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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity and Special Circuit Court Judge

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Case No. 2016-CP-07-02274

Stephanie M. McDew a/k/a Stephanie McDew Schoumacher, ... Appellant,

v.

Frieda P. McDew a/k/a Frieda McDew Shorter, ... Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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I. Respondent's Argument Supports a Finding of Ouster as a Matter of Law.

In her brief[1], Respondent recapitulates her adverse possession claim but admits she fell short of establishing the ten-year statutory period under S.C. Code Ann. § 15-67-210. Respondent acknowledges that the sole reason "the Master-In-Equity ruled that Respondent could not prevail on her claim for adverse possession" was "because her exclusive possession was not for the required ten year period." (Br. of Resp't, p. 10.) Indeed, Respondent affirmatively argues that "her exclusive possession", under the facts presented at trial, would have constituted adverse possession under S.C. Code Ann. § 15-67-210 if she had been able to satisfy the statute's ten-year requirement.[2] (*Id.*) Yet, Respondent acknowledges she was unable to satisfy the ten-year statutory period because Appellant brought the current action within ten years of their mother's death.[3] (*Id.*) Thus, Respondent continues to assert to this Court that she possessed the property adversely to Appellant from the date of her mother's death on March 17, 2007 until the filing of this action on October 21, 2016. Respondent's previous assertions to the court below and current arguments to this Court that she adversely possessed the property until just shy of the ten-year statutory period constitute, and unavoidably include, an admission of ouster.

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[1] As a general matter, Respondent's Initial Brief is fraught with references to portions of the Transcript of Proceedings, March 18, 2019 that are neither included in the Appellant's nor the Respondent's Designations of Matter to be Included in the Record on Appeal. Specifically, Respondent references Transcript pages 54 (Br. of Resp't, p. 4), 174 (Br. of Resp't, p. 5), 60 (Br. of Resp't, pp. 7, 8, and 10), 182 (Br. of Resp't, p. 9) and 101 (Br. of Resp't, p. 12), none of which are included in the Designations by either party. Additionally, on page 6 of her brief, Respondent references the Transcript at 189:14-25 for the proposition that payment of property taxes should be reduced by the amount of benefit gained by the Respondent. However, this portion of the Transcript contains no such facts or testimony. Finally, Respondent's brief states numerous purported facts, including, but not limited to, many on page 6 of her brief, without citation to any item designated to be included in the Record on Appeal. All of this is improper pursuant to South Carolina Appellate Court Rules 208(b)(4), 209, & 210(h).

[2] Specifically, Respondent argues: "Under these facts had Respondent presented evidence that this course of action continued for ten years the court may have granted respondent title by adverse possession." (Br. of Resp't, p. 10.)

[3] This event ended the life estate reserved to the parties' parents in the 1979 Deed after which the period of adverse possession began. (Br. of Appellant, pp. 10-11.)

Under black letter law, one co-tenant cannot acquire title through adverse possession against another co-tenant unless there has been an ouster of the other co-tenant's possession. *See* 2 Tiffany Real Prop. § 463 (3d ed.) ("In order for a cotenant to acquire the property in question through adverse possession, he or she must oust the other cotenants before the time period for adverse possession will begin to run."); *see also* 2 Tiffany Real Prop. § 449 (3d ed.) ("A managing cotenant, in attempting to claim the interest of the other cotenants by adverse possession, has the burden of proving an ouster by clear and convincing evidence.").

In keeping with this principle, the Supreme Court of South Carolina has repeatedly held that "[t]itle by ten years' adverse possession by a cotenant against another may be acquired **only after actual ouster**". *Watson v. Little*, 224 S.C. 359, 365, 79 S.E.2d 384, 387 (1953) (emphasis added); *Wells v. Coursey*, 197 S.C. 483, 15 S.E.2d 752, 755 (1941) ("In order that one of several cotenants may acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive and hostile character as to amount to an ouster of the other cotenants."); *Brevard v. Fortune*, 221 S.C. 117, 131, 69 S.E.2d 355, 361 (1952) (same); *Terwilliger v. Marion*, 222 S.C. 185, 190, 72 S.E.2d 165, 167 (1952) (same); *Horne v. Cox*, 237 S.C. 41, 45, 115 S.E.2d 513, 515 (1960) (same); *see also Mole v. Folk*, 45 S.C. 265, 22 S.E. 882, 883 (1895) (proof of ouster is necessary to claim of adverse possession between cotenants); *Stone v. Fitts*, 38 S.C. 393, 17 S.E. 136, 138 (1893) (same).

