

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

S.C. Supreme Court

The Honorable O. Davie Burgdorf, Master-in-Equity

Opinion No. 4929 (S.C. Ct. App. filed January 25, 2012)

Thelease Kelley,

Petitioner,

-VS-

Lee Dewayne Snyder and
Harry L. Snyder,

Respondents

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

The Honorable O. Davie Burgdorf, Master-in-Equity

Case No. 2008-CP-38-900

Thelease Kelley,

Appellant,

-vs-

Lee Dewayne Snyder and
Harry L. Snyder,

Respondents

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
COURT OF COMMON PLEAS)

JUDGMENT ON TRIAL OR ORDER BY THE COURT

CASE NO. 68 -CP-38- 90

VS

Sharon Kelley

Lee Lawrence Myler

PLAINTIFF(S)

DEFENDANT(S)

- () JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND THE JURY HAS RENDERED ITS VERDICT.
- (☒) DECISION BY COURT. THIS ACTION CAME TO TRIAL OR HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN TRIED OR HEARD AND A DECISION HAS BEEN RENDERED.
- () ACTION DISMISSED. () RULE 40 (J) OF SCRPC, () RULE 12 (B) OF SCRPC,
() SETTLED. () VOL. NONSUIT. () OTHER _____

IT IS ORDERED AND ADJUDGED: (☒) SEE ATTACHED ORDER, () STATEMENT OF JUDGMENT BY COURT

DATED AT ORANGEBURG, SOUTH CAROLINA, THIS 19 DAY OF May, 20 09.

JUDGE/CLERK OF COURT

THIS JUDGMENT WAS ENTERED ON THE 27 DAY OF May, 20 09
AND A COPY MAILED FIRST CLASS THIS _____ DAY OF _____, 20 ____
TO ATTORNEYS OF RECORD OR TO PARTIES (WHEN APPEARING PRO SE) AS FOLLOWS:

Sharon Kelley

Lee Lawrence Myler

ATTORNEY(S) OR PLAINTIFF(S)

ATTORNEY(S) FOR DEFENDANT(S)

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
CASE NO. 2008-CP-38-900

Thelease Kelley,
Plaintiff,)

vs.)

FINAL ORDER

Lee Dewayne Snyder and
Harry L. Snyder,
Defendants.)

13/1
This matter comes before the Court on a Summons and Complaint filed by the Plaintiff on June 4, 2008 in which he seeks an Order of this Court prohibiting the Defendants from using a twenty (20)-foot road that he alleges is being used to obtain access from Highway 178 back to their property, which is behind the twenty-four (24) acres owned by the Plaintiff. The Defendant filed an Answer and Counterclaim on July 3, 2008 in which he seeks an Order of the Court determining that a prescriptive easement exists on the twenty (20)-foot right-of-way on the basis that the Defendants and their predecessors in title have been using this roadway for a period well in excess of twenty (20) years. The Plaintiff filed his Reply to the Counterclaim on July 15, 2008.

This matter comes before the Court for a final hearing on April 29, 2009 in regards to this matter. The hearing was attended by the Plaintiff and his attorney, Glenn Walters, and by the Defendants and their attorney, James B. Jackson, Jr. Prior to the hearing, the Court was advised that the Defendant's property was not only owned by the Defendant, Lee DeWayne Snyder, but is also owned by his father, Harry L. Snyder, and it appeared to be necessary to name Mr. Snyder as a party defendant to this action. Therefore, by agreement of both parties, Harry L. Snyder was made a party defendant to this action.

The Plaintiff presented evidence that he is owner of twenty-four (24) acres of property in the

0000002

Bowman area of Orangeburg County, which he received by deed from his relative, Bennie Kelly, recorded on November 29, 1977 in Deed Book 439 at Page 1077 in the Office of the Register of Deeds for Orangeburg County. A copy of this deed was marked as Plaintiff's Exhibit #1 in this case.

It was noted that the Plaintiff originally purchased twenty-eight (28) acres of land according to the deed, but had sold a one (1)-acre tract of land previously. The Plaintiff further presented evidence that a new survey was done on his property by Albert R. Judy, RLS, which was dated May 25, 2005 and was recorded on June 7, 2005 in Plat Book 377 at Page 6 in the Office of the Register of Deeds for Orangeburg County. This plat was marked in evidence as Plaintiff's Exhibit #2. The plat showed the one (1)-acre tract of land that had previously been sold, which was shown as Tract No. 2, and the Plaintiff's tract, which was designated as Tract No. 1. Tract No. 1 apparently contains twenty-four (24) acres according to this new survey and plat. The plat also showed the existence of the roadway in question, being used by the Defendants and which was clearly shown on the ground according to the plat.

8/2 The Plaintiff testified that he had owned this property since 1977 and that he had never given permission to the Defendant to use the roadway in question. He described the roadway originally as being a "wagon road", and that it was barely passable by any vehicle other than a wagon. The Plaintiff did acknowledge that the Defendants had been using the roadway in question since they purchased their property in order to get back to the residence, but he emphasized that he had never given permission to the Defendants to use the roadway in question. The Plaintiff's evidence shows that he lives in New York, but has owned this property since 1977. The Plaintiff requested that this Court prohibit the Defendants from using the roadway in question.

The Defendants presented their evidence, which included a copy of their deed showing that they purchased this property from Willie McLauren Rast and Lois C. Rast by deed dated June 29,

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1989 and recorded on June 29, 1989 in Deed Book 548 at Page 1093 in the Office of the Register of Deeds for Orangeburg County. A copy of this deed was marked in evidence as Defendant's Exhibit #1. It should be noted that this deed shows that an easement was also granted to the Defendants by Mr. and Mrs. Rast conveying them a twenty (20)-foot access road from US Highway 178 to the property described therein, which would be the roadway in question in this case. However, all parties agree that there appears to be no other deeded easement to this roadway on the records in Orangeburg County.

65/3 The Defendant, Lee DeWayne Snyder, testified to the Court that he purchased this property along with his father in 1989 and later moved onto the property and began living there in 1991 or 1992. He indicated that he regularly uses the roadway in question to gain access to his property, and has done so on a daily basis since 1991 or 1992 when he moved onto the property. Mr. Snyder further testified that he had been using this roadway since 1977 or 1978 when he began hunting on this property. Mr. Snyder indicated that he and others have continually used this road for many years since that time, not only for purposes of hunting, but certainly for the purposes of his living on the property behind the twenty-four (24) acres owned by the Plaintiff, Thelease Kelly, since the early 1990's. The Defendant further testified that he maintains this roadway on a regular basis, and he has put rock and dirt thereon and has regularly plowed the roadway in question. The evidence further showed that the Defendant initially placed a gate on this roadway right at its entrance from Highway 178. Mr. Snyder was asked by the Plaintiff, Thelease Kelly, to move this gate, and did move the gate back to another area on the roadway, which is also on the property of the Plaintiff, right before the roadway reached a utility easement that runs diagonally across the property of both the Plaintiff and Defendant. The testimony of the Plaintiff confirmed Mr. Snyder's testimony about the gate.

The Defendant presented four other witnesses, all of who testified that people had been using

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this roadway to get to the property behind the Plaintiff for many years for purposes of hunting. As a result, all of these witnesses indicated that the roadway in question has been used for a period in excess of forty (40) years on a regular basis, not only by them, but by other individuals. The Defendant also presented the testimony of Larry Rast, who is the child of Willie McLauren Rast and Lois C. Rast, who conveyed the property to the Defendants in this matter. Mr. Rast indicated that he actually farmed the property for his parents beginning back in the mid-1960's and knows that his parents continued to farm the property through the early 70's, when he was in charge of those farming operations. He further testified that they continued to rent the property to others for farming purposes at least until the late 1970's. As a result, Mr. Rast testified that the roadway in question was used by him and others for farming purposes throughout the 1960's and 1970's.

Based on the testimony and evidence presented by the parties, I make the following findings of fact:

- 13/4
1. The roadway in question has been used continuously, openly and notoriously for a period in excess of twenty (20) years. I find that the use by the Defendants and others have been hostile to the ownership of the Plaintiff and his predecessor in title, as evidenced by the fact that the Defendants have maintained a gate thereon since the early 1990's.
 2. The use of the roadway in question by the Defendants and their predecessors in title was continuous and uninterrupted for a period in excess of twenty (20) years and, in fact, for a period in excess of forty (40) years.
 3. The roadway in question is a twenty (20)-foot right-of-way, which is easily identifiable on the ground as it has been used by the parties in a continuous manner for more than twenty (20) years. The roadway was clearly identified and shown on a plat prepared for the Plaintiff, which was recorded in Plat Book 377 at Page 6.

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4. The use and enjoyment of the roadway in question was both adverse to the Plaintiff and his predecessor in title since 1989 under a claim of right. The Defendants claim their right to the roadway in question pursuant to their deed, which indicated that a twenty (20)-foot easement was granted to them by their predecessors in title.
5. The Plaintiff failed to establish that he is entitled to an Order prohibiting the Defendants from using the roadway in question based on their establishment of a prescriptive easement in this matter.
6. The Defendants, however, have established that the roadway in question has been used for a period well in excess of twenty (20) years and that they have established a prescriptive easement allowing them to use the twenty (20)-foot roadway in question for purposes of ingress and egress to the property that they own as set forth in their deed, and which is shown in Plat Book 377 at Page 6 in the Office of the Register of Deeds for Orangeburg County.

10/5 — Based on the above findings of facts, I conclude as a matter of law that the Complaint of the Plaintiff should be dismissed for the reasons set forth herein, and that the Defendants are hereby granted a prescriptive easement to use the twenty (20)-foot roadway in question, which is shown on the Plat of the Plaintiff referenced herein, for purposes of ingress and egress to their property.

I further conclude as a matter of law that the Defendants are not allowed to put a gate on the roadway in question as it sits on the property of the Plaintiff, and they should be and are hereby required to remove the gate that is on the property of the Plaintiff, and the gate should be removed from the Plaintiff's property within ninety (90) days from the date of this Order. The Defendants may place a gate on their property to control use of the roadway.

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IT IS THEREFORE ORDERED that the Complaint of the Plaintiff is dismissed for the reasons set forth herein, and the Defendants are granted a prescriptive easement to use the twenty (20)-foot roadway in question, which is shown on the plat of the Plaintiff referenced herein, for purposes of ingress and egress to their property.

IT IS FURTHER ORDERED that the Defendants shall remove the gate that is on the property of the Plaintiff within ninety (90) days from the date of this Order.

IT IS SO ORDERED.

Date: *May 19, 2009*
Orangeburg, SC



O. DAVIE BURGDORF
Master-in-Equity for Orangeburg County

7000007

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Thelease Kelley,)
Plaintiff,)

vs.)

Lee Dewayne Snyder and)
Harry L. Snyder,)
Defendants.)

IN THE COURT OF COMMON PLEAS
CASE NO. 2008-CP-38-900

**ORDER DENYING MOTION
FOR RECONSIDERATION**

FILED FOR RECORD
VIRGINIA B. CLARK
CLERK OF COURT

2009 NOV 10 A 9

This matter comes before the Court on a Notice of Motion and Motion for Reconsideration filed by the Plaintiff on June 29, 2009. The Plaintiff seeks an Order of the Court reconsidering and changing its prior decision issued in its Order dated May 19, 2009. A Hearing on the Motion for Reconsideration was held before the Court on October 13, 2009 attended by the Plaintiff's attorney, Glenn Walters, and by the attorney for the Defendants, James B. Jackson, Jr.

10/11 Based on the arguments of counsel presented at the hearing on the Motion for Reconsideration and on the transcript of testimony, which was reviewed by this Court, I find that the Plaintiff has presented no new issues that were not considered by the Court in its previous decision. In addition, after reviewing the evidence in this case one more time and considering the arguments of counsel, the Court finds that the previous decision issued in its Order dated May 19, 2009 was corrected and appropriate and should be confirmed by this Court. As a result, the Plaintiff's Motion for Reconsideration must be denied.

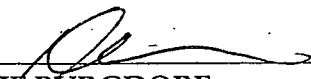
IT IS THEREFORE ORDERED that the Motion for Reconsideration filed by the Plaintiff in this matter is hereby denied.

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IT IS SO ORDERED.

Date: 4/2/05
Orangeburg, SC



O. DAVIE BURG DORF
Master-in-Equity for Orangeburg County

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

THELEASE KELLEY,)

C/A NO.: _____

PLAINTIFF(S),)

V.)

COMPLAINT
JURY TRIAL REQUESTED

LEE DEWAYNE SNYDER,)

DEFENDANT.)

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC

2008 JUN -4 A 4:53

NOW COMES the Plaintiff above-named, complaining of the Defendant(s) above-named, and does allege and show unto this Honorable Court as follows:

1. Plaintiff is a citizen and resident of the County of Orangeburg, State of South Carolina.
2. Defendant is a citizen and resident of the County of Orangeburg, State of South Carolina.
3. Plaintiff is, and at all times mentioned in this Complaint, the owner and possessor of certain real property legally described in Exhibit "A", attached to this Complaint and incorporated herein by this reference as though set forth in full. The above described real property will be referred to as "Parcel 1" for convenience.
4. Defendant is, and at all times mentioned in this Complaint, the owner and possessor of certain real property which property will be referred to as "Parcel 2" for convenience. Parcel 2 is legally described in Exhibit "B", attached to this Complaint and incorporated by this reference as though set forth in full.
5. Defendant and his agents have entered upon Plaintiff's land and have used and occupied a portion of the land creating a private roadway as a passage for trucks and other vehicles.
6. Plaintiff has not in the past given, nor does he now give, to Defendant or his agents, or to the general public, or to any person, permission to use Plaintiff's land for any purpose or activity whatsoever.
7. Plaintiff has on many occasions given notice to Defendant and to his agents to cease using the road for any purpose whatsoever, but despite such notice, Defendant and his agents have continued to use Plaintiff's property.
8. Unless and until enjoined and restrained by Order of this Court, Defendant's interference with Plaintiff's land will cause great and irreparable injury to Plaintiff's land.

ATTEST: TRUE COPY

CLERK OF COURT

ORANGEBURG COUNTY, SOUTH CAROLINA

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9. Plaintiff has no adequate remedy at law for the injuries being suffered as a result of Defendant's interference, in that, among other things: (1) Parcel 1 is unique real property and therefore pecuniary compensation would not afford Plaintiff adequate relief; (2) it would be extremely difficult to ascertain the amount of monetary damages that would fully compensate Plaintiff for the losses and damages that he will sustain in the future as a result of the wrongful acts of Defendant; and (3) it would be necessary to maintain a multiplicity of judicial proceedings to protect Plaintiff's interests by reason of Defendant's intentional and repeated encroachment on the Plaintiff's land.

10. As a proximate result of Defendant's interference, Plaintiff has been unable to fully utilize his land, and unless Defendant is enjoined and restrained, the interference and trespass described will continue.

11. As a proximate result of Defendant's interference, Plaintiff has suffered and will continue to suffer, until the interference and trespass is discontinued, emotional distress and mental anguish in a sum that has yet to be ascertained, but will be proven at trial.

12. As a further and proximate result of Defendant's interference, the value of Parcel 1 has been diminished, and Plaintiff has been damaged in a sum that has yet to be ascertained, but will be proven at trial.

WHEREFORE, the Plaintiff prays for judgment against the Defendant :

1. For a preliminary injunction and a permanent injunction enjoining Defendant, And each of his agents, servants and employees, and all other persons acting under, in concert with or for them, from interfering with or obstructing the use of Plaintiff's land, Parcel 1;

2. For compensatory damages according to proof;

3. For costs of suit; and

4. For such other and further relief as the Court may deem just and proper.

LAW OFFICE OF GLENN WALTERS



Glenn Walters, Esquire
R. Benz Kirby, Esquire
Attorneys for Plaintiff
P. O. Box 1346
Orangeburg, SC 29116
803 531-8844

Orangeburg, South Carolina
June 4, 2008

0000011

Rec: R 48

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

TITLE TO REAL ESTATE

Parcel 2

KNOW ALL MEN BY THESE PRESENTS That I, Thomas Kennedy, in consideration of the sum of Seventy Seven Thousand Six Hundred Sixty Two and no/100 (\$77,662.00) Dollars, to me paid by Lee Dewayne Snyder, in the State aforesaid, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Lee Dewayne Snyder, his heirs and assigns, forever, the following described property, to-wit:

All that certain piece, parcel, or lot of land designated as 36.831 Acres, Tract H, situate, lying and being in Orangeburg County, State of South Carolina, as shown on a plat prepared for Trustees of Marion Kennedy and Estate of Gladys Kennedy by W. F. Stokes, RLS dated April 5, 1999 and recorded in the Office of the Register of Deeds for Orangeburg County in Plat Book C-307, at Page 3, and having all metes, bounds, courses, distances, directions and measurements as are shown on said plat, are incorporated herein and made a part hereof by reference.

This being a portion of the property conveyed to Thomas Kennedy by Deed of Ernestine K. Tindall and Thomas Kennedy as Trustees dated September 5, 2003 and recorded September 11, 2003 in the Office of the Register of Deeds for Orangeburg County in Deed Book 1003, at Page 207.

Tax Map No.: 0254-00-02-060 2046016

Grantee's Address: 8714 Charleston Hwy.
Dorchester, SC 29018

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned, unto the said Lee Dewayne Snyder, his heirs and assigns forever.

And I hereby bind myself, my heirs and assigns, to warrant and forever defend all and singular the said premises unto the said Lee Dewayne Snyder his heirs and assigns, against myself and my heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 4th day of May, in the year of our Lord two thousand five and in the two hundred twenty-ninth year of the Sovereignty and independence of the United States of America.

Orangeburg County 05-05-2005
SOUTH CAROLINA
County Revenue Stamp \$95.80
State Revenue Stamp \$202.80

FILED May 05, 2005 04:38:40 pm
BOOK 01094
PAGE 0069 NEW 0070
INSTRUMENT # 2005002214

FILED
ORANGEBURG
COUNTY
GAIL LANEY
REGISTER
OF DEEDS

Neil J. Snyder
Signature

RECORDED IN THE OFFICE OF ASSESSOR
MAP 0254 SHEET 02 BLOCK 02 PARCEL 060
THIS 9 DAY OF May 2005
ORANGEBURG COUNTY JIM McLEAN, COUNTY ASSESSOR

0000012

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGE BURG)

Thelease Kelley,

Plaintiff,

vs.

Lee Dewayne Snyder,

Defendant.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2008-CP-38-900

ANSWER AND COUNTERCLAIM

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGE BURG, SC
JUL -3 A 9:12

The Defendant above named, answering the Complaint of the Plaintiff, would respectfully show this Honorable Court as follows:

AS A FIRST DEFENSE

1. The Defendant would admit the allegations contained in Paragraphs 1, 2, 3 (except that no Exhibit A or Parcel 1 was attached to the Complaint), 4 (except that no Exhibit B or Parcel 2 was attached to the Complaint), and 5 of the Complaint of the Plaintiff.

2. The Defendant would deny the allegations contained in Paragraphs 6, 7, 8, 9, 10, 11 and 12 of the Complaint of the Plaintiff and demands strict proof thereof.

3. The Defendant would deny each and every allegation contained in the Complaint of the Plaintiff, which is not specifically admitted, denied or controverted herein, and would demand strict proof thereof.

AS A SECOND DEFENSE AND BY WAY OF COUNTERCLAIM

4. The Defendant would reaffirm and reiterate all of the allegations contained in his first defense above as fully as if repeated verbatim herein.

ORANGE BURG COUNTY
CLERK OF COURT
LISA W. MIZELL
ATTEST: TRUE COPY

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5. The Defendant purchased the property in question that he owns along with his father, Harry L. Snyder, by deed from Willie McLauren Rast and Lois C. Rast dated June 29, 1989 and recorded on June 29, 1989 in Deed Book 548 at page 1093 in the Office of the Register of Deeds for Orangeburg County. The Defendant's property is described as follows:

All that certain piece, parcel or tract of land, with any improvements thereon, situate, lying and being Southeast of the Town of Bowman, off S.C. Highway No. 178, County of Orangeburg, State of South Carolina, containing one hundred three and nine hundred eighty-three (103.983) acres, more or less, and being more particularly set forth and shown on a Plat for Willie and Lois Rast, prepared by Lloyd S. Moore, Jr., RLS, dated December 21, 1970, and recorded in the office of the RMC for Orangeburg County in Plat Book 32 at page 72, said tract being irregular in shape and bounded and measuring as follows: On the Northwest by lands now or formerly of Hazzard Irick and of Roosevelt Mathis, measuring thereon two thousand sixteen and forty-nine hundredths (2,016.49) feet; on the Northeast by lands now or formerly of Shelly Moss, measuring thereon one thousand four hundred eighteen and thirty-three hundredths (1,418.33) feet; on the Southeast by property of now or formerly of Kennedy, measuring thereon two hundred thirty-nine and sixty-nine hundredths (239.69) feet and by lands now or formerly of Moss, measuring thereon two hundred fifty-six and seventy-three hundredths (256.73) feet; on the East by property now or formerly of Moss and of Kennedy, measuring thereon a total distance of one thousand seven hundred ninety-nine and eighty-hundredths (1,799.80) feet; on the Southeast by property now or formerly of Kennedy, measuring thereon two hundred seventy-four and eighty-five hundredths (274.85) feet; on the South by lands of now or formerly of Kennedy, measuring thereon six hundred ninety-six and thirty-hundredths (696.30) feet; and on the Southwest by lands now or formerly of Kennedy, measuring thereon two thousand two hundred twenty-four and thirty-hundredths (2,224.30) feet; all measurements being more or less.

Being the same property conveyed to Willie and Lois C. Rast by deed of George L. Reed, sheriff Orangeburg County, by deed dated February 28, 1957, and recorded in the Office of the RMC for Orangeburg County of February 28, 1957, in Deed Book 208 at page 296; and by deed of David Bookhart to Willie M. Rast, dated August 5, 1964, recorded in the aforesaid office on August 5, 1964, in Deed Book 265 at page 389; and by deed of Hattie Mae F. Rast and Julie Mae R. Buck to Willie McLauren Rast, dated June 13, 1964, recorded in the aforesaid office in Deed Book 264 at page 258.

ALSO: All of our right, title and interest in an easement or right-of-way for ingress and egress over, along and through a 20-foot access road from the property hereinabove described to U. S. Highway No. 178.

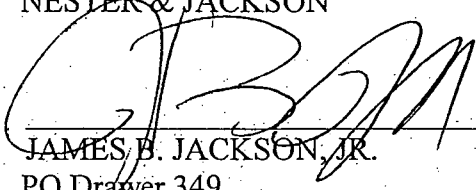
6. Since the purchase of the property by the Defendant in 1989, the Defendant has continuously used a road that crosses over the property of the Plaintiff from Highway 178 to the Defendant's property. The Defendant, his family and others have been using this road in a manner that is open, hostile, continuous, notorious and uninterrupted since his purchase of the property. The Defendant is further informed and believes that this road was also used by his predecessors in title for a period of time in excess of twenty years in the same manner. The road is twenty (20) feet in width and is shown on a plat prepared for the Plaintiff.

