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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable Joseph M. Strickland, Master-in-Equity
Trial Court Case No.: 2014-CP-40-01805

Appellate Case No.: 2017-001795

Raglins Creek Farms, LLC.....Respondent,

vs.

Nancy Dunn Martin.....Appellant.

FINAL BRIEF OF RESPONDENT

John W. Wells, Esquire
Baxley, Pratt & Wells, P.A
P.O. Box 10
Lugoff, SC 29078
jwells@baxleywells.com

M. Brent McDonald, Esquire (S.C. Bar 78057)
Bundy McDonald, LLC
1516 Old Trolley Road, 2nd Floor
Summerville, SC 29485
Phone:843-492-0221
brent@bundymcdonald.com

Attorneys for Respondent

May 3, 2022

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STATEMENT OF THE CASE

The underlying action was originally filed by Country Properties, LLC[1] (hereinafter sometimes referred to as "Respondent") on March 18, 2014. (*See* Complaint R. p. 48). Respondent sought three separate declarations from the trial court. (Id). It sought to establish the following: (1) an easement by express grant; (2) a prescriptive easement; and (3) an easement by public dedication over the property of Appellant Nancy Dunn Martin (hereinafter "Appellant"). (Id). Though the three theories of recovery are distinct in their elements and proof, they each result in the same outcome—Respondent would have the right to access its property over the property of Appellant. Respondent also sought relief in the form of an injunction that would prohibit Appellant from blocking or obstructing the easement. (Id). Appellant answered the complaint and counterclaimed on May 21, 2014. (*See* Answer and Counterclaim R. p. 60). The Answer was a

[1] As stated below, during the pendency of the appeal Country Properties, LLC conveyed its property to Raglins Creek Farms, LLC. A motion to substitute Raglins Creek Farms, LLC as Respondent is in the process of being drafted and filed with this Court.

general denial with certain other affirmative defenses. (Id). The counterclaim was for adverse possession or prescription by a servient tenement. (Id). Respondent filed a Reply to the counterclaim on May 29, 2014. (*See* Reply R. p. 66).

By order of the Honorable L. Casey Manning, the action was referred to the Master in Equity for Richland County, Judge Joseph M. Strickland. (*See* Order of Reference R. p. 1).

The case was tried over four days before Judge Strickland on March 21-24, 2016. Twenty-three (23) witnesses were called by both parties. The trial court entered into evidence and considered sixty-seven (67) exhibits.

After consideration of the case for six (6) months, Judge Strickland entered his Final Order on September 27, 2016 ("Final Order"). (*See* Final Order R. p. 4). The Final Order found that Respondent had an express easement over the property of Appellant, an easement by prescription over the property of Appellant, and that the road in question was dedicated to the public. (Id). The trial court held as follows:

"ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered:

1. That the Plaintiff has a private twenty (20) foot wide easement across the lands of the Defendant to use the disputed portion of Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's southern property line as shown on the 2004 Gonzales plat, Plaintiff's Exhibit 2. The Defendant is enjoined from obstructing the Plaintiff's use of the road by a locked gate or any other device. To the extent that the Defendant keeps a gate across said road, the Defendant is ordered to provide the Plaintiff with a means of opening the gate within thirty (30) days of the signing of this order. This easement is appurtenant to the tract now owned by the Plaintiff and shall run with the land to the Plaintiff's successors and assigns;
2. Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's southern property line as shown on the 2004 Gonzales plat, Plaintiff's Exhibit 2, is declared to be a public road open to the public for use by the public, provided that Richland County is not required by this order to provide maintenance services to the portion of Northeast Shady Grove Road past its end of County maintenance sign. The Defendant is ordered to remove her gate from this road within thirty (30) days of the signing of this order."

(Id at p. 31 R. p. 36).

Appellant filed a Rule 59(e) and Rule 52(b), SCRCP, motion on November 9, 2016. (R. p. 1160). That motion was denied by the trial court on July 21, 2017. (Order denying Appellant's Post-Trial Motion R. p. 37). Appellant served a Notice of Appeal on August 22, 2017.

There is no monetary amount in controversy in this action as it is for declaratory and injunctive relief. **During the pendency of this appeal, the Respondent has transferred its in interest in its property to Raglins Creek Farms, LLC. A motion to substitute Raglins Creek Farms, LLC for Respondent Country Properties, LLC is in the process of being drafted and filed.**

STANDARD OF REVIEW

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." *Slear v. Hanna,* 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

The issue of whether an easement has arisen by prescription is an action at law. *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015).

