IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Appellate Case No. 2019-001216

Frances O. Johnson, Respondent,

v.

Mason C. Heyward, Berkeley Electric Cooperative, Inc., and Clementine Ravenel, Defendants,

Of Whom Mason C. Heyward is the Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

I. DID THE MASTER ERR IN CLARIFYING AND LOCATING THE EASEMENTS SUCH THAT THERE WAS ONE 25 FOOT WIDE PATH?

II. DID THE MASTER ERR IN TRYING THE ISSUE OF DEDICATION WHEN THIS WAS PUT AT ISSUE IN THE PLEADINGS, CAUSED NO PREJUDICE TO HEYWARD, AND WHERE HEYWARD DID NOT ASK FOR A CONTINUANCE?

STATEMENT OF THE CASE

Plaintiff Francis O. Johnson commenced this action by filing a Summons and Complaint on February 25, 2008, requesting a declaratory judgment, which would among other things, grant him a 25' right of way of Resurrection Road, located on Johns Island, County of Charleston (Complaint, p. 3). Heyward answered and he eventually filed an Amended Answer and Cross Claim where he crossclaimed against the County of Charleston, asserting abandonment as a defense against Johnson's cause of action. Johnson, out of an overabundance of caution, filed a pleading in response that denied any counterclaim mentioned in Defendant Heyward's Amended Answer and Crossclaim. Ralph Haynes explicitly challenged the claim of abandonment via letter (Exhibit 2 to his Amended Answer) and via his pleadings in his Amended Answer and Crossclaims (Paragraphs 17, 32-36, and 43, along with his prayer).

The County filed an Amended Answer on November 21, 2011 in which it asserted many affirmative defenses. Berkeley Electric Cooperative, Inc. duly answered.

The trial of the case occurred through several separate hearings, including January 20, 2010, May 28, 2010, and January 14-17, 2013.

On August 13, 2010, the Court issued a ruling granting Johnson a prescriptive easement, but which reserved the issue of the nature, scope, location, and extent of the easement. This Order is not appealed and Heyward does not dispute the existence of the prescriptive easement.

The Court issued an Order and Findings of Fact dated June 30, 2015 which defined the nature, scope, location and extent of the easement. He ruled:

> SECOND: George A.Z. Johnson, Jr., Inc. be retained at the expense of Francis O. Johnson and Ralph L. Haynes to redraw in two or more plats, in recordable form:
>
> (1) A survey and plat commencing at Betsy Kerrison Parkway and terminating and including the property of Francis O. Johnson to Line J-N (the easternmost boundary line of parcel 14) on the survey of October 31, 2011 with specific detail up to Line B-C on said plat, including the Existing 25' Right-of-Way (A, B, C, D, A)
>
> (2) A survey and plat showing the area from Line B-C (also shown as L3) to the point of termination at point M (1.0.5/8" Rebar).
>
> THIRD: The southernmost boundary line between the Existing Dirt Road known as Resurrection Road be moved or relocated to the south between points A and H on the Johnson survey and plat so as to widen the prescriptive easement from the said point A to point H to a uniform width of twenty-five (25') feet.
>
> FOURTH: From point H on the Johnson plat (the point of intersection of the existing dirt road with the existing 25' Right-of-Way) the existing dirt road be incorporated into and become a part of the easternmost 415.37' to Line B-C on the Johnson plat.
>
> FIFTH: The movement or relocation of the southernmost boundary of the existing dirt road, as aforesaid, will create a viable, uniform right-of-way to Line B-C (line L2) on the plat of Johnson with a length of 891.13 feet and a uniform width of twenty-five (25') feet as contemplated by the actions of Mason C. Heyward and Charleston

> County Council, all as shown on the approved Final Plat recorded in Plat Book DA, page 789, RMC Office for Charleston County.
>
> SIXTH: The area of the Existing 25' Right-of-Way to the west of point H on the Johnson survey and plat is impassable because of vegetative and topographical features and that area be returned by the County of Charleston in its natural state to Mason C. Heyward as the compensation for the portion of the "radish" patch used to create the uniform twenty-five (25') foot of the westernmost portion of Resurrection Road.
>
> . . .
>
> EIGHTH: Within forty-five (45) days subsequent to this Order becoming the Final Order of this Court, the George A.Z. Johnson, Inc. survey team draw, in recordable form, the two surveys and plats as outlined.

