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SC Court of Appeals

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

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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***

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BCE 2015, LLC,

Appellant,

v.

YVONNE C. KNIGHT and ELEANOR C. BROWN,

Respondents.

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# *FINAL BRIEF OF THE APPELLANT, BCE 2015, LLC*

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E. Whether The Master-In-Equity Incorrectly Denied BCE 2015, LLC's Post-Trial Motion Made Pursuant To Rules 52(b) and 59(e), *SCRCivP*?

## II. STATEMENT OF THE CASE

On 21 February 2018, the Appellant, BCE 2015, LLC ("BCE 2015"), brought a quiet title and establishment of ingress/egress easement action against the Respondents, Yvonne C. Knight, Eleanor C. Brown, and others (the "Landowners"). (R.p.4;R.pp.60, 61-64). BCE 2015 sought to confirm and/or establish a 50' ingress/egress easement across the Landowners' real property. (R.p.4; R.p.16; R.pp.63-64, paras. 10-11). The Landowners denied the material allegations. (R.p.67, paras.1, 3).**1** The parties, by consent, referred the matter to the Berkeley County Master-In-Equity. (R..p.48-51).**2**

The Master-In-Equity held a Bench Trial on 15 September 2022, taking testimony and receiving documentary evidence. (R.pp.90-285). By order dated 31 October 2022, the Master-In-Equity denied BCE 2015's request to establish an ingress/egress easement. (R.pp.16-26). BCE 2015 moved for reconsideration, etc. (R.pp.70-81). The Master-In-Equity held a hearing on BCE 2015's post-trial motions on 7 February 2023 (R.p.298), and denied the same by order dated 1 March 2023. (R.pp.1-3). The Master-In-Equity also issued an Amended Order also dated 1 March 2023. (R.pp.4-15).**3** This appeal followed.

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**1** The Circuit Court appointed a Guardian *ad Litem Nisi* on 27 January 2020. (R.pp.56-59). The GAL Nisi admitted, upon information and belief, BCE 2015's material allegations. (R.pp.68-69). The Circuit Court also entered a Rule 55(a), SCRCivP, order of default on 28 January 2020. (R..p.52-55).

**2** The Master-In-Equity conducted a hearing on 15 December 2020 (R.pp.82-89), and, by order issued 17 December 2020, quieted title in the real property at issue in BCE 2015. (R.pp.27-47).

**3** The Master-In-Equity did not specifically vacate the 31 October 2022, order or otherwise indicate the Amended Order was intended to replace the first order. (Amd. Order, pp.1-12).

# III. STATEMENT OF THE FACTS

## A. The Landowners' And BCE 2015's Respective Properties

The Landowners' real estate is a 39-acre unimproved tract located adjacent to Old Cherry Hill Road in Berkeley County (the "Landowners' Property" or "Parcel 001").[4] (R.p.101, line 18 – R.p.102, line 8; R.p.247, lines 12-17; R.p.261, lines 2-7; R.p.341). The Landowners acquired Parcel 001 via a Deed of Distribution from the Estate of their father, Edward Cooper, Jr. (R.p.159, lines 6-13; R.pp.341, 505-522).[5] The Landowners also own a 21-acre unimproved tract ("Parcel 036") (Rp.247, lines 12-17),[6] as well as a 15-acre unimproved tract ("Parcel 034") (R.p.247, lines 12-17),[7] both of which also which came to them through the same Deed of Distribution. (R.pp.505-522).

On 16 November 2015, through a Berkeley County Delinquent Tax Sale (R.p.95, line 23 – R.p.96, line 4; R.pp.472-487), BCE 2015 purchased a 22-acre unimproved tract ("Parcel 038") adjoining the northern boundary of the Parcel 001.[8] (R.p.95, line 23 – R.p.96, line 4; R.pp.472-487). BCE 2015 also owns the five-acre unimproved tract ("Parcel 039") located directly to the north of and adjoining Parcel 038.[9] (R.p.96, lines 8-13; R.pp.472-487). Parcel 038 and Parcel 039 are landlocked. (R.p.103, line 19 –

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**4** TMS No. 123-00-02-001. (R.pp.341, 495). The property tracts herein generally contain acreage slightly more or less than a whole acreage number. In order to avoid confusion, whole numbers have been used unless otherwise contextually required.

**5** *See generally* Berkeley County Probate Case No. 2008ES08-720, dated and recorded in the Register's Office on 8 April 2010, in Book 8396, Page 004, and then re-recorded 16 February 2011, in Book 8823, Page 099. (R.pp.369, 495).

**6** *See* TMS No. 123-00-02-036. (R.p.341).

**7** *See* TMS No. 123-00-02-034. (R.p.341).

**8** See TMS No. 123-00-02-038. (Exh. 1).

**9** See TMS No. 123-00-02-039. (Exh. 1).

R.p.104, line 3; R.p.255, lines 9-23; R.p.341).[10] The sole reasonable means of vehicular access to Parcels 001, 034, 036, 038, and 039 is across a generally unimproved dirt roadway (the "Dirt Road") running from the nearest public roadway – Old Cherry Hill Road. (R.p.110, line 23 – P.p.111, line 1; R.p.121, line 25 – R.p.122, line 13; R.p.129, lines 5-24). The Dirt Road, which has been in use for many, many decades (R.pp.341, 373-432), runs from Old Cherry Hill Road – across Parcel 001 in a northwesterly direction until it makes a right turn and heads north across Parcel 038, Parcel 039, Parcel 036, and onward. (R.p.129, lines 5-24; R.pp.341, 373-432).

### 1. Evolution of the Properties

In early colonial days, much of South Carolina was divided into baronies. (R.p.104, lines 10-15). The properties at issue originated from the approximately 12,000-acre Wadboo Barony originally given to Sir James Colleton in 1693. (R.p.104, lines 15-22; R.pp.346, 351).[11] In 1783, after the Revolutionary War ended, Wadboo Barony was broken into 28 lots and sold off at auction. (R.p.104, line 22 – R.p.105, line 1; R.pp.349, 351).[12] One of the sold lots – Lot 20 – purchased by William Logan and, together with Lot 19, became the 893.6-acre Broad Axe plantation. (R.pp.350-351). Elizabeth Holmes owned the property in 1815 (R.p.350), and in 1828, Dr. Henry Holmes sold Broad Axe

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**10** Parcels 035, 037, and 072 are all also landlocked. (R.p.256, line 23 – R.p.258, line 6).

**11** Sir James, for political reasons, fled to Barbados prior to the American Revolutionary War (R.p.104, lines 19-24) and the American colonists seized Wadboo Barony. *See* Wadboo Barony – Avenue of the Cedars – Before The Battle (*Wadboo Barony Battle Facts and Summary | American Battlefield Trust (battlefields.org)*). *See also* The Historical Marker Database (*Wadboo Barony Historical Marker (hmdb.org)*).

