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NO. COA10-129

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

ROY GARRETT and MAX GARRETT,
Plaintiffs,

v.

Cherokee County
No. 07 CVS 323

J.B. MURPHY,
Defendant.

Appeal by Defendant from judgment entered 23 March 2009 by Judge James U. Downs in Cherokee County Superior Court. Heard in the Court of Appeals 2 September 2010.

No brief for Plaintiff-Appellees.

Nelson Mullins Riley & Scarborough, LLP, by Joseph S. Dowdy, for Defendant-Appellant.

STEPHENS, Judge.

This dispute involves Plaintiffs' claim of an easement over Defendant's property. Defendant appeals from the trial court's denial of his motions for directed verdict and judgment notwithstanding the verdict ("JNOV"), and from the judgment entered upon the jury's verdict finding that Plaintiffs have a prescriptive easement over Defendant's property. Specifically, Defendant contends that Plaintiffs presented insufficient evidence to establish a prescriptive, appurtenant easement over his property.

For the reasons stated herein, we agree with Defendant and, accordingly, reverse the judgment of the trial court.

I. Procedural History

On 5 May 2007, Plaintiffs Roy Garrett ("Mr. Garrett") and his son, Max Garrett, filed a Complaint and Motion for Injunctive Relief in Cherokee County Superior Court against Defendant J.B. Murphy. Plaintiffs alleged that they have an easement, either by prescription or by estoppel, across Defendant's property and that Defendant had unlawfully erected a gate across the easement. Plaintiffs sought a temporary restraining order and a preliminary injunction ordering Defendant to remove the gate, as well as an order declaring that Plaintiffs have an easement across Defendant's property. Defendant timely answered, denying Plaintiffs' claims and counterclaiming for slander of title.¹

The matter was tried before a jury beginning 26 January 2009. At the close of Plaintiffs' evidence, and again at the close of all the evidence, Defendant moved for a directed verdict. Defendant's motions were denied. The jury found in favor of Plaintiffs on their prescriptive easement claim and found against Plaintiffs on their easement by estoppel claim. In light of the jury's findings, the jury did not consider the third and fourth issues submitted to the jury.²

¹ Defendant also filed a counterclaim against Herman Dockery who, Defendant alleged, falsely represented that he owned a valid easement over Defendant's property which he purported to deed to Mr. Garrett. That claim is not at issue on this appeal.

² The third issue asks, "Did the Defendant suffer monetary loss as a result of a false and malicious statement about the

Defendant made post-trial motions for JNOV and a new trial.³ The trial court denied those motions. On 23 March 2009, the trial court entered judgment upon the jury's verdict, granting Plaintiffs "a permanent, appurtenant, non-exclusive road right of way and easement" over Defendant's property.

From the trial court's denial of Defendant's motions for directed verdict and JNOV, and the trial court's judgment entered upon the jury's verdict, Defendant appeals.

II. Factual Background

The property at issue in this case derives from a parcel of property in Cherokee County previously owned by Major Ben Dockery. In 1950, after his death, Major Dockery's property was partitioned into seven tracts, with each of his seven children inheriting one tract.

Luther Dockery inherited Tract 1 from Major Dockery. In 1969, Luther died intestate and Tract 1 was transferred to his wife, Ruth Dockery, and their sons, Herman and Martin Dockery. In 1974, Herman and Martin transferred their interest in Tract 1 to their mother, Ruth. In 1986, Ruth died, bequeathing Tract 1 to Herman and Martin. In 2004, Herman and Martin sold Tract 1 to Plaintiffs. Plaintiffs are the current owners of Tract 1.

Defendant's property?" The fourth issue asks, "What amount of damages, if any, is the Defendant entitled to recover from the Plaintiffs?"

³ Although Defendant appealed from the trial court's denial of his motion for a new trial, Defendant did not present any argument in his brief with respect to this allegedly erroneous denial. Defendant's argument on this issue is thus deemed abandoned. N.C. R. App. P. 28(b)(6).

In 1971, Defendant's father purchased Tracts 3, 4, and 5 from Major Dockery's son Fred.⁴ In 1974, Defendant's father deeded Tract 3 to his son Billy, Tract 4 to his son Michael, and Tract 5 to his son J.B. Murphy, Jr., Defendant in this case. In 2000, Michael sold Tract 4 to Defendant. Defendant is the current owner of Tracts 4 and 5.

