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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

Melissa J. McDaniel,)
John F. McDaniel, III, Tara M. Dickerson) CIVIL ACTION NO.: 2014-CP-32-00461
and Brandi M. Augustine,)

Plaintiffs,)

vs.)

ORDER

Jolene J. Marchant and
Larry C. Marchant, Sr.,)

Defendants.)

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SC Court of Appeals

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

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FILED

This matter came before me pursuant to an Order of Reference signed by The Honorable William P. Keesley dated March 18, 2015 and filed March 27, 2015. Plaintiffs are represented by James Randall Davis and the Defendants are represented by Ronald R. Hall.

PROCEDURAL BACKGROUND

The Summons and Complaint in this matter were filed on February 6, 2014 and was served on the Defendants by their attorney, Ronald R. Hall, accepting service on February 11, 2014. The causes of action in the Complaint are a Declaratory Judgment requesting an easement by prescription in favor of the Plaintiffs on the Defendants' property as well as a second cause of action for Denial of Plaintiffs' Property Rights by the Defendants. On March 23, 2014, Defendants answered and counterclaimed which included a general denial and other affirmative defenses and a counterclaim by the Defendants against the Plaintiffs for denial of Defendants' lawful right to peaceful and quiet enjoyment of their property. A Reply to the Answer and Counterclaim of Defendants was filed by the Plaintiffs on March 25, 2014 which included certain affirmative defenses by the Plaintiffs as to Defendants' Counterclaim. A hearing was held in this matter on March 1, 2016, attended by the

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Plaintiff Melissa J. McDaniel, John F. McDaniel, Jr., Defendants, and various witnesses for the Plaintiffs.

FINDINGS OF FACT

I FIND AS FOLLOWS:

1. Plaintiffs own the property located at 1700 Riviera Drive, West Columbia, South Carolina and Defendants own the property located at 1706 Riviera Drive, West Columbia, South Carolina. These properties are located in the Saluda Hills area of West Columbia, South Carolina.
2. Plaintiffs' and Defendants' properties are residential lots with their primary residence located on each lot. Their lots are contiguous to each other.
3. Plaintiffs' property was originally owned by their grandfather, J. Fulton McDaniel, and was purchased by him in 1966. After the death of J. Fulton McDaniel in 1991, Plaintiffs' property was conveyed to John F. McDaniel, Jr. in 1993. Thereafter, the property was conveyed to John F. McDaniel, Jr.'s wife, Joann Odom McDaniel in 1998. Thereafter, the property was conveyed to the Plaintiffs in this action by deed in 2011. This property has been in the McDaniel family for at least 50 years.
4. Defendants' property was owned by Sara B. Crumpton and she conveyed it to Carol L. Arehart and Gail D. Arehart in 1976. Thereafter, Carol L. Arehart conveyed his interest in the property to his wife, Gail D. Arehart, by deed in 1979. Thereafter, Gail D. Arehart conveyed the Defendants property to Shoi Yean Hwang and Mary S. P. Hwang by deed in 1981. Finally, Shoi Yean Hwang and Mary S. P. Hwang conveyed the property to the Defendants in 2005.
5. Plaintiffs' Exhibit "2" is a photograph of Plaintiffs' primary residence lot with their home located on it, showing a gravel drive area on the Eastern side of the Plaintiffs' property (Defendants' home is next door on the eastern side).
6. The gravel drive area shown on Plaintiffs' Exhibit "2" commences on Riviera Drive (which Plaintiffs' and Defendants' homes front) and runs South to North on the Eastern side of the Plaintiffs' property where it terminates in the rear of the Plaintiffs' property.
7. The gravel drive area referenced in Finding 5, has been used for the following purposes: (a) J. Fulton McDaniel, Plaintiffs' grandfather, from 1967 through 1991 to access the rear of the property over this gravel drive area to get to his horses and bird dogs which were his hobbies; (b) J. Fulton McDaniel's use of the gravel drive area extended to using the gravel drive area as a parking area for hunting jeep, trucks, and horse trailers related to his hobbies; (c) after the death of J. Fulton McDaniel's wife, Ted McDaniel, brother of of J. Fulton McDaniel, stayed with his brother for some years and used the gravel drive area

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as a parking area for motor home; (d) John F. McDaniel, Jr. used the gravel drive area when he lived with his father, J. Fulton McDaniel, as a means of access over the family property to get to the Saluda River; (e) John F. McDaniel, Jr. used the same gravel drive area after he moved from the family property in 1982 to park his trucks and trailers related to his roofing business and this activity continued until 1992; (f) in 1992, John F. McDaniel moved back to the family residence and has used the driveway to access the back of this property for vehicular and pedestrian purposes to get access to the shop which he had built in the rear of the residence in 1992 for his rental maintenance business; (g) Melissa McDaniel, one of the Plaintiffs, testified she and her siblings have used the gravel drive area as a convenience access to the family residence which she and her brothers and sisters were in high school; and (h) Patrick L. West, Marvin E. Martin, Jr., and Jimmy R. Dillon, either friend and/or co-worker or neighbor, testified, collectively, as to the McDaniel family's use of the gravel drive area since the mid 1970's for vehicular traffic.

