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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master-In-Equity

The Honorable Mikell R. Scarborough

Appellate Case No. 2022-185

Larry Gregg, Appellant,

v.

Herman Smalls, III, Izetta Shaw a/k/a Syvetta Smalls, John Doe and Jane Doe, as fictitious names for a class of unknown persons being incompetents, minors, person in military service to the United States of America, imprisoned, and/or under any other form of legal disability, including but not limited to unknown heirs, devisees, distributes, administrators, or personal representatives of deceased persons Herman Smalls, Jr. and Lamont Green and all other persons known or appear of record to have some right, title, interest in or lien upon the real estate described in the complaint herein

Of whom Herman Smalls, III and Izetta Shaw a/k/a Syvetta Smalls are Respondents

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RESPONDENTS' INTIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the Lower Court erred in granting Respondents' Motion for Summary Judgment because there was evidence to support Appellant's position that Herman Smalls, Jr. and Respondents were not the legal owners of Lot 4B during the years that Appellant occupied it and therefore could not give him legal permission to live there.**

2. **Whether the Lower Court erred in granting Respondents' Motion for Summary Judgment because there was evidence to support Appellant's Adverse Possession Claim.**

STATEMENT OF THE CASE

The Plaintiff filed an action in the Charleston County Common Pleas Court claiming ownership of property known as Lot 4B, 2229 David Green Road, Mt. Pleasant South Carolina, based upon adverse possession. Lot 4B was part of a larger tract, specifically 9.75 acres, purchased by David Green in 1926 (Amended Complaint, Exhibit A, Page 3). David Green died intestate and was survived by his five (5) children. (Amended Complaint, Exhibit A, Page 5). On June 21, 1979, the heirs of David Green recorded a plat in Plat Book AN, Page 74 which subdivided the 9.75 acres into five (5) equal lots along with an access road named "David Green Road". (Amended Complaint, Exhibit A, Page 5). On November 26, 1979, five (5) deeds were recorded which were signed by the heirs of David Green conveying the five lots created by the Plat to each of the five family branches. (Amended Complaint, Exhibit A, Page 6).

A Quiet Title action was filed in the Charleston County Common Pleas Court by Jonnie Mae Robinson on December 30, 2016 in Case Number 2016-CP-10-06964 (*Robinson et al v. Ketchen, et al.*) to confirm ownership of the five (5) lots. The court in *Robinson et al v. Ketchen, et al.* found that a division of David Green's property by his heirs constituted a voluntary partition-in-kind and divided his property evenly with each branch receiving a 1/5 interest in his property. (Amended Complaint, Exhibit A, Page 6). The court confirmed ownership of the five (5) lots to each branch of the family. (Amended Complaint, Exhibit A, Pages 10, 11, 12).

Helen Green Smalls was one of the children of David Green and her family received one of the five lots, specifically Lot 4. (Amended Complaint, Exhibit A, Page 8). Helen Green Smalls died intestate in 1940 and she was survived by her husband, Herman Smalls, Sr., and three children, Herman Smalls, Jr., Joseph Smalls and Ellen Smalls Manigault. (Amended Complaint, Exhibit A, Page 8). Herman Smalls, Sr., died intestate in 1965 and was survived by his three (3)

children, Herman Smalls, Jr, Joseph Smalls and Ellen Smalls Manigault. (Amended Complaint, Exhibit A, Page 8). Joseph Smalls died intestate unmarried and with no children and was survived by his siblings, Herman Smalls, Jr. and Ellen Smalls Manigault. (Amended Complaint, Exhibit A, Page 8).

Ellen Smalls Manigault received Helen Green Smalls interest in David Green's property, specifically, Lot 4, by a deed recorded on November 26, 1979 in Deed Book T120 at Page 196. (Amended Complaint, Exhibit A, Page 8). The court in *Robinson et al v. Ketchen, et al.* confirmed this deed and ownership of Lot 4. (Amended Complaint, Exhibit A, Page 11). Ellen Smalls Manigault subdivided Lot 4 by a plat recorded in Plat Book BE at Page 50 on July 2, 1985. (Amended Complaint, Exhibit A, Page 8). This plat created Lots 4A and 4B. (Amended Complaint, Exhibit A, Page 8). She conveyed Lot 4B to Herman Smalls, Jr. by deed dated July 11, 1985 and recorded in Deed Book N146 at Page 801. (Amended Complaint, Exhibit A, Pages 8, 9).

