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SC Court of Appeals

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.

FINAL BRIEF OF APPELLANT

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VI. **DID THE LOWER COURT FAIL TO CONSIDER THAT ONLY A REASONABLE NECESSITY IS REQUIRED TO IMPLY AN EASEMENT?**

STATEMENT OF THE CASE

Appellant initiated this action seeking judicial confirmation of its 30-year use of the adjacent Vacant Lot owned by Respondent, with the filing of a Complaint May 1, 2019. 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 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 July 23, 2020, requesting the right to a trial on the merits to continue using the adjacent property.

STATEMENT OF THE FACTS

Appellant is a former U.S. Army Ranger, squad leader for the Honor Guard at Arlington National Cemetery, and Greenville City Police S.W.A.T. team member.[1] Twenty-seven years ago he purchased a home in Travelers Rest for his young family.[2] His home is adjacent to a vacant lot owned by Respondent (Vacant Lot), both originating from the same parcel.[3] When he purchased his home, there was an existing back building formerly used as a blacksmith shop.[4] The back portion of the property was not accessible by car without driving across the Vacant Lot, on a road that existed before Appellant purchased his home.[5] Without access to the road, Appellant cannot reach the back of the property by vehicle or operate his business.

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[1] R. 134, l. 18- R. 135, l. 3.
[2] R. 261, Ex. 2, R. 141, ll. 7-13
[3] R. 189, ll. 5-13.
[4] R. 158, l. 9- R. 159, l. 3
[5] R. 159, ll. 10-14.

Appellant received Respondent's permission to mow and maintain a small strip of the Vacant Lot to prevent mice and snakes that endangered his young children since the mid-90s.[6] He started a landscaping business using the back portion of his property in 1994[7] and used the same road on the Vacant Lot for ingress and egress to the portion of Appellant's property used by the previous owner for his blacksmith shop.[8]

Appellant's use of the Vacant Lot was not restricted to Respondent's limited permission, however. For almost 30 years, Appellant has openly maintained a portion of the Vacant Lot as his own: building a berm to prevent flooding on his property[9], landscaping and planting trees[10], and placing an outbuilding in part on the Vacant Lot.[11] Skelton installed a dog fence in 2000, which encompassed 41,300 sq. ft. onto the Vacant Lot.[12] This adverse use is in addition to the use of the driveway on the Vacant Lot[13] or mowing to prevent infestations of mice and snakes. Appellant did not obtain permission for these uses.[14] Respondent does not claim to have objected to Appellant's use of the Vacant Lot until 2019, when it claims it revoked its permission. (R. 74, Respondent's Memorandum in Support of its Motion for Summary Judgment, p. 3).

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[6] R. 141, ll. 7- R. 142, l. 20; R. 33, ¶ 19. When Respondent would not keep the grass cut, Appellant had to do it.
[7] R. 135, ll. 4-7; R. 149, ll. 7-9.
[8] R. 156, ll. 6-7; R. 158, l. 12- R. 159, l. 20. "All 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).
[9] R. 140, ll. 12-14; R. 32, ¶ 15.
[10] R. 141, l. 15-R. 142, l. 10; R. 145, ll. 8-20; R. 32, ¶ 15.
[11] R. 33, ¶ 19.
[12] R. 144, ll. 4-6; R. 33, ¶19.
[13] The driveway on the Vacant Lot was dedicated to public use by the former owners in 1997-98. (R. 33, ¶ 19).
[14] R. 140, l. 9 – R. 141, l. 5; R. 144, ll. 12-14, R. 154, ll. 10-14.

ARGUMENT

I. STANDARD OF REVIEW

The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury. *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987). However, the determination of the extent of a grant of an easement is an action in equity. *Moore v. Reynolds*, 285 S.C. 574, 577, 330 S.E.2d 542, 544 (Ct.App.1985). The Court may take its own view of the evidence on the latter issue. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). Respondent does not dispute that Appellant had an easement across the Vacant Lot. Rather, it argues that the easement was permissive, and that permission has been revoked. (R. 74). Therefore, the issue before the Court is one in equity.

