IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ANN M. SWIFT, Plaintiff, vs. DAVID J. HELTMAN, KATHERINE A. HELTMAN, PRESTONE J. EVANS, JR., IDA M. EVANS, BRUCE K. CAMERON, and BARBARA R. CAMERON, Defendants.	: NO. 18-0768 : : : CIVIL ACTION : : : : *Motions for* : *Summary Judgment*

OPINION & ORDER

On June 6, 2018, Plaintiff Ann Swift ("Plaintiff") filed a complaint against Defendants David and Katherine Heltman, Preston and Ida Evans, and Bruce and Barbara Cameron (collectively "Defendants").[1] Plaintiff averred that a right-of-way was deeded from the estate of Nora L. McEntire to each grantee, which included Plaintiff and Defendants, in their respective deeds.[2] However, Plaintiff argued that she had exerted continuous, open, exclusive, notorious and hostile use of the property in question for thirty-four (34) years, and had been by herself or predecessors in interest, in the actual, exclusive and adverse possession of the real property continuously for over twenty-five (25) years prior to filing this complaint.[3] Therefore, she seeks a court order stating that Defendants' right to use their rights-of-way is extinguished.[4]

Plaintiff claimed her following conduct permitted a finding of adverse possession of Defendants' rights-of-way: (1) mowing and maintaining the grass; (2) planting and

[1] Counsel has informed the Court that Defendants Preston and Ida Evans are preceding *pro se*, but are remaining out of the dispute since they do not object to Plaintiff's claims.
[2] Plaintiff's Complaint, ¶4 (June 6, 2018).
[3] *Id*. at ¶6(A).
[4] Plaintiff's complaint is unclear as to whether she is asserting a right in fee simple to the land underlying Defendants' rights-of-way. Nevertheless, for the reasons discussed *infra*, the Court does not need to

cultivating a grapevine arbor; (3) planting ornamental shrubs, trees, and fruit trees; (4) installing an ornamental pond for wildlife; (5) maintaining the driveway and turnaround with gravel surfaces; (6) providing tar & chip treatment, snow removal, and drainage improvements; (7) storing wood on the land underlying the rights-of-way; and (8) parking equipment on the land underlying the rights-of-way.[5]

Before the Court are Defendants David and Katherine Heltman's *Motion for Summary Judgment* and *Motion to Amend the Motion for Summary Judgment*, as well as Defendants Bruce and Barbara Cameron's *Motion for Summary Judgment*.[6] In their motions for summary judgment, Defendants argue that Plaintiff has failed to establish that they abandoned their rights-of-way over Nora L. McEntire's property or that Plaintiff's actions made Defendants' use of their rights-of-way impossible. Regarding the motion to amend, Defendants seek to amend the motions for summary judgment to also allege that Plaintiff's complaint should be dismissed because she failed to join necessary party member Nora L. McEntire, owner of the underlying property.[7] On March 7, 2019, a hearing was held on the aforementioned motions and the Court reserved decision.

In 1966, the Pennsylvania Supreme Court held that "where an easement is created by deed, Pennsylvania has required not only intent to abandon by the dominant tenement [land benefitting from the easement], but adverse possession by the servient

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address this issue because Plaintiff has failed to show abandonment by the current Defendants of their rights-of-way.

[5] *Id*. at ¶6(B).

[6] Defendants Bruce and Barbara Cameron joined Defendants David and Katherine Heltman's Motion to Amend the Motion for Summary Judgment. For reasons discussed *infra*, the Court finds it unnecessary to rule on Defendants' motion to amend.

[7] On October 22, 2018, this Court granted Defendants the ability to amend their motions for summary judgment until January 15, 2019.

tenement [land burdened by the easement] as well."[8] The rationale for the entanglement of these doctrines was that an express grant does not obligate the grantee to utilize the right.[9] The Court in *Hatcher v. Chesner* also recognized that abandonment would be found absent adverse use by the plaintiff where the owner of the easement obstructs his own use by taking steps to render the easement's use impossible or "obstructs it in a manner that is inconsistent with its further enjoyment."[10] In 1975, the Pennsylvania Supreme Court reaffirmed its holding in *Hatcher*.[11] Echoing *Hatcher* and its progeny, the Pennsylvania Superior Court was presented with a challenge to a railroad company's right-of-way and stated "[i]n order to find that a right of way has been abandoned, there must be an intention to abandon, accompanied by external acts by which the intention is carried out.[12]

