THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Court of Common Pleas, Spartanburg County
Honorable J. Derham Cole, Circuit Judge

Circuit Court Case No. 2011-CP-42-02079
Appellate Case No.: 2019-000852

The Revocable Trust Agreement of
Manning Lee Williams dated October 28, 2015 .....Respondent,

vs.

Cynthia Norden and Raymond Norden,.....Appellants.

RESPONDENT'S INITIAL BRIEF

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November 1, 2019

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STATEMENT OF THE CASE

In 1975, Manning L. Williams and Eleanor C. Williams[1] (Respondent) purchased a 14.17 acre tract of land which was landlocked. The Respondent was granted an easement for ingress and egress to have access to a public road. The easement is over the northern boundary of the 37.5 acre tract of land owned by Raymond Norden and Cynthia Norden (Appellants). [At the time the Respondent purchased the tract, the Appellants' tract was owned by Beretta B. Hyder; the Appellants subsequently purchased the tract from her in 2007.]

The Respondent brought this action on May 10, 2011 because the Appellants were blocking the entrance to the easement. The Appellants filed an Answer on June 14, 2011 admitting the validity of the easement, but denied that they were interfering with the Respondent's right to use the easement.

By Order of the court dated July 29, 2011, the court issued a preliminary injunction which enjoined the Appellants from denying access to the property in any way during the pendency of the action.

On November 20, 2014, the Appellants filed an Amended Answer and Counterclaim. This pleading was filed without leave of court or without written consent of the Respondent as required by Circuit Court Rule 15.The Counterclaim accused the Respondent of: trespassing onto the Appellants' property; creating a nuisance on their own property; and interfering with the contractual efforts of the Appellants to sell their property.

[1] Manning L. Williams subsequently died and by Order dated September 10, 2018, the court substituted the Revocable Trust Agreement of Manning Lee Williams as the proper Party Plaintiff.

On January 15, 2015, the Respondent filed an Amended Complaint. This pleading realleged in its initial Complaint and requested attorney fees. The Appellants filed an Answer and Counterclaim on January 28, 2015. The Counterclaims were the same allegations contained in the November 20, 2014 pleading.

On December 16, 2015, the Respondent filed a Motion for Summary Judgment. A hearing was held on October 10, 2016. The court granted the summary judgment by Order filed January 14, 2019. The Appellants filed a Motion for Reconsideration on January 23, 2019. By Order filed April 24, 2019, the court denied the Appellants' Motion.

This appeal has ensued.

I. The Court Correctly Applied The Sham Affidavit Rule

The facts of a case are extremely important when the trial court is deciding whether to grant a Summary Judgment. In the case at bar, the actions of the Appellants were unwarranted and improper. And, the Appellants' counterclaims were undocumented.

It is respectfully submitted that the following facts are important:

- The gate to the subject easement had been installed by the Respondent long before the Appellants owned the property. The installation was to prevent people from dumping debris onto the Respondent's property. When the Appellants purchased their property, they were given a key.

- The disputes between the parties came to a head when the Appellants denied access by changing the locks on April 19, 2011. Subsequently, on June 2, 2011, the Appellants parked a truck in front of the easement.

- When the Complaint was filed, the Appellants' Answer did not raise any issues relating to damages or wrongdoings on the part of the Respondent.

- In discovery, the Appellants specified that they had "no damages" (Interrogatory, page _____).

- Notwithstanding, when Mr. Norden was deposed, he testified that he first learned about trespassing on the part of the Respondent in planting season of 2007 (Depo.- page 13).

- The real motive of the Appellants was documented when Mr. Norden testified that if the Williams would simply keep the gate locked every time they went in and out, he would settle the lawsuit because that is all he wanted (Depo. – page 49).

The subject gate and easement are located on the northern boundary of the Appellants' land, so there is minimal, if any, interference with the Appellants' use of their property. Notwithstanding, When the Appellants' purchased the property they were given a key (Hearing page 4).

On April 19th, the Appellants abruptly changed the locks and the Respondent did not have a key (Hearing – Depo. page 28). The Appellants testified that he "thinks" that he left a message for the Respondent (Hearing, page 29). The point is the Respondent did not have access and had to cut the lock and put on another one.

