THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Honorable Luke N. Brown, Jr., Special Referee for Jasper County

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Case No. 2008-CP-27-481

Cole L. Lawson, III and Cole L. Lawson, IV,

Appellants,

v.

Weldon T. Strahan a/k/a Weldon Travis Strahan, a/k/a W. Travis Strahan, Individually and in his capacity as Personal Representative of the Estate of Ronald J. Strahan, Wilson Lee Mixson, Vivian M. McAlhaney, as Trustee of the McAlhaney Family Trust, UTD 9/20/2004, Vivian Mixson McAlhaney, David A. Shipes, Tony Walter Shipes, Helen S. Kinard a/k/a Helen Shipes Kinard, Wanda Shipes Casey a/k/a Wanda S. Casey a/k/a Wanda D. Casey, and Jacob F. Malphrus,

Defendants,

of whom

David A. Shipes, Tony Walter Shipes, Helen S. Kinard a/k/a Helen Shipes Kinard, Wanda Shipes Casey a/k/a Wanda S. Casey a/k/a Wanda D. Casey, and Jacob F. Malphrus are

Respondents.

RESPONDENTS' RETURN TO APPELLANTS' PETITION FOR REHEARING

Respondents David S. Shipes, Tony Walter Shipes, Helen S. Kinard a/k/a Helen Shipes Kinard and Wanda Shipes Casey a/k/a Wanda S. Casey a/k/a Wanda D. Casey (collectively, "the Shipes") respectfully submit this Return to the Petition for Rehearing filed by Cole L. Lawson, III and Cole L. Lawson, IV (collectively, the "Lawsons") in above-captioned action. For the reasons set forth below, in addition to the arguments previously submitted by the Shipes in their brief and during oral argument, the Lawsons' Petition for Rehearing should be denied.

I. The Court properly applied the two issue rule.

At oral argument and in the Lawsons' Petition for Rehearing, the Lawsons failed to set forth any legal authority for the proposition that they can ignore rulings of the special referee, not appeal them, not brief them until the reply brief, but instead asked this Court to remand certain "affirmative and equitable defenses for further proceedings and reconsideration only after the proper legal standard is applied to the Lawsons' easement." No such authority exists.

The Lawsons simply failed to appeal the special referee's findings that the Lawsons' claims are barred by laches, the Lawsons' alleged easement was abandoned, and the Lawsons' claims of an easement are barred due to the Shipes' adverse possession of any claimed easement. The Lawsons claim they addressed these issues in their original brief, but that is simply incorrect. In no part of their original brief, including the issues on appeal, do the Lawsons mention the words "adverse possession," "laches," or

"abandonment." The Lawsons quite simply have failed to challenge the special referee's rulings on these issues.[1]

Because the Lawsons have failed to appeal these other rulings, and these other rulings provide an independent basis for the special referee's finding that the Lawsons do not possess an easement over the Shipes' Property, this Court properly affirmed the Order of the Special Referee. See State v. Hicks, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010) (affirming the ruling of the trial court because the appellant failed to appeal all grounds upon which the ruling was based); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

The Lawsons cite Anderson v. S.C. Dept. of Highways & Pub. Transp., 322, 417, 421, 472 S.E.2d 253, 255 (1996) as providing some sort of exception to the two issue rule. In Anderson, the plaintiff sued the South Carolina Department of Transportation (SCDOT) alleging negligent maintenance of a sidewalk on which she fell and injured herself. Id. at 419, 472 S.E.2d at 254. The plaintiff moved for a directed verdict as to liability, but the trial court deferred ruling on the motion and submitted the case to the jury on the issues of general negligence and contributory negligence. Id. After the jury returned a general verdict for SCDOT, the trial court granted the plaintiff's motion for a

[1] See Rule 208(b)(1)(B), SCACR (The brief of the appellant shall contain "a statement of each issue presented for review. The statement shall be concise and direct as to each issue . . . . Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal"); See also Glasscock, Inc. v. U.S. Fidelity & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (applying the general rule that an appellant cannot present an issue to the appellate court in a reply brief if that issue was not addressed in the initial brief); Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1998) (holding that "[a]n appellant may not use . . . the reply brief as a vehicle to argue issues not argued in appellant's brief").

directed verdict on the issue of negligent maintenance of the sidewalk, and subsequently granted a new trial on the basis that it was impossible to determine whether the jury reached its verdict based on the plaintiff's failure to prove improper maintenance, the plaintiff's failure to prove proximate cause, or SCDOT's success in proving contributory negligence. Id. This Court held the trial court should have applied the two issue rule. The Supreme Court rejected this Court's interpretation of the two issue rule and held it is a rule used by appellate courts, not trial courts, the rule is a procedural tool for upholding, not reversing decisions, and application of this rule would discourage trial courts from correcting errors.

