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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-In-Equity

Appellate Case No. 2022-001145
Circuit Court Case No. 2020 CP-22-00808

3D Land Holdings, LLC, Respondent,

v.

Willis J. Johnson, Virginia Smith,
Marcella Coachman, Toni Owens,
Brandon L. Carr and Henry Lee Green, Appellants.

FINAL BRIEF OF APPELLANTS

/s/ Cynthia Ranck Person
Cynthia Ranck Person, Esquire (SC Bar #105126)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN DENYING COACHMAN HEIRS' MOTION TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADINGS WHERE THE COMPLAINT FAILED TO SET FORTH FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR EASEMENT BY NECESSITY, EASEMENT BY IMPLICATION OR EASEMENT BY PRESCRIPTION.

II. THE TRIAL COURT ERRED IN GRANTING A PRESCRIPTIVE EASEMENT OVER LAND OF THE COACHMAN HEIRS IN FAVOR OF 3D LAND AFTER FINAL HEARING WHERE 3D LAND FAILED TO ESTABLISH ALL ELEMENTS OF A PRESCRIPTIVE EASEMENT BY CLEAR AND CONVINCING EVIDENCE.

   A. THE TRIAL COURT ERRED IN PERMITTING A LOCAL REAL ESTATE ATTORNEY TO TESTIFY AS AN EXPERT WHERE HIS OPINIONS AMOUNTED TO LEGAL CONCLUSIONS AND HE POSSESSED NO SPECIAL EXPERTISE BEYOND THAT OF THE JUDGE THAT WOULD ASSIST THE JUDGE IN UNDERSTANDING THE EVIDENCE OR IN MAKING FACTUAL FINDINGS ON THE THREE ELEMENTS OF PRESCRIPTIVE EASEMENT.

   B. THE TRIAL COURT ERRED IN PERMITTING THE EXPERT TO BASE HIS OPINION ON INADMISSIBLE HEARSAY.

III. THE TRIAL COURT ERRED IN NOT PERMITTING THE COACHMAN HEIRS TO TESTIFY OR PRESENT EVIDENCE ABOUT MATTERS NOT ADMITTED IN THE COMPLAINT BY VIRTUE OF ENTRY OF DEFAULT THAT WERE RELEVANT TO THE NATURE, EXTENT, CHARACTER AND USE OF THE EASEMENT.

STATEMENT OF THE CASE

This Declaratory Judgment action was commenced by Summons and Complaint filed on September 29, 2020, by Edward Dereef, Trustee, (hereinafter "Dereef") the predecessor in title to Appellee 3D Land Holdings, LLC, (hereinafter "3D Land"), requesting an easement over land owned by Appellants, Willis J. Johnson, Virginia Smith, Marcella Coachman, Toni Owens, Brandon L. Carr and Henry Lee Green, (hereinafter collectively referred to as "Coachman heirs"), to access a 1.54 acre parcel of land Dereef had acquired on October 30, 2019. While the action was pending, Dereef sold the parcel to 3D Land on April 12, 2021.

On October 18, 2021, Dereef filed an Affidavit of Default requesting entry of default against the Coachman heirs for failure to respond to the Complaint, and on November 21, 2021, the court granted entry of default and referred this case to a Master In Equity.

On February 18, 2022, an order was issued substituting 3D Land as a Plaintiff in place of Dereef. A Notice of Appearance was filed by counsel for the Coachman heirs on March 21, 2022, and on March 25, 2022, the Coachman heirs filed a Motion to Set Aside Entry of Default. The Master In Equity indicated in an email communication to counsel that the motion was denied; however, no court order was ever filed with respect to this motion.

The Coachman heirs filed a Motion to Dismiss on June 10, 2022, raising, *inter alia*, that the Complaint failed to state a cause of action upon which relief could be granted pursuant to Rule 12(b)(6), SCRCP, or in the alternative for Judgment on the Pleadings pursuant to Rule 12(c), SCRCP, and renewing their Motion to Set Aside Entry of Default.

