THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2020-000458
Civil Action No. 2017-CP-36-00214

James L. Braswell, Sr.,……. Respondent – Appellant,

v.

James F. Amick,…… Appellant – Respondent.

INITIAL REPLY BRIEF OF APPELLANT – RESPONDENT

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I. THE ORDER OF JUDGMENT IS CONTROLLED BY ERRORS OF LAW BECAUSE IT FAILS TO APPLY THE CURRENT TEST FOR PRESCRIPTIVE EASEMENTS AND THE SUBTEST FOR ADVERSE USE AS SET FORTH IN SIMMONS.

In his Initial Brief, Respondent – Appellant ("Plaintiff") avers the Order of Judgment is not controlled by errors of law and it did apply the current test for prescriptive easements even though the Order of Judgment did not specifically say "open" and "notorious". Plaintiff's argument wholly disregards the fact that the South Carolina Supreme Court established a new test for prescriptive easements in Simmons, as follows:

> Thus, we believe the test for a prescriptive easement can be simplified as follows: In order to establish a prescriptive easement, the claimant must identify the thing enjoyed, and show his use has been *open*, *notorious*, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years.

Simmons v. Berkeley Elec. Coop., Inc., 419 S.C. 223, 233, 797 S.E.2d 387, 392 (S.C. 2016).

The South Carolina Supreme Court took the opportunity in Simmons v. Berkeley Elec. Coop., Inc. to overrule prior inconsistent precedent and set forth the current test for prescriptive easements in South Carolina. Simmons, 419 S.C. at 232, 797 S.E.2d at 392. In Simmons, the Supreme Court provided a lengthy breakdown of prior case law which is *almost* entirely incorporated into the Order of Judgment. Simmons, 419 S.C. at 229-31, 797 S.E.2d at 390-91; (Order of Judgment pp. 11-12).

The Order of Judgment erroneously provides the new test remains the same as the old test which created the confusion in the first place and is in direct contrast with the foundation of the Supreme Court's decision in Simmons. *Id.* It is clear the Order of Judgment handpicked pieces of the Supreme Court's breakdown of prior case law which most benefitted Plaintiff. For example, the Order of Judgment provides:

> "In order to establish a prescriptive easement, "the claimant must prove by clear and convincing evidence: (1) the continued and uninterrupted use or enjoyment 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 v. Berkeley Electric Cooperative, Inc., 419 S.C. 223, 229, 797 S.E.2d 387, 390 (2016), quoting Darlington County. v. Perkins, 269 S.C. 572, 576, 239 S.E.2d 69, 71 (1977).

(Order of Judgment p. 11). The Order then omits the very next line from that breakdown which actually provides the basis for the current test as follows:

> "[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).

Simmons, 419 S.C. at 229, 797 S.E.2d at 390 citing Williamson v. Abbott, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917) (emphasis added).

The Order of Judgment then provides some additional breakdown related to the use of a comma in the third element before curiously stopping without citing any analysis by the Simmons Court and failing to mention of the Supreme Court set forth a new test for prescriptive easements. (Order of Judgment p. 12). Consequently, it is inarguable the Order of Judgment applies the old, confusing test for prescriptive easements and must be reversed.

In his Initial Brief, Plaintiff even concedes the new test as provided in Simmons is current law despite the fact it was not included in the Order of Judgment. Plaintiff avers his use was open and notorious because it is visible on some old USDA photographs. It is important to clarify that Appellant – Respondent ("Defendant") does not allege his entire property was heavily wooded; rather, significant, relevant portions of Defendant's property were heavily wooded, and it was entirely undeveloped until sometime after 2002 when construction on Defendant's house began. Specifically, Defendant would show this Court that such portions immediately off of Highway 76 and along the fence line were overgrown with trees and brush which are readily visible from the

USDA photographs. This made it difficult, if not impossible, to determine the location of the dirt road from the highway where the those in the neighborhood could see.