Summary judgment is appropriate where it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Calvert v. House Beautiful Paint and Decorating Ctr., Inc.*, 313 S.C. 494, 443 S.E.2d 398 (1994). Summary judgment is not appropriate where further inquiry into the facts of the case 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). Summary judgment should only be granted when plain, palpable and undisputed facts exist on which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co.*, 314 S.C. 542, 431 S.E.2d 565 (1993).

In determining whether any triable issues of fact exist, the lower court must view the evidence and all reasonable inferences which may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbank* v. *Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). "In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom

must be viewed in the light most favorable to the nonmoving party." *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 717, 511 S.E.2d 413, 415 (Ct. App. 1999). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Baugus* v. *Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). "All ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant." *Id.* Since it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

II. APPELLANT PRESENTED A GENUINE ISSUE OF MATERIAL FACT AS TO THE SCOPE OF ANY PERMISSION (Issues I, II)

The issue before the lower court as to a prescriptive easement and adverse possession was whether Appellant exceeded any permission arguably granted by Respondent.[15] Respondent concedes that Appellant meets the other elements. The lower court's Order overlooks the inferences from the evidence that must be construed most strongly against the Respondent. Appellant presented a question of material fact that he possessed the property in question without permission when he:

1. built a berm;
2. landscaped the property;
3. planted trees;
4. installed power conduits;
5. placed an out-building; and
6. installed a 41,300 sq. ft. dog fence

[15] As set forth in Section II.C., Appellant's use of the Vacant Lot exceeded any permission given by Respondent for ingress and egress or to mow.

in addition to simply using the driveway for ingress and egress.

These evidentiary facts are not in dispute; the inferences drawn from them must favor Appellant and thus a further inquiry into the facts is desirable: summary judgment should be denied. *Baugus, supra.*

The scope of an easement is an equitable matter in which the reviewing Court may take its own view of the preponderance of evidence. *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 558 S.E.2d 902 (Ct.App. 2001).

A. It is Undisputed that Appellant Met the Elements of a Prescriptive Easement (Issue III)

To establish a prescriptive easement, Plaintiff must show:

(1) continued or uninterrupted use of the right for a period of twenty years;
(2) the identity of the thing enjoyed;
(3) use or enjoyment which is either adverse or under claim of right.

Pittman v. *Lowther*, 363 SC 47, 610 S.E. 2d 479 (2005).

Respondent does not dispute that Appellant has used a significant portion of the Vacant Lot for almost 30 years, nor does it disagree as to the portion of the property over which Appellant exercised control, as it is clearly defined by Appellant's maintenance and use of the property.

Appellant built a berm to prevent flooding on his property[16], landscaped and planted trees[17], placed an outbuilding in part on the Vacant Lot[18], and used a significant portion of the property to fence in his dogs.[19] Appellant's dog fence extended onto the Vacant Lot, encompassing 41,300 square feet, to prevent trespassers from crossing the property.[20] All of these actions were clearly visible to Respondent. The inferences drawn strongly in Appellant's favor are that this use is adverse to

[16] R. 140, ll. 12-14; R. 32, ¶ 15.
[17] R. 141, ll. 4-5; R. 145, ll. 11-12; R. 32, ¶ 15.
[18] R. 33, ¶ 18.
[19] R. 144, ll. 4-6; R. 33, ¶ 19.
[20] R. 144, ll. 4-6; R. 33, ¶ 19.

Respondent's exclusive use of the property. "[W]hen it appears that claimant has enjoyed an easement openly[21], notoriously[22], continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse." *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 229, 797 S.E.2d 387, 390 (2016).

Appellant, therefore, clearly presented evidence of a prescriptive easement; the inferences drawn from these facts, construed most strongly against Respondent, prohibit the granting of summary judgment.

B. Appellant Presented Evidence of Adverse Possession (Issue IV)

Appellant presented evidence of his exercise of control over a portion of the Vacant Lot. Adverse possession requires possession that is continuous, hostile, open, actual, notorious, and exclusive for at least ten years. *Davis v. Monteith*, 289 S.C. 176, 345 S.E.2d 724 (1986).

