

STATE OF SOUTH CAROLINA)
)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP16-0429

WAYNE DIXON,)
)
PLAINTIFF,)

VS.)
)
BRADY W. HILL,)
)
DEFENDANT.)

ORDER

2016 DEC 29 PM 3:40
SCOTT B. SUGGS
CLERK OF COURT/R.D.
DARLINGTON COUNTY, S.C.

FILED

Date of Hearing: December 8, 2016.
Special Referee: John M. Milling
Plaintiff's Attorney: John W. Bledsoe, III
Defendant's Attorney: Carl A. Saleeby
Court Reporter: Crystall Knappenberger

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SC Court of Appeals

This matter was referred to the undersigned by a Consent Order signed by the Honorable Roger E. Henderson dated May 10, 2016, and filed in the Office of the Clerk of Court for Darlington County on May 23, 2016. An action has been filed by the Plaintiff asserting that he has a prescriptive easement across the property of the Defendant providing ingress to and egress from his own property. The Defendant has filed an Answer denying that the Plaintiff has a prescriptive easement across his property and has filed a Counterclaim for trespass and has also filed a second Counterclaim seeking attorney's fees and costs. The Plaintiff has filed his Reply to the Defendant's Counterclaim denying the same. The Plaintiff in this matter is represented by John W. Bledsoe, III, Esquire. The Defendant is represented by Carl A. Saleeby, Esquire, although at the time the Defendant filed his Answer and Counterclaim, he did so *pro se*. This matter was heard on Thursday, December 8, 2016.

TESTIMONY

Testifying in connection with the Plaintiff's case were the Plaintiff, Wayne Dixon, as well as Moses Graham and James Vernon Brown. Plaintiff's Exhibit One (1) and Exhibit Two (2)

are the deed dated June 21, 1988, by which he obtained his 2.38 acre tract of land from Denise J. Griggs, as well as the plat that had been attached to said deed showing that it was bounded on the Northwest and Northeast by other property of Denise J. Griggs, on the Southwest by property of Allen G. Weatherford, and on the Southeast by property, now or formerly, of Elberta Brown. This survey is dated June 3, 1988, and was prepared by J. E. Tucker, Jr., Registered Surveyor. The deed and plat are recorded in the Office of the Clerk of Court for Darlington County in Book 952 at pages 742-725. This plat does not show the road on which Mr. Dixon asserts he has a prescriptive easement, but makes reference that ingress and egress to the property was to be provided by Ms. Griggs to Public Road. Mr. Dixon testified that the road going across the property now belonging to Mr. Hill was in existence at the time he bought his tract in 1988. He said that this road crossed over the property now belonging to Mr. Hill and came on to his property along the property line that sets his property apart from that of James Vernon Brown. Mr. Dixon testified that he did not seek any other access to his property, as it was understood that this road provided the access. Mr. Dixon further testified that after buying the property, he located a mobile home on it, as he intended to live there. He testified that this road is the only way into the property, and that the mobile home was moved down the dirt road and set up on his property. That mobile home has now been demolished by vandals, but he plans to locate another mobile home on the property. He also testified that he has utilized standard sized vehicles, a golf cart and a four (4) - wheeler to traverse this road into and out of his property. He testified that he uses this road a couple times of week, and to start with, he used this road about every day to come to and go from his property. He also testified that he had never asked neither Mr. Hill, nor his predecessor in title or anyone else about permission to use the dirt road, as he and others had always treated it as the access by which individuals accessed his property. He testified that because of the vandalism that he



put a cable across the road about ten (10) years ago, but he would simply take the cable down when he was going to access his property. He testified that currently the existing road has various items of Mr. Hill located on it.