Herman Smalls, Jr. died intestate and was survived by his three (3) children, Herman Smalls, III, Izetta Shaw a/k/a Syvetta Shaw and Lamont Green. (Amended Complaint, Exhibit A, Page 9). Lamont Green died in either 2018 or 2019 leaving no spouse and no children and leaving as his heirs, his siblings, Syvetta Shaw and Herman Smalls, III. (Amended Complaint, Page 1). The heirs of Herman Smalls, Jr. are Syvetta Smalls and Herman Smalls, III.

The court in *Robinson et al v. Ketchen, et al.* confirmed that the heirs of Herman Smalls, Jr. are the owners of Lot 4B. The court held:

> "The heirs of Herman Smalls, Jr. are the owners of Lot 4B as described in Exhibit "A" and fee simple title is quieted and confirmed in their names; subject however to the claims, if any, of Larry Gregg with it being the obligation of the Herman Smalls Jr. Heirs and Larry Gregg to undertake such processes as required by law to determine their respective interests and claims to Lot 4B, and further subject,

however, to the rights of any mortgagee or lien holder of public record having obtained such encumbrances by such owner's consent or due process of law."

(Amended Complaint, Exhibit A, Page 11).

Herman Smalls, Jr. placed a mobile home on Lot 4B in the early 1980's and used it on vacations and at other times. In 1986, Appellant had a conversation with Herman Smalls, Jr. regarding moving his mobile home onto Lot 4B. (Order Granting Defendants' Motion for SJ, Page 3). Appellant received permission from Herman Smalls, Jr. to place his mobile home on Lot 4B (Order Granting Defendants' Motion for SJ, Page 3). After Appellant moved his trailer onto Lot 4B he made improvements to his mobile home over several years by adding a carport and three rooms. (Order Granting Defendants' Motion for SJ, Page 3).

After Herman Smalls, Jr.'s death, the Respondents knew that Appellant was living on Lot 4B and gave him permission to live on Lot 4B. (Order Granting Defendants' Motion for SJ, Page 3). After the court confirmed Respondents were owners of Lot 4B in Case Number: 2016-CP-10-06964, *Robinson v, Ketchen, et al*. they provided notice to Appellant on April 24, 2019 that he did not have permission to reside on Lot 4B and that he needed to vacate Lot 4B. (Order Granting Defendants' Motion for SJ, Page 3).

ARGUMENT

1. The Lower Court did not err in granting Respondents' Motion for Summary Judgment because Herman Smalls, Jr. and Respondents were the legal owners of Lot 4B during the years Appellant occupied the property and they gave Appellant legal permission to occupy the property.

Appellant argues that Herman Smalls, Jr. and Respondents were not the legal owners of Lot 4B and they could not have given him legal permission to occupy the property. Respondents disagree and set forth that Herman Smalls, Jr. was the owner of Lot 4B since 1985 until his death and that they have been the owners since their father's death. Respondents argue that since they

and Herman Smalls, Jr. are the owners of Lot 4B they could provide Appellant legal permission to occupy Lot 4B. The findings in *Robinson v, Ketchen, et al*. confirmed that Herman Smalls, Jr. and the Respondents are the owners of Lot 4B. The deposition testimony of Appellant and Respondent set forth that Herman Smalls, Jr. and the Respondents gave permission to Appellant to occupy Lot 4B.

David Green's family voluntary divided his property in 1979 into 5 lots and distributed these lots to his five children/branches. The Court in *Robinson v, Ketchen, et al*. confirmed that the heirs of David Green performed a voluntary partition-in-kind when they divided the property evenly into five (5) lots and then executed five (5) deeds conveying the lots to the five family branches. As a result, David Green's property was no longer heir's property and was properly divided evenly to his five children and their heirs.

