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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable Anderson M. Griffith, Master-in-Equity

Appellate Case No. 2024-000545

Melanie P. Hozey, Appellant,

v.

Alan L. Rutherfurd and Susan M. Rutherfurd, Respondents.

FINAL BRIEF OF APPELLANT

McCANTS & McCANTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR BY FINDING THAT THE APPELLANT'S POSSESSION AND USE OF THE DISPUTED AREA WAS NOT NOTORIOUS, HOSTILE AND EXCLUSIVE AND THUS CONCLUDING THAT SHE DID NOT ACQUIRE THE DISPUTED AREA BY ADVERSE POSSESSION?

2. DID THE TRIAL COURT ERR IN FINDING THAT THE APPELLANT TRESPASSED ON THE RESPONDENTS' PROPERTY AND BY ENTERING JUDGMENT IN THEIR FAVOR IN THE AMOUNT OF $300.00?

STATEMENT OF THE CASE

This matter presents unique issues involving the law of adverse possession in South Carolina. The Appellant, Melanie Hozey, resides next door to the Respondents, Alan and Susan Rutherfurd on Laurel Drive in Aiken, South Carolina. (R. pp. 20-21). She purchased her home there in May 2001 and the Rutherfurds purchased their home in June 2001. (Id).

Ms. Hozey alleges that since at least 2003 she has continuously possessed and used a defined area of land located within the boundaries of the Rutherfurds' property as described by their deed. (R. p. 21). This area of land is referred to as the "Disputed Area". She further asserts that her possession and use of the Disputed Area has been hostile, open, actual, notorious and exclusive, as the law in South Carolina defines such terms. As such, Ms. Hozey submits that she has acquired legal title to the Disputed Area by adverse possession, and is entitled to judgment in her favor as set forth in her Complaint for this case.

The Rutherfurds deny the Plaintiff's claims. (R. pp. 27-28). They contend that she has failed to establish any of the elements which must be proven under the law of this State to establish acquisition of title by adverse possession. (Id). They further contend that Ms. Hozey has trespassed upon their lands and they are entitled to recover actual and punitive damages from her in this case. (R. pp. 31-32).

A two-day trial of the merits of this case was held on November 1, 2023 and December 11, 2023 before the Honorable Anderson M. Griffith, Master-in-Equity for Aiken County. Following this trial Judge Griffith issued his order denying the relief Ms. Hozey seeks. He also issued judgment in favor of the Rutherfurds on their cause of action for trespass, and awarded them damages in the amount of $300.00. (R. pp. 1-16).

Ms. Hozey then filed a Notice of Appeal to this Court and now asks that it reverse Judge Griffith's decision in this case.

Arguments

I. THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANT'S POSSESSION AND USE OF THE DISPUTED AREA WAS NOT NOTORIOUS, HOSTILE AND EXCLUSIVE AND THUS CONCLUDING THAT SHE DID NOT ACQUIRE THE DISPUTED AREA BY ADVERSE POSSESSION.

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). Ms. Hozey respectfully submits that Judge Griffith's decision is based upon errors in the application of the law to the applied to the evidence presented by the parties, and should be reversed.

Ms. Hozey seeks to establish legal title to the Disputed Area of property involved in this case under the provisions of S.C. Code Ann. § 15-67-210 (1976), which provides:

> In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.
>
> S.C. Code Ann. § 15-67-210 (1976).

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, Ms. Hozey must prove the following elements in order to show that she has acquired title to the Disputed Area by adverse possession:

> 1. That her possession of the Disputed Area has been continuous for at least ten years prior to her commencement of this civil action;
>
> 2. Such possession has been hostile;
>
> 3. It has been open and notorious;
>
> 4. It has been actual; and
>
> 5. Exclusive.
>
> Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 489 S.E.2d 223 (S.C. App. 1997).

First, though, it is necessary to specifically define the Disputed Area in this matter. An aerial depiction of the area Ms. Hozey claims she has adversely possessed was introduced into evidence at the trial of this case. (Plaintiff's Exhibit No. 1). Ms. Hozey testified that she prepared this exhibit, with the assistance of her counsel, using a computer program available on the internet website maintained by Aiken County for purposes of locating and identifying real property in the

County. (R. p. 52, ln. 1 to p. 129, ln. 1; Plaintiff's Exhibit No. 1).

