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

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

v.

William C. Jackson, ... Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TREATISES

STATEMENT OF ISSUES ON APPEAL

I. WHETHER JUDGE GOODSTEIN'S ORDER AND HER ORDER DENYING JACKSON'S MOTION TO ALTER OR AMEND, RECOGNIZING BUYCK'S PRESCRIPTIVE EASEMENT IN THE RED ROAD AND FINDING THE JACKSON PROPERTY DOES NOT CONSITUTED "UNENCLOSED WOODLANDS", SHOULD BE UPHELD WHEN NO EVIDENCE WAS PRESENTED ESTABLISHING THE JACKSON PROPERTY AS UNENCLOSED WOODLANDS, THE CIRCUMSTANCES OF THE PARTIES AND THE JACKSON PROPERTY ARE NOT CONSISTENT WITH THOSE OF UNENCLOSED WOODLANDS, AND JACKSON AND HIS PREDECESSORS WERE AT ALL TIMES AWARE OF BUYCK'S USE OF, AND CLAIMED RIGHT TO USE, THE RED ROAD?

II. WHETHER JUDGE GOODSTEIN'S ORDER CONFIRMING BUYCK'S PRESCRIPTIVE EASEMENT IN THE RED ROAD SHOULD BE AFFIRMED WHEN BUYCK AND HIS PREDECESSORS ESTABLISHED USE OF THE RED ROAD FOR ACCESS TO THE BUYCK PROPERTY FOR A PERIOD OF OVER FIFTY YEARS UNDER AN ASSERTED CLAIM OF RIGHT TO SUCH USE?

III. WHETHER JUDGE GOODSTEIN'S ORDER CORRECTLY FOUND BUYCK'S PRESCRIPTIVE EASEMENT OVER THE RED ROAD TO BE APPURTENANT TO THE BUYCK PROPERTY, EVEN THOUGH THE BLUE ROAD PROVIDES ALTERNATE (THOUGH LIMITED) ACCESS TO THE BUYCK PROPERTY, WHEN THE RED ROAD IS ESSENTIALLY NECESSARY TO BUYCK'S FULL ENJOYMENT OF THE BUYCK PROPERTY IN ACCORDANCE WITH HIS HISTORICAL USE OF THE PROPERTY AND THE BLUE ROAD DOES NOT PROVIDE ACCEPTABLE ACCESS?

IV. WHETHER JUDGE GOODSTEIN'S ORDER SHOULD BE AFFIRMED WHICH FOUND BUYCK'S PRESCRIPTIVE EASEMENT OVER THE RED ROAD TO BE OF THE SAME SCOPE AS HIS HISTORICAL USE OF THE RED ROAD AS ESTABLISHED BY THE TESTIMONY AT TRIAL?

STATEMENT OF THE CASE

This action was initiated by the filing by W. Peter Buyck, Jr. (hereinafter, "Buyck") of his Lis Pendens, Summons and Complaint on September 18, 2008 and his Amended Complaint on October 9, 2008 seeking, among other things, an order that Buyck has certain easement rights established by prescription over a particular road, termed the "Red Road" herein, which traverses lands of the Defendant, William C. Jackson (hereinafter, "Jackson") and has been used by Buyck and his predecessors in title for access to the Buyck Property (defined below) for over fifty years. (R. p. 29). Buyck's Amended Complaint further seeks an injunction restraining and enjoining Jackson from obstructing the Red Road or otherwise interfering with Buyck's use of the Red Road. Id. Although Buyck sought in his Amended Complaint to recover damages resulting from Jackson's interference with Buyck's use of the Red Road, Buyck elected not to proceed on that cause of action, rendering this matter essentially an easement case.[1] Jackson filed his Answer to the Amended Complaint on November 12, 2008 denying that Buyck has the right to use the Red Road. (R. p. 52).

The trial of this matter was held before The Honorable Diane S. Goodstein on October 5 and October 6, 2010.[2] The two-day trial included testimony from ten witnesses, and Judge Goodstein was in a position to hear the testimony and evaluate the credibility of each and every witness. After concluding the trial, and upon review of extensive proposed Orders submitted by both parties (with three different proposed

[1] Nonsuit was granted denying Plaintiff's claim for damages following Plaintiff's election to refrain from introducing evidence as to such damages. (R. p. 1).

[2] Prior to the hearing of any evidence in this case, the parties stipulated to the dismissal of Defendant Lorraine Ruple Conrad, Trustee for the Lorraine Ruple Conrad Revocable Trust Under Agreement dated March 30, 2000 ("Defendant Conrad") from this action and Defendant Conrad was dismissed from this action without prejudice.

Orders granting various forms of relief having been submitted by Jackson)[3], Judge Goodstein issued her Order in this matter on October 26, 2011 (the "Order"), ruling that Buyck has a prescriptive easement over the Red Road and permanently enjoining Jackson from obstructing the Red Road or interfering with Buyck's right to use of the Red Road. (R. pp. 22-23).

Jackson filed his Motion to Alter or Amend the Order on November 23, 2011, which was denied by Order of Judge Goodstein dated June 5, 2012 and entered June 14, 2012. (R. pp. 664-706, 28). Notably, Judge Goodstein, who heard and viewed all of the testimony and evidence presented throughout the two-day trial, specifically held in her Order Denying Jackson's Motion to Alter or Amend that "this Court finds that the Defendant's Property is not unenclosed woodlands . . . ." (R. p. 28).

This appeal followed.

[3] Jackson mentions the South Carolina unenclosed woodlands rule for the first time in his proposed Order submitted to Judge Goodstein months after completion of the trial, for the first time citing the case law discussed at length below relating to unenclosed woodlands in South Carolina

STATEMENT OF THE FACTS

Buyck and Jackson are the fee simple owners of adjacent tracts of real property located in Calhoun County, South Carolina. Buyck's property, which shall hereinafter be referred to as the "Buyck Property," consists of approximately 700 acres and was initially acquired by Plaintiff's father, W.P. Buyck, and an uncle in 1942 and was ultimately conveyed to Plaintiff by deed of his father, W.P. Buyck, recorded on December 7, 1977 as Deed 6623 in the Calhoun County records. (R. pp. 565-568). The Buyck Property is more particularly shown and described in Exhibits A and B to Judge Goodstein's Order. (R. pp. 24-25).

Jackson's property is hereinafter referred to as the "Jackson Property" and consists of approximately 108 acres located adjacent to the Buyck Property. (R. pp. 607-615). In April of 2000, Jackson and Defendant Lorraine Ruple Conrad, Trustee for the Lorraine Ruple Conrad Revocable Trust Under Agreement dated March 30, 2000 (who was dismissed from this action before the trial) purchased, as tenants-in-common, an undivided tract of approximately 203 acres. (R. pp. 607-608). The undivided 203-acre tract was once owned by Grace McAlister and therefore is often referred to as the "McAlister Tract." (R. p. 86, lines 1-6). Thereafter, in May of 2000, Jackson and Conrad effectively partitioned the McAlister Tract with Jackson receiving the Jackson Property by way of a deed from Conrad recorded with the Calhoun County Clerk of Court on May 22, 2000 in Book 141 at Page 319. (R. pp. 609-615). The remainder of the McAlister Tract was retained by Conrad. Id. The Jackson Property is more particularly shown and described on Exhibit A and Exhibit C to Judge Goodstein's Order. (R. pp. 24, 26).