The determination of whether property has been dedicated to the public is an action in equity. *State v. Beach Co.,* 271 S.C. 425, 248 S.E.2d 115 (1978); *Mack v. Edens,* 320 S.C. 236, 464 S.E.2d 124 (Ct.App. 1995). In an equitable proceeding, the Appellate Court may find facts in accordance with their own view of the facts challenged in evidence. *Murrells Inlet Corp. v. Ward,*

378 S.C. 225, 231, 662 S.E.2d 452, 455 (Ct.App. 2008) "[The Appellate Court's] duty in equity cases to review challenged findings of fact as well as matters of law does not require that it disregard the findings below or that it ignores the fact that the trial judge, who saw and heard the witnesses, was in better position than it is are to evaluate their credibility; nor does it relieve appellant of the burden of convincing the Appellant Court that the trial judge erred in his findings of fact." *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011).

FACTS

Respondent is the owner of a certain tract of land located partly in Kershaw County and partly in Richland County which was conveyed to the Respondent by deed of Pine Ridge Investments, LLC, dated March 11, 2009, and recorded in the RMC office for Richland County in Book 1515, at page 1554, the same being also filed in the ROD office for Kershaw County. The tract is described as follows:

All that piece, parcel or lot of land, with improvements thereon, if any, lying, situate and being in the State of South Carolina, Counties of Richland and Kershaw, located approximately ten (10) miles South of Lugoff, containing 1,023.07 acres, more or less, and being shown and described on a plat prepared for Gonzales Land and Timber, LLC, by Michael R. Mills, P.L.S., dated June 22, 2004, and recorded in the office of the ROD for Richland County in Book "951", at page 1618 and recorded in the office of the ROD for Kershaw County in Book "3121", at page 7. Said plat is incorporated herein by reference for a more complete and accurate description.

The 1,023.07 acres is split between Richland County, containing 383.63 acres and Kershaw County containing 640.07 acres.

(Plaintiff's Ex. 3, R. p. 634)

The Appellant is the owner of several tracts of land located in the County of Richland, State of South Carolina described as follows:

PARCEL 1:

All that certain piece, parcel, or tract of land, situate, lying and being near Raglin Creek, east of U.S. Highway 601, in School District No. 2, in the County of Richland, and State of South

Carolina, containing Sixty-Five and 06/l00ths (65.06) acres, more or less, and bounded as follows: to wit: On the NORTH by property now or formerly of R.W. Lloyd; on the EAST by property now or formerly of R.W. Lloyd; on the SOUTHEAST and SOUTH by property now or formerly Astor V. Cleveland; and on the WEST by property now or formerly of Jessie Dunn Martin; said tract will more fully appear reference to a plat prepared for Rufus D. Lewis, Jr., by Edward R. Owens, R.L.S., dated October 18, 1976. Be all measurements a little more or less.

TMS# 38000-03-08 and 38000-03-08

This being the same property conveyed to the Defendant by deed of Laura Jane Lewis Allen, et al. dated November 15, 2012, and recorded in the RMC for Richland County in Book 1813, at page 244.

PARCEL 2:

All that certain piece, parcel or lot of land with improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, being shown and designated as Parcels 3, 4, 5, and 6, containing in the aggregate 164.0 acres, more or less, as shown on a plat surveyed for Heirs of Osie E. Martin by Jas. C. Covington, C.E., dated October 8, 1930, and recorded in the office of the RMC for Richland County in Plat Book R, at page 199; said parcels having such boundaries and measurements as shown on said plat which are specifically incorporated herein by reference thereto.

TMS # R38000-03-07 & R38000-03-l 5

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U.S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 1 and 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E. dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.20 acres on a plat prepared for Neal H. Higgins and Karen J. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded in Plat Book 55, at page 7626, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS #: R38000-03-06

ALSO: All that certain piece, parcel, or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U.S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E., dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.30

acres on a plat prepared for Van A. Higgins and Linda L. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded May 19, 1995 in Plat Book 55, at page 7627, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS# R3800-03-48

(Plaintiff's Exhibits 21-24, R. p. 686-694)

Respondent's property is divided by Raglin Creek, which flows generally from west to east, and serves as the county line between Kershaw County to the north of the creek and Richland County to the south of the creek. According to the property description in the Respondent's deed, approximately 384 acres of Respondent's property is located south of Raglin Creek in Richland County, and approximately 640 acres of Respondent's property lies to the north of Raglin Creek in Kershaw County. (Plaintiff's Ex. 3, R. p. 633).

