RECEIVED
Jan 23 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Case No. 2021-CP-02-00766
App Case No. 2024-000545

Melanie Hozey,

Appellant,

v.

Alan Rutherfurd and Susan Rutherfurd Respondents.

(Substitute)
INITIAL BRIEF OF RESPONDENTS

Dionè C. Carroll, Esq.
Carroll Law Offices, P.A.
107 Pendleton St. NW
Aiken, SC 29805
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules of Court

Other Authorities

STATEMENT OF THE ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT WAS CORRECT IN FINDING THAT THE APPELLANT FAILED TO POSSESS AND USE THE RELEVANT LAND OF RESPONDENTS IN A MANNER THAT WAS NOTORIOUS, HOSTILE AND EXCLUSIVE AND THUS DID NOT ACQUIRE LAND OF RESPONDENTS BY ADVERSE POSSESSION.

2. WHETHER THE TRIAL COURT WAS CORRECT IN FINDING THAT THE APPELLANT TRESPASSED ON THE RESPONDENTS' PROPERTY AND IN ENTERING JUDGMENT IN THEIR FAVOR IN THE AMOUNT OF $300.00.

STATEMENT OF THE CASE

Respondents object to the Statement of the Case set forth by Appellant. South Carolina Rule of Appellate Procedure 208(b)(1)(C) requires that the Statement of the Case "shall not contain contested matters and shall contain, as a minimum, the following information: [specified generally neutral information]." Appellant's Statement of the Case is argumentative and argues the case and should be rejected. Respondents provide, instead, the following Statement of the Case.

The Summons, Complaint and Lis Pendens in this case were filed on April 15, 2021. *See* Order of Judge Griffith at 1. The first cause of action by Appellant in her Complaint was a claim of adverse possession. *See id.* The Second cause of action was for quieting the title in Appellant's favor, and the third cause of action was for damages resulting from the Appellant being placed on a notice of criminal trespass. *Id.*

Defendant/Respondents filed an Answer and Counterclaim on July 7, 2021, and Appellant filed a Reply on August 6, 2021. *See* Order of Judge Griffith at 1. The Answer and Counterclaim contained a general denial and affirmative defenses concerning the adverse possession. *See id.* The first counterclaim was for civil trespass. *See id.* The second counterclaim was a declaratory judgment action requesting injunctive relief. *See id.* The third counterclaim was for Slander of Title, which was eventually voluntarily dismissed by counter claimants. *See id.*

The matter was referred to the Aiken County Master in Equity. *See* Order of Judge Griffith at 1. This referral was accomplished through an Order of Reference made by agreement of the parties filed on February 20, 2023. *See id.*

The final evidentiary hearing was held on November 1, 2023 and December 11, 2023. *See* Order of Judge Griffith at 1. The parties submitted written closing arguments on January 11, 2024. *See id.* The Master in Equity entered his Order on February 28, 2024. *See id.* The Master in Equity denied Adverse Possession and other relief requested by Appellant. *See id* at 15. He issued judgment in favor of Respondents on their cause of action for trespass and awarded them damages in the amount of $300.00. *See id* at 15.

Plaintiff/Appellant's Notice of Appeal was entered April 4, 2024. *See* Notice of Appeal. Appellant filed her initial brief on November 22, 2024 seeking to reverse the final order in this case. This Initial Brief of Respondent is filed in reply to Appellant's Initial Brief and in defense of the final order and judgment in this case.

STANDARD OF REVIEW

In an action at law referred to a master or special referee for final judgment, appellate courts will correct errors of law, but must affirm the master's or referee's factual findings unless no evidence reasonably supports those findings. *Townes Associates, Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976). "Because an adverse possession claim is an action at law, the character of the possession is a question for the jury or fact finder. Therefore, appellate review is limited to a determination of whether any evidence reasonably tends to support the trier of fact's findings." *Taylor v. Heirs of Taylor*, 419 S.C. 639, 650, 799 S.E. 2d 919 (Ct. App. 2017).