S.C. Code §15-67-230 provides:

> For the purpose of constituting an adverse possession by a person claiming title not founded on a written instrument or a judgment or decree, land shall be deemed to have been possessed in the following cases only:
>
> (1) When it has been protected by a substantial enclosure; and
> (2) When it has been usually cultivated or improved.

The parties agree that Skelton cultivated a portion of the Vacant Lot, not only by mowing but also planting shrubs and trees[23]. Appellant also erected a dog fence on the Vacant Lot[24]. Appellant thereby exercised open and exclusive control of these portions of the Vacant Lot. As set forth in Section III, the lower court erred in finding the inferences from these actions, construed

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[21] "'Open' generally means that the use is not made in secret or stealthily. It may also mean that it is visible or apparent." *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 233, 797 S.E.2d 387, 392 (2016) (quoting Restatement (Third) of Property (Servitudes) § 2.17(h) (2000)).

[22] "'Notorious' generally means that the use is actually known to the owner, or is widely known in the neighborhood." *Id.* 419 S.C. at 234, 797 S.E.2d at 392 (quoting Restatement (Third) of Property (Servitudes) § 2.17(h)).

[23] R. 145, ll. 8-14; R. 32, ¶ 15.

[24] R. 144, ll. 4-6; R. 33, ¶19.

most strongly against the Respondent, were not sufficient to deny summary judgment as to adverse possession.

C. Appellant Exceeded any Permission (Issue II)

The lower court's finding that there was no prescriptive easement or adverse possession because Appellant had permission to use the Vacant Lot for egress and ingress and to mow the lot (R. 7, Order, p. 7) overlooks the fact that he did not receive permission for any other adverse uses of the property.[25] A genuine issue of material fact exists as to the scope of any permission.[26]

Respondent itself submitted Appellant's testimony to the lower court that he was not given permission to erect a dog fence on the Vacant Lot.[27] There is also no evidence that Appellant received permission for the extensive landscaping that was performed or for the installation of power conduits across the Vacant Lot.[28]

Respondent presented an unsigned document offering permission for Appellant to use a forty (40) by three hundred (300) foot strip of the Vacant Lot (12,000 sq. ft.) for the "purpose of occasional light vehicle traffic access."[29] When asked to define the scope of his prescriptive easement, Appellant responded that he maintains a one hundred twenty-two (122) by three hundred (300) foot area (36,600 sq. ft.).[30] The dog fence encompasses 41,300 square feet of the Vacant Lot.[31] It is undisputed that Appellant's use exceeds the unsigned agreement and further inquiry into the facts is desirable to clarify the application of the law. *Baugus, supra.*

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[25] R. 140, l. 9 – R. 141, l. 5; R. 144, ll. 12-14; R. 154; ll. 10-14.
[26] Respondent's representative (R. 184, ll. 18-20) was unable to speak to the scope of any permission sought or granted. (R. 214, l. 9 – R. 215, l. 14).
[27] R. 73; R. 144, ll. 12-14.
[28] R. 33, ¶ 19.
[29] R. 285, Exhibit 5.
[30] R. 146, ll. 15-22.
[31] R. 33, ¶ 19.

Appellant's actions go beyond an easement for ingress and egress and constitute inferences that support adverse possession of a portion of the Vacant Lot. "[W]hen it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse." *Williamson v. Abbott*, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917).

Appellant's use of the property in excess of any permission given converted the use from permissive to adverse. *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). At the very least, Appellant has presented sufficient evidence of a genuine issue of material fact supporting the inference that he was acting adverse to any permission of the Respondent to constitute adverse possession or a prescriptive easement. Again, the evidentiary facts are not in dispute; the inferences drawn from them must favor Appellant. *Baugus, supra.* It was therefore error for the lower court to grant summary judgment as to the existence of a prescriptive easement or adverse possession.