Final hearing was held on June 16, 2022, at which the court denied the Coachman Motion to Dismiss in open court. (Transcript, R. p. 65, lines 23-24). 3D Land called an "expert" as its single witness to testify at the hearing. The Coachman heirs' requested to call witnesses and

introduce evidence of facts other than those well-pleaded facts that had been admitted in the complaint by virtue of entry of default, including evidence about the nature, scope, character and use of the easement. The court denied this request and permitted no evidence whatsoever to be presented by or on behalf of the Coachman heirs. (Transcript, R. p. 66, line 16 – p. 67, line 2) (Transcript, R. p. 129, line 18 – p. 130, line 3) (Transcript, R. p. 130, line 8 – p. 131 line 5).

The Master In Equity issued a final order filed on July 20, 2022, granting 3D Land an Easement by Prescription over the Coachman land. The Coachman heirs filed a timely Notice of Appeal along with Proof of Service of same on August 16, 2022.

FACTS

3D Land purchased this 1.54 acre lot on April 12, 2021, from Edward Dereef, Trustee. (3D Land Hearing Exhibit "K," R. p. 162). Edward Dereef, Trustee, had acquired the lot on October 30, 2019, from heirs of the Dereef family, as part of the subdivision of a 5-acre piece of family-owned land, hereinafter referred to as " Dereef Parcel," into three separate approximately equal-sized lots. (3D Land Hearing Exhibit "I," R. p. 151) (3D Land Hearing Exhibit "H," R. p. 150). The lot purchased by 3D Land is a land-locked parcel that does not directly abut the Coachman land. Another one of the three lots subdivided from the Dereef Parcel and owned by heirs of Pricilla Greggs, lies to the immediate south of the 3D Land parcel. The Coachman land lies to the south of the Greggs parcel. (3D Land Hearing Exhibit "H," R. p. 150).

Significantly, there is no evidence of unity of title or severance of title or any common ownership, common grantor, or common predecessor in interest of the 3D Land parcel (formerly part of the Dereef Parcel) and the Coachman heirs' land. Thus, easement by necessity and easement by implication (which both require unity and severance of title) were ultimately not pursued, and easement by prescription was the only theory upon which evidence was presented by 3D Land at the final hearing. (Transcript, R. p. 120, line 20 - p. 121, line 7) (Transcript, R. p. 107, line 4 and lines 16-18).

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING COACHMAN HEIRS' MOTION TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADINGS WHERE THE COMPLAINT FAILED TO SET FORTH FACTS SUFFICIENT TO STATE A CAUSE OF ACTION FOR EASEMENT BY NECESSITY, EASEMENT BY IMPLICATION OR EASEMENT BY PRESCRIPTION.

STANDARD OF REVIEW

In reviewing a decision on a motion under Rule 12(b)(6), SCRCP, "the appellate court applies the same standard of review as the trial court." Doe v. Marion, 373 S.C. 390, 397, 645 S.E.2d 245, 247 (2007).

"The circuit court may dismiss a claim when the defendant demonstrates the plaintiff's failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court," Hambrick v. GMAC Mortgage Corporation, 370 S.C. 118, 121-122, 634 S.E.2d 5, 7 (Ct. App. 2006). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Doe, supra at 397, 247.

DISCUSSION

The Coachman heirs filed a Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6), SCRCP, or in the alternative for Judgment on the Pleadings pursuant to Rule 12(c), SCRCP on the basis that it failed to set forth facts to establish any cause of action. (Defendants' Motion to Dismiss, R. p. 43, pars. 31 - 56).

South Carolina courts have made it clear that a complaint must state facts and not merely legal conclusions. Thus, "[w]hen a plaintiff states nothing more than legal conclusions, a claim should fail ... [and while the courts] recognize the pleadings must be liberally construed ... Rule 12(b)(6) ***requires*** the plaintiff to allege ***facts***" and not simply legal conclusions. Paradis v.

Charleston County School District, 424 S.C. 603, 613-614, 819 S.E.2d 147, 153 (Ct. App. 2018) (emphasis added) (reversed on other grounds). Thus, while the court must examine the legal sufficiency of the complaint and construe the facts alleged in the light most favorable to the nonmoving party, it is nevertheless Plaintiff's burden to establish a *prima facie* case and a right to relief within the four corners of the complaint.