Based upon her personal observations and measurements of the Disputed Area, and using the program, Ms. Hozey marked in red lines on Plaintiff's Exhibit No. 1the area of property she has possessed and used on a continuous basis since at least 2003. (Id). That area is defined as beginning at a point of the northern end of the boundary of her property as defined by Ms. Hozey's deed, then extending west along Laurel Drive into the Rutherfurds' property, as defined by their deed, for a distance of 21.41 feet, then south for 195.9 feet basically parallel to a chain link fence located within the interior of the Rutherfurd property, then southeast for a distance of 51.14 feet and then finally north for a distance of 226 feet ending at a point on Laurel Drive. (Id).

Having reliably established the boundaries of the Disputed Area, Ms. Hozey now asks this Court to consider the evidence in this case as it regards the elements needed to establish title by adverse possession in South Carolina. As set forth below, Judge Griffith found that Ms. Hozey's possession and use of the Disputed Area was continuous, actual and open for at least ten years before this civil action was filed. He also found, however, that such possession and use was not , open use of the Disputed Area was continuous, open and actual for at least and, in fact, over ten years he found that such use was not hostile, notorious or exclusive.

Continuous

In his Order for this case Judge Griffith found that Ms. Hozey has satisfied the element of "continuous" for the requisite period of time. (R. p. 15). In that regard he wrote:

> Based on the [Ms. Hozey's] testimony she began using the portions of the disputed area in 2003 and continued the use until [Rutherfurds'] posted the property and made a report with the police. Even after this change, the camper remained in the disputed area. Ms. Hozey also introduced photographs and provided testimony of work she performed in the disputed area and the commercial workers she hired to work in that area. Based upon the nature of the disputed property, [Ms. Hozey's] use was continuous for at least ten years.
>
> (R. pp. 11-12; R. p. 15, Paragraph 3).

Actual

Judge Griffith also found that Ms. Hozey's use of the Disputed Area was "actual". In his Order he concluded:

> The disputed area is an open area and actual residency or creating permanent structures is not required. In the area of the parking pad, [Ms. Hozey's] activities of parking vehicles, campers, and boats were sufficient to place the [Rutherfurds], by ordinary diligence, to have known of the use by [Ms. Hozey].
>
> (R. p. 11).

Also, Judge Griffith noted that the remaining portion of the Disputed Area is a wooded area which slopes in a downward fashion from Laurel Drive. (Id). With respect to this part of the Disputed Area he wrote:

> [Ms. Hozey] and Mr. Rutherfurd both agree he saw her on the disputed property. Mr. Rutherfurd did not question her use of the property and said he believed he was being a good neighbor.
>
> (Id).

Open

Judge Griffith also found that Ms. Hozey's use of the Disputed Area was "open" but not "notorious". In the Conclusion portion of his Order he wrote:

> 4. While the use was open, including the use where the [Rutherfurds] knew or should have known of the use, [Ms. Hozey] never prevented or attempted to prevent the use of the disputed area by the [Rutherfurds] or the businesses they hired for performing work in the area. Under the clear and convincing standard, the court find the use was open, but not notorious.
>
> (R. p. 15, Paragraph 4).

Thus, Judge Griffith found that Ms. Hozey, by clear and convincing evidence, established the elements of "continuous", "actual" and "open" , but not "hostile", "notorious" and "exclusive". Ms. Hozey now turns to these latter elements and respectfully submits that Judge Griffith erred by not finding that Ms. Hozey proved them clearly and convincingly.

Hostility

As this Court is aware South Carolina is one of the minority jurisdictions requiring one have a "hostile intent" in order to allow them to claim that they have adversely possessed someone else's real property. As this Court has held,

> In this state, as elsewhere, adverse possession requires hostile possession, that is, possession with intention to dispossess the owner. Ouzts v. McKnight, 114 S.C. 303, 103 S.E. 561 (1920). The mere possession of land, however, 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). In South Carolina, unlike in most other jurisdictions, possession 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.
>
> Lusk v. Callaham,, 287 S.C. 459, 339 S.E.2d 156 (S.C. App. 1986).

Hostility, within the context of our law of adverse possession, may be difficult to prove by clear and convincing evidence. Some view this element as requiring a person to intend to "steal" their neighbor's land in order to obtain title by adverse possession. The common meaning

of "steal" is the taking of another person's property without permission or legal right, and without intending to return it. This plain meaning is not consistent with the manner in which our courts have defined the term "hostile" as an element of adverse possession.

