No. A24A0563

IN THE COURT OF APPEALS
STATE OF GEORGIA

REGINALD GOETTSCH

Appellant,

v.

SANDRA BROOKS

Appellee.

BRIEF OF APPELLANT

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PART ONE

STATEMENT OF THE PROCEEDINGS BELOW

Appellant/Defendant (hereinafter "Goettsch") appeals from the trial court's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment (R at 318-334). Appellee/Plaintiff (hereinafter "Brooks") filed a pleading titled Plaintiff's Motion for Summary Judgment in which Brooks' request or prayer is: "The Court should grant Plaintiff's request for an Order requiring Defendant to remove all of his encroachments into the 30 foot right of way. The Court should immediately restrain Defendant from such encroachments." (R at 66-95)

The Trial Court's Order grants relief to Brooks as follows: "IT IS ORDERED THAT Defendant remove all structures that encroach into the right of way within thirty (30) days. Defendant is further ENJOINED from parking any portion of his car in the right of way and from placing other obstructions or structures in the right of way." (R at 318-334)

In her Complaint, Brooks alleged Count I: Trespass and Ejectment, Count II: Punitive Damages, Count III: Special Damages, Count IV: Attorney's Fees, and Count V: Injunction (R at 5-29). While it is unclear on which counts Brooks sought summary judgment, it appears the Trial Court granted summary judgment on Counts I and V, but the Trial Court only expressly withheld judgment only on the issue of punitive damages (R at 318-334).

STATEMENT OF FACTS

The issue in this case concerns a few square feet of Goettsch's parking area which slightly protrudes from his property onto a property owned by Brooks which is subject to an ingress and egress easement for Goettsch and many other property owners in the subdivision. (R at 5-29, Exh. B); (R at 66-95, Exh. A-D); (R at 144, page 14:12-17 and 23:3).

Brooks owns a thirty-foot wide strip of land known as David Drive in the Old Tiger Mountain Estates Subdivision subject to the non-exclusive easement for ingress and egress contained in all deeds conveying property ownership within the Old Tiger Mountain Estates Subdivision. *Id.* The language of the deed conveying David Drive to Brooks explicitly states property "is being conveyed subordinate to the road right of way easement right that the owners of tracts of land who adjoin said above described Merriam Trail presently have to provide road access to and from their tracts of land with the public road system of Rabun County, Georgia." Notably, Brooks received the property from the original grantor of the subdivision lots. The lane used for ingress and egress is not the width of the easement. *Id.* The parking area, with or without a car in it, does not obstruct the travel of the lane used for ingress and egress. (R at 144 pages 25:13-16, 31 and 103.

When driving up the road into Tiger Mountain Estates Subdivision there is a bank on the right side across from the Defendant's property, Lot 5. (R at 144 page 15: 6-11). On the Defendant's property, Lot 5, there is a bank below the road as you progress up the mountain. (R at 144 page 15: 12-15). Prior to the Defendant's ownership of Lot 5, there was no kind of driveway on Lot 5 to and from the easement road to a home on the property. (R at 144 page 15: 16-20; R at 98 page 6:11-13). The Plaintiff was aware of parking problems with previous owners of Lot 5 due to the lack of parking space established on the property, so they had to make other arrangements. (R at 144 pages 16: 1-19, 31:22-32:4, 83:1-87:16). In fact, the Plaintiff let a previous owner of Lot 5 occasionally park in easement area of Plaintiff's property because there was no parking space on Lot 5. (R at 5 ¶7; R at 144 page 34:12-23). A survey of the property was completed before the Defendant even looked at the property or purchased the property. (R at 98 pages 11:4-15; 43: 8-14). After the Defendant bought the property, the Defendant had

Madison Tucker build a gravel parking area at his lot to gain access to his house. (R at 5 ¶8; R at 98 page 39:1-3). The Defendant spent about $20,000 to build the parking area. (R at 98 page 44:14-16). The Defendant believed that the parking pad area would be built within the boundaries of Lot 5. (R at 98 page 11:16-25). After the parking area was built on Lot 5, the Plaintiff told the Defendant that the parking area was wrongfully encroaching on the right of way, which was her property. (R at 98 page 4:13-6:8). Thus, only after it was built, the Defendant discovered that the parking area protruded slightly outside Lot 5 into the Easement. (R at 98 pages 12: 1-5; 41: 7-8) (R at 144 page 27:10-25; Depo. Exh. 2, photograph of truck in space with markings)

Brooks has not presented any evidence that the parking space, even when the Goettsch's truck is parked there, blocks travel on the road or access to the Brooks' property. Other than the period of time during which construction was taking place on Goettsch's property (R at 144 pages 28:20-30:4), Brooks has raised only hypotheticals about access when or if she needs emergency vehicles to come to her home since she has multiple medical problems. (R at 144 page 41:12-22). Brooks has not put forth any evidence that any property owners have been blocked by Goettsch's use of his parking space on his property. Further, there is no other parking available on Goettsch's lot.

