PRESCRIPTIVE EASEMENTS AND CONSIDERATION OF A PROGRESSIVE RULE FOR RELOCATION OF SERVITUDES IN NORTH CAROLINA

I. Introduction

One may acquire an easement by prescription over the land of another. *Green v. Barbee*, 233 N.C. 77, 76 S.E.2d 307 (1953). A prescriptive easement generally stands in all respects on the same footing as an easement acquired by express grant. 25 Am. Jur. 2d, Easements and Licenses § 45. However, prescriptive rights are not favored in the law since they necessarily work corresponding losses or forfeitures on property owners. *Id.*

Historically, easements were only created by express grant. *Id.* Over time, courts created the legal fiction of a "lost grant," which is generally regarded as the basis of prescriptive easement rights. *Id.* The "lost grant" was based on one's possession and exercise of a right to an interest in another's property over a long period of time, with the acquiescence of the owner. *Id*. The "lost grant" was predicated on the assumption that there must have been an "express" grant of rights by the owner to the person claiming the interest which has simply become "lost," because had there not been a grant the owner would have put an end to the wrongful use or claim to the property. *Id.* The courts have generally upheld this legal fiction, not because the presumed grant was actually made, but because public policy and convenience dictate that long-continued possession and use not be disturbed. *Id.*

II. Presumption of Permissive use

A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. *Potts v. Burnette*, 301 N.C. 663, 273 S.E.2d 285 (1981). In contrast to the general rule followed in most states, our Supreme Court has stated that "we deem it the better-reasoned view to place the burden of proving every essential element, including non-permissive use, on the party who is claiming against the interests of the true owner. *Id*. Thus, North Carolina has specifically rejected the view held in the majority of states that one's use of another's property is presumed to be non-permissive. *Id.*

The presumption followed in North Carolina courts is that one's use of another's land is by permission. Therefore, to establish a prescriptive easement in North Carolina, one must first overcome the presumption that the party is using the true owner's land with the owner's permission. *Pitcock v. Fox*, 119 N.C. App. 307, 309, 458 S.E.2d 264, 266 (citing *Johnson v. Stanley*, 96 N.C. App. 72, 74, 384 S.E.2d 577, 579 (1989) and *Dickinson v. Pake,* 284 N.C. 576, 580-81, 201 S.E.2d 897, 900 (1974)). In order to overcome this presumption, "[t]here must be some evidence accompanying the use which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent." *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 900; *see also Cannon v. Day*, 598 S.E.2d 207 (2004)(finding that evidence was sufficient to overcome presumption of permissive use where neighbor's predecessor-in-interest never gave permission to use the road and landowners still claimed it as their own, landowners performed maintenance required to keep the road passable, and landowners used the road for over 20 years as if they had a right to it). A party's "[e]ntitlement to an easement by prescription is restricted because a landowner's 'mere neighborly act' of allowing someone to pass over his property may ultimately operate to deprive the owner of his

land." *Johnson v. Stanley*, 96 N.C. App. at 74, 384 S.E.2d at 579 (1989) (quoting *Potts v. Burnette*, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981)). Therefore, "mere use alone is presumed to be permissive, and, unless rebutted will not ripen into a prescriptive easement." *Johnson v. Stanley*, 96 N.C. App. at 74, 384 S.E.2d at 579 (citing *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900 (1974)). Evidence that permission was never requested or sought is tantamount to an assertion that the person is merely using the road or path in silence. *Godfrey v. Van Harris Realty, Inc.*, 72 N.C. App. 466, 469-70, 325 S.E.2d 27, 29 (1985). North Carolina courts have held that neither law nor logic can confer upon a silent use a greater probative value than that inherent in a mere use. *Henry v. Farlowe*, 238 N.C. 542, 544, 78 S.E.2d 244, 246 (1953). Thus, under North Carolina law, one's use of a way over another's land in silence is presumed to be with permission. *Id.*

III. Creation of Prescriptive Easements

In order to establish an easement by prescription, the claimant must meet the criteria set out in *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985):

1. The use must be adverse, hostile, or under a claim of right;
2. The use must be open and notorious;
3. The adverse use must be continuous and uninterrupted for a period of twenty years; and
4. There must be substantial identity of the easement claimed.

A. <u>The Use Must Be Adverse, Hostile, or Under a Claim of Right</u>

To establish that a use is hostile, it is not necessary to show that there was a heated controversy or a manifestation of ill will, or that the claimant was in any sense an enemy of the

owner of the servient estate. *Brunswick v. State of North Carolina,* 329 N.C. 37, 404 S.E.2d 677 (1991). A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right. *Dulin v. Faires*, 266 N.C. 257, 260-61, 145 S.E.2d 873, 875 (1966). There must be some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent. *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900 (1974). Evidence showing that the owner of the servient estate agreed to let people use the path located thereon tends to show the use is not adverse or hostile, and in fact, is evidence of permissive and "non-hostile" use. *Nichols v. Wilson*, 116 N.C. App. 286, 448 S.E.2d 119 (1994). Where persons claiming a prescriptive easement over the lands of another did not engage in the upkeep or maintenance of the roadway, such evidence may be used as evidence that persons seeking to establish the prescriptive easement did not use it under a "claim of right." *Id*.

