

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

RECEIVED

APR 26 2022

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

---

Appellate Case No: 2021-000100  
Common Pleas Case No: 2019-CP-10-06058

---

Bay Light, LLC.....Respondent

v.

Westgate Office Park Landowner's Maintenance Association, Inc.....Appellant

---

BRIEF OF RESPONDENT

---

April 25, 2022

s/ Stan Barnett  
SC Bar No. 533  
305 North Civitas Street  
Mt. Pleasant, SC 29464  
843-708-4887  
Attorney for Respondent

TABLE OF CONTENTS

Table of Authorities.....ii

Statement of Issues on Appeal.....1

Statement of the Case.....2

Statement of Facts.....5

Arguments

1. The Trial Court correctly found that the record did not give rise to a genuine issue of material fact concerning the grant of an easement to Regime members allowing them to drive onto and park on Lot B-2.....9

2. The Trial Court correctly found that a statement on a plat referring to an ingress/egress easement on property never owned by the Regime could not create an easement to drive and park in favor of the Regime’s members on that property, Lot B-2.....12

Conclusion.....13

TABLE OF AUTHORITIES

CASES

Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 985).....9

Gardner v. Mazingo, 293 S.C. 23, 358 S.E.2d 390 (1987).....11

German v. N.Y. Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985).....9

Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E. 2d 133 (1979).....12

Hoyer v. Slate, 428 S.C. 833, 279 S.E. 2d 845 (Ct. App. 2019).....12

Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988).....8

Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001).....8

McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004).....8

Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965).....10

Shupe v. Settle, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994).....8

Sides v. Greenville Hospital System, 362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004)..8

Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997)..... 8

Wayburn v. Smith, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977).....11

Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009).....11

OTHER AUTHORITIES

South Carolina Rules of Civil Procedure, Rule 56(c).....8

**STATEMENT OF ISSUES ON APPEAL**

1. DID THE TRIAL COURT ERR BY FINDING THERE WAS NO EVIDENCE SUFFICIENT TO ESTABLISH THE GRANT OF AN EASEMENT ALLOWING REGIME MEMBERS TO DRIVE ONTO AND PARK ON LOT B-2?
2. DID THE TRIAL COURT ERR BY FINDING THAT REFERENCE TO AN INGRESS/EGRESS EASEMENT ON THE PLAT, EXHIBIT B, TO THE MASTER DEED, COULD NOT CREATE AN EASEMENT IN FAVOR OF MEMBERS OF THE REGIME ALLOWING THEM TO PARK ON LOT B-2?

## I.

### STATEMENT OF THE CASE

This matter is an appeal of an Order of the Honorable Bentley D. Price of the Ninth Judicial Circuit granting summary judgment to the Respondent. The case involves Appellant's use of Respondent's property as parking spaces for staff of a group of offices located adjacent to Respondent's lot. Appellant is a condominium regime composed of office condominium units. The offices are part of the Appellant's condominium regime. Appellant claims there is an easement requiring this use and Respondent denies any such easement exists. There is no dispute as to the fact that Respondent's lot is not part of Appellant's condominium regime. During the pendency of this action, Respondent has been unable to construct a veterinary clinic so as to relocate his existing business, as the property is continually used for parking by Appellant's members' staff and employees.

Respondent filed suit on November 18, 2019 seeking a declaration pursuant to S. C. Code Section 15-53-10, et seq. that no easement exists as Appellant claims. (R. p. 1). Respondent also asked for a permanent injunction forbidding Appellant to allow its condominium unit owners to use its property for any purpose. Appellant filed an Answer to Respondent's Complaint on January 17, 2020 in which it admitted that Respondent's lot, "B-2" was not conveyed as part of the regime in the Master Deed. (R. p. 78). Appellant also admitted that Appellant has never owned Respondent's lot. However, Appellant denied that its members did not have parking rights on the lot.

