

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM YORK COUNTY  
In The Circuit Court

Teasa K. Weaver, Master in Equity

Appellate Case No. 2020-001129

**RECEIVED**

**Nov 12 2020**

**SC Court of Appeals**

Benjamin J. Russell and Chere Mitchell.....Appellant

v.

Trudy Bolin Mattox.. .....Respondent

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**INITIAL BRIEF OF APPELLANT**

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November 12, 2020

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## STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ERR IN FINDING THE RESPONDENT HAS AN EASEMENT BY PRESCRIPTION?
2. DID THE LOWER COURT ERR IN FINDING THE RESPONDENT HAS AN IMPLIED EASEMENT?

This matter was commenced by the filing of a Summons and Complaint dated April 6, 2018 and amended on May 9, 2018 wherein the Respondents sought an easement by prescription, an easement implied use and an easement by necessity over the property of the Appellants. The Complaint asked for Declaratory and Injunctive Relief. The Appellant filed an Answer on May 15, 2018 denying the allegations in the Complaint. The case was tried before the Honorable Tesa Weaver, Master of Equity of York County, on June 20, 2019. At the conclusion of the Respondents case, the Respondent moved to amend the pleading to allege an implied easement. The Court granted the Motion. The Respondent dismissed the claims for the easement of necessity and easement by prior use.

The Court issued this Order dated February 4, 2020, granting the Respondent an easement by prescription over the property of Appellant and an easement by implication over the property of Benjamin J. Russell. The Appellant timely filed a Motion to Reconsider or Amend the Order pursuant to Rule 59 (e). The Motion was heard on June 16, 2020. The Court filed an Order dated July 28, 2020 that amended the Order filed February 4, 2020 still granted the Respondent relief. On August 24, 2020 the Appellant filed a Notice of Appeal with the South Carolina Court of Appeals.

## FACTS

The Respondent seeks an easement of a road that is shown on Plaintiff's Exhibit 9. The plat shows the road beginning on Beaver Dam Road and running through the property of the Appellant Benjamin J. Russell. It is undisputed that the property of the Appellant Benjamin J. Russell was at one time owned by Mae J. Mitchell. The road then enters into the property of the Respondent Chere Mitchell and ends at the property line of the Respondent. The Respondent property is shown on the plat as 46.02 acres. It is undisputed that the property of Chere Mitchell was once owned by Mary E. Mitchell. There was never unity of title between the property of Chere Mitchell and the properties of Benjamin J. Russell or the Respondent's.

The Respondent's husband, Franklin Z. Mattox owns a one-third interest in the property that borders the eastern side of the Plaintiff's property at the top and bottom of the plat. According to the testimony of Franklin Z. Mattox, the property in which he owns an interest borders Scenic View Road, a public road (Transcript page 188, lines 5-10). The Respondent's deceased husband, Carl E. Bolin, acquired the 40.6 acres from Mae J. Mitchell on June 16, 1975 and recorded in Deed Book 514, page 120 (Plaintiff's Exhibit 8). The Respondent acquired the property on April 18, 1990, pursuant to a Deed of Distribution recorded in volume 116, page 157 (Plaintiff's Exhibit 8). The Plaintiff and her husband, Franklin Z. Mattox, testified that they have used the road from Beaver Dam Road to the Plaintiff's property since 1975, openly, adversely and under claim of right (Transcript page 111, lines 15 through page 112, line 8, page 127, line 22 through page 128, line 20). The Plaintiff called several witnesses. Melvin Howell testified that Mae J. Mitchell was his mother's oldest sister (Transcript page 59, line 9). He testified that he would regularly use the road to visit his aunt, Mae J. Mitchell, but that he has not