There was no Google Earth from 1964 to 1988, and it would be unconscionable to impute aerial photographs taken by an aircraft with special equipment to the average person from the neighborhood. The record provides that only Mr. Johnson had the unique luxury of an airplane. Furthermore, the USDA photographs do not countermand the testimony of Defendant and his ex-wife because these photographs fail to accurately depict the condition of property in 1988 since they were taken four years before Defendant purchased his land and one year after Defendant started clearing his land. Moreover, there was an abundance of testimony that much of the brush and trees were relatively small and low to the ground which would not be visible in these old USDA photographs.

Plaintiff further contends Plaintiff's use was notorious because there is no testimony or anything in the record that establishes that Plaintiff's use of the right of way was not known to the true owners. "Given that a prescriptive easement results in diminished rights of the property owner, we find that a claimant seeking a prescriptive easement must be held to *a strict standard of proof*. Accordingly, we join the majority of state jurisdictions and hold that *a party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence*. Bundy v. Shirley, 412 S.C. 292, 306, 772 S.E.2d 163, 170 (S.C. 2015) (emphasis added).

It is particularly troubling Plaintiff relies on the absence of evidence to support his position that the Court should deprive Defendant of his property. In Bundy, the Supreme Court made it clear that Plaintiff not only has the burden of proof but the heightened burden of proving all elements by clear and convincing evidence. *Id*. Defendant is not required to somehow prove a negative because Plaintiff failed to offer any evidence the prior owners of Defendant's property had actual knowledge

of Plaintiff's use until 1979 at the earliest. And there is no evidence Plaintiff's use was widely known in the neighborhood.

Plaintiff further avers that Defendant's failure to put up a permanent fence is evidence that he was aware Plaintiff was using the dirt road to access the 120 acre tract. This argument fails on two fronts. First, Defendant did not purchase his property until 1988 which is four years after the Order of Judgment erroneously determined a prescriptive easement was established; thus, Defendant's knowledge is irrelevant as to whether the Plaintiff satisfied the notorious element of the new test for prescriptive easements.

Second, Defendant inquired about purchasing gates to Plaintiff which were furnished to Defendant by the Plaintiff. (Transcript p. 268, 408-09). Defendant then installed the gates and gave Plaintiff a key which clearly establishes Plaintiff was using the dirt road with Defendant's permission. *Id*. As provided in our Initial Brief, permissive use defeats the acquisition of a prescriptive easement because once permission was granted by Defendant, Plaintiff's use was no longer adverse. *See* Bundy, 412 S.C. at 310, 772 S.E.2d at 173.

II. THE ORDER OF JUDGMENT IS CONTROLLED BY ERRORS OF LAW BECAUSE THE RELIEF GRANTED FAR EXCEEDS THE SCOPE OF RELIEF ALLOWED FOR APPURTENANT PRESCRIPTIVE EASEMENTS UNDER WILLIAMSON, BUNDY, AND SIMMONS.

Plaintiff contends the record establishes he is entitled to a prescriptive easement even if the prescriptive period did not begin until he purchased the 120 acre tract on June 20, 1972 because nothing in the record supports Defendant gave permission by 1992. The testimonies of the Parties and witnesses are consistent and establish Plaintiff gave Defendant four gates which were installed sometime around 1990 at the latest.

In support of his position, Plaintiff relies on the testimony of his sons, Mark Wayne Braswell and Jimmy Braswell, Jr., because they worked closely with their father on the 120 acre tract since the 1970's. Mark Wayne Braswell's testimony provides he could only recall the gates were installed sometime after Defendant purchased his property. (Transcript p. 201). He further testified that he had a key to the gates until the lock was changed. *Id*. Jimmy Braswell, Jr. testified the gates were installed somewhere around 1990 at the latest. (Transcript p. 252). Plaintiff testified the gates were installed "Probably in the '90's or early '80's, '90, in the early '90's and whatever then." (Transcript p. 268).

Defendant's ex-wife, Tamela Adkins testified the gates must have been installed between 1990 and 1991, at the latest, since the gates were there when she was still married to Defendant, and they were divorced in 1992. (Transcript p. 332-33). Defendant testified the gates were installed between 1988 and 1990. (Transcript p. 407). Defendant further testified that he gave Plaintiff permission to come through his property, and stated, "he helped me and I was helping him." (Transcript p. 413-14). It is apparent, the record establishes, around 1990, Defendant sought help from Plaintiff in obtaining gates to fence in his horses, those gates were provided by Plaintiff at no expense to Defendant, and Defendant permitted Plaintiff to use the dirt road as a display of gratitude.