7. As a result, the Defendant is informed and believes that he is entitled to a determination by this Court pursuant to the South Carolina Uniform Declaratory Judgments Act Section 15-53-10, Code of Laws of South Carolina, 1976, as amended, that he has obtained a prescriptive easement over the road in question.

WHEREFORE, the Defendant prays that this Honorable Court will inquire into the matters set forth herein and issue its Order granting the Defendant a prescriptive easement over the property of the Plaintiff to use the roadway in question, which is twenty feet in width, to have rights of ingress and egress from Highway 178 to the Defendant's property; dismissing the Complaint of the Plaintiff; and granting such other and further relief as the Court deems just and proper.

Date: July 2, 2008
Santee, SC

NESTER & JACKSON


JAMES B. JACKSON, JR.

PO Drawer 349
Santee, SC 29142
(803) 854-4484

Attorney for the Defendant

000015

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

THELEASE KELLEY,)

PLAINTIFF(S),)

V.)

LEE DEWAYNE SNYDER,)

DEFENDANT.)

C/A NO.: 2008-CP-38-900

REPLY

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC

2008 JUL 17 P 4:15

NOW COMES the Plaintiff above-named and files this his
Reply to Defendant's Counterclaim.

1. Plaintiff would deny each and every allegation
contained in the Defendant's Counterclaim, which is not
specifically admitted, denied or controverted herein, and would
demand strict proof thereof.

2. Plaintiff denies paragraphs 4, 5, 6 and 7 of
Defendant's Counterclaim.

WHEREFORE, the Plaintiff prays for judgment against the
Defendant:

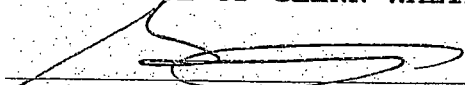
1. For a preliminary injunction and a permanent injunction
enjoining Defendant, and each of his agents, servants and
employees, and all other persons acting under, in concert with
or for them, from interfering with or obstructing the use of
Plaintiff's land, Parcel 1;

2. For compensatory damages according to proof;

3. For costs of suit; and

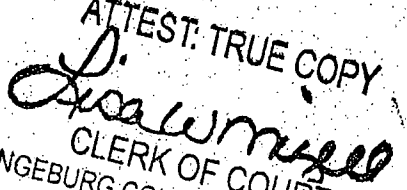
4. For such other and further relief as the Court may deem
just and proper.

LAW OFFICE OF GLENN WALTERS


Glenn Walters, Esquire
R. Benz Kirby, Esquire
Attorneys for Plaintiff
P. O. Box 1346
Orangenburg, SC 29116
803-531-8844

Orangenburg, South Carolina
July 15, 2008

0000016

ATTEST: TRUE COPY

CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

THELEASE KELLEY,)
)
PLAINTIFF(S),)

C/A NO.: 2008-DR-38-900

V.)

**NOTICE OF MOTION &
MOTION TO ALTER & AMEND JUDGMENT**

LEE DEWAYNE SNYDER,)
)
DEFENDANT.)

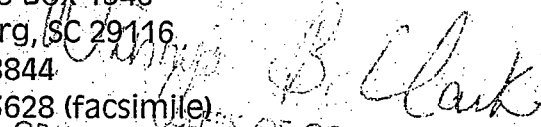
TO: THE DEFENDANT(S) ABOVE NAMED AND THEIR ATTORNEY:

The Plaintiff, Thelease Kelly, by and through his undersigned attorney
moves the Court pursuant to Rule 59 of the South Carolina Rules of Civil
Procedure to reconsider the Court's decision for the following reasons:

1. An Order was issued by the Honorable O. Davie Burgdorf, Orangeburg
County Master in Equity Court Judge on May 19, 2009, and filed with
the Orangeburg Clerk of Court on May 27, 2009;
2. Said Order was received from the Orangeburg County Clerk of Court
on June 18, 2009;
3. The Plaintiff is informed and believes that the greater weight of the
evidence is contrary to the Courts decision along with the applicable
case law and as a result the Order is subject to reconsideration.


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Orangeburg, South Carolina
June 29, 2009


CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

000017

1 THE COURT: You may proceed. Call your first
2 witness.

3 MR. WALTERS: May it please the court. At this
4 time, Your Honor, we will call Mr. Thelease Kelley.
5 Thereupon,

6 THELEASE KELLEY,
7 being first duly sworn to tell the truth, the whole truth
8 and nothing but the truth, as hereinafter certified,
9 testified as follows:

10 EXAMINATION

11 BY MR. WALTERS:

12 Q. Mr. Kelley, would you state your full name for
13 the record please.

14 A. Thelease Kelley.

15 Q. Mr. Kelley, do you own property in Orangeburg
16 County?

17 A. Yes.

18 Q. I ask the court to take judicial notice of
19 Exhibit A that's attached to the summons and complaint. I
20 believe it describes the property that is owned by
21 Mr. Kelley. Mr. Kelley, how many acres is that land?

22 A. Twenty-eight acres.

23 Q. When did you purchase that land?

24 A. Right now it's 27, because I sold one acre.

25 Q. The property that we are referring to in this

1 particular case, who did you buy it from?

2 A. Bennie Kelley, my brother.

3 MR. WALTERS: I would ask that the court take
4 judicial notice of Book 439 Page 1077.

5 Q. Mr. Kelley, when you purchased this property it's
6 adjacent to the Defendant in this particular case, Mr. Lee
7 DeWayne Snyder, is that correct?

8 A. Yes.

9 Q. When you originally approached my office, the
10 summons and complaint was filed in June 2008. You had come
11 to me and you had certain complaints with regard to the
12 behavior of Mr. Snyder and his relationship with you
13 specifically with regards to the land?

14 A. Right.

15 Q. Would you please tell the court what problems you
16 had?

17 A. Well, first he put a gate right at 178 on my
18 property. So I asked him to move the gate. After he moved
19 the gate from 178, he put it back about halfway on my
20 property so I asked him why did he leave it there instead
21 of putting it to the end of the, you know, at the line. So
22 he told me that he had what you call an easement and he
23 have a right to do what he want with my property.

24 Q. At any time have you given him an easement?

25 A. I haven't give him nothing.

1 Q. As far as in your relationship, he stated he
2 believed he had an easement and you stated you don't have
3 an easement, is that right?

4 A. Yes.

5 Q. At any time did you ever make any conveyance to
6 Mr. Snyder?

7 A. No time at all.

8 Q. Did you ever give Mr. Snyder permission to use
9 your land?

10 A. No.

11 Q. In the summons and complaint we allege in
12 Paragraph 5 that the Defendant and his agents have entered
13 upon Plaintiff's land and have used and occupied a portion
14 of the land creating a private roadway as a passage for
15 trucks and other vehicles. When did that start, sir?

16 A. It been, been happening.

17 Q. When did you tell him that they couldn't do this?

18 A. I had my cousin that cut the property, that was
19 about two years ago, they want to use the road to go back
20 to cut the property. Mr. Snyder said no you all can't use
21 this road. Now that was one time. I had another guy last
22 year who farm the land and he wouldn't let him use the road
23 to go through the property and before then, years ago, back
24 a few years back, a friend of mine was farming land but
25 he's dead now. Mr. Snyder wouldn't let him go use the road

1 to go back. Everybody have to go through, you know, off
2 the highway, go through the lady who bought my acre, they
3 have to use her property to go back to mine.

4 Q. Specifically tell this court the problem that you
5 have with Mr. Snyder. You say he denied someone access to
6 this road. I want to make sure the judge has some type of
7 pictorial of what we are talking about. Your land is
8 adjacent to Mr. Snyder. Let's go back through your
9 testimony. You said he denied someone use of the road.
10 What were they going to use the road for?

11 A. The first, first of all the people that I had
12 farming my land, they had to go back, use the road to go
13 back to get to the back of my property.

14 Q. I want to show you a document here. I'm going to
15 show it to Attorney Jackson. I believe that's the acreage
16 there. I'll have it marked as Plaintiff's Exhibit 1 and
17 let's have this plat marked as Plaintiff's Exhibit Number
18 2.

19 (WHEREUPON, Plaintiff's Exhibit
20 Nos. 1 AND 2 were marked for
21 identification only.)

22 Q. Let's look at Plaintiff's Exhibit Number 2. Is
23 that your 24 acres you are referring to? Does that look
24 familiar?

25 A. I have -- as far as I know. I don't know too

1 much about a plat like this.

2 Q. It's similar to the document you brought to my
3 office, is that correct?

4 A. Yes.

5 Q. On that document could you show me where someone
6 is making use of your land. Perhaps what will help you is
7 a picture. See this picture?

8 (WHEREUPON, Plaintiff's Exhibit
9 No. 3 was marked for
10 identification only.)

11 Q. This is Plaintiff's Exhibit 3. Can you identify
12 that document?

13 A. Yes. This is when, when I had it appraised.

14 Q. Is that the road that we are referring to?

15 A. Yes, this is the road.

16 Q. Could you show me where that road runs, I'll go
17 through the plat with you and explain it to you, make sure
18 you understand.

19 A. This is 178. You can't see the highway, but this
20 is 178 right here.

21 Q. Would you look at the plat then and show me where
22 178 is. I'll give you some frame of reference. That's the
23 roadway. That's 178 right there.

24 A. Yes.

25 Q. If I was standing at 178, where does the road go?

1 A. I would say this is the road here.

2 Q. Right. Your Honor, for the court's edification,
3 we're referring to 178 which runs across this area here,
4 right there, and, then of course, he's referring to the
5 open roadway that runs across here. Sort of T-bones right
6 into 178. Is that correct?

7 A. You can see it right here. Here is the gate
8 right here. He moved it from 178 and put right there
9 halfway of my property.

10 Q. Let me make sure the court is aware. 178 runs
11 here. The area he's referring to is here. All the way
12 back here. And, of course, the first gate he says was
13 placed there and then it was moved back.

14 A. You also see he have a private property sign on
15 this light post.

16 Q. This particular road that you are referring to,
17 you have a picture of it there, that road was being used by
18 whom, sir?

19 A. By Mr. Snyder.

20 Q. Did you ever give Mr. Snyder permission to use
21 the road?

22 A. No.

23 Q. You said a couple years ago you had a problem
24 with regards to this issue?

25 A. Yes.

1 Q. When we talked about this, we talked about the
2 counterclaim that was filed in this particular case and it
3 was alleged that this particular road was being used for
4 more than ten years. You told me you didn't agree with
5 that. Why didn't you agree with that?

6 A. I didn't agree, because he didn't ask me about
7 cutting this road or using it going through my property.

8 Q. Is it your testimony that it hasn't been ten
9 years?

10 A. At least ten years or more.

11 Q. That you've had an ongoing dispute?

12 A. Yes.

13 Q. This road, you stated that he wouldn't allow
14 certain people to use. Who are the people he allowed to
15 use it?

16 A. I don't know who the people he allowed to use,
17 but I know that my cousin wanted to cut timber and a guy he
18 was using it for to farm my land, Lee McDaniel years ago,
19 he's dead now, but I have a guy now farming it and he told
20 me Mr. Snyder wouldn't let him use the road.

21 MR. JACKSON: I object to what he told him.

22 Q. You asked this court for a restraining order to
23 prevent him from using the road on your property?

24 A. Yes.

25 Q. Is there anything else you're requesting from

1 Mr. Snyder? You just want him to leave you alone?

2 A. I want him off my property.

3 Q. Other than that, is that it?

4 A. That's it. As long as he get off of my property.

5 MR. WALTERS: Your Honor, we have no further
6 questions.

7 EXAMINATION

8 BY MR. JACKSON:

9 Q. Mr. Kelley, Plaintiff's Exhibit Number 1, the
10 deed, you said you bought this property from your brother
11 Bennie Kelley?

12 A. Right.

13 Q. I'm looking at the deed and it was recorded back
14 in November 29, 1977. Does that sound right?

15 A. Sounds right.

16 Q. You have owned this property since 1977, is that
17 correct?

18 A. Yes.

19 Q. You continue to own it today with the exception
20 that you sold a 1-acre tract?

21 A. Right.

22 Q. This plat shows right there on Bowman Road is
23 where the one acre is that you sold, is that correct?

24 A. Right in the middle of 178.

25 Q. This plat you had prepared in 2005, is that

1 correct?

2 A. Yes.

3 Q. It shows the road in question that we are talking
4 about today, is that correct?

5 A. (Shakes head yes.)

6 Q. Has that road been there since 1977 when you
7 bought the property?

8 A. It was a dirt road like a little wagon road. My
9 brother, when he was going back to farm the land, that's --
10 there's no road like Mr. Snyder have or nothing.
11 Mr. Snyder cut the road through it.

12 Q. But there's always been --

13 A. There never was a road -- not a road. Just a
14 wagon road I would say.

15 Q. People used it, is that right?

16 A. My brother. Nobody --

17 Q. And other people used it?

18 A. No, no other people used it.

19 Q. What about the people that owned Mr. Snyder's
20 property before he owned it?

21 A. They didn't come through there. I don't know
22 nothing about that.

23 Q. You don't think those people used that road?

24 A. Nobody used -- as far I know about that road, it
25 was just a little wagon road to go back to the back of my

1 property which my brother had owned it and he was, he was
2 using the road to go back to the back of the property.
3 First it was a wagon road and then he bought a little
4 tractor. That's all it was, a tractor road.

5 Q. He's improved it, is that correct?

6 A. No, it was no improvement. Mr. Snyder is the one
7 who improved it.

8 Q. Mr. Snyder improved the road?

9 A. Right.

10 Q. Do you know when Mr. Snyder bought the property
11 and started using the road?

12 A. I don't know. I didn't keep...

13 Q. If I told you that according to his deed he
14 bought the property in 1989, would that sound about right?

15 A. I don't know. I don't know when he bought it.

16 Q. He's been using it since he lived there, isn't
17 that right?

18 A. As far as I know.

19 Q. Have you ever told Mr. Snyder he couldn't use
20 that road?

21 A. I never told him he couldn't, but I asked him why
22 he was using it.

23 MR. WALTERS: Excuse me, can I see what you're
24 referring to when you said if I told you 1989. I didn't
25 mean to interrupt your cross.

1 Q. I think that's all I have of Mr. Kelley.

2 THE COURT: Anything further, Mr. Walters?

3 EXAMINATION

4 BY MR. WALTERS:

5 Q. Attorney Jackson referred to a deed that was in
6 the name of Lee DeWayne Snyder and Harry L. Snyder. Let's
7 make sure this is clear for the court. If you would refer
8 to your plat, the property that Attorney Jackson is
9 referring to is on the, get your bearing on there, I guess
10 that would be north. Essentially what we got is, I'll make
11 it easy, I'll say the lower left hand corner here where it
12 simply says Lee DeWayne Snyder and it refers to tax map
13 number 2540002016.

14 MR. JACKSON: That's the 2005 tax map. The
15 numbers have changed from when he bought it in 1989, but
16 it's the same piece of property.

17 MR. WALTERS: It's this property here?

18 MR. JACKSON: Correct.

19 MR. WALTERS: Of course the easement that we are
20 referring to in this particular case is an easement that
21 ran from here to here, is that correct.

22 MR. JACKSON: No. Runs off --

23 MR. WALTERS: 178 all the way across.

24 MR. JACKSON: But he owns down here.

25 Q. Then there was another purchase, the point I want

1 to make out, Lee DeWayne Snyder made another purchase, and
2 you can see this, from Thomas Kennedy, probably this piece
3 over here.

4 MR. WALTERS: Should be adjacent to --

5 MR. SNYDER: It's a two piece tract that runs up
6 through here. This is the road we're talking about and
7 this is the last piece I bought.

8 MR. JACKSON: It's further back.

9 MR. WALTERS: If one tract -- I ask the court to
10 take judicial notice of the deed. That purchase was made
11 in May 2005 with regards to 36.831 acreage. I'm going to
12 mark that and put it in evidence.

13 (WHEREUPON, Plaintiff's Exhibit
14 No. 4 was marked for
15 identification only.)

16 Q. Mr. Kelley, would you look at that document. How
17 many acres did Mr. Snyder purchase? I believe it was for
18 the year 2005, is that correct?

19 A. Pardon me.

20 Q. It says 2005 at the bottom. I believe it was
21 36.831 acres, is that right?

22 A. I don't know how many, how many acres his was.

23 MR. WALTERS: I ask the court to take judicial
24 notice of it, the purchase that was made in 2005.

25 Q. Mr. Kelley, your testimony was that you referred

1 to it as a wagon trail or wagon road. Did I use your words
2 correctly?

3 A. Wagon road.

4 Q. When you say wagon road, what are you referring
5 to? Someone will come along --

6 A. That's like, you know, years ago at least 50
7 years ago my brother bought this property from a man named
8 Mr. George Morris. So when we, you know, go back there in
9 the wagon with a mule, that's all the road was, just a
10 wagon.

11 Q. During the time you purchased this property, was
12 Mr. Snyder operating a wagon and a mule?

13 A. I didn't know nothing about Mr. Snyder had
14 property back there. I never knew nothing about him and
15 his property in the back of mine until this road, I seen
16 this road was cut through my property.

17 Q. Is there another way to get to Mr. Snyder's
18 property?

19 A. There's plenty ways he could've went there. He
20 could go around off the highway right down below my
21 property. It's a road that go in the back around called
22 Snail Branch Road I think that's the name of it.

23 Q. It's called Snail Branch Road?

24 A. Yes, I think that's the name of it. He could've
25 used, he could've went in from that way to his property.

1 Q. Snail Branch Road, was that used for wagons or
2 was it used for cars?

3 A. For cars.

4 Q. As far as the ability to ingress and egress on
5 the property, there weren't any horses or mules during the
6 time you purchased this property that were using the road
7 you are referring to?

8 A. No.

9 Q. And the other way that you could get to his
10 property was a road that was traveled by cars?

11 A. Nearby. He could've got more closer to his
12 property that way then coming through mine.

13 Q. Can you explain to me or do you have any idea as
14 to why he wanted to use, you said wagon trail, as opposed
15 to the road that was actually cut that could go to his
16 house?

17 MR. JACKSON: I object to the question. He's
18 speculating as to what Mr. Snyder's reasons are.

19 MR. WALTERS: I'm asking Mr. Kelley what do you
20 think the reason was.

21 MR. JACKSON: It's speculation, Your Honor, and I
22 object to the question.

23 A. I feel like --

24 THE COURT: What's your question?

25 MR. WALTERS: I'm asking him of his own personal

1 knowledge as to why he believes that the Snail Branch Road
2 is better than the wagon trail.

3 THE COURT: I'll let him answer.

4 A. Rather than using the road that goes through my
5 property, he could have cut a road, go around the dirt road
6 and cut him a road that been closer to go to his property
7 from around in the back of the property. Do you understand
8 what I'm saying?

9 Q. But there is an existing road that can get to his
10 house?

11 A. He could've made a road.

12 Q. Instead of making a road, what was the name of
13 the road that he could use to get to his house?

14 A. Snail Branch Road.

15 Q. How long have you known Snail Branch Road to be
16 there?

17 A. That was there before -- that's the only way we
18 could go back to my old house years ago that's how long...

19 Q. How many years ago when you'd go to your house?

20 A. Before I was born. That road was there for
21 years.

22 Q. It was used for vehicles?

23 A. That was the road that people used to go back to
24 the house.

25 MR. WALTERS: Your Honor, I have no further

1 questions.

2 EXAMINATION

3 BY MR. JACKSON:

4 Q. Mr. Kelley, Snail Branch Road doesn't go to
5 Mr. Snyder's house, does it? It goes to your old house?

6 A. It goes right -- when you come off the highway on
7 that road, it's a fork road. You can either go straight or
8 branch around. That's where Mr. Snyder, take you to
9 Mr. Snyder's house.

10 Q. It doesn't go directly to his house? He has to
11 cut --

12 A. No. My road don't go directly to his house.

13 Q. You would have to cut another road to get to his
14 house?

15 A. Right, just like he cut a road through my
16 property.

17 Q. That road has been there for years and years and
18 years to your property, hasn't it?

19 A. That's not a road. That was just a wagon road
20 that we were using to come off the highway to go to the
21 back of my property that Mr. Snyder cut the road through.

22 Q. He's been using it as long as he's been living
23 there, hasn't he?

24 A. I don't know how long he's been using it.

25 MR. JACKSON: That's all I have, Your Honor.

1 MR. WALTERS: Your Honor, we have no further
2 questions.

3 THE COURT: Next witness.

4 MR. WALTERS: Your Honor, I'm not going to call
5 the gentleman that's sitting outside. That's the
6 Plaintiff's case.

7 MR. JACKSON: We call Harry Wimberly.
8 Thereupon,

9 HARRY WIMBERLY,
10 being first duly sworn to tell the truth, the whole truth
11 and nothing but the truth, as hereinafter certified,
12 testified as follows:

13 EXAMINATION

14 BY MR. JACKSON:

15 Q. Mr. Wimberly, would you state your full name for
16 the record please.

17 A. Harry Wimberly.

18 Q. Where do you, Mr. Wimberly?

19 A. 2782 Cattle Creek Road, Branchville.

20 Q. How long have you lived in the general area?

21 A. Born and raised there.

22 Q. Do you know Mr. Snyder here, Mr. Lee Snyder and
23 Mr. Harry Snyder?

24 A. Yes.

25 Q. How long have you known them?

1 A. Probably 25 years, maybe 30.

2 Q. Are you familiar with where Mr. Lee Snyder lives
3 now?

4 A. Yes, I am.

5 Q. Are you familiar with how to get to his house?

6 A. Yes, I am.

7 Q. I'm going to show you a copy of a plat that's
8 been marked as Plaintiff's Exhibit 2 which is a plat of
9 some property of Mr. Thelease Kelley. Do you know
10 Mr. Kelley? This gentleman over here?

11 A. I don't believe I do. I know some Kelleys, but I
12 don't believe I know that one.

13 Q. Are you familiar with his property on that plat
14 which is right off Bowman Road Highway 178?

15 A. Yes, sir.

16 Q. Do you see where Mr. Snyder lives in the back end
17 of that property?

18 A. Right.

19 Q. Do you see a road shown on that plat?

20 A. Right. Yes.

21 Q. Are you familiar with that driveway or road that
22 goes back to Mr. Snyder's house?

23 A. Yes, I know where it is.

24 Q. How long has that road been there?

25 A. It's been a road back in that property as long as

1 I can remember back when Mr. Willie Rast owned it. I don't
2 know how many years ago that's been, but I know probably --
3 I can remember back as far as maybe late '60s, early '70s.

4 Q. Can remember back say 1970 that would be almost
5 40 years, is that correct?

6 A. Yes, sir. And back into '60s, way back when deer
7 hunting wasn't territorial, you had pretty much free range
8 and we deer hunted from where I lived on Cattle Creek
9 campground all the way down to where we either killed a
10 deer or could catch the dogs. So I'm familiar. I've deer
11 hunted back in the late '60s and early '70s all the way out
12 to the Charleston Highway.

