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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-962

Filed 31 December 2024

Ashe County, No. 19 CVD 138

GILBERT GUY TESTERMAN, MARY B. TESTERMAN, Plaintiffs,

v.

WAYNE COTHRAN, CINDY COTHRAN, Defendants.

Appeal by Defendants from judgment entered 9 June 2023 by Judge William F. Brooks in Ashe County District Court. Heard in the Court of Appeals 19 March 2024.

*Kilby and Hurley Law Firm, by John T. Kilby, for plaintiffs-appellees.*

*Logsdon Law Firm, PLLC, by John M. Logsdon, for defendants-appellants.*

MURPHY, Judge.

Wayne Cothran and Cindy Cothran (“Defendants”) appeal from judgment entered in favor of Gilbert Guy Testerman and Mary B. Testerman (“Plaintiffs”) granting Plaintiffs an easement “across the roadway leading from [North Carolina State Road (“N.C.S.R.”)] No. 1573 across the Defendants’ property to the Plaintiffs’ property based on an implied easement by prior use and/[o]r necessity.” After careful

review, we reverse and remand.

### **BACKGROUND**

The record indicates that through warranty deeds dated 28 April 1978, Robert DeBoard's property ("the DeBoard property"), located in Ashe County, was divided into six tracts (hereinafter referred to as Tracts 1 through 6). A tract was conveyed to each of Robert DeBoard's six children. The general warranty deeds for Tracts 1, 2, 3, and 4 included the following language in the legal description of the property: "There is also by these presents conveyed to the grantees herein, their heirs and assigns, a perpetual easement of right of way for the purpose of ingress to and egress from [N.C.S.R.] No. 1573 and the tract of land herein conveyed[.]" This express easement is twelve feet in width along the southern boundary lines for Tracts 2, 3, 4, and 5. The easement begins where the southern boundary of Tract 5 intersects N.C.S.R. No. 1573 and runs "in generally easterly and northeasterly directions" through Tracts 5, 4, 3, and 2. The warranty deed for Tract 6 makes no mention of any easement for the benefit of the other tracts.

Although the 1978 general warranty deeds for Tracts 1, 2, 3, and 4 included language conveying a "perpetual easement of right of way," there has never been an established roadway or path in place at that location. In addition, none of the owners of the tracts have attempted to locate a roadway at that location or use the easement as a means of access to their property.

On 4 November 1996, Plaintiffs acquired Tract 2 by general warranty deed.

Subsequently, Plaintiffs also acquired Tracts 1, 3, and 4. In January 2007, Plaintiffs conveyed Tracts 1, 2, 3, and 4 to their son, Joshua Testerman. In July 2014, Joshua Testerman conveyed Tracts 1, 2, 3, and 4 back to Plaintiffs by general warranty deed. In November 2018, Defendants acquired Tract 6 by general warranty deed from Juanita and Ronald Turnmire.

On 8 April 2019, Plaintiffs filed a complaint against Defendants. On 12 July 2019, Plaintiffs filed an amended complaint against Defendants alleging that at the time of the division of the DeBoard property, there was an existing roadway near the *northern boundary* that “commenced at the intersection of [N.C.S.R. No. ]1573 and traversed [Tracts] [6, 5, 4, 3, 2] & 1, ***which*** was used as a means of across [sic] to all [tracts].” Plaintiffs alleged that this roadway was necessary for all parcels to have access to the public road N.C.S.R. No. 1573; prior to the division of the DeBoard property, the roadway “was apparent and visibly used[,]” was “necessary for the beneficial use and enjoyment of” Plaintiffs’ property, and “was obvious and so long in use that it was intended to be permanent”; and since the division of the DeBoard property, none of the owners of Tracts 1 through 6 had “used any other roads or easements as a means of access to their properties.” Plaintiffs alleged that since the division of the DeBoard property, Plaintiffs, “as well as all other property owners and their predecessors in title[,]” used the roadway for at least forty-one, uninterrupted years “***under claim of right*** without permission and adverse to” Defendants, acquiring the right to use the road by prescriptive easement.

Plaintiffs further alleged that, recently, Defendants had verbally and in writing refused to allow Plaintiffs the right to use the roadway to access their properties. Defendants had placed a locked gate across the roadway at issue. Plaintiffs claimed they were entitled to an easement across the roadway leading from N.C.S.R. No. 1573 across Tract 6 based on an express easement, implied easement, or an easement by prescription. They sought to recover actual and punitive damages in an amount in excess of \$10,000.00 for intentional trespass and damage to Plaintiffs' property and for the intentional infliction of emotional distress. Plaintiffs sought a preliminary and permanent injunction prohibiting Defendants from interfering with access to their property pending the outcome of the case.