8. The gravel portion of the drive area has been in existence as early as J. Fulton McDaniel's use of the driveway area where gravel, rock, mortar, bricks, etc. were placed in the driveway area and the driveway area has been renourished with the gravel, rocks, mortar, bricks, etc. over the years, including a major renourishment in 1992.
9. Plaintiffs' Exhibit "5", a survey by Bob Collingwood, a Registered Land Surveyor, shows that portion of the gravel drive area which is located on the Defendants' property. This area is approximately four and two tenths (4.2') feet by ninety (90') feet (299 sq.ft. having 0.0068 acre). Said survey is dated November 6, 2012.
10. Plaintiffs' and their predecessors-in-title since 1967, have had continuous and uninterrupted use of the gravel drive area, including that which is shown on Plaintiffs' Exhibit "5", until Defendants placed wooden and metal stakes and a fence in the driveway area which was in Summer of 2013.
11. No one in the chain-of-title of Defendants' property, from 1967 until 2005, objected to Plaintiffs and their predecessors-in-title using the area shown on Plaintiffs' Exhibit "5".
12. Defendants never took any affirmative steps to prevent the use of the area shown on Plaintiffs' Exhibit "5" until they placed the wooden and/or metal stakes and the fence in the gravel drive area in Summer of 2013.
13. Defendants have placed a fence which is located in the area shown on Plaintiffs' Exhibit "5" and it is impeding the Plaintiffs' use of the gravel drive area, including that which was within Plaintiffs' Exhibit "5".
14. Defendants knew of the gravel drive area on the Plaintiffs' property prior to their purchase and also knew at the time of their purchase in 2005 that an old fence had been established showing the property line of the Defendants' property and the Plaintiffs' property (property line crossed through Exhibit "5").

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LAW

An easement is a right given to a person to use the land of another for a specific purpose. Murrells Inlet Corp. v. Ward, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App. 2008). An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription. Frierson v. Watson, 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct. App. 2006). "A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." Boyd v. BellSouth Tel. Tel. Co., 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). To establish a prescriptive easement, the party asserting the right must show: (1) continued and uninterrupted use of the right for twenty years; (2) the identity of the thing enjoyed; and (3) use which is either adverse or under a claim of right. Horry Cnty. v. Lavchur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993). "To establish an easement by prescription, one need only establish either a justifiable claim of right *or* adverse and hostile use." Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005) (emphasis added). There is no requirement of exclusivity of use to establish a prescriptive easement. Id. at 317, 609 S.E.2d at 600. The party claiming a prescriptive easement bears the burden of proving all of the elements by clear and convincing evidence. Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163; Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997).

"[I]n 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, 363 S.C. at 318, 609 S.E.2d at 601. "When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." Boyd, 369 S.C. at 419, 633 S.E.2d at 141.

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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 the circumstances surrounding his use." Jones, 363 S.C. at 318, 609 S.E.2d at 601.

"The law granting a prescriptive easement under claim of right does not mandate a party to believe that he holds actual title or that he intends to acquire it." Hartley, 355 S.C. at 151, 584 S.E.2d at 389.

"[a] party may 'tack' the period of use of prior owners in order to satisfy the 20-year requirement." Morrow, 328 S.C. at 527, 492 S.E.2d at 423 (citing 25 Am. Jur. 2d Easements and Licenses § 70 (1996)). "[T]he time of possession may be tacked not only by ancestors and heirs, but also between parties in privity in order to establish the 20-year period." Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 430, 489 S.E.2d 223, 226 (Ct. App. 1997).

"When the claimant has established that the use was open, notorious, continuous, and ~~uninterrupted, the use will be presumed to have been adverse.~~" Boyd, 369 S.C. at 419, 633 S.E.2d at 141. Then, the burden shifts to the title owner of the servient tenement (Kelley) to rebut the presumption that the use was adverse. Sanitary & Aseptic Package Co. v. Shealy, 205 S.C. 198, 203, 31 S.E.2d 253, 255 (1944). An "intent to claim adversely may be inferred from the acts and conduct" of the dominant users. Matthews, 365 S.C. at 250 n.10, 616 S.E.2d at 440 n.10 (quoting 25 Am. Jur. 2d Easements & Licenses § 57, at 552 (2004)).