13 Q. Have you ever used this particular road in
14 question?

15 A. I've gone back in there to hunt dogs.

16 Q. All the way back to the late '60s early '70s on
17 forward, is that correct?

18 A. Yeah. And then deer hunting changed up in the
19 last 20 years.

20 Q. Are you familiar that other people continued to
21 use that road?

22 A. As far as I know, yes, sir.

23 Q. You certainly know Mr. Snyder uses it to go back
24 to his property?

25 MR. WALTERS: Objection, Your Honor. He's

1 leading his witness.

2 Q. Do you know who else might use that road,
3 Mr. Wimberly?

4 A. Unless some of the landowners on the adjacent
5 side maybe go on the fields or something, I don't know. I
6 know Mr. Snyder used it and I've used it to go back to his
7 house.

8 Q. Thank you, Mr. Wimberly. Please answer any
9 questions Mr. Walters may have for you.

10 MR. WALTERS: I have no questions.

11 MR. JACKSON: We call Mr. Larry Rast.

12 Thereupon,

13 LARRY RAST,

14 being first duly sworn to tell the truth, the whole truth
15 and nothing but the truth, as hereinafter certified,
16 testified as follows:

17 EXAMINATION

18 BY MR. JACKSON:

19 Q. Mr. Rast, would you state your full name for the
20 record please?

21 A. Larry Alan Rast.

22 Q. Where do you live, Mr. Rast?

23 A. High Point, North Carolina.

24 Q. How long have you lived in that area, Mr. Rast?

25 A. Fifteen years.

1 Q. Where are you originally from?

2 A. Bowman.

3 Q. Born and raised in Bowman?

4 A. Born and raised in Bowman. Left Bowman in 1972.

5 Q. Are you familiar then with the property that's

6 now owned by Mr. Lee Snyder and Harry Snyder?

7 A. I am.

8 Q. How are you familiar with that property?

9 A. It was a property that my grandfather purchased
10 and my dad inherited and my dad sought my permission to
11 sell it to the Snyders whenever it was sold.

12 Q. Was your dad Willie McLauren Rast?

13 A. That's correct.

14 Q. Who is Loris C. Rast?

15 A. My mother.

16 Q. They sold it to the two Snyders, is that correct?

17 A. That's correct.

18 Q. Did you ever live on this property?

19 A. No.

20 Q. Did your parents ever live on this property?

21 A. No.

22 Q. But they owned it?

23 A. Yes.

24 Q. Did your grandparents live on it?

25 A. No.

1 Q. But your grandfather I think you said purchased
2 it?

3 A. Yes.

4 Q. Do you remember when he purchased it?

5 A. My grandfather died in 1952. So I do not know
6 when it was purchased.

7 Q. How would your grandparents and your parents get
8 to this property if you know?

9 A. There was an access road off of Highway 178.

10 Q. I'm going to show you a copy of a plat which is
11 in evidence marked as Plaintiff's Exhibit 2 and orient you
12 to Highway 178 which is up here. This is a plat of
13 Mr. Kelley's property and property owned by the Snyders
14 that I think your parents sold them is back here. Do you
15 see the access road you're talking about on there?

16 A. I do.

17 Q. Would you point that out?

18 A. Right here.

19 Q. It's that road right back there, is that correct?

20 A. Correct.

21 Q. How long has that road been there, Mr. Rast?

22 A. I can't say for certain. I can tell you that
23 when I was in high school, I was charged with farming that
24 property. We planted corn on it for a number of years and
25 then we planted soybeans on it. In the mid 1960s that road

1 needed to be opened wider in order to allow a combine to
2 cut the soybeans and I remember being there with my dad
3 with a chain saw and bush axe and I remember limbs were
4 being taken off because of the elevator on the combine and
5 the width of it.

6 Q. The road was widen then at that time, is that
7 correct?

8 A. It was widened and it was already in existence.
9 I have no idea how long the road had been there.

10 Q. When you were in high school farming this
11 property and using that road, about what year would that
12 have been?

13 A. I graduated high school in 1967. When I was in
14 eighth grade my dad turned over most of the farming to me.
15 So this would have been '63/64.

16 Q. You were an eighth grade farmer?

17 A. I was.

18 Q. Kind of young to be in charge of a farm
19 operation.

20 A. My dad worked public work.

21 Q. Did it continue to be farmed after that?

22 A. Daddy farmed it -- I had a younger brother so my
23 younger brother and my dad continued to farm it up until
24 sometime in the '70s. I'm not sure when they discontinued
25 farming.

1 Q. But they continued to own the property until they
2 sold it to the Snyders?

3 A. Correct.

4 Q. Let me ask you if you recognize this deed. You
5 may or may not. Have you ever seen the deed to the
6 Snyders?

7 A. No, I've never seen the deed. I do know that
8 when my dad got ready to sell it, he talked to me and asked
9 if I would ever come back to Bowman to farm it or if I
10 objected to him selling it and my brother and I had no
11 objection to his selling it.

12 Q. Back in the '60s when you were farming it, you
13 said the combine used this road to get back there?

14 A. Yes.

15 Q. What other kind of vehicles would use it?

16 A. The tractor and all the implements we pulled on
17 it plus our pick-up which carried in the fertilizers and
18 seeds, et cetera.

19 Q. Were other people using that road?

20 A. That I don't know.

21 Q. Were there people who lived back in that area
22 back there at that time?

23 A. I don't recall a dwelling that would have used
24 that road.

25 Q. Has that road ever been closed that you know of?

1 A. Not that I know of.

2 Q. When did you leave the Bowman area?

3 A. I left in July of 1972.

4 Q. Mr. Rast, please answer any questions Mr. Walters
5 may have for you.

6 EXAMINATION

7 BY MR. WALTERS:

8 Q. I just want to make sure I highlight some of the
9 points of your testimony. Number 1: You stopped farming
10 in 1970, is that correct?

11 A. Sometime during the '70s. I'm not sure of the
12 time. I left in '72 and as of that time we were still
13 farming. My brother is three years younger than me. They
14 would have continued farming until at least he graduated
15 high school. So sometime late '70s they would've still
16 been farming.

17 Q. Of course, you stated you don't know if other
18 people used the road?

19 A. No, I don't.

20 Q. As far as your testimony is concerned you stated
21 in the 1960s the road needed to be opened because you
22 remember your father and chain saw and combine had to come
23 through and you had to cut that road, is that correct?

24 A. We made it wider. The road was there. We just
25 made it -- enlarged.

1 Q. The '60s you enlarged it, in the '70s you stopped
2 farming and it's now 2009, but since the late '70s you have
3 no idea if anyone else was using that road?

4 A. I have no knowledge.

5 Q. You can't testify that it's been continuous use
6 since the late '70s, is that correct?

7 A. I cannot testify to that.

8 MR. WALTERS: Your Honor, I have no further
9 questions.

10 MR. JACKSON: That's all I have for Mr. Rast. I
11 ask that he be excused.

12 MR. WALTERS: No objection, Your Honor.

13 MR. JACKSON: We call Curtis Spell.

14 Thereupon,

15 CURTIS SPELL,

16 being first duly sworn to tell the truth, the whole truth
17 and nothing but the truth, as hereinafter certified,
18 testified as follows:

19 EXAMINATION

20 BY MR. JACKSON:

21 Q. Mr. Spell, would you state your full name for the
22 record please.

23 A. Curtis Spell.

24 Q. Where do you live, Mr. Spell?

25 A. I live in Columbia.

1 Q. In Columbia?

2 A. Yes, sir.

3 Q. How long have you lived up there?

4 A. It was in 1953.

5 Q. You moved to Columbia in '53?

6 A. Yes, sir.

7 Q. Where did you live prior to that?

8 A. Bowman.

9 Q. Prior to moving to Columbia, you lived in Bowman?

10 A. Yeah.

11 Q. Your earlier life?

12 A. Yes, sir.

13 Q. Are you familiar then with the property of
14 Mr. Snyder, that Mr. Snyder owns?

15 A. Yes, sir.

16 Q. Are you familiar with the property Mr. Kelley
17 owns?

18 A. Yes, sir.

19 Q. I'm going to show you a copy of what's been
20 introduced into evidence as Plaintiff's Exhibit 2 and show
21 you the Bowman Road over there. Do you recognize this
22 property?

23 A. Yes, sir. The highway here and right down the
24 street there was Murray Road and the school where I went to
25 school at down there, couple of blocks. I say a couple of

1 blocks, about six blocks down on the left.

2 Q. That's on the Bowman Road?

3 A. Yes, sir. Yes, sir. I'm familiar with this road
4 going back...

5 Q. You're familiar with the road going back into the
6 Snyder's property?

7 A. Yes, sir.

8 Q. How long has that road been there?

9 A. I talked to my sister yesterday. I'm 78 years
10 old and she's 93 and she said --

11 MR. WALTERS: I object, Your Honor. I don't
12 think he can testify to what his sister said.

13 Q. You can't say --

14 A. Okay, I'm 78 years old and that road was there
15 when I was born.

16 Q. The road was there when you were born?

17 A. Yes, sir.

18 Q. You're 78 years old?

19 A. Yes, sir.

20 Q. During your 78 years has that road been used?

21 A. Yes, sir. People going -- it was a man living
22 back there, it was, I forgot the people name now. Anyway
23 when the people were living back there, there was a house
24 back there and they were living right there and we went to
25 school together with their children and they had to walk.

1 Q. You say you moved to Columbia in the '50s, is
2 that correct?

3 A. Yes, sir, '53.

4 Q. Since then do you continue to be familiar with
5 the property now that you are in Columbia?

6 A. Yes, sir. I come down, hunting season I be down
7 here every Saturday.

8 Q. You come down other times than that?

9 A. Every other weekend I was here.

10 Q. Do you have family in the Bowman area?

11 A. Yes, sir.

12 Q. Do you visit them often?

13 A. Yes, sir.

14 Q. Throughout this time period from the '50s while
15 you've been in Columbia, do you know whether or not that
16 road has been used?

17 A. It was used, only used by Mr. Snyder going into
18 the house. It was a road that goes all the way, but it's a
19 dead end road now, because they built a new road, they
20 built a couple new roads down there since 1950.

21 Q. This road that we are talking about here, is it
22 still open?

23 A. Yes, sir, this road right here is still open.

24 Q. Do people still use it?

25 A. Yes, sir.

1 Q. Have they used it throughout your lifetime?

2 A. Yes, sir.

3 Q. Thank you, sir. Please answer any questions

4 Mr. Walters may have.

5 EXAMINATION

6 BY MR. WALTERS:

7 Q. Mr. Spell, you stated you moved from Bowman in
8 1953, is that correct?

9 A. Yes, sir.

10 Q. How often do you come down a year?

11 A. I've been down here every other Saturday and
12 during the winter months I be down every Saturday.

13 Q. Mr. Spell, you stated you left Bowman in 1953, is
14 that correct?

15 A. That's right.

16 Q. You said you come back and you hunt, is that
17 right?

18 A. Right.

19 Q. How often do you hunt?

20 A. In the winter months I hunt deer. I hunt every
21 Saturday and sometimes on Wednesday.

22 Q. Those Saturdays that you came down, did you use
23 this road?

24 A. If we hunt that part over there, we use it.
25 Right.

1 Q. Where were you going? Whose land were you
2 hunting on?

3 A. We rent land.

4 Q. Who were you renting land from?

5 A. Different -- the ones that live down there.

6 Q. Let's look at the map, the plat. Whose land were
7 you using, whose land were you using when you used that
8 road?

9 A. 178 coming off Bowman, we hunt each side of the
10 road all the way down, down to 95, each side of the road.

11 Q. Do you ever hunt Mr. Snyder's land?

12 A. Yes.

13 Q. How much do you pay Mr. Snyder to do that?

14 A. He's a member of the club.

15 Q. What club is he a member of?

16 A. Kelley Hunting Club.

17 Q. How many people are members of that club?

18 A. About 40.

19 Q. About 40 members?

20 A. Yes.

21 Q. How much does it cost to be a member of the club?

22 A. You pay according to what -- I own property down
23 there myself. We hunt my property.

24 Q. How many acres do you own?

25 A. About 100 acres down there my family and I own.

1 Q. To be a part of the club, do you have to own land
2 or do you pay dues?

3 A. No, you don't have to own land.

4 Q. Just pay dues?

5 A. Right.

6 Q. Do you hunt Mr. Snyder's land?

7 A. Yes.

8 Q. Mr. Snyder has some land, he has over a hundred
9 acres, wouldn't you agree?

10 A. I don't know how much he have.

11 Q. You and Mr. Snyder, how long have you been
12 members of the same hunting club?

13 A. About 10, 12, 15 years.

14 Q. He's allowed you to hunt his land, is that
15 correct?

16 A. Yes, and allow them to hunt my land.

17 Q. You have a good relationship because you allow
18 this exchange --

19 A. We're members. We're in club together. Right.

20 Q. Would that affect your testimony today knowing
21 that you are club members and you share land?

22 A. I'm here. I'm not in here for hunting. I'm in
23 here for regular purpose about this road. That's what it's
24 about, isn't it, about this road. Let's talk about the
25 road.

1 Q. I'm allowed to explore something called bias.

2 A. Okay. Carry on.

3 Q. You're allowed to hunt his land and he allows
4 you -- you allow him to hunt your land, is that correct?

5 A. Yes.

6 Q. How long have you all had that agreement?

7 A. Ever since we met.

8 Q. How many years ago was that?

9 A. About 12 to 15 years.

10 Q. Friendship of 12 to 15 years has evidently been
11 very, very nice?

12 A. Yes. I hope it always will be like that.

13 Q. You wouldn't say anything today to hurt
14 Mr. Snyder, would you?

15 A. No. No one.

16 MR. WALTERS: Your Honor, I have no further
17 questions.

18 MR. JACKSON: No further questions.

19 Thereupon,

20 MARION KENNEDY,

21 being first duly sworn to tell the truth, the whole truth
22 and nothing but the truth, as hereinafter certified,
23 testified as follows:

24

25

EXAMINATION

1

2

BY MR. JACKSON:

3

Q. Mr. Kennedy, state your full name for the record?

4

A. Marion Kennedy.

5

Q. Where do you live, Mr. Kennedy?

6

A. Bowman, right below Bowman.

7

Q. What is your address?

8

A. 8776 Charleston Highway.

9

Q. How long have you lived in the Bowman area,

10

Mr. Kennedy.

11

A. All my life.

12

Q. How old are you, sir?

13

A. Sixty-five.

14

Q. Are you familiar with the property of the two

15

Mr. Snyders here?

16

A. Yes, I am.

17

Q. Do you know Mr. Thelease Kelley over here?

18

A. Yes, I know him.

19

Q. Are you familiar with his property?

20

A. Not all of it. I know where.

21

Q. You know it's the property in front of the

22

Snyders?

23

A. Hm-hmm.

24

Q. I'm going to show you a plat that's been

25

introduced into evidence. It's Plaintiff's Exhibit 2 and

1 I'm going to show you the Bowman Road over here and this is
2 the plat of Mr. Kelley's property with Mr. Snyder's
3 property being back here. Are you familiar with that?

4 A. Yes.

5 Q. Are you familiar with how people get from the
6 Bowman Road back to Mr. Snyder's?

7 A. Yes, that road.

8 Q. Do you see the road on here?

9 A. Yes.

10 Q. That's the road we're talking about. Are you
11 familiar with it?

12 A. Yes, I am.

13 Q. Tell the judge if you would, Mr. Kennedy, how
14 long has that road been there?

15 A. All my life. Ever since I can remember.

16 Q. That's been --

17 A. I'm 65. So I know ever since I can remember.

18 Q. Has that road always been open?

19 A. Yes, it was.

20 Q. Do people use that road?

21 MR. WALTERS: I'm going to object, Your Honor,
22 he's leading the witness.

23 MR. JACKSON: I'm asking if people have used the
24 road.

25 MR. WALTERS: It's a yes or no response.

1 THE COURT: Because the response requires a yes
2 or no does not make it a leading question.

3 MR. JACKSON: Has to suggest an answer.

4 THE COURT: Yes.

5 Q. Do people use that road, Mr. Kennedy?

6 A. Yes, we always did when we go back through there.

7 Q. You've used that road?

8 A. Yes. Yes. Years ago.

9 Q. What about recently, do you continue to use the
10 road or not?

11 A. Not recently, you know, because I had no reason.

12 Q. Have you ever observed others using the road
13 recently?

14 A. Oh, yeah.

15 Q. Has that road, again to your knowledge, ever been
16 closed down by anybody?

17 A. Not to my knowledge, not that I know of.

18 Q. Do you know whether or not anybody lives back
19 there now?

20 A. Yes, the Snyders.

21 Q. The Snyders live back there?

22 A. Yes.

23 Q. Do you know whether or not they use the road?

24 A. Yes, they does.

25 Q. Do you know whether or not other people might use

1 that road?

2 A. Yes, down in the community.

3 Q. Again you have lived in that area all your life?

4 A. All my life, yes.

5 Q. Thank you, sir. Please answer any questions

6 Mr. Walters may have.

7 MR. WALTERS: No questions.

8 MR. JACKSON: Your Honor, I call Lee Snyder to
9 the stand.

10 Thereupon,

11 LEE SNYDER,

12 being first duly sworn to tell the truth, the whole truth
13 and nothing but the truth, as hereinafter certified,
14 testified as follows:

15 EXAMINATION

16 BY MR. JACKSON:

17 Q. Mr. Snyder, state your full name for the record.

18 A. Lee DeWayne Snyder.

19 Q. Mr. Snyder, where do you live?

20 A. 8714 Charleston Highway, Bowman.

21 Q. How long have you lived there, Mr. Snyder?

22 A. Since 1991 or '92. '92 I believe it was.

23 Q. Let me show you a copy of a deed where you

24 purchased this property and ask you if in fact that is the
25 deed.

1 A. That is the deed.

2 Q. Who bought this property?

3 A. Me and my father.

4 Q. Is this your father over here?

5 A. That's correct.

6 Q. His name is Harry Snyder?

7 A. Harry Snyder.

8 Q. What year did you all buy the property according
9 to the deed?

10 A. We bought it in '89.

11 MR. JACKSON: Your Honor, we offer this deed into
12 evidence.

13 THE COURT: Any objection?

14 MR. WALTERS: No objection, Your Honor.

15 (WHEREUPON, Defendant's Exhibit
16 No. 1 was marked for
17 identification only.)

18 Q. I believe this lawsuit might be just against you,
19 but actually your dad owns this property too, is that
20 correct?

21 A. That's correct.

22 Q. Both of you continue to own it?

23 A. Hm-hmm.

24 Q. Did you move in when you bought the property?

25 A. No, I didn't.

1 Q. When did you move onto the property?

2 A. '91 or '92, I can't remember what the year was.

3 Q. You bought it in '89?

4 A. Hm-hmm.

5 Q. Moved in a couple-three years later, is that
6 correct?

7 A. Hm-hmm.

8 Q. I'm now going to ask you to look at Plaintiff's
9 Exhibit Number 2, a copy of that plat. Are you familiar
10 with that plat?

11 A. Yes, sir.

12 Q. Whose property does that show?

13 A. Shows Mr. Thelease Kelley's and my piece is in
14 back.

15 Q. Does it show the road as to how you get to your
16 property?

17 A. Yes, sir.

18 Q. That road goes from the Bowman Highway back to
19 your property?

20 A. That's correct.

21 Q. How long have you been using that road or do you
22 use that road?

23 A. Since '78 or '79 when I started coming up there.

24 Q. Before you owned it you mean?

25 A. That's correct.

1 Q. Why were you using it back then?

2 A. Because we rented land from Mr. Willie Rast and
3 Mr. Ernest Moss.

4 Q. Why did you rent this land?

5 A. For deer hunting rights.

6 Q. You said what year was that?

7 A. That was in '79, '78. It was back between
8 them -- it was mid season when we started hunting up there.

9 Q. It was late '78/early '79, is that what you're
10 saying?

11 A. Right.

12 Q. Was the property being farmed at that time?

13 A. Yes, it was.

14 Q. Who was farming it?

15 A. I could not find that out.

16 Q. Was it Mr. Rast or his wife?

17 A. It had to be them, because as far as I know that
18 was the only people that farmed Mr. Willie Rast's property.

19 Q. But you were deer hunting on it?

20 A. I was deer hunting on it, yes, I was.

21 Q. Who also was deer hunting on it?

22 A. Probably -- well, we had 30 members back then.

23 Q. Thirty member of what?

24 A. Of the hunting club.

25 Q. Is that the hunting club Mr. Spell was talking

1 about?

2 A. Kelley Club, that's correct.

3 Q. Kelley Hunting Club. How long have you been a
4 member of that club?

5 A. Since '78/79.

6 Q. Mr. Spell said he joined 12 or 15 years ago.
7 Does that sound about right?

8 A. Yes.

9 Q. Then later you purchased this property, you and
10 your dad?

11 A. That's correct.

12 Q. While you were hunting how did you get back to
13 this piece of property?

14 A. We used that same road right there.

15 Q. Since you purchased it, how do you get back to
16 this piece of property?

17 A. It's the same road I've used.

18 Q. Do you ever use another way to get back to this
19 property?

20 A. Now I do. I come in from the back side off the
21 fields that I bought.

22 Q. You do have another way to get there?

23 A. That's correct.

24 Q. That's over some additional property you bought?

25 A. That's correct.

1 Q. Is that the property that I think --

2 A. That's correct.

3 Q. In relation to the plat, Plaintiff's Exhibit 2,
4 where is that property?

5 A. This doesn't show it. You have to use this one
6 here. This piece right here was split up in two pieces.
7 It should run down through here.

8 Q. Again Bowman Road is?

9 A. Bowman Road right there.

10 Q. Where is the road we are talking about?

11 A. This one right here. All the way down here.

12 Q. You now own all the way over to another road --

13 A. No, it's not a road. This is the road that it
14 joins up to now.

15 Q. Is there a primary way you get back to your
16 property?

17 A. From the 178 side.

18 Q. The road we're talking about?

19 A. That's correct.

20 Q. You continue to use that road?

21 A. Yes, sir.

22 Q. Have you put a gate on it?

23 A. Yes, I have.

24 Q. Mr. Kelley talked about putting a gate up near
25 178. Did you do that?

1 A. Yes, I did.

2 Q. Do you remember about when you did that?

3 A. That's when I first got up there.

4 Q. Before you built your house or after?

5 A. Yes, sir, I had dog pens up there and I put a
6 gate up there to keep anybody from going in there and
7 stealing the dogs.

8 Q. Did Mr. Kelley speak to you about that?

9 A. He didn't in general. I think it might have been
10 his nephew or something like that.

11 Q. Somebody spoke to you?

12 A. Well, somebody sent a message to me that I needed
13 to move the gate.

14 Q. What did you do as a result?

15 A. I took that gate down. I went back. Probably --
16 about 140 feet from my property right now.

17 Q. I'm going to show you again Plaintiff's Exhibit
18 Number 2, the plat. Why don't you step up here so
19 everybody can kind of see. About where on this plat would
20 you say that gate is now?