The road at issue in this action is shown and identified as the "Red Road" on Exhibit D to the Order and is referred to herein as the "Red Road."[4] The Red Road has long been the primary access road serving the Buyck Property, and is in fact the only means of accessing the Buyck Property of which most people were even aware. (R. p. 192, lines 18-23, p. 196, line 24 – p. 197, line 7, p. 229, lines 14-19, p. 264, lines 8-11). Buyck and his father (as his predecessor in interest with respect to the Buyck Property), and their guests, licensees and invitees, have used the Red Road for access to the Buyck Property for farming and logging activities as well as for recreational purposes for over fifty years. (R. p. 4, p. 112, lines 14-18, p. 131, lines 15-24, p. 229, lines 4-24, p. 264, lines 1-4, p. 268, lines 20-23, p. 344, lines 1-12). A wide range of vehicles have uses the Red Road in connection with these activities, including, for example, "logging trucks . . . tractors with equipment behind . . . tractor trailer trucks hauling crops out of the fields . . . regular farm trucks. . . pickup trucks . . . [and] . . . cars." (R. p. 122, lines 8-17).

Judge Goodstein, who heard all of the testimony at trial, specifically relied on the testimony set forth below (which is taken directly from her Order), *and specifically found "each and every one of these witnesses to be credible and reliable"*:

- Plaintiff, who is 64 years old, testified that he has used the Red Road for his entire life for access to the Buyck Property for farming and logging activities as well as for hunting, fishing and general recreation and that his father and uncle used the Red Road for these same purposes since 1942. During this period of continuous use, various types of vehicles have used and traveled the Red Road for access to the Buyck Property specifically

[4] As discussed at length at trial and in post-trial submissions, the Red Road shown on Exhibit D to the Order also crosses through the corner of a parcel of land owned by a neighboring property owner. The testimony shows that this neighboring property owner has never challenged Plaintiff's right to use the Red Road crossing his property, and therefore it was not necessary to make this owner a defendant to this lawsuit. (R. p. 120, line 16 – p. 122, line 7). Therefore, unless specifically stated otherwise, all references to the Red Road shall mean and refer to those portions of the Red Road which are located upon the Jackson Property, and this is consistent with Judge Goodstein's Order on this issue.

including cars, trucks, farm trucks, tractors hauling equipment, tractor-trailers hauling crops, and logging trucks.

- Mark Buyck, a cousin of Plaintiff and member of the South Carolina Bar, testified that he has used the Red Road on a regular basis for access to the Buyck Property for general recreational purposes beginning around 1946 and continuing until around 1964, and that he continued use of the Red Road on a less regular basis thereafter, particularly during the late 1970s and the 1980s.

- Mike Nickells, who is 61 years old and a former owner of the McAlister Tract, testified that he used the Red Road for access to the Buyck Property as a child, with Plaintiff and Plaintiff's father. Mr. Nickells further testified that when he purchased the McAlister Tract in 1990, and during his ownership of the McAlister Tract for six years thereafter, he knew that Plaintiff and Plaintiff's family, as well as their invitees and licensees, had used the Red Road for access to the Buyck Property "for a long, long time" and were currently still using the Red Road. Mr. Nickells further testified that Plaintiff had used the Red Road to bring his tractor and other equipment onto the Buyck Property and for logging activities on the Buyck Property. Mr. Nickells testified that he did not think that he could stop Plaintiff from using the Red Road.

- Jack Brady, a retired Calhoun County farmer and owner of property along the Congaree River, testified that he used the Red Road as far back as the mid 1970s, and before, for access to the Buyck Property for recreational purposes.

- Robert Martin, a logger from Summerton, testified that he used the Red Road for access to the Buyck Property to cut timber as recently as 1994 and periodically over several years thereafter. Mr. Martin further testified that as long as 40 years ago or more he engaged in logging activities including the removal of timber from the Buyck Property by means of the Red Road.

- Brock Conrad, a retired wildlife biologist with the South Carolina Department of Natural Resources, testified that he used the Red Road for access to the Buyck Property in connection with the administration of certain hunting programs affiliated with the Wildlife Department in the 1970s. Mr. Conrad further testified that in connection with his (through Defendant Conrad identified herein) eventual purchase with Defendant Jackson of the McAlister Tract, he was aware of and even made Defendant Jackson aware of the historic and continuous use by Plaintiff and his predecessors of the Red Road for access to the Buyck Property.

(R. pp. 5-6). These factual findings may not be disturbed on appeal unless there is no evidence in the record whatsoever to support them. See Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987) ("[T]he determination of the existence of an easement is a question of fact in a law action. . . . In an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is *no evidence* to support the judge's finding.") (emphasis added).

Another road runs along the boundary line of the Jackson Property (between the Jackson Property and the "Conrad Property", which represents the remainder of the McAlister Tract) and terminates upon the Buyck Property. This other road is shown and identified on Exhibit D to the Order and referred to herein as the "Blue Road." (R. p. 27). The Blue Road primarily provides access to a "hayfield" located on the Buyck Property just across the boundary line with the Jackson Property. (R. p. 123, lines 5-8). The Blue Road, as discussed more fully below, is actually more of a trail, is not passable by regular cars (as opposed to all-terrain vehicles), and certainly not by logging trucks. (R. p. 419, line 16 – p. 420, line 11, p. 489, lines 19-22, p. 491, lines 8-19). According to the testimony at trial, most people who accessed the Buyck Property (all accessed via the Red Road) did not even know the Blue Road existed. (R. p. 192, lines 18-23, p. 196, line 24 – p. 197, line 7, p. 229, lines 14-19, p. 264, lines 8-11).

Buyck claims to have acquired a prescriptive easement over the Red Road, through use of the Red Road for over fifty years for access to the Buyck Property for farming and logging activities as well as for recreational purposes, and Judge Goodstein indeed so held in her Order. (R. pp. 22-23).

Prior to his purchase of the McAlister Tract, Jackson was advised of the Buycks' long established rights in the Red Road. Brock Conrad specifically "explained to William" prior to their purchase of the McAlister Tract "that Peter had an easement to get across our road." (R. p. 263, lines 13-14). Nonetheless, Jackson proceeded with the acquisition of the McAlister Tract (of which the Jackson Property is a part), then knowing of Buyck's claim to an easement to use the Red Road. Jackson promptly erected a gate across the Red Road, which he ultimately locked preventing Buyck's access to the Buyck Property via the Red Road. (R. p. 32).[5]

[5] Jackson correctly points out that at one point immediately following Jackson's purchase of the Jackson Property he gave Buyck a key to the gate he erected across the Red Road, which Buyck accepted and continued his use of the Red Road. This incident, however, occurred *long* after the prescriptive period and the ripening of Buyck's prescriptive rights in and to the Red Road and is therefore irrelevant for purposes of this appeal.

ARGUMENT

I. THE UNENCLOSED WOODLANDS RULE IS INAPPLICABLE; THE JACKSON PROPERTY IS NOT UNENCLOSED WOODLANDS AND NO EVIDENCE WHATSOEVER HAS BEEN PRESENTED ON THIS ISSUE.

