THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Joseph M. Strickland, Master-in-Equity

Ct. App. Op. No. 2013-UP-062
Appellate Case No.: 2023-000772

Raglins Creek Farms, LLC,……...Petitioner,

v.

Nancy Dunn Martin, ……..Respondent.

RESPONDENT'S RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Joey R. Floyd
Wesley D. Peel
Chelsea J. Clark
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693
Attorneys for Respondent

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INTRODUCTION

Raglins Creek Farms, LLC ("Petitioner"), successor-in-interest to Country Properties, LLC, seeks a writ of certiorari to the Court of Appeals for a correctly-decided unpublished easement opinion where no special and important reasons exist to merit this Court's attention. This is a case both personal and important to Nancy Martin ("Respondent" or "Martin"), as it concerns the encumbrance of land that has been in her family for generations. But while the opinion in this case, as decided by the Court of Appeals, will have a substantial impact on Respondent, it will have no impact on the law. The Court of Appeal's non-precedential decision simply applies existing law to the unique facts created by the particular geography and history of the parcels of land herein implicated. Because the Court of Appeals correctly decided this appeal, because Petitioner has found no valid error in the Court of Appeals' decision, and because there is no matter of particular public import presented in this case, Respondent requests that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case was filed in 2014 by Country Properties, LLC against Nancy Dunn Martin.[1] (R. p. 48.) Petitioner sought a court order forcing Respondent to allow it to traverse through the center of her land on three theories. These theories were easement by grant, the first cause of action; easement by prescription, the second cause of action; and public road, the fifth cause of action. (R. pp. 54–58.) Martin moved for summary judgment on September 14, 2015 (R. p. 994), but this motion was denied by order dated November 3, 2015 (R. pp. 2–3).[2] The case went to a bench trial

[1] Country Properties, LLC remained the plaintiff in this matter until 2022, when it sold its property to Raglins Creek Farms, LLC. The new owner was substituted as the respondent by the Court of Appeals by written order on March 31, 2022. Both companies are called "Petitioner" herein.

[2] Respondent continues to assert that this order was in error because applicable statutes of limitation bar Petitioner's claims. However, the Court of Appeals did not address the issue.

before the Honorable Joseph M. Strickland on March 21–24, 2016. (R. p. 104.) Following the trial, proposed orders were submitted by the parties. Petitioner submitted four different proposed orders—one for each easement theory and one omnibus order including them all. (R. pp. 1039–128.) Respondent submitted one order. (R. pp. 1129–59.) On September 27, 2016, the trial court adopted and signed the omnibus order, which found an easement by grant, an easement by prescription, and a public road. (R. pp. 4–36.) Martin filed a motion to alter or amend, which was denied. (R. pp. 1160–216 (motion and memo); 37–38 (order).) Respondent thereafter filed her appeal.[3] Following briefing and oral arguments, the Court of Appeals reversed the trial court in an unpublished opinion filed February 15, 2023. (Unpublished Opinion No. 2023-UP-062 (hereinafter "Op.").) The Court of Appeals held that the trial court had erred in ruling in favor of Petitioner on any easement theory. Because the Court of Appeals reversed the trial court on the merits of all three legal theories, the court declined to address Respondent's statute of limitations arguments. (*See* Op. at p. 7.) Petitioner filed a petition for rehearing on March 2, 2023. Respondent filed a return on March 17, 2023. The Court of Appeals denied rehearing on April 20, 2023. This matter is now before the Court upon Petitioner's request for a writ of certiorari to the Court of Appeals. Respondent opposes the petition.

STANDARD OF REVIEW

A writ of certiorari is not guaranteed to any litigant, but rather is granted in the sound discretion of the Court only where there exist special and important reasons. Rule 242(b), SCACR. Such reasons may exist where (1) there are novel questions of law, (2) where there was dissent in

[3] During the pendency of this first and current appeal, Martin moved to present new evidence to the trial court. The trial court granted a new trial. (R. pp. 39–43.) Petitioner appealed that new trial order and it was reversed by the Court of Appeals. *See Country Properties, LLC v. Nancy Dunn Martin*, Unpublished Op. No. 2021-UP-292 (S.C. Ct. App. filed Aug. 4, 2023) (hereinafter, "2021 Op."). Following the conclusion of that appeal, this appeal, which had been stayed, resumed.

the lower court's opinion, (3) where there is conflict created with prior precedent, (4) where there are substantial constitutional issues, or (5) where there is conflict created with federal case law. Rule 242(b)(1)–(5), SCACR. Respondent would submit that none of these considerations apply in this case.

STATEMENT OF THE FACTS

The story of the land at issue in this case is a long one.[4] The land in question lies along the Richland and Kershaw County line off of Highway 601. (R. pp. 752.) The parcels at issue straddle Raglins Creek near the Wateree River. In the late 1800s, the land now owned by Respondent was owned by Mary Peay Black. (R. p. 669.) When she died circa 1881, a suit was filed to partition her lands, including "River Place," which encompassed Respondent's property. (*Id.*) As a result of the suit, each of her six daughters received two parcels each—one tract designated by number and one tract designated by letter each. (R. pp. 669–70 (hereinafter, the "Partition Tracts").) A plat was drawn up by a surveyor to reflect the distribution. (R. p. 683.) The result was as follows.