21 A. It's right before the gas line.

22 Q. There's a gas easement across there?

23 A. That's correct.

24 Q. It's right before that?

25 A. That's correct.

1 Q. When you moved the gate from 178, that's where
2 you moved it to?

3 A. That's correct.

4 Q. Has that gate been there continuously?

5 A. Yes, it has.

6 Q. Is it kept locked or is it just a gate?

7 A. 95 percent of the time it stays open. If we
8 leave on a trip or something, I lock the gate.

9 Q. Again since you bought this property, there's
10 been a gate on it?

11 A. That's correct.

12 Q. Pretty much, is that correct?

13 A. Yes, sir.

14 Q. That has been since 1989?

15 A. Yes.

16 Q. Mr. Kelley talked about somebody using the road
17 for cutting timber. What can you tell the court about
18 that?

19 A. The first logging crew he had in there, I come
20 home from second shift one night, I had to move limbs, tore
21 up the road, I had ruts 18 inches deep. I had to fix the
22 road after they got done. Pulled all the debris out to the
23 road so I can get back to the house.

24 Q. Why were there so many ruts in it?

25 A. They used the road to pull the trees down.

1 Q. Who maintains this road?

2 A. I do.

3 Q. Does anybody help you with that?

4 A. No.

5 Q. How long have you done that?

6 A. Since I bought the property.

7 Q. The first crew, you talked about what the first
8 crew did. Was there another crew?

9 A. Another crew come in.

10 Q. Was that very shortly after or much later?

11 A. That was probably three, three years ago and I
12 sent word to the loggers if you mess it up, let's get it
13 fixed, because I have to use that road and they said they
14 weren't going to fix the road so they quit using the road.
15 That was a done deal.

16 Q. Did you refuse to let them use the road?

17 A. I preferred them not to. That's what my words
18 was. I preferred them not to use it if they were going to
19 tear it. If they fixed it, fine, use it. If they didn't
20 want to fix it, please don't use it.

21 Q. So what did they do?

22 A. They didn't use it.

23 Q. Have there been other folks to farm Mr. Kelley's
24 property?

25 A. I rented it. Farmed it for about three years.

1 Q. You rented it from who?

2 A. Mr. Kelley.

3 Q. When was that?

4 A. Maybe about six years ago. Maybe seven.

5 Q. Did anybody else ever farm that property?

6 A. I want say Mr. Brown. What is his first name?

7 Q. You can't ask your dad. If you don't remember
8 that's okay.

9 A. We called him, I think it's Olin Brown used to
10 farm it.

11 Q. Did you ever refuse to let him use the road?

12 A. No. Of course, he come off the highway. There
13 was no access to the field from the road until I started
14 farming it, because I had to get another farmer, he had
15 bigger planters and all. I pushed him to swipe through
16 there so we could get in there with the tractor instead of
17 coming off the highway side.

18 Q. You're saying you couldn't get to the field from
19 the road in question?

20 A. That's correct.

21 Q. Why was that?

22 A. Because it was trees, I mean it's 30 or 40 feet
23 deep.

24 Q. You open up a way to get to the field?

25 A. Yes.

1 Q. That's used for farming?

2 A. That's correct.

3 Q. Other than these loggers, have you ever refused
4 for anybody to use the road?

5 A. I had a farmer in there about two years ago to
6 come in there and he asked if he could use the road, I said
7 I prefer him not to because all they're going to do is come
8 in and tear it up and leave and I got the problem.

9 Q. Did he use the road?

10 A. No, he did not.

11 Q. Was he able to farm the property?

12 A. Yes, he was.

13 Q. Let me ask you to look at your deed again.

14 According to the deed there's 103.983 acres, is that
15 correct?

16 A. That's correct.

17 Q. You had an old plat on it?

18 A. That's correct.

19 Q. Let's look down to the bottom where it says also.
20 Would you read that to the judge what it says on your deed.

21 A. It says, also all rights, title and interest in
22 an easement or right of way for ingress and egress over,
23 among and through 20-foot access road from highway property
24 here above described into US Highway 178.

25 Q. So your deed from Mr. and Mrs. Rast who were the

1 parents of the Mr. Rast that testified earlier?

2 A. That's correct.

3 Q. Purportedly gave you an easement?

4 A. That's correct.

5 Q. Based on that, what did you think?

6 A. I had a road there to use.

7 Q. Have you learned since that -- obviously you
8 found out there was a problem when Mr. Kelley brought suit?

9 A. That's correct.

10 Q. Did you know there was a problem prior to that?

11 A. As far as a suit?

12 Q. As far as anybody telling you you couldn't use
13 this road?

14 A. He came down and wanted me to.

15 Q. Who is he?

16 A. Mr. Kelley. Wanted me to come move the gate. I
17 offered to give him a key to the gate. I said I prefer to
18 leave the gate there so we don't have people coming in and
19 out as far as coming back there to my place. I got a wife
20 and two small boys and valuable things in there. That's
21 why I left the gate there.

22 Q. Did you give him a key?

23 A. He would not take the key.

24 Q. You offered him a key?

25 A. Yes, I did.

1 Q. But he wanted you to move the gate?

2 A. That's correct.

3 Q. Did he tell you why?

4 A. He just told me he wanted it off his property.

5 Q. What happened after that?

6 A. That was it and then I had to contact you.

7 Q. That's when the suit was brought, is that
8 correct?

9 A. Hm-hmm.

10 Q. Has Mr. Kelley ever told you that you couldn't
11 use this road?

12 A. Not to my face, no.

13 Q. Has anybody, up until the suit, has anybody ever
14 prevented you in any way from using this road?

15 A. No, they haven't.

16 Q. Have you ever hidden the fact that you were using
17 this road?

18 A. No, I haven't.

19 Q. What kind of vehicles do you drive up and down
20 this road?

21 A. Pick-up truck. If I come home from work late, if
22 I'm in a tractor-trailer, I bring the tractor-trailer down
23 it.

24 Q. Back in '78 when you started hunting on it, what
25 kind of vehicles were you using on it?

1 A. Farming equipment, trucks. Like I say,
2 Mr. Willie I can't speak for him, that's.

3 Q. Don't speak for anybody else. As far as you know
4 was this road able to be used by those kinds of vehicles
5 back then?

6 A. Yes.

7 Q. Again you've maintained the road?

8 A. Hm-hmm.

9 Q. Have you improved it any at all?

10 A. Yes, I have.

11 Q. What all have you done?

12 A. Put rock on it. Fixed the holes.

13 Q. I'm going to show you an aerial and somewhere in
14 my pile I have a better of this copy, I don't know what
15 I've done with it. Is that an aerial that you provided me?

16 A. Yes, sir.

17 Q. This is from 2005 I believe?

18 A. I don't remember the date on this aerial.

19 Q. Can you see the road on this aerial?

20 A. Right here.

21 Q. Can you step up here and show it to the judge and
22 Mr. Walters?

23 A. 178 runs here, that's the road that runs down
24 through there. I live right there.

25 MR. JACKSON: Your Honor, I offer this aerial

1 into evidence.

2 MR. WALTERS: No objection.

3 (WHEREUPON, Defendant's Exhibit
4 No. 2 was marked for
5 identification only.)

6 Q. Mr. Snyder, please answer any questions
7 Mr. Walters may have.

8 MR. WALTERS: Your Honor, we have no questions.
9 I simply want to recall one witness. That's not the
10 Defendant's case, I'm sorry.

11 MR. JACKSON: Let me call Harry Snyder.
12 Thereupon,

13 HARRY SNYDER,
14 being first duly sworn to tell the truth, the whole truth
15 and nothing but the truth, as hereinafter certified,
16 testified as follows:

17 EXAMINATION

18 BY MR. JACKSON:

19 Q. Tell us your name, Mr. Snyder?

20 A. Harry Lee Snyder.

21 Q. This is your son right here, is that right?

22 A. Yes, sir.

23 Q. You and he together bought this property in 1989?

24 A. Yes, sir.

25 Q. How long have you been familiar with the

1 property?

2 A. In the late '70s. The same purpose for deer
3 hunting and stuff like that.

4 Q. Are you a member of this hunting club too?

5 A. Yes, sir. I'm an official of the hunting club.

6 Q. You're one of the big shots?

7 A. Yes, sir.

8 Q. You've been hunting on this property since '78?

9 A. Yes, sir.

10 Q. Has this road been there since then?

11 A. '78 I went back there many times to turn out
12 dogs, drive it, you know. Yes, sir.

13 Q. Has that road ever not been there?

14 A. No, sir.

15 Q. Has the road ever been blocked other than the
16 gate your son put up?

17 A. Just the gate.

18 Q. Has anybody told you you couldn't use that road?

19 A. No, sir.

20 Q. Since you bought the property is the same true?

21 A. That's true.

22 Q. Your son moved out there in '91 or '92, is that
23 correct?

24 A. Yes.

25 Q. You go visit him?

1 A. I stay on the property now, because my second
2 wife died and I live on the property with him now.

3 Q. How long have you lived there?

4 A. I'd say eight years, seven-eight years.

5 Q. Did you visit your son prior?

6 A. Oh, yes. Every weekend. I kept my dogs back
7 there and he fed them, but I come up there and take care of
8 my own dog pen.

9 Q. You used this road regularly yourself?

10 A. Yes, sir.

11 Q. And have been for a long time?

12 A. Yes, sir.

13 Q. Again anybody stopping you from using this road?

14 A. No, sir.

15 Q. Were you familiar with whether or not the road
16 was there before 1978 of your own knowledge?

17 A. I don't know. I know whenever we went to buy the
18 land, you know, we checked the deed, you know, that had the
19 easement to it. We wouldn't buy land-locked land, so.

20 Q. At the time that you bought it, was there any
21 other way to get to it other than this road?

22 A. No, sir. There's really not now. I mean there's
23 Woods Road back where he's talking about through the land
24 we just purchased from Thomas Kennedy, but there's
25 two-three woods ponds that you don't travel through there

1 during the winter time. They fill up with water. It's
2 not, it's not so you can just drive it all the time you
3 come in there. It's not possible.

4 Q. You could get to his house another way, but you
5 really have to go another road do it?

6 A. It's a long way. It's half a mile through there.

7 Q. Are you familiar, Mr. Snyder, have you ever
8 stopped anybody from using that road?

9 A. Yes, sir.

10 Q. Tell us about that.

11 A. I didn't stop them. I had a little heart to
12 heart with the logger when they come in there the last
13 time. He come right before the gate and he pushed some
14 trees and stuff out to where he could go into the field
15 there and I told him, I says, and he was pulling a log
16 truck and I said Bubba you understand that this road will
17 not take that heavy truck and he says why. I said because
18 the banks are already sluffing off of this road. I said
19 there's three places down this road that's sluffing off and
20 drop down and bug chunks like, you know, size of that table
21 and one was right when he have to come out to make the
22 turn, it was right there, and I says you try to come out of
23 there with a tractor-trailer full with logs and that bank
24 gives away, which is already weakened, you're going upside
25 down in that canal and he went over there and looked at it

1 with me and he says I see what you're talking about, I
2 appreciate you letting me know and he says I ain't coming
3 on this road. So he said I'll go talk, go talk to the
4 people in the front to see if I can come through their back
5 and that's what he did, but as far as stopping him, I
6 didn't say you could not come through. I just said you're
7 taking your equipment and somebody's life in danger,
8 because the canal is deep. It's deep. Deep ditch.

9 Q. Thank you, Mr. Snyder. Please answer any
10 questions Mr. Walters may have.

11 MR. WALTERS: No questions, Your Honor.

12 MR. JACKSON: That would be my case, Your Honor.

13 MR. WALTERS: I call Mr. Kelley.

14 THE COURT: Mr. Kelley, you're still under oath.

15 Thereupon,

16 THELEASE KELLEY,

17 testified as follows:

18 EXAMINATION

19 BY MR. WALTERS:

20 Q. Mr. Kelley, you've heard the testimony with
21 regards to the road itself. I want to go back and ask you
22 some simple questions. At any time did you give permission
23 during hunting season for somebody to use your land?

24 A. No.

25 Q. Have you ever known hunters to use this road?

1 A. No.

2 Q. How long have you owned this property?

3 A. At least about 30 years.

4 Q. There was testimony there was some people that
5 lived at the back of this property. Who do you know that's
6 lived at the back of this property other than Mr. Snyder?

7 A. I ain't never known nobody that lived back there
8 really.

9 Q. Nobody?

10 A. Not that I know of until Mr. Snyder moved back
11 in.

12 Q. Other than that, no one else?

13 A. Not that I know of. I remember Mr. Snyder moved
14 back there, that's when this road was cut. Everybody come
15 in there a witness there was road there, there never was a
16 road there as long as I know, but a little wagon road and
17 that road was to go back as far more or less the back of my
18 property.

19 Q. When was the road cut?

20 A. Since Mr. Snyder moved back there.

21 Q. Mr. Snyder testified he rented property from you.
22 What did he rent from you?

23 A. Mr. Snyder, when did you rent that property from
24 me? You said you rented property three years ago.

25 MR. JACKSON: Mr. Kelley.

1 Q. Just answer the question.

2 A. He just said it sitting here that he rent
3 property from me.

4 Q. When did Mr. Snyder rent property from you?

5 A. I'm going to let him tell you.

6 Q. Would you answer me and --

7 A. He never. He never.

8 Q. He's never rented property from you?

9 A. No. Never.

10 Q. You never entered into an agreement with him to
11 rent property?

12 A. Never. Never.

13 Q. His testimony was that he rented the property six
14 years ago?

15 A. He didn't rent no property from me.

16 Q. Did you ever rent the property to anyone?

17 A. Yes.

18 Q. Who did you rent it to?

19 A. To the Browns. I rent it to the Browns back
20 years ago and actually I rented to a man name, he live
21 right across the highway from here. What is his name and
22 he sub -- I rented to -- the Brown man was farming the
23 land, but this guy, it's a white man, that he paid, he was
24 paying me to rent the land. Mr. Brown wasn't farming the
25 land. I don't know the Brown man. I know, what's the man

1 name. I can't recall his name, but I can get his name.

2 Q. Was Mr. Snyder ever involved in that agreement?

3 A. Me and Mr. Snyder never had no agreement for
4 nothing. He had nothing. Nothing. I had no contact with
5 Mr. Snyder other than going back there twice to his house
6 about the gate. That's all the contact I had with
7 Mr. Snyder.

8 Q. You understand today's the date of your trial.
9 Is there any other information you want to provide the
10 court in regard to this particular property?

11 A. I want Mr. Snyder off my property.

12 MR. WALTERS: Your Honor, we have no further
13 questions.

14 EXAMINATION

15 BY MR. JACKSON:

16 Q. Mr. Kelley, where do you live?

17 A. I live in Mount Vernon, New York.

18 Q. How long have you been living there?

19 A. 1960.

20 Q. Thank you. That's all I have.

21

22

23

24 AT THIS TIME THE HEARING IS CONCLUDED.

25

State of South Carolina,

COUNTY OF ORANGEBURG.

ATTEST: TRUE COPY
Hail Loney
REGISTER OF DEEDS
ORANGEBURG COUNTY SOUTH CAROLINA

KNOW ALL MEN BY THESE PRESENTS, That I, Bennie Kelly

in the State aforesaid,

sum of Nineteen thousand six hundred and no/100 (\$19,600.00) Dollars

in consideration of the

to me paid by Thelease Kelly

in the State aforesaid

have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Thelease Kelly, the following described property:

All that certain piece, parcel or lot of land, situate, lying and being in School District No. 2, Cow Castle Township, County of Orangeburg, State of South Carolina, approximately two and one-half (2½) miles south of Bowman, and containing twenty-eight (28) acres, more or less, and being bounded as follows: On the North by lands now or formerly of George Moss; on the East by U. S. Highway No. 178; on the South by lands now or formerly of the Estate of Tom Murray; and on the West by lands now or formerly of Mittle and Weathers.

This being the same tract of land conveyed to Bennie Kelly by George Moss by his deed, dated November 18, 1948 and recorded in the Office of the Clerk of Court for Orangeburg County in Deed Book 155 at Page 111.

Entered In The Office Of Tax Assessor

Map 869 Block 00 Parcel 2

This 12 day of May 19 78

V. R. Benton
Tax Assessor

ORANGEBURG
COUNTY

030943

FILED FOR RECORD

1977 NOV 29 AM 10:17

J. K. McQUEEN, CLERK OF COURT
ORANGEBURG COUNTY, S. C.



EXHIBIT

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Thelease Kelly, his

Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Thelease Kelly, his

Heirs and Assigns, against myself and my Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS my Hand and Seal this 23rd day of November

in the year of our Lord one thousand nine hundred and seventy-seven,

and in the two hundred and second

year of the Sovereignty

and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED

IN THE PRESENCE OF

Karen W. Harden

John F. Shuler

Bennie Kelly (SEAL)

(SEAL)

STATE OF SOUTH CAROLINA,
ORANGEBURG COUNTY

PERSONALLY appeared before me Karen W. Harden and made oath that she saw the within-named Bennie Kelly sign, seal and, as his act and deed, deliver the within-written Deed for the uses and purposes therein mentioned, and that he, with John F. Shuler execution thereof, witnessed the

SWORN to before me this 23rd day of November

, 1977

John F. Shuler (L.S.)

Notary Public of S. C.

My commission expires: 9-11-79

Karen W. Harden

NO RENUNCIATION OF DOWER
(GRANTOR UNMARRIED)

, do hereby certify

I, unto all whom it may concern, that Mrs. the wife of the within-named did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within-named

heirs and assigns, all her interest and estate, and also all her right and claim of Dower of, in or to all and singular the premises within mentioned and released.

Given under my Hand and Seal, this

day of

, 19

(L.S.)

Notary Public of S. C.

My commission expires:

State of South Carolina

County of Orangeburg

Bennie Kelly

TO

Thelease Kelly

TITLE TO REAL ESTATE

I hereby certify that the within Deed was filed

for record in my office at M. o'clock on

the 29th day of November,

1977, and was immediately entered upon the

proper indexes and duly recorded in Book

BOOK 439 PAGE 1077

Clerk of Court

General Ses-

sions for ORANGEBURG COUNTY, S. C.

I hereby certify that the within Deed has been

this

day of

A. D. 19

Recorded

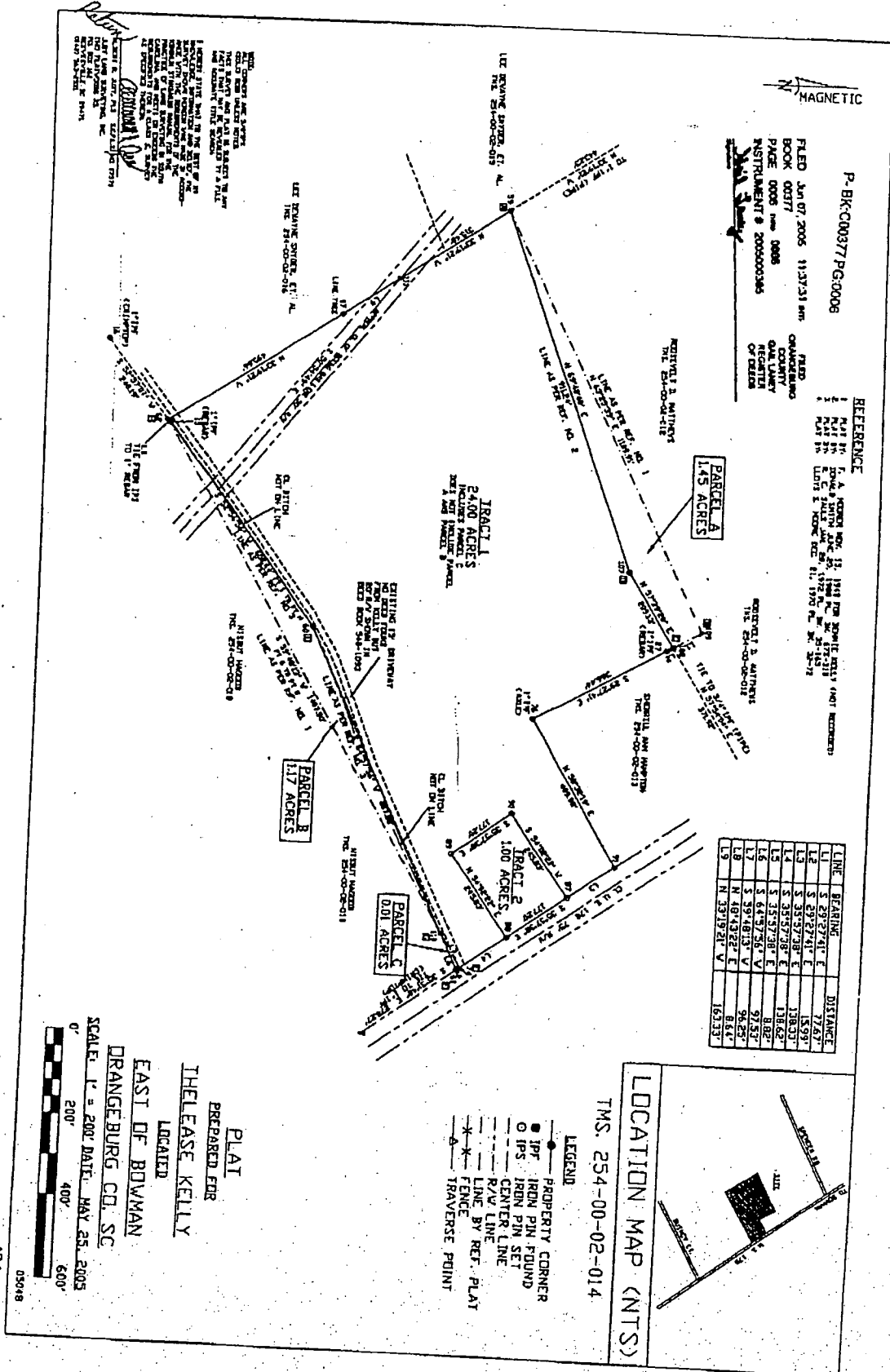
of Deeds, page

Auditor

County

A. L. BOWLITT & SON, PRINTERS, ROMEVILLE, S. C.

0000077



0000078

EXHIBIT
 2
 Kelley

PHOTOGRAPH ADDENDUM

File No. 05070179

Borrower or Owner N/A

Property Address Tract 1, Charleston Highway

City Bowman

County Orangeburg

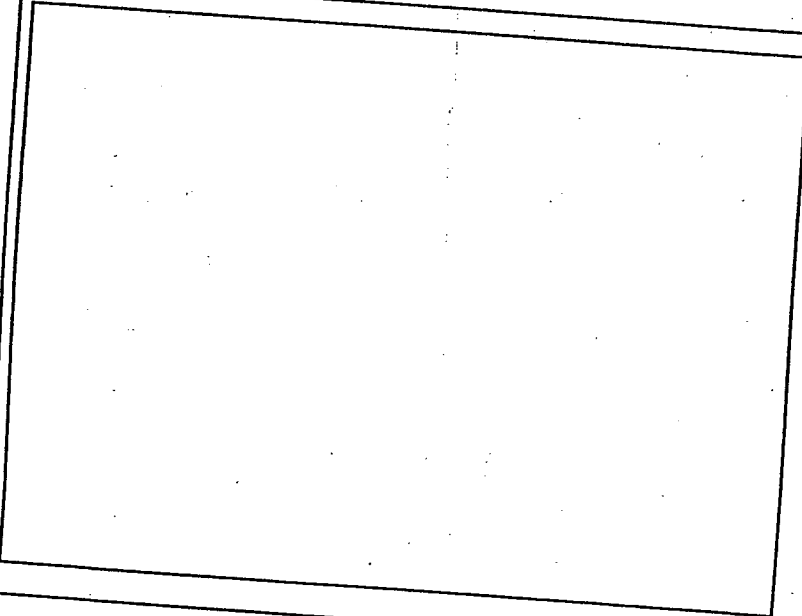
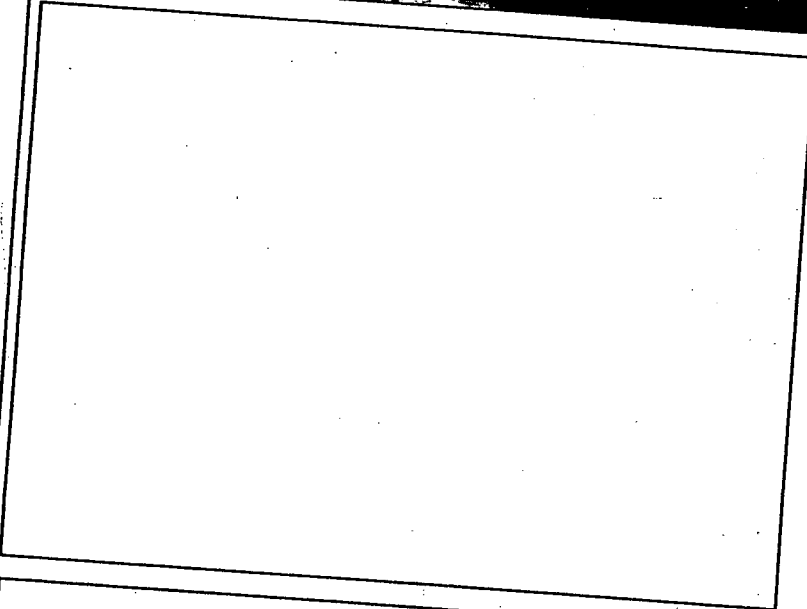
State SC

Zip Code 29018

Lender or Client Thelease Kelly



Tract 1, Charleston Highway
Access Road



Johnston Appraisal & Assoc.