Respondent filed a motion for summary judgment on February 21, 2020. (R. p. 80). A hearing on the motion was held before the Honorable Bentley Price on June 25,

2020 at which both parties were represented by counsel. (R. p. 494). This hearing was scheduled as a status conference and was held two weeks after the originally scheduled date for a hearing. The Court had granted Appellant a ten-day continuance. (R. p. 490, l. 19 – p. 491, l. 8). At the June 25 hearing, the judge heard arguments but also granted Appellant two more weeks to file a response to Respondent’s motion. (R. p. 504, l. 23 – p. 505, l. 3). During that 10-day period, Appellant did not file any memorandum or evidence in opposition to the motion for summary judgment. Judge Price granted Respondent summary judgment on July 21, 2020 with a Form 4 Order. (R. p. 216). Appellant filed a motion to reconsider on July 27, 2020. (R. p. 219). Judge Price denied this motion without a hearing using a Form 4 Order on August 5, 2020. (R. p. 236). On or about August 12, 2020, Respondent filed a proposed order with Judge Price reflecting his grant of summary judgment. Appellant requested leave to respond to the proposed order by August 18. On August 18, 2020, no response having been filed by Appellant, Judge Price adopted and signed the order proposed by Respondent. (R. p. 239). On August 19, 2020, Appellant requested the Court to vacate the order filed on August 18, 2020 and provide them the chance to file comments to the order proposed by Respondent and adopted by the Court. (R. p. 244-253). The Court granted this request, vacated its Order of August 18, 2020 and allowed Appellant to submit a memorandum with exhibits. (R. p. 256).

Appellant’s memorandum in opposition and exhibits was filed on August 20, 2020, but did not include any new documents beyond those filed by Respondent with its motion for summary judgment. Appellant filed a letter with Judge Price listing 14 documents they requested the Court to “take judicial notice of.” These are all either

plats or deeds. (R. p. 244-253). Appellant did not file any of these with the Court. On September 17, 2020, Judge Price issued a second Order granting Respondent summary judgment, once again adopting the proposed order submitted by Respondent in August. (R. p. 294-297). In this Order, the judge noted that in their Answer, Appellant admitted: the Master Deed did not convey Lot B-2 to Appellant as part of the Regime; the Master Deed did not convey to condominium owners in the Regime any rights of ingress/egress or easements on Lot B-2; and that Appellant does not own and has never owned Lot B-2. Judge Price found that the undisputed facts in the record proved that there was no easement for the benefit of Appellant and its Regime members established as alleged by Appellant. Specifically, the Judge found that none of the documents cited by Appellant constituted a conveyance of land or an interest in land to Appellant affecting Respondent's title to Lot B-2.

On September 28, 2020, Appellant filed a motion for reconsideration of the September 17 Order along with a memorandum in support and a voluminous set of exhibits. (R. 298). While there is significant overlap in these exhibits with what had been before the Court when it granted summary judgment on September 17, there were also documents not previously filed with the Court, some which Appellant listed in its letter to Judge Price of August 19 and a few additional ones never mentioned before.

Judge Price denied Appellant's motion for reconsideration with a Form 4 Order on December 22, 2020. (R. 481). This appeal followed. Appellant served a Notice of Appeal on Respondent's counsel by personal service – delivery by hand – on January 21, 2021. Notice of Appeal was filed in the office of the Clerk of Court for Charleston County and in this Court on February 1, 2021.

## II.

### STATEMENT OF FACTS

Respondent acquired title to the property at issue, referred to as Lot B-2, by deed executed on July 27, 2018 and filed in the Registrar's Office on August 3, 2018. (TMS # 351-10-00-099). The property is located on Wallace School Road in the West Ashley area of the City of Charleston. Appellant owns three neighboring lots, TMS # 351-10-00-039, TMS # 351-10-00-066 and TMS # 351-10-00-093 located to the east of Lot B-2. (R. p. 2). These three lots were included in the Master Deed conveying title to various parcels on October 30, 1996 and which created the Horizontal Property Regime known as "Westgate Office Park Horizontal Property Regime." (R. p. 36-37).

In the Complaint at paragraph 15, Respondent alleged:

15. Defendant does not own and has never owned Lot B-2 as part of the Regime nor does Defendant have any rights to use Lot B-2 for parking or ingress/egress. (R. p. 4).