Mattie LeCompte Black (DesPortes)	Tracts E and No. 1
Leila S. Black (Miller)	Tracts D and No. 2
Mary P. Black (Nance)	Tracts C and No. 3
Ella J. Black (Miller)	Tracts F and No. 4
Eunice L. Black (Palmer)	Tracts A and No. 6
Virginia J. Black (McSwain)	Tracts B and No. 5

The lettered tracts are roughly rectangular plots situated below Raglins Creek, while the numbered tracts are thin horizontal parcels off to the right-hand side, closer to the river and to the right of a present-day power line path. (*Compare* Tracts E and 1 from R. p. 683 with right-most blue parcel and bottom-most orange property lines on R. p. 752, noting straight vertical line forming left-most boundary of the numbered tracts, with straight vertical line of utility easement.)

[4] This statement of the facts is curtailed somewhat for the sake of brevity; a more fulsome recounting of the facts is contained in Martin's Appellant's Brief.

The Partition Tracts implicated in Respondent's chain of title are C, D, and E—although each arrived in Martin's possession through a different route. Petitioner now owns some of the land that would have been part of the numbered Partition Tracts, although the bulk of Petitioner's property—primarily to the left of the power line easement—consists of what used to be known as the English Place. (*See* R. p. 661 & 762, both notating name.) Importantly, only lettered Partition Tracts are in Respondent's chains of title for the parcels she presently owns.

Partition Tract C. This lot was purchased by Respondent's great-grandfather, Cordero Martin, circa 1892. (*See* R. p. 685, ¶ 8 (Petitioner did not enter the deed into evidence).) Cordero purchased the lot from Mary Black Nance. In 1911, Cordero transferred Partition Tract C to his wife, Respondent's great-grandmother, who went by "Ossie" Martin. (*Id.* at ¶ 7 (Petitioner did not enter the deed into evidence).)

Partition Tract D. In addition to the tract she received from her husband, Ossie purchased Partition Tract D from J.H. Miller in 1918. (R. p. 706.) Dr. Miller had first married Leila Black—presumably inheriting Tracts D and 2 from her after her untimely death—then married her sister, Ella Black, who owned Tracts F and 4. The deed transferring Partition Tract D from Dr. Miller to Ossie Martin forms a portion of Petitioner's argument for an easement by grant. A full transcript of the legal description in this deed is contained in Appellant's Final Brief at page 6. There are two primary points to note about this deed. First, it is not in the chains of title for Partition Tract C (referenced as lands of C.M. Martin) or Tract E (referenced as lands of Mattie C. Desportes). Second, where the deed describes a purported easement, it says "passing by the lands of C.M. Martin," not "through the lands." (*Id.*) The road Petitioner wants access to goes straight through the middle of the lands of C.M. Martin.

Ossie's Land. From 1918 forwards, Ossie owned both Tract C and Tract D. In 1930, a plat was prepared that further subdivided Tracts C and D into three parcels each—presumably with

an eye to distributing the land to Ossie's heirs. (*See* R. p. 762.) However, this was during the period of the Great Depression and the land was taken by the county tax collector. The Martin family was able to get the land back in 1936, when tax collector Ellen I. Butler deeded the land to Ossie's daughter, Florence Martin Van Horten. (R. p. 705.) When the land was regained, the original, separate legal descriptions for Partition Tracts C and D were used in the deed, rather than any reference to the 1930 subdivision plat. The first paragraph in the deed contains the legal description of Tract C, purchased by Cordero, and the second paragraph contains the legal description of Tract D, purchased by Ossie. (*Id.*) The 1918 deed language is only repeated in the description for Tract D. (*Id.*)

Florence promptly deeded the land to her brother and Respondent's grandfather, Edward F. Martin, Sr., in 1939, again using the two separate legal descriptions for Tracts C and D. (R. p. 704.) This deed, in 1939, was the last time any mention of an easement related to Tract D was ever mentioned. Edward Sr. held the land until his death in 1967. (R. p. 684, ¶ 4.) At that time, he left his wife, Jessie Dunn Martin, a life estate and the remainder to his three children, Jessie Martin Pratt, Edward Frank Martin, Jr., and Naomi Martin Jackson. (*Id.*) Jessie Dunn Martin died in 1985, at which point the land devolved upon her three children, including Edward Jr., Respondent's father. (R. p. 702.)

Parcels Three through Six. A few years later, in 1990, Edward Jr.'s two sisters, Jessie and Naomi, deeded him their rights to portions of the property. (*Id.*) At this point, the chain of title began to employ the numerical subdivision parcel numbers from the 1930 plat, which are still currently in use today. The deed states that the interests transferred are in Parcels 3, 4, 5, and 6. (*Id.*) These subdivision sections would be equivalent to the right-most third of Tract C and the whole of Tract D. By the time Edward Jr. deeded the land to a trust in 2004, the County was identifying the portion of Tract C that is now known as Parcel 3 by TMS Number R38000-03-15.

(*See* 699.) Meanwhile, Tract D, now known as Parcels 4 through 6, is identified by TMS Number R38000-03-07. (*Id.*) Following his death in 2006, Respondent received the land from her father's trust in 2007.[5] (R. pp. 694–98, 686–91.)