The area around the existing roadbed was widened to an easement of 25 feet by incorporating the "radish patch" and parts of a dedicated 25 foot easement. The remainder of the dedicated 25 foot easement was given back to Heyward. This ruling was set forth graphically on the plat of Johnson dated October 20, 2015.

Appellant Mason C. Heyward filed a Motion to Alter and Amend Judgment, For a New Trial, and for Relief from Judgment, July 15, 2015, which was denied on June 13, 2019. Heyward's counsel received written notice of entry of judgment of the Order appealed from on June 19, 2019. Heyward timely served his Notice of Appeal on July 17, 2019, appealing the Orders of June 30, 2015, and of June 13, 2019.

FACTS

Resurrection Road has existed for many years, or "since dirt was new." It is a prescriptive easement (Order of August 13, 2010), and the roadbed varies in width, as shown on the plat of Steven J. Johnson (Plaintiff's Exhibits 1 and 1A).

In 1996, Mason Heyward wished to subdivide his property into 2 lots, one of 5 acres and one of 1.3 acres. He instructed his surveyor to prepare a plat in February of 1996 (Plaintiff's Exhibits 2 and 2A). The Planning Staff and Public Works Department of Charleston County required a 50' right of way, but Heyward would only give a 25' right of way. Planning staff explained to the board that "There are landlocked properties behind him, it is the County's obligation to provide access to these landlocked properties." Mr. Heyward responded by saying, "If the people in the rear would like access to the property, let them pay for the additional 25' right of way" (Plaintiff's Exhibit 10; Transcript of January 15, 2013, p.127, line 1 - p.133, line 25). County Council eventually "granted approval of a 25' road right of way dedicated to the public. Resurrection road serves as access to approximately 25 acres of property with high developmental potential" (Defendant's Exhibit 15; Transcript of January 15, 2013, p.134, line 12 - p.136, line 12; p.63, lines 7-17).

The granted 25' road, however, was not Resurrection Road. It turns out, rather than being the roadbed and surrounding area where people had traversed "since dirt was new," the dedication had area impassible because of grand trees and topographical hindrances (Defendant's Exhibit A; Johnson Plat of April 15, 2010; Transcript of January 14, 2013, p.39, line 18 - p.40, line 24). As shown on the plat, Resurrection Road roadbed overlaps with the dedicated 25' easement in some areas, but there is an island of land, or "radish patch" that separates the two (Transcript of January

17, 2013, p.23, line 18 - p.24, line 16). This is a small area of approximately 1733 square feet (Plaintiff's Exhibits 1 and 1A; Johnson Plat of October 20, 2015).

Johnson, who owns property down Resurrection Road, eventually wanted to sell, but Heyward blocked this sale because of access issues (Plaintiff's Exhibit 13; Transcript of January 17, 2014, p.13, line 2 - p.22, line 4). Haynes bought his property for investment purposes thinking it had 25' road access (Deposition of Haynes, p.12, lines 1-18; p. 29, line 15 - p.31, line 16).

James R. Neal, the Director of Public Works for the County of Charleston, (Transcript of January 15, 2013, p.9, lines 1-3) testified that the County of Charleston has records of 34 years of continuous maintenance on Resurrection Road, including motor grader operators to maintain the road (Plaintiff's Exhibit 8; Transcript of January 15, 2013, p.11, lines 1-15). The assigned motor grader operator would go down Resurrection Road to blade road to the end of the road. This would include blading outside the roadbed and into the radish patch, the 1733 square foot area (Transcript of January 17, 2013, p.85, line 19 – p.86, line 24; p. 124). If the operator needed dirt/fill, then a foreman would follow up with an inspection to see that he did it properly (Transcript of January 15, 2013, p.12, line 19 - p.16, line 15). Inspections and maintenance occurred on a monthly and regular basis (Transcript of January 15, 2013, p.95, line 20 - p.98,line 20; Transcript of January 17, 2013, p.124, line 4-23; p.130, line21 - p.131, line 9). Numerous exhibits were entered through Mr. Neal (Plaintiff's Exhibits 5, 6, 7, and 8) and they included a list of the county non-standard roads (Plaintiff's Exhibit 5). Resurrection Road was shown on that list and it was noted–"approximate years maintained–34; it is in Council District 8; number of adjacent properties are 9. Travelway is 30'; no turn around at the end. No drainage. There are trees. The length in miles is .4" (Plaintiff's Exhibits 5 and 8; Transcript of January 15, 2013, p.28, line 12 - p.30, line 2). Mr. Neal agreed that

the existing right-of-way had at least existed since August 16, 1982. Mr. Neal testified that a portion of the existing prescriptive right-of-way was within the boundaries of the dedicated 25' right- of-way and was regularly maintained by the County of Charleston (Transcript of January 15, 2013, p.15, line 20 - p.16, line 15).

