

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

FEB 13 2017

SC Court of Appeals

Clyde N. Davis, Special Referee for 11th Judicial Circuit

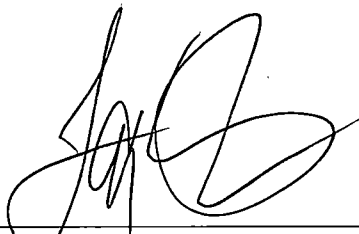
Appellate Case No.: 2016-002298

Melissa J. McDaniel, John F. McDaniel, III,
Tara M. Dickerson and Brandi M. Augustine.....Respondent,

v.

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

INITIAL BRIEF OF APPELLANT



Larry C. Marchant, Jr.
S.C. Bar # 102071
3020 Devine Street
Columbia, South Carolina 29205
Telephone: 803-771-1507
Facsimile: 803-771-9752
Email: larrycmarchant@gmail.com
Attorney for Appellant

February 13, 2017

TABLE OF CONTENTS

Table of Authorities3

Statement of Issues on Appeal.....4

Statement of the Case.....5

Facts5

Arguments

1. THE SPECIAL REFEREE ERRED IN FAILING TO REQUIRE THE MCDANIEL’S TO ESTABLISH ANY RIGHT TO EASEMENT BY PRESCRIPTION BY THE STANDARD OF CLEAR AND CONVINCING EVIDENCE..... 9

2. THE SPECIAL REFEREE ERRED IN FAILING TO REQUIRE THE RESPONDENTS TO ESTABLISH THE ELEMENTS OF PRESCRIPTIVE EASEMENT TO SATISFY TACKING FOR REQUIRED TWENTY-YEAR PERIOD..... 11

3. THE SPECIAL REFEREE FAILED TO WEIGH THE CORRESPONDING LOSSES OR FORFEITURES OF THE APPELLANTS IN AFFIRMING HIS ORDER AND UPHOLDING THE GRANT OF THE PRESCRIPTIVE EASEMENT, THUS REACHING A DECISION THAT IS CONTRARY TO THE POLICY REQUIRING THE CLAIMANT OF A PRESCRIPTIVE EASEMENT BE HELD TO A STRICT STANDARD OF PROOF 12

Conclusion.....13

TABLE OF AUTHORITIES

CASES

Bundy v. Shirley, 412 S.C. 292, 306, 772 S.E.2d 163, 170.....8

Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).....8

Knox v. Bogan, 322 S.C. 64, 66, 472 S.E.2d 43, 45 (Ct.App.1996).....8

Pain Gayle Props., L.L.C. v. CSX Transp., Inc., 400 S.C. 568, 735 S.E.2d 528.....11

Morrow v. Dyches, 328 S.C. 522, 528, 492 S.E.2d 420, 42411

STATEMENT OF ISSUES ON APPEAL

- I. THE SPECIAL REFEREE ERRED IN FAILING TO REQUIRE THE RESPONDENTS TO ESTABLISH ANY RIGHT TO EASEMENT BY PRESCRIPTION BY THE STANDARD OF CLEAR AND CONVINCING EVIDENCE.
- II. THE SPECIAL REFEREE ERRED IN FAILING TO REQUIRE THE RESPONDENTS TO ESTABLISH THE ELEMENTS OF PRESCRIPTIVE EASEMENT TO SATISFY TACKING FOR THE REQUIRED TWENTY YEAR PERIOD.
- III. THE SPECIAL REFEREE FAILED TO WEIGH THE CORRESPONDING LOSSES OR FORFEITURES OF THE APPELLANTS IN AFFIRMING HIS ORDER AND UPHOLDING THE GRANT OF THE PRESCRIPTIVE EASEMENT.

STATEMENT OF THE CASE

This is an appeal from the Order of Special Referee Judge Clyde N. Davis of the Eleventh Judicial Circuit, Lexington, South Carolina, entered on October 5, 2016. (Order). The Summons and Complaint giving rise to the action underlying this Appeal were filed by Melissa J. McDaniel, John F. McDaniel, III, Tara M. Dickerson, and Brandi M. Augustine (collectively Respondents) on February 6, 2014. Respondents requested a Declaratory Judgment granting them a prescriptive easement to a piece of Appellants' property, as well as a Denial of Appellants' property rights to the same. On March 23, 2014, Appellants filed an Answer with a general denial of the allegations and a Counterclaim against Respondents for denying Appellants' lawful right to peaceful and quiet enjoyment of their property. Respondents filed a Reply on March 25, 2014. A hearing was held on the matter on March 1, 2016. On August 16, 2016, the Honorable Clyde N. Davis, Special Referee for the Eleventh Judicial Circuit, issued an Order granting Respondents the requested prescriptive easement and ordering the removal of a fence installed by Appellants. On August 22, 2016, Appellants filed a Motion to Reconsider the Order of August 16, 2016. That Motion was subsequently denied and the instant Appeal followed. (Order of October 13, 2016).