A trespass action is an action at law. *Butler v. Lindsey*, 293 S.C. 466, 469, 361 S.E.2d 621, 622 (Ct. App. 1987) (citing *Uxbridge Co. v. Poppenheim*, 135 S.C. 26, 133 S.E. 461 (1926); *Corley v. Looper*, 287 S.C. 618, 340 S.E.2d 556 (Ct. App. 1986)); *see also* Black's Law Dictionary at 1508 (7th ed. 1999) (defining trespass as "a legal action for injuries."). On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law,

but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) (citing *Cohens v. Atkins*, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998)); *Sherman v. W & B Enters.*, 357 S.C. 243, 592 S.E.2d 307 (Ct. App. 2003).

ARGUMENT

(Statement of Facts)

(1) Statement of Significant Relevant Evidence Admitted Into Evidence at Trial.

The Appellant, Melanie P. Hozey, is currently a neighbor of the Respondents, Alan L. Rutherfurd and Susan M. Rutherfurd. In June of 2001, the Respondents purchased certain real property located at 714 Laurel Drive, S.W. in Aiken, South Carolina.

Hereinafter it will be referred to as the "Subject Property." Witness Curtis "Rhet" Coleman, the surveyor, established and confirmed Respondents good and correct title and the boundary of the Subject Property. *See* Testimony of Coleman (Tr. Vol. II at 151-200); *see also* Defendants' Trial Exhibits 15-25; *see also* (Tr. Vol. II at 26, L1-11).

Appellant purchased her property shortly before Respondents purchased the above-referenced Disputed Area. Appellant's property neighbors and adjoins the Subject Property. *See* Testimony of S. Rutherfurd. (Tr. Vol. II)

The Appellant claimed at trial to have continuously held a portion of the Subject Property, owned by Respondents, for a period exceeding 10 years in a manner, resulting in adverse possession. *See* Hozey Testimony (Tr. Vol. I). To establish adverse possession, the burden of proof was on Appellant to prove all the elements of adverse possession by clear and

convincing evidence and to prove that they were all in place for a period exceeding 10 years. Appellant failed to meet her heavy burden.

It was, and is, Respondents' firm position that the Appellant has NOT continuously held, occupied and possessed any portion of the Disputed Area by, among other things, usually cultivating, maintaining and/or improving that portion of the real property for the required period. *Cf.* Complaint at ¶11; *see* Testimony of S. Rutherfurd and A. Rutherfurd (Tr. Vol. II at 8-107 and 108-150). Appellant claimed no color of title in her Complaint, and it was further stipulated at trial that Appellant claims no color of title. *See* Complaint.

Appellant supplied at trial a large satellite image, which included a view of both Appellant's and Respondent's properties. It was admitted into evidence at trial. *See* Plaintiff's Trial Exhibit 1.

Appellant had modified that satellite image to show a geometric figure bounded by red lines. *See* Plaintiff's Trial Exhibit 1. The area bounded by red lines is, evidently, the area Appellant sought to take from Respondents, Mr. and Mrs. Rutherfurd, by adverse possession. *See* Testimony of M. Hozey. Hereinafter the red bounded area will be referred to as the "Disputed Area."

The evidence demonstrated that the use and possession of the Disputed Area of the Disputed Area by Appellant had NOT been actual, open, notorious, hostile, continuous and exclusive for such requisite statutory and/or other applicable period of time as to constitute the Appellant's adverse possession of said portion of the Disputed Area. *Cf.* Complaint ¶12. Appellant is, further, not entitled to title of any portion of the Disputed Area for any reason.

The uncontroverted evidence confirmed and demonstrated the Disputed Area that Appellant claims she has continuously held, occupied and possessed is not, and never has been,

enclosed or protected by a fence. *See* Complaint at ¶13. Appellant has never paid any portion of the taxes applicable to the Disputed Area, which has always been paid by Respondents since they purchased the property. (Tr. Vol. II)

Appellant freely admitted at trial that she had a neighborly and good relationship with the Respondent Rutherfurd's until late 2020, undermining her claim of hostility for the 10-year statutory period. *See* Testimony of M. Hozey. (Tr. Vol. I) Respondents testified she was allowed on their property. *See* Testimony of S. Rutherfurd and A. Rutherfurd. (Tr. Vol. II) She had tacit permission. *See id.* They believed that was the neighborly thing to do. *See id.*

Appellant used portions of the Disputed Area, but Respondents used it too. They just used it differently. Respondents used it as a buffer as discussed above. Respondents' use of the property undermined the element of Appellant's claim that her use was exclusive. She failed to prove that her use was exclusive by clear and convincing evidence, and arguendo even if it was exclusive for any period of time, it was not continuously exclusive for any 10-year period. On this element alone, her claim of adverse possession had to fail.