Jackson asserts that his property (and the entire McAlister Tract) constitutes "unenclosed woodlands" and that this claimed treatment of his property as unenclosed woodlands should somehow alter the outcome of Judge Goodstein's Order. This is simply not the case. The Jackson Property is not the sort of wild and unenclosed woodlands addressed in the cases from the 1800s upon which he relies. Moreover, even if the presumption of permission established by the unenclosed woodlands line of cases were to apply, Buyck has more than overcome this presumption through the trial testimony of numerous witnesses (including one of Jackson's own witnesses) establishing that Buyck and his predecessors' use of the Red Road was at all times under a claim of right.

Judge Goodstein, after hearing the testimony *and viewing* all of the evidence presented at trial, specifically found "the Defendant's Property is *not* unenclosed woodlands . . . ." (R. p. 28) (emphasis added). This finding should not be disturbed on appeal unless there is no evidence in the record to supporting the finding. See Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987) ("We hold that the determination of the existence of an easement is a question of fact in a law action. . . . In an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is no evidence to support the judge's finding.").

A. No evidence was submitted at trial in support of Jackson's claim that his property should be considered unenclosed woodlands.

No evidence whatsoever was presented at trial that Jackson's property is actually "unenclosed woodlands".[6] In an attempt to cobble together some sort of evidence to support this proposition, Jackson points to certain video footage of the roads in question which (coincidentally) show some surrounding portions of the Jackson Property and do not show a fence. Certainly it is not the mere existence or non-existence of a fence around the subject property which is determinative of whether property is "unenclosed woodlands,"[7] but instead the test is of the general nature of the property and the area. Rowland v. Wolfe, 17 S.C.L. (1 Bail.) 56 (1828) (in determining whether property constitutes "unenclosed woodlands" . . . "we must look to the situation of the country"). To hold otherwise would result in different standards being applied to neighbors in a subdivision with respect to prescriptive claims based solely upon whether one's yard was fenced in or not.

Jackson further suggests certain trial testimony established that gates exist on the Buyck Property and not on the Jackson Property. In fact the testimony is to the contrary; the gate mentioned in the cited testimony is described *by Jackson* as "our gate" and "my gate" and surely was not constructed by Jackson on the Buyck Property. (R. p. 344, lines 22-25, p. 345, lines 15-17). No evidence whatsoever has been presented to establish the Jackson Property as the sort of unenclosed woodlands intended to be benefitted by the unenclosed woodlands rule.

[6] In fact, the South Carolina unenclosed woodlands rule (established and most often applied in the 1800s) was not even mentioned by Jackson until after the trial of this case, in one of his proposed Orders submitted to Judge Goodstein.

[7] Even the existence or non-existence of a fence has not been established by the evidence in this case.

B. Unenclosed Woodlands as they existed in the 1800s are rare in modern times.

As is immediately apparent from Jackson's brief, our courts have rarely addressed the issue of unenclosed woodlands in the past century. Although the principles of the unenclosed woodlands concept have been acknowledged relatively recently in Tyler v. Guerry, 251 S.C. 120, 160 S.E.2d 889 (1968)[8], only a handful of other twentieth century cases have addressed this issue, with the great weight of authority having been established in the 1800s. This is not to say that the unenclosed woodlands rule is no longer good law when applicable, but simply to say that it appears the rule is not often found applicable in modern times. Woodlands of the type that existed in the 1800s when the rule was prevalent simply are not often found in modern times, at least not in such a state that would justify application of the unenclosed woodlands rule.

Jackson identifies the seminal case on the South Carolina unenclosed woodlands rule as Lawton v. Rivers, 2 McCord (13 S.C.L) 445 (1824), and – in an attempt to modernize application of this somewhat antiquated rule - suggests that the unenclosed woodlands rule established in Lawton has "been consistently followed in a long line of decisions." Notably, however, the list of twentieth century cases cited by Jackson in support of the modern application of the unenclosed woodlands rule do not even apply (and most do not even address or mention) the unenclosed woodlands rule.[9] These cases

[8] The unenclosed woodlands rule was also mentioned in County of Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977), but deemed inapplicable based upon the nature of the property in question.

[9] Although one case cited by Jackson in this regard, Craven v. Rose, 3 S.C. 72 (1871), does mention unenclosed woodlands, it does not apply the rule or provide any in-depth analysis of its application. Interestingly, this was a nineteenth century case. The remaining cases cited by Jackson as comprising the "long line of cases" consistently applying the unenclosed woodlands rule do not even mention unenclosed woodlands (these cases are cited herein in the same order in which they were cited by Jackson). Sanitary & Antiseptic Package Co. v. Shealy, 205 S.C. 198, 31 S.E.2d 253 (1944) (analyzing rights to a driveway over a lot located on Main Street in downtown Columbia); Williamson v. Abbott, 107 S.C. 397, 93 S.E.15 (1917) (analyzing a claim for a prescriptive right to drainage, without mention of unenclosed woodlands); Poole v. Edwards, 197 S.C. 280, 15 S.E.2d 349 (1941) (general prescriptive easement case with no mention whatsoever of unenclosed woodlands); Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944) (addressing

simply apply the general prescriptive easement elements established in Lawton, without regard to or mention of unenclosed woodlands or any presumptions created thereby. Jackson's statement regarding the consistent modern application of the unenclosed woodlands rule is misleading to say the least.

C. The Jackson Property is not of the type open to common use by the public and neighbors for passing through, hunting, etc.

The rationale behind the unenclosed, unimproved woodlands rule, as noted by Jackson, is 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) (referring to unenclosed woodlands as an open thoroughfare, through which every one [sic] passed without consent or molestation."); see also Hutto v. Tindall, 40 S.C.L. (6 Rich.) 396 (1853) ("Merely passing over uncultivated and unenclosed forest, *which is common to every one* [sic], cannot, by any lapse of time, give a right *to any individual.*") (emphasis added). In addressing a road that was held to run through unenclosed woodlands this Court stated that "although it was used chiefly by the neighbours [sic], it was open to all who passed in that direction, and there was no evidence that one had a better right than another." Rowland v. Wolfe, 17 S.C.L. (1 Bail.) 56 (1828).

Certainly there was no common or public right to hunt, pass over, or otherwise make use of the Jackson Property or the McAlister Tract from which it was subdivided. The only party claiming any right over the Jackson Property is Buyck, and the only

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easement claims related to two lots on Vardry Street, near downtown Greenville); Boyd v. Bellsouth Tel. & Tel. Co., 369 S.C. 410, 633 S.E.2d 136 (2006) (an easement implied by prior use case citing Lawton regarding the necessity required to establish an easement by necessity); Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 584 S.E.2d 386 (Ct. App. 2003) (analyzing easement rights in a church road without any mention of unenclosed woodlands).

parties who have utilized the Red Road traversing the Jackson Property are Buyck and his predecessors in title, and their individual invitees and licensees. The public has never used and has not claimed any right in the Jackson Property or the Red Road. Buyck's rights with respect to the Red Road, as shown at trial and as set forth more particularly below, were established through the individual claim of right of Buyck and his predecessors in interest.