On 12 August 2019, Defendants filed an *Answer, Defenses, and Counter Claims*. Defendants argued that Plaintiffs' complaint should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure; Plaintiffs had unclean hands and their claims were barred by the doctrine of laches; and to the extent that any use of Defendants' property by Plaintiffs ever occurred, the use was permissive and not hostile, continuous, or under any claim of right. Defendants' counterclaim sought to quiet title. On 11 September 2019, Plaintiffs filed an answer to Defendants' counterclaim.

Plaintiffs made a motion to continue the case and to allow Plaintiffs to amend their complaint to add a cause of action based on an express easement. On 15 June 2021, the trial court entered an order allowing Plaintiffs fifteen days to file an

amended complaint. The parties agreed to waive a jury trial.

On 15 June 2021, Plaintiffs filed a second amended complaint. The complaint included the following additional allegation:

8. When the Defendants received their property ([T]ract 6) from Juanita and Ronald Turnmire, Deed recorded in Deed Book 496 at page 42-44. The Deed clearly stated in the deed:

“Said property conveyed subject to such rights, agreements, easements, restrictions and liens of record and as further set forth in deeds of record in Book 359, Page 1912-1915, Ashe County Registry, said documents incorporated by reference as though fully set out herein.”

The deed in Book 359 at page 1912-1915 is a deed from Gilbert Guy Testerman et ex to Joshua Testerman the [Plaintiffs] son. Note Joshua Testerman later reconveyed the property to the Plaintiffs including the same description, by reference. The fourth tract in the deed was the 2.767 acre tract originally conveyed to [Plaintiffs] by Earl and Ruby Debord in Deed Book 216 at page 929-932. The description of tract four (actually tract two of the Debord division) clearly states that there is also conveyed the same easement of right of way as particularly described in the deed which in fact is the roadway in question in this case. While the then owner of tract two, the Turnmires did not join in conveying the easement in the deed of record in Book 216 at page 929-932. They clearly adopted it by reference in the Defendants’ deed and made the Defendants’ property subject to the easement, which was their intent to do.

On 6 July 2021, Defendants filed an answer to the second amended complaint, defenses, and counterclaim for an action to quiet title. On 20 July 2021, Plaintiffs filed an answer to Defendants’ counterclaim.

Following a hearing on 28 October 2022, the trial court entered judgment on 9 June 2023 finding that both Plaintiffs' and Defendants' tracts were originally part of the DeBoard property. At the time of the division, there was an "unpaved roadway near the Northern boundary that comes directly off the state road and crosses [Tract ]6, [Tract ]5, [Tract ]4, [Tract ]3 and ends at [Tract ]2." Plaintiffs "continued to use the northern existing roadway claiming [a] right to do so until" Defendants placed a locked gate across the roadway in April 2019 that prevented Plaintiffs from using the roadway. The trial court further found that:

28. The evidence presented supports common ownership of a dominant and servant [sic] tracts of land and subsequent transfers separating ownership.

29. Prior to transfer of [Tract] 6 to the Defendants, the Plaintiffs use of said existing roadway was apparent, continuous, and permanent.

30. The claimed easement of said existing roadway is necessary to the use and enjoyment of Plaintiffs' land.

31. As a result of the transfer of [Tract] 6 to the Defendants it has become necessary for the Plaintiffs to have an easement.

32. The evidence presented a[t] trial establishes an implied easement by prior use and/or necessity.

33. It is unnecessary to address the other two theories set out by the Plaintiffs of an easement by prescription and an express easement in that the evidence is that the Plaintiffs have an implied easement by prior use and or necessity.

34. The evidence presented does not support the Plaintiffs claim for actual and punitive damages and for the intentional infliction of emotional distress.

The trial court granted Plaintiffs “an easement across the roadway leading from [N.C.S.R. No. ]1573 across the Defendants’ property to the Plaintiffs’ property based on an implied easement by prior use and/[o]r necessity.” Defendants were ordered to “take such actions immediately as are necessary to enable the Plaintiffs to use said roadway for ingress and egress to the Plaintiffs’ property.” The trial court also ordered Defendants to remove the gate they had erected or to immediately provide a key or access to the gate to Plaintiffs so that they could “have unfettered access to said roadway.” The trial court denied Plaintiffs’ claim for actual and punitive damages and intentional infliction of emotional distress. On 3 July 2023, Defendants filed notice of appeal.

### ANALYSIS

“The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *Cartin v. Harrison*, 151 N.C. App. 697, 699 (2002) (citation and marks omitted). “The trial court’s findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.” *Resort Realty of Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116 (2004). “The trial court’s conclusions of law drawn from the findings of fact are reviewable *de novo*.” *Curan v. Barefoot*, 183 N.C. App. 331, 335 (2007).

