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SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Berkeley County
Honorable Dale E. Van Slambrook, Master-In-Equity
Civil Action No.: 2018-CP-08-344
Appellate Case No. 2023-000405

BCE 2015, LLC,

Appellant,

v.

YVONNE C. KNIGHT and ELEANOR C. BROWN,

Respondents.

***INITIAL REPLY BRIEF
OF THE APPELLANT, BCE 2015, LLC***

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The Appellant, BCE 2015, LLC (“BCE 2015”), submits this Initial Reply Brief in response and answer to the Brief of the Respondents, Yvonne C. Knight and Eleanor C. Brown (the “Landowners”).

ARGUMENT AND CITATION OF AUTHORITY

A. BCE 2015, LLC’S PROPERTY WAS IRREFUTABLY LANDLOCKED WHICH REQUIRED AN EASEMENT BY NECESSITY OVER THE DIRT ROAD CROSSING PARCEL 001.

BCE 2015’s property (*i.e.*; Parcel 038 and Parcel 039) is incontestably and incontrovertibly totally landlocked. (Tr.14, line 19 – Tr.15, line 3; Tr.166, lines 9-23; Exh.1). BCE 2015 showed the Dirt Road was the sole practical and only realistic and pragmatic means for BCE 2015 to access Parcel 038 and Parcel 039. (Tr.108, line 12 – Tr.111, line 13; Tr.125, line 16 – Tr.126, line 20; Tr.131, line 6 – Tr.132, line 7; Tr.133, line 9 – Tr.135, line 7; Tr.147, line 13 – Tr.148, line 18; Tr.149, line 22 – Tr.155, line 25). BCE 2015 was legally entitled to an easement by necessity over the Landowners’ property.

In response to BCE 2015’s overwhelming evidence of necessity, the Landowners simply asserted that the 1867 Tiverton Lawn Plantation plat (Exh. 23) ostensibly showed there was “no necessity” at the time of severance. (*Respondents’ Brief*, pp.5-6). The Landowners’ position, however, is factually and logically incorrect; as 57 of BCE 2015’s 139 submitted exhibits (Exhs. 3, 5-31, 107-110, 113-137, 140), as well as the Jason Maxwell’s and Dan Sheffling’s testimony, directly and/or indirectly addressed the long-existing necessity required under South Carolina law to authorize granting easement access to Parcels 038 (Tr.6, line 23 – Tr.7, line 4; Exh. 120) and Parcel 039. (Tr.7, lines 8-13; Exh. 121). Based on the historical property records maintained by in this State,

there was overwhelming evidence for prior use. In fact, when P.D. Meree subdivided Broad Axe Plantation the historical recorded plats of the time showed a road (*i.e.*; the Dirt Road) coming up from the south and connecting directly to Meree's Avenue – a road still in use today, albeit now known as Singleton Lane. (Exh. 23). None of the historical plats, however, show the existence of any other roads which did or reasonably could have provided access to either Parcel 001, Parcel 038, and/or Parcel 039.

Even if the historical evidence of prior use is disregarded, evidence which was presented to the Master-In-Equity through documents and testimony, it cannot be reasonably denied that BCE 2015 demonstrated that necessity clearly exists regarding the ingress and egress access to both Parcel 038 and Parcel 039. The evidence showed there is no reasonable alternative access point to those properties other than the long-established, long-existing, and long-used Dirt Road. (Tr.40, lines 5-24; Exhs. 1, 33-92). Moreover, the Landowners failed to credibly refute the access necessity.

The historical records showed that BCE 2015's property (*i.e.*; Parcel 038 and Parcel 039) was clearly surrounded by the lands of P.D. Meree on three sides (to the North, South, and East) and by the Tiverton Lawn Plantation (to the West) at the time of severance. (Exhs. 11-28). Moreover, BCE 2015's property presently remains surrounded on the North, South, and East by the Landowners' property. (Exh. 3). Consequently, any historical access which P.D. Meree could have conveyed in 1882 would necessarily now cross the Landowners' property, which was formerly part of the Broad Axe Plantation. (Exh. 23). When P.D. Meree sold the various land parcels, **the only access** to what are now Parcels 038 and 039 was over the Dirt Road located on and across Parcel 001.

