In The

Supreme Court of Virginia

RECORD NO. 090972

JUDITH HAFNER,

Appellant,

v.

WALTER D. HANSEN,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT I

Can the Court treat an affirmative defence as a counterclaim?

Appellant, Hansen, has changed the question presented from that stated above to "whether the pleadings in evidence presented at trial where sufficient for the Trial Court to find that a trespass by Hansen did not occur based upon a finding that a prescriptive easement had been established in favor of Hansen."

Hansen's arguments here do not meet the question presented as raised by Hafner in this appeal even by changing its focus. In his argument, Hansen states: "Hafner was well aware that Hansen was seeking to enjoin her from intervening with the sewer line over Hafner's property, based in part, upon the establishment of a prescriptive easement" (Brief of Appellee Page 8). Hansen argues that his prayer for relief in his Answer and Grounds of Defence to Hafner's Complaint requested the Trial Court to order Hafner "not to interfere with [the subject] sewer line" (JA 5). However, Hansen also declared that, "he has a prescriptive easement over the subject property" which the Trial Court treated as a counterclaim, granting and creating a prescriptive easement.

The question raised in this appeal is whether the Trial Court could treat the plea for affirmative relief as a counterclaim and grant a

prescriptive easement over Hafner's property for the buried sewer line. The Question is not addressed in Hansen's argument here.

In his argument, Hansen cites Smith v. Sink, 247 Va. 423, 442 S.E.2d 646, 648 (1994) which does not address the issue. The position articulated by Smith is that the Court can only rule upon issues raised by the pleadings. In the instant case, Hansen did raise the issue of prescriptive easement, but failed to raise it in a counterclaim which was required for the Trial Court to judicially decree a prescriptive easement on Hafner's yard.

ARGUMENT II

Can circumstantial evidence from which an inference can be drawn equally for either side support a party's requirement that proof of the existence of a prescriptive easement for an underground sewer pipe be by clear and convincing evidence when an equally probably inference supports a permissive use defeating a claim for prescriptive easement and no proof of being open and notorious for the tracking of ownerships to support the required twenty years?

Hansen restates the questioned presented in this Assignment of Error asserting that where Hafner's predecessors in title had knowledge of the presence of the subject sewer line and failed to object to its presence for a period of twenty years there was established a prescriptive easement. Neither Johnson v. DeBusk Farm, Inc., 272 Va. 726, 730, 636 S.E.2d 388, 390 (2006) nor Wade v. Moore, 139 Va. 765, 772, 124 S.E. 201, 203 (1924) cited by Hansen address the issue in the instant case. Both the

Johnson Case and Wade Case involve roads which, during the prescriptive period, were exclusive, continuous and uninterrupted and in the context of this instant case, were visible during the entire prescriptive period and therefore were utilized with knowledge and acquiescence of the servient landowner. The law stated in those cases is not contrary to any of the law cited by Appellant, and do not apply to the underground sewer lines involved here.

ADVERSE

Under this subheading, Hansen argues that in considering the issue of acquiescence versus permissive, the Trial Court was correct in finding "acquiescence". Here, Hansen argues that since it could be inferred that his father-in-law knew of the sewer line because his title report stated that the sewer line existed without an easement, that knowledge somehow was transmitted to the predecessors in title of Hafner. Of course there is no evidence to support any such contention. Further, he argues that since none of the 511 N. Fillmore Street owners complained of the presence of the sewer line until Hafner's builder struck the line during construction, this is evidence that there was knowledge and resulting acquiescence. This is only conjecture, not evidence. The sewer line was buried deep in the ground reaching 11 feet at the sewer tap in the street. There were no

visible pipes, no indented land and, in fact, no marks or signs of any kind that would indicate the presence of an underground sewer line running along, underground, next to the house. Hansen argues that accepting the evidence that the construction of the sewer line in 1940 allows the inference that the Horrigans, the owners of 511 N. Fillmore Street, were on notice that there was a sewer line across their land from the 2807 Pershing Street apartment and into which they connected their own sewer lateral; and that the use by the apartment owners ripened at some unknown future date into acquiescence and adverse as contrasted to an initial permissive use. The application of Davis v. Wilkinson, 140 Va. 672, 125 S.E. 700 (1924) does not help Hansen's position. The Davis Case involves a farm road which use was open and obvious. Hansen ignores the fact, established by the County Records placed in evidence by the Defendant (Defendant's Exhibit 1 & 2, JA 111 & 113), that at the same time that the sewer line was connected by the apartment through 511 N. Fillmore Street to the sewer lateral, the sewer lateral from the house at 511 N. Fillmore Street was connected directly into the apartment lateral. The inference there is more likely that the use was not hostile and not a mere acquiescence, but rather an agreed joint use which began by permission. Beginning by permission does not ripen into a prescriptive title. The

authorities on this point are in the Appellant's brief and are consistent with the finding in Davis v. Wilkinson. Once that permissive use began there is no evidence that at some later time it changed to an adverse use. There is no "clear & convincing" evidence that any owner thereafter ever had a clue that a sewer pipe was under the yard.

