THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Opinion No. 5035 (S.C. Ct. App. filed Sept. 19, 2012)

David R. Martin and Patricia F. Martin ..... Respondents,

v.

Ann P. Bay, Harvie Goddin, Tony L. Hannon
and Diann F. Hannon ..... Defendants,

Of Whom Ann P. Bay and Harvie Goddin are ..... Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 18, 2012.

QUESTIONS PRESENTED

1. Did the South Carolina Court of Appeals err in ignoring the mandate of long-standing precedent established by the Supreme Court of South Carolina in construing the terms of the Easement at issue in the case before it and in making a critical finding of fact unsupported by the written terms of the Easement, to open the door to consideration of extrinsic evidence?

2. Did the South Carolina Court of Appeals err in finding that the evidence applicable to the Trial Court's decision to take judicial notice of the fact that the high water mark of the property involved in the dispute "tends to migrate landward," while not a proper subject for judicial notice, was nonetheless supported by sufficient evidence to sustain the Trial Judge's Order, when the cited evidence did not establish that fact?

STATEMENT OF THE CASE

The within action was commenced on June 9, 2008 by the filing of a Summons and Complaint in the Court of Common Pleas for Charleston County. By their complaint, Respondents (hereinafter "the Martins") sought a declaration of the rights of the owners of four lots (A, B, C and D) to an easement for use of a gazebo, dock and boat ramp constructed on Lot C of a small subdivision on Edisto Island. (See Grant of Perpetual Easement and Indemnification Agreement (hereinafter "the Easement") attached to Plaintiff's Exhibit 3, R. p. 453).

Two of the lots (B and D) are owned by the Martins and one lot (Lot C) is owned by Petitioners (hereinafter "Bay"). Specifically, the Martins sought a declaratory judgment that the covenants in a Declaration of Covenants, Conditions and Restrictions, (hereinafter "the Covenants") (Exhibit 1 to Complaint, R. p. 40), were binding on the owners of the four lots (A, B, C and D) and that they hold an easement permitting them full use of the portion of Lot C shown on a plat attached to the Easement allowing access to the community gazebo, dock and boat ramp located on Lot C. (Plaintiffs' Exhibit 3, R. p. 456).

Bay answered the Martins' complaint and asserted a counterclaim seeking a declaratory judgment establishing that the only access point of the Easement was from Jumbo Lane and that she was within her rights to erect a fence along the portions of Lot C that border Lot D.

On December 10, 2008, with consent of counsel, the case was referred to the Honorable Mikell R. Scarborough, Master-In-Equity, in accordance with Rule 53 of the South Carolina Rules of Civil Procedure, with appeal therefrom directly to the Supreme Court or the Court of Appeals pursuant to S.C. Code Ann. 14-11-85.

The case came to trial on October 7, 2009 and, prior to its commencement, the parties, through counsel, stipulated that the Covenants govern all four lots of the subdivision.

Essentially, the only issue in controversy relating to the Easement was the route of access required to be followed for its use.

The Easement provides:

1. A pedestrian/vehicular easement for ingress and egress from Jumbo Lane, across Tract C to the community dock, gazebo and boat landing, said route shall be the route shown on the plat by David W. Spell, RLS dated January 31, 1996 a copy of which is attached hereto and specifically incorporated herein by reference; said easement is for the mutual benefit of the property being simultaneously conveyed to David Martin and Patricia F. Martin and property of the Grantor as shown on the above Plat and is a perpetual non-exclusive, appendant, appurtenant easement which shall run with the land and is essentially necessary to the enjoyment of the property conveyed above, and such property of the prior Grantor as is shown on the above referred to Plat, and shall be transmissible by deed or otherwise upon any conveyance or transfer of the above conveyed property.

(Easement attached to Plaintiffs' Exhibit 3, R. p. 453) (Emphasis added)

The case was tried on October 7-8, 2009 and the Order of the Court was filed on February 5, 2010, but notice of the entry of Judgment was not received by counsel for Bay until February 16, 2010. The trial judge found:

1. For the Martins for attorney's fees and costs, which were not pleaded or testified to by the Martins, nor requested in their prayer for relief, but were raised *sua sponte* by the Trial Judge at the conclusion of the trial.