Appellant therefore respectfully requests this Court vacate the lower court's grant of summary judgment and remand the case to give Appellant his day in court.

III. APPELLANT'S ACTIONS CONSTITUTE ADVERSE POSSESSION (Issues I, IV)

The parties agree that Appellant cultivated a portion of the Vacant Lot, not only by mowing but also planting shrubs and trees[32]. Appellant also erected a dog fence on the Vacant Lot[33]. This supports the inference that Appellant exercised open and exclusive control of these portions of the Vacant Lot. These activities constitute adverse possession pursuant to S.C. Code §15-67-230. The

[32] R. 145, ll. 8-14; R. 32, ¶ 15.
[33] R. 144, ll. 4-6; R. 33, ¶ 19.

lower court improperly found that these activities did not rise to the level of possession necessary to support adverse possession. The lower court does not provide any reasoning for this finding. (R. 7)

The lower court cites *Taylor v. Heirs of Taylor*, 419 S.E. 639, 799 S.E.2d 919 (2017), in which the South Carolina Supreme Court stated:

> For possession to be open and notorious, "the legal owner need not have actual knowledge the claimant is claiming property adversely, [but] the hostile possession should be so notorious that the legal owner by ordinary diligence should have known of it."

It is undisputed that the berm and landscaping are open and notorious. As set out above, these activities exceeded any permission to mow a portion of the Vacant Lot. Using almost a quarter of the Vacant Lot for 20 years for a dog fence creates an inference supporting a material question of fact as to the adverse possession and Respondent's knowledge and use of ordinary diligence to know of this adverse use.[34]

The Supreme Court further stated:

> [A]cts of ownership of open land for purposes of adverse possession need not include actual residency or occupancy. Moreover, activities that do not involve the creation of permanent structures on the land can be sufficiently open and notorious as to put the legal owner on notice that his land is being adversely possessed. *Id.* (internal citations omitted).

Taylor, 419 S.C. at 651, 799 S.E.2d at 925.

The lower court appears to have relied upon Respondent's argument that the dog fence was not open and notorious because it was an electric fence. However, Respondent[35] admitted the dog fence was open and obvious and that it was aware of its presence:

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[34] Respondent admitted the dog fence was open an obvious and that it was aware of its presence. (R. 239, ll. 2-10).
[35] Gary Batson was deposed as the Respondent's representative. (R. 184, ll. 18-20).

Q. When you walk the lane or when anybody from the Church walks the lane, are they aware that there's been a dog fence to keep those Skelton dogs and -- excuse me – under control?
A. Well, I saw it personally, myself, the first time I walked down there.
Q. Yes, sir.
A. And our grass guy, Ron Cooke, is aware of it.

R. 239, ll. 2-10.

Appellant presented sufficient evidence to support an inference of a genuine issue of material fact and further inquiry into the facts of the case is desirable to clarify the application of the law. Appellant therefore respectfully requests this Court vacate the lower court's grant of summary judgment and remand the case for further proceedings.

IV. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO EASEMENT BY NECESSITY (Issues I, V, VI)

South Carolina has long recognized the acquisition of an easement of right of way over another's land by necessity. *See Brasington v. Williams*, 143 S.C. 223, 238, 141 S.E. 375, 380 (1927). 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). There is no dispute in the Record regarding unity of title or that the two properties were severed from a single tract.[36]

The lower court found:

> Skelton's claim of necessity must fail because it did not exist when Skelton purchased his lot but came about when he formed his landscaping business and the use of the Church's lot is simply a matter of convenience.

(R. 7, Order p. 7). This finding overlooks that "necessity" looks at the issue of access and not the purpose for which access is required and that South Carolina requires only "reasonable necessity" to imply an easement.

[36] R. 189, ll. 5-13; R. 22, ¶14.