Respondent's property is for recreation, including hunting and fishing, and for growing and harvesting timber. This has been the historical use of the tract by all of the Respondent's predecessors in title during the time period relevant to this case. (R. p. 193, 249-254, 259-260, 322-325, and 336-338)

The issue in the present case relates to a dirt road leading from Highway U.S. 601 to the southern boundary of the Respondent's property. This road is known as Shady Grove Road, among other names as will be described. (R. pp. 190-192, 249-255, 278, and 337-338)

Shady Grove Road is shown on the 2004 plat by Michael Mills of Glenn and Associates, (Plaintiff's Exhibit 2 R. p. 632), as Shady Grove Road and Dirt Woods Road. It is shown on the 1998 Robert H. Lackey Surveying, Inc. plat, (Plaintiff's Ex. 6, R. p. 651), as N.E. Shady Grove Road and Existing Woods Road. It is shown on the 1969 Fred J. Hager plat, (Plaintiff's Ex. 8 R.

p. 655), as Woods Road. It is shown on the 1957 plat for Powe Veneer Company, (Plaintiff's Ex. 10, R. p. 660), as Camp Road.

All of these plats show a dirt road extending from U.S. Highway 601 eastward below Raglin Creek through the Appellant's tract to Respondent's property and then extending to the Guy[2] property east of the Respondent's tract.

Shady Grove Road appears on aerial photographs from 2013 (Plaintiff's Ex. 42, R. p. 738); 1981 (Plaintiff's Ex. 43, R. p. 739); 1970 (Plaintiff's Ex. 44, R. p. 740); 1951 (Plaintiff's Ex. 45, R. p. 741); and 1943 (Plaintiff's Ex. 46, R. p. 742). These aerial photographs show the road in the same location as the road depicted in the above-mentioned plats. The road was receiving enough use to resist the overgrowth of vegetation and remain visible from an airplane from 1943 to 2013. (Id).

Shady Grove Road is shown as a light duty road on 1953 Leesburg Quadrangle Map prepared by the United States Department of the Interior Geological Survey. (Plaintiff's Ex. 41, R. p. 737).

Shady Grove Road is shown on a 1939 map prepared by the South Carolina Highway Department. (Plaintiff's Exhibit 49, R. p. 745). On this map, it is shown as a double solid line, whereas private roads are depicted on this map by a dotted line, indicating that the South Carolina Highway Department considered the entire road back to the Respondent's property to be a public road since 1939.

Respondent produced witnesses who testified that Shady Grove Road had received public maintenance from Highway U.S. 601 to the Respondent's property line during the 1950s and 1960s. (R. pp. 276-278, 292-293; and 324).

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[2] Mr. James Lindsay Guy, II testified at the trial of this action regarding Shady Grove Road. (Trial Transcript, pp. 145-160).

There is no evidence in the record that any individual, entity, or governmental authority has petitioned any court or initiated any action to close or abandon any portion of Shady Grove Road or met the requirements of S.C. Code Ann. §57-9-10 to abandon or close a public road.

The Appellant's property includes a tract containing 213.53 acres as shown on a plat prepared by Bostick Surveying for Nancy D. Martin dated February 15, 2010, (Plaintiff's Exhibit 22, R. p. 692), and an adjacent tract, sometimes referred to as the Lewis Tract, containing 64.68 acres as shown on a plat prepared by Bostick Surveying for Nancy D. Martin, et al. dated September 9, 2012, (Plaintiff's Exhibit 23, R. p. 693). Both plats show Shady Grove Road and label it Black Dog Road.

The 213.53-acre tract was conveyed to Appellant on August 9, 2007, by the trustees of the Edward Frank Martin, Jr. Trust. (Plaintiff's Exhibit 24, R. p. 694). It was passed down to the Appellant's father, Edward Frank Martin, Jr. through his mother and sisters from his father, Edward Frank Martin, Sr. who died owning it on December 15, 1967.

Edward Frank Martin, Sr. obtained the 213.53-acre tract from Florence Martin Van Horten by deed dated December 29, 1939, (Plaintiff's Exhibit 27, R. p. 704), which deed imposes a twenty (20) foot permanent right of way on the property "from said road running through the plantation back to the lands of J. H. and Ella T. Miller." The easement in favor of the lands of J. H. and Ella T. Miller derives from a deed by J. H. Miller to Ossee M. Martin dated November 18, 1918, reserving the identical easement over the lands now owned by Appellant. (Plaintiff's Exhibit 29, R. p. 706).

The lands of J. H. and Ella T. Miller, referred to in Plaintiff's Exhibit 27 as the tracts served by the twenty (20) foot right of way, are now a portion of Respondent's tract south of Raglin Creek.

The only road fitting the description in Plaintiff's Exhibit 27 running through the Appellant's property to the Respondent's property, which is shown on the 1939 South Carolina Highway Department Map, (Plaintiff's Exhibit 49, R. p. 745), and the 1943 aerial photograph, (Plaintiff's Exhibit 46, R. p. 742), is Shady Grove Road.