Effect of Entry of Default

Entry of default against the Coachman heirs has no bearing on the legal sufficiency of the complaint and does not operate as an admission that the complaint states a cause of action. South Carolina courts have long held

> [t]he default does not admit that the facts pleaded are sufficient to constitute a cause of action, as the effect of the confession is limited to the material issuable facts well pleaded in the declaration or complaint. Nor does it admit an allegation which constitutes a mere conclusion of law. The facts pleaded must accordingly be sufficient to form a legal basis for the judgment taken by default, or it will be reversed on appeal or set aside on proper application.

Gadsden v. Home Fertilizer & Chemical Co., 89 S.C. 483, 72 S.E. 15, 17 (1911). Similarly, "if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error." Mutual Savings and Loan Association v. McKenzie, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980).

Purported Causes of Action

In the present case, the Complaint requests declaratory relief in the form of (1) easement by necessity; (2) implied easement; and/or (3) easement by prescription. (Complaint, R. pp. 21-24). Thus, facts must be averred in the complaint to establish each element of all three causes of action. The causes of action and their respective elements are as follows.

1. Easement by Necessity & Easement by Implication

To establish easement by necessity, the party asserting the right to the easement must show: (1) unity of title, (2) severance of title, and (3) necessity that existed at the time of severance. Boyd v. Bellsouth Telephone Telegraph Co., Inc., 369 S.C. 410, 418-419, 633 S.E.2d 136, 141 (2006).

An easement by implication requires the party asserting the right to establish: (1) unity of title, (2) severance of title, (3) the prior use was in existence at the time of unity of title, (4) the prior use was not merely temporary or casual, (4) the prior use was apparent or known to the parties, (5) the prior use was necessary in that there could be no other reasonable mode of enjoying the dominant tenement without the prior use, and (6) the common grantor indicated an intent to continue the prior use after severance of title. Id. at 417, 139.

Both easement by necessity and easement by implication require unity of title and severance of title as essential elements. The complaint makes no averment whatsoever that even arguably relates to unity and/or severance of title. The complaint references that Plaintiff Dereef acquired the parcel of land in question by deed of October 30, 2019, from Leon Young, Kenneth Young, Russell Young, Noble Young, Vermell Young, and George Medina. (Complaint, R. p. 22, par. 6). The Complaint makes further reference to land owned by the Coachman heirs over which an easement is being requested by Plaintiff Dereef (Complaint, R. pp. 22-23, pars. 7-11, 14); however, there are no facts or even conclusions alleged that the Dereef parcel and the Coachman parcel were ever part of a common tract or that they were severed from a common tract. There are no facts to establish that there was ever unity of title or severance of title or common grantors or common predecessors in interest.

Accordingly, the complaint fails to establish essential elements of both easement by necessity and easement by implication, and the Coachman heirs' Motion to Dismiss or for Judgment on the Pleadings should have been granted by the trial court with respect to these two purported causes of action.

2. Prescriptive Easement

The elements of a prescriptive easement are: (1) continued and uninterrupted use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is adverse, *i.e.*, contrary to the rights of the true property owner. Simmons v. Berkeley Electric Coop., Inc., 419 S.C. 223, 797 S.E.2d 387 (2016).

In this case, Plaintiff Dereef owned the land in question for under one year, far less than the required 20 years. South Carolina law is clear that when relying on tacking previous owners, "[t]he use by the previous owners must also satisfy ***all*** of the elements of a prescriptive easement." Paine Gayle Properties, LLC v. CSX Transportation., Inc., 400 S.C. 568, 585, 735 S.E.2d 528, 537 (Ct. App. 2012) (emphasis added).

Allegations in the Complaint

A close examination of the 15 paragraph Complaint reveals failure to set forth facts to establish two of the three essential elements of a prescriptive easement, *i.e.*, (1) that Plaintiff Dereef ***and*** his predecessors in interest used the existing dirt road continuously and without interruption for a period of 20 years or more, ***and*** (2) that the nature of such continuous and uninterrupted use by Plaintiff Dereef and his predecessors in interest was adverse to the Coachman landowners.

Paragraphs 1 - 5 contain facts that relate strictly to the identity of the Defendants.

Paragraph 6 is a description of the parcel of land that was acquired by Plaintiff Dereef on October 30, 2019.

Paragraphs 7 states that the only means of access to Plaintiff Dereef's land is across the existing road on the land of the Coachman heirs' and references an Exhibit "A" that was not and never has been attached. The referenced document, however, is the same plat as 3D Land ultimately offered as Hearing Exhibit "H," and simply relates to the subdivision of the Dereef land. It is not relevant to a prescriptive easement.

