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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

ALISON RENEE LEE, Circuit Court Judge

Case No. 2016-CP-32-0387
Appellate Case No. 2019-001609

Rachel Farley, as Trustee of the Louise Farley Revocable Trust Dated February 8, 2005; Rachel R. Farley.....Appellants,

v.

Church of the Harvest of Columbia, Inc.,.....Respondent.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

The Appellants Rachel Farley, as Trustee of the Louise Farley Revocable Trust Dated February 8, 2005, and Rachel R. Farley, individually ("Appellants") hereby replies to the brief of the Respondent Church of the Harvest of Columbia, Inc. ("Respondent"). The Appellants have limited their Reply Brief to address certain portions of the Respondent's Initial Brief that required further exposition and analysis. To the extent that the Reply Brief does not address each and every argument made by the Respondent, the Appellants rely upon the arguments set forth in their Initial Brief. The Appellants hereby incorporate all arguments made in their Initial Brief, as though fully set forth herein, and do not waive any of the arguments asserted in the Initial Brief.

I. THIS COURT HAS JURISDICTION TO CONSIDER THIS APPEAL

The Respondent argues that the Appellants failed to timely file and serve their Notice of Appeal and thus, this Court lacks jurisdiction to hear this appeal. This argument lacks merit. The time to file an appeal began to run once the parties received notice of the Form 4 Order denying the Motion for Reconsideration on September 12, 2019. The Appellants filed and served a Notice of Appeal on September 23, 2019. Therefore, the Appellants timely filed and served their appeal, and this Court has jurisdiction to consider this appeal.

The service requirement for a notice of appeal is jurisdictional. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) (citing *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985)); *See*, Rule 203(b)(1), SCACR. Thus, if the notice of appeal is not filed by the deadline, "the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Id.*

The Appellants here timely filed a Rule 59(e) Motion to Alter or Amend the Order Denying Plaintiff's Motion for Summary Judgment, Granting Defendant's Motion for Summary Judgment and Dismissing the Case with Prejudice filed May 9, 2019. A Form 4 Order denying Plaintiff's Rule 59(e) motion was issued and filed by the Honorable Alison R. Lee on June 20, 2019. In addition to denying the Rule 59(e) motion, the Form 4 Order noted that a revised order reflecting amendments to several clerical errors had been filed pursuant the Defendant's Rule 60(a), SCRCP motion. A Revised Order Denying Plaintiffs' Motion for Summary Judgment, Granting Defendant's Motion for Summary Judgment and Dismissing the Case with Prejudice was filed on July 23, 2019. Thereafter, the Appellants timely filed a Motion for Reconsideration, and a Form 4 Order denying the Motion for Reconsideration was filed on September 12, 2019.

Contrary to Respondent's argument, the Appellants timely filed and served their Notice of Appeal and this Court has jurisdiction to consider this appeal. Therefore, the Respondent's argument to the contrary lacks merit and should be rejected by this Court.

II. THE APPELLANTS' RULE 59(e) MOTION TO ALTER OR AMEND FILED ON MAY 9, 2019 WAS NECESSARY AND PROPER

The Respondent claims that the Appellants' Rule 59(e) Motion filed on May 9, 2019 was not necessary or proper because it only raised issues which had been raised to and ruled upon by the lower court. In so arguing, the Respondent relies on a footnote in *Elam*, which specifically states: "An aggrieved party who is confident his issues and arguments were sufficiently raised to and ruled on by the trial court may wish to serve a timely Notice of Appeal." *Id.* at n. 5. The Respondent's argument, however, fails to provide any basis or claim that the Appellants were confident that their issues and arguments were sufficiently raised to and ruled on by the lower court.

Moreover, South Carolina case law highlights "the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration." Namely, issues and arguments shall be preserved for appellate review only if, and when they are raised to and ruled on by the lower court. *Id.* at 23-24, 602 S.E.2d at 779-80 (*E.g., Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Long v. Dunlap,* 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler,* 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal);Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court)).

In *Elam*, the South Carolina Supreme Court noted "[t]here is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." *Id.* at 22, 602 S.E.2d at 779. Consequently, "if a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion" or the issue or argument may later be determined to not be preserved for appellate review. *Id.* at 25, 602 S.E.2d at 780.

Here, the Appellants timely filed a Rule 59(e) Motion, which specifically addressed issues that the Appellants believed were not ruled on in the Order Denying Plaintiff's Motion for Summary Judgment, Granting Defendant's Motion for Summary Judgment and Dismissing the Case with Prejudice filed on May 9, 2019. Namely, that the Respondent admitted the Appellants' Trust had a valid easement, that the Respondent was obstructing the valid easement, and the

Appellants' request that the Respondent be ordered to remove its obstructions from the easement. Thus, Appellants' Rule 59(e) motion was necessary and proper, and the Respondent's claim to the contrary is without merit.

