

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

MAY 01 2017

SC Court of Appeals

Clyde N. Davis, Jr., Special Referee for the Eleventh Judicial Circuit

Appellate Case No.: 2016-002298

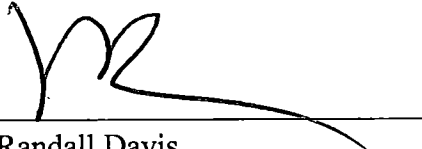
Melissa J. McDaniel, John F. McDaniel, III, Tara M. Dickerson
and Brandi M. Augustine.....Respondents,

vs.

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

INITIAL BRIEF OF RESPONDENTS

BY:



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April 28, 2017

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STATEMENT OF ISSUES ON APPEAL

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

STATEMENT OF THE CASE

This appeal arises from the Order of the Special Referee Clyde N. Davis, filed October 5, 2016. On February 6, 2014, Respondents (hereinafter "Respondents") Melissa J. McDaniel, John F. McDaniel, III, Tara M. Dickerson and Brandi M. Augustine, filed a Summons and Complaint for Declaratory Judgment granting them a prescriptive easement. (R.p.____; Compl.). Then Larry Marchant, Sr. and Jolene J. Marchant (hereinafter "Appellants") filed an Answer and Counterclaim on March 3, 2014. (R.p. _____; Answer and Counterclaim) to which the Respondents filed a reply to the Counterclaim on March 25, 2014 (R.p. _____; Reply). On March 27, 2015 a Consent Order of Reference signed by The Honorable William P. Keesley was filed referring this matter to The Honorable Clyde N. Davis, Jr., Special Referee. (R. p._____; Consent Order of Reference). A hearing was held on March 1, 2016 before The Honorable Clyde N. Davis, Special Referee (R. p._____; Transcript). On August 16, 2016, Special Referee Davis issued an Order granting Respondents the requested prescriptive easement and ordering the removal of the fence installed by the Appellants (R.p. _____; Order, August 16, 2015). On August 22, 2016, the Appellants filed a Motion to Reconsider the Order of August 16, 2016. (R.p

____; Motion to Reconsider). On September 13, 2016, Respondents filed a Response to the Appellants' Motion to Reconsider. (R. p. ____; Response). Special Referee Davis ruled on the Motion to Reconsider in an Order filed on October 13, 2016. (R. p. ____; Order, October 13, 2016). Appellants filed appeal by Notice of Appeal filed on November 14, 2016. (R. p. ____; Notice of Appeal).

STATEMENT OF FACTS

Respondents own the property located at 1700 Riviera Drive, West Columbia, South Carolina. (T. p. 6, Line 25). Appellants 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. (T. p. 7, Lines 1-2) Respondents' and Appellants' properties are residential lots with their primary residence located on each lot. Their lots are contiguous to each other. Respondents' 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, Respondents' 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 Respondents in this action by deed in 2011. This property has been in the McDaniel family for at least 50 years. (See *Plaintiff's Trial Exhibit 1*).

Appellants' property was originally owned by Sara B. Crumpton and she conveyed it to Carol L. Arehart and Gail D. Arehart in 1976. (See *Plaintiff's Trial Exhibit 1*). Thereafter, Carol L. Arehart conveyed his interest in the property to his wife, Gail D. Arehart, by deed in 1979. (See *Plaintiff's Trial Exhibit 1*). Thereafter, Gail D. Arehart conveyed the Appellants 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 Appellants in 2005.

Respondents' primary residence lot has a gravel drive area on the Eastern side of their property. (T. p. 13, Lines 5-18). The gravel drive area commences on Riviera Drive and runs South to North on the Eastern side of the Respondents' property where it terminates in the rear of Respondents' property. (T. p. 14, Lines 5-22). The gravel drive area has been used for the following purposes: (a) J. Fulton McDaniel, Respondents' grandfather, from 1967 through 1992 to access the rear of the property over this gravel drive area to get to his horses and bird dogs which were his hobbies (R. p. 16, Lines 5-17); (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 (T. p. 16, Lines 18-25); (c) after the death of J. Fulton McDaniel's wife, Ted McDaniel, brother of J. Fulton McDaniel, stayed with his brother for some years and used the gravel drive area as a parking area for a motor home (T. p. 18, Lines 9-16); (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 (T. p. 23, Lines 1-23); (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 (T. p. 23, Lines 1-9); (f) in 1992, John F. McDaniel, Jr. 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 (T. p. 23, Lines 17-23)(T. p. 24, Lines 1-4); (g) Melissa McDaniel, one of the Respondents, testified she and her siblings have used the gravel drive area as a convenient access to the family residence when she and her brothers and sisters were in high school (T. p. 55, Lines 6-25)(T. p. 56, Lines 1-2); 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 (T. p. 59, Lines 24-25)(T. p. 60, Lines 1-25)(T. p. 61, Lines 1-25)(T. p. 62, Lines 1-25)(T. p. 66, Lines 1-25)(T. p. 67, Lines 1-16)(T. p. 71, Lines 1-25).