0000079

Ret: B & S

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS That I, Thomas Kennedy, in consideration of the sum of Seventy Seven Thousand Six Hundred Sixty Two and no/100 (\$77,662.00) Dollars, to me paid by Lee Dewayne Snyder, in the State aforesaid, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Lee Dewayne Snyder, his heirs and assigns, forever, the following described property, to-wit:

All that certain piece, parcel, or lot of land designated as 36.831 Acres, Tract H, situate, lying and being in Orangeburg County, State of South Carolina, as shown on a plat prepared for Trustees of Marion Kennedy and Estate of Gladys Kennedy by W. F. Stokes, RLS dated April 5, 1999 and recorded in the Office of the Register of Deeds for Orangeburg County in Plat Book C-307, at Page 3, and having all metes, bounds, courses, distances, directions and measurements as are shown on said plat, are incorporated herein and made a part hereof by reference.

This being a portion of the property conveyed to Thomas Kennedy by Deed of Ernestine K. Tindall and Thomas Kennedy as Trustees dated September 5, 2003 and recorded September 11, 2003 in the Office of the Register of Deeds for Orangeburg County in Deed Book 1003, at Page 207.

Tax Map No.: 0254-00-02-060 2046016

Grantee's Address: 8714 Charleston Hwy.
Dowman, SC 29018

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned, unto the said Lee Dewayne Snyder, his heirs and assigns forever.

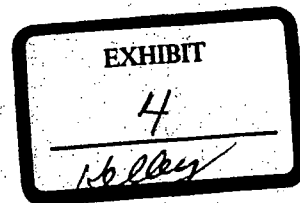
And I hereby bind myself, my heirs and assigns, to warrant and forever defend all and singular the said premises unto the said Lee Dewayne Snyder his heirs and assigns, against myself and my heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 4th day of May, in the year of our Lord two thousand five and in the two hundred twenty-ninth year of the Sovereignty and independence of the United States of America.

Orangeburg County 05-05-2005
SOUTH CAROLINA
County Revenue Stamp \$85.80
State Revenue Stamp \$202.80

FILED May 05, 2005 04:38:40 pm
BOOK 01094
PAGE 0069 THRU 0070
INSTRUMENT # 2005002214

FILED
ORANGEBURG
COUNTY
GAIL LANEY
REGISTER
OF DEEDS



ENTERED IN THE OFFICE OF ASSESSOR
MAP 0254 SHEET 02 BLOCK 02 PARCEL 060
THIS 9 DAY OF May 2005
ORANGEBURG COUNTY JIM MOLEAN, COUNTY ASSESSOR

0000080

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Bonnie L. Jordan
John L. Hiles

Thomas Kennedy
Thomas Kennedy

STATE OF SOUTH CAROLINA,)
COUNTY OF ORANGEBURG,)

PERSONALLY appeared before me the undersigned witness who, on oath, says that s/he saw the within-named grantor, sign, seal, and as his/her act and deed, deliver the within-written Deed for the uses and purposes therein mentioned, and that deponent, with the other subscribing witness witnessed the execution thereof.

Bonnie L. Jordan

SWORN to before me this 4th
day of May, 2005.

John L. Hiles
Notary Public for South Carolina

My Commission Expires: 7-6-09

0000081

State of South Carolina
COUNTY OF ORANGEBURG

MORGER, BARNWELL & REE

1989-2460

KNOW ALL MEN BY THESE PRESENTS, That

We, Willie McLauren Rast and Lois C. Rast

in the State aforesaid
sum of Thirty-six thousand three hundred ninety-four (\$36,394.05) dollars in consideration of the
to us paid by Lee DeWayne Snyder and Harry L. Snyder and 05/100
in the State aforesaid,
have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said

Lee DeWayne Snyder and Harry L. Snyder, their heirs and assigns:

All that certain piece, parcel or tract of land, with any improvements thereon, situate, lying and being Southeast of the Town of Bowman, off S. C. Highway No. 178, County of Orangeburg, State of South Carolina, containing one hundred three and nine hundred eighty-three (103.983) acres, more or less, and being more particularly set forth and shown on a Plat for Willie and Lois Rast, prepared by Lloyd S. Moore, Jr., RLS, dated December 21, 1970, and recorded in the office of the RMC for Orangeburg County in Plat Book 32 at page 72, said tract being irregular in shape and bounded and measuring as follows: On the Northwest by lands now or formerly of Hazzard Irick and of Roosevelt Mathis, measuring thereon two thousand sixteen and forty-nine hundredths (2,016.49) feet; on the Northeast by lands now or formerly of Shelly Moss, measuring thereon one thousand four hundred eighteen and thirty-three hundredths (1,418.33) feet; on the Southeast by property of now or formerly of Kennedy, measuring thereon two hundred thirty-nine and sixty-nine hundredths (239.69) feet and by lands now or formerly of Moss, measuring thereon two hundred fifty-six and seventy-three hundredths (256.73) feet; on the East by property now or formerly of Moss and of Kennedy, measuring thereon a total distance of one thousand seven hundred ninety-nine and eighty-hundredths (1,799.80) feet; on the Southeast by property now or formerly of Kennedy, measuring thereon two hundred seventy-four and eighty-five hundredths (274.85) feet; on the South by lands of now or formerly of Kennedy, measuring thereon six hundred ninety-six and thirty-hundredths (696.30) feet; and on the Southwest by lands now or formerly of Kennedy, measuring thereon two thousand two hundred twenty-four and thirty-hundredths (2,224.30) feet; all measurements being more or less.

Being the same property conveyed to Willie and Lois C. Rast by deed of George L. Reed, Sheriff Orangeburg County, by deed dated February 28, 1957, and recorded in the office of the RMC for Orangeburg County of February 28, 1957, in Deed Book 208 at page 296; and by deed of David Bookhart to Willie M. Rast, dated August 5, 1964, recorded in the aforesaid office on August 5, 1964, in Deed Book 265 at page 389; and by deed of Hattie Mae P. Rast and Julia Mae R. Buck to Willie McLauren Rast, dated June 13, 1964, recorded in the aforesaid office in Deed Book 264 at page 258.

ALSO: All of our right, title and interest in an easement or right-of-way for ingress and egress over, along and through a 20-foot access road from the property hereinabove described to U. S. Highway No. 178.

ENTERED IN THE OFFICE OF TAX ASSESSOR
MAP SHEET 06 BLOCK 01 PARCEL 003
THIS 10 DAY OF July 19 76
ORANGEBURG COUNTY
TAX ASSESSOR

JUN 29 PM 1 44
80-30
40-15
120-45



54S 1094
TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said
Lee DeWayne Snyder and Harry L. Snyder, their

Heirs and Assigns forever.

And we do hereby bind ourselves and our Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said

Lee DeWayne Snyder and Harry L. Snyder, their

Heirs and Assigns, against ourselves and our Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS our Hands and Seals this 29th day of June
in the year of our Lord one thousand nine hundred and eighty-nine
and in the two hundred and thirty-third year of the Sovereignty
and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Robert S. McClure
Samuel F. Reid

Willie McLauren Rast (SEAL)
Willie McLauren Rast
Lois C. Rast (SEAL)
Lois C. Rast

STATE OF SOUTH CAROLINA,
COUNTY OF ORANGEBURG }

PERSONALLY appeared before me Robert F. McCurry, Jr.
and made oath that he saw the within named Willie McLauren Rast and Lois C. Rast
sign, seal and as their Act and Deed, deliver the within written Deed, and that deponent with
Samuel F. Reid, Jr. witnessed the execution thereof.

SWORN to before me this 29th day of June, 1989
(SEAL) *Samuel F. Reid*
NOTARY PUBLIC

Robert S. McClure (L.S.)

My Commission Expires 9/3/96

The State of South Carolina
COUNTY OF ORANGEBURG

Willie McLauren Rast and Lois C. Rast

TO

Lee DeWayne Snyder and Harry
L. Snyder
101 Marvel Oaks circle
Ladson, South Carolina 29456

TITLE TO REAL ESTATE

I hereby certify that the within Deed was filed for
record in my office at 11:00 clock on
the 29th day of June
1989 and was immediately entered upon the proper
indexes and duly recorded in Book
of Deeds, page 1093

Robert S. McClure
Notary Public of Common Pleas and General Sessions
for RMC
County, S. C.
Orangeburg County, S.C.

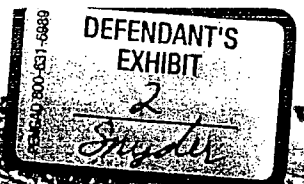
I hereby certify that the within Deed has been this
day of
A.D. 19 Recorded
in Book of Deeds, page
for Auditor County.

HORNER, BARNWELL & RHID
ATTORNEYS AT LAW
438 AMELIA STREET, N.E.
POST OFFICE DRAWER 329
ORANGEBURG, S. C. 29116-0329

803- 531-3000

0000083

0000084



The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted this the 28th day of October, 2010 at Orangeburg, South Carolina.

Glenn Walters, Attorney at Law, PA

A handwritten signature in black ink, appearing to read "R. Bentz Kirby", is written over a horizontal line.

R. Bentz Kirby

Glenn Walters

PO Box 1346

Orangeburg, South Carolina 29116

803-531-8844

Facsimile 803-513-3628

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

The Honorable O. Davie Burgdorf, Master-in-Equity

Case No. 2008-CP-38-900

Thelease Kelley,

Appellant,

-vs-

Lee Dewayne Snyder and
Harry L. Snyder,

Respondents

BRIEF OF APPELLANT

Glenn Walters Attorney at Law, PA
R. Bentz Kirby
Glenn Walters
Post Office Box 1346
Orangeburg, South Carolina 29116
(803) 531-8844

Attorney for Appellants

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err by ruling that the deed conveying them the property created a claim of right to constitute one of the elements of a creation of easement by prescription in favor of the Defendants?
2. Did the Trial Court err by ruling that the Defendants have an easement by prescription due to an adverse use for a period of twenty years?

STATEMENT OF CASE

The Plaintiff initiated this lawsuit on June 4, 2008, with the filing of a Summons and Complaint alleging that he owned a parcel of real estate and the Defendant, Lee Snyder, had created a private roadway over his property without his permission. The Plaintiff also alleged that he had given notice to the Defendant to cease using his property for any purpose. The Plaintiff also alleged he had no adequate relief at law and requested that an injunction be issued to restrain the Defendant from using the property and trespassing on the property owned by the Plaintiff. [R, pp 10-12]. The Defendant, Lee Snyder, answered and denied many of the allegations of the Complaint and asserted a Counterclaim that he and his father, Harry Snyder, had purchased certain property from Willie and Lois Rast and that the property included a conveyance of "All of our right, title, and interest in an easement or right-of-way for ingress and egress over, along and through as 20 foot access road from the property herein described to U.S. Highway No. 178." Further, the Answer and Counterclaim asserted that since the purchase of the property in 1989, the Defendant had used the road over the Plaintiff's property in a hostile and open manner uninterrupted "since his purchase of the property." The Defendant sought a declaratory judgment he had "obtained a prescriptive easement over the road in question. [R, pp 13-15].

The Plaintiff filed a reply in which he denied the allegations in the Counterclaim [R, p 16].

The matter was referred to the Master in Equity by a Consent Order of Reference. The matter came on to be tried before the Master in Equity on April 29, 2009. After hearing testimony the Court entered its Order, which among other rulings, added Harry Snyder as a Defendant based upon the trial testimony. [R, pp 1-7]. The Court ruled that the Plaintiff acquired his tract of land on November 29, 1977 by deed of Bennie Kelly, the Defendants acquired their property by a deed from Willie and Lois Rast on June 29, 1989, and that the deed contained an easement for a twenty (20) foot road from US Highway 178, and that there was testimony the road had been in use for longer than twenty years. [R, pp 1-7]. Based upon the evidence, the Court maintained that the use of the roadway had been continuous, open and notorious for a time period of more than twenty years and it had been hostile based upon the erection of a gate in the early 1990's. [R, pp 1-7]. The Court also found the roadway was used in such a manner for an excess of forty years and that the roadway had been identified on the ground and shown on a plat prepared for the Plaintiff. The finding also stated the claim of right was established by the Deed to the Defendants. [R, pp 1-7]. The Court finally concluded the Defendants had acquired an easement by prescription of ingress and egress from their property, but required the Defendants to remove the gate they had erected on the Plaintiff's property. [R, pp 1-7].

The Plaintiff filed a Motion to Alter or Amend the Judgment on the grounds it was not consistent with the evidence presented to the Court. [R, p 17]. The Court entered its Order Denying this Motion on November 10, 2009. [R, pp 8-9]. This appeal followed.

FACTS

The Plaintiff obtained his title to the property in question from his relative, Bennie Kelly, pursuant to a Deed dated November 23, 1977 and recorded on November 29, 1977 at Deed Book 439 at Page 1077. [R, pp 76-7]. The derivation clause states that Bennie Kelly acquired it by a deed

dated November 18, 1948. The property description does not mention that the property is subject to any easement. [R, pp 76-7]. The Defendants obtained their property pursuant to a deed from Willie and Lois Rast, dated June 29, 1989, and recorded on June 29, 1989 in Deed Book 548 at Page 1093. [R, pp 82-83]. In the deed to the Defendants there is the following recital:

Also: All of our right, title, and interest in an easement or right of way for ingress and egress over, along and through a 20-foot access road from the property hereinabove described to U. S. Highway No. 178.

[R, pp 82-3]. However, the deed does not provide any derivation for the right of way or easement, nor does it state what property it lies over. [R, pp 82-3]. The Court acknowledged this in its Order when it stated that "However, all parties agree that there appears to be no other deeded easement to this roadway on the records of Orangeburg County." [R, p 4].

The Plaintiff testified at trial there was no roadway when he purchased the property but he did acknowledge there was what he called a "dirt road like a little wagon road.", that his brother used the road as a wagon or tractor road to get to the Plaintiff's property to farm and that Snyder cut a road through there after he purchased the property. [R, pp 26, l. 6- p 27, l. 7] The Plaintiff further testified that he and his brother had used the road for a wagon and a mule going back for fifty (50) years. [R p 30, l. 4-16]. The Plaintiff testified that he never gave permission to the Defendants to use the road, as far as he knew no other party had used it to access the Defendant's property until the Defendants cut a road over the property, put up a fence and a private property sign, and that it was not a road until the Defendants cut one through after they purchased the property. [R pp 26, l. 6- 27, l. 18; p. 29, l. 25- 30, l. 16; p 33, l. 4- l. 24; pp 72, l. 20- p. 75, l. 11].

The Defendants testified and presented several witnesses who testified they were aware that

a road had been there for some number of years and it had been used to access the Defendants' and other parties property for hunting and farming over the years. Mr. Harry Wimberly testified he was aware of using the road to go deer hunting over the years and that he and the Defendants had used it to go back to the Snyders' house on their property. [R, pp, 35, l. 16- p. 37 l. 7]. Larry Rast testified that he had used the road to access the property sold to the Defendants to farm the property in the 1960s and that he had done so until sometime in the 70s when his family stopped farming the land. However, he testified he did not know if others were using the road to access the property and he could not testify that it had been continuously used since the time he stopped going there in the 70s. [R, pp 39, l. 7- 43, l. 7].

Curtis Spell testified that he was familiar with the property but had moved from the area to Columbia in 1953. He said the access road was there as long as he could recall and he was 78 years old. He also testified that people still use the road and he used it to access land to hunt. He also testified that he and at least one of the Defendants were members of the same hunt club and had been good friends for 12 to 15 years before the trial. [R, pp 43, l. 24 - p. 50, l. 15]. Mr. Marion Kennedy testified that he knew the Plaintiff and was familiar with the property in question. He stated that people used the access road to get to the Defendants' property. He said he had used the road, but had not recently used it. [R, pp 51, l. 9- 54, l. 4].

The Defendants also testified. Harry Snyder testified they had rented the property to deer hunt prior to purchasing it and they used the access road. This started in about 1979. He also testified he uses another road to access the property as well. He admitted he put up a gate after they purchased the property and that the Plaintiff sent word through a nephew and asked him to take the gate down and he did. He then moved it to the second location. He also testified that the first

logging crew had obstructed the road and torn the road up. He also testified that Mr. Kelly asked him to move the gate but did not tell him he could not use the road and that he maintained and had improved the road. [R pp 55, l. 18- p. 67, l. 24]. Mr. Harry Snyder testified that they have used the road since they rented the property in the late 70s, the road had not been blocked except for the gate they erected, he was not familiar with the property prior to renting it to hunt and that he had asked a logger not to use the road because it would damage the road. [R pp 68, l. 23- p. 72, l. 8].

Thus, it is clear that the gate was not erected for more than 20 years as it was erected no earlier than when the property was purchased in 1989. There was conveyance of an “easement” in the deed to the Defendants, but there is no evidence indicating where that easement lay, or even what easement the grantors owned as they conveyed three (3) separate properties to the Defendants and there was not reference to any easement or right of way ever created by an owner of the property conveyed to the Plaintiff. Further, there is no evidence that any use of the “road” was hostile under a claim of right until at least the erection of the gate.

ARGUMENTS

I. THE TRIAL COURT ERRED IN RULING THE DEFENDANTS HAD A PRESCRIPTIVE EASEMENT UNDER A CLAIM OF RIGHT

On direct appeal from a final judgment of a master-in-equity, the scope of review is the same as that for review of a case heard by a circuit court without a jury. Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (S.C.App. 2009); Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). In the case of Pittman vs. Lowther, ____ SC ____, 610 S.E.2d 479 (S.C. 2005), the Supreme Court stated, “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. Slear v. Hanna, 329 S.C. 407, 496 S.E.2d 633 (1998). To establish a prescriptive easement, there must be continued and uninterrupted use or enjoyment of the right for a period of twenty years, identity of the thing enjoyed must be proven, and use must be adverse or under claim of right. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993).” However, the claim of an easement by claim of right is not invalidated because there is a mistake in the belief of ownership. Matthews v. Dennis, 365 S.C. 245, 616 S.E.2d 437 (S.C.App. 2005).

In the instant case the Defendants attempt to establish a claim of right from their deed which was granted to them on June 29, 1989. [R, pp 82-3]. However, this case was instituted on June 4, 2008 less than twenty (20) years after the conveyance of the deed with the easement language. Thus the Court was clearly in error to rule as it did in its Order on page five (5) that the claim of right existed against both the Plaintiff and his Grantor for more than twenty (20) years as there is no evidence that any claim of right existed prior to the deed to the Defendants in 1989. In fact, on page 3 of the Order, the Court even concedes that there is no recorded easement over the property of the Plaintiff other than the deed to the Defendants. Thus, the factual holdings within the Order are incorrect and there is no evidence to support a finding of a claim of right existing for more than twenty (20) years as the Deed in question was granted less than nineteen (19) years prior to the suit being instituted in response to the failure of the Defendants to remove the gate and private property sign. [R, pp 1-7, pp 19, l. 15- p. 20, l.10, pp. 22, l. 5- p. 25, l. 4, p 79].

It being clear that there is no claim of right, the Court should further examine the evidence to see if there is sufficient evidence to support a finding of an easement by prescription through a continued and uninterrupted use or enjoyment of that right for a period of twenty years which is adverse. Pittman vs Lowther, supra.

II. THE TRIAL COURT ERRED BY RULING THE DEFENDANTS
HAD A PRESCRIPTIVE EASEMENT PURSUANT TO AN ADVERSE
USE FOR A PERIOD OF TWENTY YEARS.

The testimony of the Plaintiff was that he lives in New York and had done so since 1960. [R, p 75, l. 16-20]. He further testified that while he did not give the Defendants permission to use the road in question, he never knew it was being used by any third parties until the Defendants improved the road, put up a gate and a sign saying it was private property. [R, pp 19, l. 15- p. 25, l. 4; pp 26, l. 6- p 27, l. 22]. As far as the Plaintiff knew, no one was using the road, but his brother and some others to access the Plaintiff's property until after the Defendants purchased their property. [R, pp 26, l. 6 - p. 27 l. 18]. Both the Plaintiff and the Defendant testified that the Defendants improved the road after they bought the property in 1989, less than twenty (20) years before the law suit was instituted. [R, pp 26, l. 6- p 27, l. 9, p. 33, l. 10-24; p 67, l. 7-12]. The Defendants testified that the gate was put up after they purchased the property in 1989. [R, pp 59 l. 22 - 61, l. 15] Therefore, based upon the testimony of the Plaintiff and the Defendants, the earliest the gate was put up was in 1989, less than twenty years before the law suit was filed. While there was testimony, as set forth in the facts above that the road in some form was there and used for deer hunting prior to 1989, the record is devoid of any evidence that the use of the road was adverse prior to the gate being put up and Mr. Kelly instituted the lawsuit after he had requested that the gate be removed and the Defendants refused and put up a sign saying it was private property.