**12** (R.pp.348-349, 351). *See also* Wadboo Barony – Avenue of the Cedars – Aftermath (*Wadboo Barony Battle Facts and Summary | American Battlefield Trust (battlefields.org)*) (Following the war, the [12,000] acre property was seized by South Carolina, subdivided, and redistributed to compensate payment to soldiers of the war.").

plantation to William Meree. (R.p.106, lines 8-13; R.pp.350, 354, 356-357). William Meree then willed the property to his son Thomas Meree (R.p.360), who later left the land to his son - Paul Durant Meree, Esquire ("Attorney Meree" or "P.D. Meree"), a Berkeley County attorney. Parcel 001, Parcel 038, and Parcel 039 were all previously part of Attorney Meree's property.**13**

### 2. Parcel 038's Chain Of Title

In 1882, Attorney Meree subdivided the property into 12 separate parcels as shown on a plat (the "*1882 Subdivision Plat*") prepared by surveyor E. J. Dennis.**14** (R.pp.366-368). Access to Parcel 038, was solely over and across the Dirt Road located on Parcel 001, as shown on the *1882 Subdivision Plat* which Attorney Meree referenced in each of his eleven subsequently executed deeds.**15** Had Attorney Meree not required the surveyor, E.J. Dennis, a county surveyor, to include a road on the *1882 Subdivision Plat*, all of the various parcels located west of the Broad Axe Creek, except Parcel 001, would have been 100% landlocked. (R.p.111, line 10 – R.p.114, line 10; R.pp.553-554).

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**13** The properties were in Charleston County when the 1882 transactions ensued. (R.p.106, lines 2-6). Berkeley County was dissolved in 1865 and not reestablished until late 1882. *See* South Carolina Encyclopedia, Berkeley County (*Berkeley County | South Carolina Encyclopedia (scencyclopedia.org)*).

**14** Even though Attorney Meree repeatedly referenced the 1882 Subdivision Plat in each of the 12 deeds he later executed, the actual 1882 Subdivision Plat was missing from the public records. (R.p.111, line 16 – R.p.112, line 1). Nevertheless, as evidence of Attorney Meree's consistency, he subdivided another property - also surveyed by E. J. Dennis. (R.p.112, line 1 – R.p.113, line 18; R.pp.553-554). This other recorded plat, found in the public records, showed that Attorney Meree uniformly provided access and egress roads for each of the subdivided parcels. (R.p.112, line 1 – R.p.113, line 18; R.pp.553-554).

**15** Stains on the Nero Smalls' recorded deed show where a plat, referenced in subsequent documents related to this property, likely was located. (R.pp.492-494). The 1882 Subdivision Plat likely was lost when the deed book was rebound, or deteriorated over time, or simply was misplaced. Attorney 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 showed a road to the otherwise landlocked parcel. (R.p.103, lines 19-25; R.pp.553-554).

On 29 February 1884, in his seventh sale, Attorney Meree sold a 29-acre tract to Jupeter Tate. (R.p.106, line 22 – R.p.117, line 2; R.pp.457-459). When Attorney Meree sold Jupeter Tate his tract, the only access to what is now Parcels 038 and 039 was over the Dirt Road located on Parcel 001. Jupeter Tate later willed his 29 acres to his daughter, Hester Fashion (R.p.117, lines 3-8; R.p.460), who, on 8 August 1905, sold the property to J. W. Thornley. (R.p.117, lines 3-8; R.p.461-462). J. W. Thornley then bequeathed the property to his son - Andrew Thornley – on 7 October 1936 (R.p.117, lines 9-11; R.pp.463-465), who then transferred the property to his sister - Minnie Shay Stell - on 28 May 28, 1941. (R.p.117, lines 9-13; R.pp.466-467). Ms. Stell later subdivided the 29 acres by transferring five or so acres to her sister - Lottie Taucer – on 29 January 1954. (R.p.117, lines 12-15; R.pp.468-471). Minnie Shay Stell expressly granted an easement over both her land 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. (R.p.117, line 18 – R.p.118, line 5; R.p.119, line 3 – R.p.120, line 2; R.p.120, line 18 – R.p.121, line 5; R.pp.463-467). Ms. Stell effectively claimed a right to use the Dirt Road over Parcel 001. (R.p.122, lines 1-13; R.pp.463-467).**16**

On 24 September 1958, Minnie Shay Stell further subdivided her remaining 24 or so acres by transferring approximately 22 acres to Ms. Taucer which became Parcel 038 and five or so acres to her nephew - Freddie Parker - which tract is now TMS No. 123-00-02-037 ("Parcel 037"). (R.p.117, lines 12-17; R.pp.463-467). Parcels 038 and 039 later became the property of the Heirs of Lottie Taucer and remained in the Taucer family

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**16** Furthermore, a road does appear even earlier on the 1828 Plat prepared for Dr. Henry M. Holmes in the very same location of the current Dirt Road. (R.p.359).

for 110 years from 1905 until 2015. (R.p.259, line 19 – R.p.260, line 1; R.pp.468-471). The Dirt Road crossing Parcel 001 provided the only access from Old Cherry Hill Road - a public road – to (a) BCE 2015's Parcel 039 and (b) the Landowners' Parcels 034 and 036.**17**

### 3. Parcel 001's Chain Of Title

Much as did Parcel 038, Parcel 001 also evolved from Attorney Meree's 1882 subdivision of the 408-acre tract into 12 separate parcels. (R.pp.366-368). Attorney Meree sold the first subdivided 30-acre tract to Nero Smalls on 16 February 1882. (R.p.115, lines 14-24; R.p.259, lines 19-23; R.pp.366, 369, 492).**18** This initial property transfer - for what is now Parcel 001 - necessarily required the accompanying *1882 Subdivision Plat* to show the existence of the present-day Dirt Road for ingress and egress, otherwise all of the other subsequent property transfers would have been for totally landlocked properties. (R.p.113, line 19 – R.p.114, line 16; R.p.162, line 12 – R.p.163, line 12). Access to Parcel 038, as well as to Parcel 034 and Parcel 036, was, both then and now, solely over the Dirt Road located on Parcel 001, as shown on the *1882 Subdivision Plat* which Attorney Meree referenced in each of his subsequently executed deeds.**19**

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**17** The Dirt Road is also the only access to TMS No. 123-00-02-035 ("Parcel 035"), TMS No. 123-00-02-037 ("Parcel 037") and TMS No. 123-00-02-075 ("Parcel 075") all owned by third parties not involved in this litigation.

**18** Nero Smalls was the Landowners' great-great-grandfather (R.p.116, lines 19-21; R.p.259, lines 16-18; R.p.271, lines 15-19) and the admitted original owner of Parcel 001. (R.p.259, lines 19-21).

**19** As noted, the 1882 Subdivision Plat was missing from the public records. (R.p.111, line 16 – R.p.112, line 1). Stains on the Nero Smalls' recorded deed show where a plat, referenced in subsequent documents pertaining to this property, likely was located. (R.pp.492-494). The 1882 Subdivision Plat likely was lost when the deed book was rebound, or deteriorated over time, or simply was misplaced at some point in the past. Attorney Meree did record a plat bound in the deed book

On 19 January 1911, Nero Smalls sold his 30 acres to Seligh Behrman. (R.p.115, line 24-25; R.p.270, line 22 – R.p.271, line 6; R.pp.493-494). Mr. Berman passed and the property went to his heir – J. Russell Williams, Jr. - on 9 July 1942. (R.p.115, line 24 – R.p.116, line 1; R.p.271, lines 19-23; R.p.497). Mr. Williams, on 20 October 1942, then sold the property to Eddie Cooper (R.p.116, lines 1-2; R.p.271, line 19 – R.p.272, line 6; R.p.498), the Landowners' grandfather. (R.p.259, lines 11-15; R.p.271, lines 7-18). During the same time period, Henry Cooper deeded Eddie Cooper other property which is now part of Parcel 001. (R.p.116, lines 3-18; R.pp.343, 495-496). Eddie Cooper retained both properties until 27 April 1993, when he transferred them to the Landowners' father – Eddie Cooper, Jr. (R.p.247, line 22 – R.p.248, line 1; R.p.259, lines 11-15; R.pp.500-504). The younger Mr. Cooper died on 28 October 2008, and other tracts, including Parcel 001 (R.pp.505-510), passed to the Landowners. (R.p.259, lines 9-15; R.p.262, lines 3-6; R.pp.505-522).

