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,

v.

Cynthia Norden and Raymond Norden, ... Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the court err in excluding the entirety of both Defendants' affidavits as sham affidavits where the affidavits failed to contradict a prior sworn statement?

2. Did the court err in granting summary judgment and dismissing the Defendants' claim for trespass where evidence existed that plaintiffs' exceeded the scope of the easement?

3. Did the court err in granting summary judgment and dismissing the Defendants' nuisance claim where evidence showed the plaintiffs' acts caused a substantial and unreasonable interference with the use and enjoyment of defendants' land?

4. Did the court err in granting summary judgment and declaring that the Plaintiffs had an unrestricted use of easement over Defendants' land?

STATEMENT OF THE CASE

This case was initiated by the Plaintiffs' Summons and Complaint filed May 10, 2011. Plaintiffs filed the Plaintiff's First Amended Complaint and Reply to Amended Counterclaim of Defendants on January 15, 2015. The Defendants filed Counterclaims dated January 26, 2015, to which the Plaintiffs filed a Reply on February 16, 2015. This case came to court by way of the Plaintiffs' Motion for Summary Judgment date December 16, 2015. A hearing was held on October 10, 2016, in Spartanburg County, the Honorable J. Derham Cole presiding. Appearing at the hearing were the parties and their respective counsel, John B. White for the Plaintiffs and N. Douglas Brannon for the Defendants.

An Order Granting Plaintiffs' Motion for Summary Judgment was issued on January 14, 2019, granting the Plaintiff's motion dismissing the counterclaims of the Defendants and declaring that the Plaintiffs' had an unrestricted right to use the easement over the Defendants' property. The Defendants timely moved to alter or amend judgment. An Amended Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion to Reconsider was entered April 24, 2019. The Defendants timely appealed. J. Falkner Wilkes and N. Douglas Brannon represent the Defendants/Appellants on appeal. The Plaintiffs/Respondents are represented by Richard H. Rhodes.

ARGUMENT

Standard of Review

In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRCP. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 644 S.E.2d 730. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Montgomery v. CSX Transp., Inc., 376 S.C. 37, 656 S.E.2d 20 (2007) Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct.App.2004).

I. THE COURT ERRED IN EXCLUDING THE ENTIRETY OF BOTH DEFENDANTS' AFFIDAVITS AS SHAM AFFIDAVITS WHERE THE AFFIDAVITS FAILED TO CONTRADICT A PRIOR SWORN STATEMENT.

Based on a finding that the Affidavits of the Defendants contradicted a statement made in the prior deposition testimony of Defendant Ray Norden the court refused to consider the entirety of both affidavits of the Defendants. Under the competing affidavit rule, also commonly referred to as the "sham affidavit" rule, a court may disregard a subsequent affidavit as a "sham," that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent

affidavit to contradict that party's own prior sworn statement. *See* Margo v. Weiss, 213 F.3d 55, 63 (2nd Cir.2000); Rohrbough v. Wyeth Labs. Inc., 916 F.2d 970, 976 (4th Cir.1990); Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703, 705 (3rd Cir.1988); Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). The court expressly relied on the sham affidavit rule in refusing to consider either affidavit of the Defendants[1] in their entirety.

Here the court based its finding that the Defendants' affidavits constituted sham affidavits based on what it saw as a contradiction between the deposition testimony of Ray Norden and the Defendants' affidavits. A review of the evidence shows the court's finding to be in error. The court cited to only one contradiction. Ray Norden testified in his deposition that his first knowledge that the Defendants were not using the correct easement was in 2007. Aff 051515 13. His affidavit states that "We believed that the Plaintiffs were traveling off of the easement and therefore trespassing just they entered on to their property (*sic*), but were not sure of the this fact until we began the process of laying out the footprint of our indoor riding ring." Depo RN page 2. Ray Nordens' affidavit does not contradict his prior statement as to what he believed in 2007. It only clarifies that he wasn't sure of the fact until he obtained the survey. The statements clearly do not conflict at all.

In distinguishing between a sham affidavit and a correcting or clarifying affidavit the court should consider the degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact. Cothran v. Brown, 357 S.C. 210, 217, 592 S.E.2d 629, 633 (2004). Here the affidavit simply stated that Ray Norden believed that

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[1]The Defendants signed the same affidavit which was entered as an affidavit twice, once for each Defendant.

the Plaintiffs were going off the easement and became certain once he obtained a survey. This statement simply clarifies when his belief became certain. It was therefore not in conflict with the prior statement sufficiently to trigger sham affidavit rule and warrant the exclusion of the entirety of both Defendants' Affidavits. The court therefore erred in disregarding both of the Defendants' affidavits as sham affidavits.

II. THE COURT ERRED IN GRANTING SUMMARY JUDGEMENT AND DISMISSING THE DEFENDANTS' CLAIM FOR TRESPASS WHERE EVIDENCE EXISTED THAT PLAINTIFFS' EXCEEDED THE SCOPE OF THE EASEMENT.

