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June 21, 2019

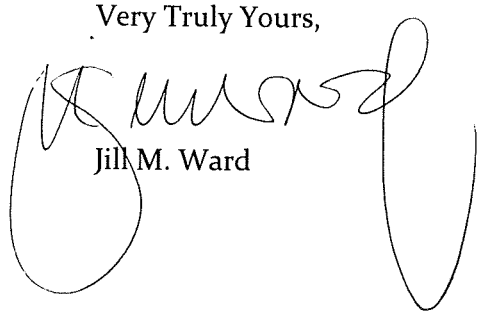
John Andrew Justice
102 Park Place
Russellville, AR 72802

RE: Tucker v. Petty, et al
Pope County Circuit Court Case No. 58CV-2019-125

Dear Mr. Justice:

Enclosed please find plaintiffs' motion for summary judgment and attorneys fees, and its brief in support. Appreciating your time and consideration in this matter, I remain,

Very Truly Yours,



Jill M. Ward

Encl.

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS
DIVISION IV

BILL TUCKER, ANNETTE KOCH, MARY HOPPER, JAMES TUCKER, DONNIE DUNLAP, and DANIEL DUNLAP

PLAINTIFFS

VS. NO.58CV-2019-125

EDWARD DALE PETTY, STEPHANIE PETTY, JUSTICE HOME AND LAND, LLC, and JOHN ANDREW JUSTICE, Sole Member and Manager of JUSTICE HOME AND LAND, LLC

DEFENDANTS

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

For reasons set forth below, the separate defendants John Andrew Justice, individually, and John Andrew Justice, sole member and manager of Justice Home and Land, LLC, and Justice Home and Land LLC (collectively "Justice"), have failed to present sufficient facts to warrant dismissal of this action, or the award of the requested damages in their answer. Furthermore, the Plaintiffs cannot as a matter of law be granted anything less than the prescriptive easement as described in the complaint. As a result, the Plaintiffs' motion for summary judgment should be granted.

In addition, Justice's answer lacks any justiciable issue which could possibly deny the granting of a prescriptive easement. Therefore, the Plaintiffs' motion for attorneys' fees should be granted pursuant to Ark. Code Ann. §16-22-309.

I. BACKGROUND

As alleged in plaintiffs' complaint, Woodrow S. Tucker and Nova Joyce Tucker received title to real property in 1964, which was accessed by a gravel drive that runs across Justice's property to Damascus Road. Complaint at ¶4(b) and ¶5. Plaintiffs inherited this property from Woodrow S. Tucker and Nova Joyce Tucker. *Id.* At ¶4(a). Plaintiffs created the gravel drive at issue at the time of their purchase of the dominant property and maintained it from 1964 until the present; neither Justice nor any other individuals have ever interfered with the use of the gravel drive by Woodrow S. Tucker and Nova Joyce Tucker or, subsequently, the plaintiffs. *Id.* at ¶6.

II. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted "when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law." *Verdier v. Verdier*, 364 Ark. 287, 289, 219 S.W. 3d 143, 144 (2005). The moving part bears the burden of setting forth facts showing that it is entitled to judgment as a matter of law. *See Forest City Machine Works v. Mosbasher*, 312 Ark. 578, 851 S.W. 2d 443 (1993). The burden then shifts to the non-moving party to respond by showing facts which would be admissible in evidence to create a factual issue. *See Dixie Ins. Co. v. Joe Works Chevrolet, Inc.*, 298 Ark. 106, 766 S.W. 2d 4 (1989). If the non-moving party fails to show the requisite facts, then the moving party is entitled to judgment as a matter of law. *See Sanders v. Banks*, 309 Ark. 375, 378, 803 S.W. 2d 861 (1992).

III. SUMMARY JUDGMENT ANALYSIS

Defendants' answer is subject to summary judgment. The Defendants have failed to present sufficient facts that would entitle them to dismissal of the Plaintiffs' complaint, or the recovery of damages. Plaintiffs have successfully gained an easement by prescription through their continuous and adverse use of the driveway for the applicable statutory period. Therefore, Plaintiffs' should be granted an easement by prescription as requested in their complaint as a matter of law.

A. Easement by Prescription

A prescriptive easement may be gained by one not in fee possession of the land by operation of law in a manner similar to adverse possession. *Roberts v. Jackson*, 2011 Ark. App. 335, 384, S.W. 3d 28 (2011) One asserting an easement by prescription must show by a preponderance of the evidence that one's use has been adverse to the true owner and under a claim of right for the statutory period. *Id.* The statutory period of seven years for adverse possession applies to prescriptive easements. *Id.*

