

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM JASPER COUNTY

Court of Common Pleas

R. Thayer Rivers, Jr., Special Referee

Case No. 2018-CP-27-00507

Appellate Case No. 2020-001301

RECEIVED

Apr 14 2021

SC Court of Appeals

Maria Hernandez.....Respondent,

v.

Mary V. Fields, Dora Bennett, Shaakira Saffir
a/k/a Shaakira Saffir Nia Rashad
f/k/a Audrey I. Knight, Defendants

Of whom Mary V. Fields and Dora Bennett are Respondents
and Shaakira Saffir is the.....Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. To argue an issue on appeal, the Appellant must have raised the issue in the lower court, and the lower court must have ruled on the issue. Here, Appellant did not argue, among other things, that the parties to the deed of conveyance incorporated the plat map for descriptive purposes only. Are Appellant's arguments preserved for appellate review?
2. After Respondent carried her initial responsibility of demonstrating the absence of a genuine issue of material fact, Appellant had to do more than merely oppose the motion for summary judgment with bald, contrary assertions. Appellant failed to come forward with any specific facts showing that there is a genuine issue for trial. Did the lower court properly grant Respondent's motion for summary judgment?
3. Per Rule 208(b)(2), Respondent may ask the Court to affirm on any ground appearing in the record, as provided in Rule 220(c). Respondent asks the Court to affirm the Special Referee's determination that an easement implied by law exists.

STATEMENT OF THE CASE

This appeal arises from the Special Referee's Order Granting Plaintiff's Motion for Summary Judgment, which was filed on September 2, 2020 in the Jasper County Court of Common Pleas (Order). The Order declared that Respondent Maria Hernandez (Hernandez) had an easement¹ (Easement) as shown on a subdivision plat² (Subdivision Plat), and that Appellant Shaakira Saffir (Saffir) was permanently enjoined and ordered to remove certain encroachments that she caused to interfere with Hernandez's access to the Easement, as further described in the Order. R. p. 4 ¶¶3-4.

Hernandez generally agrees with the filing dates and procedural history provided in Saffir's Statement of the Case in her brief, but Hernandez provides the following additional information. At the November 5, 2019 Motion for Summary Judgment (Motion) hearing (First Hearing), all parties attended the hearing at the Special Referee's office. R. p. 2. After hearing arguments without the presence of a court reporter, the Special Referee orally granted Hernandez's Motion. The Special Referee ordered Hernandez to obtain a new survey showing the encroachments within the Easement prior to issuing a written ruling. *Id.* Hernandez ordered and paid for a titled survey, "Survey prepared for Maria Hernandez by TGS Land Surveying, dated January 9, 2020" (Encroachment Survey). R. p. 42. Hernandez served all Defendants and the Special Referee with

¹ An easement for ingress and egress to Lot 3 from a public highway known as Macedonia Road, on and across a fifty (50) foot easement on and across real property specifically described as a "50' R/W" described further as having bearings of N61° 18'W for 680.0 feet, all as depicted and set out on that certain Plat prepared by Harold R. Johnson, R.L.S. No. 2077, as recorded in Plat Book 18 at Page 138 in the Office of Register of Deed, office of the Clerk of Court for Jasper County, South Carolina.

² A survey of the "Hattie Bennett Subdivision," established and platted on or after November 17, 1987, which plat was recorded in Plat Book 18 at Page 138 in the Office of Register of Deed, Office of the Clerk of Court for Jasper County, South Carolina.

a copy of the Encroachment Survey on February 10, 2020 as shown by a Certificate of Mailing filed February 10, 2020.

A re-hearing of the Motion occurred on July 21, 2020 (Second Hearing) to allow the parties to make their arguments for the court in the presence of a court reporter who could create a transcript. The Second Hearing was conducted telephonically by Remote Communication Technology, as provided for in the Supreme Court's Order dated April 3, 2020 in Appellate Case No. 2020-000447. However, it was not conducted "via Zoom videoconference", which the "Hearing Proceedings July 21, 2020" (Transcript) incorrectly states.