Partition Tract E. This Tract was originally inherited by Mattie LeCompte (Black) DesPortes. Partition Tract E forms a more triangular lot to the right of Tracts C and D. After she passed away, Mattie's heirs sold Tract E to Cordero and Ossie's son, Fletcher Randolph Martin. (R. p. 724.) Fletcher was the brother of Respondent's grandfather, Edward Sr., making Fletcher Respondent's great-uncle. When Fletcher died, his heirs sold the property to Joe Earl Taylor, C. Lem Harper, and John V. Green in in 1971. (R. p. 716.) They in turn sold the property to Raymond R. Tucker in 1973. (R. pp. 720–21.) Mr. Tucker left the property to Tucker Enterprises, Inc., which sold the property to Rufus Duncan Lewis, Jr. in 1976. (R. pp. 707, ¶ 5; 713–14.) Subsequently, the property remained in the Lewis family until 2012, leading to the term "Lewis Tract" for Partition Tract E in the documents for this case. (R. p. 707.) In 2012, Respondent repurchased the property and brought it back into the Martin family. (R. p. 709.) Nowhere in the entire chain of title for Tract E—which stretches back more than a century—is there any easement by grant language recorded anywhere. In an attempt to resolve this problem, Petitioner turns to its own chain of title.

[5] Respondent's father left her more than just Parcels 3 through 6. Respondent also owns portions of Parcels 1 and 2, identified by TMS Numbers R38000-03-06 and R38000-03-48. (R. pp. 697–98.) Petitioner failed to enter any evidence into the record at trial about a possible easement through this section of land (portions of the left-most two-thirds of Tract C). (*See* R. p. 752, showing two uneven half rectangles to the left of Parcel 3, but within the blue border of Respondent's land.) Notably, these parcels were obtained by Respondent's father from cousins and their entire chain of title before 2004 is not in the record, much less any document reflecting an easement. Without access through this antecedent portion of Respondent's land, an easement by grant through the other portions is of no consequence—Petitioner would need a helicopter to reach the beginning of the easement without trespassing.

Petitioner's Chain of Title. Petitioner owns roughly one thousand acres above Respondent's property. The chain of title for this property is complex, given that the land has been assembled from a quilt of parcels that do not have the same origins. The land has also changed hands frequently, including during the pendency of this appeal. Primarily, Petitioner's land derives from the "English Place" that was never owned by the Black family like "River Place." However, some of Petitioner's property derives from the numbered Partition Tracts. A full description of Petitioner's chain of title is included in Appellant's Final Brief at pages 10 through 13, as well as being summarized in the Record at pages 630 and 631, and does not bear recapitulation here. Petitioner asserts that easement language from the chain of title for Partition Tract 1 should apply to Partition Tract E, despite the fact that the language is not in the chain of title for Tract E. Indeed, Tracts C, D, and E have never been conveyed in the same instrument as any of the numbered partition tracts since the original court order subdividing the property in the late 1800s. Petitioner's argument is thus predicated on the idea that because Mattie DesPortes owned Tract E and owned Tract 1, that the purchaser of Tract E should be on notice of a deed from the Tract 1 chain from roughly a century ago. In 1926, Lura Mae Kinsland purchased Partition Tracts 1, 2, and 4, which were owned by Mattie, her sister Ella, and Ella's husband and former brother-in-law, Dr. Miller. (R. p. 667 (illegible deed), p. 668 (enlargement) (hereinafter "Kinsland Deed").) The Kinsland Deed contains some easement language, albeit not language that clearly points to the road on Respondent's land. However, the deed is not in any chain of title for any of Respondent's property.

QUESTIONS PRESENTED

Petitioner has set forth three questions in its Petition for Writ of Certiorari.[6] Rephrased slightly, the questions are as follows.

[6] Following the Court of Appeal's opinion, Petitioner abandoned any argument that there is a public road traversing Respondent's property for the sole purpose of ending at Petitioner's property

1. **Whether the Court of Appeals properly applied the any evidence standard when holding there is no easement by grant.**

2. **Whether the Court of Appeals properly applied the any evidence standard when holding there is no easement by prescription.**

Respondent argues below that the answer to each question is yes—the record of this case does not contain facts sufficient to meet the elements of an easement by grant or prescription and the Court of Appeals properly determined that the lower court should be reversed.

RETURN ARGUMENT

Petitioner argues that the Court of Appeals failed to apply the any evidence standard of review. That argument is inaccurate—the Court of Appeals found that the lower court's findings were unsupportable even when the any evidence standard was applied. (*See* Op. p. 2 ("Even under our any evidence standard of review . . .").) The key point that Petitioner neglects about the any evidence standard is that, while certainly deferential to the lower court, it still requires some evidence for each element that must be proven; the standard is not global, but rather the lower court must have support of some kind for each finding required to establish a favorable ruling. For instance, Petitioner cites to a case for the proposition that, "The appellate court's task is not to weigh evidence, but to decide if *any* evidence exists to support the trial court's ruling." (Pet. for Cert. p. 4). In point of fact, the cited case states, "Accordingly, this Court's task in reviewing a damages award is not to weigh the evidence, but to decide if any evidence exists to support the damages award." *McNaughton v. Charleston Charter Sch. for Math & Sci., Inc.*, 411 S.C. 249, 262, 768 S.E.2d 389, 396 (2015) (citing *Santoro v. Schulthess*, 384 S.C. 250, 267, 681 S.E.2d 897, 906 (Ct. App. 2009)). The distinction lies in the fact that the Court was not seeking any evidence