On appeal, Defendants challenge several of the trial court’s findings of fact and

conclusions of law, argue that the trial court erred in granting Plaintiffs an easement across Defendants' property based on an implied easement from prior use and/or necessity, and contend the trial court erred in failing to quiet title to Defendants' property.

Although easements must generally be created in writing, courts will find the existence of an easement by implication under certain circumstances. Easements are implied in two basic situations. In the first, an "easement by necessity" may be found, typically when land becomes landlocked after a sale or transfer. In the second situation, . . . an "easement from prior use" may be implied "to protect the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer."

*Knott v. Washington Hous. Auth.*, 70 N.C. App. 95, 97–98 (1984) (citations omitted).

To satisfy the elements of an easement by necessity, the claimant must prove that: (i) the claimed dominant tract and the claimed subservient tract were once held in common ownership that was severed by a conveyance and (ii) the necessity for the easement arose out of the conveyance. The necessity must arise at the time of conveyance from the common grantor. It is not necessary that the person over whose property the easement is sought be the immediate grantor, provided that there was at one time common ownership of both lots.

*Jernigan v. McLamb*, 192 N.C. App. 523, 526–27 (2008) (citation and marks omitted).

"To establish a right of way as 'necessary,' it is not required that the party thus claiming show absolute necessity. It is sufficient to show physical conditions and use which would 'reasonably lead one to believe that the grantor intended the grantee should have the right of access.'" *Adelman v. Gantt*, 251 N.C. App. 372, 379–80 (2016)



(citation omitted).

An easement implied from prior use is generally established by proof: (1) that there was common ownership of the dominant and servient parcels and a transfer which separate[d] that ownership; (2) that, before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was apparent, continuous and permanent; and (3) that the claimed easement [was] “necessary” to the use and enjoyment of the claimant’s land.

*Lester v. Galambos*, 258 N.C. App. 28, 33 (2018) (alterations in original) (citation omitted). “[T]he use which gives rise to an implied easement must have been so long-continued and obvious as to show it was meant to be permanent at the time of the severance. The shortest times heretofore recognized as sufficient to imply an easement is thirteen years.” *Id.* at 34 (citations and marks omitted).

Defendants first challenge findings of fact 28 through 33. Specifically, they contend that findings of fact 28 and 29 are ultimate facts, which are not supported by the evidence. They also contend that findings of fact 30 through 33 are actually conclusions of law and that they are not supported by the findings of fact. They further argue that the trial court erred in concluding that Plaintiffs “have established an implied easement by prior use and/[o]r necessity.”

We note that “[t]he labels ‘findings of fact’ and ‘conclusions of law’ employed by the lower tribunal in a written order do not determine the nature of our standard of review.” *In re Estate of Sharpe*, 258 N.C. App. 601, 605 (2018). Our Supreme Court has held that

[t]here are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.

. . . .

Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.

*Woodard v. Mordecai*, 234 N.C. 463, 470–72 (1951) (citations omitted).

Here, in findings of fact 28 and 29, the trial court determined that there was once common ownership of dominant and servient tracts of land, there were subsequent transfers separating ownership, and prior to Defendants acquiring Tract 6, Plaintiffs' use of the existing roadway at issue was "apparent, continuous, and permanent." These determinations are the "final resulting effect . . . reached by processes of logical reasoning from the evidentiary facts." *Id.* Thus, we agree with Defendants that the trial court's findings of fact 28 and 29 are more appropriately considered ultimate findings of facts and review them as such.

Ultimate finding of fact 28 is supported by the trial court's finding of fact 1, which provides that "[b]oth the Plaintiffs[] tracts of real estate and the Defendants[]

tract of real estate are part of the R. L. DeBoard property which was divided in 1978 into six (6) Tracts which were conveyed to R. L. DeBoard[]s six (6) children.” Finding of fact 1 is supported by the record evidence, including warranty deeds dated 28 April 1978 dividing the DeBoard property into six tracts and the testimony of Plaintiff Mary Testerman.

With regard to ultimate finding of fact 29, the trial court found, in pertinent part, that

6. The Plaintiffs testified that all the original uses of this roadway continued on a regular basis including regular travel through, maintain the roadway, placing gravel on roadway, keeping animals on their property, fixing fences, planting grass and trees, mowing grass, hunting and family gatherings on the property, until the Defendants took possession of the [Tract] 6.

7. Plaintiff, Mary Testerman testified that the Plaintiffs used the roadway at least every other week except in winter. She further testified that at Thanksgiving each year they would have a tailgate [Thanksgiving] meal with their family on [Tract] 3 using the existing roadway.

....

9. The Plaintiffs continued to use the northern existing roadway claiming right to do so until the Defendants put up a gate and blocked the roadway after they purchased [Tract] six (6).

