NO. COA09-847

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

THOMAS LENOIR WOLTZ, Trustee of THE CRAWFORD CREEK TRUST AGREEMENT, SOUTHERN APPALACHIAN HIGHLANDS CONSERVANCY, INC., and THE STATE OF NORTH CAROLINA,

Plaintiffs,

v. Haywood County
No. 07 CVS 923

DONALD S. TAYLOR and wife, CAROLINE CROWELL TAYLOR; and WILLIAM J. DRAKE and wife, LORRAINE CROWELL DRAKE,

Defendants.

THOMAS LENOIR WOLTZ, Trustee of THE CRAWFORD CREEK TRUST AGREEMENT,

Plaintiff,

v. Haywood County
No. 08 CVS 345

DONALD S. TAYLOR and wife, CAROLINE CROWELL TAYLOR; and WILLIAM J. DRAKE and wife, LORRAINE CROWELL DRAKE,

Defendants.

Appeal by defendants from an order entered 8 December 2008 by Judge James U. Downs in Haywood County Superior Court. Heard in the Court of Appeals 12 January 2010.

Roberts & Stevens, P.A., by F. Lachicotte Zemp, Jr. and Ann-Patton Hornthal, for Woltz and Southern Appalachian Highlands Conservancy, Inc., plaintiffs-appellees.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Ann Stone and Special Deputy Attorney General Francis W. Crawley, for State of North Carolina, plaintiffs-appellees.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by W. Thurston Debnam, Jr. and Thomas R. Lenfesty, III, for defendants-appellants.

JACKSON, Judge.

Donald S. Taylor, Caroline Crowell Taylor ("the Taylors"), William J. Drake, and Lorraine Crowell Drake ("the Drakes") (collectively, "defendants"), appeal the trial court's 8 December 2008 judgment entered upon a jury's verdict in favor of Thomas Lenoir Woltz ("Woltz") as a trustee of the Crawford Creek Trust Agreement ("the Trust"), the State of North Carolina, and Southern Appalachian Highlands Conservancy, Inc. ("SAHC") (collectively, "plaintiffs"). For the reasons set forth below, we affirm.

At issue in the case *sub judice* is the ownership and use of three adjoining tracts of land in Haywood County, North Carolina, individually owned by the Taylors ("Taylor tract"), the Drakes ("Drake tract"), and the Trust ("Woltz tract"). The Woltz tract has an area of approximately 488 acres, and was deeded to Woltz's predecessors in interest in April 1942. Crawford Creek, which passes east to west through the southern side of the Woltz tract, is subject to a conservation easement held jointly by the SAHC and the State, which the Trust granted on 9 April 2001. The conservation easement establishes a 300 foot wide riparian

corridor, which extends to either side of the middle of Crawford Creek. The 300 foot wide corridor extends sixteen-and-a-half feet over the bank of Crawford Creek on either side. The conservation easement expressly prohibits the "disturbance of natural features within the riparian corridor[,] and the removal of topsoil, sand, gravel, and rock within [it.]" Crawford Creek Road runs through the Woltz tract, parallel to Crawford Creek on its north side.

The Drake tract consists of approximately thirty acres, and is located directly south of the Woltz tract — the southern border of the Woltz tract and the northern border of the Drake tract abut. The Drakes' predecessors in interest — the Hoopers — jointly deeded the tract to the Drakes and the Taylors in 1997. The Taylors conveyed their interest in the tract to the Drakes in 2005.

The Taylor tract abuts the Drake tract from the west and the Woltz tract from the south. The boundary line between the Drake and Taylor tracts runs parallel to John's Creek, which intersects with Crawford Creek at the northern portion of the Taylor and Drake tracts. Rupert Crowell had devised the Taylor tract to his daughters, Caroline and Lorraine Crowell in 1972, who became known as Caroline Drake and Lorraine Taylor, respectively. In 2005, the Drakes conveyed their interest in the tract to the Taylors.