In order to prove the existence of a prescriptive easement, it must be proved that the use of the property was adverse for a period of twenty years. Pittman v. Lowther, supra. As set forth in Horry County vs Laychur, supra, the use of property can also be permissive. Because it is one of the elements of the cause of action, the person seeking to prove the existence of an easement must show

that the use of the easement was adverse. There is no testimony by any party that the use of the property was ever adverse until the gate was put up after the purchase of the Defendants' property in 1989. Thus, there is no evidence to support the fact that the use of the property has been adverse for more than twenty (20) years. The court simply seems to make the leap of logic that because a road was there and was used prior to the purchase of the property that the easement was created. However, there is no testimony by any of the witnesses that the use was ever adverse, except the testimony which relates to the time period which is less than twenty (20) years prior to the law suit being instituted.

The Plaintiff's testimony was that he and his brother had used the "wagon" or "tractor" road and he knew of no other use until the road was "cut" by the Defendants and a gate was put up. Further, the evidence of the use being adverse is the testimony about the use by the loggers, which also occurred after the purchase of the property in 1989. [R, pp 19, l 15-24, pp 20, l. 11- p 21, l. 13; p. 23, l.2- p 24, l. 12; pp 61, l. 16- p. 62, l. 22; pp 71, l. 7- p. 72, l. 8]. Thus, there is no competent evidence that the use was ever adverse until after the purchase of the property by the Defendants in 1989. Therefore, there is not "any evidence" to support the findings of the court that the use of the claimed easement was adverse for twenty (20) years.

CONCLUSION

The finding that there is a claim of right to support an prescriptive easement is not supported as there is no testimony that the claim of right existed before 1989. Further, the Defendants testified they examined the deed to ensure they had an easement because they did not want to buy landlocked land. [R, p 70, l 15-19]. Thus it is not reasonable to find there was a right of use as the Defendants' testimony defeats any claim they believed they had a claim of right. This case is the opposite of

Matthews v. Dennis, supra, where the persons testified they had used the easement for years under the assumption there was legal documentation granting them an easement. Therefore, this holding should be reversed.

If there is no prescriptive easement under a claim of right, the prescriptive easement must be proved by evidence confirming it has been used for a continued uninterrupted period of twenty (20) years under adverse circumstances.¹ There is no evidence or testimony that the use of the easement was adverse until the gate was put up after the purchase in 1989. The Plaintiff testified that was when he first knew that anyone besides his brother and others used the road to do anything other than for access to his property. While there was testimony establishing the use of the road prior to the twenty (20) year period, there was no evidence it was adverse until after 1989. The Court simply recites the fact the property was used and makes the leap of logic to conclude the use was adverse. The facts it does recite are those such as the erection of the gate, which is less than twenty (20) years ago. The mere fact the road was used for more than twenty (20) years does not establish the fact it was adverse. In fact, the only reliable evidence on this issue is that it became adverse less than twenty years ago when the gate and sign were erected and the use to the loggers was denied. Therefore, the Defendants failed on this issue of proof as well.

Based upon the evidence actually admitted there is no reliable evidence establishing a claim of right or adverse use for more than twenty (20) years and therefore the Defendants have failed on the burden of proof to establish a prescriptive easement. Having failed in this proof, it was error for

¹ The Plaintiff's plat and photograph, Exhibits 2 and 3 show the road and the Plaintiff testified the Defendants had cut a road where the wagon road had been. Therefore, the Plaintiff must admit the element of the identity was proved at trial by all the parties testimony and exhibits.

the Court to deny the injunction sought by the Plaintiff and to find the Defendants have an easement by prescription. Therefore, the Order of the Court should be reversed and the case should be remanded to the trial court with instructions to enter an order granting the injunction sought by the Plaintiff.

Respectfully submitted, this the 17th day of November, 2010, at Orangeburg, South Carolina.


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Case No. 00-10000-0000

The Honorable C. David Boyd, Master in Equity

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR THE COUNTY OF ALBANY, FLORIDA

IN RE: THE ESTATE OF JAMES B. JACKSON, JR.

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STATEMENT OF ISSUES ON APPEAL

1. WAS THE TRIAL COURT CORRECT IN RULING THAT THE DEFENDANTS OBTAINED A PRESCRIPTIVE EASEMENT UNDER A CLAIM OF RIGHT?
2. WAS THE TRAIL COURT CORRECT IN RULING THAT THE DEFENDANTS OBTAINED A PRESCRIPTIVE EASEMENT DUE TO AN ADVERSE USE FOR A PERIOD OF OVER TWENTY YEARS?
3. WAS THE ORDER OF THE TRIAL COURT CORRECT SINCE THE RESPONDENTS PROVED THAT THE USE OF THE ROADWAY IN QUESTION WAS HOSTILE AND ADVERSE TO THE APPELLANT?

STATEMENT OF THE CASE

The Plaintiff filed his Summons and Complaint on June 4, 2008 seeking an injunction prohibiting the Defendant, Lee Dewayne Snyder, from using the private roadway over his property without his permission. The Defendant filed his Answer and Counterclaim on July 3, 2008 requesting that Court find that he held a prescriptive easement on a 20-foot right-of-way over the Plaintiff's property for use of the roadway in question. The Plaintiff filed his Reply to the Counterclaim on July 15, 2008. The case was referred by consent to the Master-in-Equity for Orangeburg County.

A final hearing on the case was held on April 29, 2009 in regard to this matter, and it was determined that Harry L. Snyder should be made a party Defendant to the action since he was also an owner of the property that was the subject of this action. Based on the evidence presented at trial, the Master-in-Equity for Orangeburg County determined that the Defendants had presented sufficient evidence and had proven all of the elements necessary to show that a prescriptive easement had been established to the roadway in question and had denied the Complaint of the Plaintiff. The Court further determined

way referred to and used by the Defendants to obtain access to their property, which is located behind the property of the Plaintiff as shown on the same plat. The Defendants used the roadway in question to obtain access to the property from Highway 178, which is also shown on the same plat. Therefore, the roadway in question is easily identifiable, an element of a prescriptive easement.

The Defendants obtained title to their property by deed from Willie McLauren Rast and Lois C. Rast, dated June 29, 1989 and recorded on June 29, 1989 in Deed Book 548 at Page 1093 in the Office of the Register of Deeds for Orangeburg County (R. p. 82-83). This deed conveyed the property to the Defendants, Lee Dewayne Snyder and Harry L. Snyder, conveying them 103.983 acres. This deed also shows specifically on it a 20-foot right-of-way, which specifically refers to the easement in question that is the subject of this litigation.

The Plaintiff testified in this case that he had never given permission to the Defendants to use the roadway in question. He testified that prior to the Defendants expanding the roadway and using it, it had been "a little wagon road" (R. p. 13, l. 9) that was not used very extensively. He indicated that it was only the Defendants that began using the roadway after they moved onto the property when they purchased it in 1989. However, the Plaintiff conceded that he has lived in Mt. Vernon, New York since 1960 (R. p. 62, l. 17, 19). Based on the findings of the lower Court, the Master gave little or no credibility to the Plaintiff's testimony about the wagon road and its limited use.

Mr. Harry Wimberly testified for the Defendants that he is familiar with the road in question and that he has known of this existence since the 1960's and 1970's when he used it himself for the purposes of hunting (R. p. 23, l. 7-13). Mr. Wimberly is also

familiar with other people continuing to use the road in question (R. p. 23, l. 21-23). Mr. Larry Rast testified for the Defendants and indicated that his grandparents owned this property for some period of time and that his father inherited the property from his grandfather (R. p. 25, l. 10-13). He further testified that his father and mother sold the property to the Defendants, Lee Dewayne Snyder and Harry L. Snyder, (R. p. 25, l. 10-12). Mr. Rast testified that while he was in high school he was in charge of farming this particular piece of property and that he used the road in question to gain access to the property in question for his farming purposes. He graduated from high school in 1967, and he was farming the property during the mid-1960's (R. p. 26, l. 23-25, p. 27, l. 1-6). Mr. Rast testified that his parents continued to farm the property after he graduated from high school and that they continued to own the property up until they sold it to the Snyders (R. p. 27, l. 14-25, p. 28, l. 2-4). Mr. Curtis Spell testified for the Defendants that he is 78 years old and that the road in question was there when he was born (R. p. 32, l. 15-20). Mr. Spell testified that during his 78 years people were using the road and there were people living in the back during certain periods of time (R. p. 32, l. 22-25, p. 33, l. 1). Mr. Spell testified that even though he now lives in Columbia, he continues to come to Bowman every other weekend and has family in the area and visits them often (R. p. 33, l. 5-14). Mr. Spell further testified that the road in question is still open and people still use it and have used it throughout his lifetime (R. p. 33, l. 22-25, p. 34, l. 1-3). Mr. Marion Kennedy testified for the Defendants that he has lived in the Bowman area all of his 65 years. He testified that he is familiar with the property of Thelease Kelley and knows Mr. Kelley (R. p. 38, l. 14-23). Mr. Kennedy testified that he is familiar with the road in question and that people use that road and have used that road continuously (R. p.

40, l. 5-14, p. 41, l. 1-2). The Defendant, Lee Dewayne Snyder, testified that he personally had been using the road in question since 1978 or 1979 because he had been renting land from Mr. Willie Rast and Mr. Earnest Moss for deer hunting rights since that time. As a result, he had been using the road in question even before he purchased his property in 1989. He further testified that after buying his share of the property in 1989, he moved into his home on the property in 1991 or 1992 (R. p. 43, l. 1-7), and has certainly used the road on a daily basis since he has moved into the property. The Defendant, Harry L. Snyder, also testified that he has also been using the road in question since 1978 when he began hunting on the property as well and has been using the property regularly since that time (R. p. 56, l. 8-9; p. 57, l. 9-10).

The Plaintiff then testified on re-direct examination that he never gave permission to any hunters to use the road in question and that he had owned the property for at least thirty (30) years (R. p. 59, l. 20-24; p. 60, l. 2-3). As a result, it is clear that the use of the road in question by the many hunters and hunt club members that have used the property for years certainly creates a hostile, adverse and continuous use of the road for a period in excess of twenty (20) years as evidenced by the testimony in this matter. It is clear from testimony of the Plaintiff that he has given permission to no one for use of the road in question, but it is also clear from the testimony of the many witnesses presented by the Defendants that many people have used this road for a long period of time and that the Plaintiff has acquiesced and done nothing to prevent the use of the road in question for well over thirty (30) years until the initiation of this lawsuit.

ARGUMENTS

I. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE DEFENDANTS HAVE ESTABLISHED A PRESCRIPTIVE EASEMENT UNDER A CLAIM OF RIGHT.

On direct appeal from a final judgment of a master-in-equity, the scope for review is the same as that for review of the case heard by a circuit court without a jury. Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (S.C.App. 2009). Thus, 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. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (S.C.App. 1976). The elements to establish a prescriptive easement are undisputed in South Carolina. The case law establishes that in order to have a prescriptive easement, the party asserting the right must show: (1) continued use for twenty (20) years; (2) the identity of the thing enjoyed; and (3) use, which either adverse or under a claim of right. Boyd v. Bell South Telephone, 369 S. C. 410, 633 S.E.2d 136 (S.C.App. 2006).

The Appellants argue that the Respondents failed to prove and the Court erred in determining that a claim of right was established by the evidence in this case. In order for a party to earn a prescriptive easement under claim of right, you must demonstrate a substantial belief that you had the right to use the parcel or road based upon the totality of circumstances surrounding its use. Jones v. Daley, 366 S.C. 310, 609 S.E.2d 597 (S.C. App. 2005). In this case, it seems clear that the Snyders have established a claim of right based on the fact that their deed from Mr. and Mrs. Rast showed that the property that they purchased included the 20-foot right-of-way from Highway 178 back to the tract of land that was included in the sale itself. The deed also showed that it was the belief of

the sellers, Mr. and Mrs. Rast, that they owned the 20-foot right-of-way that they could convey to the Snyders and that they did convey to the Snyders in the deed in question that was part of the transaction. The circumstances further show through the testimony of the son of the sellers, Larry Rast, who testified in this case, that the Rast family owned this property for many years. Larry Rast indicated that his parents sold the property to the Snyders and that the property was previously owned by not only his parents, but also by his grandparents. (R. p. 26, l. 10; p. 27, l. 10) He testified that he farmed this particular piece of property while he was in high school and that it was thereafter farmed by his younger brother and was otherwise farmed by his parents and grandparents at other times. (R. p. 26, l. 23-25; p. 27, l. 11-16 and l. 23-25) He further indicated that at all times this same road was used in order to gain access to the property from Highway 178 throughout the ownership of the property by the Rast family. (R. p. 27, l. 1-16) As a result, these circumstances surely would indicate that the Rast family felt like they had an easement, which gave them the right to use the road in question to gain access to the property they owned behind that of the Appellant and that they had the right to sell this easement to the Snyders in the transaction in 1989. As a result, it seems clear that all these circumstances and the use of the road for many years by the Rast family, as well as the use of the road by the many hunters who used the road in question, gives rise to the justifiable belief by the Rast family and the Snyders that they had a right to use the easement in question that was both understandable and reasonable under the circumstances in this case.

It seems further reasonable that under the totality of circumstances in this case that Thelease Kelley and prior to him his brother, Bennie Kelley, had owned the adjoining property for a period of over fifty years and that throughout that time, neither of them had

done anything to prevent the Rast family or the Kelley family from using the road in question. This would give rise to a reasonable belief that the Rasts and the Kelleys had the right to use this easement to gain access to their property. This is also reasonable under South Carolina law since a prescriptive easement is not implied by law, but is established by the conduct of the dominant tenement owner. Boyd v. Bell South Telephone, 369 S. C. 410, 633 S.E.2d 136 (S.C.App. 2006).

II. THE TRIAL COURT WAS CORRECT IN RULING THE DEFENDANTS HAD ESTABLISHED A PRESCRIPTIVE EASEMENT PURSUANT TO AN ADVERSE USE FOR A PERIOD IN EXCESS OF TWENTY YEARS.

The Plaintiff argued that the Defendants' claim for a prescriptive easement fails because the Defendants have owned the property for less than twenty years prior to the initiation of this litigation. However, the Plaintiff's argument fails because the Defendants are allowed to tack the period of use of prior owners in order to satisfy the 20-year requirement. Morrow v. Dyches, 328 S.C.522, 492 S.E.2d 420 (S.C.App. 1997); Matthews v. Dennis, 365 S.C.245, 616 S.E.2d 437, (S.C.App. 2005). It is clear from the derivation contained in the deed from the Rast family to the Snyders that the predecessors in title in this matter have owned this property since at least 1964. As a result, it is clear from the evidence of the Synder's deed (Defendant's Exhibit #1) and from the testimony of Larry Rast as to how long his family had owned the property prior to being sold to the Snyders (R. p. 26), that the period which the road had been present was for well more than twenty years. The evidence further shows that the Plaintiff, Thelease Kelley, purchased the property from his brother, Bennie Kelley, (R. p. 6) in 1977 (R. p. 76-77) and owned the property for approximately thirty years at the time the litigation was filed.

As a result, it seems clear that the adverse use period requirement of twenty years had easily been met in this case as a result of the tacking the ownership of the Synders to the Rast family, the predecessors in title to this matter.

The Plaintiff further argues that there is no evidence that the use of the road was adverse to the interest of the Plaintiff until the gate was erected by the Defendants in this matter. Certainly, the erection of the gate in the early 1990's was adverse to the Plaintiff, and the Plaintiff chose to do nothing about the gate for a period of well in excess of ten years. However, the Defendants would argue that the use of the road by the Defendants and their predecessors in title, as established by the witnesses and found by the lower Court, for a period of well in excess of forty years is certainly adverse to the Plaintiff and his brother. The law in South Carolina has been simplified in establishing the elements of a prescriptive easement. To establish an easement by prescription, one need only establish either a justifiable claim of right or adverse and hostile use. Jones v. Daley, 366 S.C. 310, 609 S.E.2d 597 (S.C. App. 2005). As a result, one does not have to prove an adverse or hostile use when a justifiable claim of right is established. However, the Respondents would argue that an adverse and hostile use certainly has been established in this case. In addition, the Respondents would argue that it is simply not appropriate for the Appellant in this case to live his life in Mt. Vernon, New York and rarely, if ever, come to the property in Bowman, South Carolina and then be able to claim in Court that he does not know what is going on at the property in Bowman. It is certainly very easy to never go to the property and never look at the property and then be able to deny that you don't know what is going on in regard to your property. Certainly, the Court must and does place duties on the property owners to look after their property and to inspect their

property on some basis so that they can come back later and simply claim that they did not know. For this reason, a prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner. Boyd v. Bell South Telephone, 369 S. C. 410, 633 S.E.2d 136 (S.C.App. 2006). Thus, prescriptive easements can and must be established when the dominant tenement owner is apathetic and fails to protect his own property.

III. AS AN ADDITIONAL SUSTAINING GROUND, THE RESPONDENTS PROVED THAT THE USE OF THE ROAD IN QUESTION WAS ADVERSE FOR OVER TWENTY YEARS.

The Respondents would argue that even if the Court is not correct determining that a justifiable claim of right was established by the evidence in this case, it is clear that the use of the roadway in question for a period of well over forty years by the Respondents and their predecessors in title as well as by the witnesses provided by the Respondents and other hunters as testified to by those witnesses shows that the use by these persons was adverse to the rights of the Appellant. Jones v. Daley, 366 S.C. 310, 609 S.E.2d 597 (S.C. App. 2005). The Jones case establishes that one needs to establish either a justifiable claim of right or adverse and hostile use. It seems clear that the testimony of many witnesses in this case shows that the use of the roadway, not only by these witnesses, but by the hunters and others referred to by the witnesses shows that the use of the roadway by those persons was adverse and hostile to the rights of Thelease Kelley and his brother, Bennie Kelley, for a period of at least forty years. Although Thelease Kelley may not have known about this use because he lived in Mt. Vernon, New York, certainly the use was adverse and hostile to him. The witness, Larry Rast, testified that

the roadway was widened in the 1960's in order to allow for farm equipment to go to the property that now belongs to the Respondents. (R. p. 27 l. 1-10) The testimony of Marion Kennedy and Curtis Spell both show that many people have used this roadway in question for a period of time well in excess of forty years during which the property was owned by either Thelease Kelley or his brother, Bennie Kelley. The use of this roadway by multiple people for such a long period of time is clearly adverse and hostile to the ownership of the property by the Kelleys. The Court should keep in mind that use of an easement can only be shown to be adverse and hostile when it is used by persons other than the owner. As a result, the Respondents would argue that they have established a prescriptive easement to their property by use of the property for a period in excess of twenty years through adverse and hostile use, even if they failed to do so through a claim of right. The Respondents would argue that this is an additional sustaining ground to uphold the decision of the lower Court.

CONCLUSION

There is significant and substantial evidence in the record that a prescriptive easement has been established under a claim of right for a continuous uninterrupted period of twenty years or more by the Defendants in this matter. Additionally, the Respondents proved that the use of the roadway for more than twenty years was adverse and hostile to the Appellant. As a result, the decision of the Master-in-Equity should be affirmed.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Thelease Kelley, Appellant,

v.

Lee Dewayne Snyder and Harry L. Snyder,
Respondents.

Appeal From Orangeburg County
Olin D. Burgdorf, Circuit Court Judge

Opinion No. 4929
Heard December 5, 2011 – Filed January 25, 2012

AFFIRMED

R. Bentz Kirby, of Orangeburg, for Appellant.

James B. Jackson, Jr., of Santee, for
Respondent.

SHORT, J.: In this land dispute involving a road on Thelease Kelley's property that leads to the property of Lee Snyder and his father Harry Snyder^[1] (Respondents), Kelley appeals the master's order granting Respondents a prescriptive easement to use the road "for ingress and egress" from their property to a public road. We affirm.

FACTS

Kelley purchased twenty-eight acres of land from his brother on November 23, 1977. The property description did not mention the property was subject to an easement.^[2] Respondents purchased their property from Willie and Lois Rast on June 29, 1989, and the deed included an easement for a twenty-foot access road from U.S. Highway 178 to Respondents' property, which appears to be the road at issue in this case.^[3] A new survey of Kelley's land was completed on May 25, 2005, showing Kelley's twenty-four acres, the one-acre parcel he sold, and the roadway in question.

Kelley lives in New York, but has owned the property since purchasing it in 1977, and although he acknowledged Respondents had been using the "wagon road" since purchasing their property, he claimed he never gave Respondents permission to use the road to access their property.^[4] Kelley testified Respondents never asked him for permission to use the road or "cut it"; however, he never told them they were not allowed to use the road. Kelley maintains the road was barely passable by any vehicle other than a

wagon until Respondents "cut" a road through after they purchased the property and put up a gate and private property sign. He claims the parties have had an "ongoing dispute" about the road for more than ten years, but the only contact he had with Respondents was comprised of two conversations about the gate they erected on the road. Kelley testified he asked Respondents to move the gate when they installed it, and they moved it back about halfway down his property. He then asked Respondents why they did not move it to their property line, and they replied they had an easement and a right to do what they wanted with his property. Lee Snyder (Lee) testified Kelley asked him to move the gate, but he said he preferred to leave the gate to prevent people from using it. He offered Kelley a key to the gate, but Kelley refused to take it.

Respondents testified Kelley never forbade them from using the road, and no one has ever prevented them from using it. Respondents also assert local residents have used the road for years to access their property and other property for hunting and farming.^[5] Larry Rast, son of Willie and Lois Rast, testified he and his father widened the road to accommodate farm equipment in the mid-1960s, and his family used the road to farm their property until the 1970s. Resident Harry Wimberly testified he used the road as far back as the late 1960s to hunt, and he has used it to access Respondents' house. Curtis Spell, who grew up in the area, testified he is seventy-eight years old, and the road was there when he was born. Marion Kennedy also testified the road has been there as long as he can remember, and he is sixty-five years old. He also testified he has seen others use the road, in addition to Respondents. Before purchasing the property, Respondents rented the land from the Rasts and used the road to hunt the land.

Lee testified he is the only person who maintains the road on Kelley's property. Respondents also admitted they have exercised some control over the road by telling loggers and a farmer they "preferred them not to use it," and the loggers and farmer acquiesced.^[6] Kelley testified there were other ways Respondents could have accessed their property, including an existing road. Lee testified that in addition to the road on Kelley's land, he and his father also use another road to access their property, which traverses some additional land they purchased.