Paragraph 8 refers to an existing dirt road over the Coachman land that provides "the only means of access to Plaintiff Dereef's parcel" (whether this is the only means of access is not relevant to establishing a prescriptive easement) and that has been "utilized for many years as evidenced by its presence on aerial photographs and other resources."

Paragraph 9 avers that Plaintiff Dereef has utilized this dirt road as a means of access since acquiring the property on October 30, 2019, (less than a year before the Complaint was filed), and has not been challenged in its access by Defendants "for decades."

Paragraphs 10 - 15 consist of legal or other conclusions that do not constitute well-pleaded facts and in any event have no bearing on the elements of a prescriptive easement.

Viewing the well-pleaded facts in the light most favorable to the Plaintiff, at best, the complaint establishes the existence of a dirt road over the Coachman heirs' land that Plaintiff Dereef has used to access his land since October 30, 2019, without challenge from the Coachman landowners. There is no reference whatsoever to any use or the character of any use of this existing dirt road by Plaintiff Dereef's predecessors in title.

The complaint makes vague and general references to the effect that the existing road was utilized for many years or even "decades" without challenge, but there are no facts alleged to

establish who used the road, when it was used, how frequently, over what period of time, for what purpose, under what circumstances, whether it was continuous, whether it was uninterrupted, whether it was by permission, whether it was adverse, or whether the Coachman landowners were aware of the use.

"Evidence establishing the mere fact of use does not necessarily equate with evidence establishing the character of such use." Morrow v. Dyches, 328 S.C. 522, 528, 492 S.E.2d 420, 424 (Ct. App. 1997). Thus, the existence of a dirt road on the Coachman heirs' land that was used by unspecified persons for unspecified times under unknown circumstances does not sufficiently describe the requisite character of use. There is a complete absence of any facts set forth in the Complaint to establish a continuous, uninterrupted use for 20 years by Plaintiff Dereef and his predecessors in interest or that such use was adverse to the interests of the Coachman heirs.

Accordingly, the Coachman heirs' Motion to Dismiss and/or for Judgment on the Pleadings should have been granted with respect to the cause of action for prescriptive easement.

CONCLUSION

For the above reasons, the Coachman heirs respectfully submit that their Motion to Dismiss or in the alternative for Judgment on the Pleadings should have been granted for failure to set forth any cause of action and Plaintiff's Complaint should have been dismissed in its entirety with prejudice.

II. THE TRIAL COURT ERRED IN GRANTING A PRESCRIPTIVE EASEMENT OVER LAND OF THE COACHMAN HEIRS IN FAVOR OF 3D LAND AFTER FINAL HEARING WHERE 3D LAND FAILED TO ESTABLISH ALL ELEMENTS OF A PRESCRIPTIVE EASEMENT BY CLEAR AND CONVINCING EVIDENCE.

A. THE TRIAL COURT ERRED IN PERMITTING A LOCAL REAL ESTATE ATTORNEY TO TESTIFY AS AN EXPERT WHERE HIS OPINIONS AMOUNTED TO LEGAL CONCLUSIONS AND HE POSSESSED NO SPECIAL EXPERTISE BEYOND THAT OF THE JUDGE THAT WOULD ASSIST THE JUDGE IN UNDERSTANDING THE EVIDENCE OR IN MAKING FACTUAL FINDINGS ON THE THREE ELEMENTS OF PRESCRIPTIVE EASEMENT.

B. THE TRIAL COURT ERRED IN PERMITTING THE EXPERT TO BASE HIS OPINION ON INADMISSIBLE HEARSAY.

STANDARD OF REVIEW

"The standard of review for a declaratory judgment action is ... determined by the nature of the underlying issue." Bundy v. Shirley, 412 S.C. 292, 301, 772 S.E.2d 163, 168 (2015). South Carolina courts have consistently held that "the determination of the extent of an easement is an equitable matter. Accordingly, an appellate court may review the trial judge's findings *de novo*." Plott v. Justin Enterprises, 374 S.C. 504, 510, 649 S.E.2d 92, 95 (Ct. App. 2007). Likewise, in Hardy v. Aiken, 369 S.C. 160, 631 S.E.2d 539 (2006), the South Carolina Supreme Court stated in the context of determining the extent of an easement, "we hold the proper scope of review is *de novo.*" Id. at 165, 541. "Thus, we may take our own view of the evidence [in determining the extent of an easement]." Bundy, supra, 168-169, 302.