STATEMENT OF FACTS

In 2005, Larry Marchant, Sr., and his wife, Jolene J. Marchant (hereinafter Appellants), retained ownership of the property and residence at 1706 Riviera Dr., West Columbia, South Carolina by conveyance from Shoi Yan Hwang and Mary S. Hwang (hereinafter, "the Hwangs"). The Hwangs were conveyed the property by deed from Gail D. Arehart in 1981, who gained ownership of the property from her husband, Carol L. Arehart, in 1979 (hereinafter, "the

Areharts"). The Areharts were conveyed the property by Sara B. Crumpton in 1976. The Appellants' property is contiguous to the Respondents' property located at 1700 Riviera Dr., West Columbia, South Carolina. The Respondents' property was originally owned by their grandfather, J. Fulton McDaniel, and was purchased by him in 1966. J. Fulton McDaniel passed away in 1991, and the property was conveyed to John F. McDaniel, Jr. in 1993. In 1998, Mr. McDaniel (Jr.) conveyed the property to his wife, Joann Odom McDaniel. The Respondents were conveyed the property by deed in 2011.

The Respondents' first predecessor in interest was their grandfather, J. Fulton McDaniel, who used the land in dispute as a means to access his horses and birddogs, beginning in 1966. He also parked other hunting jeeps, trucks, and horse trailers related to his hobbies. Mr. McDaniel's brother, Ted McDaniel, moved to the property after Mr. McDaniel's wife passed away and parked his motor home in the area that had once been used to access Mr. McDaniel's horses and birddogs. When Mr. McDaniel passed away in 1992, his son, John F. McDaniel, Jr., was conveyed the property. Prior to being conveyed the property in 1992, John F. McDaniel, Jr., moved away in 1980, but maintains that he used the property in dispute to park equipment used in his roofing business. Once he became the property owner in 1992, Mr. McDaniel took down his father's horse stables and dog kennels and built a shop to hold his business equipment and had gravel put down on the area between his and the Marchant's property. During the time Mr. McDaniel resided on his property, he, his wife, and four children utilized the disputed land to park their cars. Their use of the land allowed them to be able to drive around their house in a loop, from the actual driveway onto the property between their home and what would eventually become the Marchants' land. The McDaniels never received any complaints from the prior

owners of the Marchant property regarding their various uses of the land and never took any measures to establish a right to use the property.

The current owners of the property, Respondents, were conveyed the property after the death of their mother in 2011. Appellants had a survey of their property prepared shortly after the Respondents were conveyed the property from their mother. This survey (dated November 6, 2012) shows a portion of a gravel drive located on Appellants' property, which is approximately four and two tenths (4.2') feet by ninety (90') feet. After receiving the survey, Appellants put down stakes to demarcate their property line. The Respondents (or guests of Respondents) subsequently drove over the stakes, prompting Appellants to install even more stakes. When these efforts failed to prevent the Respondents from crossing onto their property, Appellants paid to have a fence installed.

The facts in regards to the boundaries of the properties lines are stipulated to as defined by the survey prepared by Bob Collingwood for Appellants. (Survey of November 6, 2012). At the time the Marchants purchased the property in 2005, no documents indicated a driveway or easement. In 2012, in contemplation of selling their property and home, the Marchants hired Bob Collingwood, a Registered Land Surveyor, to survey their property. The survey prepared by Mr. Collingwood showing a portion of their property as a gravel driveway was the first time the Marchants were made aware that their land was being encroached upon. Their subsequent attempts to clearly mark their property line (as described in the paragraph above) were to no avail and after they installed an actual fence, received the Summons and Complaint from Respondents (Plaintiffs in 2014-CP-32-00461) which gave rise to the actions underlying this Appeal.

SUMMARY OF THE ARGUMENT

The requirement that the party claiming a prescriptive easement be held to a strict burden of proof, specifically clear and convincing, was set forth by the Supreme Court due to the public policy of protecting the rights of the property owner. *Bundy v. Shirley*, 412 S.C. 292, 306, 772 S.E.2d 163, 170. The Order by the Special Referee demonstrates that the Respondents, the party seeking the prescriptive easement, were not held to a strict standard of proof, as the Respondents failed to establish (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under claim of right. *Id.* Specifically, the Special Referee failed to require the Respondents to provide clear and convincing evidence to satisfy the requirements of prescriptive easement throughout the 20-year period. The Respondents relied on the ability to tack the use of the previous owners to reach the requisite 20 years, however, they failed to provide evidence establishing each element of prescriptive easement for the duration of that 20 years. The Special Referee erred in holding the Respondents to a less strict burden of proof and because the Respondents were not required to provide clear and convincing evidence establishing the satisfaction of the elements of prescriptive easement as to previous owners, Appellants ask this Court to correct this error of law.