Mr. Neal stated that he, as the Director of Public Works, sent a letter to all persons owning property joining Resurrection Road that stated in part as follows:

> Our records reflect that you reside upon or along property adjoining a road formerly characterized as a community road. County records show that you have allowed lengthy public use of property for the above-referenced road; and the County has performed long-term, continuous maintenance of this road for 20 years or more. As a result of these actions, Council determined as of December 6, 2011 at a County Council meeting that Resurrection Road is a public road. In that regard, please consider the following:
>
> 1. The County believes that this road is a public road because you have allowed the public to use your property for over 20 years, and the County has no record of your refusing our maintenance and/or improvement efforts. The County is planning to improve this road's condition.
>
> 4. Unless you notify the County in writing at the above-listed address within 90 calendar days from the date of this date of letter that you disagree and/or oppose these actions, the County will proceed with this continued maintenance and improvements under its public roads maintenance system.

A like letter was sent to all property owners adjoining Resurrection Road and only Mason C. Heyward gave notice, through counsel, that he disagreed with the contents of the letter (Plaintiff's Exhibits 7; Defendant's Exhibit 9; Transcript of January 15, 2013, p.47, line 20 - p.51, line 20).

Two long-term employees of the County–Mr. Raymond Robinson and Mr. Paul Porter–testified that they maintained, repaired, and worked on Resurrection Road over a period of many years. These employees testified that they had on a regular basis graded portions of the road, that they had at times ordered fill, packed and leveled any developing potholes, (Transcript of January 17, 2013, p.69, line 24 - p.78, line 20; p.79, line 21 - p.81, line 16; p.119, lines 6-17; p.122, line 21 - p.127, line 20), and that they had trimmed and cut back vegetative growth on either side of the travel path (Transcript of January 17, 2013, p.85, line 23 - p.87, line 18; p.124, lines 4-23; p.130, line 21 - p.131, line 9). Mr. Neal and these employees testified that a green Resurrection Road sign had been erected by the County, in place for many years, and was maintained by the County. The green color of the sign indicated that Resurrection Road was a public road as opposed to a blue sign which would indicate that it was a private road maintained by the residents of that private road (Transcript of January 15, 2013, p.24, lines 1 - p. 25, line 22; Plaintiff's Exhibits 3A and 4). The testimony and records of Mr. Neal and the testimony of the on-the-ground workers of the County of Charleston showed a continuing long-term repair and working of the road by the public authorities of the County of Charleston. Those actions and records, together with the correspondence to adjoining land owners, show a strict, cogent, and convincing dedication of Resurrection Road and the acceptance of that offer to dedicate that road as a public road.

STANDARD OF REVIEW

The determination of the extent of a grant of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). Thus, the Court of Appeals may take its own view of the evidence. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The Court of Appeals may reverse a factual finding by the trial court in

such cases when the appellant satisfies the court the finding is against the greater weight of the evidence. Campbell v. Carr, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct.App. 2004).

ARGUMENT

I. THE MASTER DID NOT ERR IN CLARIFYING THE LOCATION AND SCOPE OF THE EASEMENTS.

The Master was compelled to locate and define the scope of the easement such that the intentions of the parties were realized. Equity here follows the intentions of the parties. Heyward intended to give a 25' easement so that he and others could subdivide (Plaintiff's Exhibits 2, 2A, and 10; Transcript of January 15, 2013, p.127, line 1 - p.133, line 25; Defendant's Exhibit 15; Transcript of January 15, 2013, p.134, line 12 - p.136, line 12; p.63, lines 7-17). A long standing road was in existence (Order of August 13, 2010). It is equitable and within the power of the court to locate and clarify the implied easement such that it encompasses the road bed and is 25 feet wide. A court in equity may relocate an easement. It may be changed for equitable reasons. Goodwin v. Johnson, 357 S.C. 49, 591 SE2d 34 (Ct. App. 2003). Courts have moved easements along the route preferred by the dominant owner. 36 A.L.R. 4th 788 -791 Sec. 8(b).

