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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY COURT OF COMMON PLEAS

PERRY H. GRAVELY, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2020-001051

Thomas C. Skelton.....Appellant,

vs.

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

# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

Appellant initiated this action by filing a Complaint on May 1, 2019 seeking: (1) a prescriptive easement of ingress and egress on Respondent's lot; 2) easement of necessity; 3) adverse possession of part or all of Respondent's lot; and 4) a *de facto* lease of the lot. Respondent filed its Answer denying Appellant's right to use the property and counterclaiming for attorneys' fees pursuant to S.C. Code §15-36-10. Respondent filed a Motion for Summary Judgment on April 14, 2020, which was briefed by both parties and heard before the lower court on June 11, 2020. Respondent filed a supplemental Memorandum on June 18, 2020. The lower court granted Respondent's Motion for Summary Judgment later that day. Appellant filed a Motion to Alter or Amend on June 26, 2020 which was denied on July 13, 2020. Appellant subsequently filed this appeal on July 23, 2020, requesting the right to a trial on the merits to continue using the Respondent's lot.

## STATEMENT OF THE FACTS

By deed filed March 25, 1992, the Appellant, Thomas C. Skelton ("Skelton") purchased from Mary Erline Smith Banic and Carroll Watson Smith a house and lot that fronts on McElhaney Road in Travelers Rest. At the time he purchased the property Skelton was a police officer. (R. pp. 134, 135.) He left the police force in 1994 and started his current landscaping business. He employs trucks, tractors and trailers in this business and uses a shop at the rear of his property to do maintenance and repairs. (R. p. 156.)

Skelton realized he had a water problem soon after purchasing the McElhaney Road property so he constructed a French drain and placed a small berm along the property line of the lot now owned by the Respondent, First Baptist Church of Travelers Rest ("Church"). Some of the berm is on the Church's adjoining lot. (R. pp. 140-143.) Skelton also realized he had a problem with mice which would attract snakes. Skelton hired an exterminator in the mid 90's who advised the tall grass adjoining Skelton's property would attract mice. (R. p. 141.)

Skelton's wife spoke with the pastor of the Church which had purchased the adjoining lot from Carroll W. Smith and Catherine Smith by deed recorded May 5, 1993. According to Skelton his wife received permission to mow a section of the Church's lot to keep down mice. (R. p. 141.)

Skelton also put in a dog fence on the Church's lot. The fence is apparently of the invisible kind. Skelton's wife may have spoken to someone at the Church about the dog fence but he did not. (R. p. 144.) Skelton planted a maple tree on the Church property as well.

After Skelton began his landscaping and water control business, he began to use a strip of the Church's lot to reach the rear of his lot. (R. p. 149.) A written agreement was prepared by the Church in about May, 2012 labeled "Temporary Right of Access Agreement," but was never signed by either party. Nevertheless, Skelton continued to use the strip of the Church's property

for his trucks or trailers to reach the rear of his lot.

In 2019 the Church revoked its permission for Skelton to use a portion of its lot for access to the rear of his lot. As a result, Skelton wrote a letter to the Church dated February 28, 2019. In his letter Skelton stated, in part:

> My wife and I have spoken with several pastors and deacons over the past 20 plus years and we were told by all of them that it was fine for us to use the lower portion of the field so that we could have ingress and egress to the rear of our property. In addition, a written agreement was also put into effect to codify this in writing. During the period I have lived here, I have mowed and bush hogged, grassed and fertilized the field at my expense. I have done this because the failure to do so would cause serious damage to my home and property.
>
> (R. p. 100.)

## STANDARD OF REVIEW

The current standard of review for grants of summary judgment was stated in The Kitchen Planners, LLC v. Samuel Friedman and Jane Bryer Friedman and Branch Banking and Trust, _____ S.C. _____, 851 S.E.2d 724 (Ct. App. 2020):

> "When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 36, 637 S.E.2d 560, 561-62 (2006). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354-55, 650 S.E.2d 68, 70 (2007) (quoting Rule 56(c), SCRCP). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 516, 812 S.E.2d 750, 754 (Ct. App. 2018) (quoting *M&M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008)). "When evidence is susceptible to more than one reasonable inference, the issue should be

submitted to the jury." *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).

## ARGUMENT I

**THE LOWER COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS TO A PRESCRIPTIVE EASEMENT BECAUSE THE UNDISPUTED FACT WAS THAT APPELLANT HAD PERMISSION FROM THE OWNER OF THE PROPERTY TO USE THE OWNERS' LAND FOR INGRESS AND EGRESS. (APPELLANT'S ISSUES I, II & III.)**

The Supreme Court recently considered the requirements of a prescriptive easement in Simmons v. Berkeley Elec. Coop., Inc., 419 S.C. 223, 797 S.E.2d 387 (2016). The Court in Simmons quoted with approval the requirements for a prescriptive easement set out in County of Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977):

> To establish a prescriptive easement, the claimant must prove by clear and convincing evidence: '1) the continued and uninterrupted use or engagement of the right for a period of 20 years; 2) the identity of the thing enjoyed; and 3) the use [was] adverse under claim of right.'

Simmons also stated the long-established rule in South Carolina that permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse. Bundy v. Shirley, 412 S.C. 292, 310, 772 S.E.2d 163, 173 (2016).

