

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CALHOUN COUNTY
COURT OF COMMON PLEAS

Diane Schafer Goodstein, Circuit Court Judge
Case No. 2008-CP-9-135
Appellate Case No. 2012-212463

W. Peter Buyck, Jr., ... Respondent,

v.

William Jackson, ... Appellant.

RECORD ON APPEAL
Volume II

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1 THE COURT: Okay.

2 (The Court and Mr. Booth talk simultaneously.)

3 THE COURT: I'm the keeper of the plats. All right.
4 Go right ahead, Mr. Booth.

5 MR. BOOTH: Okay.

6 DIRECT EXAMINATION BY MR. BOOTH:

7 Q Mr. Medlan, please give us your full name.

8 A James Nelson Medlan.

9 Q And Mr. Medlan, where do you live?

10 A Elgin, South Carolina.

11 Q And I'm not going to ask you your age.

12 A I'm 69.

13 Q Okay. That's not bad. And what do you do currently?

14 A I'm retired residential home builder.

15 Q All right. Mr. Medlan, I know I've got you here to
16 talk about the Buyck Hunt Club.

17 A Yes.

18 Q Okay. Good. And I believe you're -- you've been
19 acting or you have a job as the president of that hunt
20 club.

21 A Yes, sir.

22 Q All right. And you personally hunt on Mr. Buyck's
23 property, correct?

24 A Yes, sir.

25 Q And just for clarification, and again, this is a very

1 general question, the property that you hunt on, I know
2 it's not exactly shown here, but I assume it's a part of
3 the 700 acres?

4 A Yes, sir. Some of it is.

5 Q Yes, sir. Okay. And you've had that arrangement --
6 the hunt club has had that arrangement with Mr. Buyck for
7 several years; is that correct?

8 A Yes, sir.

9 Q All right. Now, hunting seasons starts and ends --
10 and I believe we're just talking about deer but maybe
11 something else, too. I don't know. When does that usually
12 start?

13 A August 15th and ends January the 1st.

14 Q Okay. And what type of animals do y'all hunt on Mr.
15 Buyck's property?

16 A Deer.

17 Q Okay. And about how members in the hunt club are
18 there?

19 A It's 25 this year. Normally 23.

20 Q All right. And do you pay a fee to Mr. Buyck?

21 A Yes, sir.

22 Q And how -- just -- just tell me, do you collect money
23 from everybody, then you pay Mr. Buyck? Or is it everybody
24 pay him? I'm just curious.

25 A No, sir. I collect the money from them, then I pay

1 him.

2 Q Great. All right. Now, with respect to this hunting
3 season, the one we're in now, which I hope I'm not keeping
4 you from hunting. And I'm sure that's not good.

5 THE COURT: He is retired and it is hunting season and
6 today's a beautiful, cool day.

7 Q Exactly. So, has the hunt club been able to hunt on
8 Mr. Buyck's property since August 15th?

9 A Yes, sir. We hunt on it, but not as -- like we
10 usually do.

11 Q Okay. Now, is it true that you and other members of
12 the hunt club did some work on a road that exists on Mr.
13 Buyck's 700 acres?

14 A Yes, sir.

15 Q Okay. Now, let's identify that road now. (Holds up
16 document) You've seen this, I think, from afar. And I
17 think my laser -- is it broken still?

18 THE COURT: Uh-oh.

19 Q We don't know what happened to it. But I'm going to
20 use my finger. Again, looking at this exhibit, which is
21 Plaintiff's 4 -- and again I'm just going to take my finger
22 and just sort of just start -- down here at the boundary of
23 the property we're been talking about today, up through
24 what we call the hayfield, traveling around again -- and we
25 know this is not necessarily the exact location. And then

1 down over here. Is this a road you're familiar with?

2 A Yes, sir.

3 Q Okay. And did you and some members of the hunt club
4 do any work on that road in the last couple of months?

5 A July the 31st.

6 Q All right. And what did you do and what -- what
7 equipment did you use?

8 A We used a Ford front-end-loader tractor and skid
9 steer.

10 Q Okay.

11 PA Which is a Bobcat, more or less.

12 Q Gotcha.

13 THE COURT: Which is a what now?

14 THE WITNESS: Call it a Bobcat skid steer.

15 THE COURT: Oh, okay. Bobcat skid ...?

16 THE WITNESS: Skid steer.

17 THE COURT: Skid...?

18 THE WITNESS: Steer.

19 THE COURT: Steer.

20 THE WITNESS: Yes.

21 THE COURT: Got it.

22 Q So, who was actually doing the work inside your club?
23 Was it more than one person or just you or somebody else?

24 A It was about 23 of us.

25 Q Okay. And how long did y'all work., to work on the

1 road?

2 A We worked on that section of the road there all day
3 long.

4 Q All right. So, you were able to finish that day; is
5 that correct? That one day? I -- I know you kind of said
6 that. I just want to make sure.

7 A Yeah. We -- we finished with what we done with it. I
8 mean, it wasn't back in perfect shape ---

9 Q Right.

10 A --- but we finished what we were going to do.

11 Q Okay. But you did the work for what reason?

12 A So we could travel it.

13 Q Right. To get to where?

14 A To get to the land to the left up there, and -- and
15 also back around to the river, swamp.

16 Q Okay. "To the left" obviously means kind of the way
17 to the river.

18 A Right.

19 Q Again, we're within the 700 acres somewhere ---

20 A Uh-huh.

21 Q --- right? Yes or no.

22 A Yes, sir.

23 Q Thank you. Yes or no. And then you also did some
24 hunting up in this area (indicates), which is near the
25 river, correct?

1 A Yes.

2 Q Okay. Now, did everybody in the club hunt this year
3 so far, as far as you know? Do you keep track of that, I
4 guess is a better question.

5 A I keep track of it, but I -- but no, everyone has not
6 hunted.

7 Q Okay. But you know a few have hunted, including
8 yourself, I believe.

9 A Yes, sir.

10 Q Okay. Since the road was worked on, correct?

11 A Yes, sir.

12 Q And what kind of vehicle are you using to get to the
13 hunting areas, whether it's back over here to the left ---

14 A ATV. That's all we use. All our -- all our pickups
15 stopped at the hayfield, and we go from there on the other
16 land on ATVs.

17 Q Okay. And that's, again, all-terrain vehicle.

18 A Right.

19 Q Okay. And two people can drive on an ATV? Two people
20 can ride on it, or is it just one person?

21 A Not supposed to. Just one -- mostly ---

22 Q Okay. I mean -- I'm sorry. Okay. It's one vehicle -
23 - it's a one-person vehicle and just leave it at that.

24 A There you go.

25 Q All right. Now, as part -- just getting over to one

1 more area, does part of your lease payment -- or the
2 payment that you make for the club to Mr. Buyck, does it
3 take into account the club's responsibility to maintain
4 that road we were just talking about?

5 A I don't know what Mr. Buyck was thinking it was. But
6 he give me a price and I had to pay him. That's what I
7 paid him.

8 Q Okay. But I'm -- I'm just trying to ask, you did
9 maintain the road?

10 A Yes, sir. And I agreed that I would help take care of
11 roads.

12 Q That's what I was saying. So, that's been the
13 agreement for a number of years?

14 A Almost 40 years.

15 Q Okay. And -- all right.

16 (Mr. Jackson confers with Mr. Booth.)

17 Q Let me just ask a clarification question.

18 A Okay.

19 Q I asked you -- I recall asking you how many members of
20 the hunt club worked on the road that particular day. And
21 I'll get that date in a minute. And you said, I think, 23.

22 THE COURT: Uh-huh.

23 A I said roughly 23 members.

24 Q So, you -- I know that, but did each one of them come
25 that day to work on the road?

1 A Yes, sir.

2 Q Okay. Well, whose equipment was it?

3 A It was Jeff Jefferson's.

4 Q So, he drove the equipment?

5 A He drove the Ford tractor front-end loader and then
6 Otis Richardson's stepfather drove the skid steer.

7 Q Okay. What did the other members do on that
8 particular day when you were ---

9 A We -- we trimmed the limbs that has overgrown back
10 over the road. We trimmed them back to keep from
11 scratching -- you know, hitting you in your face, briars
12 and stuff like that.

13 Q Sounds good. Okay. Now, with respect to the date
14 that happened, I believe it was about two weeks before the
15 start of the season, right?

16 A July 31st, August. Yes, sir.

17 Q Right. About two weeks is when the work was done.

18 A Yes, sir.

19 Q All right. Have you had to do any work since then
20 with your members of the club?

21 A No, sir. Not yet because it's been dry --

22 Q Right.

23 A -- up til last week.

24 Q Right. Now, let me ask you, you said it'd been dry.

25 So, I'm assuming sometimes you've hunted when the roads

1 have been wet?

2 A We have since that last rain we had week before last.

3 Q Okay. Does the areas that get saturated or get
4 flooded, do those areas also include some of the areas that
5 are on the -- the extension, the Duck Pond Road that we've
6 talked about up to the river?

7 A There's a -- right now there's a couple of spots that
8 -- where the loggers never did, I reckon, totally fix back,
9 you know, all the way to the Duck ---

10 Q But I -- but I mean, it has flooded in this area. And
11 you've been doing it for a number of years.

12 A Oh, yes. That's -- that's right.

13 Q That's -- that's what I'm asking.

14 A Yes, it did flood.

15 Q Yeah. And so, it floods basically from overflowing in
16 the Congaree.

17 A Right. But the -- well, it didn't flood it. It would
18 flood the road along the base of that hill, coming out the
19 creek quicker than it will flood the -- what we call the
20 River Road, the Red Road.

21 Q Okay. All right.

22 (Mr. Booth confers with Mr. Jackson.)

23 MR. BOOTH: Thank you, Mr. Medlan. I'm through. Mr.
24 English may have some questions.

25 THE WITNESS: Okay.

1 THE COURT: Cross-examination.

2 MR. ENGLISH: Thank you.

3 THE COURT: Uh-huh.

4 MR. ENGLISH: May it please the Court?

5 CROSS-EXAMINATION BY MR. ENGLISH:

6 Q Mr. Medlan, how -- how long have you been a member of
7 the Buyck Hunt Club?

8 A I'd say roughly 40 years.

9 Q Okay.

10 A I started it.

11 Q And you're the president now?

12 A Yes, sir. Always have.

13 Q You always have been the president, 40 years?

14 THE COURT: He -- I don't know if you heard him. He
15 said, he started it.

16 Q Oh, you started? I'm sorry. I did -- okay. So, you
17 started it? All right.

18 So, how long have you known Peter?

19 A Forty years. But I dealt with his dad, you know, up
20 until two or three years before his passing.

21 Q Okay.

22 A And then I started dealing strictly with Peter.

23 Q Okay. So, when you -- when you started the hunt club,
24 you were dealing with Peter's father.

25 A Yes, sir.

1 Q Okay. All right. Now, so y'all -- so, the hunt
2 club's been hunting the 700-acre Congaree River property
3 for all these 40 years?

4 A Yes, sir.

5 Q Okay. Now, up until the last couple of years, what
6 road -- what -- let me ask you this: What's your favorite
7 road on this property?

8 A Going through? The Red Road.

9 Q The Red Road?

10 A What y'all calling the Red Road.

11 Q Did y'all always use the Red Road?

12 A Yes, sir.

13 Q Okay. Did anybody -- up until this lawsuit, did
14 anybody ever tell you you couldn't use the Red Road?

15 A No, sir.

16 Q Okay. Now, did you -- in your mind, did you believe
17 that Peter and Peter's father had a right to use that Red
18 Road?

19 A I just felt like, yeah, they had a right to use it,
20 because it's been open so many years; open so -- you know,
21 so long.

22 Q All right, sir. Now when -- what -- what was the
23 condition of what we'll call the "Blue Road" and then Road
24 3 -- the other road, not the Red Road -- when y'all got
25 down there on July 31st?

1 A There was probably on some areas two-foot washes in
2 the road. It -- it was bad enough that a small four-
3 wheeler could not travel, especially going back up the
4 road.

5 And we -- we done a lot of fill in and a lot of moving
6 dirt up and down the road. And there was a lot of bad sand
7 beds on the road. One bad one in a curve.

8 Q Have you ever -- has there ever been a time or how
9 often -- well, has there ever been a time when there'd be
10 portions of the other road that you couldn't get down?

11 A In a -- in a pickup, yes.

12 Q Would there ever be a time when the water might come
13 all the way across the Red Road?

14 A The lower part of the road and in the bottom land of
15 the creek.

16 Q What's the topography of that road like? I mean, is
17 it -- or what are the features when you're ---

18 A One of the -- well, if you leave the hayfield going
19 all the way down, you're going downhill continuously, all
20 the way until you get to the bottom and you make a curve,
21 come back up a hill and back down a hill. And that's when
22 you hit to flat land along the backside -- what we call the
23 backside of the hayfield. And there it's low enough that a
24 lot of times there's water standing in that road. The
25 least little bit of rain, that creek will flood out that

1 low -- low area there and come in that road. And when it
2 does -- we don't -- we don't travel, it because we got to
3 fix it back up because we don't want to tear it up.

4 MR. ENGLISH: All right. Thank you for being here
5 today.

6 THE WITNESS: Thank you, sir.

7 THE COURT: Mr. -- might have some more questions.

8 MR. BOOTH: And just one follow up.

9 THE COURT: Yes.

10 RE-DIRECT EXAMINATION BY MR. BOOTH:

11 Q You said you -- you and other members of the hunt club
12 had been using this Red Road up until a couple of years
13 ago, correct?

14 A Yes, sir.

15 Q All right. And I assume you saw the gate and the
16 lock?

17 A Yes, sir.

18 Q Okay. And so, to go in and out of that road, you had
19 to actually get out of your vehicle and unlock the gate.

20 A Unlock the gate.

21 Q All right. And that's been there for several years,
22 hasn't it?

23 A Yes, sir.

24 Q It says "private property"?

25 A Yes, sir.

1 Q Okay. So, how did you get the key?

2 A From Mr. Buyck.

3 Q Mr. Buyck. Did he say anything when he gave you the
4 key?

5 A Yeah. He said, "Here's the key to the gate."

6 Q And -- and where -- would you make multiple copies for
7 your members or you just keep one?

8 A No, sir. I made more copies for the members.

9 Q And did you ever -- did you know Mr. Jackson owned the
10 road after the gate was put up?

11 A Yes, sir.

12 Q Did you ever -- you, yourself -- talk to him about
13 using his road?

14 A No, sir. I haven't talked to him but one time.

15 MR. BOOTH: That's all I have.

16 THE COURT: Well -- hold on.

17 THE WITNESS: Okay.

18 THE COURT: Counsel, of course --

19 MR. BOOTH: Yes, ma'am.

20 THE COURT: -- if my questions pose additional
21 questions, I want you to ask them.

22 DIRECTION EXAMINATION BY THE COURT:

23 Q You were running the hunt club back in the 80s?

24 A Yes, ma'am.

25 Q Because you've been running it 40 years?

1 A Yes, ma'am.

2 Q Back in the 80s is in that period of time.

3 A Yes, ma'am.

4 Q And do you remember the McAlister family? I don't
5 know why you would.

6 A I met -- when McAlister -- Ms. McAlister died or
7 something, I met her grandson or something one time down
8 there. And --

9 Q Do you remember logging going on in that area?

10 A Yes -- yes, ma'am.

11 Q Right there on the McAlister -- like, right in that
12 property?

13 A Yes, ma'am.

14 Q And do you remember that as being some time in the mid
15 80s maybe?

16 A I couldn't remember.

17 Q I understand. Back long in the 80s, you were still
18 hunting -- y'all were deer hunting?

19 A Yes, ma'am.

20 Q Y'all -- were y'all doing any turkey hunting?

21 A No, ma'am. Peter won't let us. Saves that for
22 himself.

23 Q Saves that for himself. I understand.

24 And during the -- the deer seasons in the 80s -- now
25 if you can do that for me -- what road were you using?

1 A We used the -- the Red -- what we call -- you start
2 out the Red Road --

3 Q Right.

4 A -- to get down to the lower part of the land.

5 Q Right.

6 A And we'd also used the other road cross McAlister --
7 that goes to that hayfield.

8 Q Right.

9 A You get to the hayfield to get to that part of the
10 land.

11 Q To get to the lower part?

12 A No. Also to the land out to the left.

13 Q Uh-huh. Okay. Okay. All right. So -- so, in the
14 80s -- in the 80s, what -- one or both of those roads will
15 be the -- will be -- were in existence.

16 A That road, which is white now, going around --

17 Q Uh-huh.

18 A -- I put that road in there before I -- I put it as
19 trail, not a road.

20 Q Okay.

21 A Because we had so much area that we had to walk to.
22 You know, and we -- we started that as -- to -- to get
23 people back to the back side of the property.

24 Q I understand. You put it in as a trail for what, for
25 ---

1 A Four ---

2 Q --- ATVs?

3 A Yes, ma'am. That's right.

4 Q Okay. How about for like -- for like trucks?

5 A I wouldn't drive my truck around it, because it's -- I
6 -- I couldn't get back it up with my two-wheel drive truck.

7 Q Okay.

8 A Most of us have two-wheel drives.

9 Q Okay. Okay. How about a car?

10 A I wouldn't take a car down there, it wouldn't come
11 back.

12 Q Okay. Okay. How about -- how about with the Red --
13 with -- with the Red Road, would you -- would you drive a
14 truck down the Red Road?

15 A Yes, ma'am.

16 Q Okay. When did you put the trail in; do you remember?
17 I know that's not necessarily fair. And just -- and if you
18 don't know -- remember, I -- I don't want to be --

19 A It was probably the late 70s or early 80s; somewhere
20 like that.

21 Q Okay.

22 A Somewhere in that neighborhood.

23 Q Okay. And -- and when you -- when y'all -- if you get
24 -- if I can get you up out of here in a little bit and you
25 go down today to go hunting, can -- can you take a -- can

1 you take your truck on -- on the White Road?

2 A No, ma'am. I wouldn't -- I would take it no further
3 than the hayfield, and then from there, we go on a four-
4 wheeler.

5 And give an example of a time, I have -- I have a
6 daughter that's 46 years old, hunts with me regularly and
7 she's tough as nails. And there's times when I won't let
8 her even drive a four-wheeler down that road unless I go
9 with her. That's just how bad it gets sometimes.

10 Q All right. If you -- if -- if -- if you was able to
11 do the Red Road today --

12 A I'd drive -- I drive it all the time.

13 Q -- what would you take on that one?

14 A I would take it to the bottom of the hill onto -- to
15 Mr. Buyck's property. And then I would take my four-
16 wheeler.

17 Q Four-wheeler. Where's the bottom of the hill?

18 A Right where the two roads come back together.

19 Q Come back together?

20 A Yes, ma'am.

21 Q Okay. Okay.

22 A And the reason that is, I just don't want to tear up
23 the roads no more than what they already are, you know.

24 Q Okay. Okay. And back in the mid 80s -- and I'm just
25 talking about McAlister, I'm just talking about what's in

1 that yellow. Back in the mid 80s, was there a difference
2 in the roads? Were they about the same? If you remember?

3 A They were -- they were about the same --

4 Q Okay.

5 A -- you know, which we -- we kind of kept them up, you
6 know.

7 Q Okay.

8 A I mean, we still have to cut limbs off, you know, to
9 keep from scratching up vehicles and stuff like that.

10 Q Uh-huh.

11 A But they -- they're about the same.

12 Q Okay. All right. And back in the mid 80s -- back in
13 the mid 80s, if you were to -- if you were to gone on the
14 Buyck property, would you be -- would you be inclined to
15 take the Red Road or the Blue Road?

16 A According to where I was going in on the Buyck
17 property.

18 Q Okay.

19 A If I was going ---

20 Q What if you was going down to -- do you know where
21 there's a shed, where they have like cookouts; you know
22 what I'm talking about?

23 A Real well.

24 Q And if you were -- if you were to go -- if you had a -
25 - you know --

1 A The Red Road.

2 Q Why wouldn't -- why wouldn't you go the Blue Road?

3 A Because I wouldn't -- I couldn't drive my truck around
4 that Blue Road most of the time. And to me, it -- it's a
5 lot longer.

6 Q Okay. Okay. And that would be in the mid 80s?

7 A That's right.

8 Q And what if you were -- what if you had invited people
9 that have cars and didn't have trucks in the mid 80s, would
10 you -- would you use the Red Road or the Blue Road?

11 A Red Road.

12 Q The Red Road. Okay.

13 And -- and -- and just so I'm clear, the white line,
14 that's -- you -- you referred to that as the trail that you
15 put in to access the -- the --

16 A Half ---

17 Q -- the land?

18 A -- about 200 yards past the hayfield from there, as
19 far as that road went, it stopped. And we took it the rest
20 of the way.

21 Q Okay. And -- and when you did that, what were you
22 thinking about using that road?

23 A Four-wheelers.

24 Q Four-wheelers.

25 A And over the years, it's got ---

1 Q Not four-wheel trucks or four-wheel cars.

2 A No. Four-wheelers.

3 Q Four-wheelers.

4 A Four-wheelers.

5 Q ATVs.

6 A Right.

7 Q Strictly for hunting.

8 A Strictly for hunting.

9 THE COURT: Does that prompt any questions from either
10 of you guys?

11 MR. BOOTH: Yes, ma'am. Just two or three.

12 THE COURT: Please. No, no, no. Don't say two or
13 three. You --

14 MR. BOOTH: Okay. Thank you.

15 RE-DIRECT EXAMINATION BY MR. BOOTH:

16 Q Mr. Medlan, again, I want to ask you just some
17 questions just to get information. Two things right now.
18 Again, you said to really get down to the shed or the -- I
19 think you called it a shed, I may be wrong about that --
20 that you would normally transfer from your pickup, over to
21 the ATM -- AT --

22 A ATV.

23 Q Yeah. ATV.

24 A Four-wheeler.

25 Q Four-wheeler. That -- that's normal procedure whether

1 you use the -- the Red Road or the Blue Road, correct?

2 A The reason that is, is it's low land and just ---

3 Q Right.

4 A --- you know, it all depends on -- on the -- the type
5 of weather, how -- how dry it is. If it's -- I mean, if --
6 if it's dry enough, we drive all the way back to the back
7 side of Peter's property with the trucks.

8 Q All right. And again, the question was asked about
9 sometimes you would take this road back in the 80s, again
10 the Blue Road, or the road that kind of splits the property
11 now with Mr. Jackson's. You said, you and your hunt club
12 members would travel this road on occasion.

13 A Not -- not to go down to the river swamp.

14 Q All right.

15 A We'd travel that to go to the hayfield to hunt the
16 property around the hayfield.

17 Q Right. I understand that. So, again, depending upon
18 -- was there a reason why you picked one area versus
19 another area on a particular trip to hunt?

20 A All depends on where we're hunting at.

21 Q I know that's a bad -- I know that's a bad question.
22 You just do whatever you want to do, right? Okay.

23 A Well, it -- it's normal, I mean, if we would go hunt
24 to the left of that White Road there, we wouldn't take the
25 Red Road to come all the way back around.

1 Q Right.

2 A That we would just go that right -- that route.

3 Q So, her question was, at the time you remember back in
4 the 80s, when you were both using the Blue Road here and
5 also the Red Road -- just -- just up to here, now, I'm not
6 trying to get beyond that line -- you said those two roads
7 pretty much were about the same condition ---

8 A Yes, sir.

9 Q --- back in the 80s. But you said, even though this
10 is the McAlister's property, you said the hunt club would
11 do whatever maintenance was required on both roads?

12 A Yes, sir.

13 Q Okay.

14 MR. BOOTH: Yes. That's -- that was my questions.

15 THE COURT: Wonderful. Okay. All right. Yes, sir.

16 Any ...?

17 RE-CROSS-EXAMINATION BY MR. ENGLISH:

18 Q You're pretty familiar with the property.

19 A Yes, sir.

20 Q All right. Do you know where Mr. Buyck had -- do you
21 know whether Mr. Buyck had any farming activities or
22 anything going on?

23 A He -- on the -- down in the river swamp, on the field
24 -- when we first started hunting down there, it was corn
25 fields.

1 Q Now, where are we talking about?

2 A Way down there next to the river, it -- it ---

3 Q Up here (indicates)?

4 A It's in between. Up -- up next to -- up there, yeah.

5 Q Okay.

6 A Yeah. You see the kind of light areas, that -- that -
7 - that would be all fields.

8 Q All right. Okay. To the right of the Red Road as
9 shown on Exhibit 4?

10 A Yes, sir. It's all the way down.

11 Q All right. So, he had -- Mr. Buyck had crops up
12 there?

13 A That's right.

14 Q Okay. If you were going to take -- if you were going
15 to get -- if you know, I mean, what would you say -- what
16 would be the easiest road to use to get in and out of there
17 for farm activities?

18 A At that time, the only road would be the Red Road. To
19 me, right now, the only road would be the Red Road.

20 MR. ENGLISH: Okay. Thank you, sir.

21 MR. BOOTH: I was going to say there's nothing
22 further, but ---

23 THE COURT: Very well.

24 MR. BOOTH: --- you're through, too?

25 THE COURT: Very well. Enjoy the rest of your day.

1 THE WITNESS: Thank you.

2 THE COURT: And thank you for being here.

3 THE WITNESS: No problem.

4 (The witness retires from the stand.)

5 MR. BOOTH: And again, I would like him to be excused
6 from further attendance.

7 THE COURT: Absolutely.

8 MR. BOOTH: I assume that's okay?

9 THE COURT: Yeah. He's going hunting.

10 THE WITNESS: Yeah.

11 (The witness retires from the stand.)

12 THE COURT: All right. Call your next witness,
13 please. It's not one o'clock? No.

14 MR. BOOTH: No.

15 THE COURT: Twelve fifteen. Call your next witness.

16 MR. BOOTH: Mr. Mike Mills.

17 THE COURT: Oh. Okay.

18 MR. BOOTH: And there he is over there.

19 (The witness approaches the stand.)

20 MR. BOOTH: We're going to take just a couple of
21 minutes to mark, again, about two exhibits.

22 THE COURT: Oh, please. Take your time.

23 (Briefly off the record to mark exhibits.)

24 (Defendant's Exhibit Nos. 19(a) through 19(d),

25 aerial map documents; 20(a) through 20(f),

1 color aerial map documents; and 21, survey document,
2 dated 1874; marked for identification.)

3 (On the record at 12:17 p.m.)

4 MR. BOOTH: I'm ready.

5 THE COURT: Wonderful.

6 MR. BOOTH: All right. I think he needs to be sworn
7 in.

8 THE COURT: I think he does, too. Come on, Mr. Mills.

9 (The witness takes the stand.)

10 MICHAEL MILLS, having been first
11 duly sworn, testifies as follows:

12 CLERK OF COURT: And state your full name for the
13 record, please.

14 THE WITNESS: Michael R. Mills.

15 (To the Court) Good morning.

16 THE COURT: Good morning.

17 MR. BOOTH: Mr. Mills --

18 THE COURT: I'm the keeper of the plats --

19 THE WITNESS: Okay. Thank you.

20 THE COURT: -- if you need these.

21 MR. BOOTH: That's what he does for a living.

22 THE COURT: He's probably got more plats.

23 MR. BOOTH: I was going to say --

24 THE COURT: Wonderful. I'll be the keeper of your
25 plats, too.

1 MR. BOOTH: Okay. Pull that mic up. The microphone,
2 just kind of ...

3 THE WITNESS: Yeah.

4 MR. BOOTH: Yeah. Good. Good.

5 DIRECT EXAMINATION BY MR. BOOTH:

6 Q All right. MR. Mills, where do you live?

7 A I live in Blair, Fairfield County, South Carolina.

8 Q And Mr. Mills, what do you do for a living right now?

9 A I am a professional land surveyor, have a surveying
10 business located in Jenkinsville, South Carolina.

11 Q All right. Jenkinsville, I believe, is also in
12 Fairfield County.

13 A That's right.

14 Q All right. Mr. Mills, I'm going to have the Judge
15 hopefully qualify you as an expert in surveys. So, let's
16 quickly go through your survey.

17 You're registered, correct?

18 A That is correct.

19 Q And when were you registered to be a land surveyor?

20 A 1987.

21 Q And I assume that's by the State of South Carolina?

22 A That's right.

23 Q All right. And you've performed surveys since then?

24 A Yes, I have.

25 Q Have you been required to do any of those surveys to

1 locate and interpret easement documents?

2 A Yes, I have.

3 Q And that's part of what surveyors do, isn't it?

4 A That's right.

5 Q All right. And your education is what? You have a
6 degree?

7 A I have a B.S. degree from Clemson University in Forest
8 Management.

9 Q Okay. Are you also a registered forester?

10 A I'm not a registered forester. I've done some amount,
11 but I specialize in surveying.

12 Q All right. Now, for today's testimony, have you been
13 asked to testify as an expert?

14 A That's right.

15 Q And just -- not giving me what you're going to say,
16 but just a scope or the type things you're going to testify
17 about. Let me just have a quick list of what you plan to
18 testify to. Then I'll ask for approval of you as an
19 expert.

20 A I am going to show some maps and exhibits, old plats
21 that we have put together. Some that has come from the
22 courthouse that show evidence of the usage -- the
23 historical usage of the property, some of it dating back
24 into the 1800s. I think it would be relevant to show ---

25 Q That's the Judge's job. Stop there.

1 A Good.

2 Q Stop there. Now, what else ---

3 A I don't want to get in the wrong spot.

4 Q --- tell us what else you're going to do.

5 THE COURT: You just want to be helpful to me.

6 THE WITNESS: I want to be helpful to you, yes.

7 THE COURT: Exactly.

8 Q What else are you going to talk about today as an
9 expert?

10 A Well, we have the easements, and I will give my
11 interpretation of the --

12 Q And so.---

13 A -- easement and location.

14 Q Gotcha. So, in preparation, have you been given -- I
15 think by me, but they're in evidence -- the various
16 easement documents and deeds related to this property?

17 A That's correct.

18 Q All right.

19 MR. BOOTH: Your Honor, at this time we'd move to have
20 him qualified as an expert in the field of surveying.

21 THE COURT: All right. And is there any voir dire?

22 VOIR DIRE EXAMINATION BY MR. ENGLISH:

23 Q Have you ever -- you been a surveyor since when?

24 THE COURT: 1987.

25 Q 1987?

1 A I was licensed in 1987. I begun -- started full time
2 in surveying in 1976, graduated from Clemson University.
3 So, I have over 30 years experience.

4 I have in the past years and up to current conducted
5 surveys on utility lines over -- close to 400 miles of new
6 utility transmission, right-of-ways, pipelines, involving
7 probably over 1100 tracts of land; several thousand
8 boundary surveys.

9 I cannot tell you the number that may have had
10 easements, but I've been around property.

11 MR. ENGLISH: Okay. I don't -- I don't have any more
12 questions, Your Honor.

13 THE COURT: Let me ask you this question, because I --
14 I may need a little bit more foundation. I've got the
15 surveys. That's not a problem at all. The -- the placing
16 of easements on plat I have no problem at all.

17 I'm a little bit concerned with regards to the
18 interpretation of the language of an easement. I'm a
19 little concerned about that.

20 VOIR DIRE EXAMINATION BY MR. ENGLISH (CONTINUES):

21 Q Do you have any legal experience?

22 A Now, only -- well, I would consider quite a bit of
23 legal reading in the practice of surveying as it relates to
24 survey.

25 To address your question, most surveys involving

1 boundaries that may or may not have an easement on them, it
2 may potentially, some have written easements. We often
3 must interpret the language of an easement. And I can
4 discuss that more.

5 THE COURT: From the perspective ---

6 THE WITNESS: But we often have to discuss the
7 language of the easement to decide whether we can plot or
8 may not be able to plot a particular easement. So ...

9 MR. ENGLISH: Right.

10 THE COURT: Uh-huh. In other words ---

11 THE WITNESS: I do have considerable experience with
12 that.

13 THE COURT: --- in other words, from the perspective
14 or a surveyor.

15 THE WITNESS: Right. Simply from the perspective ---

16 THE COURT: Uh-huh.

17 THE WITNESS: --- of a surveyor.

18 THE COURT: Uh-huh. That's how ---

19 THE WITNESS: Anything that I say, of course, is for
20 your use and you, Judge, as to whether I say it correctly.

21 Q Okay. So, you're not here to make any legal
22 conclusions?

23 A No. Only from a surveying standpoint, this easement.

24 Q Uh-huh.

25 A It would be simply if I were doing the survey that was

VOIR DIRE EXAMINATION BY MR. ENGLISH - MICHAEL R. MILLS365

1 done my Mr. Jackson's property today, how I would interpret
2 the writings of that easement.

3 I do believe I have considerable experience reading
4 and interpreting the writing of easements, which sometimes
5 goes beyond the exact wording. Or -- no, I won't say that.
6 It does go to the exact wording; however, evidence on the
7 ground -- there are other things that I, as a surveyor, may
8 have seen can help interpret a location of an easement.

9 THE COURT: Uh-huh.

10 MR. ENGLISH: All right.

11 THE COURT: Very well. This is -- I obviously --
12 obviously, Mr. Mill is an expert in the area of surveying,
13 without question. I understand what he is saying in terms
14 of as a surveyor, if he is, perhaps, looking at an old plat
15 or a recorded easement, that -- that as a surveyor, he must
16 oft times make a determination about what a surveyor does
17 with this language in this easement.

18 And so, he clearly is an expert regard as well, I
19 think. However, I'm going to reserve any additional --
20 need for any additional foundation. Or, Counsel, if you
21 believe that -- that he is going beyond that expertise, I
22 certainly want you to -- to object, just cause we're in one
23 of those areas that -- that may -- it -- it could
24 potentially go far -- too far into a -- what ought be
25 considered a legal interpretation ---

1 MR. ENGLISH: Right.

2 THE COURT: --- as opposed to a surveyor's
3 interpretation.

4 (To the witness) Although, I am most interested in
5 your perspective as a surveyor.

6 MR. ENGLISH: Thank you, Your Honor. And I -- what I
7 was saying earlier -- I'm sorry.

8 THE COURT: Yeah.

9 MR. ENGLISH: What I was saying earlier, I -- I won't
10 object to his surveying expertise --

11 THE COURT: Exactly.

12 MR. ENGLISH: -- or his -- or his qualification as a
13 surveying.

14 THE COURT: Yeah. That's --

15 THE WITNESS: If I might shed a little light on a
16 perspective of that. An easement written in a document --

17 MR. ENGLISH: Let's let Mr. Booth --

18 THE WITNESS: Okay.

19 MR. ENGLISH: -- examine you.

20 THE COURT: I think so. Hold on. It'll get -- you --
21 you'll explain all that to me.

22 THE WITNESS: Okay.

23 THE COURT: Mr. Booth?

24 MR. BOOTH: Thank you.

25 DIRECT EXAMINATION BY MR. BOOTH:

1 Q We're ready to go on.

2 And first of all, I'm going to do this by reference to
3 documents. I'm going to show you and put in front of you
4 Defendant's 1, Defendant's 3, Defendant's 2, Defendant's 4,
5 and Defendant's 6 and Defendant's 5, which quickly, these
6 are the easement grants that we were talking about. And
7 this is the --

8 A Right.

9 Q -- Oliver Plat, Exhibit 5. And then there's my -- and
10 the plat with the road on it.

11 A Right.

12 Q All right. Look at these and just verify one way or
13 the other if you have actually seen those and studied those
14 in preparation for your testimony today?

15 (The witness looks over the exhibits.)

16 A I have seen these exhibits, yes.

17 Q All right. Now, did -- did you also do any field work
18 to prepare for today's testimony?

19 A Yes. I have made three visits to the site. The first
20 visit was January 15th of this year; the second visit was
21 August 26th of this year; and the last visit was on
22 September 15th of this year.

23 Q And have those visits included traveling on the
24 various roads that we've talked about today?

25 A Yes. Yes.

1 Q All right. In your vehicle, I would assume?

2 A January 15th, I rode to the site, but we traveled in
3 Mr. Jackson's vehicle. We rode from Motte Road -- Motte --
4 Fort Motte Road to Mr. Jackson's gate. From there we
5 proceeded along what's been called the "Hayfield Road,"
6 down the hills past the hayfield to the -- I call it the
7 "River Bottom Road"; traversed along the River Bottom Road,
8 which is Road 3, I believe, in prior exhibits -- to the
9 intersection with the -- what has been called the "Red
10 Road."

11 Q Okay. All right. And this ---

12 A And back up to Mr. Jackson's gate.

13 Q Okay. Now, Mr. Mills, I show you what's been marked
14 as Exhibit No. -- Defendant's Exhibit No. 2(a) [sic]. Do
15 you see that clear enough?

16 A Yes.

17 Q All right. Is that something that you prepared for
18 today's testimony?

19 A Yes.

20 Q And what is this picture and where did it come from?

21 A That is a aerial photo prepared from a GI -- GIS
22 mapping, 2009 photography. And we have overlaid the
23 boundaries of the 203 acre tract.

24 Q All right. Now, what is that source again? You
25 mentioned some acronym. What is that source again?

1 A It is a publically available aerial photography. It's
2 GIS-type photography.

3 Q Okay. And is it customary that you as a surveyor
4 would use this resource to obtain ---

5 A It is a very common resource.

6 MR. BOOTH: All right. We'd offer ---

7 THE COURT: Any objections to this exhibit?

8 MR. ENGLISH: You got this -- so you -- you -- you
9 just obtained this off the internet or -- where'd you get
10 the document?

11 THE WITNESS: That's a "yes." Yes.

12 MR. ENGLISH: Okay. All right. And then you did the
13 overlay, the red overlay?

14 THE WITNESS: The red overlay comes from our work,
15 yes. MR. ENGLISH: Okay. No objection.

16 THE WITNESS: The boundary.

17 MR. ENGLISH: No objection.

18 THE COURT: Okay.

19 (Defendant's Exhibit No. 20(a), in evidence,
20 without objection.)

21 DIRECT EXAMINATION BY MR. BOOTH (CONTINUES):

22 Q Okay. Mr. Mills, what did you look at on this aerial
23 for the purpose of plotting the easement, if you did? The
24 easement we're going to talk about in a minute.

25 A Well, looking at this particular exhibit, where we

1 used to see the location of -- of the roads, there were, of
2 course, been discussed plenty of times, to see how they
3 related to the property boundaries and other physical
4 features on the ground.

5 Q All right.

6 MR. ENGLISH: Now, can I ask -- I'm sorry. I -- I --
7 can I ask a question, please? Because I don't know if this
8 is an objection, but I just want to make a point of
9 clarification.

10 THE COURT: Okay.

11 MR. ENGLISH: If you -- you don't mind? My question
12 is: I just wonder how you managed to go by orienting the
13 red lines on this, you know -- on this piece of paper?

14 THE COURT: Oh. I think that was -- I understand. In
15 other words -- in other words -- really it's a foundational
16 question for the exhibit --

17 MR. ENGLISH: Yes.

18 THE COURT: -- is -- is --

19 MR. ENGLISH: I think it that's ---

20 THE COURT: And it's now in evidence, so it'll be ripe
21 for you for cross-examination.

22 MR. ENGLISH: Thank you.

23 THE COURT: Yes, sir. Thank you, Mr. Booth, for ---

24 DIRECT EXAMINATION BY MR. BOOTH (CONTINUES):

25 Q All right. Mr. Mills, looking at the exhibit we just

1 identified as Exhibit 20(a), again, this identifies, and
2 you've outlined through your work, the outline of the
3 McAlister tract, correct?

4 A That is correct.

5 Q All right. Now, looking at the exhibits that I gave,
6 I believe there's an existing plat. It's No. 5. Yes. Is
7 that, again, something you've looked at?

8 A Yes.

9 Q All right. Exhibit 5, tell me, from a surveyor's
10 point of view, what Exhibit 5 shows on Exhibit 5?

11 A The Exhibit 5 shows the boundaries of the 203-acre
12 tract that was surveyed for Mrs. McAlister back in 1963.
13 It also shows some of the physical features such as
14 location of some of the roads that cross the boundaries
15 that was observed at that time.

16 Q And I believe that plat is recorded, correct? Here --
17 -

18 A That's correct.

19 Q --- here in this building, correct?

20 A That's correct.

21 Q Okay. Now, the deed or the easement deed that we're
22 going to talk about, does it use that plat to describe Mrs.
23 McAlister's property at the time?

24 A That is correct. Yes.

25 Q All right. So, as far as you know, are there any

1 other plats in existence or plats that were recorded other
2 than that one at the time?

3 A At the time of the easement, no.

4 Q All right. 1984, of course, is when the easement was
5 granted. Do you have any reason to believe that the roads
6 that you're showing on your exhibit did not exist in 1984?

7 A No.

8 Q Are there roads ---

9 MR. ENGLISH: Objection. Objection, Your Honor. I
10 think that calls for speculation.

11 THE COURT: At this point, I -- I would sustain the
12 objection.

13 Q Okay. Now, Mr. Mills, looking at the Oliver plat that
14 you have in front of you, you said it does show -- Exhibit
15 5, I believe it was. Exhibit 5?

16 I believe it -- Defendant's Exhibit 5. I believe it
17 does show existence of roads, correct?

18 A That is correct.

19 Q All right. Is there a road shown on the Oliver plat
20 that corresponds to the road or parts of the road shown on
21 your Exhibit No. 20(a)?

22 A Yes.

23 Q All right. Tell me what -- using the Oliver plat,
24 what -- what physical evidence do you have that is
25 consistent with what roads are shown on this USDA Plat?

1 A The roads on the Oliver plat are shown with small
2 dashed lines where they intersect the boundary lines.
3 These seem consistent with the road as it enters the 203-
4 acre tract from the south from -- as it traverses from Fort
5 Motte Road.

6 There's an indication of the road that leads to the
7 hayfield, and there is an indication of the northerly --
8 easterly Red Road.

9 Q Okay. Now -- now, currently, based on your visits to
10 the property, does this aerial correspond to where the
11 roads are within the McAlister tract?

12 A Yes.

13 Q Okay. Now -- so, in 1984 -- you have the easement in
14 front of you, correct?

15 A That's correct.

16 Q All right. Now, what other -- what other easements
17 were done at the same time that the easement in question
18 was done? Just help us ---

19 A There was actually a series of easements that were
20 developed at the same time. The road begins at Fort Motte
21 Road, crosses two relatively small tracts of land near plat
22 -- Fort Mott Road; one owned by Mr. Stuck and one by Mrs.
23 Pedings, I believe, then to Mr. Buyck's property, then to
24 the McAlister property. So, there are four easement in a
25 series.

1 Q All right. And what do all four easement grants have
2 in common if anything?

3 A To me there -- all four easement grants are and were
4 being used to establish a --

5 MR. ENGLISH: Your Honor, I object. He's -- this is
6 legal. He's -- he's drawing a legal conclusion.

7 Q I just -- Okay. Yeah. Stop with saying legally.
8 Just -- again, what do they all four have in common? Maybe
9 just the wording as far as the ---

10 A They define one existing road.

11 Q Okay. So, do all ---

12 MR. ENGLISH: Your Honor, I'm not sure -- I don't
13 think he can testify as to what this -- these are legal
14 documents, and I don't think as a surveyor he -- it's not
15 within his province to testify as to what they mean.

16 Q Okay. You're not ask -- I'm not asking you what they
17 mean. I'm just asking you what they say in common. What
18 wording from a surveyor's point of view do they have in
19 common? Strictly a surveying ---

20 A They follow ---

21 Q -- analysis?

22 A --- an existing road.

23 Q And that's what they say, right?

24 A That's what they say.

25 MR. BOOTH: Okay. So, I'm ---

1 THE COURT: Okay.

2 MR. BOOTH: Okay. That's all I'm just trying say.

3 THE COURT: Okay.

4 Q All right. Now -- now, what other characteristics of
5 the easement grant that Mrs. McAlister did -- from a
6 surveying point of view -- did you look -- look at in
7 trying to determine if you could plot it?

8 A They do have a direction in the ---

9 Q All right. And what is ---

10 A --- given in the easement as "traveling generally
11 northwesterly."

12 Q All right. Is that same term or direction put in any
13 of the other easement documents?

14 A I'm -- I'm not sure --

15 Q In the other easements that you refer to that ---

16 A All four easements have the same direction given.

17 Q All right. And the easements start where?

18 A The series of easements?

19 Q Yes, sir.

20 A They start at the right-of-way of Fort Motte Road.

21 Q Okay. And we, of course, know where that is. And
22 they go through whose properties? Just name the names
23 again. You mentioned them earlier.

24 A Pedings, Stuck, Buyck, and McAlister.

25 Q All right. Good. Now, what other information on the

1 grant of easements -- again as a group; you don't
2 necessarily have to pick one over the other -- also were
3 looked at by you for determining whether you could plot
4 that easement road?

5 A They do give a width of 20 feet.

6 Q All right. Anything else?

7 A Other than the descriptions of the property, that is
8 all.

9 Q All right. Now, I show you Exhibit 20(b), and ask if
10 this is something you prepared for today's testimony?
11 20(b).

12 A That exhibit was prepared by my office, yes.

13 Q Okay.

14 THE COURT: Is it in evidence?

15 MR. BOOTH: We're -- we're going to try to offer it
16 now. Let me ---

17 THE COURT: Oh, okay.

18 MR. BOOTH: I wanted to provide him with a copy.

19 THE COURT: Why don't we do this? Why don't we let
20 Mr. English just know about that, because as you know ---

21 MR. BOOTH: Right.

22 THE COURT: --- exhibits ought not to be shown to the
23 Court until they are in evidence.

24 And so -- and so, why not give Mr. English an
25 opportunity to see how he -- he very well may consent to

1 all of them.

2 MR. BOOTH: All right. Okay.

3 THE COURT: You know what I mean?

4 MR. BOOTH: Let me -- let me do this, Judge, let me
5 get back to that after our lunch break. But I have one
6 other area that should run us to 1:00.

7 THE COURT: And I may even ask y'all to take a look at
8 the exhibits over your lunch break, and see which ones can
9 be agreed to.

10 MR. BOOTH: All right. Let me just swith --

11 THE COURT: Okay.

12 DIRECT EXAMINATION BY MR. BOOTH (CONTINUES):

13 Q Mr. Mills, you mentioned a trip -- you mentioned a
14 trip that you took or a travel that you took in August of
15 this year with Mr. --

16 A Right.

17 Q -- Jackson, correct?

18 A That's correct.

19 Q Did you -- did you make a movie of that trip?

20 A The video --

21 Q Right.

22 A -- was made by Mr. Jackson as I drove.

23 THE COURT: Here comes the train.

24 Q So, you -- you were the director and he was the one
25 doing the actual ---

1 THE COURT: The camera.

2 A Yeah. He held the camera as I drove. Yes.

3 Q But you were with him the whole trip ---

4 A I was ---

5 Q --- correct?

6 A -- with him the entire time. Yes.

7 MR. BOOTH: Your Honor, we have that video. We've
8 already furnished to counsel. We have that video. It'll
9 take about eight or nine minutes.

10 THE COURT: Great.

11 MR. BOOTH: And that'll get us right at lunch. So,
12 I'd like to ---

13 THE COURT: (To Mr. English) Have you seen it?

14 MR. ENGLISH: Is this the one that you -- is this the
15 one that you uploaded to the ---

16 MR. BOOTH: Yes.

17 MR. ENGLISH: --- internet? I've seen, Your Honor.
18 Well, I can't -- I don't know.

19 MR. BOOTH: It is. It is.

20 THE COURT: Okay. If it's -- if it isn't, you let us
21 know. Wonderful. Okay.

22 (Defendant's Exhibit No. 22, video,
23 marked for identification.)

24 MR. BOOTH: And while we're getting it marked, again -

25 --

1 THE COURT: I hope Mr. Jackson was the cameraman on
2 the last saw, because I didn't get nauseous. So, I hope he
3 was the cameraman on this one.

4 MR. BOOTH: Okay. All right.

5 Q Mr. Mills, we're going to play the movie. Do not
6 narrate, other than to tell me again what you said, this
7 was a trip from where to where that day on August, I think,
8 27th.

9 A I'll give you locations.

10 Q Okay. Just where it starts and where it ends, but try
11 not to add too much ---

12 MR. ENGLISH: He can ---

13 MR. BOOTH: Okay.

14 MR. ENGLISH: --- he can -- he can just tell us that
15 now. I mean --

16 Q Tell me again where you started on this trip that's
17 shown on this movie?

18 A We --

19 Q Where did you start?

20 A Well, I have not seen the entirety of this video
21 myself. I know where we drove, but the contents of the
22 video I would have to see.

23 THE COURT: Why don't we let you do that over lunch?
24 That's not fair to you. I don't want to do that to you.
25 Because then you're trying to see something for the first

1 time and testify, that's not quite fair. Why don't we do
2 that?

3 MR. BOOTH: Okay.

4 THE COURT: And just to give him that opportunity to -
5 - to look at it. And -- and -- and here's what we're going
6 to do: It's about ten minutes to one, because y'all can --
7 Mr. Mills can look at the video so he can talk about it.

8 (To the witness) I'm really interested in boundaries,
9 you know, where is the boundary --

10 THE WITNESS: Right.

11 THE COURT: -- where is the "v" in the road and that
12 sort of thing.

13 And I know that y'all have got to look at the
14 exhibits.

15 MR. BOOTH: Right.

16 THE COURT: And so, why don't we break a little bit
17 early, because I don't want anybody's blood sugar
18 plummeting, because I want y'all to eat. I'm -- you know,
19 I'm a Jewish mother and I believe in eating.

20 And so, we -- if we break a little bit early. Y'all
21 got some work to do, but I really do want everybody to get
22 some lunch, too. So --

23 MR. ENGLISH: Okay.

24 THE COURT: -- I've got -- as I understand it, I've
25 got a minor settlement coming in at 1:15 that I'm going do.

1 And then we probably gonna start back -- that'll take
2 me to 1:30. I gotta have a -- I gotta have -- we gonna
3 start back at 2:15. I know that's a little bit later, but
4 I've got to have -- 2:15 --

5 MR. BOOTH: Yeah.

6 THE COURT: -- just because I gotta have a minute for
7 -- for my lunch or walk or whatever; whatever my court
8 reporter's got planned. So, order your lunch.

9 But anyway, that gives you a chance to look at that
10 thing.

11 MR. ENGLISH: Your Honor, do we need to straighten up
12 for your settlement?

13 THE COURT: I -- I think they're coming to chambers.
14 I think they're -- I think it's very informal. I don't --
15 I don't think they want it on the record. So, I don't
16 think so.

17 (Off the record at 12:51 p.m.)

18 (On the record at 2:24 p.m.)

19 THE COURT: All right.

20 MR. BOOTH: We have gone over the exhibits, and --

21 THE COURT: Great.

22 MR. BOOTH: -- if you need for me to put on the record

23 --

24 THE COURT: Yes, please.

25 MR. BOOTH: We had pre-marked several exhibits, which

1 we may need to blow up in a large size.

2 THE COURT: Wonderful.

3 MR. BOOTH: Looking at them, we decided even though
4 they're marked for ID only on the reporter's sheet, we now
5 would like to state for the record that Exhibits 19(a)
6 through letter "d" and Exhibit 20(b) and (c), previously
7 marked, but as the person that offered those, we're going
8 to not enter those into evidence.

9 So, even though the record will show they were
10 identified, we're stating on the record that we are not
11 introducing them into evidence.

12 THE COURT: Okay.

13 MR. BOOTH: Apparently she can not use an eraser and
14 erase those ---

15 THE COURT: Right.

16 MR. BOOTH: --- which I understand. So, this way ---

17 THE COURT: They're -- they're just for ID --
18 identification purposes and will not be admitted into
19 evidence.

20 MR. BOOTH: Right. Right.

21 THE COURT: Not a problem. Very appropriate.

22 MR. BOOTH: Exactly. We want to make sure --

23 THE COURT: Uh-huh.

24 MR. BOOTH: -- of course, we coordinated with counsel
25 here --

1 THE COURT: Sure.

2 MR. BOOTH: -- on all that.

3 THE COURT: Okay.

4 MR. BOOTH: Mike?

5 (Mr. Michael Mills re-takes the witness stand.)

6 MR. BOOTH: We're ready to proceed with the -- the
7 movie, and then we have --

8 THE COURT: Fantastic.

9 MR. BOOTH: -- we have those exhibits ready to go.

10 THE COURT: Great.

11 DIRECT EXAMINATION BY MR. BOOTH (CONTINUES):

12 Q And Mr. Mills, you've resumed the witness stand.

13 A Yes.

14 Q And you're still under oath. And before the break we
15 had you look at this movie. And just tell me, after
16 looking at it, was this the movie that was taken while you
17 were driving a truck?

18 A Yes.

19 Q Okay. You can confirm that.

20 A Yes, sir. Video.

21 Q Okay. And now, I think what we decided to do was to
22 take Exhibit -- this has already been introduced, right?

23 We're going to take your Exhibit 20(a) that's already been
24 introduced into evidence, and have you sort of tell us --

25 If I can borrow, Mr. English -- my laser pointer --

1 (Counsel confers briefly with the Court
2 about the laser pointer.)

3 Q All right.

4 THE COURT: Yes.

5 Q So, Mr. Mills, I'm going to give you the ruler that's
6 currently 36 inches long. And ask that you just point to,
7 again, your exhibit as to where you started this trip.

8 And then during the trip movie, if you feel like
9 there's a need to say we went from, you know, this piece to
10 this piece of property, since it's your survey, you can say
11 that. But don't describe any of the features. I made a
12 mistake with Mr. Jackson and I know the rule, and I should
13 have followed it.

14 All right. Go ahead and start the movie now.
15 Everybody's in position to watch it.

16 THE COURT: Oh, boy.

17 Q All right. Go ahead.

18 A The movie will begin ---

19 Q Oh, yeah. I'm sorry.

20 A --- at the -- approximately at the edge of the woods
21 here at the west side of the hayfield.

22 THE COURT: Got it.

23 Q All right. That -- all right. So, start the movie,
24 please.

25 THE COURT: Can -- can we do -- before we -- I'm so

1 sorry to do that. Just -- you know, what happens to my
2 mind is that when all this is with me in the comfort of my
3 own chambers and I'm making decisions, I'm going to say,
4 "Dag gone it, Diane, why didn't you get them to put some
5 sort of little mark? Why did you think you would
6 remember?"

7 And then I'm bothering Bonnie, and I'm like, "All
8 right, Madam Court Reporter, you got to help me."

9 And I would love to -- can you put -- just put me a
10 little mark on that. I want it to look like a little
11 camera, but it's not. Let's put a little star. Like
12 "movie star," right? That's how I'll remember it, like the
13 movie star.

14 (Brief pause as mark is made.)

15 Q All right. Again, the movie's ---

16 (Video plays while Mr. Booth questions the witness.)