### 4. Access Via The Dirt Road

The Dirt Road has been in existence for decades and has been used for well over 20 years to facilitate harvesting timber, farming, and hunting by Parcel 038's and Parcel 39's prior owners, as well as by the Landowners for Parcel 036 and Parcel 034. (R.p.122, line 24 – R.p.130, line 20; R.p.131, line 17 – R.p.146, line 25; R.p.148, line 2 – R.p.149, line 25; R.p.194, lines 10-20; R.p.244, lines 8-17; R.p.262, line 3 – R.p.262, line 6; R.pp.373-432).[20] The Dirt Road is the sole reasonable means of vehicular access from

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just prior to Nero Smalls' deed in the same exact manner, in the same year, and by the same surveyor. While the did not reserve an easement, the plat showed a road to the parcel which would have otherwise been landlocked. (R.p.103, lines 19-25; R.pp.553-554).

[20] The Dirt Road actually services some 14 properties, including the ones owned by BCE 2015 and the Landowners. (R.p.163, lines 3 – 12).

those several properties to and from Old Cherry Hill Road. (R.p.129, lines 5-24; R.pp.373-432). The Dirt Road has been in existence since approximately 1820 (R.p.162, lines 12-20) as shown on various plats. (R.p.162, line 21 – R.p.173, line 2; R.pp.359, 362-365). The Landowners admitted the Dirt Road has been there for more than 50 years (R.p.252, line 7 – R.p.253, line 12; R.p.282, lines 19-22) and had been periodically improved. (R.p.253, line 13 – R.p.254, line 8).

The Landowners have used the Dirt Road to harvest timber from Parcel 001, Parcel 034, and Parcel 036 since at least the 1990s, crossing over Parcel 038 and Parcel 039 in the process. (R.p.122, line 24 – R.p.130, line 20; R.p.131, line 17 – R.p.146, line 25; R.p.148, line 2 – R.p.149, line 25; R.p.151, line 8 – R.p.152, line 3; R.p.254, line 5-8; R.pp.373-432). The Dirt Road was also utilized for access and harvesting timber by the Landowners' predecessors-in-title to Parcel 036 and Parcel 034 for over 20 years including, but not limited to, Edward Cooper, Jr. and Eddie Cooper. (R.p.244, lines 8-17; R.p.251, lines 8-14). BEC 2015's predecessor-in-title - Lottie Taucer – used the Dirt Road for 20 years ago for farming and to harvest timber. (R.p.244, lines 8-17). Hunters who lease Parcels 034 and Parcel 036 from the Landowners use the Dirt Road, crossing over Parcel 038, Parcel 039, and Parcel 035 to access Parcel 034. (R.p.193, lines 13-23; R.p.194, lines 10-20; R.p.249, lines 11-22; R.p.252, line 20 – R.p.253, line 2; R.p.254, line 11 – R.p.255, line 8; R.p.261, line 8 – R.p.262, line 25; R.p.282, line 23 – R.p.283, line 14).

Ariel imagery from 1954 onward showed the Dirt Road's continued use across Parcel 001, Parcel 034, Parcel 038, Parcel 039 consistent with agricultural and timber operations. (R.p.220, lines 1-5; R.pp.373-432). The *LIDAR* imagery of the various

parcels illustrated the Dirt Road was depressional (*i.e.*; the roadbed was physically depressed below the level of the grade of the surrounding land) (R.pp.447-450) – indicative of long-term, repetitive vehicular use. (R.p.160, line 20 – R.p.161, line 72).

Additionally, the Dirt Road's current position on Parcel 001 is the only practical location, given the area's topography and the existing area's wetlands. Notwithstanding the Landowners' suggested other access points (R.p.197, line 12 – R.p.200, line 12; R.p.265, line 17 – R.p.266, line 19, R.p.272, line 20 – R.p.273, line 24; R.p.279, lines 5-20), those areas were, at best, unreasonable. Given the scope and magnitude of constructing a proper roadway through the offered areas, the majority of which were wetlands, the project was estimated to cost in excess of $400,000.00. (R.p.239, line 4 – R.p.244, line 7). That amount did not include the cost of the required federal and/or state wetland remediation and/or mitigation efforts. (R.p.244, lines 8-25).[21] Furthermore, this presumed the relevant governmental authorities would agree to issue the myriad of required permits. (R.p.197, line 12 – R.p.198, line 8; R.p.223, lines 19-25). In any case, Dan Scheffing stated to construct such a new road, considering the existence of the well-situated Dirt Road (R.p.224, lines 1-7), would be environmentally irresponsible. (R.p.222, lines 9-25; R.p.224, lines 1-3).

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**21** *See e.g.*; S.C. Dept. of Health & Environmental Control Wetlands Mitigation Guidelines (*Mitigation_Guidelines.pdf (scdhec.gov)*). *See also* U.S. Army Corps of Engineers – Charleston District Compensatory Mitigation (*Charleston District Regulatory Program – Compensatory Mitigation (army.mil)*).

# IV. ARGUMENT AND CITATION OF AUTHORITY

***Standard Of Review***

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury."**22** "If the action is viewed as interpreting a deed, it is an equitable matter and the appellate court may review the evidence to determine the facts in accordance with the court's view of the preponderance of the evidence."**23** "The interpretation of a deed is an equitable matter."**24** " 'In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.' "**25**

## A. BCE 2015, LLC WAS ENTITLED TO AN EASEMENT BY NECESSITY OVER THE DIRT ROAD CROSSING PARCEL 001 AS PARCELS 038 AND 039 WERE ADMITTEDLY LANDLOCKED

Undeniably both Parcel 038 and Parcel 039 are landlocked. (R.p.103, line 19 – R.p.104, line 3; R.p.255, lines 9-23; R.p.341). Although disputed (R.pp.12-13), the evidence BCE 2015 presented demonstrated the Dirt Road was the most practical and most reasonable means for BCE 2015 to access its property at Parcel 038 and Parcel 039. (R.p.97, line 12 – R.p.200, line 13; R.p.214, line 16 – R.p.215, line 20; R.p.220, line

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**22** Pittman v. Lowther, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005) (*citing* Slear v. Hanna, 329 S.C. 407, 496 S.E.2d 633 (1998)).

**23** Slear v. Hanna, 329 S.C. 407, 410-411, 496 S.E.2d 633, 635 (*citing* Wayburn v. Smith, 263 S.C. 518, 211 S.E.2d 560 (1975); Heritage Fed. Sav. & Loan Assn v. Eagle Lake Condos, 318 S.C. 535, 458 S.E.2d 561 (Ct.App. 1995)).

**24** Wayburn v. Smith, 263 S.C. 518, 521, 211 S.E.2d 560, 561 (*citing* Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 167 S.E.2d 420 (1969); Wolfe v. Hayes, 161 S.C. 293, 159 S.E. 620 (1931)).

**25** Columbia Ventures, LLC v. Richland County, 413 S.C. 423, 442, 776 S.E.2d 900, 910 (2015) (Citations omitted).

6 – R.p.221, line 7; R.p.222, line 9 – R.p.224, line 7; R.p.236, line 13 – R.p.237, line 18; R.p.238, line 22 – R.p.244, line 25). The Master-In-Equity incorrectly concluded BCE 2015 "ha[d] failed to prove [its] entitlement to an easement by necessity over Parcel 001. (R.p.13). Contrary to the Master-In-Equity's decision, BCE 2015 was entitled to an easement by necessity over the Landowners' property.