Saffir filed a pro se Answer to Hernandez's Amended Complaint (Complaint) on July 14, 2019. Saffir's Answer admits where she resides and that the Plat created the Hattie Bennett Subdivision when it was recorded in 1987. R. pp. 26-27, ¶¶ 3, 6, 8, 9, 13. Saffir's Answer generally denies the balance of the Complaint's allegations and, while making legal conclusions, does not make a single factual allegation or assert any affirmative defenses or counterclaims.

Hernandez filed her supporting affidavit with her Motion that included three exhibits, in addition to the Encroachment Survey that was filed and entered into the record. R. pp. 30-31; R. pp. 34-42. Saffir did not file any affidavits opposing the Motion. Saffir chose to represent herself pro se throughout the lower court proceedings that extended from her June 14, 2019 Answer through the date of the September 2, 2020 Order, and until shortly before she retained counsel to file her Notice of Appeal.

At the Second Hearing, Saffir repeated the allegations in her Answer, i.e., there is no easement. R. p. 52, lines 4-8; p. 54, lines 6-7; p. 58, lines 22-25 cont. p. 59, lines 1-3. She admitted that a road is on the "Hattie Bennet Subdivision" plat map. R. p. 52, lines 13-15. She also admitted that the road is an existing dirt road and that her mother had used it. R. p. 59, lines 1-5. She

incorrectly posited that that this dirt road did not constitute an easement because it was “not...recorded...at the courthouse...[and] had nothing to do with the county or nothing...[and] [Hattie Bennett] would have had to build that road and everything...[and] [the dirt road] had nothing to do with the county building the road.” Id., lines 3-8.

Hernandez argued that the recorded Subdivision Plat depicting the Easement, which was referenced in the deed of Lot 3 of the Hattie Bennett Subdivision, created an easement in favor of Hernandez. R. pp. 47-50 (arguments of Mr. Walker); see also R. pp. 30-31 (Motion).

The Special Referee ruled that the Easement existed in favor of Hernandez, and Saffir was ordered to permanently remove the Encroachment on the Easement.

Saffir did not file any post-trial motions. Saffir served her notice of appeal on September 18, 2020.

STATEMENT OF THE FACTS

Saffir’s brief does not provide a single citation in her Statement of Facts because she did not allege or present any evidence in the lower court. The pertinent, uncontroverted facts of record are as follows.

Hattie Bennett created and recorded the Subdivision Plat when she subdivided her 12.613-acre property into 16 lots in 1987. R. p. 39; see also Appellant’s Brief, p. 7, ¶1. Lots 1 and 10 abut Macedonia Church Road. R. p. 39. Lots 2-9 and 11-16 are landlocked except for the access to Macedonia Church Road provided by the Easement, a 50’ right of way created by and shown in the Subdivision Plat to serve as ingress and egress for the sixteen lots. Id.

Luther Bennet took title and possession of Lot 3 on August 9, 1999 by a deed recorded in Book 971 at Page 0290 in Register of Deeds Office for Jasper County (ROD). Appellant’s Brief, p. 7; R. pp. 8-9, ¶15. On August 8, 2017, U.S. National Bank acquired title to Lot 3 via foreclosure

and by judicial deed recorded in Book 95 at Page 0320 in the ROD. Appellant's Brief, p. 8; R. p. 9, ¶16. Hernandez purchased and acquired title to Lot 3, commonly known as 186 Macedonia Church Rd., Hardeeville, SC, from U.S. National Bank on January 31, 2018 by deed recorded in Book 971 at Page 0290 in the ROD (Deed). R. p. 34, ¶3; R. pp. 37-38; Appellant's Brief, p. 8; R. p. 9, ¶18.

Saffir placed encroachments in the Easement including a utility shed, fence, a portion of a dwelling, and a chain. R. p. 35, ¶¶6-7; R. pp. 40-41; R. p. 42. Trees have also grown and become impediments in the Easement. Id. Hernandez's mobile home and other portions of Lot 3 need repair, but Hernandez, her husband, her waste services contractor, and her surveyor were denied access to the Easement by Saffir. R. p. 35, ¶¶8-9. Saffir admits that she ordered them off the property. R. p. 53, line 8.

