NO. COA01-474

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

TERRY LANE BREWER, and wife,
ANITA JEAN BREWER,
Plaintiffs,

v.

Rowan County
No. 96 CVD 015

JERRY P. FINNEY and wife,
BARBARA J. FINNEY; REBECCA L.
TAYLOR; JILL V. STOLZ and
husband, OTTO G. STOLZ; JAMES
F. HAITHCOCK and wife, SHARON
D. HAITHCOCK,
Defendants.

Appeal by defendant from judgment entered 2 January 2001 by Judge Ted Blanton in Rowan County District Court. Heard in the Court of Appeals 30 January 2002.

Donald D. Sayers for plaintiff-appellees.

Corriher & Koontz, by Earle A. Koontz for defendant-appellants.

BIGGS, Judge.

Rebecca Taylor (defendant) appeals from judgment for plaintiffs entered following a non-jury civil trial. For the reasons that follow, we affirm.

The relevant facts are as follows: Defendant and plaintiffs own, and reside upon, neighboring properties in rural Rowan County, North Carolina. Defendant's land fronts onto Old Beatty Ford Road,

a nearby public road. Plaintiffs' property, however, is landlocked and does not adjoin any public road. Since purchasing the land, plaintiffs have accessed their property from Old Beatty Ford Road, by means of a small dirt road connecting plaintiffs' property to the public road. This dirt road, which runs through defendant's property and several other tracts, is the subject of the present appeal.

In July, 1995, defendant entered into a consent agreement with other neighbors, whereby the route of the dirt road was altered. While the roadway still traversed defendant's land, its course was changed so as to skirt along the property's edge, rather than cut through the middle of her tract. Plaintiffs began to use the altered route along the southern and western perimeter of defendant's property. Defendant issued verbal and written protests, as well as physically blocking the road, in an effort to stop plaintiffs from using the road.

On 31 July 1997, plaintiffs filed this action, seeking either a declaration that the roadway was a public neighborhood road, or an easement by prescription, entitling them to use the road. Plaintiffs also sought a temporary restraining order, barring further obstruction of the roadway, and attorneys' fees. On 19 September 2000, a non-jury trial was conducted on the matter. On 2 January 2001, the trial court entered an order granting plaintiffs a prescriptive easement to use the roadway. The court's findings of fact included, in pertinent part, the following:

. . . .

> 7. That the Plaintiffs and their predecessors in title . . . have continuously, openly and notoriously against [defendant's] objections used the roadway . . . from at least 1973 through 1995 when, in July 1995, [defendant] entered into a Consent Agreement . . . whereby the course of the roadway . . .[was] altered so as to travel along the southern and western boundaries of her property . . . rather than traveling across the center of the [defendant's] property[.]
> 8. That the Plaintiffs . . . then began using the altered path . . . even though [defendant] objected to the use of said right of way by the Plaintiffs.
> 9. That the Plaintiffs' sole means of ingress, egress and regress to their home . . . [is] over said unpaved one-lane road of approximately 20 feet in width which extends from the northeastern corner of Plaintiffs' property over, through and beyond the Defendant's property out to the Beatty Ford Road.

The trial court concluded that plaintiffs were entitled to a prescriptive easement "20 feet in width over the one-lane road." The court further concluded that the alteration of the route of the dirt road, pursuant to the consent agreement, was not "a substantial deviation" in the course of the roadway, and that plaintiffs' use of the new route "did not constitute an abandonment of their claim for a prescriptive easement."

Upon these findings and conclusions, the trial court ordered: (1) that plaintiffs be granted a 20 foot wide easement and right of way along the dirt roadway; (2) that plaintiffs were entitled to maintain the roadway, and; (3) that defendant was enjoined from further obstruction of the roadway. Defendant has appealed from this order.

On appeal from a non-jury trial, the applicable standard of review is whether competent evidence supports the trial court's findings of fact, and whether "the conclusions reached were proper in light of the findings." *Lewis v. Edwards*, __ N.C. App. __, __, 554 S.E.2d 17, 23 (2001). Further, in the absence of a valid objection, "the court's findings of fact are presumed to be supported by competent evidence, and are binding on appeal." *Dealers Specialties, Inc. v. Housing Services*, 305 N.C. 633, 636, 291 S.E.2d 137, 139 (1982). In the instant case, defendant did not object to any of the trial court's findings of fact, and, thus, they are conclusively established on appeal.

Defendant presents two arguments on appeal. She alleges first that the trial court erred by granting plaintiffs an easement by prescription. We disagree.

A party claiming an easement by prescription must meet a four-pronged test, which was recently summarized by this Court in *Yadkin Valley Land Co., L.L.C. v. Baker*, 141 N.C. App. 636, 539 S.E.2d 685 (2000), *disc. review denied,* 353 N.C. 399, 547 S.E.2d 432 (2001):

> To establish an easement by prescription, a claimant must prove by the greater weight of the evidence that: (1) the use is adverse, hostile or under claim of right; (2) the use has been open and notorious such that the true owner had notice of the claim; (3) the use has been continuous and uninterrupted for at least twenty years; and (4) there is substantial identity of the easement claimed throughout the prescriptive period. Prescriptive easements are not favored in the law, and the burden is therefore on the claiming party to prove every essential element thereof.