STATEMENT OF THE METHOD OF PRESERVATION OF ERROR BELOW

Goettsch preserved error in the trial court by filing a response to Brooks' Motion for Summary Judgment on February 15, 2023. The Court's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment was filed on March 22, 2023, and Goettsch timely filed a Notice of Appeal.

PART TWO

ENUMERATION OF ERRORS

1. The Trial Court erred in relying on facts which are disputed by the Parties in granting Brooks' Motion for Summary Judgment and denying Goettsch's Motion for Summary Judgment.
2. The Trial Court erred in its interpretation of the conveyance to Brooks of the underlying fee simple property described as David Drive and the relationship between the fee simple and the ingress and egress easements.
3. The Trial Court erred in holding that the intent of the grantor was express and unambiguous with regard to the nature of the relationship between the different ownership interests in the property.
4. The Trial Court erred in finding that Defendant's use of the right of way is outside of the scope of the easement rights and thus constitutes a trespass.
5. The Trial Court erred in finding that the Defendant's interference was a voluntary, intended act.
6. The Trial Court erred in ruling that there is no genuine issue of material fact with regard to any element of Brooks' trespass claim.
7. The Trial Court erred in holding that equitable defenses are not applicable in this case.
8. The Trial Court erred in holding that ejectment is a proper remedy in this case.
9. The Trial Court erred in ordering, "[T]hat [Goettsch] remove all structures that encroach into the right of way within thirty (30) days."
10. The Trial Court erred in its order enjoining Goettsch from parking "in the right of way".

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this appeal, because it is not a case for which jurisdiction has been reserved exclusively for the Georgia Supreme Court. Ga. Const. Art. VI, § 6, ¶ II. This an appeal from an order granting a motion for summary judgment which resulted in a final judgment as to the issuance of the injunction. O.C.G.A. § 5-6-34(a)(4).

PART THREE

STANDARD OF REVIEW

"[A] *de novo* standard of review 'applies to an appeal from a grant or denial of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant.'" *Whitehead v. Green*, 365 Ga. App. 610, 613 (2022). "[A]t the summary-judgment stage, we do not 'resolve disputed facts, reconcile the issues, weigh the evidence, or determine its credibility, as those matters must be submitted to a jury for resolution.'" *Id.* "The party opposing summary judgment is not required to produce evidence demanding judgment for it, but is only required to present evidence that raises a genuine issue of material fact." *Toyo Tire North America Manufacturing, Inc. v. Davis*, 299 Ga. 155, 161 (2016).

ARGUMENT AND CITATIONS OF AUTHORITIES

I. THE TRIAL COURT ERRED IN RELYING ON FACTS WHICH ARE DISPUTED BY THE PARTIES IN GRANTING BROOKS' MOTION FOR SUMMARY JUDGMENT AND DENYING GOETTSCH'S MOTION FOR SUMMARY JUDGMENT.

The facts as stated in this Brief are the extent of the undisputed facts in this case. The facts about property ownership and the language contained in the deeds are an undisputed matter of public record. Beginning on page two with the litigious relationship between Brooks and Goettsch's predecessor in interest, the Trial Court recites as fact a narrative put forth by Brooks

which is not undisputed and which would inevitably be controverted at trial. The Trial Court states as fact immaterial and potentially irrelevant details put forth by Brooks – for example, Brooks' story that she placed survey markers on Goettsch's property prior to his purchase and that Brooks believes that the parking area may restrict construction of a culvert she planned to put under the road at some point in the future. It is unclear where the Trial Court drew the recitation of facts, as it does not have citations and it did not appear to come from either Parties' Statement of Facts about Which No Material Dispute Exists. Given that the Trial Court cited numerous immaterial and disputed particulars in its section titled "Facts" spanning from page two through five, this Court cannot be sure upon which facts the Trial Court relied in reaching its decision to rule in favor of Brooks.