On 26 July 2007, the Trust filed a complaint in Haywood County Superior Court for trespass, requesting punitive damages and preliminary and permanent injunctions against defendants. In its complaint, the Trust states that defendants are permitted to cross Crawford Creek from Crawford Creek Road at a gravel ford, serving

as a motor vehicle right-of-way for access to their properties to the south. This existing ford is not subject to the restrictions of the conservation easement because it existed prior to the recording of the conservation easement. However, the Trust contends that defendants violated the conservation easement by starting to construct a new ford. In early July 2007, defendants entered onto the Woltz tract and began construction approximately 750 feet northeast of the existing ford, moving rocks, digging out dirt and gravel, and otherwise disturbing the stream bed of Crawford Creek.

On 10 September 2007, SAHC filed a complaint as an intervening plaintiff for trespass and interference on the easement. Also on 10 September 2007, defendants filed an answer, arguing that the new ford, known to them as Maple Ford, had existed for a number of years prior to the conservation easement as a crossing at Crawford Creek, and defendants and their predecessors in title had regularly used Maple Ford for a period in excess of twenty years. Defendants further claimed that their open and continuous use and traversing of Maple Ford had been adverse and under a claim of right. Defendants raised the affirmative defense that their use constituted ownership by adverse possession of the portion of land upon which Maple Ford sits, or, in the alternative, constituted an easement by prescription.

Defendants further argued that the sixteen-and-a-half-foot strip that runs parallel to Crawford Creek on the south side and

continues to run alongside John's Creek is a portion of the thirty-acre Drake tract.

On 11 September 2007, the trial court granted a preliminary injunction against defendants, enjoining them from further construction of Maple Ford and access to the Woltz tract other than at the permitted crossing. On 28 July 2008, defendants filed a counterclaim, contending that Maple Ford was within the perimeter of their tracts; or, in the alternative, that they had adversely and continuously used and traversed the ford for a period in excess of twenty years and, therefore, had established an easement by prescription. On 10 March 2008, the Trust filed an action to quiet title with respect to the Woltz tract and for trespass and punitive damages.

On 10 July 2008, the State filed a motion for joinder and a motion to intervene as a plaintiff in the action. On 7 August 2008, the trial court filed an order joining the State and SAHC as plaintiffs in the action. On 8 December 2008, the trial court issued a final judgment, quieting title (1) in favor of the Trust as to ownership of both the sixteen-and-a-half-foot strip parallel to Crawford Creek and John's Creek subject to the conservation easement, and the portion of land upon which Maple Ford sits; (2) in favor of the State and SAHC as to the true and exclusive ownership of the conservation easement; and (3) in favor of plaintiffs as to defendant's claims of adverse possession and the prescriptive easement. On 8 December 2008, the trial court ordered

defendants to pay costs, expenses and punitive damages. On 2 January 2009, defendants filed notice of appeal.

On appeal, defendants argue that the trial court erred by (1) allowing Woltz to testify that the Trust would grant the desired easement to defendants if the Trust prevailed at trial, (2) refusing to instruct the jury on the issue of tacking, (3) instructing the jury that only motor vehicle use could serve as the basis of use for the purpose of establishing an easement by prescription over Crawford Creek, and (4) submitting issues numbered one and two to the jury with the location of the two-acre tract designated as per plaintiff's exhibit number fifteen. We disagree, and for the reasons set forth below, we dismiss defendants' assignments of error numbered one through three for failure to preserve the issues for appellate review, and overrule defendants' assignments of error numbered four and five.

Defendants first contend that the trial court erred in allowing Woltz to testify that he would grant the easement to defendants if he prevailed at trial. At trial, the following exchange occurred:

> [Plaintiffs' counsel]: Mr. Woltz, there's been a lot of discussion in this case about this two-acre strip that comes down along John's' [sic] Creek. . . . I don't want to lead to confusion in the jury's mind about this. Would the Woltz family -- if the jury were to find that the 2-acre [sic] strip belongs to the Woltz family, would the Woltz family be [] willing to give an easement to the Drakes and Taylors across John's Creek as the Drakes and Taylors exchanged in their deeds?
>
> [Defendants' counsel]: Objection.

> THE COURT: Overruled.
>
> [Woltz]: Yes, sir. We would be willing to grant a right of way or an easement at that location on John's Creek . . . without question.

Plaintiffs argue that defendants have not preserved this issue for appeal because defendants made a general objection at trial, yet on appeal, defendants raise three evidentiary objections that were not raised at trial. We agree.

