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REPORTER'S RECORD

VOLUME 1 OF 1

CAUSE NO. 471-01040-2022

COURT OF APPEALS NO. 05-22-01173-CV

HENRY MISHKOFF,)	IN THE DISTRICT COURT
Plaintiff,)	
VS.)	471ST JUDICIAL DISTRICT
SONIA BRYANT,)	
Defendant.)	COLLIN COUNTY, TEXAS

MOTION HEARING

AUGUST 22, 2022

On the 22nd day of August, 2022, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Ray wheless, Visiting Judge, in McKinney, Collin County, Texas. Proceedings reported by realtime machine shorthand.

A P P E A R A N C E S

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P R O C E E D I N G S

(Monday, August 22, 2022, 10:35 a.m.)

THE COURT: This is Cause Number 471-01040-2022, Henry Mishkoff vs. Sonia Bryant. This is on the plaintiff's motion for summary judgment and -- no. It's the defendant's motion for summary judgment.

And, for the record, my name is Ray wheless, and I am the judge assigned to the case today.

All right. You may proceed.

MR. GARRETT: Your Honor, Chase Garrett here on behalf of the defendant, Sonia Bryant.

May I approach Your Honor --

THE COURT: Yes, sir.

MR. GARRETT: -- with something to follow along?

There was a temporary injunction hearing back in May. This is a dispute between two neighbors. My client is Sonia Bryant. The plaintiff is Henry Mishkoff. They live right next door to each other.

Ms. Bryant asked Mr. Mishkoff to stay off of her property, which then initiated this lawsuit in which declaratory relief was sought seeking one of two easements -- one easement but two declarations. One is by prescription, and then one is pursuant to the CC&RS that you have there in front of you.

1 The prescriptive easement, that is an
2 easement by adverse possession. When we moved for
3 summary judgment, we added three declarations. One is
4 from Ms. Bryant, who owns the property. One is from
5 Mr. Partridge, who owned the property before her, and
6 one is from a neighbor who has been living there since
7 1986, Mr. King. All three testified that this easement,
8 which comprises a portion of the driveway, has been used
9 for ingress and egress from the garage and from the
10 carport.

11 We asserted in our motion for summary
12 judgment there was no evidence of exclusive use or
13 hostility. Those two things must exist for a 10-year
14 period in order to have an easement by prescription.

15 And if it, sort of, helps the Court, just
16 imagine that this piece of paper is a driveway. What
17 Mr. Mishkoff is claiming is that he needs to leave his
18 property, do a semicircle over a five-foot section to go
19 back onto his property to get to an electrical box. At
20 the temporary injunction hearing, it was undisputed that
21 he could actually access the electrical box, but he had
22 to walk through his own flowerbed. It's more of a
23 convenience thing than a necessity. As a matter of law,
24 there is no easement by prescription. There's no
25 exclusive use of the driveway.

1 we've briefed the Court in the reply about
2 joint use of a driveway, that sort of thing. In fact,
3 there is just no evidence of exclusivity. The word
4 "exclusive" is nowhere in the summary judgment evidence.
5 The only mention in their response is -- there is a
6 photograph of some plants that my client has placed on
7 her driveway, and they said, "well, these plants are
8 where the easement was, and no one knocked them over
9 when they pulled in and out of the driveway; so,
10 therefore, it must have been exclusive." That's not
11 evidence of exclusivity. In the reply, we pointed out
12 what kind of evidence is required to prove exclusivity.

13 I think it's worth noting there's not even
14 an affidavit attached, not even a self-serving
15 affidavit, that said, "Hey, I've exclusively used this
16 for ten years."

17 **THE COURT:** I saw that. I think it's the
18 first time I've ever seen a response to a summary
19 judgment that didn't have an affidavit attached.

20 **MR. GARRETT:** Hostility is another element
21 they have to prove, some hostile act. The only evidence
22 that they even, kind of, tried to get into that is while
23 Ms. Bryant has owned the property. She's owned the
24 property for two years. She bought it in the summer of
25 2020. There is no hostile act going back ten years.