The dirt road at issue, which witnesses at trial referred to as Woody Branch Road, is accessed from Boiling Springs Road by turning into Defendant's driveway. Woody Branch Road continues north over Defendant's Tracts 4 and 5, as well as over Tracts 2 and 3, to Plaintiffs' Tract 1.

In 1980, Defendant placed a chain across his driveway to protect his property by limiting access through his property. The chain was secured by a keyed pad lock. Defendant gave Plaintiffs and other members of the community keys to the pad lock to allow them to use his driveway to access their property or to access other property close to Defendant's property.

The chain was not sufficient to "prevent anybody from just driving over it" so about 10 years later, with the help of Mr. Garrett and two other men, Defendant replaced the chain with a welded steel gate. The gate was locked with a keyed pad lock and the keys to the pad lock could only be duplicated with Defendant's signed, written permission. Defendant paid for the gate and the pad lock himself.

⁴ Fred's sister Daisy Allen inherited Tract 3. Fred's sister Annie Lou Gaddis inherited Tract 4. Fred inherited Tract 5. Daisy and Annie Lou deeded their tracts to Fred.

Mr. Garrett did not object to the gate's being erected and purchased keys from Defendant so Mr. Garrett and his son could cut through Defendant's property to nearby mountain property. At Defendant's request, Mr. Garrett helped identify other local individuals who should receive keys to the gate in order that those individuals would also be able to get through the gate and continue hunting at the top of the mountain.

In 2007, Defendant discovered that Mr. Garrett's grandson was growing marijuana and transporting the marijuana down the mountain using Defendant's driveway and going through Defendant's locked gate. When Mr. Garrett stopped by Defendant's house one afternoon, Defendant attempted to speak with Mr. Garrett about his grandson's activities. The two exchanged unpleasant words, and Mr. Garrett drove off.

Thereafter, Defendant received Plaintiffs' complaint in the mail. Mr. Garrett and Defendant have not spoken since.

III. Discussion

Defendant contends that the trial court erred by denying his motions for directed verdict at the close of Plaintiffs' evidence and at the close of all evidence and his motion for JNOV under Rule 50 of the North Carolina Rules of Civil Procedure. Specifically, Defendant argues that Plaintiffs failed to overcome the presumption of permissive use of Defendant's property and, therefore, failed to establish a prescriptive easement as a matter of law. We agree.

"[T]he questions concerning the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict or judgment

notwithstanding the verdict present an issue of law[.]” *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999). “On appeal, this Court thus reviews an order ruling on a motion for directed verdict or judgment notwithstanding the verdict *de novo*.” *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 342, 658 S.E.2d 1, 4 (2008). The standard of review of a ruling entered upon a motion for directed verdict and judgment notwithstanding the verdict is “whether upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.” *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002) (quoting *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000)). “A motion for . . . [directed verdict and] judgment notwithstanding the verdict should be denied if there is more than a scintilla of evidence supporting each element of the non-movant’s claim.” *Denson v. Richmond Cty.*, 159 N.C. App. 408, 412, 583 S.E.2d 318, 320 (2003) (citation and quotation marks omitted).

To establish entitlement to a prescriptive easement, the claimant must prove by the greater weight of the evidence each of the following essential elements:

- (1) the use must be adverse, hostile, or under a claim of right;
- (2) the use must be open and notorious;
- (3) the use must be continuous and uninterrupted for a period of 20 years; and
- (4) there must be substantial identity of the easement claimed.

Woodring v. Swieter, 180 N.C. App. 362, 370, 637 S.E.2d 269, 276 (2006) (internal citations omitted). "The burden of proving the elements essential to the acquisition of an easement by prescription is on the party claiming the easement." *Id.* at 370, 637 S.E.2d at 277.

Because we conclude that there was insufficient evidence that Plaintiffs' or their predecessors in interest's use of Mr. Murphy's property has ever been adverse, hostile, or under a claim of right, we need only address the first element.

"The three components of the first element are, for the most part, synonymous." *Johnson v. Stanley*, 96 N.C. App. 72, 74, 384 S.E.2d 577, 579 (1989). "The term adverse . . . implies a use or possession that is . . . open and of such character that the true owner may have notice of the claim" *Warmack v. Cooke*, 71 N.C. App. 548, 552, 322 S.E.2d 804, 807-08 (1984), *disc. rev. denied*, 313 N.C. 515, 329 S.E.2d 401 (1985). Moreover, "[f]or a use to be adverse, it 'must be with the intent to hold to the exclusion of others.'" *Vandervoort v. McKenzie*, 105 N.C. App. 297, 301, 412 S.E.2d 696, 698 (1992) (citation omitted). Additionally, "[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." *Caldwell v. Branch*, 181 N.C. App. 107, 111, 638 S.E.2d 552, 555 (2007).