Id. at 639, 539 S.E.2d at 688.

In the instant case, "defendant-appellant does not dispute that use of both the old way and the new way has been adverse, hostile, open and notorious," and, thus, the existence of the first two prongs is not contested. Defendant argues, however, that her alteration of the route of the roadway defeats the third and fourth prongs of the test. She contends both that the altered roadway lacked "substantial identity" with the original route, and also that, by making use of the altered roadway, plaintiff "abandoned" any earlier prescriptive easement that may have existed.

We address first the question of the "substantial identity" between the current and prior roadway. "Whether changes in a traveled way are so great as to establish that there is no substantial identity of the way claimed is a question for the trier of fact." *Concerned Citizens v. Holden Beach Enterprises*, 329 N.C. 37, 467-47, 404 S.E.2d 677, 683 (1991). The plaintiffs in *Concerned Citizens* claimed a prescriptive easement across sand dune areas along the coast, requiring the Court to consider the physical nature of dunes and coastline features. Significantly, the Court also held:

> The fact that the portion of the easement claimed, which was marled and then paved by defendant, varies slightly from the old pathway does not, in and of itself, defeat the claim of a prescriptive easement over that portion of the pathway. *Changes made to suit the convenience of the owner of the subservient land during the prescriptive period do not destroy the identity of the road claimed.* (emphasis added)

Id. at 49, 404 S.E.2d at 684. Other jurisdictions also have held that when it is the landowner who changes the pathway, and the

party claiming an easement merely acquiesces in the new route, the easement is not defeated. *See, e.g., Weigel v. Cooper*, 245 Ark. 912, 922, 436 S.W.2d 85, 90-91 (1969):

> [The fact that] *appellee . . . changed this road* so that it extended directly north and south on the east side of his house rather than through his orchard [is not] sufficient to defeat the right of the public in the road[.] . . . *[T]he change having been made by appellee for his own convenience, he is not now entitled to say that*, because those who desired to drive over the road followed it as he had changed it, *the right of the public in the road as changed became destroyed*. (emphasis added)

See also State ex rel. Game, Forestation and Parks Commission v. Hull, 168 Neb. 805, 820, 97 N.W.2d 535, 545 (1959) (finding prescriptive easement where the roadway "traversed the identical general area of the land of appellants . . .[and] [a]ny deviation in the road was caused by the . . . act of the landowner, or with his consent and acquiescence"); *Faulkner v. Hook*, 300 Mo. 135, 254 S.W. 48 (1923) (changes "made for the convenience of the landowner" do not defeat prescriptive easement); *Leonard v. Hart*, 2 A. 36, 38 (Court of Chancery, N.J. 1885) (changes made "solely for the accommodation of the defendant" do not invalidate easement).

Defendant has cited *Speight v. Anderson*, 226 N.C. 492, 39 S.E.2d 371 (1946), in support of her contention that the plaintiff must "be confined to a definite and specific line" for 20 years, to establish an easement by prescription. However, this standard was explicitly rejected by the North Carolina Supreme Court in *Concerned Citizens*, 329 N.C. at 46, 404 S.E.2d at 683, which held that the trial court erred when "[r]ather than applying the

'substantial identity' test, the trial judge . . . [required plaintiffs] to show the existence of . . . the 'same' definite and specific line of travel."

We conclude that the trial court's conclusion that there was no substantial alteration between the original path and the altered path was supported by its findings of fact, and thus, was not error.

Defendant has argued that after she altered the roadway, plaintiffs were required to establish a new 20 year period of adverse use in order to obtain a prescriptive easement. However, having concluded that the trial court did not err by determining that the altered route was not a substantial deviation from the original route, we necessarily conclude that the 20 year period of prescriptive use need not start anew. This assignment of error is overruled.

Defendant also argues that the trial court erred by granting an easement that was 20 feet wide. This argument is without merit. Defendant contends that the easement represents an expansion or enlargement of the original roadway. She also asserts that "there are no findings of fact from the trial judge to support the expanded width of the easement[.]" However, in its Finding of Fact 9, the trial court found that plaintiffs' "sole means of ingress, egress and regress to their home" was "over said unpaved one-lane road of approximately 20 feet in width[.]" As discussed above, the court's findings of fact are conclusive on appeal. We conclude that this finding clearly supports the trial court's conclusion

that plaintiff was entitled to an easement 20 feet in width. Accordingly, this assignment of error is overruled.

For the reasons discussed above, we conclude that the trial court did not err in its order and judgment. Consequently, we affirm the trial court.

Affirmed.

Judges WALKER and MCGEE concur.

Reported per Rule 30(e).