1 And what they really call the hostile act is, well, the
2 lawsuit, and the police have been called, and the
3 parties have yapped at each other, that sort of thing.
4 But there is no act of hostility that let the world know
5 that Mr. Mishkoff claimed this to be his, at any point
6 in time, for a 10-year period. So the prescriptive
7 easement claim -- the request for declaratory relief, it
8 just fails as a matter of law.

9 Getting to the express easement claim
10 under a declaratory judgment. And there is a
11 Declaration of Covenants, Conditions and Restrictions,
12 and I've attached for the Court the, kind of,
13 relative -- relevant provisions.

14 If you go to the second tab, that's the
15 easement that they are asking the Court to declare their
16 rights to, and that is an easement for maintenance
17 purposes. It states, at Article II, Section 6, "Each
18 owner shall have a nonexclusive easement over and upon
19 the portions of the Affected Lots within the Maintenance
20 Area associated with such Owner's Affected Lot for the
21 purposes described in Article IV, Section 1."

22 "Maintenance Area" is a defined term. You
23 will find that in the first tab. That is defined as:
24 "Shall mean and refer to that portion of each Affected
25 Lot, and areas adjacent thereto, designated by number on

1 Exhibit A attached hereto and incorporated herein by
2 reference for all purposes, the maintenance and repair
3 responsibilities for which shall be borne by the Owner
4 of the Affected Lot numbered with the same number as the
5 Maintenance Area."

6 If you, essentially, go to Exhibit A --
7 and it's -- you can't tell anything from it. The copy
8 I've handed you is the non-official copy, which is
9 actually clearer than the official copy that they've
10 attached as Exhibit B. And you cannot tell, from
11 Exhibit A, where the Maintenance Area begins or ends on
12 my client's property. And, in fact, I don't know where
13 my client's lot is, even, on this exhibit.

14 So we have this idea that an easement
15 exists. It's a portion -- and the word "portion" is
16 important -- of my client's lot. A portion of her lot
17 is designated as an easement for maintenance purposes.
18 The problem is, we can't tell where it begins or where
19 it ends. Is it a 5-foot section? Is it a 10-foot
20 section? Is it a 30-foot section? Is it an oval? Is
21 it a rectangle? Is it a triangle? Is it a trapeze
22 [sic]? we don't know. The drafter did a poor job of
23 letting the parties know where the maintenance area is.

24 In responding to the motion for summary
25 judgment, they said, "well, hey. You know what? This

1 is a blanket easement." I don't pretend to be that
2 smart, but I've never heard of a blanket easement. So I
3 had to go, kind of, look into it. And what it is, it's
4 used for underground utilities and pipelines. It's for
5 long routes, where you're going to run, you know,
6 20 miles of pipeline, and at the time the easement is
7 granted, you don't know where on someone's property they
8 are going to put the subsurface easement.

9 I cited the Court to a 2020 Fort Worth
10 Court of Appeals opinion, and it says that a blanket
11 easement is an easement without a metes and bounds
12 description of its location on the property. It's an
13 easement over the entire servient tract. That's not
14 what the maintenance area is defined as in the CC&Rs.
15 The maintenance area is defined as a portion. Only some
16 portion can be used for maintenance purposes.

17 So it's not a blanket easement. In fact,
18 that same case writes that blanket easements have been
19 commonly used in Texas history, particularly for
20 long-route utility projects, such as pipelines and
21 electric power lines. The purpose of a blanket easement
22 is for the practical convenience of the easement holder
23 to alter the exact location of the lines during
24 construction.

25 That is not what we have at all. This is

1 not a blanket grant to come anywhere onto Ms. Bryant's
2 property. It's a specific portion of her property, as
3 designated by Exhibit A. The problem is, when you get
4 to Exhibit A, it doesn't exist.

5 So in our motion we've cited the elements
6 for a valid, enforceable easement, one of which is a
7 sufficient description of the servient tract. There is
8 no description of the servient tract because I can't
9 find it. You can't find it. Mr. Newton can't find it.
10 So, therefore, it is unenforceable as a matter of law.
11 If we had a trial in this case, the trial wouldn't be
12 any different from what we are saying right now. It's
13 take a look at the CC&Rs, see if the Court can determine
14 the extent and the enforceability of the easement.
15 Because it cannot, summary judgment is proper on that
16 claim as well.

17 **THE COURT:** All right. Thank you. Does
18 that conclude your argument?