The evidence confirmed that during the years between 2001, when the property was purchased, and the present, Respondents lived on the Subject Property as their residence and made use of all of the Disputed Area personally and through agents, further undermining Appellant's claim that her use had been exclusive. *See* Testimony of S. Rutherfurd and A. Rutherfurd. (Tr. Vol. II)

Respondent Susan Rutherfurd testified extensively regarding the use by Respondents of the Disputed Area. She told the court that the Disputed Area serves an important buffer purpose for Respondents. *See id. See* Testimony of S. Rutherfurd. (Tr. Vol. II at 8-107). It provides the Respondents a degree of privacy, and it guarantees separation from potential future noxious uses,

by both the current and potential future owners. *See* Testimony of S. Rutherfurd and A. Rutherfurd; (Tr. Vol. II at 8-150).

As part of her testimony, Respondent Susan Rutherfurd supplied invoices, checks and other proofs of payment regarding work done by agents of the Respondents to maintain and improve the Disputed Area, all of which included work on the Disputed Area. *See* Testimony of S. Rutherfurd; *see* Defendants' Exhibits 1-9. Those invoices, checks and other proofs of payment were admitted into evidence as Defendants' Trial Exhibits 1 through 9. She further indicated other work had been done on the property by her husband during every year since they purchased the Disputed Area, and other work had been done by agents under circumstances where she had not kept the invoices. *See* Testimony of S. Rutherfurd; (Tr. Vol. II at 8-107). Mr. Rutherfurd also testified and confirmed he had worked on the property at least several times each year. *See* Testimony of A. Rutherfurd; (Tr. Vol. II at 108-150)

Surveyor Coleman also testified at trial and was qualified as an expert witness. During Witness Coleman's testimony, he confirmed that one aspect of work done on the property included a survey, done at the Respondents' request and direction, confirming the lines of the Subject Property, the corners of the Subject Property and the corners of other neighboring properties, including Appellant's property. *See* Testimony of Coleman. He also confirmed that Mr. Rutherfurd walked the entire property with him after completion of the survey. *See id.*

The use of the property by the Rutherfurds and their agents has included occupying and making use of, and improvements to, the Disputed Area. *See* Testimony of S. Rutherfurd, A. Rutherfurd, Coleman, and M. Hozey (who admitted, reluctantly, seeing Mr. Rutherfurd doing work on the property at some point.); *see* Defendants' Exhibits 1-9. On the witness stand, Mrs. Rutherfurd went through the timeline of activities done by landscapers and other professionals.

Mr. and Mrs. Rutherfurd confirmed Mr. Rutherfurd worked on the property each and every year, multiple times. No period of 10 years has passed when Respondents did not personally and/or through their agents make use of the property. Appellant, therefore, may not legitimately claim she has had exclusive use of the property.

Appellant has, from time to time, parked vehicles on the Disputed Area. However, consistent with the testimony of Witness Coleman, there are no permanent structures on the Disputed Area, only rocks that can be easily removed. *See* Testimony of Coleman. Witness Coleman's survey does not show the parking as a permanent structure. Mrs. Rutherfurd confirmed the parking has not been continuous for a period of 10 years. Rocks that are easily movable gravel in a small area does not constitute a permanent structure. *See* Testimony of Coleman. Appellant did not, therefore, prove by clear and convincing evidence that she has actually, continuously used the Disputed Area for 10 years and may not legitimately assert a physical intrusion sufficient to establish adverse possession. On this element alone, her claim of adverse possession must also fail.

Testimony of Mrs. Rutherfurd and Defendants' Exhibits 10-13 reveal a change in the relationship between Appellant and Respondents in late 2020. *See* Defendants' Trial Exhibits 10-13. Where there previously had been no "hostility," their relationship became adverse. Appellant evidently decided to get quotes on the construction of a permanent structure on Respondents' land. *See* Testimony of S. Rutherfurd and A. Rutherfurd. Mr. Rutherfurd saw the man on the property working on giving such a quote. *See* Testimony of A. Rutherfurd. Respondents then felt they needed to take affirmative action to protect their property after that discovery. *See id.*

In 2020, Respondents undertook certain actions to stop and prevent the Appellant from having access to and using the area of the real property, including a request that the City of Aiken

Department of Public Safety issue and serve upon her a notice that she is criminally trespassing upon said real property. *See* Complaint at ¶14; *see also* Defendants' Exhibits 10-13. They posted "no trespass" signs and demanded that she not trespass. Letters from their son-in-law and from the undersigned were sent. *See* Defendants' Exhibits 10-13. Mr. Rutherfurd testified the "no trespass" signs were taken down several times. Every time they were taken down, he put them back up.

