THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2012-CP-20-401
Appellate Case No. 2013-001386

Carol Reid Smallwood, Barbara Reid Strickland, Ann Reid Hamlin
William L. Reid, III, Judith Lawrence Medlin,
Francis Patterson Lawrence . . . . . Appellants.

v.

Helen M. Lee, Linda Lee and Joe Lee, Jr., as Co-Trustees of the
Joseph H. Lee, Sr. Family Trust U/W . . . . . Respondents.

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF THE ISSUES ON APPEAL

I. HAVE THE APPELLANTS MET THE CONTINUAL USE REQUIREMENT FOR A PRESCRIPTIVE EASEMENT WHEN EVIDENCE AT TRIAL SHOWED THAT THE NEEDS OF THE APPELLANTS ONLY REQUIRED ACCESS EVERY SIX TO EIGHT YEARS AND EVERY SIXTEEN YEARS?

II. DID THE PHYSICAL ACT OF ERECTING A FENCE AND VERBAL OBJECTION TO ACCESS INTERRUPT ANY PRESCRIPTIVE PERIOD OF USE BY THE APPELLANTS?

III. HAVE THE APPELLANTS ESTABLISHED THE IDENTITY OF THE THING ENJOYED WHEN EVIDENCE AT TRIAL SHOWED THAT THE ROUTE ONCE CLAIMED WAS REDIRECTED PRIOR TO COMPLETION OF ANY PRESCRIPTIVE PERIOD AND THAT NO EXISTING PATH EXISTS ON THE RESPONDENTS' PROPERTY?

IV. HAVE THE APPELLANTS ESTABLISHED THAT THEIR USE WAS UNDER CLAIM OF RIGHT WHEN EVIDENCE AT TRIAL SHOWED THAT THE APPELLANTS APPELLANTS SOUGHT PERMISSION TO ACCESS THE RESPONDENTS' PROPERTY?

V. CAN THE APPELLANTS TACK ANY PERIODS OF PREVIOUS USE WHERE NO EVIDENCE WAS PRESENTED AT TRIAL OF DATES OF ACCESS PRIOR TO THE APPELLANTS' USE, NO EVIDENCE WAS PRESENTED AT TRIAL ESTABLISHING THE PATH THAT WAS USED PRIOR TO THE APPELLANTS' USE, AND NO EVIDENCE WAS PRESENTED AT TRIAL THAT USE BY PREVIOUS OWNERS WAS UNDER CLAIM OF RIGHT?

STATEMENT OF THE CASE

On April 18, 2013, this matter was tried without a jury with the Honorable Brooks P. Goldsmith presiding. The Appellants sued asserting that they were entitled to a prescriptive easement across the Respondents' property. The Order of the Court was filed on May 14, 2013, denying the Appellants relief. On June 12, 2013, the Appellants served their Notice of Appeal.

FACTS

The parties own adjacent tracts of property located primarily in Fairfield County, with each having a portion of property in Chester County. The Appellants' property, a timber tract, is located to the east of the Respondents' property, which contains the residence of Helen M. Lee and a fenced pasture containing cattle. The Appellants alleged that they are entitled to an easement by prescription crossing the Respondents' land for access to conduct forestry operations. The Appellants contend that their property is landlocked and sole access to their property has been over and across the property of the Respondents for the statutory period. The Respondents have denied the Appellants access. The trial court denied the Appellants relief.

ARGUMENT

A. THE APPELLANTS FAILED TO ESTABLISH USE OF A REASONABLE FREQUENCY TO SATISFY THE CONTINUAL USE REQUIREMENT FOR A PRESCRIPTIVE EASEMENT.

To establish an easement by prescription, the party asserting the right must show: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (S.C.App. 2005), citing Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993).

The Appellants argue that, in applying Jones, they have met their burden of establishing a continued use for the full period of twenty years. In Jones, the Court of Appeals held that, in 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 at 318. The element of continued use does not require the use thereof every day for the statutory period or even on a weekly or monthly basis; but simply the exercise of the right more or less frequently according to the nature of the use and needs of the claimant. Id.