Moreover, the "exclusive possession" element of a ten-year adverse possession claim is synonymous with "ouster":

> In order for possession to be exclusive for purposes of adverse possession, the claimant must shut out or wholly exclude the rightful owner from possession of the property during the required statutory period. The claimant's possession, to be exclusive, must be such as to operate as an ouster of the owner of legal title. Thus, a possession

> that does not amount to an ouster of the owner of land is not sufficiently exclusive to support adverse possession.

3 Am. Jur. 2d *Adverse Possession* § 63; *see also Powers v. Smith*, 80 S.C. 110, 61 S.E. 222, 223 (1908) ("A tenant is not bound to give actual notice to his co-tenant of ouster, but he may do this by conduct. Holding exclusively and adversely and openly are the highest acts in the power of a disseisor to indicate his intention."). In bringing an adverse possession claim based on the ten-year statute and reiterating that claim to this Court, Respondent has necessarily alleged and admitted that she maintained possession of the property of "such an actual, open, notorious, exclusive and hostile character as to amount to an ouster". *Felder v. Fleming*, 278 S.C. 327, 330, 295 S.E.2d 640, 642 (1982).[4]

Thus, by asserting a claim for adverse possession, alleging "exclusive" possession of the property, and reiterating those assertions in her argument to this Court, Respondent has conclusively admitted to ousting Appellant from the property as a matter of law. As a result, Appellant was relieved of the burden of proving ouster at trial because Respondent's allegations made such proof unnecessary. *See Youmans v. Youmans*, 128 S.C. 31, 121 S.E. 674, 676 (1924) (stating that a cotenant claiming title by adverse possession is "chargeable with knowledge that, if their claim to exclusive title [is] not sustained, they [will] be accountable to their cotenants for

[4] Respondent's reliance on *Felder* to distinguish her "exclusive possession" from ouster is misplaced. (Br. of Resp't, p. 11.) The quote relied on by Respondent references "an implication of ouster" which is only relevant to the common law twenty-year presumption of grant claim at issue in *Felder* and is not relevant to the statutory ten-year adverse possession claim at issue in this case. *See Felder*, 278 S.C. at, 331, 295 S.E.2d at 642; *see also Getsinger v. Midlands Orthopaedic Profit Sharing Plan*, 327 S.C. 424, 429–30, 489 S.E.2d 223, 225–26 (Ct. App. 1997) (noting difference between ten-year adverse possession claim under statute and twenty-year presumption of grant claim under common law). Respondent also appears to rely on the fact that the property has not been rented to suggest either that ouster has not occurred or that Appellant is not entitled to ouster damages. (Br. of Resp't, p. 11.) Relevant authorities preclude both arguments. *See Williams v. Bruton*, 133 S.C. 395, 131 S.E. 18, 21 (1925) (explaining the ousting cotenant "cannot justly complain if he is charged with such profits as . . . could have been made by a man of ordinary business sense and capacity in the exercise of due diligence"); *see also* 2 Tiffany Real Prop. § 450 (3d ed.) ("If one tenant is actually ousted or excluded by his cotenant from possession of the whole or any part of the property, the former may recover from the latter to the extent of the value of the use of which he has been deprived, whether the latter does or does not receive rents or profits from others.").

their proportionate shares of the rents and profits."); *see also* 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 113 ("If there has been an ouster, the plaintiff must prove that fact, unless the circumstances of the case or the allegations of the opponent's pleading are such as to make proof unnecessary. Where the defendant in his or her answer claims the entire property in his or her own right as sole owner, the plaintiff is under no obligation to show an ouster."). The Master-In-Equity erred in denying Appellant's ouster claim. This Court should reverse.

II. The Facts of this Case Dictate a Finding of Ouster.

A. The Evidence Indicates Respondent Changed the Locks.

At trial, Respondent claimed she did not change the locks to the property. However, a full view of the record evidence makes the opposite conclusion more likely.

Appellant testified that during a telephone call in the spring of 2009, Respondent informed her that she "could not stay at the house" because Respondent "had changed the code and the locks on the house" and Appellant "would not be able to get into the house until [Respondent] was paid what she claimed [Appellant] owed her." (Trial Tr. 21:2-11.) This testimony was corroborated by Edgar Gay—the parties' shared financial advisor—who testified that, in 2009, Respondent told him: "I told [Appellant] if she reimbursed me for the expenses that I have incurred, she can use [the House]. If [Appellant] doesn't, I am not going to allow her to do it." (Trial Tr. 83:9-84:1.) Mr. Gay further testified that, in 2009, Respondent also stated: "I'm going to change the locks if Stephanie doesn't pay – you know, reimburse me for the expenses." (Trial Tr. 85:10-16.) Notably, Mr. Gay is the only independent witness to testify at trial and Respondent did not contradict his testimony. Moreover, Respondent admitted, "I might have said to [Appellant], I'm going to change that lock." (Trial Tr. 150:12-13.)