For most of Respondents' tenancy on the Subject Property including the Disputed Area, Respondents committed to being good neighbors and allowed Appellant to come into their space on the land near their shared property line, allowing her permission to do so. *See* Testimony of S. Rutherfurd. Notorious hostility has existed only since shortly before suit was filed. Appellant, therefore, also failed to prove by clear and convincing evidence that her use was hostile, open, actual or notorious for 10 years. If it was any of these for any period of time, the uncontroverted evidence demonstrates the hostility started in late 2020, about a year before the lawsuit was initiated. An exclusive, hostile, open, actual and notorious situation did not exist continuously for any 10-year period. On any one of these elements, Appellant's claim of adverse possession must fail. Pursuant to the lower Court opinion, it did fail on the exclusive, hostile and notorious requirements. *See* Judge Griffith's Order at 15.

After Notice that she was trespassing was given to Appellant, rather than complying, Appellant filed suit to try to take her neighbor Respondents' property away from them for her personal and exclusive use. They are retired, and the testimony showed that it has become more and more difficult for them to personally maintain the buffer, which is the Disputed Area, but it remains important to them. They have employed professionals to maintain this area for the

protection of their privacy, and it is a priority to them to continue to do so. *See* Testimony of S. Rutherfurd and A. Rutherfurd.

It would be an abuse and misuse of the adverse possession law to allow a neighbor to bully retired people and take away their land just because they do not use buffer land in an active and activist way. It would defy logic for the law to require the less physically active to frequently go on to parts of their property that are difficult to get to in order to prevent adverse possession, especially when Appellant never outwardly attempted to prevent them or their agents from coming on the land. It would defy logic for use as a buffer to be a use not allowed on private property seeking to avoid adverse possession.

There was extensive testimony about how a portion of the disputed area drops off dramatically away from the road. *See* Testimony of Coleman. No one could be expected to go there frequently.

Several witnesses testified that the Rutherfurd's have never been excluded from the property. It is undisputed that the Disputed Area is not fenced around its boundary or protected by a substantial enclosure. Appellant has failed to prove by clear and convincing evidence that the Disputed Area "has been protected by a substantial enclosure" for any period of time, ever, much less for any 10-year period. On this requirement alone, her claim of adverse possession must fail. *See* S.C. Code Ann. § 15-67-250; *see also M3s v. Charleston Lands Corp.*, 2019 S.C. C.P. LEXIS 1180 at *5 (Ct. Common Pleas, 9th Cir. 2019) (finding the party claiming adverse possession had enclosed the space for parking).

The Rutherfurd's have a pool. The only fence standing, relevant to the dispute, is a fence, required by law, which protects the pool from children and animals who might be at risk of drowning in an attractive nuisance like a pool. It is required by City Code. *See* Testimony of S.

Rutherfurd; *see also* City Code, Section 303, specifically § 303.2, Enclosures ("Private swimming pools . . . . shall be completely surrounded by a fence or barrier . . . . An existing pool enclosure shall not be removed, replaced or changed in a manner that reduces its effectiveness as a safety barrier.") The fence exists only along a modest portion of the west side of the Disputed Area and does not surround it. *See* Testimony of Coleman.

As discussed earlier, Appellant has no "color of title" to the Disputed Area, has made no assertion of "color of title." Appellant made assertions to Witness Coleman regarding her belief there was some kind of government easement on the Disputed Area, further entitling her to be on the property. *See* Coleman Testimony. Her belief that she had a right to be in the Disputed Area contradicts and undermines any claim of hostility. Appellant, failed to prove by clear and convincing evidence that her use was hostile for 10 years. If she believed she had a right to be on the property because of an easement until Witness Coleman corrected her in 2020 or 2021, her occupation was not hostile. This confirms that hostility was not continuous for any 10-year period. On this element alone, her claim of adverse possession must fail.