The court in *Robinson v, Ketchen, et al*. also confirmed that the family branch of Helen Green Smalls received Lot 4 and because she was deceased at the time of the voluntary partition-in-kind, her living heirs at that time, Ellen Smalls Manigualt and Herman Smalls, Jr., received her interest in Lot 4. Ellen Smalls Manigault took possession of Lot 4 in 1979 and then she divided Lot 4 into two lots, Lot 4A and B. Herman Smalls, Jr. received a deed to Lot 4B in 1985. Herman Smalls, Jr. died in 2005 and left as heirs, his children, the Respondents. The court in *Robinson v, Ketchen, et al*. confirmed that the Respondents are the heirs of Herman Smalls, Jr. and confirmed ownership of Lot 4B in their names.

Herman Smalls, Jr. was the owner of Lot 4B from 1985 until his death in 2005. He placed a mobile home on Lot 4B in the early 1980's and used it for vacations and other times. (Order Granting Defendants' Motion for SJ, Page 3). The court in *Robinson v, Ketchen, et al*. made a

legal determination that Herman Smalls, Jr. and also that the Respondents are the owners of Lot 4B.

Appellant and Herman Smalls discussed Appellant moving his mobile home onto Lot 4B in 1986 and since Herman Smalls, Jr. was the owner of Lot 4B at this time he could give permission to Appellant to move onto Lot 4B. Once Herman Smalls, Jr. died in 2005 his heirs, the Respondents, became the owners of Lot 4B.

Respondent, Syvetta Shaw, knew that Appellant was residing on Lot 4B and that he had permission to do so from her father (Order Granting Defendants' Motion for SJ, Page 3). Respondent knew that Appellant continued to live on Lot 4B after her father's death and did not see the need to do anything regarding Appellant occupying Lot 4B. (Plaintiff's Memo in Support of MSJ – Exhibit 3 – Syvetta Smalls Deposition). By not asking Appellant to vacate Lot 4B, Respondents, as the owners, gave him permission to remain on the property. Since Herman Smalls, Jr. and the Respondents were the owners of Lot 4B they could give Appellant permission to reside on the property.

2. The Lower Court did not err in granting Respondents' Motion for Summary Judgment because the Appellant is unable to prove he occupied the property adversely, specifically without hostility.

The Appellant argues that he has occupied Lot 4B with hostility and thus he can prove his adverse possession claim. The Respondents disagree because the Appellant occupied Lot 4B with the consent of the owners, he did not intend to take away the property from the owners and was not under a mistaken belief that he owned Lot 4B. Therefore, his possession cannot be hostile.

The Appellant cannot satisfy the elements of adverse possession, specifically hostility. In order to establish a claim for adverse possession, the claimant must prove by clear and convincing evidence his possession of the subject property was continuous, hostile, actual, open, notorious

and exclusive for the statutory period. *All Saints Parish, Waccamaw v. Protestant Episcopal Church In the Diocese of S.C.*, 358 S.C. 209, 595 S.E.2d 253 (Ct. App. 2004). The statutory period in South Carolina for adverse possession is ten (10) years. S.C. Code Ann. §15-67-210 (2005). In *Knox v. Bogan*, 322 S.C. 64, 472 S.E.2d 43 (Ct. App. 1996), the court explained for the possession to be hostile, the adverse claimant is required to show that his possession was actual, exclusive, open, notorious, and *without the consent* of the title owner.

In this instance it is undisputed that the Appellant had permission and consent from the owners to place his mobile home on Lot 4B and live on Lot 4B. (Order Granting Defendants' Motion for SJ, Page 3). Since the Appellant had permission by the owners to occupy and possess Lot 4B, his possession was *with the consent* of the owners and therefore could not be hostile.