Although these findings relate to whether Plaintiffs’ use of the northern roadway was apparent, continuous, and permanent, findings of fact 6 and 7 are merely recitations of testimony. It is well established that “recitations of the testimony of each witness

*do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.” *In re Green*, 67 N.C. App. 501, 505 n.1 (1984). Thus, we must disregard findings of fact 6 and 7 and conclude that finding of fact 9 is insufficient to support the trial court’s ultimate finding of fact 29 that, prior to Defendants’ acquisition of Tract 6, Plaintiffs’ use of the northern roadway was apparent, continuous, and permanent.

In findings of fact 30, 31, 32, and 33, the trial court determined that the easement through the existing roadway was necessary to the use and enjoyment of Plaintiffs’ land; the evidence established an implied easement by prior use and/or necessity; and it was unnecessary to address whether there existed an easement by prescription or an express easement because the evidence showed Plaintiffs had an implied easement by prior use and/or necessity. We agree with Defendants that these determinations are properly classified as conclusions of law, and we review them accordingly. *In re Helms*, 127 N.C. App. 505, 510 (1997) (citations omitted) (stating that “any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law”).

Here, the trial court’s evidentiary findings of fact only establish that Plaintiffs’ and Defendants’ tracts of property were once held in common ownership and that there was a transfer which separated that ownership. It is well established that a “trial court must . . . make sufficient findings of fact and conclusions of law to allow

the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.” *Spicer v. Spicer*, 168 N.C. App. 283, 287 (2005). Yet, a significant portion of the trial court’s “findings” in its 9 June 2023 order are recitations of testimony. “Findings” of fact 6, 7, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 merely summarize the substance of various witnesses’ testimony. “This is indicated by the trial court’s repeated statements that a witness ‘testified’ to certain facts or other words of similar import.” *Williamson v. Williamson*, 140 N.C. App. 362, 364 (2000). The trial court failed to make any findings about whether it found specific testimony credible or not credible and failed to make any findings of fact about the material facts of the case. *See Gen. Specialties Co. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275 (1979) (“The trial judge is both judge and jury, and he has the duty to pass upon the credibility of the witnesses who testify.”).

Because recitations of testimony are not considered findings of fact, we are left with only the following relevant findings of fact:

1. Both the [Plaintiffs’] tracts of real estate and the [Defendants’] tract of real estate are part of the R. L. DeBoard property which was divided in 1978 into six (6) Tracts which were conveyed to R. L. Deboards six (6) children.
2. Each of the [Plaintiffs’] tracts (being tracts of the R.L DeBoard Lands) has an express appurtenant easement 12 feet in width located adjacent to and northern of the southern boundary lines of Tracts extending to [N.C.S.R. No.] 1573 (Old NC Hwy 16).
3. At that time there was no roadway or path in place at

that location and at no time since then have any of the owners attempted to locate a roadway there or use the easement as a means to access to their [tracts].

4. At the time of the Division of the property there was an unpaved roadway near the Northern boundary that comes directly off the state road and crosses [Tract ]6, [Tract ]5, [Tract ]4, [Tract ]3 and ends at [Tract ]2.

5. The Defendants . . . acquired [Tract] 6 of the R.L. DeBoard lands from Juanita Gilbert Turnmire and husband, Ronald Turnmire by deed under the date of November 5, 2018 and filed [5 November] 2018 in book 496, page 42 thru 44 of the Ashe County N.C. Registry.

. . . .

8. When the Plaintiffs acquired [Tract] 2 from Earl and Ruby DeBoard, the grantors in said deed gave the Plaintiffs an express easement which followed the existing roadway. This easement was given by a metes and bounds description. However, this is not the location of the easement set out in the original deeds of the R.L. DeBoard property.

9. The Plaintiffs continued to use the northern existing roadway claiming right to do so until the Defendants put up a gate and blocked the roadway after they purchased [Tract] six (6).

. . . .

11. The roadway in existence and used by the Plaintiffs until blocked by the Defendants from doing so corresponds with a 1996 survey of said properties.

. . . .

23. After purchasing said property the Defendants placed a locked gate across the roadway in April 2019, thereby preventing the Plaintiffs from accessing their property using said roadway since that time.

These findings of fact are insufficient to support the trial court's conclusions that Plaintiffs had established an implied easement by prior use or an easement by necessity. Therefore, we must reverse the trial court's order and remand for entry of a revised order with appropriate findings of fact sufficient to support the trial court's conclusions of law. Based on the foregoing, it is not necessary for us to reach Defendants' final argument that the trial court erred in failing to quiet title to Defendants' property.

**CONCLUSION**

Where the trial court failed to make sufficient findings of fact to support its conclusions of law, we reverse and remand for entry of a revised order.

REVERSED AND REMANDED.

Judge FLOOD concurs.

Judge STROUD concurs in result only.

Report per Rule 30(e).