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LAW ANALYSIS

The use of the gravel drive area, including that which is shown on Plaintiffs' Exhibit 5, was continuous. The use of the gravel drive area must be of a reasonable frequency as determined from the nature and needs of the Plaintiffs and their predecessors-in-title. The gravel drive area has been used for various needs by the parties and reasonable frequency has been shown for each of these needs. This is evidenced by the Court's findings in paragraph 7.

The prescriptive easement use has been uninterrupted. The prescriptive easement area has been used by the McDaniel family since 1967 up until 2013 when a wooden and/or metal stakes and a fence was installed in the gravel drive area. There have been no overt acts such as a physical barrier or verbal threats that gave the impression that Defendants, or any predecessor-in-title, was opposing the use. The testimony is that no adjoining neighbor complained about the use of the this gravel drive area by the Plaintiffs over the years claimed and the present Defendants did not take any overt action or verbal impressions that they were opposing use until eight (8) years after they were conveyed their property in 2005. The Defendants also had knowledge of where their property line was based on the testimony of Mrs. Marchant that she walked the property line at the time of purchase and she also knew the old fence ran the property line from years back.

The Plaintiffs have demonstrated that they can claim the prescriptive easement by claim of right in that the Plaintiffs and their predecessors-in-title have used the gravel drive area, including that which is shown on Plaintiffs' Exhibit "5", since 1967. Under the claim of right theory, they do not have to prove they own the title or they intended to acquire it. Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003). Plaintiffs and their predecessors-in-title have used the access and have shown that they have maintained the access over an approximate fifty (50) year period.

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The use by the Plaintiffs has been open, notorious, continuous and uninterrupted over twenty (20) years. Once that is shown, the burden to rebut the presumption of being held adversely shifts to the Defendants when it can be shown that the use has continued to present date. In this case, that has been shown or at least until the impedements were installed and evidence is that the Plaintiffs, through their attorney, wrote the Defendants regarding removing the impedements and a lawsuit was shortly filed thereafter.

Tacking is allowed between ancestors and/or those in privity, which we have in this case, and Plaintiffs have satisfied the Court that the Plaintiffs, as well as their predecessors-in-title, use was continuous and uninterrupted, either under claim of right or adverse use, over that fifty (50) year period. No one has stopped their use of this area on Plaintiffs' Exhibit "5" until the impedements that were installed in the Summer of 2013. Defendants could not present an testimony as to any action by them to interrupt the prescriptive easement period until the impedements were installed in the Summer of 2013.

The Plaintiffs have proven that the requested prescriptive easement has been continuous and uninterrupted for more than twenty (20) years and can claim it under the theory of claim of right or adverse use by parties who have a right to tack time periods of ownership by clear and convincing evidence.

NOW, THEREFORE, based on the evidence before this Court through the testimony and exhibits, the Court finds and Orders that the Plaintiffs are granted a prescriptive easement appurtenant to Plaintiffs' property under the theory of claim of right as well as adverse use for more than twenty (20) years for the area shown on Plaintiffs' Exhibit "5", identified as a four and two tenths (4.2') feet by ninety (90') feet (299 sq.ft. having 0.0068 acre). This prescriptive easement runs with the Plaintiffs' property and is binding on the Defendants, their heirs,

successors and assigns. The Defendants are ordered to remove, within ten (10) days from the date of this Order, the fence area or any other impediment in this area referred to above. The plat showing the prescriptive easement area is identified herein is attached as Exhibit "A" to this Order.

IT IS ALSO ORDERED that a copy of this Order shall be filed in the Lexington County Register of Deeds Office indexed under Defendants as Grantors and Plaintiffs as Grantees.

IT IS SO ORDERED.

Date August 12, 2016

Lexington, South Carolina

C. Lee H. Dantz
Presiding Judge for the Special Referee
Eleventh Judicial Circuit

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October 18, 2016

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SC Court of Appeals


Larry C. Marchant, Esquire
3020 Devine Street, Suite 2-C
Columbia, South Carolina 29205

Re: Melissa J. McDaniel, John F. McDaniel, III, Tara M. Dickerson and Brandi M. Augustine v.
Jolene J. Marchant and Larry C. Marchant, Sr.
Civil Action No.: 2014-CP-32-00461
Our File No.: 29207

Dear Mr. Marchant:

Enclosed, please find a filed copy of the Form 4 Order and written Order regarding the Motion to Reconsider in regards to the above referenced matter. Please do not hesitate to contact me if you have any questions.

Sincerely,


Nicole T. Price
Paralegal

Enclosures

cc: John M. McDaniel
(via e-mail)