A. Evidence of Reasonable Necessity (Issue VI)

The inferences from the evidence in the Record support that at the time Appellant purchased his property, vehicular access to the back portion was only available through the Vacant Lot. 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.[37] The inferences to be drawn in Appellant's favor are that access to the back of Appellant's property was cut off when the single tract was severed into two parcels.[38]

This is analogous to *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012) in which Proctor's property was bisected by a creek and ravine preventing vehicular access to the north side of the property, absent use of the access road through Steedley's property. Proctor was able to access the southern part of her property from an unpaved road. The South Carolina Court of Appeals confirmed the special referee's conclusion that the use of the road to access Steedley's property was necessary for the enjoyment of the dominant estate. *Id.* 398 S.C. at 575, 730 S.E.2d at 364. Likewise, Appellant's use of the access road was necessary for the enjoyment of his dominant estate even before his business began in 1994.

The lower court recognized that "the necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible." (R. 6) citing *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012). The lower court also acknowledged that "South Carolina requires only 'reasonable necessity' to imply an easement: while the owner of the servient estate must prove more than convenience, he need not show the [easement] is absolutely necessary." *Id. citing*

[37] R. 159, l. 21- R. 160, l. 12.
[38] R. 159, ll. 10-14.

Graham v. Causey, 284 S.C. 339, 341, 326 S.E.2d 412, 414 (Ct.App.1985), disapproved of on other grounds by *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987) (citations omitted).

There is a reasonable necessity even when an alternative route could be constructed at an expense. In *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct.App.1985), the South Carolina Court of Appeals affirmed an easement by necessity when a piece of property abutted a public road for several hundred feet, but the property was "80 feet above the bottom of a gully found along the public road's western side" and had "draw[s]" obstructing access to the public road. *Id.* 287 S.C. at 292, 337 S.E.2d at 890. The Court of Appeals affirmed the only reasonable access to the property was a gravel road that crossed over a neighboring piece of property that was previously part of the same larger tract of land. *Id.* Appellant is not arguing that it is more convenient or preferable to use the Vacant Lot to access the back of his property, rather access is unavailable absent the use of the Vacant Lot.

Appellant presented inferences which support a genuine issue of material fact of a reasonable necessity for access across the Vacant Lot to the rear of his property and inquiry into the facts of the case is desirable to clarify the application of the law. Appellant therefore respectfully requests this Court vacate the lower court's grant of summary judgment and remand the case to allow a trial.

B. The Necessity Existed Prior to Appellant's Purchase of the Property (Issue V)

The necessity to access the rear of Appellant's property from the Vacant Lot can be inferred at the time of Appellant's purchase and was not created by Appellant.[39] Appellant did not have to be operating his business from the rear of his property from the date of purchase for the driveway on the Vacant Lot to be necessary to access this portion of the property.

[39] R. 158, l. 9 – R. 162, l. 5.

Appellant presented evidence to the lower court that he purchased his home in 1992 with an existing back building formerly used as a blacksmith shop.[40] Appellant testified that the driveway on the Vacant Lot was not for the purpose of accessing the house that originally stood on the Lot. (R. 191, Batson deposition, p. 15, ll. 7-11). The inference, taken in the light most favorable to Appellant, is 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. (R. 159, Skelton deposition, p. 30, ll. 10-20). Further inquiry into the facts is desirable to clarify the application of the law. *Standard Fire, supra.*

Appellant therefore respectfully requests this Court vacate the lower court's grant of summary judgment and remand the case for trial.

CONCLUSION

For almost 30 years, Appellant has exercised dominion over a portion of Respondent's Vacant Lot, even extending his dog fence to keep trespassers off the property. This use exceeded any permission for ingress and egress or to mow the Vacant Lot. Appellant presented inferences to support a genuine issue of material fact as to an easement or adverse possession and the lower court erred in granting summary judgment in favor of the Respondent. Further inquiry into the facts is called for to clarify the application of the law in this case. Inferences drawn from the facts in Appellant's favor preclude the granting of summary judgment.

[40] R. 158, l. 9 – R. 159, l. 4.

Appellant requests that this Court vacate the lower court's grant of summary judgment and allow him his day in court.

Respectfully submitted,

Date 2/4/2021

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The undersigned, attorney for Appellant, hereby certifies that this Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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