STANDARD OF REVIEW

“A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue.” *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). “The determination of the existence of an easement is a question of fact in a law action.” *Bundy v. Shirley*, 412 S.C. 292, 302, 772 S.E.2d 163, 168 (2015). In an action at law tried without a jury, the findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports them. *Knox v. Bogan*, 322 S.C. 64, 66, 472

S.E.2d 43, 45 (Ct.App.1996) (*citing Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)).

ARGUMENT

- I. THE SPECIAL REFEREE ERRED IN FAILING TO REQUIRE THE MCDANIELS TO ESTABLISH ANY RIGHT TO EASEMENT BY PRESCRIPTION BY THE STANDARD OF CLEAR AND CONVINCING EVIDENCE.

“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, 306, 772 S.E.2d 163, 170 (2015)(emphasis added). This is because, “a private way is an easement in favor of another, *in derogation of the rights of the owner*; and hence is *not to arise without clear, unequivocal proof of such facts* as will give the right from the owner to the claimant.” *Id.* at 305. When tacking is used in proving a right to a prescriptive easement, the use by the previous owners must also have been adverse or under claim of right. *Id.* at 314, 772 S.E. 2d 163, 175. The party seeking the prescriptive easement must have asserted a distinct and positive assertion of a right hostile to the servient tenement owner in order to establish that the use is adverse or under a claim of right. *Id.* at 308, 772 S.E.2d 172.

In order to establish an easement by prescription, the party asserting the right must establish the “identity of the thing enjoyed.” *Id.* at 304, 772 S.E.2d 169 (*citing Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005)). None of the surveys prepared prior to the Appellants’ November 6, 2012 survey shows any indication of a driveway. Testimony by various witnesses at the March 1, 2016 hearing indicates that whether the land in dispute was in fact a driveway is not clear. John F. McDaniel, Jr., described the area as “a buggy path” and “right there in the front yard, in the driveway.” (Transcript, p. 23, ll. 2, 13-14). He also testified

that an uncle used the land abutting the Marchants' property to park a motor home. (Transcript, p. 18, ll. 3-16). A driveway and a parking area serve different purposes, as does a path that can accommodate a golf cart versus a road for regular vehicular traffic. The identity of the land as a distinct "driveway" is very much in dispute and Respondents have failed to provide clear and convincing evidence that they have indeed developed a prescriptive easement to a driveway on the Marchants' land.

Respondents did not establish that their use was adverse. "Use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription." *Bundy*, at 309, 772 S.E.2d 172 (citing *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15 (1917)). At the March 1, 2016 hearing, Respondents were asked whether there had ever been any objections to their use of the property to which they now claim a prescriptive easement. They provided no evidence of communication between themselves and any previous owners of the Marchant property. Despite the lack of evidence concerning objection to the use, the Respondents supplied witnesses who testified to the general use of the land in dispute, with one witness stating that he was under the impression that the area used between the properties actually belonged to the McDaniels. It is possible then, that the previous owners of the Marchant property were complicit in the use of their land by the McDaniels, by not objecting, they thus expressed implied permission. No evidence has been provided to establish that the McDaniels asserted any right adverse to any of the previous owners of the Marchants' property. The absence of clear and convincing evidence of intent of the previous owners of their property to assert any claim of right adverse to the property rights of the previous owners of the Marchants' property requires the Order of the Special Referee to be reversed. *See id.* ("even if the [claimant's] use could be characterized as adverse or under claim of right, the court found no

probative evidence showing such an intent on the part of all previous owners of the property dating back twenty years.” *Pain Gayle Props., L.L.C. v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528 (Ct.App.2012))

II. THE SPECIAL REFEREE ERRED IN FAILING TO REQUIRE THE RESPONDENTS TO ESTABLISH THE ELEMENTS OF PRESCRIPTIVE EASEMENT TO SATISFY TACKING FOR REQUIRED TWENTY YEAR PERIOD.

“A party’s use must meet all requirements throughout the 20-year period, and if tacking is used, ‘the use by the previous owners must also meet the requirements of a prescriptive easement.’” *Morrow v. Dyches*, 328 S.C. 522, 528, 492 S.E.2d 420, 424 (Ct.App.1997)(citing 25 Am.Jur.2d *Easements and Licenses* § 70, at 640 (1996)). The Special Referee failed to require the Respondents to establish uninterrupted use for 20 years. One of the three elements that must be shown to establish a prescriptive easement is continued use for 20 years. *Id.* The fact that the Respondents’ family has maintained ownership of the property for at least 50 years is not determinative of the continuous use prong. In reaching its decision in *Bundy*, the Court stated that the party claiming the easement “cannot establish prescription merely by referencing the [prior ownership of one family].” *Id.* at 313, 772 S.E.2d 163, 175.