Appellant now seeks an Order from this Court reversing the lower court's opinion that she is not the lawful, rightful and fee simple owner of the Disputed Area. This claim by Appellant is firmly disputed by Respondents who assert that Appellant failed to meet all the requirements of adverse possession, which must be proved, including every element, and uninterrupted, by the Appellant, whom the burden is upon, by clear and convincing evidence, for a period of 10 years.

Respondents counterclaimed, claiming Appellant trespassed on their property. Evidence admitted at trial demonstrated multiple instances of such trespass. Appellant was provided the adequate notice and warning. Testimony of Mrs. Rutherfurd demonstrated she and her husband

were both frightened, as Appellant had become aggressive in her attempt to take away their property, and financially damaged by Appellant's trespass as Respondents would have liked to have downsized and rented or sold the property but were unable to do so. *See* Testimony of S. Rutherfurd. The trial Court found that "since the Plaintiff filed the lawsuit, Mrs. Rutherford has suffered from increased stress, sleeping issues and has noticed that her husband has lost weight due to stress." Judge Griffith's Order.

These facts demonstrate willful, wanton and reckless disregard of the Respondents' rights and justified both compensatory and exemplary damages for trespass, though only a nominal $300.00 was awarded. *See Fox v. Munnerlyn*, 283 S.C. 490; 323 S.E.2d 68 (Ct. App. 1984). Respondents do not, however, assert that any such aggressive behavior occurred before 2020. *See* Judge Griffith's Order.

(2) <u>Summary</u> of Respondents' Significant Relevant Evidence Submitted at Trial.

- Appellant has NOT continuously held, occupied and possessed the disputed section of the Disputed Area. She was, instead, a trespasser that was declared a trespasser and Respondents were awarded damages with respect to the trespass that occurred after they gave Notice. *See* Defendants' Trial Exhibits 10-13.
- Appellant has NOT had exclusive use of the property. Respondents have used the Disputed Area at the same time, but in different ways.
- Respondents and Appellant were NOT hostile or adverse for the required period. Appellant did not even know what the lot line was and believed she was entitled to be there by virtue of a utility easement for times relevant to this case, negating hostility. Furthermore, Respondents had given her tacit permission.

- The Appellant did not offer any testimony of any direct conflict with the Defendants where she claimed ownership of the disputed property. Judge Griffith's Order at 12. She did not make any attempts to pay the annual property taxes for the disputed property. *Id.*

- Appellant failed to prove by clear and convincing evidence that she continuously had all the elements necessary to establish adverse possession for 10 years continuously.

- The use and possession of the Disputed Area by the Appellant described above has NOT been actual, open, notorious, hostile, continuous and exclusive for such requisite statutory and/or other applicable period of time to constitute the Appellant's adverse possession of said portion of the Disputed Area described above.

- Appellant is a trespasser, and Respondents are entitled to and received damages.

- Respondents have been damaged by Appellant's shocking, wanton and willful behavior in having recently tried to grab their land in disregard of their legal rights. Her behavior is so shocking as to justify punitive damages, though none were awarded.

- Appellant is, further, not entitled to title or use of the property for any reason. She is a trespasser and was required to compensate Respondents for her trespass.

(3) The Judge's Finding of Facts Rejecting Adverse Possession by Appellant, Finding She Trespassed and Imposing Damages Against Appellant.

Judge Griffith's final Order dated February 28, 2024 made findings of fact at pages 1 through 10 that are substantially supported by the forgoing evidence, which is in the record. His conclusions at page 15 further contain findings of fact supporting the same. The Judge's facts may not be disturbed unless no evidence reasonably supports those findings. *See Townes Associates, Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976).

It is Respondents' contention that Appellant, in actuality, disputes the facts, which may not be disturbed in this case, rather than the law. *See* Standard of Review *supra.*

The facts and applicable law require relied upon by the Court below mandate that this honorable Court reject Appellant's appeal.

(Legal Arguments)

I. THE TRIAL COURT WAS CORRECT IN FINDING THAT THE APPELLANT FAILED TO POSSESS AND USE THE RELEVANT LAND OF RESPONDENTS IN A MANNER THAT WAS NOTORIOUS, HOSTILE AND EXCLUSIVE FOR 10 YEARS AND THUS DID NOT ACQUIRE LAND OF RESPONDENTS BY ADVERSE POSSESSION.