Actions taken to maintain or improve a roadway underlying the prescriptive easement may be sufficient evidence to rebut the presumption of permissive use and demonstrate adverse and hostile use. *Perry v. Williams and Holloman*, 84 N.C. App. 527, 353 S.E.2d 226 (1987). In *Dickinson,* Plaintiffs raked leaves and scattered oyster shells in the roadway, performing the slight maintenance required to keep the road in passable condition. *Dickinson,* 284 N.C. 576, 201 S.E. 2d 897. In *Potts,* Plaintiffs, on at least one occasion, smoothed, graded, and graveled the road, and on other occasions, attempted to work on it. *Potts,* 301 N.C. 663, 273 S.E. 2d 285. In *Perry,* Plaintiff's agent testified at trial that he placed brickbats and rocks in holes, hauled sand to fill in low areas, and cut trees and bushes in order to maintain the roadway for plaintiff's use. *Perry*, 84 N.C. App. 527, 353 S.E.2d 226 (1987). Such actions have been held sufficient to

overcome the presumption of permissive use. A claimant may also establish a prescriptive use under a "claim of right" where he or she alleges that the disputed road was graveled, opened, maintained by plaintiff, used by the public, and as a mail and school bus route for the prescriptive period. Maintenance by plaintiff (however poorly) and public use of the road is evidence that there was a "claim of right" to the street. *Town of Sparta v. Hamm*, 97 N.C. App. 82, 387 S.E.2d 173 (1992).

However, in *Vandervoort v. McKenzie*, Plaintiff seeking establishment of a prescriptive easement:

1. approached the owner of the servient estate about maintenance of the roadway and placement of a gate across the roadway;
2. told the owner of the servient estate that he was going to maintain the roadway for both plaintiff's benefit as well as the owner's benefit; and
3. made sure that members of the family of the owner of the servient estate had keys to the lock on the gate across the roadway.

According to the Court of Appeals, such actions amounted to Plaintiff asking the owner for permission to use the road and his claim for a prescriptive easement was therefore denied since the use was not deemed adverse, hostile, or under a claim of right. *Vandervoort*, 105 N.C. App. 297, 412 S.E.2d 696 (1992).

B. <u>The Use Must Be Open and Notorious</u>

The prescriptive use of another's land must be "open and notorious." *West v. Slick*, 313 N.C. 33, 326, S.E.2d 601 (1985). The use must be so open and notorious that the true owners of the land probably had notice of it. *Dickinson,* 284 N.C. 576, 201 S.E. 2d 897 (1974). "Open and notorious" use sufficient to establish a prescriptive easement may be proven by circumstances as well as by direct evidence. *Snowden v. Bell*, 159 N.C. 497, 75 S.E. 721 (1912); *Dickinson*, 284

N.C. at 580-81, 201 S.E.2d at 900. Use of a roadway for the ingress and egress of large farming equipment at all hours of the day during farming season is sufficient use by one asserting a prescriptive easement to give open and notorious notice to the owner of the servient estate that the person claiming a prescriptive easement was acting under a claim of right. *Perry v. Williams*, 84 N.C. App. 527, 353 S.E.2d 226 (1987). Proof of "open and notorious" use may also be demonstrated by prior attempts by the owner of the servient estate to block the easement sought to be established by prescription. *See Higdon v. Davis*, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

As an example of the outer limits of prescriptive rights based on the theory of open and notorious use, the recent Pennsylvania case of *Koresko v. Farley* held as a matter of first impression in that state that an easement by prescription cannot be acquired from encroaching tree roots and overhanging branches. 844 A.2d 607 (Pa. Cmwlth. 2004). The reasoning of the Court followed that encroaching tree parts by themselves do not establish an open and notorious use of land, and, in the absence of additional facts, such as the use of the ground for maintenance or collection of leaves or fruit, roots and branches alone do not alert an owner that his or her exclusive dominion of the land is in dispute. *Id.* at 613. Though this case is from another jurisdiction, it is illustrative of the limits that Courts may consider in defining what is and is not open and notorious use for establishing prescriptive rights to use of another's land.

C. Continuous and Uninterrupted Use for Twenty Years

Another requirement in establishing a claim for a prescriptive easement is that the use be "continuous and uninterrupted" for the prescriptive period. *West v. Slick*, 313 N.C. at 50, 326 S.E.2d at 611; *Brunswick*, 329 N.C. 37, 404 S.E.2d 677 (1991). The "continuous" usage required of a claimant of an easement by prescription does not mean a perpetually unceasing use, but has

been construed reasonably to depend on the nature of the easement asserted. *Id*. The continuity required is that the use be exercised more or less frequently, according to the purpose and nature of the easement. *Id*. It is necessary, however, that the use be often enough and with such regularity as to constitute notice to the potential servient owner that the user is asserting an easement. P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 321, at 390 (3d ed. 1988) (footnotes omitted).

In the early case of *Williams v. Buchanan,* 23 N.C. (1 Ired.) 535 (1841), the Court held that the placing of fish traps in a river every year only during the fishing season for the purpose of catching fish constituted sufficiently "continuous" possession to pass title by adverse possession. Similarly, in *Perry v. Williams,* 84 N.C. App. 527, 353 S.E.2d (1987), our Court of Appeals held use of a roadway during each growing season for at least 40 years was sufficient and uninterrupted use for purposes of establishing a prescriptive easement.

The use must also be "uninterrupted." *See Brunswick*, 329 N.C. 37, 404 S.E.2d 677 (1991). Though a barricade placed by the owner of the servient estate may discourage the use of the pathway by a few members of the public or even suspend its use very briefly by the entire public, such actions do not necessarily destroy the public's uninterrupted use for the period necessary to establish a right to prescriptive use. *Brunswick*, 329 N.C. at 52.

