In The

Supreme Court of Virginia

RECORD NO. 160664

JOANNA PALMER,

Appellant,

v.

R.A. YANCEY LUMBER CORPORATION,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Issues

R. A. Yancey Lumber Corporation ("Yancey") has argued that Joanna Palmer ("Palmer") misstated the issues of the case. Primarily, it argues that the case is one of fact and not law.

A. The First Assignment of Error

Palmer's first assignment of error is purely one of law and not fact. What is the rule for determining the width of an easement by necessity? The width of the easement was in dispute at trial and the parties argued different rules for determining what the width should be.

Palmer argued that the easement could not be wider than the historic width of the road.[1] Yancey argued that the dominant owner could expand the width of the road to whatever was reasonably necessary.

Unfortunately for the parties, there is no stated rule in Virginia about how to determine the width of an easement by necessity. Thus, the issue in the first assignment of error is a legal issue and one of first impression. Palmer asks the Court to follow her theory: that the width of an easement by necessity is confined to the historic width of the road.

[1] The width expansions are not small or insignificant like the Appellee claims. The Final Judgment Order doubled the size of the existing road in three areas: at the entrance, at the ford, and at the rocky outcroppings.

B. The Second Assignment of Error

Palmer's second assignment of error is a mixed question of law and fact. Based on the evidence presented, is the trial court's widening of the road and taking of land, trees, and rocks an impermissible, additional burden on Palmer?

Palmer testified that she had lived on the land for forty years and that the widening of the road would be a great burden on her sense of enjoyment, privacy, and property ownership. She asks this Court to review her testimony, and the evidence offered by Yancey, to determine whether the trial court's widening of the road qualifies as an impermissible, additional burden as a matter of law.[2]

C. The Trial Court's Ruling

Paragraph 11 of The Agreed Stipulations by the Parties framed the main issue at trial by stating that "the size and scope of the easement by necessity are disputed by Yancey and Palmer." (App. 31). Yancey's request for an expansion of the road's width and the burden that said expansion would impose on Palmer were argued extensively at trial.

[2] Yancey argues that *Keen v. Paragon Jewel Coal Co.*, 203 Va. 175 (1961) has no additional burden test (Brief of Appellee at 30–31) but the Court in *Keen*, by its plain language, considered the "additional burden . . . put upon the servient tenement." *Keen* at 180.

In its ruling, the trial court put the cart before the horse. The court stated that "the question before the Court is what steps are necessary to enable Yancey to timber the property." (App. 479). This re-framing of the issue apparently followed Yancey's rule and rejected Palmer's rule. The trial court went on to create a new road for Yancey that would be widen enough to allow tractor-trailers on the road for the first time.

Palmer's first assignment of error asks this Court to go back a step, on the trial court's ruling, and determine whether Yancey's rule is actually the correct rule for determining width expansion for roads/easements by necessity. Palmer has always argued that width expansion without consent it not allowed, and that the trial court's reliance on *Keen* for width expansion was in error because *Keen* is about use and not width expansion.

Palmer's second assignment of error also complains that the trial court should have ruled against Yancey because of the the additional burden that the width expansion had on Palmer. It took several hearings, over Yancey's objections, to minimize the burden on Palmer after the trial court ruled that it would allow the widening. The judicial road-building was a laborious and expensive process for both parties, and it was based on an incorrect foundation of law (*Keen*).

D. Expansion versus Establishment

Yancey argues that the trial court did not expand the width of an easement but, rather, established the width of the easement. This is a distinction without difference. In either case, Yancey asked for the access road to be widened and for land to be taken away from Palmer. Yancey offers no authority for why there would be any distinction between determining the width of an easement at its establishment or at any other time.

Once established, an easement by necessity is not an implied, unwritten easement anymore. Rather, it is a final judgment order. Yancey would like for easements by necessity to be "flexible and fluid" and to give special rights to dominant owners for all time. (App. 413). An implied easement (or lack of a written access agreement) is a problem, a title defect, something you cannot insure, something that will prevent a buyer from getting a mortgage. The dominant owner must bargain for a written agreement for legal access or to establish access at court. Just because an easement gets established does not mean the dominant owner has *carte blanche* to create a whole new road over the servient owner's objection.

II. *Stare Decisis*

The size and width of easements are created by express or implied agreement, or by prescription. When there is no written agreement, the best evidence of the implied width of the easement is the historic width of the road. *Dudgeon v. Bronson*, 159 Ind. 562 (1902); *Shooting Point*, *LLC v. Westcoat*, 265 Va. 256 (2003); *Waskey v. Lewis*, 224 Va. 206 (1982). Virginia courts have relied on this general rule in every case about easements, as discussed in Palmer's Opening Brief.

The problem highlighted by this case is that Virginia does not have case law that specifically addresses the issue of width for easements by necessity. Michie's Jurisprudence cites a West Virginia case of *Johnson v. Lunsford*, 168 S.E. 382 (1933), which was one of the several cases that Palmer cited in her Opening Brief. *Johnson* states the rule about the location of an easement by necessity. "Where the owner of a way of necessity follows a particular route over the servient estate for thirty years, his course will be deemed a practical location of the easement, and ordinarily he has no right afterwards to change the location in any material degree." 6B M.J. §24 at 237–38 (citing *Johnson*).

Michie's does not cite *Keen* or *Smith v. Virginia Iron*, *Coal & Coke Co.*, 143 Va. 159 (1925) to say that a road can be changed, that width can

be expanded, or that an easement can be re-located around rocks or trees. *Keen* and *Smith* were about use, not width, and this appeal is not about use. *Keen* and *Smith* need not be overturned to follow Palmer's rule. Yancey could use the tractor-trailers on the road if they could fit on the road. Because tractor-trailers cannot fit on the road, the issue between this case, and *Keen* and *Smith*, are starkly different.

Yancey has asked this Court to expand the ruling in *Keen* and hold that the width of an easement by necessity, the physical size of a road, can change over time. If followed, there would be an ever-expanding cloud on the title and the land of the servient owner.

Yancey, and dominant owners generally, should not be able to unilaterally expand the width of a road that they have the privilege of using. The road has been in the same condition and has served all of its owners for many, many years. Yancey is the party asking for something new and different, both on the Palmer property and in the law of easements. There is no *stare decisis* issue here.

CONCLUSION

For the reasons stated in her Opening Brief and for the reasons stated herein, Palmer asks this Court to reverse the trial court.

Respectfully submitted,
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CERTIFICATE

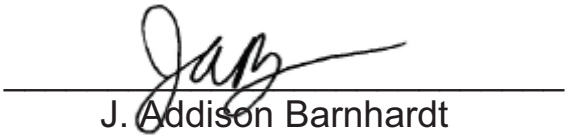
I hereby certify, pursuant to Rule 5:29, that:

A. This reply brief is in compliance with Rules 5:6 and 5:26;

B. The word count is 1,320 words; and

C. On this 12th day of December 12, 2016, an electronic copy of the Reply Brief of Appellant was filed, via VACES, and ten copies of this Reply Brief of Appellant have been hand-filed with the Clerk of the Supreme Court of Virginia.

D. On this same day, an electronic copy of the Reply Brief of Appellant, was served via email upon W. Alexander Burnett (VSB# 68000) and Andrew O. Mathews (VSB# 77038) at WILLIAMS MULLEN, Post Office Box 1320, Richmond, Virginia 23218-1320. Their telephone number is (804) 420-6481, their facsimile number is (804) 420-6507, and their email addresses are aburnett@williamsmullen.com and mathews@williamsmullen.com.



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