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NO. COA08-263

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

BYRD FAMILY, LLC OF LAKE  
WACCAMAW, ELOISE W. BYRD;  
AND, BOGUE SWAMP HUNTING  
CLUB, INC.,

Plaintiffs,

v.

CAMERON L. SMITH & SON  
PROPERTIES, LLC,

Defendant.

Columbus County  
No. 07 CVS 667

# Court of Appeals

Appeal by plaintiffs from order filed 17 December 2007 by  
Judge D. Jack Hooks, Jr. in Columbus County Superior Court. Heard  
in the Court of Appeals 10 September 2008.

## Slip Opinion

*Michael W. Willis for plaintiff-appellant.*

*Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for defendant-appellee.*

ELMORE, Judge.

In early 2007, Cameron L. Smith & Son Properties, LLC (defendant), erected and locked gates at each end of a dirt road known as Bogue Swamp Road. The road exists entirely within the boundaries of property (Lambert's Bay) that defendant purchased in March 2006. Byrd Family, LLC, of Lake Waccamaw (Byrd Family), Bogue Swamp Hunting Club, Inc. (Bogue, together, plaintiffs), and

Eloise W. Byrd each owns or leases land located in the vicinity of defendant's property. However, none of plaintiffs' property abuts Bogue Swamp Road.

On 26 April 2007, plaintiffs and Eloise Byrd filed suit against defendant seeking: (1) "a judgment declaring that the Plaintiffs, and each of them, have an easement over and along the Bogue Swamp Road to their respective owned and leased lands" and (2) "both a preliminary and permanent injunction . . . requiring the Defendant to either remove the gates . . . or alternatively to leave said gates unlocked and open, and to refrain from any other actions which would in any way interfere with or obstruct the Plaintiffs' use of the Bogue Swamp Road." The complaint alleged that plaintiffs and their predecessors in title had "used and helped to maintain the Bogue Swamp Road continuously in an open and notorious manner, adversely to the Defendant and its predecessors in title, and under a claim of right . . . for a period of more than 20 years with the full knowledge of the Defendant and its predecessors in title." In their complaint, plaintiffs stated that Bogue "formerly leased the hunting rights to a portion of the timberlands which the Defendant recently acquired[.]"

On 20 August 2007, defendant filed a motion for summary judgment as to all of plaintiffs' claims, and plaintiffs filed a cross-motion for summary judgment the same day. On 17 December 2007, the trial court granted summary judgment to defendant as to plaintiffs' claims, denied defendant's motion as to Eloise Byrd's claims, and denied plaintiffs' cross-motion for summary judgment.

On 3 January 2008, Eloise Byrd filed a notice of voluntary dismissal without prejudice. Plaintiffs appeal from the order of summary judgment and from the trial court's denial of its motions.

Summary judgment is appropriate if 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 any party is entitled to a judgment as a matter of law. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion. The standard of review for summary judgment is de novo.

*Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (quotations and citations omitted; alteration in original).

Plaintiffs first argue that defendant should be required to establish title or otherwise demonstrate a right by which it may lawfully obstruct the roadway before this Court addresses their claim for a prescriptive easement. However, plaintiffs did not raise the issue of ownership in their complaint, asserting only that Bogue Swamp Road crosses defendant's property. They did not argue that the road was a public highway, that the public has used the road as a matter of right, or that anybody else owned the road. The record includes the final recorded plat of Lambert's Bay prepared in 2001 for Sustainable Forests LLC, one of defendant's predecessors in interest; the plat does not include Bogue Swamp Road, although other public roads and private easements are included on the plat. It is undisputed that defendant owned the land underlying the road and, absent any substantial evidence to

the contrary, the road's ownership was not a material fact at issue. Moreover, plaintiffs' brief does not direct our attention towards any evidence that would tend to support their position.

Plaintiffs next argue that the record evidence of plaintiffs' prescriptive easement to use the road was sufficient not only to survive defendant's motion for summary judgment, but also to establish the prescriptive easement as a matter of law. We disagree.

To establish the existence of a prescriptive easement, plaintiffs must prove the following:

(1) that the use is adverse, hostile or under a claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

*Caldwell v. Branch*, 181 N.C. App. 107, 111, 638 S.E.2d 552, 555 (2007) (quoting *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981) (additional citation omitted)). As to the element of adverse use we have explained that "[m]ere failure of the owner of the servient tenement to object—even if he was aware of the use—is insufficient, as the party seeking to claim the easement must overcome the presumption that a party's use is permissive and not adverse." *Id.* (citing *Henry v. Farlow*, 238 N.C. 542, 543-44, 78 S.E.2d 244, 245 (1953) (additional citations omitted)). "[A]dverse use implies use that is exclusive as against the community or public at large." *Id.* at 112, 638 S.E.2d at 556 (quotations and citation omitted).

Here, plaintiffs have failed to establish the element of adverse use. The record includes several hunting leases between plaintiffs and defendant's predecessor's in interest. One lease, effective 7 June 2002, was entered into between Sustainable Forest L.L.C. and Bogue<sup>1</sup> and granted Bogue "full rights . . . to enter upon, over, across and out of" Lamberts Bay for hunting purposes. This right of entry implicitly includes the use of any roads located within the property's boundaries, including Bogue Swamp Road. This lease belies plaintiffs' claims that their use of the road has been adverse or hostile; their use under these leases was permissive. Accordingly, we need not address the other elements required to prove a prescriptive easement.

We affirm the order of the trial court.

Affirmed.

Judges TYSON and CALABRIA concur.

Report per Rule 30(e).

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<sup>1</sup> We note that the hunting leases were executed only by Bogue, and not by Byrd Family. However, plaintiffs direct us to no evidence of adverse use of the road by Byrd Family as a corporate entity.