

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FAIRFIELD)
)
 Carol Reid Smallwood, Barbara)
 Reid Strickland, Ann Reid Hamlin,)
 William L. Reid, III, Judith)
 Lawrence Medlin, and Frances)
 Patterson Lawrence,)
)
)
 Plaintiffs,)
)
 v.)
)
 Helen M. Lee, Linda Lee and Joe)
 Lee, Jr. as Co-Trustees of the)
 Joseph H. Lee, Sr. Family)
 Trust U/W,)
)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 FOR THE SIXTH JUDICIAL CIRCUIT

C. A. No.: 2012-CP-20-401

RECEIVED
 ORDER JUN 14 2013
 SC Court of Appeals

This action was before me on April 18, 2013, and involves a claim for a prescriptive easement between adjacent landowners over property situated in Fairfield County. The Plaintiffs are owners of a timber tract known as the Reid property (or "Henry Place"). The Plaintiffs allege that the historic and sole access to their property has been over and across the residential property of the Defendants and that the Defendants have denied the Plaintiffs access to conduct forestry operations.

At the trial of this case, Tom Patrick, a forester employed by the Plaintiffs since 1983, testified that the Plaintiffs' property contained a "forty-year crop" which required planting or seeding at the crop's inception, thinning of the timber after sixteen years, and then access every six to eight years for maintenance until the crop is harvested at maturity after forty years of

growth. Patrick testified that the most recent timber harvest took place in 1992 and that seeding took place in 1994. In 2009, the Defendants denied the Plaintiffs access for thinning of the crop. Judith Medlin, age 67, testified that she had accessed the Reid property eight times in her lifetime, including 1959, 1966, and 1981. Medlin testified that the purpose of her visits were to make sure trees were growing properly and were in good health. William Reid, III, testified that he did not remember the dates he accessed the Reid property prior to the last ten years, but that he had accessed the property four times since 2001 to investigate reports of hunters on the property.

To establish an easement by prescription, the party asserting the right must show: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (S.C.App. 2005), citing Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993).

CONTINUAL USE REQUIREMENT

This Court finds that the Plaintiffs have not met their burden of establishing a continued use for the full period of twenty years. In Jones, the Court of Appeals held that, in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant. Jones at 318. The element of continued use does not require the use thereof every day for the statutory period or even on a weekly or monthly basis; but simply the exercise of the right more or less frequently according to the nature of the use and needs of the claimant. The Plaintiffs maintain that, applying Jones, their use must only be as frequent as the forty-year crop dictates. While Jones held that the claimant need not

establish daily use or even weekly or monthly use, nothing in the Jones decision suggests that usage separated by six to eight years or even sixteen years is a reasonable frequency. This Court finds that the Plaintiffs have failed to meet the continual use requirement for a prescriptive easement.

UNINTERRUPTED USE REQUIREMENT

The Court of Appeals has held that physical and verbal acts may interrupt the required period of use. The servient owner may interrupt the prescriptive period by engaging in "overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief." Kelley v. Snyder, 396 S.C. 564, 573, 722 S.E. 2d 813, 818 (S.C.App. 2012), quoting Pittman v. Lowther, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005). In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period. Kelley at 573.

At the trial of this case, witnesses for each landowner testified that a fence was erected in the Defendant's pasture in 1992, obstructing the path alleged by the Plaintiffs. Tom Patrick testified that Joe Lee, the deceased husband of Defendant Helen M. Lee, instructed him to redirect his forestry equipment to avoid the fence. Defendant Helen M. Lee testified that, in response to requests in 2009 by Tom Patrick, she verbally objected to her property being used for access to the Reid property. The Plaintiffs avoided use the Defendants' property following her objection. This Court finds that the physical act of erecting a fence in 1992 and verbal objections in 1992 and 2009 were sufficient to interrupt any prescriptive period.