Rather, the element of "hostility" requires that possession of property must be without subserviency to, or recognition of, the true owner's title, and must be hostile to it and the whole world. Greg v. Moore, 226 S.C. 366, 85 S.E.2d 279 (1954); All Saints Parish v. Protestant Episcopal Church, 358 S.C. 209, 595 S.E.2d 253 (Ct. App. 2004). A focus, therefore, is placed upon how one views or respects the legal title to property held by another.

At trial Ms. Hozey testified that she knew the Disputed Area was not within the legal boundaries of her property as established by her deed, and she knew it did not belong to her. (R. pp. 126, ln. 11 to p. 129, ln. 1). She had no mistaken belief in these regards. (Id). She stated further that it was her intent to acquire lawful title to that area, and to the exclusion of her neighbors' legal interest. (Id).

Further, the term "hostile" must be read together with the other required elements in order to establish title by adverse possession in South Carolina - together they are, in reality, a safeguard against allowing one neighbor to acquire title to their neighbor's property without the latter fully knowing, or having a clear opportunity to know, the former's true intentions. In this regard, Ms. Hozey has clearly met her burden of proof.

Notorious

As set forth above Judge Griffith found that Ms. Hozey's use of the Disputed Area has been "open" for the requisite period of time, but not "notorious". Returning to his Order in this

regard, he wrote:

> 4. While the use was open, including the use where the [Rutherfurds] knew or should have known of the use, [Ms. Hozey] never prevented or attempted to prevent the use of the disputed area by the [Rutherfurds] or the businesses they hired for performing work in the area. Under the clear and convincing standard, the court find the use was open, but not notorious.
>
> (R. p. 15, Paragraph 4).

The conclusion to be drawn from Judge Griffith's finding here is that Ms. Hozey's use and possession of the Disputed Area could not be "notorious" as a matter of law because she never undertook to exclude or bar the Rutherfurds from it. Ms. Hozey respectfully submits that there is no such requirement under South Carolina law, and Judge Griffith's conclusion is based upon an error of law.

To establish notorious possession in South Carolina it is not necessary that a property owner have actual knowledge of the acts of the person seeking to acquire title by adverse possession. Graniteville Co. v. Williams, 209 S.C. 112, 39 S.E.2d 202 (S.C. 1946). This element is satisfied if that person's acts are so open, visible and notorious a reasonable person should, in the exercise ordinary diligence, know of those acts. Id.

The elements of "open" and "notorious" should be read together given the facts of this case. Ms. Hozey contends that while the terms "open" bears upon how visible her acts within the Disputed Area have been, the term "notorious" should be used to define the nature of those acts - and perhaps more specifically, whether the nature of those acts are consistent with acts of an innocent neighbor or someone intending to establish legal ownership of real property over a requisite period of time.

As noted Judge Griffith found that Ms. Hozey's use and possession of the Disputed

area was "actual". What she did in exercising such use and possession is set forth below and demonstrates that she intended to seek legal ownership of the Disputed Area:

- Since she bought her home in 2001 Ms. Hozey regularly planted bushes and shrubbery within the Disputed Area, cleared the area and regularly maintained it. (R. p. 52, ln. 1 to p. 129, ln. 1; R. pp. 499-510);

- Between 2003 and the date of Judge Griffith's decision Ms. Hozey parked several different types of vehicles, including at least two campers, two trucks and a boat on a trailer on the northern part of the Disputed Area where it borders Laurel Drive. Additionally, visitors to the Hozey home would park in this area. (R. p. 52, ln. 1 to p. 129, ln. 1);.

- She installed a sprinkler irrigation system in the Disputed Area in 2003. (R. p. 96, ln. 20-23; Plaintiff's Exhibit No. 1);

- Ms. Hozey installed an invisible pet fence in 2005 in the area along the Rutherfurds' chain link fence, where her pets would freely roam. The flags marking this fence remained where they were placed for several months after installation of the fence and, in fact, some of those flags remain there today. (R. p. 96, ln. 21-25 to p. 100, ln. 20);

- In 2011, she hired and paid Heath Tractor and Backhoe Services to construct a parking pad in the Disputed Area for her vehicles, campers and boat and trailer using "crush and run" material which distinguishes the parking area from the surrounding ground. (R. p. 104, ln. 15 to p. 105, ln. 16);

- In June 2012 she hired and paid Cold Creek Nurseries, a local landscaping business, to clear underbrush in the Disputed Area. (Transcript of Trial, Part I, P. 9, L. 1 to P. 86, L. 1);

