In The

Supreme Court of Virginia

RECORD NO. 090972

JUDITH HAFNER,

Appellant,

v.

WALTER D. HANSEN,

Appellee.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The Court erred in treating an affirmative defense by Appellee/Defendant as a counterclaim to grant and create a prescriptive easement in favor of Appellee.
2. The Court erred in applying circumstantial evidence from which inferences could be drawn equally for either side, to grant a party a prescriptive easement for a hidden, underground sewer pipe which requires proof by clear and convincing evidence when an equally probable inference supports a permissive use defeating a claim for prescriptive easement and no proof of being open and notorious for the tacking of ownership to support the required twenty years.
3. The Court erred in disregarding Plaintiff's proof of damages.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This case involves a buried sewer line running under the Appellant - Hafner's yard for which she claimed a trespass by Appellee - Hansen and for which Hansen in turn claimed a prescriptive easement.

Upon discovery of the sewer line, Hafner filed a Complaint in Trespass against Hansen (JA 1-3). In response Hansen filed his Answer and Grounds of Defense (JA 4-6). The case came on for a bench trial on

January 29, 2009. At the conclusion of the trial the Court rendered its decision and directed counsel for Hansen to prepare a final order (JA 107-110). Prior to counsel presenting a proposed order, Hafner filed a Motion to Reconsider. Hafner's Motion to Reconsider and Hansen's presentation of his proposed Final Order were placed on the Court's docket for February 20, 2009. At that hearing the Court modified and entered its Final Order, advising counsel that the Motion to Reconsider would be reviewed that day and a hearing set if the Court felt it was necessary. By letter the same day, the clerk advised counsel for the parties that no hearing would be set (JA 216-229). Hafner filed her timely Notice of Appeal from the Final Order (JA 230).

STATEMENT OF FACTS

Judith Hafner purchased her house at 511 N. Fillmore Street in Arlington County, Virginia (JA 164-165 Plaintiff Exhibit 14) on May 23, 2006 from Ferer. At that time she was unaware of the existence of any buried underground sewer line crossing her property from Walter Hansen's apartment building located at 2807 Pershing Drive, behind her house (JA 51). No recorded easement appeared in her title and there was no physical indication of an underground sewer line (JA 28-31; JA 155-165 Plaintiff Exhibits 6-14) which, to connect to the public sewer main, had to have been

connected at a depth of 11 feet (JA 201 Defendant Exhibit 1; JA 203 Defendant Exhibit 2).

There later came a time when she began to remodel her house to add an expansion to her kitchen and a screened porch in the rear. During the course of construction, the contractor, while digging for a foundation, struck an unexpected sewer line running next to the house (JA 171-172 Plaintiff Exhibit 17; JA 46-47). Recognizing that it was an active sewer lateral from the apartment building next door, and out of consideration for the tenants in the apartment building, Hafner had the builder quickly take the necessary steps to repair and move the line around the new foundation footings and restore its use (JA 40-50; JA 171-180 Plaintiff Exhibits17, 20, 22, 23, 24, 25). Thereafter, she found the name and address of the non-resident owner of the apartment building and, through her lawyer (JA 50-55), requested that Hansen, the non-resident owner, remove his line directly to the street and reimburse her for her plumbing costs arising out of the trespass (JA 50 -51; JA 170 Plaintiff Exhibit 16). It was feasible for Hansen to connect to the public sewer (JA 15-17).

An examination of the Arlington County Water & Sewer & Street Bureau archived plumbing records revealed that on July 18, 1940 a sewer

tap was connected for a lateral sewer line from the Pershing Drive apartment building through the land of 511 Fillmore Street (JA 73-74; JA 199-201 Defendant Exhibit 1) and at the same time a lateral sewer line from the Fillmore Street house had been connected into that same line so that both 2807 Pershing Drive and 511 Fillmore Street were connected into a single lateral line which then was tapped into the public sewer main running down Fillmore Street (JA 73-74; JA 202-203 Defendant Exhibit 2).

Because the County installed a new 8” sewer main in 1940 all of the sewer laterals may have been changed from the 6” sewer main to the 8” main in July 1940 (JA 78-79). None of these records were part of the land records (JA 83-85). No sewer easement was or is recorded (JA 31-33).

In July 1940 the 511 Fillmore Street house was owned by Mr. and Mrs. D. E. Horrigan and the 2807 Pershing Street apartment building was owned by Mr. and Mrs. Joseph Boss.

In 1944 the Horrigans sold to Walters, who in 1946 installed a second sewer lateral on the other side of his 511 Fillmore Street house (JA 76-77; JA 204-205 Defendant Exhibit 3). The reason for the new sewer line is unknown.

The 511 Fillmore Street chain of title is (JA 30-31; JA 155-164 Plaintiff Exhibits 6-14).