As to the 64.68-acre tract owned by the Appellant (the Lewis Tract), it is shown as 65.61 acres on a plat prepared for the Estate of F. R. Martin by Keels Engineering Company dated May 25, 1970. (Plaintiff's Exhibit 35, R. p. 723).

According to the August 15, 1971 deed from Sara Martin Goff et al. to Joe Earl Taylor et al., (Plaintiff's Exhibit 33, R. p. 716), this tract is identical to the tract conveyed to Fletcher R. Martin by the heirs of Mattie L. C. Desportes by deed dated September 24, 1948, (Plaintiff's Exhibit 36, R. p. 724) which deed describes and conveys Tract E from the 1884 plat of the property partitioned in the 1885 lawsuit of Mattie L. C. Desportes v. John A. Myers et al. (Plaintiff's Exhibit 19, R. p. 683).

On December 21, 1926, Mattie L. C. Desportes was the owner of Tract E (the Lewis Tract) when she signed a deed to Respondent's predecessor in title, Lura Mae Kinsland, (Plaintiff's Exhibit 16, R. p. 666), conveying to Kinsland Tract 1 from the 1884 partition suit, (Plaintiff's Exhibit 19, R. p. 683). At that time she imposed upon Tract E:

> "also convenient rights of way for cart and wagon road over the lands of the parties of the first part and each of them to the Burney lands, the Martin lands, and the English lands for the purposes of ingress and egress and access from the public road to such tracts of land. Said grantee, her heirs and assigns shall also have the right to construct and use cart and wagon roads connecting the said tracts of land hereby conveyed with each other by the nearest convenient route, the present roads upon said lands to be followed where (illegible) and no lands at present under cultivation to be taken for roads without compensation being made for the same. **The said rights of way to be appurtenant to and pass by conveyance of the tracts of land above described.** The said right of way not to exceed twenty feet in width (illegible)."

(Emphasis supplied)

The tracts conveyed to Kinsland by Mattie L. C. Desportes, J. H. Miller and Ella T. Miller, formerly Ella Black, were Tract 1, Tract 2 and Tract 4 from the 1884 partition plat, (Plaintiff's Exhibit 19, R. p. 683), which now form the southeastern corner of the Respondent's tract, and the easement conveyed in Plaintiff's Exhibit 16 was for the purpose of giving those tracts, now owned by the Respondent, access.

When they signed the December 21, 1926 deed to Lura Mae Kinsland, (Plaintiff's Exhibit 16, R. p. 666), conveying Tracts 2 and 4 from the 1884 partition plat together with the rights of way to reach those lands, which are now a part of Respondent's property, J. H. Miller and Ella T. Miller owned and conveyed to Kinsland, her heirs and assigns the right of way over Appellant's property described in the November 18, 1918 deed to Ossee M. Martin, (Plaintiff's Exhibit 29, R. p. 706) , and later described on the deed to Appellant's grandfather. (Plaintiff's Exhibit 27, R. p. 704).

In sum, Plaintiff's Exhibit 16 conveyed the twenty (20) foot easement on Appellant's 213 acre tract shown on the 2010 Bostick Plat, (Plaintiff's Exhibit 22, R. p. 692), **and** the easement over the Appellant's 64.68 acre tract shown on the 2012 Bostick Plat, (Plaintiff's Exhibit 23, R. p. 693), to Lura Mae Kinsland, Respondent's predecessor in title, and expressly made both easements into appurtenances to pass by conveyance of Tracts 1, 2, and 4 from the 1884 partition plat which are now part of the Respondent's tract.

Both easements imposed on both of the Appellant's tracts flowed to Respondent by and through the language "Together with all and singular, the rights, members, hereditaments, appurtenances to the said premises belonging or in anywise incident appertaining," which language is found in each deed in the Respondent's chain of title and which language was meant to convey the easements, which are appurtenances to Respondent's tract.

Finally, Respondent produced numerous witnesses who testified that they used Shady Grove Road openly, notoriously, continually, uninterrupted, and contrary to the rights of Appellant for a period well in excess of twenty (20) years. See Testimony of C. Campbell (R. pp. 904-905); James Guy (R. pp. 259-263, 593-594); Cecil Brazell (R. pp.192-195); Gordon Baker (R. pp.338-340); William Cate (R. pp.347-348); and James Podell (R. pp. 429-437). None of the witnesses sought or received permission from Appellant to use Shady Grove Road to access Respondent's property. (Id).

Moreover, Respondent and its predecessors in title back to 1976 were business entities and a trust which could only use Shady Grove Road in and through their employees, agents, foresters, timber crews, surveyors, real estate agents, and invited guest, who hunted and fished on Respondent's property together with members of hunt clubs who leased the hunting rights to Respondent's property. (R. pp. 193, 249-254, 259-260, 322-325 and 336-338). These persons used Shady Grove Road with a frequency commensurate with the use of the property for hunting, fishing and, growing and harvesting timber. (Id).