17 A I'm going -- is it okay if I stand here? I --

18 THE COURT: Sure.

19 Q Well, you gotta watch the movie.

20 THE COURT: Can you see the movie?

21 A I can see the movie.

22 THE COURT: Okay. Cool.

23 Q This is Defendant's Exhibit 22.

24 THE COURT: Okay.

25 Q All right. Please continue with the movie.

1 (Video plays.)

2 Q All right. Pause the movie.

3 (Video is paused.)

4 Q Mr. Mills, currently, where is the vehicle traveling
5 within ---

6 A The vehicle's traveling approximately westwardly into
7 the woods from the hayfield --

8 Q All right. Continue --

9 A -- about this point.

10 Q Continue with the movie.

11 (Video plays.)

12 Q Okay. Pause the movie.

13 (Video is paused.)

14 Q Where are we there, Mr. Mills? If you could tell us.

15 A The clearing you see in the movie would be this little
16 clearing right here (indicates) that you can see on the
17 top.

18 Q All right. Continue with the movie.

19 (Video plays.)

20 Q Okay. Pause the movie.

21 (Video is paused.)

22 Q Where are we there? Can you tell?

23 A (Indicating) In this area that's leading down this
24 hill.

25 Q Continue with the movie.

1 (Video plays.)

2 Q All right. Pause the movie.

3 (Video is paused.)

4 Q Can you tell us about where you are?

5 A We're just continuing to travel down this hill. We're
6 getting close to the creek bottom area. We're nearly at
7 the bottom of the hill.

8 Q All right. Continue the movie.

9 (Video plays.)

10 Q Okay. Pause the movie.

11 (Video is paused.)

12 Q Can you tell us where you think --

13 A We're at the base of the hill right in this area along
14 here (indicates.)

15 Q All right. Continue.

16 (Video plays.)

17 Q Pause the movie.

18 (Video is paused.)

19 Q Where do you think you are there? Can you tell?

20 A We're -- if you look closely, the -- you can see
21 somewhat of a change in the vegetation.

22 THE COURT: Uh-huh.

23 A These trees (indicates), do you see that outline?

24 That's pretty well the base of the hill between the creek
25 bottom and the toe of the hill. That's the reason for the

1 change in vegetation. And we'll follow -- turning to a
2 northerly and a --

3 THE COURT: Uh-huh.

4 A -- this turn into an easterly direction --

5 THE COURT: Uh-huh.

6 A -- along the base of the hill.

7 THE COURT: Uh-huh.

8 Q Continue with the movie.

9 (Video plays.)

10 Q All right. Pause the movie.

11 (Video is paused.)

12 Q Can you tell us approximately where the ---

13 A Just continuation of that travel along the base of the
14 hill. We went over a slight second hill, back to the
15 bottom now. We'll follow the -- essentially the toe of the
16 hill, along the river bottom, all the way down.

17 Q Continue with the movie.

18 (Video plays.)

19 Q All right. Pause the movie.

20 (Video is paused.)

21 Q Where -- where do you think the vehicle is right now?

22 A Probably about in this location (indicates) as we
23 continue along the river bottom. All of this is
24 essentially flat river bottom.

25 Q All right. Continue the movie.

1 (Video plays.)

2 Q All right. Pause the movie.

3 (Video is paused.)

4 Q Do you know about where that is, sir?

5 A Yes. We are probably within a hundred yards of the
6 intersection of this road, with the road -- Red Road, it's
7 been called.

8 Q So, we'll run to the end. Go ahead.

9 (Video plays.)

10 Q All right. All right. Stop the movie.

11 (Video is paused.)

12 Q Where are we now, sir?

13 A We're at the intersection of the two roads.

14 Q All right. So, we'll finish it up. That's about it.

15 (Video plays to the end.)

16 Q All right. Just -- just to add a couple of questions
17 to the movie, then we'll move on. What -- you were
18 driving, I think you already said.

19 A That's correct.

20 Q And what type of vehicle?

21 A A Chevrolet three-quarter ton, crew cab, four door
22 pick-up.

23 Q All right. And what -- two-wheel? four-wheel drive?

24 Just --

25 A It was a four-wheel drive -- it is four-wheel drive

1 capable. We were driving in two-wheel drive.

2 MR. BOOTH: All right. Now, the movie's been
3 introduced, and we'd offer it into evidence. I don't think
4 -- there's no objection. And again, we have it in Window's
5 Media --

6 THE COURT: Got it.

7 MR. BOOTH: -- form.

8 THE COURT: Right.

9 (Defendant's Exhibit 22, video, in evidence
10 without objection.)

11 Q All right, Mr. Mills, what I'm going to do is leave
12 the -- the charts here -- up here. And I'm going to get
13 back to the easement. Again ---

14 THE COURT: Mr. Booth, can I ask this?

15 MR. BOOTH: Yes, ma'am.

16 THE COURT: And -- and I know -- and you tell me if
17 you don't want this. It would help me greatly -- only in
18 the event that I want to review -- to know where the movie
19 ended. Do -- do you ---

20 MR. BOOTH: With -- with a marker.

21 THE COURT: --- do you mind.

22 MR. BOOTH: I think that's where -- no, ma'am.

23 THE COURT: All right.

24 MR. BOOTH: That's a good idea.

25 THE COURT: Because I know -- I -- one thing I do -- I

1 promise I do try to leave -- let lawyers try their own
2 cases. But again, I -- I know that in the comfort of my
3 own home, I'm going to be trying to remember --

4 MR. BOOTH: Okay.

5 THE COURT: -- where the movie ended. Do you know?

6 MR. BOOTH: The ending point of the movie.

7 THE COURT: Another star -- movie star.

8 MR. BOOTH: Maybe two stars for the ---

9 THE WITNESS: You want -- want to write "end" beside
10 it.

11 MR. BOOTH: Yeah. E-n-d, okay.

12 THE COURT: Oh, good. Yeah.

13 (To Mr. English) Come and look at this, because that's
14 not fair to you. You know, and it just helps me, again.
15 And object if you feel like -- as though that's something
16 you ought to do now.

17 MR. ENGLISH: That's fine. Because I think he had
18 just testified on the fact, not as an expert witness, just
19 on his observations.

20 THE COURT: That's -- yeah. And as I look at the
21 movie, I -- you know, I'm afraid it won't make any sense.

22 MR. ENGLISH: I've seen it, yes, ma'am. I've seen the
23 movie. I appreciate that though. Thank you.

24 THE COURT: Thank you. Thank you very much. Yep.
25 Got it.

1 DIRECT EXAMINATION BY MR. BOOTH (CONTINUES):

2 Q Now, we're back to talking about the easement,
3 plotting of the easement, the one that travels over the
4 McAlister tract.

5 A Correct.

6 Q Or at least back in 1984.

7 Now, assuming that the roads that you see on your
8 Exhibit 20(a) -- assuming the roads that you can see
9 physically on 20(a) were also there in 1984 --

10 MR. ENGLISH: Objection, Your Honor.

11 THE COURT: Okay.

12 MR. ENGLISH: Calls for speculation. Are we assuming
13 --

14 MR. BOOTH: I thought an expert -- you could -- you
15 could do a hypothetical --

16 THE COURT: You can ask -- yes, you can. It just must
17 be from facts which are in evidence. So, my mind just went
18 somewhere else to -- to begin to list the facts.

19 MR. ENGLISH: Maybe if you could ask the question
20 again. Maybe I missed it. I'm sorry.

21 THE COURT: And there may be.

22 Q Okay. The question was: Assuming that the roads that
23 you see on your -- Exhibit 20(a), assuming the road that
24 you see there, again, were within the box that we call the
25 "McAlister tract", assuming they were there that day, have

1 you been able to determine if you are able to plot the
2 location of the McAlister easement?

3 A I believe that I would be able to, yes.

4 Q Now, the -- I mean, the location of the road --

5 MR. ENGLISH: Objection. So, the question is are we
6 assuming that the roads that are on the route today are the
7 -- are in the same place as they were in 1984? Are you
8 asking him to testify as to what the roads were like in
9 '84? Or just extrapolate and assume that they are today
10 the same as they were then?

11 MR. BOOTH: Yes. I'm asking to assume for this
12 question that the roads that were -- at least shown there
13 and shown on other exhibits, the road which we call the
14 "Hayfield Road 1," versus Road 3, were there in 1984 as
15 shown on this.

16 MR. ENGLISH: Your Honor, that was 26 -- that was 26
17 years ago. I don't think there's any facts in evidence as
18 to where the location of the Hayfield Road was in 1984.

19 THE COURT: I was going to ask -- I was going to ask
20 that question. And help me, because, yes, you can have
21 your expert make that assumption. But the hypothetical
22 must be made from facts which are in evidence in the
23 record.

24 I believe -- and let me tell -- first of all, let me
25 tell you what I heard. What I heard was the roads within

1 the box, now, the roads within the red box on the exhibit.
2 All right.

3 So, we're talking about roads on the McAlister tract
4 only, not as they would be outside the -- the box.

5 Now, we -- we've got the testimony -- we've got
6 testimony from a number of witnesses about the Red Road.
7 With regards to the testimony regarding the Blue Road, in
8 talking about the 80s, we have the testimony of -- and his
9 name --

10 MR. BOOTH: James Medlan.

11 THE COURT: That's it. I was going to say the -- our
12 president of the deer club; president of the Buyck Deer
13 Club that testified that with regards to the Blue Road
14 within the box -- now, we're not talking about beyond the
15 box -- but within the box, that he could identify that
16 road. So --

17 MR. BOOTH: Correct. He --

18 THE COURT: -- so ---

19 MR. BOOTH: -- traveled it himself.

20 THE COURT: With the -- with the -- not beyond, but
21 with regards to within the box. I believe we do have those
22 two items in the hypothetical.

23 But hold on, because -- do we have any other -- no
24 other facts could you plot the -- could you plot those two
25 roads within the box if they were in the 80s as they are

1 today?

2 MR. BOOTH: Correct. That's right.

3 THE COURT: Got it. I think that -- I think that
4 hypothetical is -- noting I overrule the objection. You
5 may proceed.

6 MR. BOOTH: Of course, the -- the other foundation
7 we'd laid before was he had looked at the easement grants
8 and been out there physically, talking about the series of
9 easement grants.

10 THE COURT: Uh-huh.

11 DIRECT EXAMINATION BY MR. BOOTH (CONTINUES):

12 Q All right. Now, I asked you a hypothetical based on
13 the fact that the roads that -- that you show there, could
14 you be able to plot as a surveyor the location of the
15 easement within the property of Mrs. McAlister, yes or no?
16 I think you already said yes.

17 THE COURT: He did.

18 Q The answer's "yes"?

19 A Yes.

20 Q Where would you plot it, the 20-foot line easement?

21 Use -- use the ruler if you don't mind. And again,
22 this is exhibit -- I'm so sorry -- Exhibit 20 ---

23 A I'd like to make one statement. Just because I've
24 been qualified ---

25 (The witness continues to talk as the

1 Court begins to talk.)

2 THE COURT: Let me tell you what is so difficult for
3 you. I know it. But you've got to answer questions.
4 He'll get there.

5 THE WITNESS: I --

6 THE COURT: He'll get there.

7 THE WITNESS: -- being asked -- okay. You want me to
8 wait?

9 THE COURT: He'll get there.

10 MR. BOOTH: Yeah.

11 THE WITNESS: Okay.

12 MR. BOOTH: You really need to wait, because he'll
13 cross you and -- not -- not negatively. But just cross-
14 examination. So, it may come up then.

15 DIRECT EXAMINATION BY MR. BOOTH (CONTINUES):

16 Q But I'm just asking you now, based on somewhat of a
17 hypothetical and somewhat on the recorded documents that
18 you ---

19 A No.

20 Q Huh?

21 A No.

22 Q Okay. Would not be able to do what?

23 A Plot it. No.

24 Q Why not?

25 A Being constrained too much to what has been admitted

1 as evidence.

2 Q Oh. Possibly --

3 So, you would not be able to determine the location of
4 the McAlister easement ---

5 A I'll tell you what I can.

6 Q Okay. What can you determine?

7 A Through the McAlister plat, there is an indication --
8 that there was a road here, crossed the line here
9 (indicating.)

10 Q Right.

11 A This is what we see today. There is also indication
12 of a road here, here, and here (indicating.)

13 Q Right.

14 A The -- from what -- read strictly by the McAlister
15 easement says that the road travels beginning at -- and
16 running in a northwesterly direction from the line of the
17 grantee to the line of the grantee, across the grantor of
18 the easement.

19 Q Right.

20 A Runs in that direction. Making all the assumption you
21 have, it would be this road (indicates.)

22 Q So, you would plot it within that road.

23 A With that strict evidence, yes.

24 Q Okay. I got you. I see what you're saying.

25 Because normally -- if you would be plotting

1 something, normally you would have more information to make
2 a true, exact plot; is that what you're trying ---

3 A I would tell you much more information --

4 Q Right.

5 A -- which I have.

6 Q All right. With this easement you have more
7 information?

8 A Well, it backs it up, yes.

9 Q Okay. What are -- what are the things that back it
10 up?

11 A I have some earlier aerial photos --

12 Q And --

13 A -- that go back until the 1930s, which verifies my
14 opinion of the road as they exist today and then.

15 MR. ENGLISH: Your Honor, I object to that. I mean, I
16 -- we haven't seen any of those documents. We don't know
17 what's being verified.

18 Q All right. You mentioned the McAlister plat, and I
19 assume you were referring to Defendant's Exhibit No. 5,
20 which I'm putting in front of you again. Is that what you
21 meant when you referenced ---

22 A That is correct.

23 Q All right. And that McAlister plat, again, is the
24 plat done by, I believe, a surveyor named "Oliver."

25 A That's correct.

1 Q All right. Now also, again, based on those
2 assumptions, can you determine whether or not the McAlister
3 easement would be the Red Road, as we've been calling it?

4 A (No audible response.)

5 Q You know what I mean by the "Red Road"?

6 A Yes. I know what you mean by the "Red Road."

7 Q Okay.

8 A Given strictly the language in the easement, I would
9 not think it's the Red Road, because it does not run in a
10 northwesterly direction.

11 Q Any other ---

12 A I would say ---

13 Q Any other factors?

14 A It does not mention that it, at any time, leaves the
15 McAlister property. It says that it runs on the McAlister
16 property from beginning to end.

17 The Red Road has a break caused by the Bruner property
18 that would tend to negate the Red Road.

19 Q All right. And based on your Exhibit 20(b), do you
20 actually have any computation as to the distance on the
21 Bruner property of the Red Road?

22 A It's approximately 160 feet.

23 Q All right. And you verified that it does -- the road
24 itself does travel off of the ---

25 A It does travel off the McAlister now, onto the Bruner

1 property, and back onto the McAlister tract.

2 Q Speaking of distances, as we go back to the fork in
3 the road where Mr. Jackson's gate is and you go all the way
4 up to where it enters Mr. Bruner's property, how many feet
5 is that approximately?

6 A Just over 2000 feet --

7 Q All right.

8 A -- from where the property line of the gate.

9 Q As from where the intersection ---

10 A The intersection is about 1500 feet --

11 Q 1500 ---

12 A 1600 feet.

13 Q So, 2000 feet including ---

14 A Right.

15 Q --- the section here (indicates)?

16 A That's correct.

17 Q Okay. Gotcha. Now, as far as after coming back on
18 Mr. Jackson's property until it leaves this property --

19 A Approximately 750 feet.

20 Q All right. Now, you do have on this 20(d) -- you
21 labeled something as an easement road. But again, that's
22 not within the box. But what does that represent on your
23 exhibit here?

24 A That's a road that pertains to the other -- well, the
25 easement as it leads all the way out to Fort Motte Road.

1 Q Okay. Again, this is based on the record easements --

2 -

3 A That's right.

4 Q --- that you've looked at. Okay.

5 Now, if we look at Exhibit No. 20(e) -- you -- you
6 prepared that, correct?

7 A That's right.

8 Q All right. And what does that graphically show?

9 A This shows the boundaries of the McAlister Tract,
10 along with general straight-line directions from a
11 beginning point of the road as it enters the McAlister
12 Tract, to terminus points for each of the roads.

13 Q All right. So, this is a direction arrow.

14 A Yes.

15 Q Or direction ---

16 A Right.

17 Q Okay. So, again, describe exactly where this point is
18 here (indicates) I got my finger on, and then the -- go
19 ahead ---

20 A This is a point on the boundary line in the middle of
21 the existing dirt road.

22 Q Okay. Go ---

23 A (Indicates) That point.

24 Q All right. Go ahead and -- and where is the first
25 directional information? Where does it go?

1 A This direction is -- runs North 25 West approximately,
2 to a terminus point where the Hayfield Road leaves the
3 McAlister Tract.

4 Q Okay. And I ---

5 A This point ---

6 Q --- and I -- again -- and you have another directional
7 --

8 A This direction gives us a bearing of North 2 East from
9 that beginning point to the point where the Red Road leaves
10 the McAlister plat --

11 Q Okay.

12 A -- tract.

13 Q That's -- that's a -- that's a straight direction.

14 A That's a straight direction.

15 Q From the same point on the plat.

16 A From the same point.

17 Q Okay. All right. This one -- I don't think it adds
18 to this -- is 20(f). What do you have here, Mr. Mills?

19 A Well, this is the same McAlister Tract on the lane --
20 on the same photography. But we have an inset with the --
21 on the Walker plat.

22 Q All right. And that's the one that's got -- can you
23 step up here?

24 A (Complies.)

25 Q What revision date -- I know we have that in evidence,

1 but I want to make sure I know what you got on here.

2 A April 27, 2000, last revision date I see on that one.

3 Q Okay.

4 A September 18, 2008, is the last revision date.

5 Q I believe that's in evidence as Exhibit 15.

6 MR. BOOTH: So, Your Honor, I think, hopefully, we can
7 agree that ---

8 MR. ENGLISH: I don't have a copy.

9 MR. BOOTH: --- Exhibit 15 is the insert of Mr.
10 Walker's survey. Is that okay?

11 THE COURT: All right. The Exhibit 15 is superimposed
12 on Exhibit 20(e)?

13 MR. BOOTH: Right. 15, again, is the --

14 THE COURT: Okay. Sure.

15 MR. BOOTH: Okay.

16 THE COURT: Sure.

17 MR. BOOTH: All right. You can sit back down and
18 let's do this together, because I already knocked off --
19 come back over here. Let me pull these back over so I
20 don't tear them up.

21 THE WITNESS: Okay.

22 MR. BOOTH: But we offer these into evidence, these
23 ones that he's identified.

24 THE COURT: All right. And for the record, the
25 numbers are 20 --

1 THE WITNESS: 20(a).

2 THE COURT: 20(a).

3 MR. BOOTH: It jumps a little bit.

4 THE COURT: That's okay.

5 THE WITNESS: 20(b).

6 THE COURT: 20(d)?

7 MR. BOOTH: "D" as in dog.

8 THE WITNESS: 20(f).

9 THE COURT: "F."

10 THE WITNESS: 20(e.)

11 THE COURT: And 20(e.) Any objection?

12 MR. ENGLISH: Has he testified that he -- the he
13 prepared these himself?

14 THE COURT: I think at each -- I think at each time
15 that the document has been introduced, Mr. Booth has asked,
16 "Is this the -- the exhibit that you prepared

17 MR. BOOTH: Yes.

18 THE COURT: I'm right about that, Mr. Booth?

19 MR. BOOTH: Yes, I did.

20 THE COURT: Did I miss --

21 MR. BOOTH: We started with the basic aerial, and then
22 everything else he prepared.

23 THE COURT: Exactly. Yeah.

24 MR. ENGLISH: Okay.

25 THE COURT: Very well.

1 (Marked Exhibits 20(a), 20(d), 20(f), and 20(e),
2 aerial maps, in evidence without objection.)

3 MR. BOOTH: Give me just one minute.

4 THE COURT: Sure.

5 (Brief pause.)

6 MR. BOOTH: That's all I have.

7 THE COURT: Cross-examination.

8 (To the witness) How's your water holding up? You
9 still got your cup?

10 THE WITNESS: Oh, it's pretty good.

11 THE COURT: Good.

12 MR. ENGLISH: Need some more?

13 THE WITNESS: No.

14 MR. ENGLISH: Could I just have a moment to look --
15 look at these, please?

16 THE COURT: That's fine, because I just dropped my
17 ring and I need a moment to look for that.

18 MR. ENGLISH: Thank you.

19 (Brief pause.)

20 CROSS-EXAMINATION BY MR. ENGLISH:

21 Q Mr. Mills, let's talk -- kind of take it as -- you
22 know, work with -- talk about the video a little bit first.

23 You said -- how many -- how many times have you
24 visited the property?

25 A Three separate days. Two days I went on Mr. Buyck's

1 property.

2 Q Okay.

3 A The last day was only on Mr. Jackson's property.

4 Q So, what days did you go on Mr. Buyck's property?

5 THE COURT: You want to pull that microphone. I know

6 --

7 THE WITNESS: Oh, I'm sorry. Yeah.

8 THE COURT: -- Mr. Booth's having trouble hearing you,
9 because I am. Okay.

10 A January 15th was on Mr. Buyck's property, and August
11 the 26th.

12 Q Okay. So, those were the only two times -- were those
13 the only two times in your life that you'd ever seen
14 Hayfield Road?

15 A Yes.

16 Q Okay. So --

17 A Well, on Mr. Buyck's property.

18 Q Okay. All right. Once it crosses --

19 A Right.

20 Q -- off what we call the --

21 A Right.

22 Q -- McAlister Tract. Okay. All right, sir.

23 Now, you -- did you say that you had a degree in
24 forestry?

25 A That's correct.

1 Q From Clemson?

2 A That's correct.

3 Q Okay. And you -- you've done some informal -- have
4 you ever consulted with anybody on forestry matters?

5 A Not as a professional job, no.

6 Q Do you know about timbering or logging operations?

7 A I know a good bit about it, yes.

8 Q Okay. Well, did you ever go down the Red -- what we
9 call the "Red Road" throughout this -- this case?

10 A Yes.

11 Q You know what I'm talking about when I say the ---

12 A Yes. Yes.

13 Q All right. That also goes to Mr. Buyck's property; is
14 that ---

15 A That's correct.

16 Q Okay. All right. I'll just hold this.

17 Now, if logging operations were occurring on Mr.
18 Buyck's property between the Red Road and the Hayfield
19 Road, which one would you pick to take logs in and out of -
20 - to take equipment in and out of, between those two roads?

21 A I might use both.

22 Q Both? Looking at that video we just saw, you -- you'd
23 take logging trucks and things down that Hayfield Road?

24 A Yes.

25 Q You're willing to tell me that?

1 A Yes.

2 Q What if you had -- if you had the choice of the two,
3 which would you take?

4 A Depends on which area of Mr. Buyck's property you were
5 logging.

6 Q Pick one.

7 A (No audible response.)

8 Q Okay. Let's say ---

9 A If logging operations were occurring over here
10 (indicates), you could use this entrance to his property
11 over here (indicates.) If you were logging on the eastern
12 end of his property, you would probably take the road over
13 here (indicates.)

14 In both cases, there would probably -- there would be
15 improvement made to the road for logging operations.

16 Q Okay. Which road's in better condition right now? Or
17 the last time you saw both of them?

18 A The road, as it goes to the bottom of the hill,
19 essentially the same thing at the present.

20 Q When was the last time you went?

21 A August 26th.

22 Q When was the last time you went over the Red Road?

23 A September 15th.

24 Q This year?

25 A Yes.

1 Q All right. Now, what I'd like for you to do, if you
2 don't mind, so we can get -- since we've got a good end
3 point here -- this is the inner -- what we've marked it in
4 with a star.

5 A Right.

6 Q That's the -- is that generally where the Red Road and
7 what we'll call the Blue and the White Road intersects?

8 A Yes. That's the intersection. Yes.

9 Q Okay. Well, if you could take -- we --
10 (To the Court) Do we have a red pen?

11 THE COURT: We do.

12 MR. ENGLISH: Okay.

13 Q If you could step down.

14 A (Complies.)

15 Q And let's just keep calling it the Red Road. Just
16 draw the Red Road to the -- to the end point. Let's just
17 go down to the -- to the fork.

18 A (Complies.) Fork?

19 Q Yeah.

20 A All right.

21 Q Okay. Now, I want you to take this blue pen, and just
22 like you were pointing when you were watching the video,
23 from your starting point, trace the route of the Blue Road.
24 Or just ---

25 A Trace it in blue?

1 Q Yes, sir.

2 A (Complies.)

3 Q Keep going. No. We want it to go all the way to the

4 --

5 A Oh.

6 Q -- all the way to the end. To where they join up.

7 A (Complies.) There are several sections, because of
8 vegetation, can't see in here.

9 Q Well, just guess.

10 MR. BOOTH: Your Honor, the witness says he can't do
11 it.

12 MR. ENGLISH: He -- he did it ---

13 (Attorneys talking over each other.)

14 THE COURT: Shh, gentlemen. I -- I -- it is my
15 understanding that the question is, is to trace the road
16 that we saw on the video.

17 MR. ENGLISH: Correct.

18 THE COURT: Did I misunderstand that?

19 MR. ENGLISH: In blue. Yes, ma'am.

20 THE COURT: Okay.

21 MR. ENGLISH: In blue.

22 MR. BOOTH: But -- but on that map.

23 THE COURT: And the witness does not believe he can do
24 that. Is that what you are saying.

25 MR. BOOTH: I -- I thought he said that, Your Honor.

1 THE COURT: Oh --

2 MR. BOOTH: I could be wrong.

3 THE WITNESS: Well, I can see probably a section here.
4 But there are -- obviously, because of the canopy, you
5 cannot see all of it.

6 CROSS EXAMINATION BY MR. ENGLISH (CONTINUES):

7 Q But you saw all the Red Road. You can see all the Red
8 Road.

9 A That's correct.

10 Q Does that mean that the Blue Road's --

11 A It has a canopy over it, closure of trees.

12 Q Okay. But can you see any portion of the -- of what
13 we would -- I would ask you to mark blue? Is there any
14 portion of it?

15 A Here's a section (indicates.) And there ---

16 Q Just mark -- mark the sections that you can.

17 A (Complies.)

18 Q So, general -- in general --

19 A Right.

20 Q Any idea how long it would take you to get via the Red
21 Road from the fork of the two roads, north, to the end?

22 A Well, we could measure the length of the video and get
23 an exact time. I think they're in real time, if you want a
24 time on it.

25 Q But to get -- okay. To get from your start point on

1 the last video, which started on the other side of the
2 hayfield --

3 A Right.

4 Q -- to get to the intersection, that was 9 minutes and
5 14 seconds; is that right?

6 A I don't remember what was on the --

7 Q It was on the video. I -- I think I wrote it down, 9
8 minutes; does that sound right?

9 A That's probably right.

10 Q Okay. All right, sir.

11 MR. ENGLISH: I'm sorry, Your Honor. I'm looking for
12 the series of easements right now.

13 (Brief pause.)

14 Q Okay. Now, we might come back to that, but I want to
15 -- I want to put in front of you what's been marked --
16 these are the series of easements, Defendant's 1 through 4.

17 Okay. Have you seen -- you testified earlier, I
18 think, you've reviewed all these?

19 A Yes.

20 Q Okay. Before I ask you questions, I now want to kind
21 of get my bearings on what we're looking at; 20 -- 20(E)
22 now. Okay. This is the one that has the courses and
23 distances on it; is that right?

24 A (No audible response.)

25 Q Okay. Now, is the north -- north and south straight

1 up and down?

2 A North is straight up the page.

3 Q Okay. So, that's why the red is oriented kind of more
4 of an angle.

5 A That's correct.

6 Q Okay. All right. So, at the top of this, what --
7 what would the compass degree be at the very top? Is that
8 180 degrees? How do you -- how do you do that?

9 A That would be zero degrees.

10 Q Okay. All right.

11 A The north.

12 Q So, direct -- direct north is zero degrees.

13 A Right.

14 Q All right, sir. Okay. Now, in those easements, I
15 believe you would view them, I believe that each of those
16 describe a road running in a generally northwesterly
17 direction.

18 A That is correct.

19 Q Okay. And I think that when you read -- read that,
20 and you marked easement road on here going across other
21 property of Mr. Buyck, in your opinion as a surveyor, all
22 those are to be read together as a series?

23 A As a theory?

24 Q No. I just want to know what your opinion is.

25 A Yes.

1 Q Okay. Now, if you could point -- what I want you to
2 do is take this blue pen here or the red pen -- let's use
3 the red pen -- and mark on -- on Exhibit 20(E) where the
4 first easement in the series of easements begins.

5 A (Indicates) Here.

6 Q All right. Mark -- mark it.

7 A (Complies.) That would be the, I believe, Pedings
8 easement, which begins here.

9 Q All right. Do a -- let's do a star there.

10 A (Complies.)

11 Q Okay. All right. So, that's at the -- we'll just
12 call that the intersection of Fort Motte Road and --

13 A Fort Motte Road right here.

14 Q -- and the Pedings.

15 A Right.

16 Q Okay. All right. Now, do another -- let's do a blue
17 mark at the point where what we've been referring to as the
18 Red Road leaves Mr. Jackson's property, and crosses the end
19 -- the boundary of Mr. Buyck's property and Mr. Jackson's
20 property. The Red Road.

21 A The Red Road -- say it all again.

22 Q I want you to point out where the Red Road leaves Mr.
23 Jackson's property as it crosses into Mr. Buyck's property.

24 A (Complies.)

25 Q Okay. Now, this is why I have this -- can you tell me

1 if the point where the Red Road leaves Mr. Jackson's
2 property, if you drew a straight line from that point down
3 there, what kind of compass bearing would it have?

4 A Compass bearing?

5 Q Yeah. And directional bearing.

6 A A directional bearing?

7 Q Yes, sir. North, east, south, or west.

8 A I've calculated it, so I know. It's about North 1
9 West.

10 Q So, it's northwest. West of --

11 A Correct.

12 Q Okay.

13 A In today's compass bearing.

14 Q Okay.

15 THE COURT REPORTER: "North 1 West"?

16 THE WITNESS: Yes.

17 Q So, if the top is true north, the point where the road
18 leaves Mr. Jackson's property is northwest of the point
19 where the first easement starts off Fort Motte Road.

20 A Correct.

21 Q And each of those easements say "in a generally
22 northwesterly direction" they tract this dirt road.

23 A Yes.

24 Q Okay.

25 MR. ENGLISH: Beg the Court's indulgence.

1 THE COURT: Of course.

2 (Brief pause.)

3 Q I'm sorry. What day was the video taken? I'm sorry.
4 The last video, where you went --

5 A August 26th.

6 Q Okay. And I think -- did you hear Mr. Medlan testify
7 that the hunt club had improved the road a few weeks
8 earlier than that?

9 A Yes.

10 Q Okay. All right. Okay.

11 A We could see where they worked on it.

12 Q Oh, you could?

13 A Yes.

14 Q What all did they do?

15 A A few small spots they pushed back some brush bushes,
16 and filled in a little bit.

17 Q Okay. He testified to what he did.

18 A Yes.

19 Q Thank you, sir. I don't have any more questions.

20 THE COURT: Re-direct?

21 MR. BOOTH: Okay. Thank you, Your Honor.

22 RE-DIRECT EXAMINATION BY MR. BOOTH:

23 Q Your trip of January, 2010 -- you mentioned you made
24 another trip on the same road in January, 2010.

25 A That is correct.

1 Q All right. What kind of vehicle were you driving
2 then?

3 A We were in Mr. Jackson's truck at that time.

4 Q All right. And you know, the condition of the road
5 then, was it comparable to what it was ---

6 A Yes.

7 Q Okay. So, okay. I gotcha. All right.

8 MR. BOOTH: That completes our examination. We have
9 one more witness after -- assuming he's finished.

10 MR. ENGLISH: I did ---

11 THE COURT: Re-cross.

12 RE-CROSS EXAMINATION BY MR. ENGLISH:

13 Q Did you ever speak with Ms. -- did you ever know Grace
14 McAlister?

15 A No.

16 Q Okay. So, you never -- okay. So, you never talked to
17 Grace McAlister.

18 A No.

19 Q All right. Thank you.

20 MR. BOOTH: Like I said, I think we're through ---

21 THE COURT: I have a question. I keep doing this to
22 y'all. I apologize.

23 DIRECT EXAMINATION BY THE COURT:

24 Q What is the minimum width of a road that, based on
25 your experience -- I'm not -- I know that you have lost --

1 you've left your forestry days for the surveying days. But
2 what is the minimum width of a road that -- that would be
3 appropriate to take logging equipment down?

4 A Some -- I've watched experienced logging ---

5 Q Sure.

6 A --- vehicles move down trails that are amazingly
7 narrow. But the fact that the road ---

8 Q I would -- I would think you do that all the time --

9 A Right.

10 Q -- to be sure that when log -- when people are
11 logging, they wouldn't be on their neighbor's land.

12 Because in Dorchester County, that -- that can just ---

13 A More often than not, I'm there when they have logged
14 on their neighbor's land.

15 Q Right. And -- and as you know, that can obviously
16 cause lots of ---

17 A Right.

18 Q --- lots of consternation. But yet, tell me about
19 that. Tell me about the width.

20 A The -- of course --

21 Q Uh-huh.

22 A -- the -- even logging equipment can travel on a road
23 as narrow as about 10/11 feet.

24 Q Uh-huh.

25 A That's the essential -- 11 feet's the standard width

1 of one lane of traffic on a paved highway. It can actually
2 travel on a narrower road. That's assuming terrain,
3 topography, weather -- weather ---

4 Q Of course, you know ---

5 A --- conditions.

6 Q --- with public roads, it's gotta be 50 feet minimum -

7 -

8 A Well, most ---

9 Q -- right of way.

10 A --- most standard farming market roads --

11 Q Right.

12 A -- and most state highways are 66-foot right of way.

13 Q Uh-huh. That's right.

14 A Reason being for adequate maintenance and --

15 Q Uh-huh.

16 A -- clearance.

17 Q Because it is sustained.

18 A Right.

19 Q But you're saying 10/11 feet is sufficient for log
20 trucks to do -- to do the work that they must do.

21 A That's minimum.

22 Q Uh-huh. That's minimum.

23 A And it can be done and I've --

24 Q Uh-huh. And you've seen it.

25 A -- I've actually -- I've experienced logging trucks

1 pass out of amazingly small trails. As we've already seen
2 in some of the videos, some of the trucks that were on that
3 -- roads that we viewed, those were essentially the largest
4 logging trucks, and they were passing down those roads.

5 All of these roads are relatively narrow.

6 Q Uh-huh.

7 A Small.

8 MR. ENGLISH: Ask a question, Your Honor?

9 THE COURT: But of -- absolutely, but of course.

10 Yeah.

11 RE-CROSS EXAMINATION BY MR. ENGLISH:

12 Q You just mentioned that you saw the videos, you saw
13 the -- these trucks going ---

14 A Yes.

15 Q You know where they went?

16 A I have no idea.

17 Q Where'd they stop?

18 A Where these particular ones ---

19 Q The ones you saw in the video, did you see ---

20 A I saw on the video what you saw. They were trucks on
21 the road.

22 Q Did you know where they -- where they went? Where
23 they kept going?

24 A In this particular incidence?

25 Q Yes, sir.

1 A I have no personal knowledge of it at all.

2 Q So, you don't know if they might have stopped at the
3 hayfield.

4 A When I was speaking to this, I was comparing to what
5 the judge asked me in relationship to roads. I was just
6 using that as an illustration.

7 These -- these particular trucks, I can't testify to.

8 Q Okay. So, you -- on the day the video was shot, you
9 were in your pick-up or Mr. Jackson's?

10 A The video that we watched was in my truck.

11 Q Yes, sir.

12 A It's a fairly large --

13 Q It's not 11 feet wide, though, is it?

14 A No. It's -- but it's just a large truck.

15 Q It's not 11 feet wide.

16 A Logging truck's not 11 feet wide.

17 Q I'm not asking how wide a logging truck is. I'm
18 asking how wide your truck is.

19 A It's not 11 feet wide.

20 MR. ENGLISH: Thank you, Your Honor.

21 THE COURT: Yes, sir. Absolutely, Mr. Booth. Yes,
22 sir. You go right ahead.

23 MR. BOOTH: Okay. Thank you, Your Honor. We'd just
24 like to put back up the map slide of roads, just again, to
25 have him on the record verify some road locations.

1 RE-DIRECT EXAMINATION BY MR. BOOTH:

2 Q Mr. Mills, you've seen this exhibit before, correct?

3 A Yes.

4 Q All right. And it's labeled "Road 1," "Road 3," and
5 "Road 2"; you remember that?

6 A That's right.

7 Q Okay. Now, Road 1 extends from Fort Motte Road
8 through the properties, and then ends at the hayfield area,
9 correct?

10 A That's correct.

11 Q And you traveled that road several times I believe.

12 A Yes.

13 Q In Road 3 you notice -- not to pick it necessarily --
14 Road 3 is the road that the movie was done, correct?

15 A Right. That's a -- it's a fair representation. Yes.

16 Q And Road 2 is the road that you described as -- as the
17 Red Road, I believe.

18 A That is correct.

19 Q And again, that does show where it goes -- goes onto
20 the property of Mr. Bruner, correct?

21 A That is correct.

22 MR. BOOTH: And we just thank you, Your Honor. I just
23 wanted to get all that -- in this version of the map, have
24 him confirm where certain activities took -- as far as his
25 investigation. So, I believe that --

1 RE-DIRECT EXAMINATION BY THE COURT:

2 Q Did you -- when you were on the property in August,
3 did you see the road that went from -- where you -- where
4 the movie concludes, went back around to what we are
5 calling the Red Road? Did you happen to see that road?

6 A We drove up it, yes.

7 Q Okay. Because it wasn't on the video that I saw.

8 A No.

9 Q All right. But you did see that road that day.

10 A Yes.

11 Q All right.

12 A It would have been the same road that was in the
13 earlier video. It was just opposite direction of travel.

14 MR. BOOTH: I believe she's talking -- I mean --

15 Q I don't think I've seen it.

16 A No. You're correct -- you're correct --

17 Q Yeah. See where it says "road" -- yeah.

18 See where it says "Road 3," with the blue --

19 A I did travel it. But it wasn't in the video.

20 Q Was it in the video?

21 A No, it was not.

22 THE COURT: Y'all didn't video that.

23 A That section.

24 Q I understand. Now --

25 A I -- you asked -- I didn't produce the video, so I

1 don't know what ---

2 Q I gotcha.

3 A -- the video -- I was driving the truck.

4 Q I'm with you completely. Now, you said that you have
5 -- you've looked at all of the easements and you notice
6 that there were four easements that -- that appear to be
7 done at or near the same period of time.

8 A Right.

9 Q All were in the mid 80s.

10 A That's correct.

11 Q A number of people joined together, looked like at
12 least, in this effort to -- to grant each to the other
13 easements of ingress and egress, right?

14 A That's correct.

15 Q And clearly, Mr. Buyck's appeared -- was a -- was in a
16 concerted effort with -- and I'm -- I'm going to
17 mispronounce her name -- Ms. Pee --

18 MR. ENGLISH: Pedings.

19 Q -- Pedings. And the Sturks. Not Sturks.

20 MR. BOOTH: Stuck.

21 Q Stuck.

22 MR. BOOTH: Yes, ma'am.

23 Q And of course, the -- the main property in the yellow
24 box and Mr. Buyck. Right?

25 A Right.

1 Q And -- and I think we've all conceded that it appeared
2 what was going on is that ---

3 A Can I make one comment?

4 Q Okay.

5 A If I were viewing this and attempting to locate the
6 easement --

7 Q Okay.

8 A -- there's one thing, since it was a concerted effort
9 apparently to establish easement for travel --

10 Q Sure.

11 A -- there was one landowner that was left out for some
12 reason.

13 Q Right.

14 A And that was the Bruner tract.

15 Q Right. Sure.

16 A Which apparently wasn't involved in the existing road
17 that the easement traveled over.

18 Q I don't know. I mean, you ---

19 A Well, I -- that's just an observation.

20 Q Well, you just make that assumption.

21 A It's just my observation.

22 Q Because -- because it's 160 feet, right, over in their
23 property. And -- and hundreds and hundreds of acres of
24 property involved. Nine hundred acres of property involved
25 just in Mr. Buyck, right?

1 A That's correct.

2 Q And you got 203 acres with Ms. -- I want to say
3 "Milligan." That's not right.

4 MR. BOOTH: McAlister.

5 Q McAlister. That's another 200. Shoot, that's up 1100
6 acres right there, and that's not even the Stuck or -- or
7 the other property. In other words -- and all of it
8 country property, right? We not talking about a
9 subdivision, right? We not talking about the subdivisions
10 in Columbia where everything can be seen, right?

11 A Well, I think all of the landowners involved in these
12 easements, especially Ms. McAlister and Mr. Buyck, would
13 have been very aware that the road crossed the Bruner
14 property.

15 Q Yeah. Okay. Well, Mr. Buyck has told me repeatedly
16 that the road he was concerned about getting to was the Red
17 Road. So, if -- if that's true and he knows where his road
18 is, why shouldn't I just believe him that the Red Road is
19 the one he's worried about?

20 A But it crosses the Bruner property. Why wouldn't he
21 obtain that easement?

22 Q I don't know. Maybe his -- I don't know. Maybe his
23 relationship with Dr. Bruner's different. I don't know.
24 That's what I -- that is what I must decide.

25 A You have a very difficult job.

1 Q Well, no question to -- but that the easement talks
2 about the existing road, right -- correct? The existing
3 road, doesn't it?

4 A That is exactly correct.

5 Q Okay.

6 A And if you want me to elaborate on my ideas I will,
7 but if not, I won't.

8 Q Well, because existing road is what they are talking
9 about in all of these easements. I -- I didn't realize
10 that until you actually talked about that, that in all four
11 of these easements they talk about the existing road,
12 right? I mean, don't they?

13 A (No audible response.)

14 Q I mean, In other words ---

15 A Yes.

16 Q --- Ms. Peding and Stuck and ---

17 A In both the -- the -- if I overstep what I'm saying
18 just let me know.

19 Q Uh-huh. Sure.

20 A In my investigation of this, I did review historical
21 documents and photographs.

22 Q Sure.

23 A You -- both of these roads are easily available and
24 seen on photography back to the 30s.

25 Q Yes.

1 A Both were existing roads, I believe, at the time of
2 the easement creation. The -- I don't believe that, as
3 they describe, that the existing road -- it wasn't but one
4 road they were describing.

5 Now, in creation and writing of easements, one of the
6 most difficult jobs that a surveyor has is actually
7 interpreting what the written document says. No person
8 ever rode on a piece of paper. But they do ride on roads.

9 Generally speaking, it's the responsibility of a
10 surveyor to delineate a road. He has to interpret the
11 written road to put on the ground what is written.

12 Q Okay.

13 A I can only use what is written.

14 In this case, there was no easement that crossed the
15 Bruner property. Whether that be a mistake or not, it said
16 "an existing road," and only named those four tracts of
17 land.

18 Also, in a northwesterly direction. Mr. English asked
19 me directions, and I gave him my honest answer based on
20 calculated directions we have today. But there's a lot of
21 qualifications to that answer. But that ---

22 Q Let me tell you -- let me tell you. Here -- and I'll
23 ask you this question ---

24 A Well ---

25 Q --- and -- and then I'll be done.

1 A Okay.

2 Q But you need to listen to my question. Because here's
3 -- when you're talking about there are two existing roads
4 and that in your historical data it shows the two existing
5 roads, you are talking about the two existing roads within
6 the green box, right? Right?

7 A (No audible response.)

8 Q In your historical ---

9 A Well, there's one road up until the point it forks.
10 Then you have two options.

11 Q Listen to my question.

12 A Oh, sorry.

13 Q When you are referring to the historic evidence that
14 you have of two roads, you are referring to the existence
15 of those two roads within the --

16 A That's right. Either the blue or the red.

17 Q --- within the green box.

18 A Right.

19 Q Right? Right?

20 A Yes.

21 Q Okay. All right.

22 THE COURT: Prompt any questions from either of you?

23 MR. BOOTH: Just one moment.

24 THE COURT: Okay.

25 MR. BOOTH: I believe that's all I have.

1 THE COURT: Wonderful. Thank you so much.

2 THE WITNESS: You're welcome.

3 MR. BOOTH: Thank you, Mr. Mills.

4 (The witness retires from the stand.)

5 THE COURT: Call your next witness, please, sir.

6 MR. BOOTH: Yes. Last witness. Permission to move
7 things around a little bit up here.

8 THE COURT: Sure.

9 (Brief pause.)

10 MR. BOOTH: Barbara Jackson's my next witness.

11 THE COURT: Okay.

12 MR. BOOTH: Ms. Jackson, if you'll -- you know where
13 to go to be sworn.

14 (The witness approaches the stand.)

15 BARBARA JACKSON, having been first
16 duly sworn, testifies as follows:

17 CLERK OF COURT: Please state your name for the
18 record.

19 THE WITNESS: Yes. Barbara Jackson.

20 THE COURT: And be seated. Now, you're up here
21 without any water, and I'm worried about your voice getting
22 tired. How bout a little cup of water?

23 THE WITNESS: Thank you, Your Honor. I'm hoping I
24 won't be here so long.

25 THE COURT: Well, if it gets to be too long, please

1 let us know.

2 THE WITNESS: Thank you.

3 THE COURT: Wonderful.

4 THE WITNESS: Thank you. I just had some.

5 THE COURT: Great.

6 MR. BOOTH: All right. Sorry that we need water.

7 THE COURT: Here comes the calvary.

8 (Clerk of Court hands water cup to the witness.)

9 THE WITNESS: Oh, thank you.

10 MR. BOOTH: That's yours.

11 THE WITNESS: All right.

12 MR. BOOTH: (Removing old cup) Let me get that -- make
13 sure --

14 THE WITNESS: I don't get any cooties.

15 DIRECT EXAMINATION BY MR. BOOTH:

16 Q Mrs. Jackson, give us your full name.

17 A It's Barbara, my middle name's Ann, last name's
18 Jackson.

19 Q And I assume your husband's William Jackson.

20 (Several people talking and laughing at once.)

21 A I'm awake. It's been a long day, but I'm awake.

22 Q Thank you.

23 A Yes.

24 Q Mrs. Jackson, are you familiar with the property that
25 we've been talking about today?

1 A Yes, I am. I'm intimately familiar with it.

2 Q Yeah.

3 A Yes.

4 Q And from your view point as the wife of Mr. Jackson,
5 what benefit and what pleasure do you get out of using that
6 particular piece of property?

7 A I love and adore that piece of property. I'm very
8 passionate about it. And it's where we go anytime weather
9 permits us to be there, that excludes the summertime.

10 We're there as often as we can in the winter. And we
11 love to be there just to eat, cook dinner, spend the night
12 there now that we have a cabin. I have dogs that just love
13 to run free on the roads. I have nieces and nephews that
14 love to visit. We have Christmas parties for my family.

15 We're getting ready to have my mother's family
16 reunion, to include all of my extended family. And we
17 often have just my nieces and nephews to come spend the
18 night.

19 I love to listen to the owls and along the Congaree
20 River. We have wonderful owls. We have Barn Owls and the
21 Great Horned Owl, the Screech Owl. It's just wonderful.

22 Q Now, of course, you know why we're here today, to talk
23 about the access of using what we've been calling the "Red
24 Road," which I called the "William Jackson Road" yesterday.
25 So, I'll call it the "Barbara Jackson Road" today, if

1 that's okay with you.

2 A That's fine.

3 Q The Barbara Jackson Road, you know, we're -- you know
4 we're here today to talk about whether Mr. Buyck and his
5 other activities can use that road, correct?

6 A Yes.

7 Q Okay. Did -- did -- did you know or were you there
8 when your husband put in the gate and the lock?

9 A Yes.

10 Q All right. What was your reason for having that gate
11 and lock put in, I think, back in 2000?

12 A My reason was for security reasons, to -- to protect
13 us when we're in there. I -- I like when we go in there,
14 especially after dark, to be able to lock that gate, and
15 know who's coming and going.

16 Q All right. And have you heard testimony today or are
17 you aware of the fact -- I don't think you heard it today -
18 - aware of the fact that Mr. Buyck has given the key out to
19 a variety of people?

20 A Yes, I've known that for some time.

21 Q All right.

22 A I've witnessed people coming and going that could only
23 be there if they were issued a key.

24 Q All right. And was -- was the intent or the desire
25 for your husband or you to give him a key, to let him just

1 basically let anybody else come in there?

2 A Oh, no. It was for Mr. Buyck; and it was for him to
3 use, we believe, as a short cut to get to his duck pond
4 when he wanted to go to that piece of his property.

5 Q Okay. Now, for the last couple of years, Mr. Buyck,
6 in his other activities, has not been able to use the
7 Barbara Jackson road. You're aware of that, of course.

8 A I'm sorry. I --

9 Q You're aware that in the last two years, he was not
10 able ---

11 A Right. That's true.

12 Q So, what differences have you noted, if any, from the
13 previous, say, two or three years?

14 A Well, our -- our enjoyment of the property has
15 increased, particularly mine. I'm not as afraid to be
16 there. I know who's coming and going.

17 I haven't quite gotten used to the fact that I'm not
18 going to meet one of these big trucks driven by the
19 hunters, meeting me in the blind spots of the road when I'm
20 walking my dogs. I still am fearful that maybe they're
21 going to come around the corner, and I can't see them.

22 I'm still concerned about my nieces and nephews
23 playing on those roads and riding in golf carts on those
24 roads and meeting one of these vehicles. It's hard to see.
25 I think we've seen that in the videos.

1 I've enjoyed knowing that the -- these vehicles aren't
2 there now, and it's -- it's still -- I'm getting used to --
3 -

4 Q All right.

5 A --- not being so afraid of that.

6 Q All right. For the last couple of years, I'm -- I'm --
7 - during this time, I'm also going to ask you to report if
8 you observed -- first observed any traffic on the other
9 road, the -- the Hayfield Road?

10 A Yes, I have. I've personally observed numerous
11 vehicles going. It feels like it's constantly anytime we
12 have been there. And as I mentioned earlier, we are there
13 as often as possible, which is almost every weekend in the
14 winter.

15 There's never a time that I drive down there and not
16 witness a vehicle of some sort going down the Hayfield
17 Road. And there's never a time I even leave the property
18 to go to the grocery store without running into or seeing
19 one of these vehicles, never.

20 Q All right. So, if that volume of traffic was shifted
21 to the Barbara Jackson Road, how would that make you feel?

22 A It would -- it'd make me unhappy, of course. It would
23 increase my concerns about safety, our security.

24 I'm very concerned, too, Mr. Booth, about our
25 liability. We've spoken to our insurance agent, Beaver

1 Hardy, and he tells me --

2 Q You gotta stop there.

3 A I'm sorry.

4 Q You cannot ---

5 A We've confirmed that we have liability.

6 Q Okay. And now, you -- you got some background in
7 legal help, I believe, right?

8 A In legal ...?

9 Q I mean, your -- your job.

10 A Yeah.

11 Q I mean, actually your job ---

12 A I'm a certified public accountant. I'm also a
13 certified valuation analyst. I have a degree from USC in
14 accounting. And I -- my firm -- I have my own firm now,
15 and we practice litigation support.

16 Q All right. But you know about liability issues ---

17 A Oh, yes.

18 Q --- I assume, from your experience.

19 A Yes.

20 Q So, tell me what liability issue or issues you see
21 with respect to Mr. Buyck using the Barbara Jackson road on
22 a regular basis?

23 A I feel like we now -- if he uses the -- I -- I call
24 that my driveway, Your Honor, this road.

25 I feel like he -- if he uses that, it increases our

1 burden of responsibility if somebody got hurt. I feel like
2 we're responsible -- we share responsibility, I believe,
3 with the Conrad's. If they just restrict their use to the
4 Hayfield Road, we have a liability.

5 But if he also enjoys use of our driveway and allows
6 the hunt club and the farming activities to use that road,
7 it -- it doubles or -- or probably quadruples our -- our
8 risk of being responsible if somebody got hurt and the
9 damages associated with the injuries.

10 Q All right. Now, let me go back before two years ago,
11 let's say 3/4 years prior to November of '08 -- September
12 of '08. Did you observe traffic on the Hayfield Road back
13 then?

14 A Yes.

15 Q Okay. So, when did you personally become aware of how
16 Mr. Buyck was using both of those roads prior to November
17 of '08? What did you observe, I guess, is a better
18 question, you personally observe?

19 A My personal observation then and -- it's different now
20 -- then, prior to November of '08, was Mr. Buyck used what
21 we call the Hayfield Road or the Blue Road when he was
22 farming or -- or doing something with the hayfield. That's
23 where all this larger equipment traveled.

24 The other road -- our driveway or the Red Road -- was
25 used when they -- duck season would be an example, early in

1 the mornings when they wanted access to the property where
 2 the river is, the swamp, where the ducks are. They were
 3 going to hunt deer -- I guess they would hunt deer down
 4 there as well as the ducks -- that's the activity that I
 5 would see traveling our driveway. It just depended on what
 6 they were doing.

7 In my opinion, my observation was if it was farming
 8 activities, they used the Hayfield Road; if it was hunting,
 9 they would use our road.

10 Q All right.

11 A The Red Road.

12 Q All right.

13 MR. BOOTH: Thank you for -- my questions, and again -

14 --

15 THE COURT: Very well. Cross-examination?

16 CROSS-EXAMINATION BY MR. ENGLISH:

17 Q Mrs. Jackson, did you look at the property before
 18 y'all bought it, before your husband bought it?

19 A I won't recall if it was a specific date, Mr. English.
 20 I saw it when we were contemplating purchasing it.

21 Q Okay.

22 A I saw ---

23 Q So, this -- so, you -- you visited the property before
 24 you purchased it.

25 A I'm not sure if it was before the purchase. I know

1 that I saw the property with Loraine and Brock Conrad. We
2 went to the -- what they call the "pond house." And I'm
3 not sure that I went all the way into the interior of the
4 property.

5 Q Okay. Did you -- this visit with Brock and Loraine,
6 did you see the Red Road?

7 A I don't know that I did.

8 Q Okay. Do you remember how you got to Brock and
9 Loraine's ---

10 A Yes.

11 Q Okay.

12 A Yes. Right off of Fort Motte Road and then a left
13 turn. It's like a very short --

14 Q Okay.

15 A -- distance into the road.

16 Q Okay. All right. Now -- so, it's safe to say that
17 before you -- before you were interested in buying the
18 property -- I say "you," you together with your husband --
19 you had -- had no familiarity, you had never seen any of
20 this property before; is that right?

21 A No, I had not.

22 Q So, as far as what went on, Mr. Buyck's use of the
23 road up until you bought it, you had no idea about that ---

24 A Oh, no. I didn't have any idea.

25 Q --- the historical use of the Red Road? No idea.

1 A I don't -- I had no -- no.

2 Q All right. If I can just get you to just look at
3 this. This is Defendant's -- this is 20(a).

4 We're just trying to get an idea of -- tell you what,
5 could you point out what -- how -- you guys have built a
6 cabin, right?