On June 2nd, the Appellants parked their truck in front of the easement denying access. It was there for over five (5) days (Hearing, page 31). This prompted the bringing of the lawsuit.

The reasons that the Appellants took the actions that they did may never be fully understood. However, they did testify that if the Respondent would simply open and shut the gate every time they went in and out, the lawsuit could be settled (Tr. 49). Thus, the only evidence that we have to justify the actions of the Appellants is that they simply want to control the use of a gate that is not even theirs.

In the case of Cothran v. Brown, 357 S.C. 210 (2004), our Supreme Court adopted our state policy for a Sham Affidavit. The Court held that when attempting to determine whether to treat the Affdiavit as a "Sham Affidavit", the following considerations are important:

> **Explanation** – If the Affidavit is designed to explain or correct a previous sworn state, the Affidavit may be acceptable. [In the case at bar, that was not the case; instead, the Affidavit is a blatant change of testimony and does not even make reference to the prior sworn testimony of Mr. Norden in his deposition.]
>
> **Importance of Fact** – If the contradiction relates to an insignificant fact, the Court may place less significance on the change in testimony. [In the case at bar, the contradiction is the basis of the Appellants' claim for trespass.]
>
> **Access to Prior Testimony** – If a litigant did not have access to his prior testimony, the Court may be more lenient. [In the case at bar, the prior testimony had been given in a deposition with his attorney present and there was no suggestion that Mr. Norden did not have the prior testimony available.]

Degree of Variation – If the degree of variation in the testimony is significant, the Affidavit may be less likely to be accepted.. [In the case at bar, the Affidavit is an outright contradiction of Mr. Norden's prior testimony and was submitted for the sole purpose of trying to survive a statute of limitation argument.]

Confusion – If the Court concludes that there was confusion when the prior statement was made, then the contradiction can be justified. [In the case at bar, there is no evidence of any confusion; the first statement was made with counsel present, and nothing was offered by the Appellants to indicate that they were confused.]

Purpose of Affidavit – If the second Affidavit is being used for the purpose of resisting a Summary Judgment Motion, the Affidavit may be less likely to be accepted. [In the case at bar, the sole reason for the Affidavit was to defeat a Motion for Summary Judgment.]

Based upon the fact pattern of this case and based upon the specific facts surrounding the subject Affidavit of the Appellants, it is respectfully submitted that the trial court properly treated the Affidavit as a "sham".

Even if the Appellants' Affidavit were not considered to be "sham", the court properly granted a Summary Judgment. The Appellants' claim for trespass was barred by the statute of limitations. Code §15-3-530 specifies that a cause of action for trespass as a three (3) year statute of limitation.

In the case of City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225 (Ct. App. 2004), the Court outlined a history of our statute of limitations. Even though this statute is a procedural device, it is almost universally accepted by all jurisdictions. The lengths of a statute of limitation may vary, but the statutes are imposed for the purpose of setting a time limit to bring an action because delays may make evidence unavailable. The Court specifically stated that statute of limitations "promote justice by forcing parties to pursue a case in a timely manner" id at. p.231.

The underlying purpose for the statute of limitation is to require cases to be tried before memories fade and evidence grows stale or nonexistent.

In the case at bar, the Appellants had owned their land since 2007. For over four (4) years after they purchased their land, they never claimed that the Respondent was trespassing. And, about 3 1/2 years after the Respondent commenced the subject action is when the Appellants first claimed that the Respondent was trespassing. [This is true even though the Appellants testified that they thought the Respondent had been trespassing since 2007 (Tr. 13).]

II. The Court Properly Held That The Respondent Did Not Exceed The Scope of The Easement

When a litigant is attempting to avoid the granting of summary judgment, there is a duty to come forward and do more than make unsupported allegations and claims. In the case of Sides v. Greenville Hospital System, 362 S.C. 250 (Ct. App. 2004), the Court held that when fighting a Motion for Summary Judgment, a litigant must show "specific facts' that demonstrate that there is a genuine issue of fact for trial.

