

NO. COA14-283

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

DUKE ENERGY CAROLINAS, LLC,

Plaintiff,

v.

Mecklenburg County  
No. 12 CVS 22790

HERBERT A. GRAY,

Defendant/  
Third Party Plaintiff,

v.

JOHN WIELAND HOMES AND  
NEIGHBORHOODS OF THE  
CAROLINAS, INC.,

Third Party Defendant.

AND

BUILDER SUPPORT SERVICES OF THE  
CAROLINAS, INC. f/k/a JOHN WIELAND  
HOMES AND NEIGHBORHOODS OF  
THE CAROLINAS, INC.,

Fourth-Party Plaintiff,

v.

YARBROUGH-WILLIAMS & HOULE, INC.,  
LUCAS-FORMAN, INC., and CARTER  
LAND SURVEYORS & PLANNERS, INC.,

Fourth-Party Defendants.

Appeal by plaintiff from order entered 1 November 2013 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 September 2014.

*James, McElroy & Diehl, P.A., by Preston O. Odom, III, and John R. Buric, for plaintiff-appellee Herbert A. Gray.*

*DeVore, Acton & Stafford, PA, by Fred W. DeVore, III, and Derek P. Adler, for plaintiff-appellee John Wieland Homes and Neighborhoods of the Carolinas, Inc.*

*Hamilton Stephens Steele & Martin, PLLC, by Mark R. Kutny, and Erik M. Rosenwood, for fourth-party defendant-appellee Yarbrough-Williams & Houle, Inc.*

*Womble Carlyle Sandridge & Rice, LLP, by Debbie W. Harden, Meredith J. McKee, and Jackson R. Price, for plaintiff-appellant Duke Energy Carolinas, LLC.*

*Nelson Mullins Riley & Scarborough, LLP, by Joseph W. Eason, and Phillip A. Harris, Jr., for Amici Curiae North Carolina Electric Membership Corporation and the North Carolina Association of Electric Cooperatives.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Matthew D. Rhoad, and Davis F. Roach, for Amici Curiae Public Service Company of North Carolina, Inc. d/b/a PSNC Energy; and Piedmont Natural Gas Company, Inc.*

STEELMAN, Judge.

N.C. Gen. Stat. § 1-50(a)(3) provides for a six year statute of limitations for injury to an incorporeal hereditament, which includes claims for encroachment upon an easement. Because plaintiff's claim for encroachment was filed more than six years after its claim accrued, the claim was barred by the statute of limitations.

I. Factual and Procedural Background

On 18 May 1951, J. L. Wallace and his wife, Pearl D. Wallace, executed an agreement with Duke Power Company, the predecessor to Duke Energy Carolinas, LLC (plaintiff). In exchange for the sum of \$652.50, Mr. and Ms. Wallace granted a 200 foot easement over their property, allowing Duke Power to enter upon the easement for purposes associated with the transmission of electric and telephone services, and to keep the 200 foot strip of land free of structures and trees. The terms of the easement were binding on the parties and on "their successors, heirs and assigns."