7 A Yes.

8 Q Okay. Can you point where -- where is the cabin
9 located on the property, if you can see it on this aerial?

10 A (Indicates) I think I can see it. Boy, he's going to
11 kill me if I can't point out the cabin. I'm not sure I can
12 on this page.

13 Q Okay. Well, maybe this will help ---

14 A Will you help me?

15 Q Oh. I want -- I want you to be able to tell me.
16 Maybe we can figure it out together. All right.

17 (Indicates) This is what we would call -- would you
18 agree that this is the Red Road?

19 A That's the Red Road. That's my driveway.

20 Q That's your driveway.

21 A Yes.

22 Q Okay. All right. And so ---

23 A (Indicates) And this is where it crosses Dr. Bruner's
24 property.

25 Q Right.

1 A So, we would come inside here. So, my cabin would be
2 approximately in this area (indicates.)

3 Q So, it's on the road?

4 A No.

5 Q Okay.

6 A It's very, very close to the road.

7 Q Well, I see some cleared areas. And I'm just
8 wondering -- I'm not trying to suggest -- but are any of
9 these cleared areas near --

10 A That could be.

11 Q Well, do you ---

12 A It's very, very close to the road. I can -- I can
13 hear the vehicles passing down this road, and when the --
14 in the winter, when the leaves are dead, I can see them.

15 Q Okay.

16 A Mostly hear them.

17 Q When you -- do you have another driveway off of the
18 Red Road to get to the cabin?

19 A Off of the Red Road? No.

20 Q Like if you're driving to the -- if you're driving to
21 the cabin, do you take a right off of the Red Road to go?
22 Or do you just stop on the Red Road and there's your house?

23 A We ride straight down the Red Road to the cabin.

24 Q Okay. So, it's in these woods?

25 A It's not -- well, it's sort of in the woods. It's

1 sort of in this clearing. Like I said, it's very close to
2 this road, hearing distance. And I can see the road, and
3 there's the trees out to this -- this is -- cabin --
4 there's some trees out there. Yes.

5 Q All right. Okay. Okay. It's hard to see on an
6 aerial ---

7 A Yeah. That's hard.

8 Q --- sometimes. So ...

9 How did y'all select the location for your cabin?

10 A Well, I'm sure -- my recollection is when we bought
11 the property, we put our gate up immediately. And then
12 chose some distance away from our understanding of what Mr.
13 Buyck's easement was to be away from this traffic.

14 And in addition to that, where the cabin is now, it's
15 fairly close to the river, although we don't go down to the
16 river. We don't have the property that joins the river.

17 Q Can you see the river?

18 A On a really good day when -- you can -- you can barely
19 make it out. And I can see birds that fly over the river.
20 I know exactly where the river is from the cabin, when I'm
21 sitting on the porch.

22 Q I want you to look real -- look real hard, because it
23 looks to me like -- tell me if I'm wrong -- it looks to me
24 like there's a -- some makings of a -- of a driveway
25 through there. There's a clearing -- you remember seeing a

1 clearing?

2 You go past a clearing -- the reason I'm saying, it
3 looks like maybe that there's a cabin back here in the far
4 corner of the panhandle.

5 A Well, there's just one cabin, so --

6 Q I can't tell if that's a cabin, but ---

7 A I can't either. But I -- we were in this vicinity
8 (indicates) and I'm sorry I'm not any better with ---

9 Q Well, I'm just trying -- it's just I'm trying to
10 figure out with you if -- if there's any travel from the
11 Red Road to your cabin. Because -- because I think what
12 I'm getting from your testimony is almost that you -- that
13 the cabin's almost right beside the Red Road.

14 A It's very, very close. Like I testified, it's -- I
15 can hear them, and sometimes see them.

16 Q Sometimes see them.

17 A Yeah. If I'm outside. It's ---

18 Q Are there woods -- like if you go outside right now,
19 these -- are these pine trees (indicates)?

20 A We would have pine trees, yes.

21 Q Okay. You got some hardwoods, too?

22 A Not as many as pine.

23 Q Well, let's just say on a summer day --

24 A Uh-huh.

25 Q -- okay, when you are at your cabin and you might come

1 out of your cabin and you face what -- the direction of the
2 Red Road, are there trees between you?

3 A Yes.

4 Q Okay. All right. Okay. (Indicates) Could that be it
5 there?

6 A I don't think it's that quite high up. I think it's
7 here (indicates.) I don't know.

8 Q It's not showing on that picture, but I believe it was
9 taken in 2009, but I'm not sure. All right.

10 THE COURT: All right. Re-direct?

11 MR. BOOTH: No, ma'am.

12 THE COURT: All right. I have --

13 THE WITNESS: Yes.

14 THE COURT: -- I have a question.

15 DIRECT EXAMINATION BY THE COURT:

16 Q Do -- do you have an easement from Dr. Bruner?

17 A We lease the hunting rights from Dr. Bruner, so, no.

18 Q Do you have an easement ---

19 A No, ma'am.

20 Q --- to the road?

21 A No.

22 Q Why do you think you have any right to be on his
23 property on that road?

24 A We were -- we were initially -- when we first bought
25 it, Your Honor, we were very careful not to drive on Dr.

1 Bruner's property. We went around it.

2 My husband took a tractor and actually cut a road
3 around a tree, so that we would not be trespassing on his
4 property. And he was mindful to tell me not to take the
5 shortcut and go across Dr. Bruner's property.

6 Since that time, we started leasing the hunting rights
7 from Dr. Bruner. And because of that, we -- we're on his
8 property a good bit.

9 Q But you don't have an easement to the road.

10 A No, ma'am.

11 Q But you use the road.

12 A It's -- I cross over his property.

13 Q You use the road that goes across his property.

14 A Right. I -- yes.

15 Q Do you have a gate at Dr. Bruner's property line?

16 A No. There's no gate there.

17 Q But you have a gate at Mr. Buyck's property line.

18 A Mr. Buyck has two gates: One's off the Fort Motte
19 Road, and one is going down Hayfield Road.

20 Q Uh-huh. Yours is on the road.

21 A Ours is on our driveway road.

22 Q Okay.

23 A The Red Road.

24 Q Did you -- okay. And when you built the cabin, you
25 built the road to the cabin?

1 A No. It was an existing road. We might have improved
2 it, cleared it; mow it --

3 Q Uh-huh. Okay.

4 A -- and keep it ---

5 Q All right.

6 A --- passable.

7 Q Thank you.

8 A Uh-huh.

9 Q Thank you very much.

10 THE COURT: Any questions?

11 MR. BOOTH: That's all we have. I would like -- I
12 know that's my last witness, but on that last question
13 about Bruner and the leasing of his property, Mr. Jackson,
14 of course, would have more familiarity with that, Judge.

15 THE COURT: You can recall him if you would like.

16 MR. BOOTH: Yes. Mr. Jackson? May I put Mr. Jackson
17 up just for that one ---

18 THE COURT: Of course.

19 MR. BOOTH: --- area of testimony?

20 THE COURT: Absolutely.

21 THE WITNESS: I'm assuming I may be excused?

22 THE COURT: You certainly may be excused.

23 THE WITNESS: Thank you.

24 MR. BOOTH: Mr. Jackson, when resuming the stand,
25 you're still under oath, of course.

1 DIRECT EXAMINATION BY MR. BOOTH:

2 Q Mr. Jackson, I just want to ask you a question about
3 using this area of Mr. Bruner's property for access to you
4 cabin in this case. Are you familiar with that?

5 A Yes.

6 Q All right. What are the -- what are the -- what are
7 the circumstances that you dealt with when you first
8 started traveling to your cabin?

9 A Well --

10 Q To your property, I should say.

11 A When we -- we didn't -- when we first bought the
12 property, as I testified earlier, it was several years we
13 didn't have a cabin. So -- and the -- and -- and this --
14 I'm sorry -- (indicates) this area up here, we did clear
15 out this. This -- this was all woods and -- and Barbara
16 wouldn't know about ---

17 Q Now, you're -- you're talking about the area on --
18 again, what we're calling Exhibit ---

19 A On -- right there, where the -- where that cabin is.

20 Q --- let me slow you down for a second. Exhibit 20(a),
21 you're referring to, again, the box, the red box.

22 A Right.

23 Q And you're -- and now you're talking about the smaller
24 sort of panhandle box, correct?

25 A Right.

1 Q All right. Go ahead.

2 A All right. There was -- there was nothing there.
3 There was no clearing, there was no cabin, there was
4 nothing. It was -- all those trees were there. And -- and
5 Barbara would have no knowledge about this early on.

6 And like I said earlier, it was several years before
7 we built anything. And I would go out there and work with
8 the tractor and stuff like that.

9 I went -- when I went up there with a tractor, I would
10 do this clearing. I went this way (indicates) because I
11 had like a big track loader on tracks. And I could go --
12 and I cleared out some around in here, too, just to --
13 making clearings.

14 And so, I used this (indicates) off of the Bruner
15 property. And I didn't go up there much, because I --
16 until two or three years later, because like I said, there
17 was nothing there.

18 By that time I know Dr. Bruner. He's from Sumter
19 where I'm from, and we began communications. And we talked
20 about leasing and I got his permission to use it.

21 And after we -- it might be maybe 2004 or whenever we
22 bought the cabin -- by that time, we began to use the road
23 with his permission.

24 Q All right. So, you don't have a granted easement.

25 A No. We just had permission.

1 Q That's all.

2 A Well, we had his permission and we have a lease of the
3 property. We lease all of -- all of his property, not just
4 that corner. We lease the whole tract for recreational
5 use.

6 Q Okay. And you've leased it for about how long?

7 A I don't remember how many years now. Maybe ---

8 Q Is it a written lease?

9 A --- four or five -- yeah.

10 Q It's a written lease?

11 A It's a -- it's a written one that was -- like, I don't
12 know if it was four or five -- three or four years, maybe
13 five years, something like that. It has expired, and now
14 it just goes year to year.

15 But I mean, I just paid it a month ago or so. And it
16 just goes -- it just keeps going forward. And we've agreed
17 that unless they ever sold the property or something,
18 they'd continue to do it.

19 It's revenue for them, and it kind of gives us a
20 buffer. Because there was a hunting club on there at one
21 time, and they would -- would hunt with dogs. And -- and
22 we just would rather they not do that, because it was
23 disruptive.

24 And so, when we had communication with him, I agreed
25 to lease it and he leased it to me. I hope to do that for

1 the foreseeable future.

2 Q All right.

3 MR. BOOTH: That's -- that's all I was going to ask in
4 that area, Judge.

5 THE COURT: All right. Thank -- cross-examination.

6 MR. ENGLISH: Thank you.

7 CROSS-EXAMINATION BY MR. ENGLISH:

8 Q Mr. Jackson, I -- just quickly, I'll ask you the same
9 question I asked your wife: If you could point out where
10 the cabin is?

11 A It's -- it's somewhere in this -- I don't know if I
12 can see it. It's somewhere in these trees right here
13 (indicates.)

14 Q What -- this -- you said this -- you testified that
15 this was a clearing that you did?

16 A Right.

17 Q Okay. And are these other ---

18 A I think it was ---

19 Q --- clearings ---

20 A --- I think there may have been like a little ---

21 THE COURT: (Hands marker to the witness) Here you go.
22 There you go.

23 THE WITNESS: You want me to mark the cabin?

24 THE COURT: Yes.

25 THE WITNESS: Where the cabin is?

1 MR. ENGLISH: Yeah. Please.

2 THE WITNESS: Okay. (Complies.) I think it's right
3 there.

4 Q All right. And so, you -- and you have a driveway to
5 get to it off the Red Road?

6 A Yeah. Well, if -- if you could see the -- I don't
7 know if I should mark on that.

8 But the Red Road splits, and it shows it that way on
9 the plat. It splits on the Bruner property, and it goes on
10 around like this and like that (indicates.)

11 Q Okay.

12 A And -- and really, it's a sort of continuation like
13 this. And then the Red Road starts -- splits off of it.

14 Q If you don't mind, just maybe draw -- continuing -- to
15 continue the little driveway line to the -- to the cabin.

16 A (Complies.)

17 Q All right. You got a scale down here. This is on 20
18 -- talking about 20(a): One inch equals 300 feet.

19 A Yeah.

20 Q Let's just try to figure out about how far the cabin
21 is --

22 A It's probably -- be about 600 feet, 700. Something
23 like that. That sounds about right.

24 Q It looks like two -- two and a half inches?

25 A Uh-huh.

1 Q 700?

2 A Yeah.

3 Q 750 feet? Something like that?

4 A Yeah. And I -- I think the reason it's -- it's so
5 visible is this is a bluff, and that's one of the reasons
6 we liked it; that -- because that's why you can see the
7 river. It's one of those bluffs like you have on the
8 Congaree.

9 And because it's up higher than this, you can -- you
10 probably have better visibility that way, for the same
11 reason you have that way (indicating.) You know, with that
12 being the desirable view, because it's river and all that.
13 And if you have traffic, it's -- unfortunately, you got
14 visibility to that one, too, because you're on the hill.
15 It's up above the road.

16 Q You -- you say you started -- when -- when did you say
17 you started build -- building the cabin?

18 A I don't remember. I think it was -- like I said in my
19 earlier testimony, first we built the little -- like an
20 equipment shed, tractor shed. You can't see it for the
21 trees. I think we built that within a couple of years.

22 And then it might have been another couple of years
23 before we built the cabin. So, I don't remember exactly.
24 Sometime in '04 or 5, something like that.

25 Q There was -- but you'd owned the property for a while.

1 A Yeah. Yeah.

2 Q So, y'all had -- and y'all decided to put the cabin
3 near the -- near the Red Road.

4 A Well, we had decided it by that time, yeah. We didn't
5 decide that right away.

6 Q So, after you'd been there for a while, and you'd
7 gotten familiar with the property, that's when you decided
8 ---

9 A Yeah. For the first few years, you know, all this
10 stuff was overgrown and stuff, and then I didn't have any
11 equipment or anything. I would rent tractors, like a week
12 of vacation or something. Just come out there and we were
13 trying to clean up, improve; working all over the property.
14 We weren't even -- didn't even have our sights set on
15 building any kind of building or anything yet. That was
16 several years.

17 Q Okay. Thank you.

18 THE COURT: Thank you. Uh-huh. Re-direct?

19 MR. BOOTH: No, ma'am. That's --

20 THE COURT: All right. Come on back down.

21 MR. BOOTH: -- the end of --

22 THE COURT: The defense's case?

23 MR. BOOTH: -- case.

24 THE COURT: All right. Very well.

25 THE COURT: Will there be any reply?

1 MR. ENGLISH: No, Your Honor.

2 THE COURT: Rebuttal? No? All right. Very well.
3 Okay. Gentlemen, do you wish to make closing?

4 MR. BOOTH: I have a very short one, yes, ma'am.

5 THE COURT: All right. All right.

6 MR. ENGLISH: And I'll --

7 THE COURT: Yes, sir. Yes.

8 MR. ENGLISH: Your Honor, you've heard the testimony -
9 --

10 THE COURT: I have.

11 MR. ENGLISH: -- of Peter Buyck, his -- his father
12 before him, and his uncle before -- with his father, used
13 that Red Road from at least the late 1940s, according to
14 Mark Buyck, unchallenged by anyone, up until Mr. Jackson
15 bought the property. That's a period of more than 50
16 years.

17 The elements of prescriptive -- I'm talking about
18 prescriptive easement.

19 THE COURT: I understand.

20 MR. ENGLISH: We -- we satisfied the elements of -- of
21 prescriptive easement: Continuous and uninterrupted use
22 for a period of more than 20 years, under a claim of
23 rights.

24 Peter testified that he certainly thought he -- he --
25 he thought he had the right to use it and -- over all that

1 time and -- and there was never any fact or -- or anything
2 that ever happened in that period of time, up until 2000 at
3 the earliest, where -- that would -- would challenge that
4 right. He clearly knew that the Red Road was a road that
5 he enjoyed, and it was never any question about it.

6 You heard from Jack Bratty and Brock Conrad. And
7 everybody testified that they thought the Red Road was --
8 was Peter Buyck's road and the Buyck family road.

9 And so, when Mr. Jackson purchased the property in
10 2000, he took title subject to Mr. Buyck's prescriptive
11 rights or easement rights in the Red Road. And he cannot
12 now be allowed to change what's been the facts as they
13 exist on the ground and -- and in fact. Now that he
14 decides he doesn't want the Red Road used by Mr. Buyck, he
15 can't close it. Mr. Buyck's rights to use the Red Road
16 ripened much before he -- he purchased the property.

17 On the issue of express easement, I think there's
18 testimony that -- that -- well, Mr. Mills testified that if
19 you look at the easements in series, the place -- point at
20 which the Red Road terminates on Mr. Jackson's property,
21 begins to go across Mr. Buyck's property, is northwesterly
22 of the point where it originates off Fort Motte Road. If
23 you read those easements in -- in conjunction with one
24 another, the one common vein that they all share is that
25 there's a single road that runs in a generally

1 northwesterly direction.

2 Mark Buyck testified he didn't -- he'd been visiting
3 the property since 1948, didn't know anything about the
4 Hayfield Road.

5 I think the testimony is clear that if you talk about
6 the one road, you're talking about -- at least over Mr.
7 Jackson's property -- the Red Road. The Red Road continues
8 down to Fort Motte Road, it continues back up into Mr.
9 Jackson -- into Mr. Buyck's property. That's the main
10 road. That's the main road. That's -- that's what the
11 testimony says; that's what the evidence says.

12 So, at this -- this stage, Mr. Jackson would not have
13 a right to prevent -- prevent or -- or limit Mr. Buyck's
14 use of -- of the Red Road. He's -- he's entitled to enjoy
15 it as he has enjoyed it ---

16 THE COURT: Let me ask you this question, Mr. English:
17 Claim -- he has a -- a -- a claim under the -- under the
18 belief of a claim, where did that -- talk to me about that.

19 MR. ENGLISH: All right. We've got some cases, Your
20 Honor.

21 THE COURT: All right.

22 MR. ENGLISH: If I can beg the Court -- Court's
23 indulgence. I want to make sure I've got the right case.

24 THE COURT: Sure.

25 MR. ENGLISH: Okay. *Matthews vs. Dennis*, that's 365

1 South 245; 616 SE 2nd 437. That's ---

2 THE COURT REPORTER: You gotta slow down just a little
3 bit ---

4 MR. ENGLISH: I'm sorry.

5 THE COURT REPORTER: --- when you read.

6 MR. ENGLISH: I'll go slower.

7 THE COURT REPORTER: Thank you.

8 MR. ENGLISH: This *Matthews vs. Dennis*, 365 South
9 Carolina 245; 616 SE 2nd 437, Court of Appeals, 2005, this
10 is a case where -- similar to this case.

11 But the plaintiff's testimony was that members of her
12 family had always used the roadway for access. They
13 acknowledged that they did not have any legal documents
14 granting them the right to do this. But they thought they
15 had the legal documents, and they thought they had the
16 right to use the road.

17 I think thinking having a good faith basis to believe
18 you have the right to use the road is -- is enough. Mr.
19 Buyck claimed that in 1984, he thought it covered the roads
20 -- both roads on the property. He didn't -- so he thought
21 he had a legal right to use it. He never -- never -- has
22 never wavered on that. And his father had the -- had the
23 right to use it.

24 And just the consistent, continuous use of -- I mean,
25 it was -- Mike Nichols said he couldn't stop him from using

1 it. He said, "I couldn't stop him if I wanted to." And --
2 because he knew when he bought -- he knew when he bought
3 the property that that was the Buyck road, and he would
4 never think to challenge that right.

5 And that's how it is. I mean, if -- if somebody had a
6 right to use the road, they have the right to use it. And
7 I think we've -- I think we've met our burden.

8 THE COURT: Thank you so much. Yes. All right. Mr.
9 Booth.

10 MR. BOOTH: Thank you, Your Honor.

11 THE COURT: Yeah.

12 MR. BOOTH: I certainly enjoyed my two days with you
13 as a circuit court judge, and I mean that sincerely.

14 THE COURT: Well, you are very kind.

15 MR. BOOTH: I mean, ---

16 THE COURT: Let me tell you something, a number of
17 people have made the comment, you know, what are you doing.
18 I said I'm trying a road case in Calhoun County. And
19 they're like, "Aw, a property case."

20 I said, "Let me tell you something, these lawyers, you
21 know, why normally it -- it's the driest kind of case you
22 could ever try, these lawyers have done the most
23 spectacular job. I am having a blast in that they have
24 made it fascinating, entertaining, absolutely as grand as
25 any case could be." And I said, "I don't -- you know, I

1 know it's about a road, but you have no idea. You know,
2 these lawyers have just been spectacular."

3 So, let me tell you what, I -- I've done everything I
4 can to add to your client base, because I have told
5 everybody I've had contact with that y'all have done an
6 unbelievable job with -- with this case.

7 MR. ENGLISH: I'm sorry. I ask for your indulgence.
8 I did have one other case. Just one other case.

9 MR. BOOTH: That's fine.

10 MR. ENGLISH: If you -- you don't mind.

11 MR. BOOTH: That's fine.

12 THE COURT: Sure.

13 MR. ENGLISH: *Jones vs. Daily*. That's 363 SC 310; 609
14 SE 2nd 597. That's also from the Court of Appeals in 2005.

15 This is the one where the dominant owner, the person
16 claiming the easement, believes she had the right to use
17 the access, because her family had used it to get to and
18 from their land, quote, "as long as she could remember."

19 And then they had -- other family members testified
20 that they asserted their right to use (as read): "the pre-
21 existing path with full -- with full knowledge and
22 acquiescence of the servient owner."

23 That goes to Mike Nichols's testimony, clearly.
24 Again, Mike testified that he didn't have any right to
25 interrupt Mr. Buyck's use of the road. This is another

1 case.

2 THE COURT: All right. Mr. Booth.

3 MR. BOOTH: I have a quick comment on his case called
4 *Matthews v Dennis*.

5 THE COURT: Yes.

6 MR. BOOTH: I did have a chance to look at it while we
7 were here.

8 THE COURT: Yes.

9 MR. BOOTH: And of course, that case, the claim of
10 right part of the case, is based on a plat that had been
11 recorded showing the existence -- I believe it was Hawk --
12 of Hawk Road or Hawk Lane. So, there was a plat that did
13 give them a claim of right argument.

14 Here we just have physical evidence of a road. A
15 claim of right isn't -- I think, not proven here. But even
16 if the long use by friends of Mr. Buyck's family somehow
17 transforms itself into a claim of right, then I just don't
18 think the *Matthews* case is -- is the correct case.

19 But I -- let me proceed onto my -- our principal
20 reasons why you as the judge should not grant either a
21 dedicated or deeded easement within the Barbara Jackson
22 Road or give Mr. Buyck a prescriptive easement. Because
23 again, I feel like they should elect which one they're
24 asking you to award.

25 But since you have said, "No, they don't have to

1 elect, I'm going to proceed as if -- only if -- that
2 they're trying to get a determination that the easement
3 grant from Ms. McAlister is in fact the road, because
4 that's what their amended complaint said.

5 Their amended complaint only refers to -- to the Red
6 Road or the Barbara Jackson Road -- whatever you want to
7 call it -- as the place for that McAlister easement. They
8 do not say that the McAlister easement is located anywhere
9 else.

10 So, I'm going to go with that, and I feel that --
11 feel that reading of the McAlister easement ---

12 THE COURT: Rather than -- why would you not argue the
13 prescriptive easement?

14 MR. BOOTH: Well, I'm going to argue it. I just ---

15 THE COURT: Oh, you're going to do both.

16 MR. BOOTH: Yes. Yes, ma'am.

17 THE COURT: Right.

18 MR. BOOTH: I'm just going to argue that, I just -- I
19 would like to say that ---

20 THE COURT: I thought you were going to leave me in
21 the lurch with half of this case.

22 MR. BOOTH: Oh, no.

23 THE COURT: Hence, you were frightening me with ---

24 MR. BOOTH: But the reason I bring that up at first,
25 because to me -- the deeded easement, again, done in 1984,

1 to us -- and in fact I think is located on the Hayfield
2 Road because of the language in the easement grant.

3 THE COURT: Let me ask you this question. Let -- can
4 -- because I am going to challenge you, because there are
5 some questions that I've got that I'm struggling with.

6 One of them is: What if it is ambiguous? What if it
7 is -- what if it is ambiguous? What am I to do then?

8 MR. BOOTH: Well ---

9 THE COURT: Do I give -- do I give -- attempt to give
10 meaning to the intention of the parties? Tell me what
11 happens then.

12 MR. BOOTH: Well, if -- if you're inclined, for
13 example, not to grant them a prescriptive easement --

14 THE COURT: Yes.

15 MR. BOOTH: -- because obviously that would sort of
16 make that question mute --

17 THE COURT: Right.

18 MR. BOOTH: -- if you give them a prescriptive
19 easement. But assuming that, and then I think whether or
20 not the language of the easement is ambiguous --

21 THE COURT: Yes.

22 MR. BOOTH: -- I believe you as a judge can make a
23 determination of location. That's what -- the law is
24 clear. It's a -- it's a question of law as to the location
25 of the easement. It's a question of equity as far as the

1 extent or the use of the easement, such as with travel over
2 the road, that sort of thing. That's the distinction. So,
3 it's a question of law, and I think that puts it right to
4 you.

5 You think it's ambiguous, I believe you would have to
6 decide which -- which road it applied to.

7 THE COURT: Yeah.

8 MR. BOOTH: The reason I think that's important to my
9 case is -- and I made this argument in my trial brief --
10 you know, we ---

11 THE COURT: Uh-huh.

12 MR. BOOTH: --- we take the position that the deeded
13 easement is the Hayfield Road.

14 THE COURT: Uh-huh. I know that.

15 MR. BOOTH: And -- and we take the position that at
16 the time that it was deeded and recorded that way -- again,
17 Mr. Buyck participating -- that that right there took away
18 any argument that in addition to this deeded easement to
19 get to his property -- because it does -- he was also at
20 the same time prescriptively using a second road over the
21 property.

22 But the argument is that when you look at the recorded
23 documents, you see the reported easement. Again, assuming
24 that -- that it was the Hayfield Road, then a -- then you
25 would not think that a landowner would deed a second way to

1 get to his property, because the property access is not an
2 issue. Obviously, easement and prescriptive easement --
3 any great extent.

4 But here, the Hayfield Road does get into his
5 property, his 700 acres. It gets there. After that, and
6 where he wants to go on his property, where his hunters
7 want to go on his property, clearly, I think it's beyond
8 any part of the law that requires us to think that he
9 should get a deeded easement or prescriptive easement to
10 allow him to have, I guess, better access to his interior
11 700 acres. I -- I just don't think that's part of how you
12 do prescriptive easement.

13 In fact, my -- my case that I like is a case from
14 Dorchester County, and it's the *Tupper* case. And the
15 *Tupper* case -- and I've cited it earlier. I think I cited
16 it yesterday.

17 THE COURT: Yes.

18 MR. BOOTH: *John M. Tupper vs. Dorchester County.*

19 Again, that touches on the terminus argument, that touches
20 on the "if you don't own it, you can't grant an easement
21 over it." But also, it talks about -- it says (as read):
22 "It's clear from the hearing that there is other access
23 which is simply less convenient." And it says,
24 "Accordingly, the trial court erred in finding that the
25 easement was necessary to the enjoyment of the Diamond

1 Estate." Meaning, not as convenient road or use of -- you
2 should take that into consideration, because that's a third
3 element of prescriptive easement.

4 And here, like I said, he's got a road that he's been
5 using, the Hayfield Road. We think it's part of the deed
6 of the easement. So, he -- he's basically can't argue a
7 second prescriptive easement.

8 But let me just go on with my other argument, and then
9 I'll -- I'll finish. This is one that I had not discussed
10 too much. But I would like to hand up both to the Court --

11 THE COURT: Okay.

12 MR. BOOTH: -- information out of the treatise called
13 "Creation of Easement by Prescriptive Easement." That was
14 the chapter.

15 THE COURT: Great.

16 THE COURT REPORTER: Say that again, the title again.

17 MR. BOOTH: "Creation of Easements by Prescription."
18 And this is section 5.03.

19 THE COURT REPORTER: Thank you.

20 MR. BOOTH: And the reason I've showed that to you,
21 Judge -- also at the same time give you the *Pittman v.* --
22 *v. Lowder* case.

23 THE COURT: Oh, good. Okay.

24 MR. BOOTH: And basically, putting over a gate and
25 putting in a lock clearly is evidence of interruption or

1 stopping somebody from acquiring prescriptive easement.

2 Now, that's what I think that treatise says. Plus,
3 the *Pittman* case is the -- is the latest pronouncement by
4 our Supreme Court as to what a landowner can do to be -- to
5 be considered as interrupting the prescriptive easement.

6 And that case just happens to be thousands of acres, I
7 believe, in -- I believe Beaufort County -- I was in the
8 wrong county -- where there were some series of roads. And
9 in this case, the landowner's road, being used by another
10 person, did want to stop the use.

11 And the -- and the Court said we don't require fist
12 fighting to stop people from using the road. We don't
13 require fist fighting. We don't require any strong action.
14 All we require is something like a gate and a lock; as long
15 as it's very clear to the person using that road that the
16 landowner objects. In other words, no one consents, then
17 you -- you just do certain actions.

18 I went to the treatise, because the treatise cites
19 cases where a lock and a gate were installed and the giving
20 of a key. That treatise said that constituted permissive
21 use once the key is given and once the gate and lock are
22 put up. And again, stopping the prescriptive easement,
23 because we know it somewhat -- constitutes some claim of
24 right use.

25 So, the landowner that's affected should be able to do

1 something, other than fist fight and putting guns at their
2 property line to stop the user. And that's what *Pittman v*
3 *Lowder* dealt with. That was the primary issue of *Pittman v*
4 *Lowder*.

5 And like I said, the *Tupper v Dorchester County* case,
6 those two cases I think really give you the basis for the
7 law that I think applicable to our case.

8 So, Your Honor, that is the end of our ---

9 THE COURT: Let me ask you some questions, because let
10 me -- let me tell you just -- that some of the testimony
11 that -- that -- is compelling.

12 First of all, you've had a number of people who have
13 come in and talked about the fact that the Red Road was the
14 road -- the only road, the predominate road, "the road,"
15 beginning with Big Peter. I think that Mr. Buyck called
16 him "Big Peter."

17 And I don't know if they then called current Mr. Buyck
18 "Little Peter," but certainly --

19 (Courtroom erupts in laughter.)

20 But when Big Peter ---

21 MR. BOOTH: You can tell us later.

22 THE COURT: --- you know what I mean? You know "Big
23 Peter."

24 You know, and that was always the road, always the
25 road, always the road, in that all that there was on the --

1 on the lower road was the piece that went to the hayfield,
2 hence, the Hayfield Road. But that the road that went to
3 the -- that went to this piece of property was the Red
4 Road.

5 I mean, you know, I've had person after person come in
6 and testify to that for -- you know, for -- some folks
7 talked about going down there and hunting ducks -- and I
8 thought I was the older than dirt -- but seven years before
9 I was born, which was very remarkable for me.

10 So, we're talking about a lot of use of this --
11 there's a lot of testimony that this -- that the Red Road
12 has been used for a very long period of time.

13 And -- and -- and I couple that with two other things,
14 and -- and -- and here's what I couple with -- I couple
15 that with the testimony of Mr. Nichols and then Mr. Conrad.

16 Mr. Nichols said that he -- he knew that that was --
17 that that was Mr. Buyck's road. That the Red Road was Mr.
18 Buyck's road. That was just Mr. Buyck's. That's just the
19 way it was. That was Mr. -- and when he sold the property,
20 it wasn't any question in his mind but that was Mr. Buyck's
21 property.

22 And then you've got the testimony from Mr. Conrad that
23 says that as he's riding along the road, or riding on this
24 piece of property with your client, he said that's --
25 that's Peter Buyck's road. That's Mr. Buyck's road. He's

1 always used that road. You cannot close that road. And --
2 and at that point the discussion of, you know, "I -- I'm
3 closing that road" began.

4 And you know -- and that is disconcerting. I must
5 tell you, that is disconcerting to the Court. And -- and a
6 little surprising -- in all candor, a little surprising
7 testimony for -- for me to receive.

8 I couple that with the testimony of Mr. Medlan of my -
9 - of -- of the president of the deer hunting club for 40
10 years, who says that -- that all that the Blue Road on the
11 property is is a trail. He doesn't even call it -- he
12 said, "That's my trail. I built that trail. And it's a
13 trail. It's not a road.

14 "And it goes from the hayfield, and it goes around and
15 it's -- you know, it's -- it's good for what it is good
16 for, and that is hunting."

17 That concerns me. I'm coupling -- and I must couple
18 that with obviously some -- some lack of consideration by
19 Rebel Logging, clearly, clearly, by the -- the way that
20 they logged and it's -- it's pretty unimpressive that they
21 would have parked their logging equipment on these folks'
22 land, when it's just -- and staged their logging efforts on
23 these people's land. But -- but obviously, they're not
24 before me.

25 I hear all of that, and -- and of course, it -- you

1 know, it does concern me. But here's what -- here's what I
2 couple with, and -- and I find troubling with these
3 easements as well: I'm thinking about in the mid 80s, and
4 I'm thinking about these easements. And I'm thinking about
5 the fact that the process wasn't begun by Mr. Buyck, but it
6 was begun by the -- the woman who owned what is now the
7 divided tract between Mr. Conrad and of course, the
8 Jacksons.

9 And she said, "My insurance company says we got to --
10 we got to have easements on the road to get to my property,
11 because I'm going to be doing some logging. And I got to -
12 - you know, I'm doing a lot of logging. I'm not doing a
13 little bit. I'm doing substantial logging, and I've got to
14 have me some easements."

15 And so, she goes to Mr. Buyck, and she goes to the
16 Stuck and she goes to -- to -- to the other property owner.
17 And says, "We all got to get together to get this cleaned
18 up. We got to get these."

19 And so, what concerns me is that if -- and I -- I
20 really want my -- I want my Exhibit 6, I think it is,
21 Plaintiff's Exhibit -- come on give me that one. Because
22 that one is helpful to me. And it's the one that shows the
23 road.

24 MR. BOOTH: This?

25 THE COURT: Yeah. That's it.

1 (Hands up exhibit to the Court.)

2 THE COURT: What concerns me -- here's what bothers me
3 about this case: We start down here on Fort Motte, and
4 nobody's got as much property between Fort Motte and --
5 what -- and the name -- I keep wanting to say ---

6 MR. ENGLISH: Grace -- Grace -- Grace McAlister.

7 THE COURT: McAlister. I really -- I remember
8 everything else. McAlister.

9 The person that's got the most to give and -- but to
10 get to this piece of property is Mr. Buyck. He's the one
11 with all the property. He's got the 200 acres. Everybody
12 else got a little piece here and a little piece there.

13 And what he testifies to is that, "What I told her was
14 I -- that's fine. I'm willing to do that. I'm willing to
15 give you easement over my 200 acres to get to your
16 property" -- otherwise, she'd have been the one, I guess,
17 with the litigation -- "or -- but I -- you know, in
18 exchange I want my road."

19 And here's what I find disturbing about this: No
20 question but that the easement came across his property.
21 He didn't -- apparently, he didn't have it drafted. And
22 what is troubling to me is that in the litigation, you all
23 -- both sides, really -- obviously plaintiff less than the
24 defendant -- and I don't think that's fair.

25 Because if it's -- because Mr. Buyck testified that

1 what they were after was give and take. She was going to
2 give a road into her property, and he was going to give a
3 road into his.

4 And so, if that's what was afoot here, if that's what
5 was afoot here, then you can't do as the surveyor did and
6 cut it off right here (indicates), and say that there were
7 two wonderful roads right along this piece of property.

8 Because the intention -- if you look at the intention
9 of -- of these four easements, it was to get from Fort
10 Motte to this piece of property (indicates) and from this
11 piece of property to the Buyck property. There was give
12 and take.

13 And so -- and so -- but the only consistent person
14 throughout all of this, obviously, is Mr. Buyck. Mr. Buyck
15 says, "I told her just -- we going to be giving easements,
16 that's fine, but I want my road. If I'm going to give you
17 your road, I want my road."

18 And without exception, people talked about the
19 predominant road as being the Red Road.

20 My -- the reason that I am troubled with stopping on
21 the property line, while I am well aware that that's where
22 the easement ends, it is compelling that Mr. Buyck said,
23 "This is my road. This was the -- this is -- the Red Road
24 is the road that connects to the road that we use, that my
25 family used."

1 And everybody that has testified says that, even some
2 folks that -- Mr. Booth, that you presented.

3 So -- and even when you go to the northwest -- the
4 general northwest description of the road, just as your
5 surveyor said, "No. If you want to stay in a general
6 northwesterly, you look at the whole. You would -- you
7 would begin here (indicates) looking."

8 Now, I know, Mr. English, you stop at the boundary
9 line. But I -- but -- but if you look at the -- the Red
10 Road in its entirety, clearly, it is -- the road -- the
11 existing road traverses in a northwesterly direction.
12 Clearly.

13 That is what is troubling to me. Do I think that the
14 easement is clear? No, it's not clear. Absolutely not
15 clear; absolutely not clear. And -- and just as you say,
16 there is the clear -- there's the clear issue of the Dr.
17 Bruner property.

18 But your clients don't have the easement either over
19 the road, which is interesting. And they -- obviously,
20 they're relying on that road now in -- in -- in a huge way.

21 So, that -- those are the issues -- those are the
22 issues that concern me. Those are the issues that I find
23 troubling.

24 Now, as I sit here, I have not seen the road -- I
25 think we called it "the duck pond road." I've not seen

1 photos of the duck pond road, beyond the -- the boundary of
2 Mr. Jackson and Ms. Jackson's property. However, it -- you
3 know, pretty good looking road up to that point. I don't
4 know what it looks like beyond.

5 So, help me -- help me with those -- with the issues,
6 Mr. Booth, that I am having with regards to the
7 relationship with those easements, first of all. And then,
8 tell me how important that third element -- because I am
9 concerned about the third element, that claim of right.

10 Must there be some claim under that grant of -- some
11 reasonable claim under that grant of easement in order for
12 there to be a prescriptive easement? And what is the
13 effect of having to put that gate up in 2000?

14 This litigation was filed when? 2000 and 8?

15 MR. BOOTH: 2008.

16 THE COURT: 2000 and 8.

17 MR. ENGLISH: Yes, I -- I think that is important.

18 THE COURT: Yes.

19 MR. ENGLISH: As -- as far as the claim of right,
20 again, we -- we talked about that a little bit also as far
21 as -- I -- I think the analysis -- and again, I -- I went
22 into this in my pre-trial brief.

23 THE COURT: Yes.

24 MR. ENGLISH: I cited a series of cases out of North
25 Carolina, which I think they have a lot of woodlands up

1 there, too. And I assume a lot of roads going through the
2 woods. And I'm being silly.

3 And I picked North Carolina because I -- I thought it
4 physically has characteristics. And in North Carolina,
5 they've really done a lot of studies on questions about
6 prescriptive easement. And based on what I cited in my
7 trial brief, they've come to the conclusion that there is a
8 presumption that any use, like in this case, would be by
9 permission; that the use would be by permission.

10 And here -- that's a -- the facts of this case clearly
11 show everybody -- you know, Nichols, anybody else that had
12 property, that owned this property that were all -- knew
13 Mr. Buyck, friends of his, I guess, would be the way to put
14 it; and therefore, the idea of it being permissive comes
15 into play, rather than even a claim of right or adverse
16 use.

17 And that's what North Carolina says. It says that you
18 have to -- there is that presumption. And -- and I think
19 that's what the evidence shows, that for years and years
20 and years, Mr. Buyck, by permission from -- and even the
21 two landowners on Fort Motte Road, because he was --
22 obviously, to travel on the Red Road, he had to come off
23 Fort Motte. So, for years and years he was actually going
24 over property that he didn't own.

25 And I'm not sure who owned it over the last 40 or 50

1 years. We know --

2 THE COURT: Uh-huh.

3 MR. BOOTH: -- Ms. Peding and -- and Mr. Stuck owned
4 it at least in 1984. So, we have that going on.

5 And again, I think the evidence would -- would tend to
6 show the -- the use by these gentlemen that have testified
7 clearly falls in the North Carolina analysis of -- of
8 nothing -- being nothing but permissive use.

9 And I think there's where they did not offer any
10 evidence that they had ever -- and again, read North
11 Carolina is -- you know, permissive use means that you --
12 you don't say anything to the person's property you're
13 going over. You just go over it. You don't, you know,
14 say, you know, I'm going to use your property for access to
15 -- to my property for years and years.

16 And so, I think that's an important fact here, because
17 I can't -- I can't -- as a lawyer, I can't say that there
18 wasn't a lot of testimony about the use of the Red Road.
19 You know, but still I think it's how they were using it.

20 And again, I asked most of them, you know, who told
21 you you could use it? It was Mr. Buyck. And -- and these
22 were a variety of individuals who traveled that road for a
23 variety of reasons: recreational -- clearly there wasn't -
24 - what I consider testimony, there was a lot of continuous
25 use other than possibly by the hunt club.

1 Mr. Buyck certainly said he used the road quite often.
2 And I guess like he said as far about his age 15. But as
3 far as anybody else using it on a continuous basis, these -
4 - these gentlemen that used it was a trip once in a while,
5 I guess, to join in some activity on the property.

6 Now, we do know that Mr. Buyck does have a lot of
7 commercial activities on his 700 acres. I think the
8 evidence is clear he ---

9 THE COURT: Uh-huh.

10 MR. BOOTH: --- conducts quite a few commercial
11 activities, and -- and we showed pictures. A lot of that
12 traffic uses the Hayfield Road.

13 THE COURT: Uh-huh.

14 MR. BOOTH: And you know, clearly, the last two years
15 all the traffic's been on that road. But even before that,
16 there's testimony that a lot of that commercial activity
17 traffic was using that road.

18 So, just like you said, we're left with the -- the
19 hunters, who were doing fine with -- I shouldn't say that -
20 - the hunting club, who -- who are still hunting, and
21 they're able to get to the property. And -- and but that
22 doesn't take away the fact that for years, like Mr. Medlan
23 said, they used sometimes the Red Road, but also they used
24 the other road. Just depending upon where their stands
25 were.

1 THE COURT: Where they were going.

2 MR. BOOTH: Just -- and again, I -- I tried to get
3 educated about how you choose where to hunt. But I assume
4 there's some -- always, when I used to fish, I -- it was
5 always the guy next to me who caught the fish. So, I -- I
6 just quit ---

7 THE COURT: They're not going to tell you either.

8 MR. BOOTH: --- fishing.

9 THE COURT: I think it's secret.

10 MR. BOOTH: That's probably it.

11 So anyway, but he did -- he did testify, way back when
12 he started as the president and they started using it, that
13 they would use the ---

14 THE COURT: And what happens -- can you have a -- can
15 you have a prescriptive easement -- say it's existed for 40
16 years. Then you have a different owner, puts up a gate.
17 Is it once a prescriptive easement, forever a prescriptive
18 easement? Or can the nature of that change?

19 MR. BOOTH: I -- I read the law as it's got to be
20 continuous up until basically you file your lawsuit.

21 THE COURT: Uh-huh.

22 MR. BOOTH: I don't believe you can -- again, it's the
23 continuous part of the test, whether it's been continuous
24 from 1940 through 1960, you couldn't use that, I don't
25 think, to prove today continuous use. I think it has to be

1 a little bit more current, obviously.

2 And that's where the case that I gave you, the *Pittman*
3 case ---

4 THE COURT: Uh-huh.

5 MR. BOOTH: --- talks about that and deals with that.

6 THE COURT: Uh-huh.

7 MR. BOOTH: Again, of course, you're -- so, I think
8 right there that the gate and the lock eight years ago
9 roughly, Mr. Buyck give -- be given a key and didn't do
10 anything after that until Rebel Lumber showed up. And of
11 course, that was igniting a forest fire in the woods as far
12 as they were concerned.

13 THE COURT: Uh-huh.

14 MR. BOOTH: Because like I said, they, you know,
15 couldn't believe what was happening. So, they took action
16 and -- to stop it, and eventually the lawsuit was filed.
17 And of course, here we are today.

18 So, I just think that shows you his intent of putting
19 the gate and the lock up there was sort of not to let Mr.
20 Buyck give it to a logging company and not tell him ahead
21 of time. I think there was testimony there was no advance
22 warning given --

23 THE COURT: That's right. There was --

24 MR. BOOTH: -- so, it just happened one day and
25 without -- without them knowing until they, I guess,

1 arrived on the property and saw, again, the -- the road and
2 also the staging area for the vehicles near the cabin.

3 But again, Mr. Jackson, you know, worked through that
4 with Rebel to make sure that -- that it was finished ---

5 THE COURT: That they -- right. Exactly.

6 MR. BOOTH: He controlled -- he controlled that access
7 at that point. He controlled when Rebel used his road.

8 THE COURT: Uh-huh.

9 MR. BOOTH: He did not acknowledge that Mr. Buyck
10 could have -- did have that right. He -- he clearly took
11 over the coordination of Rebel. As I said, he said he made
12 them tell him what time they were going to be doing it and
13 all that. So, he -- he took over that.

14 So, he, again, exercised that control over his
15 property. And I think that's again evidence that he was
16 trying not to claim ownership of that road, but that he
17 brought it in a way that the Courts have said you can do to
18 stop prescriptive easement rights.

19 And again, I think that's where the *Pittman* case again
20 ---

21 THE COURT: Uh-huh.

22 MR. BOOTH: --- just -- he -- he laid out what the law
23 was and he said we're going to take the minority view. We
24 don't need to have fist fights and ---

25 THE COURT: Yeah. Right.

1 MR. BOOTH: --- very, very reasonable ---

2 THE COURT: Right.

3 MR. BOOTH: --- for -- again, that's his first -- so,
4 he kind of looked at it and felt like this would be a good
5 way to tell everybody what you can do to stop prescriptive
6 rights.

7 THE COURT: Uh-huh. Uh-huh.

8 MR. BOOTH: And I think that was what Mr. Jackson did,
9 you know, eight years ago ---

10 THE COURT: And did that immediately upon the purchase
11 of the road. I mean, not particularly closing, but very
12 soon there after --

13 MR. BOOTH: Oh, yes.

14 (Mr. Booth and the Court talking at the same time.)

15 THE COURT: -- took the action ---

16 MR. BOOTH: Very ---

17 THE COURT: -- to go put up --

18 MR. BOOTH: --- very quickly.

19 THE COURT: --- uh-huh -- to put up ---

20 MR. BOOTH: And again, gave a key to Mr. Buyck --

21 THE COURT: Yes.

22 MR. BOOTH: -- because a permissive user -- but until
23 just the last two or three years he didn't realize the key
24 was now --

25 THE COURT: Uh-huh.

1 MR. BOOTH: -- being given to other people. Hunt
2 club, for example, Mr. Medlan said he got the key from Mr.
3 Buyck. I'm sure Mr. Jackson did not authorize -- there was
4 no question about that. I think the inference is ---

5 THE COURT: When he talks about hanging the key and he
6 found the key hanging on the tree.

7 MR. BOOTH: Correct. Right.

8 THE COURT: Right. Yeah.

9 MR. BOOTH: Just hung it somewhere so they could, I
10 guess, get to it.

11 So anyway, I just think when you put all that
12 together, the fact that he has a deeded easement right that
13 gives him access, I think that's -- that's, again, a very
14 strong indication that in 1984, he, again, participated in
15 the granting of easements.

16 And I understand what you're saying about even though
17 -- and I -- I understand what you said. I mean, first time
18 when I first read the case I said, "Well, you know, Mrs.
19 McAlister just needed to hunt on her property -- excuse me
20 -- log on her property. So, Mr. Buyck really didn't need
21 to be involved in that.

22 But he did, and I understand what you said. I think
23 that's very persuasive. He had -- you know, gave up a lot
24 of areas and he wanted to make sure he could go over her
25 property at the same time.

1 But again, I just think: existing road, northwesterly
2 direction. I know we can sit here all day and debate. And
3 I -- I -- I -- of course, I represent a client. So, I'm
4 going to say northwesterly means this way, and ---

5 THE COURT: Oh, sure.

6 MR. BOOTH: --- that's where the road does -- the
7 Hayfield Road definitely goes ---

8 THE COURT: They both go north -- the truth is they
9 both go northwest.

10 MR. BOOTH: Well ---

11 THE COURT: Now that I'm looking at it, they --
12 because they both at one point go to the east. Then they
13 jog back. The difference is, is that I believe that the
14 Hayfield Road, it's jog northwest is very clear ---

15 MR. BOOTH: Right.

16 THE COURT: --- on the McAlister property. But you've
17 got -- you know, it's -- you're looking at the whole Red
18 Road to see that it -- that the Red Road -- it'll -- it
19 jogs well to the east and then it turns back and comes to
20 the ---

21 MR. ENGLISH: There's a westerly direction ---

22 THE COURT: Clearly no help to us.

23 MR. BOOTH: I was getting ready to say that -- that
24 just complicates even worse ---

25 THE COURT: Thank you.

1 MR. BOOTH: --- if the road never turned at all to the
2 west, we wouldn't be talking. But you're right, it does
3 have that jog or turn and therefore it's -- makes it a
4 little bit harder to determine.

5 THE COURT: Uh-huh.

6 MR. BOOTH: And I -- I believe that the westerly road
7 is the Hayfield Road.

8 And again, I think it's one road, too, by the way.
9 It's one road, existing road, rather than, you know, both.

10 Because I think Mr. Buyck at one time would like to
11 claim that the easement gives him rights over both roads.
12 But he ---

13 THE COURT: Yes. It says the -- it says "the existing
14 road."

15 MR. BOOTH: Right.

16 THE COURT: It does not say "the existing roads."

17 MR. BOOTH: And I -- and I -- and I know he -- he read
18 it and saw the word "lands of." And he -- he likes that
19 language, "lands of." So, he said, "Well, that means
20 wherever my lands are, wherever the roads intersect, I get
21 the benefit." And -- and you know, I don't ---

22 THE COURT: Let me ask you this question, and -- and -
23 - and I really ask only because Mr. Mills talked about it.
24 Because he -- he -- he almost refers to it as being one
25 road, because he talks about it being a loop.

1 I mean, you don't maintain that it's -- that it's one
2 road. Is it one road? Could it be one road?

3 MR. BOOTH: Well, I can just look at it and I -- you
4 know --

5 THE COURT: Only because, you know, Mr. Mills said
6 it's a loop. It's one road. It's a loop.

7 MR. BOOTH: It definitely is a loop. But again, since
8 we're talking about it, when Mrs. McAlister, Grace
9 McAlister -- granting an easement within her box is the way
10 I would argue it; therefore, again, we could go -- we could
11 go westerly, like you said, around the loop to the left and
12 do that, too.

13 But I -- I -- really, I'm just looking at it simply as
14 Mrs. McAlister granting an easement to Mr. Buyck.

15 THE COURT: Uh-huh. Uh-huh.

16 MR. BOOTH: Which is fine. The two other people, they
17 were just -- they were just giving up some of their land.
18 They weren't actually -- I don't believe they were granted
19 easements. They just basically --

20 THE COURT: Right. Were giving.

21 MR. BOOTH: -- gave 10 feet --

22 THE COURT: Right.

23 MR. BOOTH: -- to get in and get off Fort Motte. And
24 that helped Mr. Buyck out also to -- that part of the
25 easement helped him out --

1 THE COURT: Oh, sure.

2 MR. BOOTH: -- because of his 200 acres. There was a
3 little bit of a distance there.

4 So again, whether or not -- you know, I call this case
5 my "lack of magic marker case." It would -- if we would
6 have taken the Oliver plat -- at the time of granted
7 easement, if I had taken a magic marker and connected what
8 I think is shown as parts of the road at the bottom of the
9 plat and the parts of two roads at the top of the plat --
10 talking about the old Oliver plat, which is recorded here
11 at this courthouse -- if that magic marker had just drawn
12 it ---

13 THE COURT: Absolutely.

14 MR. BOOTH: --- it would have helped out. But it
15 didn't -- or whoever did it --

16 THE COURT: You know, I don't believe under any theory
17 in the case -- and y'all help me, because I just want to be
18 clear. You know, sometimes, you know, the Court is -- is
19 called upon to declare the area of the easement or
20 whatever.

21 MR. BOOTH: Sure.

22 THE COURT: I do -- I do not believe that there are
23 circumstances here, I think -- I -- I think with regards to
24 the express easement, is "pick," and -- and then with
25 regards to the prescriptive easement it is "does it exist

1 or not."

2 And -- and I certainly understand your position of
3 it's -- that -- that it ought not be both. I -- I
4 certainly understand your argument with regards to that.

5 But I don't believe that this is a circumstance that
6 the Court is called on under any of these pleadings to
7 draw. Right?

8 MR. BOOTH: I think the evidence is there for you to
9 make that determination. And I think it makes it -- if you
10 agree with us, I think the fact that you have the deeds
11 already; again, Mr. Jackson and Mr. Conrad have the plat,
12 the Walker plat, that five -- ten feet on each side of that
13 center line is drawing the easement --

14 THE COURT: Right.

15 MR. BOOTH: -- even though --

16 THE COURT: Right. I do good --

17 MR. BOOTH: -- I don't know if you're going to use the
18 magic marker.

19 THE COURT: Good. Good. No, you're not.

20 MR. BOOTH: But I think in this case -- in this case --
21 there -- and again, even with -- even with the *Tupper* case
22 -- I think it was *Tupper* -- or one of the cases, you know,
23 yes, there is some indication of some existing type of
24 road.

25 THE COURT: Yes. Yes.

1 MR. BOOTH: And therefore, the Court can --

2 THE COURT: Right.

3 MR. BOOTH: -- you know, locate it. But I think here,
4 again, both roads are something you could look to for
5 actually locating it. So, I -- I do think there's enough
6 evidence ---

7 THE COURT: Right. Right.

8 MR. BOOTH: --- for you to actually locate it --

9 THE COURT: Yes.

10 MR. BOOTH: -- in this case.

11 THE COURT: Got it. All right, gentlemen. And how
12 long do you want to submit, gentlemen -- I say "gentlemen."
13 I know who's going to be -- I know who's going to be
14 working on this one.

15 Tell me how long you -- you know, there's been a lot
16 of testimony. These are not the easiest issues, at least
17 for me. Probably for you geniuses. But I -- you know, 60
18 days?

19 MR. BOOTH: Well, let me make this comment --

20 THE COURT: Okay.

21 MR. BOOTH: -- because I've been in this place before.
22 I -- I always like to have the transcript to do my proposed
23 orders.

24 THE COURT: You got it if you want it.

25 MR. BOOTH: And I know the court reporter here can

1 probably produce that within a reasonable length of time.

2 THE COURT: She -- I will tell -- I can tell you she
3 is a court reporter that reproduces transcripts within the
4 most reasonable of times.