The simple and most logical reason for the abject absence of any other roads was that the Dirt Road was the best, the most reasonable, and the most practical location and placement for a road to access properties north of what is now Old Cherry Hill Road. The topography of the properties and the area's extensive wetlands effectively eliminated the reasonableness of any other possible route.

Given the location of P.D. Meree's property, there were only three possible scenarios he could have pursued regarding access to his lands:

1. *P. D. Meree intended to and did provide for and convene access to the property at the time of severance;*
2. *Access existed from the West over the Triverton Lawn Plantation at the time of severance; or*
3. *P.D. Meree never intended to and did not provide any ingress and egress access to the property.*

1. **P. D. Meree Provided Access At The Time Of Severance And The Dirt Road Was Already Affording Access To The Property**

P.D. Meree, a Moncks Corner attorney, retained E.J. Dennis to survey, plat, and subdivide his property into 12 separate parcels. (Tr.21, line 18 – Tr.23, line 2; Tr.23, line 22 – Tr.24, line 25; Exhs. 26-28). E.J. Dennis' actions were memorialized on a plat (the "1882 Subdivision Plat").¹ (Tr.22, line 18 – Tr.24, line 25; Exhs. 26-28). P.D. Meree later sold the various parcels during his lifetime, clearly intending to give access to all divided parcels in the recorded plat, the record of which is mentioned in numerous submitted

¹ Even though P.D. Meree repeatedly referenced the 1882 Subdivision Plat in each of the subsequent 12 deeds he later executed, the actual 1882 Subdivision Plat was missing from the public records. (Tr.22, line 16 – Tr.23, line 1). Nevertheless, as evidence of P.D. Meree's consistency, he subdivided another property - also surveyed by E.J. Dennis. (Tr.23, line 1 – Tr.24, line 18; Exh. 140). This other recorded plat, found in the public records, showed that P.D. Meree uniformly provided access and egress roads for each of the subdivided parcels. (Tr.23, line 1 – Tr.24, line 18; Exh. 140).

documents. (Tr.21, line 23 – Tr.22, line 7; Exhs. 26-28). The access road to the dozen parcels would have tied into the road shown on the circa 1828 or so plat/map (Tr.18, line 8 – Tr.19, line 6; Exh. 19), which is consistent with the present location of the Dirt Road. (Tr.19, line 7 – Tr.20, line 23; Exh. 23).

Importantly, the placement of the Dirt Road was confirmed by LIDAR imagery - the most advanced geospatial technology currently available to verify when and where roads were traveled. (Exhs. 107-110). In addition to the imaging documents, Mr. Sheffling's testimony confirmed the Dirt Road had existed in its present location for a very, very long time. (Tr.130, line 16 – Tr.131, line 5; Tr.139, line 22 – Tr.141, line 15). Even the Landowners testified many people used the Dirt Road (Tr.163, line 7 – Tr.167, line 12; Tr.171, line 3 – Tr.172, line 14; Tr.173, line 3 – Tr.174, line 11), testimony consistent with BCE 2015's evidence showing (a) the land had been actively farmed and timbered (Tr.163, line 7 – Tr.167, line 12; Tr.171, line 3 – Tr.172, line 14; Tr.173, line 3 – Tr.174, line 11; Tr.180, lines 14-20; Exhs. 27, 28, 135), and (b) P.D. Meree's prior subdivision of a similar parcel which E.J. Dennis also platted and recorded. (Tr.22, line 16 – Tr.24, line 25; Exh. 140).

A close examination of the property's conveyance and severance further solidifies these claims. P.D. Meree named the owner to the North of the Landowners' property at the time of severance simply "J. Tate," and the property was not conveyed to the intended owner (*i.e.*; Jupiter Tate), until two years after that conveyance. (Tr.27, line 22 – Tr. 28, line 2; Tr.100, line 3 - Tr.101, line 12; Exh. 115). This two-year time lag without a proper naming suggests Jupiter Tate was a known person on the property, either someone who was farming and/or living on BCE 2015's present property at the time of severance. (Exh.

