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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-956

Filed: 5 May 2020

Henderson County, No. 17 CVS 1449

SARAH JOHNSTON SPENCER, Plaintiff,

v.

PAUL C. AUGHTRY and wife, JUDITH W. AUGHTRY, Defendants.

Appeal by defendants from judgment entered 15 May 2019 by Judge William H. Coward in Henderson County Superior Court. Heard in the Court of Appeals 31 March 2020.

*Cannon Law, P.C., by William E. Cannon, Jr., Mark A. Wilson, and Tiffany F. Yates, for plaintiff.*

*Elmore Goldsmith, P.A., by Mason A. Goldsmith, Jr., for defendants.*

ARROWOOD, Judge.

Paul and Judith Aughtry (“defendants”) appeal from the trial court’s judgment enjoining encroachments upon Sarah Johnston Spencer’s (“plaintiff”) neighboring property. For the following reasons, we affirm in part and reverse and remand for additional findings and determinations in part.

I. Background

This case involves a property dispute arising from defendants' construction of a house on the banks of Lake Summit. Plaintiff filed suit against defendants on 2 August 2017. Plaintiff's complaint asserted claims of trespass and requested injunctive relief from numerous alleged encroachments on her property caused by defendants' construction on their neighboring lot. On 11 March 2019, the case was heard as a bench trial.

Among the evidence introduced at trial were numerous recorded and unrecorded plats, surveys, and maps, expert testimony from plaintiff's and defendants' surveyors, Charles Hampton, Jr., ("Mr. Hampton") and Jim Freeland, respectively, and plaintiff's title expert B.B. Massagee ("Mr. Massagee"), as well as lay testimony from defendants' contractor for the construction work at issue. The evidence at trial tended to show the following.

The undeveloped land and neighborhoods surrounding Lake Summit were owned and intermittently developed and sold by a succession of residential development companies from the 1920s to the time of trial. Defendants traced their chain of title back to two conveyances by the first two of these development companies, Lake Summit Company and Lake Summit Corporation, to Nana King in 1935 and 1950 ("the King conveyances" or "the King deeds"). The 1935 deed conveyed what purported to be a 53-foot-wide, landlocked parcel abutting the road that followed the southern banks of Lake Summit. This deed incorporated by reference a

plat survey prepared by L.E. Gradick (“the Gradick plat”). The 1950 deed extended Ms. King’s lot across the road to the waterfront and purported to widen it by 17 feet on its western boundary.

Plaintiff’s property surrounds defendants on all sides except the waterfront. Plaintiff traced her chain of title back to a 1952 deed from Lake Summit Corporation that excepted the land conveyed in the King deeds. Thus, the location of three of plaintiff’s boundary lines were contingent upon whatever was conveyed by the King deeds. A later quitclaim deed executed in 2018 by Lake Summit Corporation’s successor-in-interest, Montgomery Industries, conveyed a tract containing the road as it bisects plaintiff’s lot, which had been excepted from plaintiff’s first deed.

Mr. Hampton and Mr. Massagee testified regarding the validity of the King deeds. They testified that the conveyances described in the King deeds could not be located on the ground. The first King deed allows its conveyance to be moved about “the edge of the fill” of South Lake Summit Drive without any fixed physical monument to anchor its description to an exact location along the road. The description in the second King deed relies entirely upon the insufficient description in the former. Furthermore, Mr. Massagee testified that the Gradick plat incorporated into the King deeds by reference was unrecorded, not attached to either of the King deeds, and contained different calls than those described in the deeds.

Based on these circumstances, Mr. Massagee formed the ultimate opinion that the King deeds were void for vagueness of description.

Mr. Hampton and Mr. Massagee also testified regarding the effect of the King deeds on the parties' shared borders and the width of defendants' lot. Their testimony tended to show that, even if the King deeds operated to effectively convey land out from the parties' common grantor, the structures complained of nonetheless encroached upon plaintiff's property.