5 That she -- she -- as we oft times do, we will walk at
6 lunch. And I do know that, in our walking last week, she
7 made a comment that "her typing duties were bountiful."

8 MR. BOOTH: Right.

9 THE COURT: I don't think she's quite worried about
10 having a tax problem yet from all the transcripts.

11 But if -- I tell you what, I'm happy for you all to do
12 is if y'all want to confer with -- with Bonnie and each
13 other, all three. And let me know what works for you. It
14 -- you know, if it suits y'all, it plum tickles me half to
15 death. How bout that?

16 MR. BOOTH: I hope -- and then -- once we get the
17 transcript, I'll -- I'll talk to Drew about how much time
18 he needs.

19 THE COURT: Sounds good to me.

20 MR. BOOTH: And we'll report that to you.

21 THE COURT: And I should know when you get the
22 transcript, because Bonnie will tell me.

23 MR. BOOTH: Right.

24 THE COURT: Is that reasonable?

25 MR. BOOTH: Right.

1 THE COURT: Yeah?

2 MR. BOOTH: So, we'll let her report to us --

3 THE COURT: Sure.

4 MR. BOOTH: -- when she gets it finished. And then
5 we'll --

6 THE COURT: She's going to want you guys to -- you
7 know, you -- I know she's going to want you all to just --
8 that -- I'm going to let y'all talk to her about the
9 requirements. And they're not -- they're not Bonnie's
10 requirements. They're requirements of the court reporter
11 rules what you must do to order the transcript and all
12 that.

13 MR. BOOTH: Right.

14 THE COURT: But I'll let y'all go through that. And
15 then what -- what I will look for y'all to do is
16 communicate -- if you'll do this for me with Mr. Miller
17 when you all want to submit your proposed orders. And
18 he'll calendar it and I'll be looking for them then if
19 that's reasonable. Is that reasonable?

20 MR. BOOTH: Yes. Okay.

21 THE COURT: Yes? Yes?

22 MR. BOOTH: We'll do that.

23 THE COURT: Very well. And you know, I -- I really do
24 applaud your clients, because oft times, you know, you
25 worry that people will not keep the peace when there are

1 property line issues. And they -- they've done --
2 apparently they've done a very fine job of doing that. And
3 I appreciate that. I very much do.

4 And they've honored each other and -- and -- and I'm
5 so grateful that they've kept -- kept the peace. I don't
6 anticipate that there'll be any problems while we wait for
7 this. I -- and all can just remain as we have been doing
8 it. If there's a problem, I -- I trust y'all will let me
9 know.

10 MR. BOOTH: And we will certainly take into
11 consideration any problem while we're doing this. If Mr.
12 Buyck communicates through his lawyer if there is any
13 problem ---

14 THE COURT: Absolutely.

15 MR. BOOTH: --- and that's a promise ---

16 THE COURT: Absolutely.

17 MR. BOOTH: --- from me and my -- and from my client.

18 THE COURT: Absolutely. You know, absolutely.

19 MR. BOOTH: If there's any -- any problem ---

20 THE COURT: Of course, you know, Bambi and -- and all
21 her friends would like for y'all to just stop all the
22 hunting going on out there, at least til January 1st.

23 MR. BOOTH: Yeah.

24 THE COURT: Wonderful.

25 MR. BOOTH: Okay. So, Judge ---

1 THE COURT: Yes.

2 MR. BOOTH: Yes.

3 THE COURT: Wonderful.

4 MR. BOOTH: Thank you --

5 THE COURT: (To the court reporter) What -- what I'm
6 going to do then is -- Bonnie, I think you know -- you'll
7 get all the -- you'll get the exhibits together.

8 (To the Clerk of Court) And once -- once I get my
9 proposed orders, Ms. Claudia, I'll just come camp out with
10 you.

11 CLERK OF COURT: Okay.

12 THE COURT: Yeah. And go through them then. I don't
13 want to remove them from the -- I hate removing the files.
14 That -- that always goes badly for me. Very well. Thank
15 you.

16 MR. BOOTH: One -- one final question --

17 THE COURT: Yes.

18 MR. BOOTH: -- about submitting a proposed order,
19 assuming we both put case citations in there --

20 THE COURT: Yeah.

21 MR. BOOTH: -- which I know I'm going to. You like to
22 get copies from us or do you have access through Ryan?

23 THE COURT: If you have them -- I don't want to burden
24 you. If you have them. It depends on how you do your
25 work. If you do your work on the screen only, no. I do

1 not want you to be burdened with having to print them for
2 me.

3 MR. BOOTH: Okay.

4 THE COURT: If you -- if you are a printer and you
5 print them anyway, I would love to have them.

6 MR. BOOTH: Okay.

7 THE COURT: So, it's how you do your work.

8 MR. BOOTH: Yes, ma'am.

9 THE COURT: I don't want you to -- you know, I don't
10 want you to -- I -- I want -- if you have them and that's
11 how you work, that's fine. If you are a screen writer and
12 researcher, don't.

13 MR. BOOTH: Gotcha.

14 THE COURT: Don't do that.

15 MR. BOOTH: I understand.

16 THE COURT: Because I can get them.

17 MR. BOOTH: All right.

18 THE COURT: Wonderful. Thank you, gentlemen. I must
19 tell you, I genuinely mean what I say. It has been a
20 pleasure -- and I really have bragged. And you know,
21 because I've been communicating with a number of different
22 folks. And told them, I said, "Y'all won't believe, I'm
23 trying a road case, and it has been fascinating and
24 interesting. These lawyers have been fantastic, and I've
25 had a blast."

1 So, thank you all for that.

2 (Off the record at 4:40 p.m.)

3 -- END OF TRANSCRIPT OF RECORD --

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ATTEST: TRUE COPY

PLA. EXH.

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Kenneth Hasty
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

TITLE TO REAL ESTATE

Form 14

The R. L. Ryan Company, Columbia, S. C.

State of South Carolina,

Know All Men by These Presents, That I, *W. P. Buyok*

in the State aforesaid, for and

in consideration of the

sum of One Dollar (\$1.00)

to ~~me~~ paid by W. Peter Buyok, Jr.

in the State aforesaid Calhoun County

have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said W. Peter Buyok, Jr. Eight hundred twenty one (821) acres; comprised in two parts. One of a tract of one hundred eleven (111) acres situate in Richland County, South Carolina, and the other of seven hundred ten (710) acres in the aggregate with the Congaree River serving the two parts as follows: (1) All that certain piece, parcel or tract of land situate in Amelia Township, Calhoun County, South Carolina, about eight (8) miles north of Town of St. Matthews, containing seven hundred ten (710) acres, more or less, and bounded as follows: On the north by Congaree River; on the northwest by High Hill Creek and Congaree River and lands of E. P. Paulling; on the south by lands of Menriette and D. D. Buyok now owned by O'Neal; all of which is more accurately described by Metes, bounds and Directions on a plat thereof made by F. H. Grambling, Sur. and record of which is found in Plat Book 2 at page 9 in the office of the Clerk of Court for Calhoun County, South Carolina.

Also all that certain other tract of land situate in Richland County, South Carolina directly across the Congaree River from the above mentioned tract containing one hundred eleven (111) acres, more or less, and bounded as follows: on the north by lands now or formerly of Williams and on all other sides by the Congaree River.

The above described tracts being the same conveyed to ~~the said~~ C. H. Carter by Alfred C. DeForme et al., by deed dated the 14th day of January, 1942 Recorded in Vol 324 page 527

The above tracts were conveyed to W. P. Buyok by R. L. Buyok and are recorded in Book 34, page 183 for Calhoun County and in Book B.M. page 88 for Richland County

Also the part of Tract 9 referred to as 20 acres of open land. Deed to W. Peter Buyok, Jr. in January 1975. Being the remainder of Tract 9. This will give him the entire control of Tracts 9, 10 and 13 as shown on plat of Preference Plantation Book 2, page 48. as I am now in process of clear cutting remaining timber that was reserved in my deed of January 1975. This is part of lands bought from H. C. & Dorothy B. Shackelford, see Deed book 26, page 67 recorded October 22, 1947

Deed
4982

Book 34, Page 183, Recorded Calhoun County on April 19, 1962

DEED

6823

565

66263

Grantee's Address: P.O. Box 416, St. Matthews, S.C. 29135

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

To HAVE AND TO HOLD all and singular the premises before mentioned unto the said

W. Peter Buyok, Jr., his

Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said W. Peter Buyok, Jr., his

Heirs and Assigns, against me and my Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS my Hand and Seal this 5th day of November
in the year of our Lord one thousand nine hundred and seventy-six
and in the one hundred and year of the Sovereignty
and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

John A. Hart
Chris P. Stone

W P Buyok (SEAL)
(SEAL)

STATE OF SOUTH CAROLINA,
Calhoun County.

PERSONALLY appeared before me Lynn D. Arnt
and made oath that she saw the within-named W. P. Buyok
sign, seal and, as his act and deed, deliver the within-written Deed for the uses and purposes therein men-
tioned and that he, with Oris R. Hume witnessed the
execution thereof.

SWORN to before me this 5

day of Nov

19 76

Mary Arthur Ingham (L.S.)
Com Expires 1-5-80
Notary Public of S.C.

Lynn D. Arnt

STATE OF SOUTH CAROLINA,
County.

RENUNCIATION OF DOWER

I, _____, do hereby certify
unto all whom it may concern, that Mrs. Elizabeth B. Buyok
the wife of the within-named W. P. Buyok
did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely,
voluntarily and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release and for-
ever relinquish unto the within-named

W. Peter Buyok, Jr.

heirs
and assigns, all her interest and estate, and also all her right and claim of Dower of, in or to all and singular the premises
within mentioned and released.

Given under my Hand and Seal, this 30th

day of November

Anno Domini 1976

Mary Arthur Ingham (L.S.)
Com Expires 1-5-80
Notary Public of S.C.

Elizabeth B. Buyok

FILED

Dec 7 4 06 PM '77

C. R. BANKS
CLERK OF COURT
CALHOUN COUNTY
SOUTH CAROLINA

State of South Carolina,

County of _____

W. P. Blythe Sr.
TO

W. P. Blythe Jr.

TITLE TO REAL ESTATE

I hereby certify that the within Deed was filed for
record in my office at 4:06 P. M. o'clock on
the 7th day of December
19 77 and was immediately entered upon the proper
indexes and duly recorded 6626

Clerk of Court of Common Pleas and General Sessions
for Calhoun County, S. C.

I hereby certify that the within Deed has been
this 7th day of

December . A. D. 19 77. Recorded

In Book 22 of Deeds, page 87

H. B. Livingston Auditor
for Calhoun County

The H. B. Bryan Company, Columbia, S. C.

The within instrument has been transferred
this 7th day of December 19 77 at

O'clock PM, and recorded

In transfer Book _____ Page _____

In Tax Assessor's office. Tax map

No. _____

Transfer No. _____

Tax Assessor's Office, Calhoun County, S. C.

H. B. Livingston

ATTEST: TRUE COPY

Kenneth Hasty
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

State of South Carolina,

COUNTY OF CALHOUN, AND
COUNTY OF RICHLAND,KNOW ALL MEN BY THESE PRESENTS, That I, R. L. Buyck

State Revenue Stamps \$

Federal Revenue Stamps \$

in the State aforesaid, for and Five (5) dollars and a partition deed in consideration of the sum of

to me paid by W. Peter Buyck in the State aforesaid, Calhoun County DECEASED
have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said

W. Peter Buyck, all that certain piece, parcel or tract of land situate, lying and being in Amelia Township, said county and State, containing two hundred (200) acres more or less, on High Hill Creek and Buck Head Creek and bounded by estate lands of H. H. Paulling; by lands of Mrs. M. F. Antley; now or formerly of Pauline Steiner and conveyed to me by M. O. Dantzier the 22nd day of March, 1923, and recorded in Deed Book 10 at page 161 Clerk's office, Calhoun County, S. C.

ALSO

Eight hundred twenty one (821) acres; comprised in two parts, one of a tract of one hundred eleven (111) acres situate in Richland County, South Carolina, and the other of seven hundred ten (710) acres, situated in the aggregate with the Congaree River serving the two parts as follows: (1) All that certain piece, parcel, or tract of land situate in Amelia Township, Calhoun County, South Carolina, about eight (8) miles north of Town of St. Matthews, containing seven hundred ten (710) acres, more or less, and bounded as follows: on the North by Congaree River; on the Northwest by High Hill Creek and Congaree River and lands of H. P. Paulling; on the South by lands of Henriette Howard and bonds of Buyck now owned by O'Neal; all of which is more accurately described by metes, bounds and directions on a plat thereof made by F. H. Grambling, Sur., and record of which is found in Plat Book 2 at page 9, in the office of the Clerk of Court for Calhoun County, South Carolina.

Also all that certain other tract of land situate in Richland County, South Carolina directly across the Congaree River from the above mentioned tract containing one hundred eleven (111) acres, more or less, and bounded as follows: on the North by lands now or formerly of Williams and on all other sides by the Congaree River.

The above described tracts being the same conveyed to the said C. H. Carter by Alfred C. DeLorme et al., by deed dated the 14th day of January, 1942.

Deed 22/305

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said

W. Peter Buyck, his

Heirs and Assigns forever.

And I do hereby bind myself and my

Heirs, Executors

and Administrators, to warrant and forever defend all and singular the said premises unto the said

W. Peter Buyck, his

Heirs and Assigns, against me and my Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS BY Hand and Seal this 16th day of January

in the year of our Lord one thousand nine hundred and sixty and in the one hundred and eighty-fourth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Dorothy B. Driggers

R. L. Buyck (SEAL)

W. R. Symmes

(SEAL)

State of South Carolina,

COUNTY OF Calhoun

PERSONALLY appeared before me Dorothy B. Driggers

and made oath that she saw the within-named R. L. Buyck

sign, seal and, as his act and deed, deliver the within-written Deed for the uses and purposes therein mentioned, and that he, with

W. R. Symmes

witnessed the execution thereof.

SWORN to before me this 16th day of January, 1960

W. R. Symmes (L. S.)

Notary Public of S. C.

Dorothy B. Driggers

State of South Carolina,

COUNTY OF Calhoun

RENUNCIATION OF DOWER

I W. R. Symmes, a Notary Public for South Carolina, do hereby certify unto all whom it may concern, that Mrs. Celia R. Buyck, the wife of the within-named R. L. Buyck did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within-named

W. Peter Buyck, his

heirs and assigns, all her interest and estate, and also all her right and claim of Dower of, in or to all and singular the premises within mentioned and released.

Given under my Hand and Seal, this 16th day of January, A. D. 19 60

W. R. Symmes (L. S.)

Celia K. Buyck

/Seal Affixed/ Notary Public of S. C.

Recorded 19th day of April, 19 62 Examined and delivered to

569

C. C. P. & G. S.
C. C. P. & G. S., Calhoun County, S. C.

ATTEST: TRUE COPY

PLA. EXH.

3

State of South Carolina,

COUNTY OF CALHOUN

KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

State Revenue Stamps \$6.00

Federal Revenue Stamps \$3.30

KNOW ALL MEN BY THESE PRESENTS, That I, C. H. Carter

in the State aforesaid, for and to Twenty-seven hundred fifty (\$2,750.00) in consideration of the sum of DOLLARS have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said R. L. Buyck and W. P. Buyck, their heirs and assigns, Eight hundred twenty one (821) acres, comprised in two parts, one of a tract of one hundred eleven (111) acres situate in Richland County, South Carolina, and the other of seven hundred ten (710) acres, situated in Calhoun County, South Carolina, forming one tract in the aggregate with the Congaree River severing the two parts as follows:

1. All that certain piece, parcel or tract of land situate in Amelia Township, Calhoun County, South Carolina, about eight miles north of the town of St. Matthews, containing seven hundred ten (710) acres, more or less, and bounded as follows: on the North by Congaree River; on the Northwest by High Hill Creek and Congaree River; On the Northeast by lands of Henrietta Howard and lands of T. T. Bates, and on the West by lands of Buyck, now owned by O'Neal; all of which is more accurately described by Metes, bounds and directions on a plat thereof made by F. H. Granbling, Surveyor, dated the 6th day of December, 1906, and record of which is found in plat book 2 at page 9, in the office of the Clerk of Court for Calhoun County, S.C.

Also all that certain other tract of land situate in Richland County, S.C., directly across the Congaree River from the above mentioned tract containing one hundred eleven (111) acres, more or less, and bounded as follows: On the North by lands now or formerly of Williams and on all other sides by the Congaree River.

The above described tracts being the same conveyed to the said C. H. Carter by Alfred C. DeLorme et al., by deed dated the 14th day of January, 1942.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said R. L. Buyck and W. P. Buyck, their

Heirs and Assigns forever.

And I do hereby bind myself, my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said R. L. Buyck and W. P. Buyck, their

Heirs and Assigns, against me and my Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS my Hand and Seal this 29th day of April in the year of our Lord one thousand nine hundred and fourth two and in the one hundred and sixty sixth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

J. A. Merritt C. H. Carter (SEAL)
Blanche Inabinet (SEAL)

State of South Carolina,

Calhoun County

PERSONALLY appeared before me Blanche Inabinet and made oath that he saw the within named C. H. Carter sign, seal and, as his act and deed, deliver the within written Deed for the uses and purposes therein mentioned, and that he, with J. A. Merritt, witnessed the execution thereof.

SWORN to before me this 29 day of April, 1942

J. A. Merritt (L. S.)
Notary Public of S. C.

Blanche Inabinet

State of South Carolina,

Calhoun County

RENUNCIATION OF DOWER

I, J. A. Merritt, a Notary Public for South Carolina, do hereby certify unto all whom it may concern, that Mrs. Carter, the wife of the within named C. H. Carter, did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within named R. L. Buyck and W. P. Buyck, their heirs and assigns, all her interest and estate, and also all her right and claim of Dower of, in or to all and singular the premises within mentioned and released.

Given under my Hand and Seal, this 29th day of April A. D., 1942

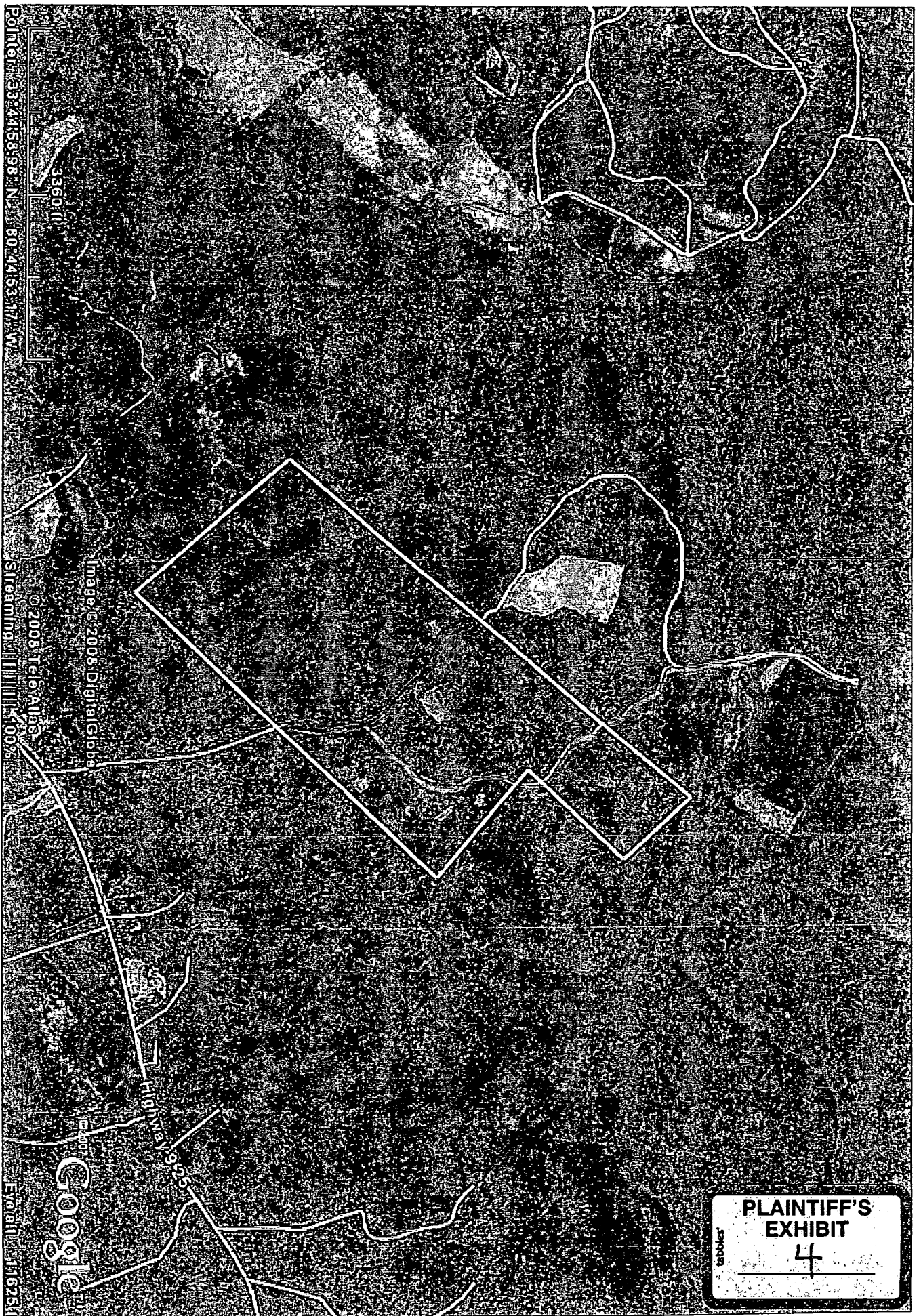
J. A. Merritt (L. S.)
Notary Public of S. C.

Ruthie Mae Carter.

Recorded 5 day of May, 1942. Examined and delivered to J. A. Merritt

C. C. C. P. & G. S., Calhoun County, S. C.

570



ATTEST: TRUE COPY

PLA. EXH.

6

Kenneth Hasty
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

TITLE TO REAL ESTATE
A. L. Bonnett & Son, Printers, Rowesville, S. C.

S.C. 25300
State of South Carolina,
COUNTY OF CALHOUN.

Calhoun County
Documentary Tax \$176.50 Paid
by DRS

KNOW ALL MEN BY THESE PRESENTS, That

I, John T. McAlister, Jr.

in the State aforesaid,

sum of One Hundred Fourteen Thousand Six Hundred Ninety-five and 00/100 Dollars
to me paid by James M. Nickells

In consideration of the

in the State aforesaid

have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the
said James M. Nickells

*Revised: B.B. 4/11/89 p. 26-27
from Jane McAlister Clerk of Court 12/26/90*
All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Amelia Township, School District No. 1, Calhoun County, South Carolina, containing 203 acres, more or less, as shown on a plat of H. R. Oliver, RLS, dated December 12, 1963 and recorded in the office of the Clerk of Court for Calhoun County in Plat Book 8 at Page 259 and bounded on the Northwest by lands of Buyck; on the South and Southwest by lands of Hancock; on the Northeast by lands of A. P. Bruner; and on the Southeast by lands of Buyck.

The property herein described being property of which Grace J. McAlister died, seized and possessed on June 19, 1989 and having devised the same to Jane McAlister Clark and John T. McAlister Clark by her Last Will and Testament admitted to Probate on June 26, 1989 and filed as Case No. 89ES3800261 in the Probate Records for Orangeburg County, South Carolina.

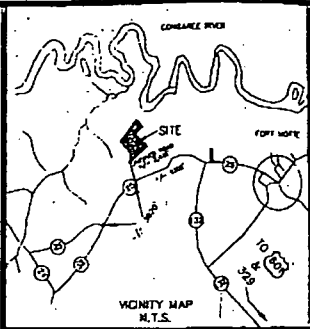
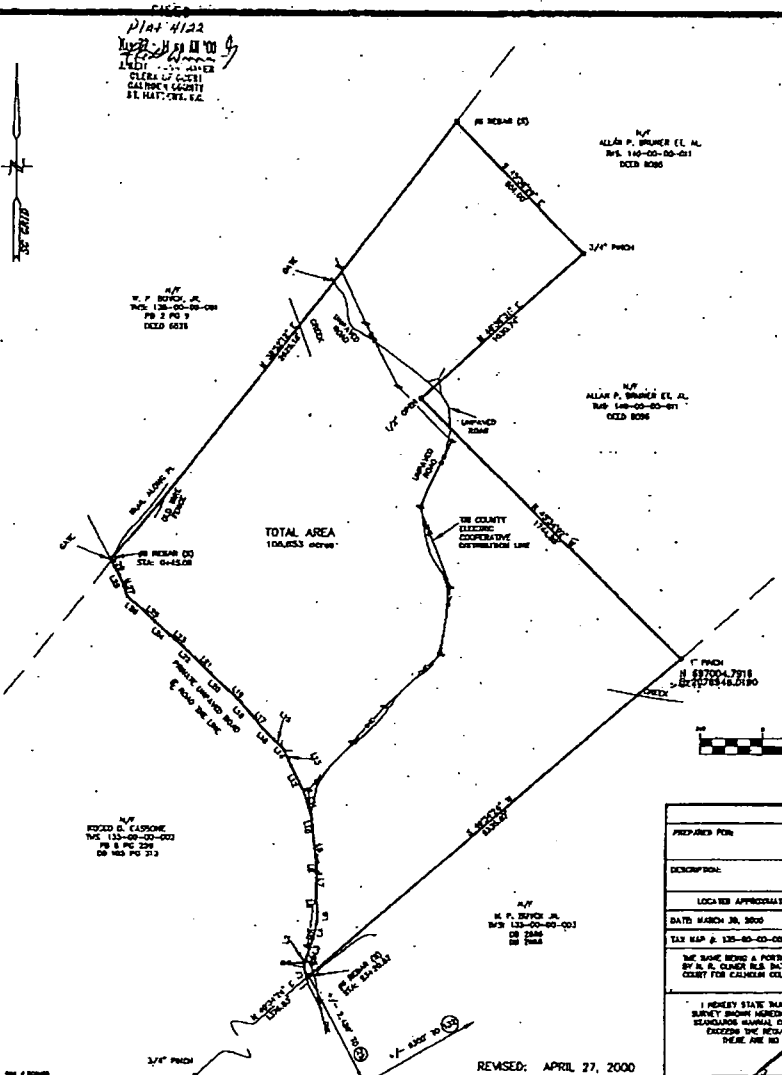
571

BOOK 0049 PAGE 264

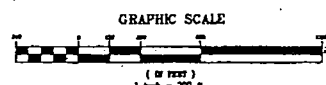
572

- LEGEND**
- = BENCH MARK
 - = POWER POLE
 - = STONE DRAIN LINE
 - = SURVEY STAKE LINE
 - = OVERHEAD ELECTRIC LINE
 - = UNDERGROUND ELECTRIC LINE
 - = WIRE FENCE
 - = WOOD FENCE
 - = CHAIN LINK FENCE
 - (X) = SET
 - (O) = OLD
 - (O) = (X) REBAR (X)
 - (O) = STONE DRAIN HATCH
 - (O) = SAME STAKE HATCH
 - (O) = CATCH BASIN
 - (X) = TREE STUMP

LINE	FROM	TO	BEARING	DISTANCE
1	100	101	S 89° 00' 00" E	1.0000
2	101	102	S 89° 00' 00" E	1.0000
3	102	103	S 89° 00' 00" E	1.0000
4	103	104	S 89° 00' 00" E	1.0000
5	104	105	S 89° 00' 00" E	1.0000
6	105	106	S 89° 00' 00" E	1.0000
7	106	107	S 89° 00' 00" E	1.0000
8	107	108	S 89° 00' 00" E	1.0000
9	108	109	S 89° 00' 00" E	1.0000
10	109	110	S 89° 00' 00" E	1.0000
11	110	111	S 89° 00' 00" E	1.0000
12	111	112	S 89° 00' 00" E	1.0000
13	112	113	S 89° 00' 00" E	1.0000
14	113	114	S 89° 00' 00" E	1.0000
15	114	115	S 89° 00' 00" E	1.0000
16	115	116	S 89° 00' 00" E	1.0000
17	116	117	S 89° 00' 00" E	1.0000
18	117	118	S 89° 00' 00" E	1.0000
19	118	119	S 89° 00' 00" E	1.0000
20	119	120	S 89° 00' 00" E	1.0000
21	120	121	S 89° 00' 00" E	1.0000
22	121	122	S 89° 00' 00" E	1.0000
23	122	123	S 89° 00' 00" E	1.0000
24	123	124	S 89° 00' 00" E	1.0000
25	124	125	S 89° 00' 00" E	1.0000
26	125	126	S 89° 00' 00" E	1.0000
27	126	127	S 89° 00' 00" E	1.0000
28	127	128	S 89° 00' 00" E	1.0000
29	128	129	S 89° 00' 00" E	1.0000
30	129	130	S 89° 00' 00" E	1.0000
31	130	131	S 89° 00' 00" E	1.0000
32	131	132	S 89° 00' 00" E	1.0000
33	132	133	S 89° 00' 00" E	1.0000
34	133	134	S 89° 00' 00" E	1.0000
35	134	135	S 89° 00' 00" E	1.0000
36	135	136	S 89° 00' 00" E	1.0000
37	136	137	S 89° 00' 00" E	1.0000
38	137	138	S 89° 00' 00" E	1.0000
39	138	139	S 89° 00' 00" E	1.0000
40	139	140	S 89° 00' 00" E	1.0000
41	140	141	S 89° 00' 00" E	1.0000
42	141	142	S 89° 00' 00" E	1.0000
43	142	143	S 89° 00' 00" E	1.0000
44	143	144	S 89° 00' 00" E	1.0000
45	144	145	S 89° 00' 00" E	1.0000
46	145	146	S 89° 00' 00" E	1.0000
47	146	147	S 89° 00' 00" E	1.0000
48	147	148	S 89° 00' 00" E	1.0000
49	148	149	S 89° 00' 00" E	1.0000
50	149	150	S 89° 00' 00" E	1.0000
51	150	151	S 89° 00' 00" E	1.0000
52	151	152	S 89° 00' 00" E	1.0000
53	152	153	S 89° 00' 00" E	1.0000
54	153	154	S 89° 00' 00" E	1.0000
55	154	155	S 89° 00' 00" E	1.0000
56	155	156	S 89° 00' 00" E	1.0000
57	156	157	S 89° 00' 00" E	1.0000
58	157	158	S 89° 00' 00" E	1.0000
59	158	159	S 89° 00' 00" E	1.0000
60	159	160	S 89° 00' 00" E	1.0000
61	160	161	S 89° 00' 00" E	1.0000
62	161	162	S 89° 00' 00" E	1.0000
63	162	163	S 89° 00' 00" E	1.0000
64	163	164	S 89° 00' 00" E	1.0000
65	164	165	S 89° 00' 00" E	1.0000
66	165	166	S 89° 00' 00" E	1.0000
67	166	167	S 89° 00' 00" E	1.0000
68	167	168	S 89° 00' 00" E	1.0000
69	168	169	S 89° 00' 00" E	1.0000
70	169	170	S 89° 00' 00" E	1.0000
71	170	171	S 89° 00' 00" E	1.0000
72	171	172	S 89° 00' 00" E	1.0000
73	172	173	S 89° 00' 00" E	1.0000
74	173	174	S 89° 00' 00" E	1.0000
75	174	175	S 89° 00' 00" E	1.0000
76	175	176	S 89° 00' 00" E	1.0000
77	176	177	S 89° 00' 00" E	1.0000
78	177	178	S 89° 00' 00" E	1.0000
79	178	179	S 89° 00' 00" E	1.0000
80	179	180	S 89° 00' 00" E	1.0000
81	180	181	S 89° 00' 00" E	1.0000
82	181	182	S 89° 00' 00" E	1.0000
83	182	183	S 89° 00' 00" E	1.0000
84	183	184	S 89° 00' 00" E	1.0000
85	184	185	S 89° 00' 00" E	1.0000
86	185	186	S 89° 00' 00" E	1.0000
87	186	187	S 89° 00' 00" E	1.0000
88	187	188	S 89° 00' 00" E	1.0000
89	188	189	S 89° 00' 00" E	1.0000
90	189	190	S 89° 00' 00" E	1.0000
91	190	191	S 89° 00' 00" E	1.0000
92	191	192	S 89° 00' 00" E	1.0000
93	192	193	S 89° 00' 00" E	1.0000
94	193	194	S 89° 00' 00" E	1.0000
95	194	195	S 89° 00' 00" E	1.0000
96	195	196	S 89° 00' 00" E	1.0000
97	196	197	S 89° 00' 00" E	1.0000
98	197	198	S 89° 00' 00" E	1.0000
99	198	199	S 89° 00' 00" E	1.0000
100	199	200	S 89° 00' 00" E	1.0000



1. STATE PLANE COORDINATES ESTABLISHED BY GPS FASTSTATIC OCCUPATION.
2. 20' WIDE EASEMENT RIGHT OF WAY ALONG THE EXISTING UNPAVED ROAD GRANTED TO W. P. BUICK, JR. BY INSTRUMENT RECORDED AT REC. BOOK 6 AT PAGE 2815.
3. LOCATION OF EASEMENT REFERENCED BY BOOK 6 AT PAGE 2815 IS UNPLOTTABLE. THE DESCRIPTION DESCRIBES A EASEMENT ALONG THE PRESENT EXISTING ROAD. THERE IS NO WAY TO DETERMINE FROM THIS DESCRIPTION WHICH ROAD THE DEED IS REFERRING TO.



BOUNDARY SURVEY	
PREPARED FOR:	WILLIAM C. JACKSON
DESCRIPTION:	108.653 ACRES
LOCATION APPROXIMATELY 3 MILES WEST OF FORT MONTE, CALHOUN COUNTY, SOUTH CAROLINA	
DATE: MARCH 28, 2000	JOB # 2000-051/BOUNDARY
TAX MAP # 125-62-02-002 (SECTION 07)	
WE HAVE BEEN A PORTION OF THE PROPERTY SHOWN ON A PLAT PREPARED FOR A. L. HULLERBY BY H. R. OLIVER, JR. DATED RECORDED IN REC. BOOK 6 AT PAGE 236.	
I HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE UNIFORM READING MANUAL OF PRACTICE FOR LAND SURVEYORS OF SOUTH CAROLINA, AND THAT THERE ARE NO UNPAID ENCUMBRANCES OR INTERESTS OTHER THAN SHOWN HEREON.	
H. R. OLIVER, JR. REGISTERED LAND SURVEYOR	

J. E. FALKER & ASSOCIATES
130 WEST BROAD STREET
P. O. BOX 1100
COLUMBIA, SC 29201
(803) 425-0741

REVISED: APRIL 27, 2000

BUSINESS RESEARCH CORPORATION



6/26/12

5/17/84

Ret: BFI

STATE OF SOUTH CAROLINA,
COUNTY OF CALHOUN.

EASEMENT OR RIGHT OF WAY

KNOW ALL MEN BY THESE PRESENTS, That

I, Charles B. Stuck in the State aforesaid, in consideration
of the sum of Five (\$5.00) Dollars -----
to me in hand paid at and before the sealing of these presents by
Grace J. McAlister

the receipt whereof is hereby acknowledged, have granted, bargained,
sold and released, and by these presents do grant, bargain, sell
and release unto the said Grace J. McAlister, the following:

An easement or right-of-way, ten (10') feet in width for
ingress and egress from South Carolina Highway #S-9-25 and
extending generally in a northwesterly direction from South
Carolina Highway #S-9-25 to the property line of lands of
W. F. Buyck, Jr. and along the present existing road over the
following described lands of the Grantors:

All that certain piece, parcel or tract of land situate,
lying and being in Amelia Township, Calhoun County, South Carolina,
containing 15/2 acres, located near the town of St. Matthews and
shown on a plat prepared for Charles Stuck by Evett, R.L.S., dated
January 6, 1978 and recorded in the office of the Clerk of Court
for Calhoun County as Plat #1285. Said property bounded as follows:
On the EAST by the center line of the roadway as shown on said
plat and measuring thereon in a broken line six hundred forty-six
and one-tenth (646.1) feet; On the SOUTHEAST by the right-of-way
of State road #9-32 and measuring thereon one thousand four hundred
forty-nine and two-tenths (1,449.2) feet; On the SOUTHWEST by
measuring thereon three hundred and measuring thereon three
hundred twenty-two and six-tenths (322.6) feet; and On the NORTHWEST
by property now or formerly of Buyck and measuring thereon one
thousand eight hundred forty-one and two-tenths (1,841.2) feet.
The easement herein granted being the western one-half of an
easement having a total width of twenty (20') feet along a
roadway as shown along the Eastern boundary of the property shown
on the above plat.

Grantor responsible for maintenance and cleanliness of Right of Way.
The said property described above being the same property which
was conveyed to Charles B. Stuck by Patrick J. Williams and Marion
B. Williams by their deed dated the 13th day of January, 1978 and
filed in the Office of the Clerk of Court for Calhoun County on
the 14th day of January, 1978 and recorded as Deed #6677.

6 2612

TO HAVE AND TO HOLD the easement or right of way herein granted to the said Grace J. McAlister, her heirs and assigns forever.

AND I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto Grace J. McAlister, her Heirs and Assigns, against myself and my Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS my Hand and Seal this 17th day of May, in the year of our Lord one thousand nine hundred and eighty-four and in the 208th year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Charles B. Stuck (SEAL)

Beverly G. Simmons
Addison G. Wilson

STATE OF SOUTH CAROLINA,
COUNTY OF CALHOUN. }

PERSONALLY appeared before me, Beverly G. Simmons and made oath that s/he saw the within-named Charles B. Stuck sign, seal and as his Act and deed, deliver the within-written Easement or Right of Way for the uses and purposes therein mentioned, and that s/he with Addison G. Wilson witnessed the execution thereof.

SWORN to before me this 17th day of May, 1984.

(SEAL) Addison G. Wilson
Notary Public, S.C.

Beverly G. Simmons

My Commission Expires: 12-31-91

REC. 6 2612

STATE OF SOUTH CAROLINA,
COUNTY OF CALHOUN.

I, Addison G. Wilson Notary Public for S.C.,

do hereby certify unto all whom it may concern, that Mrs. Ada Stuck, the wife of the within-named Charles B. Stuck, did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily and without any compulsion, dread or fear of any person or persons whomsoever renounce, release and forever relinquish unto the within-named Grace J. McAlister, her heirs and assigns, all her interest and estate and also all her right and claim of Dower of, in or to all and singular the premises within mentioned and released.

(SEAL) Addison G. Wilson
Notary Public, S.C.

Ada D. Stuck

My Commission Expires: 12-6-92

FILED

JUN 7 3 41 PM '84

CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, S.C.

I hereby certify that the within
Right of Way
was filed for record in my office at
3:41 P M. o'clock on the 7th day
of June 19 84 and was
immediately entered upon the proper
indexes and duly recorded
V.D. 6 2612

W. Banks
CLERK OF COURT FOR CALHOUN COUNTY
ST. MATTHEWS, S. C.

V.D. 6 2612

575

612613

5/15/1984

Net: 3507

STATE OF SOUTH CAROLINA,
COUNTY OF CALHOUN.

EASEMENT OR RIGHT OF WAY

KNOW ALL MEN BY THESE PRESENTS, That I,
Patsy S. Pedings in the State aforesaid, in consideration of
the sum of Five (\$5.00) Dollars -----
to me in hand paid at and before the sealing of these presents by
Grace J. McAlister
the receipt whereof is hereby acknowledged, have granted, bargained,
sold and released, and by these presents do grant, bargain, sell
and release unto the said Grace J. McAlister, the following:

An easement or right-of-way, ten (10) feet in width for
ingress and egress from South Carolina Highway #S-9-25 and
extending generally in a northwesterly direction from South
Carolina Highway #S-9-25 to the property line of lands of
W. P. Buyck, Jr. and along the present existing road over
the following described lands of the Grantor:

All that certain piece, parcel or tract of land, situate,
lying and being in Amelia Township, Calhoun County, South Carolina,
containing 21.0 acres and being more fully and clearly shown
on a plat prepared by Woodrow W. Evett, dated January 6, 1978 and
filed in the Office of the Clerk of Court for Calhoun County as
Plat #1284. Said property being bounded as follows: On the
NORTHWEST by property now or formerly of Buyck; On the EAST by
property now or formerly of Floyd; On the SOUTHEAST by the right-
of-way of Highway #S-9-32; and On the WEST by the center line
of the roadway as shown on said plat. The easement herein
granted being the eastern one-half of an easement having a
total width of twenty (20') feet along a roadway as shown along
the Western boundary of the property shown on the above plat.
Grantee responsible for maintenance and cleanliness of Right of Way.

The property above described being the same property which
was conveyed to Patsy S. Pedings by Patrick J. Williams and
Marion B. Williams by their deed dated the 13th day of January,
1978 and filed in the Office of the Clerk of Court for Calhoun
County on the 16th day of January, 1978 and recorded as
Deed #6678.

TO HAVE AND TO HOLD the easement or right of way herein
granted to the said Grace J. McAlister, her Heirs and Assigns forever.

AND I do hereby bind myself and my Heirs, Executors, and
Administrators, to warrant and forever defend all and singular

6 2613

576

DEF. EXH.

2

the said premises unto Grace J. McAlister, her Heirs and Assigns,
against myself and my Heirs and against every person whomsoever
lawfully claiming, or to claim, the same or any part thereof.

WITNESS my Hand and Seal this 15th day of
May in the year of our Lord one thousand nine hundred
and eighty-four and in the 208th year of the Sovereignty and
Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Beverly G. Simmons
Addison G. Wilson

Patsy S. Pedings (SEAL)

STATE OF SOUTH CAROLINA,
COUNTY OF CALHOUN. }

PERSONALLY appeared before me, Beverly G. Simmons
and made oath that s/he saw the within-named Patsy S. Pedings
sign, seal and as her Act and deed, deliver the within-written
Easement or Right of Way for the uses and purposes therein mentioned
and that s/he with Addison G. Wilson witnessed the execution
thereof.

SWORN to before me this 15th
day of May, 1984.

(SEAL) Addison G. Wilson
Notary Public, S.C.

Beverly G. Simmons

My Commission Expires: 12-6-92

FILED

JUN 7 3 42 PM '84

CLERK
CALHOUN COUNTY
ST. MATTHEWS, S.C.

STATE OF SOUTH CAROLINA,
COUNTY OF CALHOUN.

Patsy S. Pedings

TO

Grace J. McAllister

BASEMENT OR RIGHT OF WAY

I hereby certify that the within
Easement or Right-of-Way was
filed in my office at

3:42 PM on the 7th

day of May, 1984.

and was immediately entered upon the
proper indexes and duly recorded as

Map. 6 2613

CLERK
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, S. C.

Ret. BFD 1

STATE OF SOUTH CAROLINA,)
COUNTY OF CALHOUN.)

EASEMENT OR RIGHT OF WAY

KNOW ALL MEN BY THESE PRESENTS, That I, W.P. Buyck, Jr.,
in the State aforesaid, in consideration of the sum of
Five (\$5.00) Dollars -----
to me in hand paid at and before the sealing of these presents by
Grace J. McAlister,
the receipt whereof is hereby acknowledged, have granted, bargained,
sold and released and by these presents do grant, bargain, sell and
release unto the said Grace J. McAlister, the following:

An easement or right-of-way, twenty (20) feet in
width for ingress and egress from South Carolina Highway #8-9-25 and
extending generally in a northwesterly direction across the lands of Stark,
Pedings and grantor herein to the property line of lands of the Grantee,
and along the present existing road over the following described
lands of the Grantor:

All that certain piece, parcel or tract of land, situate,
lying and being in Amelia Township, Calhoun County, South Carolina,
containing two hundred (200) acres, more or less on High Hill and
Buck Head Creeks and bounded by lands of the estate of H. H. Paulling,
by lands of Mrs. B. F. Antley and by lands now or formerly of Mrs.
Pauline Steiner. Being the same lands being conveyed to the Grantor,
W. P. Buyck, JR. by W. P. Buyck by his deed dated the 7th day of
December, 1972 and filed in the Office of the Clerk of Court for
Calhoun County on the 7th day of December, 1982 and recorded as
Deed No. 2886.

TO HAVE AND TO HOLD the easement or right-of-way herein
granted to the said Grace J. McAlister, her heirs and assigns forever.

AND I do hereby bind myself and my Heirs, Executors and
Administrators, to warrant and forever defend all and singular the said
premises unto the said Grace J. McAlister, her Heirs and Assigns,
against myself and my Heirs and against every person whosoever lawfully
claiming, or to claim, the same or any part thereof.

WITNESS my Hand and Seal this 1st day of
June in the year of our Lord one thousand nine hundred
and eighty-four and in the 208th year of the Sovereignty and Independence
of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Patty S. McCormack
Charles W. Whetstone, Jr.

SEAL

STATE OF SOUTH CAROLINA,
COUNTY OF CALHOUN.

PERSONALLY APPEARED BEFORE ME, Patty S. McCormack
and made oath that s/he saw the within-named W. P. Buyck, Jr. sign, seal
and as his Act and deed, deliver the within-written Easement or Right-of-Way
for the uses and purposes therein mentioned, and that s/he with
Charles W. Whetstone, Jr. witnessed the execution thereof.

SWORN to before me this 1st
day of June, 1984.

(SEAL) Charles W. Whetstone, Jr.
Notary Public for S.C. (My Commission Expires: 5/7/94)

STATE OF SOUTH CAROLINA,
COUNTY OF CALHOUN.

RENUNCIATION OF DOWER

I, Patty S. McCormack Notary Public
for South Carolina, do hereby certify unto all whom it may concern, that
Mrs. Marie D. Buyck, the wife of the within-named W. P. Buyck,
Jr., did this day appear before me, and upon being privately and
separately examined by me, did declare that she does freely, voluntarily,
and without any compulsion, dread or fear of any person or persons
whomsoever, renounce, release and forever relinquish unto the within-
named Grace J. McAlister, her heirs and assigns, all her interest and

6 2614

estate and also all her right and claim of Dower of, in or to all
and singular the premises within mentioned and released.
GIVEN under my Hand and Seal this 1st day of June, 1984.

(SEAL) Paul H. Bernall Marion D. Buysch
Notary Public for S.C.

My Commission Expires: 1/6/92

FILED
JUN 7 3 42 PM '84
CLERK
CALHOUN
ST. MATTHEWS, S.C.

I hereby certify that the within
Rightly Way
was filed for record in my office at
3:42 P. M. o'clock on the 7th day
of June 19 84 and was
Immediately entered upon the 6 2614
Indexes and duly recorded as

Ch. Banks
CLERK OF COURT FOR CALHOUN COUNTY
ST. MATTHEWS, S. C.

4/2615

d. 6-7-1987

STATE OF SOUTH CAROLINA,
COUNTY OF CALHOUN.

EASEMENT OR RIGHT-OF-WAY

KNOW ALL MEN BY THESE PRESENTS, That I, Grace J. McAlister, in the State aforesaid, in consideration of the sum of Five (\$5.00) Dollars-----
to me made and paid at and before the sealing of these presents by W. P. Buyck, Jr.,
the receipt whereof is hereby acknowledged, have granted, bargained, sold and released and by these presents do grant, bargain, sell and release unto the said W. P. Buyck, Jr., the following:

An easement or right-of-way, twenty (20) feet in width for ingress and egress from South Carolina Highway #S-9-25 and extending generally in a northwesterly direction from lands of the Grantor across the lands of the Grantor herein to the property line of other lands of the Grantee and along the present existing road over the following described lands of the Grantor:

All that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Amelia Township, School District #1, Calhoun County, South Carolina, containing two hundred three (203) acres, more or less, as shown on a plat by H. R. Oliver, Reg. L.S., dated December 12, 1963, and recorded in the office of the Clerk of Court for Calhoun County in Plat Book 8 at page 259, and bounded on the Northwest by lands of Buyck; on the South and Southwest by lands of Hancock; on the Northeast by lands of A. P. Bruner; and on the Southeast by lands of Buyck.

And being the same tract of land conveyed to J. T. McAlister by deed of J. B. Williams, dated July 1, 1944, and recorded in the office of the Clerk of Court for Calhoun County in Deed Book 23 at page 365, the said J. T. McAlister having died on January 10, 1966, leaving a Will dated January 25, 1964, of record in the office of the Judge of Probate for Calhoun

County, South Carolina, filed in Apartment 96 in Package 2233,
by which he devised the above-described property to Grace J.
McAlister.

TO HAVE AND TO HOLD the easement or right-of-way herein
granted to the said W. P. Buyck, Jr., his heirs and assigns
forever.

And I do hereby bind myself and my Heirs, Executors and
Administrators, to warrant and forever defend all and singular
the said premises unto the said W. P. Buyck, Jr., his Heirs and
Assigns, against myself and my Heirs and against every person
whomsoever lawfully claiming, or to claim, the same or any part
thereof.

WITNESS my Hand and Seal this 7th day of June,
in the year of our Lord one thousand nine hundred and
eighty-four and in the two hundred and eighth year of the
Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Paul P. King
Steel G. Gentry

Grace J. McAlister

6 2615

STATE OF SOUTH CAROLINA,
COUNTY OF CALHOUN.

PERSONALLY appeared before me Paul D. King
and made oath that s/he saw the within-named Grace J.
McAlister sign, seal and as her Act and Deed, deliver the
within-written Easement or Right-of-Way for the uses and
purposes therein mentioned, and that s/he with
F. Hall Yarbrough witnessed the execution thereof.

SWORN to before me this 7th
day of June, 1984.

(SEAL) F. Hall Yarbrough
Notary Public South Carolina

My Commission Expires: 10-16-90

FILED
JUN 7 3 47 PM '84
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, S.C.

I hereby certify that the within

Right of Way

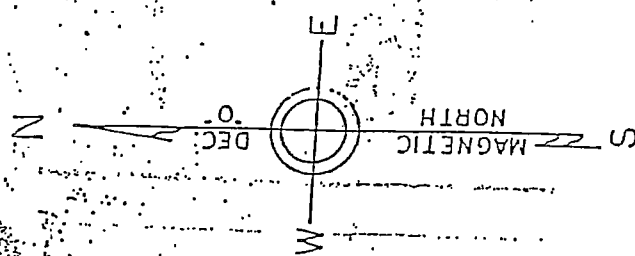
ed for record in my office at
3:47 P.M. o'clock on the 7th day
June 19 84 and was
lately entered upon the proper
as and duly recorded as

Mass. 3 2615

DR. Banks
CLERK OF COURT FOR CALHOUN COUNTY
ST. MATTHEWS, S. C.

Vol. 6 2615

584



RECORDED
DEC 19 1963
G.C.P. & G.R.

*This is a
1060 ac Tract*

DOES NOT NEED ACCESS

MRS. A.P. BRUNER

IRON NM-WIT. SM. OAKS & PUGWOOD

IRON NM-WIT. 13" LINE III QM

SCALE: 1" = 660'

STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN
PLAT OF THE PROPERTY OF J. F. MCALISTER
CONTAINING 203 ACRES, MORE OR LESS, A
LOCATED APPROXIMATELY 3 MILES WEST
FORT MOTTE, S.C.
SURVEYED DURING THE SUMMER OF 1963.
PLAT COMPLETED 12 DECEMBER 1963.