In order to preserve an issue for appeal, the North Carolina Rules of Appellate Procedure require more than a general objection. Rule 10(b)(1) requires that "a party must have presented to the trial court a timely . . . objection . . . , stating the *specific grounds* for the ruling the party desired the court to make[.]" N.C. R. App. P. 10(b)(1) (2007) (emphasis added). "'The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal.'" *Reep v. Beck*, 360 N.C. 34, 37, 619 S.E.2d 497, 499 (2005) (quoting *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991)). "[A] mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent appellate review." *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 18, 415 S.E.2d 111, 116 (1992) (quoting *State v. Hunt*, 305 N.C. 238, 243, 287 S.E.2d 818, 821 (1982)), *disc. rev. denied*, 331 N.C. 553, 418 S.E.2d 664 (1992). "A general objection, if overruled, will not be preserved on appeal unless there was no purpose for which the evidence could have been admitted." *Knott v. Washington Housing*

Authority, 70 N.C. App. 95, 99, 318 S.E.2d 861, 864 (1984) (citing *State v. Ward*, 301 N.C. 469, 477, 272 S.E.2d 84, 89 (1980)).

It is not the responsibility of the trial court to predict the grounds of every objection made to testimony. It is the duty of counsel claiming error to "'demonstrate not only that the ruling was in fact incorrect, but also that he provided the judge with a timely and *specifically defined* opportunity to rule correctly.'" *State v. Adcock*, 310 N.C. 1, 18, 310 S.E.2d 587, 597 (1984) (quoting Henry Brandis, Jr., Brandis on North Carolina Evidence § 27 (2d rev. ed. 1982) (emphasis added).

Here, the general objection raised by defendants did not "clearly present the alleged error[s] to the trial court as required by G.S. § 8C-1, Rule 103(a)(1)." *Nunn v. Allen*, 154 N.C. App. 523, 531, 574 S.E.2d 35, 40 (2002) (citing N.C. Gen. Stat. § 8C-1, Rule 103 (2007)), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 630 (2003). On appeal, defendants argue three independent grounds for their objection that were not specified at trial. Moreover, defendants did not move to strike Woltz's testimony. Accordingly, we dismiss defendants' argument because it has not been preserved for appellate review. *See id.* (citing *State v. Reid*, 322 N.C. 309, 367 S.E.2d 672 (1988)).

Next, defendants argue that the trial court improperly instructed the jury by failing to include an instruction on tacking on the issue of adverse possession. Defendants have failed to preserve this issue for appellate review. The North Carolina Rules of Appellate Procedure, Rule 10(b)(2) states:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury[.]

N.C. R. App. P. 10(b)(2) (2007).

In the case *sub judice*, at the close of all the evidence, the trial court excused the jury to discuss proposed issues and instructions with counsel outside the presence of the jury. Both parties had prepared proposed issues for the jury to consider and proposed instructions for the trial court to give to the jury. The court did not utilize either of them. After a lengthy discussion regarding the jury issues, the court asked counsel if they had any special requests for instructions on the issues. The court stated to counsel, "since we're not using your issues, essentially, you just listen carefully to my instructions. If you have any objection to them, you note them." Then the jury was brought back in for closing arguments and final instructions. At the end of the trial court's instructions to the jury, the trial court asked, "Anything else in the way of instructions for the jury[?]" to which defendants' counsel responded, "Yes, sir. I have some additional instructions I think are appropriate." The jury was excused, giving defendants the "opportunity . . . to make the objection out of the hearing of the jury." N.C. R. App. P. 10(b)(2) (2007). Defendants requested that additional instructions be given as to (1) what constitutes abandonment, (2) whether wagons qualify as motor vehicular traffic, and (3) whether the