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 re-nourished with gravel, rocks, mortar, bricks, etc. over the years, including a major re-nourishment in 1992. (T. p. 12, Lines 14-17)(T. p. 62, Lines 13-23)(T. p. 65, Lines 10-15)(T. p. 66, Lines 10-14). A survey by Bob Collingwood, a Registered Land Surveyor, dated November 6, 2012, shows that portion of the gravel drive area which is located on the Appellants' property. This area is approximately four and two tenths (4.2') feet by ninety (90') feet (299 sq.ft. having 0.0068 acre). (See *Plaintiff's Trial Exhibit 5*).

Respondents and their predecessors-in-title since 1967 have had continuous and uninterrupted use of the gravel drive area until Appellants placed wooden and metal stakes and a fence in the driveway area which was in the summer of 2013. No one in the chain-of-title of Appellants' property, from 1967 until 2005, objected to Respondents and their predecessor-in-title using the gravel drive. (T. p. 32, Lines 15-20). Appellants never took any affirmative steps to prevent the use of the area until they placed wooden and/or metal stakes and the fence in the gravel drive area in summer 2013. (T. p. 37, Lines 28-35)(T. p. 38, Lines 1-7). Appellants have placed a fence in the gravel drive and is impeding the Respondents' use of the gravel drive area. (T. p. 38, Lines 3-4). Appellants knew of the gravel drive area on the Respondents' 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 Appellants' property and the Respondents' property. (T. p. 33, Lines 1-6).

Appellant Marchant stated that the City of West Columbia or Lexington County required a five (5') foot setback area on one side of the house and a ten (10') foot setback area on the other side of the house. (T. p. 89, Lines 1-21). She then indicated that the east side of the house did not have five (5') feet lying between the house and the property line but there was ten (10') feet between the houses and the McDaniel property line that because the four and nine-tenths (4.9') foot prescriptive easement area was granted, she could not get legal access to the back of her property unless it was on the McDaniel side. (T. p. 89, Lines 7).

STANDARD OF REVIEW

“The determination of the existence of an easement is a question of fact in a law action.” *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987). “The instant case was referred to a special referee for entry of a final judgment. Accordingly, this Court’s review is limited to correction of errors of law, and we will not disturb the special referee’s factual findings that have some evidentiary support.” *Townes Assocs., Ltd. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (S.C. 2015).

LAW

An easement is 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. 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 used 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. Laychur*, 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). There is no requirements 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 (Ct. App. 1997); *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.

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 v. John Wesley United Methodist Church*, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003).

“[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 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).

An “intent to claim adversely may be inferred from the acts and conduct” of the dominant users. *Am. Jur. 2d Easements & Licenses* §57, at 552 (2004).

ARGUMENT I

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

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. The use of the gravel drive area must be of a reasonable frequency as determined from the nature and needs of the Respondents 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. The testimony is that no adjoining neighbor complained about the use of this gravel drive area by the Respondents over the years claimed. Furthermore, once a right-of-way by prescription has been established by 20 years of continuous use, which is the Respondents’ contention, and the use has been open, notorious, continuous and uninterrupted for a period of twenty (20) years, the use will be presumed to have been adverse. *Boyd v. Bellsouth Telephone*, 369 S.C. 419, 633 S.E.2d 141.

Mr. Marchant testified that prior to the purchase of the property, she did see “a gravel and brick driveway there; it may have been a path where cars went by back through there; and I could see that it could possibly be one next to their house; I have seen vehicles back there at the back door; this is before we bought the house.” She acknowledged there was a fence on the

property line between McDaniel and Marchant and she knew at the time she walked the property with the person she bought the property from.

Appellants next content that there was express or implied permission to use the area in question and therefore there could not be a prescriptive easement by adverse use or claim of right. Appellants have presented no verbal or written evidence or actions that shows expressed or implied permission. The use of the gravel drive area, including that which is shown on *Respondents' Trial Exhibit 5*, was continuous. 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 Appellants, 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 Respondents over the years claimed and the present Appellants 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 Appellants 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 Respondents have demonstrated that they can claim the prescriptive easement by claim of right in that the Respondents and their predecessor-in-title have used the gravel drive area since 1967. Under the claim of right theory, they do not have to prove 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). Respondents and their predecessor-in-title have used the access and have shown that they have maintained the access over an approximate fifty (50) year period. Based on Respondents' continuous and uninterrupted use and no acts by Appellants or their

predecessors-in-title opposing the use, Respondents have the right to claim by “claim of right”.