DEF. EXH.
5

585

Handwritten notes:
36 acres in plat
201 of it
P.M.
HANCHOCK

WIT. 28" CHEST. OAK

IRON NM
S46°15'E
851'

S46°W
1029.5'

IRON NM-WIT. SM. OAKS & PUGWOOD

S44°20'E
1749'

203 AC. ±

BUCK

2361'

S37°40'W
537.40'

BUCK

IRON NM
WIT. 12" BIRCH & 8" MAPLE

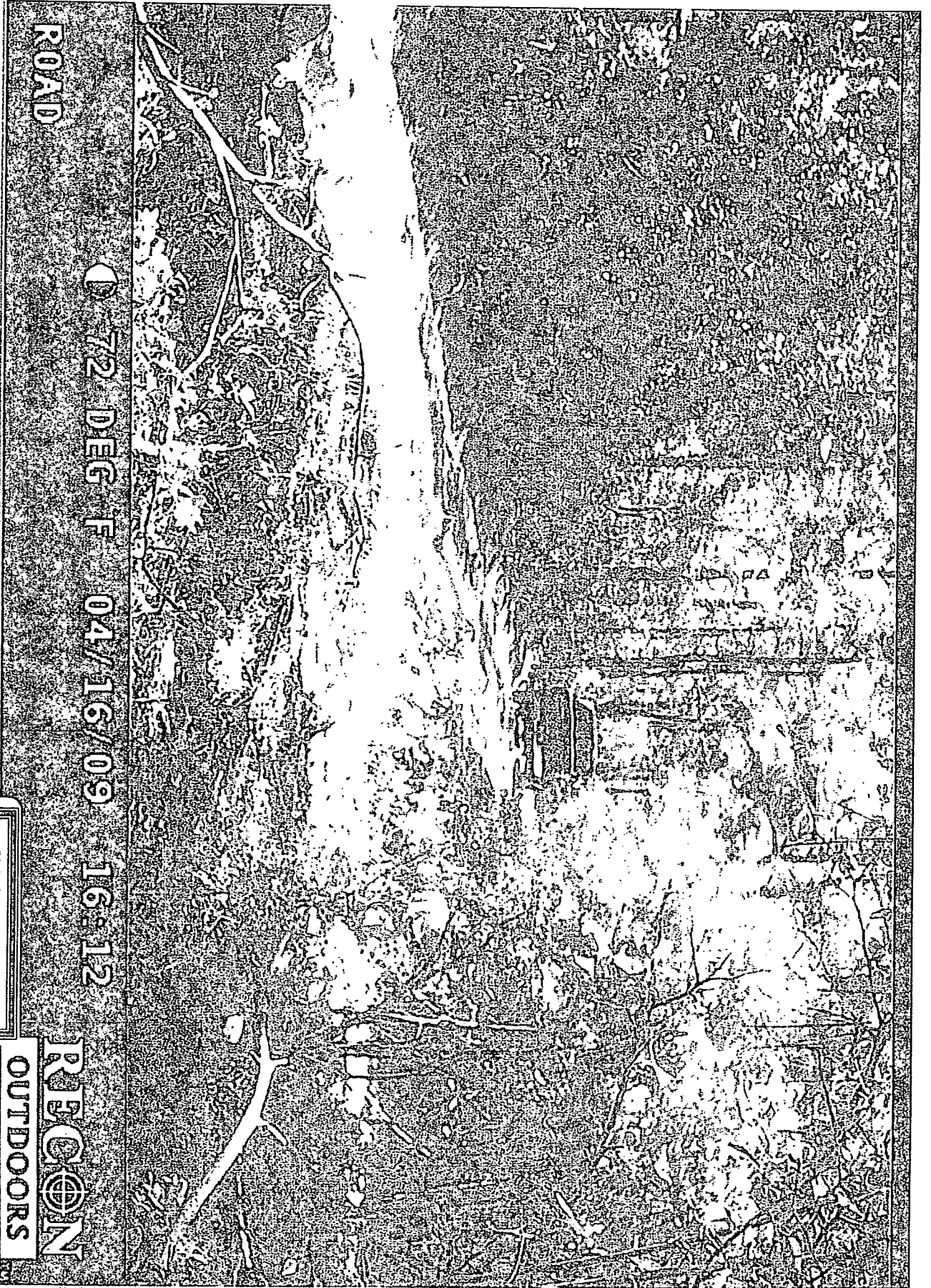
IRON NM-WIT. 13" LINE III QM

N49°30'W
1116'

CONC. NM.
WIT. 7" & 12" HICKS. 684'

HANCHOCK





ROAD

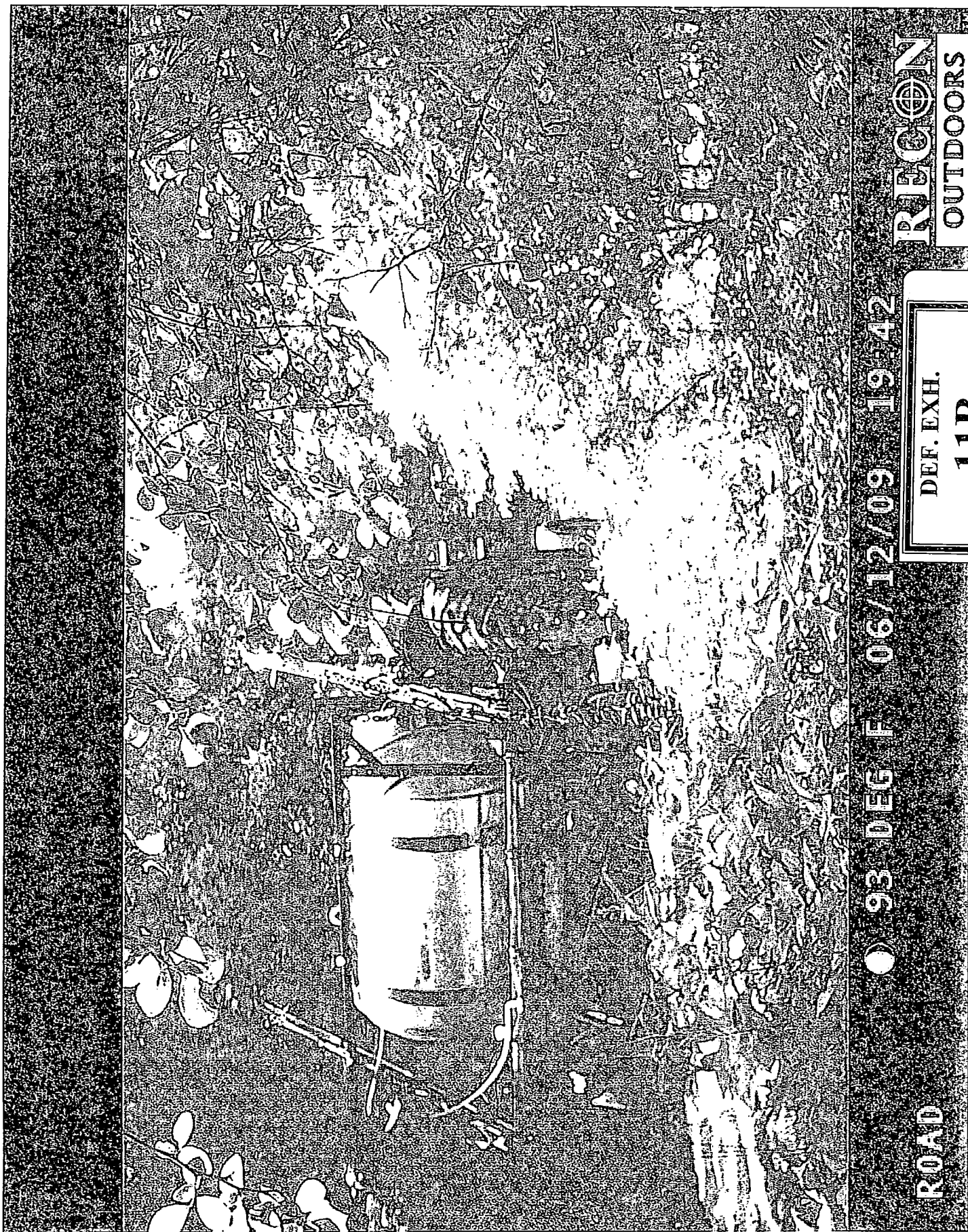
72 DEG F 04/16/09 16:12

RECON

OUTDOORS

DEF. EXH.

7



93 DEG F 06/12/09 19:42

ROAD

RECON

OUTDOORS

DEF. EXH.

11B



90 DEG F 06/12/09 20:38

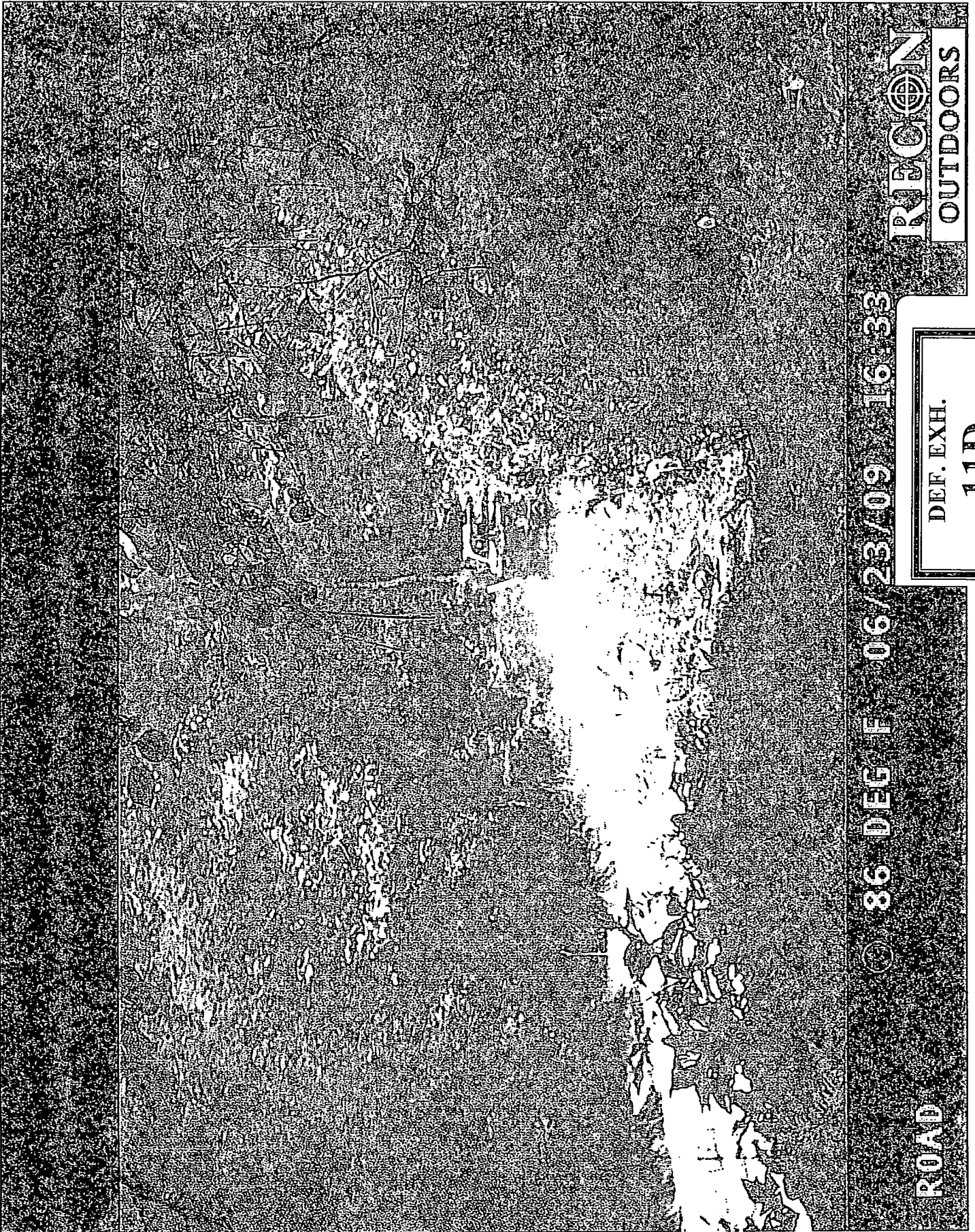
ROAD

RECON

OUTDOORS

DEF. EXH.

11C



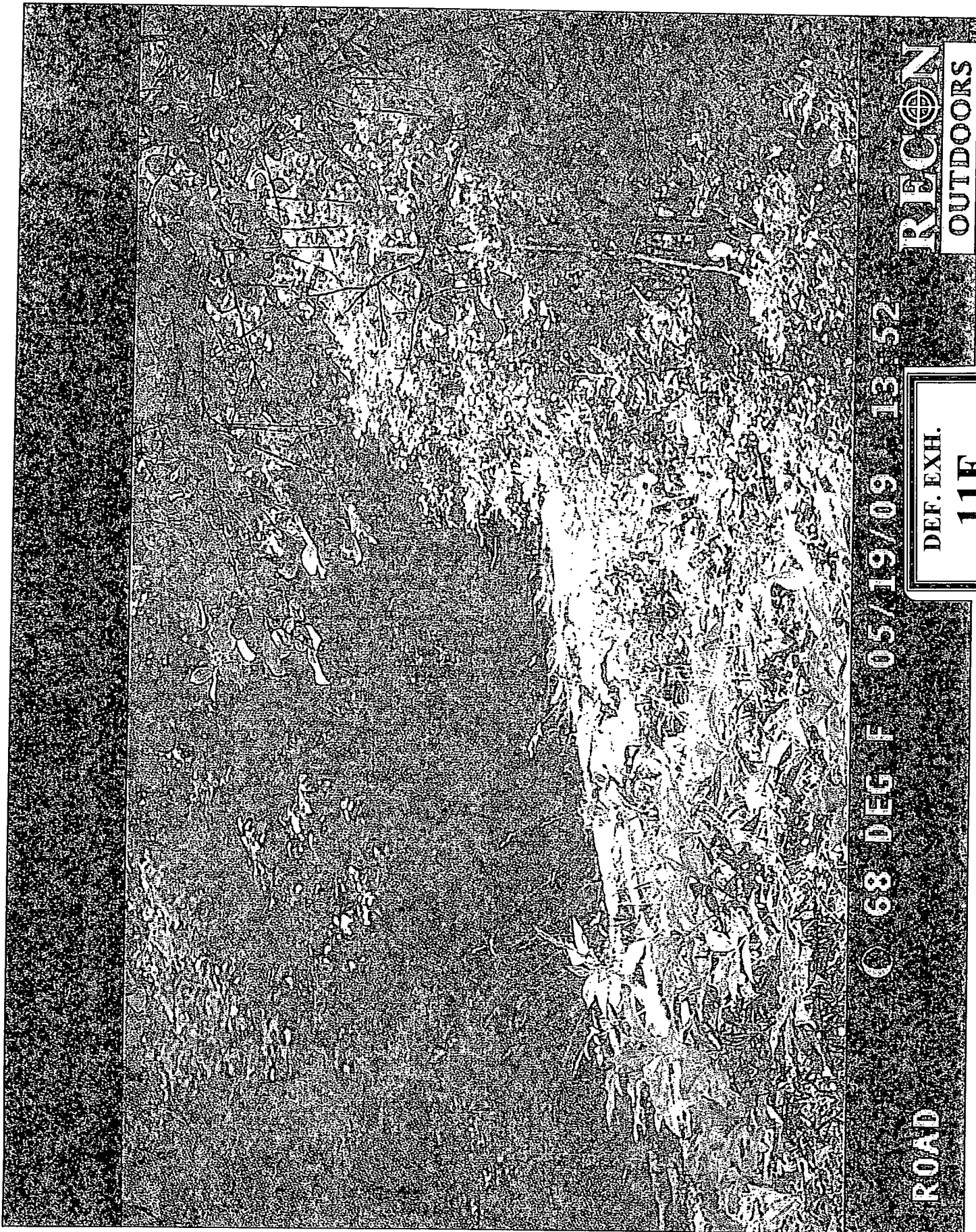
© 86 DEG F 06/23/09 16:33

ROAD

RECON
OUTDOORS

DEF. EXH.

11D



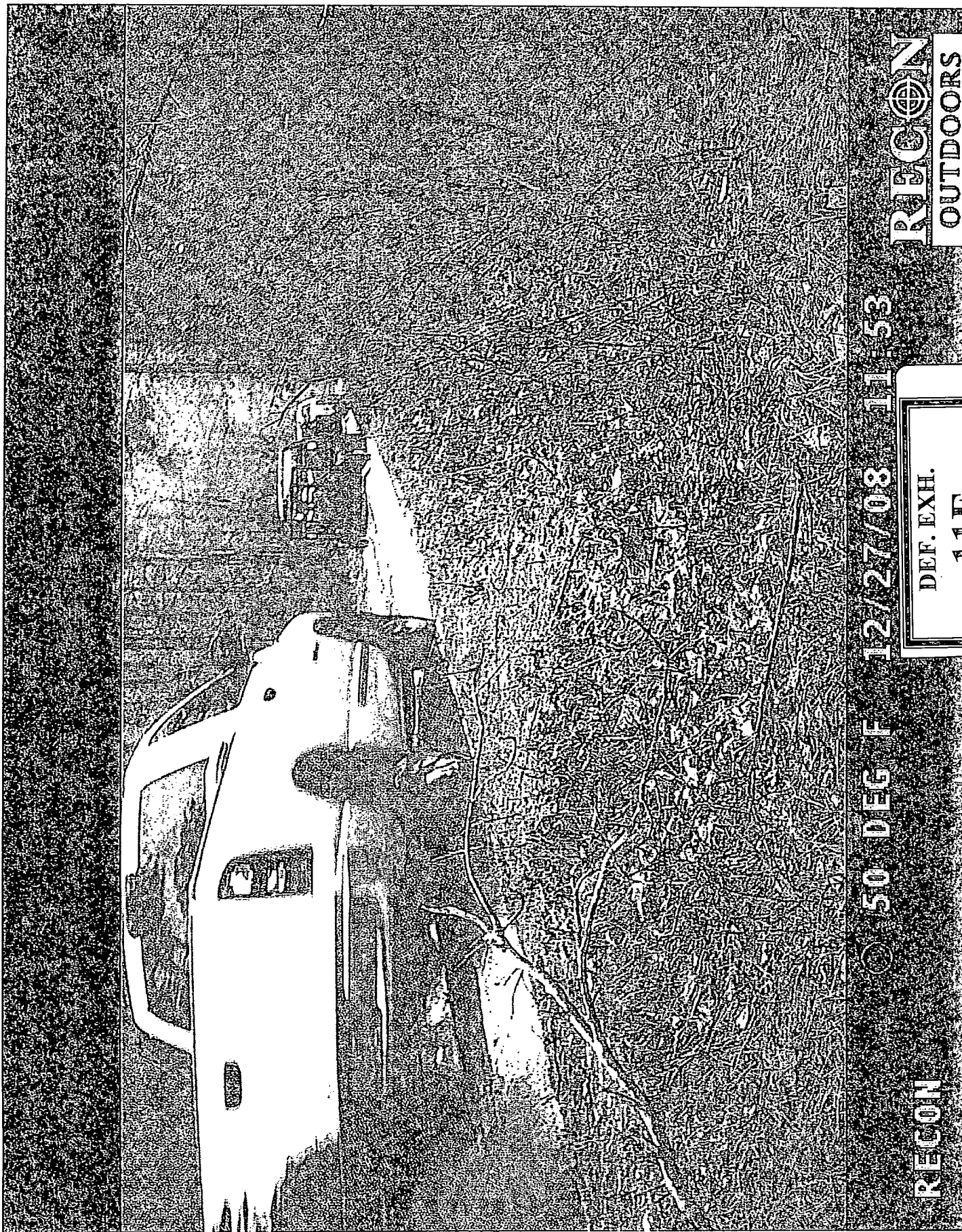
ROAD

© 68 DEG F 05/19/09 13:52

DEF. EXH.

11E

RECON
OUTDOORS



50 DEG F 12/27/08 11:53

RECON

OUTDOORS

DEF. EXH.

11F

RECON



● 89 DEG F 05/31/09 13:29

ROAD

DEF. EXH.
11G

RECON
OUTDOORS

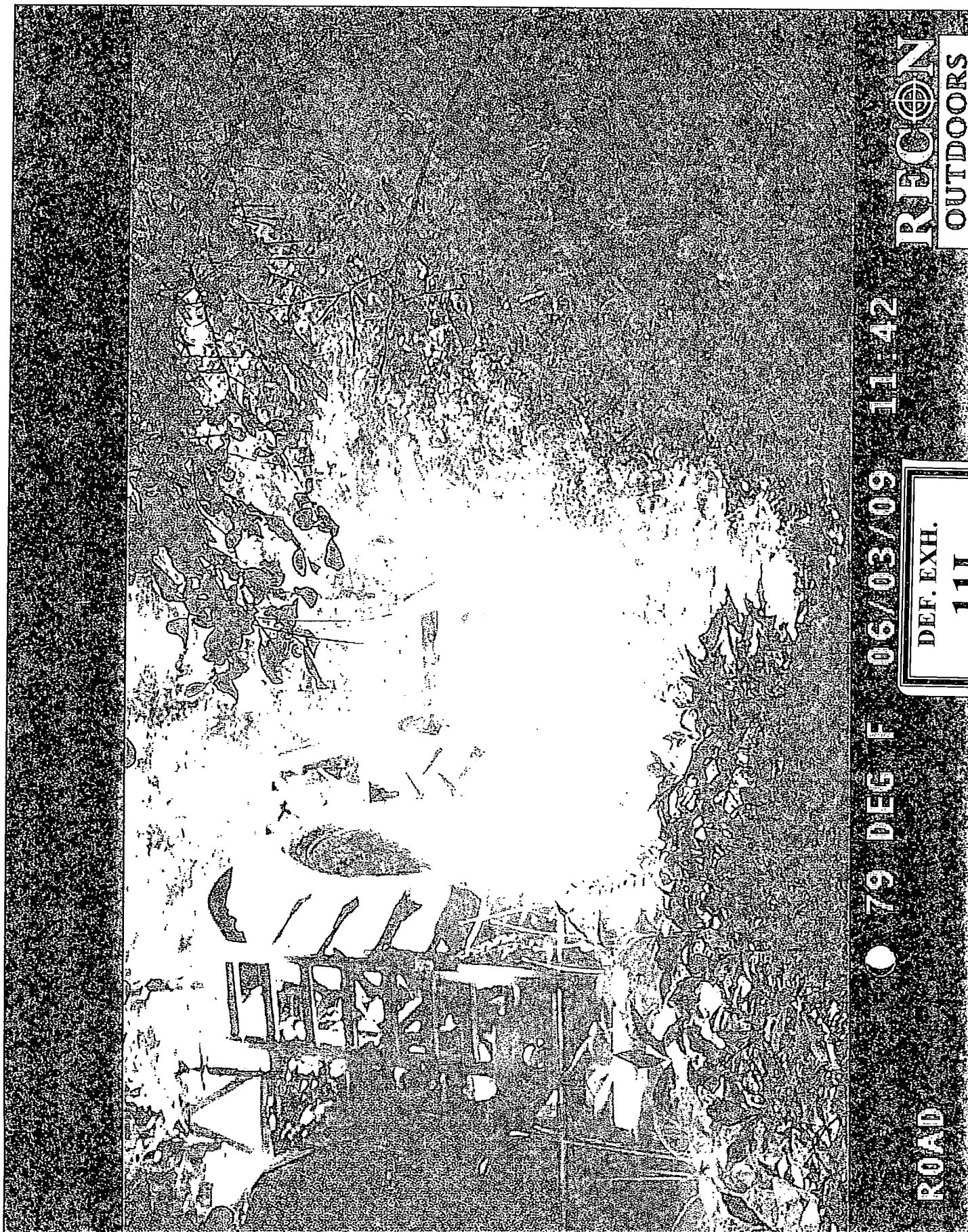


96 DEG F 05/31/09 14:31

RECON
OUTDOORS

DEF. EXH.
11H

ROAD



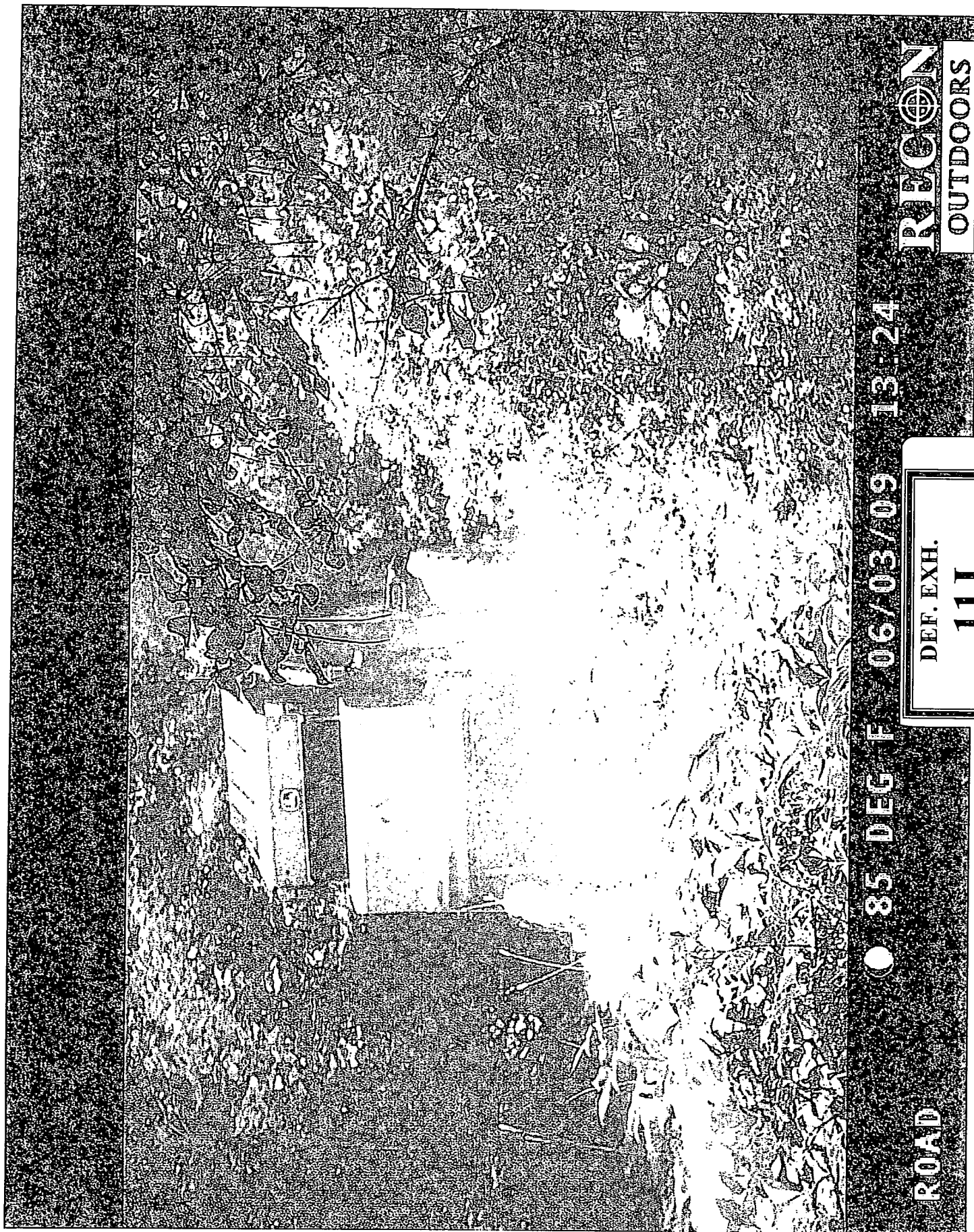
ROAD

● 79 DEG F 06/03/09 11:42

RECON
OUTDOORS

DEF. EXH.

11I



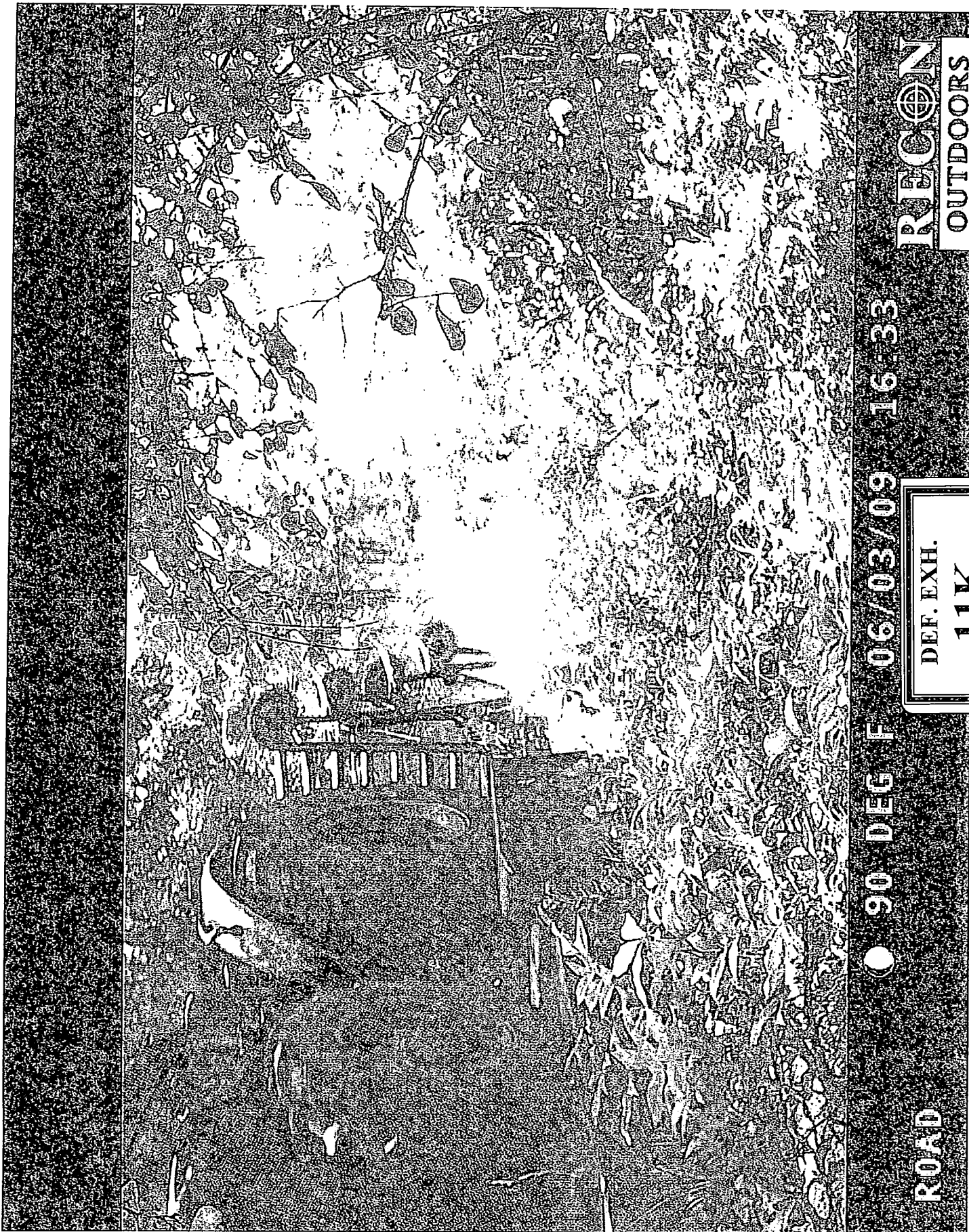
● 85 DEG F 06/03/09 13:24

ROAD

DEF. EXH.

11J

RECON
OUTDOORS



● 90 DEG F 06/03/09 16:33

ROAD

DEF. EXH.

11K

RECON
OUTDOORS



● 89 DEC F 06703/09 17:46

ROAD

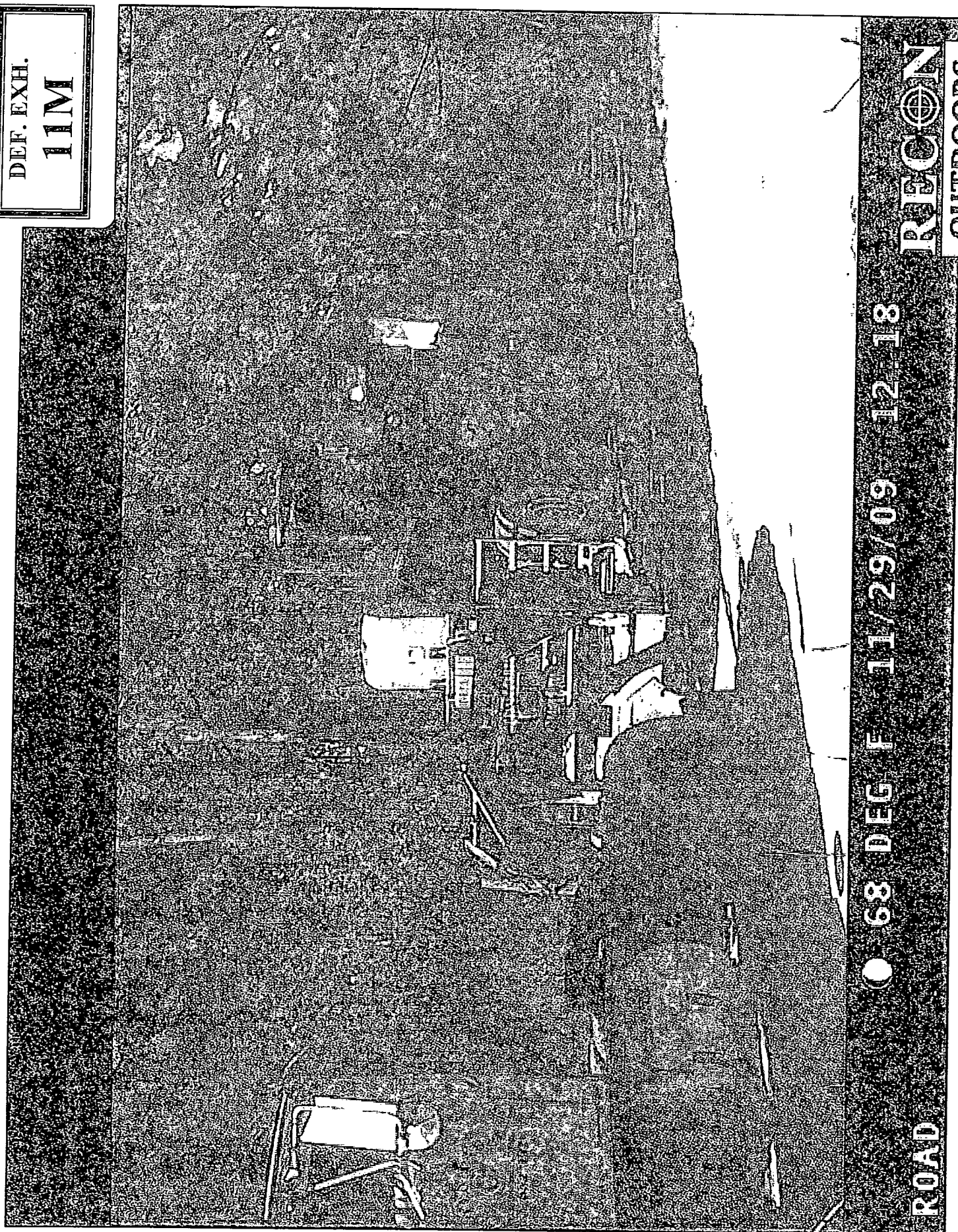
DEF. EXH.

11L

RECON
OUTDOORS

DEF. EXH.

11M

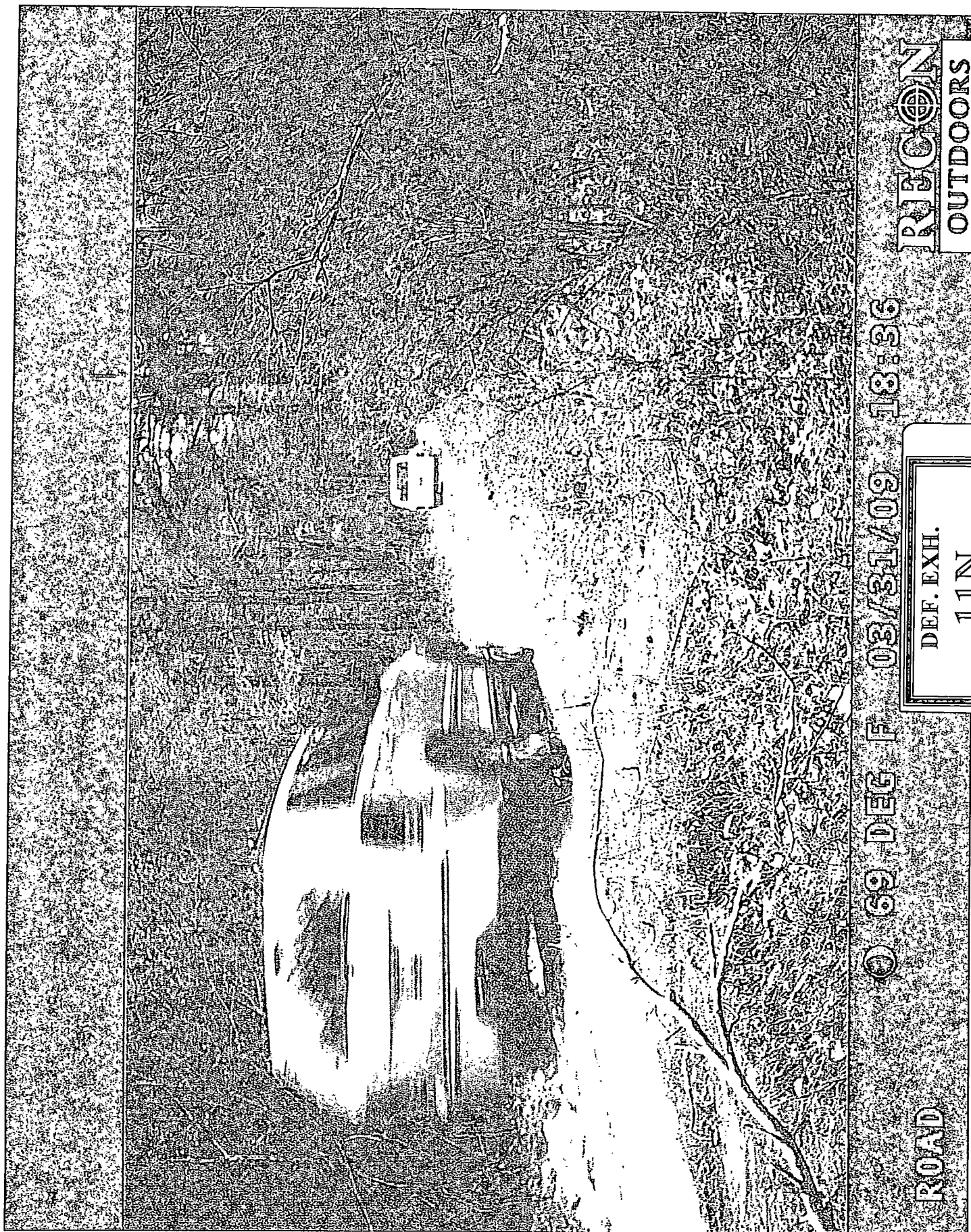


68 DEG F 11/29/09 12 18

ROAD

RECON

OUTDOORS



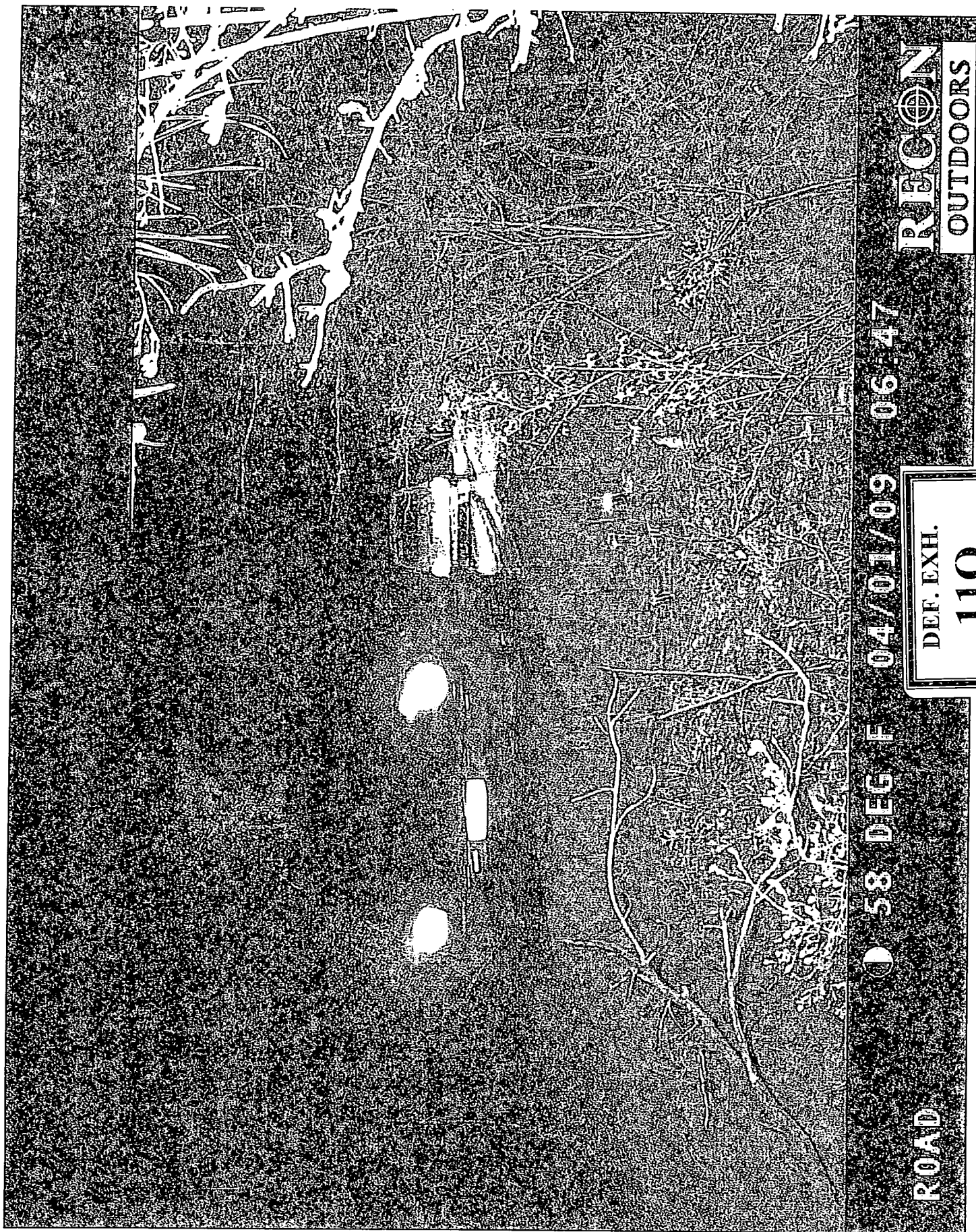
© 69 DEG F 03/31/09 18:36

ROAD

RECON
OUTDOORS

DEF. EXH.

11N



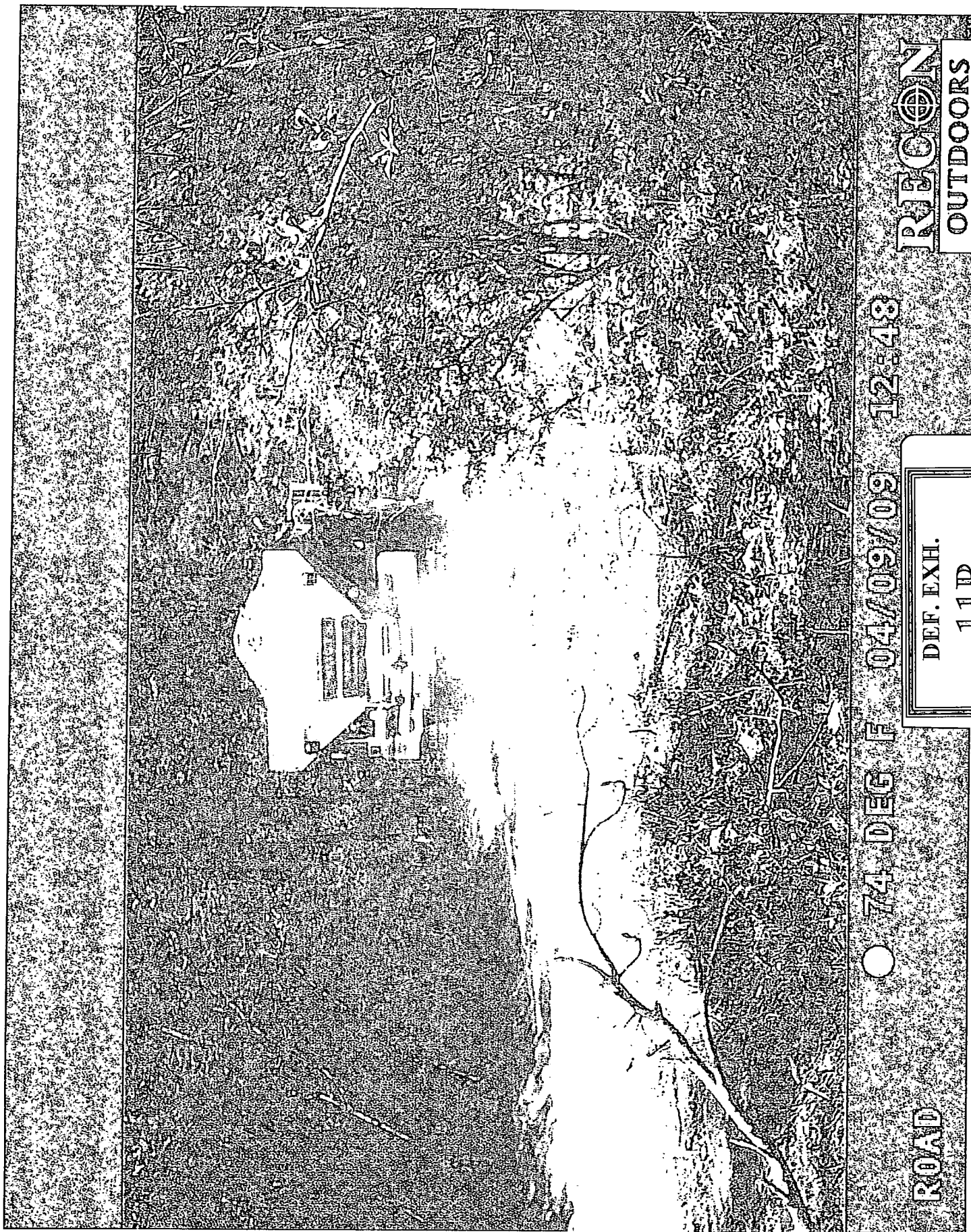
04/01/09 06:47

RECON
OUTDOORS

DEF. EXH.

110

ROAD



○ 74 DEG F 04/09/09 12:48

ROAD

DEF. EXH.

11P

RECON
OUTDOORS

MCORP-FIN108321-land of Real Property.doc 4/10/00 1:24 PM

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

DEED OF REAL PROPERTY

THIS DEED, executed this 7th day of April, 2000, by Rocco D. Cassone (hereinafter referred to as "Grantor") to William C. Jackson, Individually, and Lorraine Ruple Conrad, Trustee for the Lorraine Ruple Conrad Revocable Trust Under Agreement dated March 30, 2000 (hereinafter referred to as "Grantee").

WITNESSETH:

IN CONSIDERATION of the sum of Two Hundred Ninety Thousand and no/100 Dollars (\$290,000.00), the receipt and sufficiency of which is acknowledged by Grantor, Grantor has granted, bargained, sold and released, and by this Deed grants, bargains, sells and releases to Grantee, their heirs and assigns, the following real property:

ALL that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Amelia Township, School District No. 1, County of Calhoun, State of South Carolina, containing 203 acres, more or less, shown on a plat of H.R. Oliver, RLS, dated December 12, 1983, and recorded in the Office of the Clerk of the Court for Calhoun County in Plat Book 8 at Page 259, and bounded as follows: on the Northwest by lands of Buyck; on the South and Southwest by lands of Hancock; on the Northeast by lands of A.P. Bruner; and on the Southeast by lands of Buyck.

TOGETHER with an easement twenty (20) feet in width for ingress and egress granted by W.P. Buyck, Jr. by instrument dated June 1, 1984, and recorded in Miscellaneous Book 6-2614; an easement ten (10) feet in width for ingress and egress granted by Patsy S. Pedings by instrument dated May 15, 1984, recorded in Miscellaneous Book 6-2613; and an easement ten (10) feet in width for ingress and egress granted by Charles B. Stuck by instrument dated May 17, 1984, and recorded in Miscellaneous Book 6-2612.

Tax Map No. 135-00-00-002

Derivation: This being the same property conveyed to Grantor by deed of James M. Nickells and Rachel C. Nickells dated December 2, 1996, and recorded in Deed Book 105, page 313.

Grantor's Mailing Addresses for Tax Notices:

Lorraine Ruple Conrad
201 Old Woodland Road
Columbia, South Carolina 29209

William C. Jackson
2803 Canterbury Road
Columbia, South Carolina 29204

I hereby certify that the within Deed was filed for record in my office at 3:15 P.M. on the 10th day of April, 2000 and was immediately entered upon the proper Index as duly recorded as

Deed Book 140 Page 275
CLERK OF COURT OF C. H. AND CL.
FOR CALHOUN COUNTY, S. C.

BOOK - 140 PAGE 275

607

DEF. EXH.

12

MCORP-FIM1003211000 of Real Property, doc 4400 124 PM

TOGETHER with all and singular rights, members, hereditaments and appurtenances belonging or in any way incident or appertaining thereto;

TO HAVE AND TO HOLD all and singular said property unto Grantee, their heirs and assigns forever.

GRANTOR binds himself and his heirs to warrant and forever defend all and singular said property unto Grantee, their heirs and assigns, from and against Grantor and his heirs and all persons whomsoever lawfully claiming the same or any part thereof.

IN WITNESS WHEREOF, Grantor has caused this Deed to be executed the day and year first above written.

Signed, sealed and delivered
in the presence of:

Kicki R. Duncan

Rocco D. Cassone (SEAL)
Rocco D. Cassone

Kelly R. Hartman

STATE OF SOUTH CAROLINA)
COUNTY OF Calhoun }

PROBATE

Before me, the undersigned notary public, personally appeared the undersigned, who, being sworn, depose and said that (s)he saw Rocco D. Cassone sign, seal and deliver the foregoing Deed and that (s)he, together with the other witness subscribing above, witnessed the execution thereof.

SWORN TO and subscribed
before me this 12th day
of April, 2000.

Kelly R. Hartman

Kicki R. Duncan (SEAL)
Notary Public for South Carolina
My commission expires 3-31-2002

This within instrument has been received
this 12th day of April, 2000 at
9:30 O'clock A.M.
in the Assessor's office, Tax map
No. 125-00-00-000
Assessor's Office-Calhoun County, S.C.
Edna R. Mauls

I HEREBY CERTIFY THAT THE WITHIN
INSTRUMENT HAS BEEN THIS 12th DAY
OF April, 2000 A.D.
RECORDED IN BOOK 4 OF DEEDS,
PAGE 109
Donela R. Taha-Cis
A NOTARY FOR CALHOUN COUNTY

2 BOOK -140- 276

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

FILED
JUL 11 11 59 AM '00
DEED 5-22-00

DEED OF REAL PROPERTY

THIS DEED, executed the 19th day of May, 2000, by William C. Jackson (hereinafter referred to as "Grantor") to Lorraine Ruple Conrad, Trustee for the Lorraine Ruple Conrad Revocable Trust Under Agreement dated March 30, 2000 (hereinafter referred to as "Grantee").

WITNESSETH:

WHEREAS, Grantor and Grantee purchased as tenants in common approximately 203 acres of land located in Calhoun County, South Carolina from Rocco D. Ciscone by deed dated April 7, 2000, and recorded in the Office of the Register of Deeds for Calhoun County in Deed Book 140 at Page 275; and

WHEREAS, Grantor and Grantee desire to divide the property, with Grantor receiving approximately 108.653 acres of land and Grantee receiving approximately 94.347 acres of land (203 acres less 108.653 acres), and in connection with such property division, Grantor and Grantee will each grant to the other an easement for ingress and egress over the 20-foot-wide unpaved road located on the common boundary of the two tracts (the centerline of such 20-foot-wide road being the common boundary line between the property received by Grantor and the property received by Grantee);

NOW, THEREFORE, in connection with the partition of the above-referenced property and the payment by Grantee to Grantor of the sum of Twenty-Five Thousand Four Hundred Eighty-One and 70/100 Dollars (\$25,481.70), the receipt and sufficiency of which is acknowledged by Grantor, Grantor has granted, bargained, sold and released, and by this Deed grants, bargains, sells and releases to Grantee, her heirs, successors and assigns, all of Grantor's one-half (1/2) undivided interest in the following real property:

ALL that certain piece, parcel or tract of land, with improvements thereon, situate, lying and being in Amelia Township, School District No. 1, County of Calhoun, State of South Carolina, containing 203 acres, more or less, shown on a plat of H.R. Oliver, RLS, dated December 12, 1963, and recorded in the Office of the Clerk of Court for Calhoun County in Plat Book 8 at Page 259, and bounded as follows: on the Northwest by lands of Buyck; on the South and Southwest by lands of Hancock; on the Northeast by lands of A.P. Brimer; and on the Southeast by lands of Buyck.

LESS AND EXCEPTING THEREFROM THE FOLLOWING PROPERTY:

ALL that certain piece, parcel or tract of land, together with all improvements thereon, situate, lying and being approximately three miles west of the Town of Fort Motte, in County of Calhoun, State of South Carolina, containing 108.653 acres, more or less, and shown and delineated on a plat dated March 30, 2000, revised April 27, 2000, prepared for William C. Jackson by J.H. Walker &

BOOK -141- 319

Associates and recorded in the Office of the Register of Deeds for Calhoun County, South Carolina, in Plat Book 4122 at Page , such plat being incorporated herein by reference as if fully set forth herein. Said 108.653 acres is bounded on the southwest by property now or formerly of Rocco D. Cassone, the center line of the private unpaved road, being the line; on the northwest by property now or formerly of W.P. Buyck, Jr.; on the northeast by property now or formerly of Allan P. Bruner, et al; and on the southeast by property now or formerly of W.P. Buyck, Jr.

AND GRANTOR FURTHER grants and conveys to Grantee and Grantee's heirs, successors and assigns, and hereby reserves unto Grantor and Grantor's heirs, successors and assigns, a twenty-foot (20') wide non-exclusive perpetual easement for pedestrian and vehicular ingress and egress, such easement running over and along the twenty-foot (20') wide private unpaved road as shown on the plat prepared for William C. Jackson as described above, the center line of such road being the common boundary of the parcel containing 108.653 acres, more or less, retained by Grantor and the parcel containing 94.347 acres, more or less, hereby conveyed to Grantee. The center of said road has such bearings and lengths (L1 - L29) as shown on such plat. The easement over such 20-foot-wide private unpaved road shall run with the land for the benefit of Grantor and Grantor's heirs, successors and assigns, as owner of the parcel containing 108.653 acres, more or less, and for the benefit of Grantee and Grantee's heirs, successors and assigns, as owner of the parcel containing 94.347 acres, more or less. Grantee is simultaneously granting and conveying to Grantor in the deed from Grantee to Grantor a reciprocal easement over the 20-foot-wide road, such that each of Grantor's property and Grantee's property shall be subject to an easement being ten feet (10') in width for a total width of twenty feet (20').

TOGETHER with an easement twenty (20) feet in width for ingress and egress granted by W.P. Buyck, Jr. by instrument dated June 1, 1984, and recorded in Miscellaneous Book 6-2614; an easement ten (10) feet in width for ingress and egress granted by Patsy S. Pedings by instrument dated May 15, 1984, recorded in Miscellaneous Book 6-2613; and an easement ten (10) feet in width for ingress and egress granted by Charles B. Stuck by instrument dated May 17, 1984, and recorded in Miscellaneous Book 6-2612.

Tax Map No. 135-00-00-002 (a portion thereof)

Derivation: This being a portion of the same property conveyed to William C. Jackson, individually, and Lorraine Ruple Conrad, Trustee for the Lorraine Ruple Conrad Revocable Trust dated March 30, 2000, by deed of Rocco D. Cassone dated April 7, 2000, and recorded in Deed Book 140, page 179.

I HEREBY CERTIFY THAT THE WITHIN
INSTRUMENT HAS BEEN THIS 25th DAY
OF May, 20 00 A.D.
RECORDED IN BOOK 4 OF DEEDS,
PAGE 112
Annella A. Jeter
AUDITOR FOR CALHOUN COUNTY

2

BOOK -141 PAGE 320

Grantee's Mailing Addresses for Tax Notices:

Lorraine Ruple Conrad
201 Old Woodland Road
Columbia, South Carolina 29209

TOGETHER with all and singular rights, members, hereditaments and appurtenances
belonging or in any way incident or appertaining thereto;

TO HAVE AND TO HOLD all and singular said property unto Grantee, her heirs,
successors and assigns forever.

GRANTOR binds himself and his heirs to warrant and forever defend all and singular said
property unto Grantee, her heirs, successors and assigns, from and against Grantor and his heirs and
all persons whomsoever lawfully claiming by, through or under Grantor, but no further.

IN WITNESS WHEREOF, Grantor has caused this Deed to be executed the day and year
first above written.

Signed, sealed and delivered
In the presence of:

Quinn O'Chuck

Henrietta R. Jackson

William C. Jackson (SEAL)
William C. Jackson

The within instrument has been received
this 25th day of May, 2000 at
10:40 O'Clock AM,
in the Assessor's office, Tax map
No. 125-00
Assessor's Office-Calhoun County, S.C.
Julian R. Manly

STATE OF SOUTH CAROLINA }
COUNTY OF RICHLAND }

PROBATE

Before me, the undersigned notary public, personally appeared the undersigned, who, being sworn, depose and said that (s)he saw William C. Jackson sign, seal and deliver the foregoing Deed and that (s)he, together with the other witness subscribing above, witnessed the execution thereof.

SWORN TO and subscribed
before me this 17th day
of MAY, 2000.