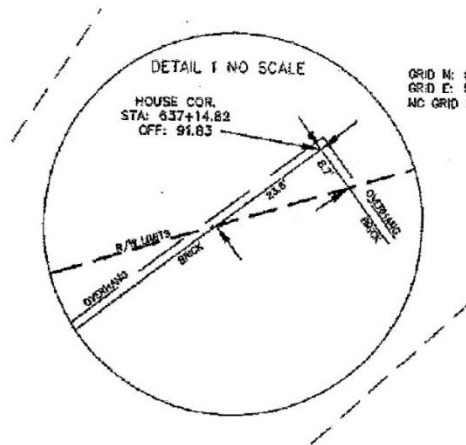
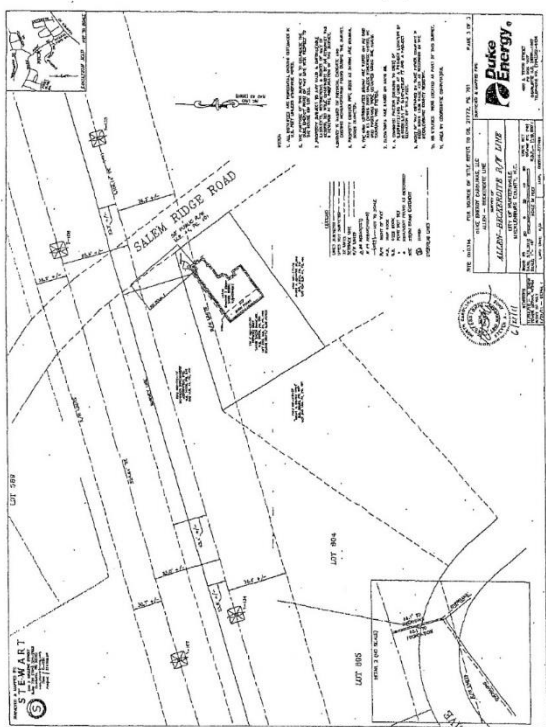
In 2006 John Wieland Homes and Neighborhoods of the Carolinas, Inc., (Wieland)<sup>1</sup>, built a house located on Lot 533 in Phase 8 of the Skybrook neighborhood, in Huntersville, Mecklenburg County. The building lot included a strip of land located within plaintiff's easement. The house was completed no later than 11 October 2006, the date that the Mecklenburg County Land Use and Environmental Services Agency issued Wieland a Certificate of Occupancy for the house.

In 2007 Herbert A. Gray (defendant) purchased the house and lot from Wieland, and a general warranty deed was filed in the

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<sup>1</sup> In November, 2012, John Wieland Homes and Neighborhoods of the Carolinas, Inc., changed its name to Builder Support Services of the Carolinas, Inc. For clarity, we refer to this party as "Wieland" throughout our opinion.

Mecklenburg County Register of Deeds, stating that the conveyance was subject to easements "which may appear of record[.]" It is not disputed that plaintiff's easement appears in the chain of title for the property. On 17 February 2010 plaintiff wrote to defendant and informed him that a portion of his house encroached on its 200-foot right of way, with the greatest encroachment being 8.7 feet on the easement, as shown below:



On 17 August 2010 defendant filed suit against Wieland. After plaintiff refused defendant's request to intervene in the lawsuit, defendant filed a dismissal without prejudice in January 2012. On 12 December 2012 plaintiff filed suit against

defendant in the instant case, seeking a mandatory injunction directing defendant to remove the encroachment from its easement. On 3 January 2013 defendant filed an answer and third-party complaint against Wieland, and on 8 March 2013 Wieland filed an answer to the third party complaint and filed fourth-party complaints against Yarbrough-Williams & Houle, Inc., Lucas-Forman, Inc., and Carter Land Surveyors & Planners, Inc., who are not involved in the present appeal.

Wieland and defendant filed motions on 10 September 2013 and 2 October 2013 respectively, seeking entry of summary judgment against plaintiff based upon the affirmative defense that plaintiff's action was barred by the statute of limitations. They asserted that N.C. Gen. Stat. § 1-50(a)(3) established a six year statute of limitations for "injury to any incorporeal hereditament," including claims for encroachment on an easement, and that plaintiff had not filed suit within six years of the time that its cause of action accrued. On 1 November 2013 the trial court entered an order granting summary judgment for defendant and Wieland, based upon the six year statute of limitations.

Plaintiff appeals.

## II. Standard of Review

Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered "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." "In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party.' We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.'" *Patmore v. Town of Chapel Hill N.C.*, \_\_ N.C. App. \_\_, \_\_, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted), and *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotation omitted)), *disc. review denied*, \_\_ N.C. \_\_, 758 S.E.2d 874 (2014).

In this case, summary judgment was granted based upon the applicable statute of limitations. "Once a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence

showing that the action was instituted within the permissible period after the accrual of the cause of action.'" *Waddle v. Sparks*, 331 N.C. 73, 85-86, 414 S.E.2d 22, 28-29 (1992) (quoting *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)). "Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate." *Pembee*, 313 N.C. at 491, 329 S.E.2d at 353 (citing *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978), and *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974) (other citation omitted). "As a general proposition, 'an order [granting summary judgment] based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom.'" *Williams v. Houses of Distinction, Inc.*, 213 N.C. App. 1, 4, 714 S.E.2d 438, 440 (2011) (quoting *Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001) (internal quotation omitted)).