"Questions of law may be decided with no particular deference to the trial court ... [and] [t]his court may correct errors of law in both legal and equity actions." South Carolina Department of Transportation v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 13 (Ct. App. 2008).

Accordingly, the standard of review of this equitable matter is *de novo*.

DISCUSSION

Although easement by necessity and implication were raised in the complaint, easement by prescription was the only theory ultimately pursued by 3D Land at the final hearing and the only theory upon which testimony was presented. (Transcript, R. p. 120, line 20 - p. 121, line 7).

Burden of Proof for Prescriptive Easement

"[The] party claiming a prescriptive easement has the burden of proving all elements by *clear and convincing* evidence." Bundy, supra, 306, 170 (emphasis added). The rationale for this heightened standard of proof is that "[e]ssentially, by claiming a prescriptive easement, a claimant seeks for a property owner to forfeit rights to the subject property ... [and] [g]iven that a prescriptive easement results in diminished rights of the property owner, we find that a claimant seeking a prescriptive easement must be held to a strict standard of proof." Id. at 306, 170. "Hence [it] is not to arise without clear, unequivocal proof of such facts as will give the right from the owner to the claimant." Id. at 305, 170.

Effect of Entry of Default

The entry of default against the Coachman heirs operates as an admission only of the well-pleaded allegations of the complaint. State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 488 S.E.2d 528, 530 (Ct. App. 1985). This rule "does not apply to allegations which are not well pleaded, and hence conclusions of law are not admitted, as are not evidentiary facts, nor mere inferences or conclusions of facts, even if alleged in the pleading, nor inferences or conclusions from facts not stated, nor matters of opinion, nor surplusage and irrelevant matter." State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41, 53 (1935).

Rule 8(d), SCRCP, provides that "averments in a pleading to which a responsive pleading is required ... are admitted when not denied in the responsive pleading. Averments in a pleading

to which no responsive pleading is required or permitted shall be taken as denied or avoided." Thus, "the court is required to presume all well pled facts, *not propositions of law*, to be true." HHHunt Corporation v. Town of Lexington, 389 S.C. 623, 636, 699 S.E.2d 699, 705 (Ct. App. 2010) (emphasis added).

As set forth in Argument I, above, which is incorporated herein by reference, at best the well-pleaded facts of the complaint establish the existence of a dirt road over the Coachman heirs' land that Plaintiff Dereef has used to access his land since October 30, 2019, without challenge from the Coachman landowners. There is no reference whatsoever to any use or the character of any use of this existing dirt road by Plaintiff Dereef's predecessors in title.

Evidence Presented at Final Hearing

3D Land called a local real estate attorney, Greg Weathers, as its only witness to testify at the final hearing as an "expert in matters of real estate generally and easements in particular." (Transcript, R. p. 73, lines 18-21).

Rule 702, SCRE provides that

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to *understand the evidence or to determine a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Mr. Weathers' qualifications were those of an attorney with a real estate practice in Georgetown County, South Carolina. (Transcript, R. p. 73, line 10 – p. 77, line 23). He did not possess any special expertise beyond that of the trier of fact, who in this case was a judge, that would assist the judge in understanding the evidence or making factual findings on the three elements of prescriptive easement: (1) continued and uninterrupted use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is adverse. Simmons, supra.

Over the objection of counsel for Coachman (Transcript, R. p. 74, line 2) (Transcript, R. p. 78, line 12), the court qualified Mr. Weathers to testify as "an expert in the area of title review, easements, and rights-of-way as well as access to property." (Transcript, R. p. 78, ln. 16 - 19).

1. Scope of Expert Testimony – Legal Conclusions

Ultimately, the court permitted Mr. Weathers to testify to matters well beyond the specified scope of expertise including legal conclusions and inadmissible hearsay over the objection of opposing counsel. (Transcript, R. p. 87, line 22 - p. 88, line 24) (Transcript R. p. 90, lines 19–24) (Transcript, R. p. 94, line 22 - p. 95, line 4). The majority of Mr. Weathers' testimony was the equivalent of legal argument.