This matter is governed, in part, by South Carolina Code Title 15: Civil Remedies & Procedures, Chapter 67: Recovery of Real Property, Article 3: Possession & Adverse Possession. Possession is presumed to follow the legal title to land. *Knight v. Hilton*, 224 S.C. 452, 79 S.E.2d 871 (1954); *Lyles v. Fellers*, 138 S.C. 31, 136 S.E. 13 (1926). Respondents have legal title to the land in question. Appellant sought to claim adverse possession of Respondents' property. The trial court denied Appellant's attempt to seize Respondents' land.

"Indeed, there is every presumption that such an occupancy [by an alleged adverse possessor] is in subordination to the legal title." *Knight v. Hilton*, 224 S.C. at 456, 79 S.E.2d at 873. In order for an attempted adverse possessor to maintain an action for adverse possession, he/she must rebut a landowner's presumption of possession. *See Love v. Turner*, 71 S.C. 322, 51 S.E. 101 (1905). Such proof must be by clear and convincing evidence. *Zinnerman v. Williams*, 211 S.C. 382, 45 S.E. (2d) 597 (1947); *Thomas v. Dempsey*, 53 S.C. 216, 31 S.E. 231 (1898); *Grant v. Grant*, 288 S.C. 86, 340 S.E. (2d) 791 (Ct. App. 1986); *Lusk v. Callaham*, 287 S.C. 459, 339 S.E. (2d) 156 (Ct. App. 1986); *Butler v. Lindsey*, 293 S.C. 466, 470. The burden of proof is on Appellant. Appellant failed to meet the burden.

Acquisition of title to real property by adverse possession must be shown by clear and convincing evidence. *Jones v. Leagan*, 384 S.C. 1, 681 SE2d 6 (Ct. App. 2009). Using this burden of proof, Appellant needed to, but failed to, prove "actual, open, notorious, hostile, continuous, and exclusive possession by the claimant," *Miller v. Leaird*, 307 S.C. 56, 61, 413 S.E.2d 841, 844 (1992), for a period of 10 years. *See also Getsinger v. Midlands Orthopaedic Profit Sharing Plan*, 327 S.C. 424, 489 S.E.2d 223 (S.C. App. 1997). Judge Griffith's found that Appellant's occupation of Respondents' property was not hostile, notorious or exclusive. *See* Judge Griffith's Order at 15. His order is based on a sound understanding of the law and the existence of facts in the record. The lower Court's opinion should not be disturbed.

Not Exclusive

The general rule is that where an owner of property and an occupier are both in possession, the possession of the legal owner prevails to the exclusion of the other. *Middleton v. Dupuis*, 11 S.C.L. (2 Nott & McC.) 310 (1820). Among other important findings, the trial Court held as a matter of fact that "[t]here was never a 10-year period where the Defendants did not maintain the property in the disputed area. The Defendant's never abandoned the property and were never prevented from accessing the property." Judge Griffith's Order at 5. These findings of fact clearly support a legal holding that Appellant did not exclusively occupy the property. Findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)

The exclusive possession necessary to acquire title by adverse possession is not satisfied if occupancy is shared with the owner or with agents of the owner. *Farella v. Rumney*, 649 P. (2d) 185 (Wyo. 1982); *Butler v. Lindsey*, 293 S.C. 466, 472; 361 S.E.2d 621 (Ct. App. 1987).

Appellant and Respondents have always shared occupancy for those periods when Appellant has invaded Respondents' legally protected property interests as the trial Court's findings of fact acknowledge.

As the Judge found, "[b]ased on the testimony, the exhibits, and the case law, the Plaintiff has failed to establish the exclusive use required for adverse possession by clear and convincing evidence. While the Plaintiff used the parking pad area and did maintenance on the rest of the area, the Defendant's worked in the same area and hired commercial parties to work in the disputed area along with the Plaintiff." Judge Griffith's Order at 15. Therefore, the legal owner prevails to the exclusion of the other. *Id.*

Not Notorious

The lower Court found "the Plaintiff [Appellant] never prevented or attempted to prevent the use of the disputed area by the Defendants or the businesses they hired for performing work in the area." Judge Griffith's Order at 15. On this basis, the Court held Appellant's presence on the land was not notorious. *See id.* For possession to be open and notorious, "the legal owner need not have actual knowledge the claimant is claiming property adversely, [but] the hostile possession should be so notorious that the legal owner by ordinary diligence should have known of it." *Jones v. Leagan* 384 S.C. 1, 681 S.E. 2d 6, 384 S.C. at 13–14, 681 S.E.2d at 13. As a matter of fact, when Appellant "never prevented or attempted to prevent the use" of the Disputed Area by Respondent or their agents, she failed to be "notorious" as that term is contemplated by *Jones*.