In the case at bar, the Affidavit of the Appellants does not assert specific facts. In their counterclaim, the Appellants simply assert that the Respondent does not follow the path shown on the plat (Counterclaim paragraph 31). The Appellants contend that the Respondent trespasses every time they access their property (Counterclaim paragraph 32). In support of these allegations, the Appellants offered pictures of parked vehicles and a post which had been placed into the ground. However, these pictures do not show that there is any trespass. In fact, the trial court stated to counsel that the court could not tell where the vehicles were located as it related to the easement shown on the plat (Tr. 24 - Hearing).

In their Affidavit, the Appellants stated that they had put stakes in the ground when planning a building. This made them realize that there was a trespass. They also averred that they had had another survey done of the property and the easement. However, no pictures showing the stakes in the ground were presented and the new survey was not offered into evidence. As a result, there was no showing to indicate that the Respondent was trespassing.

A significant fact about this case is that the roadbed which is used as the easement is well marked. It is undisputed that the roadbed is well identified and has been in use for a long time (Tr. 8 – Hearing). If there were a "new roadbed" as indicated by the Appellants, pictures could document that new tracks were being made and new ruts for the travel.

In the prior Argument, the Respondent presented the fact pattern of this case. The facts of this case require the Appellants to come forward with some documentary evidence to show a dispute. This is particularly true when the Appellants admitted that if the Respondent would simply open and shut the gate every time, they would dismiss their case. (Depo. – page 49).

The Appellants' Counterclaim for trespass is totally unsupported. During arguments before the court, reference is made to stakes which show trespass and to a new survey. However, this was not presented to the court. Accordingly, the court properly granted summary judgment.

III. The Court Correctly Found That The Nuisance Claim Was Unfounded

The Appellants' argument for a nuisance is unfounded. The Appellants did not present any evidence that would justify a claim for nuisance. One of the Appellants arguments was that their quiet enjoyment of their land was interfered with because the Respondent allowed third parties to have access to the easement for "hunting and other firearm practices". (Counterclaim, paragraph 41). However, the Appellants offered no specific evidence to support this allegation. More importantly, in the case of Rice Hope Plantation v. S.C. Public Service Authority, 216 S.C. 500 (1950), our Supreme Court held that a property owner has the right to hunt and fish his own property. And, this right may be granted to or leased to other parties. id at. p. 524 and id at p. 142.

The Appellants also argued that the Respondent caused a substantial and unreasonable interference with the use and enjoyment of their land. However, the Appellants did not offer any specific evidence to support this claim. In their Brief, the Appellants cite three (3) cases which they contend supports their claim for nuisance. It is respectfully submitted that these cases are not applicable to the facts of the case at bar. A summary is presented below:

> **Hunter v. Hyder, 236 S.C. 378 (1960)** – The Defendant was having timber cut on his own land. By mistake, his logger went onto the land of the adjoining property owner. Trees were removed and ruts were placed in the Plaintiff's meadow land. Thus, there were specific damages.
>
> In the case at bar, there were no damages. There was no specific showing that anyone went onto the property of the Appellants and hunted.
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> **Deason v. Southern Railway, 142 S.C. 334 (1914)** – The Defendant diverted water and created damage to the pond of the Plaintiff. The concentration of water and the altering of the flow of surface water caused specific damage to the Plaintiff.

In the case at bar, the Appellants can attest to no specific damage other than a general allegation that the Respondent was using their land for hunting or for parking vehicles.

Peden v. Furman University, 155 S.C. 1 (1930) – Furman University was leasing property to be used as a baseball field. The field was too small for playing the sport and did not have adequate space for patrons. As a result, the Plaintiff's property was damaged from patrons attending the games and players hitting the balls onto adjoining land. Some damages included fences being knocked down. Thus, there were specific damages which could be documented.

In the case at bar, there are no known damages. The only evidence is unsupported and undocumented allegations of the Appellants.

The Appellants also contend that the trial court erred because it held that the Appellants failed to expressly allege and prove agency. It is respectfully submitted that this argument is without merit. The trial court did not dismiss the Appellants' action based on the lack of agency. It is true that no specific allegation was made of agency, but the reason that the nuisance claim was determined to be unfounded was because of the lack of evidence, not the lack of showing agency.

