
840.20 IMPLIED EASEMENT—USE OF PREDECESSOR COMMON OWNER.

The (*state number*) issue reads:

"Does the plaintiff[1] have an easement [of] [for] (*specify the nature of the easement*)[2] [on] [over] [across] [under] the land of the defendant?"[3]

(An easement is a right to make (a) specific use(s) of land owned by another.[4] One who has an easement does not own the land but has only the right to use the land for the purpose(s) of the easement.[5] The use of the easement must be reasonable. The owner of land burdened by an easement continues to have all of the rights of a landowner which are not inconsistent with the easement.)[6]

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence,[7] four things:

First, that the parcel of land now owned by the plaintiff and the parcel of land now owned by the defendant were at one time owned by the same[8] [person] [entity], that is, that both parcels of land had a common owner.[9] (It is not necessary for either the plaintiff or the defendant to have been the earlier common owner.[10])

Second, that during the time of this ownership, the common owner of the two parcels of land used (*describe the easement claimed*) [on] [over] [across] [under] the land which is now owned by the defendant for the benefit of the land now owned by the plaintiff.

Third, that the common owner's use of the land now owned by the defendant for the benefit of the land now owned by the plaintiff occurred over so long a time and was so continuous and obvious as to indicate that the use was intended to be permanent.[11] That is, the conduct of the common owner must have been such as to create a reasonable belief that the use of the land was intended to continue permanently and that when the land now owned by the plaintiff was separated from the land now owned by the defendant, the

common owner intended to [grant] [retain][12] the continued right to use the land as it had been used.

And Fourth, that the existence of the easement claimed by the plaintiff is[13] [reasonably][14] [strictly][15] necessary to the beneficial enjoyment of the land owned by the plaintiff.

[A use is "reasonably necessary" when the plaintiff's full and comfortable enjoyment[16] of the land depends on it.][17]

[A use is "strictly necessary" when it is absolutely necessary to the plaintiff's full enjoyment[18] of the land.]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the parcel of land now owned by the plaintiff and the parcel of land now owned by the defendant had an earlier common owner, that the common owner of the two parcels of land used (*describe the easement claimed*) [on] [over] [across] [under] the land which is now owned by the defendant for the benefit of the land now owned by the plaintiff, that the common owner's use of the land now owned by the defendant for the benefit of the land now owned by the plaintiff occurred over so long a time and was so continuous and obvious as to indicate that the use was intended to be permanent, and that the existence of the easement claimed by the plaintiff is [reasonably] [strictly] necessary to the beneficial enjoyment of the land owned by the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. In most cases the party claiming the easement will be the plaintiff but in some cases the easement will be claimed by the defendant. The name of the parties should be modified to fit the situation.

2. While the most common claim will be for a right of ingress and egress, some cases will involve claims for easements for drainage, *see, e.g., Lamb v. Lamb*, 177 N.C. 150, 152,

98 S.E. 307, 309 (1919), for the maintenance of a pond, *see, e.g., Thomas v. Morris*, 190 N.C. 244, 248, 129 S.E. 623, 625 (1925), or for other particular uses, *see e.g., Ferrell v. Durham Bank & Trust Co.*, 221 N.C. 432, 436, 20 S.E.2d 329, 332 (1942) (use of party wall).

It also will be necessary to tailor the issue and the mandate to identify the location of the claimed easement. In these cases there will be a history of use of the easement which, together with the pleadings, should serve to locate the claimed easement on the land of the alleged servient owner.

3. Another issue will be required where the statute of limitations is raised as a bar to the claim of implied easement. Whether a statute of limitations applies at all will depend on the nature of the action in which the claim of the existence of the easement is made. In a case in which the plaintiff brings suit to prevent the defendant from blocking a right of way, N.C. Gen. Stat. § 1-50(a)(3), the six year statute of limitations of actions "[f]or injury to any incorporeal hereditament," probably applies and begins to run when the right of way is blocked. If the action, however, is to quiet title to the easement or for a declaratory judgment that the easement exists, it is most likely that the action is not governed by any statute of limitations at all because there is no wrong and then no cause of action to begin the limitations period. *See generally Boyden v. Achenbach*, 79 N.C. 539, 541 (1878) (if a right of way is claimed as an incorporeal hereditament then six years is the statute of limitations).

4. *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972).

5. *Thomas*, 190 N.C. at 248, 129 S.E. at 625.