III. Statute of Limitations

A. Applicability of N.C. Gen. Stat. § 1-50(a)(3)

Plaintiff first argues that the trial court erred in ruling that the six year statute of limitation set out in N.C. Gen. Stat. § 1-50(a)(3) governs its claim against defendant. We disagree.

N.C. Gen. Stat. § 1-50(a)(3) establishes a six year statute of limitations for claims based upon "injury to any incorporeal hereditament." "The 8th edition of Black's Law Dictionary defines [an] 'incorporeal hereditament' as '[a]n intangible right in land, such as an easement.' BLACK'S LAW DICTIONARY 743 (8th ed. 2004)." *Pottle v. Link*, 187 N.C. App. 746, 750, 654 S.E.2d 64, 67 (2007). Thus, "an easement is an incorporeal hereditament[, and] G.S. 1-50[(a)](3) requires that an action for injury to any incorporeal hereditament be brought within six years." *Hawthorne v. Realty Syndicate, Inc.*, 43 N.C. App. 436, 440, 259 S.E.2d 591, 593 (1979) (citing *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925)). See also *Boyden v. Achenbach*, 79 N.C. 539, 543 (1878) ("If the right of way is claimed as an incorporeal hereditament, as is probable, then six years is the statute[ of limitations]."). Based on the plain language of N.C. Gen. Stat. § 1-50(a)(3), and the cases of *Hawthorne* and *Pottle*,



the statute of limitations for a lawsuit based upon encroachment on an easement is six years.

B. Expiration of Statute of Limitations

Plaintiff next argues that there are genuine issues of material fact as to whether its claim was filed within six years of the time that the statute of limitations began to run. We conclude, based upon the relevant facts which are not in dispute, that the statute of limitations had in fact expired when plaintiff filed suit against defendant.

"The application of any statutory or contractual time limit requires an initial determination of when that limitations period begins to run. 'A cause of action generally accrues when the right to institute and maintain a suit arises.'" *Register v. White*, 358 N.C. 691, 697, 599 S.E.2d 549, 554 (2004) (quoting *Ocean Hill Joint Venture v. N.C. Dep't of E.H.N.R.*, 333 N.C. 318, 323, 426 S.E.2d 274, 277 (1993) (internal quotation omitted). "Under the common law, a cause of action accrues at the time the injury occurs, 'even in ever so small a degree.' This is true even when the injured party is unaware that the injury exists." *Pembee* at 492, 329 S.E.2d at 353 (quoting *Matthieu v. Gas Co.*, 269 N.C. 212, 215, 152 S.E.2d 336, 339 (1967), and citing *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957) (other citation omitted) (emphasis added). In addition,

N.C. Gen. Stat. § 1-15, "Statute runs from accrual of action," provides that "[c]ivil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute." N.C. Gen. Stat. § 1-15(a).

As noted in G.S. § 1-15, there are a number of "special cases" in which a specific claim is deemed to accrue, not when the injury occurs, but when it is discovered or reasonably should be discovered. For example, N.C. Gen. Stat. § 1-52(16) provides that in regards to claims "for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." However, there is no such provision in N.C. Gen. Stat. § 1-50(a)(3), and no other statutory basis to delay the accrual of a claim for encroachment on an easement until the encroachment is discovered, or reasonably should be known. We hold that the statute of limitations for a claim based on injury to an easement runs from the time that the claim accrues, even if a plaintiff is not aware of the injury at that time.