Plaintiff's contention that nothing in the record supports Defendant having given permission by 1992 is entirely unsupported because there is no evidentiary support in the record that the gates were installed after June 20, 1992. Accordingly, this Court should reverse any factual finding the gates were installed after 1992. *See* Bundy, 412 S.C. at 302, 772 S.E.2d at 168 citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) (providing the Court will not disturb the special referee's factual finding that have some evidentiary support).

In his Initial Brief, Plaintiff claims he never sought permission from anyone to use the dirt road, he believed he had the right to use the dirt road, and this is supported by Defendant asking permission from Plaintiff to install gates. Plaintiff cites his testimony on page 268 of the trial transcript which does *not* provide Defendant ever asked for Plaintiff's permission to install the gates. (Transcript p. 268). Plaintiff merely testified that Defendant asked him to furnish the gates and Defendant put them up. *Id*. This comports with Defendant's testimony which clearly articulated the nature of their conversation regarding the installation of the gates. (Transcript p. 408-09). Plaintiff explained he knew absolutely nothing about where to go buy gates, he had never bought a gate, but he knew Plaintiff, so he asked Plaintiff where he buys his gates. *Id*. Plaintiff gave Defendant four gates and graciously refused to accept any money for them. *Id*.

Notwithstanding, Plaintiff's claim that he never sought permission and believed he had the right to use the dirt road is irrelevant. In Simmons, the Supreme Court held, "We also take the opportunity to emphasize that a *claimant's belief regarding permissiveness of his use of property is irrelevant* when determining the existence of a prescriptive easement." Simmons, 419 S.C. at 232, 797 S.E.2d at 392 (emphasis added). Thus, Plaintiff cannot assert his own beliefs to establish a prescriptive easement. The permissiveness of his use is established by testimony of Defendant and the conducted between the parties.

Even if Plaintiff could point to some evidence in the record to support that the gates were installed after June 20, 1992, Plaintiff failed to set forth any evidence or testimony that showed the owners of Defendant's property from June 20, 1972 to September 7, 1979 were aware Plaintiff used the dirt road.

In his Initial Brief, Plaintiff claims his testimony indicates he knew of the predecessors in interest to Defendant; however, Plaintiff never testified the owners of the property June 20, 1972 to

September 7, 1979 were aware he was using the dirt road. In fact, the owners during that time period, Steven R. Gaston, Lynn B. Gaston, and Grady Tarleton, are never mentioned by a fact witness for either Party. Plaintiff further failed to call any owner(s), tenant(s), or user(s) from the neighboring properties as witnesses to establish his purported use of the dirt road was widely known. Rather, Plaintiff just believes he has proved his use was notorious because there is no testimony or anything in the record that establishes that his use was not known to the true owners. It is the Plaintiff's burden to prove all elements by clear and convincing evidence which he has plainly failed to do.

CONCLUSION

Based upon the reasons stated, this Court should reverse the judgment of the Circuit Court because the Order of Judgment fails to use the current law for prescriptive easements as set forth by the Supreme Court in Simmons; the record fails to establish Plaintiff's use was open and notorious because Plaintiff failed to offer any evidence his use was known to the true owners of Defendant's property between June 20, 1972 to September 7, 1979, or that his purported use was widely known to the neighborhood; and Plaintiff cannot use the time between June 20, 1972 and June 20, 1992 as the prescriptive period because the evidence in the record establishes Defendant granted Plaintiff permission to use the dirt road when he installed the gates around 1990.

SIGNATURE PAGE TO FOLLOW

Respectfully submitted,

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PROOF OF SERVICE

I, James D. Floyd, hereby certify that I have served the Initial Reply Brief of the Appellant – Respondent on James L. Braswell, Sr. by service using AIS E-mail pursuant to South Carolina Supreme Court Order 2020-05-29-02 to his attorneys of record Jennifer Dowd Nichols, Esq. at jdowdnicholsesq@gmail.com and Robert W. Dibble, Jr., Esq. at rwd@hmp-law.com, Attorneys for Respondent – Appellant.

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