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line. This may stem from the fact that a prescriptive easement cannot be applied to public land. *See Davis v. Monteith*, 289 S.C. 176, 179, 345 S.E.2d 724, 726 (1986) (citations omitted). This makes the lower court's order inherently contradictory where it found both a public road and a prescriptive easement.

to support a global result, but rather any evidence to support one element of a cause of action: damages. Here, the Court of Appeals was to determine if there was any evidence to establish each element of an easement by grant, an easement by prescription, or a public road. The Court of Appeals properly applied that standard, finding that there was not "any evidence" such that the lower court's order could be affirmed. That was the proper result, achieved by applying the proper standard.

I. Petitioner failed to establish an express grant for each portion of land it wishes to cross.

Petitioner argues that there is evidence in the record to support the lower court's findings regarding an express easement, but Petitioner has not stated any specific findings that it believes were overlooked or improperly ignored by the Court of Appeals. In order for Petitioner to establish any evidence supporting a holding of easement by grant, each requirement of the law must be met. The law states that "[a]n easement may be established by express grant or by express reservation in a deed or other instrument." 12 S.C. Jur. *Easements* § 6 (citing *Sandy Island Corp. v. Ragsdale*, 246 S. C. 414, 143 S. E. 2d 803 (1965)). In this case, Petitioner can only point to one piece of language tending to suggest an easement and that language is only in the chain of title for Tract D—a third of property that Petitioner wishes to cross. Thus, the Court of Appeals correctly found that the lower court did not meet the any evidence standard. The law is indeed simple to apply—there are three tracts that Petitioner wishes to cross, Tract C, Tract D, and Tract E. These tracts were split apart in the late 1880s and each have a separate chain of title. An easement by grant must be expressly stated. Only one chain of title contains the word "easement"—Tract D, which is in the middle.[7] Ergo, Petitioner's claim for an express easement across three Tracts fails

[7] Somewhat ironically, Petitioner's professional title abstractor testified unequivocally that there is no reservation of an express easement in the chain of Tract D. (R. p. 180, ll. 14–16 ("Q: So, in tract D there is no reservation of any type of right-of-way? A: No, sir.").) The fact that this

as a matter of law. There is not a single shred of evidence related to Tracts C or E that could meet the any evidence standard.

Petitioner tries to circumvent these straightforward facts with two workaround arguments. The first argument assumes that there is a valid express easement over Tract D contained in the deed from Dr. Miller to Ossie Martin in 1918. This is not conceded by Respondent, but is assumed here *arguendo*. The language in the 1918 deed was included verbatim in two further deeds before being extinguished entirely before World War II. (R. pp. 705 (1936 deed), 704 (1939 deed).) While the language itself by no means lends support to the idea that it grants access through the middle of Respondent's land when it says "by" the contiguous tract, the word easement is indeed in these early deeds for Tract D. Petitioner now argues, without ever having done so in Respondent's Final Brief,[8] that because Ossie owned both Tract C from her husband and Tract D from Dr. Miller at the same time that her "common ownership" somehow extended a purported easement for Tract D to also cover Tract C. This is preposterous both factually and legally.

Legally speaking, the undersigned is unaware of and cannot locate any South Carolina law that that creates a "common ownership" doctrine whereby an express easement on one purported servient estate would expand to cover a second new purported servient estate because the parcels are owned by the same person. The issue of common ownership or unity of title does not arise in the context of easements by express grant and the reason for this is exceedingly obvious—there either is or is not an express grant. An express grant does not get implied onto other properties. The one situation where common ownership may matter is in the context of an easement by necessity. *See Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 418–19, 633 S.E.2d 136, 140–41

testimony is not conclusive of the entire issue of an express easement is a sign that the Court of Appeals did in fact apply the any evidence standard.

[8] Petitioner's arguments to the Court of Appeals on the easement by grant theory are contained at pages 12 to 16 of its Final Respondent's Brief.

(2006) (citing *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002)) ("The party asserting the right of an easement by necessity must demonstrate: (1) unity of title, (2) severance of title, and (3) necessity."). During the history of this case, including during a prior appeal, Petitioner has categorically denied seeking an easement by necessity. Indeed, the Court of Appeals held in its earlier unpublished opinion in this case that "the record conspicuously discloses that all parties agreed at various points in this case that easement by necessity was not an issue." (2021 Op. p. 3.) This substantive holding, not appealed by Petitioner, is the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (citing *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010)) ("An unappealed ruling is the law of the case and requires affirmance.").

