THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Circuit Court Case No. 2019-CP-23-02476

Appellate Case No. 2020-001051

Thomas C. Skelton..... Appellant,

v.

First Baptist Church of Travelers Rest, South Carolina, a non-profit Corporation..... Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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SUMMARY OF REPLY

Appellant has served his country and community well as a former U.S. Army Ranger, Squad Leader for the Honor Guard at Arlington National Cemetery, and as a Greenville City Police Officer. For almost 30 years, he has openly maintained a portion of Respondent's Vacant Lot that borders his property as his own. He is seeking the right to continue to use the Vacant Lot. This use is necessary for him to access his business. Respondent does not dispute that Appellant's use exceeded its permission or that access predated Appellant's ownership when previously used as a blacksmith shop. Therefore, the inferences support causes of action for prescriptive easement, easement by necessity, and adverse possession. Appellant is simply seeking his right to his day in court.

STANDARD OF REVIEW

Respondent does not dispute the Standard of Review as to when summary judgment may be granted. Respondent admits that only a scintilla of evidence will defeat summary judgment. Respondent admits that all evidence must be viewed in the light most favorable to Appellant. Also, Respondent does not dispute that summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law. *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). Finally, Respondent does not dispute that "[a]ll ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant." *Baugus* v. *Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991).

ARGUMENT

A. A GENUINE ISSUE OF MATERIAL FACT IS PRESENTED BY APPELLANT'S USE OF THE PROPERTY IN EXCESS OF ANY PERMISSION ARGUABLY GIVEN

The lower court erred in granting summary judgment when Appellant presented a genuine issue of material fact regarding the scope of permission for the use of Respondent's land and whether Appellant adversely used the property in excess of that permission. Respondent argues only that Appellant had permission to mow a portion of the Vacant lot and to use a portion of the Lot for ingress and egress. Respondent does not present any evidence that Appellant had permission to:

1. build a berm;
2. landscape the property;
3. plant trees;
4. install power conduits;
5. place an out-building; or
6. install a 41,300 sq. ft. dog fence.

Respondent misapprehends Appellant's argument when it claims the additional uses made beyond ingress and egress do not support a finding of a prescriptive easement. Respondent correctly notes that an easement is the right to use another's land for a particular purpose. (Respondent's Brief, p. 5). The very fact that an easement is granted for a particular purpose means that use beyond that purpose is problematic. It actually supports the argument that a prescriptive easement or adverse possession can arise from use in excess of the specific permission granted.

Respondent cites no authority that exceeding permission does not support a prescriptive easement or adverse possession, but there is authority to the contrary. Courts in other jurisdictions have found such a right can be created. *See Turner v. Bouchard*, 32 A.3d 527 (Md. App. 2011)

(finding a prescriptive easement was established because the Bouchards' use, beginning in 1984, exceeded the scope of the original 1975 easement); *Kerr Land & Timber Co. v. Emmerson*, 43 Cal.Rptr. 333, 351, 233 Cal.App.2d 200, 228 (Cal. App. 1965) (finding the existence of an easement does not preclude the acquisition of greater rights by prescription.); *McBride v. Smith*, 227 Cal.Rptr.3d 390, 409, 18 Cal.App.5th 1160, 1182 (Cal. App. 2018) (finding Plaintiff's allegations sufficient to support a cause of action for a prescriptive easement based on the theory that Plaintiff's daily and primary use of the easement significantly expanded the use allowed under the terms of a 1993 recorded grant.) Appellant's acts in excess of ingress and egress were open and notorious, providing Respondent with an opportunity to protect its rights, which it failed to do.

Respondent also does not dispute the evidentiary facts. The lower court was required to draw all inferences from the testimony presented most strongly in favor of Appellant. Further inquiry is required to clarify the application of the law, therefore Appellant respectfully requests this Court vacate the lower court's grant of summary judgment and remand the case for further proceedings.

B. EVIDENCE OF TACIT APPROVAL ALONE IS NOT SUFFICENT FOR A GRANT OF SUMMARY JUDGMENT

Respondent attempts to minimize Appellant's actions that exceeded any permission granted. Appellant built a berm to prevent flooding on his property[1], landscaped and planted trees[2], placed an outbuilding in part on the Vacant Lot[3], installed power conduits across the Vacant Lot[4], and used a significant portion of the property to fence in his dogs.[5] Appellant's dog fence extended

[1] R. __, Skelton deposition, p. 11; R._, Skelton Affidavit, ¶ 15.
[2] R. __, Skelton deposition, p. 12, ll. 4-5; p. 16, ll. 11-12; R._, Skelton Affidavit, ¶ 15.
[3] R.__, Skelton Affidavit, ¶ 18.
[4] R. ___, Skelton Affidavit, ¶ 19.
[5] R. __, Skelton deposition, p. 15; R._, Skelton Affidavit, ¶ 19.

onto the Vacant Lot, encompassing 41,300 square feet, to prevent trespassers from crossing the property.[6] Appellant's installation of a dog fence allowing his dogs to patrol a portion of Respondent's property is a use of the property meant to exclude others from entry and, therefore, hostile to use by Respondent.