" 'From the earliest period of our judicial history the acquisition of an easement of right of way over another's land, by necessity, has been clearly [long] recognized and protected.' "**26** Consequently, in matters involving a party's claim to an easement by necessity our courts have acknowledged:

> the theory of the law is that the title to the same rests upon an *implied* or *presumed* grant, as the law presumes that, where a person is at one time the owner of the servient and dominant tenements as one tract, and conveys a part thereof to another, it is his intention also to convey [such rights as are] reasonably and actually necessary for the enjoyment of the land conveyed.**27**

In fact, " 'the whole point of the easement by necessity doctrine is to ensure . . landlocked parcels[, like Parcel 038 and Parcel 039,] have access to a public road[, such as Old Cherry Hill Road,] thus, the doctrine presumes or implies . . the grantor intended for the grantee of a landlocked parcel to have access, which is one of the rights essential to the enjoyment of land.' "**28**

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**26** 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).

**27** Brasington, 143 S.C. 223, 3233-234, 141 S.E. 375, 381 (Emphasis in original).

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

The legal requirements of an easement by necessity are well-established, namely (a) unity of title, (b) severance of title, and (c) necessity.**29** The Master-In-Equity acknowledge he had "already found that there was unity of title and severance of title" (R.p.12) and, therefore, needed only to address the "necessity" issue. (R.pp.12-13). The "necessity element of easement by necessity must exist at the time of the severance and the party claiming the right to an easement must not create the necessity when it would not otherwise exist."**30**

In that vein, the Master-In-Equity concluded BCE 2015 was required to demonstrate, as of 6 February "1882, when Paul D. Meree conveyed the property now owned by the [Landowners (Parcel 001)] severing [that] property from his remaining property, there was no reasonable means of ingress and egress for the property [(Parcel 038 and Parcel 039)] now owned by [BCE 2015]." (R.p.13). The Master-In-Equity determined, after ostensibly reviewing the Tiverton Lawn Plantation Plat (R.p.363), the "survey, by itself, d[id] not provide proof [BCE 2015's] real property [(Parcel 038 and Parcel 039] was without other reasonable means of ingress and egress at the time of the severance" (R.p.13)**31** and, therefore, BCE 2015 was not entitled to an easement by necessity. (R.p.13).**32** The Master-In-Equity ignored the plain import of the Tiverton Lawn

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**29** Kennedy v. Bedenbaugh, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002).

**30** Boyd v. Bellsouth Telephone Telegraph. Co., 369 S.C. 410, 418-419, 633 S.E.2d 136, 140-141 (2006) (*citing* Clemson Univ. v. First Provident Corp., 260 S.C. 640, 652, 197 S.E.2d 914, 920 (1973)). *See also generally* 28A C.J.S., Easements, 96 (West Group 1995).

**31** The Master-In-Equity did not address easement by necessity in the original order. (R.pp.16-26). BCE 2015 sought reconsideration on, among other things, the easement by necessity issue. (R.pp.70-81). The amended order repeated the contents of the original order, albeit with added language addressing BCE 2015's easement by necessity argument. (R.pp.12-13).

**32** The Master-In-Equity's decision BCE 2015 failed to demonstrate there was no other reasonable access to the property other than the Dirt Road at the time of the severance effectively

Plantation Plat, which showed a road in the very location of the Dirt Road's current northern terminus which then historically provided the most reasonable and practical access to present-day Parcel 038 and Parcel 039. (R.p.363).**33**

### 1. Necessity Of The Easement As Of The Severance

As previously noted, the " 'necessity element . . ***must exist at the time of the severance*** . . . ' "**34** The justification is "because it is the severance that creates the necessity for an easement and, thus, allows the law to impute to a landowner a right to cross an adjacent parcel."**35** While " '[t]he necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, [it] but need not be absolute and irresistible.' "**36** " 'South Carolina requires only 'reasonable necessity' to

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required BCE 2015 to impossibly "prove a negative". *See* Copeland v. Western Assur. Co., 43 S.C. 26, 27, 20 S.E. 754, 754 (1895). *See also In re* Oliver, 21 S.C. 318, 324 (1884) (". . .one is not required to prove a negative."). The Landowners failed to present any evidence showing when Attorney Maree subdivided the property there was another reasonable ingress and egress access location to a public road (*nee* Old Cherry Hill Road). The Landowners presented no such evidence nor did they affirmatively challenge BCE 2015's evidence. The Landowners conceded the properties (Parcels 035, 037, 038, 072, and 075) were all landlocked. (R.p.255, lines15-23; R.p.256, line 23 – R.p.258, line 6). The only reasonable and practical ingress and egress access from the properties to the north and northeast of Parcel 001 on to and away from Old Cherry Hill Road was and still remains the Dirt Road in its present general location as has been the case since the 1880's.

**33** The earliest incarnation of the Dirt Road is shown on the 1828 Plat. (R.p.106, line 2 – R.p.108, line 6; R.p.259). This plat also confirms Dr. Henry Holmes owned sections 19 and 20. (R.p.106, lines 17-22; R.p.259). As has been referenced, Dr. Holmes sold the property to William Meree (R.p.106, lines 8-13; R.pp.350, 354, 356-357) and, some years later, Attorney Maree eventually became the owner. (R.pp.360, 366-368, 455-459, 490-492).

**34** Paine Gayle Properties, LLC v. CSX Transp., Inc., 400 S.C. 568, 590, 735 S.E.2d 528, 540 (2012) (*quoting* Boyd, 369 S.C. 410, 420, 633 S.E.2d 136, 141) (Internal citations omitted and emphasis in original).

**35** *Id.*, (*citing* Turnbull v. Rivers, 14 S.C.L. 131, 139 (Ct.App. 1825) ("The necessity by which a person derives a right of way, is when one person sells to another lands inclosed on all sides by other lands. Here[,] the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land.")).

**36** *Id.*, (*quoting* Boyd v. Bell South Telephone & Telegraph Co., 369 S.C. 410, 418-419, 633 S.E.2d 136, 140-141).

imply an easement: while the owner of the servient estate must prove more than convenience, he need not show the [easement] is absolutely necessary.' "**37** While the "doctrine [of easement by necessity] provides reasonable access to the dominant estate when there is none; it does not provide a means for ensuring a preferred method of access to a particular portion of a tract when access to the tract is otherwise available."**38**

The Master-In-Equity, reviewing the Tiverton Lawn Plantation Plat (R.p.363) (the "Tiverton Plat"), denied BCE 2015 an easement by necessity on the grounds the "necessity" did not exist at the time of Attorney Meree's severance of the dominate estate. (R.p.13). A closer look at the Tiverton Plat, as well as other relevant evidence, shows the "necessity" existed in 1882 at the severance.

Firstly, the Wadboo Barony plat (R.p.351) shows how South Carolina later divided the property in 1783 post-Revolutionary War. (R.p.104, line 22 – R.p.105, line 1; R.pp.349, 351). Parcel Nos. 19 and 20 noted on the same plat became the Broad Axe Plantation. (R.pp.352-353). A transparent overlay of the Wadboo Barony plat placed atop a present-day Berkeley County GIS map (R.p.353) show[ed] the "black . . the dotted line indicat[ed] lot [No.] 20 of the Wadboo Barony, and the little squiggly line across there indicate[d] a stream, [which was] the Broad Ax[e] [Branch] that r[an] through the property". (R.p.105, line 10 – R.p.106, line 1; R.p.353). Secondly, a circa 1820's plat (R.p.359), showed, for "the first time that a road appear[ed] going north across [a] section line in approximately the [same] location where [the Dirt] [R]oad was - - or is, about 200 years

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**37** *Id.*, (*quoting* Graham v. Causey, 284 S.C. 339, 341, 326 S.E.2d 412, 414) (Citations omitted in original)).