In *Brunswick*, the trial judge found as a fact and concluded as a matter of law that defendant had interrupted the use of the easement claimed since at least 1962 and therefore held that there was no prescriptive easement established. The Supreme Court disagreed and reversed.[1] According to Justice Meyer writing for the majority in *Brunswick*, the evidence

[1] Justice Mitchell dissented in the Brunswick case opining that the facts as found by the trial judge supported its conclusions that the plaintiff's use of the road was, in fact, interrupted by the defendant and its predecessor in title on numerous occasions, thereby preventing the full and free enjoyment of the easement by plaintiffs. *See Ingraham v. Hough*, 46 N.C. 44 (1853).

showed that the owner escalated efforts to prevent unauthorized passage on the property since 1962, and as these efforts escalated, so did the acts of the public use the roadway by disregarding the barricades. The owner of the servient estate in *Brunswick* erected some forty to fifty "No Trespassing" signs. People continued to use the pathway and actually used the signposts for firewood. The owner of the servient estate later placed a telephone pole across the road. This measure was to no avail as members of the public avoided the barrier by driving around either end of the pole, passing so often that their passage dug deep ditches in the sand. Further efforts to block the way were disregarded or avoided by the public. According to the *Brunswick* Court, such evidence goes far beyond what is required to establish the use as being "hostile," repelling any inference that this use is permissive, thus giving notice to the owner of the servient estate that the use was adverse. According to the Supreme Court in *Brunswick*, such use was sufficient to establish a prescriptive easement despite the efforts of the owner of the servient estate to, on several occasions, interrupt the continued use by the public.

To effectively defeat a prescriptive right, an interruption of the use must be accompanied by some act of the owner which *prevents* the use of the easement. 2 *Thompson on Real Property* § 347, at 257 (1980). A "substantial" interruption during the period of use will defeat the plaintiffs' claim to the prescriptive easement. 28 C.J.S. *Easements* § 13, at 649 (1941). "What period of interruption . . . will defeat the acquisition of the right by prescription, however, depends upon the nature of the right and the attendant circumstances." 2 *Thompson on Real Property* § 347, at 249-50 (1980). While it has been said that an interruption of the use "however briefly" destroys continuity of use (*See* P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 321 (3d ed. 1988)), the North Carolina Supreme Court has noted that an interruption would be any act which would prevent the *full and free* enjoyment of the

easement. *See Dickinson v. Pake*, 284 N.C. 576, 581, 201 S.E.2d 897, 901 (quoting *Ingraham v. Hough*, 46 N.C. (1 Jones) 39 (1853)). Thus, complete interruption of the use is not necessarily required.

Of course, the acts or statements necessary to prevent the full and free enjoyment of the easement must be understood in the context of the situation to which they are related. *Id*. Most often, the acts or statements are made with regard to claims by individuals to a right-of-way or easement over the lands (generally farmlands or woodlands) of neighbors for access to a public road. Nevertheless, despite evidence of significant interruptions in use, the Supreme Court has apparently seen fit to be more lenient in finding a prescriptive easement in the public for access to beaches and other recreational areas. *See Brunswick* and *West v. Slick*, *supra*.

Generally, the continuous and uninterrupted use must continue for the statutory period of twenty years to ripen into a prescriptive easement. However, the doctrine of "color of title" is also applicable to acquisition of title to an easement by prescription so that one may acquire a prescriptive easement by adverse use for seven years under color of title pursuant to G.S. 1-38. *See Higdon v. Davis*, 71 N.C. App. 640 (1984). "Color of title" is generally defined as a written instrument which purports to convey the land described in the written instrument, but fails to do so because of:

1. Want of title in the Grantor; or
2. Some defect in the mode of conveyance.

Price v. Tomrich Corp., 275 N.C. 385, 167 S.E. 2d 766 (1969). Therefore, where the evidence demonstrates that the owner of the dominant estate and his immediate predecessors in title used the easement over the servient estate for ingress to and egress from the dominant estate under

color of title for a period of seven years or more, then a prescriptive easement may be recognized under North Carolina law.

D. Substantial Identity

Requiring "substantial identity" of a definite and specific path as an element of proof to establish a prescriptive easement gives the owner of the servient estate notice of not only the adverse claim, but the extent of it as well. Factors which the fact finder may consider in making a determination with respect to "substantial identity" include the vulnerability of the road traveled due to forces of nature. *Brunswick v. State of North Carolina*, 329 N.C. 37, 47, 404 S.E.2d 677 (1991). This is particularly pertinent where the easement claimed is across windswept, shifting sands which are subject to ocean storms (i.e., the Outer Banks). Many of the cases in North Carolina defining the term "substantial identity" come from the coastal area of the State. To require there be no change, or at most only very slight change, in a road traveled in an area highly vulnerable to the forces of wind, shifting sand, ocean tide, flooding from ocean or sound, etc., would effectively bar the acquisition of a prescriptive easement in many locales of the coastal area of North Carolina. *Id*. Thus, the way traveled must merely be identifiable with "reasonable specificity." *Id*.

In *West v. Slick.* 313 N.C. at 50, 326 S.E.2d at 611, there was evidence of deviation in the line of travel in particular spots by as much as three hundred feet; routes varied due to the effects of wind, rain, and tides on the beach, and an aerial photograph of the routes showed the routes "clearly visible in some areas while impossible to discern in others, but generally . . . pointed out." Given the vulnerability of certain easements or ways to the effects of nature, the North Carolina Supreme Court has viewed deviations due to such forces as "slight" and "not substantial." *West v. Slick*, 313 N.C. at 47-48, 326 S.E.2d at 608.