Despite all of her stated intentions, Respondent claimed she did not actually change the locks. The record evidence indicates otherwise. In 2009, Appellant was unable to open the locks with her existing keys despite significant effort. (Trial Tr. 21:12-20, 27:8-28:22.) Appellant had no prior issues with the locks and, in fact, had witnessed her frail 82-year-old mother open the lock without issue in 2006. (Trial Tr. 28:23-30:8.) Appellant then telephoned Respondent and requested a new set of keys and the security code, but Respondent refused. (Trial Tr. 26:8-13; 178:15-179:18.) Moreover, Respondent withheld from Appellant the purported fact that she did not actually change the locks or the code and did not mention anything about the locks being difficult to operate. (Trial Tr. 178:15-179:18, 192:2-6.) Although Respondent claimed she was caring for her sick husband at the time of the 2009 telephone call, Respondent never followed up with Appellant to let her know the locks were unchanged, tell her the security code, or mail her a set of keys. (Trial Tr. 179:5-18.) Respondent's refusal to provide the keys or an explanation for why they were not needed strongly indicates that she did, in fact, change the locks.

Respondent has suggested that the locks were merely difficult because of corrosion from the salt air. (Trial Tr. 189:17-192:1.) To corroborate her testimony, Respondent offered only the deposition testimony of Carla Nettles. However, Ms. Nettles' testimony is tainted with bias because she is regularly employed by Respondent's counsel. (Def.'s Ex. 5, 14:10-23.) Moreover, Ms. Nettles' difficulty in operating the locks in 2017 has no bearing on whether the locks had been changed prior to Appellant's attempt to access the house in 2009. The eight years between the two events would certainly be more than enough time for Respondent's salt-air corrosion theory to render a lock installed in 2009 difficult to operate by 2017. Thus, Respondent failed to present credible or relevant corroborating evidence to support her claim that she never changed the locks.

Considering the evidence, it is more likely that Respondent did, in fact, change the locks to the property to exclude Appellant. This Court should take its own view of the facts and find that Respondent changed the locks and ousted Appellant.

B. Even if Respondent did not Change the Locks, She Ousted Appellant.

No matter the reason Appellant was unable to access the house, Respondent knew Appellant did not have access to the property and Respondent maintained Appellant's exclusion. This continued denial of access constitutes ouster.

Even though Respondent denied changing the locks herself, she admitted that her mother had changed the locks multiple times. (Trial Tr. 180:17-181:4.) Thus, Respondent was aware of the likelihood that Appellant no longer possessed a working set of keys to the house. Respondent also admits in her brief that "Appellant was unaware that the lock on the home often stuck due to salt air and the home's proximity to the ocean." (Br. of Resp't, p. 5.) Yet, Respondent never informed Appellant of that fact. (Trial Tr. 192:2-6.) Furthermore, Respondent told Appellant and others that she had changed, or would be changing, the locks to the house. Respondent, however, withheld from Appellant the purported fact that she did not actually change the locks or the code. (Trial Tr. 178:15-179:18.)

Thus, Respondent knew of multiple reasons why Appellant might not have been able to access the property and withheld that knowledge from Appellant. When Appellant requested working keys and the security code in 2009, Respondent refused and never corrected Appellant to suggest the lock was merely difficult or followed up to provide new keys, the code, or any other information regarding access. Even if Respondent did not change the locks, which is unlikely, she purposely led Appellant to believe that she did. Moreover, by at least 2009, Respondent knew that Appellant could not access the property and, instead of providing the keys and the code or telling

her to use WD-40 on the lock, she withheld those items and information to maintain Appellant's exclusion and ouster from the property.

All of this evidence leads to the likely and reasonable conclusion that Respondent ousted Appellant. The Master-In-Equity erred in holding otherwise and this Court should reverse.