The Trial Court must make a determination where there is a genuine issue as to any material fact, and, if there is, the Trial Court must stop there. O.C.G.A. § 9-11-56(c). The Trial Court only proceeds to the question of whether Brooks is entitled to a judgment as a matter of law *if* there is no genuine issue as to any material fact. *Id.* There is no indication that the Trial Court conducted the initial inquiry to determine if there was a genuine issue of material fact. O.C.G.A. § 9-11-56(d) deals specifically with cases like this one where the case is not fully adjudicated on the motion for summary judgment:

> If on [a motion for summary judgment] judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such proceedings in the action as are just. Upon the

> trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

The Trial Court failed to follow this procedure. At many places in the Order, the Trial Court phrases its sentences as "The Plaintiff/Defendant testified . . .". It is unclear which statements the Trial Court found as facts and which it relied upon. This Court should reverse the Trial Court with instructions to limit its analysis to the undisputed material facts and to construe all reasonable inferences in favor of Goettsch, the non-moving party.

II. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE CONVEYANCE TO BROOKS OF THE UNDERLYING FEE SIMPLE PROPERTY DESCRIBED AS DAVID DRIVE AND THE RELATIONSHIP BETWEEN THE FEE SIMPLE AND THE INGRESS AND EGRESS EASEMENTS.

The conveyance to Brooks of the underlying fee simple states:

> The above described Merriam Trail (nka: David Drive), that is shown on said plat of record in Plat Book 11, Page 285, aforesaid records, is being conveyed subordinate to the road right of way easement right that the owners of tracts of land who adjoin said above described Merriam Trail presently have to provide road access to and from their tracts of land with the public road system of Rabun County, Georgia.

"Subordinate" means placed in a lower position, to make subservient, to treat as of less value or importance. Generally, if a deed is subordinate to another deed, the owner whose conveyance was subordinate is subject or inferior to the other owner. For example, an easement that is subject to or subordinate to a security deed can be extinguished in its entirety by foreclosure. *Eagle Glen Unit Owners Ass'n, Inc. v. Lee*, 237 Ga. App. 240 (1999).

When analyzing the rights of the fee owner burdened by an easement (servient) and the easement holder's (dominant estate) rights regarding easement use, the primary rule is that

neither a dominant tenement nor a servient tenement can interfere with each other's rights to a reasonable use of a non-exclusive easement for ingress and egress. *See* Huckaby v. Cheatham, 272 Ga. App. at 750-751, 612 S.E.2d at 814. A servient estate holder retains full possession and rights to reasonable use of its land, but it is limited by the right of the dominant estate (or estates) to a reasonable use of that easement as well. *Montana v. Blount*, 232 Ga. App. 782, 784-787, 504 S.E.2d 447, 450-452 (1998); *see also State Soil & Water Conservation Comm'n v. Stricklett*, 252 Ga. App. 430, 430, 555 S.E.2d 800, 801 (2001). "A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *De Castro v. Durrell*, 295 Ga. App. 194, 194, 671 S.E.2d 244, 246 (2008)

The interpretation of the word "subordinate" in the context of a deed that otherwise appears to be a grant in fee simple while describing the relationship between the fee property and the easement, where the fee and the easement concern the same exact property, is a question of first impression for this Court. This Court should hold that, where the fee simple interest which consists of the same property as an easement is taken "subordinate" to that easement, the fee simple owner must be held to the same standard as a fellow easement holder seeking an injunction – the owner of the fee simple must show an adverse effect or substantial or material interference therewith. *See generally East Beach Properties, Ltd. V. Taylor*, 250 Ga. App. 798 (2001).

III. THE TRIAL COURT ERRED IN HOLDING THAT THE INTENT OF THE GRANTOR WAS EXPRESS AND UNAMBIGUOUS WITH REGARD TO THE NATURE OF THE RELATIONSHIP BETWEEN THE DIFFERENT OWNERSHIP INTERESTS IN THE PROPERTY.

The property at issue is a thirty-foot wide strip of land designed to serve as the roadway for the subdivision. The easements granted to the subdivision lot owners are for the entirety of the same property owned by Brooks in fee simple subordinate to the easement rights.

> Where a grantor-subdivider creates a subdivision plat, setting forth lots and streets for the benefit of the grantor and all subsequent grantees and subsequently conveys lots with legal descriptions that are dependent upon such plat, all grantee landowners receive the express grant of an easement of ingress and egress across and between the boundaries of such platted streets or rights-of-way, and such express grant by the subdivider relinquishes the right to require the showing of necessity over such platted streets or roads for the full use of such easement. Such rights and uses by all subdivision owners can be determined in an action in equity.

Montana v. Blount, 232 Ga. App. 782, 784 (1998). Generally, the grantor retains the right to full dominion and use of the land, except where it is granted under an easement. "However, the subdivider-grantor by the recordation of a plat and by dedication of the easements contained in the plat and deeds evidences the intent to relinquish such rights for the benefit of all subdivision grantees." *Id.*

In the context of a subdivision, a right-of-way easement creates a legal rebuttable presumption that "reasonably necessary use," "fair," or "reasonable enjoyment" of the easement requires the full use of the right-of-way or street as platted. *Id.*, where the Court held that the easement owner could clear cut the easement.

