMENTS FOR AN EASEMENT BY NECESSITY?

The Respondent has claimed the existence of an easement by necessity. Given the interconnection of the theories of easement, the *Boyd* Court discussed easement by necessity:

> The party asserting the right of an easement by necessity must demonstrate: (1) unity of title, (2) severance of title, and (3) necessity. *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002). . . .
>
> The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible. *Jowers* [*v Hornsby*], 292 S.C. at 550-51, 357 S.E.2d at 711 (citing *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944); *Merrimon* [*v McCain*], 201 S.C. at 76, 21 S.E.2d at 404; *Lawton v. Rivers*, 13 S.C.L. (2 McCord) 445 (1823)).
>
> [*Boyd* v. *Bellsouth Telephone*, 369 S.C. 410, 418-420, 633 S.E.2d 136, 140-141 (2006).]

The evidence in this matter makes clear the former unity of title of the tracts in question, and their severance. The question, therefore, is whether the Respondent has demonstrated that either the claimed LESONDAK or GRISSINGER easements are necessary to her in light of the unquestioned existence of the platted common easement along the HARDEE tract.

Faced with a similar situation in *Morrow* v. *Dyches*, 328 S.C. 522, 492 S.E.2d 420 (Ct.App. 1997), this Court of Appeals stated:

> Only reasonable necessity is required; thus, the easement must be more than merely convenient, but it does not need to be absolutely essential. *Jowers* v. *Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987). . . . Although the Morrows claim necessity because they wish to use the CSX tract for large tractor-trailers to access the rear of their store, their claim fails because the entire eastern side of their tract borders on and is accessible by a public road. The doctrine only provides reasonable access to the dominant estate when there is none; it does not provide a means for ensuring a preferred method of access to a particular portion of a tract when access to the tract is otherwise available. Cf. *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct.App. 1985) (easement by necessity across adjoining land was upheld because a deep gully separated the dominant estate from a bordering public road).
>
> [*Morrow* v. *Dyches*, 328 S.C. 522, 529, 492 S.E.2d 420, 424 (Ct.App. 1997)].

The Respondent has clear access by the platted common roadway (the Hardee Easement). The other claimed easements are those she prefers. Under the established precedent of this State as

recited in *Morrow, supra,* the Respondent has failed to demonstrate necessity in those claimed easements over the property of GRISSINGER or LESONDAK.

The Appellants point out that allowance of either of the non-platted easements would necessitate either a) a roadway almost in front of GRISSINGER's home, or b) within a few feet of the windows of LESONDAK's home. Thus, equity mandates the denial of those claimed easements on the grounds of necessity.

TRESPASS

By their Answer, the Appellants GRISSINGER and LESONDAK counterclaimed for damages for trespass. That claim is not pursued by this appeal.

CONCLUSION

The Respondent has access to her property over the existing and acknowledged easement established in 1951. None of the grounds claimed by the Respondent in this action exist to create, or recognize, an easement over the property of the Appellants. No other basis has been plead to allow her access under any other theory of law or equity. The Order of the Circuit Court is unsupported by the facts and must be reversed.

Respectfully submitted,

John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
803 324-8100
Attorney for Appellants

May 30, 2017

Rock Hill, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

May 30, 2017

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731-6106
(803) 324-8100
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

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 Appellants.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellants, dated May 30, 2017, on the following counsel of record:

Jessica C. Crowson
Rogers Lewis
Post Office Box 11803
Columbia, S. C. 29211
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 addressees) of those attorney(s) and/or persons set out below, all pursuant to Rule 233(b), S.C.A.C.R.

May 31, 2017

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731-6106
(803) 324-8100
Attorney for Appellants