Anderson simply does not apply to this case and provides no refuge for the Lawsons' failure to appeal rulings that provide an independent basis for the special referee's order.

In addition, the argument the Lawsons actually set forth, asking this Court to remand certain "affirmative and equitable defenses for further proceedings and reconsideration only after the proper legal standard is applied to the Lawsons' easement," is not preserved. The Lawsons point to no authority to support their request, because there is none, and the arguments are conclusory. This argument should be deemed abandoned. See State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (deeming an issue abandoned because the appellant failed to "provide arguments or supporting authority for his assertion").

Finally, the Lawsons argue this Court should have addressed the issues that were not preserved. This Court is not required to do so. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).[2]

II. The Court correctly held the Lawsons are not entitled to an express easement by reservation.

The Lawsons assert the following language, included in a deed in Respondents' chain of title, creates *appurtenant* easement rights over the Shipes' Property *for access* to the Lawsons' Property:

> Reserving, however, unto the grantor all the timber and trees of every sort and description, and also all mineral rights in the above described property; and there is also further reserved the right and privilege by the grantor, its successors and assigns, of a right of way for roads, railroads or tram roads, and such other rights and privileges *as might be useful, convenient or necessary for the removal of said timber and trees and for the exercising of the mineral rights.*

(Transcript, Plaintiff's Ex. 3G; R. p. 494) (emphasis added). The true nature of the rights reserved, and the intent of the parties relating thereto, is indisputable upon reading the reservation language in question.[3] Even if (for the sake of argument only) appurtenant easement rights were created by the above-quoted language, any access rights reserved

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[2] The Lawsons also rely upon certain statements made by the Referee at trial concerning his general views on the admissibility of evidence. The Referee simply stated in this regard: "I always like to hear the whole story because I disregard a lot of it, but you can't really get a picture of what everybody is thinking unless you hear everything, even those you know you're going to rule against." (R. p. 191, lines 13-16). Clearly the Referee's off-the-cuff statements at trial relating to admissibility of evidence have no effect on preservation issues on appeal, and certain not on application of the two issue rule.

[3] The Lawsons, in asserting their interpretation of the rights reserved is consistent with the language found within the four corners of the deed, claim the reservation "already included the rights to even the smallest sprouted sapling." This is not consistent with South Carolina law which specifically provides that a reservation or conveyance of rights relating to "timber" does *not* include "sprouts" and "bushes" but instead refers to trees suitable for manufacture of lumber, building materials, etc. Holly Hill Lumber Co. v. Grooms, 198 S.C. 118, 16 S.E.2d 816, 819 (1941).

were expressly and unequivocally limited to rights used in connection with "the removal of said timber and trees and for the exercising of the mineral rights." Id. The Lawsons nonetheless assert that this language somehow creates a general access easement over the Shipes' Property for access to the Lawsons' Property, and that this claimed general access easement is appurtenant to the affected properties. This is simply not the case. No general access rights were created pursuant to the reservation language above, and any rights that may have been created by this reservation were in gross in nature, as opposed to appurtenant, and therefore do not run with the title to the affected properties.

The law is well-established and concise with respect to the elements required for an easement to be considered appurtenant, and therefore run with the title to the real property affected: 1) the easement must inhere in the land and concern the premises; 2) the easement must have one terminus on the land of the party claiming it; and 3) the easement must be essentially necessary to the enjoyment of the property. Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 583 (2009). The Lawsons do not challenge in their Petition for Rehearing any findings relating to items 1) and 3), above, but instead request a rehearing based upon their claim that the terminus requirement described in item 2), above, has been satisfied, and that this Court erred in not so finding.

As this Court noted in its decision, "the absence of a terminus on property is fatal to [a] claim of an appurtenant easement." Windham v. Riddle, 381 S.C. 192, 202, 672 S.E.2d 578, 583 (2009) (quoting Shia v. Pendergrass, 222 S.C. 342, 351, 72 S.E.2d 699, 703 (1952)). In the case under present consideration the easement reserved does not have a terminus at all since it is not located or defined in any way. "Terminus" is defined as "the final point; the end." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH

LANGUAGE 1852 (3d ed. 1992). The easement reserved in the instant case simply has no final point; no end. In fact, there is no description of any property whatsoever that is sought to be benefitted by the easement; instead, the easement rights reserved are personal to the grantor, not benefitting any particular property, and thus without any terminus upon any particular property. It goes without saying that "where the easement does not benefit the owner *of a particular tract*, it is in gross." JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND §2:3 (2011) (emphasis added).

