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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-222

Filed: 2 January 2018

Greene County, No. 14-CVS-301

JOHNNY M. TURNAGE, and wife, PATRICIA H. TURNAGE, PLAINTIFFS,

v.

RUBY B. CUNNINGHAM, by and through her General Guardian, ROBERT PATRICK CUNNINGHAM, DEFENDANT.

Appeal by defendant from judgment entered 11 August 2016 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 5 September 2017.

Cauley Pridgen, P.A., by James P. Cauley, III, and David M. Rief, for plaintiff-appellees.

Lanier, King & Paysour, PLLC, by Jeremy Clayton King and Steven F. Johnson II, for defendant-appellant.

BRYANT, Judge.

Where plaintiffs satisfied both elements of their claim for an implied easement, plaintiffs' claim is not barred by res judicata, collateral estoppel, or judicial estoppel; the trial court did not err in granting summary judgment to plaintiffs; and it did not err by not restricting the scope of the implied easements. Where neither plaintiffs nor their predecessors in title abandoned an easement and defendant cannot destroy

an implied easement by adverse possession before it is legally recognized, we affirm. Lastly, where the second motion for summary judgment presented legal issues that were different from those raised in the earlier motion, the trial court did not err in granting summary judgment in favor of plaintiffs, and we affirm.

Defendant Ruby B. Cunningham has owned her parcel of farmland (the "Cunningham Property") in Greene County since October 1969. The Cunningham Property was originally severed from a larger parcel, as was another parcel—a 31.4-acre tract of farmland and woodland (the "Turnage Property") located due north of the Cunningham Property—in 1922. That same year, defendant's grandfather bought the Cunningham Property, and defendant later bought the property from her parents. In 2001, plaintiffs Johnny and Patricia Turnage bought the Turnage Property.

Prior to plaintiffs' purchase of the Turnage Property, plaintiffs' immediate predecessors in title, Christopher and Phyllis Rene Parks (the "Parks"), instituted a Verified Petition for Cartway. The Parks' petition was denied by the Clerk of Superior Court of Greene County on 18 November 1997. The Parks appealed to the superior court, which ruled that: (1) "no legal easement was conveyed with the deed described herein"; (2) "access to this 31.4 acre tract could possibly be obtained by at least three ways or more across property of others, including but not limited to the lands owned by [defendant]"; (3) the farm path, which is a means of access directly

across defendant's land from Highway 903 to the Turnage Property, has "never been used to gain access to [the Turnage Property] and stops short of [the Turnage Property] by approximately One Hundred Feet." In the order, the trial court also stated that "it appears to the court the Plaintiffs/Petitioners could maintain an action for an easement by implication, necessity, or prescription, but has [sic] failed to pursue an action under these common law doctrines." The trial court's order was appealed to this Court and dismissed. *See Parks v. Cunningham*, 132 N.C. App. 132, 516 S.E.2d 921 (1999) (unpublished).

After their petition for Cartway was denied and their appeal dismissed, the Parks conveyed the Turnage property to plaintiffs. Since plaintiffs purchased the property, it has been accessed through the lands of others or by limited access through defendant's lands when the tracts were farmed by a common farmer. At some point, plaintiffs requested an easement from defendant, but the request was refused. No express easement through the Cunningham Property to reach the Turnage Property is contained in the chain of title of either property.

On 18 December 2014, plaintiffs filed their complaint against defendant seeking an easement to and from their landlocked property over the Cunningham Property to Highway 903 South in Greene County. The complaint alleges two separate bases for implied easements: an easement implied by necessity and an easement implied by prior use. Defendant answered and raised multiple affirmative

defenses including abandonment, res judicata/collateral estoppel, and statute of limitations. On 15 September 2015, plaintiffs filed a motion for summary judgment.

On 12 October 2015, the Honorable William Douglas Parsons, Superior Court Judge presiding, denied plaintiffs' motion for summary judgment. On 26 July 2016, defendant filed a motion to dismiss, motion for summary judgment, and motion *in limine*.[1] On 4 August 2016, plaintiffs filed a brief opposing defendant's dispositive motions and seeking summary judgment against defendant.

On 11 August 2016, the Honorable Paul Jones, Superior Court Judge presiding, denied defendant's motion for summary judgment and entered summary judgment in favor of plaintiffs, granting an implied easement by necessity and by prior use for the benefit of plaintiffs. Defendant appeals.