115). Given that Jupiter Tate was likely working the land, he necessarily had access or P.D. Maree must have intended him to have access. If not, Jupiter Tate would not have been able farm the property or physically access it for residential purposes. (Tr.24, lines 13-25). Furthermore, Minnie Shay Stell's act of specifically claiming and conveying an easement over the Landowners' property (Exhs. 30, 31, 120 and 121) further solidifies and confirms P.D. Maree's intention to grant the necessary² access to the property.

The historical records all point toward the proposition P.D. Meree had intended what are now Parcels 038 and 039 to have access at the time of severance over the existing Dirt Road and such access was already in existence at the time. (Tr.24, lines 13-25). Had P.D. Meree not required E.J. Dennis to include a road on the *1882 Subdivision Plat*, the various parcels located west of the Broad Axe Creek, except Parcel 001, would have been 100% landlocked. (Tr.22, line 10 – Tr.25, line 10; Exh.140).³ Furthermore, that the *1882 Subdivision Plat* specifically detailing this access has been lost from the public records⁴ - is not determinative since the appurtenant historical documents collected

² Boyd v. Bellsouth Tel. & Tel. Co., Inc., 369 S.C. 410, 417-418, 633 S.E.2d 136, 140 (2006) (citing Crosland v. Rogers, 32 S.C. 130, 133, 10 S.E. 874, 875 (1890) (“ ‘ . . . the term ‘necessary’ meaning that there could be no other reasonable mode of enjoying the dominant tenement without this easement.’ ”)).

³ It is well-established when a property owner “subdivide[s] and plat[s] a portion of his property into lots and [roads] and [then] conveyed lots with reference to [a] plat, the purchasers and those claiming under them acquired [a permanent] easement in the [road] as [shown] on the plat. [That] easement inheres in the [adjacent] land . . . , is . . . necessary to its enjoyment and passes with the dominant estate, [even when the dominant estate’s] conveyance . . . does not expressly mention it.” See Carolina Land Co., Inc. v. Bland., 265 S.C. 98, 106, 217 S.E.2d 16, 20 (1975).

⁴ Stains on the Nero Smalls’ recorded deed show where a plat, referenced in subsequent documents related to this property, likely was located. (Exh. 122). The 1882 Subdivision Plat likely was lost when the deed book was rebound, or deteriorated over time, or simply misplaced. P.D. Meree recoded a plat in the same deed book just prior to Nero Smalls’ deed in the same (a) exact manner, (b) year, and (c) surveyor. While the deed did not reserve an easement, the plat specifically showed a road to the otherwise landlocked parcel. (Tr.14, lines 19-25; Exh. 140).

both before and after the transfer to Mr. Tate, as well as the other historical records collectively substantiated that P.D. Meree envisioned the continuance of cultivation and habitation of this land which by its very nature included a purposeful grant of access and egress. This is and always has been the most logical and reasonable scenario.

2. Access To The Property Existed Via The Triverton Lawn Planation

This scenario, although theoretically possible, is not born out by the historical documents. There is no record of any existing road going from the Tiverton Lawn Plantation West to East either in 1867 (Exh. 23) before the property was severed or in 1882 after the property had been subdivided. (Exh. 136). Additionally, there is no record existing of any easement across the property to the West. In addition, there is no record of P.D. Meree ever owning any part of Triverton Lawn Plantation (Exhs. 134-135). In fact, at the time of the severance, P.D. Meree named Jacob Carlson as the owner of the lands West of Parcel 038 and Parcel 039 and Parcel 001 (*i.e.*; the Landowners' property. (Exhs. 115, 126). This documentation shows P.D. Meree did not own any of the land to the West of his property and, therefore, did not have any ability to grant access and ingress to his property from any lands to the West. P.D. Meree could not convey what he did not have.⁵

There was no access to the property from the West and the Landowners did not present any evidence showing there was such access. The historical records did not provide any evidence there was access to the property from the West or that anyone had granted access from the West. There is no evidence of any access from the Tiverton Lawn Plantation and the Landowners failed to prove any such access ever existed.⁶

⁵ *Cf. Hensley v. Riverland Development Corp.*, 256 S.C. 304, 182 S.E.2d 290 (1971).