South Carolina courts are clear that "[g]enerally, expert testimony pertaining to issues of law is inadmissible." Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197, 207, 662 S.E.2d 444, 450 (Ct. App. 2008). The South Carolina Supreme Court was faced with an issue similar to the case at bar in Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). The court affirmed the trial court's refusal to consider an affidavit from an "expert" where the

> affidavit reads as if it could have been respondents' oral argument to the trial court at the summary judgment hearing. Although [the expert] arguably offered some helpful, factual information, the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied. For that reason, we hold the trial court correctly refused to consider it, and the Court of Appeals erred in finding otherwise.

Id. at 66 - 67, 437.

The Supreme Court went on to say, citing its decision in Green v. State, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002), that "such 'testimony' falls outside of Rule 702 SCRE," and like Mr. Weathers' testimony in the present case,

> [t]he expert offered no factual evidence. He proffered his opinion, assuming certain facts, [that] trial counsel's actions fell below

> acceptable legal standards of competence. The testimony was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel's actions fell below an acceptable legal standard of competence.

Green, supra, at 198, 325.

The court pointed out "[w]hile it is true that an opinion ... is not objectionable because it embraces an ultimate issue to be decided by the trier of fact, Rule 704, SCRE, ... [the] affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment." Dawkins, supra, 65, 437.

Throughout the hearing in the present case, Mr. Weathers expressed his opinion that 3D land met its burden of proving the various elements of a prescriptive easement and he ultimately expressed his opinion "to a reasonable degree of legal certainty" that 3D Land had met its burden of proving a prescriptive easement. (Transcript, R. p. 99, line 10 – p. 100, line 21). This is not just "a" legal conclusion , it is "the" legal conclusion, and is beyond the province of an expert witness.

2. Misstatement of Law

Mr. Weathers also testified about the specific elements required to establish various kinds of easements under South Carolina law. (Transcript, R. p. 84, line 9 – p. 86, line 2). Not only did this testimony amount to legal conclusions outside the scope of proper expert testimony, but it was also a misstatement of the law. Mr. Weathers testified that the third element of a prescriptive easement is a use that is "*either* adverse *or* under a claim of right." (Transcript, R. p. 86, line 2) (emphasis added), and "there's *two ways* [to establish the third element]: 20 years under an implied claim of right, but also 20 years it would be adverse." (Transcript, R. p. 93, line 25 – p. 94, line 4) (emphasis added).

In Simmons, supra, the South Carolina Supreme Court clearly stated, "we hold the Court of Appeals erred in recognizing *two* methods of proving the third element of a prescriptive easement," Id. at 230 (emphasis added), and "we hold adverse use and claim of right cannot exist as separate methods of proving the third element of a prescriptive easement as the two terms are, in effect, *one and the same*. Thus, we overrule those decisions that express a contrary conclusion of law." Id. at 232 (emphasis added). The court went on to say, "courts in this state should only determine whether the claimant's use was indeed adverse." Id. at 232.

3. Reliance and Conclusions Based on Inadmissible Hearsay

In addition to legal conclusions, the court permitted Mr. Weathers to testify to other conclusions based on matters that were not properly in evidence and amounted to inadmissible hearsay. For example, Mr. Weathers testified that based on his "research with the county aerial photos and Google Earth historical imagery," none of which were specifically identified or brought into the courtroom, the dirt road existed for more than 20 years and was "well used." (Transcript, R. p. 86, line 24 – p. 88, line 24). He added similar opinion testimony about the location of the road. (Transcript, R. p. 89, line 1 – p. 93, line 14). Counsel for the Coachman heirs objected on the basis that the documents were not specifically identified or available for review, inspection or cross-examination and amounted to inadmissible hearsay. (Transcript, R. p. 87, line 22 - p. 88, line 24) (Transcript, R. p. 90, lines 19 - 24) (Transcript, R. p. 94, line 22 - p. 95, line 4).

4. Permissive Use & Prescriptive Easement

Mr. Weathers testified at length about his interpretations of various deeds and plats for the purpose of identifying the respective parcels of land owned by the parties and establishing the "identity of the thing enjoyed," i.e., the existence and location of the dirt road over the

Coachman land. (Transcript, R. p. 79, line 8 – p. 84, line 8). The Coachman heirs have never disputed the existence of a dirt road on their private property. Their issue has always been that 3D Land does not have a right to use it simply because it exists.