The Appellant cannot establish that he had a conscience intention to possess Lot 4B against Herman Smalls, Jr.'s and the Respondents' intentions. The Appellant specifically stated in his deposition that he never meant to take Lot 4B away from Herman Smalls, Jr. and his heirs. (Order Granting Defendants' Motion for SJ, Page 7). The mere possession of land does not in and of itself manifest hostility toward the landowner. *Knight v. Hilton*, 224 S.C. 452, 79 S.E.2d 871 (1954); *Croft v. Sanders*, 283 S.C. 507, 323 S.E.2d 791 (Ct. App.1984). [P]ossession under a mistaken belief that property is one's own and with no intent to claim against the property's true owner cannot constitute hostile possession. *Lynch v. Lynch*, 236 S.C. 612, 115 S.E.2d 301 (1960); *Babb v. Harrison*, 220 S.C. 20, 66 S.E.2d 457 (1951); *Outz v. McKnight*, 114 S.C. 303, 103 S.E. 561 (1920); *Lusk v. Callaham*, 287 S.C. 459, 339 S.E.2d 156 (Ct. App. 1986); *Brown v. Clemens*, 287 S.C. 328, 338 S.E.2d 338 (1985); Note, South Carolina Law on Boundary Disputes, 12 S.C.L.Q. 418, 419-26 (1960). An adverse possession claim fails if the claimant's possession is not

hostile. *Perry v. Heirs at Law and Distributees of Gadsden*, 316 S.C. 224, 225, 449 S.E.2d 250, 251 (1994).

The Appellant by his own admission sets forth that he was not occupying Lot 4B with hostility because he stated in his deposition that he did not intend to take away Lot 4B away from Herman Smalls, Jr. or his heirs. (Order Granting Defendants' Motion for SJ, Page 7). This admission alone causes Appellant's claim for adverse possession to fail. In addition, Appellant failed to submit or provide any testimony or evidence that he is occupying Lot 4B under a mistaken belief that he owns it. The Appellant testified in his deposition that he did not know who owned Lot 4B. (Order Granting Defendants' Motion for SJ, Page 7). Furthermore, the Appellant never paid the property taxes on Lot 4B. (Order Granting Defendants' Motion for SJ, Page 7). The Appellant did not take any actions consistent with occupying Lot 4B against the owners or under a mistaken belief that he owned it. Therefore, the Appellant is unable to prove that he occupied Lot 4B with hostility.

The facts and circumstances in the current matter are similar to *McDaniel v. Kendrick*, 386 S.C. 437, 688 S.E.2d 852 (S.C. Ct. App. 2009). In *McDaniel*, Kendrick and McDaniel's father were married and separated in 1989. While married and before the separation, they lived on property owned solely by McDaniel's father. Kendrick continued to live on the property after the separation with the permission from McDaniel's father. McDaniel's was conveyed the property by her father in 1989 while Kendrick was residing on the property. McDaniel was aware that Kendrick was living on the property at the time she received ownership. In 2005, McDaniel provided Kendrick with a notice to vacate. Kendrick failed to vacate and McDaniel filed suit. Kendrick claimed ownership of the property by adverse possession because she had occupied it for over 19 years. The trial court ruled that Kendrick failed to prove adverse possession of the

property because she had not demonstrated the required element of hostility. Kendrick then appealed.

In the appeal, Kendrick contended that the trial court erred in finding she was required to establish the element of hostility when claiming adverse possession of an entire tract of land. She maintained that the trial court further erred in concluding her possession was not sufficiently hostile. The court disagreed.

The court cited *All Saints Parish, Waccamaw* and *Knox v. Bogan* regarding what must be proven to claim adverse possession and specifically, hostility. Citing *Knox v. Bo*gan, the supreme court, addressing the requirement of hostility, stated:

> "The only issue is whether the Knoxes' possession was sufficiently hostile. As we read *Perry v. Heirs at Law* (316 S.C. 224, 449 S.E.2d 250 (1994) and *Wigfall v. Fobbs*, 295 S.C. 59, 367 S.E.2d 156 (1988) either there is no longer a hostility requirement where the claim is to an entire tract, or South Carolina does in fact follow the majority view that the mental attitude of the possessor of land is immaterial. Under the majority view an actual, exclusive, open and notorious possession without the consent of the title owner is both wrongful and adverse and will ripen into perfect title in the usual way when the statute of limitations has run. The majority view represents the most practical approach to the hostility requirement of adverse possession and is in keeping with the national trend of authority."