On December 13, 2018, Plaintiff was deposed. Plaintiff claimed that Defendants Bruce and Barbara Cameron had abandoned their right-of-way based solely on them failing to use the right and allowing shrubbery to become overgrown.[13] Plaintiff claimed that Defendants David and Katherine Heltman had abandoned their right-of-way based solely on them failing to utilize the right.[14] It is undisputed that "nonuse" is insufficient to establish abandonment.[15] Additionally, one's allowance of vegetative growth is

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[8] *See Hatcher v. Chesner*, 221 A.2d 305, 307 (Pa. 1966).
[9] *Id.* at 308 (quoting *Lindeman v. Lindsey*, 69 Pa. 93, 100 (1871)).
[10] *Id.*
[11] *Ruffalo v. Walters*, 348 A.2d 740, 741 (Pa. 1975) (citing *Hatcher v. Chesner*, 221 A.2d 305 (Pa. 1966)) ("In Pennsylvania, the law requires that there be showing of intent of the owner of the dominant tenement to abandon the easement, coupled with either (1) adverse possession by the owner of the servient tenement; or (2) affirmative acts by the owner of the easement that renders to use of the easement impossible; or (3) obstruction of the easement by the owner of the easement in a manner that is inconsistent with its further enjoyment.").
[12] *Thompson v. Maryland & Penn. R.R. Preserv. Soc'y*, 612 A.2d 450, 453 (Pa. Super. Ct. 1992).
[13] Deposition of Ann Swift Tr. 21-22 (Dec. 13, 2018) (hereinafter "Tr.").
[14] Tr. at 58.
[15] *See Hatcher*, 221 A.2d at 307 ("Mere non-use, no matter how long extended, will not result in extinguishment of an easement created by deed. . . .").

synonymous with nonuse.[16] Therefore, Plaintiff, by her own admission, cannot claim that Defendants abandoned their rights-of-way. Further, Plaintiff's complaint fails to address the issue of abandonment and allege any affirmative acts by Defendants to indicate abandonment.

During the March 7th hearing, Plaintiff relied on *Hatcher* for the proposition that the allowance of vegetative growth results in abandonment. First, *Hatcher* does not stand for this proposition. Second, *Hatcher* is easily distinguishable.[17] In *Hatcher*, the easement was only accessible by plaintiff through a "small frame shed."[18] The plaintiff had not only closed the shed's double doors and nailed them shut with an overhanging board, but had also allowed a tree to grow for thirty five (35) years that inhibited the use of those boarded doors.[19] Conversely, in the present case, there is no restriction on the movement of Defendants into their rights-of-way. Defendants can simply walk into or around the growing vegetation. In other words, Defendants' allowance of such growth did not render the use of their rights-of-way impossible or physically obstructed in such a way as to prevent future enjoyment.

Defendants' Motions for Summary Judgment are **GRANTED**. The Court finds that Plaintiff's claim fails as a matter of law.[20]

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[16] *See Croyle v. Dellape*, 832 A.2d 466, 472 (Pa. Super. Ct. 2003) (citing *Sabados v. Kiraly*, 393 A.2d 486, 488 (Pa. Super. Ct. 1978) ("In *Sabados,* we further concluded that the growth of brush and saplings on a right of way area is not an affirmative act evidencing an intent to abandon the right of way; rather, the growth of such vegetation results from merely doing nothing. Evidence of abandonment must consist of affirmative acts such as placement of a barrier." (internal citation omitted)).

[17] *See Hatcher*, 221 A.2d at 307.

[18] *Id.*

[19] *Id.* at 307-08 ("In the instant case, the plaintiff, or his predecessors in title by whose actions in relation to the property he is bound, planted or permitted a tree to grow on the land now owned by the plaintiff which obstructed use of the easement to a material extent. Further, the same parties placed, or permitted to be placed, a bar across the doors of the garage serving as the only entrance to the easement right of way. These acts, in our opinion, were not mere inaction. . . .").

[20] *See* Pa.R.C.P. No. 1035.2 ("After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

IT IS SO ORDERED this 15th day of March 2019.

BY THE COURT:

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Eric R. Linhardt, Judge

cc: Matthew J. Zeigler, Esq.
Zeigler & Associates LLC
Scott T. Williams, Esq. (Counsel for David and Katherine Heltman)
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[. . .] (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.").