C. Respondent's Arguments Against Ouster are Without Legal or Factual Support.

First, Respondent argues that there was no ouster because she never physically prevented Appellant from entering the property or accessing the house.[5] However, South Carolina cases are clear that ouster does not require "a physical eviction". *Parker v. Shecut*, 349 S.C. 226, 230, 562 S.E.2d 620, 622 (2002) (*"Parker I"*); *Brevard*, 221 S.C. at 132-133, 69 S.E.2d at 362. Instead, ouster merely requires that "an exclusion of the other tenants from possession must be shown." *Brevard*, 221 S.C. at 131, 69 S.E.2d at 361. As shown above, the evidence demonstrates that Respondent excluded Appellant by, at the very least, refusing to provide working keys, the security code, or information necessary for Appellant to access the house. This denial of access to the property is the very definition of ouster. *See Parker I*, 349 S.C. at 230, 562 S.E.2d at 622; *see also Laughon v. O'Braitis*, 360 S.C. 520, 526, 602 S.E.2d 108, 111 (Ct. App. 2004) (discussing *Parker I*'s finding of ouster where brother cotenant "denied his sister access to the property").

Next, Respondent's attempt to distinguish *Parker I* and her reliance on *Laughon* is flawed. In direct contrast to the present case and *Parker I*, the party claiming ouster in *Laughon* was "allowed . . . access to the property every time she visited." *Laughon*, 360 S.C. at 526, 602 S.E.2d

[5] In her brief, Respondent argues that "[n]o evidence was presented that the Respondent never barred the Appellant from entry to the property which would have been difficult in any case as Respondent lived over an hour away in Savannah." (Br. of Resp't, p. 7.) She goes on to argue that she "was not at the subject residence at the time and thus could impede Appellant in no way." (Br. of Resp't, p. 9.) Respondent reiterates this point again by stating that she "lived over an hour away and visited the property briefly to check on things once a month. As such Appellant could go to the property any time she desired." (Br. of Resp't, p. 11.)

at 111. Indeed, on each of Ms. Braitis's three visits to the house, she "walked freely through the house, looking at and going through personal property." *Id.* Moreover, on the final visit, she came to the front door, walked in without knocking, and went around the house going through every bit of the property. *Id.* Thus, in *Laughon*, there was no denial of access to the property. Here, however, just like the brother in *Parker I*, Respondent refused to give Appellant a working key or the security code, refused to let Appellant into the house (or explain how she might get access to the house), and continued to refuse Appellant the key and the security code until ordered to do so by the Master-In-Equity. Respondent's actions in this case are virtually identical to the "distinctly hostile" acts of the brother co-tenant in *Parker I. Parker I*, 349 S.C. at 230–31, 562 S.E.2d at 623 ("[Brother] testified that he had not given [his sister] a working key, nor did he have any intention of giving [her] a key unless the master ordered him to do so. [His] actions . . . are so distinctly hostile to [his sister]'s rights that [the brother]'s intention to disseize is clear and unmistakable."). Thus, Respondent's denial of access to the property constitutes ouster under *Parker I* and the great body of South Carolina cases cited herein.

Finally, at certain points in her brief, Respondent appears to argue that Appellant should have resorted to self-help or some other extra-judicial means of gaining access to the property.[6] The Supreme Court of South Carolina has flatly rejected the use of self-help in resolving property disputes between cotenants. *See Parker I*, 349 S.C. at 231 n.3, 562 S.E.2d at 623 n.3 (indicating a cotenant is not permitted to "take the law into his own hands" and, instead, must seek redress through the courts "rather than resorting to self-help"); *see also Gibson v. Belcher*, 287 S.C. 315, 320, 338 S.E.2d 330, 333 (1985) (rejecting self-help measures in context of interpretation of a

[6] "[Appellant] further testified that she did not call a locksmith, the security company or make any other effort to gain access to the home." (Br. of Resp't, p. 8.) "Appellant testified she never called a locksmith or made any efforts to enter the subject premises." (Br. of Resp't, p. 9.)

will); S.C. Code Ann. § 27-40-660 (1986) (providing penalties for use of self-help in residential landlord-tenant context). Consequently, Respondent's suggestion that Appellant should have pursued her rights in any way other than by bringing this action is simply without merit.

III. Respondent's Tax Deduction Argument Directly Contradicts Her Stipulation at Trial.

In her brief, Respondent argues that the availability of an itemized tax deduction for the property taxes paid by the Respondent is merely "theoretical" and that "the court cannot presume that Respondent could claim the taxes on the property as an itemized deduction." (Br. of Resp't, p. 14.) However, Respondent's argument runs directly contrary to the very substance of the trial stipulation Respondent quotes on the same page of her brief. (Br. of Resp't, p. 14.) The availability of the tax deduction is not merely theoretical. Rather, it is concrete. Respondent explicitly stipulated that she "could have taken the [tax] deduction". (Trial Tr. 158:10-159:8.) Respondent even affirms this fact earlier in her own brief when she states that she "either claimed, or **could have claimed**, the taxes paid on the Property as deductions on her federal income taxes." (Br. of Resp't, p. 6 (emphasis added).) The parties' stipulation rendered evidence of Respondent's tax filings unnecessary. Respondent's argument lacks any reasonable basis as it squarely contradicts both her trial stipulation and her own brief. This Court should reject Respondent's argument as frivolous and reduce Respondent's contribution claim accordingly.