**38** Morrow v. Dyches, 328 S.C. 522, 529, 492 S.E.2d 420, 424 (*citing* Hayes v. Tompkins, 287 S.C. 289, 337 S.E.2d 888 (Ct.App. 1985) (easement by necessity across adjoining land was upheld because a deep gully separated the dominant estate from a bordering public road)).

ago." (R.p.107, lines 17-22). Dr. Henry Holmes later owned the land (R.p.107, lines 8-19; R.p.359) and sold it to William Meree - Attorney Meree's grandfather. (R.p.106, lines 8-13; R.pp.350, 354, 356-357). After Attorney Meree inherited the land, he divided the entire 408-acre tract property into twelve parcels (*i.e.*; the severance) and sold the individual tracts to, among others, BCE 2015's and the Landowners' predecessors-in-title. (R.pp.366-368).

The evidence (R.p.341) showed the Dirt Road started "at Old Cherry Hill Road, ma[de] a 90-degree turn, continue[d] across [Parcel 038 and Parcel 039] . . [a]nd continue[d] on up . . through the trees [on Parcels Nos. 34, 35, 36, and 40], and then it actually meets up with . . an old road called Singleton Lane . . . .". (R.p.102, line 11 – R.p.103, line 8). While Singleton Lane still exists today, the roadway was previously known as Meree Avenue (R.p.109, lines 15-18; R.p.121, lines 6-18), an obvious title given its location on Attorney Meree's property. (R.p.363).

The Tiverton Plantation Plat (R.p.363) which specifically referenced "Meree's land" (R.p.108, lines 20-23; R.p.363) "show[ed] a road entering from east to west . . which [wa]s actually in the same location as Singleton Lane [is] right now . . . ." (R.p.108, lines 23-25; R.p.363). A virtual transparency of the Tiverton Plat overlaying both an MLS Tax Map (R.p.364), as well as the present-day Berkeley County GIS map (R.p.365), demonstrates the designated boundary areas match up very well and shows Meree Avenue sitting in the exact position where Singleton Lane lies today. (R.p.109, lines 8-23; R.pp.363-365).

As further evidence showing the "necessity" existed at the time of the severance, in 1954 Minnie Shay Stell (a prior owner of present-day Parcel 038) – subdivided her 29 acres by transferring five or so acres to her sister - Lottie Taucer. (R.p.117, lines 12-15;

R.pp.468-471). Minnie Shay Stell expressly granted an easement[39] over both the property she was transferring (*i.e.*; 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. (R.p.117, line 18 – R.p.118, line 5; R.p.119, line 3 – R.p.120, line 2; R.p.120, line 18 – R.p.121, line 5; R.pp.468-471). Ms. Stell specifically stated she was transferring the property (Parcel 039):

> TOGETHER with the right of the Grantees [the Taucers] herein a reasonable and convenient right-of-way for access, ingress, egress and regress to have the right to select two (2) such right-of-way, if desired, in order to have access to their land from the west or south across lands of Grantor [Ms. Stell], and Grantor [Ms. Stell] herein reserves the right to use any rights-of-way established by the Grantees [the Taucers] across their lands, concurrently with the usage by Grantees [the Taucers] for ingress, egress, and regress across the lands above described.

(R.p.119, line 12 – R.p.120, line 2; R.p.120, line 18 – R.p.121, line 5; R.p.468). Ms. Stell's reserved "easement to the south would line up with th[e] existing [Dirt] [R]oad [which] crosses [the property] comes out [to Old Cherry Hill Road]." (R.p.117, lines 18-23). Her reserved easement to the west "probably . . was Singleton Lane . . which comes out to the west and joins [U.S. Highway *17A*]." (R.p.117, line 24 – R.p.118, line 2). Given Ms. Stell's reservation of a "reasonable and convenient right-of-way for access, ingress, egress and regress", she clearly believed "there [the Dirt] [R]oad [went] all the way through [the tracts down to Old Cherry Hill Road], based on the deed when she broke up [her] property." (R.p.118, lines 3-5). Moreover, "historically[, the Dirt Road] was [the only]

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**39** 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.

road going all the way through [from its staring point] up where [Meree's] Avenue originally was [and going] down through all [the] parcels and exit[ing] on the south [to Old Cherry Hill Road]." (R.p.121, line 6 – R.p.122, line 9).

When Attorney 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. (R.p.363). 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. The simple and most logical reason for the abject absence of any other roads was 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.

Contrary to the Master-In-Equity's "conclusion" to the contrary, the "necessity" element existed in 1882 when Attorney Meree subdivided the property. There was no other reasonable or practical ingress and/or egress means of access from the various parcels to a public road other than the Dirt Road. Moreover, the Landowners failed to present any evidence and/or legal theory to the contrary.

## 2. Access For An Easement By Necessity Must Be Reasonable

The "necessity" element for an easement by necessity "need not be absolute and irresistible"**40** but "must be actual, real, and reasonable . . ."**41** South Carolina law " 'requires only 'reasonable necessity' to imply an easement: while the owner of the servient estate must prove more than convenience, he need not show the [easement] is absolutely necessary.' "**42** Nevertheless, " 'necessity means 'there could be no other reasonable mode of enjoying the dominant tenement without this easement.' ' "**43** Consequently, while it may be possible for a property owner seeking an easement by necessity to install another driveway providing access to the property, such a possibility does not carry the day when " 'the evidence also indicat[s] an alternative driveway to the [property] would be infeasible, impractical, and very costly.' "**44**

Admittedly, the Landowners "offered" to provide BCE 2015 access via other locations along Parcel 001 adjacent to Old Cherry Hill Road. (R.p.197, line 12 – R.p.200, line 12; R.p.265, line 17 – R.p.266, line 19, R.p.272, line 20 – R.p.273, line 24; R.p.279, lines 5-20).**45** Nevertheless, the only evidence presented demonstrated those

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**40** Jowers v. Hornsby, 292 S.C. 549, 550-551, 357 S.E.2d 710, 711 (*citing* Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944); Merrimon v. McCain, 201 S.C. 76, 81, 21 S.E.2d 404, 407 (1942); Lawton v. Rivers, 13 S.C.L. (2 McCord) 445 (1823)).

**41** Proctor v. Steedley, 398 S.C. 561, 578, 730 S.E.2d 357, 366 (Ct.App. 2012).

**42** Paine Gayle Properties, LLC v. CSX Transp., Inc., 400 S.C. 568, 590, 735 S.E.2d 528, 540 (*quoting* Graham v. Causey, 284 S.C. 339, 341, 326 S.E.2d 412, 414 (Citations omitted and alteration in original)).

**43** Pendarvis v. Cook, 391 S.C. 528, 534, 706 S.E.2d 520, 523 (Ct.App. 2011) (*quoting* Boyd v. Bell South Telephone Telegraph Co., Inc., 369 S.C. 410, 421, 633 S.E.2d 141 (2006) (*quoting* Crosland v. Rogers, 32 S.C. 130, 133, 10 S.E. 874, 875 (1890)).