ARGUMENT

I. Many of the factual arguments now made by the Appellant are not preserved for appellate review.

"An appellate court will not consider an issue that has not been preserved for appellate review." *Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006). "[A]n issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

A review of this record on appeal, including Appellant's post-trial motions, demonstrates that many of the factual issues raised by the Appellant in its brief were never made to or ruled

upon by the trial court. As such, any factual issue now raised for the first time is not preserved for appellate review.

II. The trial court correctly ruled that there is an easement by express grant to the property of Respondent.

An easement is a right given to a person to use the land of another for a specific purpose. *Murrells Inlet Corp. v. Ward,* 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct.App.2008). An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription. *Frierson v. Watson,* 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct.App.2006). "A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." *Id.* (quoting *Sandy Island Corp. v. Ragsdale,* 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965)). "As a general rule, to constitute a grant of an easement, any words clearly showing the intention to grant an easement are sufficient." *Ten Woodruff Oaks v. Point Development*, 683 S.E.2d 510, 385 S.C. 172 (S.C. App., 2009). "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention." *Id.*

In the Final Order, the trial court found that Respondent's and Appellant's chain of title established a specifically located twenty (20) foot wide express easement by grant. (Final Order, R. pp. 29-31). The evidentiary basis for this finding was as follows:

Plaintiff's Chain	Defendant's Chain	"Lewis" Chain
Plaintiff Ex.1 (R. p. 630)	Plaintiff's Ex. 20 (R. p. 684)	Plaintiff's Ex. 30 (R. p. 707)
Plaintiff Ex. 18 (R. p. 669)	Plaintiff Ex. 18 (R. p. 669)	Plaintiff's Ex. 36 (R. p. 724)
Plaintiff Ex. 19 (R. p. 683)	Plaintiff Ex. 19 (R. p. 683)	Plaintiff's Ex. 37 (R. p. 726)
Plaintiff Ex. 17 (R. p. 667)	Plaintiff Ex. 29 (R. p. 706)	Plaintiff's Ex. 35 (R. p. 723)
Plaintiff Ex. 15 (R. p. 665)	Plaintiff Ex. 28 (R. p. 705)	Plaintiff's Ex. 34 (R. p. 720)

Plaintiff Ex. 16 (R. p. 666)
Plaintiff Ex. 14 (R. p. 664)
Plaintiff Ex. 13 (R. p. 663)
Plaintiff Ex. 12 (R. p. 662)
Plaintiff Ex. 11 (R. p. 661)
Plaintiff Ex. 27 (R. p. 704)
Williams, p. 60 (R. p. 163)
Plaintiff's Ex. 26 (R. p. 702)
Plaintiff's Ex. 25 (R. p. 699)
Plaintiff's Ex. 24 (R. p. 694)
Plaintiff's Ex. 21 (R. p. 686)
Williams, pp. 66-67 (R. pp. 169-170)
Plaintiff's Ex. 32 (R. p. 713)
Williams, pp. 64-65 (R. pp. 167-168)
Plaintiff's Ex. 31 (R. p. 709)
Williams, pp. 36-49 (R. pp. 139-152)
Plaintiff Ex. 9 (R. p. 656)
Plaintiff Ex. 10 (R. p. 660)
Plaintiff Ex. 7 (R. p. 652)
Plaintiff Ex. 8 (R. p. 655)
Williams, pp. 27-28 (R. pp. 130-131)
Plaintiff Ex. 5 (R. p. 646)
Plaintiff Ex. 6 (R. p. 651)
Plaintiff Ex. 4 (R. p. 638)
Plaintiff Ex. 3 (R. p. 633)
Plaintiff Ex. 2 (R. p. 632)

As found in the Court's Order, the express grant of the twenty (20) foot easement is in the Respondent's chain and the Appellant's chain—as it necessarily would need to be. (Id). Importantly, at the time of the 1948 transfer of Tract "E" (the Lewis Tract) from Desportes to F. Martin, Desportes had already conveyed out the easement over Tract "E," on December 21, 1926, to Respondent's predecessor in title. (Plaintiff's Exhibit 17 R. p. 667). The same is true for Tract "D" because at the time of conveyance of Tract "D" to Appellant's predecessor in title (Ossie Martin) Respondent's predecessor in title reserved the easement for the lands of Respondent. (Plaintiff's Exhibit 29, R. p. 706 and Exhibit 17, R. p. 667); see also Testimony of Williams, p. 60, lines 20-24 (R. p. 163). The language in the deeds is clear that Appellant's title is subject to an express easement over its property to the property of Respondent. "One claiming title by deed [here Appellant claims title by deed] has no greater title than the original grantor in the chain of title upon which he relies." *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 313, 433 S.E.2d 875, 880 (Ct.App. 1992). Appellant received her title subject to the easement. Appellant cannot now

argue that she has greater title (i.e. title without the easement) than she actually received (title subject to the easement). The express easement is appurtenant to the property of Respondent.

