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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY

Honorable Luke N. Brown, Jr., Special Referee for Jasper County

Case No. 2008-CP-27-481

Cole L. Lawson, III and Cole L. Lawson, IV,

Appellants,

v.

Weldon T. Strahan a/k/a Weldon Travis Strahan, a/k/a W. Travis Strahan, Individually and in his capacity as Personal Representative of the Estate of Ronald J. Strahan, Wilson Lee Mixson, Vivian M. Mcalhaney, as Trustee of the Mcalhaney Family Trust, Utd 9/20/2004, Vivian Mixson Mcalhaney, David A. Shipes, Tony W. Alter Shipes, Helen S. Kinard a/k/a Helen Shipes Kinard, Wanda Shipes Casey a/k/a Wanda S. Casey a/k/a Wanda D. Casey, and Jacob F. Malphrus,

Defendants,

of whom

Davis A. Shipes, Tony W. Alter Shipes, Helen S. Kinard a/k/a Helen Shipes Kinard, Wanda Snipes Casey a/k/a Wanda S. Casey a/k/a Wanda D. Casey, and Jacob F. Malphrus are

Respondents.

PETITION FOR REHEARING

Appellants, Cole L. Lawson, III and Cole L. Lawson, IV, respectfully petition the Court for rehearing pursuant to Rule 221(a), SCACR. This petition is submitted on the

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grounds that this Court may have overlooked or misapprehended important factors in its analysis of the two issue rule and factual record forming the record on appeal. Based on the reasons set forth below, Appellants respectfully ask this Court to grant this Petition for Rehearing and reverse the decision of the Special Referee, with a remand for further proceedings consistent with this Court's further directives.

PROCEDURAL AND FACTUAL BACKGROUND

This matter was before the South Carolina Court of Appeals (Court) following an action in which the Appellants, Cole L. Lawson, III and Cole L. Lawson IV, sought an easement to certain real property they own that is located in the County of Jasper which is land-locked and to which they have no access. Respondents were Defendants by virtue of their status as adjoining landowners to the real property located between the subject property and the closest public road. By consent of the parties, and a trial was held on October 20, 2010 before Jasper County Special Referee Luke N. Brown, Jr. ("Referee"). The Final Decree denied Appellants' requested easement by express grant and necessity. (R. p. 11). The Referee subsequently denied Appellants Motion to Amend, Alter, Open, Reconsider, or Vacate the Final Decree. (R. p. 1).

On appeal, this Court affirmed the Referee's order. Appellants now submit this petition for rehearing from the Court's decision.

OVERLOOKED OR MISAPPREHENDED MATTERS

In affirming the Referee's denial of an easement on the basis of two grounds: the two-issue rule and on the merits of the claim for an easement.

I. Two Issue Rule

Appellants first respectfully submit that the two issue rule is not appropriately applied in the facts and circumstances presented in this matter. The cited authority by the Court states that the brief must address every issue upon which the underlying order was based. Appellants articulated an argument that the initial conclusions reached by the Special Referee, mistakenly finding no easement in favor of Appellants existed, so tainted the remainder of the factual and legal issues decided by the Referee that the entire matter should be remanded for further proceedings. (AIB, p. 13). This Court's opinion implies the issues were entirely absent from the initial brief, which result is apparently a misapprehension on the part of this Court.

Further, the cited authority is used to establish that issues may not be raised for the first time on reply brief. As stated above, Appellants did address the issues in its original brief. Admittedly, the Reply Brief discusses the issues to a much greater extent than the initial brief, but did so after the issues were made a primary focus by being addressed to a significant extent in Respondent's initial brief.

Additionally, the two issue rule is cited by the Court in its opinion, but when the opinion addresses the alternate grounds of the merits of the appeal, the cited authority only addresses the issue that all parties agree was fully argued and preserved. The Court has therefore failed to determine that the second issue has sufficient merit or support in the underlying record.

Appellant therefore contends all relevant issues were preserved and addressed for full consideration on appeal. But even if it is determined the two-issue rule would normally preclude that determination, the facts and circumstances in this case support the

State Supreme Court's determination that the two-issue rule is not a complete and unyielding doctrine free from exception. Since both parties to the appeal had the full and fair opportunity to address the equitable defense issues, both in the briefs and at argument, a limitation on the two-issue rule, whereby policy considerations, specifically applications that would discourage trial courts from correcting errors, should prevent application of the rule in this matter. See Anderson v. S.C. Dept. of Highways & Pub. Transp., 322 S.C. 417, 421, 472 S.E.2d 253, 255 (1996).

The Referee's own words at the start of trial indicate his predilection to make up his mind before presentation of argument on a particular issue, but prophetically, his desire to review materials that may taint his analysis, even though known to be improper for consideration. (R. p. 191, lines 12-16).¹ It is on the basis of that factual basis, referenced in the brief of Appellant, that Appellant contends justifies recognition of the preservation and presentation of all issues requiring this Court's review.

II. Merits of the Easement Claims

Appellants next respectfully submit that the opinion's cited authority confuses the issues raised by Appellant, specifically the separate issues on appeal as to whether an easement by reservation existed, or whether an easement by necessity existed.