19 **MR. GARRETT:** Yes, Your Honor. Thank you.

20 **THE COURT:** Yes, sir.

21 Mr. Newton.

22 **MR. NEWTON:** Thank you, Your Honor.

23 Counsel here has done a fair job of
24 describing the nature of the property. It's important
25 to note that while the prescriptive claim is really more

1 of a substitute claim, our primary statement in a cause
2 of action is that there is an express easement.
3 Specifically, it states in the CC&Rs, as counsel -- or
4 opposing counsel just read to you, "Each Owner shall
5 have a nonexclusive easement over and upon the portions
6 of the Affected Lots within the Maintenance Area
7 associated with such Owner's lot," et cetera, et cetera.
8 And that is Section 6 of Article II of the CC&Rs.

9 It's undisputed that Mrs. Bryant, the
10 movant in this case, is an affected lot. It's
11 undisputed that she is the owner of an affected lot
12 within the maintenance area, Your Honor.

13 If you turn back to the exhibit to the
14 CC&Rs, on Exhibit A, you will see -- although we had --
15 although this is truncated down to 8-1/2 by 11, so it's
16 hard to tell, you can absolutely tell, if you were
17 looking at the original, which lot is Mrs. Bryant, which
18 lot is my client, Mr. Mishkoff's. And you will see
19 little lines cutting through the property here.

20 May I approach, Your Honor, so I can show
21 you exactly what I am talking about?

22 **THE COURT:** Sure.

23 **MR. NEWTON:** Okay. So this is a really
24 interesting piece of property.

25 **MR. GARRETT:** Do you mind if I join?

1 **MR. NEWTON:** Come on up here.

2 **THE COURT:** Is this on the same copy that
3 I have?

4 **MR. NEWTON:** It is, Your Honor. So you
5 can look at yours as well if you want.

6 So see these little -- so, first of all,
7 Mr. Mishkoff's piece of property or tract is right
8 now -- or, I should say, Mrs. Bryant's is right here. I
9 can't read upside down. I'm sorry.

10 So we have Mr. -- or Mrs. Bryant right
11 here and Mr. Mishkoff right here. Right there.

12 See these little lines right here going
13 up, these tiny little rectangles, Your Honor?

14 **THE COURT:** Yes, sir.

15 **MR. NEWTON:** So that first rectangle on
16 this, to the left, is actually my client's property, but
17 that is opposing counsel's client's yard next to them.
18 So that property line goes up like this and attaches.
19 This property line here goes up and attaches. The third
20 property line is the center of the street, Your Honor.

21 Now, you see this line going directly
22 across, cutting it, making it a rectangle. That is a
23 maintenance area. That is different than the plat.
24 whereas, the plat shows a property line, right? So on
25 the plat, you will see this little strip go up. That

1 line, making a rectangle not be there, and it will curve
2 around. That makes this a dominant estate and a
3 servient estate in this particular deal or this
4 particular case, this particular subdivision.

5 So this is not just an attachment of a
6 plat. This actually defines the maintenance area. As
7 we can tell, there is absolute evidence -- as you relate
8 back to the lot lock, follow the deed, go to the plat,
9 there is absolute evidence that Mrs. Bryant, for this
10 particular purpose, is a servient estate. My client is
11 the dominant estate. She has an affected lot within the
12 maintenance area as you can see.

13 The plain reading of Section 6 says, "Each
14 owner," which Mr. Mishkoff is an owner -- that is
15 undisputed -- "shall have a nonexclusive easement over
16 and upon the portions of the Affected Lots within the
17 Maintenance Area." Ms. Bryant is an affected lot within
18 a maintenance area.

19 My client has an express, nonexclusive
20 easement over her property for the purposes defined in
21 Article IV, Section 1, which defines, "Each owner shall
22 maintain the exterior of their unit in an attractive
23 manner and shall not permit the paint, roof, rain
24 gutters, downspouts," et cetera, et cetera, "to
25 deteriorate in an unrestricted -- or "an unattractive

1 manner." And it continues to go on.

2 Your Honor, there is absolutely an express
3 easement for those purposes. The whole entire purpose
4 of that easement, in the way it's drafted, is because
5 Mrs. Bryant's yard is actually owned by my client and
6 another neighbor. My client actually owns 10 feet of
7 her driveway, and another neighbor owns the first
8 10 feet of her driveway.