STANDARD OF REVIEW

1. An argument must be raised and ruled upon by the lower court before the Court of Appeals can consider it. On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." Id. Notwithstanding, when an Appellant makes an argument in the lower court that is not incorporated into the lower court's order, and Appellant does not file a motion to alter or amend the judgment, the argument can nevertheless be preserved for appellate review if "the [lower court] order explicitly [and necessarily] addresses that argument by ruling" in favor of Respondent's opposing argument. Spence v. Wingate, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009). But Appellant's argument is

only preserved in this narrow situation if she actually made the argument in the lower court. Id., 381 S.C. 487, 488-89, 674 S.E.2d 169, 170.

2. The Court of Appeals reviews the grant of a motion to dismiss under the same standard governing the lower court, Rule 56(c). Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006). A party is entitled to judgment as a matter of law when there is no genuine issue as to any material fact. Id. “Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility can be satisfied by pointing out ““that there is an absence of evidence to support the nonmoving party's case.”” Id. (citation omitted). The moving party does not have to negate the nonmoving party’s claim. Id. (citation omitted). After the moving party has satisfied her initial responsibility, the “opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with ‘specific facts showing that there is a genuine issue for trial.’” Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (citation omitted) (emphasis removed); Rule 56(e), SCRCF. The opposing party “may not rest upon the mere allegations of [her] pleadings.” Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 452–53 (Ct. App. 1988); Rule 56(e), SCRCF.
3. The existence of an easement is a question of fact within a law action that “is subject to the any evidence standard of review when tried by a judge without a jury.” Murrells Inlet Corp. v. Ward, 378 S.C. 225, 231, 662 S.E.2d 452, 454 (Ct. App. 2008). The decision regarding the existence of an easement will be reviewed by appellate courts as an action at law. Jowers v. Hornsby, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987). “In an action at law

tried without a jury, the judge's findings of fact will not be disturbed on appeal unless there is no evidentiary support for the judge's findings. Murrells Inlet Corp. v. Ward, 378 S.C. 225, 231, 662 S.E.2d 452, 455.

ARGUMENTS

1. **The arguments in Saffir's brief were not made below and are not preserved.**

In her brief, Saffir contends without support that the reference in the Deed to the Subdivision Plat is for descriptive purpose only. She also baldly asserts that Hattie Bennett, now deceased, did not intend to convey an easement in the Subdivision Plat that shows a 50' right of way. Appellant's Brief, p. 13. She also claims that the lower court failed to consider whether her now-alleged adverse possession of the easement had "destroyed" the easement. Id. Finally, Saffir asserts the lower court failed to consider other case law concerning easements implied by law. Id.

First, Saffir does not provide or cite to any facts in support of her arguments. Instead, Saffir merely asserts that the "intention of the parties, when discerned from the Deed as whole was to [describe the property conveyed], not to represent...the existence of an easement..." Id., 12. Saffir does not discuss the language of the deed, probably because she did not argue about any discernment gleaned "from the Deed as whole" during the motion for summary judgment hearing. R. pp. 46-62. Second, Saffir failed to present any case law in opposition to the Motion, much less any facts to support the unmade arguments. Id. Third, the Special Referee did not consider adverse possession because Saffir never made an adverse possession argument in the lower court, including in her pleadings. Id.; R. pp. 26-29. Consequently, these arguments were not raised or ruled upon by the lower court and are not preserved for appellate review. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724.

Saffir tries to argue around the procedural reality that none of her appellate arguments are preserved for appellate review. She does so by misinterpreting Spence v. Wingate, 381 S.C. 487, 674 S.E.2d 169 (2009). In that case, the two respondents, a law firm and an attorney, argued in a motion for summary judgment hearing that they did not owe a duty to the appellant, a former client. Id., 381 S.C. 487, 489, 674 S.E.2d 169, 170. The appellant in that case argued that respondents owed her a fiduciary duty as a former client. Id. The lower court ruled that respondents did not owe appellant a duty but did not address her opposing argument in its order. Id. The Court of Appeals later dismissed appellant’s appeal because she had not received a ruling concerning the existence of a duty and had not filed a Rule 59(e). Id. The Supreme Court reversed the Court of Appeals:

While [the lower court] order did not restate the ground on which petitioner opposed the motion—a duty based on the existence of a prior attorney-client relationship—the order explicitly addresses that argument by ruling respondents ‘owed no duty or obligation’ to petitioner.