- In June 2013 she again paid Cold Creek to clear underbrush in the area. (R. p. 108, ln.11 to p. 109, ln. 3; Plaintiff's Exhibit No. 1);

- After a severe ice storm which struck Aiken in February 2014 Ms. Hozey hired a contractor to clear six large pine and hardwood trees which had fallen in the Disputed Area and also damaged the invisible fence, which was covered by her homeowner's insurance policy. At that time the invisible fence was also repaired. (R. p. 110, ln. 3 to p. 117, ln. 16);

- In 2015 she again hired and paid Cold Creek to clear underbrush from the Disputed Area. (R. p. 118, ln. 1-8; Plaintiff's Exhibit No. 1);

- In May and June of 2020 she again engaged and paid Cold Creek to perform clearing and debris removal in the area. (R. p. 118, ln. 1-8; Plaintiff's Exhibit No. 1);

- Ms. Hozey's children, Colby and Kaitlan, also used the Disputed Area to play with friends on a regular basis during the time they lived with her. (R. p. 182, ln. 20-23).

The nature of Ms. Hozey's acts in the Disputed Area are consistent with her efforts to exercise legal ownership of that land, to the exclusion of the Rutherfurds' interest in that property. In that regard, her acts were clearly "notorious" as defined by South Carolina law.

Exclusive

Judge Griffith ruled that Ms. Hozey's use of the Disputed Area has not been "exclusive". Ms. Hozey contends that she has maintained such possession for at least 18-years, far in excess of the requisite period of time of ten years. The Rutherfurds contend they also "possessed" the Disputed Area during the 18-year period, such that Ms. Hozey's possession may not be deemed to be exclusive.

The term "possession" has not been fully defined by our appellate courts. Ms. Hozey does not challenge the general rule in South Carolina 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. Butler v. Lindsey, 361 S.E.2d 621, 293 S.C. 466 (S.C. App. 1987).

However, and as noted above, South Carolina law does provide that the requirement of exclusive possession and continuity be examined within the context of the nature of the real property involved in an adverse possession case. Mullis, Id. In that case the Supreme Court also reviewed the actions of the party who sought to obtain title by adverse possession and noted that "occasional entries on land to cut a small amount of timber do not constitute a sufficiently

continuous use to establish adverse possession." Mullis, Id.

The evidence in this case shows that the Rutherfurds themselves never acted to "possess" or "occupy" the Disputed Area. Mr. Rutherfurd testified that he infrequently walked through the area and picked up fallen tree branches. (R. p. 368, ln. 8-11). Though disputed, there is evidence that he and his wife occasionally hired individuals to clear debris from their yard, and they picked up some amount of debris from across the chain link fence in the Disputed Area. (R. p. 368, ln. 12-20).

The Rutherfurds, however, never erected any structures in the Disputed Area, never stored or placed any personal property in the area, never used the area for any family or similar activities or did anything else which might reasonably be viewed as an actual possession or occupation of the land. The lack of such actions bears directly upon whether the Rutherfurds truly ever possessed or occupied any portion of the Disputed Area.

Further, the chain link fence mentioned above is another critical factor to consider when analyzing whether or not the Rutherfurds acted to actually possess or occupy the Disputed Area. A portion of this fence, of course, is situated between the Rutherfurds' house and pool and their boundary line with Ms. Hozey. (R. p. 136, ln. 9-22). There is no gate along this line of the fence, or other access, between the home and pool side of the fence and the Disputed Area. (R. p. 85, ln. 2-15; Plaintiff's Exhibit No. 1). This fact bears directly on whether the Rutherfurds could gain the necessary and regular access to the Disputed Are in order to possess, occupy or even use it in any manner.

In addition, the Rutherfurds never took any affirmative steps to challenge Ms. Hozey's occupation, possession and use of the Disputed Area until early 2021 when, upon the advice of their attorney, they posted a "No Trespassing" sign near the Disputed Area. (R. p. 98, ln. 1-9). At that time they also had the Aiken Department of Public Safety issue a trespass notice to Ms. Hozey. (R. p. 528). As stated above Ms. Hozey began using and occupying the Disputed Area as early as 2003, eighteen years before the Rutherfurds posted the No Trespassing sign. (R. p. 106, ln. 2-19).

Further, had the Rutherfurds truly believed that they "shared" the Disputed Area with Ms. Hozey, there would be no reason for them to post such a sign - that is, unless they came to realize that the Disputed Area was within the boundaries of their property as defined by their deed. Their realization, however, arose well after the time period within which Ms. Hozey had established title in her name by way of adverse possession.

