



THE TITLE COMPANY OF NORTH CAROLINA

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Landscaping within a Driveway Easement—Is it Permitted?

The Court of Appeals has attempted to deal with the challenging question of driveway easements, adverse possession, and who can maintain bushes and shrubs within an easement in four cases in the past eight months, but without adding much clarity or guidance. A divided panel, two unpublished decisions and a confusing opinion have failed to shed much light on the topic.

In one of the unpublished decisions, *Scott v. Ross*, ___ N.C. App. ___, ___ S.E.2d ___, (COA07-104, 19 Feb. 2008), the Court of Appeals dealt with a private road leading to a Swansboro subdivision. Plaintiffs and defendants all owned a sixty-foot private easement over Shore Road, (which leads from the public road to the subdivision) and a perpendicular thirty-foot private easement (Bynum Lane). Both easements were shown on a recorded plat. In 2001, Defendant, one of the owners of property in the subdivision, approached the Plaintiff about making improvements in the easement. Plaintiff stated he was “very interested in this possibility.” Defendant then made improvements to the easements, including extension of the pavement, curbing, brick entrance structures, trees and shrubbery. All of the improvements were located within the bounds of the Shore Road and Bynum Lane easements. Upon seeing the improvements, the Plaintiff objected contending that the Defendant had assumed full control and use of the easements, using Bynum Lane as if it were the Defendant’s private driveway. A suit was filed by the Plaintiff seeking injunctive relief to remove the improvements. The trial court granted summary judgment for the

Plaintiff, requiring the Defendant to restore the easements to their original condition existing prior to the construction of the improvements, including removal of “all vegetation, walls, road surfaces . . . and other obstructions.” The trial court permanently enjoined any interference with the Plaintiff’s use of the entire width of the easements.

The issue addressed on appeal was whether the Plaintiff was entitled to access all sixty feet of the Shore Road easement and all of the Bynum Lane easement, or if he was only entitled “to access as much of the Shore Road [and Bynum Lane] easement as is minimally necessary to allow his ingress and egress.” The Court of Appeals affirmed the trial court decision, citing *Stanley v. Laughter*, 162 N.C. App. 322, 590 S.E.2d 429 (2004). In *Stanley*, the Court held that when lots are sold by reference to a recorded plat showing rights of ways, each lot owner has a right to have the easements that are not opened kept free to be opened to their full length and width.

Also citing the *Stanley* case is the unpublished opinion in *Dempsey v. Silver Creek Homeowners Association*, ___ N.C. App. ___, ___ S.E.2d ___, (COA06-699, 7 August 2007). As part of the subdivision approval process the developer of Silver Creek Subdivision implemented a master landscaping plan which included the installation of an irrigation system and eleagnus bushes in the buffer and easement areas shown on the recorded plats of the subdivision.

The developer also reserved the right to “cultivate and landscape” the easement areas when granting easements to public utility companies. Pursuant to

applicable declarations and other instruments of record, the Silver Creek Homeowners Association assumed the responsibility of maintaining the landscaping in the buffer and easement areas. The Plaintiffs purchased a subdivision lot in 1998 and the vesting deed made specific exception to matters shown on the subdivision plat, declarations, and utility easements. In 2004 the Homeowners Association adopted a plan to remove and replace the eleagnus bushes and retained a landscape contractor to do so. When the contractor began to remove the eleagnus bushes from the buffer and easement areas on the Plaintiffs' lot, the workers were confronted by the Plaintiffs and ordered off the lot. The Plaintiffs then filed an action based on trespass seeking injunctive relief prohibiting the removal of plantings and landscaping by the Defendants. The trial court granted summary judgment for the Defendants holding that the Homeowners Association had the legal right to enter the buffer and easement areas on the Plaintiffs' lot. The Court of Appeals affirmed, stating that title to the Plaintiffs' lot was subject to the Homeowners Association's right to maintain the landscaping which provided an affirmative defense to the trespass action.

The Court did not indicate whether the prior planning of the landscaping in *Dempsey* was what made it permissible over the *Scott* landscaping, or whether it was the different character of the party seeking the injunction, or some other factor.

Sounds simple enough, right? Well, then there is the *Jones v. Miles* case, ___ N.C. App. ___, ___ S.E.2d ___, (COA07-109, 18 March 2008). In that case, the Plaintiff's predecessors in title had owned a lot in Henderson County since 1965. When the house was built in 1965, a driveway and decorative shrubs were installed. Unfortunately, the driveway and shrubs encroached onto the adjoining property owned by the Defendants' predecessors in title. The Plaintiffs bought the property in 1981 and maintained the driveway and shrubbery on a regular basis ever since. In addition, the Plaintiffs paved the driveway in 1987. In April, 1992, the Plaintiffs had the property surveyed and discovered

the driveway and shrubbery actually encroached on the Defendants' land. The opinion says that the Plaintiff was under the mistaken belief that he owned title to the Defendants' property through adverse possession (although the decision does not say why the 27 years which had passed did not give rise to an adverse possession claim). Notwithstanding the adverse possession claim, the Plaintiffs decided to "do the right thing" by offering to purchase the one-tenth-of-an acre portion of the property containing the driveway and shrubbery. The Defendants' predecessors declined the Plaintiffs' offer, but told them to "just enjoy the land" and "don't worry about it."