Appellant's Answer responded to paragraph 15:

3. Defendant admits the allegations contained in Paragraph 15 that allege that Defendant does not own and has never owned Lot B-2 as part of the Regime; however, Defendant denies the remaining portions of Paragraph 15 and demands strict and absolute proof thereof. (R. p. 78).

Despite this clear admission, Appellant attempted to argue to the trial judge that Lot B-2 was, contrary to its admission, part of the property covered by the Master Deed. Appellant did not, however, provide any documents or other evidence supporting this claim. In fact, the Master Deed was amended on June 3, 2005, this amendment being provided to the Court by both parties. The amended deed explicitly says at the third introductory paragraph, "Lot B-2...was never to have been a part of the Westgate Office Park Horizontal Property Regime but was to be an out parcel adjacent to the Westgate

Office Park Horizontal Property Regime.” (R. p. 71). The fourth introductory paragraph continues, “the owners of the ...Regime desire to correct the aforesaid error...” (Emphasis supplied). (R. p. 71). Paragraph 1 of the amendment effects this intent and provides, “The Master Deed is amended to exclude from the Westgate Office Park Horizontal Property Regime the *out parcel designated as Lot B-2...*” (Emphasis supplied). (R. p. 71). Later in the same amendment to the Master Deed, Paragraph 5 says, “The owners of any condominium unit in the Westgate Office Park Horizontal Property Regime...shall have the non-exclusive right to utilize all parking areas...and any other easements located on Lot B-2 as more fully shown on Exhibit B of the Master Deed.” (R. p. 72). Exhibit B was a plat done on October 30, 1996 and twice revised, on November 7, 1996 and March 11, 1997. It is entitled, “Plat of Westgate Office Park Horizontal Regime.” Exhibit B shows an area shaded as “asphalt” on the northeastern quarter of Lot B-2, as well as on Lot B-1, with the label “24’ private ingress/egress easement.” It does not show parking spaces and neither the word “parking” nor any word meaning “parking”, appears on Exhibit B. (R. p. 175).

The original Master Deed, the Re-recorded Master Deed, which included a copy of Exhibit B, and the Amended Master Deed were the only evidence in the record when Judge Price entered his original Order on August 18, 2020. (R. p. 145-206). No deed of an easement on Lot B-2 executed by an owner of Lot B-2 was introduced or identified by either party. The only document referred to by Appellant in its filings mentioning an easement was Exhibit B as described above, which only denotes a 24’ easement for ingress/egress. (Exhibit B). (R. p. 175). Nothing constituting a grant of an easement to the members of the Regime was introduced or referenced in any way.

Appellant had the following five opportunities in 2021 to file documents with the trial court:

- A formal response to Respondent’s motion for summary judgment, up to two days before the date the hearing is set (SCRCP 56(b)) or by June 13;
- Two days before the second date of the hearing set at Appellant’s request for a 10-day continuance – or by June 23;
- By July 9, within the two-week grace period the Court granted Appellant to file opposition an memorandum and evidence after the June 25 hearing;
- By August 18, the time by which Appellant asked they be allowed to file opposition memoranda and evidence; and
- August 20, when, pursuant to their request as granted by the trial court, they filed a memorandum opposing the Court’s grant of summary judgment.

The only opportunity “of right” to file evidence with the trial court was the first one. All the others were by permission granted by Judge Price in response to repeated requests by Appellant for leave to file memoranda and evidence outside the period provided in the rules. Only after all five opportunities were wasted, did Appellant, without leave of the trial court, attempt to supplement the record by filing many documents with its memorandum in support of its final motion for reconsideration on September 28. (R. p. 219).

### **III.**

#### **ARGUMENT**

##### **Standard on Appeal**

The standard for summary judgment under South Carolina law is high. “Summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.” McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376-77, 597 S.E.2d 181, 184 (Ct. App. 2004)(quoting Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001). Furthermore, in determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988).

A trial court may grant a motion for summary judgment when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC; *See also*, Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997).