At the trial of this case, Judith Medlin, age 67 at the time of trial, testified that she had accessed the property "probably" eight times in her lifetime, including 1959, 1966, and 1981. R. p. 29, lines 9-10; R. p. 42, lines 17-19. Medlin also testified that the property has to be thinned periodically, but after maybe ten years of growth. R. p. 31, lines 15-17. William L. Reid, III, a resident of Tennessee for approximately fifty years (R. p. 44, lines 18-19), guessed that he had visited the Appellants' property five times in his lifetime - in his teen years and then four times

since 2001 for the purpose of inspecting reports of hunters cutting shooting lanes and for enjoyment. R. p. 46, lines 12-16; R. p. 49, lines 18-25; R. p. 50, lines 1-10.

Thomas A. Patrick, III, who had been working as a forester for the Reid family since 1983 (R. p. 63, lines 9-10), testified that the Reid property contains a forty-year crop. R. p. 65, lines 24-25. The process starts when a new tree is planted. R. p. 90, lines 1-3. Patrick first planted trees on the Reid property in 1994. R. p. 90, lines 23-25. Patrick testified that after planting, sixteen years would pass before one would have a reason to return to the property. R. p. 68, lines 6-12. After sixteen years have passed, the crop would be ready for the first thinning. R. p. 68, line 25; R. p. 69, lines 1-3. Patrick testified that the next thinning would have been in 2010. R. p. 91, lines 5-7. After the first thinning, the property only requires forestry access at six to eight year intervals until the timber is ready for harvesting. R. p. 69, lines 12-24.

The Appellants maintain that, under Jones, their use must only be as frequent as the forty-year crop dictates. In that case, Jones testified that the trail was used by her family to access the parcel "as far back as [she] remembered"[1], but nothing in the Jones opinion suggests that the dominant estate was purely a timber tract requiring access only every few years to remove timber. It should be noted that the Court did not find that Jones satisfied the requirement; the case was remanded for more specific findings on the issue of continued use. Id at 317-18. Nor did the Court find that Jones had not accessed her land for a number of years. The Jones opinion merely states that Jones "[was] not a South Carolina resident, however, her visits to the property, though many, were sporadic". Id at 313. The opinion only mentioned that Jones attempted to haul timber in 2001. Id at 314.

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[1] Jones at 316.

The trial court correctly held that the Appellants failed to meet the continual use requirement for a prescriptive easement. The trial court held that, "[w]hile Jones held that the claimant need not establish daily use or even weekly or monthly use, nothing in the Jones decision suggests that usage separated by six to eight years or even sixteen years is a reasonable frequency." R. p. 3. The Respondents maintain that the maintenance needs of the Appellants' forty-year crop are too isolated and infrequent to establish continuity, and that such frequency lacks reasonableness.

B. OVERT ACTS INTERRUPTED ANY PRESCRIPTIVE PERIOD OF USE PRIOR TO THE COMPLETION OF TWENTY YEARS.

The Court of Appeals has held that physical and verbal acts may interrupt the required period of use. The servient owner may interrupt the prescriptive period by engaging in "overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief." Kelley v. Snyder, 396 S.C. 564, 573, 722 S.E. 2d 813, 818 (S.C.App. 2012), quoting Pittman v. Lowther, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005). In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period. Kelley at 573.

The trial court held that the physical act of erecting a fence and verbal objections were sufficient to interrupt any prescriptive period. Evidence at trial showed that a fence was erected on the Respondents' property some time prior to 1992. R. p. 86, lines 8-21. William L. Reid, III, testified that the fence was erected perpendicular to the alleged path, requiring a gate to be opened to go through the Respondents' property. R. p. 58, lines 2-18. Joe Lee, Jr. testified that

the gate is eight to twelve feet in length and that his mother keeps the gate latched. R. p. 146, lines 14-22.