The Goodwin factors are addressed in paragraph 29 of the Final Order. To have the easement in swampland, (Defendant's Exhibit A; Johnson Plat of April 15, 2010; Transcript of January 14, 2013, p.39, line 18 - p.40, line 24) or to have no 25' easement at all, would frustrate any honest intentions of the parties and the purpose of the easement. The location and scope set by the Master increases the utility of the easement. It is not impassible. It encompasses an existing road. The scope and the new location of the easement does not burden Heyward. He gains more acreage than

he loses. It is not closer to his house. The easement boundary is moved to the south and away from his property (Transcript of January 14, 2013, p.46, line 8 - p.48, line 1; Plaintiff's Exhibits 1 and 1A; Defendant's Exhibit A; Johnson Plat of October 20, 2015).

All of these factors show that locating the easement as such and clarifying its scope is reasonable, which is the basis for the decision in Marlow v. Marlow, 284 S.C. 155, 325 S.E.2d 703 (1984), especially since the express grant here envisioned future subdivision. Paragraph 23 of the Final Order outlines this potential subdivision with the County granting "approval of a 25' right-of-way being dedicated to the public" for "access to the approximately 25 acres of property with high development potential" (Defendant's Exhibit 15; Transcript of January 15, 2013, p.134, line 12 - p.136, line 12; p. 63, lines 7-17). Heyward bargained for this and the county reduced the right-of-way from 50' to 25' (Plaintiff's Exhibit 10; Transcript of January 15, 2013, p.127, line 1 - p.133, line 25). The Order of June 30, 2015 is fair, equitable and reasonable. Heyward should not be allowed disavow his promise and bargain to give the public a 25' easement such that he and others could subdivide. Heyward is not concerned about the increased burden on his estate, he is concerned about money. Heyward should not allowed to extract money from other landowners for a grant already expressly publically given (Transcript of January 15, 2013, p.117, line 10 - p.119, line 19). The easement is located in such a way that it is least burdensome to all parties involved and in such a way that Heyward receives more land than he gives (Plaintiff's Exhibits 1 and 1A; Defendant's Exhibit A; Johnson Plat of October 20, 2015).

II. THE MASTER DID NOT ERR BY TRYING THE ISSUE OF DEDICATION BECAUSE THIS MATTER WAS ALWAYS AT ISSUE BETWEEN HEYWARD AND THE ORIGINAL DEFENDANTS, AND BECAUSE HEYWARD NEVER MOVED FOR A CONTINUANCE.

Issues not raised in the pleadings cannot be a basis for relief at trial where not tried by the implied consent of the parties. Dunbar v. Carlson, 533 S.E.2d 913, 341 S.C. 261 (S.C.App. 2000). Motions to amend pleadings are within the sound discretion of the trial judge, and the party objecting must establish prejudice. Foggie v. CSX Transp., Inc., 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993).

A. Abandonment was always at issue in this case and Heyward was aware of this.

Heyward only asserts that the Master erred in trying the issue of abandonment, not the reasoning in the ultimate ruling. However, Plaintiffs were entitled to put up a defense to Defendant's claim of abandonment. The issue was put forth by Heyward as a defense and a cross claim against the County. Plaintiffs were required to file no responsive pleading to a defense and can freely contest the applicability of defenses at trial. Furthermore, Plaintiff Johnson , out of an overabundance of caution, did file a pleading in response that denied any counterclaim mentioned in "Defendant Heyward's Amended Answer and Crossclaim." Rule 15(b), SCRCP is only applicable, and an amendment to the pleadings is only necessary if the evidence offered "is not within the issues made by the pleadings." Here it clearly was an issue in the pleadings. An amendment was not necessary. As the Master found in his order of June 10, 2019, "[t]he pleadings conformed to the proof at trial."

Furthermore, Ralph Haynes explicitly and vehemently challenged Heyward's claim of statutory abandonment via letter (Exhibit 2 to his Amended Answer, and filed independently with

the court) and via his pleadings. His Answer and Crossclaim, in detail and in many paragraphs, puts abandonment at issue (Paragraphs 17, 32-36, and 43, along with his prayer) Haynes set forth his opposition to abandonment in his deposition which was incorporated into trial testimony (see 53[h] of the Final Order). Certainly Heyward knew this was going to be an issue at trial and it was tried with the consent of the parties. Heyward did not demonstrate that "the admission of such evidence would prejudice him in maintaining his action or defense upon the merits" as required by Rule 15(b), SCRCP. He was fully aware of these issues.