Surely Jackson would not claim that the nature of his property is such that the general public, or even his neighbors, have the general right to traverse, hunt upon and otherwise use his property, and there is certainly no evidence that this was his belief, attitude or custom.

In determining whether property should be treated as unenclosed woodlands, "we must look to the situation of the country and the habits of the people." Rowland, 17 S.C.L. 56. The Jackson Property was simply not the wild, unimproved and uncultivated type of property which is benefitted by the unenclosed woodlands rule. See Behen v. Elliott, 791 S.W.2d 475 (Mo. Ct. App. 1990) (modern-day case addressing the unenclosed woodlands rule and holding that "defined travelways in existence for more than forty years" are not unenclosed woodlands; unenclosed woodlands consist of "vast reaches of undeveloped, unoccupied territory."). "The 'wild lands' exception to prescriptive easements is inapplicable where defendant's land is located in a well settled county and forms no part of an extensive, unimproved, uninhabited area." Id.

The Jackson Property, and the McAlister Tract from which it was subdivided, are located in close proximity to a well-traveled road and thoroughfare and the Red Road is a well-established and well-defined road, which has existed in its current location upon the

Jackson Property for over fifty years. This is not a case of paths created by passing neighbors through a tract of wild land which would not be apparent to the property owner; in fact, the prior owners of the Jackson Property were at all times aware not only of Buyck's use of the Red Road but of his *right* to use the Red Road. (R. p. 210, line 23 – p. 211, line 3, p. 212, lines 2-6).

D. Jackson and his predecessors were at all times aware of Buyck's use of the Red Road for access to his property.

The unenclosed woodlands rule is intended to apply to "wild and unappropriated forest" in which case "[t]he owner of the land might not know of the existence of the way. . . ." Hogg v. Gill, 26 S.C.L. (1 McMul.) 329 (1841). The purpose of the rule is to protect owners of large unimproved tracts from rights being acquired by third parties through continued use of which the owner may not, under the circumstances, be aware (due to the vast and wild nature of the property). Id. This is simply not the case here. The prior owners of the Jackson Property were at all times aware of the use of the Red Road by Buyck and his predecessors in title and their licensees and invitees.

Mike Nickells, a former owner of the McAlister Tract (which included the entire Jackson Property and the adjoining parcel now owned by Conrad), testified that he "walked about every square inch" of the property during his ownership. (R. p. 208, lines 9-22). He further testified that he always was aware of Buyck's use of the Red Road, that he believed Buyck had the right to use the Red Road, and that he was without the ability to stop or prevent Buyck's use of the Red Road. (R. p. 210, line 23 – p. 211, line 3, p. 212, lines 2-6). Mr. Nickells confirmed that Buyck "had the right [to use the Red Road] way before I moved out there." (R. p. 223, lines 4-5).

Likewise, Brock Conrad (who purchased the McAlister Tract with Jackson) testified that he knew Buyck had the right to use the Red Road and that he even advised Jackson of Buyck's rights and historic use of this Red Road before Jackson's purchase (and subsequent attempts to close the Red Road). (R. p. 263, lines 19-23, p. 264, lines 1-2, 17-20, p. 268, lines 1-24). Mr. Conrad testified that as far back as the 1970s he knew that Buyck and his family "used [the Red Road] on a regular basis." (R. p. 264, lines 12-22). Mr. Conrad refused to entertain Jackson's talks of relocating the Red Road because he believed Buyck and his family had the right to use the Red Road and because Buyck (and his licensees and invitees) had been using the Red Road "for all these years." (R. p. 268, lines 16-24).

The reality is that unenclosed woodlands of the type contemplated in application of the unenclosed woodlands rule established and applied throughout the 1800s, are not as prevalent in modern times. Certainly the Jackson Property is not considered "unenclosed woodlands" such as is contemplated by this rule. There is no evidence that the nature of the Jackson Property is such that "every person may, of common right, pass over [it], hunt upon [it], etc." Lawton v. Rivers, 2 McCord (13 S.C.L) 445, 452 (1823). Indeed, Jackson has been very protective of his property and would not allow the general public to pass over it. Moreover, Jackson and his predecessors in interest were at all times aware of the use of the Red Road by Buyck and his licensees and invitees. The purpose of the unenclosed woodlands rule is to protect owners of large unimproved tracts from third parties acquiring rights in their property without their knowledge (due to the nature of unenclosed woodlands and the inability of owners to adequately monitor activities on their property). See, e.g., Hogg, 26 S.C.L. 329. This rationale does not

apply here. The Jackson Property is not "unenclosed woodlands" of the nature intended to be benefitted by the unenclosed woodlands rule, and there is no evidence in the record whatsoever to support this claim. Judge Goodstein's specific finding in her Order that the Jackson Property does not constitute "unenclosed woodlands" must be upheld. Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987) ("the judge's finding of fact will not be disturbed unless there is *no evidence* to support the judge's finding.") (emphasis added).

II. REGARDLESS OF WHETHER THE UNENCLOSED WOODLANDS RULE IS APPLICABLE, BUYCK HAS SHOWN ADVERSE USE NECESSARY FOR ESTABLISHMENT OF A PRESCRIPTIVE EASEMENT.

The elements necessary for establishment of a prescriptive easement are (1) the continued and uninterrupted use or enjoyment of the right for the full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right.[10] Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457 (1951); Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005). Typically, adverse use is presumed once the claimant of a prescriptive right establishes open, notorious, continuous and uninterrupted use. Poole v. Edwards, 15 S.E.2d 349, 350 (1941). However, as Jackson correctly states, in cases involving unenclosed woodlands, this *presumption* of adverse use does not apply and an adverse use (in addition to simple use which is open and continuous) must be established. Hogg v. Gill, 26 S.C.L. (1 McMul.) 329 (1841) (". . . the use of a way for twenty years, through enclosed ground, implies that it is adverse; but when it runs entirely through unappropriated forest, it is merely permissive. In the first, there is a presumption of a grant, which cannot be resisted but by

[10] Jackson does not appeal Judge Goodstein's Order as it relates to elements (1) and (2), above.

proof to resist it; in the other, this presumption does not exist, but by some evidence to raise it."). It is well-settled that use under a claim of right is the equivalent of, and constitutes, adverse use, and Jackson acknowledges this in his Brief. 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); see also Jones at 315-16, 609 S.E.2d at 600-601 (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).

Buyck has established a prescriptive easement in the Red Road regardless of whether or not the Jackson Property is classified as "unenclosed woodlands." The unenclosed woodlands rule merely alters the *presumption* in a prescriptive easement case from a *presumption* of adverse use (applied in cases not involving wild and unenclosed woodlands), to a *presumption* of permissive use (applied cases involving unenclosed woodlands). Hogg, 26 S.C.L. 329. Buyck has clearly established his adverse use of the Red Road - without the benefit of any presumption – by showing that his use of the Red Road, and that of his predecessors, was at all times under a claim of right, which claim of right is the equivalent of, and satisfies the requirement of, adverse use. Earle, 63 S.C. 439, 41 S.E. at 531. The unenclosed woodlands rule, even if it were to apply, does not alter the general elements required for establishing a prescriptive easement in this State, or the well-established law (acknowledged multiple times by Jackson in his Brief) that the concepts of "adverse" use and use under a "claim of right" are synonymous. The unenclosed woodlands rule simply removes the *presumption* of adverse use which

benefits other prescriptive easement claimants. Buyck did not rely upon or benefit from any such presumption in establishing his entitlement to prescriptive rights over the Red Road, but instead proved his adverse use of the Red Road through the testimony of numerous witnesses at trial (even a witness called by Jackson).