2. For Bay on her claim of a right to build a fence along the joint property line of Lots C and D.

3. For the Martins on their claim of the right to access the Easement from any point beyond the fence as built, as well as from Jumbo Lane, the route of access described in the Easement. The Order also required the fence to be set back 40' from the Critical Line established by the OCRM, exceeding the

County's required setback by 5' based on the Trial Judge's personal judicial notice of the propensity of the Critical Line to migrate inland over an undefined period of time. (See 2/5/10 Order, R. p. 6).

On February 26, 2010, counsel for Bay filed a Motion to Alter or Amend pursuant to SCRCP 59(e), citing authority and pointing out that, by virtue of the Court having determined that the Easement was unambiguous, existing precedent established by decisions of the South Carolina Supreme Court and the South Carolina Court of Appeals required the Trial Judge to determine the extent of the Easement solely from the language of the Easement and plat attached which explicitly required the Martins to access the Easement from Jumbo Lane. (See Motion to Alter or Amend, R. p. 100)

Counsel for Bay also requested the Court to reverse its decision to award attorney's fees on the grounds that neither the complaint, nor the amended complaint contained any claim to recover damages or attorney's fees and costs incurred in filing the action to enforce the Covenants and Restrictions and no proof of damages, nor proof of attorney's fees was proffered. Reversal was also requested on the grounds that counsel had elected to pursue injunctive relief rather than damages and attorney's fees.

Counsel also cited authority for and requested the Court to reverse its holding requiring an additional setback of 5' for the fence to be constructed by Bay based on the Trial Judge's taking "judicial notice of the fact that the Critical Line is not a permanently fixed line, but tends to migrate landward. The line along Lot C, therefore, can be expected to move over time" (2/5/10 Order, R. p. 11);

and in his taking judicial notice of the fact that "the critical line . . . tends to migrate landward." (2/5/10 Order, R. p. 26)

On June 16, 2010, the Court filed its Order denying Bay's motion to alter its judgment regarding the Martins' right of access to the Easement and denying Bay's motion to alter its requirement of an additional 5' setback of the fence to be constructed by Bay based on the Trial Judge's judicial notice of facts sufficient to him to justify his decision.

The Trial Judge granted Bay's motion to reverse his judgment for attorney's fees on the grounds that, under the language of the Covenants, a party seeking to enforce the Covenants through an injunction, as the Martins had done, was not entitled to attorney's fees. No petition for rehearing was submitted by the Martins.

Bay duly appealed the decision of the Trial Judge and arguments were heard by the Court of Appeals on March 13, 2012. The Court of Appeals thereafter issued its opinion on September 19, 2012 affirming the Trial Judge's decision as to the right of the Martins to access the Easement at any point along the boundary of Lots B and C, but doing so by ignoring the meaning of the word "route" and stating that "despite the unambiguous description of the easement's location and boundaries, there is no mention of access to the easement." (Emphasis added) (Opinion by the South Carolina Court of Appeals, p. 8) In the Court's opinion, this statement opened the door for consideration of extrinsic evidence which included only the Martins prior habits of accessing the Easement and the physical condition of Mrs. Martin more than 13 years after the Easement was created. Indeed, the physical condition of Mrs. Martin appeared to be the

principal consideration in determining the intention of the parties by both the Trial Court and the South Carolina Court of Appeals. However, the only parties who testified were the Martins. The developer and grantor of the Easement, John L. Gramling, Jr., was not called as a witness.

ARGUMENT

1. The South Carolina Court of Appeals erred in ignoring the mandate of long-standing precedent established by the Supreme Court of South Carolina in construing the terms of the Easement at issue in the case before it and in making a critical finding of fact unsupported by the written terms of the Easement, to open the door to consideration of extrinsic evidence.