⁶ The Landowners asserted there was access from the West via a footbridge originating on Parcel 014. (Tr.160, line 23 – Tr.162, line 7; Tr.162, lines 20-22). BCE 2015's after-discovered

3. P.D. Meree Never Granted Nor Intended Any Access

The final possibility is that P.D. Meree, a practicing attorney, had E.J. Dennis survey and plat the property and then P.D. Meree sold the 12 parcels with no intention of granting the purchasers any access whatsoever.⁷ The evidence showing that access was mentioned in a dozen documents eviscerates this theory, as well as the logical proposition that no reasonable buyer would knowingly purchase property for which he had no access. Furthermore, had P.D. Meree not required E.J. Dennis to include a road on the *1882 Subdivision Plat*, all of the parcels located west of the Broad Axe Creek, *except Parcel 001*, would have been 100% landlocked. (Tr.22, line 10 – Tr.25, line 10; Exh.140). If this theory was true, then the property never had any access at the time of severance and BCE 2015 would be entitled to an easement by necessity since property cannot exist without access.

The most remarkable aspect of the Landowners' arguments is that they contradict each other as to the right to access. The Landowners ask this Court of Appeals to deny BCE 2015's legal right to access Parcels 038 and 039⁸ by arguing there was some theoretical alternate access to the property (other than the Dirt Road which showed very, very many years of use) and, conversely, there was no access whatsoever to the property at the time of severance. The various plats and historical records undermine the

evidence demonstrated that such assertions were entirely false given the wetlands nature of the alleged access and the deplorable condition of the "footbridge". (PT 1J – 1O).

⁷ This proposition is ludicrous since the law presumes an implied or presumed grant of access to guarantee the purchaser enjoyment of the property conveyed. *See Brasington v. Williams*, 143 S.C. 223, 3233-234, 141 S.E. 375, 381 (1927).

⁸ *Graham v. Causey*, 284 S.C. 339, 341, 326 S.E.2d 412, 414 (Ct.App. 1985) (*quoting Brasington v. Williams*, 143 S.C. 223, 233, 141 S.E. 375, 380 (1927)), *disapproved of on other grounds by Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987).

Landowners' contradictory arguments (Tr.15, line 22 – Tr.16, line 1; Tr.17, lines 8-13; Exhs. 8-11, 14, 16-17) and show that P.D. Meree sold the land to Jupiter Tate (Tr.17, line 22 – Tr.28, line 2; Exh. 113), who most likely had been sharecropping the land and accessing the property by way of the Dirt Road, as was also the case for the surrounding parcels.

The Dirt Road was the most reasonable and most practical location for a road to access properties to the North of present-day Old Cherry Hill Road. The land's topography and the area's extensive wetlands realistically eliminated the possibility of any other possible access route.⁹ BCE 2015 is entitled to an easement by necessity. There is no other logical or reasonable access to Parcel 038 and Parcel 039 other than across the long-existing and long-used Dirt Road. Absent reasonable access, BCE 2015 is denied "one of the rights essential to the enjoyment of land."¹⁰ The Master-In-Equity's decision must be reversed.

**B. BCE 2015, LLC PROVED IT WAS ENTITLED TO AN EASEMENT BY
PERSCRPTION OVER PARCEL 001 WHICH WAS CONFIRMED BY BCE
2015'S AFTER-DISCOVERED POST-TRIAL PHOTOGRAPHIC EVIDENCE.**

Notwithstanding any assertion to the contrary, BCE 2015 definitively proved by clear and convincing evidence,¹¹ that it was entitled to an easement by prescription over the Landowners' property (*i.e.*; Parcel 001). In fact, the only evidence which

⁹ Mr. Scheffing stated to construct a new road at the location the Landowners' "offered" (Tr.133, lines 9–25; Tr.141, line 16 – Tr.142, line 3; Tr.149, line 22 – Tr.150, line 10; Tr.176, line 17 – Tr. 177, line 19; Tr.183, line 20 – Tr.184, line 13), considering the existence of the well-situated Dirt Road (Tr.135, lines 1-7), would be environmentally irresponsible. (Tr.133, lines 9-25).