The party opposing summary judgment has the burden of producing proof and not mere allegations in the face of proof submitted by the moving party. “Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is genuine issue of fact remaining for trial.” Sides v. Greenville Hospital System, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). “When a plaintiff is faced with a defendant’s motion for summary judgment that is supported by evidence, the plaintiff cannot defeat the motion by relying upon the mere allegations of his complaint, but must disclose the facts he intends to rely on by affidavit or other proof.” Shupe v. Settle, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App.

1994); Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). “A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment.” Shupe, 315 S.C. at 516-17, 445 S.E.2d at 655; German v. N.Y. Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985).

**A. The Trial Court correctly found that the record did not give rise to a genuine issue of material fact concerning the grant of an easement to Regime members allowing them to drive onto and park on Lot B-2.**

Appellant’s argument as articulated, is one dimensional: that the Westgate Office Park Horizontal Property Regime (“the Regime”) conveyed an easement over Lot B-2 for the benefit of its members. This could only be possible if Westgate owned Lot B-2. There is no evidence in the record that Westgate ever owned Lot B-2. In fact, the Amended Master Deed for the Horizontal Property Regime, filed with the trial court by both parties, confirms that Lot B-2 was always to be “an out parcel” and was never owned by the Regime. (R. p. 70-77).

There is nothing ambiguous about the Amendment. It was not a new conveyance or re-conveyance. It was a corrective deed expressly executed, as its language says, so as to effect the desire of the Regime’s owners, “*to correct the aforesaid error...*” (Emphasis supplied), the error being any interpretation of the Master Deed that Lot B-2 was part of the Regime. The Amendment clearly and unambiguously provides that, “Lot B-2...was never to have been a part of the Westgate Office Park Horizontal Property Regime but was to be an out parcel *adjacent* to the Westgate Office Park Horizontal Property Regime.” (Emphasis supplied). Paragraph 1 of the amendment effects this intent and provides, “The Master Deed is amended to exclude from the

Westgate Office Park Horizontal Property Regime the *out parcel designated as Lot B-2...*” (Emphasis supplied). (R. p. 71).

Appellant, as noted above, admitted this in their Answer. (R. p. 78). Only after losing summary judgment, did Appellant attempt to retract the admission by arguing – in clear contradiction of its own Amended Master Deed – that Lot B-2 was at one time owned by the Regime. Appellant cites numerous documents, which they did not file with the trial court until after summary judgment was granted for the second time. What is missing in these improperly filed documents is any proof of a conveyance of Lot B-2 by the Regime. That is because the Regime never owned it, just as Appellant admitted in its Answer and, more importantly, as the Amended Master Deed confirms: The Regime – the Appellant – is not in the chain of title of Respondent.

Appellant’s argument suffers fatally from this fact. If the Regime did not own Lot B-2, as the Amended Master Deed confirmed, it could not convey any easement burdening Lot B-2. As the Regime did not own Lot B-2 when it filed the plat Appellant relies upon, Exhibit B to the Master Deed, the Regime could not by filing that plat, create an easement on Lot B-2 benefitting itself or its members. Appellant does not offer any argument as to how the Regime could do so. Their argument is a different one.

Appellant’s entire argument on appeal is a rejection of record title, a plea that somehow the Regime at one time owned Lot B-2. There is absolutely no evidentiary support for this claim. An easement may be created by express grant in a deed. Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965), but Appellant fails to offer any such grant. Their argument is that when the Regime filed a plat showing an

ingress/egress easement on land it did not own, an easement somehow arose. There is no legal support for such a position and Appellant offers none. Whether Appellant should be bound by its admission in their Answer – and Respondent believes they should – there is simply no evidence to support Appellant’s claim that the Regime ever owned Lot B-2.

It should also be pointed out that the easement language in the plat relied on by Appellant in no way reflects what Appellant claims they have – a right for its members to park on Lot B-2. The only easement referred to on the plat, Exhibit B, is for “a 24’ private ingress/egress easement.” The easement shown on the plat stops short of a complete traverse of Lot B-2 stopping short of the property to the west, shown at the time of the plat as that of “Barbara and Mitchell Waring.” (Exhibit B). (R. p. 175). An ingress/egress easement for Regime members onto property not part of the Regime and never owned by the Regime, therefore, would serve no purpose and make no sense whatsoever.