It is disingenuous of Petitioner to seek to inject a concept from the law of easement by necessity at this late stage of this case. This is particularly so where Petitioner has not cited a single case under the argument heading to support the contention that somehow the purported easement over Tract D could mutate and expand to Tract C. On this basis alone, the argument should be deemed abandoned. *See State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (citations omitted) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Indeed, Petitioner ignores one other key aspect of the concept of common ownership—it anticipates that one of the two estates at issue be the dominant estate-holder. *See Boyd*, at 421, 633 S.E.2d at 141 (string citation omitted) ("For an easement implied by prior use, necessity means "there could be no other reasonable mode of enjoying the dominant tenement without this easement . . . ."). Here, Petitioner is seeking to clone the purported easement by grant from one servient estate to the other one where the purported dominant estate is not even contiguously connected to the tracts in question. This would be unsupportable even if "common ownership" somehow were implicated in the law of

express easement. Indeed, this "common ownership" argument for extension of an easement over a new estate solely because two pieces of property are described in the same document violates the common law that an easement cannot be granted to a third party, or "stranger to the deed." *See Windham v. Riddle*, 381 S.C. 192, 202–03 n.1, 672 S.E.2d 578, 583–84 n.1 (2009) (declining to overrule existing common law, including doctrine of stranger to the deed). If Petitioner's theory were to be believed, then by purchasing her own mother's land back from the tax collector, Florence Van Horten granted an easement to unknown persons who were not party to the transaction.

Petitioner argues that because two different tracts both have their legal description included in the same deed, the purported easement across one gets carbon copied to the other. If such a principle were true, properties both described in the same legal instrument, regardless of their location, similarity, or characteristics could somehow transmute easements or covenants. This is patently ridiculous. To afford the type of notice sufficient for an express easement in a recorded instrument, "the language must be so intelligible and significant that it would naturally raise a well-grounded suspicion in the mind of a reasonably prudent person, or a person of ordinary diligence and understanding, sufficient to suggest an inquiry that would lead to a knowledge of the facts.'" *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71–72, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting *Fuller-Ahrens P'ship v. S.C. Dep't of Highways & Pub. Transp.*, 311 S.C. 177, 183, 427 S.E.2d 920, 924 (Ct. App. 1993)). Specifically, a "description of an easement in a recorded document is sufficient when it contains language that acts as a guide to the location of the easement on the land such that the easement is capable of being rendered to a certainty by reference to something extrinsic . . . ." *Id.* at 72, 558 S.E.2d at 909 (footnote with multiple citations omitted).

According to Petitioner, the following language, last recorded in 1939 in blurry typewriter print it takes extensive review to decipher, should have put Respondent or any person of ordinary diligence and understanding on notice that the owners of the land above Raglins Creek have the right to drive logging trailers directly through the middle of Tract C towards Tract D.

> All that tract or land in Center Township, School District #12-a, Richland County, South Carolina, containing one hundred twenty two (122) acres, more or less, bounded on the north by lands of English Estate; on the south by lands of Dr. Burney, known as Austin Black Estate; on the east by lands of J.L. Black Estate; and on the west by lands now or formerly of J.L. Black Estate, and being the identical premises heretofore conveyed to the grantor by Ellen I. Butler, Tax Collector, by deed dated September 9, 1936, and recorded February 3, 1937, in Deed Book ED at page 14.
>
> ALSO
>
> All of that piece, parcel or tract of land situate, lying and being near Raglins Creek in school district #12-A in Richland County and State of South Carolina, containing one hundred forty (140) acres, more or less, said being known as tract "D" upon original plat for petition of the lands of Mary G. Black, deceased, and others and being bounded as follows: on the north by lands of Burney; on the east by lands of Martin; on the south by lands of Miller and others; and on the west by lands Miller and others, with the exception of a permanent right of way of twenty (20) feet from the certain road passing by lands of C.M. Martin, and this said road runs to the said plat and the said right of way to be enforced from said road running through the said plantation back to the said lands of J.H. and Ella T. Miller and said right of way to be left open for plantation uses of the said J.H. and Ella T. Miller, their successors or assigns forever and to be binding forever upon said Ooosee M. Martin, her heirs and assigns for plantation uses only and for the protection of the said property for said J.H. and Ella T. Miller,
>
> And this being the identical property heretofore conveyed to the grantor by Ellen I. Butler, Tax Collector, by deed dated September 9, 1936, and recorded February 3, 1937, in Deed Book "ED" at page 14 of he Clerk of Court's Office, Richland County.

(R. p. 704.)

An examination of this dense language shows that the legal descriptions of Tract C and Tract D remain separate and distinct in the two deeds where they are both conveyed, in 1936 and 1939, respectively. (*See* R. pp. 705, 704.) It is unlikely that any reasonable person would even locate and read these deeds given their age, as the lower court expressly found in its order—"both easement deeds cited above were greater than sixty years old and therefore outside of the scope of

a sixty year title search, which is the standard of practice for title searches in South Carolina, although many real estate attorneys now use a forty year standard." (R. pp. 19–20, ¶ 39 (referring to the 1918 Tract D deed and the Lura Mae Kinsland deed in Petitioner's chain).) Nonetheless, even if reviewed, no reasonable reader of these deeds would believe the tracts to be combined such that an easement over one would become an easement over the other. After all, to this very day, Tract D has a separate TMS number from the fragmented pieces of Tract C. No reasonable person, viewing the chain of title in this case would be on notice of an easement over Tract C where none is ever described anywhere in any document. Further, the purported easement language for Tract D specifically bypasses Tract C where it says "passing by the lands of C.M. Martin," *i.e.*, Tract C. Under such circumstances, not only is there no notice of a supposed easement over Tract C, there is language contrary to the existence of an easement over Tract C contained in the deeds. The Court of Appeals found that, "There is quite literally no easement language in the chain of title for C." (Op. p. 4.) The Court of Appeals was absolutely correct. Where there is literally no easement language, the any evidence standard for an easement by express grant must necessarily be failed.