IDENTITY OF THE THING ENJOYED

In order to establish an easement by prescription, a claimant is required to prove the identity of the thing enjoyed. This element requires a claimant to establish the presence of the road or path allegedly used for access. Plaintiffs' witnesses were each asked during direct examination to use a marker with black ink to indicate on separate maps the alleged path each recalled taking across the Defendants' property. Judith Medlin marked a path on one map which followed the Defendants' gravel driveway to the residence and continued south through a pasture before heading east to the Reid property. William Reid, III, and Tom Patrick marked a similar direction, south before heading east to the Reid property. Tom Patrick marked a second path, east from the Defendants' driveway and then south to the Reid property, which he testified was used after 1992. All three Defendants, however, denied during testimony that any path or road existed across their property.

This Court finds that the Plaintiffs have not met their burden of establishing the identity of the thing enjoyed. There was no evidence offered at trial that the map drawings in evidence, while similar in cardinal direction, mark the same path. There was no testimony that gravel, pavement, or other lasting characteristic across the Defendants' pasture which would identify a specific path. Evidence of the second path used after 1992 is inconsistent with the burden of proof. Thus, this Court finds that the Plaintiffs have failed to establish a required element of a prescriptive easement.

CLAIM OF RIGHT

The Plaintiffs allege that their use of the Defendants' property has been under claim of right rather than adverse. A party claiming a prescriptive easement under a claim of right "must

demonstrate a substantial belief that he had the right to use the parcel or road based upon the totality of circumstances surrounding his use.” Kelley at 574. A claim of right is without recognition of the rights of the owner of the servient estate. Paine Gayle Properties, LLC v. CSX Transp., Inc., 400 S.C. 568, 584, 735 S.E.2d 528, 537 (S.C.App. 2012). The asking and obtaining of permission, whether from the tenant or owner of the servient estate, stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription. Paine Gayle at 584. Paine Gayle also held that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription. Id.

At the trial of this case, Judith Medlin and Tom Patrick testified that permission was sought from Defendant Helen M. Lee or her deceased husband, Joe Lee, to use their property for access to the Reid property. Helen M. Lee also testified that she had been asked by Tom Patrick and received letters from the Plaintiffs’ attorney requesting access. Each time that access was needed for timber services, permission was sought from the Lees. This Court finds that the Plaintiffs’ use could not be adverse or under claim of right because, by requesting access from the Defendants, the Plaintiffs have demonstrated recognition of the rights of the Defendants. This Court further finds that the Plaintiffs’ use of the Defendants’ property to conduct forestry operations was with express permission or license, thus unable to ripen into a prescriptive easement.

TACKING PREVIOUS USE

The Plaintiffs allege that the Defendants’ property has been used for access for a period exceeding one hundred years. The Court of Appeals has held that tacking of periods of

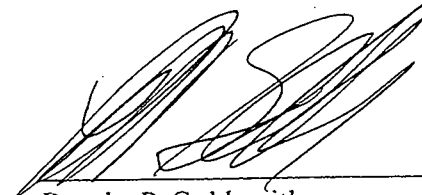
prescriptive use is permitted where there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefitted by the inchoate servitude. Kelley, at 575. A party's use must meet all requirements throughout the twenty-year period and, if tacking is used, the use by the previous owners must also meet the requirements of a prescriptive easement. Morrow v. Dyches, 328 S.C. 522, 528, 492 S.E.2d 420, 424 (S.C.App. 1997). This Court finds insufficient evidence that any use by the Plaintiffs' predecessors-in-interest satisfied the elements of a prescriptive easement.

CONCLUSION

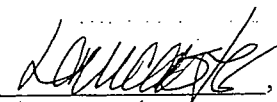
This Court finds that the Plaintiffs have failed to meet the required burden of proof for a prescriptive easement.

THEREFORE, the requested relief is DENIED and judgement shall be entered in favor of the Defendants.

IT IS SO ORDERED.



Brooks P. Goldsmith
Presiding Judge
Sixth Judicial Circuit


_____, South Carolina
Date: May 14 2013