Veronica D. Stedman (SEAL)
Notary Public for South Carolina
My commission expires 6/14/06

Shirley D. Cheek

I hereby certify that the within Deed
was filed for record in my office at
11:26 A.M. o'clock on the 21st day
of May, 2000, and was
immediately entered upon the proper
indexing duty recorded as

Book 141 Page 319
J. Keith Chestnut
CLERK OF COURT OF CL. & PROB. SA.
FOR RICHLAND COUNTY, S. C.

STATE OF SOUTH CAROLINA)

COUNTY OF CALHOUN)

DEED OF REAL PROPERTY

FILED

MAY 22 12 00 PM '00

THIS DEED, executed the 19th day of May, 2000, by Lorraine Ruple Conrad, Trustee for the Lorraine Ruple Conrad Revocable Trust Under Agreement dated March 2000 (hereinafter referred to as "Grantor") to William C. Jackson (hereinafter referred to as "Grantee").

WITNESSETH:

WHEREAS, Grantor and Grantee purchased as tenants in common approximately 203 acres of land located in Calhoun County, South Carolina from Rocco D. Cassone by deed dated April 7, 2000, and recorded in the Office of the Register of Deeds for Calhoun County in Deed Book 140 at Page 275; and

WHEREAS, Grantor and Grantee desire to divide the property, with Grantee receiving approximately 108.653 acres of land and Grantor receiving approximately 94.347 acres of land (203 acres less 108.653 acres), and in connection with such property division, Grantor and Grantee will each grant to the other an easement for ingress and egress over the 20-foot-wide unpaved road located on the common boundary of the two tracts (the centerline of such 20-foot-wide road being the common boundary line between the property received by Grantor and the property received by Grantee);

NOW, THEREFORE, the receipt and sufficiency of which is acknowledged by Grantor, Grantor has granted, bargained, sold and released, and by this Deed grants, bargains, sells and releases to Grantee, his heirs and assigns, all of Grantor's one-half (1/2) undivided interest in the following real property:

ALL that certain piece, parcel or tract of land, together with all improvements thereon, situate, lying and being approximately three miles west of the Town of Fort Mite, in County of Calhoun, State of South Carolina, containing 108.653 acres, more or less, and shown and delineated on a plat dated March 30, 2000, revised April 27, 2000, prepared for William C. Jackson by J.H. Walker & Associates and recorded in the Office of the Register of Deeds for Calhoun County, South Carolina, in Plat Book 4122 at Page , such plat being incorporated herein by reference as if fully set forth herein. Said 108.653 acres is bounded on the southwest by property now or formerly of Rocco D. Cassone, the center line of the private unpaved road being the line; on the northwest by property now or formerly of W.P. Buyck, Jr.; on the northeast by property now or formerly of Allan P. Bruner, et al; and on the southeast by property now or formerly of W.P. Buyck, Jr.

AND GRANTOR FURTHER grants and conveys to Grantee and Grantee's heirs, successors and assigns, and hereby reserves unto Grantor and Grantor's heirs, successors and assigns, a twenty-foot (20') wide non-exclusive perpetual easement

BOOK -141 PAGE 324

613

DEF. EXH.

14

Buyck 009

for pedestrian and vehicular ingress and egress, such easement running over and along the twenty-foot (20') wide private unpaved road as shown on the plat prepared for William C. Jackson as described above, the center line of such road being the common boundary of the parcel containing 94.347 acres, more or less, retained by Grantor and the parcel containing 108.653 acres, more or less, hereby conveyed to Grantee. The center of said road has such bearings and lengths (L1 - L29) as shown on such plat. The easement over such 20-foot-wide private unpaved road shall run with the land for the benefit of Grantor and Grantor's heirs, successors and assigns, as owner of the parcel containing 94.347 acres, more or less, and for the benefit of Grantee and Grantee's heirs, successors and assigns, as owner of the parcel containing 108.653 acres, more or less. Grantee is simultaneously granting and conveying to Grantor in the deed from Grantee to Grantor a reciprocal easement over the 20-foot-wide road, such that each of Grantor's property and Grantee's property shall be subject to an easement being ten feet (10') in width for a total width of twenty feet (20').

TOGETHER with an easement twenty (20) feet in width for ingress and egress granted by W.P. Buyck, Jr. by instrument dated June 1, 1984, and recorded in Miscellaneous Book 6-2614; an easement ten (10) feet in width for ingress and egress granted by Patsy S. Pedings by instrument dated May 15, 1984, recorded in Miscellaneous Book 6-2613; and an easement ten (10) feet in width for ingress and egress granted by Charles B. Stuck by instrument dated May 17, 1984, and recorded in Miscellaneous Book 6-2612.

Tax Map No. 135-00-00-002 (a portion thereof)

Derivation: This being a portion of the same property conveyed to William C. Jackson, individually, and Lorraine Ruple Conrad, Trustee for the Lorraine Ruple Conrad Revocable Trust dated March 30, 2000, by deed of Rocco D. Cassone dated April 7, 2000, and recorded in Deed Book 140, page 179.

Grantee's Mailing Addresses for Tax Notices:

William C. Jackson
2803 Canterbury Road
Columbia, South Carolina 29204

I HEREBY CERTIFY THAT THE WITHIN
INSTRUMENT HAS BEEN THIS 25TH DAY
OF May, 20 00 A.D.
RECORDED IN BOOK 4 OF DEEDS,
PAGE 112
Donna A. Jabe
AUDITOR FOR CALHOUN COUNTY

TOGETHER with all and singular rights, members, hereditaments and appurtenances belonging or in any way incident or appertaining thereto;

TO HAVE AND TO HOLD all and singular said property unto Grantee, his heirs and assigns forever.

GRANTOR binds herself and her successors to warrant and forever defend all and singular said property unto Grantee, his heirs and assigns, from and against Grantor and Grantor's successors and all persons whomsoever lawfully claiming by, through or under Grantor, but no further.

IN WITNESS WHEREOF, Grantor has caused this Deed to be executed the day and year first above written.

Signed, sealed and delivered
in the presence of:

John N. D. McLeod
Shirley D. Hunsley

Lorraine Ruple Conrad, Trustee
Lorraine Ruple Conrad, Trustee for the
Lorraine Ruple Conrad Revocable Trust
Under Agreement dated March 30, 2000

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

PROBATE

Before me, the undersigned notary public, personally appeared the undersigned, who, being sworn, deposed and said that (s)he saw Lorraine Ruple Conrad, Trustee for the Lorraine Ruple Conrad Revocable Trust Under Agreement dated March 30, 2000 sign, seal and deliver the foregoing Deed and that (s)he, together with the other witness subscribing above, witnessed the execution thereof.

SWORN TO and subscribed
before me this 19th day
of May, 2000.

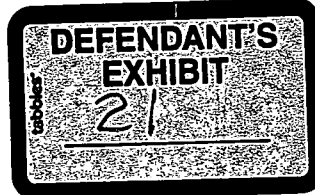
John N. D. McLeod

Shirley D. Hunsley (SEAL)
Notary Public for South Carolina
My commission expires 2-7-2007

I hereby certify that the within Deed
was filed for record in my office at
12:00 M. O'clock on the 23rd day
of May, 2000, and was
immediately entered upon the proper
indexes duly recorded as

Deed Book 141 Page 314
A. Keith Hunsley
CLERK OF COURT OF CL. & S. C.
FOR CALHOUN COUNTY, S. C.

The within instrument has been received
this 25th day of May, 2000 at
10:30 O'clock A.M.
In the Assessor's office, Tax map
No. 135-00
Assessor's Office, Calhoun County, S. C.
Lee R. Mandy



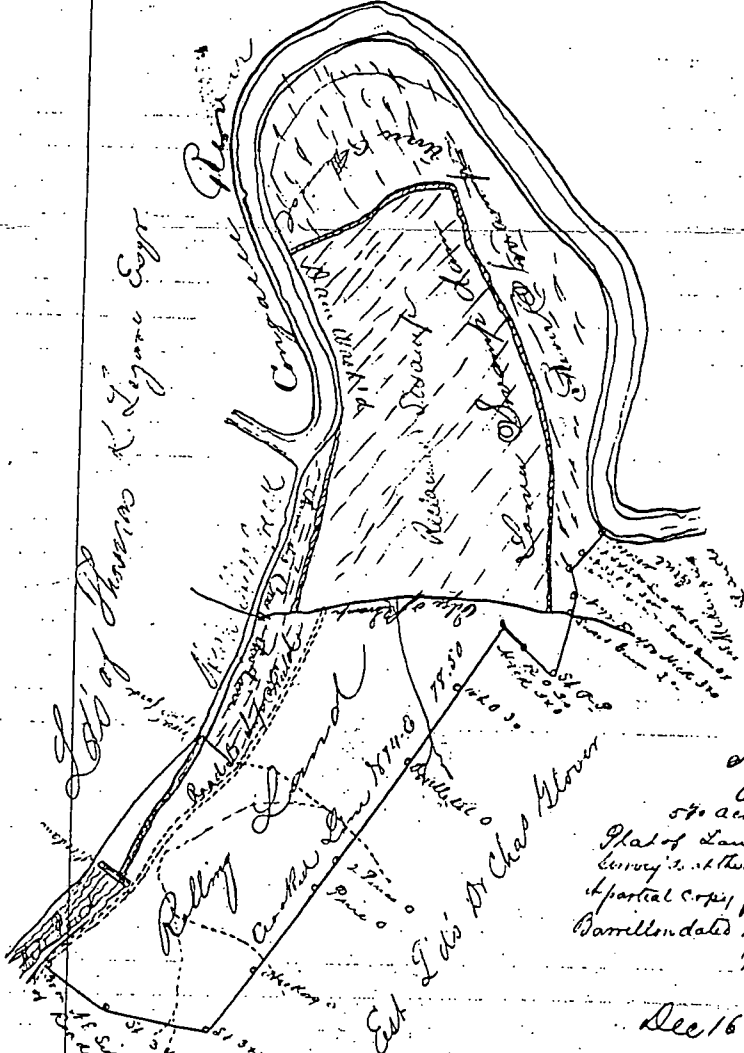
Notary this day appears before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily and without any compulsion, dread or fear of any person, from whomsoever, recourse, release and former relinquish into the within named George Fry and Apprais. all her interest and estate, and also all her right and claims of dower, of, in or to all and singular the premises within mentioned and released.

Given under my Hand and Seal, this 2nd day of March Anno Domini eighteen hundred and seventy five.

Seal
George Fry
Notary Public

C. H. Rogers
Office of County Auditor
Orangeburg County
28 March 1875

Verify the return of the within return as is on file in this office
Jos Van Tassel,
Co-Auditor for S.W. Deputy



South Carolina
Orangeburg Co
5th Ave - 1st Ave
Plat of Land belonging to George Fry
Surveyed at the request of Dr. J. M. Mammeter
a partial copy from Survey of J. M.
Barnell dated Mar 21 1859.
M. L. Baldwin
Dec 16 1874

Belonging to Laura
Recorded March 22nd 1875 Exam'd for record to George Fry
Geo. B. Bower
Per T. R. M.

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

W. Peter Buyck, Jr.,)
Plaintiff,)
-vs-)
William Jackson,)
Defendant.)

Case No. 2008-CP-9-135

DEFENDANT'S PROPOSED ORDER
FINDING NO PRESCRIPTIVE EASEMENT

The plaintiff claims a prescriptive right-of-way across a portion of the defendant's property.

The case was tried at the October 5, 2010 term of Court of Common Pleas for Calhoun County. The parties requested and were granted leave to await transcription of the trial record before making their final submissions to the Court. Having had the benefit of those submissions and having carefully considered the evidence, the Court enters this Final Order.

Background

Peter Buyck, Jr., the plaintiff herein, and William Jackson, the defendant herein, are adjoining landowners on the Congaree River in rural Calhoun County, several miles from Fort Motte. Jackson's 108-acre tract is roughly the northern half of a larger 203-acre tract referred to at trial as the McAlister tract, named for earlier owners. The McAlister tract is bounded on two sides by two tracts owned by the plaintiff, Peter Buyck, Jr. On the southeast is Mr. Buyck's 200-acre tract and on the northwest is his 700-acre tract.

Mr. Buyck reaches his 700-acre tract by way of a dirt road which begins at Fort Motte Road and which traverses four woodlands tracts before reaching his 700-acre

tract. First, the road passes over and separates the Pedings tract and the Stuck tract.¹ Next, the road crosses Mr. Buyck's 200-acre tract. It then crosses the McAlister tract to a point roughly in the middle of the McAlister tract, where the road forks left and right. Both forks continue through the remainder of the McAlister tract to the 700-acre Buyck tract.

Mr. Buyck holds an express easement for the use of the road from its beginning at Fort Motte Road, thence across the Pedings and Stuck tracts to his own 200-acre tract. (Mr. Buyck owns the road where it crosses his own 200-acre tract.) His easement resumes at the point where the road reaches the McAlister tract, continuing to the middle of the McAlister tract, where the road forks. From the fork, Mr. Buyck's express easement continues along the left fork of the road to the boundary of his 700-acre tract.²

Various names, numbers, and colors were used at trial to identify the road segments involved in the case. For the purpose of this Final Order, a new labeling method has been devised and is used to identify the five segments pertinent to the case, as follows: (1) The portion of the road which begins at Fort Motte Road (S-9-25) and crosses the Pedings and Stuck tracts, the 200-acre Buyck tract, and the McAlister

¹ The centerline of the road is the boundary between these two tracts.

² In 1984, Mr. Buyck agreed with the owners of the McAlister tract, the Pedings tract, and the Stuck tract to exchange mutual easements for the use of this dirt road from where it begins at Fort Motte Road to the point where it forks on the McAlister tract. From that point the express easement granted to Mr. Buyck continues along the left fork of the road to the border of the 700-acre Buyck tract. The plaintiff alleged in his complaint that the 1984 easement included not the left fork — what the parties call "the hayfield road" — but rather the right fork. This claim was withdrawn in plaintiff's pretrial brief, in which the plaintiff limited his claim to a prescriptive easement over the right fork road. See plaintiff's pretrial brief and his opening statement, Tr. 11. A claim that the express easement granted by McAlister included the right fork road, which left McAlister's tract and passed over the Bruner tract, would require "the court to conclude that [McAlister] gave an easement over property she did not own." *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985). Although the claim was withdrawn pretrial, the only expert testimony was to the effect that the hayfield road, not the right fork road, is the western-most segment of the express easement granted by McAlister to Buyck. [Tr. 381-82.]

tract as far as the fork in roughly the center of the tract, will be called "the Red Road," since that is the color uniformly used at trial to depict this segment. (2) Beginning at the fork in the road on the McAlister tract, the road which forks to the **right**, continuing through the McAlister tract, then across the Bruner tract, then again through the McAlister tract to the boundary of the 700-acre Buyck tract will be called "the Right Fork Road". (A claimed prescriptive easement over the portion of this road on the McAlister tract is the subject of this action.) (3) Beginning at the fork referred to above, the road which forks to the **left**, running through the McAlister tract to the boundary of the 700-acre Buyck tract will be called "the Hayfield Road," since that is what the witnesses most commonly called it. (This road leads to a hayfield on the 700-acre tract.) (4) The road segment which begins where the Right Fork Road reaches the 700-acre Buyck tract and runs from there to the duck pond on the 700-acre tract will be called "the Duck Pond Road". (5) The road which begins where the Hayfield Road reaches the 700-acre Buyck tract and runs from there to the duck pond, where it ties in with the Duck Pond Road, will be called "Road Three," since that was the only name for it used at trial. The Red Road and the two forks on the McAlister tract are seen in aerial photographs from the 1930s [Tr. 409/18 – 410/1] and may well be much older, but there is no evidence of their origin.

The controversy concerns whether Mr. Buyck enjoys a prescriptive easement for the use of the Right Fork Road.

The plaintiff, Peter Buyck, Jr., received title to the 700-acre tract at issue in 1976 by deed from his father, who had owned a half-interest in it since 1942 and sole title since 1960. The plaintiff used the year 1942 as the starting point for his claim to a 20-year period of prescriptive use of the Red Road.³

³ The 700-acre Buyck tract "goes back in the [Buyck] family to at least 1942 of continuous ownership." (Plaintiff's attorney, Mr. English, Tr. page 9, lines 15–17 ("Tr. 9/15–17"). See Plntf. Ex. 3.) "Tacking" is permitted when the plaintiff claims an easement appurtenant to his dominant estate, which is the claim here. Tacking is (continued...)

Historically, the McAlister tract is unenclosed woodland. On its northeast and southwest sides are the two Buyck tracts. Other woodland tracts border the McAlister tract on the northwest and southeast. The McAlister tract is unfenced. In recent years, a house has been built by the defendant Jackson near the river bluff on his 108-acre northern portion of the McAlister tract. William Conrad, the owner of the southern portion of the tract, uses a cottage built in the 1990s on his southern portion of the tract. No other improvements are found on the 203-acre McAlister tract, which was exclusively unenclosed woodland during the prescriptive period claimed by the plaintiff and until relatively recently. It remains in that condition today except for the home and cottage built in the past twenty years. There is no evidence that the McAlister tract has ever been used for anything but timber production and recreation.

Thus, the McAlister tract — the tract over which Mr. Buyck claims a prescriptive easement — is a kind of property which once predominated in South Carolina. It is what the cases have long described as unenclosed woodlands.⁴

A claim to a prescriptive easement calls for what has been called a “fact-intensive review of past use”.⁵ This Court has therefore summarized the material testimony of the witnesses. Immaterial portions of the testimony have been omitted.

³(...continued)

unnecessary here, however, since Peter Buyck, Sr., owned at least a half-interest in the 700-acre tract during the entire prescriptive period of 1942 through 1962. The plaintiff, Mr. Buyck, Jr., testified that he has made the same use of the 700-acre tract as did his father before him. [Tr. 41/16–17.]

⁴ See, e.g., *M’Kee v. Garrett*, 1 Bailey (17 S.C.L.) 341 (1830); *Hogg v. Gill*, 1 McMull. (26 S.C.L.) 329 (1841); *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848); *Hutto v. Tindall*, 6 Rich. (40 S.C.L.) 396 (1853); *Sims v. Davis*, Cheves (25 S.C.L.) 1; *State v. Floyd*, 39 S.C. 23, 17 S.E. 505; *State v. Rodman*, 86 S.C. 154, 68 S.E. 343 (1910); *Slater v. Price*, 96 S.C. 245, 80 S.E.372 (1913); *State v. Miller*, 130 S.C. 152, 125 S.E. 298 (1923); *Savannah River Lumber Corp. v. Bray*, 189 S.C. 237, 200 S.E. 760 (1939); *Tyler v. Guerry*, 251 S.C. 120, 126, 160 S.E.2d 889, 891 (1968); *Cleland v. Westvaco*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993).

⁵ *Rokesh v. Running*, 2002 S.D. 126, 652 N.W.2d 790, 793 (2002). See JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 5:3 (2011) (“Establishing a servitude by prescription is primarily a question of fact.” [Citing *Nelums v. Cousins*, 304 S.C. 306, 308, 403 S.E.2d 681, 682 (Ct. App. 1991)]).

The summary of testimony is appended to this Order as a part hereof.

LAW/ANALYSIS

South Carolina has a rich history of jurisprudence on the subject of prescriptive easements. The seminal case is *Lawton v. Rivers*, 2 McCord (13 S.C.L.) 445 (1823). As recently as 1944, our Court noted that the holding in *Lawton* had been “consistently followed in a long line of decisions.” *Sanitary & Aseptic Package Co. v. Shealy*, 205 S.C. 198, 31 S.E.2d 253, 255 (1944), citing *Craven v. Rose*, 3 S.C. 72 (1871); *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15 (1917); *Poole v. Edwards*, 197 S.C. 280, 15 S.E.2d 349 (1941); and *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944). The *Lawton* decision retains vitality today, nearly two centuries later. See, e.g., *Boyd v. BellSouth Tel. & Tel. Co.*, 369 S.C. 410, 633 S.E.2d 136, 141 (2006), and *Hartley v. John Wesley United Methodist Church*, 355 S.C. 145, 584 S.E.2d 386, 388 (Ct. App. 2003).

Our caselaw prescribes the approach which the court must take in evaluating a claim to a prescriptive easement. Of course the burden rests upon the plaintiff to establish such a claim.⁶ That burden must be carried by clear and unequivocal evidence. *State v. Sartor*, 2 Strob. (33 S.C.L.) 60, 66 (1848); *Gibson v. Durham*, 3 Rich. (37 S.C.L.) 85, 87 (1846) (“[H]e who claims an easement on another’s land, must establish it clearly”); *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985) (“[T]he law is jealous of a claim to an easement, and the party asserting such a claim must prove his right to it clearly, *Polson v. Ingram*, 22 S.C. 541 (1885)”). Accord: JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 5:3 (2011) (“Courts often stress the need for clear and convincing

⁶ *Babb v. Harrison*, 220 S.C. 20, 66 S.E.2d 457 (1951) (The claimant “carries with her the burden of proving that the use of such disputed area was adverse for the full period of twenty years in order to establish an easement by prescription.”), *quoted in Morrow v. Dyckes*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997).

evidence.” [citing cases from 23 jurisdictions]].⁷ A good analogy is to the quality of the evidence needed to prove adverse possession — clear and convincing evidence. *Miller v. Leaird*, 307 S.C. 56, 62, 413 S.E.2d 841, 844 (1992); *Jones v. Leagan*, 384 S.C. 1, 10, 681 S.E.2d 6, 10–11 (Ct. App. 2009); *McDaniel v. Kendrick*, 386 S.C. 437, 688 S.E.2d 852, 855 (Ct. App. 2009). *Cf. Lawton v. Rivers*, *supra*, South Carolina’s first reported prescriptive easement case: “The testimony on all these points was too weak to take the land of one man and appropriate it to another.” 2 McCord (13 S.C.L.) at 450.

The courts and law writers have agreed that prescriptive easement claims are disfavored. *Taylor v. Hampton*, 4 McCord (15 S.C.L.) 96, 100 (1827) (“[An easement] which one man claims in derogation of the rights of another is viewed with jealousy by the law, and is an object not highly entitled to its favor.”); *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 361, 639 N.W.2d 905, 911 (2002) (prescriptive easement claims are “treat[ed] . . . with disfavor”); *Powder River Ranch, Inc. v. Michelena*, 2005 Wyo. 1, 103 P.3d 876, 879 (2005). *See: Caribou Four Corners, Inc. v. Chapple-Hawkes, Inc.*, 643 P.2d 468, 471 (Wyo. 1982) (characterizing claim of prescriptive easement as “a judicially unpopular cause to take another’s land”); 1 THOMPSON ON REAL PROPERTY § 408, p. 523 (1st ed. 1924) (“It is for the claimant of the prescriptive right to establish the extent thereof. Nothing is presumed in his favor and he can claim nothing beyond what the user proves.”).

In the same way that adverse *possession* is the foundation of a claim of title by adverse possession, adverse *use* is the foundation of a claim of prescriptive easement.⁸

⁷ Our Court of Appeals cited and relied upon this leading treatise in *Matthews v. Dennis*, 365 S.C. 245, 616 S.E.2d 437, 440 n.9 (Ct. App. 2005).

⁸ These two bodies of law — adverse possession and prescriptive easement — have been likened to twins, but not *identical* twins. *Felgenhauer v. Soni*, 121 Cal.App.4th 445, 449, 17 Cal.Rptr.3d 135, 138 (2004) (“[T]he courts have adopted language from adverse possession in stating the elements of a prescriptive easement. The two are like twins, but not identical.”); *Heuer v. County of Aitkin*, 645 N.W.2d 753, (continued...)

This is true in South Carolina as everywhere else. See, e.g., *Lawton v. Rivers*, 2 McCord (13 S.C.L.) 445, 449, 452 (1823);⁹ *Rowland v. Wolfe*, 1 Bailey (17 S.C.L.) 56 58–59 (1828);¹⁰ *Nash v. Peden*, 1 Speers (28 S.C.L.) 17, 22 (1842);¹¹ *Hutto v. Tindall*, Rich. (40 S.C.L.) 396, 401 (1853);¹² *Bailey v. Gray*, 53 S.C. 503, 31 S.E. 354, 358 (1898);¹³ *Crosland v. Rogers*, 32 S.C. 130, 10 S.E. 874 (1890);¹⁴ *Williams v. Haile Gold Mining Co.*, 85 S.C. 1, 66 S.E. 117, 118 (1909);¹⁵ *Slater v. Price*, 96 S.C. 245, 80

⁸(...continued)

757 (Minn. App. 2002) (“Rules pertaining to adverse possession are analogous to those governing easements by prescription.”); *Homan v. Hutchinson*, 817 S.W.2d 944, 948 (Mo. App. 1991) (“The method by which prescriptive rights are acquired is akin to the acquisition of title to real estate by adverse possession.”); *Scott v. Cannon*, 959 S.W.2d 712, 721 (Tex. Civ. App. 1998) (“The hostile and adverse character of the use necessary to establish an easement by prescription is the same as that which is necessary to establish title by adverse possession.”). See also: *Interior Trails Preservation Coalition v. Swope*, 115 P.3d 527, 529 (Alaska 2005) (pointing out that prescriptive easement claims focus on use rather than possession).

⁹ “Three things appear to be necessary to establish a right by prescription: 1st. Use and occupation or enjoyment. 2nd. The identity of the thing enjoyed; and 3rd. That it should be adverse to the right of some other person. . . . The third requisite, to a right by prescription is, that the use should be adverse to the owner of the soil;”

¹⁰ “A right by prescription, is founded on a presumption, that a grant once existed, which has been lost by lapse of time. But lapse of time is not alone sufficient to afford such a presumption. The use must be adverse to the claim of the owner of the land.”

¹¹ “[N]o prescriptive way can be established otherwise than by an adverse use of it for twenty years;”

¹² “The use must be adverse to the owner of the land.”

¹³ “[A]s to prescription: As is said in the case [of *Lawton v. Rivers*, 2 McCord 445, 448 (1823)], ‘three things appear to be necessary to establish a right by prescription: (1) Use and occupation or enjoyment; (2) the identity of the thing enjoyed; and (3) that it should be adverse to the right of some other person.’”

¹⁴ “[A]n easement may come into existence . . . by adverse use for twenty years, which is prescription and presumes a grant”

¹⁵ “To acquire an easement by prescription, it must have been used in substantially the same way for the full period of 20 years, and adversely to the rights of the owner.”

S.E.372, 375 (1913);¹⁶ *Babb v. Harrison*, 220 S.C. 20, 23 66 S.E.2d 457, 458 (1951);¹⁷ *Clemson Univ. v. First Provident Corp.*, 240 S.C. 640, 652, 197 S.E.2d 914, 919 (1973);¹⁸ *Horry County v. Laychur*, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993).¹⁹ This is the law of every state. See, e.g., 4 POWELL ON REAL PROPERTY § 34.13 (2d ed.2008);²⁰ 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 796 p. 299 (3d Jones ed. 1939);²¹ 7 THOMPSON ON REAL PROPERTY § 60.03(b)(6)(vi) p.513 (2d Thomas ed. 2006);²² 1 THOMPSON ON REAL PROPERTY § 390 p. 504 (1st ed. 1924);²³ W. STOEUCK &

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This [jury] instruction authorized the finding that the easement was established by proof of 20 years' permissive use. This court has never held that use alone, however long continued, will establish a private easement. On the contrary, it has always held that, to have that effect, the use must be adverse. *Lawton v. Rivers*, 2 *McCord*, 445, 13 Am. Dec. 741; *Bailey v. Gray*, 53 S.C. 514, 31 S.E. 354. . . . [It is a] universal rule that, to acquire a way by prescription, the use must be adverse. . . . [N]one of our cases hold that a private easement, such as that here claimed, can be established by use, unless it is adverse.

(Hydrick and Fraser, JJ., dissenting.)

¹⁷ The claimant "carries with her the burden of proving that the use of such disputed area was adverse for the full period of twenty years in order to establish an easement by prescription."

¹⁸ "An easement by prescription is predicated upon adverse use for the prescriptive period."

¹⁹ "This evidence was offered to refute the claim that use by the public was adverse, an element essential to proving the existence of a prescriptive easement."

²⁰ "The theory of [a prescriptive easement] is that an adverse use made continuously and uninterruptedly for the prescriptive period ripens into the easement. Thus the scope of such easement is necessarily a primary function of the continued use or uses by which it was generated." Citing *Jackson v. City of Auburn*, 971 So.2d 696 (Ala. Civ. App. 1996), a case cited with approval in *Gressette v. South Carolina Electric & Gas Co.*, 370 S.C. 377, 635 S.E.2d 538 (2006).

²¹ § 796. Prescription.

An easement may be acquired by the adverse user of another's land for a certain period, usually the same as that required to give title to land itself by disseisin or adverse possession.

²² "To gain a prescriptive easement over someone else's land, one's use must be 'adverse, under claim of right" quoting *C & E Partnership v. Donnelly*, 235 Va. (continued...)

A. WHITMAN, THE LAW OF PROPERTY § 8.7 Prescription p. 452 (3rd ed. 2000).²⁴

The courts have often equated the necessity of adverse use to a “claim of right” by the prescriptive user. See: *Earle v. Poat*, 63 S.C. 439, 41 S.E. 525, 531 (1902) (“[S]uch use must be adverse, or, what is the same thing, under a claim of right”) (Jones, J., dissenting). The phrase itself — *claim of right* — connotes an intention to claim adversely to the rights of the landowner.²⁵ The authors of the leading treatise on the subject of easements have observed:

Adverse use is sometimes characterized as a use made under a claim of right, but such a description is imprecise because a claim need not be formally asserted, nor must the use be made with the belief that it is lawful.

Indeed, it has been suggested that the phrase “claim of right” is often employed only to explain the requirement of adversity. The Supreme Court of Washington has aptly described the requisite

²²(...continued)
301, 305, 367 S.E.2d 490, 492 (1988).

²³ “To effect this [*i.e.*, a prescriptive easement] there must be a distinct and positive assertion of a right hostile to the owner, and of which he has knowledge.” Citing *Williamson v. Abbott*, 107 S.C. 297, 93 S.E. 15 (1917).

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[T]he elements for adverse use are enough the same as for adverse possession that the section on that subject is generally applicable here. Some differences need to be pointed out, however. The most basic difference is between “use” and “possession,” for that determines whether activities that are adverse will gain an easement or estate for the claimant.

* * * * *

[A]dverse possession must be “hostile,” which means it must be without the record owner’s permission. This is true also of prescription

²⁵ See, *e.g.*, *Babb v. Harrison*, 220 S.C. 20, 23 66 S.E.2d 457, 458 (1951):

[The claimant to a prescriptive easement must prove] ‘that the use or enjoyment was adverse and under claim of right. . . . [Claimant’s] possession was not with intent to dispossess the [owner] for he thought it had all it was entitled to. Therefore, the possession . . . was not hostile, and nowhere in the case is there any evidence that [owner] had any notice of any claim.’

Quoting *Atlantic Coast R.R. v. Baker*, 143 S.C. 445, 141 S.E. 688, 701 (1927).

adverse use as:

such use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right. Hostile use of real property by an occupant or user does not import ill will, but imports that the claimant is in possession or using it as owner, in contradistinction to possession or using the real property in recognition of or subordinate to the title of the true owner.

JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 5:8 (2011). Most courts treat the two concepts — “adversity” and “claim of right” — as synonymous.²⁶ See 4 POWELL ON REAL PROPERTY § 34.10[2][c] (2d ed. 2008) (“adversity” means “that the use made has been made not in subordination to the rights of the claimed servient owner, but rather has been made under claim of right”).

“Claim of right” apparently first entered the South Carolina caselaw of

²⁶ *Matthews v. Dennis*, 365 S.C. 245, 616 S.E.2d 437 (Ct. App. 2005) (“defining ‘claim of right’ as ‘without recognition of the rights of the owner of the servient estate,’” quoting 25 Am.Jur.2d *Easements and Licenses*, § 57, at 552 (2004)); *Pickar v. Erickson*, 382 N.W.2d 536, 538 n.1 (Minn. App. 1986) (“A ‘claim of right’ is often used synonymously with a ‘hostile’ or ‘adverse’ use.”). See, e.g., *Vandervoort v. McKenzie*, 117 N.C. App. 152, 160, 450 S.E.2d 491, 496 (1994) (“The meaning of the terms ‘adverse,’ ‘hostile,’ and ‘under claim of right’ are intertwined.”); *Kunkel v. Fisher*, 106 Wash.App. 599, 603, 23 P.3d 1128, 1129 (2001) (“The requirements of hostility (i.e. adversity) and claim of right are one and the same.”); *Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997) (“Under claim of right means that the claimant has used the way without recognition of the rights of the owner of the servient tenement.”); *Pitcock v. Fox*, 119 N.C.App. 307, 310, 458 S.E.2d 264, 267 (1995) (“A ‘claim of right’ is an intention to claim and use land as one’s own.”); 2 AMERICAN LAW OF PROPERTY § 8.54 (Casner ed. 1952) (“The word ‘hostile’ is frequently used as a term of art meaning that the claim is ‘adverse’ or under ‘claim of right,’ and that it is not subordinate to the title of the true owner.” quoting *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1328 (Alaska 1975)); *Warnack v. Coneen Family Trust*, 266 Mont. 203, 216, 879 P.2d 715, 723 (1994) (“[A]dverse use or adversity simply refers to the requirement that the easement must be exercised under a claim of right and not as a mere privilege or license.”); 7 THOMPSON ON REAL PROPERTY § 60.03(b)(6)(viii) p.519 (2d Thomas ed. 2006) (“*Under a Claim of Right* One translation of “adversity” is that the prescriptive easement claimant acts as though the use being made were already owned, that, it is not with the permission or by the grant of the owner.”); M. Dwyer, *Real Property: Prescriptive easements of way: Presumption as to adverse character of user of way over unenclosed urban land*, 19 CORNELL L.Q. 337, 340 n.17 (1934) (“The requirement that to be adverse the user must be under a claim of right does not necessitate an express declaration. It means simply that the user must be ‘as of right,’ that is, without recognition of the right of the landowner to terminate it.” Citing *Phillips v. Bonadies*, 105 Conn. 122, 136 A. 644 (1927)).

prescriptive easements in 1839 in the case of *Sims v. Davis & Tygart*, Cheeves (13 S.C.L.) 1, 3 (1839), where the court observed:

[T]he use [of the way] must be adverse to him who was the owner. This term, *adverse*, as applied to ways, according to our decisions in analogous cases, means such use as men make of their own property; and must be accompanied by such facts and circumstances as shew that it is claimed as a right exercised without the consent, and in opposition to the rights, of the owner of the soil.

In 1917, in the case of *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15, 15–16 (1917), the Court formulated the three-point test of prescriptive easement which has been repeated in our caselaw in one form or another to the present day:

To establish a right by prescription, it is necessary to prove three things: (1) The continued and uninterrupted use or enjoyment of the right for the full period of 20 years; (2) the identity of the thing enjoyed; (3) that the use or enjoyment was adverse, or under claim of right.

The Court cited in support the cases of *Lawton v. Rivers*, 2 McCord (13 S.C.L.) 445 (1823), and *Bailey v. Gray*, 53 S.C. 503, 31 S.E. 354 (1898). The phrase “claim of right” does not appear in either of these opinions, but in the national caselaw the phrase had already come to signify an adverse use of the right-of-way. Later in the Court’s opinion in *Williamson v. Abbott*, the Court spoke of the necessity to prove adverse use, with no further reference to “claim of right”.

In subsequent South Carolina cases the conjunction “or” has sometimes been used to separate “adverse” from “claim of right” — “adverse **or** under claim of right”.²⁷ Sometimes the conjunction is changed from “or” to “and,” so that the phrase reads “adverse **and** under claim of right”.²⁸ And sometimes no conjunction is used at all, so

²⁷ *E.g.*, *Frazier v. Smallseed*, 384 S.C. 56, 65, 682 S.E.2d 8, 13 (Ct. App. 2009).

²⁸ *Atlantic Coast R.R. v. Baker*, 143 S.C. 445, 141 S.E. 688, 701 (1927). See *Savannah River Lumber Corp. v. Bray*, 189 S.C. 237, 200 S.E. 760, 761 (1939) (“[I]t must also be shown that the use was adverse and under a claim of right, and not by the owner’s permission.”), citing *State v. Miller*, 125 S.C. 289, 118 S.E. 624 (1923).

that it reads “adverse under claim of right”.²⁹ These various formats imply that adversity and claim of right are two sides of the same coin in South Carolina, as in all other jurisdictions.

In the case of *Morrow v. Dyckes*, 328 S.C. 522, 492 S.E.2d 420 (Ct. App. 1997), however, for the first time the Court characterized adverse use and claim of right not as synonymous but as alternatives. The Court stated:

To establish a prescriptive easement, one must show: (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is *either* adverse *or* under a claim of right.

Id. at 527, 492 S.E.2d at 423 (emphasis added).³⁰ The view that adverse use is one thing and claim of right another was fully articulated for the first time in *Jones v. Daley*, 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005).

In any event, the evidence of adverse use was ample in *Jones v. Daley* and the cases upon which it relied, so that it is unnecessary to decide whether the distinction made in *Jones v. Daley* between adverse use and claim of right actually marks a change in the law.³¹ In the case at bar, it would make no difference if the need for proof of adverse use were dispensed with, and proof of claim of right — viewed as something different — were deemed enough. For the reasons that follow, the Court finds that the plaintiff has failed to carry his heavy burden to prove either thing.

To acquire a prescriptive easement, the plaintiff must use the right-of-way for

²⁹ See, e.g., *County of Darlington v. Perkins*, 269 S.C. 572, 576, 239 S.E.2d 69, 71 (1977) (“It is well settled that the requirements necessary to establish a right by prescription are: . . . (3) the use must be adverse under claim of right.”); *Shia v. Pendergrass*, 222 S.C. 342, 351–52, 72 S.E.2d 699, 703 (1952) (“[I]n order to establish a private right of way by prescription over the lands of another, the use and enjoyment thereof by the claimant must be shown to be adverse, under a claim of right,” etc.).

³⁰ No prescriptive easement was found to exist in this case.

³¹ As recently as 1993, our Supreme Court identified adverse use as “an element essential to proving the existence of a prescriptive easement.” *Horry County v. Laychur*, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993). Accord: *Clemson Univ. v. First Provident Corp.*, 240 S.C. 640, 652, 197 S.E.2d 914, 919 (1973) (“An easement by prescription is predicated upon adverse use for the prescriptive period.”).

the prescriptive period (in South Carolina, 20 years) in disregard of the rights of the landowner, whether this usage is characterized as adverse or under a claim of right. See *Crigger v. Florida Power Corp.*, 436 So.2d 937, 944 n.16 (Fla. App. 1983) (“[A]dverse use must be made with an intentional disregard of the rights of the servient owner and under a claim of right.”); *Steifel v. Lindemann*, 33 Conn.App. 799, 810, 638 A.2d 642, 649 (1994) (“A claim of right exists only if the user does not recognize the right of the owner of the servient tenement to prevent the use.”); *Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997) (“Under claim of right means that the claimant has used the way without recognition of the rights of the owner of the servient tenement.”); *Pitcock v. Fox*, 119 N.C.App. 307, 310, 458 S.E.2d 264, 267 (1995) (“A ‘claim of right’ is an intention to claim and use land as one’s own.”).

It is critical to determine whether the plaintiff’s claim is supported by a **presumption** of adverse use under claim of right. For the reasons that follow, the Court finds that no such presumption applies here. On the contrary, the presumption is that the plaintiff’s use of the road in question began with the permission of the landowner, and so continued.

If the land over which the right-of-way runs is what the cases call **“improved,”** notice of a use of his property, presumed to be adverse, is imputed to the landowner. It is then incumbent upon the landowner to prove that the usage was permissive in its inception, or else to stop the adverse usage on pain of having the usage become prescriptive. However, our South Carolina cases, like those from most jurisdictions, have taught from the earliest time that where the land is **unimproved woodland**, such as the McAlister tract, it is presumed that the use of a road through the woods is by permission of the landowner. The claimant must then carry his heavy burden to overcome the presumption of permission by proving that the usage was adverse or under claim of right. Use of a right-of-way by permission, regardless of how long it lasts, can never ripen into a prescriptive easement. “[A] mere courtesy can never grow

into a right.” *Witter v. Harvey*, 1 McCord (12 S.C.L.) 72 (1821).

The *Lawton v. Rivers* case of 1823 taught that the use of roads and other rights-of-way across unimproved woodland is deemed to be permissive, not adverse, until the opposite is proved. This continues to be the rule in South Carolina, as in most jurisdictions. See, e.g., *Tyler v. Guerry*, 251 S.C. 120, 126, 160 S.E.2d 889, 891 (1968) (road in existence for more than 50 years; “The property . . . is shown to be unenclosed and unimproved woodland and the mere use of what is referred to as the old road does not give rise to a right-of-way by prescription.”); *Savannah River Lumber Corp. v. Bray*, 189 S.C. 237, 200 S.E. 760, 761 (1939) (“The rule in this state is that a prescriptive right arises in favor of the public after continuous use of a road for 20 years when it runs through cultivated land, but that, when it passes over unenclosed woodland, it must also be shown that the use was adverse and under a claim of right, and not by the owner’s permission.”), quoting *State v. Miller, et al.*, 125 S.C. 289, 118 S.E. 624 (1923).³² Accord: *State v. Rodman*, 86 S.C. 154, 68 S.E. 343 (1910); *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848); *Sims v. Davis & Taggart*, Cheves (25 S.C.L.) 1 (1839); *M’Kee v. Garrett*, 1 Bailey (17 S.C.L.) 341 (1830); *Hutto v. Tindall*, 6 Rich. (40 S.C.L.) 396, 401 (1853) (“The use must be adverse to the owner of the land. Merely passing over uncultivated and unenclosed forest . . . cannot, by any lapse of time, give a right to any individual.”); *Cleland v. Westvaco*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993).

This is the general rule throughout the country. Cases from most jurisdictions are cited in the major treatises on the subject of prescriptive easements for the rule that no presumption of adverse use applies where the land over which the easement is claimed is unenclosed and unimproved, such as woods. JAMES W. ELY, JR. & JON W.

³² *Savannah River Lumber* was a case involving a claim to a prescriptive easement in favor of the public and not a private individual. An even higher degree of proof is needed to prove a private easement than a public one. *Slater v. Price*, 96 S.C. 245, 80 S.E.372 (1913) (“[T]here is a difference between the quantum of proof necessary to establish a public and a private right of way; the former requiring less proof than the latter.” (Hydrick and Fraser, JJ., dissenting, citing *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848)).

BRUCE, THE LAW OF EASEMENTS AND LICENSES IN LAND § 5:3 n.10 (2005); 4 POWELL ON REAL PROPERTY § 34.10[2][c] n.23 (2d ed. 2008); 4 H. TIFFANY, LAW OF REAL PROPERTY § 1196.1 (3d Jones ed. 1939) (presumption of permissive use).

The reasons for the presumption of permissive use of rights-of-way over unenclosed woodland are clearly stated in the early cases. For example, in *Hutto v. Tindall*, 6 Rich. (40 S.C.L.) 396, 401–03 (1853), the Court stated:

To prohibit [those who travel a way over woodland] would be considered churlish; and would be ineffectual, unless a constant watch was kept to prevent them.

* * * * *

The use must be adverse to the owner of the land. Merely passing over uncultivated and unenclosed forest . . . cannot, by any lapse of time, give a right to any individual.

* * * * *

Too often a use commenced and continued in courtesy, after the expiration of the prescribed time is claimed adversely, and judicially established as a right.

The same idea was expressed in *State v. Miller*, 130 S.C. 152, 125 S.E. 298, 299 (1923):

The rule requiring that in addition to proof of the continuous use of a road for 20 years or more in order to establish a prescriptive right, 'when it passes over unenclosed woodland it must also be shown that the user was adverse,' proceeds upon the theory, soundly grounded in conditions which are a matter of common knowledge in this country, that the user of a road through unenclosed woodland is, in effect, a user by license or permission of the owner of the land.

The traditional openness of unenclosed woodlands was noted in our first prescriptive easement case, *Lawton v. Rivers*, 2 McCord (13 S.C.L.) 445, 452 (1823):

It has been decided in this state, that as long as lands remain open and unenclosed, every person may, of common right, pass over them, hunt upon them, etc. And it is within our daily observation, that as long as lands remain in that, they are considered as common for those purposes. Such a use cannot be considered adverse, whatever length of time it may continue, and therefore can furnish no evidence of right;

Soon after the *Lawton* case, the court made the same sort of observation in *Turnbull v. Rivers*, 3 McCord (14 S.C.L.) 131, 139 (1825):

The several occupants of the island were permitted to pass over the unenclosed lands of the defendant, in the same manner and to the same extent as all the rest of the neighbors; Allowing the use of the way appears to have been a mere act of courtesy;

The traditions of the countryside were again noted in *Rowland v. Wolfe*, 1 Bailey (17 S.C.L.) 56, 58–59 (1828):

The use must be adverse to the claim of the owner of the land. Merely passing over an uncultivated and unenclosed forest, which is common to every one, cannot, by any lapse of time, give a right to any individual. To determine a question of this sort, we must look to the situation of the country and the habit of the people. We know that it is an indulgence allowed to every body, by the universal consent of the country, to make roads through unenclosed lands in any direction, without any kind of restraint. But no one ever dreamed, that by this kind of courtesy, a neighbor might, by and by, claim a right to such a road, to the exclusion of the owner of the soil. Such a use is not adverse: It deprives the owner of no right, and subjects him to no inconvenience. A privilege thus enjoyed, can never be claimed as a right.

A few years later, in *Hogg v. Gill*, 1 McMull. (26 S.C.L.) 329, 331 (1841), the court said:

When lands are enclosed, or otherwise specifically appropriated, any encroachment on them will soon be known and promptly resisted. . . . On the contrary, where the way runs entirely through wild and unappropriated forest, no such presumption could naturally arise. . . . Persons travel and use such a way under an implied, but revocable, license, and regard it as a mere convenience to be enjoyed at sufferance, without ever thinking of a right in themselves.

The presumption that the use of a right-of-way over unenclosed woodlands is permissive unless proved otherwise is the majority rule.

There is . . . a widely recognized exception to this general rule [of a presumption of adverse use] where the land involved is considered to be wild, unenclosed, or unimproved. In this situation there is generally a presumption of permissiveness, or at least no

presumption of adverseness. . . . This rule is based upon the philosophy that "the law should and does encourage acts of neighborly courtesy." [*Citing Weaver v. Pitts*, 191 N.C. 747, 749, 133 S.E. 2, 3 (1926).] . . . This philosophy is not by any means unique to North Carolina as most courts will apply it where the facts warrant. . . .

* * * * *

[U]nder modern theories of neighborliness, prescriptive rights are not favored in the law as they necessarily result in the forfeiture of the rights of others.

J. Aldridge, *Real Property—Easements—Prescriptive Acquisition in North Carolina*, 45 N.C.L.REV. 284, 289–90, 294 (1966).

Another law writer has observed:

The prevailing rule regarding the establishment of easements by prescription seems to be that where the claimant has openly made continuous use of a way over lands, unmolested by the owner for a time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right; but where the way is across property that is unenclosed it will *prima facie* be deemed to be by permission of the owner and not to be adverse to his title.

* * * * *

It is a matter of common knowledge that the owner of unenclosed and unused land frequently has no objection to his adjoining neighbor's passing over his premises. The presumption in such cases is that the user is permissive; and it is a perfectly natural presumption since the use conflicts with no present interest of the owner of the land. Thus on a showing that the land is unenclosed the ordinary presumption of adverseness may be rebutted and replaced by a presumption that the user was permissive.

* * * * *

As soon as the user becomes of such nature that a distinct and positive assertion of a right may be implied it ceases to be an enjoyment of neighborly courtesy and the landowner is called upon to appeal to the protection of the law.

* * * * *

Even in the case of ways across unenclosed woodlands, concededly presumed to be permissive, the generally established rule is that where there is an act of a clearly hostile character a prescriptive right may be

acquired if such hostile conduct is pursued for the duration of the statutory period.

M. Dwyer, *Real Property: Prescriptive easements of way: Presumption as to adverse character of user of way over unenclosed urban land*, 19 CORNELL L.Q. 337, 338–40 (1934).

Where no presumption of adverse use under claim of right aids the plaintiff in his claim, the cases require proof of “some unequivocal act of adverse right” *State v. Sartor*, 2 Strob. (33 S.C.L.) 60, 66 (1848).

The reason of that is obvious — a private way is an easement in favor of another, in derogation of the rights of the owner; and hence is not to arise without clear, unequivocal proof of such facts as will give the right from the owner to the claimant.

Id. (per O’Neal, J.). There must be evidence of “‘a distinct and positive assertion of a right hostile to the owner, and brought home to him,’” *Williamson v. Abbott*, 107 S.C. 400, 401, 93 S.E. 15 (1917).

To give a right-of-way through woodland, there must be some notorious assertion of right, by an act done, which would be equal to a *pedis possessio* ³³

Watt v. Trapp, 2 Rich. (31 S.C.L.) 136, 139 (1845).

In *Nash v. Peden*, 1 Speers (28 S.C.L.) 17, 22–23 (1842), the court rejected a contention that clearing fallen trees and the like from the right-of-way was the kind of unequivocal proof of adverse use under claim of right which would rebut the presumption of permissive use:

[N]o prescriptive way can be established otherwise than by an adverse use of it for twenty years; and where the way passes through forest land, the mere use, unaccompanied by any acts indicating that the party claims the use as a right, cannot give a right of way.

* * * * *

Removing fallen trees or changing the route are not such

³³ “Lat. A foothold; an actual possession. . . .” BLACK’S LAW DICTIONARY 1289 (4th ed. 1951), citing *Bailey v. Irby*, 2 Nott & McCord (10 S.C.L.) 343 (1820).

[acts] as establish a use hostile to the right of the owner of the soil. They are perfectly consistent with the supposition that the use was permissive, as all these roads through wood land are presumed to be, until some evidence is offered to give them a different character

....

In accord is the case of *Gibson v. Durham*, 3 Rich. (37 S.C.L.) 85, 87 (1846), where the court held that the claimant's removal of saplings from the right-of-way was "wholly insufficient to establish adverse use. . . . [H]e who claims an easement on another's land, must establish it clearly"

Public maintenance of the right-of-way is a factor pointing to adverse use, either by the public or by the private user benefitted by the maintenance. *County of Darlington v. Perkins*, 269 S.C. 572, 239 S.E.2d 69 (1977); *Cleland v. Westvaco*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993). There is no evidence here of public maintenance.

Unaided by any presumption of adverse user under claim of right, it was incumbent upon the plaintiff to prove by clear and convincing evidence "some unequivocal act of adverse right . . . , " *State v. Sartor, supra*, or "some notorious assertion of right, by an act done," *Watt v. Trapp, supra*. It was the plaintiff's heavy burden to demonstrate that his and his father's use of this right-of-way over their neighbor's property was not a typical instance of neighborly courtesy in rural South Carolina but was intended to gain a property right in the land of their neighbor. The court finds no such evidence.

Mr. Buyck's testimony is summarized fully in the Addendum to this order. In pertinent part, Mr. Buyck testified as follows about his use of the Right Fork Road:

Mr. Buyck was born in 1946. [Tr. 27/5.] All his life he has used what he describes as the "red road" from Fort Motte Road (S-9-25) to reach the 700-acre Buyck tract.³⁴ The road crosses five tracts — the 21-acre Pedings tract, the 15-

³⁴ What Mr. Buyck referred to as "the red road" is what is described in this Order (continued...)

acre Stuck tract, the 200-acre Buyck tract, the McAlister tract, the Bruner tract, and the McAlister tract again — in order to reach the 700-acre Buyck tract. The road then continues across the 700-acre tract to the duck pond and finally the Congaree River.

From the age of 6 or 7 Mr. Buyck would accompany “some of the people who worked on our place” as they went fishing in the river. Mr. Buyck’s father, Peter Sr., used the 700-acre tract for “hunting, farming, logging, general recreation. Same things I would use it for, I guess.” To this list of uses Mr. Buyck added watching the wildlife.

Mr. Buyck and his father and uncle were not the only ones who used the road to reach the 700-acre tract. It was also used by the group which leased deer-hunting rights on the 700-acre tract and Mr. Buyck’s “friends that hunt with me.” Occasionally he would authorize someone else to “go fishing and I’ll allow them to go in and go right back out.” Occasionally Mr. Buyck would bring “a lot of friends” for fishing and a cookout on the tract. “[A]ll kind of vehicles would go over the road.”

Before 1984, Mrs. McAlister, who then owned the McAlister tract, would cut a small amount of timber each year. Mr. Buyck and the owners of the Pedings and Stuck tracts “never had any problem” with Mrs. McAlister’s timber contractor using the Red Road from Fort Motte Road to the McAlister tract to access the McAlister tract for this purpose. [Tr. 55/11–13.] But in 1984, when Mrs. McAlister wanted to clearcut her tract, her insurer wished her to obtain an express easement “rather than [go] by what we’ve always done,” *i.e.*, the traditional use of the Red Road as a neighborly courtesy. [Tr. 55/18–19.] Mrs. McAlister suggested that not only should Mr. Buyck grant her an easement for her use of the Red Road across

³⁴(...continued)
as the Red Road and the Right Fork Road.

his 200-acre tract, but that all four tract owners — Pedings, Stuck, Buyck, and McAlister — should grant one another mutual easements for the use of the dirt road from Fort Motte Road to the boundary of the 700-acre Buyck tract.³⁵ Mr. Buyck and the owners of the Pedings and Stuck tracts agreed with Mrs. McAlister's proposal, and these easements were exchanged amongst the four owners. Mr. Buyck testified that the entire transaction was Mrs. McAlister's proposal, that he proposed no part of it, and that he "never thought anymore about it." [Tr. 55/23.] After 1984, Mr. Buyck continued to use the Right Fork of the road on the McAlister tract, the same as before.³⁶

When the defendant Jackson and a partner bought the McAlister tract in 2000, Mr. Buyck and Mr. Jackson "discussed the [Right Fork Road] a little" Mr. Buyck told Mr. Jackson that the Right Fork Road "was never — not an issue and had never been an issue." [Tr. 57/1.] Mr. Buyck accepted a key to Mr. Jackson's new gate at the fork and continued to use the Right Fork Road for the next eight or so years.

Neither the owner of the McAlister tract nor anyone else ever told either Mr. Buyck or, so far as he knew, his father that they could not use the Right Fork Road. Mr. Buyck testified that he thinks he has a right to use the Right Fork Road because he has always used it without complaint, and "it's the only road that everybody's ever used to go in and out of there; the loggers and everything else." He testified that he believes he needs no permission to use the road from Fort Motte Road to the 700-acre tract, including the Right Fork Road. No one has ever challenged his right or that of his father to use it.