"The requirement that the use be 'hostile' before a prescriptive easement is established does not mean that animosity

must exist between the claimant and the true owner” *Johnson*, 96 N.C. App. at 74, 384 S.E.2d at 579. “‘A “hostile” use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right.’” *Dickinson v. Pake*, 284 N.C. 576, 581, 201 S.E.2d 897, 900 (1974) (quoting *Dulin v. Faires*, 266 N.C. 257, 145 S.E.2d 873 (1966)).

“A ‘claim of right’ is an intention to claim and use land as one’s own.” *Johnson*, 96 N.C. App. at 75, 384 S.E.2d at 579 (citation omitted). “Notice to the true owner of the existence of the alleged easement is ‘crucial to the concept of holding under a claim of right.’” *Id.* (quoting *Taylor v. Brigman*, 52 N.C. App. 536, 541, 279 S.E.2d 82, 85 (1981)). Notice of a claim of right may be given in a number of ways, including holding under color of title, see *Taylor*, 52 N.C. App. at 541, 279 S.E.2d at 86, or by open and visible acts such as repairing or maintaining the way over another’s land. See, e.g., *Potts v. Burnette*, 301 N.C. 663, 668, 273 S.E.2d 285, 289 (1981) (plaintiffs smoothed, graded, and poured gravel on road).

“A prescriptive easement . . . over the land of another, being acquired in the manner of adverse possession, is disfavored in the law.” *Johnson*, 96 N.C. App. at 74, 384 S.E.2d at 579. Entitlement to an easement by prescription is restricted to avoid a landowner’s “‘mere neighborly act’” of allowing someone to pass over his property to ultimately operate to deprive the owner of his land. *Id.* (citation omitted). “For this reason, mere use alone is

presumed to be permissive, and, unless that presumption is rebutted, the use will not ripen into a prescriptive easement." *Johnson*, 96 N.C. App. at 74, 384 S.E.2d at 579 (citing *Dickinson*, 284 N.C. at 580-81, 201 S.E.2d at 900).

In *Dickinson*, plaintiffs brought an action to establish a prescriptive easement in a roadway over defendants' land which had been used by themselves and the public to reach plaintiffs' property from 1938 until 1968 when defendants blocked it. *Dickinson*, 284 N.C. at 578, 201 S.E.2d at 898. Plaintiffs and their mother, by raking leaves and scattering oyster shells in the roadway, had performed the slight maintenance required to keep the road in passable condition. *Id.* at 583, 201 S.E.2d at 901. Permission to use the road had neither been sought nor given, and plaintiffs testified that, prior to defendants' blocking the road, they considered the road to be their own. *Id.* at 583, 201 S.E.2d at 902. The North Carolina Supreme Court determined that the evidence was sufficient to rebut the presumption that the use was permissive and, thus, to carry the issue to the jury. The Court therefore concluded that the trial court properly overruled defendants' motion for a directed verdict. *Id.* at 584, 201 S.E.2d at 902.

Similarly, in *Cannon v. Day*, 165 N.C. App. 302, 598 S.E.2d 207 (2004), plaintiffs filed suit against defendants alleging plaintiffs had acquired a prescriptive easement across defendants' lots permitting use of a private lane to access the public road from plaintiffs' lot. *Id.* at 303, 598 S.E.2d at 208. Plaintiffs'

evidence tended to show that plaintiffs' predecessors-in-interest never asked for nor received anyone's permission to use the lane, used the lane at issue without permission for more than 20 years, maintained the lane, named the lane, and treated the lane as if they owned it. *Id.* at 303, 598 S.E.2d at 208-09. This Court concluded that such evidence was sufficient to support a verdict in plaintiffs' favor. The trial court therefore properly submitted the issue to the jury, which ultimately found that a prescriptive easement existed. *Id.* at 303, 598 S.E.2d at 209.