Moreover, Respondent also entered into evidence aerial photographs between 1943 and 2013 showing the disputed road as the only west to east road through the lands of the defendant to the lands of the Plaintiff. (Plaintiff's Exhibits 42-46 R. p. 738). Each of the witnesses offered by the Respondent testified that they used the disputed road to access Respondent's property. Therefore, given the language of the deeds and all of the surrounding circumstances, the trial court correctly held that Respondent has a twenty (20) foot express easement over the property of Appellant.

The trial court also correctly rejected the defenses to Respondent's claim of an express easement offered by Appellant related to the abandonment, statute of limitations and adverse possession of the easement.

First, "termination of an easement by abandonment is a factual question in an action at law." *Judy v. Kennedy*, 398 S.C. 471, 728 S.E.2d 484 (Ct.App. 2012). "An easement may be lost by abandonment and in determining such a question the intention of the owner to abandon is the primary inquiry." *Id.* Absent an express abandonment, an abandonment may be shown "where there appears some clear and unmistakable affirmative act or series of acts clearly indicating, either a present intent to relinquish the easement, or purpose inconsistent with its further existence." *Id.* "The burden of proof is upon the claiming party to show the abandonment by clear and unequivocable evidence." *Id.* The "burden is a high one that cannot be satisfied by mere nonuse." *Id.* In the present case, there is no evidence in the record of any intent of Respondent nor any of its predecessors in title to abandon the easement. In fact, the evidence is quite to the contrary in

that the Respondent and its predecessors in title continually used the easement to access it's property. As such, the trial court correctly rejected Appellant's argument of abandonment.

Second, the trial court correctly rejected Appellant's statute of limitations argument. Appellant asserts that the forty-year statute of limitations found at S.C. Code Ann. § 15-3-380 bars the Respondent's claim for an express easement. S.C. Code Ann. § 15-3-380 requires an action to be commenced within forty years from when the party claiming an interest in property (in this case the easement) "was actually in possession of the same." S.C. Code Ann. § 15-3-380. The evidence is replete that Plaintiff and its predecessors in title were in possession of and using the easement well within forty (40) years of the filing of this action. (Guy Testimony, (R. p. 259-, line 7-p. 260, line 12); Cecil Brazell Testimony, (R. p. 192, line 16-p. 195, line 4); Dargan Testimony, (R. p. 309, line 3-p. 312, line 24); LaFaye Testimony, (R. p. 322 Line 12-p. 329, line 11); Baker Testimony, (R. p. 336, line 14-p. 340, line 23); Podell Testimony, (R. p. 425, line 16-p. 426, line 17.)). As such, S.C. Code Ann. § 15-3-380 has no application to this case.

Appellant next asserts that S.C. Code Ann. § 15-3-340 bars Respondent's claim for an easement because the easement was obstructed for more than ten (10) years prior to the filing of this action. This argument is unfounded as well. As cited above, Respondent presented evidence that the so-called obstruction (i.e. the gate) did not stop it or its predecessors in title from using the easement in the usual and customary way they always used the easement. Therefore, neither Respondent nor its predecessors in title were "seized' of the possession of their easement for more than ten years prior to the filing of the action. Moreover, the existence of a gate upon an easement is permitted in South Carolina and does not give rise to a statute of limitations defense related to an express easement. *See Judy*, 728 S.E.2d at 486-487.

The final statute of limitations argument submitted by Appellant relies on S.C. Code Ann. § 15-3-360. Quite simply, this section does not apply to express easements or prescriptive easements. It is axiomatic that one would not commence an action to enforce an express grant. Additionally, this section has never been applied to a prescriptive easement, and it cannot be applied to a prescriptive easement because the dominant estate holder is forced to establish continuous entries over twenty (20) years. The dominant estate holder could never establish the required twenty (20) years if it was statutorily mandated to file an action within one (1) year of entry.

Finally, Appellant cites no authority that the statutes of limitations asserted above apply to a publicly dedicated road. The interest in a publicly dedicated road belongs to the public and cannot be "waived" through a statute of limitations or otherwise by a single individual or entity.

III. The trial court correctly ruled that Respondent established a prescriptive easement over the property of Appellant.

In order to establish a prescriptive easement, the claimant must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years. *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 797 S.E.2d 387 (2016). The establishment of a prescriptive easement must be shown by clear and convincing evidence. *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015).