They testified that the true width of defendants' lot was nearly one foot narrower than defendants claimed. A recorded survey incorporated by reference into defendants' deed measured their lot at 69.05 feet on the ground. The survey conducted by Mr. Hampton measured the width of the conveyance at 69.06 feet on the ground. Mr. Hampton explained that different methods of surveying in use at the time of the King conveyances explained why their description of a 70-foot-wide parcel could be reduced to 69.06 feet when surveyed on the ground. He stated that the antiquated method of surveying by surface measurements tends to overstate length as compared to true horizontal distance on sloped terrain. Based on his endeavor to survey the property described in the King deeds, Mr. Hampton believed that the surface method was used in the Gradick survey referenced in the King deeds. Defendants' parcel contained a steady slope, which would result in an overstatement of distance when utilizing the surface method. Thus, when the calls and distances

described in the King deeds were surveyed using true horizontal distance, the resulting width of the lot was .94 feet smaller than indicated on the Gradick plat. Additionally, Mr. Massagee testified that defendants' lot was not a full 70 feet in width. He stated that the first King deed would not come to a full 53 feet in width because the calls did not make a perfect rectangle. Thus, the second King deed's addition of 17 feet to the dimensions of the first parcel would not create a lot 70 feet in width.

Accordingly, Mr. Massagee and Mr. Hampton testified that, based upon their conclusion on the width of defendants' parcel, the structures complained of extended past defendants' borders and encroached upon plaintiff's property. Seven of the alleged encroachments ("Encroachments 1 through 7") related to defendants' house and its footprint extending over their western boundary. Three encroachments ("Encroachments 8, 9, and 10") lay within the parcel containing South Lake Summit Drive quitclaimed to plaintiff in 2018. These encroachments involve defendants' driveway, retaining wall, and a drainpipe installed across the road to alleviate excessive rainwater pooling caused by their construction.

At trial, defendants argued that even if Encroachments 8, 9, and 10 extended past their property lines, they did not amount to actionable trespasses because they were permitted by the North Carolina Department of Transportation ("DOT") within a public right-of-way it held in South Lake Summit Drive. Defendants introduced

several recorded and approved subdivision plats and surveys, as well as other unrecorded maps, in support of their contention that the developers of Lake Summit had effectively dedicated South Lake Summit Drive for public use. Mr. Massagee testified that there was no recorded conveyance or right-of-way agreement between any of the developers and DOT, and that DOT merely had a “maintenance easement” over the road.

On 15 May 2019, the trial court entered an order of judgment in plaintiff’s favor. In the order, the court made the following findings of fact. The court found that the first deed in defendant’s chain of title from Lake Summit Company was void for vagueness of description, as the conveyance described could not be located on the ground. As a result, the court found that the second King deed was also void because its description relied entirely upon that of the first. The trial court adopted the survey depicting the alleged encroachments conducted by Mr. Hampton as an accurate depiction of the property lines and encroachments and found that whatever land the King deeds did purportedly convey was only 69.06 feet in width, rather than the 70 feet in total width described in the deeds.

The court found that South Lake Summit Drive had not become a public right-of-way by any implied dedication of the road in any of the recorded subdivision plats before it. It further found that DOT had only a “maintenance easement” along South Lake Summit Drive, and that all the alleged encroachments were located outside this

easement. Accordingly, the trial court found that all ten structures complained of encroached upon plaintiff's property and concluded that they amounted to actionable trespasses warranting injunctive relief for removal, which the court so ordered. Defendants timely noted their appeal from the order.

## II. Discussion

On appeal, defendants challenge the trial court's order in several respects concerning the findings supporting its conclusion of law that the encroachments amounted to actionable trespasses upon plaintiff's property. Defendants argue that competent evidence did not support several of the trial court's findings relevant to: (a) the effect of the King deeds; (b) the location of the alleged encroachments in relation to the parties' shared property lines; (c) the nature of DOT's interest in South Lake Summit Drive; and (d) the physical location of Encroachments 8, 9, and 10 in relation to this interest. We address each argument in turn.

### A. Standard of Review

"When the trial court sits without a jury, . . . the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. The trial court's conclusions of law are reviewed *de novo*." *Shepard v. Bonita Vista Props., L.P.*, 191 N.C. App. 614, 616, 664 S.E.2d 388, 390 (2008) (internal citations and quotation marks omitted), *aff'd*, 363 N.C. 252, 675 S.E.2d 332 (2009). "The elements of a

trespass claim are that plaintiff was in possession of the land at the time of the alleged trespass; that defendant made an unauthorized, and therefore unlawful, entry on the land; and that plaintiff was damaged by the alleged invasion of his rights of possession.” *Young v. Lica*, 156 N.C. App. 301, 305, 576 S.E.2d 421, 424 (2003) (internal quotation marks and citation omitted).

