



NUMBER 13-15-00096-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

**HENRY GEARHART, JYLAIN GEARHART,
AND ORION GEARHART, Appellants,**

v.

JOHN WARDELL AND WIFE, LOIS WARDELL, Appellees.

**On appeal from the 206th District Court
of Hidalgo County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez**

By one issue, appellants Henry Gearhart, Jylaine Gearhart, and Orion Gearhart appeal the trial court's summary judgment dismissal of their lawsuit against appellees John and Lois Wardell. We affirm in part and reverse and remand in part.

I. Background

The Gearharts and the Wardells are neighbors. It is undisputed that a portion of the Wardells's land is burdened by an express easement previously granted to the

Gearharts for ingress and egress to the Gearharts's property. In August 2009, the Wardells built a wall on their property, which blocked the easement previously granted to the Gearharts. Between 2009 and 2013, the Gearharts accessed their land via another route until that route closed. In September 2013, over four years after the wall was built, the Gearharts filed a petition for mandatory injunction in the trial court, requesting: (1) that the Wardells remove the wall; and (2) that the Wardells be held responsible for any damages proximately caused by the blocking of their easement. In answer to the Gearharts's lawsuit, the Wardells pleaded the affirmative defense of limitations.

Through a motion for summary judgment, the Wardells moved to dismiss the Gearharts's lawsuit as being barred by the two-year statute of limitations set out in section 16.003(a) of the Texas Civil Practice and Remedies Code. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West, Westlaw through 2015 R.S.) (providing that a suit for trespass for injury to the estate or to the property of another is subject to a two-year statute of limitations). The Gearharts responded that, although section 16.003(a) might apply to bar recovery of damages for a trespass occurring more than two years before suit was filed, section 16.003(a) did not govern their request for an injunction to remove the wall. After considering the Wardells's motion for summary judgment, as well as the Gearharts's response thereto, the trial court dismissed the Gearharts's lawsuit in its entirety. This appeal followed.

II. Discussion

We review the trial court's summary judgment ruling de novo. See *Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994). The statute of limitations is an affirmative defense. See TEX. R. CIV. P. 94. To be entitled to summary judgment on their limitations defense, the Wardells were required to conclusively establish that the Gearharts's suit

was time-barred. See *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997). The Wardells attempted to do so in this case by characterizing the Gearharts's claim as exclusively one for trespass under section 16.003(a), which is subject to a two-year statute of limitation. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a). To the extent that the Gearharts sought to recover damages for a trespass under section 16.003(a), we agree with the Wardells and with the trial court that such an action became time-barred on the second anniversary of the wall being built. See *id.* In fact, on appeal, the Gearharts concede that a trespass action for damages would be time-barred under section 16.003(a). However, the Gearharts maintain that their right to enjoin further encroachment upon their express easement is governed by the ten-year limitation period set out in section 16.026(a), which reads:

A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.

See TEX. CIV. PRAC. & REM. CODE ANN. § 16.026(a). Because an express easement constitutes an interest in real property¹, we agree with the Gearharts that only the ten-year limitation period set out in section 16.026(a) could apply to extinguish the easement by adverse possession. See *Gulf, C. & S.F. Ry. Co. v. Candler*, 61 S.W.2d 997, 998 (Tex. Comm'n App. 1933) (holding that the ten-year limitation period set out in section 16.026(a)'s predecessor operated to extinguish an express easement when the fee owner of the property burdened by the easement erected a fence that blocked the easement for more than ten years); *Schuhardt Consulting Profit Sharing Plan v. Double Knobs Mountain Ranch, Inc.*, 426 S.W.3d 800, 804 (Tex. App.—San Antonio 2014, pet. denied)

¹ See *Cummins v. Travis County Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 51 (Tex. App.—Austin 2005, pet. denied).