On appeal, defendant contends (I) the trial court erred in granting plaintiffs an easement by necessity and easement by prior use across defendant's property; (II) collateral estoppel, res judicata, and/or judicial estoppel bar plaintiffs from obtaining any easement; (III) any implied easement that may have existed was abandoned by plaintiffs' predecessors in title; (IV) any implied easement that may have existed at the time of severance was terminated through adverse possession by defendant; (V)

[1] After the trial court denied plaintiffs' motion for summary judgment, defendant obtained new counsel. During the pendency of the litigation, Ruby Cunningham was declared incompetent and her son was appointed as guardian and was properly substituted as defendant in his capacity as guardian.

the trial court erred in declaring the scope of the easement was unrestricted in awarding summary judgment to plaintiffs; and (VI) the trial court lacked the authority to rule in favor of plaintiffs.

I

Defendant first argues the trial court erred in granting summary judgment to plaintiffs. Specifically, defendant argues that an issue of material fact exists—related to the second required element of an implied easement—which cannot be resolved in plaintiffs' favor on a motion for summary judgment. We disagree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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 re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)). "When considering a motion for summary judgment, the trial court must view the evidence in a light most favorable to the nonmoving party." *Id.* (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)).

> [A]n easement by necessity will be implied upon proof of two elements: (1) the claimed dominant parcel and the claimed servient parcel were held in common ownership which was ended by a transfer of part of the land; and (2) as a result of the land transfer, it became "necessary" for the claimant to have the easement.

Adelman v. Gantt, ___ N.C. App. ___, ___, 795 S.E.2d 798, 804 (2016) (alteration in original) (quoting *Wiggins v. Short*, 122 N.C. App. 322, 331, 469 S.E.2d 571, 577–78 (1996)).

Defendant concedes that the first element has been satisfied; thus, the only element in dispute is whether "it became 'necessary' for the claimant to have the easement." *Id.* (citation omitted). Defendant contends that no easement became "necessary" because a public road abutted the Turnage Property rather than a "path."

However, defendant produced no evidence of a public road abutting the Turnage Property. The evidence before the trial court on this issue included a deed to the Turnage Property, drafted at the time of its severance from the Cunningham Property, in which it references "a pine on *path* chopped" in describing one of the property corners. (Emphasis added). The evidence also included an affidavit by Robert M. Beaman, who grew up in the same home as defendant, and who averred that the "house [he grew up in] was located about 300 yards off highway 903 facing a *farm path*." Defendant's son also described a farm path rather than a public road that connected the Turnage Property to Highway 903 in his affidavit. Although defense counsel argued that "[we] believe that the evidence is going to show that the public actually . . . used the road," defendant presented no evidence to support that forecast.

The trial court did not err in granting an easement based on necessity to plaintiffs as defendant produced no evidence to dispute that a farm path, not a public road, abutted the Turnage property. Defendant's argument is overruled.

II

Defendant next argues that res judicata, collateral estoppel, and/or judicial estoppel bar plaintiffs from obtaining any easement through the Cunningham Property as a result of the position taken in the 1997 Cartway proceeding and the ultimate final judgment in that case. We disagree.

A. Res Judicata

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Williams v. Peabody*, 217 N.C. App. 1, 5, 719 S.E.2d 88, 92 (2011) (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)).

Defendant contends plaintiffs' claims are barred by res judicata because plaintiffs' predecessor in title filed a petition for cartway pursuant to N.C. Gen. Stat. §§ 136-68 *et seq.*, which was denied by the court. However, a cartway proceeding, a statutorily created remedy to create access to landlocked parcels under certain conditions and for certain prescribed purposes, *see* N.C. Gen. Stat. § 136-69 (2015), "is not a proceeding to declare [one] ha[s] an easement," as even defense counsel

acknowledged at the second summary judgment hearing. An easement implied by prior use or necessity is derived from common law and allows a court to grant an easement where the intent to grant one was implied rather than explicitly made by the grantor. *See Knott v. Wash. Hous. Auth.*, 70 N.C. App. 95, 98, 318 S.E.2d 861, 863 (1984). Indeed, in a cartway proceeding, the acquirer of the cartway must compensate the owner of the servient parcel, whereas with an implied easement, no compensation is owed. *See* N.C.G.S. § 136-69(b). Accordingly, plaintiffs' claims in the instant case were not barred based on the doctrine of res judicata because the instant case was not "the relitigation of 'all matters . . . that were or should have been adjudicated in the prior action[,]' " *Whitacre P'Ship*, 358 N.C. at 15, 591 S.E.2d at 880 (alteration in original) (quoting *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)), the cartway proceeding, but rather the litigation of an entirely different issue—an implied easement.