Kelley filed a complaint on June 4, 2008, alleging Respondents had created a twenty-foot private roadway on his property without his permission, and he had given notice to Respondents to cease using his property for any purpose. He sought an injunction to restrain Respondents from using the property and trespassing on his land. Respondents filed an answer, asserting as a counterclaim that Respondents had purchased property from the Rasts, which included a conveyance of "[a]ll our right, title and interest in an easement or right-of-way for ingress and egress over, along and through a 20-foot access road from the property herein described to U.S. Highway No. 178." Additionally, Respondents asserted they had used the road in an open and hostile manner continuously since purchasing the property in 1989; therefore, Respondents sought a declaratory judgment that they obtained a prescriptive easement over the road. The matter was referred to a master in equity by a consent order of reference, and the master granted Respondents "a prescriptive easement to use the twenty (20)-foot roadway in question . . . for purposes of ingress and egress to their property."^[7] Kelley filed a motion to reconsider, which the master denied. This appeal followed.

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." Pittman v. Lowther, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005). "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." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

Kelley argues the master erred in ruling Respondents had a prescriptive easement under a claim of right and pursuant to an adverse use for a period of twenty years.[8]

An easement is a right given to a person to use the land of another for a specific purpose. Murrells Inlet Corp. v. Ward, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App. 2008). An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription. Frierson v. Watson, 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct. App. 2006). "A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." Boyd v. BellSouth Tel. Tel. Co., 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). To establish a prescriptive easement, the party asserting the right must show: (1) continued and uninterrupted use of the right for twenty years; (2) the identity of the thing enjoyed; and (3) use which is either adverse or under a claim of right. Horry Cnty. v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993). "To establish an easement by prescription, one need only establish either a justifiable claim of right or adverse and hostile use." Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005) (emphasis added). There is no requirement of exclusivity of use to establish a prescriptive easement. Id. at 317, 609 S.E.2d at 600. The party claiming a prescriptive easement bears the burden of proving all of the elements. Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997).

I. Identity

Kelley concedes the identity of the roadway, the second element necessary to establish a right by prescription. Therefore, we need not address this element.

II. Continuous and Uninterrupted

Kelley does not specifically challenge the master's finding that Respondents' use of the road was continuous and uninterrupted, the first element necessary to establish a right by prescription. "[I]n order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant." Jones, 363 S.C. at 318, 609 S.E.2d at 601. "When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." Boyd, 369 S.C. at 419, 633 S.E.2d at 141.

Although Respondents' need for using the road has evolved over time, testimony indicates Respondents used the road with reasonable frequency for each of those needs. Lee

testified he began using the road in 1978 or 1979 for hunting purposes. He did not explicitly state how often he used the road for hunting; however, the fact that he was a member of a hunting club that used the road suggests he used it with reasonable frequency to hunt. Lee further testified that after he bought the property in 1989, he kept dogs on his land and used the road to get to the dogs. In order to care for his dogs, Lee had to have used the road frequently. Finally, Lee testified that when he moved to his land in 1991 or 1992, he used the road to get to his house.

The record also supports the master's finding that Respondents' use of the road was uninterrupted during the prescriptive period. The servient owner may interrupt the prescriptive period by engaging in "overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief." Pittman, 363 S.C. at 52, 610 S.E.2d at 481. "In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period." Id. Respondents testified Kelley did not prevent them from using the road, and Harry testified the only obstruction he has ever seen on the road is the gate they erected. Although Kelley asked Respondents to move the gate, there is no indication that Kelley's request conveyed to Respondents the impression that he did not acquiesce in Respondents using the road. In fact, after Lee moved the gate back, Kelley merely asked why Lee put it there instead of on his land. Further, Kelley never told Respondents they could not use the road. Therefore, the testimony shows Respondents' use of the road was uninterrupted during the prescriptive period.

III. Claim of Right

A party claiming a prescriptive easement under a claim of right "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." Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003); see Revis v. Barrett, 321 S.C. 206, 209, 467 S.E.2d 460, 462 (Ct. App. 1996) (holding a party's belief that she had a right to use a road flowed from a claim of right that originated with her parents' use of the roadway to access the property, and her use of the road for a substantial period of time to access her property); Morrow, 328 S.C. at 528, 492 S.E.2d at 424 (noting a party's belief that he had a right-of-way may be sufficient for a prescriptive easement pursuant to a claim of right). "The law granting a prescriptive easement under claim of right does not mandate a party to believe that he holds actual title or that he intends to acquire it." Hartley, 355 S.C. at 151, 584 S.E.2d at 389.

Here, there is evidence that Respondents believed they possessed the right to use the road. Respondents' deed indicated the Rasts had a right of ingress and egress over the road and were conveying that right to Respondents. Harry Snyder testified that before purchasing the land, they checked the deed to make sure it had an easement because they would not have purchased land-locked land. As such, Respondents used the road to access their land, and improved and maintained the road. Additionally, before purchasing the property, Respondents rented the land from the Rasts and used the road to hunt the land. There was also ample evidence the Rasts used the road under a claim of right. The language in the deed, stating the Rasts were conveying "[a]ll of our right, title and interest in an easement or right-of-way for ingress and egress over, along and through" the road,

indicates the Rasts believed they had a right to use the road. Larry Rast testified he and his father widened the road in the mid-1960s to accommodate their farming equipment. Additionally, Larry testified his grandparents owned the land prior to his parents, and they also used the road to access the land.

Kelley asserts the master erred in ruling that the claim of right existed against both Kelley and his grantor for more than twenty years because there was no evidence that any claim of right existed prior to the deed to Respondents in 1989. Respondents purchased their land on June 29, 1989, and Kelley filed his complaint on June 4, 2008; therefore, Respondents' claim of right as landowners extends back just shy of nineteen years. Regardless, "[a] party may 'tack' the period of use of prior owners in order to satisfy the 20-year requirement." Morrow, 328 S.C. at 527, 492 S.E.2d at 423 (citing 25 Am. Jur. 2d Easements and Licenses § 70 (1996)). "[T]he time of possession may be tacked not only by ancestors and heirs, but also between parties in privity in order to establish the 20-year period." Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 430, 489 S.E.2d 223, 226 (Ct. App. 1997). Tacking of periods of prescriptive use is permitted where "there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefitted by the inchoate servitude." Matthews v. Dennis, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Ct. App. 2005) (quoting Restatement (Third) of Property: Servitudes § 2.17 (2000)). If tacking is used, the use by the previous owners must have also been adverse or under a claim of right. See Morrow, 328 S.C. at 528, 492 S.E.2d at 424. Therefore, tacking the Rasts' claim of right over the road to Respondents' claim of right, Respondents have well over twenty years of use of the roadway.

IV. Adverse Use

"When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." Boyd, 369 S.C. at 419, 633 S.E.2d at 141. Then, the burden shifts to the title owner of the servient tenement (Kelley) to rebut the presumption that the use was adverse. Sanitary & Aseptic Package Co. v. Shealy, 205 S.C. 198, 203, 31 S.E.2d 253, 255 (1944). An "intent to claim adversely may be inferred from the acts and conduct" of the dominant users. Matthews, 365 S.C. at 250 n.10, 616 S.E.2d at 440 n.10 (quoting 25 Am. Jur. 2d Easements & Licenses § 57, at 552 (2004)).

Kelley impliedly concedes Respondents' use of the road after they purchased their land in 1989 was adverse, in that they erected a gate and asked loggers and a farmer not to use the road. However, Kelley argues Respondents are not entitled to a prescriptive easement based on adverse use because "there is no competent evidence that the use was adverse" for the full twenty years. Kelley states, "there is no testimony by any of the witnesses that the use was ever adverse, except the testimony which relates to the time period which is less than twenty (20) years prior to the law suit being instituted."

Because Respondents established the use was open, notorious, continuous, and uninterrupted, and Kelley did not appeal this finding, the use is presumed to have been adverse. It is Kelley's burden to rebut the presumption. Larry Rast testified his family used the road to access their land for farming, and they widened it in the mid-1960s to accommodate their farming equipment. Additionally, Larry testified his grandparents owned the land prior to his parents, and they used the road to access the land, as well. Kelley did

not present any evidence that he gave the Rasts permission to use or improve the road; therefore, Kelley has failed to rebut the presumption of adverse use. Also, as tacking is permitted to establish the 20-year period, when the Rasts' adverse use of the road is tacked to Respondents' adverse use, Respondents have well over twenty years of adverse use of the roadway.

CONCLUSION

Because the existence of the easement is in issue, and the existence of an easement is a question of fact in a law action, we are subject to an any evidence standard of review, and we will not disturb the master's findings of fact unless there is no evidence that reasonably supports the findings. We find the evidence supports the master's finding that Respondents are the owners of the twenty-foot right-of-way easement, by both claim of right and adverse use; therefore, we affirm the master's order.

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

-
- [1] Because Harry Snyder co-owned the land, the court joined him as a defendant.
 - [2] At some point, Kelley sold a one-acre tract of the land.
 - [3] All parties agree there appears to be no other deeded easement to this roadway on the records in Orangeburg County.
 - [4] The road is unpaved and runs the entire length of one side of Kelley's land, connecting Respondents' land to U.S. Highway 178.
 - [5] Kelley testified he never gave any hunters permission to use his land, and he has never known any hunters to use the road.
 - [6] The loggers and farmer were using Kelley's land with his permission.
 - [7] The master also ordered Respondents to move their gate to their property; however, the parties have not appealed that portion of the order.
 - [8] It is not clear whether the master granted Respondents a prescriptive easement on grounds of adverse use, a claim of right, or both, and the parties concede the master's order is unclear. The master based the prescriptive easement on several findings of fact he made in his order. In finding of fact number four, the master found that based on Respondents' deed, "[t]he use and enjoyment of the roadway in question was both *adverse* to [Kelley] and his predecessor in title since 1989 *under a claim of right*." (Emphasis added.) The master also found in finding of fact number four, that Respondents "*claim their right* to the roadway in question pursuant to their deed, which indicated that a twenty (20)-foot easement was granted to them by their predecessors in title." (Emphasis added.) In finding of fact number one, the master found "[t]he roadway in question has been used continuously, openly and notoriously for a period in excess of twenty (20) years" and "the use [of the roadway] by [Respondents] and others [has] been *hostile* to the ownership of

[Kelley] and his predecessor in title, as evidenced by the fact that [Respondents] have maintained a gate thereon since the early 1990s." (Emphasis added.) The master never clarified if he granted Respondents a prescriptive easement on the ground of adverse use or under a claim of right, or on both.

The South Carolina Court of Appeals

Thelease Kelley,

Appellant,

v.

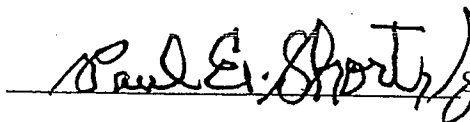
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Harry L. Snyder,

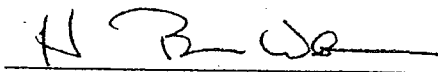
Respondents.

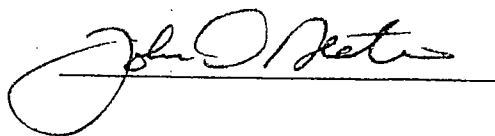
The Honorable Olin D. Burgdorf
Orangeburg County
Trial Court Case No. 2008-CP-38-00900

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

 Short, J.

 Williams, J.

 Geathers, J.

Columbia, South Carolina

cc: R. Bentz Kirby, Esquire
James B. Jackson, Jr, Esquire

FILED

29 March 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

RECEIVED

FEB 09 2012

SC Court of Appeals

The Honorable O. Davie Burgdorf, Master-in-Equity

Case No. 2008-CP-38-900

Thelease Kelley,

Appellant,

-vs-

Lee Dewayne Snyder and
Harry L. Snyder,

Respondents

PETITION FOR REHEARING
AND MEMORANDUM IN SUPPORT

Comes now the Appellant, and does hereby make his Petition for a Rehearing and respectfully represents unto this Honorable Court as follows:

The findings of the Master were not reasonably supported by the evidence. The court acknowledged in footnote 3 that there was not a proper history of any deeded easement in the records of Orangeburg County. There is no record of any grant of an easement by the holder of the property belonging to Thelease Kelly. Therefore, the deed to the Respondents does not reasonably support any of the findings of the Master, or any claim of right. In Hartley vs John Wesley United Methodist Church, 355 SC 145, 584 SE2d 386 (Ct App. 2003) there were other factors involved including the fact that the County had maintained the road. In this instance, the Appellant testified that he and hs

brother had used the road and he knew nothing of any adverse use until the Respondents began to maintain the road. Additionally, in Hartley, the easement was the only ingress and egress. In this case, the Respondents admit that they have other access roads to their property. This case is more like Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (S.C.App. 2009), and the deed should be ambiguous at best as the grantor in this case had no right to make any grant of an easement and it should not be relied upon by the Master or by this Court.

Kelly did rebut the presumption the use was adverse for more than twenty (20) years. As demonstrated on the Record of this case, Kelly testified that the road in question was used by his permission by his brother and other persons farming his land with his permission. He had no notice of any adverse use until the gate was put up by the Respondents. He undertook measures he believed were reasonable to have them stop using the road, and when they refused, he brought this action within twenty (20) years. The primary case law used by this Court to justify its decision was Boyd vs BellSouth Tel. Tel. Co., 369 S.C. 410, 633 S.E.2d 136 (S.C. 2006). Boyd involved a case where Bell South was the common owner of the two properties and it had used the easement. The type of easement discussed was an easement by necessity. In this case, there is no easement by necessity and the Court's reliance on **Boyd** is misplaced. Further, the holding of the Court ignores the evidence that Kelly did rebut the evidence was not adverse for more than twenty years and that he acted to protect his rights within the allowable time period.

There was no evidence the use by any previous owners was adverse and so the use of the theory of tacking was inappropriate. There is no evidence in the record that any use of this road prior to the time the road was improved by the Respondents. Therefore, the Court's characterization that the Appellant did not rebut the implication it was adverse is not supported. The Appellant presented

testimony that he did not know anyone was using the road other than the use by his brother and others with his permission until the Respondents improved the road. He had no knowledge of any claimed use prior to this time and there was no evidence he was aware of this use. He established through his testimony sufficient evidence to rebut the presumption and the Court should reconsider its holding in the opinion.

CONCLUSION

The Respondent submits that there was no reasonable evidence to support the findings of the Master or of this Court and the Court should rehear this matter and reverse the published opinion. Further, Respondent asserts that the reliance upon the case law by the Court of Appeals was misplaced as those cases are distinguishable on factual and legal grounds. Therefore the Appellant requests that the Court rehear this case.

Respectfully submitted this the 9th day of February, 2012 at Orangeburg, South Carolina.

Glenn Walters, Attorney at Law, PA



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

RECEIVED

FEB 09 2012

SC Court of Appeals

The Honorable O. Davie Burgdorf, Master-in-Equity

Case No. 2008-CP-38-900

Thelease Kelley,

Appellant,

-vs-

Lee Dewayne Snyder and
Harry L. Snyder,

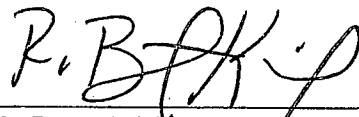
Respondents

CERTIFICATE OF SERVICE

On this the 9th day of February, 2012, the undersigned hereby served a copy of the Motion for Rehearing on counsel for the Respondents by placing a copy in the United States Mail, postage fully paid and addressed to their attorney at the following address:

James B. Jackson, Jr.
PO Drawer 349
Santee, SC 29142

Glenn Walters, Attorney at Law, PA



R. Bentz Kirby
Attorney for the Appellants

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

The Honorable O. Davie Burgdorf, Master-in-Equity

Opinion No. 4929 (S.C. Ct. App. filed January 25, 2012)

Thelease Kelley,

Petitioner,

-vs-

Lee Dewayne Snyder and
Harry L. Snyder,

Respondents

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

The Honorable O. Davie Burgdorf, Master-in-Equity

Case No. 2008-CP-38-900

Thelease Kelley,

Appellant,

-VS-

Lee Dewayne Snyder and
Harry L. Snyder,

Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)
COURT OF COMMON PLEAS)

JUDGMENT ON TRIAL OR ORDER BY THE COURT

CASE NO. 68 -CP-38- 40

VS

Michael Kelley

Lee Lawrence Smyke

PLAINTIFF(S)

DEFENDANT(S)

- () JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND THE JURY HAS RENDERED ITS VERDICT.
- (☒) DECISION BY COURT. THIS ACTION CAME TO TRIAL OR HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN TRIED OR HEARD AND A DECISION HAS BEEN RENDERED.
- () ACTION DISMISSED. () RULE 40 (J) OF SCRPC, () RULE 12 (B) OF SCRPC,
() SETTLED. () VOL. NONSUIT. () OTHER _____

IT IS ORDERED AND ADJUDGED: (☒) SEE ATTACHED ORDER, () STATEMENT OF JUDGMENT BY COURT

DATED AT ORANGEBURG, SOUTH CAROLINA, THIS 19 DAY OF May, 20 09.

JUDGE/CLERK OF COURT

THIS JUDGMENT WAS ENTERED ON THE 27 DAY OF May, 20 09
AND A COPY MAILED FIRST CLASS THIS _____ DAY OF _____, 20 ____
TO ATTORNEYS OF RECORD OR TO PARTIES (WHEN APPEARING PRO SE) AS FOLLOWS:

Michael Kelley

Lee Lawrence Smyke

ATTORNEY(S) OR PLAINTIFF(S)

ATTORNEY(S) FOR DEFENDANT(S)

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Thelease Kelley,
Plaintiff,)

vs.)

Lee Dewayne Snyder and
Harry L. Snyder,
Defendants.)

IN THE COURT OF COMMON PLEAS
CASE NO. 2008-CP-38-900

FINAL ORDER

18/1
This matter comes before the Court on a Summons and Complaint filed by the Plaintiff on June 4, 2008 in which he seeks an Order of this Court prohibiting the Defendants from using a twenty (20)-foot road that he alleges is being used to obtain access from Highway 178 back to their property, which is behind the twenty-four (24) acres owned by the Plaintiff. The Defendant filed an Answer and Counterclaim on July 3, 2008 in which he seeks an Order of the Court determining that a prescriptive easement exists on the twenty (20)-foot right-of-way on the basis that the Defendants and their predecessors in title have been using this roadway for a period well in excess of twenty (20) years. The Plaintiff filed his Reply to the Counterclaim on July 15, 2008.

This matter comes before the Court for a final hearing on April 29, 2009 in regards to this matter. The hearing was attended by the Plaintiff and his attorney, Glenn Walters, and by the Defendants and their attorney, James B. Jackson, Jr. Prior to the hearing, the Court was advised that the Defendant's property was not only owned by the Defendant, Lee DeWayne Snyder, but is also owned by his father, Harry L. Snyder, and it appeared to be necessary to name Mr. Snyder as a party defendant to this action. Therefore, by agreement of both parties, Harry L. Snyder was made a party defendant to this action.

The Plaintiff presented evidence that he is owner of twenty-four (24) acres of property in the

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Bowman area of Orangeburg County, which he received by deed from his relative, Bennie Kelly, recorded on November 29, 1977 in Deed Book 439 at Page 1077 in the Office of the Register of Deeds for Orangeburg County. A copy of this deed was marked as Plaintiff's Exhibit #1 in this case.

It was noted that the Plaintiff originally purchased twenty-eight (28) acres of land according to the deed, but had sold a one (1)-acre tract of land previously. The Plaintiff further presented evidence that a new survey was done on his property by Albert R. Judy, RLS, which was dated May 25, 2005 and was recorded on June 7, 2005 in Plat Book 377 at Page 6 in the Office of the Register of Deeds for Orangeburg County. This plat was marked in evidence as Plaintiff's Exhibit #2. The plat showed the one (1)-acre tract of land that had previously been sold, which was shown as Tract No. 2, and the Plaintiff's tract, which was designated as Tract No. 1. Tract No. 1 apparently contains twenty-four (24) acres according to this new survey and plat. The plat also showed the existence of the roadway in question, being used by the Defendants and which was clearly shown on the ground according to the plat.

OK
The Plaintiff testified that he had owned this property since 1977 and that he had never given permission to the Defendant to use the roadway in question. He described the roadway originally as being a "wagon road", and that it was barely passable by any vehicle other than a wagon. The Plaintiff did acknowledge that the Defendants had been using the roadway in question since they purchased their property in order to get back to the residence, but he emphasized that he had never given permission to the Defendants to use the roadway in question. The Plaintiff's evidence shows that he lives in New York, but has owned this property since 1977. The Plaintiff requested that this Court prohibit the Defendants from using the roadway in question.

The Defendants presented their evidence, which included a copy of their deed showing that they purchased this property from Willie McLauren Rast and Lois C. Rast by deed dated June 29,

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1989 and recorded on June 29, 1989 in Deed Book 548 at Page 1093 in the Office of the Register of Deeds for Orangeburg County. A copy of this deed was marked in evidence as Defendant's Exhibit #1. It should be noted that this deed shows that an easement was also granted to the Defendants by Mr. and Mrs. Rast conveying them a twenty (20)-foot access road from US Highway 178 to the property described therein, which would be the roadway in question in this case. However, all parties agree that there appears to be no other deeded easement to this roadway on the records in Orangeburg County.

65/3 The Defendant, Lee DeWayne Snyder, testified to the Court that he purchased this property along with his father in 1989 and later moved onto the property and began living there in 1991 or 1992. He indicated that he regularly uses the roadway in question to gain access to his property, and has done so on a daily basis since 1991 or 1992 when he moved onto the property. Mr. Snyder further testified that he had been using this roadway since 1977 or 1978 when he began hunting on this property. Mr. Snyder indicated that he and others have continually used this road for many years since that time, not only for purposes of hunting, but certainly for the purposes of his living on the property behind the twenty-four (24) acres owned by the Plaintiff, Thelease Kelly, since the early 1990's. The Defendant further testified that he maintains this roadway on a regular basis, and he has put rock and dirt thereon and has regularly plowed the roadway in question. The evidence further showed that the Defendant initially placed a gate on this roadway right at its entrance from Highway 178. Mr. Snyder was asked by the Plaintiff, Thelease Kelly, to move this gate, and did move the gate back to another area on the roadway, which is also on the property of the Plaintiff, right before the roadway reached a utility easement that runs diagonally across the property of both the Plaintiff and Defendant. The testimony of the Plaintiff confirmed Mr. Snyder's testimony about the gate.

The Defendant presented four other witnesses, all of who testified that people had been using

this roadway to get to the property behind the Plaintiff for many years for purposes of hunting. As a result, all of these witnesses indicated that the roadway in question has been used for a period in excess of forty (40) years on a regular basis, not only by them, but by other individuals. The Defendant also presented the testimony of Larry Rast, who is the child of Willie McLauren Rast and Lois C. Rast, who conveyed the property to the Defendants in this matter. Mr. Rast indicated that he actually farmed the property for his parents beginning back in the mid-1960's and knows that his parents continued to farm the property through the early 70's, when he was in charge of those farming operations. He further testified that they continued to rent the property to others for farming purposes at least until the late 1970's. As a result, Mr. Rast testified that the roadway in question was used by him and others for farming purposes throughout the 1960's and 1970's.