A. The unenclosed woodlands rule does not apply, and the use of the Red Road by Buyck and his predecessors is therefore presumed adverse.

If the Jackson Property is properly found *not* to be the wild and unenclosed woodlands contemplated in cases applying the unenclosed woodlands rule, which Buyck again urges this Court it is not, then Buyck's use will be *presumed* adverse upon a showing of open, notorious, continuous and uninterrupted use. Poole v. Edwards, 15 S.E.2d 349, 350 (1941). Judge Goodstein specifically held that the use of the Red Road by Buyck and his predecessors was "open, notorious, continuous and uninterrupted and therefore considered adverse . . . ." (R. p. 12). Jackson has not challenged this finding, which is more than supported by the trial testimony, and this finding cannot be disturbed on appeal unless there is *no evidence* to support it. See Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987) ("We hold that the determination of the existence of an easement is a question of fact in a law action. . . . In an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is no evidence to support the judge's finding.").

Therefore, in the event the Jackson Property is not found to be unenclosed woodlands, there is no question (or challenge from Jackson) that Buyck has established and is entitled to a prescriptive easement in the Red Road. And again, as stated above, there is simply no evidence in the record to support a finding that the Jackson Property constitutes, or constituted, unenclosed woodlands. The facts of this case and

circumstances relating to the property in question actually establish otherwise, and this was specifically held by Judge Goodstein after hearing the testimony from all of the witnesses, and judging their credibility, and must not be disturbed on appeal. (R. p. 28) ("Specifically, this Court finds that the Defendant's property is not unenclosed woodlands as has been argued by the Defendant in his Motion to Alter or Amend.").

B. Even if the unenclosed woodlands rule does apply, Buyck has established his use of the Red Road was adverse and overcome any presumption of permission.

In establishing his right to a prescriptive easement in the Red Road, Buyck has not simply relied upon the presumption of adversity afforded him by virtue of his continuous and uninterrupted use, but instead Buyck has *additionally* established, through the testimony of numerous witnesses at trial, that his (and his predecessors') use of the Red Road has at all times been under a claim of right, that he and his predecessors performed maintenance and other work on the Red Road, and that the prior owners of the McAlister Tract (which includes the Jackson Property) believed Buyck and his predecessors had the right to use the Red Road, and did not believe they were at liberty to stop his use. Buyck therefore satisfies the adversity requirement (on three independent grounds) and establishes his prescriptive easement without reliance on any presumption of adversity.[11] Hutto v. Tindall, 40 S.C.L. (6 Rich.) 396 (1853) (holding with respect to unenclosed woodlands that "'the use must be adverse, accompanied by acts which showed the use was claimed as a right and not by permission of the owner [i.e., use under

[11] Jackson claims that Judge Goodstein erred in *presuming* the use of the Red Road by Buyck was adverse. Judge Goodstein made no such presumption. To the contrary, Judge Goodstein devotes a substantial portion of her Order to a discussion of the "overwhelming and unrebutted testimony" relating to the use of the Red Road by Buyck and his predecessors and finds "that the use of the Red Road by Plaintiff and his predecessors was *not only* open, notorious, continuous and uninterrupted and therefore considered adverse, *but was clearly under a 'claim of right'*; thus satisfying the final element necessary for a prescriptive easement." (R. p. 12) (emphasis added).

a claim of right].' Such acts, for instance, as working on it and keeping it in repair, . . . or as shown by the conduct of the owners of the soil.").

1. The use of the Red Road by Buyck and his predecessors was under an asserted claim of right and is therefore adverse.

a. Use of the Red Road under Claim of Right has been established.

There are several South Carolina cases on point which establish without any doubt that the use of the Red Road by Buyck and his predecessors has always been under a claim of right. A prescriptive easement can be established under a "claim of right" when a party is under the mistaken belief that it has a right to use the property. Loftis v. South Carolina Elec. & Gas Co., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004). In addressing this right the Loftis Court held that "a party may earn a prescriptive easement under a claim of right if 'he demonstrate[s] a substantial belief that he had the right to use the property in a manner consistent with the alleged easement." Id.

In order for use to be considered "under a claim of right" a party must "demonstrate a substantial belief that he had the right to *use* the parcel or road based upon the totality of the circumstances surrounding his use." Matthews v. Dennis, 365 S.C. 245, 250, 616 S.E.2d 437, 440 (Ct. App. 2005) (emphasis in original) (expressly disagreeing with the plaintiff's contention that a claim of right cannot be established based on a mistaken belief of ownership); Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003); see also Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005) (requiring either a "justifiable claim of right" or adverse use). In this respect, our Court of Appeals has found a prescriptive easement to exist in a case where "[p]laintiffs have established that theirs has always been a belief that they have had a right to use of the subject roadway for ingress

and egress, and had openly done so for well in excess of twenty years." Matthews at 250, 616 S.E.2d at 440.

The testimony at trial (consistently from each of the six witnesses called by Buyck and even from one of the witnesses called by Jackson) was that Buyck and his predecessors in title with respect to the Buyck Property have used the Red Road for access to the Buyck Property for over fifty years. (R. p. 112, lines 14-18, p. 131, lines 15-24; p. 229, lines 4-24, p. 264, lines 1-4, p. 268, lines 20-23, p. 414, lines 1-12). Buyck and his father (and predecessor in title), as well as numerous friends, relatives, neighbors, licensees and invitees, always believed Buyck (and his father before him) had the right to use the Red Road for access to the Buyck Property. (R. p. 118, line 24 – p. 119, line 7, p. 197, line 19 – p. 198, line 16, p. 230, lines 16-19, p. 414, lines 16-21). No one ever challenged the use of the Red Road by Buyck and his predecessors and no one ever gave permission to Buyck and his predecessors to use the Red Road. (R. p. 117, lines 22-24, p. 118, lines 9-14, p. 230, lines 16-19, p. 414, lines 13-15). Jack Brady testified that during his use of the Red Road, which use was with the permission of Buyck (or his father) and began prior to the 1970s, he did not think it was possible that anyone could challenge the right of Buyck and his father to use the Red Road, remarking "I've never heard of such a thing." (R. p. 229, lines 4-23, p. 230, lines 6-19).

Brock Conrad, who purchased the McAlister Tract (which includes the Jackson Property) with Jackson, believed that the Buycks actually had an easement over the Red Road, and Mr. Conrad communicated this to Jackson prior to their purchase of the McAlister Tract. (R. p. 263, lines 13-16). Of course, Buyck and his father (and predecessor in title) never believed they needed anyone's permission to use the Red

Road; they absolutely believed they had the right to use the Red Road and so used it. (R. p. 118, lines 22-23).