In 2004, the Plaintiffs put up a fence around the disputed property in order to demarcate the portion they were claiming by adverse possession. The Defendants sent a letter requesting that the fence be removed. The Plaintiffs filed suit, alleging they had acquired ownership of the disputed property by adverse possession, at least from 1981 until 2004. The Defendants claimed that the Plaintiffs' use of the disputed tract had been permissive since April of 1992, thus interrupting the running of the twenty-year statutory period for adverse possession.

The trial court granted summary judgment for the Defendants, holding that the permission granted in 1992, after 11 years of inarguably adverse possession, stopped the running of the statute of limitations. The Court of Appeals affirmed the trial court.

Judge Tyson, in a well-reasoned dissent, contended that "permission given after the hostile use has begun does not destroy hostility," citing *Webster's Real Estate Law in North Carolina*, §15-18(a) at p. 722. His dissent cites several other situations where statutes of limitations were not allowed to be interrupted by a subsequent disability. The dissent argues that once adverse possession has begun and the owner is on notice of the adverse use, the burden shifts to the record owner to take physical or legal action to interrupt the running of the twenty year statutory period.

To muddy these waters even more, look at the case of *Pottle v. Link*, ___ N.C. App. ___, ___ S.E.2d ___, (No. COA07-359, 18 December 2007). Plaintiffs owned two lots on Cedar Island, together with two thirty-foot appurtenant easements for ingress and access to the public road. Defendants owned the servient lots over which the easements ran. Beginning in 1994, one of the Defendants planted several trees on his tract, but within the Plaintiffs' access easement. Plaintiffs allege that after nine years the trees grew to the point where they "impede vehicular traffic." The Defendants allegedly prohibited the Plaintiffs from trimming or clearing the trees from the easements, and later installed post and rope fencing within the easements.

The Plaintiffs sought an injunction to prohibit the Defendants from interfering with their appurtenant right to the thirty-foot easements. The Defendants asserted the six year statute of limitations for injuries to an incorporeal hereditament and further asserted that the Plaintiffs had abandoned the easements. The Plaintiffs countered that the applicable statute of limitations was 20 years for adverse possession. [Note: the law clearly provides that the owner of the servient estate can terminate an easement by adverse possession for the prescriptive period, *Skvarla v. Park*, 62 N.C. App. 482, 303 S.E.2d 354 (1983)].

The trial court denied summary judgment for the Defendants. The Court of Appeals decided that planting of trees in an easement constitutes damage to the incorporeal hereditament, so the applicable six year statute of limitations barred the Plaintiffs'

NC Workmen's & Materialmen's Liens

Enclosed as an insert to this edition of the TCNC Newsletter is a summary sheet which attempts to provide a flowchart analysis of a materialman's claim under North Carolina law.

Any attempt to summarize this area of law in two pages is extremely abbreviated, and the enclosure should not substitute for a careful review of the relevant statutes and case law.

Feel free to make copies to distribute to your office staff or other attorneys who might find it helpful.

action. The Court of Appeals reversed the trial court and remanded for entry of summary judgment for the Defendants as to the trees, finding that the fence had not been in place for six years.

The case could have given the Court an opportunity to discuss the extent, use and maintenance of an easement by the owners of the dominant and servient estates, but the Court never addresses those issues. When the Court grants summary judgment for the Defendants (on the "encroachment" of the trees) are the easements terminated by abandonment, which is the relief sought by the Defendants? Is only a portion of the easements terminated and if so to what extent? Alternatively, does the holding mean that the Plaintiffs' appurtenant easements remain as granted, but their failure to act within the six year statute of limitations prevents them from forcing the removal of the trees? If the trees are subsequently blown away by a hurricane can the Plaintiffs use the easement area where the trees once stood and/or can the Defendants replant the trees? Could the Plaintiffs have legally trimmed the trees, over the objections of the Defendants? What a mess!

The Court misses the chance to discuss the balancing of the right of the owner of the dominant estate to use and maintain the easement vs. the right of the owner of the servient estate to use the land within the easement as long as doing so does not unreasonably interfere with the intended use of the easement. The Court's opinion fails to address when the applicable statute of limitations begins to run when trees or other landscape planting is at issue (i.e., when planted, the young trees did not interfere with the use of or otherwise injure the incorporeal hereditament, rather the interference resulted only after a number of years of substantial growth, so when does the statute of limitations begin to run?)

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