Respondent does not claim to have granted actual permission for these uses and admits it never had a signed agreement with Appellant.[7] Respondent also cites no authority that tacit approval is enough to defeat adverse possession or a prescriptive easement. Other jurisdictions have found, to the contrary, that silence by an owner regarding the adverse use of his property is not the same as granting permission and will not, by itself, defeat a claim of prescriptive rights. *Rotman v. White*, 74 Mass. App. Ct. 586, 590 (2009).

Further inquiry into the facts of the case is desirable to clarify the application of the law, therefore summary judgment is not appropriate. *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Appellant respectfully requests this Court vacate the lower court's grant of summary judgment and remand the case for further proceedings.

C. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMMENT AS TO EASEMENT BY NECESSITY

Respondent attempts to conflate the requirements of an easement by prior use with an easement by necessity. Unlike an easement by prior use, where the use must be continuous, an easement by necessity only requires that the necessity exist at the time of the severance and at the time of the exercise of the easement. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 418-19, 633 S.E.2d 136, 140-41 (2006) *citing* 28A C.J.S. Easements 96.[8] Respondent does not dispute the

[6] R. __, Skelton deposition, p. 15; R._, Skelton Affidavit, ¶ 19.
[7] Respondent's Brief, p. 3.
[8] The elements of a claim for easement of necessity are 1) unity of title, 2) severance of title and 3) necessity. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 418-19, 633 S.E.2d 136, 140-41 (2006). In comparison, an easement by prior use exists when: (1) the dominant and servient tracts of land originated from a common owner; (2) the use was in

blacksmith's use of the building on Appellant's property in the past or that the driveway was necessary to access the blacksmith shop at the rear of what is now Appellant's property at the time that the property was severed.

Further, Appellant testified that a septic tank and several pre-existing buildings on the property necessitated the use of the driveway on the Vacant Lot to access the rear of the property.[9] Therefore, the inference to be drawn most strongly in Appellant's favor is that access to the back of Appellant's property was cut off when the single tract was severed into two parcels.[10]

Appellant's undisputed testimony presents a genuine issue of material fact and further inquiry is desirable to clarify the law. Appellant therefore respectfully requests this Court vacate the lower court's grant of summary judgment and remand the case for trial.

CONCLUSION

Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law. *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). Appellant presented evidence that he exceeded any permission granted by Respondent for the use of Respondent's property to support a genuine issue of material fact as to an easement or adverse possession. Appellant additionally presented evidence that an easement was necessary to access the back portion of his property at the time the property was severed and that it was necessary at such time as he exercised the easement. Without this access, Appellant will lose his business.

Appellant requests that this Court vacate the lower court's grant of summary judgment and remand the case as further inquiry into the facts is desirable to clarify the application of the law.

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existence at the time the original grantor severed the tracts; and (3) the use was apparent, continuous, and necessary for enjoyment of the dominant tract." *Id.*, 633 S.E.2d at 139.

[9] R.__ Skelton deposition, p. 30, l. 21- p. 31, l. 12.

[10] R.__, Skelton deposition, p. 30, ll. 10-14.

Respectfully submitted,

Date 17 December 2020

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SC Court of Appeals

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CERTIFICATE OF SERVICE

I, Peggy McComb, Legal Assistant to attorney for Appellant, certify that I have served a copy of the Initial Reply Brief of Appellant *via email* and by depositing a copy in the U.S. Mail, postage prepaid, on December 17, 2020, addressed to attorney of record:

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December 17, 2020

Via email ctappfilings@sccourts.org and U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Thomas C. Skelton v. First Baptist Church of Travelers Rest*
Appellate Case No. 2020-001051

Dear Ms. Kitchings:

Enclosed is an original and one copy of the Initial Reply Brief of Appellant and a Certificate of Service in the above matter. Please file the originals with your Court and return clocked copies in the enclosed envelope.

As stated in the attached Certificate of Service, I am serving a copy of the attachments upon counsel of record via email and U.S. Mail.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Bradford N. Martin

Bradford N. Martin

/pm
Enclosures

cc: O.W. Bannister, Esq.