9 Opposing counsel wants to talk about this
10 not being a blanket easement. The case he was reading
11 was about railroad -- or power lines and utilities. So,
12 yes, we typically -- we routinely use blanket easements
13 for utilities. That is a hundred percent correct.
14 There are blanket easements in here, Your Honor.
15 There's not just one. There are several. There is a
16 utility easement in here. Opposing counsel's client
17 utilizes the overhang easement, which is a blanket
18 easement. It's not defined as metes and bounds. It's
19 not defined as a separate lot block. It, literally,
20 overhangs my client's property.

21 The driveway, it's not delineated by metes
22 and bounds. It's not delineated by a plat. But we know
23 it's there. We know it's there because the drafters of
24 this document said, wherever there is pavement, that is
25 going to be an easement for the person that -- for this

1 affected lot.

2 We're not so fickle to say that there is
3 not an easement because there is not a metes and bounds
4 description for this, so, therefore, opposing counsel's
5 client cannot access her carport and her garage. That
6 is nonsensical. Similarly, it's nonsensical to say that
7 my client cannot access a portion of his yard for the
8 purpose of maintaining the exterior of his house, which
9 is what is required by the CC&Rs. They envisioned this.
10 So they allow -- the drafters of this document allow and
11 expressly provided that easement. Whereas, it does look
12 a little bit like a blanket easement because it's not a
13 defined area, so to speak. We do know that it's
14 portions of her property. So it would be a reasonable
15 portion to paint, to maintain.

16 As far as summary judgment evidence,
17 opposing counsel attached a letter from my client that
18 shows how he's used this easement over the last 34
19 years. I didn't have to include an affidavit. He did
20 it for me.

21 So when we are talking about these
22 easements, the express versions of them, there is a
23 dominant estate in each one of these. For the driveway
24 easement, opposing counsel is the dominant estate. My
25 client is the servient estate.

1 For the overhang easement for the
2 carports, which overhangs and actually abuts the
3 property line and probably overhangs the property line,
4 opposing counsel is the dominant estate. My client is
5 the servient estate. We would never argue differently.

6 For the ability for him to access that
7 portion of the property to maintain the exterior of his
8 home, yes, my client is the dominant estate. His client
9 is the servient estate. All three are express,
10 explicitly, in this agreement. And although they are
11 not minutely defined in area, we can reasonably
12 determine them.

13 So, absolutely, there are express
14 easements available here. At the very least, as counsel
15 suggested, there are questions of fact about where the
16 property line may or may not sit, where the maintenance
17 area may or may not sit. Those are questions of fact.
18 Those are not questions of law, Your Honor. So,
19 absolutely, there is evidence to suggest more than a
20 scintilla that there are matters of fact in dispute
21 here.

22 As far as the prescriptive easement,
23 prescriptive easements need to be open, obvious,
24 continuous, exclusive, and adverse. There is no
25 question that for the last 34 years my client has used

1 that property in an open, obvious, and continuous
2 manner. The letter attached as Exhibit A-1 to
3 opponent's motion for summary judgment, as amended, and
4 on my response show that, Your Honor. He states that
5 explicitly in his letter.

6 There is a question of exclusivity, an
7 understandable question of exclusivity. In his original
8 amended motion for summary judgment, counsel suggested
9 that we were asking for -- that we could not -- that we
10 could not meet the requirements for exclusive over the
11 entire driveway. I said we are not asking for the
12 entire driveway in the response, Your Honor. We are
13 only asking for enough room to get around the flowerbed,
14 which existed upon building the property and has not
15 really been altered since then. And he has used it for
16 34 plus years. If you read in there, he says he's
17 maintained that portion of the driveway for 34 years,
18 Your Honor. And he says the other neighbors didn't
19 help. In the exhibit that opposing counsel attached to
20 his motion and in his reply, he states the same.

21 As far as adverse, I'm not sure how much
22 more adverse you can get in a case like this, Your
23 Honor. The police have been called. There's been
24 threats to call the police other times. There has been
25 a case filed. There has been barriers placed. You

1 know, although Texas is considered a self-help state, I
2 don't think any -- we'd be in here for a different
3 reason if anything more occurs, Your Honor. And so
4 there's certainly been arguments, videos taken. He
5 showed some. They're fighting -- or, at least, verbally
6 fighting. They are arguing.