¹⁰ Morrow v. Dyches, 328 S.C. 522, 529, 492 S.E.2d 420, 424 (1997) (*citing* Brasington v. Williams, 143 S.C. 223, 238-239, 141 S.E. 375, 380).

¹¹ *See generally* Bundy v. Shirley, 412 S.C. 292, 305-306, 772 S.E.2d 163, 170-171 (2015).

ostensibly disputed the proscribed and long-term nature of the Dirt Road's use was the Landowners' which, once scrutinized, could not be credibly sustained. (Tr.133, line 9 – Tr.134, line 25; Tr.141, line 16 – Tr.142, line 3; Tr.148, lines 8-18; Tr.149, line 22 – Tr.156, line 24; Tr.176, line 17 – Tr. 177, line 19). BCE 2015 clearly had a “substantial belief that [BCE 2015] had the right to use the [Dirt] [R]oad based upon the totality of circumstances surrounding [BCE 2015]’ use.”¹²

Moreover, BCE 2015's proffered photographic evidence (Tr.II 30, line 12 – Tr.II 31, line 12; PT Exh. 1A – 1O), albeit clearly unavailable pre-trial, confirmed and validated BCE 2015's assertions regarding the well-established long-term use of the Dirt Road, as well as, substantiated and verified the continued post-trial use of the Dirt Road across and through Parcel 038 and Parcel 039.¹³

Even though the Landowners disputed the Dirt Road's usage (Tr.166, line 9 – Tr.167, line 9; Tr.180, line 21 – Tr.181, line 6; Tr.193, line 23 – Tr.194, line 14), their own testimony belied that position. The Landowners admitted the Dirt Road had been consistently used for agricultural and logging operations for decades. (Tr.33, line 24 – Tr.41, line 20; Tr.42, line 17 – Tr.57, line 25; Tr.59, line 2 – Tr.60, line 25; Tr. 105, lines 10-20; Tr.131, lines 1-5; Tr.155, lines 8-17; Tr.173, line 3 – Tr.174, line 6; Exhs. 33-92). The Landowners admitted hunters had used the Dirt Road to access the northern properties for many, many years, at least since 2000. (Tr.163, line 20 – Tr.164, line 12;

¹² Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct.App. 2003), *overruled on other grounds*, Simmons v. Berkeley Electric Cooperative, Inc., 419 S.C. 223, 797 S.E.2d 387.

¹³ Morin v. Innegrity, LLC, 424 S.C. 559, 578, 819 S.E.2d 131, 141 (Ct.App. 2018) (*quoting Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005)). *See also generally McCabe v. Sloan*, 184 S.C. 158, 167-168, 191 S.E. 905, 908-909 (1937).

Tr.165, line 11 – Tr.166, line 8; Tr.172, lines 8-18; Tr.173, lines 3-25; Tr.193, line 23 – Tr.194, line 14). The Landowners admitted the Dirt Road had been in its present location for at least 50 years. (Tr.163, lines 7-15; Tr.193, lines 19-22). The Landowners admitted the Dirt Road provided ingress and egress access to additional parcels other than just Parcel 001 and Parcel 038. (Tr.163, line 16 – Tr.164, line 12; Tr.165, line 11 – Tr.166, line 4; Tr.193, line 23 – Tr.194, line 14).¹⁴ Furthermore, LIDAR imagery showed the Dirt Road as depressional (*i.e.*; roadbed was physically depressed below the grade of the surrounding land) (Exh. 107-109) – a situation indicative of both long-term **and** repetitive vehicular use. (Tr.71, line 20 – Tr.73, line 8).

In 1954 Minnie Shay Stell (a prior owner of Parcel 038) – subdivided her 29 acres by transferring five or so acres to her sister - Lottie Taucer. (Tr.28, lines 12-15; Exhs. 118-119). Minnie Shay Stell expressly granted an easement¹⁵ over both the property she was transferring (Parcel 039) and over Parcel 001, as well as reserving the right to use any rights-of-way established by Lottie Taucer across Ms. Taucer’s property. (Tr.28, line 18 – Tr.29, line 5; Tr.30, line 3 – Tr.31, line 2; Tr.31, line 18 – Tr.32, line 5; Exhs. 118-119).