One naturally has to question why a property owner would allow their neighbor to occupy and use land not belonging to them for such long period of time and to such an extent without taking affirmative steps to stop them. Also, if a property owner intended to "share" property with a neighbor one has to also question why no agreement was made between them in that regard over the course of eighteen years. It is undisputed in this case that the Rutherfurds did nothing to memorialize any agreement whereby they "shared" the Disputed Area with Ms. Hozey. In fact, the only evidence of such an arrangement is the Rutherfurds' testimony that they believed, unilaterally, that they shared the area with Ms. Hozey.

The simple answer to these questions is the fact that Rutherfurds did not know the

true location of the boundary lines of their property until a surveyor showed the lines to them in 2020. The following testimony and other evidence presented at trial supports this conclusion:

- A local surveyor, Benjamin Christensen, prepared a survey for Mrs. and Mr. Rutherfurd when they purchased their home in 2001. However, both of the Rutherfurds did not know where their boundary lines were located so they asked Mr. Christensen to visit their property and "flag" the lines, which he never did. (R. p. 302, ln. 21 to p. 303, ln. 25; R. p. 531);

- In 2012 the Rutherfurds built a water fountain on their property. Their former neighbor to the south, Ms. Jackson, complained about the workers building the fountain and contended that they were encroaching on her property. The Rutherfurds hired another surveyor, Curtis Coleman to physically mark only the southern line between their property and Ms. Jackson's property, which he did. After the southern boundary was marked by Mr. Coleman, the Rutherfurds discovered that Ms. Jackson's fence was partially located on their property, but they took no action to have it moved. (R. p. 311 ln. 18 to p. 314, ln. 1). (Emphasis added);

- Ms. Rutherfurd testified that as a result of their experience with Ms. Jackson in 2012, she and her husband knew how to find the true locations of the boundaries of their property using a surveyor. (R. p. 315, ln. 16 to p. 316, ln. 2);

- Despite knowing how to resolve any uncertainties, they did not obtain a survey of the Disputed Area until 2020. (R. p. 322);

- A problem arose again with Ms. Jackson in 2013 when she complained of workers clearing debris in the Disputed Area near the southern part of the property. These workers were hired by Ms. Hozey and not the Rutherfurds. The Rutherfurds testified again that they did not know the location of the boundary lines in that area (R. p. 312);

- Both Mr. and Mrs. Rutherfurd stated in their depositions, without qualification, that they did not know the location of the boundary line between their property and Ms. Hozey's property until Mr. Coleman surveyed their entire property in June 2020, and walked with them along their boundaries and showed them where they are located. Mr. Coleman's survey was introduced into evidence as part of this case. (R. p. 322; R. p. 555) (Emphasis added);

- This fact is supported by Exhibits 10, 11 and 12, which are letters written by the Rutherfurds' attorneys confirming that they did not know the actual boundaries of their property until Mr. Coleman surveyed their property in June 2020, and showed them where their boundaries are located. (R. p. 522-527);

- At trial, however, they did attempt to change their deposition testimony by stating

that they "thought" they knew approximately where all their boundary lines were located. (R. p. 360, ln. 20 to p. 368, ln. 7);

- Mrs. Rutherfurd clearly testified that until Mr. Coleman prepared his survey in 2020, and showed her where her boundary lines are located, she did not know who actually owned the chain link fence which borders the Disputed Area. (R. p. 333, ln. 1-6);

- Before Mr. Coleman prepared his survey in 2020, and walked the boundary lines with them, neither of the Rutherfurds confronted Ms. Hozey with respect to her performing work in the Disputed Area, even though Judge Griffith found that they had actual notice of that work. Their testimony indicates that they did not do so because they did not know where the boundary line between their properties was located. (R. p. 342, ln. 15 to p. 343, ln. 1);

- Mr. Rutherfurd testified that he saw Ms. Hozey's vehicles and campers parked in the Disputed Area as early as 2005, but never asked her to move them because he did not know where the boundary line in that area was located. (R. 343, ln. 2-16);

- Mrs. Rutherfurd previously worked as a real estate agent and told the Court that she counseled her clients to be aware of the locations of their boundary lines before they purchased property. She agreed that it is important for every property owner to know where their property lines are actually located, and everyone should watch over and protect their property. (R. p. 306, ln. 12-25);