At issue in this case, is a decision which tramples one of the Supreme Court's most important precedents in the law of contracts in general and specifically, in the law of easements. That is, that in construing a contract or in construing an easement, "clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense." S.C. Public Serv. Auth. v. Ocean Forest, Inc., 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). (Emphasis added) While the South Carolina Court of Appeals paid lip service to this precedent by citing S.C. Public Serv. Auth., it ignored the precedent's application to this case.

In its statement of facts, the Court of Appeals stated:

> The easement's description is as follows:
>
> A pedestrian/vehicular easement for ingress and egress from Jumbo Lane, across Tract C to the community dock, gazebo and boat landing, said route shall be the route shown on the plat by David W. Spell, RLS dated January 31, 1996 a copy of which is

> attached hereto and specifically incorporated herein by reference . . . .

The Court then stated:

> The referenced plat shows the easement as fifteen feet wide at its access point from the cul de sac on Jumbo Lane joining a triangular shaped area approximately one hundred and fifty feet from Jumbo Land. The southern boundary of the easement is also the boundary between Lots C and D. (Emphasis added)

Thus, in construing the Easement in accord with the precedent established by the Supreme Court, the Court was able to determine "its access point from the cul de sac on Jumbo Lane" and yet, at page 8 of its decision, the Court inexplicably states:

> However, despite the unambiguous description of the easement's location and boundaries, there is no mention of access to the easement. (Emphasis added)

This finding not only ignores the plain wording of the Easement, it ignores and contradicts its own finding of fact that the referenced plat shows the Easement as "fifteen feet wide at its access point from the cul de sac on Jumbo Lane. . . ." (Emphasis added)

To his credit, the Trial Judge, in his order on the Rule 59(e) hearing, stated: "I find that common sense should prevail over any literal meaning which, if that's what you're getting at, I would find that the access to this easement should be anywhere along the line."

In other words, the Trial Judge admittedly refused to apply the precedent requiring a literal interpretation of the Easement as written, while the Court of Appeals made a finding, unsupported by the grant of easement, that "there was

no mention of access to the easement." (Opinion p. 8) Indeed the Trial Judge noted in his Order that the Martins "have accessed the easement by vehicle to tow their boat and trailer at various point, but most often by driving across the easement and circling around their house along the easement route delineated on the easement plat." (Order p. 21, R. p. 26) (Emphasis added)

As noted in Petitioners' Petition for Rehearing, the description of the Easement specifically provides that ". . . said route shall be the route as shown on the plat by David W. Spell, RLS dated January 31, 1996 a copy of which is attached hereto and specifically incorporated by reference . . ." As stated in Bay's Final Reply Brief at page 4:

> 'Route' is defined in Webster's dictionary as: 1 a: a traveled way, b: a means of access, 2. a line of travel: course, 3 a: an accepted or selected course of travel.[1] Nowhere does the Easement or the plat attached to the Easement suggest any line of travel or means of access other than from Jumbo Lane, which the plat shows as the initial point of access. And the Martins' own expert attorney stated in an affidavit adopted by all parties:
>
> > This Agreement granted a pedestrian/ vehicular easement for ingress and egress from Jumbo Lane to the community dock, gazebo and boat landing on lot 'c' as depicted on a plat by David Spell R.L.S. and attached as an exhibit to the Grant of Perpetual Easement and Indemnification Agreement.
>
> (Plaintiffs' Exhibit 3, Affidavit of J. Howard Yates, Jr., R. p. 453) (Emphasis added).

While the Trial Judge had no difficulty finding the "route" as shown on the David Spell plat, the Court of Appeals, by its opinion, simply ignored the meaning of the term "route" which, in all four Webster definitions, describes the access

[1] WEBSTER'S NEW COLLEGIATE DICTIONARY (9th ed. 1990).

intended by the parties at the time the Easement was entered into. By doing so, the Court also ignored the mandate of the Supreme Court's decision in S.C. Public Serv. Auth. v. Ocean Forest, Inc., 275 S.C. 552, 273 S.E.2d 773 (1981) that "clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense," by simply saying that "there is no mention of access" in the Easement. (Emphasis added) See also Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58; 558 S.E.2d 902, 905 (Ct. App. 2001), involving a particularly strict decision holding that the owners of expensive waterfront lots could have ascertained the height of a subject flood easement by obtaining a survey of their properties.