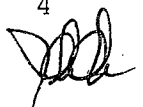
Also, testifying on behalf of Mr. Dixon was Mr. Moses Graham. Mr. Graham lives at the end of Flat Nose Road, which is the Public Road from which the dirt road leads going to Mr. Dixon's property. Mr. Graham testified that he is eighty-eight (88) years old and has lived on his one hundred twenty-six (126) tract of land since 1940. He testified that the dirt road going to the property of Mr. Dixon has been there some forty (40) to fifty (50) years. Mr. Graham testified that Mr. Buddy Sims had previously lived back in the area of Mr. Dixon's property. Mr. Sims utilized this road in order to obtain access to his house. Mr. Sims lived back there during the 1950's and 1960's. Mr. Graham also testified that an Isaiah McIver used this dirt road to get to his house. He also testified that he has seen Mr. Dixon using this same road to access his own property, and that Mr. Dixon uses the road on a regular basis.

Also testifying on behalf of Mr. Dixon was Mr. James Vernon Brown. Mr. Brown testified that he owns the property next to that of Mr. Dixon. He testified that he has lived in this area for seventy-two (72) years, and that he knows that the road has been there at least sixty-five (65) years. He testified that he would use that road to go to the home of Buddy Sims. He further testified that the house of Mr. Sims was on the property that is now the Dixon property, and that this dirt road leading from Flat Nose Road to the Dixon property has been there since the early 1950's. He testified that he has used this dirt road to reach the property owned by Mr. Dixon, as well as his own property adjacent to Mr. Dixon's property. He states that this dirt road was a Public Road and that there is no other road into Mr. Dixon's property. He testified that he has never asked anyone for permission to use that road, as it has always been the road to access the property.

On cross-examination, Mr. Brown acknowledged the existence of a ditch, which is shown on Defendant's Exhibit Number One (1), but testified that the ditch stopped short of the dirt road used to access Mr. Dixon's property.

Appearing on behalf of the Defendant, Mr. Hill, was Jack McIver Weatherford, whom the parties agreed to call out of order. Mr. Weatherford testified that he owned the 20.30 acres shown on Defendant's Exhibit Number One (1), prior to it being owned by the Defendant. Mr. Weatherford testified that he purchased this property from his own father in 1991. He testified that he was born on this land and that his grandfather had owned it before it was owned by his father and ultimately owned by him. Mr. Weatherford testified that he had not met Mr. Dixon until the day before this case was presented to the undersigned, and that he had never had any prior contact with him. Mr. Weatherford testified that this tract of land, where Mr. Dixon seeks to establish a prescriptive easement, was a sandy tract and was known as "Little Sahara". He testified that the tract had some trails on it and he did not know if a car could go down them. He further testified that later in his ownership, this tract was planted with trees and fire breaks were put in. He does not specifically remember the road testified to by the other witnesses and testified that he never saw anyone cross his property. He testified that he was more familiar with property on the other side of Flat Nose Road. He testified that he left the area in 1959 but would come back one or two times a year. He testified that he hoped he would notice if there was any activity on his property.

Mr. Hill testified that there is a ditch that follows along the property line between himself and Mr. Dixon. He testified that this ditch continues up to a point about five (5') feet past the Dixon corner. He testified that the ditch did not exist on the property line with Mr. Brown and it was flat in that area. Mr. Hill testified that he is in the construction business, and he acquired this property with the idea that he could sell dirt off of this land and construct a



pond where the dirt was removed. He testified that he has a mining license and that because of that, he has to restrict the access to his land. He testified that he has built a berm along Flat Nose Road and down into the area where Mr. Dixon claims his easement and down the back side. He testified that there was a cable along the road and that it appeared it had been there for some period of time, as it had grown into the tree, and that there was a four (4) – wheeler trail that went around where the cable was located. Mr. Hill testified that he was not aware that Mr. Dixon was using this road at the time he purchased this property. Mr. Hill testified that he spoke with Mr. Dixon at the time Mr. Dixon was trying to cut the cable and that Mr. Dixon, at that time, asked for permission to use the road. Mr. Hill testified that he told Mr. Dixon that he would have to check with his wife and that they ultimately decided “no”. Mr. Hill does acknowledge that his plat, Defendant’s Exhibit Number One (1), shows an existing dirt road going across his property, leading back to the property of James Vernon Brown.