Appellants contend the party asserting prescriptive easement must establish the “identity of the thing enjoyed”. The survey prepared for the Respondents in 2012 shows the gravel driveway. Furthermore, the testimony of each witness for the Respondents indicated that a “driveway for access” was the identity of the thing enjoyed.

ARGUMENT 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.

Appellants are claiming that there is not sufficient evidence to support continuous and uninterrupted use of said driveway between 1980 and 1993. However, the evidence proves otherwise for this time frame. McDaniel testified that the driveway area had been used since he was a child and it provided access the rear of the McDaniel property. John McDaniel testified that when he moved back to the residence on the McDaniel property in 1992 and he built a shop in the back of the property and kept his rental maintenance business equipment there and he had used the driveway for access to the shop since 1992 to present date. Melissa McDaniel testified that she and her siblings had used the driveway since the mid 1990’s to present date. Jimmy R. Dillon testified that the family had used the driveway since the late 1960’s and there was brick or mortar there and/or gravel since the 1980’s.

Both John F. McDaniel, Jr. and his father, J. Fulton McDaniel, utilized the driveway area in question during the time frame that Appellant claims that there was not continuous and uninterrupted use and their use was as an access area to the rear of their property and the parking of vehicles and storage on the property. The use by each was consistent.

The use by the parties or their family or friends were as follows: (a) J. Fulton McDaniel, Respondents' 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 J. Fulton McDaniel, stayed with his brother for some years and used the gravel drive area as a parking area for a 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, Jr. 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 Respondents, testified she and her siblings have used the gravel drive area as a convenient access to the family residence when 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.

Tacking is allowed between ancestors and/or those in privity, which we have in this case, and Respondents have satisfied the Court that the Respondents, as well as their predecessor-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 until the impedements that were installed in the summer of 2013. Appellants could not present any testimony as to any action by them to interrupt the prescriptive easement period until the impedements were installed in the summer of 2013.

ARGUMENT III

THE SPECIAL REFEREE FAILED TO WEIGH THE CORRESPONDING LOSSES OR FOREITURES OF THE APPELLANTS IN AFFIRMING HIS ORDER AND UPHOLDING THE GRANT OF THE PRESCRIPTIVE EASEMENT.

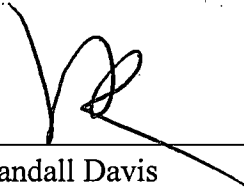
Appellants first contend Respondents' granted prescriptive easement will prohibit the Appellants from having vehicular access to the rear of the property and not equitable as to the parties in this action. The offered testimony by Mrs. Marchant on this issue was that the City of West Columbia or Lexington County required a five (5') foot area on one side of the house and a ten (10') foot area on the other side of the house. She then indicated that the East side of the house did not have five (5') feet lying between the house and the property line but there was ten (10') feet between the house and the McDaniel property line and that because the four and nine-tenths (4.9') foot prescriptive easement area was granted, she could not get legal access to the back of her property unless it was on the McDaniel side. *Defendants' Trial Exhibit 2* shows that the Marchants house on the subject property and shows an area of ten and one-half (10.5') foot on the Eastern side instead of five (5') feet and on the McDaniel side, a twenty (20') foot to twenty-five (25') foot width between the McDaniel and Marchant properties. No testimony was presented by the Appellants as to the necessary width of the proposed driveway to the rear of the property. Furthermore, Appellants presented no ordinance or statute indicating such regulation by the City or County. Also, the Appellants have owned the property since 2005 and presented no evidence that they attempted to establish a driveway on the McDaniels' side of their property.

Plaintiff's Trial Exhibits 7 and 8 shows a steep slope on the McDaniels' side of the Marchant property and the Respondents would ask the Court to make judicial notice of the slope which shows the difficulties in creating a driveway on the McDaniel side because of the slope. The preponderance of evidence does not prove that the granted prescriptive easement legally interferes with the Marchants obtaining access to the rear of their property. Furthermore, the Appellants were offered a joint access over the four and nine-tenths (4.9') foot prescriptive easement area but refused the offer.

CONCLUSION

Respondents have proved, by clear and convincing evidence, the elements of a prescriptive easement continual and uninterrupted use of that portion of the driveway on Appellants' property since 1967 either under the theory of adverse use or under the Appellants' belief of owning by claim of right.

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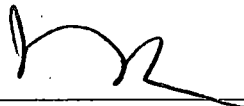
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CERTIFICATE OF COUNSEL

I hereby certify that this Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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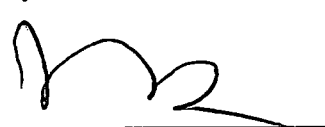
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PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents by U.S. regular mail, postage pre-paid on May 1, 2017, addressed to their attorneys of record, Larry C. Marchant, Jr., Esquire, 3020 Devine Street, Columbia, South Carolina 29205.



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