At some points in describing the "identity of the thing enjoyed," as referenced above, Mr. Weathers' testimony seems to be at odds with his own legal conclusion about a prescriptive easement. He seems to imply that the fact that the road is shown on some plats (which is not relevant to anything other than the "identity of the thing enjoyed") somehow grants 3D Land permission to use it. This is in direct contravention of a prescriptive easement which specifically requires an ***adverse*** use, which is necessarily a use ***without permission***.

The South Carolina Supreme Court in Simmons held "it is well-established that evidence of permissive use ***defeats*** the establishment of a prescriptive easement because use that is permissive cannot also be adverse." Simmons, supra, 232. "Permissive use of property cannot ripen into an easement by prescription." Bundy, supra, 172.

5. Concessions on Cross-Examination

In response to questions on cross-examination, Mr. Weathers, testified unequivocally that he was not personally aware of how the dirt road was used, by whom or with what frequency.

> Q. So just again, to be clear, other than your review of the documents in this case, you're not personally aware of – from 1953 until the complaint was filed in this case, you're not personally aware of how that road was used by whom and what frequency?
>
> A. Other than the allegations of the complaint and my review of the title documents and the GIS and other aerial photography and court records, ***I don't have any personal knowledge. I don't know any of these individuals personally nor have I spoken with them about their historic use of the road***.

(Transcript, R. p. 117, lines 6-18) (emphasis added).

Mr. Weathers conceded that he had driven by the area only one time ever, several days prior to the hearing, and had never physically walked it. He had no personal familiarity beyond reviewing documents, many of which were not identified or brought into the courtroom.

Q. Mr. Weathers, have you been out to actually look at the physical layout of the property and this road that is referenced in the Martin subdivision?

A. I have driven by it. I have not physically walked it.

Q. And when would that have been?

A. One day this week. I don't know if it was Monday, Tuesday or Wednesday.

Q. Have you ever been out there to review that or view it in the past?

A. Prior to this ---

Q. Prior to this week.

A. No ma'am, it's all based upon review of historical documents and recorded documents.

(Transcript, R. p. 101, lines 5-19).

Mr. Weathers also stated that he was not personally aware of the relationship between the Dereefs and the Coachman family and could not say whether the predecessors in interest to 3D Land and Edward Dereef, Trustee, had used the dirt road with the permission of the Coachman family pursuant to an easement in gross. (Transcript, R. p. 123, line 10 – p. 125, line 3).

6. Clear and Convincing Evidence

Even assuming, *arguendo,* that all of Mr. Weathers' testimony was properly admitted, 3D Land through this one single witness did not meet its burden of proving the three essential elements of a prescriptive easement by ***clear and convincing evidence***. At best, the only thing established was the existence of the dirt road over the Coachman heirs' private property. While there is arguably some inconclusive evidence that the dirt road may have been used by someone

at some point in time, for some unknown purpose and under some unknown circumstances, there was absolutely *no* evidence, and certainly not clear and convincing evidence, that 3D Land and its predecessors in title used the dirt road continuously and without interruption for a period of 20 years, and that such use was adverse. "In order to establish continuity of use by tacking, a claimant must show that predecessors in title actually used the alleged easement" and tacking is not permitted when "it is unclear that use by claimant's predecessor was adverse." Bundy, supra, 413, 175.

After the judge permitted this broad scope and latitude of testimony from 3D Land's expert, opposing counsel requested an opportunity to call an expert on behalf of the Coachman heirs to address the many unexpected matters upon which Mr. Weathers was permitted to testify. The trial court denied that request. (Transcript, R. p. 130, line 8 – p. 131, line 5).

CONCLUSION

For the foregoing reasons, 3D Land has failed to meet its burden of proving a prescriptive easement by clear and convincing evidence. Accordingly, the Coachman heirs' respectfully request this court to reverse the judgment of the trial court, enter judgment in favor of Appellants, and dismiss this claim with prejudice.

III. THE TRIAL COURT ERRED IN NOT PERMITTING THE COACHMAN HEIRS TO TESTIFY OR PRESENT EVIDENCE ABOUT MATTERS NOT ADMITTED IN THE COMPLAINT BY VIRTUE OF ENTRY OF DEFAULT THAT WERE RELEVANT TO THE NATURE, EXTENT, CHARACTER AND USE OF THE EASEMENT.