The Court erred in finding that the Defendants had not exceeded the easement at issue and granting the Plaintiffs' motion for summary judgment on the Plaintiffs' trespass claim. While the Court found that the Plaintiffs had used the same path for 40 years, it did not find, nor was there evidence to support, that the easement for ingress and egress extended to allow Plaintiffs to leave the easement roadway and create a parking area for farm equipment or vehicles on the Defendants' property. The Plaintiffs offered no evidence to support the use of the Defendants' property for anything other than the ingress and egress to their property, or that the easement exceeded what was granted by deed and plat, or at most, what the court referred to as the gravel easement roadway. The record shows that the Plaintiffs exceeded any possible boundary of the easement when they used a portion of the Defendants land to store farm equipment and vehicles.

The record shows that in addition to ingress and egress over the disputed portion of the easement, the Plaintiffs also began parking farm equipment and vehicles on the Defendants' property. The record shows that the Plaintiffs were parking equipment on the Defendant's

property, outside of the easement roadway and outside of the purpose of the easement. AFF. 23; 32-33 and Attachments C&D; Ans & CC para 40-43. The affidavits and evidence offered by the Plaintiffs fail to show the use of the easement for any purpose other than accessing their property, nor that the easement extended to the Defendants' property for the use of parking or storing farm equipment or vehicles. The record is sufficient to establish a question of fact that the parking of farm equipment or vehicles on the Defendants' property exceeded the easement and constituted a trespass. C. Norden Depo p. 32; Aff. Def p. 4. The record also shows that the Plaintiffs placed a post on the Defendants' property to use to lock the access gate open and prevent the Defendants' from closing the gate to their property. Aff. Def.; T. p. 28; Photo Ex. C & D. Evidence that the Plaintiffs placed a post on the Defendants' property likewise is sufficient to establish a genuine question of material fact as to trespassing for the purposes of summary judgment.

The placing of the post off of the easement is in and of itself sufficient to support the Defendants cause for trespass. "'The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted.' Snow v. City of Columbia, 305 S.C. 544, 552, 409 S.E.2d 797, 802 (Ct. App. 1991). 'The entry itself is the wrong. Thus, for example, if one without license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure.' *Id.*" Ralph v. McLaughlin, No. 2017-000866, 2019 WL 3938679, at *10 (S.C. Ct. App. Aug. 21, 2019). Placement of the offending post therefore is sufficient to support Defendants' claim. The court therefore erred in granting summary judgment on the issue of trespass.

The court further erred in granting summary judgment and dismissing the Defendants' trespass claims based on the statute of limitations. The Plaintiffs admitted that the post to lock the gate open was erected on the Defendants' property up during the litigation in 2014. R. T. 26. The Plaintiffs' placement of the post and locking the gate open so the Defendants' could not close it, as well as the Plaintiffs' parking of equipment and vehicles off of the easement roadway occurred withing three years of the initiation of the suit and therefore, are not barred by the statute of limitations. R. T. 20-27. While the trespass as to the actual location of the easement roadbed being outside of that which was granted by deed and plat had been occurring long before this case was filed, it did not become evident until the Defendants' obtained a survey, which also occurred within three years of the Defendants' counterclaims. Aff Def. The parking of equipment off of the easement roadbed, the erection of the gate post to lock the gate open to prevent the Defendants from securing their property, and the easement roadbed exceeding the easement granted by deed, are all separate and distinct. Each individually constitutes sufficient evidence of trespass such that summary judgment was error.

In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 642 S.E.2d 751 (2007); Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Moore v. Weinberg, 373 S.C. 209, 216, 644 S.E.2d 740, 743 (Ct.App.2007); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). If triable issues exist, those issues must go to the jury. Mulherin–Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct.App.2005). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be

drawn from them, summary judgment should be denied. Montgomery v. CSX Transp., Inc., 376 S.C. 37, 656 S.E.2d 20 (2007). Here, the parking, the gate post, and the non-conforming path of the easement roadbed each individually create a genuine issue of material fact.

While the evidence submitted at the summary judgment stage was not substantial, and additional inquiry necessary, it was sufficient to create questions of fact sufficient to overcome summary judgment. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004). Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct.App.2004). The court erred in granting summary judgment and dismissing the Defendants' claim for trespass.

III. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE DEFENDANTS' NUISANCE CLAIM WHERE EVIDENCE SHOWED THE PLAINTIFFS' ACTS CAUSED A SUBSTANTIAL AND UNREASONABLE INTERFERENCE WITH THE USE AND ENJOYMENT OF DEFENDANTS' LAND.

The court in this case granted summary judgment and dismissed Defendants' claim based largely on findings that the nuisance was caused by actions of third parties and that the Defendants' had failed to expressly allege agency. Amended Order. This was error as the Defendants' claim clearly alleged that the nuisance was caused by the Plaintiffs' actions in allowing others to commit acts that injured the Defendants' peaceful and quiet enjoyment of their

property. The court's ruling was further in error as the Defendants' were not required to expressly plead agency where it was otherwise clear from the pleadings and record.