³⁵ This was the Red Road from Fort Motte Road up to the fork on the McAlister tract, then progressing along the left fork ("the Hayfield Road") up to the boundary of the 700-acre tract.

³⁶ The plaintiff's witness Nickells testified that Mr. Buyck used the Hayfield Road as well during the period 1990–96 when Mr. Nickells owned the McAlister tract. [Tr. 142/20 – 143/24.]

The Right Fork Road leaves the McAlister tract at one point and crosses the Bruner tract before returning to the McAlister tract and thence to the 700-acre tract. Mr. Buyck testified that the owner of the Bruner tract has never complained of his or his father's use of the Right Fork Road or prohibited it.³⁷ He has never abandoned the Red Road or the Right Fork Road, or stopped using them. Mr. Buyck testified that the Buyck Hunt Club leases the 700-acre tract from him for deer-hunting, as they did from his father. Mr. Buyck testified that his timber contractor used the Right Fork Road in connection with timber operations on the 700-acre tract in about 2002, without objection from Mr. Jackson.³⁸

In this testimony, there is nothing to overcome the presumption that during the prescriptive period and for decades thereafter, neither Mr. Buyck nor his father before him did anything to manifest an adverse user of the road in question under claim of right.

There is ample evidence that Mr. Buyck believed that he had a legal right to use the road. Others in the neighborhood believed the same thing. For example, Mr. Nickells, who owned the McAlister tract from 1989 until 1996, thought that the road across his tract had long-since become a road which not only Mr. Buyck but anyone could travel. Mr. Nickells testified that Mr. Buyck accessed his 700-tract by using the Right Fork Road, "like everybody else."³⁹ "Everybody else" included

³⁷ Mr. Buyck acknowledged that his claim to a prescriptive easement over the McAlister tract would apply equally to the portion of the right fork which passes over the Bruner tract. [Tr. 223/6–8.] The same thing applies to the Pedings tract and the Stuck tract. Of course the acquisition in 1984 of an express easement over these two tracts obviated any need to claim a prescriptive easement over this portion of the Red Road, which crosses these two tracts.

³⁸ Similarly, Mr. Buyck had no objection to Mrs. McAlister's timber contractor using the Red Road over his 200-acre tract annually. It was not his idea but hers which led to the grant of an express easement to him over the Hayfield Road, as the entire easement exchange was Mrs. McAlister's idea.

³⁹ *Cf. Price v. Wilbourn*, 1 Rich. (30 S.C.L.) 58, 60 (1844) ("[E]very body used [the road]; such a use may establish a right in the public, but is not the characteristic of a
(continued...)

the Buyck Hunt Club, the Brunerdale Hunt Club, the electric cooperative, and friends of the witness and friends of Peter Buyck, Jr. Mr. Nickells testified that during the six years that he owned the McAlister tract, Mr. Buyck used both the Right Fork Road and the Hayfield Road to get to and from the 700-acre tract. [Tr. 142/20 – 143/24.] When he bought the McAlister tract, Mr. Nickells assumed that Mr. Buyck had the right to use all the roads. Mr. Nickells never objected to anyone using any road on the McAlister tract because he was a good neighbor. [Tr. 144/26 – 145/9.] “[Y]ou know, everybody used that road. It’s been there for a long, long time.” [Tr. 133/24–26.] Mr. Nickells believed that he could not stop Mr. Buyck if he wanted to by law, “because the road’s been open for over 20 years I’ve already heard that law before.” [Tr. 146/2–4.] Testimony to the same effect was offered by Mr. Conrad, who testified that he “had just always heard that if a road was open for a long period of time and the landowner did not close it, then whenever — or he could not close it after it had been used for a long period of time.”⁴⁰ [Tr. 200/22–25.]

The claimant to a prescriptive right-of-way must certainly believe that he has a right of use, or must intend that his use be in disregard of the rights of the landowner.⁴¹ The claimant’s state of mind, however, is never sufficient to perfect the claim.⁴² There must be either a “positive assertion of such right by plaintiff,”

³⁹(...continued)
private way.”).

⁴⁰ These witnesses were simply mistaken about the law of old roads.

⁴¹ *Hartley v. John Wesley United Methodist Church*, 355 S.C. 145, 584 S.E.2d 386 (Ct. App. 2003) (“[O]ur courts have held in order for a party to earn a prescriptive easement under claim of right he must demonstrate a substantial belief that he had the right to **use** the parcel or road based upon the totality of circumstances surrounding his use.”).

⁴² See, e.g., *Morrow v. Dyckes*, 328 S.C. 522, 528, 492 S.E.2d 420, 424 (Ct. App. 1997), where the Court held that testimony that the present owner of the putative dominant estate thought that the previous owner had a right-of-way was insufficient to
(continued...)

Williamson v. Abbott, 107 S.C. 397, 93 S.E. 15 (1917), or “some unequivocal act of adverse right,” *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848), or “some notorious assertion of right, by an act done,” *Watt v. Trapp*, 2 Rich. (31 S.C.L.) 136, 139 (1845), sufficient to place the owner on notice that neighborly courtesy has been rejected and a claim to a legal right has begun. There is simply no evidence here of either thing. In the plaintiff’s evidence there is nothing to show that the plaintiff’s use of this road, like the use made of it by many others, was anything other than by permission of the owner in the fashion typical of unenclosed woodlands in South Carolina, as is presumed.

Although the absence of this essential evidence is dispositive, other features of the history of usage of this right-of-way point to the same conclusion. The owner of the Pedings and Stuck tracts crossed one another’s property with each use of the Red Road, since it bisected their parcels. The owner of 200-acre Buyck tract had to cross the Pedings and Stuck parcels. The owner of the McAlister tract had to cross the Pedings and Stuck parcels and the 200-acre Buyck tract. The owner of the 700-acre Buyck tract had to cross the Pedings and Stuck parcels, and (after crossing his own 200-acre tract), the McAlister tract and the Bruner tract (if using the Right Fork Road). There is no suggestion (apart from the controversy at issue in this case) that the use of any of these rights-of-way across one another’s property was anything other than “an enjoyment of neighborly courtesy,” M. Dwyer, *supra*, 19 CORNELL L.Q. 337, 339 (1934). It was only at the instance of Mrs. McAlister in 1984 that affirmative easements were exchanged among these owners. The proposal was hers in its entirety. Mr. Buyck

⁴²(...continued)
show that the previous owner ever *claimed* a prescriptive right-of-way. “[E]vidence establishing the mere fact of use does not necessarily equate with evidence showing the character of such use.” See: *Beckstead v. Price*, 146 Idaho 57, 190 P.3d 876, 881 (2008) (“The state of mind of the users of the alleged easement is not controlling; the focus is on the nature of their use.”).

requested no express easement but agreed to Mrs. McAlister's proposal that such easements be exchanged.

Also significant is the fact that, in the words of the witness Nickells, everybody used the Right Fork Road. The only way that the Right Fork Road could be reached was by traveling from Fort Motte Road across the Pedings and Stuck tracts, the 200-acre Buyck tract, and the eastern portion of the McAlister tract. It is inconceivable that all the traffic in the neighborhood was by persons claiming a prescriptive right over these four tracts, and yet there is nothing in the evidence to distinguish the character of Mr. Buyck's use from that of anyone else. See: *Hogg v. Gill*, 1 McMull. (26 S.C.L.) 329, 332 (1841) ("[A] presumption of a right of way by prescription was diminished by the fact that many, under the same circumstances, traveled the way, and that it passed over several tracts of land owned by different proprietors . . .").

For these reasons, the plaintiff's claim to a prescriptive easement must be denied.

Nonetheless, the defendant Jackson has never objected to use of the Right Fork Road by Mr. Buyck personally, together with family and friends in his personal company *gratis* and not for compensation.⁴³ This feature of the case will be made the order of this Court. Of course Mr. Buyck and subsequent owners of the 700-acre tract will continue to have full use of the Red Road and the Hayfield Road to reach the 700-acre tract, by virtue of the express easements exchanged among the landowners in 1984.

IT IS ORDERED, ADJUDGED, AND DECREED:

(1) Plaintiff's claim to a prescriptive easement over the Right Fork Road is denied; and

⁴³ The defendant only denied the use of the road to Mr. Buyck after eight years of defendant's ownership, when Mr. Buyck continued to make and distribute multiple copies of his key to the gate at the fork.

(2) Plaintiff, Peter Buyck, Jr., together with family and friends in plaintiff's personal company *gratis* and not for compensation, shall have the right to use the Right Fork Road for ingress to and egress from the 700-acre tract with the permission of the defendant and any subsequent owner of the Jackson tract, which permission shall not be unreasonably denied; and

(3) Defendant shall provide to plaintiff a key to the gate on the Right Fork Road, which key shall not be copied, and the gate being kept locked; and

(4) A memorandum of this Order shall be recorded in the chain of title to the defendant's tract.

IT IS SO ORDERED.

Diane Schafer Goodstein
Resident Judge, First Judicial Circuit

St. George, South Carolina

_____, 2011.

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

W. Peter Buyck, Jr.,)
Plaintiff,)
-vs-)
William Jackson,)
Defendant.)

Case No. 2008-CP-9-135

DEFENDANT'S PROPOSED ORDER
IF THE COURT FINDS
AN EASEMENT APPURTENANT

[If the Court finds that the plaintiff has a prescriptive easement appurtenant over the Right Fork Road, then the defendant would respectfully offer the following portion to be included in the Court's order, determining the width and location of the easement and determining who may use the easement.]

* * * * *

Having found that Mr. Buyck has proved his claim to a prescriptive easement over the Right Fork Road, appurtenant to the 700-acre tract, the court now turns to the question of the width and location of the easement, and who may use it.¹

The width of a prescriptive easement is determined by the usage which led to the acquisition of the easement. JAMES W. ELY, JR. & JON W. BRUCE, THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:22 (2011) ("The location and dimensions of an easement created by prescription are fixed by the actual use of the servient estate during the prescriptive period."); *Keidel v. Rask*, 290 N.W.2d 255 (N.D. 1980) (width determined from extent of actual use of the property for roadway purposes over the prescriptive period); *Hash v. Sofinowski*, 37 Pa.Sup. 451, 487 A.2d 32 (1985) (width of

¹ "[A]ny judgment determining the existence of an easement must also specify the character, width, length and location of the easement." *Beckstead v. Price*, 146 Idaho 57, 190 P.3d 876, 885 (2008).

prescriptive easement limited to width of vehicles used to establish the easement).
See: Burrell v. Kirkland, 242 S.C. 201, 207, 130 S.E.2d 470, 473 (1963) ("If the adverse use on which the prescriptive claim to a way is based was for one particular purpose only, as in the case of a way used by foot passage only, or for the carriage of timber only, this is not sufficient to support a claim to a right of way for all purposes."), and cases cited. *See also: Capers v. McKee*, 1 Strob. (32 S.C.L.) 164, 168 (1847) ("[T]he use of a road five feet wide, or a foot-path, would not authorize or support a claim to a wagon or cart-way, ten feet wide. . . . [S]o strictly is this right limited to the use").²

All manner of vehicles have used the Right Fork Road to reach the 700-acre tract. There is no evidence of the width of a woodlands right-of-way needed or actually used by any of them. Logging equipment appears to be the heaviest to use the Right Fork Road. Mr. Mills testified that logging equipment can travel on a road as narrow as ten or eleven feet.³ [Tr. 401/3–4.]

A functional way to determine the easement's width is at hand in the evidence. There is a gate on the 700-acre Buyck tract at the point where the Right Fork Road reaches the tract, allowing vehicles to enter and leave the 700-acre tract. The width of this gate is the best gauge of the maximum width of the traffic which historically has used this road to access the 700-acre tract. Accordingly, the Court finds that the width of this gate is the width of the prescriptive easement acquired in the use of that road. The parties will establish that width as hereafter ordered.

² In the somewhat similar situation where an express grant of a right-of-way fails to specify the width, strong consideration is given "to what is reasonable, convenient and necessary to accomplish the purpose for which the right-of-way was created." *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985), and authorities cited.

³ The standard width of one lane of paved highway in South Carolina is eleven feet. [Tr. 401/6–7.]

Although the parties made no issue of the precise location of the Right Fork Road, its location should be determined in this action to avoid future controversy. In the event that the parties are not in accord with the location of the road as shown on the Walker plat, Plaintiff's Exhibit No. 8, the parties jointly shall appoint another surveyor to locate the road. Failing agreement, the Court will appoint a surveyor. Either the Walker plat (if agreed) or the new plat shall determine the road's location. A party objecting to the result may request a further hearing.

The identity of those who may use the plaintiff's prescriptive easement remains to be determined.

The nature and extent of the use of the easement during the prescriptive period determine the character of the use thereby acquired. The plaintiff's prescriptive easement was used during the prescriptive period and thereafter not only by the plaintiff himself but by his family and friends in his company.⁴

The members of the hunt club are not parties to this action and do not seek a prescriptive easement over the Right Fork Road in their own right. Rather, the plaintiff seeks the right to license these third parties to use the road as part of the commercial arrangement between him and their club.

The plaintiff's right to use this prescriptive right-of-way does not extend to the members of the hunt club, which pays the plaintiff an annual fee to hunt deer on the 700-acre tract.⁵ Although the plaintiff refers to the arrangement as a "hunting lease,"

⁴ See *Ballington v. Paxton*, 327 S.C. 372, 378, 488 S.E.2d 882, 885 (Ct. App. 1997), where the order under appeal provided that, "so long as [a holder of the right-of-way] is present, any of his or her family members, or non-family members, shall be permitted to use the easement" Cf. *Levinson v. Costello*, 74 N.J. Super. 539, 181 A.2d 791 (1962) (appurtenant right-of-way granted to property owner was broad enough to allow use by guest of property owner invited for specific occasion in the personal company of the easement holder). See also: *Gowen v. Cote*, 875 S.W.2d 637 (Mo. App. 1994).

⁵ The plaintiff does not contend that his easement is commercial in nature. In
(continued...)

which is the name commonly given it in South Carolina as elsewhere, the arrangement is not a lease. *David Lee Boykin Family Trust v. Boykin*, 661 So.2d 245 (Ala. Civ. App. 1995). A lease grants possession of the estate to the lessee. The hunt club does not have possession of the tract. Rather, a valid hunting lease grants a profit à prendre to the holder, “giving the holder the right to take the product of the land of another.” *Ex parte Bedingfield*, 283 S.C. 561, 562, 324 S.E.2d 312 (1984). A valid profit à prendre is an estate in land, and therefore comes within the statute of frauds. *Palachucola Club v. Withington*, 159 S.C. 446, 157 S.E. 621 (1931). If not in writing, no profit is created. Instead, the holders of an oral hunting lease are mere licensees. H. HOVENKAMP & S. KURTZ, *THE LAW OF PROPERTY* § 10.1.4 p. 328 (5th ed. 2001) (“An attempt to create a . . . profit which fails because the deed of conveyance is defective will result in a license.”). “A license does not vest in the licensee any estate or interest in the land. . . . It conveys only the temporary privilege of being on the land for some agreed purpose.” *Hilton Head Air Service, Inc. v. Beaufort County*, 308 S.C. 450, 457, 418 S.E.2d 849, 853 (Ct. App. 1992). *Accord*: 1 THOMPSON ON REAL PROPERTY § 282, p. 362 (1st ed. 1924); JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 1:4 (2011). There is no evidence that the arrangement between Mr. Buyck and the Buyck Hunt Club or its members is in writing or ever has been. Its members are licensees when they hunt the 700–acre tract.

In *Stone v. Brickey*, 70 S.W.3d 82, 88 (Tenn. App. 2001), the plaintiff appealed a trial court order limiting the use of a prescriptive appurtenant easement to himself and his tenants, and refusing to allow the plaintiff to authorize hunters to use the easement.

⁵(...continued)
 Section 12 of the annotation entitled “Scope of prescriptive easement for access (right of way),” 79 A.L.R.4th 604, 632, seven cases are cited which hold that the scope of a prescriptive easement acquired to reach a dominant tenement used for agricultural purposes is insufficient in scope to allow its use for a commercial enterprise. No cases are cited to the contrary.

The court affirmed, stating:

[T]he right to use an easement is normally confined to the easement holder and his privies. [Plaintiff's] argument is without merit.

See also: Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 368 (1922), where the plaintiffs reserved hunting privileges on land they conveyed, and were held to be “without the right to extend such privilege to others.”

The holder of an appurtenant easement lacks the authority to license an unlimited number of third-party licensees to use his prescriptive right-of-way in consideration of a fee. Therefore, the hunt club members are limited to the use of the Hayfield Road.⁶

IT IS ORDERED, ADJUDGED, AND DECREED:

(1) Plaintiff holds a prescriptive easement over the Right Fork Road, appurtenant to plaintiff's 700-acre tract; and

(2) Plaintiff, together with family and friends in his personal company *gratis* and without compensation, has the right to use the Right Fork Road for ingress to and egress from the 700-acre tract; and

(3) The parties shall stipulate the width of the gate referred to in this Order. Their Stipulation shall be filed in the Judgment Roll of this action and shall be part of the judgment entered herein; and

(4) If the parties are not in accord with the location of the Right Fork Road as shown on the Walker plat, Plaintiff's Exhibit No. 8, the parties jointly shall appoint another surveyor to locate the road. Failing agreement, the Court will appoint a surveyor. The resulting plat shall determine the road's location and a copy shall be filed

⁶ The evidence is that the hunt club members in the past have used both the Hayfield Road and the Right Fork Road, depending upon where they wished to hunt. [Tr. 333/22 – 334/25; Tr. 337/6–1; Tr. 340/6–16.] The plaintiff can of course continue to authorize the hunt club members to reach the tract by way of the Hayfield Road under the terms of his express easement over that road.

in the Judgment Roll of this action and shall be part of the judgment entered herein. A party objecting to the result may request a further hearing; and

(5) Defendant shall provide to plaintiff a key to the gate on the Right Fork Road, which key shall not be copied, and the gate being kept locked; and

(6) A memorandum of this Order shall be recorded in the chain of title to the defendant's tract.

IT IS SO ORDERED.

Diane Schafer Goodstein
Resident Judge, First Judicial Circuit

St. George, South Carolina

_____, 2011.

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF CALHOUN	)	IN THE COURT OF COMMON PLEAS

W. Peter Buyck, Jr.,	)	Case No. 2008–CP–9–135
	)	
Plaintiff,	)	
	)	
-vs-	)	DEFENDANT’S PROPOSED ORDER
	)	IF THE COURT FINDS AN
William Jackson,	)	EASEMENT IN GROSS
	)	
Defendant.	)	

[If the Court finds that the plaintiff has a prescriptive easement over the Right Fork Road, then the defendant would respectfully offer the following portion to be included in the Court’s order, finding that the easement is in gross, not appurtenant, and determining the width and location of the easement, and determining who may use the easement.]

* * * * *

Having found that Mr. Buyck has proved his claim to a prescriptive easement over the Right Fork Road, the Court next turns to the question of whether the easement is appurtenant or in gross. This is a mixed question of law and fact. *Kershaw v. Burns*, 91 S.C. 129, 74 S.E. 378, 379 (1912).

The distinction between the two kinds of easement has been stated many times. Recently in *Windham v. Riddle*, 381 S.C. 192, 201–02, 672 S.E.2d 578, 583 (2009), our Supreme Court reiterated:

An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965). In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. *Id.*; *Smith v. Commissioners*, 312 S.C. 460, 441 S.E.2d 331 (Ct.App.1994); *Carolina Land Company, Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975); *Sandy Island Corp. v. Ragsdale*, supra; 12 S.C. JURIS. Easements § 3. It also passes with the dominant estate

upon conveyance. *Carolina Land Co., Inc. v. Bland*, supra. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. 12 S.C. JURIS. *Easements* § 3(c).

The defendant contends that the plaintiff's easement for the use of the Right Fork Road is not essentially necessary to the enjoyment of the putative dominant estate, the 700-acre tract, and hence is an easement in gross and not appurtenant. This contention is based upon the fact that the plaintiff enjoys access to the 700-acre tract by way of the Hayfield Road, over which he possesses an express easement.

The requirement that an easement be "essentially necessary to the enjoyment thereof" in order to be appurtenant to a dominant estate has long been the case. In addition to the authorities marshaled in *Windham v. Riddle*, supra, see, e.g., *Whaley v. Stevens*, 21 S.C. 221 (1883); *Kershaw v. Burns*, 91 S.C. 129, 74 S.E. 378 (1912); *Shia v. Pendergrass*, 222 S.C. 342, 72 S.E.2d 699 (1952); *Keane/Sherratt Partnership v. Hodge*, 292 S.C. 459, 357 S.E.2d 193 (Ct. App. 1987):

The plaintiff responds to this contention with three points: First, the Hayfield Road does not give as convenient a point of access to the part of 700-acre tract nearest the river as does the Right Fork Road. Second, historically the Right Fork Road has been used much more often than the Hayfield Road as the way in and out of the tract. Third, the plaintiff contends that the Hayfield Road is in worse condition than the Right Fork Road.

The Right Fork Road provides a more direct and convenient means of access to the portion of the 700-acre tract nearest the Congaree River. To reach that portion of the tract using the Hayfield Road, it is necessary to drive Road Three from where the Hayfield Road reaches the 700-acre tract to the area of the duck pond, where Road Three ties into the Duck Pond Road. The plaintiff's witnesses described Road Three as rugged, but witness Mills drove it shortly before trial using two-wheel drive in his pickup

truck without difficulty.¹

In the case of *Ballington v. Paxton*, 327 S.C. 372, 488 S.E.2d 882 (Ct. App. 1997), the Court held:

In this case, the evidence at trial established that, while perhaps not as convenient as the route across Paxton's property, there are other means of access to the pond. Therefore, because the easement is not necessary for the use of the dominant estate, the easement must be characterized as an easement in gross rather than an appurtenant easement.

Id. at 380, 488 S.E.2d 887 (footnote omitted). To like effect is the case of *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944) ("[T]here must be an actual necessity and not a mere inconvenience to entitle a person to [an appurtenant easement]."). *Accord: Fisher v. Fair*, 34 S.C. 203, 13 S.E. 470 (1891) (easement was in gross where easement holder had other means of access to his property); *Tupper v. Dorchester County*, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997) ("[T]here is other access which is simply less convenient. Accordingly, the trial court erred in finding that the easement was 'necessary to the enjoyment of the dominant estate.'").

While the Right Fork Road is a more convenient means of access to the northern portion of this large rural tract, it is not essentially necessary to access the tract as a whole, or even the northern portion. The Hayfield Road is actually a more convenient means of access to the central and southern portions of the 700-acre tract than is the Right Fork Road. In any event, "convenience merely is no foundation of a legal right." *Capers v. McKee*, 1 Strob. (32 S.C.L.) 164 (1847).

The fact that the plaintiff has historically used the Right Fork Road and not the Hayfield Road to reach the northern portion of the 700-acre tract is because it is a more convenient means of accessing that part of the tract. This historical usage has gained the plaintiff an easement, but is not determinative of what type of easement it is. It is evidence of convenience, but it is not evidence of essential necessity.

¹ A videotape of this drive shows that Road Three is navigable by pickup truck.

The plaintiff contends that the Right Fork Road is in better condition than the Hayfield Road. Photographs and videotapes in evidence do not support this contention.² The condition of either road is immaterial, however. “In general, the beneficiary of the easement, not the owner of the burdened property, is obligated to maintain the easement.” *Khalil v. Motwani*, 376 N.J. Super. 496, 506, 871 A.2d 96, 102 (2005), citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.13(2) (2000).

Because the plaintiff’s easement over the Right Fork Road is not essentially necessary to the enjoyment of the 700-acre tract, the easement is in gross, not appurtenant.

Having found that the plaintiff holds an easement in gross over the Right Fork Road, the Court should determine both the width of the easement and its location in order to provide the parties with full relief.³

The width of a prescriptive easement is determined by the usage which led to the acquisition of the easement. JAMES W. ELY, JR. & JON W. BRUCE, THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:22 (2011) (“The location and dimensions of an easement created by prescription are fixed by the actual use of the servient estate during the prescriptive period.”); *Keidel v. Rask*, 290 N.W.2d 255 (N.D. 1980) (width determined from extent of actual use of the property for roadway purposes over the prescriptive period); *Hash v. Sofinowski*, 37 Pa. Sup. 451, 487 A.2d 32 (1985) (width of prescriptive easement limited to width of vehicles used to establish the easement). See *Burrell v. Kirkland*, 242 S.C. 201, 207, 130 S.E.2d 470, 473 (1963) (“If the adverse use on which the prescriptive claim to a way is based was for one particular purpose only,

² The Right Fork Road is in especially poor condition where it traverses steep terrain, while the Hayfield Road is largely level. The photographs in evidence show trucks, tractors and various kinds of farm equipment using the Hayfield Road with no apparent difficulty.

³ “[A]ny judgment determining the existence of an easement must also specify the character, width, length and location of the easement.” *Beckstead v. Price*, 146 Idaho 57, 190 P.3d 876, 885 (2008).

as in the case of a way used by foot passage only, or for the carriage of timber only, this is not sufficient to support a claim to a right of way for all purposes.”), and cases cited. See: *Capers v. McKee*, 1 Strob. (32 S.C.L.) 164, 168 (1847) (“[T]he use of a road five feet wide, or a foot-path, would not authorize or support a claim to a wagon or cart-way, ten feet wide. . . . [S]o strictly is this right limited to the use”).⁴

All manner of vehicles have used the Right Fork Road to reach the 700-acre tract. There is no evidence of the width of a woodlands right-of-way needed by any of them. Logging equipment appears to be the heaviest to use the Right Fork Road. Mr. Mills testified that logging equipment can travel on a road as narrow as ten or eleven feet.⁵ [Tr. 401/3–4.]

A functional way to determine the easement’s width is at hand in the evidence. There is a gate on the 700-acre Buyck tract at the point where the Right Fork Road reaches the tract, allowing vehicles to enter and leave the 700-acre tract. The width of this gate is the best gauge of the maximum width of the traffic which historically has used this road to access the 700-acre tract. Accordingly, the Court finds that the width of this gate is the width of the prescriptive easement acquired in the use of that road. The parties will establish that width as hereafter ordered.

Although the parties made no issue of the precise location of the Right Fork Road, its location should be determined in this action to avoid future controversy. In the event that the plaintiff is not in accord with the location of the road as shown on the Walker plat, Plaintiff’s Exhibit No. 8, the parties jointly shall appoint another surveyor to locate the road. Failing agreement, the Court will appoint a surveyor. Either the Walker

⁴ In the somewhat similar situation where an express grant of a right-of-way fails to specify the width, strong consideration is given “to what is reasonable, convenient and necessary to accomplish the purpose for which the right-of-way was created.” *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985), and authorities cited.

⁵ The standard width of one lane of paved highway in South Carolina is eleven feet. [Tr. 401/6–7.]

plat (if agreed) or the new plat shall determine the road's location. A party objecting to the result may request a further hearing.

The identity of those who may use the plaintiff's prescriptive easement remains to be determined.

An easement in gross is a personal privilege of the holder of the easement. It is reasonable that the plaintiff's easement be used not only by the plaintiff himself but by his family and friends in his company.⁶

However, the plaintiff's personal privilege to use this right-of-way does not extend to the members of the hunt club. The club pays the plaintiff an annual fee to hunt deer on the 700-acre tract.⁷ Although the plaintiff refers to the arrangement as a "hunting lease," which is the name commonly given it in South Carolina as elsewhere, the arrangement is not a lease. *David Lee Boykin Family Trust v. Boykin*, 661 So.2d 245 (Ala.Civ.App. 1995). A lease grants possession of the estate to the lessee. The hunt club does not have possession of the tract. Rather, a valid hunting lease grants a profit à prendre to the holder, "giving the holder the right to take the product of the land of another." *Ex parte Bedingfield*, 283 S.C. 561, 562, 324 S.E.2d 312 (1984). A valid profit à prendre is an estate in land, and therefore comes within the statute of frauds. *Palachucola Club v. Withington*, 159 S.C. 446, 157 S.E. 621 (1931). If not in writing, no profit is created. Instead, the holders of an oral hunting lease are mere licensees. H.

⁶ See *Ballington v. Paxton*, 327 S.C. 372, 378, 488 S.E.2d 882, 885 (Ct. App. 1997), where the order under appeal provided that, "so long as [a holder of the right-of-way] is present, any of his or her family members, or non-family members, shall be permitted to use the easement" Cf. *Levinson v. Costello*, 74 N.J.Super. 539, 181 A.2d 791 (1962) (right-of-way granted to property owners was broad enough to allow use by guest of property owner invited for specific occasion in the personal company of easement holder). See also: *Gowen v. Cote*, 875 S.W.2d 637 (Mo. App. 1994).

⁷ The plaintiff does not contend that his easement is commercial in nature. In Section 12 of the annotation entitled "Scope of prescriptive easement for access (right of way)," 79 A.L.R.4th 604, 632, seven cases are cited which hold that the scope of a prescriptive easement acquired to reach a dominant tenement used for agricultural purposes is insufficient in scope to allow its use for a commercial enterprise. No cases are cited to the contrary.

HOVENKAMP & S. KURTZ, THE LAW OF PROPERTY § 10.1.4 p. 328 (5th ed. 2001) (“An attempt to create a . . . profit which fails because the deed of conveyance is defective will result in a license.”). “A license does not vest in the licensee any estate or interest in the land. . . . It conveys only the temporary privilege of being on the land for some agreed purpose.” *Hilton Head Air Service, Inc. v. Beaufort County*, 308 S.C. 450, 457, 418 S.E.2d 849, 853 (Ct. App. 1992). *Accord*: 1 THOMPSON ON REAL PROPERTY § 282, p. 362 (1st ed. 1924); JAMES W. ELY, JR. & JON W. BRUCE, THE LAW OF EASEMENTS AND LICENSES IN LAND § 1:4 (2011). There is no evidence that the arrangement between Mr. Buyck and the Buyck Hunt Club or its members is in writing or ever has been. Its members are licensees when they hunt the 700-acre tract.

In *Stone v. Brickey*, 70 S.W.3d 82, 88 (Tenn. App. 2001), the plaintiff appealed a trial court order limiting the use of a prescriptive easement to himself and his tenants, and refusing to allow the plaintiff to authorize hunters to use the easement. The court affirmed, stating:

[T]he right to use an easement is normally confined to the easement holder and his privies. [Plaintiff’s] argument is without merit.

See also: *Council v. Sanderlin*, 183 N.C. 253, 111 S.E. 365, 368 (1922), where the plaintiffs reserved hunting privileges on land they conveyed, and were held to be “without the right to extend such privilege to others.”

The holder of an easement in gross lacks the authority to license an unlimited number of third parties to use the right-of-way which he enjoys as a personal privilege. Therefore, the hunt club members are limited to the use of the Hayfield Road.⁸

IT IS ORDERED, ADJUDGED, AND DECREED:

(1) Plaintiff holds an easement in gross over the Right Fork Road; and

⁸ The evidence is that the hunt club members in the past have used both the Hayfield Road and the Right Fork Road, depending upon where they wished to hunt. [Tr. 333/22 – 334/25; Tr. 337/6–1; Tr. 340/6–16.] The plaintiff can of course continue to authorize the hunt club members to reach the tract by way of the Hayfield Road under the terms of his express easement over that road.

(2) Plaintiff, Peter Buyck, Jr., together with family and friends in plaintiff's personal company *gratis* and not for compensation, shall have the right to use the Right Fork Road for ingress to and egress from the 700-acre tract; and

(3) The parties shall stipulate the width of the gate referred to in this Order. Their Stipulation shall be filed in the Judgment Roll of this action and shall be part of the judgment entered herein; and

(4) If the parties agree with the location of the Right Fork Road as shown on the Walker plat, Plaintiff's Exhibit No. 8, a copy shall be filed in the Judgment Roll of this action and shall be part of the judgment entered herein. If the parties do not agree with the Walker plat, the parties jointly shall appoint another surveyor to locate the road. Failing agreement, the Court will appoint a surveyor. The resulting plat shall determine the road's location and a copy shall be filed in the Judgment Roll of this action and shall be part of the judgment entered herein. A party objecting to the result may request a further hearing; and

(5) Defendant shall provide to plaintiff a key to the gate on the Right Fork Road, which key shall not be copied, and the gate being kept locked; and

(6) A memorandum of this Order shall be recorded in the chain of title to the defendant's tract.

IT IS SO ORDERED.

Diane Schafer Goodstein
Resident Judge, First Judicial Circuit

St. George, South Carolina

_____, 2011.

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

W. Peter Buyck, Jr.,)
)
Plaintiff,)
)
-vs-)
)
William Jackson,)
)
Defendant.)

Case No. 2008-CP-9-135

NOTICE OF MOTION
TO ALTER OR AMEND

TO: ANDREW C. ENGLISH, III, ESQ., AND MESSRS. CALLISON TIGHE &
ROBINSON, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that the defendant will move before the Honorable
Diane S. Goodstein on the tenth day after service hereof, or as soon thereafter as
counsel can be heard, for an order altering and amending the Order dated October 26,
2011, and entered on November 15, 2011, at such place as the court may direct. A
copy of defendant's motion is attached to and incorporated in this notice.

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by James B. Richardson, Jr.
Attorneys for Defendant.

November 23, 2011.

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

W. Peter Buyck, Jr.,)
)
Plaintiff,)
)
-vs-)
)
William Jackson,)
)
Defendant.)
_____)

Case No. 2008-CP-9-135

DEFENDANT'S MOTION
TO ALTER OR AMEND

The defendant respectfully moves the Court to alter or amend the Order dated October 26, 2011, and entered November 15, 2011, in the following ways:

I. In general.

1. The defendant respectfully moves that the Court vacate the Order and adopt instead the order proposed by the defendant, attached to and incorporated in this motion as Exhibit A, finding no prescriptive easement.

2. If the Court continues to find that a prescriptive easement exists, then the defendant respectfully moves in the alternative that the Court vacate the finding that the easement is appurtenant, adopting instead the order proposed by the defendant, attached to and incorporated in this motion as Exhibit B, finding that the easement is in gross.

3. If the Court continues to find that a prescriptive easement exists, and that the easement is appurtenant, then the defendant respectfully moves in the alternative that the Court vacate the finding that the plaintiff may allow whom he pleases to use the easement, adopting instead the order proposed by the defendant, attached to and incorporated in this motion as Exhibit C, finding that the use of the easement is limited to the plaintiff together with family and friends in his personal company *gratis* and without compensation.

II. With respect to the finding of a prescriptive easement:

4. The defendant respectfully moves the Court to find that the McAlister tract at all relevant times was unenclosed woodland. The character of the McAlister tract as unenclosed woodland means that the use of dirt roads across the woodland by the plaintiff and his father is presumed to have originated by permission and not adversely or under claim of right.

5. The defendant respectfully moves the Court to find that the dirt roads crossing the McAlister tract existed before the plaintiff or his father acquired the adjoining 700-acre tract.

6. The defendant respectfully moves the Court to find that the burden rests upon the plaintiff to establish his claim to a prescriptive easement by clear and convincing evidence.

7. The defendant respectfully moves the Court to find that prescriptive easement claims are disfavored.

8. The defendant respectfully moves the Court to find that adverse *use* is the foundation of a claim of prescriptive easement, in South Carolina as everywhere else.

9. The defendant respectfully moves the Court to find that the use of the road in question by the plaintiff, and by his father, is presumed to have begun with the permission of the landowner, and so continued.

10. The defendant respectfully moves the Court to find that the plaintiff bore the burden to overcome the presumption of permission by proving that his usage was or became adverse or under claim of right.

11. The defendant respectfully moves the Court to find that use of a right-of-way by permission, regardless of how long it lasts, can never ripen into a prescriptive easement.

12. The defendant respectfully moves the Court to find that merely passing

over uncultivated and unenclosed woodland cannot, by any lapse of time, give a prescriptive right to any individual.

13. The defendant respectfully moves the Court to find that the plaintiff bore the burden to prove a distinct, positive, unequivocal, notorious assertion of a right hostile to the owner of the McAlister tract, and brought home to the owner, in order to rebut the presumption of permissive use.

14. The defendant respectfully moves the Court to find that the plaintiff offered no evidence of the assertion of a right hostile to the owner of the McAlister tract, and brought home to the owner. On the contrary, the only evidence offered by the plaintiff was that his use of the dirt roads crossing the McAlister tract was by permission of the owner.

15. The defendant respectfully moves the Court to find that there is no evidence of public maintenance of any of the dirt roads crossing the McAlister tract.

16. The defendant respectfully moves the Court to find that the use of the dirt roads crossing the McAlister tract by the plaintiff and his father was an instance of neighborly courtesy in rural South Carolina and was not intended to gain a property right in the land of the owner of the McAlister tract.

17. The defendant respectfully moves the Court to find that the plaintiff claims a prescriptive easement not only over the McAlister tract but also over the Pedings tract, the Stuck tract, and the Bruner tract.

18. The defendant respectfully moves the Court to find that Mr. Nickells, who owned the McAlister tract from 1989 until 1996, thought that the roads across the tract had long-since become public roads which not only Mr. Buyck but anyone could travel, "because the road's been open for over 20 years", a mistaken view of the law.

19. The defendant respectfully moves the Court to find that Mr. Conrad, like Mr. Nickells, thought that "if a road was open for a long period of time and the

landowner did not close it, then whenever — or he could not close it after it had been used for a long period of time”, a mistaken view of the law.

20. The defendant respectfully moves the Court to find that the state of mind of a person claiming a prescriptive easement is never sufficient to perfect the claim, no matter how long the use continues. Rather, there must be objective evidence of a “positive assertion of such right by plaintiff,” *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15 (1917), or “some unequivocal act of adverse right,” *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848), or “some notorious assertion of right, by an act done,” *Watt v. Trapp*, 2 Rich. (31 S.C.L.) 136, 139 (1845), sufficient to place the owner on notice that neighborly courtesy has been rejected and a claim to a legal right has begun. There is no evidence of any such conduct.

21. The defendant respectfully moves the Court to find that there is no evidence that the use of the Red Road across one another’s property by the plaintiff or his father, or by the owner of the Pedings tract, or by the owner of the Stuck tract, or by the owner of the Bruner tract, or by the owner of the McAlister tract was anything other than a mutual enjoyment of neighborly courtesy among the owners of these adjoining rural tracts.

22. The defendant respectfully moves the Court to find that It was at the instance of Mrs. McAlister in 1984 that express easements were exchanged among the owners of the Pedings tract, the Stuck tract, the 200-acre Buyck tract, and the McAlister tract, thereby substituting affirmative easements for previously permissive use.

23. The defendant respectfully moves the Court to find that there is nothing in the evidence to distinguish the character of the use of the Red Road by the plaintiff and his father from the use generally made by others in the neighborhood over the same period of time.

24. The defendant respectfully moves the Court to find that “a presumption of

a right of way by prescription [is] diminished by the fact that many, under the same circumstances, traveled the way, and that it passed over several tracts of land owned by different proprietors” *Hogg v. Gill*, 1 McMull. (26 S.C.L.) 329, 332 (1841).

25. The defendant respectfully moves the Court to find that the plaintiff failed to prove by a preponderance of clear and convincing evidence, or by any evidence, that he acquired a prescriptive easement to use the Red Road.

III. With respect to the finding that the easement is appurtenant and not in gross:

26. If the Court continues to find that a prescriptive easement exists, then the defendant respectfully moves that the Court vacate the finding that the easement is appurtenant, and instead find that the easement is in gross. Specifically, the defendant respectfully moves for the following findings:

27. The defendant respectfully moves the Court to find that the question of whether an easement is appurtenant or in gross is a mixed question of law and fact.

28. The defendant respectfully moves the Court to find that in order for an easement to be appurtenant to a tract of land, the easement must be essentially necessary to the enjoyment of the premises.

29. The defendant respectfully moves the Court to find that unless an easement is essentially necessary to the enjoyment of the premises, it will be characterized as an easement in gross.

30. The defendant respectfully moves the Court to find that the owner of the plaintiff's 700-acre tract has had access to the tract since at least the 1930s by way of the Blue Road.

31. The defendant respectfully moves the Court to find that the Blue Road is in better condition than the Red Road and is a more-convenient means of access to the plaintiff's 700-acre tract than is the Red Road.

32. The defendant respectfully moves the Court to find that the Blue Road is

in better condition than the Red Road, but that the beneficiary of an easement, not the owner of the burdened property, is obligated to maintain the easement to his or her satisfaction.

33. The defendant respectfully moves the Court to find that if a prescriptive easement is not essentially necessary to the enjoyment of the plaintiff's tract as a whole, but only is a more-convenient means of access to some part of the tract, then the easement is in gross and not appurtenant.

34. The defendant respectfully moves the Court to find that "there must be an actual necessity and not a mere inconvenience to entitle a person to [an appurtenant easement]", *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944), and that the plaintiff has failed to prove an actual necessity.

35. The defendant respectfully moves the Court to find that where "there is other access which is simply less convenient", the easement is not "necessary to the enjoyment of the [alleged] dominant estate" and is in gross. *Tupper v. Dorchester County*, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997).

36. The defendant respectfully moves the Court to find that the Red Road is not essentially necessary to access the plaintiff's 700-acre tract as a whole, or even the northern portion of the tract, and moreover that the Blue Road is a more convenient means of access to the central and southern portions of the 700-acre tract and to the tract as a whole than is the Red Road.

37. The defendant respectfully moves the Court to find that "convenience merely is no foundation of a legal right" to a prescriptive easement. *Capers v. McKee*, 1 Strob. (32 S.C.L.) 164 (1847).

38. The defendant respectfully moves the Court to find that the plaintiff's prescriptive easement over the Red Road, if the easement exists, is in gross and not appurtenant.

IV. With respect to the finding of who may use the easement, if it exists, and for what purpose:

39. The defendant respectfully moves the Court to find that the plaintiff's easement, if it exists, may be used by the plaintiff himself and by his family and friends in his company, *gratis* and not for compensation.

40. The defendant respectfully moves the Court to find that the members of the plaintiff's hunt club are mere licensees who use the plaintiff's 700-acre tract for monetary payment, and that the hunt club members have no right to use the Red Road in the right of the plaintiff.

41. The defendant respectfully moves the Court to amend the decretal portion of the Order so as to limit the plaintiff's use of his easement over the Red Road, if the easement exists, to the uses made of the Red Road during the prescriptive period, namely, hunting, fishing, birdwatching, and recreation by the plaintiff and his friends, *gratis* and not for compensation, together with farm activities and logging.

42. The defendant respectfully moves the Court to find that the defendant shall be permitted to maintain the gate now present, providing to the plaintiff a key to the gate, which key shall not be copied, and the gate being kept locked.

V. With respect to the location of the plaintiff's 1984 express easement:

43. The defendant respectfully moves the Court to alter and amend the Order in the following ways:

44. By finding that the plaintiff in his pretrial brief abandoned his claim that the express easement granted by Mrs. McAlister in 1984 covers the Red Road.

45. By deleting the conclusion on page 16 that the condition of the Blue Road is irrelevant. The condition of the Blue Road is relevant to the question of whether the plaintiff's easement over the Red Road (if he has one) is appurtenant or in gross. If the plaintiff's Red Road easement is not essentially necessary to his enjoyment of the 700-acre tract, then the easement is in gross. If the Blue Road provides adequate access,

then an easement over the Red Road is not essentially necessary.

46. By deleting the finding on page 20 that the evidence is inconclusive as to whether the plaintiff's express easement covers the Red Road or the Blue Road. The plaintiff withdrew his claim to an express easement over the Red Road in his pretrial brief. Moreover, the preponderance of the evidence, and the only reasonable conclusion from the evidence, is that the express easement applies to the Blue Road, not the Red Road.

47. By deleting the finding on page 21 that it is unnecessary to locate the express easement. The location of the express easement over the Blue Road is evidence that in 1984 the owner of the McAlister Tract and the plaintiff both believed that the plaintiff's principal means of access to his 700-acre tract was over the Blue Road, not the Red Road.

VI. With respect to specific findings and conclusions contained in the Order:

48. The defendant respectfully moves the Court to alter and amend the Order in the following ways:

49. By deleting the finding on page 3 of the Order that the Blue Road primarily provides access to the hayfield on plaintiff's 700-acre tract. The evidence shows that ingress to the 700-acre tract is obtained via the Blue Road. Once ingress to the tract is obtained, the owner of the tract can travel to any point on the 700-acre tract.

50. By deleting the finding on page 6 that the Buyck Hunt Club leases rights to the 700-acre tract. The only reasonable inference is that the members of the hunt club are licensees, not lessees.

51. By deleting the findings on pages 7, 10, 12, 13 and elsewhere that the plaintiff has authorized employees to use the Red Road. There is no evidence that the plaintiff has ever had any employees or has ever authorized any employees to use the Red Road.

52. By deleting the findings on pages 7, 10, 13 and elsewhere that the plaintiff has authorized business associates to use the Red Road. There is no evidence that the plaintiff has ever had any business associates or has ever authorized any business associates to use the Red Road.

53. By deleting the finding on page 11 that the plaintiff has “openly asserted” the right to use the Red Road. There is no evidence that the plaintiff has “openly asserted” such a right.

54. By deleting the finding on page 14 that the defendant offered no evidence of the use of the Red Road before 2000. This finding is immaterial since the defendant has no burden to produce any such evidence. The burden of proof rests exclusively upon the plaintiff to establish his claim to a prescriptive easement. The defendant has no burden to offer any such proof of prior use.

55. By deleting the finding on page 14 that the witness Brock Conrad informed the defendant before they jointly purchased the McAlister Tract that the plaintiff “had the right” to use the Red Road. Mr. Conrad testified: “it was my understanding in the law, that you could not — could not close a road that had been used for that long of a period of time.” [Tr. 185/13–16.] Mr. Conrad did not “inform the defendant” but only purported to offer his mistaken view of the law, that roads cannot be closed if they are old.

56. By deleting the finding on pages 14–15 that the defendant should have known from the notation on the preliminary plat that the plaintiff had a prescriptive easement over the Red Road. Nothing on the preliminary plat gives any evidence of a prescriptive easement in anyone's favor, but only that old neighborhood roads cross the McAlister tract, as they do every other tract in the neighborhood.

57. By deleting the findings on page 16 and elsewhere in the order that the Blue Road is an inadequate means of ingress to and egress from the 700-acre tract.

The evidence shows that the Blue Road is not only adequate but is the best means of ingress to and egress from the tract. It is immaterial that the Red Road may provide a more convenient access to a particular portion of the tract, as access to the tract as a whole is the only relevant issue.

58. By deleting the finding on page 16, note 7, that hunt club members spent a day clearing “the Blue Road”. What the Court refers to as “the Blue Road” ends at the boundary of the 700-acre tract. The hunt club members cleared one of several roads inside the 700-acre tract — the road which leads from the hayfield to the duck pond.

59. By deleting the finding on page 16, note 7, that a logging truck must have a minimum road width of between ten and eleven feet. There is no such evidence. The witness Mills testified that the standard width of one lane in the South Carolina secondary road system is eleven feet. The only evidence of the width needed by logging trucks was Mr. Mills’ testimony that he has watched “logging . . . vehicles move down trails that are amazingly narrow.” [Tr. 424.]

60. By deleting the finding on page 16 that the holding in *Tupper v. Dorchester County*, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997), is irrelevant. The holding is relevant to the point that an easement of ingress/egress is in gross, not appurtenant, if the owner of the accessed tract has other means of ingress/egress.

61. By deleting the finding on page 17 that there is no evidence that the plaintiff or his predecessor in title was given permission to traverse the McAlister tract via the Red Road to reach the 700-acre tract. It is presumed that the plaintiff’s use and that of his predecessor began with permission to cross this unenclosed woodlands tract and that such permission continued until the defendant withdrew it when the plaintiff distributed multiple keys to the gate to the hunt club members.

62. By deleting the finding on page 20, note 11, that the surveyor who

prepared the first preliminary plat for the defendant stated that the express easement applied to both the Red Road and the Blue Road. There is no such evidence.

63. By deleting the decretal matter on page 23 which allows the plaintiff to grant permission to anyone to use the Red Road. If the Court continues to find that the plaintiff possesses an easement, then the Court should limit the plaintiff's use of that easement to the plaintiff, together with family and friends in his personal company *gratis* and without compensation, for the uses made during the prescriptive period.

64. By deleting the decretal matter on page 23 which enjoins the defendant from "obstructing or otherwise interfering" with plaintiff's use of the Red Road. If the Court continues to find that the plaintiff possesses an easement, then the Order should recognize the defendant's right to maintain the security of his property. The defendant should be authorized to continue to maintain a gate across the Red Road while providing the plaintiff with a key, so as to allow the defendant to maintain the security of his property against trespassers.

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by: James B. Richardson, Jr.
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November 23, 2011.

[NOTE: Exhibits A, B, and C referenced in this motion are the three proposed Orders submitted by the defendant to the Court before the entry of judgment]

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

W. Peter Buyck, Jr.,)
Plaintiff,)
-vs-)
William Jackson,)
Defendant.)

Case No. 2008-CP-9-135

DEFENDANT'S PROPOSED ORDER NO. 1

DEFENDANT'S PROPOSED ORDER
FINDING PERMISSIVE USE
AND NO EASEMENT

By Order of October 26, 2011, this Court found that the plaintiff Buyck possessed a prescriptive easement appurtenant over the road in question. The controversy returns in the form of defendant Jackson's motion to alter or amend.

This Court found (at page 3 of the Order) that the use of the road by the plaintiff's predecessor in interest (his father) is presumed to have been adverse from the start, there being no positive evidence of whether the use was adverse or permissive when it began. The defendant asks the Court to reconsider this finding since the McAlister tract — the site of the road at issue — is and was at all pertinent times unenclosed woodland. The defendant's contention is that the use of a road over unenclosed woodland is presumed to have begun with the permission of the owner.

In his memorandum in opposition to the motion on this point, the plaintiff contends that there is no evidence that the McAlister tract was unenclosed woodland during the relevant period. The plaintiff contends, moreover, that even if the tract was of that nature, the cases relied upon by the defendant in support of a presumption of permissive use all involve claims of public easements, not private ones.

The evidence shows that the McAlister tract is unenclosed. At the points where each of the two forks of this road on the McAlister tract reach the 700-acre Buyck tract, there are gates but no fence. On the other side of the McAlister tract, there is not even

a gate separating it from the 200-acre Buyck tract. The plaintiff does not suggest that there may have been a fence at some time in the past, but now removed. There is no evidence and no reason to think that this might be the case. The evidence leaves no doubt that the McAlister tract is now, and was at the relevant times, unenclosed.

The plaintiff contends in his memorandum in opposition that there is no evidence that the 203-acre McAlister tract is woodland, but clearly it is that. There is no evidence of the presence of any structure on the tract until a cabin was built by Mr. Nickells on the southern half of the tract in the early 1990s and a house was built by the defendant on the northern half in the 2000s. The 20-year prescriptive period claimed by the plaintiff began in 1942 and matured in 1962. During that period the tract was unenclosed woodland. It continues to be unenclosed today, and remains predominantly woodland even now.

The plaintiff contends that the cases holding that the use of a road over unenclosed woodland is presumed permissive are cases involving claims to public rather than private prescriptive easements. This is incorrect. The first such case, *Lawton v. Rivers*, 2 McCord (13 S.C.L.) 445 (1823), involved a claim to a private prescriptive easement, as did *Sims v. Davis & Taggart*, Cheves (25 S.C.L.) 1 (1839), and *M'Kee v. Garrett*, 1 Bailey (17 S.C.L.) 341 (1830), among others. There is no distinction between claims to public and private easements in regard to the presumption of permissive use where the land is unenclosed woodland. The presumption is the same in both kinds of case. See, e.g., *Hutto v. Tindall*, 6 Rich. (40 S.C.L.) 396,400 (1853) ("A neighborhood road differs in its use from a private right of way in this only, that more persons pass along it."); *Tyler v. Guerry*, 251 S.C. 120, 126, 160 S.E.2d 889, 891 (1968) (road in existence for more than 50 years; "The property . . . is shown to be unenclosed and unimproved woodland and the mere use of what is referred to as the old road does not give rise to a right-of-way by prescription."); *Savannah River Lumber*

Corp. v. Bray, 189 S.C. 237, 200 S.E. 760, 761 (1939) (“The rule in this state is that a prescriptive right arises in favor of the public after continuous use of a road for 20 years when it runs through cultivated land, but that, when it passes over unenclosed woodland, it must also be shown that the use was adverse and under a claim of right, and not by the owner’s permission.”), quoting *State v. Miller, et al.*, 125 S.C. 289, 118 S.E. 624 (1923).¹ Accord: *State v. Rodman*, 86 S.C. 154, 68 S.E. 343 (1910); *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848).

The Court concludes that it was incorrect to presume that the Buyck family’s use of the road in question is presumed to have been adverse to the owner of the McAlister tract. The presumption is that the use was permissive. The presumption of permissive use is strengthened by the fact that the road in question was in existence long before Mr. Buyck’s father acquired the 700-acre tract to which the road leads.² Mr. Buyck’s father began using a road which others before him had used for an unknown length of time, with no suggestion by the plaintiff that anyone earlier had thereby acquired a prescriptive right.

Where no presumption of adverse use under claim of right aids the plaintiff in his claim, the cases require proof of “some unequivocal act of adverse right” *State v. Sartor*, 2 Strob. (33 S.C.L.) 60, 66 (1848). There must be evidence of “a distinct and positive assertion of a right hostile to the owner, and brought home to him,” *Williamson v. Abbott*, 107 S.C. 400, 401, 93 S.E. 15 (1917).

¹ *Savannah River Lumber* was a case involving a claim to a prescriptive easement in favor of the public. An even higher degree of proof is needed to prove a private easement than a public one. *Slater v. Price*, 96 S.C. 245, 80 S.E. 372 (1913) (“[T]here is a difference between the quantum of proof necessary to establish a public and a private right of way; the former requiring less proof than the latter.” (Hydrick and Fraser, JJ., dissenting, citing *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848))).

² The road and its two forks on the McAlister tract are seen in aerial photographs from the 1930s [Tr. 409/18 – 410/1] and may well be much older, but there is no evidence of their origin.

To give a right-of-way through woodland, there must be some notorious assertion of right, by an act done, which would be equal to a *pedis possessio*

Watt v. Trapp, 2 Rich. (31 S.C.L.) 136, 139 (1845).³

In *Nash v. Peden*, 1 Speers (28 S.C.L.) 17, 22–23 (1842), the court rejected a contention that clearing fallen trees and the like from the right-of-way was the kind of unequivocal proof of adverse use under claim of right which would rebut the presumption of permissive use:

[N]o prescriptive way can be established otherwise than by an adverse use of it for twenty years; and where the way passes through forest land, the mere use, unaccompanied by any acts indicating that the party claims the use as a right, cannot give a right of way.