B. Collateral Estoppel

"Under the doctrine of collateral estoppel, or issue preclusion, 'a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies.' " *Williams*, 217 N.C. App. at 6, 719 S.E.2d at 93 (quoting *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414, 474 S.E.2d 127, 128 (1996)). "A very close examination of matters actually litigated must be made in order to determine if

the underlying issues are in fact identical[;] [i]f they are not identical, then the doctrine of collateral estoppel does not apply." *Id.* (alterations in original) (quoting *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008)).

Collateral estoppel does not apply in this case because (1) identical issues were not involved, *see supra* Section I.A. (res judicata), and the contested issue—whether an easement exists—was never actually determined. In the cartway proceeding, the trial court concluded that the first and second elements required for a cartway had not been met, but the trial court never concluded that the land was without an adequate means of access to a public road or other adequate means of transportation affording necessary and proper ingress. In other words, the trial court never determined that an easement did or did not exist. Thus, collateral estoppel does not bar plaintiffs' claims as the summary judgment hearing and subsequent order did not relitigate identical issues to those litigated in the cartway proceeding.

C. Judicial Estoppel

In determining whether judicial estoppel applies, a balancing of three factors is required: (1) whether a party's subsequent position is clearly inconsistent with its earlier position; (2) the extent to which that party was successful in persuading the earlier court on the accuracy of the earlier position taken; and (3) whether an unfair advantage to that party taking the subsequent position would be gained, or an unfair

detriment to the opposing party would occur. *Whitacre P'Ship*, 358 N.C. at 28–29, 591 S.E.2d at 888–89 (citations omitted).

Defendant alleges that the position taken by plaintiffs and their predecessor in interest are inconsistent. However, even if plaintiffs' position—"[t]hat [p]laintiffs are entitled to an order establishing an easement across [d]efendant's property for the [p]laintiffs' access to and from their property by way of necessity . . . [and] by way of prior use[,]"—is somewhat inconsistent with the position taken by Parks in 1997—that he was "in need of establishing [a] cartway as his most reasonable way from the land to a public road, in this case N.C. Hwy 903[,]"—ultimately this is of no legal moment where the trial court in ruling on Parks' motion never determined the easement issue or otherwise determined whether the Turnage property was without adequate access to a public road. Furthermore, defendant in the instant case has not been harmed by plaintiffs' position because defendant has continued to enjoy her property unencumbered since 1998 (after Parks' failed petition for a cartway) to the present. Accordingly, judicial estoppel does not apply to bar plaintiffs' claims and defendant's argument is overruled.

III

Defendant argues that any implied easement that may have existed was abandoned by plaintiffs' predecessors in title. Specifically, defendant contends that

Parks' "act of filing the cartway act[ion] and litigating that issue to final determination is evidence of abandonment." We disagree.

"An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the easement; the intent to abandon is the material question." *Skvarla v. Park*, 62 N.C. App. 482, 486–87, 303 S.E.2d 354, 357 (1983) (citation omitted). "[T]he essential acts of abandonment are the intent to abandon and the unequivocal external act by the owner of the dominant tenement by which the intention is carried to effect." *Id.* at 487, 303 S.E.2d at 357 (citation omitted).

Parks' act of filing the cartway action does not show that he had a "clear intention to abandon and terminate [an] easement[.]" *Id.* at 486–87, 303 S.E.2d at 357 (citation omitted). If anything, the act of filing the cartway action shows, at least, Parks' intent to obtain (if not retain) access to his property. And the argument that Parks intended to abandon an easement, only to attempt to purchase a right of passage to his property, makes no logical sense. Defendant's argument is overruled.

IV

Defendant next argues that any implied easement that may have existed was adversely possessed by defendant. We disagree.

In *Adelman*, this Court summarized the requirements for establishing easements by necessity:

> To establish an easement by necessity, the movant must show that the easement is essential to the use and

> enjoyment of the property. When a grantee does not have "full beneficial use of their property," granting an easement by necessity is appropriate. In *Jernigan*[*v. McLamb*, 192 N.C. App. 523, 527, 665 S.E.2d 589, 592 (2008),] this Court *granted an easement* by necessity where the lack of legally enforceable access to the property at issue could have an impact on the property's value. *Id.* at 528, 665 S.E.2d at 592–93.