In their Petition for Rehearing the Lawsons continue to rely solely upon the case of Springob v. Farrar, 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999) in support of their terminus argument. However, as previously pointed out, in Springob an easement was reserved over Lot 13 in favor of the grantor for the benefit of Lot 14; however, the grantor who reserved the easement was not the fee simple owner of Lot 14. Id. at 589, 514 S.E.2d at 137-38. The Court held that since the grantor did not own the Lot that was to be benefitted by the easement, the terminus requirement was not satisfied. Id. The Lawsons again argue the Springob holding somehow supports their position that the easement reserved by Big Salkehatchie has a terminus upon the Lawsons' Property. However, unlike Springob, in the instant case there was no particular property or lot to be benefitted by the easement. The fact that Big Salkehatchie happened to own the Lawsons' Property at the time of the easement reservation is of no consequence. This fact is not mentioned in the language of the deed wherein the easement is reserved and it is never stated, or even implied, that the easement is to be reserved for the benefit of the Lawsons' Property as opposed to simply for the benefit of Big Salkehatchie, personally.

In Springob an easement was reserved in favor of the grantor *for the benefit of certain property* which was not owned by the grantor, thus the easement lacked a terminus upon the land of the party claiming it. In the instant case an easement was reserved *in favor of the grantor* as opposed to and without mention of any particular property to be benefitted. Since no property is to be benefitted by the easement it is impossible for the easement to have a "terminus" as required under the law of this State, and this Court was correct in so holding.

III. The Lawsons have not satisfied the necessity requirement for establishment of an easement by necessity, and the Court properly held accordingly.

The Lawsons' argument in their Petition for Rehearing relating to their claimed easement by necessity is not clear. Suffice it to say, however, that the Lawsons admit that Big Salkehatchie Cypress Company – the Lawsons' predecessor in title - effectively landlocked itself. (Transcript, p. 190, lines 14-18; R. p. 347, lines 14-18). Our Courts have held time and time again that the necessity required for establishment of an easement by necessity must not be created or caused by the party claiming the easement. Clemson Univ. v. First Provident Corp., 260 S.C. 640, 652, 197 S.E.2d 914, 920 (1973) (". . . this necessity must not be created by the party claiming the right of way. A grantee cannot so change the uses of land as to convert a way of convenience into a way of necessity. *Nor can he create such necessity by subdividing and selling separate portions thereof.*") (emphasis added).

In this case, Big Salkehatchie clearly conveyed the front parcel having access to the Shipes' predecessors, who negotiated and paid a valuable consideration therefor (without reduction for any general access easement rights encumbering the Shipes'

Property). (Transcript, p. 138, line 23 – p. 139, line 17; R. p. 295, line 23-p. 296, line 17). Big Salkehatchie failed to retain any access rights for its retained property. The Shipes' predecessors and the Shipes may not now be made to suffer for this mistake of their grantor after having paid valuable consideration for their property many years ago, and after constructing their homes, family cemetery and other improvements thereon. Certainly not after the Shipes' father worked six and seven days a week during his lifetime to pay for this property and to ensure the enjoyment of this property by himself and his family. (Transcript, p. 265, ll. 13-21; R. p. 422, lines 13-21).

Furthermore, the Lawsons' Property has been landlocked since the Big Salkehatchie conveyance in 1921. Since this time, and until the purchase of the Lawsons' Property by the Lawsons in 2008, no owner of the Lawsons' Property has taken any action to seek or establish any easement rights over the Shipes' Property for access to the Lawsons' Property – by necessity or otherwise. (Transcript, p. 237, lines 7-10, p. 252, lines 15-17, p. 253, lines 2-14; R. p. 394, lines 7-10, p. 409, lines 15-17, p. 410, lines 2-14). The Shipes, however, have during this time constructed their homes, their ponds and even their family cemetery upon their property. The Lawsons simply cannot be permitted to come into court now, over 80 years after the conveyance wherein the Lawsons' predecessor in title landlocked the property now owned by the Lawsons, and obtain an easement by necessity to pass through the front yards, within 20 feet of the front doors of the Shipes' homes and directly past the Shipes' private family cemetery. Certainly it cannot be implied or presumed that the Shipes' at any time intended for any such access rights to exist. The facts of this case are a perfect illustration of the rationale

behind the established principle that an easement by necessity will not exist in favor of one who landlocks himself.

For the reasons set forth above, the Lawsons' Petition for Rehearing should be denied.

Respectfully submitted,

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May 28, 2013

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Of Whom

David A. Shipes; Tony Walter Shipes; Helen S. Kinard a/k/a Helen Shipes Kinard; Wanda Shipes Casey a/k/a Wanda S. Casey a/k/a Wanda D. Casey and Jacob F. Malphrus are ..... Respondents.

CERTIFICATE OF SERVICE

I, Kathleen S. Romero, an employee of Callison Tighe & Robinson LLC, Attorneys for the Respondents, do hereby certify that, on this date, I caused to be served a copy of the foregoing **Respondents' Return to Appellants' Petition for Rehearing** upon Appellants' counsel, by depositing a copy of the same in the United States mail, with proper first-class postage affixed thereon, addressed as follows:

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May 28, 2013

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