In reply testimony, Mr. Dixon testified that it was not an abandoned four (4)- wheeler road that he was using and denied that he asked permission of Mr. Hill to use the road. Mr. Dixon testified that he put the cable up when his mobile home was vandalized and that the cable had been up for ten (10) to twelve (12) years, and that he would unlock the cable as he went back and forth to his own property.

LAW

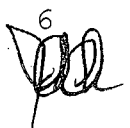
To establish a prescriptive easement, the party asserting the right must show:

(1) Continued and uninterrupted use of the right for twenty (20) years; (2) the identity of the thing enjoyed and (3) use which is either adverse or under claim of right. To establish an easement by prescription, one need only establish either a justifiable claim of right or adverse and hostile use. 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. A party's belief that he had a right-of-way may be sufficient for a prescriptive easement, pursuant to a claim of right. When the claimant has established that the use was open, notorious, continuous and uninterrupted, the use will be presumed to have been adverse. At that point the burden shifts to the titled owner of the servient tenement to rebut the presumption that the use was adverse. Kelley v. Snyder and Snyder, 396 S.C. 564, 722 S.E.2d 813 (Ct. App. 2012). Use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since user as of right, as distinguished from permissive user, is lacking. If permissive in its inception, such permissive character will continue of the same nature, and no adverse user can arise, until there is a distinct and positive assertion of a right hostile to the owner, and brought home to him. Paine Gayle Properties, LLC vs. CSX Transportation, Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012). A party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence. Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163 (S.C. 2015)

DISCUSSION

The Plaintiff, Mr. Dixon, acquired his 2.38 acre tract of land in 1988. The Defendant, Mr. Hill, purchased his property in 2014. The Plaintiff testified that for the roughly twenty-six (26) year period from the time he purchased his property until the Defendant acquired his property in 2014, that he utilized the road going across the Defendant's property to obtain access to his own property. He testified that he was deprived of the use of the road by the Defendant in 2014, after the Defendant placed a gate across the road and, thus, stopped him from having access to his property by this road. The Plaintiff's testimony established that he currently obtains access to his property by the use of a golf cart by going across other

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individuals' land. Plaintiff's Exhibits Three (3), Four (4), Five (5), Six (6) and Seven (7) are photographs of the road and where the gate is located. A review of those photographs clearly shows that the gate placed by the Defendant has been placed across the road that has been used by the Plaintiff to access his property. The existence of this road is not only established by the fact that it has been gated by the Defendant, but its existence is also shown by reference to Defendant's Exhibit One (1), the plat that he had prepared by Ryan F. Magnus on which it is designated as an existing road. This plat is incorporated into the deed by which the Defendant purchased this property.

The Plaintiff's testimony is that the road was in existence at the time he purchased his property in 1988. The witnesses for the Plaintiff, Mr. Moses Graham and Mr. James Vernon Brown, testified that they had lived in the area for over seventy (70) years. Mr. Graham testified that the road had been leading to the Plaintiff's property had been in existence for some forty (40) years to fifty (50) years, which would have indicated that the road would have been in existence since the 1960's. Mr. Brown's testimony was that it had existed since the early 1950's. Each of these witnesses testified that this was the dirt road utilized by Mr. Buddy Sims, who lived on the property now owned by the Plaintiff to access his own property, and that it is the road that they used when they would visit Mr. Sims. Mr. Moses Graham also testified that this was the road which had been utilized to reach the property of Mr. Isaiah McIver, who also lived off of Flat Nose Road. Mr. Brown also testified that he utilized this road as a way to reach property that he owned that is adjacent to the property of the Plaintiff. Mr. Brown also testified that in his opinion this was, in essence, a Public Road and there was no other road into Mr. Dixon's property. While there is testimony from Mr. Jack Weatherford, who owned the property prior to selling it to the Defendant, Mr. Dixon, that he was not aware of the existence of this road during the time that he grew up in the area or from



the time he purchased the property from his father in 1991, the testimony also reveals that Mr. Weatherford moved from this area in 1959 and after he moved, he only visited the property once or twice a year. He further testified that he was more familiar with the property on the opposite side of Flat Nose Road from the property that he sold to Mr. Hill. Mr. Weatherford also testified that no one had ever approached him seeking any permission to use this road shown on the plat that was utilized in connection with his sale of the land to Mr. Hill.