**44** *Id.*, (*quoting* Boyd, 369 S.C. 410, 422, 633 S.E.2d 142).

**45** The Landowners offered BCE 2015 access through a triangular area in Parcel 001's far northeasterly section. (R.p.158, line 6- R.p.160, line 8; R.p.219, lines 10-16; R.pp.438-445).

"alternative" sites were neither practical nor reasonable. There was no evidence of any location on Parcel 001 and adjacent to Old Cherry Hill Road, other than the Dirt Road, which demonstrated a present physical capability of sustaining vehicular traffic (of whatever nature) or which had been capable of doing so at any time in the past. (R.p.122, lines 10-13).

Dan Scheffing, the forest expert, testified it might be possible, from a purely engineering perspective, to construct a road in one of the locations the Landowners offered BCE 2015, "however, [based upon his] opinion and in [his] experience . . it [would] be not only impractical, it would be environmentally irresponsible." (R.p.222, lines 9-25).**46** The "alternate" access area offered to BCE 2015 was some six or seven feet below the grade of Old Cherry Hill Road and generally in a boggy marshy area with particularly limited "high ground". (R.p.158, line 6 – R.p.160, line 8; R.p.220, lines 17-25; R.pp.438-445). Mr. Scheffing stated the access location offered "would be classified as a wetland and would be very, very difficult[,] if not impossible[,] to construct a road across". (R.p.221, lines 17-25).

In fact, much like present day, the location of the Dirt Road then and now is a function of the area's topography and locale's extensive wetlands and marshy areas. From a purely practical standpoint, the Dirt Road was necessarily located where it is because no other site along the public roadway - now Old Cherry Hill Road - offered both sufficient structural stability and a reasonably consistent dry surface area to support the

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**46** This was particularly true, considering such construction would be completely unnecessary in light of the existence of the well-situated and long-existing Dirt Road (R.p.224, lines 1-7).

ingress and egress of vehicular traffic from horse-drawn wagons to farm trucks, farm tractors, automobiles, trucks, and logging equipment.

The Dirt Road's current position on Parcel 001 is the only practical location, given the area's topography and the existing wetlands. The Landowners' offered alternative access points (R.p.197, line 12 – R.p.200, line 12; R.p.265, line 17 – R.p.266, line 19, R.p.272, line 20 – R.p.273, line 24; R.p.279, lines 5-20), were, at best, unreasonable and, at worst, a sham. William Chivers, an expert in the construction of dirt roads in rural areas, testified given the scope and magnitude of constructing a proper roadway through the offered area, the majority of which were unmistakably wetlands,**47** the cost of the road construction project would likely exceed $400,000.00. (R.p.239, line 4 – R.p.244, line 7). Moreover, the $400,000.00 projected amount did not include the cost of complying with the various federal and/or state wetland remediation and/or mitigation requirements. (R.p.244, lines 8-25).**48**

Much as this Court of Appeals acknowledged in Pendarvis v. Cook:

> The [Dirt] [R]oad was the only one in existence in [1882] and remains the only route a vehicle may take from [Old Cherry Hill Road] to [Parcel 038, Parcel 039, and on northward] over [140] years later. [BCE 2015's evidence showed] the [Dirt Road]'s location was dictated by the [area's topography and] the marsh[y] [wetlands] and [the Dirt Road's] location was economically efficient. [The] argument that the [Dirt Road] was not the only 'reasonable mode of gaining access to and enjoying the property,' . . incorrectly focuses on whether there were other suitable locations available for the [Dirt Road around 1882]. . . . . The [M]aster[-In-Equity] [should have]

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**47** This unrealistically presumes the relevant state and federal authorities would issue the required permits. (R.p.197, line 12 – R.p.198, line 8; R.p.223, lines 19-25).

**48** *See* South Carolina Department of Health and Environmental Control Wetlands Mitigation Guidelines (*Mitigation_Guidelines.pdf (scdhec.gov)*). *See also* U.S. Army Corps of Engineers – Charleston District Compensatory Mitigation (*Charleston District Regulatory Program – Compensatory Mitigation (army.mil)*)

> focused on the fact that the [Dirt] [R]oad already existed in [1882] when [Attorney Meree] divided the property. The [M]aster[-In-Equity] [should have] then properly considered whether the alternative of building a new road entirely on [the offered area] was feasible, practical, and cost efficient. In other words, the [M]aster[-In-Equity's] inquiry [was] not to find the most convenient location to build a road in [1882], but rather to determine whether keeping the existing [Dirt] [R]oad, as opposed to building a new one . . was 'necessary'.**49**

BCE 2015 presented essentially uncontroverted evidence that the "necessity" element of an easement by necessity existed when Attorney Meree pursued his 12-part severance of the property. Moreover, BCE 2015 also presented overwhelming evidence demonstrating there was no other reasonable and/or cost effective alternative ingress and egress location to Cherry Hill Road on or through Parcel 001.

The Master-In-Equity incorrectly refused to grant BCE 2015 an easement by necessity over Parcel 001 which decision should and must be reversed.

### B. BCE 2015, LLC WAS ENTITLED TO AN EASEMENT BY PRIOR USE OVER THE DIRT ROAD CROSSING PARCEL 001 AS PARCELS 038 AND 039 WERE ADMITTEDLY LANDLOCKED

For BCE 2015 to establish an easement by prior use, South Carolina law required BCE 2015 to demonstrate seven elements, namely:

> (1) unity of title; (2) severance of title; (3) the prior use was in existence at the time of unity of title; (4) the prior use was not merely temporary or casual; (5) the prior use was apparent or known to the parties; (6) the prior use was necessary in that there could be no other reasonable mode of enjoying the dominant tenement without the prior use; and (7) the common grantor indicated an intent to continue the prior use after severance of title.**50**

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**49** Pendarvis v. Cook, 391 S.C. 528, 535, 706 S.E.2d 520, 524 (*quoting* Boyd v. Bell South Telephone Telegraph Co., Inc., 369 S.C. 410, 421-422, 633 S.E.2d 136, 141-142).

**50** *Id.*, at 391 S.C. 528, 532-533, 706 S.E.2d 520, 522-523 (*quoting* Boyd, 369 S.C. 410, 417, 633 S.E.2d 136, 139).

The Master-In-Equity conceded BCE 2015 had satisfied the first two elements, but then concluded "[t]he difficulty for [BCE 2015] appear[ed] to be providing any evidence or testimony regarding elements 3, 4, 5, 6[,] and 7." (R.p.7). Notwithstanding the Master-In-Equity's "conclusions", the record shows BCE 2015 provided credible evidence addressing and complying with each of those remaining five elements.**51**

As for element *three*, there was abundant evidence the Dirt Road existed at the time Attorney Meree subdivided his property and initiated the severance. (R.p.102, line 11 – R.p.103, line 8; R.p.108, lines 20-23; R.p.109, lines 8-23; R.p.121, lines 6-18; R.pp.363-365).

As for elements *four*, *five*, and *seven*, BCE 2015 presented evidence demonstrating the Landowners were aware the Dirt Road had been consistently used for agricultural and logging operations for decades. (R.p.122, line 24 – R.p.130, line 20; R.p.131, line 17 – R.p.146, line 25; R.p.148, line 2 – R.p.149, line 25; R.p.194, lines 10-20; R.p.220, lines 1-5; R.p.244, lines 8-17; R.p.262, line 3 – R.p.263, line 6; R.pp.373-433). The evidence further showed the Landowners were aware the Dirt Road had been used by hunters to access the northern properties for many, many years, at least since 2000. (R.p.252, line 20 – R.p.254, line 12; R.p.254, line 11 – R.p.255, line 8; R.p.261, lines 8-18; R.p.262, lines 3-25). *LIDAR* imagery showed the Dirt Road as depressional (*i.e.*; roadbed was physically depressed below the grade of the surrounding land)

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**51** Notwithstanding a day-long trial and some 140+ exhibits, the Master-In-Equity continuously, albeit incredibly, asserted in the Amended Order BCE 2015 had presented "no evidence or testimony" to address a particular issue. (Amd. Order, pp.4-6). Assuming, *arguendo*, BCE 2015's documentary evidence and testimony may have been insufficient to meet a particular burden of proof, an assertion there was absolutely no evidence shows the Master-In-Equity failed to carefully consider the record in reaching the decisions in this matter.