IV. Tacking

Even where a plaintiff is unable to show his own adverse use for the statutory period of twenty years, he may nevertheless "tack on" the adverse use of his predecessors in title in order to satisfy the 20 year requirement for proof of a prescriptive easement. Assume that Plaintiff Smith claims a prescriptive easement in a soil road over the land of Jones and that Smith became record title holder of the property in December 1984. Assume further that Jones writes to Smith in June 2004, stating that Smith no longer has permission to use the soil road. Since from this bare record of evidence the soil road has been used by Smith for only 19-1/2 years, it would appear Smith has not used it adversely for the requisite 20 years required to establish a prescriptive right. However, Smith can "tack" the possession of his predecessor in title (including possession and use of the soil road by Smith's tenants and agents of the prior owner) to his own use, as long as he can offer proof that the requirements to establish prescriptive use also existed in Smith's predecessor. *Alexander v. Gibbon*, 118 N.C. 796, 24 S.E. 748 (1896); J. Webster, *Real Estate Law in North Carolina* § 262 (1971); *see also Godfrey v. Harris Realty, Inc.*, 72 N.C. App. 466, 325 S.E.2d 27 (1985) (holding that plaintiff's claims to assert prescriptive rights to path must fail because plaintiff's adverse use lasted only 19 years, and evidence of use by plaintiff's predecessor in title was not accompanied by circumstances which would give it an adverse character and thereby rebut the presumption that it was permissive). When "tacking" prior adverse use, the person claiming the prescriptive easement must establish that the use by his predecessor in title was also (i) non-permissive, (ii) adverse, hostile, or under a claim of right, (iii) open and notorious, (iv) continuous and uninterrupted for the prescriptive period, and (v) over a way that maintained "substantial identity."

V. Termination

The easiest way to terminate any potential right to a prescriptive easement is by affirmatively granting permission in writing to the user of the way in question within the prescriptive period. At that moment, the right is then transformed into a mere permissive right which can never ripen into a prescriptive easement, and which may be terminated unilaterally at any time by the owner of the servient estate.

To terminate a permissive right, the owner of the servient estate can simply forward in writing to the owner of the dominant estate a statement that continued use of the way in question is no longer permitted. Of course, once permission is extinguished, any future use in violation of the command to cease using the way is evidence of non-permissive use. *See Brunswick* and *West v. Slick*, *supra*. As a result, action to terminate a prescriptive easement can sometimes backfire and actually create circumstances which encourage further non-permissive use and support a claim for prescriptive easement rights. If non-permissive use continues after written instructions to cease use of the way in question, one may have no alternative but to seek an injunction to prevent further non-permissive use or risk establishment of prescriptive rights which can not later be unilaterally terminated by the owner of the servient estate. *But see* Section VII.B and C., *infra*. Therefore, once non-permissive use is discovered, action should be taken to keep persons from continuing an unlawful trespass.

VI. Relocation of Servitudes or Easements

A. General Rule

The general rule in the vast majority of jurisdictions, including North Carolina, is that an easement may not be moved without the mutual consent of the owners of both the dominant and

servient estates. *Smith v. Jackson*, 180 N.C. 115, 117, 104 S.E. 169, 170 (1920); *Strickland v. Shew*, 261 N.C. 82, 88, 134 S.E.2d 137, 142 (1964); *Jones v. Caroll*, 91 N.C. App. 438, 440, 371 S.E.2d 725, 727 (1988). However, according to *Webster's Real Estate Law in North Carolina,* 5th Edition, § 15-7.4 [New]:

> "Anyone who has ever taken a first year property course in law school remembers the day we learned that an easement couldn't be moved by either party without the consent of the other party. Your editors remember thinking "Now that is a stupid rule." Today's law students have the same reaction. Nevertheless, the cases to that effect are numerous. (citations omitted). However, a closer analysis of the cases addressing this issue reveals that courts are often willing to allow unilateral relocation *by the servient owner* when equities indicate relocation is proper. (citations omitted)."

(Emphasis in original). Thus, at least one influential writer on North Carolina property law does not agree with the general rule against unilateral relocation of easements by the owner of the servient estate. In fact, Webster all but calls for the abolition of the general rule in favor of a new rule allowing unilateral relocation of easements by the owner of the servient estate. As discussed in more detail below, Webster may well get his wish in the near future if our appellate courts are presented with a case with the right facts.

Surprisingly, North Carolina appellate courts have never directly addressed the issue of unilateral relocation of an easement. *But see, McColl v. Anderson*, 152 N.C. App. 191 (2002)(analyzed in detail in § VI.C., *supra*.). Thus, the general rule against unilateral relocations still controls in this state. *See Jones v. Caroll*, 91 N.C. App. 438, 440, 371 S.E.2d 725, 727 (1988); *Smith v. Jackson*, 180 N.C. 115, 117, 104 S.E. 169, 170 (1920); *Cooke v. Wake Elec. Membership Corp.,* 245 N.C. 453, 485, 96 S.E.2d 351, 354 (1957). In *dicta,* however, our Supreme Court made the following statement:

> Unless there is an express grant which provides otherwise, *ordinarily*, when the location of an easement is once selected it cannot be changed by either the landowner or the owner of the easement without the other's consent.

Cooke v. Wake Elec. Membership Corp., 245 N.C. 453, 458, 96 S.E.2d 351 (1957) (emphasis added). The *Cooke* case appears to restate the general rule disallowing unilateral relocation of easements. However, the question has arisen as to whether the Court's unnecessary inclusion of the word "ordinarily" leaves the door open as to what our appellate courts would do in the "unordinary" situation. This begs the question as to whether the court would actually recognize an "unordinary" case and deal with the issue directly.

A recent North Carolina appellate court opinion suggests that our courts may not yet be willing to directly address the issue of unilateral relocations, but they are at least willing to "flirt" with some of the concepts underpinning a new Restatement approach favoring unilateral relocation of easements by the owner of the servient estate. *See McColl v. Anderson,* 152 N.C. App. 191 (2002).