In this case, the evidence viewed in the light most favorable to Plaintiffs tends to show the following: In 1980, Defendant stretched a chain across his driveway because his cabin had been broken into and "sang hunters"⁵ were destroying his land. However, the chain was not sufficient to "prevent anybody from just driving over it" so some years later, with the help of Mr. Garrett and two other men, Defendant replaced the chain with an iron gate.⁶ Defendant paid for the gate himself and had numbered keys made for the gate. The keys could only be duplicated by Defendant and Defendant controlled their distribution.

Mr. Garrett did not have any objection to the gate being erected as "[p]eople was traveling in there and tearing the road up; we couldn't keep that mountain up." Mr. Garrett "bought some keys from Defendant" so he could continue using the road to get to

⁵ Wild ginseng, or "sang," is collected from the mountains of North Carolina because of its supposed medicinal powers.

⁶ Testimony established that the chain was replaced with an iron gate between three to ten years later.

the mountain and hunt. At Defendant's request, Mr. Garrett helped identify other local individuals who should receive keys to the gate in order that those individuals would also be able to get through the gate and continue hunting at the top of the mountain.

This evidence supports, rather than rebuts, the presumption that Plaintiffs' use of Defendant's property was permissive and not adverse. Unlike in *Dickinson* and *Cannon* where the plaintiffs neither asked for nor received permission to use the property, Mr. Garrett purchased keys to the gate from Defendant, and Defendant sold keys to the gate to Mr. Garrett, which permitted Plaintiffs to open the gate and drive over the property. Additionally, unlike in *Dickinson* and *Cannon*, there is no evidence that Plaintiffs considered the property to be their own. Moreover, as Mr. Garrett was one of multiple individuals who received keys to the gate, and Mr. Garrett helped Defendant determine who else should have a key, the evidence contradicts any assertion that Mr. Garrett intended to hold the property "to the exclusion of others." *Vandervoort*, 105 N.C. App. at 301, 412 S.E.2d at 698.

There is evidence that Mr. Garrett may have performed some maintenance activities on the road.⁷ While "such evidence can be enough, in some cases, to rebut the presumption that a use is permissive[,]" *Boger v. Gatton*, 123 N.C. App. 635, 638, 473 S.E.2d 672, 676 (1996), it is not enough here where the evidence shows that Plaintiffs' use of the road was permitted by Defendant and any

⁷ It is unclear from the testimony whether such maintenance was performed on the portion of the road which is on Mr. Garrett's property or on a different part of that road.

maintenance performed on the road was incident to the permission to use the road and not as a means of giving notice to Defendant or others that Plaintiffs were claiming use of the road by adverse right. See *id.*

Although Plaintiffs failed to file an appellate brief in this matter, at trial, Plaintiffs' counsel argued that Plaintiffs "offered evidence of adverse use of this road sufficient to satisfy the requirements from 1950 to July 3, 1971." We disagree.

Herman Dockery, who was 85 years old at the time of the trial, testified that after his father, Luther Dockery, inherited Tract 1 from Major Ben Dockery around 1951, he and his father, mother, and brother accessed Tract 1 by going up Woody Branch Road. He further testified that no one ever gave them permission to use Woody Branch Road and that "[i]t's always been a public pathway up through there." Herman testified, "We maintained the road and took care of the road and worked on the road -- we traveled it."

Gerald Dockery, Luther's grandson and Herman's son, testified that beginning around 1964, he traveled with his grandfather and grandmother up Woody Branch Road to Tract 1. After his grandfather died and Gerald's grandmother became the owner of Tract 1, she continued to access Tract 1 using Woody Branch Road.

While this evidence may show that Luther and Ruth Dockery liberally used Woody Branch Road between 1950 and 1973, and that Herman Dockery took care of and worked on some part of Woody Branch Road, the evidence is insufficient to show that the Dockerys' use of the portion of Woody Branch Road which crosses Defendant's

Tracts 4 and 5 was adverse, hostile, or under a claim of right. On the contrary, during a majority of that time period, the owners of the tracts at issue were family members with no apparent discord amongst them who freely used each other's property for necessary ingress and egress.

After carefully reviewing the evidence in the light most favorable to Plaintiffs, we conclude that Plaintiffs failed to rebut the presumption that their use of Mr Murphy's property was permissive. Accordingly, there is insufficient evidence of adverse use to support a verdict in Plaintiffs' favor, and the trial court erred in denying Defendant's motions for directed verdict and JNOV. We thus reverse the judgment entered upon the jury verdict and remand the matter for a new trial upon the third and fourth issues submitted to, but not considered by, the jury.

REVERSED and REMANDED.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).