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NO. COA05-455

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

LORRAINE KEENER; WILLIAM
McMILLEN and wife, MILDRED
McMILLEN; FRED FORSYTH and
wife, TEDDY FORSYTH; FRANK
DAWSON and wife, PENELOPE L.
DAWSON; JIMMY GOODMAN, and
JANE MOORE,

Plaintiffs,

v.

Washington County

No. 99-CVD-231

WILLIAM ARNOLD and wife,
SHARON ARNOLD,
Defendants.

Appeal by plaintiffs from a judgment entered 22 November 2004
by Judge Regina R. Parker in Washington County District Court.
Heard in the Court of Appeals 16 November 2005.

Geo. Thomas Davis, Jr. for plaintiff-appellants.

*Manning Fulton & Skinner P.A., by William C. Smith, Jr., for
defendant-appellees.*

BRYANT, Judge.

Lorraine Keener, William and Mildred McMillen, Fred and Teddy
Forsyth, Frank and Penelope Dawson, Jimmy Goodman, and Jane Moore
(plaintiffs) are owners of lots in or adjacent to the Arnolds Beach
Subdivision in Washington County. The subdivision was once owned
by Mr. and Mrs. E.O. Arnold (original grantors). Since the early
1960's, E.O. Arnold granted certain easement rights to some, but

not all, of the purchasers in the Subdivision. The language granting the purported easements in each of the original deeds and grants differed from deed to deed and was not consistent as to extent, use, or recipient. Some plaintiffs had no easement granted in their chain of title.

The disputed parcel is bounded on the north by the waters of the Albemarle Sound, on the east by a lot owned by Frank and Penelope Dawson, on the south by Arnold Beach Drive, and on the west by a lot owned by Jimmy Goodman. The disputed parcel is approximately 206 feet wide, but in 1994 the owner of the parcel, Russell Arnold, sold to William and Sharon Arnold (defendants) an 81.65-foot-wide lot on the western edge of the parcel, bordering the lot owned by Jimmy Goodman. The sale effectively created three lots in the disputed parcel of land: (1) on the western edge of the parcel there is an 81.65-foot-wide lot owned by defendants (WA Lot); (2) on the eastern edge of the parcel there is a 100.71-foot-wide lot owned by Russell Arnold upon which is located a boat ramp (Boat Ramp Lot); and (3) between these two lots there is a 24.27-foot-wide lot owned by Russell Arnold (RA Lot).

On 5 November 1999, plaintiffs filed a complaint alleging they had an easement by grant or by prescription over the disputed parcel of land and that defendants interfered with the easement through the construction of a bulkhead, a pier and stobs, and other acts. On 17 April 2002, the Honorable Samuel G. Grimes entered summary judgment for the plaintiffs and defendants appealed Judge Grimes' judgment to this Court. On 16 December 2003, this Court

found that genuine issues of material fact existed as to whether plaintiffs had an easement over the disputed area and reversed Judge Grimes, remanding the matter for trial on the merits.¹ The matter was tried before the Honorable Regina R. Parker, sitting without a jury, on 11 and 26 August 2004.

Plaintiffs appeal Judge Parker's judgment entered 22 November 2004 holding plaintiffs do not have an easement across defendants' lot. The judgment further held plaintiff Jimmy Goodman held an easement in gross across only the Boat Ramp Lot; plaintiffs Lorraine Keener, Fred Forsyth, Teddy Forsyth, Frank Dawson and Penelope Dawson have express easements to the Boat Ramp Lot only; plaintiffs William McMillen, Mildred McMillen and Jane Moore have no easement over the disputed parcel of land; and the portion of a bulkhead permitted and installed by defendants and Russell Arnold extending onto the Boat Ramp Lot must be removed. The trial court noted that no judgment or opinion was entered regarding the RA Lot because the lot's owner, Russell Arnold was not made a party to the lawsuit.

Plaintiffs raise four issues on appeal: (I) whether the trial court erred in refusing to consider the testimony of Dr. Gene Brothers on the grounds that it was irrelevant; (II) whether the trial court erred in finding that plaintiff Goodman held only an easement in gross that terminates at his death; (III) whether the trial court erred in finding that plaintiffs William and Mildred

¹*Keener v. Arnold*, 161 N.C. App. 634, 589 S.E.2d 731 (2003).