If the Court of Appeals in this case can simply avoid the precedent of the Supreme Court and its own Court by saying "there is no mention of access" where the synonym "route" was used in its place, the doctrine of *stare decisis* is obliterated. "*Stare decisis* exist to insure a quality of justice which results from certainty and stability." State v. One Coin-Operated Video Game Machine, 321 S.C. 176, 462 S.E.2d 443 (S.C. 1996). "When a principle is once adopted and declared by the courts, the people have a right to regard it as a just declaration of the law, and to regulate their actions and contracts thereby. There should never be a disturbance of the same except upon urgent reasons and a clear manifestation of error." Lillard v. Melton, 103 S.C. 10, 87 S.E. 421, 427 (S.C. 1915). "It should require circumstances of a very strong and controlling character to induce the court to reverse a rule long in existence in this state in regard to property." Schroeder v. O'Neill, 179 S.C. 310, 184 S.E. 679, 683 (1936).

The bottom line is that neither the Trial Court nor the South Carolina Court of Appeals was willing to adhere to the longstanding precedent of the Supreme Court or its own decisions which stated that "clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary and popular sense."

As Chief Judge Sanders of the Court of Appeals stated in a footnote to Shea v. State Department of Mental Retardation, 279 S.C. 604, 608, 310 S.E.2d 819, 821 (Ct. App. 1983). "[i]f the judicial system is to operate efficiently, this court must be bound by decisions of the Supreme Court."

2. The South Carolina Court of Appeals erred in finding that the evidence applicable to the Trial Court's decision to take judicial notice of the fact that the high water mark of the property involved in the dispute "tends to migrate landward," while not a proper subject for judicial notice, was nonetheless supported by sufficient evidence to sustain the Trial Judge's Order, when the cited evidence did not establish that fact.

In response to Petitioners' SCRCP 59(e) Motion to Alter or Amend the Trial Judge's Order, wherein he took judicial notice of the "fact" that "the critical line . . . . tends to migrate landward" and required an additional 5' to the County's required set back line of 35' for construction of a fence, the Trial Judge refused the motion, stating: "The Court finds that migration of the critical line is a well established fact, so much so that it is proper for this Court to take judicial notice of the fact." (R. p. 29) He made no reference to his statement that "county regulations currently forbid erection of a fence any closer than thirty-five feet from the critical line which I find tends to migrate landward." (R. p. 21)

On appeal, the South Carolina Court of Appeals agreed with the Petitioner that it was improper for the Trial Judge to take judicial notice of the fact that the

critical line tends to migrate landward but affirmed the holding by stating that: "There is evidence on the record for the Master to determine there can be a migration of the critical line." The Court then cites the expert testimony of the surveyor which simply said the critical line does move from time to time. (Opinion p. 11) However, there was no evidence in the record that the line moved landward. It could just as well have moved seaward. In short, there was no evidentiary basis for the Trial Judge's 5' adjustment of the required set back line and thus no basis for the South Carolina Court of Appeals to sustain that action.

CONCLUSION

On the basis of the foregoing, it is respectfully submitted that the Supreme Court should grant Bay's Petition for Writ of Certiorari.

Respectfully submitted,

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November 9, 2012

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November 9, 2012

The Honorable Tanya Gee
Clerk, Court of Appeals
Post Office Box 11629
Columbia, SC 29211-1629

Re: Martin, David v. Bay, Ann
2010167366

Dear Ms. Gee:

I am enclosing herewith, for filing in the captioned matter, two copies of a Petition for a Writ of Certiorari to the Supreme Court, along with two copies of Proof of Service. Please return our stamped copies in the envelope provided.

Yours respectfully,

WARREN & SINKLER, LLP

Jo Davis
Assistant to G. Dana Sinkler

/jd
Enclosures
cc: David R. Martin and Patricia F. Martin