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SC Court of Appeals

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

Mason C. Heyward ..... Appellant

v.

Francis O. Johnson ..... Respondent

INITIAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Appellant Mason Heyward ("Appellant") submits this reply brief to address errors of law and citation of improper or unavailing authority in the Brief of Respondent filed by Francis Johnson ("Respondent").

REPLY TO ARGUMENT 1 OF RESPONDENT

The Respondent provides a cursory response to the issue of Appellant's burden on his servient tenement and reframes the court's order granting a greater scope of easement to Respondent as clarifying the scope of easement. To the extent the argument is ignored, this Court may adopt the Appellant's position. *See* First Union Nat'l Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct.App.1996) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct), *reversed on other grounds,* 328 S.C. 290, 494 S.E.2d 429 (1997). The Respondent states in his brief that "The easement is located in such a way that it is least burdensome to all parties involved. (Resp. Brief p. 9). This is not the applicable standard. "'[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.'." Clemson Univ. v. First Provident Corp., 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) (quoting 25 Am. Jur. 2d Easements and Licenses § 72 at 478). The court "'should exercise jurisdiction in locating an adequate right of way over the servient tenement in a manner so as to permit ingress and egress of vehicular traffic, but also in a manner least burdensome to the servient tenement.'" Goodwin v. Johnson at 53-57, *citing* Hancock v. Henderson, 236 Md. 98, 202 A.2d 599 (1964) at 603.

The Respondent does not acknowledge that the 25' right of way could, in fact, be built out by the County and, potentially, the Respondent. Presumably, Respondent does not want to

have to build out a road in what the testifying expert engineer identified as a challenging location, but not impossible, location for a road. (January 14, 2013 Tr. p.42:14-43:25). Assuming, *arguendo*, that the County did obtain a valid grant from Heyward via the 1996 letter, or in the alternative, an easement implied by use and maintenance, then it falls on the County to build or improve the road. (January 14, 2013 Tr. p. 15:20-p. 16:15; January 17, 2013 Tr. .p. 69:24-p.78:20; p. 79:21-p.81:16; p. 119:6-17; p. 122:21-p.127:20).

What the Respondent does not appear to acknowledge is that they are having it both ways; he doesn't want to build a road in the dedicated footprint to their sub-development at Respondent's expense. They want to use the alleged dedication of a public road, at a different location from the dedication to the public, for a private development project. This is evidenced by the immediate post-trial conduct of the Respondent, wherein they began work on what is allegedly a public road. Heyward had to post a supersedeas bond to stop the work after his request for a bond was approved by the trial court (Motion for Supersedeas Bond, and Order Granting Supersedeas Bond).

Heyward has no benefit from the 1996 dedication or the Court's planned Right-of-Way other than being allowed to rebuild his home. Heyward was required to make the dedication by the County in order to rebuild his home. (Plaintiff's Ex. 7; January 20, 2010 Working Copy Order, p.2-3; January 15, 2013 Tr. at 132:12-19; 134:19-135:4). Using this mechanism to grant the Respondent an easement of a uniform 25' width is an impermissible and material greater scope of easement, and an additional burden. Clemson Univ. v. First Provident Corp., 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) The trial ourt, in its summation on the bench in 2013, referred to this as an exaction, a taking without compensation. (January 17, 2013 Tr. at 252:24-

254:18). It is facially overly burdensome, in that Respondent admits the use is currently sufficient for his ingress and egress. (January 17, 2013 Tr. p.36:9-24).

Additionally, if the alleged dedication by Heyward in 1996 was effective, the County is bound to what it was granted, and is not entitled to legal relief from the Court in the form of a taking from Heyward because the County made an error in judgment and/or failed to exercise the due diligence to determine the utility of the Right of Way alleged to have been granted. Heyward is unquestionably burdened by what is effectively a "do-over" or second bite at the apple for Respondent and Charleston County. Similarly, any mistake by Haynes and/or his agents regarding the scope of access or its utility should not give rise to an additional taking from Heyward.

REPLY TO ARGUMENT 2 OF THE RESPONDENT

The County's change in position in and of itself is the prejudice and could not be ameliorated by a continuance. Moreover, Petitioner made a timely and proper objection. (CITE to Objection that day). As the Respondent notes, the court may deny an amendment to the pleadings where there is prejudice. National Time Shares, Inc., v. Maritime Limited Partnership, 297 S.C. 43, 374 S.E. 2d, 678 (1988). While it was possible for Heyward to move for a continuance, no grant of a continuance would remove the material prejudice to Heyward in the change of position, and stipulation of, the County of Charleston and Johnson. The change in position and amending the pleadings at trial in and of itself is the prejudice. This provides the basis on which the Court should have denied the amendment. Ball v. Canadian American Express Co., 314 S.C. 272, 275 442 S.E. 2d (S.C. Ct App. 1994). Heyward's counsel's objection to the stipulation and change in position by the County was proper, and the Court should not have denied this amendment of pleadings and/or stipulation.

CONCLUSION

Based on the foregoing arguments and citation to authority, the Court should reject the erroneous positions advanced in the Brief of Respondent and adopt the arguments of the Appellant.

RESPECTFULLY SUBMITTED,

June 12, 2020

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THE STATE OF SOUTH CAROLINA
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APPELLATE CASE NO. 2019-001216

Mason C. Heyward ..... Appellant

v.

Francis O. Johnson ..... Respondent

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Appellant's Initial Reply Brief and Designation of Matter on Appeal*** in the above referenced case has been served upon counsel of record pursuant to Order of the South Carolina Supreme Court dated May 29, 2020, by electronically mailing a copy of the same to the AIS address on file with the Court for the subscribed attorneys, a copy of the electronic mail being attached hereto:

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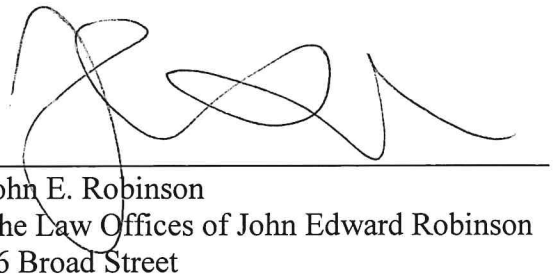

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Subject: Heyward v. Johnson 2019-001216 Appellant's Initial Reply Brief, Supplemental Designation of Matter on Appeal, and Proof of Service
Attachments: Appelant Initial Reply Brief.pdf

Dear Fellow Counsel:

I hope you and your families are well and safe during these challenging times. Pursuant to the Supreme Court Order of May 29, 2020, I serve herewith upon each of you the Appellant's Initial Reply Brief, Supplemental Designation of Matter on Appeal, and a Certificate of Service (attachment). I am furnishing a copy of this email to the Clerk of the Appellate Court. Be well!

With Kindest Regards,

John Robinson

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June 12, 2020

VIA ELECTRONIC MAIL
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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. 2019-001216.

Dear Ms. Allen:

I enclose herewith a true copy of the Appellant's Initial Reply Brief and Designation of Matter on Appeal in the above referenced case, which has been served upon counsel of record pursuant to Order of the South Carolina Supreme Court dated May 29, 2020. Prior to transmission to you, I served all parties by electronically mailing a copy of the same to the AIS address on file with the Court for those attorneys, a copy of the electronic mail being attached hereto.

Sincerely,

S/ John Edward Robinson

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