The trial court correctly held that Respondent established a prescriptive easement based upon evidence of adverse, continued, and uninterrupted use for the full 20 years and that the use was not permissive in nature. (C. Campbell (R. pp. 904-908) James Guy (R. pp. 259-263), Cecil Brazell (R. pp. 192-195), Gordon Baker (R. pp. 338-340), William Cate (R. pp.347-348), and James Podell (R. pp. 429-437)).

Appellant argues that the case of *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005) prevents, on the facts found by the trial court, the establishment of a prescriptive easement in this case. Respectfully, Appellant is incorrect. First, "in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant." *Jones v. Daley*, 363 S.C. 310, 609 S.E.2d 597 (Ct.App. 2005) citing 25 *Am.Jur.2d Easements and Licenses* § 68 (1996) ("[The element of continued use] does not require the use thereof every day for the statutory period or even on a weekly or monthly basis; but simply the exercise of the right more or less frequently according to the nature of the use and the needs of the claimant."). The needs of the claimant in the present case have been since at least the 1980s for the purposes of recreation, hunting leases and timber operations which do not require or necessitate utilizing the easement every day or even every month. Appellant, however, argues that *Pittman v. Lowther* stands for the proposition that the erection of a gate constitutes an "interruption" sufficient to prevent the establishment of a prescriptive easement. The facts of *Pittman* actually show that there was indeed a discontinuance of use prior to the running of the full twenty years as a result of the erection of an obstruction. 610 S.E.2d 479 ("In 1992, [Claimant] stopped using the road for a period of four or five months while a mutual friend attempted to mediate the dispute."). The actual holding in *Pittman* is that "actions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, such a erecting physical barriers, **which cause a discontinuance of the dominant land owner's use of the land**, no matter how brief." *Id.* (emphasis supplied). In the present case there is no evidence of any discontinuance by Respondent or its predecessors in title, briefly or otherwise. In fact, the testimony from C. Campbell (R. pp. 904-905, James Guy (R. pp. 259-263), Cecil Brazell (R. pp. 192-195), Gordon Baker (R. pp.338-340), William Cate (R. pp.347-348), and James Podell (R. pp. 429-437) establish that the use of

the easement continued on in the same manner from the 1940's into at least 2009.[3] Appellant herself testified use of the easement continued, notwithstanding the gate, into 2011-2012. (R. p. 563). The use of the easement, consistent with the uses to which the dominant estate was put, was not discontinued for any period of time. As such, the trial court was correct in holding that Respondent proved by clear and convincing evidence that continued and uninterrupted use and enjoyment of the easement occurred for a period in excess of twenty (20) years.

Appellant goes on to argue that the use of the easement by Respondent and its predecessors in title was permissive in nature. The trial court, however, correctly held, consistent with the testimony of each of the witnesses, that neither Respondent nor its predecessors in title asked for or obtained permission from the servient estate owner. Appellant attempts to liken the presence of the gate in this case to the facts of *Bundy v. Shirley*, supra, in making the argument of permissive use. The facts of *Bundy* are starkly different from the facts of the present case. In *Bundy*, the party claiming the prescriptive easement stipulated that he received permission to erect a gate on the property of Bundy. The trial court properly distinguished that fact from the facts of the present case where no one testified, much less stipulated, that they sought permission from E.F. Martin, Sr., Jessie Dunn Martin, E.F. Martin, Jr. or the Appellant. The stipulation regarding permission in *Bundy* was at the heart of the Supreme Court's holding. Indeed, the claimant in *Bundy* was given a key to a locked cable by Bundy. The Supreme Court also found that this was evidence of permissive use. In the present case, there is no such key that was given to Respondent or its predecessors in title by any owner or lessee of Appellant's property. As such, *Bundy* is distinguishable from the present case and the trial court correctly held that Respondent and its

[3] Appellant argues that there is no testimony of use of Shady Grove Road between 1994 and 1999. However, Mr. Guy testified that he used Shady Grove Road to access the Lloyd property until 1999—when the property was sold to Respondent's predecessor in title. (Trial Transcript, p. 157, R. p.).

predecessors in title used the easement without regard to the rights of the Appellant and her predecessors in title.

Appellant also places much emphasis on the "lock cleanings" it alleges occurred on a gate. First, notwithstanding the claims of Appellant, the gate did not prevent the use of the easement by Respondent or its predecessors in title. In fact, the overwhelming testimony is to the contrary. The trial court correctly found that the use of the prescriptive easement was not done with permission regardless of "lock cleanings" because the use was open, notorious, continuous, and uninterrupted. As such, it is presumed to have been adverse. *Kelley*, supra.

As to the Appellant's defenses of abandonment, statute of limitations, and adverse possession, Respondent incorporates that portion of this brief above relating to such defenses.