In fact, Buyck and his predecessors *gave permission to others* to use the Red Road for access to the Buyck Property. (R. p. 118, lines 15-21, p. 229, lines 10-17, p. 230, lines 8-15). Buyck and his father allowed loggers to access the Buyck Property via the Red Road for logging activities on the Buyck Property beginning more than forty years ago. (R. p. 119, line 25 – p. 120, line 9, p. 238, lines 22-25, p. 243, lines 15-18, p. 244, lines 16-19). Buyck and his father also gave permission to the members of the hunt club that leased hunting rights on the Buyck Property to use the Red Road for access to the Buyck Property. (R. p. 118, lines 15-21, p. 414, lines 1-12).

This Court has found use under a claim of right to exist in circumstances almost identical to the case at hand. In Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005), the dominant owner believed she had a right to use the access because her family had used it to get to and from their land "as long as she could remember." The dominant owner's family members testified that "they openly asserted their perceived right to use the pre-existing path with the full knowledge and acquiescence of" the servient owner and the Court held that there was "abundance" of testimony reflecting the easement holder's claim of right to the easement in that the easement holder demonstrated "a substantial belief that she had the right to use the property in a manner consistent with the alleged easement, originating from her family's prior use of the access." Id.

Likewise, in Matthews v. Dennis, 365 S.C. 245, 616 S.E.2d 437 (Ct. App. 2005), the plaintiff testified that members of her family had always used the roadway in question for access and that, while acknowledging they may not have had legal documents

granting them the right to do this, they thought they had the right to use the roadway. This Court held that this use was under a claim of right sufficient to support the establishment of a prescriptive easement.

Similarly, in Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 584 S.E.2d 386 (Ct. App. 2003), this Court held that a sufficient claim of right was established by testimony of many residents that they had used the roadway in question since childhood and claimed their right flowed from their own continuous use of the road and use by prior generations of their families. In Hartley, the court held it was clear that the residents and their predecessors in title "carried on a tradition of use for several decades" and that "the residents relied upon their use by their predecessors in title to gird their belief that they held a claim of right to use [the roadway]." Id.

The aforementioned cases are directly on point with the underlying facts of the instant appeal and Judge Goodstein specifically held in her Order that "[b]ased upon the overwhelming and unrebutted testimony presented at trial on this issue and the controlling precedent discussed above, I find that use of the Red Road by Plaintiff and his predecessors was . . . clearly under a 'claim of right' . . . ." (R. p. 12). This finding shall not be disturbed on appeal unless there is *no evidence* to support it. See Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987) ("[T]he determination of the existence of an easement is a question of fact in a law action. . . . In an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is no evidence to support the judge's finding.").

There simply cannot be any dispute that the use of the Red Road by Buyck and his predecessors was at all times under a claim of right. After all, what more could be

expected of a claimant in Buyck's position so far as assertion of his rights are concerned; Buyck used the road notoriously under a belief he had the right to do so, and Buyck *gave permission* to various licensees and invitees to use the Red Road for access to the Buyck Property.

b. Even in unenclosed woodlands cases, use under claim of right is sufficient to establish adverse use; nothing additional is required.

Jackson misinterprets the case law relating to the unenclosed woodlands rule as requiring something in addition to use under a claim of right to be established in order to show adverse use.[12] On the contrary, as with all prescriptive easement cases, use under a claim of right is sufficient to establish adversity, and in fact *constitutes* adverse use, even in cases involving unenclosed woodlands. 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); Hutto v. Tindall, 40 S.C.L. (6 Rich.) 396 (1853) (with respect to unenclosed woodlands "'the use must be adverse, accompanied by acts which showed the use was claimed as a right and not by permission of the owner . . . .'"). Jackson points out that the unenclosed woodlands cases specify "mere use – no matter for how long – is never enough" and Jackson asserts that something more is required. Buyck does not dispute this proposition, which is a correct account of the shift in the *presumption* from adverse to permissive use in cases involving unenclosed woodlands. What these unenclosed woodlands cases cited by Jackson hold is that "mere use" for the requisite time period will not be *presumed* adverse use (as is the case when unenclosed woodlands are not involved) and instead, as stated by Jackson, "some assertion of a right hostile to

[12] Jackson incorrectly states in his Brief that Buyck's belief that he had a legal right to use the road is "never sufficient" to establish a prescriptive easement. This is a misinterpretation of the law, and the Court will note that no legal authority whatsoever is cited in support of this proposition.

the owner" must be shown. Use under a claim of right (as opposed to "mere use") is that "something more" that is required. Use amounting to a claim of right *is* that "assertion of a right hostile to the owner" mentioned by Jackson that overcomes the presumption of permission. See Hutto, 40 S.C.L. 396 ("the use must be adverse, accompanied by acts which showed the use was claimed as a right and not by permission . . . .").

Our courts have specifically stated with respect to claims for prescriptive easements over unenclosed woodlands that "*[t]he use must be adverse to the claim of the owner of the land.* Merely passing over an uncultivated and uninclosed [sic] forest, which is common to every one cannot, by any lapse of time, give right to any individual." Rowland v. Wolfe, 17 S.C.L. (1 Bail.) 56 (1828). In other words, what is required in order to be entitled to a way over unenclosed woodlands is "some assertion of ownership by the claimant" – for example, use under a claim of right. Hutto, 40 S.C.L. 396; see also State v. Miller, 130 S.C. 152, 125 S.E. 298, 299 (1924) (basing its determination of whether a prescriptive easement had been established through unenclosed woodlands on the question of whether "there had been a continuous adverse user of this road by the public *under a claim of right* for a period of 20 years or more") (emphasis added). It has been stated another way that in unenclosed woodlands cases "[a]n adverse use must be something for which the owner may sue . . ." Sims v. Tygart, 25 S.C.L. (Chev.) 1 (1839). Certainly Jackson's predecessors would have had the right to sue Buyck and his predecessors to prevent their use of the Red Road (prior to the ripening of their prescriptive rights in the Red Road). Buyck's undisputed and continuous use of the Red Road *under a claim of right*, in and of itself, evidences Buyck's assertion of a right

adverse to the owner of the underlying fee sufficient for establishment of prescriptive rights – even through unenclosed woodlands.

The theory behind the shift in the adversity presumption and the requirement of a showing of adversity (as opposed to a presumption established through "mere use") is that a party asserting prescriptive rights through unenclosed woodlands needs to show that he has asserted an "exclusive use" over the road in question (separate and apart from the use by the general public which may not have been noticed or found objectionable by the landowner). Lawton v. Rivers, 13 S.C.L. (2 McCord.) 445 (1823) (denying a claim for prescriptive easement since the defendant did not adequately establish his claim to an "exclusive use" over the subject road, and when it commenced, how long it continued and in what manner). Again, Buyck's use of the Red Road under a claim and assertion of right for over fifty years was clearly established at trial and is more than sufficient to rebut the presumption of permission and establish the adverse use required to be shown in unenclosed woodlands cases.

In fact, use amounting to a claim of right is likely *more* than what is required to show adversity in unenclosed woodlands cases. Our courts have specifically held that a "right of way may be acquired *by use* over unenclosed woodland; that is to say, by constant and notorious use, but not by that which is casual and interrupted . . . ." Jeter v. Mann, 20 S.C.L. (2 Hill) 641 (1835) (emphasis added). In support of the principle that a right of way can be acquired through unenclosed woodlands by use (similar to the use of the Red Road by Buyck and his predecessors) it has been stated that "[t]he continued use of a way, particularly with carriages of burthen, leaves an impression not be mistaken, *not only as indicating an adverse use with its identity*, but essentially injuring the soil

over which it passes . . . ." Id. (emphasis added). Our Supreme Court has specifically held that continued use by the public of a well-defined road through unenclosed woodlands, under the general belief that the public had the right to so pass, can constitute sufficient adverse use. State v. Toale, 74 S.C. 425, 54 S.E. 608 (1906).