A. Easement by Reservation was Established by Appellant.

1. Four Corners of Deed establish Easement by Reservation

¹ At the start of the first witness' testimony, a discussion of whether a stack of documents would be submitted as a whole or individually was discussed with the Referee, to which the Referee responded "Let me just tell y'all something. I always like to hear the whole story because I disregard a lot of it, but you can't really get a picture of what everybody is thinking unless you hear everything, even those you know you're going to rule against." (Tr. p. 34, ll. 12 - 16).

The deed language in question clearly establishes, within its four corners, an appurtenant easement that inures to the benefit of Appellants as the current owners of the dominant tenement property served by the easement. The Court appropriately cites authority that provides the grantor's intent, gleaned within the four corners of the deed, controls and should be given full effect. *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987). Authority is also cited that provides a deed restriction will not be "enlarged or extended by construction or implication beyond the clear meaning of its terms." *Forest Land Co. v. Black*, 216 S.C. 255, 262, 57 S.B.2d 420, 424 (1950).

The deed in question, however, is very broad, and Appellants are not asking for anything not encompassed within the existing breadth of the easement. The deed references an easement reserving "all the timber and trees of every sort and description". (R. 494-495). Thus the reservation was surely as expansive as possible and not subject to any possible expansion by Appellants, as it already included the rights to even the smallest sprouted sapling and the right to access Respondent's property in search thereof. The deed also establishes the requisite level of need to be shown for its reserved rights, reserving to the full extent necessary such that only the "useful" or "convenient" are sufficient to justify utilization of the easement. (R. 494-495).

2. Terminus requirement is satisfied

The Court's opinion cites *Shia v. Pendergrass*, 222 S.C. 342, 351, 72 S.E.2d 699, 703 (1952), which states the absence of a terminus on property is fatal to a claim of an appurtenant easement such as the one made by Appellants. As cited in Appellant's brief and referenced during oral argument, this Court's prior opinion on this requirement, specifically *Springob v. Farrar*, 334 S.C. 585, 514 S.E.2d 135 (Ct.App.1999) favors

Appellant's position on the existence of an easement. Unlike in the facts at issue in *Springob*, Big Salkehatchie owned both adjacent properties at issue (the land now known as the Lawson Tract as well as the property conveyed in the 1921 deed to the Stanleys). Based on the four corners test for establishing intent, the only evidence available is that owner of the dominant and servient land specifically referenced road building reservation of right between the two. The Referee presumed the owner already had access to the Lawson Tract via a bordering public roadway. (R. p. 494). But that finding and determination relies upon evidence, or the absence thereof, that ventures beyond the four corners test required under South Carolina law and amounts to a reversible error of law. See *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987).

B. Easement by Necessity was established.

The Court's opinion only cited one authority relevant to the determination of an easement by necessity, Clemson Univ. v. First Provident Corp., 260 S.C. 640, 652, 197 S.B.2d 914, 920 (1973), for the requirement that the necessity element of an easement by necessity must exist at the time of the severance and a grantee claiming easement may not "so change the uses of land as to convert a way of convenience into a way of necessity".

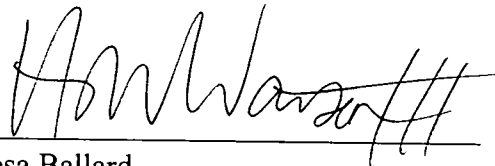
In the present matter, Appellants are not arguing over mere convenience or aesthetic access points: they are entirely landlocked without present alternative, as all parties acknowledge, and that barrier to access renders the property nearly without value to Appellants or almost every potential purchaser to whom they could sell the property. The Court's ruling leaves the Respondents with effective ownership and control of real property owned by another, yet bars the actual owners from access and use of their own

property. The drafting of the deed, with an express and additional reservation of the right of access across the Respondents' property had to have been created for a reason at the time of its drafting in 1927, and only evidence in the record as to the reason is the deed itself, which is clearly drafted consistent with a contemporaneous need for access to the property that could not be otherwise guaranteed without special written provision by reservation.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Appellants respectfully ask this Court to grant this Petition for Rehearing and reverse the decision of the Special Referee and remand for further proceedings consistent with this Court's further directives.

Respectfully submitted,



Desa Ballard
Harvey M. Watson III

Ballard Watson Weissenstein
P.O. Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
Email: desab@desaballard.com
harvey@desaballard.com

May 9, 2013

ATTORNEYS FOR APPELLANTS

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CERTIFICATE OF SERVICE

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on May 9, 2013, I served a copy of the **PEITION FOR REHEARING** in the above-captioned case on the following individuals by standard US Mail:

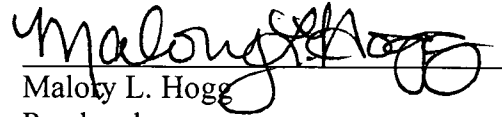
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**Kevin A. Brown, Esquire
Anderson & Brown, LLC
Post Office Box 576
Hampton, South Carolina 29924**

**Demetri K. Koutrakos
Mary Dameron Milliken
Callison Tighe & Robinson, LLC
Post Office Box 1390
Columbia, South Carolina 29202-1390**


Malory L. Hogg
Paralegal

May 9, 2013
West Columbia, South Carolina