The adverse nature of the use of the Dirt Road is a matter of established fact. (Tr.163, line 16 – Tr.164, line 12; Tr.165, line 11 – Tr.166, line 4; Tr.193, line 23 – Tr.194, line 14). It is clearly shown by Minnie Shay Stell’s recorded easement (Exh. 120)

¹⁴ The Landowners’ own testimony showed the Dirt Road’s continued use and operation. BCE 2015 could not have presented any better evidence that the testimony from the very parties disputing BCE 2015’s easement claim.

¹⁵ Ms. Stell obviously could not grant an easement over her transferred property if there was no easement in existence for her to grant as she could not grant anything to another person or entity if she did not own the grantable right in the first place.

showing she intended to convey an easement over the Landowners' property. Since the Landowners vigorously deny the existence of such an easement over the Dirt Road; the Landowners' position constitutes an adverse claim of right. BCE 2015 well-documented the consistent use of the Dirt Road from 1950 until the present. (Exhs. 31-110).

Importantly, not only did BCE 2015 demonstrate that the Dirt Road had been in use for many, many years, BCE 2015 presented evidence, albeit by proffer,¹⁶ consisting of some 16 or so photographs (Tr.II 30, line 12 – Tr.II 31, line 12; PT Exh. 1A – 1O) taken after the trial which showed physical improvements made to the Dirt Road by unknown persons after the Bench Trial. (Tr.II, p.27, line 24 – Tr.II, p.29, line 24). The photographs, taken on 3 February 2023, some four and ½ months after the 15 September 2022 Bench Trial showed that the Dirt Road was and had been both well used (PT Exhs. 1B - 1E) and reasonably well-maintained. (PT Exh. 1B – 1E, 1N – 1O). Additionally, the photographs did much to completely disprove the Landowners' illogical theory that hunters going to Parcel 035 had available ingress and egress from the West over Parcel 014. (Tr.104, lines 13-24; Tr.160, lines 11-16; Tr.160, line 23 – Tr.162, line 7; PT Exh.1G – 1L).

This after-discovered photographic evidence should have been admitted. The evidence, unquestionably not available pre-trial,¹⁷ was both material and relevant since it validated BCE 2015's evidence which demonstrated the custom and pattern of the

¹⁶ The Master-In-Equity improperly denied admission of the 16 photographs on the grounds that the proffered photographs “would [not] have any relevance to the motion [then under consideration].” (Tr.II, p.29, line 25 – Tr.II, p.30, line 10).

¹⁷ Morin v. Innegrity, LLC, 424 S.C. 559, 578, 819 S.E.2d 131, 141 (*quoting Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459).

Landowners' behavior in renting hunting rights and/or logging rights on the property and, in turn, granting the necessary access to and/or over and through the property¹⁸ – activities which continued unheeded after the trial. Additionally, since the photographic evidence clearly showed it was essentially impracticable and virtually unfeasible, absent the use of heavy machinery, for the hunters to reasonably gain legitimate access over to Parcel 034 (or any other parcel in the area) via the “footbridge” from Parcel 014, the photographs cast a very dark cloud over the credibility of the Landowners' “testimony” (Tr.160, line 23 – Tr.162, line 7) that such access was readily available.

This “alternate access” testimony was, of course, the only “evidence” which did not support BCE 2015 being granted a prescriptive easement and which the Master-In-Equity must have seized upon to deny BCE 2015's easement request. In light of the very questionable factual footing for that testimony as shown by the photographs (PT Exh. 1J-1O), the proffered evidence was material and constituted a legitimate basis for a different overall result of the trial other than that presently in place.

¹⁸ As shown by older and more recent hunting blinds, stands, markings, and materials left on the property. (PT Exh. 1A – 1O).

CONCLUSION

Based upon the foregoing arguments and citation of authority, the Appellant, BCE 2015, LLC, respectfully requests this Court of Appeals to reverse the Master-In-Equity in all respects and remand this matter back with directions for the Master -In-Equity to award BCE 2015 a 50-foot wide easement over Parcel 001 on the existing Dirt Road.

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