2. *In addition, Buyck and his predecessors repaired and maintained the Red Road throughout the period of their use which alone satisfies the requirements for adverse use.*

Separate and apart from use under a claim of right, adverse use may also be established in unenclosed woodlands cases by showing that the easement claimant "worked on" or "kept in repair" the road over which easement rights are claimed. Sims v. Tygart, 25 S.C.L. (Chev.) 1 (1839). This principle is well-established in the unenclosed woodlands cases cited by Jackson. See id.; see also, e.g., Hutto v. Tindall, 40 S.C.L.) 396 (1853) ("That 'the use must be adverse, accompanied by acts which showed the use was claimed as a right and not by permission of the owner.' Such acts, for instance, as working on it and keeping it in repair . . .").

James Medlan is the president of the Buyck Hunt Club, and was called as a witness at trial by Jackson. (R. p. 404, lines 18-21). Mr. Medlan testified the hunt club has leased hunting rights on the Buyck Property, and has been given permission by Buyck to use the Red Road for access to the Buyck Property for forty years. (R. p. 413, lines 6-10, p. 414, lines 1-21). The hunt club also assisted in the maintenance of the Red Road during that time. (R. p. 421, line 24 – p. 422, line 7, p. 426, lines 9-12). Mr. Medlan specifically stated in this respect as follows:

Q: . . . But you said, even though this is the McAlister's property, you said the hunt club would do whatever maintenance was required on both roads?

A: Yes, sir.

(R. p. 426, lines 9-12).

This forty years of continued maintenance of the Red Road by the Buyck Hunt Club, on Buyck's behalf and at his request, is sufficient, taken alone, to constitute adverse use of the Red Road by Buyck and his predecessors.

3. *Furthermore, the prior owners of the Jackson Property acted in a way that recognized the right of Buyck to use the road, without permission, and in fact did not believe that his use could be stopped.*

Another way adverse use is established in unenclosed woodlands cases is through evidence that the owner of the soil over which the way passes recognized the right of the claimant to use the road without the owner's permission. State v. Miller, 130 S.C. 152, 125 S.E. 298, 299 (1924). "[N]o right of way can arise from the mere use of a road over woodland; unless, it is added, there be some assertion of ownership by the claimant, *or some act of the owner of the soil showing an admission that the claimant had a right.*" Hutto v. Tindall, 40 S.C.L. (6 Rich.) 396 (1853) (emphasis added).

Mike Nickells testified that when he bought the McAlister Tract he believed Buyck had the right to use the Red Road, and that he did not think he could stop him. (R. p. 211, lines 6-8; p. 212, lines 5-6, p. 222, lines 18-23). Brock Conrad (who purchased the McAlister Tract, which includes the Jackson Property, with Jackson) testified that he thought Buyck had an easement over the Red Road, and that he did not believe Buyck would have agreed to relocate the Red Road if asked to. (R. p. 267, line 15 – p. 268, line 10).

These owners of the soil through which the Red Road passes wholeheartedly believed and admitted that Buyck had the right to use the Red Road. These owners clearly did not think they had the power to stop Buyck from using the Red Road; they did

not even think they had the right to relocate the Red Road without Buyck's agreement. These owners actually told Jackson about the Buycks' rights in the Red Road. To say these owners admitted that Buyck claimed a right in the Red Road is an understatement, and this admission of a right in Buyck to use of the Red Road is, in and of itself, sufficient to establish adverse use by Buyck and his predecessors of the Red Road – specifically in unenclosed woodlands cases. Hutto, 40 S.C.L. 396.

In sum, even if the unenclosed woodlands rule did apply, Buyck has established that his use was not *mere continued use* of the Red Road, but was use in a way that amounted to a claim of right, which indisputably satisfies the adversity requirement for establishment of a prescriptive easement. Adverse use has been established, rebutting any presumption of permission, and nothing more is required, even if the unenclosed woodlands rule is applied. Furthermore, and for the sake of argument only, even if something more *were* required as Jackson asserts, Buyck has established his historic maintenance and repair of the Red Road (through his hunt club) for a period of at least forty years, and Buyck has further established recognition of his rights in the Red Road by the owners of the soil through which the Red Road passes. Each of these – use under claim of right, maintenance and repair, and recognition of rights by the owner of the soil – are sufficient alone to constitute adverse use. Thus, adverse use has been established by Buyck on three independent grounds.

Even (again, simply for the sake of argument) if it were argued that none of these circumstances alone were sufficient to prove adverse use, taken as a whole, based on the totality of the circumstances, the adverse nature of the use cannot be disputed. State v. Rodman, 86 S.C. 154, 68 S.E. 343, 344 (1910) ("Even if there is not a single

circumstance standing alone tending to prove adverse user, nevertheless, when the facts and circumstances are considered in connection with each other, it might reasonably be inferred by the jury that the user was adverse."). In this case it is simply inconceivable that Buyck and his predecessors' exercise of absolute dominion over the Red Road for such a long period, including Buyck and his predecessors' giving permission for others to use the Red Road (under the Buycks' claim of right to the use of the same), the maintenance and repair of the Red Road, and the constant recognition by the property owner(s) of Buycks' rights in the Red Road, would not constitute such "unequivocal act of adverse right" sufficient to rebut any presumption of permission.

III. BUYCK'S PRESCRIPTIVE EASEMENT IN THE RED ROAD IS AN EASEMENT APPURTENANT TO THE BUYCK PROPERTY; THE RED ROAD IS ESSENTIALY NECESSARY TO BUYCK'S USE OF THE BUYCK PROPERTY.

Jackson claims Buyck's right to use the Red Road is not essentially necessary to Buyck's enjoyment of his property and that therefore the prescriptive easement established by Buyck and by his father, as his predecessor in interest, over the Red Road should be treated as an easement in gross, as opposed to an appurtenant easement. Jackson's argument in this respect is grounded upon the existence of another road (which is better classified as a trail) – termed the "Blue Road" - which does provide *access* to the Buyck 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. Mark Buyck, an established Florence attorney, testified that throughout his enjoyment of the Buyck Property (beginning in the 1940s) he always used the Red Road

and in fact "really never heard of the other road [the Blue Road] – until today." (R. p. 192, lines 18-23, p. 196, line 24 – p. 197, line 7). Jack Brady testified that for over forty years he used the Red Road for access to the Buyck Property (at the invitation of Buyck and/or his father) and that in all of this time he only knew of one road that provided access to the Buyck Property – the Red Road. (R. p. 227, line 24 – p. 228, line 5, p. 229, lines 14-19). Brock Conrad, who purchased the McAlister Tract with Jackson and used the Buyck Property as an invitee prior to that purchase, confirmed that the Red Road "was the main road" the Buycks had always used to access their property. (R. p. 264, lines 8-11). Mr. Conrad believed the use of the Red Road by the Buyck family to be so important to them that he refused to even entertain Jackson's early thoughts of relocating the Red Road to suit his plans for the Jackson Property. (R. p. 267, line 15 – p. 268, line 10).