(analyzing whether the fee owner of property burdened by an express easement established the elements of adverse possession under the ten-year statute of limitation set out in section 16.026(a)); *Robinson Water Co. v. Seay*, 545 S.W.2d 253, 259 (Tex. Civ. App.—Waco 1976, no writ) (same); see also *Nevins v. Whitley*, No. 13-04-486-CV, 2005 WL 2036213, at *9 (Tex. App.—Corpus Christi Aug. 25, 2005, no pet.) (mem. op.) (same).²

Nonetheless, the Wardells respond that section 16.003(a)'s two-year limitation period should govern a cause of action to enjoin further encroachment upon an express easement if a trespass causes permanent (as opposed to temporary) injury to the easement. The Wardells rely on *Babb* as authority for the proposition that a permanent-versus-temporary-injury analytical construct should apply to determine the temporal bar on limitations with respect to injunctive relief. *Scott v. Babb*, 419 S.W.3d 531 (Tex. App.—San Antonio 2013, no pet.). In *Babb*, the defendant built a fence to block an express easement that burdened his property, and the plaintiff waited more than two years to file suit. *Id.* at 532. The San Antonio Court of Appeals found that the encroachment (the fence) constituted a permanent injury to the easement and therefore applied section 16.003(a)'s two-year statute of limitation to bar the plaintiff's cause of action for

² We note that this Court, in *Wright v. Dierlam*, applied the five-year statute of limitation set out in section 16.025(a) to extinguish an easement that had once existed by prescription when the fee owner of the property discontinued access to the easement by erecting a fence. See No. 13-12-00004-CV, 2013 WL 1188999, at *2 (Tex. App.—Corpus Christi Mar. 21, 2013, no pet.) (mem. op.) (extinguishing easement by prescription by applying five-year statute of limitation); see also TEX. CIV. PRAC. & REM. CODE ANN. § 16.025(a) (West, Westlaw through 2015 R.S.) (providing that “[a] person must bring suit not later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who: (1) cultivates, uses, or enjoys the property; (2) pays applicable taxes on the property; and (3) claims the property under a duly registered deed”). However, *Wright v. Dierlam* is distinguishable. In this case, the Wardells cannot claim the easement under a duly registered deed because it is undisputed that the deed itself granted an express easement to the Gearharts. See *id.* For this reason, we agree with the authority cited above that a ten-year statute of limitation applies to extinguish an express easement.

encroachment upon the easement. *Id.* at 534. The *Babb* court borrowed the permanent-versus-temporary-injury analytical construct for determining the temporal bar on limitations from the Texas Supreme Court's decision in *Bates*—a nuisance case which concerned “only the running of limitations [under section 16.003(a)] as to damages claims.” *Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264, 288 (Tex. 2004) (emphasis added), *holding modified on other grounds by Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014). Because the *Babb* court applied law specific to damage claims in reaching its decision, we do not read *Babb* as holding that a cause of action to enjoin encroachments upon an express easement is governed by section 16.003(a)'s two-year limitation period. Thus, the Wardells's reliance on *Babb* is well-placed with respect to damages but misplaced with respect to injunctions—the latter of which we deal with here.

Based on the foregoing authority, we hold that the ten-year limitation period set out in section 16.026(a) governs the Gearharts's suit for a mandatory injunction to remove the wall and that the two-year limitation period set out in section 16.003(a) governs the Gearharts's suit for damages. See *Candler*, 61 S.W.2d at 998; *Schuhardt Consulting Profit Sharing Plan*, 426 S.W.3d at 804; *Robinson Water Co.*, 545 S.W.2d at 259; see also *Nevins*, 2005 WL 2036213, at *9. The Wardells's summary judgment motion did not allege a legally sufficient ground to entitle them to summary judgment with respect to the Gearharts's petition for a mandatory injunction to remove the wall. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.026(a). We therefore sustain the Gearharts's sole issue to the extent that the trial court dismissed the Gearharts's petition for mandatory injunction on limitations grounds.

III. Conclusion

We reverse the portion of the trial court's judgment dismissing the Gearhart's petition for a mandatory injunction and remand for further proceedings. We affirm the remainder of the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
1st day of December, 2016.