“Because defendants contested plaintiff[s] alleged title to the land in controversy, plaintiff[ ] (in addition to establishing *prima facie* evidence of record title) [was] also required to demonstrate the disputed strip lay within the boundaries provided in [her] record title by showing the on-the-ground location of those boundaries. This aspect of plaintiff[s] proof is also known as ‘putting the land on the ground.’ ” *Chappell v. Donnelly*, 113 N.C. App. 626, 630, 439 S.E.2d 802, 805 (1994) (internal citation omitted). In a bench trial, the trial court’s determination of what constitute the boundaries to the property in question “is a matter of law to be determined by the court from the description set out in the conveyance. Where those boundaries may be located on the ground is a factual question . . . .” *Id.*

B. Strength of Defendants’ Title and Width of Defendants’ Property

Defendants first challenge the trial court’s findings regarding the strength of their chain of title as against plaintiff’s and the location of their shared property lines relative to the alleged encroachments. We find these arguments unconvincing.

1. Strength of Defendants’ Chain of Title



Defendants argue that the trial court erred in finding that the King deeds were void because they failed to describe the property's metes and bounds to the extent necessary to place their conveyances "on the ground." We disagree.

"A deed is void for vagueness of description unless it identifies with certainty the land sought to be conveyed. The identification must be complete in the deed itself, or the deed must point to some source from which the deficiency in the description may be supplied." *Carrow v. Davis*, 248 N.C. 740, 742, 105 S.E.2d 60, 61-62 (1958) (citations omitted). "[I]t is a settled rule of construction with us that when [references to 'stakes'] are mentioned in a deed simply, or with no other description than that of course and distance, they are intended by the parties, and so understood, to designate imaginary points." *Barker v. S. Ry. Co.*, 125 N.C. 596, 599-600, 34 S.E. 701, 702 (1899) (internal quotation marks and citation omitted). Where failure to anchor the metes and bounds of a deed description to a single fixed monument on the ground allows the described conveyance "[to] be shifted up and down [one of its borders] for an indefinite distance[.]" the description is insufficient. *Id.* at 598, 34 S.E.2d at 702; *cf. Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959) (citations omitted) (stating otherwise vague deed description can be remedied by single reference to fixed physical monument from which calls can be retraced to determine other points).

In the instant case, as in *Barker*, the first King deed contains calls only to points described as "stakes," which we construe to be imaginary points rather than

physical monuments. Likewise, the first King deed allows her conveyance to be moved about “the edge of the fill” of South Lake Summit Drive without any fixed physical monument to anchor its description to an exact location along the road. The description in the second King deed relies entirely upon the insufficient description in the first. The Gradick plat referenced in both deeds was unrecorded, unattached, and otherwise failed to aid in locating the conveyances described. The trial court heard competent testimony from Mr. Hampton and Mr. Massagee to this effect supporting its finding that the King deeds were void for vagueness.

Despite the lack of an adequate deed description, defendants argue that plaintiff is nonetheless estopped from asserting that the King deeds are void. Defendants contend that successors-in-interest to a grantor whose conveyance contained a vague deed description are estopped from denying the sufficiency of the grantee and his successors’ title ownership, where the grantor “at the time of the execution of said deed . . . had a surveyor to run out and locate the lot in controversy, and put the [grantee] in actual possession thereof[.]” *Barker*, 125 N.C. at 597, 34 S.E. at 702. This principle is inapposite in the instant case. Defendants have cited no evidence, other than the mere fact of the conveyance itself, from which the court could find that Lake Summit Company located and put Nana King in possession of her property contemporaneously with the execution of her deeds.