The court in *McDaniel* set forth that:

> "The supreme court did not, as Kendrick argues, eliminate the hostility requirement when a party claims adverse possession of an entire tract of land. The court simply explained the hostility requirement is not necessarily predicated upon the claimant's conscience intention to possess the property against the true owner's wishes. A claimant may establish adverse possession if he occupies the property under the mistaken belief that it belongs to him. In any case, Knox makes clear the claimant must be on the property without the consent of the title owner." *Id* at 442.

The court in *McDanie*l also set forth that Kendrick was given tacit permission by McDaniel for her to occupy the property. The Court then stated:

> "Instead, this case is more analogous to those wherein a party entered land with permission of the owner and then claimed adverse possession at a later point. See

> *Davis v. Monteith*, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986) (finding occupation of property with owner's tacit permission was not hostile although such possession may have become hostile when claimant remained on property after being told to vacate); *Frady v. Ivester*, 118 S.C. 195, 205, 110 S.E. 135, 138 (1921) ("The defendant's entry into possession was permissive, and, as she had a duty to perform, she could not hold adversely to the rights of the mortgagors until she either surrendered the possession or gave notice of an adverse possession."); *Young v. Nix*, 286 S.C. 134, 136, 332 S.E.2d 773, 774 (Ct.App. 1985) (holding claimant who had farmed tract of land for more than forty years with permission of property owner's widower did not establish claim of adverse possession without a "clear and positive disclaimer of the title under which entry was made"). While a party cannot adversely possess property used with permission, a party may begin to satisfy the requirement of hostility upon a clear disclaimer of the owner's title. *All Saints Parish, Waccamaw*, 358 S.C. at 233, 595 S.E.2d at 266-67." *Id* at 443-444.

The court in *McDaniel* affirmed the trial court's ruling stating that Kendrick entered the property with her husband's permission and remained there for the next nineteen years with McDaniel's tacit permission. Kendrick's refusal to vacate the property in 2005 began her time of occupying the property with hostility. However, Kendrick clearly had not satisfied the statutory period for adverse possession because McDaniel commenced her lawsuit just a few months later. The court held, "Accordingly, the trial court did not err in finding Kendrick was required to establish the element of hostility and that she failed to do so by clear and convincing evidence." *Id* at 444.

In this instance, Herman Smalls, Jr. gave permission to Appellant to occupy Lot 4B in 1986, just as McDaniel's father gave permission to Kendrick. When Herman Smalls, Jr. died in 2005, the Respondents became the owners of Lot 4B. The Respondents knew the Appellant was living on Lot 4B and did not request that he vacate. By the Respondents allowing the Appellant to continue residing on Lot 4B they gave him tacit permission to remain on the property, just as in the *McDaniel* case, McDaniel gave tacit permission to Kendrick to reside on her property. (Order Granting Defendants' Motion for SJ, Page 8). The Respondents informed the Appellant to vacate the Property on April 24, 2019, just as McDaniel informed Kendrick to vacate her property. (Order

Granting Defendants' Motion for SJ, Page 8). The Appellant received the notice and failed to vacate Lot 4B. On April 24, 2019, the Appellant's time started for occupying Lot 4B with hostility and *without the consent* of the owners, just as Kendrick's possession became hostile after she received the notice to vacate from McDaniel. The statutory period of 10 years has obviously not been satisfied.

The Appellant began occupying Lot 4B with the permission of Herman Smalls, Jr. and remained on the property after Mr. Smalls' death with the tacit permission of the Respondents. The Appellant could not have occupied Lot 4B with hostility because he had the permission of the owners. Furthermore, the Appellant's time for occupying Lot 4B with hostility began on April 24, 2019, when he received the notice to vacate and refused to leave. This is clearly not enough time to meet the statutory period of 10 years.

The Appellant is unable to establish by clear and convincing evidence that his possession of Lot 4B was hostile.

CONCLUSION

The Master-In-Equity did not err and the court's Order should be affirmed.

RESPECTFULLY SUBMITTED

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PROOF OF SERVICE

I certify that I have served Respondents' Initial Brief on Appellant by E-Filing and by depositing a copy of said documents in the United States Mail, postage prepaid, on July 6, 2022, addressed to his attorney of record, Karen M. Dejong, Esq., Dejong Law Firm, LLC, 222 West Coleman Blvd., Ste. 110, Mt. Pleasant, SC 29464.

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