It is clear from the testimony that this road has been in existence for at least forty (40) to fifty (50) years and has been utilized by the Plaintiff as a way to obtain ingress to and egress from his 2.38 acre tract for a period of at least twenty-six (26) years. Mr. Dixon's use was continued and uninterrupted until the gate was erected across this road by Mr. Hill.

Accordingly, I find that the Plaintiff has established, by clear and convincing evidence, the first element needed to establish a prescriptive easement, and that is the continued and uninterrupted use of the road for twenty (20) years.

The testimony from the Plaintiff is to the effect that the road that he utilized to obtain ingress to and egress from his property lay in the general location of the existing road shown on Defendant's Exhibit Number One (1). His testimony, however, was to the effect that where this road came onto his property was more in the area of his common boundary with Mr. Brown. Mr. Brown's testimony was essentially to that same effect. However, both Mr. Dixon, as well as Mr. Brown, acknowledge that there was a ditch along the boundary line between Mr. Dixon's property and Mr. Hill's property. That ditch is shown on Plaintiff's Exhibit Number Two (2), which is his plat, as well as being shown on Defendant's Exhibit Number One (1), being the plat of Mr. Hill. The testimony of Mr. Hill acknowledges that where the road comes onto the land of Mr. Brown that the ditch does not exist and that the



land is flat. While the Defendant had photographs of the ditch, they were not oriented with respect to the plat and did not show where the irons were located and at what point along his common boundary line with Mr. Dixon these pictures were taken. The Plaintiff's pictures, as well as the testimony in this matter, show that this road would have been a one-lane road. There was no testimony that it was wide enough for two (2) cars to pass each other going in opposite directions. While the Google Earth map photographs introduced by the Defendant as his Exhibit Number Two (2) do not clearly show a road going across the Defendant's property back to the Plaintiff's property, these maps show that there is a great deal of vegetation in this area that would obscure the old road from being shown. However, were it not in existence, it would not be shown on the plat prepared for Mr. Hill, and introduced as his Exhibit Number One (1). I find that, based upon the testimony as to the character of the road in existence, and the use that has been made of it, that it is a one (1) -lane, twelve (12') foot wide road. Accordingly, I find that the Plaintiff has proved, by clear and convincing evidence, the second prong of establishing a prescriptive easement, that being the identity of the thing being enjoyed, the same being a twelve (12') foot wide existing dirt road easement following the path shown on the plat prepared by Mr. Magnus as Defendant's Exhibit Number One (1).

The testimony of the Plaintiff, as well as the testimony of Mr. Graham and Mr. Brown establishes that they never asked anyone for permission to use the dirt road from Flat Nose Road back to Mr. Dixon's property. Mr. Brown testified that this was the way Mr. Dixon's property has always been accessed and he considered it to be a Public Road. Mr. Jack Weatherford, who owned the property prior to its purchase by Mr. Hill, testified that he had never talked with anyone about the road and stated that he had never met Mr. Dixon, the Plaintiff, until the day prior to the hearing. While Mr. Weatherford testified that he was not

aware of any road across this property, he also testified that since he moved away in 1959, he only came back one (1) or two (2) times a year. While he testified that he would hope that he would notice if there was any activity taking place on this tract, he did not affirmatively testify that there was no road at the time the tract was purchased by Mr. Dixon or prior to his purchase.