2. Determination of Defendants’ Property Lines

Defendants next argue that the trial court erred in finding that their deed description conveyed an on-the-ground parcel measuring 69.06 feet in width, rather than 70 feet as described in the King deeds, and, therefore, the ten structures complained of encroached beyond defendants' boundary onto plaintiff's property. We are not convinced by defendants' argument with respect to Encroachments 1 through 7, as detailed below.

a. Location of Shared Property Lines

There was competent evidence supporting the trial court's findings concerning the width of defendants' property and the location of their shared boundaries with plaintiff's parcel. Mr. Hampton's survey measured the lot at 69.06 feet, as found by the trial court. The court's finding is supported by Mr. Hampton's testimony regarding the discrepancies from true horizontal distance created by deed descriptions utilizing the surface method of surveying, and his belief that the Gradick survey referenced in the King deeds utilized this method. Furthermore, the court's finding was supported by Mr. Massagee's testimony stating that the calls and distances described in the King deeds would not create a lot 70 feet in width at the locations of the alleged encroachments.

b. Encroachments 1 through 7

Having upheld the trial court's determinations regarding the boundaries of defendant's property, we now address defendants' challenges to the court's finding

that defendants' construction trespassed upon plaintiff's property. Due to an unresolved factual issue concerning the location of Encroachments 8 through 10, discussed *infra*, we only address the trial court's findings as to the first seven encroachments.

Defendants do not dispute the physical location of their allegedly encroaching structures depicted in the Hampton survey. Thus, we uphold the order's findings of trespass because competent evidence supported the trial court's determination that the encroachments complained of lie within plaintiff's property. Plaintiff's chain of title contains deeds which note the exception of the King conveyances from the metes and bounds otherwise described therein, rather than measuring off their shared borders with calls and distances. Therefore, the trial court's binding findings of fact establishing defendants' property lines suffice to establish the relevant boundaries of plaintiff's parcel. Mr. Hampton testified that each of the ten structures complained of extended over defendants' boundaries onto plaintiff's lot, as depicted in his survey. Therefore, we uphold the trial court's conclusion that Encroachments 1 through 7 unlawfully trespassed upon plaintiff's property.

c. Encroachments 8, 9, and 10

Defendants challenge the trial court's conclusion that Encroachments 8, 9, and 10 trespassed upon plaintiffs' property on grounds additional to those discussed *supra*. They maintain that South Lake Summit Drive is a public right-of-way.

Therefore, these encroachments do not amount to actionable trespasses because they lay within the road's right-of-way as it bisects plaintiff's property. We agree with defendant's first position, and hold that remand is necessary for entry of a new order that contains (a) findings of fact locating the boundaries of the right-of-way relative to the encroachments and (b) conclusions of law on whether the particular encroachments in the public right-of-way, if any, constitute actionable trespasses upon plaintiff's servient estate warranting the injunctive relief granted.

1. Public Right-of-way

Defendants challenge the trial court's finding that DOT merely has a "maintenance easement" on South Lake Summit Drive. They contend that the evidence at trial established that DOT holds a right-of-way for public use, because plaintiff's predecessors-in-interest dedicated the road for public highway purposes by implication. We agree.

"Because North Carolina does not have statutory guidelines for dedicating streets to the public, the common law principles of offer and acceptance apply. . . . Generally, where lots are sold and conveyed by reference to a plat which represents the division of a tract into streets and lots, recordation of the plat is an offer to dedicate those streets to the public." *Tower Dev. Partners v. Zell*, 120 N.C. App. 136, 140-41, 461 S.E.2d 17, 20 (1995) (internal citations omitted), *appeal dismissed*, 342 N.C. 897, 471 S.E.2d 64 (1996).

When proving implied dedication, where no actual intent to dedicate is shown, the manifestation of implied intent to dedicate must clearly appear by acts which to a reasonable person would appear inconsistent and irreconcilable with any construction except dedication of the property to public use. In general it appears that an implicit intention may be demonstrated by: 1.-The owner's use of the dedicated property as a boundary in a deed, as long as the use was not for descriptive purposes only. 2.-The owner's affirmative acts respecting the property. 3.-The owner's acquiescence in the public's use of the property, under circumstances indicating that the use was not permissive.

*Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 640, 684 S.E.2d 709, 723 (2009) (alterations and citation omitted).

In the instant case, the intent of the developers of Lake Summit to dedicate South Lake Summit Drive to public use can be implied from the evidence at trial. Recorded maps and surveys before the trial court reflect that the road was always planned or in existence. An unrecorded subdivision plan prepared for Lake Summit Company in 1925 depicts a subdivision with several roads, including the road in question. A recorded subdivision plat from 1959 depicts the Lake Summit neighborhood, featuring "South Lakeside Drive" passing through the properties along the lake's southern banks. All subsequent recorded and approved subdivision plats depict the road in question.