Evidence at trial also showed that the Appellants received verbal objection by Helen M. Lee. Judith Medlin testified about a conversation she had with Helen M. Lee in which Lee informed Medlin that she didn't want her coming across the property. R. p. 27, lines 19-25:

> Q. Do you remember at any time in your life time asking for permission to come across the Lee's property?
> A. No.
>
> Q. You never asked for permission?
> A. No.
>
> Q. Do you remember any of your family members asking for permission?
> A. Yes.
>
> Q. Who asked for permission?
> A. Well, I personally called Miss Lee in recent years to not really ask permission but to say we have the right to cross your property. I did not ask for permission. I was asking -- I was telling her that we needed to thin our timber and we needed to come through.

R. p. 41, lines 21-25:

> Q. Describe the conversation that you had with Miss Lee?
> A. Well, I just said that I understood Mr. Patrick was having difficulty accessing the timber that needed to be thinned and that we wanted her to acknowledge our right to cross the property.
>
> Q. And what was the response?
> A. Basically no.

R. p. 42, lines 7-9:

> Q. Did she tell you that she didn't want you coming across the property?
> A. Well, yes.

Thomas A. Patrick also testified about a conversation he had with Helen M. Lee. R. p. 91, lines 21-24:

> A. ...We have been trying to get back in since 2010 and Mrs. Lee has objected.
> Q. Trying to get in. Who objected?
> A. Mrs. Lee.

R. p. 92, lines 18-25:

> Q. Well, let's talk about 2010. When Miss Lee objected what did she say?
> A. She just said that she didn't think she wanted us going across -- the Reids going across her property any more. Something to that effect. I don't remember her exact words.
>
> Q. Did she threaten to bring any lawsuit or anything?
> A. No.
>
> Q. She just said I don't want you coming across the property?
> A. She said something to that effect.
>
> Q. Have you contacted Miss Lee since 2010?
> A. I called after she said that. I called Will Reid and I just told him the basis of that conversation. I told him what Mrs. Lee had said and I think -- I seem to remember maybe six months or a year later I called Miss Lee back one more time.

Thomas A. Patrick also testified that, in the early 90s, Joe Lee erected a fence and asked him to change the route across his property. R. p. 74, lines 19-22.

The trial court was correct in finding that the physical act of erecting a fence and verbal objections from Helen M. Lee were sufficient to interrupt any prescriptive period. There is no dispute that a fence was erected before 1992 blocking the alleged path. Evidence at trial also shows that Lee told Medlin and Patrick that she did not want them coming across the property, and that Patrick told William Reid what Lee had said. Because there was evidence at trial of

overt acts discontinuing the Appellants' access, this Court should affirm the ruling of the trial court.

C. THE APPELLANTS FAILED TO ESTABLISH THE IDENTITY OF THE THING ENJOYED.

In order to establish an easement by prescription, the Plaintiffs are required to prove the identity of the thing enjoyed. There is no known case law in South Carolina in which this element is in dispute. This element requires a claimant to establish the presence of the road or path allegedly used for access.

The trial court held that the Appellants failed to meet their burden of establishing the identity of the thing enjoyed. At the trial, Thomas A. Patrick was asked during direct examination to show the route that he would use to get to the Reid property. R. p. 64, lines 9-20:

> A. Well, it is actually been two different ways over the years because of some new fence construction during a period of time that we did not just it for forestry operations. But initially it was something along the lines of there. (Indicating) And then some time between must have been early 90's there was a new fence built on the Lee property and a gate was put up somewhere along in here and we were asked to - - no, no, I am sorry. Somewhere -- I really don't know exactly where it was, but we ended up coming in more along the lines of something like that. So there have been two different ways that we have crossed the pasture.