Furthermore, whether or not Appellant managed to prove she was notorious, failing to prevent or attempt to prevent the use of the Disputed Area by Respondents means that she did not have exclusive use of the disputed area, and her claim to adverse possession must fail on that

element as well. In order to prevail, she must have proved all the elements, continuously, for a period of 10 years, and she did not do that.

Not Hostile

"If a claimant asserts title by adverse possession and his or her occupancy is not under color of title [as here], the claimant must show either fencing or other improvements covering most of the subject land or some other continuous use and exercise of dominion." *Frazier v. Smallseed*, 384 S.C. 56, 63, 682 S.E.2d 8, 12 (Ct. App. 2009). *Millvale Plantation, LLC v. Carrison Family L.P.*, 401 S.C. 166, 177, 736 S.E2d 286 (Ct. App. 2012). There is no fencing of the property in this case. There are no improvements covering most of the subject land or other continuous use and exercise of dominion.

"The mere possession of land does not in and of itself show hostility to the owner thereof. Indeed, there is every presumption that such an occupancy is in subordination to the legal title." *Lynch v. Lynch*, 236 S.C. 612, 619-620 (quoting 1 Am. Jur., Adverse Possession, Section 138)

"A plaintiff claiming title by adverse possession must show the extent of his possession." *Cantey v. Platt,* 13 S.C. L. 260, 2 McCord 260. The burden of proof of adverse possession is on the one relying thereon. *Lynch v. Lynch*, 236 S.C. 612, 621-622.

In South Carolina, adverse possession is established under a ten-year statutory period. *See* S.C. Code Ann. § 15-67-210. "To constitute adverse possession, the possession must be continuous, hostile, open, actual, notorious and exclusive for the entire ten year statutory period." *Davis v. Monteith*, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986) (*emphasis added*). Hostile possession has been defined as possession "with the intention to dispossess the owner." *Lynch v. Lynch*, 236 S.C. 612, 623, 115 S.E.2d 301, 306 (1960).

Contrary to Appellant's recent assertions, for the majority of time relevant to this matter, Appellant believed she was sharing the land pursuant to a utility easement and failed to understand her exact boundary. In any event, the judge found in his finding of facts that "there was no hostility between the parties until 2020 when Mr. Rutherford encountered a contractor planning to construct a building in the disputed area." Judge Griffith's Order at 5. He also found that, "Defendants [Respondents] believed the use was permissive . . . ." Judge Griffith's Order at 15. He further found, "[t]he Plaintiff [Appellant] failed to confront Mr. Rutherford or any other parties to prevent them from entering or using the disputed area. She never paid or sought to pay any property taxes on the area. The Defendants used and maintained the property as would be expected for a buffer area." *Id.* The use Appellant, in concert with Respondents, was clearly not hostile.

As previously indicated, the party asserting adverse possession must show continuous, hostile, open, actual, notorious, and exclusive possession for a certain period of time. *Mullis v. Winchester*, 237 S.C. 487, 491, 118 S.E.2d 61, 63 (1961). In South Carolina, adverse possession may be established if the elements of the claim are shown to exist for at least ten years. S.C. Code Ann. 15-67-210 (Supp. 2008). To meet this burden of proof, the party asserting the claim must show by "clear and convincing" evidence he/she has met the requirements for adverse possession. *Davis v. Monteith*, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986). Appellant failed to meet this difficult burden.

The evidence showed, at the very least, that occupancy was shared with the owner and agents of the owner, that occupation by Appellant was never exclusive; that any use of the claimed area by Appellant was not continuous; it was not hostile, but rather for long periods at

Respondents' sufferance; and it was not actual as Appellant failed to assert control over the property.