regularly used the road since 1990 (Transcript page 63, lines 3-6). Oscar Ramsey testified he started using the road in the late 1960's when the road was owned by Mae J. Mitchell. He would help move cows in and out of the road with his uncle and her nephew. James R. Jones testified Mae J. Mitchell was his father's sister (Transcript page 91, lines 6-10). James R. Jones owned some of the property now owned by the Appellant, Russell. He testified he had equipment on the property and he put up a locked gate to protect his property. He gave each of the adjoining property owners a key to access the property (Transcript page 99, lines 2-10). The Plaintiff testified that James R. Jones did not ask permission to put up the gate but told her he was putting up the gate and gave her a key to the lock (Transcript page 136, lines 6-10). The husband of Appellant, Franklin Z. Mattox, testified that James R. Jones told him and his wife that he was putting up a gate and gave them a key to the gate (Transcript page 123, lines 15-20). Mr. Mattox worked for York Electric Cooperative and would use a work key to enter the property as part of his job (Transcript page 124, lines 2-17). Appellant Russell testified that when he was considering purchasing the property that he had a conversation with Franklin Z. Mattox. Mr. Mattox asked if the Appellant would continue to allow them to use the road on the property (Transcript page 152, lines 6-11). Appellant Russell testified that at some point the Plaintiff's husband placed a gate where the road enters into the Appellant's property. The Appellant has permission to continue using their property to access other property he owns and was denied his request (Transcript page 155 line 20 through page 156, line 6). Appellant testified that he lives near the road and intends to restore the house that was the residence of Mae J. Mitchell, which is located right next to the road (Transcript page 150, lines 5-10).

## ARGUMENTS

### I. THE COURT ERRED BY FINDING THAT THE RESPONDENT HAD AN EASEMENT BY PRESCRIPTION.

A discuss of the requirements of a prescriptive easement are set forth in Bundy v. Shirley 412 S.C. 292, 772 S.E.2d 63 (2015). To establish a prescriptive easement one must show: (1) Continued and uninterrupted use or enjoyment of the right for a period of up to twenty (20) years; (2) The identity of the thing enjoyed; and (3) The use or enjoyment which is either adverse or under claim of right. In Simmons v. Berkeley Electric Cooperative, Inc., 419 S.C. 223, 797 S.E. 2d 387(2016), the South Carolina Supreme Court discussed the third element. The Court held that adverse use and claims of right cannot exist as separate methods approving the third element of a prescriptive easement as the two terms are, in effect, one in the same. The South Carolina Supreme Court held that when analyzing the third element of a prescriptive easement, the Court should apply the test for adverse use. Simmons clarified that a claim of right by the parties seeking a prescriptive easement is not an element of a prescriptive easement, but adversity, which is lack of permission, is required. “It is well established that of a permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse,” Simmons, 419 S.C. 223 (2016)797 S.E. 2d 392 (Bundy, 412 S.C. at 310, 772 S.E. 2d at 173 (2015)).

It appears from the testimony that the Plaintiff, her late husband and her present husband used the road along with other individuals in the community without objection. Melvin Howell Sr. is a nephew of Mae J. Mitchell the former owner of Plaintiffs and Defendants property. His main use of the road was to visit Mae J. Mitchell, such with were clearly permissive. Oscar

Ramsey testified that he started going to the property now owned by the Plaintiff back in the late 1960s when Mae J. Mitchell owned it. The purpose of going was to help her haul cattle in and out of the property (Transcript p. 82, lines 2-5). Mr. Ramsey's use was clearly permissive not adverse. He was there with the permission of Mae J. Mitchell and he was helping her.

While there are no South Carolina cases on point, other jurisdictions have held that use of a neighbors land based on mere neighborly accommodation or courtesy is not adverse and cannot result in a prescriptive easement, Rathbun v. Robson, 203 Mont. 319, 661 P.2d 850, 852 Mont. 1983). In Morrow v. Dyches, 328 SE 522, 492 SE 2d 420 Ct. App. (1997) the Court noted that no evidence indicated that the use was anything more than permissive and, "evidence established in the mere fact of use does not necessarily equate with evidence establishing the character of such use."