Once made aware of all of the facts, the County is free to change its position. Additionally as explained by council for the county, they did not believe they were changing their position. He states that the answer only speaks to there being no stamp on the plat, not to abandonment or acceptance (Transcript of January 14, 2013, p.10, lines 1-16).

Plaintiffs and Defendants went forward with testimony and were prepared to try this issue. They did try this issue and the pleadings show that the parties knew that the issue would be tried.

B. Heyward did not move for a continuance.

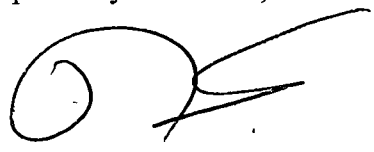
Ordinarily, amendments to conform to proof should be liberally allowed. Soil & Material Engineers, Inc. v. Folly Associates, 293 S.C. 498, 361 S.E.2d 779 (Ct.App.1987). However, if late amendment of the pleadings would cause prejudice to the opposing party, the court should either deny the amendment or grant a continuance reasonably necessary to allow the opposing party to meet the amendment. National Time Share Sales, Inc. v. Maritime Ltd. Partnership, 297 S.C. 43, 374 S.E.2d 678 (1988).

The Master did not refuse Heyward a continuance because he did not ask for one. Rule 15(b), SCRCP provides that if the court allows the pleadings to be amended, "The court shall upon motion grant a continuance reasonably necessary to enable the objecting party to meet such evidence." Assuming for the moment that an amendment was necessary, and that Heyward was prejudiced by such amendment, Heyward did seek an appropriate remedy and ask for a continuance (Transcript of January 14, 2013, p.6, line 17 - p.10, line 24). Heyward actually stated with regard to another issue, the value of certain property contained in appraisal, he would have to ask for a continuance if the appraisal was considered (Transcript of January 14, 2013, p.16, lines 4-19). Heyward was not reluctant to consider a continuance on that issue and if he thought he was going to be truly prejudiced, he would have asked for one as to the abandonment issue.

CONCLUSION

This Court should affirm the Master. The easement is in a reasonable location. Abandonment was always at issue in the pleadings.

Respectfully submitted,



April 22, 2020

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IN THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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The Honorable Mikell R. Scarborough, Master in Equity

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Frances O. Johnson, Respondent,

v.

Mason C. Heyward, Berkeley Electric Cooperative, Inc., and Clementine Ravenel, Defendants,

Of Whom Mason C. Heyward is the Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent by depositing one copy of it in the United States Mail, postage prepaid, on April 22, 2020, addressed to the Appellant's attorneys of record, John Edward Robinson, Esquire, 36 Broad Street, Charleston, SC 29401 and G. Simms McDowell, III, Esquire, 68 Legare Street, Charleston, SC 29401.

April 22, 2020

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April 22, 2020

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RE: Francis O. Johnson, Respondent v. Mason C. Heyward, Berkeley Electric Cooperative, Inc., and Clementine Ravenel, Defendants; Of Whom Mason C. Heyward is the Appellant
Case No. 2008-CP-10-1054
Appellant Case No. 2019-001216

Dear Ms. Allen:

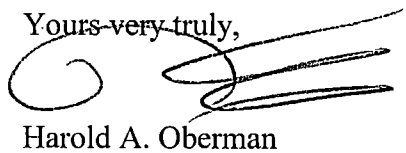
I enclose the original and one (1) copy of the Initial Brief of Respondent and Designation of Matter To Be Included in the Record on Appeal, along with the Proofs of Service and Certificate of Counsel, with regard to the above-captioned matter.

Upon filing, please return a clocked-in copy of each to our office in the enclosed self-addressed, stamped envelope.

Please note that we not only representing Francis O. Johnson but also Ralph L. Haynes. He is a Crossclaim Defendant and Counterclaimant in the underlying case and should be labeled as a Respondent in this Appellant case. I have enclosed a filed copy of the Form 4 and Consent Order signed by Judge Scarborough that allowed Ralph L. Haynes to enter his answer or other pleadings as well as a filed copy of the Findings of Fact and Order filed on June 30, 2015. We will await your advice on how to title this matter on our Final Brief.

If you have any questions or need more information, please give us a call. With warmest personal regards, I remain

Yours very truly,



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HAO/shb
Enclosures

cc: John Edward Robinson, Esquire (w/enclosures)
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