The Blue Road is clearly 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. For example, the Red Road is the only road that Buyck is able to transport his farming equipment across. (R. p. 115, lines 5-10). 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. (R. p. 419, line 16 – p. 420, line 11, p. 489, lines 19-22, p. 491, lines 8-19). *Jackson's own witnesseses testified that the Blue Road was not suitable for use for Buyck's historical purposes.*[13] Specifically, Jackson's own surveyor expert witness, Michael R. Mills, testified that for a logging truck to travel the Blue Road it must have at

[13] It is interesting that Jackson asserts in his Brief the Blue Road actually provides better access to the Buyck Property than the Red Road. This statement is clearly untrue, unsupported by any evidence in the record (including the testimony of Jackson's own witnesses), and is disingenuous to say the least.

least a ten or eleven foot clearance – which clearance width the Blue Road obviously does not provide. (R. p. 489, lines 19-22, p. 491, lines 8-19). Further, James Medlin, another of the Jackson's own witnesses, testified that the Blue Road was not suitable for any vehicle that lacked four-wheel drive. (R. p. 419, line 16 – p. 420, line 11). Mr. Medlin further testified that the Blue Road was really no road at all but was actually just a trail. Id. This Blue Road simply is not an adequate access to the Buyck Property, particularly for Buyck's historic and established uses which include farming and logging as well as general recreation. This fact is clear based upon a review of the transcript, and was admitted by multiple of Jackson's own witnesses.

In support of its argument, Defendant relies upon the case of Ballington v. Paxton, wherein this Court 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, in Ballington, the claimed dominant estate had alternate access, and there was no finding or discussion whatsoever that this alternate access, though possibly less convenient, was inadequate for the *enjoyment* of the property. Id. Likewise, in the cases of Fisher v. Fair, 34 S.C. 203, 13 S.E. 470 (1891), and Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944), both relied upon by Jackson for this proposition, the claimed dominant estates actually abutted and had direct access to public roads (in addition to the ways claimed appurtenant in those cases), and access via those public rights-of-way allowed the claimant to fully enjoy the claimed dominant tract. This line of cases is clearly distinguishable from the facts of this case, where overwhelming evidence (even testimony of Jackson's own witnesses) has shown that the Blue Road does not provide

adequate access for Buyck's historic use and *enjoyment* of the Buyck Property but is simply a trail which is used (primarily by hunters) for access to one area of the Buyck Property. In fact, this Court has held under a fact pattern more closely related to that before us that an access way claimed appurtenant *was* essentially necessary to the use of the dominant estate when the dominant estate had alternate access but the alternate access way was "swampy" and otherwise unsuitable for acceptable passage. Proctor v. Steedley, 398 S.C. 561, 575, 730 S.E.2d 357, 365 (Ct. App. 2012).

"Easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate." Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012). Furthermore, although the standard of review in issues relating to the scope of easements is somewhat broad, this "does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." Proctor at 571, 730 S.E.2d at 363. Judge Goodstein examined all of the evidence and heard all of the testimony (judging the credibility of each of the witnesses) and aptly determined that Buyck's well-established easement rights over the Red Road for access to the Buyck Property are appurtenant to the Buyck Property. (R. p. 23). There is simply no dispute that the Blue Road is not suitable for Buyck's historic uses of the Buyck Property, and in any event having an alternate access way to a property does not mean that access via the Red Road is not "essentially necessary" to Buyck's *enjoyment* of his property. This is not an easement by necessity case. The standard is not whether the Red Road is essentially necessary for Buyck to *access* the Buyck Property, but instead is whether the Red Road is essentially necessary to Buyck's *enjoyment* of the

Buyck Property. It is clear in this case that Buyck cannot properly *enjoy* his property without the use of the Red Road; hence, the Red Road is "essentially necessary" to his *enjoyment* of his property. The fact that Buyck's use of the Red Road has been so consistent and of such character and nature as to effectively establish prescriptive rights in the Red Road is sufficient evidence, in and of itself, that the Red Road is essentially necessary to Buyck's use and enjoyment of the Buyck Property.

IV. THE LOWER COURT'S ORDER PROPERLY DEFINED THE SCOPE OF THE EASEMENT IN ACCORDANCE WITH THE USE OF THE RED ROAD DURING THE PRESCRIPTIVE PERIOD.

It is hornbook law that "[t]he scope of a prescriptive easement is determined by the adverse usage through which it is acquired." JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 8.12 (2012) (noting the prevalence of this rule and the fact that it has even been codified in several states). The testimony established use of the Red Road during the prescriptive period for farming and logging activities as well as for hunting, fishing and other recreational purposes – specifically including use by members of the Buyck Hunt Club and other similar organizations with permission from Buyck. (R. pp. 4-6, p. 112, lines 14-18, p. 131, lines 15-24, p. 229, lines 4-24, p. 264, lines 1-4, p. 268, lines 20-23, p. 414, lines 1-12). Accordingly, Judge Goodstein granted a prescriptive easement in favor of Buyck in similar scope.

It having been clearly established that Buyck's prescriptive easement rights over the Red Road are appurtenant in nature, the remainder of Jackson's argument as to the scope of the prescriptive easement established by Buyck – relating to the right of the hunt club to use the Red Road - is inapplicable. Suffice it to say, however, that the Buyck Hunt Club has used the Red Road for access to the Buyck Property for over forty years,

with the permission of Buyck, and his father before him, and this fact is not disputed on the record. (R. p. 413, lines 6-10, p. 421, line 24 – p. 422, line 7, p. 426, lines 9-12). The easement rights acquired by Buyck therefore necessarily include the right to allow his Hunt Club to use the Red Road, as it has for the past forty years, as well as his loggers and other licensees, guests and invitees. Again, the scope of the easement established by Buyck through prescription is defined by the use of the Red Road by Buyck and his guests, licensees and invitees during the prescriptive period. This use clearly included the use of the Red Road by the Buyck Hunt Club.

CONCLUSION

In accordance with the foregoing, this Court should find that Buyck has established a prescriptive easement over the Red Road, appurtenant to the Buyck Property and of a scope consistent with the historical use of the Red Road by Buyck and his predecessors, particularly in light of the circumstances of the case and the fact that the Special Referee actually heard the testimony of the witnesses and was in a position to judge the credibility of each witness. Therefore, Judge Goodstein's Order, and her subsequent Order Denying Appellant's Motion to Alter or Amend, should be affirmed.

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July 12, 2013

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I hereby certify that this Final Brief complies with Rule 21(b), SCACR.

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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

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

v.

William C. Jackson, ... Appellant.

CERTIFICATE OF SERVICE

I, Laura F. Hood, an employee of Callison Tighe & Robinson LLC, Attorneys for the Respondent, do hereby certify that, on this date, I caused to be served a copy of the foregoing **Final Brief of Respondent,** W. Peter Buyck, Jr., upon Appellant's counsel, by depositing a copy of the same in the United States mail, with proper first-class postage affixed thereon, addressed as follows:

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