Petitioner next attempts to resolve the complete lack of easement language for Tract E by shoehorning in its chain of title. This is inconsonant with the law and common sense. The law is simple. "Property owners are charged with constructive notice of instruments recorded in their chain of title." *Binkley,* at 71, 558 S.E.2d at 909 (multiple citations omitted) (emphasis added). "The law imputes to a purchaser who proposes to acquire title to real estate notice of the recitals contained in any properly recorded instrument of writing which forms a link in a chain of title to the property proposed to be acquired. *Carolina Land Co. v. Bland*, 265 S.C. 98, 107, 217 S.E.2d 16, 20 (1975) (citing *Moyle v. Campbell*, 126 S.C. 180, 119 S.E. 186 (1923); *National Bank of Newberry v. Livingston*, 155 S.C. 264, 152 S.E. 410 (1930)) (emphasis added). Petitioner seeks to

charge Respondent with notice of language that is not anywhere in her chain of title, but rather in Petitioner's chain of title. No title search performed by any abstractor would include someone else's separate chain of title. No reasonably property purchaser would read someone else's deeds—this simply makes no sense and would impose an entirely irrational burden on real property purchases, their attorneys, and title insurance companies if it were to be the standard.

In its Petition for Rehearing at pages 4 and 5, Petitioner attempted to introduce for the first time the idea that a reasonable abstractor would have reviewed the Kinsland Deed in Petitioner's chain when abstracting the chain for Tract E. This argument is not repeated in the Petition for Writ of Certiorari, perhaps because neither of the trial witnesses Petitioner asked to abstract the chains of title in this case found the deed in Petitioner's chain it seeks to apply to Tract E. Ms. Williams, Respondent's title abstractor with decades of experience, testified about the document from which Respondent argues the easement came from, as part of "Plaintiff's Chain," as contrasted with "Defendant's Chain" or the "Lewis Chain." (*Compare* Pl. Ex. 1 at R. 630 *with* Pl. Ex. 20, at R. 684 *and* P. Ex. 30 at R. 707.) The Kinsland Deed is found at entry number 13 of Ms. Williams' notes on the Plaintiff's Chain. (R. pp. 630–31.) The deed is nowhere to be found in Ms. Williams' notes for the chain of title for the Lewis Tract, Tract E. (*See* R. pp. 707–08.) Ms. Williams testified for Respondents that she copied "all of the deeds in the chain of title leading from now back to the beginning of time when it was issued by a decree of the Fairfield County Court in a partition deed." (R. p. 123, l. 24–p. 124, l. 3.) Nonetheless, she did not find the deed Respondent relies on in her search of the Tract E chain. (*See* R. pp. 707–08.) Respondent's surveyor also testified. Mr. Mills was qualified as an expert in surveying land. (R. p. 373, ll8–13.) Upon questioning by the lower court during the trial, Mr. Mills stated, "We didn't find any recorded easement involving the entirety of the road." (R. p. 418, ll. 19–20.) Mr. Mills clarified that the lack of any recorded easement was why he was in court testifying about usage of the road

based on surveys or maps. (R. p. 417, ll. 13–18 ("But if they're unrecorded that's why we're here today . . . .").) That is there is no evidence in the record at all that any title abstractor would ever find the document in Petitioner's chain, nor does the lower court's final order contain any such finding which could even be affirmed. In this scenario, Petitioner has no evidence of constructive notice sufficient to comply with the law and thus, again, fails the any evidence standard.

The law provides that a property purchaser is assumed to have the knowledge to which due diligence would lead him, "but he is not held to have notice of matter which lies beyond the range of that inquiry and which that diligence might not disclose. *Spence v. Spence*, 368 S.C. 106, 120–21, 628 S.E.2d 869, 876 (2006) (quoting *Black v. Childs*, 14 S.C. 312, 321–22 (1880)) (emphasis added). Understanding the chains of title in this case is a literal case study on convoluted real property transactions. The chains date back to the late 1800s and acreage sometimes disappears without reason. Marriages and inheritances are not always explained or recorded. Some deeds are from Richland County and some are from Kershaw County. While attorneys who have dedicated years to this case now have a reasonable understanding of the geographic, familial, and transactional events that created the chains of title for the multiple different parcels in this case, it is sincerely inconceivable that a layperson purchasing property in this state would be required to do the level of "due diligence" indicated by Petitioner's Tract E argument. A purchaser would have to find a deed from 1926 in someone else's chain of title that vaguely references some form of right-of-way for carts and wagons, and somehow decide that deed indicated an easement over Tract E, which has a wholly separate chain of title. A holding suggesting that level of due diligence would set a standard genuinely impossible for any title abstractor, loan company, or real estate attorney in this state to meet. Further, it would be a risk no title insurance company and no legal malpractice insurance company would wish to insure. Petitioner's flailing attempt to find an

easement across Tract E is not supported by any evidence, is not supported by any law, and is not supported by common sense.