McMillen and Jane Moore have no easement at all; and (IV) whether the trial court erred in refusing to rule that the plaintiffs have an easement along the RA Lot. Notably, while plaintiffs assign as error the trial court's finding that they do not have an easement over the defendants' lot, this assignment of error is not argued in plaintiffs' brief and is therefore dismissed. N.C. R. App. P. Rule 28(b)(6) (2005) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."); see also, *State v. Drew*, 162 N.C. App. 682, 684, 592 S.E.2d 27, 29 (2004) (when criminal defendant asserted eight assignments of error but argued only two in his brief on appeal, remaining six were deemed abandoned).

I

Plaintiffs first argue the trial court erred by refusing to consider the testimony of Dr. Gene Brothers. At trial Dr. Brothers was offered by plaintiffs and received by the court as an expert witness "in the area of designing and building and what area is needed to fish, swim and launch boats in waterfront facilities." Dr. Brothers' testimony spoke to the amount of the disputed parcel that would be necessary for plaintiffs to enjoy the reasonable use of their purported easements.

In its judgment, the trial court held "[a]ll of Dr. Brothers' testimony relied upon an evaluation of the evidence based on today's standards and therefore, Dr. Brothers' testimony was not relevant to the issues in this case." "In making its findings, the

trial court [is] entitled to consider both expert and nonexpert testimony. Uncontradicted expert testimony is not binding on the trier of fact. Questions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994).

Dr. Brothers gave conflicting testimony as to the amount of the parcel necessary for plaintiffs to reasonably enjoy their easements. On direct-examination, Dr. Brothers testified that if the entire 206-foot-wide parcel was not available to plaintiffs their enjoyment of the easement would be diminished. However, Dr. Brothers admitted on cross-examination that it was possible to carry out all of the functions listed in plaintiffs purported easements without ever straying off the 100.71-foot-wide Boat Ramp Lot. Furthermore, non-expert testimony was presented to the trial court that a 100-foot-wide easement would be sufficient for the plaintiffs' full enjoyment of their easements. Therefore the trial court could properly discount Dr. Brothers' testimony and not rely on his testimony in its judgment. This assignment of error is overruled.

II & III

Plaintiffs next argue the trial court erred in finding that plaintiff Jimmy Goodman holds only an easement in gross in the Boat Ramp Lot and that the easement he held terminates at his death and that plaintiffs William and Mildred McMillen and Jane Moore have no easement in the Boat Ramp Lot. The trial court further held that

plaintiffs Lorraine Keener, Fred and Teddy Forsyth, and Frank and Penelope Dawson have an easement in the Boat Ramp Lot. However, the existence and scope of plaintiffs' easements were not properly before the trial court and the court's holdings must be vacated.

The issue before the trial court was whether the plaintiffs' had an easement over defendants' lot. In determining the scope and extent of an easement, the trial court should be guided by the following established law:

First, the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue. Second, if the conveyance speaks to the scope of the easement in less than precise terms (i.e., it is ambiguous), the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant. Third, if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in this latter situation, a reasonable use is implied.

Swaim v. Simpson, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786-87 (1995) (quotations omitted). The trial court properly adjudicated this issue, holding defendants own their 81.65-foot-wide lot free and clear of any easements plaintiffs may have. As plaintiffs do not argue this holding was in error, it is binding upon this Court.

Having found that plaintiffs easements do not attach to defendants' lot, the trial court had no authority to inquire as to the existence or scope of plaintiffs' easements attached to property not owned by defendants. The easements in question attach to property owned by Russell Arnold and therefore the scope, extent

and even existence of the easements affect the property rights of Russell Arnold, who was not made a party to the plaintiffs' lawsuit. The North Carolina Supreme Court has held:

[A] judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void and may be treated as a nullity whenever it is brought to the attention of the Court. . . . In such case the Court does not investigate the merits of the matter in dispute, but sets aside the judgment

Buncombe County Board of Health v. Brown, 271 N.C. 401, 404, 156 S.E.2d 708, 710 (1967) (quotations omitted). The trial court improperly determined the scope, extent and existence of easements pertaining to the Boat Ramp lot, property whose owner was not before the court. Accordingly, these assignments of error are dismissed and the portions of the trial court's judgment regarding plaintiffs' easements in the Boat Ramp Lot are vacated.

IV

Finally, plaintiffs argue the trial court erred in refusing to rule that plaintiffs have an easement running over the RA Lot. As discussed in Issues II & III, *supra*, the question of whether the plaintiffs' easements attached to the RA Lot were not properly before the trial court. Russell Arnold was not a party to this action and the trial court properly refused to enter a judgment or opinion as to whether plaintiffs' easements attached to the RA Lot. This assignment of error is overruled.

Affirmed in part, vacated in part.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).