The court's ruling overlooked that the Defendants' claim includes the Plaintiffs' act of allowing the third parties to skeet shoot on the Plaintiffs' property. Contrary to the court's ruling, the record shows that the Defendants expressly alleged that the Plaintiffs interfered with the Defendants' quiet enjoyment by allowing third parties to hunt and "other firearms practices" on the Plaintiffs' property. (2011 RN Depo 43; CC para 46-52). Defendants' counterclaim for nuisance made clear that the underlying acts included the actions of third parties committed at the invitation or with the consent of the Plaintiffs. The Defendants' Counterclaim specifically alleges that the "Plaintiffs regularly allow others to use the subject easement for hunting and other firearms practices" which the Defendants alleged unreasonably interfered with their quiet enjoyment of their property. CC para 50. The court overlooked that the actions of Plaintiffs in inviting and consenting to the actions of the third parties on their property was an essential part of the Defendants' claim.

The court's ruling also rests heavily on its finding that the Defendants' failed to expressly allege agency, and as a result could not impute to the Plaintiffs the nuisance created by those actually shooting guns on the Plaintiffs' property. This was error as the law does not require that the Plaintiffs personally be committing the offense conduct that is the nuisance if the Plaintiffs procured or allowed the activity. Nor was it necessary that the Defendants expressly plead agency to establish their case against the Plaintiffs. "We reach this conclusion in view of the fact that the pleadings, as a whole, raised the issue as to whether the delicts charged against the appellants were committed by their agents and servants." Hunter v. Hyder, 236 S.C. 378, 386, 114 S.E.2d

493, 497 (1960). Here it was not necessary that Defendants expressly allege agency as the allegations of the Defendants' counterclaim made the basis of the claim clear. "While again, the complaint does not use the very words of the statute, it nevertheless alleges that the fire originated in consequence of the act of the defendant, and this is equivalent to alleging that the fire 'originated in consequence of the act of any of the defendant's authorized agents or employés.'The act of an authorized agent or employé is the act of the principal. '*Qui facit per alium facit per se*'." Hunter v. Hyder, 236 S.C. 378, 385–86, 114 S.E.2d 493, 497 (1960).

Here, proof that the Plaintiffs allowed the shooting to occur on their property was sufficient to establish the cause for nuisance. ("Nuisance' is *** 'Anything that unlawfully worketh hurt, inconvenience or damage. *** That class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property, either real or personal. *** A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. It produces damage to but one or two persons, and cannot be said to be public. *** If a thing is calculated to interfere with the comfortable enjoyment of a man's house, it is a nuisance. *** Every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property. ***"' Deason v. Southern Railway, 142 S. C. 334, 140 S. E. 575, 577; 3 Bouv. Law Dict. (1914) p. 2379.) Peden v. Furman Univ., 155 S.C. 1, 151 S.E. 907, 912 (1930).

The evidence sufficiently establishes the cause for nuisance for the purposes of overcoming the Plaintiffs' motion for summary judgment. The Defendant Ray Norden testified that the Plaintiffs are responsible for the nuisance created by the third parties, by giving them the key to the gate and therefore consent to use the property. Depo Ray Norden p. 43-44. All

ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003). In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 642 S.E.2d 751 (2007); Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Moore v. Weinberg, 373 S.C. 209, 216, 644 S.E.2d 740, 743 (Ct.App.2007); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). If triable issues exist, those issues must go to the jury. Mulherin–Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct.App.2005).

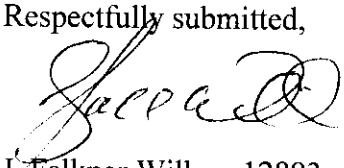
Here there is evidence that the Plaintiffs gave access to others to conduct skeet shooting and hunting on their property, and that the shooting has prevented the quiet and peaceful enjoyment of the Defendants' property. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Montgomery v. CSX Transp., Inc., 376 S.C. 37, 656 S.E.2d 20 (2007). Because there is sufficient evidence in record to show that the Plaintiffs consented and gave access to those shooting guns on the Plaintiffs' property, summary judgment was in error. "Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004)" Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct.App.2004). The court therefore erred in granting summary judgment as to the Defendants' nuisance claim.

Based on the foregoing the court erred in granting by summary judgment dismissing the Defendants' counterclaims and declaring that the Plaintiffs had an unrestricted right to the use the easement road over the Defendants' property.

CONCLUSION

Based on the foregoing the decision of the trial court should be reversed.

Respectfully submitted,



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October 14, 2019.

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CERTIFICATE OF SERVICE

I certify that on October 14, 2019, I served Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal on the Respondents, and others if indicated, by placing a copy in the U.S. Mail, first class, postage prepaid, addressed as follows:

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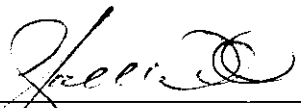
Respectfully submitted,



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