OPEN AND NOTORIOUS

Under this argument Hansen offers no authority to support his position. Instead, Hansen argues the applicability of Calhoun v. Woods, 246 Va. 41, 44, 431 S.E.2d 285, 287 (1993). In the Calhoun Case, Calhoun was claiming title of a parcel of land by adverse possession. His claim failed. As the Court noted in Calhoun, even though the exhibits and testimony might support an adverse possession by a preponderance of the evidence it was insufficient to establish adverse possession by the needed clear and convincing evidence.

That principle applies in the instant case. Hansen to prove his case relies on various records from the Arlington County Department of Sewers: (see Defendant's Exhibits 1, 2 and 3, JA 111, 113, 114). These three Exhibits essentially represent Hansen's entire case. They show the establishment of the sewer tap performed in 1940 and later a new sewer line put in 511 N. Fillmore Street house in 1963. In the trial, Hansen also

produced testimony dealing with Arlington County Street Plans referencing Defendant's Exhibits 10 and 11 (which were not made part of the Joint Appendix). The Arlington County Street Plans were stored among the records of the Highway Department of Arlington County but they were not part of the land records (JA 83). There is no evidence that any of the landowners in the chain of title for 511 N. Fillmore Street ever looked at or had a reason to look at or had any knowledge of the records of the Sewer Department of Arlington County or the Highway Department of Arlington. Thus the bare existence of these County records fails to reach the clear and convincing level of evidence needed for a prescriptive easement. See: Amstrutz v. Everett Jones Lumber Corp., 268 Va. 551, 559, 604 S.E.2d 437 (2004) overturning a trial court for lack of clear and convincing evidence.

ASSIGNMENT OF ERRORS NO. 3

The Court erred in disregarding Plaintiff's Proof of damages.

In support of the Trial Court's rejection of damages for Hafner, Hansen argues that since the $12,500 represented two distinct activities by the contractor, the later being solely for her own benefit because she failed to contact Hansen prior to moving the previously hidden sewer pipes. The evidence does not support that view of the events (JA 51-57).

After Hafner's contractor struck the pipe and figured out that it was an active sewer pipe, he turned off the apartment water, made a quick fix, for the benefit of the apartment occupants. Obviously its existing location was where he needed to pour footings; so he had to reroute it around the new footing, a task which he performed the next day (JA 173 a & b, 174 a & b). Hafner paid $12,500 for this work (JA 48-49). At the time she did not know that Hansen, who did not live in the apartment building, owned the apartment. By taking the action she took, she prevented disruption of the lives of the apartment dwellers, while allowing for the continuation of the contractor's work. The fixing of the pipe and the moving of the pipe were part of a continuous construction project. The prompt action by Hafner and her contractor should not result in no compensation for her damages. There was enough evidence to allow the Trial Judge to make a intelligent and probable estimate of the damages Hafner suffered.

The law as presented in Martin v. Moore, 263 Va. 640, 651, 561 S.E.2d 672, 679 (2002) is not contrary to Hafner's citation in her brief. The facts in Martin, however, are far more ethereal than the contractor's bill in this case. Hafner paid $12,500. Some award of damages could intelligently be estimated by the Trial Judge.

CONCLUSION

Appellant prays this Court to find that the Trial Court was plainly wrong and abused its discretion, reverse the grant of a prescriptive easement and remand to the Trial Court to grant injunctive relief to Appellant and award damages to Appellant for Appellee's trespass.

Respectfully Submitted,

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I hereby certify, this 9th day of October, 2009, that Rule 5:26(d) of Supreme Court of Virginia has been complied with and pursuant to that Rule, fifteen (15) paper copies and one electronic copy on CD of the foregoing Reply Brief of Appellant have been hand-filed with the Clerk of

the Supreme Court of Virginia and three (3) paper copies have been mailed, postage prepaid to:

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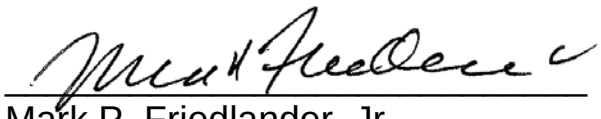

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