Plaintiff argues that the statute of limitations does not begin to run until the encroachment on an easement is known or should reasonably be known. In support of this position, plaintiff cites *Karner v. Roy White Flowers, Inc.*, 134 N.C. App. 645, 652, 518 S.E.2d 563, 568 (1999), *rev'd and remanded*, 351 N.C. 433, 527 S.E.2d 40 (2000), which stated that "the statute of limitations begins running as to the violation of a restrictive covenant when the plaintiff first becomes aware or should have reasonably become aware of the violation." The holding in *Karner* is in turn based solely upon the cases of *Liptrap v. City of High Point*, 128 N.C. App. 353, 355, 496 S.E.2d 817, 819 (1998), and *Hawthorne v. Realty*. Neither case supports *Karner's* posited exception to the general rule that the statute of limitations runs from the accrual of a claim. *Liptrap* quoted *Pembee's* statement that "'[a]s soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run.'" *Liptrap*, 128 N.C. App. at 355, 496 S.E.2d at 819 (quoting *Pembee* at 492, 329 S.E.2d at 354). However, *Liptrap* was simply quoting *Pembee's* recitation of the language of N.C. Gen. Stat. § 1-52(16), which sets out a statutory exception to the general rule. *Hawthorne* did not address the point at which the statute of limitations begins to run, and did not hold that it

was delayed until such time as a plaintiff reasonably should be aware of the injury. Moreover, *Karner* was reversed and remanded by the North Carolina Supreme Court, based on failure to join all necessary parties, making its precedential value questionable at best. We conclude that *Karner* does not require a holding that the statute of limitations runs from when plaintiff knew or reasonably should have known of the encroachment.

Furthermore, even if we were to apply the standard urged by plaintiff, we would nonetheless conclude that the statute of limitations had expired when plaintiff filed suit. It is undisputed that the house was completed, at the latest, by 11 October 2006, when the Mecklenburg County Land Use and Environmental Services Agency issued Wieland a Certificate of Occupancy for the house. Plaintiff should reasonably have known of the existence of a completed house that encroached on its easement, and plaintiff's claim was not filed until more than six years after this date. Therefore, the trial court did not err by ruling that its claim was barred by the relevant statute of limitations.

In reaching this conclusion we have considered and rejected plaintiff's arguments to the contrary. Plaintiff's arguments are primarily based on its contention that, by ruling that plaintiff's claim against defendant was barred by the statute of

limitations, the trial court "terminated" or "extinguished" plaintiff's easement, and allowed defendant to "obtain property without satisfying the required elements for adverse possession." We are not persuaded.

Plaintiff's easement was not terminated or extinguished as a result of the summary judgment order. Plaintiff retains its easement, and may pursue any future claims arising from an encroachment to the easement, whether caused by this defendant or another party. Furthermore, in appropriate circumstances, plaintiff may exercise its power of eminent domain under N.C. Gen. Stat. § 40A-3(a)(1). In addition, defendant did not obtain title to any property he had not previously owned; indeed plaintiff concedes that defendant is "the owner of the underlying property[.]" Thus, the only effect of plaintiff's failure to file suit before expiration of the statute of limitations was to bar its lawsuit against defendant based upon this specific encroachment. In this regard, plaintiff experienced the same consequences as any other plaintiff who fails to file suit in a timely manner:

"[S]tatutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are . . . intended to require that litigation be initiated within the prescribed time or not at all. The purpose of a statute of limitations is to afford security against

stale demands[.] . . . In some instances, it may operate to bar the maintenance of meritorious causes of action."

*Hackos v. Goodman, Allen & Filetti, PLLC*, \_\_ N.C. App. \_\_, \_\_, 745 S.E.2d 336, 342 (2013) (quoting *Congleton v. City of Asheboro*, 8 N.C. App. 571, 573-74, 174 S.E.2d 870, 872 (1970) (internal quotation omitted)).

Plaintiff raises several additional arguments based upon the assertion that its easement was terminated by application of the statute of limitations to its claim against defendant, including contentions that the trial court's ruling conflicts with the law governing adverse possession and with cases addressing a defendant's continuing trespass upon land owned in fee by a plaintiff. Plaintiff also asserts that defendant "terminated" its easement and "obtained property" to which he was not entitled. As we have concluded that plaintiff's easement was not extinguished and that defendant did not obtain title to property he had not previously owned, we do not examine these arguments any further.

