An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-797

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

DOROTHY WRENN SCHIELER,
Plaintiff,

v.

Montgomery County
No. 04 CVS 17

JAMES R. CAMPBELL,
Defendant.

Appeal by defendant from order entered 15 March 2005 by Judge Edwin G. Wilson, Jr., in the Superior Court in Montgomery County. Heard in the Court of Appeals 12 January 2006.

Horack, Talley, Pharr & Lowndes, P.A., by Zipporah Basile Edwards, for plaintiff-appellee.

Rodney C. Mason, for defendant-appellant.

HUDSON, Judge.

In January 2004, plaintiff sued for a judicial declaration of an easement over and across defendant's property. Defendant filed an answer and counterclaim, whereupon plaintiff filed a motion for summary judgment. In February 2005, after a hearing, the trial court granted summary judgment to plaintiff. Defendant appeals. As discussed below, we affirm.

Plaintiff and defendant own adjoining parcels of land in Montgomery County. The relevant conveyances regarding these properties are as follows: in June 1997, Louise Hale Dale conveyed an 82.28 acre portion of land she owned to defendant and Everette

and Barbara Duck as tenants in common. In September 1997, defendant and the Ducks, again as tenants in common, purchased an additional adjacent 6.76 acre tract from Dale. In April 2000, the Ducks conveyed their interest in the 82.28 acre tract to defendant and defendant conveyed his interest in the 6.76 acre tract to the Ducks. And, on 15 March 2001, the Ducks conveyed their 6.76 acre parcel to plaintiff.

None of the land involved adjoins a public road. When the Ducks and defendant initially purchased the 82.28 acre tract from Hale, they acquired a written easement running across the land of R.W. Perry ("the Perry easement") to access the public road. However, during the time that defendant and the Ducks owned their parcels together, they did not use the Perry easement. Rather, they accessed the public road via Harris Cemetery Road, a private road. When plaintiff first purchased the 6.76 acre parcel from the Ducks, in March 2001, she also used Harris Cemetery Road to access the public road. In the summer of 2001, a property owner on Harris Cemetery Road blocked access to the road. After the Ducks conveyed their tract to plaintiff, defendant cut a road across the Perry easement and began using it to reach the public road. Plaintiff's parcel remained land-locked and she began traveling over defendant's land to reach the public road. The trial court granted plaintiff an 18-foot-wide perpetual easement over defendant's property to reach the public road and gave defendant thirty days to locate the easement in a reasonable manner and notify plaintiff, giving plaintiff the right to locate the easement thereafter.

Defendant argues that because the evidence does not support an implied grant of easement to plaintiff, the trial court erred in granting summary judgment to plaintiff. We disagree. Summary judgment should be granted "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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2004). On appeal, we conduct a *de novo* review to determine whether there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *See Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 707, 582 S.E.2d 343, 345 (2003).

In his brief, defendant argues that plaintiff was not entitled to an easement across his land because she could not establish prior use of such an easement. However, it is well-established North Carolina law recognizes two distinct types of implied easements: an implied easement by necessity and an implied easement arising by prior use. *See, e.g., Pritchard v. Scott,* 254 N.C. 277, 118 S.E.2d 890 (1961); *Carmon v. Dick, et al.,* 170 N.C. 305, 87 S.E. 224 (1915). An easement by necessity does not require prior use. *Pritchard*, 254 N.C. at 280, 118 S.E.2d at 894.

> A way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over the land retained by the grantor or land owned by a stranger. An implied easement of necessity arises only by implication in favor of a grantee and his privies as against a grantor and his privies. It is not necessary that the party claiming the easement show absolute necessity. An easement by necessity

> may arise even where other inconvenient access to the parcel in question exists.

Boggess v. Spencer, ____ N.C. App. ____, 620 S.E.2d 10, 13 (2005) (internal quotation marks and citation omitted). Furthermore, for an easement by necessity to arise, at one time the adjoining tracts must have had a common owner. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 37 (1986). "[T]he easement must arise, if at all, at the time of the conveyance from common ownership." *Id*.

Here, it is undisputed that defendant and the Ducks owned both the 82.28 acre and the 6.76 acre tract as tenants in common. When defendant conveyed his interest in the 6.76 acre tract to the Ducks and the Ducks conveyed their interest in the 82.28 acre tract to defendant, the unity of title was severed. Plaintiff subsequently purchased the tract from the Ducks, making her a privy of the Ducks. It is also undisputed that plaintiff's land, the 6.76 acre tract, lacks access to a public road, as it is surrounded by defendant's land and the land of others. Accordingly, we conclude that plaintiff is entitled to an easement by necessity and that the trial court properly granted summary judgment to plaintiff.

Affirmed.

Judges TYSON and GEER concur.

Report per Rule 30(e).