sixteen-and-a-half-foot strip should be identified as being on the eastern or western side of John's Creek. Notwithstanding defendants' requested instructions and arguments of counsel at trial, defendants' assignment of error states: "The trial court erred by refusing to instruct the jury on the issue of tacking because [d]efendants' claims for adverse possession were, in part, based on use by their predecessor's in title . . . ." By failing to object to the omission of an instruction on tacking at trial, defendants failed to preserve this issue for appellate review and impermissibly attempt to "swap horses in midstream" by assigning error to this omission on appeal. *Roberts v. Grogan*, 222 N.C. 30, 33, 21 S.E.2d 829, 830 (1942). *See also Parrish v. Bryant*, 237 N.C. 256, 260, 74 S.E.2d 726, 729 (1953) ("'[T]he law does not permit parties to swap horses between courts in order to get a better mount[.]'") (quoting *Well v. Herring*, 207 N.C. 6, 10, 175 S.E.2d 836, 838 (1934)); *Everhart v. O'Charley's, Inc.*, ___ N.C. App. ___, ___, 683 S.E.2d 728, 734 (2009) ("'[Appellant] may not swap horses after trial in order to obtain a thoroughbred upon appeal.'") (quoting *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)). The trial court did not "err[] by refusing to instruct the jury on the issue of tacking" because defendants never objected, thereby giving the court an opportunity to refuse the tacking instruction. Even though the trial court gave defendants an opportunity to request additional instructions, and defendants did make three requests, defendants failed to request any

additional instruction on the issue of tacking. Accordingly, we dismiss this assignment of error.

Next, defendants argue that the trial court erred when it instructed the jury that only motor vehicle traffic could serve as the basis for establishing an easement by prescription. Defendants also have failed to preserve this issue for appellate review.

Defendants' proposed jury instructions ask only that the trial court instruct the jury on the prescriptive use as general "access to their property." A thorough review of the transcript shows that defendants did not object to the jury instructions on the grounds that the instructions should address "access to their property." The nature of the prescriptive use first arose during *voir dire* discussion of jury issue number four. The following colloquy took place:

> THE COURT: " . . . Have the defendants, [the Drakes], acquired an easement across the property of the plaintiffs for road right of way purposes" -- road right of way purposes?
>
> [Defendants' counsel]: Yes, sir. But I think it needs to identify -- or I just --
>
> THE COURT: I'm not through with it. I'm just asking, that's the purpose, isn't it -- the road right of way purposes?
>
> [Defendants' counsel]: Yes, sir, it is. But we've been talking about -- all the testimony is about easements. I don't know -- I don't know that I have much preference on which term you use.
>
> THE COURT: Well, it's not for strolling.
>
> [Defendants' Counsel]: It's not for strolling.
>
> THE COURT: It's not for mushroom picking.

> [Defendants' Counsel]: That's right.
>
> THE COURT: Holding hands or berry picking. *It's for road right of way, isn't it? Isn't that what you want?*
>
> [Defendants' Counsel]: *Yes*.
>
> THE COURT: *Concrete trucks and such as that?*
>
> [Defendants' Counsel]: *That's what I want*.

(Emphasis added).

After further discussion of the prescriptive easement claim, defendants said, "What you have read is, basically, out of the . . . pattern jury instructions. It's worked for many years. I'd be happy with it just like you had it."

The trial court subsequently instructed the jury as follows:

> And on [the issue of an easement by prescription], the burden of proof is upon the defendants Drake to satisfy you from the evidence and by its greater weight of four things: first, that the Drakes, or those under whom they claim title to the property, have used that Old Maple Ford . . . for . . . road right of way purposes, ingress, egress, regress to and from the land, from the public road. Now, mere intention to claim a right to use that land for those purposes, that's not sufficient. The actual use must be substantially within a definite and specific time and -- and purposes; although, there may be slight deviations over the course of time. And I'm talking about vehicular traffic. I'm not talking about walking, strolling, picking mushrooms or anything else. I'm talking about motor vehicle traffic. That's what the road right of way is for.

After the jury had been charged and excused, defendants made the following objection:

> [Defendants' counsel]: Your Honor, you instructed them that it has to be motor vehicular traffic in order to make

> prescriptive easement. I would respectfully contend, you can draw a wagon across that thing. You can walk to school every day --
>
> THE COURT: No. Walking's not going to get it. *Coggins versus Fox* in Jackson County clearly stated it, a Court of Appeals' case.
>
> [Defendants' counsel]: How about the wagons?
>
> THE COURT: The wagons may. I may have misstated that. That berry picking and walking and strolling, that's not going to do it.
>
> [Defendants' counsel]: All right, sir.