The Deed from Mr. Weatherford to Mr. Hill makes reference to the plat prepared by Mr. Magnus, on which the existing dirt road is clearly shown. This plat is referenced as a part of the description in the land being conveyed to Mr. Hill, the Defendant. Mr. Hill testified that he was not aware of this road prior to his purchase. He also testified that he was not aware of it being used by Mr. Dixon and had never seen him coming or going. However, Mr. Graham testified that the road had been there some forty (40) to fifty (50) years, and also testified that he had, in fact, seen Mr. Dixon using this road to access his property, and that Mr. Dixon uses the road on a regular basis. Mr. Hill testified that after he purchased the property in 2014, that he found Mr. Dixon on the property trying to cut the cable. He said that it was at that time that Mr. Dixon asked him for permission to use the road, and Mr. Hill replied that he would have to talk with his wife about his using the road, and when he did, she did not like the idea, so Mr. Hill told Mr. Dixon that he could not use the road. Mr. Dixon denied in his reply testimony that he ever asked for permission to use the road or that he was cutting the cable. Inasmuch as Mr. Dixon had been using this road for approximately twenty-six (26) years, it is more likely that if such a conversation took place, that Mr. Dixon was trying to ascertain whether or not Mr. Hill was going to try and interrupt his long time use of the road. Since Mr. Dixon had never asked anyone else for permission when he began using the road, it is unlikely that such conversation would have been a true request for permission to use the road. Here the evidence establishes that the road had been in existence since Mr. Dixon's purchase



of his property, and that this was the road he used in order to obtain ingress to and egress from his property. He testified that this is the only way in and out, and he considered it to be the access road for his property. This testimony is supported by the testimony offered by Mr. Graham and Mr. Brown. Both of them considered this to be the way people would reach the Dixon property, even when it was being lived on by Mr. Sims and Mr. Isaiah McIver. Clearly Mr. Dixon had a substantial belief that he had the right to use this road based upon the totality of the circumstances surrounding his use. Further, the evidence establishes that Mr. Dixon's use of the road was open, notorious, continuous and uninterrupted, and, thus, such use is presumed to be adverse to the rights of the servient tenements. I find that the Plaintiff has proved, by clear and convincing evidence, the third prong to establish a prescriptive easement, that being the use was either adverse or under the claim of a right to use the same. In this instance, I find that both have been established by the Plaintiff.

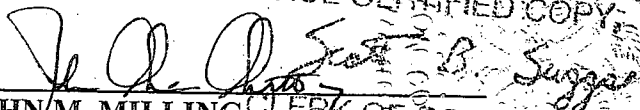
It is, therefore, the finding of the Court that Mr. Dixon has proven by clear and convincing evidence that he has a prescriptive easement for himself, his heirs and assigns, in a width of twelve (12') feet to use the road that is shown on the Magnus plat identified as Defendant's Exhibit Number One (1). The Defendant, Mr. Hill, is barred from undertaking any action to impede Mr. Dixon's use of this road, and Mr. Hill is further required to remove the gate and any obstructions that may be currently in place with respect to this road and shall be barred from creating any future obstructions which would interfere with Mr. Dixon's use of the same. IT IS, THEREFORE,

ORDERED: That the Plaintiff, Wayne Dixon, has an easement by prescription for ingress to and egress from his 2.38 tract for the benefit of himself, his heirs and assigns, that is twelve (12') feet in width and is located where the existing dirt road is shown on the plat prepared by Ryan Magnus and introduced as Defendant's Exhibit Number One (1). The Defendant,



Grady W. Hill, is given fifteen (15) days in which to remove the gate and all impediments that are located in and along this road, and is enjoined and restrained from constructing any further gates or placing any obstructions or impediments in or along this road in an attempt to prevent Mr. Dixon's use of the same. The relief requested by Mr. Hill in his Counterclaim is denied. These parties shall bear their own costs in connection with this matter and shall be responsible, each, for one-half (1/2) of the costs related to the Court Reporter's appearance fee and each shall be responsible for one-half (1/2) of the fee and costs charged by the Special Referee in connection with this hearing. These fees and costs are to be paid within thirty (30) days of the same being provided to the attorneys for the parties.

Darlington, South Carolina.
December 29, 2016.



JOHN M. MILLING, CLERK OF COURT/RMG
Special Referee

TRUE CERTIFIED COPY

CLERK OF COURT/RMG
DARLINGTON COUNTY, SC

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