Horrigan 7-7-30

Walters 4-17-44

Better Homes Realty 8-26-63

Elliott 11-18-63

Rios 5-11-64

Ferer 7-21-89

Hafner 5-23-06

From the 2807 Pershing Street chain of title there was one further record regarding the sewer line. A title insurance report revealed to Holton, Hansen's step-father, that when he took title in 1944, the apartment building he purchased was connected to the sewer line in Fillmore Street through the 511 Fillmore Street property without a recorded easement, (JA 31-33; JA 166-168 [see "sewer" JA 168] Plaintiff Exhibit 15).

The 2807 Pershing Drive chain of title is (JA 28-30; JA 119-135 Plaintiff Exhibits 1-5):

Boss 10-18-38

Smith 8-23-41

Holton 4-27-44

Hansen 1-12-03

No sewer line easement was in Hafner's or Hansen's Chain of Title (JA 31). Below is a plat illustrating the relationship of the two lots, Hafner's lot is in pink and Hansen's lot is in yellow.

QUESTIONS PRESENTED

1. Can the Court treat an affirmative defense as a counterclaim? (See Assignment of Error 1).

2. 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 probable inference supports a permissive use defeating a claim for prescriptive easement and no proof of being open and notorious for the tacking of ownerships to support the required twenty years. (See Assignment of Error 2).

3. Can the Court disregard a reasonable claim for damages even if not established with exactitude? (See Assignment of Error 3).

ARGUMENTS

1. The Court can not treat an affirmative defense as a counterclaim in order to grant relief.

Addressing Assignment of Errors No. 1 & Question Presented No. 1

In Virginia practice, there is a distinct difference between an affirmative defense and a counterclaim. In Bremer v. Doctor's Building Partnership, 251 Va. 74, 465 S.E.2d 787 (1996) the Court distinguished a

statutory plea of equitable defense from a counterclaim to allow a non-suit. In City of Hopewell v. Cogar, 237 Va. 264, 269, 377 S.E.2d 385, 388 (1989) the Court held that an affirmative defense was not a counterclaim and therefore a non-suit would be allowed.

After Hafner filed her Complaint alleging a trespass, Hansen filed his Answer and Grounds of Defense, adding a list of Affirmative Defenses including: "He has a prescriptive easement over the subject property" (JA 6 Paragraph 1; JA 4-6 Defendant's Answer and Grounds of Defense).

Based upon this sentence the Trial Judge treated this affirmative defense as a counterclaim and granted Hansen positive relief, to wit: granting him a prescriptive easement for his sewer line through Hafner's yard. When objection was made, the Court ruled that the affirmative defense was his prayer for relief and declared that if Hafner had not been satisfied with whether the pleading was sufficient, then Hafner should have dealt with it by a demurrer at the pleading stage, (JA 86; JA 101-102) and therefore treated the affirmative defense as a prayer for affirmative relief as in a counterclaim.

2. When circumstantial evidence from which inferences can be drawn equally for either side, the party claiming prescriptive easement for an unseen, underground sewer pipe can not prevail by clear and convincing evidence when an equally probable inference supports a permissive use which in turn defeats a claim for prescriptive easement particularly where there was no evidence that the use was open and notorious for the required passage of twenty years.

Addressing Assignment of Errors No. 2 & Question Presented No. 2

Where inferences can be drawn from the evidence favorable to Hansen and other probable inferences can be drawn from the same evidence favorable to Hafner then Hansen, who had the burden to establish his claim of a prescriptive easement by clear and convincing evidence, can not prevail. Calhoun v. Woods, 246 Va. 41, 431 S.E.2d 285 (1993).

In a will contest case this Court held:

> "While these inferences could be drawn from the evidence, other equally probable inferences favorable to the opponents could be drawn from the same evidence. Thus, the proponents have failed to carry their burden of proving, by clear and convincing evidence, that the will was not revoked."

Harris v. Harris, 216 Va. 716, 720, 222 S.E.2d 543, 546 (1976).

A prescriptive easement requires the application of the same elements as adverse possession of the land of another. Craig v. Kennedy, 202 Va. 654, 657-58, 119 S.E.2d 320, 322-23 (1961) (adverse use of a road).

The law does not lightly presume the existence of a prescriptive easement and the burden was on Hansen to prove that for 20 years the sewer lateral was open, visible, continuous and unmolested and adverse by clear and convincing evidence.

Adverse

Among the elements which must be met by a claimant is that the right claimed was adverse. If the use was permissive, it can not ripen into a prescriptive easement. When the use is permitted, either expressly or implicitly, a prescriptive easement can never arise.