III. THE APPELLANTS' MOTION FOR RECONSIDERATION FILED ON AUGUST 2, 2019 TOLLED THE TIME TO FILE AND SERVE HER NOTICE OF APPEAL

The Respondent argues the Appellants' Motion for Reconsideration of the Court's Order dated July 23, 2019 did not extend the time to appeal. By so arguing, the Respondent heavily relies on cases that are considerably dissimilar to the facts here. *See*, *Coward Hund Cost. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999); *Quality Trailer Products, Inc. v. CSL Equipment Co., Inc.*, 349 S.C. 216, 221, 562 S.E.2d 615, 618 (2002); *Collins Music Co., Inc. v. IGT*, 353 S.C. 559, 563, 579 S.E.2d 524, 525 (Ct. App. 2002); *Elam,* 361 S.C. 9, 602 S.E.2d 772 (2004).

The South Carolina Supreme Court has previously articulated that the South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules should not be interpreted so as to "create a trap for the unwary lawyer or party." *Elam*, at 25, 602 S.E.2d at 780. A consideration of this issue lead the Court in *Elam* to conclude, "that is precisely the effect of an unwarranted expansion of *Quality Trailer. Cf. Gamble v. State,* 298 S.C. 176, 379 S.E.2d 118 (1989) (stating rules applicable to post-conviction relief actions should not be construed in manner which operate as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition); Rule 1, SCRCP (civil procedure rules "shall be construed to secure the just, speedy, and inexpensive determination of every action")." *Id.* As a result, South Carolina courts "strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place." *Id.* at 25, 602 S.E.2d at 780-81.

Moreover, South Carolina case law makes clear that following the denial of a Rule 59(e), SCRCP motion, the filing of a second similar motion does not toll the time for appeal, where the court's ruling on the first motion did not change or alter its ruling at trial. *Collins Music Co., Inc. v. IGT*, 353 S.C. 559, 563, 579 S.E.2d 524, 525 (Ct. App. 2002) (referencing *Coward Hund Cost. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999)).

In *Coward Hund Cost. Co., Inc. v. Ball Corp.*, the trial court granted summary judgment to the defendants by written order. *Coward Hund*, at 2, 518 S.E.2d at 57. Appellant, Coward Hunt, timely served a motion for reconsideration pursuant to Rule 59(e), SCRCP, and following oral arguments, the trial court issued an order denying the 59(e) motion. *Id.* Thereafter, Coward Hund filed a successive motion for reconsideration pursuant to Rule 59(e), SCRCP, seeking clarification of the court's ruling on an issue on which the court had previously ruled. *Id.* The trial court issued a supplemental order denying the second 59(e) motion, and Coward Hund timely served its notice of appeal. *Id.* The South Carolina Court of Appeals held that the second Rule 59(e) motion did not stay the time for appeal and dismissed the appeal as untimely. *Id.* at 4, 518 S.E.2d at 58. In reaching its holding, the Court reasoned that there was nothing in the order denying Coward Hund's first Rule 59(e) motion that altered anything in the summary judgment order. *Id.*

In *Quality Trailer Products, Inc. v. CSL Equipment Co., Inc.*, the South Carolina Supreme Court dismissed an appeal as untimely where the Appellant, I. Corp, filed a successive, virtually identical post-trial motion that did not identify a single issue raised but not ruled on, and instead, "literally recite[d] the arguments" made in I. Corp's first post-trial motion. *Quality Trailer Products, Inc. v. CSL Equipment Co., Inc.*, 349 S.C. 216, 221, 562 S.E.2d 615, 618 (2002). The Court held that the time for filing a notice of appeal "is not extended by submitting the same motion under a different caption." *Id.* at 220.

Similarly, the Court of Appeals in *Collins Music Co., Inc. v. IGT*, found that a second post-trial motion did not toll the time to serve the notice of appeal. *Collins Music Co.*, at 566, 579 S.E.2d at 527. In *Collins Music Co.*, the Appellant, IGT, filed initial post-trial motions seeking JNOV, a new trial, and in the alternative, a new trial *nisi remittitur*. *Id.* at 560, 579 S.E.2d at 524. The circuit court denied IGT's motions and "made no alterations or amendments to the judgment." *Id.* Subsequently, IGT filed a Rule 59(e), SCRCP motion, seeking to alter or amend the post-trial order, and supported its motion "by repeating verbatim the twenty-eight grounds found in the first motion and referencing analysis found in the first motion's memorandum of law." *Id.* at 566, 579 S.E.2d at 527. The Court thus dismissed the appeal as untimely. *Id.*

Distinguishable from the facts in *Coward Hund*, here, the Order denying the Appellants' Rule 59(e) Motion to Alter or Amend specifically referenced amendments made to the Order Denying Plaintiff's Motion for Summary Judgment, Granting, Defendant's Motion for Summary Judgment and Dismissing the Case with Prejudice, and stated that a revised order would be filed as a result. Subsequently, a revised order was issued incorporating the amendments. Further, this case is also different from *Quality Trailer* and *Collins Music Co.* because the Appellants here identified an issue raised but not ruled on in their Motion for Reconsideration. In addition, the Motion for Reconsideration did not repeat verbatim the grounds and analysis found in Appellants' Rule 59(e) motion.