- Both of the Rutherfurds stated that nothing prevented them from walking through the area of their property to ensure that no one was encroaching upon it.(Transcript of Trial, Part II, P. 55, L. 18 to P. 107, L. 12; P. 113, L. 3 to P. 151, L. 5);

- At trial Mr. Rutherfurd was asked, using Plaintiff's Exhibit "A", to show the Court where he thought the boundary line was located between his and his wife's property and Ms. Hozey's property. He used his finger to draw a line which begins at the top of the Exhibit at the decimal point in the number "21.41" , extends down through the Disputed Area and ends at the green circle located on their southern boundary line. Ms. Hozey contends that this depiction of the line is not the boundary line between the Rutherfurd and Hozey properties as shown by Mr. Coleman's survey. (R. p. 363, ln. 5 to 366, ln. 25; Plaintiff's Exhibit No. 1);

- Both of the Rutherfurds agreed that it is difficult to share ownership of property when one doesn't know if they own the property. (R. p. 329).

Ms. Hozey submits that the only reasonable conclusion to be drawn from these facts is that the Rutherfurds could not have possibly shared the Disputed Area with Ms. Hozey because

they did not determine the true location of their boundary lines until over eighteen years after they purchased their property next door to Ms. Hozey - the length of time between someone's birth and when they reach the age of majority.

Thus, the evidence presented at the trial of this case demonstrates that Ms. Hozey has reliably proven, by clear and convincing evidence, the elements necessary to establish that she has acquired title to the Disputed Area by adverse possession. For this reason the decision and judgment of Judge Griffith should be reversed, and judgment in favor of Ms. Hozey should be entered with respect to the relief she requests in her Complaint.

II. THE TRIAL COURT ERRED IN FINDING THAT MS. HOZEY TRESPASSED UPON THE RUTHERFURD'S PROPERTY AND BY GRANTING JUDGMENT IN THEIR FAVOR.

The Rutherfurds filed three counterclaims in this case: one seeking damages from Ms. Hozey for allegedly trespassing on their property, a second seeking injunctive relief and a third seeking damages for slander of title. (Defendants' Answer and Counterclaims; Plaintiff's Reply to Counterclaims). At trial they withdrew their claim for slander of title. Judge Griffith found in favor of the Rutherfurds with respect to their counterclaim for trespassing and awarded them damages in the amount of $300.00.

The counterclaims for trespass and injunctive relief brought by the Rutherfurds raise significant issues bearing directly on the merits of their defenses as to Ms. Hozey's claims and causes of action for adverse possession in this case.[1] A cause of action for trespassing requires proof of the following elements:

1. Legal possession by the owner of the property;

[1] The Rutherfurds' request for injunctive relief is cast primarily in the form of asking that Ms. Hozey be enjoined from trespassing upon their land.

2. A voluntary entry on the property by the defendant; and

3. Entry by the defendant without the owner's permission.

Ralph King Anderson, Jr. S.C. Requests to Charge, Civil, § 4-41 (2009).

As outlined above, a major theme of the Rutherfurds' testimony at trial was to the effect that they were well aware of Ms. Hozey's possession and use of the Disputed Area, but permitted her to do so. In that regard, they attempted to be "good neighbors", which is certainly commendable. However, such permission negates any claim they present for damages due to Ms. Hozey's alleged trespass upon their land.

Likewise, the fact that they assert a claim for trespassing necessarily means that the Rutherfurds, at all times, maintained exclusive possession of all of their property, including the Disputed Area, and Ms. Hozey had no right to enter upon any portion of it. This position is wholly inconsistent with their contention that they shared possession and occupancy of the Disputed Area with her.

Rule 8(a), SCRCP, allows a party in a civil action to plead for relief in the alternative. However, once a civil action proceeds to trial a party runs a risk of introducing evidence as to one cause of action which negates another cause of action, or nullifies both.

The Rutherfurds simply cannot ask the Court in one instance to accept their position that Ms. Hozey could not have adversely possessed a portion of their land because she was allowed to possess and use that land with their consent, and in another instance ask the Court to award damages against her because they contend she was not allowed to go upon that land.

Based on their testimony Ms. Hozey respectfully contends that the Rutherfurds counterclaims must fail as a matter of law. At the same time, the Court has to consider their testimony as to those causes of action when considering the merits of their defenses as to Ms.

Hozey's cause of action for adverse possession.

CONCLUSION

For the reasons stated above the Appellant respectfully submits that Judge Griffith's Order and decision for this matter should be reversed, and judgment should be entered in favor of the Appellant.

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