Regardless of what Appellant says now in this Court, the record title of Lot B-2 is clear. In construing a deed, “the intention of the grantor must be ascertained and effectuated, unless their intention contravenes some well settled rule of law or public policy...In determining the grantor’s intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law.” Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009), citing Wayburn v. Smith, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977), and Gardner v. Mazingo, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987). Appellant themselves filed the Amended Master Deed utterly disavowing any ownership at any time of Lot B-2. (R. p. 70-77). Nothing could be a

clearer demonstration of Appellant's intent as the grantor of title to land *not to include Lot B-2 in the Regime*. This is a definitive repudiation of Appellant's argument on appeal. The trial court did not err in finding there was no genuine issue of material fact on the question of Lot B-2's ownership by the Regime. The trial court's finding that, "Neither the original Master Deed nor the re-recorded deed constitutes a conveyance of land or an interest in land to Defendant (Appellant)" was not in error. (R. p. 295).

**B. The Trial Court correctly found that a statement on a plat referring to an ingress/egress easement on property never owned by the Regime could not create an easement to drive and park in favor of the Regime's members on that property, Lot B-2.**

Appellant argues that, having confirmed in a corrective deed – the Amended Master Deed for the Regime, that the Regime did not own, and never had owned, Lot B-2, the Regime in the very same document disavowing ownership of Lot B-2 was able to impose a permanent easement on that property. Such a proposition would upend centuries of real estate law in South Carolina. If any party could, by the mere filing of a plat, impose easements on land it does not own, the result would be complete chaos. Clear title would be impossible to certify.

Our system rightly depends on clarity in the chain of title so that purchasers of land, as well as others, can know who owns property and what restrictions attach to it. As the Regime is not in the chain of title of Lot B-2, the plat filed by the Regime for the property actually in the Regime can have no bearing on Lot B-2, except for the narrow purpose of illustrating the boundaries of the lot.

As the trial court said, the legal authority cited by the Appellant, Hoyer v. Slate, 428 S.C. 279, 297, 833 S.E. 2d 845, 855 (Ct. App. 2019), citing Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 397, 252 S.E. 2d 133, 136 (1979), provides that "where a

deed describes land as it is shown on a certain plat, such plat becomes part of the deed for purpose of showing the boundaries, metes, courses and distances of the property conveyed, but, the trial court continued, it does, “not stand for the proposition that a plat itself can create or convey an interest in real estate, such as an easement. “In other words,” the trial court concluded, “just because Lot B-2 is shown on a plat does not mean a deed conveying other neighboring lots is sufficient to convey rights to Defendant (Appellant) in Lot B-2.” (R. p. 296). The holding by the trial court that the plat filed by the Regime did not create an easement on Lot B-2 was correct.

### CONCLUSION

For the reasons stated above, Respondent respectfully requests this Court to affirm the Order of the Honorable Bentley D. Price granting summary judgment to Respondent.

Respectfully submitted,

s/ Stan Barnett

---

Stan Barnett SC Bar No. 533  
305 North Civitas Street  
Mount Pleasant, South Carolina 29464  
(843) 708-4887  
Attorney for Respondent

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

---

Appellate Case No: 2021-000100  
Common Pleas Case No: 2019-CP-10-06058

---

**RECEIVED**

APR 26 2022

SC Court of Appeals

Bay Light, LLC.....Respondent

v.

Westgate Office Park Landowner's Maintenance Association, Inc.....Appellant

---

CERTIFICATE OF COUNSEL

---

The undersigned certified that this Final Brief complies with Rule 211(b),  
SCACR.

April 25, 2022

s/ Stan Barnett

SC Bar No. 533  
305 North Civitas Street  
Mt. Pleasant, SC 29464  
843-708-4887  
Attorney for Respondent