Accordingly, the Appellants' Motion for Reconsideration tolled the time to file and serve an appeal.

IV. THIS APPEAL SHOULD NOT BE LIMITED TO ISSUES ARISING FROM THE CLERICAL CHANGES MADE TO THE FORM 4 ORDER FILED ON MAY 9, 2019

In its Brief, the Respondent argues that if the appeal is allowed to proceed, it should be limited to issues arising from the three clerical changes made to the Order filed on May 9, 2019 and the Order filed on July 23, 2019. However, the Respondent does not cite a single case that stands for such a broad proposition.

Rule 203(d)(1)(B), SCACR, requires that a Notice of Appeal from the Circuit Court be filed with the clerk of the lower court and the clerk of the appellate court, and be accompanied by "(ii) a copy of the order(s) and judgment(s) challenged on appeal if they have been reduced to writing."

The Appellants' Notice of Appeal sets forth that it is appealing the Order dated September 12, 2019, of which it received notice of entry of the Order on September 22, 2019. The Order referenced by the Appellants is the Order from the Motion for Reconsideration, wherein the Court denied the Motion for Reconsideration.

In the Motion for Reconsideration, the Appellants sought for the Court to reconsider: "its Order dated July 23, 2019 and order the easement location be cleared of the Defendant's building and parking lot." The Order referenced in the Motion for Reconsideration is the Revised Order Denying Plaintiffs' Motion for Summary Judgment, Granting Defendant's Motion for Summary Judgment and Dismissing the Case with Prejudice. Consequently, because the Appellants appealed the Order denying the Motion for Reconsideration, the Appellants are limited to the issues raised in the Motion to Reconsider. Therefore, this appeal should not be limited to issues arising from the three clerical changes made to the May 9, 2019 Order by the July 23, 2019 Order.

V. THE ORDER OF THE LOWER COURT SHOULD BE OVERTURNED AND VACATED

The lower court erred in granting the Respondent's motion for summary judgment on the Appellants' claims because it is clear that the Appellant has an express easement, the Appellants have an unfettered right to use of that easement, the Respondent has violated their rights by encroaching upon that easement, and the continued violation of the easement continues and resets the statute of limitations each day the encroachment remains. As an initial matter, it is clear that the Appellants have an express easement. "A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the land." *Ward v. Evans*, 387 S.C. 401, 409, 693 S.E.2d 7, 11 (Ct. App. 2010). In 1994, the Appellants signed an agreement with the Respondent whereby the Respondent purchased about eight acres of land and creating an express easement in favor of Farley to traverse the land purchased by the Respondent in order for Farley to access the remainder of her land.

Additionally, the Respondent asserts that the allegations made in the Plaintiff's Complaint are barred by the three-year statute of limitations per S.C. Code Ann. § 15-3-530 (1976). However, the Respondent's argument is without merit. If, and to the extent that the Appellants seek to establish their rights with regard to the easement, then the statutory period required for adverse possession applies. *See,* Bruce & Ely, *The Law of Easements & Licenses in Land* ' 5:17 (Westlaw database updated Mar. 2018) ("In most jurisdictions, the period of prescription is derived by analogy from the statute of limitations governing actions to recover the possession of land. Courts typically rely on the adverse possession statute and assume, without discussion, that this measure determines the prescriptive period." (footnotes omitted)). Pursuant to S.C. Code Ann. § 15-3-340,

the limitations period for an adverse possession cause of action is ten years. S.C. Code Ann. § 15-3-340 (1976); *see also supra* note 1.

Regardless of the labels attached to the various counts of the Appellants' complaint against the Respondent, the gravamen of those allegations is the Appellants' right to the Easement and the Respondent's encroachment thereon. It is well established that in 2006, the Respondent built a parking lot, a portion of which encroached on the Easement, and in 2009, built a structure, a portion of which encroached on the Easement. In both instances, the Church's encroachment was unintended, and to the extent that the Appellants knew of the encroachments, they did not take any action.

CONCLUSION

For the foregoing reasons, the Appellants Rachel Farley, as Trustee of the Louise Farley Revocable Trust and Rachel R. Farley, individually, respectfully request that the Court vacate and overturn the lower court's decision.

Respectfully submitted,

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