V. South Carolina Law Limits Contribution Claims to Common Debts Enforceable as Liens Against the Property.

Respondent argues her equitable claims for contribution should not be limited to debts enforceable as liens against the property. Respondent's argument runs directly contrary to nearly two centuries of black letter law in South Carolina.

As early as 1833, the South Carolina Court of Appeals of Equity held that a cotenant's right to contribution for property expenses extends only to expenses enforceable as liens against the property. *Screven v. Joyner*, 10 S.C. Eq. (1 Hill Eq.) 252, 261 (S.C. App. L. & Eq. 1833). Specifically, the court held:

> The right of the complainant to call on the defendant for contribution, depends not upon any act or personal liability of his testator. If he is liable at all, it must be that the land devised to him was liable, as well as that of the complainant, to the lien . . . at the time it was enforced and the complainant's land sold under it. To make out either the community of burthen or benefit, the decree must have had an equal lien on both, and both must have had the benefit of the removal of the lien.
> . . .
> Neither the land nor the defendant's testator being liable at the time the complainant was compelled to pay the decree, it follows that the complainant has no right to claim a contribution from the defendant, on account of a payment which did not, and could not benefit it.

Screven, 10 S.C. Eq. (1 Hill Eq.) at 261-263. This ruling was echoed in a subsequent case in which the court held:

> For contribution can never be asked for on account of the removal of a common burthen on property conveyed, unless there was an inevitable necessity that a part of the property conveyed should pay it.

Thompson v. Perry, 11 S.C. Eq. (2 Hill Eq.) 204, 213 (S.C. App. L. & Eq. 1835) (citing *Screven*, 10 S.C. Eq. (1 Hill Eq.) at 261). These cases have been adequately summarized as follows:

> To be compensable, a debt or lien paid by a cotenant must have been a common obligation, the payment of which is a common benefit to the property. If the payment by the cotenant was not a debt or obligation enforceable against the common property, there can be no contribution since there was no common benefit.

6 S.C. Jur. *Cotenancies* § 27 (citing *Screven*, 10 S.C. Eq. (1 Hill Eq.) 252 and *Thompson v. Perry*, 11 S.C. Eq. (2 Hill Eq.) 204). As recently as 2012, this Court cited *Screven* and reiterated this same

rule. *See Dumit v. Holtzman*, No. 2012-UP-636, 2012 WL 10864188, at *1 (S.C. Ct. App. Dec. 5, 2012).

This Court should follow long-standing precedent and limit Respondent's contribution claim to recovery of a proportionate share of the property taxes.

CONCLUSION

For the reasons stated above and those in its Initial Brief, Appellant respectfully requests that this Court reverse the Master-In-Equity's Order denying Appellant's claim for ouster and remand for a determination of Appellant's damages and a proper calculation of Respondent's set-off or damages, if any.

Respectfully submitted,

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March 30, 2020

THE STATE OF SOUTH CAROLINA
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Stephanie M. McDew a/k/a Stephanie McDew Schoumacher,..... Appellant,

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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant and the Appellant's Designation of Matter to be Included in the Record on Appeal on Frieda P. McDew a/k/a Frieda McDew Shorter by depositing a copy of it in the United States Mail, postage prepaid, on March 30, 2020, addressed to her attorney of record, Thomas J. Finn, Post Office Box 6003, Hilton Head Island, South Carolina 29938.

[Signature Page to Follow]

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RE: Stephanie M. McDew a/k/a Stephanie McDew Schoumacher v. Frieda P. McDew a/k/a Frieda McDew Shorter
Appellate Case No.: 2019-002079
Our File No.: 057569/01500

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one (1) copy of the following:

(1) Initial Reply Brief of Appellant.

(2) Appellant's Designation of Matters to be Included in the Record on Appeal.

(3) Proof of Service of the above documents on Respondent.

Please file the originals and return a clocked-in copy to me in the enclosed self-addressed, stamped envelope. Thank you.

Very truly yours,

Andrew M. Connor
Attorney for Appellant

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