

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA14-434  
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

AUSTON P. COX, JR.,  
Plaintiff

v.

Rockingham County  
No. 12 CvD 1209

BRONWYN S. BURNETTE  
Defendant.

Appeal by Plaintiff from order entered 11 October 2013 by Judge Frederick B. Wilkins, Jr. in Rockingham County District Court. Heard in the Court of Appeals 23 September 2014.

*Higgins Benjamin, PLLC, by John F. Bloss and Stephen E. Robertson, for Plaintiff-appellant.*

*Thomas B. Kobrin for Defendant-appellee.*

DILLON, Judge.

Auston P. Cox, Jr. ("Plaintiff") appeals from an order dismissing his complaint and requiring him to remove a portion of his concrete driveway that encroached upon Bronwyn S. Burnette's ("Defendant") property and to restore the area between Plaintiff's and Defendant's driveways to its previous

condition. For the following reasons, we affirm the trial court's order.

### I. Background

Prior to 2010, Defendant and her daughter owned two houses located on adjacent lots in Reidsville. Each house had its own driveway. Both driveways were located between the houses and were separated by a thin strip of sloping dirt and grass.

In early 2010, Plaintiff purchased one of the houses from Defendant while Defendant continued to live in the other house. At the time of this purchase, the driveway associated with the house purchased by Plaintiff was gravel. After the purchase, Plaintiff replaced his gravel driveway with a concrete driveway. Defendant complained to Plaintiff that his new driveway encroached onto her land and had caused damage to her driveway. Plaintiff acknowledges the encroachment but countered that he had an easement to encroach onto Defendant's lot because his old gravel driveway encroached onto Defendant's lot at the time he purchased his lot from her.

On 10 July 2012, Plaintiff filed suit against Defendant raising claims for an easement from prior use and easement by estoppel to use the area of his driveway encroaching onto Defendant's property. In her responsive pleading, Defendant

denied that Plaintiff had any easement rights and by way of counterclaims sought relief for the repair of her driveway which was damaged by Plaintiff and for the removal of the portion of Plaintiff's driveway encroaching onto her property.

A bench trial on the matter was held in district court. Each side offered evidence. Following trial, the trial court entered an order, with findings of facts and conclusions of law. In this order, the trial court held that Plaintiff had no implied easement over Defendant's property, dismissed Plaintiff's other claims, dismissed Defendant's counterclaims, and ordered Plaintiff to remove the portion of his driveway that encroached upon Defendant's land and to restore the area between the driveways to its previous condition. Plaintiff timely filed his notice of appeal from the trial court's order.

## II. Analysis

On appeal, Plaintiff argues that the evidence in the record does not support the trial court's findings and conclusions that he did not have an implied easement to use the portion of his driveway that extended onto Defendant's property and the trial court's order should be reversed or remanded for a new trial.<sup>1</sup>

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<sup>1</sup> Plaintiff makes no argument regarding his claim for easement by estoppel on appeal and, therefore, that claim is waived. N.C. R. App. P. 28.

A. Standard of Review

Our Supreme Court has described the standard of review of a bench trial as follows:

When a jury trial is waived, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts.

*Blackwell v. Butts*, 278 N.C. 615, 619, 180 S.E.2d 835, 837 (1971) (citation omitted). "Once it has been determined that the findings of fact are supported by the evidence, we must then determine whether those findings of fact support the conclusions of law." *Stephenson v. Bartlett*, 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003) (citation omitted). The "trial court's conclusions of law, however, are reviewable *de novo*." *Hanson v. Legasus of N.C., LLC*, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010) (citation omitted). "It is the function of the trial judge, in trials without a jury, to weigh and determine the credibility of a witness." *Ingle v. Ingle*, 42 N.C. App. 365, 368, 256 S.E.2d 532, 534 (1979).

B. Implied Easement

To establish an easement implied by prior use, a party must prove that: (1) there was a common ownership of the dominant and servient parcels and a transfer which separates that ownership; (2) 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) the claimed easement is necessary to the use and enjoyment of the claimant's land. *Tedder v. Alford*, 128 N.C. App. 27, 32-33, 493 S.E.2d 487, 490 (1997), *disc. review denied*, 348 N.C. 290, 501 S.E.2d 917 (1998).

Plaintiff challenges the trial court's findings and conclusions regarding the second requirement for establishing an implied easement implied by prior use, namely the requirement that the proponent of the easement show that prior to his purchase of his house, the driveway encroached on Defendant's lot. Specifically, Plaintiff argues that the trial court erred in finding that the gravel driveway "did not extend over the property line between the two separate tracts."

We believe that there was competent evidence to support the trial court's finding. For instance, Defendant testified that the property line dividing the lots ran along the sloping strip of dirt and grass *between* her paved driveway and the gravel

driveway that was on the lot purchased by Plaintiff. Also, Defendant's daughter testified that the gravel did not encroach onto her mother's lot until after they sold Plaintiff his lot. Both Defendant and her daughter testified that Plaintiff's exhibits were taken after Plaintiff had purchased and excavated the embankment and did not show the gravel driveway in the condition that it was in when she owned it or sold it to Plaintiff. It can be inferred from this evidence that originally the gravel driveway was along the property line and Plaintiff's subsequent excavation moved gravel onto Defendant's property. Accordingly, there was competent evidence in the record supporting the trial court's finding that the gravel driveway "did not extend over the property line between the two separate tracts." This finding supported the trial court's conclusion that Defendant's prior usage of Plaintiff's driveway did not encroach upon Defendant's property, supporting the conclusion that Plaintiff failed to meet the second element to establish an implied easement.

Plaintiff relies primarily on the testimony of Mr. Chambers, a land surveyor. We note some equivocation in Mr. Chambers' testimony. For instance, Mr. Chambers testified that before Plaintiff's purchase in 2010 the "the gravel [in

Plaintiff's driveway] extended past the property corner iron" for Defendant's property. However, he stated that he did not know the exact location of the original gravel driveway. He stated that he did not depict the gravel driveway on his survey because the driveway had an "irregular" edge and noted that "gravel will move every time you go in and out so that becomes a variable as to how much [it] may extend across the property line[.]" Mr. Chambers further testified that after reviewing an older survey it appeared that the old gravel road did not extend over the property line. Mr. Chambers admitted that since he did not do a survey of the old gravel driveway he did not know how wide it was but the concrete driveway was wider than the gravel driveway.

In sum, Plaintiff testified that the gravel driveway originally extended over Defendant's property line, Defendant and her daughter testified that it did not, and Mr. Chambers' testimony was equivocal as to the location of the gravel driveway. It was within the trial court's authority to determine the appropriate weight to be assigned the evidence presented at trial when making its findings. See *Blackwell*, 278 N.C. at 619, 180 S.E.2d at 837. Plaintiff's remaining arguments challenge the credibility of Defendant's testimony. Issues of

credibility are for the trial court to resolve as the finder of fact, and we will not reweigh the evidence on appeal. See *Ingle*, 42 N.C. App. at 368, 256 S.E.2d at 534. Plaintiff's arguments are overruled.

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judge HUNTER, Robert C. and Judge DAVIS concur.

Report per Rule 30(e)