> The grant of an easement impliedly includes the authority to do those things which are reasonably necessary for the enjoyment of the things granted. For an easement for ingress and egress, this means grading, placing gravel, installing and maintaining culverts and bridges, paving, or cutting of trees and brush off the road and shoulder, which are ancillary to the easement granted.

Lanier v. Burnette, 245 Ga. App. 566, 569 (2000). Parking which slightly overflows onto the edge of the easement is a reasonably necessary use for the enjoyment of ingress and egress where no other alternatives are available to the easement holder and the use does not affect the use of the easement by others.

The Trial Court cites *Upson v. Stafford*, 205 Ga. App. 615 (1992), for the principle that the remedy for an unauthorized use lies in the owner of the underlying fee. *Upson* does not reach the issue raised in this case because the conveyance to Brooks makes her ownership subordinate to the rights of the easement holders. Brooks holds no higher status as the fee owner than the other owners of the easement due to the nature of the deed conveying ownership to Brooks. This Court should hold that Brooks must show that she is "adversely affected, or substantially or materially interfered with" in order to enjoin the easement owner's use of the easement for a purpose directly related to ingress and egress.

IV. THE TRIAL COURT ERRED IN FINDING THAT GOETTSCH'S USE OF THE RIGHT OF WAY IS OUTSIDE OF THE SCOPE OF THE EASEMENT RIGHTS AND THUS CONSTITUTE A TRESPASS.

In interpreting an express easement, the cardinal rule is to ascertain the parties' intent. *Calhoun, GA NG, LLC v. Century Bank of Georgia*, 320 Ga. App. 472, 475 (2013). "Arriving at intention requires consideration of the whole instrument, the contract, the subject matter, the object, the purpose, the nature of restrictions or limitations, the attendant facts and circumstances at the time of making the instrument, and the consideration involved." *Eagle Glen Unit Owners Ass'n, Inc. v. Lee*, 237 Ga. App. 240, 242 (1999). Parking of a vehicle is a use within the scope of the ingress and egress easement granted to Goettsch. The Parties agree that the place where the vehicle is parked does not interfere with other vehicles' use of the easement. The easement holder is entitled to use the easement for the purposes consistent with ingress and egress as long

as the easement holder does not adversely affect and substantially or materially interfere with the use of the easement by others. The Appellate Courts have held that reasonable enjoyment does not necessarily include the entire right of way. *See* Montana v. Blount, 232 Ga. App. 782; Goodson v. Ford, 290 Ga. 662 (2012); Georgia Power Co. v. Leonard, 187 Ga. 608 (1939). This Court should remand the issue of whether the parking of the vehicle in this case is in fact a trespass given the facts presented at a trial on the issue.

V. THE TRIAL COURT ERRED IN FINDING THAT THE GOETTSCH'S INTERFERENCE WAS A VOLUNTARY, INTENDED ACT.

"A trespass is any wrongful, continuing interference with a right to the exclusive use and benefit of a property right. . . . [T]he act of trespass must have been a voluntary, intentional act in that it intended the immediate consequences of the act, causing the trespass or invasion, i.e., an intended act as opposed to a negligent act." Lanier v. Burnette, 245 Ga. App. 566, 570 (2000). Whether Goettsch's act of building his parking structure slightly protruding from his property was voluntary and intended is a question of fact that should be decided by a jury. The Parties each testified in opposition to each other about this issue. The Trial Court pulled from testimony in the record which supported each Party's version of whether Goettsch intended to trespass and cited both sides in the "Facts" section of the Order. This Court should reverse the Trial Court's Order solely based upon the contradictory facts relied upon by the Trial Court in reaching its conclusion with regard to Goettsch's intentions in the building of the parking area.

VI. THE TRIAL COURT ERRED IN RULING THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT WITH REGARD TO ANY ELEMENT OF BROOKS' TRESPASS CLAIM.

Throughout the "Facts" section of the Order, the Trial Court cited contradictory assertions of the Parties. For example, the Trial Court discussed Brooks' relationship with the predecessor

in interest, the relevance of which is dependent upon Goettsch's knowledge of it, which the Trial Court did not address at all. The assertions regarding Goettsch's knowledge of the parking issue, as set forth by Goettsch in his Response to Brooks' Motion for Summary Judgment, are not consistent with the Trial Court's "Facts". The Trial Court's "Facts" are construed unfavorably to Goettsch, as Goettsch unequivocally stated he only discovered the parking area protruded slightly outside of his property after the parking area was built. Def. Depo. 12:1-5; 41:7-8; Exh. 2. This Court should reverse the Trial Court's Order and permit a jury to hear the facts of this case and determine whether a trespass occurred.