Skelton acknowledged writing a letter dated February 28, 2019, Exhibit 2 to his deposition, page 24 line 23 through page 25 line 2, in which he stated, "My wife and I have spoken with several pastors and deacons over the past 20 plus years and we were told by all of them that it was fine for us to use the lower portion of the field so that we could have ingress and egress to the rear of our property." (R. p. 100.)

Skelton was asked about the unsigned agreement to use a strip of the Church's property:

> Q. So, it (the unsigned agreement) granted you permission to use this strip of property, Church property?
>
> A. That's what I recall. But, again, that was a.
>
> Q. Ok.

A. a long time ago and we don't have it.

Because Skelton's testimony and own letter makes it clear he used the Church's strip with the Church's permission, Skelton is not entitled to a prescriptive easement.

The Appellant acknowledges that the Respondent granted permission for the Appellant to use a portion of their land for ingress and egress to the rear of his lot. Permission of the owner of land to make certain use by a non-owner is fatal to a claim of prescriptive easement for that use. Simmons v. Berkeley Electric Cooperative, Inc., 419 S.C. 223, 797 S.E.2d 387 (2016).

Instead, the Appellant contends that evidence of additional uses made by Appellant of Respondent's land above and beyond ingress and egress establishes a prescriptive easement for ingress and egress.

Such is not the law. An easement is the right to use the land of another for a particular purpose. Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2013). Constructing a berm to fight off surface water, landscaping property beyond the specific area needed for ingress and egress, planting trees, installing a power conduit, placing an outbuilding over the property line, and installing a dog fence do not support finding a prescriptive easement for ingress and egress. In other words, making use of Respondent's property beyond the permissive use of ingress and egress does not convert the permissive use for ingress and egress into a hostile use.

The lower court's grant of summary judgment should be affirmed.

## ARGUMENT II

**THE LOWER COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS TO EASEMENT BY NECESSITY BECAUSE THE UNDISPUTED FACTS WERE THAT THE NECESSITY DID NOT EXIST AT THE TIME THE LOTS WERE SEVERED AND THE APPELLANT CREATED THE NECESSITY BY GOING INTO A LANDSCAPING BUSINESS. (APPELLANT'S ISSUES V AND VI.)**

The Appellant contends that he is entitled to an easement by necessity. The necessity

arose after the Appellant purchased his lot, quit the police force and began a landscaping business. He has a shop at the rear of his property that he cannot get his big trucks and tractor to due to the structure he placed on his lot.

The simple answer to the Appellant's claim of easement by necessity is that it did not exist when the Appellant purchased his property. By his own admission he did not operate his landscaping business at that time.

An easement by necessity must exist at the time of the severance. Paine Gayle Properties, LLC v. CSX Transp. Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 1012). Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 633 S.E.2d 136 (2006).

The grant of summary judgment should be affirmed.

## ARGUMENT III

**THE LOWER COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS TO ADVERSE POSSESSION BECAUSE THE ACTS OF THE APPELLANT WERE EITHER WITH THE TACIT OR ACTUAL PERMISSION OF THE LANDOWNER OR WERE NOT HOSTILE. (APPELLANT'S ISSUE IV.)**

The Appellant claims all or a portion of the Respondent's vacant lot by adverse possession pursuant to §15-67-210, et seq., S.C. Code of Laws, 1976.

To prove he has met his burden under that law, the Appellant must prove his possession was continuous, hostile, open, actual, notorious, and exclusive for ten (10) years. Davis v. Monteith, 289 S.C. 176, 345 S.E.2d 724 (1986). The evidence that the Appellant has met his burden must be clear and convincing. Id.

Appellant admits he had permission for ingress and egress over a portion of the Respondent's lot. He also admits he had permission to mow the grass on the area next to his lot. According to the Appellant, his wife spoke to the pastor of the Respondent at the time and advised of a problem with mice and snakes. She told the pastor, "You know, we'll mow that section, but we, we've got to keep it down, like, finish mowed. You can't – if you bush hog and

its sticking up a foot, field mice are going to just run right through it and he said, 'That's fine. Y'all do what you need to do', so we started mowing that strip along there at that point." (R. pp. 141-142; 288.)

These admissions along with his letter of February 28, 2019 make it beyond argument that the Appellant had permission to do acts on the Respondent's land.

To support his claim of adverse possession the Appellant points to a small berm he constructed along the property line with the Respondent's property in order to channel the surface water away from his lot. (R. p. 140.) A picture of the berm is shown on Exhibit 8 of Deposition of Gary Batson. (R. p. 292.) The Appellant planted shrubbery on the berm to prevent erosion. (R. p. 145.)

Appellant also argues that his dog fence raises a question of adverse possession. Apparently, the "fence" is of the underground kind as is shown in Exhibit 9, Deposition of Gary Batson. (R. p. 293.) While he did not testify he had permission, the use does not rise to the level necessary to raise a factual issue.

## CONCLUSION

The grant of summary judgment on the Appellant's causes of action should be affirmed as there is no factual issue as to the consent of the Appellant to do the things he did.

Respectfully submitted,

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Attorney for Respondent

## CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), *SCACR* and, further, complies with Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information as well as Supreme Court Order dated March 20, 2020, et. seq., regarding the operation of appellate courts during the Coronavirus pandemic.

BANNISTER, WYATT & STALVEY, LLC

O. W. Bannister

February 2, 2021