B. Restatement Approach

On April 5, 1989, the American Law Institute issued Tentative Draft Number Four of the *Restatement of the Law (Third) of Property (Servitudes)* dealing with the Interpretation of Servitudes. Section 4.8 of the Restatement covers location and dimension of servitudes. The Tentative Draft, which was officially adopted into the Restatement in 1996, provides:

> Except where application of the rules stated in section 4.1 leads to a different result,[2] the location and dimension of a servitude are determined as follows:
>
> (1) The owner of the servient estate has the right to specify the location of an easement, profit, or other servitude that requires location, but the location must be reasonably suited for the intended purpose and be designated within a reasonable time.
>
> (2) The dimensions of a servitude are those reasonably necessary for the enjoyment of the servitude for its intended purpose.

[2] Section 4.1 sets forth general rules of construction in interpreting servitudes. *Restatement (Third) of Property (Servitudes)* (Tentative Draft No. 4, 1994).

> *(3) The holder of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement when necessary to permit normal use or development of the servient estate if the changes:*
>
> *(a) do not significantly lessen the utility of the servitude, or*
>
> *(b) increase the burdens on the holder of the servitude benefit, or*
>
> *(c) frustrate the purpose for which the servitude was created, and*
>
> *(d) the holder of the servient estate bears the expenses of making the changes.*

Restatement of the Law (Third) of Property (Servitudes), § 4.8 (Emphasis added). According to the authors of the new Restatement approach, the concept of permitting unilateral relocation of an easement by the owner of the servient estate as set forth above runs directly against the general rule followed in the vast majority of jurisdictions requiring the prior consent of the owners of both the dominant and servient estates before relocation of an easement may be permitted.

The reasoning behind the Restatement's break with traditional authority is set forth very clearly by its authors. The new rule is designed to permit development of the servient estate to the extent it can be accomplished without "unduly interfering with the legitimate interests of the easement holder". *Restatement of the Law (Third) of Property (Servitudes)*, § 4.8. The Restatement approach is said to compliment the corollary rule that the easement holder may increase the use of the easement to permit normal development of the dominant estate, if the increase does not unduly burden the servient estate. *See Restatement of the Law (Third) of Property (Servitudes)*, § 4.9. However, the Restatement's new rule regarding relocation is not reciprocal. It permits unilateral relocation only by the owner of the servient estate; it does not entitle the owner of the easement to relocate the easement situated on the servient estate. *Restatement of the Law (Third) of Property (Servitudes)*, § 4.8. Other reasons given by the

authors of the Restatement approach for the new rule are that it (1) tends to increase overall utility by "increasing the value of the servient estate without diminishing the value of the dominant estate," and (2) encourages the use of easements and lowers their price by decreasing the risks that easements will unduly restrict future development of the servient estate. *Id.* at § 4.8(f)). Furthermore, according to the authors of the new Restatement approach, permitting the servient owner to change the location under certain circumstances provides a fair trade-off for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate. *Id*.

The Restatement approach outlined above, and the reasoning cited by its authors, adopts the civil law rule in effect in Louisiana and a minority of other states. Louisiana is the only state which has seen fit to codify the Restatement approach. *See* Article 748, Louisiana Civil Code Ann. (West 1980). Other states which have adopted this new approach or followed its reasoning in case law include Massachusetts, Connecticut, New York, Pennsylvania, New Jersey, Maryland, Virginia, Kentucky, South Carolina, Alabama, Florida, Missouri, Illinois, Minnesota, Texas, Colorado, New Mexico, Utah[3], and Oregon. For annotations *see Restatement of the Law (Third) of Property (Servitudes)*, § 4.8 (comment (*f*)). It is interesting to note that many of the states along the east coast, from Florida to Connecticut, have adopted the Restatement approach. Notable exceptions are *North Carolina*, Georgia, Delaware, Rhode Island, and the far northeastern states, including Maine which has specifically rejected the Restatement approach due to concerns it would "discourage reliance on the easement by the easement holder and decrease the value of the dominant estate." *See Davis v. Bruk*, 411 A.2d 660, 665 (Me. 1980).

There are advantages and disadvantages to both the traditional rule and the modern

[3] *Evans v. Board of County Comm'rs*, 2005 WL 2899847 (Nov. 7, 2005)(affirming Utah's adoption of the Restatement Approach regarding the relocation of easements).

approach espoused by the Restatement. The traditional rule's strength lies in its uniformity and fairness. Courts universally recognize that an easement holder (the owner of the dominant estate) has no unilateral right to relocate the servitude. Out of symmetry and fairness, courts have felt obligated to find that the servient land holder does not have this right either. Comment, Balancing the Equities: Is Missouri Adopting a Progressive Rule for Relocation of Easements, 61 Mo. L. Rev. 1039 (1996). Commentators have criticized the traditional rule; however, pointing out that the reasons for denying the easement holder a right to relocate should not operate against the servient land holder's right to relocate the easement. *Restatement of the Law (Third) of Property (Servitudes)*, § 4.8 (comment *f*). Granting the servient owner the right of relocation would tend to increase the value and development of the servient land by making the easement a more flexible burden. *Id.* To its supporters, the modern rule offers the benefits of efficiency and flexibility. Comment, *BALANCING THE EQUITIES: IS MISSOURI ADOPTING A PROGRESSIVE RULE FOR RELOCATION OF EASEMENTS*, 61 MO. L. REV. 1039, 1057 (1996). The flexibility of the modern rule increases the value and development of the servient estate. *Restatement of the Law (Third) of Property (Servitudes)*, § 4.8 (comment *f*). At the same time, the requirement under the modern rule that the utility of the easement not be diminished ensures that the easement holder would not be adversely affected by relocation. *Id*.