(R.pp.447-450) – a situation indicative of both long-term and repetitive vehicular use. (R.p.160, line 20 – R.p.161, line 72). The Landowners admitted the Dirt Road had been in its present location for at least 50 years. (R.p.252, lines 7-15; R.p.282, lines 19-22). Moreover, the Landowners conceded the Dirt Road provided ingress and egress access to other parcels besides Parcel 001 and Parcel 038. (R.p.252, line 16 – R.p.253, line 12; R.p.254, line 11 – R.p.255, line 4; R.p.282, line 23 – R.p.283, line 14).

As for element *six*, BCE 2015 showed when Jupeter Tate acquired the property in 1884, there was no noted ingress and egress other than the Dirt Road. (R.p.106, line 22 – R.p.117, line 2; R.pp.457-459).**52** None of the contemporaneous plats showed nor did any of the involved historical deeds referenced any alternate access northward other than the Dirt Road located on Parcel 001. A later owner - Minnie Shay Stell (R.p.117, lines 9-13; R.pp.468-471) transferred five or so acres to her sister - Lottie Taucer and expressly granted an easement over both her land 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. (R.p.117, line 18 – R.p.118, line 5; R.p.119, line 3 – R.p.120, line 2; R.p.120, line 18 – R.p.121, line 5; R.pp.468-471). Ms. Stell effectively claimed a right to use the Dirt Road over Parcel 001. (R.p.122, lines 1-13; R.pp.468-471).

BCE 2015 presented evidence to satisfy all seven elements of demonstrate entitlement to an easement by prior use. The Master-In-Equity's decision to decline the easement must be reversed in all respects.

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**52** The Master-In-Equity stated the deed from Attorney Meree to Nero Smalls made "no mention of an easement being reserved across the property being conveyed . . . . (R.p.9). The missing 1882 Subdivision Plat (R.p.111, line 16 – R.p.112, line 1), likely physically attached to that deed (R.p.492), would have referenced the Dirt Road and its ability to provide ingress and egress.

## C. BCE 2015, LLC WAS ENTITLED TO AN EASEMENT BY PRESCRIPTION OVER THE DIRT ROAD CROSSING PARCEL 001 AS PARCELS 038 AND 039 WERE ADMITTEDLY LANDLOCKED

Under South Carolina law, "[i]n order to establish a prescriptive easement, the claimant must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years.[53] Furthermore, "our 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."[54]

As mentioned previously, BCE 2015 presented evidence demonstrating the Landowners were aware the Dirt Road had been consistently used for agricultural and logging operations for decades. (R.p.122, line 24 – R.p.130, line 20; R.p.131, line 17 – R.p.146, line 25; R.p.148, line 2 – R.p.149, line 25; R.p.194, lines 10-20; R.p.220, lines 1-5; R.p.244, lines 8-17; R.p.262, line 3 – R.p.263, line 6; R.pp.373-433). The evidence further showed the Landowners were aware the Dirt Road had been used by hunters to access the northern properties for many, many years, at least since 2000. (R.p.252, line 20 – R.p.254, line 12; R.p.254, line 11 – R.p.255, line 8; R.p.261, lines 8-18; R.p.262, lines 3-25). *LIDAR* imagery showed the Dirt Road as depressional (*i.e.*; roadbed was physically depressed below the grade of the surrounding land) (R.pp.447-450) – a situation indicative of both long-term and repetitive vehicular use. (R.p.160, line 20 –

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[53] Simmons v. Berkeley Electric Cooperative, Inc., 419 S.C. 223, 233, 797 S.E.2d 387, 392 (2016).

[54] 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, 419 S.C. 223, 797 S.E.2d 387.

R.p.161, line 72). The Landowners admitted the Dirt Road had been in its present location for at least 50 years. (R.p.252, lines 7-15; R.p.282, lines 19-22). Moreover, the Landowners conceded the Dirt Road provided ingress and egress access to other parcels besides Parcel 001 and Parcel 038. (R.p.252, line 16 – R.p.253, line 12; R.p.254, line 11 – R.p.255, line 4; R.p.282, line 23 – R.p.283, line 14).**55**

BCE 2015 presented evidence to satisfy all of the required elements of an easement by prescription. The Master-In-Equity's decision refusing to grant BCE 2015 the requested easement by prescription should and must be reversed in all respects.

### D. THE MASTER-IN-EQUITY SHOULD HAVE ALLOWED ADMISSION OF BCE 2015'S IMPORTANT AND MATERIAL POST-TRIAL AFTER-DISCOVERED EVIDENCE.

At the post-trial hearing, BEC 2015 moved the admission of a series of 16 or so photographs (R.p.327, line 12 – R.p.328, line 12; R.pp.567-588) taken after the trial which directly addressed the issues regarding physical improvements made by unknown persons to the Dirt Road after the conclusion of the Bench Trial. (R.p.324, line 24 – R.p.326, line 24). The Master-In-Equity denied the request on the grounds the proffered photographs "would [not] have any relevance to the motion [then under consideration]." (R.p.326, line 25 – R.p.327, line 10). The Master-In-Equity's decision not to admit the photographs was should and must be reversed as being incorrect and legally unsupportable.

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**55** The Master-In-Equity stated BCE 2015 did not prove its entitlement by "clear and convincing evidence". (R.p.12). *See generally* Bundy v. Shirley, 412 S.C. 292, 305-306, 772 S.E.2d 163, 170-171 (2015). BCE 2015 demonstrated continues use and operation of the Dirt Road using the Landowners' own testimony. It is hard to imagine any more "clear and convincing evidence" than the very testimony of the parties disputing BCE 2015's easement claim. Assuming the Master-In-Equity did not believe the Landowners' testimony was credible on this issue, then none of the Landowners' testimony could have been seen as valid and credible.

The *South Carolina Rules of Civil Procedure* " 'empowers a trial court to grant a new trial for newly discovered evidence if a party establishes the newly discovered evidence: '(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.' "**56** Furthermore, "[r]elief under the rule depends upon the post-trial discovery of previously unknown, outcome-changing facts [BCE 2015] could not have, with due diligence, unearthed before trial."**57** The doctrine allowing the admission of newly discovered evidence is directed at " 'correcting an erroneous [judicial determination] stemming from the unobtainability of evidence.' "**58** While "[t]he decision to grant a new trial based on after-discovered evidence is within the sound discretion of the trial court,"**59** such a decision may be reversed when it was found to be an abuse of discretion.**60** In any case, under Rule 59(a)(2), SCRCivP, a "new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State."**61**

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**56** 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).

**57** *Id.*

**58** *See generally* Foster v. BNP Residential Properties Limited Partnership, 2008 WL 11348323, at *8 (D.S.C., filed 28 April 2008) (*quoting* Schultz v. Butcher, 24 F.3d 626, 631 (4th Cir. 1994) (*quoting* Anderson v. Cryovac, Inc., 862 F.2d 910, 924 fn.10 (1st Cir. 1988)).