Furthermore, Appellant failed to otherwise meet the elements of adverse possession by clear and convincing evidence sufficient to deprive Respondents of their property rights in the areas around their home that she seeks to take for her own. The trial court below agreed with this conclusion, and the Respondents were compensated for Appellant's trespass on their property.

II. THE TRIAL COURT WAS CORRECT IN FINDING THAT THE APPELLANT TRESPASSED ON THE RESPONDENTS' PROPERTY AND IN ENTERING JUDGMENT IN THEIR FAVOR IN THE AMOUNT OF $300.00.

A trespass is any interference with "one's right to the exclusive, peaceable possession of his property." *Ravan v. Greenville Canty.*, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 16 1993); *Babb v. Lee County Landfill SC*, LLC, 405 S.C. 129, 139, 409 S.E.2d 468 (2013). A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. *Babb v. Lee County Landfill SC, LLC,* 405 S.C. 129, 139.

The mere entry entitles the party in possession at least to nominal damages. *Snow v. Columbia*, 305 S.C. 544, 553, 409 S.E.2d 797 (Ct. App. 1991). A trespass is any interference with "one's right to the exclusive, peaceable possession of his property." *Ravan v. Greenville Canty.*, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 16 1993); *Babb v. Lee County Landfill SC*, LLC, 405 S.C. 129, 139. A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. *Id*. The mere entry entitles the party in possession at least to nominal damages. *Snow v. Columbia*, 305 S.C. 544, 553. "The trial judge has considerable discretion regarding the amount of damages, both actual or punitive." *Austin v. Specialty Transp. Servs., Inc.,* 358 S.C. 298, 310-311, 594 S.E.2d 867, 873 (Ct. App. 2004); *Santoro v. Schulthess*, 384 S.C. 250, 267, 681 S.E.2d 897 (Ct. App. 2009).

Respondents did not refuse Appellant permission until 2020, when they came to feel her actions had become hostile. After that time, entry on the property was a trespass. Presumably, Appellant take the view adverse possession of the land prevented her from being a trespasser.

The burden of proof is on the party asserting adverse possession as an affirmative defense. *See Clark v. Hargrave, 323 S.C. 84, 87, 473 S.E.2d 474, 476 (Ct. App. 1996).* "If a claimant asserts title by adverse possession and his or her occupancy is not under color of title, the claimant must show either fencing or other improvements covering most of the subject land or some other continuous use and exercise of dominion." *Frazier v. Smallseed*, 384 S.C. 56, 63, 682 S.E.2d 8, 12 (Ct. App. 2009); *Millvale Plantation, LLC v. Carrison Family L.P.*, 401 S.C. 166, 177; *see also* S.C. Code Ann. 15-67-250 (requiring a "substantial enclosure" for adverse possession when there is none here).

There is no claim of "color of title" alleged by Appellant in her Complaint. *See* Complaint. The facts showed Appellant did not establish fencing or other improvements covering most of the subject land or other continuous use and exercise of dominion. Respondents could not have disseized Appellant of land she was not entitled to possess. An invisible fence is just that, invisible, and may not contribute to the hostility element.

It is Respondents' position that Appellant failed to establish any of the elements of adverse possession. *See* Defendants' Written Closing Argument filed January 11, 2024 (arguments adopted herein by reference). The Court, however, focused its opinion on the fact that Appellant had failed to establish adverse possession on her failure to prove by clear and convincing evidence that her presence on the Disputed Area was hostile, notorious or exclusive. This brief is dedicated to support of the Court's opinion on those three elements.

CONCLUSION

Wherefore for the foregoing reasons Respondents request that this honorable Court affirm the decision of the trial Court below. This Court should affirm that Appellant has not adversely possessed the Disputed Area of Respondents' property, that Appellant trespassed on Respondents' property, and that the $300.00 award of damages is appropriate. The Court should furthermore award Respondents' attorneys fees and costs associated with having to defend the decision of the Court below.

Respectfully submitted,

/s/ Dionè Carroll

Dionè C. Carroll, Esq.
S.C. Bar 78185
ATTORNEY FOR RESPONDENTS
Carroll Law Offices, P.A.
107 Pendleton St. NW
Aiken. SC 29801
Phone: 803-514-2557
Fax: 866-954-0184
Email: dione@carroll-law-offices.com

January 23, 2025
Aiken, South Carolina