Additionally, the subdivision plat incorporated in plaintiff's deed by reference ("the Lavender subdivision plat") indicates that DOT holds a right-of-way in the road. All eight lots surveyed in the approved and recorded Lavender subdivision plat note

that they “do not include [the] road right-of-way” bisecting the lots. Furthermore, as with the deeds for the other seven lots in the family subdivision that incorporate the Lavender plat by reference, Montgomery Industries’ first conveyance to plaintiff in 2004 did not include the parcel of land underlying the road. Montgomery Industries did not convey the road parcel to plaintiff by quitclaim deed until the dispute in the instant case materialized in 2018, 14 years after the initial conveyance excepting the roadway. *See Watkins v. Lambe-Young, Inc.*, 37 N.C. App. 30, 31-32, 245 S.E.2d 202, 204 (1978) (holding that subdivision developer’s conveyance of parcels excepting property underlying road was evidence of intent to dedicate road by implication). Therefore, the record shows that the conduct of plaintiff’s predecessors-in-interest manifested an implied offer to dedicate the road for public use.

To create a public right-of-way, an implied offer to dedicate a roadway must be “accepted in some proper way by the responsible public authority. Acceptance may be manifested not only by maintenance and use as a public street, but by official adoption of a map delineating the area as a street, followed by other official acts recognizing its character as such.” *Tower Dev. Partners*, 120 N.C. App. at 141, 461 S.E.2d at 21 (internal citation omitted).

Here, record shows the State’s acceptance of the implied offer of dedication. A 1983 survey recorded and incorporated by reference into a deed in plaintiff’s chain of title reveals that South Lake Summit Drive had received the DOT designation “S.R.

1852,” indicating that it had been incorporated into the State’s system of public roads by that time. *See* N.C. Gen. Stat. § 136-18(7) (2019) (authorizing DOT “[t]o assume full and exclusive responsibility for the maintenance of all roads other than streets in towns and cities, forming a part of the State highway system from the date of acquiring the roads.”); 19A N.C.A.C. 2C.0103(2) (2020) (providing that subdivision developers must dedicate rights-of-way to DOT for subdivision roads before they are added to the secondary road system); 19A N.C.A.C. 2C.0101 (2020) (defining “secondary road” as one “maintained by the Department of Transportation that do[es] not carry ‘NC’ or ‘US’ numbers and are outside the boundary of any incorporated municipality.”). Every subsequently recorded survey or plat refers to the road by both its local name and state secondary road designation. Furthermore, the record shows that DOT was exercising control over the relevant portion of S.R. 1852 by at least 2015, when DOT first issued defendants a permit allowing their retention wall and drainpipe to encroach upon its asserted right-of-way.

Plaintiff correctly notes that there was evidence offered at trial tending to show that DOT only had a maintenance easement on South Lake Summit Drive. Mr. Massagee testified that he found no recorded agreement or conveyance of any easement or right-of-way for the road. The Lavender subdivision plat recorded and approved in 2003 expressly notes that DOT does not have a dedicated right-of-way on South Lake Summit Drive, only a maintenance easement. Nonetheless, this evidence



cannot overcome the evidence to the contrary. Though neither party presented any evidence reflecting an official right-of-way agreement between the developers of Lake Summit and DOT, the recorded and approved subdivision plats in the record indicate that the road was incorporated into our State's system of public highways. DOT acceptance of the implicit public dedication by the developers of Lake Summit is thus clear from the record on its face. This is sufficient to establish the area in contention is a State Road bearing the designation "State Road 1852" as a matter of law.

2. Fee Title to Property Underlying South Lake Summit Drive

Defendants also challenge the trial court's finding that the second deed to plaintiff effectively conveyed fee title to the parcel of land underlying South Lake Summit Drive where it bisects the tract granted to plaintiff in her first deed. Defendants allege that, because the road was previously dedicated to the public by implication, plaintiff's grantors could not legally convey fee title to the land underlying the road. This argument is without merit.