* * * * *

Removing fallen trees or changing the route are not such [acts] as establish a use hostile to the right of the owner of the soil. They are perfectly consistent with the supposition that the use was permissive, as all these roads through wood land are presumed to be, until some evidence is offered to give them a different character

In accord is the case of *Gibson v. Durham*, 3 Rich. (37 S.C.L.) 85, 87 (1846), where the court held that the claimant's removal of saplings from the right-of-way was "wholly insufficient to establish adverse use. . . . [H]e who claims an easement on another's land, must establish it clearly"

Public maintenance of a right-of-way is a factor pointing to adverse use, either by the public or by a private user benefitted by the maintenance. *County of Darlington v. Perkins*, 269 S.C. 572, 239 S.E.2d 69 (1977); *Cleland v. Westvaco*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993). There is no evidence here of public maintenance.

Unaided by any presumption of adverse user under claim of right, it was

³ *Pedis possessio*: "Lat. A foothold; an actual possession. . . ." BLACK'S LAW DICTIONARY 1289 (4th ed. 1951), citing *Bailey v. Irby*, 2 Nott & McCord (10 S.C.L.) 343 (1820).

incumbent upon the plaintiff to prove by clear and convincing evidence “some unequivocal act of adverse right . . . ,” *State v. Sartor, supra*, or “some notorious assertion of right, by an act done,” *Watt v. Trapp, supra*. It was the plaintiff’s heavy burden to demonstrate that his and his father’s use of this right-of-way over their neighbor’s property was not a typical instance of neighborly courtesy in rural South Carolina but was intended to gain a property right in the land of their neighbor. The Court finds no such evidence.

In pertinent part, Mr. Buyck testified as follows about his use of the road in question, the same use as that of his father:

Mr. Buyck was born in 1946. [Tr. 27/5.] All his life he has used what he describes as the “red road” from Fort Motte Road (S-9-25) to reach the 700-acre Buyck tract. The road crosses five tracts — the 21-acre Pedings tract, the 15-acre Stuck tract, the 200-acre Buyck tract, the 203-acre McAlister tract, the Bruner tract, and the McAlister tract again — in order to reach the 700-acre Buyck tract. The road then continues across the 700-acre tract to the duck pond and finally the Congaree River.

From the age of 6 or 7 Mr. Buyck would accompany “some of the people who worked on our place” as they went fishing in the river. Mr. Buyck’s father, Peter Sr., used the 700-acre tract for “hunting, farming, logging, general recreation. Same things I would use it for, I guess.” To this list of uses Mr. Buyck added watching the wildlife.

Mr. Buyck and his father and uncle were not the only ones who used the road to reach the 700-acre tract. It was also used by the group which leased deer-hunting rights on the 700-acre tract and Mr. Buyck’s “friends that hunt with me.” Occasionally he would authorize someone else to “go fishing and I’ll allow them to go in and go right back out.” Occasionally Mr. Buyck would bring “a lot of friends” for fishing and a cookout on the tract. “[A]ll kind of vehicles would go over the road.”

Neither the owner of the McAlister tract nor anyone else ever told either Mr.

Buyck or, so far as he knew, his father that they could not use the road at issue. Mr. Buyck testified that he thinks he has a right to use the road because he has always used it without complaint, and "it's the only road that everybody's ever used to go in and out of there; the loggers and everything else." He testified that he believes he needs no permission to use the road from Fort Motte Road to the 700-acre tract, including the road in question. No one has ever challenged his right or that of his father to use it.

The road in question leaves the McAlister tract at one point and crosses the Bruner tract before returning to the McAlister tract and thence to the 700-acre tract. Mr. Buyck testified that the owner of the Bruner tract has never complained of his or his father's use of the road or prohibited it. He has never abandoned the road or stopped using it. Mr. Buyck testified that the Buyck Hunt Club leases the 700-acre tract from him for deer-hunting, as they did from his father. Mr. Buyck testified that his timber contractor used the Right Fork Road in connection with timber operations on the 700-acre tract in about 2002, without objection from Mr. Jackson.⁴

There is ample evidence that Mr. Buyck believed that he had a legal right to use the road. Others in the neighborhood believed the same thing. For example, Mr. Nickells, who owned the McAlister tract from 1989 until 1996, thought that the road across his tract had long-since become a road which not only Mr. Buyck but anyone could travel. Mr. Nickells testified that Mr. Buyck accessed his 700-tract by using the Right Fork Road, "like everybody else."⁵ "Everybody else" included the Buyck Hunt Club, the Brunerdale Hunt Club, the electric cooperative, friends of the witness, and

⁴ Similarly, Mr. Buyck had no objection to Mrs. McAlister's timber contractor using the Red Road over his 200-acre tract annually. It was not his idea but hers which led to the grant of an express easement to him over the Hayfield Road, as the entire easement exchange was Mrs. McAlister's idea.

⁵ Cf. *Price v. Wilbourn*, 1 Rich. (30 S.C.L.) 58, 60 (1844) ("[E]very body used [the road]; such a use may establish a right in the public, but is not the characteristic of a private way.").

friends of Peter Buyck, Jr. Mr. Nickells testified that during the six years that he owned the McAlister tract, Mr. Buyck used both forks of the road to get to and from the 700-acre tract. [Tr. 142/20 – 143/24.] When he bought the McAlister tract, Mr. Nickells assumed that Mr. Buyck had the right to use all the roads. Mr. Nickells never objected to Mr. Buyck or anyone else using any road on the McAlister tract because he was a good neighbor. [Tr. 144/26 – 145/9.] “[Y]ou know, everybody used that road. It’s been there for a long, long time.” [Tr. 133/24–26.] Mr. Nickells believed that he could not stop Mr. Buyck if he wanted to by law, “because the road’s been open for over 20 years I’ve already heard that law before.” [Tr. 146/2–4.] Testimony to the same effect was offered by Mr. Conrad, who testified that he “had just always heard that if a road was open for a long period of time and the landowner did not close it, then whenever — or he could not close it after it had been used for a long period of time.”⁶ [Tr. 200/22–25.]

In this testimony of the plaintiff, there is nothing to overcome the presumption that during the prescriptive period and for decades thereafter, neither Mr. Buyck nor his father before him did anything to manifest an adverse user of the road in question under claim of right. This evidence is entirely consistent with a permissive user, and includes no evidence that hostile use under claim of right was ever brought home to the owner of the McAlister tract by word or deed. The claimant to a prescriptive right-of-way must certainly believe that he has a right of use, or must intend that his use be in disregard of the rights of the landowner.⁷ The claimant’s state of mind,

⁶ These witnesses were simply mistaken about the law of old roads. Permissive use of a right of way, no matter how long continued, never results in a prescriptive right.

⁷ *Hartley v. John Wesley United Methodist Church*, 355 S.C. 145, 584 S.E.2d 386 (Ct. App. 2003) (“[O]ur courts have held in order for a party to earn a prescriptive easement under claim of right he must demonstrate a substantial belief that he had the right to **use** the parcel or road based upon the totality of circumstances surrounding his use.”).

however, is never sufficient to perfect the claim.⁸ There must be either a “positive assertion of such right by plaintiff,” *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15 (1917), or “some unequivocal act of adverse right,” *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848), or “some notorious assertion of right, by an act done,” *Watt v. Trapp*, 2 Rich. (31 S.C.L.) 136, 139 (1845), sufficient to place the owner on notice that a use which began in neighborly courtesy has ended and a claim to a legal right has begun. There is no such evidence here. In the plaintiff’s evidence there is nothing to show that the plaintiff’s use of this road, like the use made of this road by many others, was not by permission of the owner.

Although the absence of this essential evidence is dispositive, other features of the history of usage of this right-of-way point to the same conclusion. The owners of the Pedings and Stuck tracts crossed one another’s property with each use of the portion of the road across their tracts, since it bisected their parcels. The owner of the 200-acre Buyck tract had to cross the Pedings and Stuck parcels. The owner of the McAlister tract had to cross the Pedings and Stuck parcels and the 200-acre Buyck tract. The owner of the 700-acre Buyck tract had to cross the Pedings and Stuck parcels, and (after crossing his own 200-acre tract), the McAlister tract and the Bruner tract (if using the right fork of the road). There is no suggestion (apart from the controversy at issue in this case) that the use of any of these rights-of-way across one another’s property was anything other than “an enjoyment of neighborly courtesy,” M. Dwyer, *Real Property: Prescriptive easements of way: Presumption as to adverse*

⁸ See, e.g., *Morrow v. Dyckes*, 328 S.C. 522, 528, 492 S.E.2d 420, 424 (Ct. App. 1997), where the Court held that testimony that the present owner of the putative dominant estate thought that the previous owner had a right-of-way was insufficient to show that the previous owner ever *claimed* a prescriptive right-of-way. “[E]vidence establishing the mere fact of use does not necessarily equate with evidence showing the character of such use.” See: *Beckstead v. Price*, 146 Idaho 57, 190 P.3d 876, 881 (2008) (“The state of mind of the users of the alleged easement is not controlling; the focus is on the nature of their use.”).

character of user of way over unenclosed urban land, 19 CORNELL L.Q. 337, 339 (1934).

Also significant is the fact that, in the words of the witness Nickells, everybody used the road in question. The only way that the segment of the road on the McAlister tract could be reached was by traveling from Fort Motte Road across the Pedings and Stuck tracts, and the 200-acre Buyck tract. It is inconceivable that all the traffic in the neighborhood was by persons claiming a prescriptive right over these four tracts, and yet there is nothing in the evidence to distinguish the character of Mr. Buyck's use from that of anyone else. See: *Hogg v. Gill*, 1 McMull. (26 S.C.L.) 329, 332 (1841) ("[A] presumption of a right of way by prescription was diminished by the fact that many, under the same circumstances, traveled the way, and that it passed over several tracts of land owned by different proprietors . . .").

For these reasons, the plaintiff's claim to a prescriptive easement must be denied. The Order of October 16, 2011 is vacated and the motion to alter or amend is granted.

Nonetheless, the defendant Jackson has never objected to use of the Right Fork Road by Mr. Buyck personally, together with family and friends in his personal company *gratis* and not for compensation, for hunting, farming, logging, general recreation, and watching the wildlife, or substantially similar purposes.⁹ This feature of the case will be made the order of this Court. Of course Mr. Buyck and subsequent owners of the 700-acre tract will continue to have full use of the left fork road by virtue of the 1984 express easement.

IT IS ORDERED, ADJUDGED, AND DECREED:

(1) Plaintiff's claim to a prescriptive easement over the Right Fork Road is

⁹ The defendant only denied the use of the road to Mr. Buyck after eight years of defendant's ownership, when Mr. Buyck continued to make and distribute multiple copies of his key to the gate at the fork.

denied; and

(2) Plaintiff, Peter Buyck, Jr., together with family and friends in plaintiff's personal company *gratis* and not for compensation, shall have the right to use the Right Fork Road for ingress to and egress from the 700-acre tract with the permission of the defendant and any subsequent owner of the Jackson tract, which permission shall not be unreasonably denied, for hunting, farming, logging, general recreation, and watching the wildlife, or substantially similar purposes; and

(3) Defendant shall provide to plaintiff a key to the gate on the Right Fork Road, which key shall not be copied, and the gate being kept locked; and

(4) A memorandum of this Order shall be recorded in the chain of title to the defendant's tract.

IT IS SO ORDERED.

Diane Schafer Goodstein
Resident Judge, First Judicial Circuit

St. George, South Carolina

_____, 2012.

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

W. Peter Buyck, Jr.,)
Plaintiff,)
-vs-)
William Jackson,)
Defendant.)

Case No. 2008-CP-9-135

DEFENDANT'S PROPOSED ORDER NO. 2

DEFENDANT'S PROPOSED ORDER
FINDING EASEMENT IN GROSS

By Order of October 26, 2011, this Court found that the plaintiff Buyck possessed a prescriptive easement appurtenant over the road in question. The controversy returns in the form of defendant Jackson's motion to alter or amend.

I. Easement appurtenant or easement in gross.

This Court found that the plaintiff's prescriptive easement is appurtenant, not in gross. The defendant moves the Court to reconsider that finding. The motion is based upon the defendant's contention that the road at issue is not essentially necessary to the use and enjoyment of the 700-acre tract to which it leads. Absent such essential necessity, an easement is in gross, not appurtenant. Among the many cases so holding are *Windham v. Riddle*, 381 S.C. 192, 201-02, 672 S.E.2d 578, 583 (2009); *Shia v. Pendergrass*, 222 S.C. 342, 72 S.E.2d 699 (1952); *Kershaw v. Burns*, 91 S.C. 129, 74 S.E. 378 (1912); *Whaley v. Stevens*, 21 S.C. 221 (1883); and *Keane/Sherratt Partnership v. Hodge*, 292 S.C. 459, 357 S.E.2d 193 (Ct. App. 1987).

At a point near the middle of the McAlister tract, the dirt road which starts at Fort Motte Road forks left and right. The right fork is the branch over which the plaintiff has established his prescriptive easement. Since the plaintiff can access his 700-acre tract on the left fork as well as the right fork, the defendant contends that the use of the right fork is not essentially necessary to the enjoyment of the tract. Hence, the defendant

contends that the plaintiff's easement is in gross, not appurtenant.

The distinction between the two kinds of easement has been stated many times. Recently in *Windham v. Riddle*, 381 S.C. 192, 201–02, 672 S.E.2d 578, 583 (2009), our Supreme Court reiterated:

An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965). In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. *Id.*; *Smith v. Commissioners*, 312 S.C. 460, 441 S.E.2d 331 (Ct. App.1994); *Carolina Land Company, Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975); *Sandy Island Corp. v. Ragsdale*, [246 S.C. 414, 143 S.E.2d 803 (1965)]; 12 S.C. JURIS. *Easements* § 3. It also passes with the dominant estate upon conveyance. *Carolina Land Co., Inc. v. Bland*, *supra*. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. 12 S.C. JURIS. *Easements* § 3(c).

The requirement that an easement be “essentially necessary to the enjoyment” of the dominant estate in order to be appurtenant has long been the case.

The plaintiff's right to access the 700-acre tract via the *left* fork bears upon whether the plaintiff's easement over the *right* fork is appurtenant or in gross.¹ In opposing the defendant's motion, the plaintiff does not deny that he has a right-of-way over the left fork of the road. It is apparent that he does. The plaintiff has either a prescriptive easement over the left fork, or an express easement, or both.

The same evidence by which the plaintiff proved his acquisition of a prescriptive easement over the right fork applies with equal force to the left fork. The only historical

¹ The plaintiff alleged in his complaint that the 1984 express easement which he received from Mrs. McAlister covered the right fork, not the left fork. This claim was abandoned in plaintiff's pretrial brief, in which the plaintiff limited his claim to a prescriptive easement over the right fork road. See plaintiff's pretrial brief and his opening statement, Tr. 11. Nonetheless, the situs of the 1984 express easement is pertinent to the nature of the plaintiff's prescriptive easement over the right fork — appurtenant or in gross.

difference between the use made of these two forks by the plaintiff's father and himself is in the frequency of use. If the plaintiff has a prescriptive easement over the right fork, it follows that he has the same right in the left fork.

In the Order of October 16, 2011, the Court found that it was unnecessary to determine the location of the express easement granted to the plaintiff by Mrs. McAlister in 1984. However, it now becomes necessary to determine the situs of the express easement. This is because, if the express easement is over the left fork, giving the plaintiff another means of access to the tract, his prescriptive easement over the right fork may be in gross rather than appurtenant.

In 1984, Mr. Buyck agreed with the owners of the McAlister tract, the Pedings tract, and the Stuck tract to exchange mutual easements for the use of the dirt road from where it begins at Fort Motte Road to the boundary between the McAlister tract and the 700-acre Buyck tract. If the easement granted by Mrs. McAlister covered the right fork, which left her tract and passed over the Bruner tract, this would require "the court to conclude that [Mrs. McAlister] gave an easement over property she did not own." *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985). Mrs. McAlister did not purport to do this. She described the road over which she was granting an easement as running "across the land of the grantor".²

The only expert testimony was to the effect that the left fork road, not the right fork road, is the western-most segment of the express easement granted by McAlister to Buyck. [Tr. 381–82.]

Mr. Buyck's 1984 express easement applies to the left fork of the road (also described as the Blue Road or the Hayfield Road).

² If the easement covered the right fork instead of the left, a proper description might have been: "across the land of the grantor to [the Bruner tract], thence resuming at the western boundary of [the Bruner tract] and continuing across the land of the grantor."

The plaintiff nonetheless contends that his prescriptive easement over the right fork road is essentially necessary to his enjoyment of the 700-acre tract, principally for two reasons. First, the left fork does not give as convenient a means of access to the part of the 700-acre tract nearest the river as does the right fork. Second, the plaintiff contends that the right fork is in better condition than the left fork.

The right fork road does provide a more direct and convenient means of access to the portion of the 700-acre tract nearest the Congaree River. To reach that portion of the tract using the left fork, it is necessary to drive what the parties labeled as "Road 3" from where the left fork reaches the 700-acre tract to the area of the duck pond. At that point Road 3 ties into the Duck Pond Road. The plaintiff's witnesses described Road 3 as more trail than road, but witness Mills drove it shortly before trial without difficulty using two-wheel drive in his pickup truck. A videotape of Mr. Mills' drive confirms that Road 3 is navigable by pickup truck. Mr. Mills testified that it takes about five minutes to drive to the area of the duck pond using the right fork and thence the Duck Pond Road, and about eight minutes using the left fork and thence Road 3, a difference of three minutes.

The plaintiff further contends that the left fork is in such poor condition that it does not provide an adequate means of reaching the 700-acre tract. The plaintiff states that the left fork is impassible by anything but all-terrain vehicles, but photographs and videotapes in evidence do not support this contention. The evidence shows that cars, trucks, tractors and other farm equipment used the left fork throughout the pendency of this action. One vehicle was shown towing a boat to the 700-acre tract. The plaintiff contends that the left fork was only made passable in July 2010 by a day's work in clearing the way by the members of the Buyck Hunt Club. This is incorrect. The hunt club members did not clear the left fork on the McAlister tract, which needed no clearing. They cleared Road 3 — the trail which leads from the

hayfield to the duck pond. [Tr. 99.] Road 3 is of relatively recent origin, having been built in the late 1970s or early 1980s.

In any event, the condition of the left fork road is the responsibility of the plaintiff, not the defendant. "In general, the beneficiary of the easement, not the owner of the burdened property, is obligated to maintain the easement." *Khalil v. Motwani*, 376 N.J.Super. 496, 506, 871 A.2d 96, 102 (2005), *citing* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.13(2) (2000); *DeHaven v. Hall*, 753 N.W.2d 429, 437 (S.D. 2008) ("The owner of a servient estate has no duty to maintain the easement. The duty of maintaining the easement rests with the easement owner (*i.e.*, dominant estate)").

While the right fork road is a more convenient means of access to the northern portion of this large rural tract, it is not essentially necessary to access the tract as a whole, or even the northern portion. The left fork is actually a more convenient means of access to the central and southern portions of the tract than is the right fork. In any event, "convenience merely is no foundation of a legal right." *Capers v. McKee*, 1 Strob. (32 S.C.L.) 164 (1847).

In the case of *Ballington v. Paxton*, 327 S.C. 372, 488 S.E.2d 882 (Ct. App. 1997), the Court held:

In this case, the evidence at trial established that, while perhaps not as convenient as the route across Paxton's property, there are other means of access to the pond. Therefore, because the easement is not necessary for the use of the dominant estate, the easement must be characterized as an easement in gross rather than an appurtenant easement.

Id. at 380, 488 S.E.2d 887 (footnote omitted). To like effect is the case of *Tupper v. Dorchester County*, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997) ("[T]here is other access which is simply less convenient. Accordingly, the trial court erred in finding that the easement was 'necessary to the enjoyment of the dominant estate.'"). *Accord*:

Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944) (“[T]here must be an actual necessity and not a mere inconvenience to entitle a person to [an appurtenant easement].”); *Fisher v. Fair*, 34 S.C. 203, 13 S.E. 470 (1891) (easement was in gross where easement holder had other means of access to his property).

Because the plaintiff’s easement over the right fork road is not essentially necessary to the enjoyment of the 700-acre tract, the plaintiff’s easement is in gross, not appurtenant.

The Order of October 16, 2011 is amended so as to find that the plaintiff’s prescriptive easement over the right fork road is an easement in gross, not appurtenant.

II. Who may use the easement in gross, and for what purposes.

In the Order of October 16, 2011, the Court declared that the plaintiff may authorize anyone to use his prescriptive easement, without limitation. Upon reconsideration, the Court amends the Order so as to limit the identity of those who may use the road in the right of the plaintiff, and for what purposes, as follows:

The nature and extent of the use of the easement during the prescriptive period determine the character of the use thereby acquired. The plaintiff’s prescriptive easement was used during the prescriptive period and thereafter not only by the plaintiff himself but by his family and friends in his company.

The members of the hunt club are not parties to this action and do not seek a prescriptive easement over the Right Fork Road in their own right. Rather, the plaintiff seeks the right to license these third parties to use the road as part of the commercial arrangement between him and their club.

The hunt club pays the plaintiff an annual fee to hunt deer on the 700-acre tract. The hunt club members are commercial licensees.³ Although the plaintiff refers to the

³ The plaintiff does not contend that his easement is commercial in nature. In Section 12 of the annotation entitled “Scope of prescriptive easement for access (right (continued...))

arrangement as a hunting lease, which is the name commonly given it in South Carolina as elsewhere, the arrangement is not a lease. *David Lee Boykin Family Trust v. Boykin*, 661 So.2d 245 (Ala. Civ. App. 1995). A lease grants possession of the estate to the lessee. The hunt club does not have possession of the tract. Rather, a valid hunting lease grants a profit *à prendre*, "giving the holder the right to take the product of the land of another." *Ex parte Bedingfield*, 283 S.C. 561, 562, 324 S.E.2d 312 (1984). A valid profit *à prendre* is an estate in land, and therefore comes within the statute of frauds. *Palachucola Club v. Withington*, 159 S.C. 446, 157 S.E. 621 (1931). If not in writing, no profit is created. Instead, the holders of an oral hunting lease are mere licensees. H. HOVENKAMP & S. KURTZ, *THE LAW OF PROPERTY* § 10.1.4 p. 328 (5th ed. 2001) ("An attempt to create a . . . profit which fails because the deed of conveyance is defective will result in a license."). "A license does not vest in the licensee any estate or interest in the land. . . . It conveys only the temporary privilege of being on the land for some agreed purpose." *Hilton Head Air Service, Inc. v. Beaufort County*, 308 S.C. 450, 457, 418 S.E.2d 849, 853 (Ct. App. 1992). *Accord*: 1 THOMPSON ON REAL PROPERTY § 282, p. 362 (1st ed. 1924); JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 1:4 (2011). There is no evidence that the arrangement between Mr. Buyck and the Buyck Hunt Club or its members is in writing or ever has been. Its members are licensees when they hunt the 700-acre tract.

In *Stone v. Brickey*, 70 S.W.3d 82, 88 (Tenn. App. 2001), the plaintiff appealed a trial court order limiting the use of a prescriptive appurtenant easement to himself and his tenants, and refusing to allow the plaintiff to authorize licensee-hunters to use the easement. The court affirmed, stating:

³(...continued)
of way)," 79 A.L.R.4th 604, 632, seven cases are cited which hold that the scope of a prescriptive easement acquired to reach a dominant tenement used for agricultural purposes is insufficient in scope to allow its use for a commercial enterprise. No cases are cited to the contrary.

[T]he right to use an easement is normally confined to the easement holder and his privies. [Plaintiff's] argument is without merit.

See also: *Council v. Sanderlin*, 183 N.C. 253, 111 S.E. 365, 368 (1922), where the plaintiffs reserved hunting privileges on land they conveyed, and were held to be "without the right to extend such privilege to others."

The holder of an appurtenant easement lacks the authority to permit an unlimited number of third-party licensees to use his prescriptive right-of-way in consideration of a fee. The plaintiff's right to use this prescriptive right-of-way does not extend to the members of the hunt club. The hunt club members are limited to the use of the left fork road (the Hayfield Road).⁴

"An easement is a right which one person has to use the land of another for a *specific purpose*," *Steele v. Williams*, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944) (emphasis added). The use of the plaintiff's prescriptive easement is limited to the character of the use made during the prescriptive period. This character includes the purposes for which the use was made as well as the identity of the persons who shared that use with the plaintiff. These included the plaintiff's family and friends in his personal company, *gratis* and not for compensation.⁵ Accordingly, the Order of October 16, 2011 is amended to so limit the persons who may use the easement in the

⁴ The evidence is that the hunt club members in the past have used both the left fork road and the right fork road, depending upon where they wished to hunt. [Tr. 333/22 – 334/25; Tr. 337/6–1; Tr. 340/6–16.] The plaintiff can of course continue to authorize the hunt club members to reach the tract by way of the left fork road under the terms of his express easement over that road.

⁵ See *Ballington v. Paxton*, 327 S.C. 372, 378, 488 S.E.2d 882, 885 (Ct. App. 1997), where the order under appeal provided that, "so long as [a holder of the right-of-way] is present, any of his or her family members, or non-family members, shall be permitted to use the easement" Cf. *Levinson v. Costello*, 74 N.J. Super. 539, 181 A.2d 791 (1962) (appurtenant right-of-way granted to property owner was broad enough to allow use by guest of property owner invited for specific occasion in the personal company of the easement holder). See also: *Gowen v. Cote*, 875 S.W.2d 637 (Mo. App. 1994).

right of the plaintiff to include the plaintiff, together with the plaintiff's family and friends in his personal company, *gratis* and not for compensation.

The use made of the dominant estate during the prescriptive period similarly defines the use which can be made of the easement over the servient tenement. During the prescriptive period the dominant tenement was used for hunting, farming, logging, and general recreation. [Tr. 41/16–17.] To this list of uses the plaintiff added watching the wildlife. [*Id.* & Tr. 59/6–12 & Tr. 77/20 – 78/14.]

Accordingly, the Order of October 16, 2011 is amended so as to provide that the easement may be used by the plaintiff, together with family and friends in his personal company, *gratis* and not for compensation, in order to access the dominant tenement for hunting, farming, logging, general recreation, and watching the wildlife, or substantially similar purposes.

III. The location and width of the easement in gross.

In the Order of October 16, 2011, the Court found that the location of the prescriptive easement is adequately depicted on a plat in evidence.

Since the road is sketched on various plats, to avoid future controversy the location of the road should be fixed more-precisely at this time.

In the event that the parties are not in accord with the location of the road as shown on the Walker plat, Plaintiff's Exhibit No. 8, the parties jointly shall appoint another surveyor to locate the road. Failing agreement, the Court will appoint a surveyor. Either the Walker plat (if agreed) or the new plat shall determine the road's location, and shall be filed in the Judgment Roll as a part of the judgment entered herein. A party objecting to the result of a new survey may request a further hearing.

In like manner, to avoid future controversy, the width of the road should be determined at this time.

The width of a prescriptive easement is determined by the usage which led to the

acquisition of the easement. JAMES W. ELY, JR. & JON W. BRUCE, THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:22 (2011) (“The location and dimensions of an easement created by prescription are fixed by the actual use of the servient estate during the prescriptive period.”); *Keidel v. Rask*, 290 N.W.2d 255 (N.D. 1980) (width determined from extent of actual use of the property for roadway purposes over the prescriptive period); *Hash v. Sofinowski*, 37 Pa.Sup. 451, 487 A.2d 32 (1985) (width of prescriptive easement limited to width of vehicles used to establish the easement). See: *Burrell v. Kirkland*, 242 S.C. 201, 207, 130 S.E.2d 470, 473 (1963) (“If the adverse use on which the prescriptive claim to a way is based was for one particular purpose only, as in the case of a way used by foot passage only, or for the carriage of timber only, this is not sufficient to support a claim to a right of way for all purposes.”), and cases cited. See: *Capers v. McKee*, 1 Strob. (32 S.C.L.) 164, 168 (1847) (“[T]he use of a road five feet wide, or a foot–path, would not authorize or support a claim to a wagon or cart–way, ten feet wide. . . . [S]o strictly is this right limited to the use”).⁶

All manner of vehicles have used the Right Fork Road to reach the 700–acre tract. There is no evidence of the width of a woodlands right–of–way needed by any of them. Logging equipment appears to be the heaviest to use the Right Fork Road. Mr. Mills testified that logging equipment can travel on a road as narrow as ten or eleven feet.⁷ [Tr. 401/3–4.]

A functional way to determine the easement’s width is at hand in the evidence. There is a gate on the 700–acre Buyck tract at the point where the Right Fork Road

⁶ In the somewhat similar situation where an express grant of a right–of–way fails to specify the width, strong consideration is given “to what is reasonable, convenient and necessary to accomplish the purpose for which the right–of–way was created.” *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985), and authorities cited.

⁷ The standard width of one lane of paved highway in South Carolina is eleven feet. [Tr. 401/6–7.]

reaches the tract, allowing vehicles to enter and leave the 700-acre tract. The width of this gate is the best measure of the maximum width of the traffic which historically has used this road to access the 700-acre tract. Accordingly, the Court finds that the width of this gate is the width of the prescriptive easement acquired in the use of that road. The parties shall stipulate the width of the gate referred to in this Order. Their Stipulation shall be filed in the Judgment Roll as a part of the judgment entered herein.

IT IS ORDERED, ADJUDGED, AND DECREED:

The defendant's motion to alter or amend is granted in the foregoing respects, with the following result:

- (1) Plaintiff holds an easement in gross over the Right Fork Road; and
- (2) Plaintiff, Peter Buyck, Jr., together with family and friends in plaintiff's personal company *gratis* and not for compensation, shall have the right to use the Right Fork Road for ingress to and egress from the 700-acre tract in order to access the dominant tenement for hunting, farming, logging, general recreation, and watching the wildlife, or substantially similar purposes; and
- (3) The parties shall stipulate the width of the gate referred to in this Order. Their Stipulation shall be filed in the Judgment Roll of this action and shall be part of the judgment entered herein; and
- (4) If the parties agree with the location of the Right Fork Road as shown on the Walker plat, Plaintiff's Exhibit No. 8, a copy shall be filed in the Judgment Roll of this action and shall be part of the judgment entered herein. If the parties do not agree with the Walker plat, the parties jointly shall appoint another surveyor to locate the road. Failing agreement, the Court will appoint a surveyor. The resulting plat shall determine the road's location and a copy shall be filed in the Judgment Roll of this action and shall be part of the judgment entered herein. A party objecting to the result may request a further hearing; and

(5) Defendant shall provide to plaintiff a key to the gate on the Right Fork Road, which key shall not be copied, and the gate being kept locked; and

(6) A memorandum of this Order shall be recorded in the chain of title to the defendant's tract; and

(7) The Order of October 16, 2012 is amended so as to delete or modify any findings and conclusions in that Order inconsistent with this Order.

IT IS SO ORDERED.

Diane Schafer Goodstein
Resident Judge, First Judicial Circuit

St. George, South Carolina

_____, 2012.

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

W. Peter Buyck, Jr.,)
Plaintiff,)
-vs-)
William Jackson,)
Defendant.)

Case No. 2008-CP-9-135

DEFENDANT'S PROPOSED ORDER NO. 3

DEFENDANT'S PROPOSED ORDER
GRANTING THE MOTION TO AMEND
IN SEVERAL RESPECTS

By Order of October 26, 2011, this Court found that the plaintiff Buyck possessed a prescriptive easement appurtenant over the road in question. The controversy returns in the form of defendant Jackson's motion to alter or amend.

I. Who may use the easement, and for what purposes.

In the Order of October 16, 2011, the Court declared that the plaintiff may authorize anyone to use his prescriptive easement, without limitation. Upon reconsideration, the Court amends the Order so as to limit the identity of those who may use the road in the right of the plaintiff, and for what purposes, as follows:

The nature and extent of the use of the easement during the prescriptive period determine the character of the use thereby acquired. The plaintiff's prescriptive easement was used during the prescriptive period and thereafter not only by the plaintiff himself but by his family and friends in his company.

The members of the hunt club are not parties to this action and do not seek a prescriptive easement over the Right Fork Road in their own right. Rather, the plaintiff seeks the right to license these third parties to use the road as part of the commercial arrangement between him and their club.

The hunt club pays the plaintiff an annual fee to hunt deer on the 700-acre tract.

The hunt club members are commercial licensees.¹ Although the plaintiff refers to the arrangement as a hunting lease, which is the name commonly given it in South Carolina as elsewhere, the arrangement is not a lease. *David Lee Boykin Family Trust v. Boykin*, 661 So.2d 245 (Ala. Civ. App. 1995). A lease grants possession of the estate to the lessee. The hunt club does not have possession of the tract. Rather, a valid hunting lease grants a profit *à prendre*, “giving the holder the right to take the product of the land of another.” *Ex parte Bedingfield*, 283 S.C. 561, 562, 324 S.E.2d 312 (1984). A valid profit *à prendre* is an estate in land, and therefore comes within the statute of frauds. *Palachucola Club v. Withington*, 159 S.C. 446, 157 S.E. 621 (1931). If not in writing, no profit is created. Instead, the holders of an oral hunting lease are mere licensees. H. HOVENKAMP & S. KURTZ, *THE LAW OF PROPERTY* § 10.1.4 p. 328 (5th ed. 2001) (“An attempt to create a . . . profit which fails because the deed of conveyance is defective will result in a license.”). “A license does not vest in the licensee any estate or interest in the land. . . . It conveys only the temporary privilege of being on the land for some agreed purpose.” *Hilton Head Air Service, Inc. v. Beaufort County*, 308 S.C. 450, 457, 418 S.E.2d 849, 853 (Ct. App. 1992). *Accord*: 1 THOMPSON ON REAL PROPERTY § 282, p. 362 (1st ed. 1924); JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 1:4 (2011). There is no evidence that the arrangement between Mr. Buyck and the Buyck Hunt Club or its members is in writing or ever has been. Its members are licensees when they hunt the 700-acre tract.

In *Stone v. Brickey*, 70 S.W.3d 82, 88 (Tenn. App. 2001), the plaintiff appealed a trial court order limiting the use of a prescriptive appurtenant easement to himself and

¹ The plaintiff does not contend that his easement is commercial in nature. In Section 12 of the annotation entitled “Scope of prescriptive easement for access (right of way),” 79 A.L.R.4th 604, 632, seven cases are cited which hold that the scope of a prescriptive easement acquired to reach a dominant tenement used for agricultural purposes is insufficient in scope to allow its use for a commercial enterprise. No cases are cited to the contrary.

his tenants, and refusing to allow the plaintiff to authorize licensee-hunters to use the easement. The court affirmed, stating:

[T]he right to use an easement is normally confined to the easement holder and his privies. [Plaintiff's] argument is without merit.

See also: *Council v. Sanderlin*, 183 N.C. 253, 111 S.E. 365, 368 (1922), where the plaintiffs reserved hunting privileges on land they conveyed, and were held to be "without the right to extend such privilege to others."

The holder of an appurtenant easement lacks the authority to permit an unlimited number of third-party licensees to use his prescriptive right-of-way in consideration of a fee. The plaintiff's right to use this prescriptive right-of-way does not extend to the members of the hunt club. The hunt club members are limited to the use of the left fork road (the Hayfield Road).²

"An easement is a right which one person has to use the land of another for a *specific purpose*," *Steele v. Williams*, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944) (emphasis added). The use of the plaintiff's prescriptive easement is limited to the character of the use made during the prescriptive period. This character includes the purposes for which the use was made as well as the identity of the persons who shared that use with the plaintiff. These included the plaintiff's family and friends in his personal company, *gratis* and not for compensation.³ Accordingly, the Order of

² The evidence is that the hunt club members in the past have used both the left fork road and the right fork road, depending upon where they wished to hunt. [Tr. 333/22 – 334/25; Tr. 337/6–1; Tr. 340/6–16.]. The plaintiff can of course continue to authorize the hunt club members to reach the tract by way of the left fork road under the terms of his express easement over that road.

³ See *Ballington v. Paxton*, 327 S.C. 372, 378, 488 S.E.2d 882, 885 (Ct. App. 1997), where the order under appeal provided that, "so long as [a holder of the right-of-way] is present, any of his or her family members, or non-family members, shall be permitted to use the easement" Cf. *Levinson v. Costello*, 74 N.J. Super. 539, 181 A.2d 791 (1962) (appurtenant right-of-way granted to property owner was broad enough to allow use by guest of property owner invited for specific occasion in the personal company of the easement holder). See also: *Gowen v. Cote*, 875 S.W.2d

October 16, 2011 is amended to so limit the persons who may use the easement in the right of the plaintiff to include the plaintiff, together with the plaintiff's family and friends in his personal company, *gratis* and not for compensation.

The use made of the dominant estate during the prescriptive period similarly defines the use which can be made of the easement over the servient tenement. During the prescriptive period the dominant tenement was used for hunting, farming, logging, and general recreation. [Tr. 41/16–17.] To this list of uses the plaintiff added watching the wildlife. [*Id.* & Tr. 59/6–12 & Tr. 77/20 – 78/14.]

Accordingly, the Order of October 16, 2011 is amended so as to provide that the easement may be used by the plaintiff, together with family and friends in his personal company, *gratis* and not for compensation, in order to access the 700-acre tract for hunting, farming, logging, general recreation, and watching the wildlife, or substantially similar purposes.

II. The location and width of the prescriptive easement.

In the Order of October 16, 2011, the Court found that the location of the prescriptive easement is adequately depicted on a plat in evidence.

Since the road is sketched on various plats, to avoid future controversy the location of the road should be fixed more-precisely at this time.

In the event that the parties are not in accord with the location of the road as shown on the Walker plat, Plaintiff's Exhibit No. 8, the parties jointly shall appoint another surveyor to locate the road. Failing agreement, the Court will appoint a surveyor. Either the Walker plat (if agreed) or the new plat shall determine the road's location, and shall be filed in the Judgment Roll as a part of the judgment entered herein. A party objecting to the result of a new survey may request a further hearing.

In like manner, to avoid future controversy, the width of the road should be

637 (Mo. App. 1994).

determined at this time.

The width of a prescriptive easement is determined by the usage which led to the acquisition of the easement. JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 7:22 (2011) (“The location and dimensions of an easement created by prescription are fixed by the actual use of the servient estate during the prescriptive period.”); *Keidel v. Rask*, 290 N.W.2d 255 (N.D. 1980) (width determined from extent of actual use of the property for roadway purposes over the prescriptive period); *Hash v. Sofinowski*, 37 Pa.Sup. 451, 487 A.2d 32 (1985) (width of prescriptive easement limited to width of vehicles used to establish the easement). See *Burrell v. Kirkland*, 242 S.C. 201, 207, 130 S.E.2d 470, 473 (1963) (“If the adverse use on which the prescriptive claim to a way is based was for one particular purpose only, as in the case of a way used by foot passage only, or for the carriage of timber only, this is not sufficient to support a claim to a right of way for all purposes.”), and cases cited. See: *Capers v. McKee*, 1 Strob. (32 S.C.L.) 164, 168 (1847) (“[T]he use of a road five feet wide, or a foot-path, would not authorize or support a claim to a wagon or cart-way, ten feet wide. . . . [S]o strictly is this right limited to the use”).⁴

All manner of vehicles have used the Right Fork Road to reach the 700-acre tract. There is no evidence of the width of a woodlands right-of-way needed by any of them. Logging equipment appears to be the heaviest to use the Right Fork Road. Mr. Mills testified that logging equipment can travel on a road as narrow as ten or eleven feet.⁵ [Tr. 401/3–4.]

⁴ In the somewhat similar situation where an express grant of a right-of-way fails to specify the width, strong consideration is given “to what is reasonable, convenient and necessary to accomplish the purpose for which the right-of-way was created.” *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985), and authorities cited.

⁵ The standard width of one lane of paved highway in South Carolina is eleven feet. [Tr. 401/6–7.]

A functional way to determine the easement's width is at hand in the evidence. There is a gate on the 700-acre Buyck tract at the point where the Right Fork Road reaches the tract, allowing vehicles to enter and leave the 700-acre tract. The width of this gate is the best measure of the maximum width of the traffic which historically has used this road to access the 700-acre tract. Accordingly, the Court finds that the width of this gate is the width of the prescriptive easement acquired in the use of that road. The parties shall stipulate the width of the gate referred to in this Order. Their Stipulation shall be filed in the Judgment Roll as a part of the judgment entered herein.

III. Amendment of various other findings.

The defendant moves to amend the Order of October 16, 2012 with respect to a number of specific findings of fact. These are set forth in paragraphs 49 through 64 of defendant's motion to alter or amend.

With respect to paragraph 49 of the motion: The Order is amended to find that the Blue Road provides access to the entire 700-acre tract. Once the tract is reached on the Blue Road, every part of the tract is accessible.

With respect to paragraph 50 of the motion: The Order is amended to find that the members of the hunt club are licensees. The hunt club is not a lessor of the tract and its members are not invitees but mere licensees, whose privilege to go upon the tract can be withdrawn at any time.

With respect to paragraphs 51 and 52 of the motion: The Order is amended to find that there is no evidence that the plaintiff has ever authorized employees or business associates to use the Red Road, there being no evidence that plaintiff has ever had any employees or business associates.

With respect to paragraph 53 of the motion: The Order is amended to find that there is no evidence that plaintiff has ever asserted to anyone, before filing this suit, that he has a right to use the Red Road.

With respect to paragraph 54 of the motion: For the reasons given in the motion, the Order is amended to delete the finding that the defendant offered no evidence of the use of the Red Road before he and Mr. Conrad bought the McAlister tract in 2000.

With respect to paragraph 55 of the motion: The Order is amended to find that Mr. Conrad did not inform the defendant that Mr. Buyck had the right to use the Red Road. Mr. Conrad offered his mistaken view of the law, that roads cannot be closed if they are old.

With respect to paragraph 56 of the motion: The Order is amended to delete the finding that the defendant should have known from the notation on the preliminary plat that the plaintiff had a prescriptive easement over the Red Road. The only notation on the preliminary plat refers to the 1984 express easement, calling it “unplottable”. Nothing on the preliminary plat gives any evidence of a prescriptive easement in anyone’s favor, but only that old neighborhood roads cross the McAlister tract, as they do every other tract in the neighborhood.

With respect to paragraph 57 of the motion: The Order is amended to delete the finding that the Blue Road is an inadequate means of ingress to and egress from the 700-acre tract. The evidence shows that the Blue Road is not only adequate but is the best means of ingress to and egress from the tract. It is immaterial that the Red Road may provide a more convenient access to a particular portion of the tract, as access to the tract as a whole is the only relevant issue.

With respect to paragraph 58 of the motion: The Order is amended to delete the finding on page 16, note 7, that hunt club members spent a day clearing “the Blue Road”. What the Court refers to as “the Blue Road” ends at the boundary of the 700-acre tract. The hunt club members did not clear the Blue Road on the McAlister tract, which needed no clearing. They cleared one of several roads or trails inside the 700-acre Buyck tract — the trail which leads from the hayfield to the duck pond, referred to

at trial as Road Number 3. [Tr. 99.]

With respect to paragraph 60 of the motion: The Order is amended to delete the finding on page 16 that the holding in *Tupper v. Dorchester County*, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997), is irrelevant. The holding is relevant to the point that an easement of ingress/egress is in gross, not appurtenant, if the owner of the accessed tract has other means of ingress/egress.

With respect to paragraph 61 of the motion: The Order is amended to delete the finding on page 17 that there is no evidence that the plaintiff or his predecessor in title was given permission to traverse the McAlister tract via the Red Road to reach the 700-acre tract. It is presumed that the plaintiff's use and that of his predecessor began with permission to cross this unenclosed woodlands tract and that such permission continued until the defendant withdrew it when the plaintiff distributed multiple keys to the gate to the hunt club members.

With respect to paragraph 62 of the motion: The Order is amended to delete the finding on page 20, note 11, that the surveyor who prepared the first preliminary plat for the defendant stated that the express easement applied to both the Red Road and the Blue Road.

With respect to paragraph 63 of the motion: The Order is amended to delete the decretal matter on page 23 which allows the plaintiff to grant permission to anyone to use the Red Road.

With respect to paragraph 64 of the motion: The Order is amended to delete the decretal matter on page 23 which enjoins the defendant from "obstructing or otherwise interfering" with plaintiff's use of the Red Road. The defendant is authorized to continue to maintain a gate across the Red Road while providing the plaintiff with a key, so as to allow the defendant to maintain the security of his property against trespassers, the gate being kept locked.

IT IS SO ORDERED.

Diane Schafer Goodstein
Resident Judge, First Judicial Circuit

St. George, South Carolina

_____, 2012.

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)
W. Peter Buyck, Jr.,)
Plaintiff,)
vs.)
William Jackson,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Civil Action No.: 2008-CP-09-135

**MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION
TO ALTER OR AMEND JUDGMENT**

Plaintiff, W. Peter Buyck, Jr., by and through his undersigned counsel, hereby respectfully submits this Memorandum in Opposition to Defendant's Motion to Alter or Amend the Judgment made in the Order dated October 26, 2011 and entered on November 15, 2011.

ARGUMENT

In his Motion to Alter or Amend, Defendant has recommended sixty-four changes to the Order entered by this Court on November 15, 2011. Because this Court's Order included all relevant factual findings addressed by the parties and properly applied the law to those facts, the Defendant's Motion to Alter or Amend should be denied. Specifically, Defendant's arguments pertaining to "unenclosed, unimproved woodlands" do not change the Court's analysis. Further, this Court properly held that Plaintiff's prescriptive easement was an easement appurtenant, as it is, in fact, essentially necessary for enjoyment of the Buyck property.

I. PLAINTIFF HAS PROVEN HIS USE OF THE RED ROAD WAS ADVERSE OR UNDER A CLAIM OF RIGHT

This Court, in its Order, found that Plaintiff has established an easement by prescription over the "Red Road" which traverses Defendant's property. Defendant now argues that Defendant's Property (upon which Defendant has constructed a house which Defendant claims to be located in close proximity to the Red Road) constitutes "unimproved woodlands" and that the

claimed treatment of the Defendant's property as "unimproved woodlands" somehow alters the analysis of this Court in its Order. This is simply not the case. Plaintiff is certainly aware of the line of cases relating to unimproved woodlands in South Carolina. These cases, however, are inapplicable to our analysis of this case for each of the following reasons (which will be more particularly discussed below):

- (a) No evidence was presented at trial proving that Defendant's property is and should be treated as "unimproved woodlands" for the purposes of this analysis.
- (b) Even if Defendant's property is considered "unimproved woodlands", the line of cases in South Carolina establishing the "unimproved woodlands" rule only applies to claims of prescriptive easements in favor of the general public, not to private rights as sought by Plaintiff in this action.
- (c) Even if the "unimproved woodlands" rule is construed to apply in this case, the only result is that Plaintiff's use of the Red Road would then be "presumed" to be permissive – which presumption is clearly overcome through the trial testimony of numerous witnesses for Plaintiff, and even one of Defendant's own witnesses, that Plaintiff and his predecessor's use of the Red Road was at all times under a claim of right.

Though there was no evidence presented at trial suggesting that the Red Road travels through unenclosed, unimproved woodlands, Defendant now asserts that Plaintiff has not established a prescriptive easement because the Red Road crosses such woodlands. This argument is inapplicable in that the unimproved woodlands rule does not apply to cases seeking to establish private easement rights and, even so, would not operate to prevent or impair Plaintiff's establishment of a prescriptive easement but only affects the presumptions applied.

Furthermore, Defendant's argument is flawed at its outset in that no evidence was presented at trial that Defendant's property is actually considered "unimproved woodlands". Plaintiff denies Defendant's assertion that the Red Road passes through unenclosed, unimproved woodlands as no testimony to this effect was presented at trial, and the testimony given at trial suggests that the property is not in fact unenclosed, unimproved woodlands, but is improved property upon which a house has now been constructed.

The rationale behind the unenclosed, unimproved woodlands rule is based on the notion that "as long as lands remain open and unenclosed, every person may, of common right, pass over them, hunt upon them, etc." Lawton v. Rivers, 2 McCord (13 S.C.L) 445, 452 (1823). In the instant case, the land in question was not the type of property contemplated by the Court in Lawton. Certainly there was no common or public right to hunt, pass over, or otherwise make use of this property. Plaintiff's rights with respect to the Red Road, as shown at trial, were established through the individual claim of right of Plaintiff and his predecessors in interest.

However, even if this Court now finds that the Defendant's property over which the Red Road crosses constitutes "unenclosed, unimproved woodlands" such that the unimproved woodlands rule would apply, this analysis is inapplicable to this case as it involves a claim to a private easement as opposed to a claim benefitting the general public. And, in any event, a finding that the Red Road passes through unimproved woodlands would not change the outcome of this case because this Court explicitly found, based on ample evidence, that Plaintiff's use of the Red Road was, in fact, adverse and under a claim of right.

Defendant cites several cases for the proposition that the mere use of roads or passageways on unenclosed and unimproved woodlands will not result in a *public dedication* or access rights of the *general public* through prescription. The gist of those cases is summarized in

Savannah River Lumber Corp. v. Bray, 189 S.C. 237, 200 S.E. 760 (1939). The Court in Savannah River stated “a prescriptive right arises in favor of the *public* after continuous use of a road for twenty years when it runs through cultivated land, but that when it passes unenclosed woodland, it must be shown that the use was adverse and under a claim of right, and not by the owner’s permission.” 189 S.C. 237, 200 S.E. 760, 761 (1939) (quoting Hutto v. Tindall, 6 Rich. 396 (1853)) (emphasis added). Savannah River simply stands for the proposition that adversity will not be presumed in a *public* prescriptive easement case when a passageway runs through unenclosed woodlands. This case, however, deals with a private right sought by Plaintiff, and therefore the analysis of Savannah River and the accompanying South Carolina cases cited by Defendant are inapplicable.

In addition, even if it were found that the Defendant’s property constituted unimproved woodlands and that the unimproved woodlands rule did apply to a private easement claim, the presumption of permission which the unimproved woodlands rule establishes has clearly been overcome by the testimony presented at trial. The testimony presented at trial, by numerous witnesses for Plaintiff and even one of Defendant’s witnesses, has unequivocally established, and this Court has held in its Order, that the Plaintiff’s use, and that of his predecessors in interest, was adverse or under a claim of right for well over twenty years. In order to establish a prescriptive easement, it is only necessary that the use be adverse *or* under a claim of right. Jones v. Daly, 363 S.C. 310, 315-16, 609 S.E.2d 597, 600-01 (Ct. App. 2005) (noting that any interpretation of Nelums v. Cousins, 304 S.C. 306, 403 S.E.2d 681 (Ct. App. 1991), as requiring use that is both adverse *and* under a claim of right is incorrect; only a showing of use *either* adverse *or* under a claim of right is necessary); see also Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 406 (Ct. App. 1996) (holding that only use adverse *or* under a claim of right is required

and that cases requiring both adverse use and use under claim of right have misquoted the requirements of Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457 (1951), in this respect).

The trial testimony is replete with evidence that Plaintiff, and his predecessors in interest, used the Red Road under a claim of right. In this respect we would simply draw the Court's attention to the Order, specifically pages 9-15 thereof.

Based upon the foregoing, Defendant's suggestion that the Red Road traverses unenclosed, unimproved woodlands simply does not change this Court's analysis. Thus, this Court's holding with respect to Plaintiff's prescriptive easement rights should not be disturbed.

II. PLAINTIFF'S USE OF THE RED ROAD IS ESSENTIALLY NECESSARY TO ENJOYMENT OF THE BUYCK PROPERTY

Defendant claims that Plaintiff's right to use the Red Road is not essentially necessary to Plaintiff's enjoyment of his property and that therefore the prescriptive easement established by Plaintiff over the Red Road should be treated as an easement in gross, as opposed to an appurtenant easement. Defendant's argument in this respect is grounded upon the existence of the "Blue Road" which does provide access to the Plaintiff's property, but (as evidenced by the testimony presented at trial) is only suitable for use by all-terrain and four-wheel drive vehicles.

The trial testimony clearly established (and common sense tells us) that Plaintiff's easement rights over the Red Road are essentially necessary to Plaintiff's full enjoyment of his land. In support of its argument, Defendant relies upon the case of Ballentine v. Paxton, wherein the South Carolina Court of Appeals held that where an easement is not essentially necessary for the use of the dominant estate, the easement is characterized as an easement in gross rather than an easement appurtenant. 327 S.C. 372, 380, 488 S.E.2d 822, 887 (S.C. App. 1997). However, this Court's Order is completely consistent with the holding in Ballentine. There, the Court held

an easement was not appurtenant where the dominant estate was a pond situated by a highway, and the pond had access points other than the passageway provided for in an express easement. Id. There was no finding in Ballentine, however, that the other access points, though less convenient, were inadequate for the enjoyment of the property.

In this case, the Plaintiff has shown, and this Court has held, that Plaintiff's use of the Red Road was essentially necessary to enjoyment of the dominant estate. In fact, the evidence showed the Blue Road to be inadequate for access to the Plaintiff's property for Plaintiff's historical uses - particularly for Plaintiff's logging and farming operations, but also for hunting and recreational use. The evidence showed that the Blue Road was not in a condition that could be traveled by any vehicle other than an all-terrain vehicle and not by a car or truck without four-wheel drive. Specifically, the Defendant's own surveyor expert witness, Michael R. Mills, testified that for a logging truck to travel the Blue Road it must have at least a ten or eleven foot clearance - which clearance width the Blue Road obviously does not provide. (Transcript, p. 419, ll. 19-22; p. 421, ll. 8-19). Further, James Medlin, another of the Defendant's own witnesses, testified that the Blue Road was not suitable for any vehicle that lacked four-wheel drive. (Transcript, p. 349, l. 16 - p. 350, l. 11). Mr. Medlin further testified that the Blue Road was really no road at all but was actually just a trail. Id.

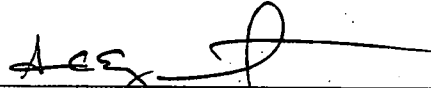
The testimony presented at trial clearly establishes that the Red Road is essentially necessary to Plaintiff's use and enjoyment of his property. As such, the Plaintiff's prescriptive easement is clearly of an appurtenant nature, and this Court's holding with respect to the appurtenant nature of Plaintiff's prescriptive easement should not be disturbed.

CONCLUSION

Because this Court made all relevant factual findings properly before the Court, and this Court properly applied the law to those facts, this Court's order dated October 26, 2011 and entered November 15, 2011, should not be disturbed.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC



Andrew C. English, III
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February 20, 2012
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CALHOUN COUNTY
COURT OF COMMON PLEAS

Diane Schafer Goodstein, Circuit Court Judge
Case No. 2008-CP-9-135
Appellate Case No. 2012-212463

W. Peter Buyck, Jr., ... Respondent,

v.

William Jackson, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the foregoing Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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Attorney for Appellant.

June 24, 2013.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Record on Appeal upon the respondent by
delivery to respondent's attorneys at their address of record, namely:

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on June 24, 2013.


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June 24, 2013.

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SC Court of Appeals