___ N.C. App. at ___, 795 S.E.2d at 805 (emphasis added) (internal citations omitted). *Adelman* makes clear that an easement by necessity is not *established* until (1) it is shown by the movant that the easement is essential to the use and enjoyment of the property and (2) an easement by necessity is *granted by the court*. *See id.*

In the instant case, the trial court granted plaintiffs an easement by order dated 10 August 2016: "[t]he Court hereby recognizes and grants to Plaintiffs, an implied easement by way of necessity and by prior use . . . ." Adverse possession requires possession that is "actual, open, notorious, exclusive, continuous, [and] *hostile*, for the statutory period, and with intent to *claim title* to the land occupied." *Skvarla*, 62 N.C. App. at 488, 303 S.E.2d at 358 (emphasis added) (citations omitted). By definition, one cannot adversely possess property to which one already claims title. *See id.* In other words, because no easement was granted over defendant's property until 10 August 2016, defendant could not have been in adverse possession of the same land subjected to the easement for twenty years prior to that date because she already had title to it. Thus, until the trial court granted the easement, plaintiffs did not possess a legally enforceable easement which could be adversely possessed.

Accordingly, defendant could not have destroyed plaintiffs' right to an implied easement through adverse possession. Defendant's argument is overruled.

V

Defendant also argues the trial court erred in declaring the scope of the easement was unrestricted in awarding summary judgment to plaintiffs, arguing that the record is devoid of any findings of fact that would support the granting of an unrestricted easement. We disagree.

In the instant case, the trial court granted plaintiffs an easement as follows: "The easement is for the beneficial use and enjoyment of Plaintiffs' property and imposes no restriction upon the uses of Plaintiffs' property." In so doing, the trial court did not draw a distinction between an easement by prior use and an easement by necessity. With regard to easement by prior use, such an easement "may be implied to protect the probable expectations of the grantor and the grantee that an existing use of part of the land would continue after the transfer." *Adelman*, ___ N.C. App. at ___, 795 S.E.2d at 803 (quoting *Metts v. Turner*, 149 N.C. App. 844, 849, 561 S.E.2d 345, 348 (2002)). With regard to easement by necessity, that necessity is met if the easement allows for the "full beneficial use of the[ ] property." *Id.* at ___, 795 S.E.2d at 805 (quoting *Jernigan*, 192 N.C. App. at 527, 665 S.E.2d at 592).

While an easement by prior use could have been limited in scope if defendant had forecast evidence regarding the reasonable expectations of the parties in 1922,

defendant failed to make a forecast as to any evidence of the reasonable expectations of the parties in 1922 and, in any event, the trial court also granted plaintiffs an easement by necessity. Accordingly, the trial court did not err in placing no restriction on the scope of the implied easement by necessity and prior use. Defendant's argument is overruled.

VI

Lastly, defendant argues the trial court lacked the authority to rule in favor of plaintiffs in the first place because plaintiffs had previously been denied summary judgment by another trial court judge in October 2015. We disagree.

As a general rule, "[o]ne superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change in circumstances since the entry of the prior order." *First Fin. Ins. Co. v. Commercial Coverage*, 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002) (citing *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984)). "A substantial change in circumstances exists if since the entry of the prior order there has been an 'intervention of new facts which bear upon the propriety' of the previous order." *Id.* (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 505, 189 S.E.2d 484, 490 (1972)). As such, "although '[t]here may be more than one motion for summary judgment in a lawsuit, . . . *the second motion will be appropriate only if it presents legal issues that*

are different from those raised in the earlier motion.' " *Cail v. Cerwin*, 185 N.C. App. 176, 181–82, 648 S.E.2d 510, 514 (2007) (alterations in original) (quoting *Huffaker v. Holley*, 111 N.C. App. 914, 915, 433 S.E.2d 474, 475 (1993)). "[O]nly when the legal issues differ between the first motion for summary judgment and a subsequent motion may a trial court hear and rule on the subsequent motion." *Id.* at 184, 648 S.E.2d at 516 (citation omitted).

In the instant case, the hearing on plaintiffs' first motion for summary judgment occurred prior to a substantial change in defendant's legal strategy. In response to plaintiffs' first motion, defendant raised several defenses: (1) the necessity for the easement would have to have existed at the time of severance in 1922, but there is no evidence that it did; (2) res judicata, with regard to the predecessors in title and their petition for Cartway and "the concept of abandonment"; (3) the statute of limitations based on damage to the easement or "injury to incorporeal hereditament"; and (4) the Marketable Title Act.