R. p. 65, lines 11-16:

> A. ...You really could drive across there about anywhere you wanted to go, but this was somewhat, you know, evident on the ground. It is not as evident from the aerial photograph. With periods of non use grass would just grow over that because it was in the open in the pasture.

The Respondents maintain that evidence of the second path used after 1992 is inconsistent with the burden of proof. The Respondents also maintain that there was no evidence offered at trial

that the map drawings in evidence, while similar in cardinal direction, mark the same path. All three Respondents denied during testimony that any path or road existed across their property. R. p. 124, lines 6-10; R. p. 140, lines 14-18; R. p. 145, lines 1-7.

D. THE APPELLANTS' USE OF THE RESPONDENTS' PROPERTY WAS WITHOUT CLAIM OF RIGHT.

The Appellants allege that their use of the Respondents' property has been under claim of right rather than adverse. 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 circumstances surrounding his use." Kelley at 574. A claim of right is without recognition of the rights of the owner of the servient estate. Paine Gayle Properties, LLC v. CSX Transp., Inc., 400 S.C. 568, 584, 735 S.E.2d 528, 537 (S.C.App. 2012). The asking and obtaining of permission, whether from the tenant or owner of the servient estate, stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription. Paine Gayle at 584. Paine Gayle also held that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription. Id.

The trial court held that the the Appellant's use could not be adverse or under claim of right because, by requesting access from the Respondents, the Appellants have demonstrated recognition of the rights of the Respondents. During cross examination, Judith Medlin said that she remembered family members asking for permission to cross the Respondents' property. R. p. 39, lines 19-25. When asked to describe the conversation that Medlin herself had with Helen M. Lee, she testified that she wanted Lee to acknowledge their right to cross the property. R. p. 41,

lines 21-25. The Respondents maintain that, even if Medlin did not ask permission from Helen M. Lee, asking Lee to acknowledge their right to cross the property demonstrates recognition of the rights of the Respondents. Because the Respondents have have demonstrated such recognition, their use of the Respondents' property cannot have been under claim of right.

The trial court additionally held that the Appellants' use of the Respondents' property to conduct forestry operations was with express permission or license, thus unable to ripen into a prescriptive easement. William Reid, who testified that he had been to the property five times in his lifetime, testified that he has let Helen M. Lee know that he was going across the property and that her response was just common pleasantries. R. p. 49, lines 16-24; R. p. 58, lines 19-24. This evidence is consistent with permissive use. Applying Paine Gayle, the Appellants' permissive use, no matter how long continued, could never ripen into a prescriptive easement.

E. THE APPELLANTS HAVE NOT MET THE BURDEN OF PROOF REQUIRED TO TACK PREVIOUS USE.

The Court of Appeals has held that tacking of periods of prescriptive use is permitted where there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefitted by the inchoate servitude. Kelley, at 575. A party's use must meet all requirements throughout the twenty-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 (S.C.App. 1997).

The trial court held that there was insufficient evidence that any use by the Appellants' predecessors-in-interest satisfied the elements of a prescriptive easement. There was no evidence presented at trial that the previous owners of the Reid property used the Lee property for access

on dates sufficient to establish continued and uninterrupted use for a full period of twenty years. While William Reid testified that he thinks he has the right to cross the Appellants' property because it is the "historical" access, there is insufficient evidence that his predecessors-in-interest used the same path used by the Appellants. Reid testified only that his father would gain access down the driveway and across the field. R. p. 55, lines 4-6. And there was no evidence presented at trial that any use by Reid's predecessors-in-interest was adverse or under claim of right. When asked if he knew if his father ever spoke to any of the Lee's about coming across their property Reid said, "I would assume he would be respectful and let them know he was coming across." R. p. 55, lines 7-12.. Thus, there was insufficient evidence for tacking to be used.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the trial court.

Respectfully Submitted,

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November 22, 2013

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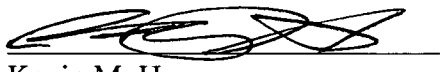
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

November 25, 2013



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