7 I don't think the Court would encourage
8 much more adverse when you're dealing in a residential
9 case like this. This isn't some ranch out in the middle
10 of nowhere to where someone would gate access. We are
11 not gating their driveway because we are not claiming
12 the entirety of the driveway. We are claiming these 3
13 or 4 feet, and I think it would be unreasonable -- as we
14 are suggesting, it's unreasonable to place that barrier
15 there, Your Honor.

16 **THE COURT:** Is that in an affidavit
17 somewhere, about the police being called and about it
18 being barricaded?

19 **MR. NEWTON:** Yes, Your Honor. It's in
20 opposing counsel's affidavit, actually.

21 **THE COURT:** Does that conclude your
22 argument?

23 **MR. NEWTON:** Yes, Your Honor. In closing,
24 I will just say that there is definitely questions of
25 fact in regards to both the prescriptive easement but

1 especially the express easement. In the express
2 easement, I feel, personally, you can find, as a matter
3 of law, the opposite of opposing counsel's motion.

4 **THE COURT:** All right.

5 **MR. GARRETT:** A very quick rebuttal.

6 still no evidence of ten years of
7 hostility. Yes, my client, who has been in the house
8 for two years, has been very hostile with Mr. Mishkoff.
9 I agree it probably couldn't be much more hostile. We
10 are back here Thursday of this week because Mr. Mishkoff
11 has sued me and my law firm and her for a statement that
12 I made in a pleading. So there certainly is hostility
13 but not ten years' worth of hostility, not even any
14 evidence of ten years' worth of hostility.

15 with respect to the Exhibit A, on the
16 CC&Rs, the elements of an easement conveyance must be in
17 writing, must express the intent to convey, must provide
18 an adequate property description of the servient estate
19 and must be executed. We are really focusing on element
20 three. There is no adequate property description of the
21 servient estate.

22 If you take Mr. Newton's word for it that
23 this is my client's lot and that this dot on here is the
24 maintenance area, who is to say that that is right?
25 They didn't attach a survey. They didn't bring a

1 surveyor in here who went out and took surveys. There
2 is no description by metes and bounds by any sort of
3 dimension as to where you can find the maintenance
4 easement, where it exists, and because there is no
5 adequate property description, the case fails as a
6 matter of law.

7 It would have been really easy for the
8 drafter to say: Hey, you know what? The first 15 feet
9 of your property, your neighbor can come onto that for
10 maintenance purposes, if he needs to set his ladder
11 there so that he can paint his gutters or do his roof or
12 whatever. That probably would have sufficed. But
13 that's not what they did here. They said go to
14 Exhibit A and find it on Exhibit A, which is nothing
15 more than a treasure hunt. As a result, the Court
16 cannot give them the relief they seek, which is a
17 declaration that the easement exists.

18 what would that declaration even look
19 like? "I declare you have a maintenance easement"? Of
20 what? Is it 5 feet? Is it 10 feet? Is it 30 feet?
21 That's why the Court can't do that. As a result,
22 this is a summary judgment case. A trial looks no
23 different than it does right now with respect to that.

24 **THE COURT:** Tell me -- so the Court denies
25 the -- or grants your summary judgment. So the Court

1 grants your summary judgment. Let's just assume for a
2 second that the Court grants your summary judgment. How
3 does that place the parties in relation to one another
4 as far as future use of both of their properties?

5 **MR. GARRETT:** It's our position that he
6 doesn't need to use her property.

7 **THE COURT:** At all?

8 **MR. GARRETT:** At all.

9 And what he is doing is, their houses
10 are -- their houses are right next to each other. Let's
11 just say these two pieces of paper are their houses.
12 This is my client's driveway. This is his yard. And he
13 can get to the side of his house by going up and down.
14 We established that at a hearing already. What he is
15 doing is he's walking on her driveway, in a semicircle,
16 and saying, "I need to come onto your driveway, like
17 this, in order to access my electrical box."