Although plaintiff's predecessors-in-interest dedicated the road for public use by implication, such dedication did not extinguish or convey the servient fee estate subject to the resulting easement. Public dedication of a road imposes only a right-of-way upon the lands of the dedicator and does not divest her of fee title to the underlying servient estate. *Hildebrand v. Telegraph Co.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256-57 (1941) ("It may be conceded that the easement acquired by the State for

a public highway is, under existing law, so extensive in nature and the control exercised by the Highway Commission is so exclusive in extent that the subservient estate in the land, from a practical standpoint, amounts to little more than the right of reverter in the event the easement is abandoned. Nevertheless, the subservient estate still exists and any encroachment thereon entitles the owner to nominal damages at least.”); *Metcalf*, 200 N.C. App. at 631, 684 S.E.2d at 718 (“Dedication is a form of transfer whereby an individual grants to the public rights of use in his or her lands. . . . [I]t has been defined as an appropriation of realty by the owner to the use of the public and the adoption thereof by the public,—having respect to the possession of the land and not the permanent estate.”) (internal quotation marks omitted) (citing *Spaugh v. City of Charlotte*, 239 N.C. 149, 159, 79 S.E.2d 748, 756 (1954)). Thus, plaintiff’s predecessors-in-interest were free to convey their fee estate in the parcel containing the road, albeit subject to the public right-of-way.

### 3. Location of Encroachments Relative to Right-of-way

In turn, defendants assert that the trial court erred in finding that Encroachments 8, 9, and 10 encroached upon plaintiff’s property outside the parameters of the DOT right-of-way. This finding was based upon the trial court’s determination that the survey performed by Mr. Hampton accurately depicted defendants’ encroachments upon plaintiff’s property. Because this finding conflicts with other findings of fact and was not supported by competent evidence with respect

to the alleged encroachments upon the roadway parcel quitclaimed to plaintiff in 2018, we agree with defendants.

As an initial matter, the trial court's finding that defendants trespassed upon plaintiff's property outside of the DOT right-of-way conflicts with its finding that "the location of the boundaries of the easement were never established." The trial court fails to explain how it could locate defendants' encroachments relative to the right-of-way without first establishing its location.

Moreover, the evidence relied upon for the trial court's findings of trespass for Encroachments 8, 9, and 10 does not support the court's inference that these structures were placed outside of DOT's right-of-way. The Hampton survey relied upon by the trial court expressly notes that several lines purportedly indicating the boundaries of plaintiff's roadway parcel were "not surveyed." Mr. Hampton testified that he extrapolated these lines from the earlier Lavender plat, rather than actually surveying them in the field. He stated that these lines did not necessarily correlate to the boundaries of DOT's right-of-way in the road. In the same line of questioning, plaintiff's counsel stipulated that the alleged encroachments upon plaintiff's roadbed parcel were within the boundaries of whatever easement DOT held in the road.

The precise boundaries of the DOT easement are essential to ascertaining whether Encroachments 8, 9, and 10 trespassed upon plaintiff's property outside of the public right-of-way. Without reference to surveyed lines representing the

physical boundaries of DOT's activities related to the roadway, the court could not have made such a determination. Thus, the trial court erred in finding that Encroachments 8, 9, and 10 trespassed upon plaintiff's property outside the bounds of DOT's easement. We therefore reverse the trial court's determinations with respect to all issues related to the parties' rights with respect to State Road 1852 and all encroachments that are relevant thereto.

### III. Conclusion

We affirm the trial court's order as it pertains to Encroachments 1 through 7. However, the order fails with respect to Encroachments 8, 9, and 10. The court erred by mistakenly concluding that State Road 1852 was not a dedicated public right-of-way. Further, the court made findings that these encroachments trespassed upon plaintiff's property outside of DOT's easement without making any findings establishing the location of the easement. Its conclusory finding is not based upon any competent evidence locating these encroachments in relation to the physical parameters of DOT's right-of-way.

Although we do not reach the issue, the character and scope of DOT's right-of-way will determine whether the encroachments therein, if any, were of such a nature that DOT had the authority to permit them as within its dominion over the road. Thus, whether the encroachments are within the physical parameters of DOT's right-of-way may be outcome-determinative. We therefore reverse the trial court's order

SPENCER V. AUGHTRY

*Opinion of the Court*

and remand for entry of additional findings of fact establishing the boundaries of DOT's public right-of-way in the road and the relative location of Encroachments 8, 9, and 10. If the court finds that the encroachments lay within the right-of-way, it must then conclude as a matter of law whether they were within DOT's authority to permit or constituted actionable trespasses upon plaintiff's servient estate.

AFFIRMED IN PART; REVERSED AND REMANDED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).