Taking the issues with Tract C and Tract E together, Petitioner must confront not one, but two wholly fatal flaws in its argument for an easement by grant. This is true, even giving Petitioner the benefit of the doubt as to the vague easement language supposedly applying to Tract D, even though it does not describe the road that exists and was recorded well outside any statute of limitations. The any evidence standard cannot rescue a lower court ruling predicated on literally no evidence. The Court of Appeals correctly ruled that there is no easement by grant.

II. The Record unequivocally lacks sufficient evidence to establish a prescriptive easement.

Petitioner argues that it has met the requirements of a prescriptive easement, presumably including, presumably, the requirement of "continued and uninterrupted use or enjoyment of the right for a period of twenty years." *See Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169–70 (2015) (citing *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005)). There is one obvious giveaway that this is not true: Petitioner filed this lawsuit because its access to the road was interrupted. The record is unequivocal on this point, but, moreover, the record lacks any evidence establishing the necessary twenty-year period. Indeed, even if use were established, the record is not "susceptible" to the conclusion that the use was adverse or under a claim of right. For all these reasons, the Court of Appeals was correct to find that Petitioner does not have a prescriptive easement.

To establish a prescriptive easement a plaintiff "must show: (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse or under claim of right." *Id.* Notably, prescriptive easements have historically been disfavored because they cause a forfeit of

the property owner's rights. For this reason, this Court has clarified that the elements of a prescriptive easement must be proven by clear and convincing evidence. *Id.* at 306, 772 S.E.2d at 170 ("Given 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."). A prescriptive easement is not implied by law but must be established by the conduct of the purported dominant estate holder and, presumably, not the conduct of members of the general public, friends, or neighbors. *See Kelley v. Snyder*, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012) (quoting *Boyd*, 369 S.C. at 419, 633 S.E.2d at 141 (2006)).

At this late stage of this case, Petitioner is now attempting to make a novel argument about the prescriptive period: that even if Petitioner (here, as Country Properties, LLC) cannot establish twenty years of prescriptive use dating back from 2014, that it can simply grab any random twenty years since 1881 and argue that the prescriptive use was established then—regardless of whether that use was continued until and during Petitioner's ownership. This argument was not made to the Court of Appeals. Even so, the law simply does not support this theory. The law does indeed allow a purported dominant estate holder to apply the adverse use of its predecessor in title. But it is clear that this "tacking" runs backwards from the present-day owner. A party "'may "tack" the period of use of prior owners in order to satisfy the 20–year requirement.'" *Kelley*, at 575, 722 S.E.2d at 819 (quoting *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997)). "'[T]he time of possession may be tacked not only by ancestors and heirs, but also between parties in privity in order to establish the 20–year period.'" *Id.* (quoting *Getsinger v. Midlands Orthopaedic Profit Sharing Plan*, 327 S.C. 424, 430, 489 S.E.2d 223, 226 (Ct. App. 1997)). "To satisfy the twenty-year prescriptive period, the **claimant can tack his use** to use by prior owners, provided the prior owners' use also satisfies the prescriptive easement elements." *Carolina Ctr.*

Bldg. Corp. v. Enmark Stations, Inc., 433 S.C. 144, 155, 857 S.E.2d 16, 22 (Ct. App. 2021) (citing *Bundy*, 412 S.C. at 313, 772 S.E.2d at 174; *Morrow*, at 527, 492 S.E.2d at 423) (emphasis added).

The law requires that Petitioner have adverse use and that the adverse use begin when this case was filed in 2014 and run backwards for twenty years to 1994. Petitioner cannot simply pick a floating twenty-year time period out of history where it has no connection to Petitioner's ownership and use and where adverse was not proven by any evidence for the interim period of time. Tacking connects one owner to the next in a chain—it is not a patchwork quilt of random years. The vast majority of the testimony cited by Petitioner is wholly irrelevant to the question of a prescriptive easement—the testimony was, at best, relevant to Petitioner's public road argument, which has been abandoned since the Court of Appeals issued its opinion.

Focusing solely on use, *arguendo*, without addressing its adversity (which is disputed), the record establishes the following evidence. The road may have been used by a forester named for an associated with corporate owners between 1999 and 2005. A brother of a principal of a former corporate owner used the road, potentially between 2005 and 2009. In 2009, Country Properties, LLC bought the land, and used the road up until access was interrupted by Respondent. There is no evidence in the record of any kind whatsoever that a predecessor-in-interest to Petitioner used Respondent's road between 1994 and 1999 when it was owned by the Trustees for R.W. Lloyd, Robert Sheheen and Henry Savage, adversely or otherwise. Moreover, Petitioner has pointed to none in its Petition. Indeed, the one witness specifically testified he did not use Respondent's road at all between 1969 and 2000. (R. p. 329, ll. 18–22.) For this reason, Petitioner wholly fails to meet the "twenty years" portion of element one of a prescriptive easement, even under an any evidence standard.