Id.

The Spence Court ruled that, in this situation, the appellant did not have to submit a Rule 59(e) to preserve the issue for appeal. Id. But if the lower court had not explicitly and necessarily addressed appellant’s argument by ruling in favor of respondents’ opposing argument, she would have had to file a Rule 59(e) motion to preserve her argument for appellate review. Spence v. Wingate, 381 S.C. 487, 489–90, 674 S.E.2d 169, 170.

Here, unlike the appellant in Spence v. Wingate, Saffir did not actually make any of her legal appellate arguments in the lower court through a pleading, affidavit, brief, or otherwise. She is announcing these legal arguments for the first time in her Appellant Brief. Additionally, even if Saffir had filed a Rule 59(e), her arguments would not be preserved. “A party cannot for the first

time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.” Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Spence v. Wingate is, therefore, inapplicable.

This Court should hold that Saffir’s arguments are not preserved for review.

2. Saffir failed to set forth specific facts showing the existence of a genuine issue for trial.

In her Motion, Hernandez attached the Affidavit of Maria Hernandez (Affidavit). The Affidavit included supporting exhibits of the Deed, the Subdivision Plat, and a photograph showing the encroachments. R. pp. 30-31; R. pp. 34-42. Prior to the Second Hearing, Hernandez also served and filed the Encroachment Survey. R. p. 49, lines 4-12. The Encroachment Survey shows impediments in the Easement created by Saffir. At the hearing, Hernandez argued that the reference to Subdivision Plat created an implied easement. R. p. 48, lines 16-25 cont. p. 49, lines 1-4. Hernandez specifically relied upon Carolina Land Co., Inc. v. Bland. In that case, the Court relied on Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965), which held that, “when the owner of land has it subdivided and platted into lots and streets and sells and conveys lots with reference to the plat, he thereby dedicates said streets to the use of such lot owners, their successors in title and the public.” Carolina Land Co. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975). The purchaser of the lot, “with reference to the plat of the subdivision [.] acquired every easement, privilege and advantage shown upon said plat, including the right to the use of all the streets, near or remote, as laid down on the plat.” Id. The Blue Ridge Court also held that, “as between the owner, who has conveyed lots according to a plat, and his grantee or grantees, the dedication is complete when the conveyance is made, even though the street is not accepted by the public authorities.” Id., 265 S.C. 98, 105–06, 217 S.E.2d 16, 19.

The rule applied in Blue Ridge is “a presumption that when a grantor conveys property with reference to a plat showing streets or other ways of passage, the grantor intends to allow the grantee the use of the delineated streets and ways of passage.” Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism, 377 S.C. 86, 93, 659 S.E.2d 151, 154 (2008). This rule has been applied to subdivided residential property and to land abutting a street. Id., 377 S.C. 86, 93, 659 S.E.2d 151, 154-55; Murrells Inlet Corp. v. Ward, 378 S.C. 225, 233-34, 662 S.E.2d 452, 455-56 (“Where land is subdivided, platted into lots, and sold by reference to the plats, the buyers acquire a special property right in the roads shown on the plat. If the deed references the plat, the grantee acquires a private easement for the use of all streets on the map.”) (citing among other cases Davis v. Epting, 317 S.C. 315, 318, 454 S.E.2d 325, 327 (Ct. App. 1994)).

By creating a record that contained the Affidavit, the Deed, the Subdivision Plat, and the Encroachment Survey, Hernandez showed that the Blue Ridge presumption regarding the intent of the grantor applies in this case. Having done that, Hernandez also carried her initial responsibility of showing that there is no genuine issue of material fact and that she is, therefore, entitled to judgment as a matter of law. At this point, Saffir had to “set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRPC; Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (citation omitted). She could not “rest upon the mere allegations of [her] pleadings.” Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 452-53; Rule 56(e), SCRPC.