#### C. Instruments Under Seal

Plaintiff's next argument is that the original agreement signed by plaintiff's predecessor and Mr. and Ms. Wallace in 1951 was an instrument "under seal" and that defendant should be considered "a principal" to this agreement, thereby making the

ten year statute of limitations for claims upon a sealed instrument applicable to plaintiff's suit. We disagree.

N.C. Gen. Stat. § 1-47(2) provides for a ten year statute of limitations for claims "[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto." (emphasis added). In 2007, defendant purchased a house located on property that included part of plaintiff's easement. Under the express terms of the agreement, he took the property subject to plaintiff's easement, and there is no dispute that plaintiff has an easement on part of defendant's property.

However, defendant was not a principal to the original contract between Mr. and Ms. Wallace and plaintiff's predecessor in title. Defendant did not sign the agreement, and was not an assignee of either principal. Nor did defendant obtain any rights or defenses that might have been available to the principals. For example, if Duke Power had failed to pay the agreed-upon sum to Mr. and Ms. Wallace, this would not provide defendant with any defense against encroachment on the easement. *See Howard v. White*, 215 N.C. 130, 131, 1 S.E.2d 356, 356 (1939) ("Defenses available to [the principal] are not available to [the defendant]"). The cases cited by plaintiff are distinguishable from the instant case, as they involve parties

who were clearly the assignees or successors in interest to a contract, such as the "general assign[ee] of an executory bilateral contract." *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 661, 194 S.E.2d 521, 534 (1973). Because defendant was not a principal to the 1951 contract, plaintiff's claim is not governed by N.C. Gen. Stat. § 1-47(2).

D. Challenges to *Pottle* Decision

Plaintiff also argues that *Pottle* was wrongly decided, and that it ignored the law on adverse possession, will lead to "absurd" results, and should not be followed. *Pottle* involved a suit between adjoining homeowners over encroachments on an easement that gave the plaintiffs access to their lots. *Pottle's* holding appears to be a straightforward application of both the statute of limitations set out in N.C. Gen. Stat. § 1-50(a)(3) and the precedent applying that statute. However, even if we agreed with plaintiff that *Pottle* was wrongly decided, we would nonetheless be bound by its holding. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we do not address plaintiff's arguments regarding the substantive merits of the *Pottle* decision.



E. Policy Arguments

Plaintiff next offers various policy reasons against the application of a six year statute of limitations to a claim by a utility company seeking injunctive relief for encroachment on an easement. For example, plaintiff contends that if the statute of limitations is limited to "six short years" it will incur "the substantial cost of continuously patrolling [its] easements" which will "increase[] the costs of providing services[.]" We note that expiration of the statute of limitations in the present case was not the result of the unusual challenges faced by a utility company that may be charged with protecting hundreds of miles of easement. Plaintiff acknowledges that it was aware of defendant's alleged encroachment on its easement by 2009, long before expiration of the statute of limitations. In addition, plaintiff was clearly aware of this Court's holding in *Pottle*, given that plaintiff petitioned for leave to file an *amicus* brief when the *Pottle* plaintiffs sought discretionary review. See *Pottle v. Link*, \_\_ N.C. \_\_, 663 S.E.2d 317 (2008) (unpublished).

Plaintiff essentially argues that it is unreasonable to apply the same statute of limitations to utility companies as to parties such as the neighboring homeowners in *Pottle*. Plaintiff's arguments are not without merit; however, they fall

outside our purview. “‘It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures.’ Normally, questions regarding public policy are for legislative determination.” *In re N.T.*, 214 N.C. App. 136, 144, 715 S.E.2d 183, 188 (2011) (quoting *Cochrane v. City of Charlotte*, 148 N.C. App. 621, 628, 559 S.E.2d 260, 265 (2002) (internal quotation omitted)). As a result, we do not express an opinion on the merits of plaintiff’s policy arguments.

For the reasons discussed above, we conclude that the trial court did not err by granting defendant’s motion for summary judgment and that its order should be

AFFIRMED.

Judges GEER and DIETZ concur.