Justice failed to provide any evidence in their answer that the use of the driveway was permissive – they repeatedly use the words "believes", "claims", "doubts", "doubtful" when

discussing the adverse nature of the easement in their answer, but present no actual evidence of permission. Answer at ¶2(b)(c) and (e). Indeed, Justice's *only* evidence that the use was and is permissive is that the gravel driveway is plainly visible on Justice's property and that Justice (despite having owned the property for four years and, during that time, having not resided on the property nor performed any maintenance, clean up, or improvement on the property) never sought to interfere with Plaintiffs' use of the driveway, and they don't "believe" anyone else did and "doubt" that the use was adverse. *Id.*

Use of unenclosed, undeveloped land by strangers is presumed permissive, but that presumption can be rebutted if hostility of conduct in the usage of the land is shown. *Merritt Mercantile Co. v. Nelms*, 168 Ark. 46, 269 S.W. 563 (1925). The property in question is not unenclosed and undeveloped – it had a residence on it that was occupied for more than 50 years, until it fell into disrepair and was condemned by the City of Russellville just prior to Justice's purchase of the land from the State Land Commissioner. Additionally, if usage of a passageway over land, whether it began as permissive or otherwise, continues for seven years after the fact and circumstances of the usage are such that the landowner would be presumed to know the usage was adverse, then the usage ripens into an absolute right. *Kralicek v. Chaffey*, 998 S.W. 2d 765, 67 Ark. App. 273 (1999) It is undisputed that Plaintiffs' predecessors in title, their parents, created the driveway in 1964 – without seeking permission of any kind from any person or entity, they created the path, poured the gravel, and immediately began using it to access Damascus Road, and continued to use and maintain it for the next 50 plus years. Complaint at ¶6. It was readily apparent that the Plaintiffs were, in fact, possessing and using the driveway. Again, by the very nature of the Plaintiffs creating, maintaining, and using the driveway since 1964, coupled with the obvious lack of oversight or involvement by Justice or any of their predecessors in title, the Plaintiffs' use has been adverse and continuous since 1964 as to everyone with any purported interest in the property. It is clear through the Plaintiffs' parents' construction of a permanent home and the driveway in question in

1964, and their permanent residence and use of the driveway since that time, that they had every intention to hold the easement as their own against any other person who might claim an interest in it. Based on these facts, the Plaintiffs have successfully met the requirement elements of an easement by prescription.

Because each element of easement by prescription has been met in this case and Justice cannot show any evidence or facts to the contrary, this matter is appropriate for summary judgment. Plaintiffs have possessed and used the easement in the required manner and for the required time period and are, therefore, entitled to the entrance of an order establishing an easement by prescription.

B. Laches

Justice acquired the property on which the prescriptive easement rests by virtue of tax deed recorded on May 4, 2015. *See* Exhibit "I" to Complaint at ¶5(a). In the four years since acquiring the property, it is undisputed that Justice has not had any communication with the Plaintiffs or their predecessors in title about the use of the gravel driveway, nor has he asserted any claim or right to the easement, or to deprive Plaintiffs of the right of its use. *See* Exhibit "P" to Complaint at ¶6. Furthermore, when Justice was approached about the matter, rather than discussing an easement, he suggested that the Plaintiffs purchase his property in its entirety.

Justice's claims that the use of the easement was permissive, and therefore no prescriptive easement can exist, are not supported by any empirical evidence, and they also should be barred by the doctrine of laches. The Supreme Court of Arkansas has stated that laches is based on the assumption that that the party to whom laches is imputed has knowledge of his rights and the opportunity to assert them, and that because of his delay an adverse party believes that those rights are either worthless or have been abandoned, and that because of the delay it would now be unjust to the adverse party to permit him to assert those rights. *Cochran v. Bentley*, 369 Ark. 159, 170, 251 S.W.3d 253, 262 (2007). This equitable doctrine is premised on the presence of detrimental reliance

upon the party claiming it by virtue of action or inaction on the part of the other party. *Id.* The application of laches to each case depends on the particular circumstances of that case. *Id.* Where the party claiming laches shows that he or she has suffered or has changed position as a result of the lack of diligence or delay in assertion of rights, the doctrine will apply. *Id.*

Justice is in the business of acquiring real estate, being the sole owner of his corporation, "Justice Home and Land, LLC." As a person holding himself out as a professional in this field, he certainly is familiar with the rights and nuances associated with real property ownership, and such knowledge should be imputed to him by the court. Furthermore, had he intended to communicate with the Plaintiffs about the driveway or dispute the ownership or status of the driveway as an easement or otherwise, he most certainly had the opportunity to do so in the 4 years since acquiring the property. Justice's failure to assert any purported right further supports the Plaintiff's beliefs that no such right existed or was being contested, as has been the case for the past 50 plus years. The Plaintiffs have relied on the existence of the easement not only to access their property, but also as evidence of marketable title to their real estate for over 50 years. The Plaintiffs and predecessors in title have maintained the driveway and expended time, energy, and resources in doing so. If Justice is allowed to assert a right over the easement, it will result in an injustice to these Plaintiffs who have relied upon the existence of this easement for over 50 years.