18 We introduced evidence at the summary
19 judgment hearing. There is a video of him or --
20 sorry -- his wife walking down here, and they have to go
21 through a flowerbed and duck under a tree on their
22 property. But what he is saying instead is, "I really
23 need to do this." You don't. You don't.

24 I have a neighbor. They have no reason to
25 be on my property. I have no reason to be on their

1 property to maintain my property.

2 But, ultimately, if the developer of a
3 neighborhood intended to grant a maintenance easement,
4 it should have been a lot clearer. He should have said
5 where it exists, where does it start, where does it
6 stop.

7 **THE COURT:** All right. Let's assume that
8 I deny the summary judgment. What does that do to the
9 parties then?

10 **MR. NEWTON:** If you deny the summary
11 judgment, it really calls into question the driveway
12 easement. It really calls into question the overhang
13 easement for the carport. My client could,
14 theoretically, at that point in time, force her to tear
15 down her carport because it overhangs because of the
16 exact same reason, Your Honor. That is not defined.

17 Every single deed that is in the plat of
18 the subdivision calls a lot block legal description.
19 That's exactly what that document there does. It calls
20 a lot block legal description. So it would,
21 essentially, invalidate the deeds in plat and
22 subdivisions in the state of Texas.

23 The fact that he can't read it very well
24 doesn't mean that it's not there, the maintenance area.
25 And, in fact, the question of whether it exists or not

1 on that document is a question of fact. We do know
2 there is a line. I showed it to you. It's there. So
3 there is a question of fact as to where that line
4 exists. And it's very evident where that line does
5 exist, Your Honor.

6 As far as the relationship between the
7 parties, I mean, my client, honestly, wouldn't have a
8 reasonable way to access that portion of his yard. He
9 says he goes through the flowerbed. There are some
10 other restrictions. You can't actually change the
11 landscaping without going through the architectural
12 control committee. There is no architectural control
13 committee anymore for this subdivision. It was built in
14 1986, and they just haven't followed all the procedures
15 that well is my understanding. That's not in summary
16 judgment evidence. I wasn't really anticipating that,
17 Your Honor.

18 So I'm not entirely sure how he could
19 reasonably access it. Obviously, he and his wife are
20 getting a little older. They probably don't need to be
21 trudging around in that kind of environment when there
22 is perfectly good pavement here. We are talking about
23 going like that. We are not talking about using the
24 driveway, of which they actually own 10 feet of. It's
25 just they own 10 feet here, and the driveway goes like

1 this. They own this 10 feet. And her 10 feet starts
2 here, at about where the flowerbed ends. So they, kind
3 of, have to jimmy around it enough to get a blower back
4 there or something. It's not like they are claiming
5 that they own all -- that they have an easement to
6 access their garage or anything like that.

7 **THE COURT:** Does that conclude your
8 argument?

9 **MR. NEWTON:** Yes, Your Honor.

10 **THE COURT:** Anything else, sir?

11 **MR. GARRETT:** No, Your Honor.

12 **THE COURT:** Motion for summary judgment is
13 granted.

14 Anything else?

15 **MR. GARRETT:** No, Your Honor.

16 we filed a proposed order.

17 were you able to see that this morning?

18 **MR. NEWTON:** I was not.

19 **THE COURT:** Thank you, gentlemen. Have a
20 good day.

21 (Proceedings were concluded at 11:33 a.m.)
22
23
24
25

1 STATE OF TEXAS

2 COUNTY OF COLLIN

3 I, Denise Carrillo, Official Court Reporter in and
4 for the 471st District Court of Collin, State of Texas,
5 do hereby certify that the above and foregoing contains
6 a true and correct transcription of all portions of
7 evidence and other proceedings requested in writing by
8 counsel for the parties to be included in this volume of
9 the Reporter's Record in the above-styled and numbered
10 cause, all of which occurred in open court or in
11 chambers and was reported by me.

12 I further certify that this Reporter's Record of
13 the proceedings truly and correctly reflects the
14 exhibits, if any, offered by the respective parties.

15 I further certify that the total cost for the
16 preparation of this Reporter's Record was \$187 and was
17 paid by Henry Mishkoff.

18 WITNESS MY OFFICIAL HAND this the 5th day of
19 December, 2022.

20 /s/ Denise Carrillo
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