As Justice Poff wrote in Martin v. Proctor, 227 Va. 61, 313 S.E.2d 659 (1984) quoting earlier authorities:

> "We believe it to be perfectly well settled that where the owner of land opens a way thereon for his own use and convenience, the mere use by his neighbor under circumstances which neither injures the way or interferes with the owner's use of it, in the absence of some other circumstance indicating a claim of right, will not be considered as adverse, and will never ripen into a prescriptive right.
>
> * * * *
>
> If it be fairly shown that the use is permissive in its inception, it will never by mere lapse of time ripen into a hostile right. (citations)"

The County land records and the testimony of Kirk Foster established that in 1940 511 N. Fillmore Street belonged to D. E. Horrigan and Mary G. Horrigan (JA 158 Plaintiff Exhibit 8) while 2807 N. Pershing Drive belonged

to Joseph Boss and Lillie Boss (JA 119 Plaintiff Exhibit 1). There is no direct evidence as to whether the sewer laterals were dug and installed in July 1940 or had previously existed and only the sewer tap in the street was changed. Assuming, as the Court did, that both lines were installed in July 1940 it would be a fair inference that both the Horrigans and the Bosses knew of the event. Further, if the Horrigans and the Bosses as neighbors connected their sewer laterals together to use a single county sewer tap (JA 74; JA 113-114 Defendant Exhibit 2) the obvious inference is that use by the Boss family was permissive, not hostile or adverse.

If on July 18, 1940, only the "single" sewer tap was changed in the street from the 6" County sewer main to the new 8" County sewer main an inference that both families knew is more tenuous. However, in either event there is <u>no</u> evidence thereafter that the existence of the sewer line from the apartment across 511 N. Fillmore yard was known to <u>any other owner of 511 N. Fillmore after 1940</u>.

In order to find that there had been the statutory passage for 20 years the Court concluded that counsel for Hansen was correct when he argued (JA 105-109) that when Walters connected a new sewer lateral to the other side of their house (JA 204-205 Defendant Exhibit 3) there arose an <u>inference</u> from which it would be <u>implied</u> that the Walters knew during their

19 years of ownership that the prior sewer lateral on the other side of the house meant that a sewer line was running from the 2807 Pershing Drive apartment through their yard. This does not meet the required clear and convincing standard.

In 1944 Horrigans sold to the Walters, who lived at 511 N. Fillmore (JA 159 Plaintiff Exhibit 9) until 1963 when Mrs. Walters, as a widow, sold to Better Homes Realty. The land then passed to three more families until it was sold to Hafner in 2006. All this time the record is void of any knowledge by any of the owners of 511 N Fillmore Street of the buried sewer line under the side yard and void of any evidence that any part of the underground sewer lateral was visible.

In this case the initiating events could be determined only by circumstantial evidence; there being no witnesses to aid the Court in its decision. The evidence in the Reports for Tap found in the records of Arlington County show that on July 18, 1940 the County connected a lateral from 2807 N. Pershing Drive to the County sewer line in N. Fillmore Street (JA 199-201 Defendant Exhibit 1) and at the same time the lateral from 511 N. Fillmore Street was connected <u>directly</u> into the other lateral (JA 74; JA 202-203 Defendant Exhibit 2) so that <u>both properties were joined</u> to share the lateral connection 11 feet below the public street.

At the conclusion of the trial the Court's attention was focused upon these reports for taps, which, while not public land records in the chain of title, when considered along with the testimony of Joe Cogswell (JA 69-83) provided the only circumstantial evidence from which the Court concluded that the Horrigans, as the owners of 511 N. Fillmore Street, would have known in 1940 of the construction of the sewer laterals being installed across their yard to the single, joint sewer tap in Fillmore Street.

In so doing the Court held:

> "... [T]his Court believes that as a matter of law the defendant has shown that the use of the property that, albeit not in the land records, this sewer pipe has been crossing this property since at least 1940. It's been used for the same use. The apartment building hasn't changed, expanded or anything else over this period of time. It's been continuous; it's been uninterrupted.
>
> And the evidence, the circumstantial evidence supports the fact that the predecessors in interest of the plaintiff had knowledge of at least 20 years." (JA 109).

The Court further found that "...the predecessors in interest of the Plaintiff had knowledge of and therefore acquiesced in it for a period of at least 20 years" (JA 109). This finding depends entirely on the **inference** that Walters, who took title 4 years later, knew that his sewer line was tied into the apartment line running through his yard either when he took title or when he himself had a new sewer lateral installed on the opposite side of his house in 1946. Certainly the installation of a sewer lateral to the other

side of his house does not imply the knowledge required to meet the clear and convincing evidence test.

A second event regarding knowledge of the sewer lateral was the Notice given to Holton, when he purchased the apartment from the Bosses in 1944.