However, this is not the only fatal flaw in Petitioner's argument. Petitioner also cannot establish that the use was "uninterrupted." Under South Carolina law, "actions are sufficient to

interrupt the prescriptive period when the servient landowner engages in overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief." *Pittman*, at 52, 610 S.E.2d at 481. Mr. Podell, who owned Petitioner's property through an LLC at the time of trial, was the only witness who testified to adverse or hostile use of the road. Mr. Podell originally obtained permissive access to the gate. However, as part of the regular routine of Appellant and her predecessor in title, a "lock cleaning" was conducted to remove any locks that were added without permission for from which Appellant or her predecessor wished to withdraw access. (R. p. 484, l. 17–p. 485, l. 17; p. 486, ll. 4–16; p. 494, ll. 3–16; 895 (showing a sign posted in advance of lock cleaning in 2005).) After such a lock cleaning, Mr. Podell lost access to the road. (R. p. 449, ll. 14–16 ("Because I was able to use the gate and all of a sudden I wasn't.") (emphasis added).) This was a clear interruption in the prescriptive period. Then Mr. Podell engaged in hostile behavior by cutting the chain on the gate and adding his own lock. (R. p. 449, ll. 17–23.) However, Respondent again removed the lock. (R. p. 449, l. 24–p. 450, l. 2.) During this exchange, Respondent unequivocally interrupted any prescriptive period Petitioner could conceivably have had. Given Mr. Podell's own testimony, it would be an error of law not to find an interruption of the prescriptive period. Yet again, Petitioner's argument fails.

Finally, Petitioner argues that whatever use there was of the road was in fact adverse or under a claim of right as required by the third element of a claim for a prescriptive easement. The Court of Appeals correctly found, based on existing case law, that private country roads are often used by locals for recreation or related purposes and that mere use is in no way proof positive of hostile or adverse action.[9] The case law espousing that principle spans many decades in South

[9] Petitioner takes issue with the use of case law related to woodlands in the Court's order. (Pet. at p. 10.) Prior to the Petition for Rehearing, Petitioner did not take issue with the fact that, other

Carolina state law. *See, e.g.*, *Cleland v. Westvaco Corp.*, 314 S.C. 508, 511–12, 431 S.E.2d 264, 266–67 (Ct. App. 1993) (citing *Tyler v. Guerry*, 251 S.C. 120, 160 S.E.2d 889 (1968); *Savannah River Lumber Corp. v. Bray*, 189 S.C. 237, 200 S.E. 760 (1939); *Rowland v. Wolfe*, 17 S.C.L. (1 Bailey) 56 (1828)) ("We also agree that Cleland failed to establish any public right to use by prescription. The long-term use by the public of a road through unenclosed and unimproved woodland does not give rise to a right-of-way by prescription."). None of the witnesses Petitioner called at trial, aside from Mr. Podell, were an actual owner of Petitioner's property or even the a principal of a corporate owner. One was a neighboring landowner. One was the nephew of a former gamekeeper. Some were involved in forestry or real estate. No one aside from Mr. Podell established adverse use inconsistent with the use by the public of an unenclosed woodland road, prior to the installation of a gate in 1970. After the installation of the gate, regular lock-cleanings interrupted any adverse use, just as it did for Mr. Podell. The Court of Appeals correctly applied the law. However, even setting aside the nature of the use, the fact is, Petitioner cannot prove any qualifying use of the road for the full prescriptive period required by law and thus fails the any evidence standard. Finally, even if Petitioner had any evidence meeting the prescriptive use period for the whole twenty-year time frame, there still would be an interruption in the period of use sufficient to nullify a claim for a prescriptive easement, just as the Court of Appeals stated.

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than a gate, Appellant's land is not fenced in, but had an opportunity to do so in its Respondent's Brief and at oral argument. (*See* R. pp. 753–59 (photos showing no fence, just Appellant's gate); *see also* R. p. 11, ¶ 8; p. 118, ll. 19–23; p. 193, ll. 14–16; 231, ll. 17–19; p. 255, l. 22–p. 256, l. 3; p. 326, ll. 14–16 (showing land use as recreation, hunting, and timber farming).) Moreover, the lower court found that "the use by the Defendant and her predecessors in title of her tract of land has been for recreation including hunting and, growing and harvesting timber." (R. p. 11, ¶ 9.) Thus, Respondent would assert that it is improper to object now. Petitioner also cannot reasonably object to the Court of Appeals applying the case law on prescriptive easements to a prescriptive easement case.

CONCLUSION

Petitioner has failed to raise any matter of special importance sufficient to merit the issuance of a writ of certiorari to the Court of Appeals. The opinion of the Court of Appeals applied existing law correctly to a unique set of facts unlikely ever to be replicated. Petitioner can demonstrate no error in the Court of Appeal's opinion. There simply is no evidence of an easement by express grant over Tracts C or E. There is also simply no evidence of use of Respondent's road between 1994 and 1999. Moreover, Petitioner itself unequivocally admitted that its use of the road was interrupted. Petitioner has wholly abandoned its public road argument. The Court of Appeals reached the correct result using the correct standard of review. Thus, Respondent requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

BRUNER, POWELL, WALL & MULLINS, LLC

s/ Chelsea J. Clark
Joey R. Floyd, Bar No. 68491
Wesley D. Peel, Bar No. 9283
Chelsea J. Clark, Bar No. 102211
Post Office Box 61110 (29260)
1735 St. Julian Place, Suite 200 (29204)
Columbia, South Carolina
(803) 252-7693
jfloyd@brunerpowell.com
wpeel@brunerpowell.com
cclark@brunerpowell.com
Attorneys for Appellant Nancy Martin

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Columbia, South Carolina