THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
COURT OF COMMON PLEAS
The Honorable Doyet A. Early, III

Unpublished Opinion No. 2012-UP-207488 (S.C. Ct. App. Filed February, 13, 2013)

I. Lehr Brisbin,..Petitioner,

v.

Aiken Electric Cooerpative, Inc., and Gary Stooksbury and Carolina Tree Care Inc., of North America,... Respondent.

PETITION FOR WRIT OF CERTIORARI

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INDEX

Page

Certificate of Counsel....1

Questions Presented....2

Statement of the Case....3

Arguments....5

1. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT....5

2. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO THE APPELLANT'S REQUEST FOR AN INJUNCTION....7

Conclusion....11

CERTIFICATE OF COUNSEL

Counsel for the petitioner certifies that the petition for rehearing was made and finally ruled upon by the Court of Appeals on April 19, 2013.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the granting of Defendant's Motion for Summary Judgment was appropriate?

2. Did the Court of Appeals err in holding that the granting of Defendant's Motion for Summary Judgment as to the Appellant's request for Summary Judgment was appropriate?

Statement of the Case

The Appellant is a senior research scientist and owner of property located at New Ellenton, South Carolina where he conducts research in the movement and behavior of box turtles, research in the ecology of nesting birds and research into the behavioral capabilities of tracking and scent discriminating law enforcement dogs. The Defendant, Aiken Electric Cooperative (AEC) and their contractors, (Carolina Tree Care of North America) entered the Appellant's property in December 2007 for the purpose of maintaining AEC's claimed easement beneath a power line. Gary L. Stooksbury is AEC's chief executive officer.

The Appellant has encountered prior problems with AEC's power line maintenance procedures on his New Ellenton property and one incident resulted in a settlement between the parties.

The Appellant filed a civil action against the Defendant's due to the Appellant being informed that the activities performed in December 2007 on his property was discriminatory, unreasonable and unjustified which consequently, detrimentally affected the Appellant's research activities.

Before all discovery was completed, the trial court judge granted AEC's and Gary L. Stooksbury's motion for summary judgment. A Motion to Alter or Amend the order as to summary judgment was timely filed on the Appellant's behalf to which the trial court judge denied.

An Order by Consent was entered into between counsel for the Appellant and counsel for the Defendant, Carolina Tree Care, Inc., of North America (CTC) which took

CTC's case from the court docket pursuant to Rule 40 (j) SCRCP based on a pending appeal against AEC.

A Notice of Appeal was ultimately filed against the Defendant, AEC and Gary L. Stooksbury.

ARGUMENT

A. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary Judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. See Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases applying the preponderance of the evidence burden of proof, the non-moving party in only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. See Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "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. See, David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery. See, Dawkins v. Fields, 354 S.C. 58, 69. 580 S.E.2d 433, 439 (2003). Summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that that there is no genuine issue as to any material fact. See; Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

The appellant respectfully asserts that the Court of Appeals erred in affirming the trail court's ruling that summary judgment was appropriate. Counsel for the Appellant informed the trial court that all discovery had not been completed, that depositions had

not been undertaken and that Carolina Tree Company's discovery request to Aiken Electric Cooperative, Inc. and Gary L. Stooksbury (AEC) had not been answered by AEC. Counsel for the Appellant informed the trial court that summary judgment should not have been granted as the Appellant did not have a full and fair opportunity to complete discovery and consequently, did not have a fair opportunity to develop his case. (R. P. 86). (R. P. 90).

Counsel for AEC repeatedly requested that summary judgment should be granted because the Appellant could not demonstrate monetary damages. The trial court judge at the November 7, 2011 hearing questioned counsel for the Appellant as follows:

Q. If I tried this case this morning non-jury right here and I asked you what are your damages, what would they be?

A. At this point Judge, we don't have an answer to that.

The Court: All right, prepare me orders within 15 days.

(R. P. 86-87).

The trial court judge would not let counsel for the Appellant argue the issue as to the Plaintiff's request for an injunction against AEC and all of the causes of action set-forth in the Appellant's amended complaint. (R. P. 86-87).

The fact that damages could not be ascertained or quantified at the November 7, 2011 hearing should not be grounds for the granting of summary judgment. The Appellant alleged that AEC intentionally trespassed onto his land at issue. If trespass is proved, the Plaintiff is entitled to some damages, if only nominal. See Norvell v. Thompson, 20 S.C.L (2 Hill) 470, 471 (1834). Actual damages need not be shown if the facts otherwise justify an award of punitive damages. Where there has been a willful

trespass but no substantial damages has been shown to have resulted therefrom, a verdict for punitive damages alone will stand, since it will be presumed that nominal damages, incapable of admeasurement, have been merged in the punitive damages." See Hinson v. A.T. Sistare Constr. Co., 236 S.C. 125, 134, 113 S.E.2d 341, 345 (1960).

The Appellant respectfully asserts that the Court of Appeals did not take into consideration that the Appellant did not have a full and fair opportunity to develop his case by way of discovery to include but not limited to depositions so that damages could be ascertained. The Appellant has not had a full and fair opportunity to develop his case by way of discovery to include but not limited to depositions so that he can continue to move forward with his causes of action set-forth in the Appellant's amended complaint.

B. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO THE APPELLANT'S REQUEST FOR AN INJUNCTION

In cases applying the preponderance of the evidence burden of proof, the non-moving party in only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. See Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "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. See, David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Where a legal remedy is inadequate or unavailable, a court may enjoin the trespasser. See Charleston Joint Venture v. McPherson, 308 S.C. 145, 417 S.E.2d 544 (1992). The power of the

court to grant an injunction is in equity. Doe v. South Carolina Med. Malpractice Liability Joint Underwriting Ass'n, 347 S.C. 642, 557 S.E.2d 670 (2001). The court will reserve its equitable powers for situations when there is no adequate remedy at law. Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n, 298 S.C. 179, 379 S.E.2d 119 (1989). The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. Calcutt v. Calcutt, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984). In deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction which seems most consistent with justice and equity under the circumstances of the case. Forest Land Co. v. Black, 216 S.C. 255, 57 S.E.2d 420 (1950). For an injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) the party seeking injunction will likely succeed in the litigation; and (3) there is an inadequate remedy at law. Scratch Golf Co. v. Dunes West Residential Golf Props., Inc., 361 S.C. 117, 603 S.E.2d 905 (2004). A power company must not inflict unnecessary damage to the land nor may its exercise of its rights unreasonably increase the burden placed on the servient tenement. Any removal must be done in a reasonable manner. See, C/R TV, Inc v. Shannondale, Inc 27 F.3d 104 United States Court of Appeals for the Fourth Circuit (1994).

Counsel for the Appellant argued that if damages could not be quantified then a review of the record indicated that there was a genuine issue of material fact as to the issue of the injunction due to AEC exceeding the scope of AEC's power-line maintenance. (R. P. 89)

Counsel for the Plaintiff invited this Court's attention to the Plaintiff's affidavit, the Plaintiff's wife's affidavit and picture attachments that were presented to this Court at the prior hearing for summary judgment. (R. P. 37-55) (R. P. 90) and (R. P. 37-55). The trial court judge acknowledged that he had the Appellant's affidavit filed on October 18, 2011. (R. P. 84).

the Appellant respectfully asserts that a genuine issue of material fact existed as to the cause of action for the injunction against AEC. AEC's contention was that they were following their correct right-of way procedures for maintaining their power lines on the Appellant's property. However, the Appellant's Response to Motion for Summary Judgment filed October 18, 2011 demonstrated that there was a genuine issue of material fact as to the issue of the injunction. Furthermore, the Appellant's and the Appellant's wife's affidavits stated as follows:

A. The Appellant attested to the fact that power line maintenance activities on his property would consist only of the topping and hand-pruning/ "side limbing" of any trees and/or branches growing within five feet of the actual power lines or utility poles, and/or which otherwise posed a danger to the wires as a result of the potential to fall or be blown into these wires during a storm.

B. The Appellant attested that it was further agreed at this meeting that no emergent woody growth and/or other ground-cover vegetation under the power line would be damaged or removed unless it could reasonably be expected to pose a barrier to the entry and free-movement of AEC vehicles under the power line in the event of an electrical maintenance emergency.

C. The Appellant's attested that the activities conducted in December 2007 violated their guidelines due to AEC selectively mowing and destroying with herbicide, low-growing vegetation, which was in no way related to any issue of safety or access to the right-of-way since this vegetation could never grow up and interfere with the power-lines nor could it impede access to the power-lines.

D. The Appellant attested that his use and enjoyment of his property and his scientific research was severely curtailed due to AEC's activities.

E. The Appellant's wife attested that a 10 foot swath was cut into their property which left their property covered in debris and rendered the property useless to the Appellant and his wife and their dogs.

F. The Appellant's wife attested that the Appellant and she have yet to be able to use the property as they once did due to the actions of AEC and the AEC's actions have allowed children from the school across the street to enter the property and created an area from which the Appellant's dogs and livestock could easily escape.

(R. P. 38-55).

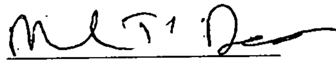
An injunction would prevent further harm to the Appellant's research activities, and his use and enjoyment of his property and for AEC to keep in the bounds of reasonableness as to their right-of-way maintenance.

The evidence submitted by the Appellant was enough for the Appellant to withstand AEC's motion for summary judgment as to the request for an injunction. The Appellant respectfully requests that the Court of Appeals should have held that the Appellant's cause of action as to an injunction should proceed in order for his rights to be protected.

CONCLUSION

For the reasons stated, the petitioner asks the court to grant the petition for writ of certiorari.

Respectfully submitted,



May 15, 2013

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PROOF OF SERVICE
OF
PETITION FOR WRIT OF CERTIORARI

I certify that on May 15th, 2013 I served by United States Postal Service overnight delivery, the Petition for Writ of Certiorari upon the Attorney for the Respondent at the following addresses:

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MAY 17 2013
SC Court of Appeals

May 15, 2013

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
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Re: I. Lehr Brisbin v. Aiken Electric Cooperative, Inc/Gary Stooksbury
Carolina Tree Care Inc., of North America

Case Number: 10-CP-02-02981

Dear Ms. Gee;

Enclosed for filing please find the following:

1) Petition for Writ of Certiorari; and
2) Proof of Service.

With warm regards,

Mark J. Devine

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