Further, the cost of any relocation must be borne by the owner of the servient estate and not the easement holder. *Id*. From the standpoint of fairness, and considering the advances in technology or increases in use to the servient estate from ever increasing burdens related by use of the dominant estate, some commentators argue it is only fair to allow the servient owner to relocate the easement to a new and equally useful location to avoid the unforeseen strains of the natural developments of both the servient and dominant estates. *Id*.

On balance, according to its proponents, the Restatement approach grants the servient landowner nothing more than a right to "*reasonable* relocations". Comment, *BALANCING THE EQUITIES: IS MISSOURI ADOPTING A PROGRESSIVE RULE FOR RELOCATION OF EASEMENTS*, 61 MO. L. REV. 1039, 1060 (1996). Such an approach, if applied evenly and cautiously, should tend to generate the maximum utility for all parties. *Id.*

Under the new approach, a court will generally be faced with three possible outcomes in any relocation case. *Id*. at 1061. First, a court could find a relocation to be "completely reasonable" under the Restatement factors (overall utility, no increased burdens, purpose not frustrated, and servient estate pays relocation costs). Second, a court could find that the relocation was "more reasonable than unreasonable" given the pertinent factors and award damages to the owner of the dominant estate to bring the relocation fully into compliance. *Id*. Finally, relocation could be found to be "generally unreasonable". *Id*.

Presumably, there are three remedies available for any action deemed to be an unreasonable relocation. *Id*. at 1062. First, a court could issue an injunction requiring the servient land owner to "restore the easement" to its former location and "pay damages" caused to the easement holder due to the trespass. *Id*. Second, the court could strike a middle ground and "issue an injunction requiring a *reasonable* relocation" in accordance with the Restatement factors. *Id*. Third, the court could "award damages" equal to the loss in value of the dominant estate due to the relocation, "leaving the easement in the unreasonable location" chosen by the servient landowner. *Id*.

As yet, North Carolina appellate courts have not treaded into the waters of the new Restatement approach. However, one recent Superior Court case from Watauga County strongly indicated an intention to submit a relocation case to a jury with instructions consistent with the

Restatement's new relocation rule. *See McColl v. Anderson*, 152 N.C. App. 191 (2002). Despite the Superior Court Judge's apparent willingness to adopt the new Restatement approach in connection with the right to relocate an easement, the Court of Appeals pulled the reins and decided to dodge the issue by basing its decision on other grounds. *Id*. Below is a discussion of the *McColl* case which shows just how close North Carolina has come to adopting this new modern Rule espoused by the Restatement authors.

C. North Carolina Considers Restatement of Property, 3d, § 4.8(3)

In *McColl v. Anderson,* 152 N.C. App. 191 (2002), the Court of Appeals was presented with the novel question of whether the "substantial rights" of the appellant (the owner of the dominant estate) were deprived by the trial court's submission to the jury of the question of whether the owner of the servient estate should be entitled to unilaterally relocate an easement in accordance with factors listed in the new Restatement approach. McColl (Plaintiff) and Anderson (Defendants) were the owners of adjoining tracts of property located in Blowing Rock. Pursuant to the deeds within the parties' respective chains of title, Defendants' property was subject to an express easement for a driveway which provides Plaintiff with access from his property to U.S. Highway 321 (Highway 321). Defendants' property was therefore the "servient estate." In October of 1999, without Plaintiff's consent, Defendants constructed a new driveway providing Plaintiff with a different access to Highway 321. Plaintiff's use of the "original" driveway was thereafter blocked by Defendants.

On July 3, 2000, Plaintiff initiated an action seeking: (1) an injunction restraining the defendants from blocking Plaintiff's use of the original driveway; (2) a declaratory judgment declaring that Plaintiff, his heirs and assigns have a permanent right to the use and enjoyment of the original driveway; and (3) compensatory and punitive damages. Thereafter, Plaintiff moved

the trial court for a preliminary injunction. After hearing from the parties, the trial court denied Plaintiff's request for a preliminary injunction. In its order, the trial court found that Plaintiff had failed to show a likelihood of success on the merits or that he was likely to sustain irreparable harm unless a preliminary injunction was issued. The trial court further concluded in its order that:

> *"In the event this case is submitted to a jury, a portion of the jury instructions shall be based upon the Restatement of Property, 3d, § 4.8(3)."*

On appeal of this order, Plaintiff argued that the trial court erroneously concluded the Restatement of Property, 3d, § 4.8(3) was the law to be applied upon the trial of the case, thereby prejudicing his "right to a trial based on the proper North Carolina law."

Defendant moved to dismiss Plaintiff's appeal as interlocutory. The Court of Appeals initially denied Defendants' motion to dismiss the appeal as interlocutory, but later withdrew its own order *sua sponte* with a very "shrewd" and technical argument. The Court of Appeals decided to reverse itself and reanalyze whether the trial court's order, including the jury instruction on the new Restatement approach, affected a "substantial right" entitling Plaintiff to appeal the trial court's "interlocutory" order.