Saffir failed. She baselessly denied the existence of an easement, as she did in her Answer. R pp. 26-29. She also argued that the road was unpaved, so the grantor could not have intended to convey an easement to access the Hattie Bennett Subdivision lots. This is spurious. A dirt road, though unpaved, is still a useable road. In fact, Saffir admitted that her mother, the grantor Hattie

Bennett, used the dirt road to access her home. R. p. 59, lines 1-5. Saffir did not cite any case wherein a South Carolina Court ruled that a road must be paved before it can constitute an easement. R. pp. 46-62. Further, no specific facts were presented to support the appellate argument that references to the Subdivision Plat in the Deed were for descriptive purposes only.

Saffir failed to rebut the Blue Ridge presumption and thereby failed to set forth specific facts that present a genuine issue for trial. Because of her failure, the Special Referee properly granted Hernandez's motion for summary judgment. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 117, 410 S.E.2d 537, 546 (“[B]ald allegations’ are insufficient to create a genuine issue of fact.”) (citing Stevens v. Barnard, 512 F.2d 876, 879 (10th Cir. 1975)).

3. The Special Referee properly determined that an easement implied by law exists.

Per the South Carolina Supreme Court, “[t]he creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristics demonstrate that the objective intention of the parties was to create an easement.” Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism, 377 S.C. 86, 92, 659 S.E.2d 151, 154. Courts have created presumptions in favor of implied easements in certain circumstances. Id. This Court reviews the Special Referee's determination regarding the existence of an implied easement under an “any evidence” standard of review, and the Court will not disturb the Special Referee's finding unless it has no evidentiary support. Murrells Inlet Corp. v. Ward, 378 S.C. 225, 231, 662 S.E.2d 452, 454-55.

In this case, several facts create a presumption in favor of finding an implied easement. First, the grantor subdivided and conveyed her property. “This Court has recognized the general rule that when an owner conveys subdivided lots and references the plat in the deed, the owner grants the lot owners an easement over the streets appearing in the plat. Inlet Harbour v. S.C. Dep't

of Parks, Recreation & Tourism, 377 S.C. 86, 92, 659 S.E.2d 151, 154. Second, Saffir did not present any evidence regarding the grantor's intention. She merely asserted that the Easement dedicated by the Grantor in the Subdivision Plat does not serve as an easement, even though the Grantor, by Saffir's own admission, used the Easement for ingress and egress. R. p. 59, lines 1-5. In the absence of contrary evidence concerning the grantor's intent, "a conveyance of land that references a map depicting streets conveys to the purchaser...a private easement by implication with respect to those streets. Murrells Inlet Corp. v. Ward, 378 S.C. 225, 234, 662 S.E.2d 452, 456 (citation omitted). Finally, the Subdivision Plat is recorded and contains a road by which the owners of the 16 lots may access their respective properties. "Recordation of a plat containing an easement may be sufficient to show that the owner intended to dedicate that easement." Id., 378 S.C. 225, 234, 662 S.E.2d 452, 456.

Saffir never rebutted the presumption that supports the existence of an implied easement. Supra. She cannot do so now. Rule 210(c), SCACR ("The Record shall not [] include matter which was not presented to the lower court or tribunal."). This Court should affirm the Special Referee's determination that an easement implied by law exists and, because of this, affirm his grant of permanent injunctive relief for Hernandez.

CONCLUSION

Saffir has presented arguments that are not preserved for appeal. At the Motion hearing, she failed to set forth any specific facts showing a genuine issue for trial. And the Special Referee properly concluded that an easement implied by law exists. The Court should affirm the Special Referee's judgment.

Respectfully submitted,



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April 14, 2021

THE STATE OF SOUTH CAROLINA

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R. Thayer Rivers, Jr., Special Referee

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Of whom Mary V. Fields and Dora Bennett are Respondents
and Shaakira Saffir is the.....Appellant.

Rule 211 Certification

Per Rule 211(a), I hereby certify that the final brief complies with Rule 211(b), SCACR.

April 14, 2021



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Of whom Mary V. Fields and Dora Bennett are Respondents
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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Respondent Maria Hernandez's Final Brief upon Appellant by depositing a copy of the document in the U.S. mail, postage prepaid, on April 14, 2021 and addressed to:

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