Our Courts have consistently held that in order for nuisance to be a viable cause of action, the interference must be substantial and unreasonable. Not all interference with adjoining property owner constitutes nuisance. In the case of FOC Lawshe Ltd. Partnership v. International Paper Co., 352 S.C. 408 (Ct. App. 2002), the interference was substantial. International Paper Co. was leasing its property to third parties for hinting purposes. The Lessee used dogs which were released and allowed to run at large. The dogs crossed onto the neighboring property owners land. The dogs raided quail pens and also interfered with the hunting of the Plaintiff. The Plaintiff complained of these actions, but the Defendant continued to use this practice.

In the case of O'Kane v. O'Kane, 332 S.C. 551 (1993), the Defendant was found to be creating a nuisance because it created a hog farm over the subject right-of-way. The fact that hogs were in the path of the right-of-way interfered with the Plaintiff's access to his property. Therefore, there was a specific showing of unreasonable interference.

In the case at bar, there are no egregious actions on the part of the Respondent, or any of its agents, that have interfered with or damaged the Appellants' property. Accordingly, the trial court properly granted summary judgment.

NOTE: The Appellants have not presented the issue of interfering with their contractual rights. It is respectfully submitted that this issue has been abandoned. If this Court contends that the exception is still part of the appeal, the Respondent would offer the following:

- **Trial Argument** – Counsel for Appellants simply argued during the trial that the Respondent's son told the realtor that the Appellants could not list or sell their land. No documentation was presented. The realtor was not deposed and there was no affidavit taken of or prepared by the realtor.

- **Appellants' Affidavit** – In their Affidavit, the Appellants did not argue or present any evidence on the claim of contractual interference.

Based on the above, it is respectfully submitted that the issue of contractual interference is not properly before the Court.

CONCLUSION

The Respondent respectfully submits that the ruling of the trial court should be affirmed. The Affidavit presented by the Appellants was properly treated as a "sham". And, the statute of limitation had clearly run which would prevent any claim of trespass.

There was no showing made by the Appellants which suggested that the Respondent exceeded the scope and intended purpose of the easement. The well established path had always been used and there was no evidence to show that a new path was being created.

The contention of the Appellants that the Respondent was creating a nuisance was totally unfounded. Nothing was shown to the court to justify a cause of action for nuisance being brought.

Respectfully submitted,

By: _____
Richard H. Rhodes

November 1, 2019

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PROOF OF DELIVERY

This is to certify that on the 1st day of November, 2019, the undersigned, secretary to Richard H. Rhodes, Esq., served a copy of the **RESPONDENT'S INITIAL BRIEF** by depositing a copy of the same into the United States Mail, postage pre-paid and in the correct amount to the following:

J. Falkner Wilkes, Esquire 114 Whitsett Street Greenville, SC 29601 Counsel for Appellants	N. Douglas Brannon, Esquire P.O. Box 3254 Spartanburg, SC 29304 Counsel for Appellants

JO ANN CHAMPION

SWORN to before me this 1st
day of November, 2019.

_____(SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 12/10/2025

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November 1, 2019

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Re: The Revocable Trust Agreement of Manning Lee Williams dated October 28, 2015 vs. Cynthia Norden and Raymond Norden
Case No. 2011-CP-42-02079
Appellate Case: 2019-000852

Dear Ms. Kitchings:

I have enclosed an original of the Respondent's Initial Brief and Designation of Matter. I have also enclosed Proof of Service on all counsel.

If I need to supply additional information, please let me know.

Sincerely,

Richard H. Rhodes

RHR/jc
Enc.

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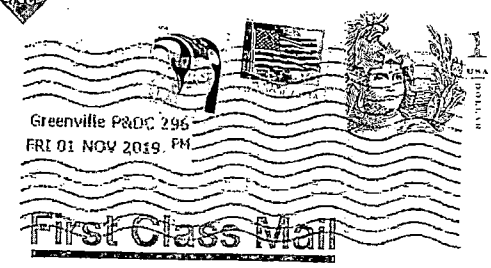

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