At one point, James R. Jones, a nephew of Mae J. Mitchell, and previous owner of property now owned by the Defendant, Benjamin Russell, put a gate on the road and gave keys to other adjoining land owners to allow them to have entrance to the property. The giving of keys is the giving of permission. Once permission is granted by the land owner there is no longer adverse use or use under claim of right. Even if the Plaintiff once had adverse use of the roadway, once permission was granted to her, the Plaintiff's use was no longer adverse. In Bundy v. Shirley 412 S.C. 292, 772 S.E.2d 63 (2015) the Court stated the presence of gates is strong evidence of permissive use.

The use of the road by the Plaintiff was clearly permissive.

II. THE COURT ERRED IN GRANTING THE RESPONDENT A DECLARATORY JUDGEMENT FOR AN IMPLIED EASEMENT.

By way of her amended complaint, the Respondent alleged the drive by which she claims an easement goes across Tracts 1 and 6 of Defendant's Russell property and across Tract 7 of Defendant Mitchell's property until it reaches Plaintiff's property. The drive is depicted on Plaintiff's Exhibit 9 and is attached to Plaintiff's amended Complaint as Exhibit B.

In Blue Ridge Realty Company, Inc. v. Williamson, 247 S.C. 112, 145 S.E. 2d 922 (1965) the Court held that where an owner of land has subdivided and plotted the land into lots and streets then sells and conveys such lots with reference to a Plat, thereby dedicates such streets to the use of lots owner and their successors and title in the public. The Court correctly held that a portion of the road that crosses the Appellant Chere Mitchell's property could not be subject of an easement by implication because Mae J. Mitchell never owned that property and had no right to create an easement over the property now owned by Appellant Chere Mitchell. The Court held that there is an implied easement that abuts Tract 7, Chere Mitchell's property, that is on land, that was formerly Mary Mitchell's property. The Court based this ruling on two Plats referenced in the deed from Mae J. Mitchell to Carl E. Bolin contained in Plaintiff's Exhibit 8. The Plat in Book 47 page 181 shows a road going from Mae J. Mitchell's property to road S-46-363. A Plat in Plat Book 47 page 146 shows a dotted line of markings going across the top of the property of a two acre portion of the Plat of the property conveyed to Carl E. Bolin. These alleged depictions of a road are not in the same location as the road shown on Plaintiff's Exhibit 9, which is the road over which Respondent claims egress and ingress. There was no testimony that there was ever actually a road or drive located in the place shown on the Plat in Exhibit 8. There was no testimony that such a drive in that location was ever used for egress and ingress. The road shown in Plat book 47 page 181 states that it goes to road S-46-363 but does not show how it connects

to road S-46-363 or whether it ever connects to the drive shown in Plaintiff's Exhibit 9. The drive showing in Plat book 47, page 176 gives no indication of where the drive leads. There can be no dedication of a road under Blue Ridge where there is no depiction of where the road is located. Any location is speculation. If it is the same drive shown in Plaintiff's Exhibit 9 then it enters into the property of Chere Mitchell, not the property of Appellant Benjamin Russell and there can be no implied easement over Chere Mitchell's property.

The drive appears to be first referenced in the deed to Mary E. Mitchell, Tract 7, dated September 18, 1965 (Plaintiff's Exhibit 7). The deed conveyed to Mary E. Mitchell Tracts 1 and 2 on the map. The Plat shows a county road which is now Beaver Dam Road. The drive in question in this action appears to come from the county road through property owned by Defendant Russell to a house on Tract 1 which is now property owned by Defendant Chere Mitchell. There is no indication on the Plat of the drive going into the property now owned by the Plaintiff.

### **CONCLUSION**

FOR all of the reasons wherefore stated, the Court should reverse the Order of the lower Court granting an easement by prescription and an easement by implication to the Respondent.

Respectfully Submitted,

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**PROOF OF SERVICE**

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I, certify that I served the Brief of Appellant by depositing copies of the same in the United States mail, postage prepaid on November 12, 2020, addressed to its attorney, Law Office of Charles S. Bradford, 4 E. Liberty Street, York, SC 29745.

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