According to the opinion of the Court of Appeals in *McColl,* the Restatement of Property, 3d, § 4.8(3) "has not been adopted by our courts as controlling authority." *See Hedrick v. Rains*, 344 N.C. 729, 477 S.E.2d 171, 172 (1996) (*per curiam*). Nevertheless, in the same opinion, the Court of Appeals stated:

> "We reject plaintiff's assertion that where the servient estate holder obstructs an easement, the dominant estate holder has *per se* been deprived of a substantial benefit right [entitling plaintiff to interlocutory relief from the trial court's conclusion that the jury instructions shall be based on the new Restatement approach]. Indeed, the ultimate questions here are: (1) whether plaintiff is deprived of a substantial right by defendants in denying him use of a particular section of defendants' property to

> access Highway 321 pending trial, and (2) whether defendants' construction and plaintiff's use of a new driveway injure plaintiff in such a manner as to require this Court's immediate review of the trial court's order.
>
> Based on our careful review of the record, we cannot conclude that the plaintiff will be irreparably injured pending a determination of the case on its merits. Furthermore, any damages which plaintiff may incur during this period, by reason of his having to use the new driveway rather than the old driveway, can later be rectified through monetary damages as well as other remedies."

The Court of Appeals in *McColl* then noted that Defendant raised several other affirmative defenses including laches, waiver and estoppel, and that the defendants' success on any of these defenses could effectively bar plaintiff's claims. As a result, the Court of Appeals decided not to directly rule on the more "thorny" question of whether or not North Carolina should follow the Restatement approach regarding the relocation of easements by the owner of the servient estate. Instead, the Court of Appeals stated that "it is premature for us to consider the merits of Plaintiff's appeal." Again, Plaintiff's appeal had raised the issue of whether the Restatement of Property, 3d, § 4.8(3) is the law of North Carolina. In the end, however, the Court of Appeals in *McColl* ruled that the trial court's order denying injunctive relief from Defendant's action in relocating the original easement did not affect a "substantial right" entitling Plaintiff to interlocutory relief.

In essence, the Court of Appeals ducked the real issue in the case which was whether North Carolina would accept or reject the Restatement approach regarding the relocation of easements. However, the statements in the Court of Appeals opinion in *McColl* may lay the ground work for the issue to be presented in subsequent litigation with at least some *dicta* supporting the right of the owner of the servient estate to relocate an easement.

The appellee's brief (owner of servient estate) before the Court of Appeals in *McColl* argued strongly in favor of adoption of the Restatement approach, citing numerous foreign state

cases and treatises supporting the right of the owner of the servient estate to relocate an easement.[4] The appellant's brief, in turn, argued forcefully that the law in North Carolina was clear and unchanged that the location of an easement could only be relocated upon the consent of owners of both the dominant and servient estates.

The appellant's brief in *McColl* cites *Jones v. Caroll*, 91 N.C. App. 438, 440, 371 S.E.2d 725, 727 (1988), for the proposition that "[w]hen there is no grant providing otherwise, the location of an easement may only be changed by consent of both the landowner and the easement owners." The appellant's brief goes on to cite *Smith v. Jackson*, 180 N.C. 115, 117, 104 S.E. 169, 170 (1920), which held that the servient owners "could not deprive [the dominant owner] of his easement by providing another outlet." In *Smith*, the defendant owners of the servient estate closed a right-of-way used by the plaintiff to access his farmland from the nearby highway by plowing and erecting a fence in the right-of-way, and then constructed a new outlet. The defendants in *Smith* claimed the new location of the easement was injurious to their property, which is a position almost identical to that taken by the plaintiff in the *McColl* case recently before the Court of Appeals.

The appellant in the *McColl* case also cites *Cooke v. Wake Elec. Membership Corp*. 245 N.C. 453, 485, 96 S.E.2d 351, 354 (1957). The *Cooke* case could actually mark the beginning of the end for the traditional rule against the relocation of easements in North Carolina jurisprudence. The *Cooke* court held that "[u]nless there is an express grant which provides otherwise, *ordinarily*, when the location of an easement is once selected it cannot be changed by either the landowner or the owner of the easement without the other's consent." *Id.* The appellant in *McColl* summed up the thrust of the argument in his brief before the Court of

[4] For anyone wishing to view a copy of the brief which makes a good case for a change in the existing law, the appellee's brief in *McColl* can be accessed from the Court of Appeals' website which can be reached from the

Appeals stating that "[t]here is not a single case in North Carolina that has allowed a unilateral relocation of an easement without an express right of relocation reserved in the easement." Thus, according to the appellant, the law in North Carolina is that once the location of an easement is determined (whether implied by agreement, prescription, or by parol agreement), it may not be altered except by mutual consent. *Strickland v. Shew,* 261 N.C. 82, 88, 134 S.E.2d 137, 142 (1964).

The appellant's brief in *McColl* attempted to close the door left so slightly open by the use of the word "ordinarily" in the *Cooke* case (unless there is an express agreement to the contrary, "ordinarily" the location of the easement cannot be changed without consent of both parties). The question, apparently raised by the appellee's brief was just how wide did the Supreme Court leave the door open on the question of easement relocation by inserting the word "ordinarily" in connection with adherence to the "general rule" against unilateral relocations. The Supreme Court in *Cooke* cited sections of Corpus Juris Secundum ("C.J.S") for the "general rule" that the location of an easement can not be changed without consent of both parties. The appellant argued in its brief that the court in *Cooke,* in appreciation of the rule as a "general rule," merely restated the rule using the term "ordinarily." According to the appellant, instead of being any opening for a contrary holding, the term "ordinarily" in *Cooke* was a simple reaffirmation of the rule against unilateral relocations as the "general rule."