Defendants again attempt to "swap horses in midstream" by asserting a theory on appeal that never was brought before the trial court. *Roberts*, 222 N.C. at 33, 21 S.E.2d at 830. Because defendants "did not object to the jury instructions on the bases contended in their brief, these issues were not preserved for appeal and are therefore not properly before this Court." *Marketplace Antique Mall, Inc. v. Lewis*, 163 N.C. App. 596, 601, 594 S.E.2d 121, 125 (citing N.C. R. App. P. 10(b)(1) (2003) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[.]")), *disc. rev. denied*, 358 N.C. 544, 599 S.E.2d 399 (2004). At trial, defendants requested road right of way to include wagon use, yet on appeal, defendants argue that the instruction should have been for general "access to their property." Moreover, defendants did not present any evidence of the duration of wagon use across Maple Ford, so the jury could not have found that defendants' predecessors' wagon use established an

easement by prescription. Accordingly, we dismiss this assignment of error.

Finally, in defendants' fourth and fifth assignments of error, defendants argue that the trial court erred by submitting issues numbered one and two to the jury with the location of the two-acre tract designated as per plaintiff's exhibit number fifteen. Defendants' essential argument is that the location of the tract is a factual issue and therefore should have been submitted to the jury for consideration.

> It is an elementary principle of law that the trial judge must submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings and supported by the evidence. However, the number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.

Kimbrell v. Roberts, 186 N.C. App. 68, 79, 650 S.E.2d 444, 451, *disc. rev. denied*, 362 N.C. 87, 655 S.E.2d 838 (2007) (internal citations and quotation marks omitted). "'Under an abuse of discretion standard, we defer to the trial court's discretion and will reverse its decision only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.'" *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (2004) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

"'What are the boundaries is a matter of law *to be determined by the [trial] court from the description set out in the*

conveyance. Where those boundaries may be located on the ground is a factual question to be resolved by the jury.'" *Hill v. Taylor*, 174 N.C. App. 415, 424, 621 S.E.2d 284, 290 (2005) (quoting *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959)), *disc. rev. denied*, 360 N.C. 363, 629 S.E.2d 852 (2006) (emphasis added). The trial court's description of the two acre tract as "the north northwest and western boundaries of which is the southern bank of Crawford Creek and the eastern bank of John's Creek" was based upon language in the deeds conveying the two acre tract. The first deed conveying the two acre tract contains the following description:

> Beginning on a Sugar tree on the North bank of Crawford Creek in the line of a tract of land conveyed by me this date to T.L. Gwyn and crossing creek runs with the meanders of said creek a West course of the creek a distance of one rod from left bank of creek to forks of creek: thence up the South Fork of said creek known as Johns Cove Creek to Thos. Crawford old line including one rod of land parallel with creek: thence crossing creek and down same with its meanders and Jas. Crawfords (now Kuykendall) line to the beginning, containing two acres more or less.

At trial, plaintiffs presented their expert witness Pat Smathers ("Smathers"), a real estate attorney, who testified as to the location of the two acre tract. Smathers testified that, pursuant to well established rules of construction, "thence crossing creek and down same with its meanders and Jas. Crawfords . . . line to the beginning" means that the line follows the center of John's Creek which was also the boundary line of Joseph Crawford's tract, placing the tract on the eastern bank of John's Creek. Defendants argue that the language of the deed could be

interpreted to mean that the line follows one rod from the left bank of John's Creek, placing either all or half of the tract on the western bank of John's Creek. Defendants' argument fails because, as Smathers testified, "[one] can only convey what [one] own[s]." *See Miller v. Tharel*, 75 N.C. 118 (1876) ("The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet*.") (citation omitted). Based upon a thorough review of the record, Smathers was correct in testifying that Amos Crawford ("Amos"), the grantor of the two acre tract, did not own land on the western bank of John's Creek. Therefore, Amos could not convey land on the western bank of John's Creek, and the two acre tract only could be on the eastern bank. The trial court's description of the two-acre tract was supported by competent evidence. Defendants failed to present any competent evidence in support of their contention that the tract could be found to be located on the western bank of John's Creek. There was no material controversy over the location of the two-acre tract and therefore the trial court was not required to submit the issue to the jury. Accordingly, this assignment of error is overruled.

For the foregoing reasons, we affirm.

Affirmed.

Judges GEER and HUNTER, Jr. concur.

Report per Rule 30(e).