While the Respondents property may have been owned by their family for 50 years, they are only able to provide evidence of use (different uses) for chunks of time that do not equate to 20 years continuous, uninterrupted use. The evidence and testimony presented by Respondents does not provide clear and convincing evidence of the identity or use of Appellants’ land for the required 20 year period. The “Findings of Fact” of the Special Referee fails to identify the use of the area to which Respondents claim a right, from the years of 1980 through 1993. (Order p. 2). The transcript from the hearing merely indicates that John F. McDaniel, Jr., moved away from

the property in 1980, and upon moving back in 1992, took down the dog kennels and horse stables that had once been used by his father and built a shop. (Transcript, p.16, ll.5-8; p.23, ll.15-23). It is clear then, that by 1992, the land in dispute was no longer being used by J. Fulton McDaniel as was described by John Fulton McDaniel, Jr., and there is no evidence which clarifies that J. Fulton McDaniel continuously used the land during the years John McDaniel, Jr., was not residing at the property.

III. THE SPECIAL REFEREE FAILED TO WEIGH THE CORRESPONDING LOSSES OR FORFEITURES OF THE APPELLANTS IN AFFIRMING HIS ORDER AND UPHOLDING THE GRANT OF THE PRESCRIPTIVE EASEMENT, THUS REACHING A DECISION THAT IS CONTRARY TO THE POLICY REQUIRING THE CLAIMANT OF A PRESCRIPTIVE EASEMENT BE HELD TO A STRICT STANDARD OF PROOF.

“By claiming a prescriptive easement, a claimant seeks for a property owner to forfeit rights to the subject property.” *Bundy*, at 305, 772 S.E.2d 170. A prescriptive easement “results in diminished rights of the property owner,” thus the party seeking the prescriptive easement must be held to a strict standard of proof. The Appellants testified that the granting of the prescriptive easement to Respondents would prohibit Appellants from having access to their backyard or from improving their property by installing a driveway. As the Marchants had the 2012 survey prepared in anticipation of listing their property and home for sale, it would seem contrary to public policy which supports the rights of property owners to ignore the fact that the grant of the prescriptive easement will prevent the Appellants from improving their property. The Special Referee indicated that because the Marchants had not made prior attempts to build a driveway, they cannot now claim a diminishment of their property rights. (Order of October 13, 2016). However, as the Marchants bought the property in 2005, it is reasonable that they may not have had a need to build a driveway and only when contemplating the sale of the property

were they motivated to improve their property with a driveway in hopes of adding value for sale. The Order of the Special Referee must be reversed as it sets a precedent that places the rights of the dominant tenement owner over and above the rights of the servient tenement owner.

CONCLUSION

Because the Special Referee failed to require the Respondents to establish the elements of a prescriptive easement by clear and convincing evidence, his Order granting Respondents a prescriptive easement must be reversed. Appellants respectfully ask this Court to reverse the Order of the Special Referee and for all other relief as the Court deems just and proper.

Larry C. Marchant, Jr.
S.C. Bar # 102071
3020 Devine Street
Columbia, South Carolina 29205
Telephone: 803-771-1507
Facsimile: 803-771-9752
Email: larrycmarchant@gmail.com
Attorney for Appellant

February 13, 2017

RECEIVED
FEB 13 2017
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Clyde N. Davis, Special Referee for 11th Judicial Circuit

Appellate Case No.: 2016-002298

Melissa J. McDaniel, John F. McDaniel, III,
Tara M. Dickerson and Brandi M. Augustine.....Respondent,

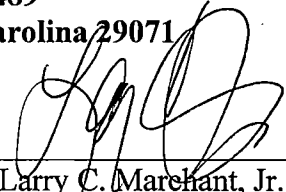
v.

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

CERTIFICATE OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal on the Respondents, Melissa J. McDaniel, John F. McDaniel, III, Tara M. Dickerson, and Brandi M. Augustine, by depositing a copy in the United States Mail, postage prepaid, on February 13, 2017, to their undersigned attorney:

James Randall Davis
P.O. Box 489
Lexington, South Carolina 29071



Larry C. Marchant, Jr.
S.C. Bar # 102071
3020 Devine Street
Columbia, South Carolina 29205
Telephone: 803-771-1507
Facsimile: 803-771-9752
Email: larrycmarchant@gmail.com
Attorney for Respondent

February 13, 2017