STANDARD OF REVIEW

The standard of review of this equitable matter is *de novo*, as more specifically set forth in Argument II, above, which is incorporated herein by reference.

DISCUSSION

Representatives of the Coachman family were present at the final hearing along with other potential witnesses, including neighbors, heirs of the Dereef family, and Leon Young, an eighty-year-old man who was one of the predecessors in title to 3D Land, all of whom were ready, willing and able to testify about matters relevant to the nature and extent of the easement other than those facts deemed admitted by the entry of default. Both at the start of the hearing and again after 3D Land rested its case, the court denied the Coachman heirs' request to call any witnesses or introduce any evidence. (Transcript, R. p. 66, line 16 – p. 67, line 2) (Transcript, R. p. 129, line 18 – p. 130, line 3) (Transcript, R. p. 130, line 8 – p. 131, line 5).

As set forth in Argument II, above, the entry of default against the Coachman heirs operates as an admission only of the well-pleaded allegations of the complaint and does not apply to legal or other conclusions. State ex rel. Medlock, supra; Broad River Power Co., supra. An easement case is different than a matter at law where there is a clear distinction between liability and damages and an entry of default operates as an admission of liability. In an easement case, there is not a clear distinction between "liability" and "damages" and the extent of an easement is purely a matter in equity. Bundy, supra.

The parties and witnesses were all present at the hearing and ready, willing, and able to testify, so no delay would have been required. One party had traveled from California and

another from Virginia. Another witness, Leon Young, an eighty-year-old man who was the predecessor in title to 3D Land and Edward Dereef, Trustee, and still owns one of the three subdivided Dereef parcels, was present to testify about the nature and extent of the easement. (Transcript, R. p. 129, lines 18-21). It seems both a grave miscarriage of justice and very curious that the court refused to hear testimony from the very witnesses who possessed knowledge of use and character of use of the existing road and the nature and extent of the easement. Yet the court was willing to not only allow, but rely on legal conclusions offered by a local attorney "expert" who had no personal knowledge of the underlying facts, as the basis for rendering final judgment.

At a minimum, the Coachman heirs should have been permitted to present relevant evidence on any matter that was not admitted by virtue of the entry of default. It was an error of law for the trial court to prevent them from doing so. In the event the appellate court reverses the trial court and enters judgment in favor of the Coachman heirs because the Motion to Dismiss should have been granted or 3D Land did not meet its burden of proving a prescriptive easement, then this is a harmless error of law. In the event, however, that the appellate court does not reverse the lower court, then this error of law resulted in severe prejudice to the Coachman heirs and they should be given an opportunity to introduce relevant evidence about the character, nature, extent or use of the easement for consideration by the finder of fact.

CONCLUSION

For these reasons, the Coachman heirs should have been permitted to present relevant evidence at the final hearing on any matter that was not admitted by virtue of the entry of default.

FINAL CONCLUSION

For the foregoing reasons, the Coachman heirs respectfully request this court to grant the following relief:

1. Reverse the trial court's denial of the Motion to Dismiss the complaint for failure to state a cause of action and enter judgment in favor of the Coachman heirs.
2. Reverse the trial court's finding of a prescriptive easement on the basis that 3D Land failed to prove a prescriptive easement by clear and convincing evidence and enter judgment in favor of the Coachman heirs.
3. In the alternative, if this court does not reverse the decision of the lower court and enter judgment in favor of the Coachman heirs, then they would request this court to remand the case and allow them to present relevant evidence on any matter that was not admitted by virtue of the entry of default.

Respectfully submitted,

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December 14, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-In-Equity

Appellate Case No. 2022-001145
Circuit Court Case No. 2020 CP-22-00808

3D Land Holdings, LLC, Respondent,

v.

Willis J. Johnson, Virginia Smith,
Marcella Coachman, Toni Owens,
Brandon L. Carr and Henry Lee Green, Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Appellants and Final Reply Brief of Appellants comply with SCACR 211(b) and are identical to the briefs previously served except for revised references to the Record on Appeal.

/s/ Cynthia Ranck Person
Cynthia Ranck Person, Esquire (SC Bar #105126)

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