VII. THE TRIAL COURT ERRED IN HOLDING THAT EQUITABLE DEFENSES ARE NOT APPLICABLE IN THIS CASE.

Goettsch is entitled to assert equitable defenses to the equitable claim for injunction. *Patel Taherbhai, Inc. v. Broad Street Stockbridge II, LLC*, 352 Ga. App. 133, 121 (2019). Goettsch raised, argued, and put forth evidence to support the equitable defenses of estoppel, laches, and license. The Trial Court failed to consider any of Goettsch's equitable defenses in their entirety, stating that equitable defenses were not permitted. This Court should reverse the ruling as to the injunction for failure to consider the equitable defenses put forth by Goettsch and remand for further proceedings.

VIII. THE TRIAL COURT ERRED IN HOLDING THAT EJECTMENT IS A PROPER REMEDY IN THIS CASE.

Ejectment is an invalid legal theory for injunctive relief merely because the plaintiff owns the access easement. *Patel Taherbhai, Inc. v. Broad Street Stockbridge II, LLC*, 352 Ga. App. 113, 113, 834 S.E.2d 117, 118, (2019). In *Patel Taherbhai, Inc.,* Broad Street Stockbridge II asserted that it was entitled to ejectment because it "was still in exclusive possession of every

foot of land that it owned.". Broad Street Stockbridge II moved for partial summary judgment on its claims for injunction and ejectment, contending that (1) it has clear title to the access easement, which is encroached upon by the modifications, and is, therefore, entitled to an ejectment, and (2) as the owner of a non-exclusive ingress/egress easement by grant in a street, Broad Street may enjoin Patel from erecting obstructions in that street or alley. Broad Street sought summary judgment in its favor, seeking to eject Patel's "encroachment from the easement area and enjoin[ ] [Patel] from trespassing on Plaintiff's access easement." *Id.* at 116.

The Trial Court granted the plaintiff's partial summary judgment motion. The Appellate Court disagreed with the trial court and reversed. In short, the court held that an ejectment action "would not lie" for a mere access easement. *Id.* The same result should happen in this case. Count One of the Complaint for trespass includes a request for an order for ejectment from the easement area. This is merely an access easement. A request for an ejectment order for trespass on an access easement by an access easement holder is no different than a request for injunctive relief directing ejectment of an encroacher on an easement. Ejectment is an invalid remedy. This Court should reverse the Trial Court's grant of the claim for ejectment.

IX. THE TRIAL COURT ERRED IN ORDERING, "[T]HAT [GOETTSCH] REMOVE ALL STRUCTURES THAT ENCROACH INTO THE RIGHT OF WAY WITHIN THIRTY (30) DAYS."

The Trial Court's order as to ejectment is unclear as to what structures must be removed because there is no definition for "right of way". The Trial Court states that all structures that encroach must be removed. The entirety of the structure need not be removed merely because a small portion of the structure may be considered a trespass. This Court should reverse and remand to the Trial Court for clarity as to what the Trial Court is expecting Goettsch to do in response to its Order.

X. THE TRIAL COURT ERRED IN ITS ORDER ENJOINING GOETTSCH FROM PARKING "IN THE RIGHT OF WAY".

O.C.G.A. § 9-11-65 provides, "Every order granting an injunction and every restraining order shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained[.]" "A legal description of the property is not required, but simply a reasonable description that specifically identifies the property and specifies the act restrained." *Kace Investments, L.P. v. Hull*, 263 Ga. App. 296, 301 (2003). The Trial Court's order enjoins Goettsch from parking in the right of way. "Right of way" is not defined in the Order and could mean the any portion of the easement or merely the road used for travel.

CONCLUSION

For the reasons and authorities set forth above, it is respectfully requested that the Court reverse the Trial Court's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment.

This Brief does not exceed the word count limit imposed by Rule 24.

This 18th day of December, 2023.

/s/ L. Allyn Stockton, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the APPELLANT'S MOTION FOR ORAL ARGUMENT, by depositing the same in the United States Mail, First Class postage prepaid and also sent via e-mail addressed to:

Michael H. Cummings II
P.O. Box 1568
Clayton, Georgia 30525

This 18th day of December, 2023.

/s/ L. Allyn Stockton, Jr.
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