THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brian L. Boger, Special Referee

Appellate Case No. 2018-000450

Trenholm Building Company, Respondent,

v.

Rajarathnam S. Aluri, Trustee,
The Aluri Family Trust,
UTD May 3, 2012, Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Attorneys for Appellant

POINT OVERLOOKED OR MISAPPREHENDED BY THE COURT

Pursuant to 219 and 221 of the South Carolina Appellate Court Rules, Appellant Rajarathnam S. Aluri, Trustee, The Aluri Family Trust, UTD May 3, 2012 ("Aluri") petitions for rehearing and further suggest that this rehearing be held en banc. While there is no question but that one half of the Aluri's property can be accessed by way of an alleyway from Pickens street as found in the April 1, 2020 opinion (filed May 27, 2020), one half of Aluri's property can only be accessed by way of property belonging to Respondent Trenholm Building Company.

What the Court failed to address in its opinion is that without use of the easement by necessity over respondent's land full utilization of Aluri's land is frustrated. The same requirement of actual, real and reasonable is required for full utilization of Alur's property as it would be if the whole property is inaccessible. The need is not absolute. The record reflects that the area held at least seven cars. (R. p. 40, lines 4-18; R. p. 62) Even if excavated there are issues with turning around which would make access very difficult. (R. p. 40, lines 12-18; R. p. 62) Reasonableness is the test. Excavating and moving a retaining wall is far from reasonable under these circumstances. This would be a major undertaking.

ARGUMENT

An easement by necessity is proved by showing: (1) unity of title, (2) severance of title, and (3) necessity. Boyd v. Bellsouth Telephone Telegraph Co., 369 S.C. 410, 418–19, 633 S.E.2d 136, 140–41 (2006). "The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible." Id. at 420, 633 S.E.2d at 141. "The necessity element of easement by necessity must

exist at the time of the severance and the party claiming the right to an easement must not create the necessity when it would not otherwise exist." Id. (citations omitted).

In this matter, the Special Referee relied on Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (1997) for his finding that the requisite level of necessity had not been shown. (R. p. 6, ¶ 3) In Morrow, however, the appellant had access to the property but simply wanted an easement over respondent's property which was easier. 328 S.C. at 529, 492 S.E.2d at 424. The same is not true in the instant case. Even Respondent's own witness, Taylor Miller, said there is no access to the part of Appellant's property for which the easement is of necessity. (R. p. 25, lines 11-21) Importantly too, in Morrow the appellants had constructed buildings which prevented trucks from accessing through the public road. 328 S.C. at 529, 492 S.E.2d at 424. Prior to the construction, appellants had access via the public road, but the law does not allow a party to change the circumstances forcing an easement. Id. The retaining wall and grade variance at 616 Pickens Street has existed since Appellant purchased the property. (R. p. 40, lines 4-18; R. p. 62)

Aluri has argued that this case is more aligned with Hayes v. Tompkins, 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1985), where access from the public road was prevented due to a gulley. The law does not require Appellant to excavate his property to access the top half of his property anymore than this Court made Mr. Hayes build a bridge over the gulley. Id. 287 S.C. at 292, 337 S.E.2d at 891. The Court determined however, that because Aluri had access to the bottom portion of his property by way of the alleyway from Pickens street the necessity element was met. One half of the property, however, cannot be accessed by way of the

alleyway. At present it can only be accessed by way of Respondent's driveway. Such was the case when Aluri bought the property seventeen years ago.

This Court has previously addressed necessity as it relates to a property that is bisected by some type of impediment. See Proctor v. Steedley, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012). In Proctor the Court of Appeals determined that the southern part of the property could be accessed by a road, County Manor Lane, but without building a bridge of some sort across a creek the norther part of the property could only be accessed across the servient estate. 398 S.C. at 575, 730 S.E.2d at 364-365. Importantly and not unlike the instant case, the owner of the dominant estate testified that a bridge could be built (just as Dr. Aluri testified that the half his yard could be excavated three of four feet) but did not give the particulars as to cost or viability. Id. The court used its common sense and deemed such measures unreasonable under the circumstances based on the following testimony: "[w]here it comes out of the pond, it's kind of flat and swampy up in there for a good ways, and then it gets pretty deep. It's deep pretty much all the way down until it exits our property ... The ditch is ... six or seven feet deep and probably seven or eight feet wide." 398 S.C. at 575, 730 S.E.2d at 364. The special referee found this supported a finding of necessity to fully utilize the property and the Court of Appeals affirmed it. Reasonableness is the key.

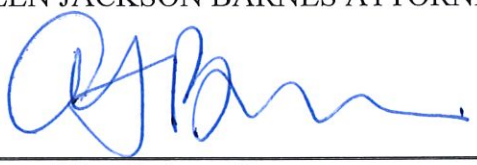
Other jurisdictions have reached similar conclusions. See Stansbury v. MDR Development, L.L.C, 889. A.2d 403, 390 Md. 476 (Md. Ct. App. 2006) (one portion of dominant estate only accessible by water except for crossing servient estate); Morris v. Simmons, 909 S.W.2d 441 (Tenn. App. 1993) (where land is divided leaving one portion inaccessible easement by necessity is created and

dominant estate cannot be forced to buy portion of servient estate to allow access). The lack of any reasonable standard seems to only apply in those jurisdictions requiring "strict necessity" such as Kentucky, where the court of appeals found that even though the dominate estate would be required to traverse a bluff to reach one portion of the property the law in Kentucky required strict necessity and most of the property could be reached by a public road. Carroll v. Meredith, 59 S.W.3d 484 (Ky. Ct. App. 2001)

CONCLUSION

Aluri is cut off from the use of one half of his back yard except by way of a driveway belonging to Respondent. It's not a matter of convenience. The yard cannot be accessed without excavating more than 4000 cubic feet of earth. The law is clear that the reasonable access standard applies to access to use the whole property. If Aluri is only allowed to use one half of his property without going to extraordinary lengths of which this court can surely take judicial notice, then he is effectively denied access to his property. The parties have used this driveway jointly for nearly two decades. A reversal is necessary to avoid injustice.

ALLEN JACKSON BARNES ATTORNEY AT LAW LLC

By: 

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June 11, 2020
Sumter, South Carolina

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CERTIFICATE OF COUNSEL

The undersigned certifies on this 11th day of June 2020 he has filed and served Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc in accordance with South Carolina Rules of Appellate Procedure 240 and 262.

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June 11, 2020

VIA EMAIL AND FIRST CLASS MAIL
The Honorable Jenny Abbott Kitchings
ATT: Shelby
Post Office Box 11629
Columbia, South Carolina 29211

RE: Trenholm Building Company v. Rajarathnam S. Aluri, Trustee, The Aluri Family Trust, UTD May 3, 2012
Appellate Case No. 2018-000450
AJB File No. 7018-1502

Dear Ms. Kitchings:

Attached please find the original and six (6) copies of Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc along with a money order in the amount of $50 to cover the filing fee. I am filing a certificate of service and have copied Messrs. Richardson and Gibbons herein

Very truly yours,

A. Jackson Barnes

Attachments
cc: James B. Richardson, Jr., Esquire (with attachments via email and first class mail)
Carlos Gibbons, Esquire (with attachments via email and first class mail)