**59** Bass v. Bass, 2006 WL 7285828, at *1 (Ct.App., filed 28 Mar. 2006) (*per curiam*) (*citing* Bowman v. Bowman, 357 S.C. 146, 151, 591 S.E.2d 654, 656 (Ct.App. 2004)).

**60** *See* Raby Construction, LLC. v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004).

**61** *See* Blejski v. Blejski, 325 S.C. 491, 497 fn.4, 480 S.E.2d 462, 466 fn.4 (Ct.App. 1997).

The several photographs, taken on 3 February 2023, some four and ½ months after the Bench Trial showed the Dirt Road was both well used (R.pp.558-569) and reasonably well-maintained. (R.pp.582-569, 586-588). Furthermore, many of the photographs were taken on TMS 124-00-00-014 ("Parcel 014")[62] – a property immediately adjacent to Parcel 035, as well as on Parcel 035 itself. (R.pp.572-583). These photographs showed the present "condition" of the hunters' access route via a wooden footbridge from Parcel 014 over to their hunting areas on Parcel 035 (R.pp.572-583) as referenced by the Landowners. (R.p.193, lines 13-24; R.p.249, lines 11-16; R.p.249, line 23 – R.p.251, line 7). The photographs showed the "access" pathway on both sides of the rather dilapidated footbridge was effectively impassable except for the most intrepid and determined individuals since the access areas were either substantially flooded and/or for the most part consistently swampy. (R.pp.572-583). In fact, the wooden footbridge appeared to be in somewhat overall general disrepair and very likely structurally untrustworthy. (R.pp.580-581). Consequently, the footbridge's physical condition rendered any attempt to cross the footbridge either while walking and/or accompanying a four-wheeled vehicle (R.p.249, line 11 – R.p.251, line 7) a perilous and dangerous proposition, at best.

All of the proffered photographs, taken just a few days prior to the post-trial hearing showed conditions which did not exist on or about 15 September 2022. (R.p.90). The photographs showed road improvements demonstrating the continuing use of the Dirt Roadway since any improvements would not be required except to enhance vehicular

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**62** The Landowners addressed the hunters' access from Parcel 014 over to Parcel 034, Parcel 036, and beyond. (Tr.160, lines 11-16; Tr.160, line 23 – Tr.162, line 7).

travel. Moreover, the photographs showed any alleged alternative access to the properties north of Parcel 001 was a very questionable and, most likely, non-existent possibility.

Even though it might be argued the rejected series of photographs failed to necessarily constitute "after discovered evidence" in the ordinary application and/or the ordinary sense of that phrase, BCE 2015's tender of the evidence during the post-trial motion was completely consistent with the purpose and spirit of the *South Carolina Rules of Civil Procedure*. The photographs were material and relevant[63] to BCE 2015's proposition the Master-In-Equity had ignored, misinterpreted, and/or overlooked BCE 2015's presented evidence which justified BCE 2015 being awarded an easement – whether such easement was (a) by necessity, (b) by prior use, or (c) by prescription.

The Master-In Equity's decision to reject BCE 2015's proffered after-discovered material and relevant photographic evidence was incorrect. The decision should and must be reversed in all respects.

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**63** *See generally* Community Services Associates, Inc. v. Wall, 421 S.C. 575, 586, 808 S.E.2d 831, 837 (Ct.App. 2017) (*citing* Rule 401, SCREvid.) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). *See also generally* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct.App. 2008), *rehearing denied* (25 Aug. 2008), *certiorari denied* 10 July 2009), *habeas corpus dismissed sub. nom.* Lyles v. Reynolds, 2016 WL 4940319 (D.S.C., filed 14 Sept. 2016), *appeal dismissed*, 684 Fed.Appx. 313 (4th Cir. 2017), *certiorari denied*, ___ U.S., ___, 138 S.Ct. 265 (2017) ("[E]vidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy.").

## E. THE MASTER-IN-EQUITY SHOULD HAVE GRANTED BCE 2015, LLC'S POST-TRIAL MOTIONS MADE PURSUANT TO RULES 52(b) AND 59(e), *SCRCivP*

After the Master-In-Equity issued the original order, BCE 2015 filed its *Motion for Reconsideration and Motion to Alter or Amend the Judgment and to Amend the Court's Judgment* (R.pp.70-81) requesting the Master-In-Equity to issue "an order reconsidering, altering, and/or amending the [original] findings of the Court . . . ." (R.p.71). The Master-In-Equity held a hearing on 7 February 2023, to consider the motion (R.pp.289-340) and, by order dated 1 March 2023, denied the motion. (R.pp.1-3). The Master-In-Equity's decision was incorrect and should be reversed in all respects.

" 'The purpose of Rule 59(e), SCRC[iv]P, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.' ' "**64** A principal purpose of Rule 52(a), SCRCivP, is to give litigants the opportunity to ensure the trial court's findings [are] sufficient to allow [an appeals] [c[ourt, sitting in its appellate capacity, to ensure the law [was] faithfully executed below."**65**

BCE 2015's real property (Parcel 038 and Parcel 039) were completely landlocked. (R.p.5; R.p.103, line 19 – R.p.104, line 3; R.p.341). The Landowners' candidly admitted the proposition. (R.p.255, lines 9-23). One of the most important and essential rights of a property owner is reasonable access to and from the property to a public road.**66**

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**64** Coward Hunt Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct.App. 1999) (*quoting* Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (*quoting* Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200 (1988)).

**65** *In re* Treatment and Care of Luckabaugh, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002).

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

BCE 2015 presented substantial evidence it was entitled to an easement – either an (a) easement by necessity, or (b) easement by prior use, or (c) easement by prescription. Notwithstanding any claims, however fanciful, to the contrary the record clearly demonstrated the Dirt Road was the most practical and most reasonable means for ingress and egress along and through Parcel 001, Parcel 038, Parcel 039, and on northward. The topography of the land, especially the marshy wetlands towards the right side of Parcel 001, dictated the location of the Dirt Road had always been placed at the most advantageous and suitable site on the property. Anywhere else would have require the roadway to cross either wetlands or areas prone to be less than stable and generally moisture laden. The Dirt Road has existed at least for the past 140 years, and likely even longer. The Dirt Road has been used for agricultural and timbering operations – withstanding a myriad on vehicular traffic, including horse-drawn wagons, horse drawn trailers, trucks, logging trucks, four-wheelers, automobiles, *etc.* The Dirt Road has been maintained and protected across the years and remains in reasonably good condition and in fairly constant use today.

BCE 2015's evidence was more than sufficient to demonstrate its entitlement to an easement. The Master-In-Equity should have granted BCE 2015's Rule 52(a), SCRCivP, and Rule 59(e), SCRCivP, motions. Failure to do so constituted error and must be reversed.

# V. 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.

Respectfully submitted:

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Charleston, South Carolina

13 December 2023

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

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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***

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BCE 2015, LLC,

Appellant,

v.

YVONNE C. KNIGHT and ELEANOR C. BROWN,

Respondents.

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**RULE 211(b), *SCACR*, CERTIFICATION**
**for the**
**FINAL BRIEF OF THE APPELLANT**

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I, Stephen P. Groves, Sr., Esquire, hereby certifies and attests the ***FINAL BRIEF*** submitted by and on behalf of the Appellant, BCE 2015, LLC, complies with the requirements of Rule 211(b), SCACR.

Signed: *Stephen P. Groves, Sr.*
Stephen P. Groves, Sr.

Charleston, South Carolina

13 December 2023
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