IV. The trial court correctly ruled that Respondent established that Shady Grove Road was dedicated to the public.

"No particular formality is necessary to effect a common law dedication." *Boyd v. Hyatt*, 294 S.C. 360, 364, 364 S.E.2d 478, 480 (Ct.App.1988). "An intention to dedicate may be implied from the circumstances." *Id.* "Any act or declaration on the part of the dedicator which fully demonstrates his intention to appropriate land to public use, or from which a reasonable inference of his intent to dedicate may be drawn, is sufficient." *Id.* "However, absent an express grant, one who asserts a dedication must demonstrate conduct on the part of the landowner clearly, convincingly and unequivocally indicating the owner's intention to create a right in the public to use the property in question adversely to the owner." *Id.*

"South Carolina law recognizes two types of implied dedication-one where the question of implied dedication arises from the sale of land with reference to maps or plats; the other when the dedication arises ... from an abandonment to or acquiescence in public use." *Town of Kingstree v. Chapman*, 405 S.C. 282, 747 S.E.2d 494 (S.C. App., 2013). "A dedication need not be made by

deed or other writing but may be effectually made by acts or declarations." *Id.* "Intent to dedicate may also be implied from long public use of the land to which the owner acquiesces." *Id.* "As with intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property." *Id.* "The use, repair, and working of the streets by public authorities is a mode of acceptance." *Id.*

As to the manifest intent of Appellant and her predecessors in title to dedicate the disputed road for public use, Respondent produced testimony that the disputed road was open to the public and used by members of the public having no ownership interest in the Respondent's property or the Appellant's property from 1944 until 1963. Witnesses A. Campbell (R. pp. 230-231), Kirkland (R. pp. 292-294), and Higgins (R. pp. 277-278) testified that the road was maintained by the public authorities and scraped during this time period. Witness LaFaye testified that the County maintained the road (R. p. 324). Respondent has satisfied both elements of an implied public dedication, offer and acceptance, by this evidence. Moreover, Respondent introduced evidence that the road has been public since the 1939 South Carolina Highway Map depicted it as a public road.

Appellant now argues, for the first time on appeal, that there cannot be a prescriptive easement and a public dedication of the same twenty-foot (20) easement because one cannot adversely possess public property. While the premise that one cannot adversely possess public property is correct, it does not apply here. The prescriptive easement exists as a dominant estate over the Appellant's servient estate—independent of the public easement. Said another way, both the public easement and the prescriptive easement exist as dominant over the Appellant's servient

estate without regard to the existence of the other. As such, the finding by the trial court of a prescriptive easement and a public dedication is not inconsistent.

There is no evidence of any abandonment of the public road pursuant to S.C. Code Ann. § 57-9-10 or otherwise.

Given the foregoing, there is clear and convincing evidence to support the finding of the existence of an implied public dedication of the disputed road.

V. The Court of Appeals should affirm the final order of the trial court based upon any evidence appearing in the record pursuant to Rule 220(c), SCACR.

There is ample evidence in the record to support the findings in the final order where the trial court sat as the finder of fact. This Court should affirm the trial court based upon any evidence in the record pursuant to Rule 220(c), SCACR.

CONCLUSION

This case is incredibly factual. The trial court sat for four days and listened to the testimony of witness after witness who had used the road over a period of seventy years. The trial court found that this evidence was clear and convincing. The trial court considered a map created by the South Carolina Highway Department showing the road as a public road. The trial court found that this evidence was clear and convincing. The trial court read and considered deeds containing easement language throughout the chains of title of the dominant and servient estates. The trial court found an easement by express grant. The findings of fact and conclusions of law made by the trial court are supported by the record. Indeed, one may be hard pressed to envision what possible additional facts Respondent would have been capable of submitting. The order of the trial court should be affirmed.

Respectfully Submitted,

BAXLEY PRATT & WELLS, P.A.

John Wells, Esq.
3 The Commons
Lugoff, SC 29078
Telephone: (803)438-4200
JWells@baxleywell.com

BUNDY MCDONALD, LLC

M. Brent McDonald, SC Bar # 78057
1516 Old Trolley Road, 2nd Floor
Summerville, SC 29485
Telephone: 888-552-1559
brent@bundymcdonald.com

Attorneys for Respondent

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable Joseph M. Strickland, Master-in-Equity
Trial Court Case No.: 2014-CP-40-01805

Appellate Case No.: 2017-001795

Raglins Creek Farms, LLC.....Respondent,

vs.

Nancy Dunn Martin.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

John W. Wells, Esquire
S.C. Bar No.: 6019
Baxley, Pratt & Wells, P.A
P.O. Box 10
Lugoff, SC 29078
jwells@baxleywells.com

Lugoff, SC
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