6. *North Asheboro-Central Falls Sanitary Dist. v. Canoy*, 252 N.C. 749, 752, 114 S.E.2d 577, 580 (1960); *Nantahala Power & Light Co. v. Carringer*, 220 N.C. 57, 58, 16 S.E.2d 453, 454 (1941); *Ferrell v. Doub*, 160 N.C. App. 373, 377, 585 S.E.2d 456, 459 (2003).

7. *Dickinson v. Pake*, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974); *Ferrell v. Doub*, 160 N.C. App. 373, 377, 585 S.E.2d 456, 459-60 (2003).

8. *Bradley v. Bradley*, 245 N.C. 483, 486, 96 S.E.2d 417, 420 (1957); *Dorman v. Wayah Valley Ranch, Inc.*, 6 N.C. App. 497, 501, 170 S.E.2d 509, 512 (1969). In *Potter v. Potter*, 251 N.C. 760, 764-65, 112 S.E.2d 569, 572-73 (1960) it was held that a tenancy in common was sufficient unity of ownership where the subsequent severance of the estates was through cross-conveyances by the tenants in common at different times.

9. In most cases, common ownership will be stipulated. In such event, the Court should instruct the jury that the parties have stipulated to the identity of a common owner. *See* N.C.P.I.—Civil 101.41 ("Stipulations"). In the second and third elements of this instruction, a personalized reference to the common owner should be used.

10. *See* the fact situations in *Barwick v. Rouse*, 245 N.C. 391, 391, 95 S.E.2d 869, 869 (1957); *Spruill v. Nixon*, 238 N.C. 523, 523, 78 S.E.2d 323, 323 (1953) and *Dorman*, 6 N.C. App. at 497, 170 S.E.2d at 509.

11. *Ferrell*, 160 N.C. App. at 377, 585 S.E.2d at 459-60; *Curd v. Winecoff*, 88 N.C. App. 720, 723, 364 S.E.2d 730, 732 (1988); *Bradley*, 245 N.C. at 486, 96 S.E.2d at 420; *Dorman*, 6 N.C. App. at 502, 170 S.E.2d at 512. *See also Tedder v. Alford*, 128 N.C. App. 27, 32-33, 493 S.E.2d 487, 490 (1997). *See also Barbour v. Pate*, 229 N.C. App. 1, 5-6, 748 S.E.2d 14, 17-18 (2013) (finding the proper scope of an easement implied by prior use to be the use of the land involved which gave rise to the quasi-easement at the time the land was divided given the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer).

12. When the case involves a claimed easement reserved by implication, the word "retain" should be used.

13. *See Knott v. Wa. Housing Auth.*, 70 N.C. App. 95, 98, 318 S.E.2d 861, 863 (1984).

14. *Bradley*, 245 N.C. App. at 487, 96 S.E.2d at 420 (holding that reasonable necessity means more than mere convenience). *McGee v. McGee*, 32 N.C. App. 726, 728, 233 S.E.2d 675, 676 (1977) states the test as being whether the use is reasonably necessary to the "full and fair" enjoyment of the property.

15. This alternate should be used if the claim is for an implied reservation of an easement. The law has drawn a distinction between the implied grant of an easement and the implied reservation of an easement. As to the former, the test is whether the easement was "reasonably necessary" to the enjoyment of the dominant parcel. *See Bradley*, 245 N.C. App. at 487, 96 S.E.2d at 420, and *McGee*, 32 N.C. App. at 728, 233 S.E.2d at 676. However, the Supreme Court's statement as to the test for an implied reservation follows the standard common law rule that such an easement was strictly necessary. *Goldstein v. Wachovia Bank & Trust Co.*, 241 N.C. 583, 588, 86 S.E. 2d 84, 87-88 (1955). (The language used by the court is that the necessity must have been "strict and imperious." The court expressly states that there is a "distinction" between an implied grant and an implied reservation.)

16. *See Black's Law Dictionary* (8th ed. 2004) (defining "enjoyment" as "[p]ossession and use, especially of rights or property," or "[t]he exercise of a right.")

17. In cases involving claimed rights of ingress and egress the existence of an alternative route does not preclude a jury determination of reasonable necessity. *See McGee*, 32 N.C. App. at 728, 233 S.E.2d at 676; *Dorman v. Wayah Valley Ranch, Inc.*, 6 N.C. App. 497, 501, 170 S.E.2d 509, 512 (1969).

18. *See Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 687-88, 51 S.E.2d 191, 195 (1949).