At the hearing on defendant's motions to dismiss and for summary judgment, defendant made the following legal arguments: (1) that there was no easement based on necessity because a road existed in 1922, and "in 1922 to get an easement for necessity you could not touch a public road or have a right to a public road"; (2) plaintiffs' claim is barred by the statute of limitations based on a theory of adverse possession—that defendant adversely possessed the easement and the time in which

to have brought a claim has passed; (3) plaintiffs' claim is barred by collateral estoppel based on Parks' filing for cartway rights, after which he surrendered his claim for easement. Defendant summed up his arguments in support of his motion for summary judgment as follows:

> [N]umber one, there is *definitely an easement in 1922*. It's either a public road or it was an easement through her land to reach there. It is visible, it is located, you can see where it is on the ground, all of the evidence will show it. . . .
>
> Number two, because of that *you cannot have an easement of necessity because you have a right to reach the public road in 1922*. You either are on a public road, that road, or you had [the] right to go from there to get to 903 and/or Warrentown Road. You can't have necessity if you have a visible easement back in 1922.
>
> Number three, that whether you had it in 1922 or not, in 1974 or around there in 1969 after [defendant] got this land, she *destroyed that easement*. And she took affirmative steps to destroy it. She dug it up and planted it consecutively for the last 40 years. Not in dispute. *She adversely possessed their easement* to the exclusion of everyone in this world from 1974 to forward, and that is a *20 year Statute of Limitations*. Their case should be dismissed on Statute of Limitations grounds.
>
> And number four, even if that wasn't the case, the filing of the – *the filing of the Cart-way Statute*, although it was denied further grounds and [plaintiff] may have a right to get a Cart-way, alright . . . the finding of facts there and the bare filing was a surrender of any easement rights he might have had by taking that position in court and they are *collaterally estopped* from arguing otherwise. That is my argument.

Defendant's legal theory changed based on the discovery of additional evidence, including postal maps of the Turnage Property dating to 1910, based on

which defendant stipulated to previously disputed facts. In light of this evidence, at the second hearing, defendant's position on several material facts changed significantly. Most notably, defendant conceded that there was an actual path or road which connected plaintiffs' property to Highway 903 in 1922, obviating the need for an easement by necessity, a claim in direct contradiction to defendant's argument at the first hearing, which was that "[i]f it was necessary to get [across the farm to get to 903], surely there would have been a path that went from the public road up to the Plaintiffs' property" but that "noone [sic] used [defendant's] property to access the Plaintiffs' property from 903." At the second hearing, defendant acknowledges this change in position:

> So in 1922 there was an easement there. And the easement, the maps all show it, the testimony all shows it. There was a visible easement there. . . .
>
> The maps, they're pretty – they're pretty damning to my – to my earlier theory. But you can't have an easement – you can't have it both ways. If you have an easement of prior use of visible easement, that if you have a road, a public road or whatever; you can't have an easement of necessity.

Defendant's argument on abandonment also changed in the second hearing to focus on the filing of the cartway proceeding rather than on the non-use of the easement.

Defendant's former argument that the six-year statute of limitations for incorporeal hereditaments applied also changed, and defendant argued instead that the easement existed and had been taken by adverse possession:

> [T]hey have an easement in 1922. That easement disappeared in approximately 1974. If they did not sue at that time, it's adverse possession and it is a 20 year period. It's not a color of title when it is a 20 year period. But if they did not sue from 20 years from when she converted that land, which 20 years from '74 would be 1994. If they did not sue in that time, they are barred. The Statute of Limitations on that bars them from bringing their claim. And this claim was brought in 2014.

And lastly, defendant abandoned the defense that the Marketable Title Act stood as a bar to plaintiffs' claims and added the defenses of judicial estoppel and collateral estoppel, while amending the argument on res judicata to apply to the claim itself rather than the facts determined in the cartway proceeding.

In sum, the record reflects that the legal issues and the evidence considered by the trial court differed significantly between the first and second motions for summary judgment. *See id.* Accordingly, the trial court did not err in hearing the subsequent (second) motion for summary judgment.

In conclusion, plaintiffs satisfied the elements for an implied easement and neither plaintiffs nor their predecessors in title abandoned the easement. The trial court did not err in granting summary judgment to plaintiffs or by not restricting the scope of the implied easement.

AFFIRMED.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).