IV. ATTORNEYS FEES

In Arkansas, attorneys' fees are recoverable in a civil action when the opposing party pursues a losing claim which has a complete absence of a justiciable issue of law or fact. Ark Code Ann § 16-22-309(a). In order to award such fees, the court must find that "the party or the party's attorney knew, or should have known, that the action ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law." *Id.* at (b). Furthermore, in Arkansas, *pro se* litigants are held to the same standards as

attorneys. *See Kennedy v. Byers,* 368 Ark. 516, 247 S.W.3d 525 (2007) (per curiam); *Eliott v. State,* 342 Ark. 237, 27 S.W.3d 432 (2000).

As previously stated in this brief, Justice offers no evidence to contradict the undisputed facts that the elements of a prescriptive easement were long ago met, and that such an easement ripened in favor of Plaintiffs nearly 50 years ago. His answer states no law or facts to support his conclusory statements billed as "Affirmative Defenses," and instead he merely asserts that his claims are supported by personal beliefs and doubts; it bears repeating that Justice's claims are peppered with the words "believes", "claims", "doubts", "doubtful", but no law or facts to support those "belie[fs]", "claims", and "doubts". Justice is attempting to leverage the Plaintiff's ability to access and market their property to profit and to dispose of an undesirable property he acquired through a tax sale. His arguments have no basis in law or equity and are not made in good faith. For the reasons herein stated, the court should find that Justice has knowingly and willfully pursued a losing claim that use of the easement has been permissible for over 50 years without any evidence, that such a claim is made in bad faith in the hopes that the Plaintiffs will buy his property, and award reasonable attorneys' fees and costs to the Plaintiffs.

V. CONCLUSION

The Plaintiffs have plead undisputed facts that are sufficient to permit the court to grant summary judgment in their favor. The elements and conditions for a prescriptive easement were long ago satisfied and finding that a prescriptive easement has existed for many decades is in accordance with the cases and laws of the state of Arkansas. Justice has pled no facts and provided no evidence to contradict the Plaintiffs' claims. Furthermore, the doctrine of laches should apply because Justice took no action nor did he assert any rights over the Plaintiffs' driveway upon acquisition of his adjoining property. Lastly, his claim that use of the driveway was and is permissive is a losing proposition for which he knew, or should have known, has no basis in law or equity, and as *pro se* litigants are held to the same standards as attorneys, he should be responsible

for the Plaintiffs attorneys' fees and costs associated with this litigation. For the reasons set forth above, the Plaintiffs' motion for summary judgment should be granted and Plaintiffs should be awarded their attorneys' fees.

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By : _____
JILL M. WARD (2006300)
Attorney for the Plaintiffs

CERTIFICATE OF SERVICE

I, Jill M. Ward, attorney for Plaintiffs, state that I have on this 21st day of June, 2019, mailed a true and correct copy of the above and foregoing pleading to the following parties, in the United States Mail, post-age prepaid:

Justice Home and Land LLC
ATTN: John A. Justice, Registered Agent
102 Park Place
Russellville, AR 72802

John A. Justice
102 Park Place
Russellville, AR 72802

_____
JILL M. WARD

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS
DIVISION IV

BILL TUCKER, ANNETTE KOCH, MARY HOPPER, JAMES TUCKER, DONNIE DUNLAP, and DANIEL DUNLAP — PLAINTIFFS

VS. NO.58CV-2019-125

EDWARD DALE PETTY, STEPHANIE PETTY, JUSTICE HOME AND LAND, LLC, and JOHN ANDREW JUSTICE, Sole Member and Manager of JUSTICE HOME AND LAND, LLC — DEFENDANTS

MOTION FOR SUMMARY JUDGMENT AND ATTORNEYS' FEES

Plaintiffs Bill Tucker, Annette Koch, Mary Hopper, James Tucker, Donnie Dunlap, and Daniel Dunlap (collectively "Plaintiffs"), pursuant to Rule 56 of the Arkansas Rules of Civil Procedure, and for their motion for summary judgment and for attorneys' fees, state:

1. For the reasons set forth in the accompanying brief, which is incorporated herein by reference, the Plaintiffs move that they be granted judgment as a matter of law on Plaintiffs' Complaint for Prescriptive Easement and Establishment of Driveway.
2. Plaintiffs further pray that they be granted their attorneys' fees pursuant to Ark. Code Ann. § 16-22-309 on the grounds that the answer and affirmative defenses and claims of separate defendants John Andrew Justice and Justice Home and Land, LLC (collectively "Justice"), lack any justiciable issue.

WHEREFORE, Plaintiffs pray that their motion for summary judgment be granted, that is has judgment as a matter of law on Plaintiffs' Complaint, for attorneys' fees, and for all other proper relief.

Respectfully submitted,

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805 West 2nd Court
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By: _____
JILL M. WARD (2006300)
Attorney for the Plaintiffs

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