The appellant in *McColl* also stated in the brief that the numerous foreign cases cited by the appellee's brief in support of the Restatement approach do not apply to the case then before the Court of Appeals. At this point, the appellant's brief includes a very interesting analysis and discussion of an eighty-three year old Kentucky case cited as *Flener v. Lawrence* 220 S.W. 1041

(Ky. 1920). The appellant's brief notes that the first exception to the general rule against unilateral relocations which is cited in C.J.S. is *Flener v. Lawrence.*

In Kentucky, *Flener* stands for the proposition that *easements by prescription may be relocated* where the equities of the parties justify it. For no apparent reason, the appellant's brief in *McColl* then states as follows:

> "Regardless of whether North Carolina courts would adopt the *Flener* holding, the limited exception to the general rule that *Flener* provides does not apply to the present case. First, the Andersons did not ask a court of equity to change the location [of the easement]; rather they unilaterally relocated the [express] easement while Mr. McColl was away from his property. Second, *Flener involved an easement acquired by prescription*. Mr. McColl obtained his easement by an express provision in his deed. Neither the *Flener* case nor any other case cited in the C.J.S. or Am. Jur. provides an exception to the general rule for cases involving easements acquired expressly by deed."

(Emphasis added). Such analysis was entirely unnecessary to the thrust of the appellant's case in *McColl* because the facts before the Court involved an easement by express grant. Thus, according to its brief, even the appellant in *McColl* leaves the door open on the question of whether the owner of the servient estate may or may not unilaterally change the location of a *prescriptive easement* under North Carolina law. Even though the appellant in *McColl* is steadfast in its position that the owner of the servient estate is not entitled to change the location of an easement acquired by an express grant, they are far from certain when commenting as to whether the same rule should govern in the case of prescriptive easements.

The recent adoption of the new Restatement approach, and the Court of Appeals flirtation with it, may indicate that North Carolina might be ready to consider the Restatement approach in connection with the right of the owner of the servient estate to unilaterally relocate an easement, even if limited to mere prescriptive easements. Despite the failure of the Court of Appeals to directly address the issue in *McColl,* the Court may soon face the right case which will force it to

decide the central issue. If so, can the arguments presented in *McColl* be presented in support of the Restatement approach, at least as far as prescriptive easements are concerned? In weighing the equities in such a case, as well as whether or not a unilateral relocation rule would maximize property values and property development rights, should North Carolina courts adopt the Restatement approach regardless of the manner by which the easement is created (i.e. express grant, implied, or by prescription)? Only time and the North Carolina Supreme Court will tell.

VII. Due Diligence

One of the issues that realtors and legal practitioners regularly face is how to find and identify a prescriptive easement. A title searcher will not ordinarily find a prescriptive easement in the chain of title when searching at the deed vault. If the easement was recorded then it would be an express grant. So, how does one identify all the rights and interests in a piece of property prior to advising a client whether or not the owner of the property can convey it free and clear of an encumbrance, including prescriptive easements, that could significantly impact potential future development?

Generally, a prescriptive easement is not reduced to writing in the form of an agreement. A prescriptive easement is one that is generally acquired by usage over time. Thus, some history or record of prior use must actually exist. The problem for a realtor or legal practitioner is finding that history or record so that our clients may be properly advised.

One of the necessary elements to prove the existence of a prescriptive easement is "open and notorious" use. Theoretically, if a prescriptive use exists, such use must be obvious to someone, and in particular, the owner of the property in question. Thus, the first source that can potentially identify the existence of a prescriptive easement is the current owner of the property.

One question that should always be asked of the current owner of potential development property is whether they are aware of any right in another to make use of the property to be purchased or developed, whether by an easement for access, drainage, sewer, or otherwise. As a matter of good practice, such information should also be set forth clearly in the representations and warranties in any purchase contract or development agreement. Keep in mind, however, the owner of a 1,500 acre tract of property who is trying to sell the land may have an interest in not revealing his or her knowledge of a prescriptive easement that could bisect the tract and possibly limit the development potential and diminish the real value of the property being sold. In essence, it may be worth it to the owner or developer of the tract to keep silent on the existence of any prescriptive easement rights in efforts to unload the property at a premium price.

The next source for "smoking out" the existence of prescriptive easement rights is to talk to all neighboring property owners and tenants. Neighboring property owners and tenants may actually be the best source of information concerning the existence of any prescriptive easements because such persons are more apt to speak up for their rights. If they do not, then their use would not be "open and notorious." Though contacting neighboring property owners may seem time-consuming and burdensome, if you are dealing with a 1,500 acre tract of land located in a rural area you can almost be certain someone other than the owner has, at some time in the past, used the property for access to a public road, for hunting, farming, recreation or otherwise. If so, the next question is whether any such user has acquired prescriptive rights requiring careful analysis of the relevant factors outlined herein.

A third source of information regarding the existence of a prescriptive easement includes the various records, maps, and documents recorded or kept by the local government. Recorded plats should be consulted to see whether rights-of-ways are shown. However, if the existence of

a prescriptive easement was not known to the person drawing the map, then it will ordinarily not be shown or revealed by pulling the recorded plats. Thus, an additional source to consult that cannot lie or conceal the existence of a potential prescriptive easement is the aerial maps of properties kept by local or state GIS offices. Review of such maps may show any clearly delineated easements or rights-of-way, and can be used as the source for questions to the property owner, developer, or neighbors as to the purpose and use of any road or trail shown thereon. If a claimed way or easement is not clearly delineated or discernible by reference to an aerial map then there is also an argument and potential evidence as to why any prescriptive rights claimed by another do not exist in that particular property (i.e. lack of "substantial identity"). The way must be discernible and have substantial identity in order to satisfy the requirements for establishment of a prescriptive easement. Thus, if an alleged way is not discernible or have a substantial identity when looking at relevant aerial maps, then one can be more comfortable that any potential user could succeed in claiming prescriptive rights therein.

Obviously, the time to learn about the existence of prescriptive rights is prior to closing on the property and prior to negotiations for the sale of the property. Such information can also provide significant leverage in price negotiations, and in some cases, may be a determinative factor if the existence of a prescriptive easement is found to unduly interfere with future development objectives.