The title report from that sale and given to William Holton (JA 166-168 Plaintiff Exhibit 15; see also JA 60) revealed the fact that 2807 N. Pershing Dr was connected to the public sewer on N. Fillmore Street by a line through 511 N. Fillmore Street <u>without a recorded easement</u>. But, knowledge by Holton or his wife or his step-son, Hansen, <u>does not</u> establish knowledge by any of the owners of 511 N. Fillmore Street.

Assuming that Holton, by reason of Exhibit 15 knew about the sewer lateral, the fact that Holton took no action about something as important as a sewer line for his apartment house supports an inference that an existing permissive use continued. However, the fact or the inference that the owner of 2807 N. Pershing Drive knew about the existence of the sewer line from the title report <u>is not</u> evidence that the owner of 511 N. Fillmore Street knew.

Open and Notorious

"When pipes are buried under the land there is an absence of the open, notorious and exclusive use which is essential to the creation of an easement by prescription." Sullivan v. Nean, 183 A.2d 834 (D.C. 1962) (denying prescriptive easement for underground line).

Sullivan is cited with authority in Powell v. Davison, 469 N.E. 2d 1179 (Ct. App. Ind. 1984) (involving underground field title) which case, contains a compilation of corroborating authorities.

To the same effect: City of Montgomery v. Couturier, et al., 373 So. 2d 625, 1979 Ala. LEXIS 3001 (no visible notice of drainage ditch) and Houston Pipe Line Company v. Brown et al., 361 S.W.2d 884, 1962 Tex. App. LEXIS 1919 (buried pipe line).

The apartment building fronts on N. Pershing Drive with its side facing the rear of the 511 Fillmore Street house. There are no visible marks, vents, indentations or open pipe ends to ever suggest that the sewer lateral ran under the 511 N. Fillmore Street yard.

The annotation found in: *Easements by Prescription-Drains*, 55 A.L.R. 2d 1144, 1166 (*Id*., at P. 1167) summarized:

> "Where the pipes or other conduits as to which easements have been claimed were buried underground and their presence was not physically apparent throughout the prescriptive period, the courts have

> generally concluded that there was insufficient notoriety of the user to permit prescription to run against the servient estate. This result has often been reached where there was an absence of substantial evidence that the servient parties had any notice or information of the existence of the facility and its user" (italics provided).

3. The Appellant's evidence was sufficient to establish damages for the alleged trespass.

Addressing Assignment of Error No. 3 & Question Presented No. 3

Hafner testified that she hired a contractor to perform work on her house. While he was working, she received a phone call to come to the house. When she arrived she saw that, while digging for footings, the builder had struck a buried sewer line. It was determined that the previously unknown sewer lateral came from the apartment building behind her house. In order to not deprive the apartment dwellers of their sewer line, she directed the builder to repair the line and then he rerouted it to allow for the continued work on her new construction (JA 41-50, JA 173-179 Exhibits 20, 22, 23, 24, 25). Afterwards, the contractor presented a $12,500 invoice for his work. Hafner paid his bill.

The repair of the broken pipe was the appropriate thing for Hafner to do. Hansen's tenants obviously benefited from Hafner's prompt action with her contractor. A charge of $12,500 was made to Hafner by the contractor. The bill itself (JA 175 Exhibit 21) was objected to as hearsay and not

admitted into evidence (JA 48-49). The work to make an emergency repair and then to move the line around the new construction was a reasonable action taken by the Plaintiff. If Hansen is determined to not have established a prescriptive easement, then Hafner is entitled not only to the requested injunctive relief to compel Hansen to install his sewer line directly into and down Pershing Road to the public sewer main (JA17-19), but also for reasonable damages for the repair of the line.

> "Damages need not be established with mathematical certainty. Rather, a plaintiff is required only to furnish evidence of sufficient facts to permit the trier of fact to make an intelligent and probable estimate of the damages sustained (citations)."

Estate of Taylor v. Flair property Associates, 248 Va. 410, 414, 448 S.E.2d 413 (1994).

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,

Judith Hafner

By Counsel

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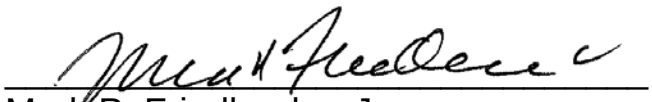

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I hereby certify, this 2nd day of September, 2009, that Rule 5:26(d) of Supreme Court of Virginia has been complied with and pursuant to that Rule, fifteen (15) paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia and three (3) copies have been mailed, postage prepaid to:

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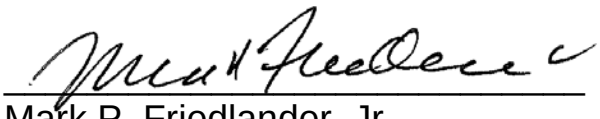

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