Based on the testimony and evidence presented by the parties, I make the following findings of fact:

1. The roadway in question has been used continuously, openly and notoriously for a period in excess of twenty (20) years. I find that the use by the Defendants and others have been hostile to the ownership of the Plaintiff and his predecessor in title, as evidenced by the fact that the Defendants have maintained a gate thereon since the early 1990's.
2. The use of the roadway in question by the Defendants and their predecessors in title was continuous and uninterrupted for a period in excess of twenty (20) years and, in fact, for a period in excess of forty (40) years.
3. The roadway in question is a twenty (20)-foot right-of-way, which is easily identifiable on the ground as it has been used by the parties in a continuous manner for more than twenty (20) years. The roadway was clearly identified and shown on a plat prepared for the Plaintiff, which was recorded in Plat Book 377 at Page 6.

4. The use and enjoyment of the roadway in question was both adverse to the Plaintiff and his predecessor in title since 1989 under a claim of right. The Defendants claim their right to the roadway in question pursuant to their deed, which indicated that a twenty (20)-foot easement was granted to them by their predecessors in title.
5. The Plaintiff failed to establish that he is entitled to an Order prohibiting the Defendants from using the roadway in question based on their establishment of a prescriptive easement in this matter.
6. The Defendants, however, have established that the roadway in question has been used for a period well in excess of twenty (20) years and that they have established a prescriptive easement allowing them to use the twenty (20)-foot roadway in question for purposes of ingress and egress to the property that they own as set forth in their deed, and which is shown in Plat Book 377 at Page 6 in the Office of the Register of Deeds for Orangeburg County.

12/5 — Based on the above findings of facts, I conclude as a matter of law that the Complaint of the Plaintiff should be dismissed for the reasons set forth herein, and that the Defendants are hereby granted a prescriptive easement to use the twenty (20)-foot roadway in question, which is shown on the Plat of the Plaintiff referenced herein, for purposes of ingress and egress to their property.

I further conclude as a matter of law that the Defendants are not allowed to put a gate on the roadway in question as it sits on the property of the Plaintiff, and they should be and are hereby required to remove the gate that is on the property of the Plaintiff, and the gate should be removed from the Plaintiff's property within ninety (90) days from the date of this Order. The Defendants may place a gate on their property to control use of the roadway.

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IT IS THEREFORE ORDERED that the Complaint of the Plaintiff is dismissed for the reasons set forth herein, and the Defendants are granted a prescriptive easement to use the twenty (20)-foot roadway in question, which is shown on the plat of the Plaintiff referenced herein, for purposes of ingress and egress to their property.

IT IS FURTHER ORDERED that the Defendants shall remove the gate that is on the property of the Plaintiff within ninety (90) days from the date of this Order.

IT IS SO ORDERED.

Date: May 19, 2009
Orangeburg, SC



O. DAVIE BURGDORE
Master-in-Equity for Orangeburg County

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STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Thelease Kelley,
Plaintiff,)

vs.)

Lee Dewayne Snyder and
Harry L. Snyder,
Defendants.)

IN THE COURT OF COMMON PLEAS
CASE NO. 2008-CP-38-900

ORDER DENYING MOTION
FOR RECONSIDERATION

FILED FOR RECONSIDERATION
VIRGINIA H. CLARK
CLERK OF COURT
2009 NOV 10 A 9

This matter comes before the Court on a Notice of Motion and Motion for Reconsideration filed by the Plaintiff on June 29, 2009. The Plaintiff seeks an Order of the Court reconsidering and changing its prior decision issued in its Order dated May 19, 2009. A Hearing on the Motion for Reconsideration was held before the Court on October 13, 2009 attended by the Plaintiff's attorney, Glenn Walters, and by the attorney for the Defendants, James B. Jackson, Jr.

10/11 Based on the arguments of counsel presented at the hearing on the Motion for Reconsideration and on the transcript of testimony, which was reviewed by this Court, I find that the Plaintiff has presented no new issues that were not considered by the Court in its previous decision. In addition, after reviewing the evidence in this case one more time and considering the arguments of counsel, the Court finds that the previous decision issued in its Order dated May 19, 2009 was corrected and appropriate and should be confirmed by this Court. As a result, the Plaintiff's Motion for Reconsideration must be denied.

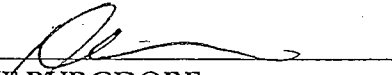
IT IS THEREFORE ORDERED that the Motion for Reconsideration filed by the Plaintiff in this matter is hereby denied.

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IT IS SO ORDERED.

Date: 4/2/05
Orangeburg, SC


O. DAVIE BURGDORF
Master-in-Equity for Orangeburg County

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

THELEASE KELLEY,)
)
PLAINTIFF(S),)

C/A NO.: _____

V.)

COMPLAINT
JURY TRIAL REQUESTED

LEE DEWAYNE SNYDER,)

DEFENDANT.)

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC
2008 JUN -4 A 4:53

NOW COMES the Plaintiff above-named, complaining of the Defendant(s) above-named, and does allege and show unto this Honorable Court as follows:

1. Plaintiff is a citizen and resident of the County of Orangeburg, State of South Carolina.
2. Defendant is a citizen and resident of the County of Orangeburg, State of South Carolina.
3. Plaintiff is, and at all times mentioned in this Complaint, the owner and possessor of certain real property legally described in Exhibit "A", attached to this Complaint and incorporated herein by this reference as though set forth in full. The above described real property will be referred to as "Parcel 1" for convenience.
4. Defendant is, and at all times mentioned in this Complaint, the owner and possessor of certain real property which property will be referred to as "Parcel 2" for convenience. Parcel 2 is legally described in Exhibit "B", attached to this Complaint and incorporated by this reference as though set forth in full.
5. Defendant and his agents have entered upon Plaintiff's land and have used and occupied a portion of the land creating a private roadway as a passage for trucks and other vehicles.
6. Plaintiff has not in the past given, nor does he now give, to Defendant or his agents, or to the general public, or to any person, permission to use Plaintiff's land for any purpose or activity whatsoever.
7. Plaintiff has on many occasions given notice to Defendant and to his agents to cease using the road for any purpose whatsoever, but despite such notice, Defendant and his agents have continued to use Plaintiff's property.
8. Unless and until enjoined and restrained by Order of this Court, Defendant's interference with Plaintiff's land will cause great and irreparable injury to Plaintiff's land.

ATTEST: TRUE COPY

[Signature]

CLERK OF COURT

ORANGEBURG COUNTY, SOUTH CAROLINA

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9. Plaintiff has no adequate remedy at law for the injuries being suffered as a result of Defendant's interference, in that, among other things: (1) Parcel 1 is unique real property and therefore pecuniary compensation would not afford Plaintiff adequate relief; (2) it would be extremely difficult to ascertain the amount of monetary damages that would fully compensate Plaintiff for the losses and damages that he will sustain in the future as a result of the wrongful acts of Defendant; and (3) it would be necessary to maintain a multiplicity of judicial proceedings to protect Plaintiff's interests by reason of Defendant's intentional and repeated encroachment on the Plaintiff's land.

10. As a proximate result of Defendant's interference, Plaintiff has been unable to fully utilize his land, and unless Defendant is enjoined and restrained, the interference and trespass described will continue.

11. As a proximate result of Defendant's interference, Plaintiff has suffered and will continue to suffer, until the interference and trespass is discontinued, emotional distress and mental anguish in a sum that has yet to be ascertained, but will be proven at trial.

12. As a further and proximate result of Defendant's interference, the value of Parcel 1 has been diminished, and Plaintiff has been damaged in a sum that has yet to be ascertained, but will be proven at trial.

WHEREFORE, the Plaintiff prays for judgment against the Defendant :

1. For a preliminary injunction and a permanent injunction enjoining Defendant, And each of his agents, servants and employees, and all other persons acting under, in concert with or for them, from interfering with or obstructing the use of Plaintiff's land, Parcel 1;

2. For compensatory damages according to proof;

3. For costs of suit; and

4. For such other and further relief as the Court may deem just and proper.

LAW OFFICE OF GLENN WALTERS



Glenn Walters, Esquire
R. Benz Kirby, Esquire
Attorneys for Plaintiff
P. O. Box 1346
Orangeburg, SC 29116
803 531-8844

Orangeburg, South Carolina
June 4, 2008

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Ret: B & S

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

TITLE TO REAL ESTATE

Parcel 2

KNOW ALL MEN BY THESE PRESENTS That I, Thomas Kennedy, in consideration of the sum of Seventy Seven Thousand Six Hundred Sixty Two and no/100 (\$77,662.00) Dollars, to me paid by Lee Dewayne Snyder, in the State aforesaid, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Lee Dewayne Snyder, his heirs and assigns, forever, the following described property, to-wit:

All that certain piece, parcel, or lot of land designated as 36.831 Acres, Tract H, situate, lying and being in Orangeburg County, State of South Carolina, as shown on a plat prepared for Trustees of Marion Kennedy and Estate of Gladys Kennedy by W. F. Stokes, RLS dated April 5, 1999 and recorded in the Office of the Register of Deeds for Orangeburg County in Plat Book C-307, at Page 3, and having all metes, bounds, courses, distances, directions and measurements as are shown on said plat, are incorporated herein and made a part hereof by reference.

This being a portion of the property conveyed to Thomas Kennedy by Deed of Ernestine K. Tindall and Thomas Kennedy as Trustees dated September 5, 2003 and recorded September 11, 2003 in the Office of the Register of Deeds for Orangeburg County in Deed Book 1003, at Page 207.

Tax Map No.: 0254-00-02-060 2046016

Grantee's Address: 8914 Charleston Hwy.
Dorchester, SC 29018

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned, unto the said Lee Dewayne Snyder, his heirs and assigns forever.

And I hereby bind myself, my heirs and assigns, to warrant and forever defend all and singular the said premises unto the said Lee Dewayne Snyder his heirs and assigns, against myself and my heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 4th day of May, in the year of our Lord two thousand five and in the two hundred twenty-ninth year of the Sovereignty and independence of the United States of America.

Orangeburg County 05-05-2005
SOUTH CAROLINA
County Revenue Stamp \$95.80
State Revenue Stamp \$202.80

FILED May 05, 2005 04:38:40 pm
BOOK 01094
PAGE 0069 NEW 0070
INSTRUMENT # 2005002214

FILED
ORANGEBURG
COUNTY
GAIL LANEY
REGISTER
OF DEEDS

Gail Laney
Signature

RECORDED IN THE OFFICE OF ASSESSOR
MAP 0254 SHEET 02 BLOCK 02 PARCEL 060
THIS 9 DAY OF May 2005
ORANGEBURG COUNTY JIM McLEAN, COUNTY ASSESSOR

0000012

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGE BURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO. 2008-CP-38-900

Thelease Kelley,

Plaintiff,

vs.

Lee Dewayne Snyder,

Defendant.

ANSWER AND COUNTERCLAIM

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC
2008 JUL -3 A 9:12

The Defendant above named, answering the Complaint of the Plaintiff, would respectfully show this Honorable Court as follows:

AS A FIRST DEFENSE

1. The Defendant would admit the allegations contained in Paragraphs 1, 2, 3 (except that no Exhibit A or Parcel 1 was attached to the Complaint), 4 (except that no Exhibit B or Parcel 2 was attached to the Complaint), and 5 of the Complaint of the Plaintiff.

2. The Defendant would deny the allegations contained in Paragraphs 6, 7, 8, 9, 10, 11 and 12 of the Complaint of the Plaintiff and demands strict proof thereof.

3. The Defendant would deny each and every allegation contained in the Complaint of the Plaintiff, which is not specifically admitted, denied or controverted herein, and would demand strict proof thereof.

AS A SECOND DEFENSE AND BY WAY OF COUNTERCLAIM

4. The Defendant would reaffirm and reiterate all of the allegations contained in his first defense above as fully as if repeated verbatim herein.

ORANGEBURG COUNTY
CLERK OF COURT
LISA W. MIZELL
ATTEST TRUE COPY

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5. The Defendant purchased the property in question that he owns along with his father, Harry L. Snyder, by deed from Willie McLauren Rast and Lois C. Rast dated June 29, 1989 and recorded on June 29, 1989 in Deed Book 548 at page 1093 in the Office of the Register of Deeds for Orangeburg County. The Defendant's property is described as follows:

All that certain piece, parcel or tract of land, with any improvements thereon, situate, lying and being Southeast of the Town of Bowman, off S.C. Highway No. 178, County of Orangeburg, State of South Carolina, containing one hundred three and nine hundred eighty-three (103.983) acres, more or less, and being more particularly set forth and shown on a Plat for Willie and Lois Rast, prepared by Lloyd S. Moore, Jr., RLS, dated December 21, 1970, and recorded in the office of the RMC for Orangeburg County in Plat Book 32 at page 72, said tract being irregular in shape and bounded and measuring as follows: On the Northwest by lands now or formerly of Hazzard Irick and of Roosevelt Mathis, measuring thereon two thousand sixteen and forty-nine hundredths (2,016.49) feet; on the Northeast by lands now or formerly of Shelly Moss, measuring thereon one thousand four hundred eighteen and thirty-three hundredths (1,418.33) feet; on the Southeast by property of now or formerly of Kennedy, measuring thereon two hundred thirty-nine and sixty-nine hundredths (239.69) feet and by lands now or formerly of Moss, measuring thereon two hundred fifty-six and seventy-three hundredths (256.73) feet; on the East by property now or formerly of Moss and of Kennedy, measuring thereon a total distance of one thousand seven hundred ninety-nine and eighty-hundredths (1,799.80) feet; on the Southeast by property now or formerly of Kennedy, measuring thereon two hundred seventy-four and eighty-five hundredths (274.85) feet; on the South by lands of now or formerly of Kennedy, measuring thereon six hundred ninety-six and thirty-hundredths (696.30) feet; and on the Southwest by lands now or formerly of Kennedy, measuring thereon two thousand two hundred twenty-four and thirty-hundredths (2,224.30) feet; all measurements being more or less.

Being the same property conveyed to Willie and Lois C. Rast by deed of George L. Reed, sheriff Orangeburg County, by deed dated February 28, 1957, and recorded in the Office of the RMC for Orangeburg County of February 28, 1957, in Deed Book 208 at page 296; and by deed of David Bookhart to Willie M. Rast, dated August 5, 1964, recorded in the aforesaid office on August 5, 1964, in Deed Book 265 at page 389; and by deed of Hattie Mae F. Rast and Julie Mae R. Buck to Willie McLauren Rast, dated June 13, 1964, recorded in the aforesaid office in Deed Book 264 at page 258.

ALSO: All of our right, title and interest in an easement or right-of-way for ingress and egress over, along and through a 20-foot access road from the property hereinabove described to U. S. Highway No. 178.

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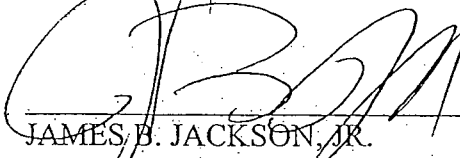
6. Since the purchase of the property by the Defendant in 1989, the Defendant has continuously used a road that crosses over the property of the Plaintiff from Highway 178 to the Defendant's property. The Defendant, his family and others have been using this road in a manner that is open, hostile, continuous, notorious and uninterrupted since his purchase of the property. The Defendant is further informed and believes that this road was also used by his predecessors in title for a period of time in excess of twenty years in the same manner. The road is twenty (20) feet in width and is shown on a plat prepared for the Plaintiff.

7. As a result, the Defendant is informed and believes that he is entitled to a determination by this Court pursuant to the South Carolina Uniform Declaratory Judgments Act Section 15-53-10, Code of Laws of South Carolina, 1976, as amended, that he has obtained a prescriptive easement over the road in question.

WHEREFORE, the Defendant prays that this Honorable Court will inquire into the matters set forth herein and issue its Order granting the Defendant a prescriptive easement over the property of the Plaintiff to use the roadway in question, which is twenty feet in width, to have rights of ingress and egress from Highway 178 to the Defendant's property; dismissing the Complaint of the Plaintiff; and granting such other and further relief as the Court deems just and proper.

Date: July 2, 2008
Santee, SC

NESTER & JACKSON



JAMES B. JACKSON, JR.

PO Drawer 349

Santee, SC 29142

(803) 854-4484

Attorney for the Defendant

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FIRST JUDICIAL CIRCUIT

THELEASE KELLEY,

PLAINTIFF(S),

V.

LEE DEWAYNE SNYDER,

DEFENDANT..

C/A NO.: 2008-CP-38-900

REPLY

2008 JUL 17 P 4:15
FILED FOR RECORD
LISA W. MIZEL
CLERK OF COURT
ORANGEBURG, SC

NOW COMES the Plaintiff above-named and files this his
Reply to Defendant's Counterclaim.

1. Plaintiff would deny each and every allegation
contained in the Defendant's Counterclaim, which is not
specifically admitted, denied or controverted herein, and would
demand strict proof thereof.

2. Plaintiff denies paragraphs 4, 5, 6 and 7 of
Defendant's Counterclaim.

WHEREFORE, the Plaintiff prays for judgment against the
Defendant:

1. For a preliminary injunction and a permanent injunction
enjoining Defendant, and each of his agents, servants and
employees, and all other persons acting under, in concert with
or for them, from interfering with or obstructing the use of
Plaintiff's land, Parcel 1;

2. For compensatory damages according to proof;

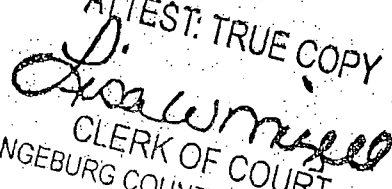
3. For costs of suit; and

4. For such other and further relief as the Court may deem
just and proper.

LAW OFFICE OF GLENN WALTERS


Glenn Walters, Esquire
R. Benz Kirby, Esquire
Attorneys for Plaintiff
P. O. Box 1346
Orangeburg, SC 29116
803 531-8844

Orangeburg, South Carolina
July 15, 2008

ATTEST: TRUE COPY

CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

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STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

THELEASE KELLEY,)

C/A NO.: 2008-DR-38-900

PLAINTIFF(S),)

V.)

**NOTICE OF MOTION &
MOTION TO ALTER & AMEND JUDGMENT**

LEE DEWAYNE SNYDER,)

DEFENDANT.)

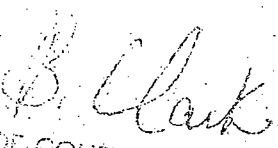
TO: THE DEFENDANT(S) ABOVE NAMED AND THEIR ATTORNEY:

The Plaintiff, Thelease Kelly, by and through his undersigned attorney
moves the Court pursuant to Rule 59 of the South Carolina Rules of Civil
Procedure to reconsider the Court's decision for the following reasons:

1. An Order was issued by the Honorable O. Davie Burgdorf, Orangeburg
County Master in Equity Court Judge on May 19, 2009 and filed with
the Orangeburg Clerk of Court on May 27, 2009;
2. Said Order was received from the Orangeburg County Clerk of Court
on June 18, 2009;
3. The Plaintiff is informed and believes that the greater weight of the
evidence is contrary to the Courts decision along with the applicable
case law and as a result the Order is subject to reconsideration.


Glenn Walters, Esquire
348 St. Paul Street
Post Office Box 1346
Orangeburg, SC 29116
(803) 531-8844
(803) 531-3628 (facsimile)

Orangeburg, South Carolina
June 29, 2009


CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

2009063017

1 THE COURT: You may proceed. Call your first
2 witness.

3 MR. WALTERS: May it please the court. At this
4 time, Your Honor, we will call Mr. Thelease Kelley.
5 Thereupon,

6 THELEASE KELLEY,
7 being first duly sworn to tell the truth, the whole truth
8 and nothing but the truth, as hereinafter certified,
9 testified as follows:

10 EXAMINATION

11 BY MR. WALTERS:

12 Q. Mr. Kelley, would you state your full name for
13 the record please.

14 A. Thelease Kelley.

15 Q. Mr. Kelley, do you own property in Orangeburg
16 County?

17 A. Yes.

18 Q. I ask the court to take judicial notice of
19 Exhibit A that's attached to the summons and complaint. I
20 believe it describes the property that is owned by
21 Mr. Kelley. Mr. Kelley, how many acres is that land?

22 A. Twenty-eight acres.

23 Q. When did you purchase that land?

24 A. Right now it's 27, because I sold one acre.

25 Q. The property that we are referring to in this

1 particular case, who did you buy it from?

2 A. Bennie Kelley, my brother.

3 MR. WALTERS: I would ask that the court take
4 judicial notice of Book 439 Page 1077.

5 Q. Mr. Kelley, when you purchased this property it's
6 adjacent to the Defendant in this particular case, Mr. Lee
7 DeWayne Snyder, is that correct?

8 A. Yes.

9 Q. When you originally approached my office, the
10 summons and complaint was filed in June 2008. You had come
11 to me and you had certain complaints with regard to the
12 behavior of Mr. Snyder and his relationship with you
13 specifically with regards to the land?

14 A. Right.

15 Q. Would you please tell the court what problems you
16 had?

17 A. Well, first he put a gate right at 178 on my
18 property. So I asked him to move the gate. After he moved
19 the gate from 178, he put it back about halfway on my
20 property so I asked him why did he leave it there instead
21 of putting it to the end of the, you know, at the line. So
22 he told me that he had what you call an easement and he
23 have a right to do what he want with my property.

24 Q. At any time have you given him an easement?

25 A. I haven't give him nothing.

1 Q. As far as in your relationship, he stated he
2 believed he had an easement and you stated you don't have
3 an easement, is that right?

4 A. Yes.

5 Q. At any time did you ever make any conveyance to
6 Mr. Snyder?

7 A. No time at all.

8 Q. Did you ever give Mr. Snyder permission to use
9 your land?

10 A. No.

11 Q. In the summons and complaint we allege in
12 Paragraph 5 that the Defendant and his agents have entered
13 upon Plaintiff's land and have used and occupied a portion
14 of the land creating a private roadway as a passage for
15 trucks and other vehicles. When did that start, sir?

16 A. It been, been happening.

17 Q. When did you tell him that they couldn't do this?

18 A. I had my cousin that cut the property, that was
19 about two years ago, they want to use the road to go back
20 to cut the property. Mr. Snyder said no you all can't use
21 this road. Now that was one time. I had another guy last
22 year who farm the land and he wouldn't let him use the road
23 to go through the property and before then, years ago, back
24 a few years back, a friend of mine was farming land but
25 he's dead now. Mr. Snyder wouldn't let him go use the road

1 to go back. Everybody have to go through, you know, off
2 the highway, go through the lady who bought my acre, they
3 have to use her property to go back to mine.

4 Q. Specifically tell this court the problem that you
5 have with Mr. Snyder. You say he denied someone access to
6 this road. I want to make sure the judge has some type of
7 pictorial of what we are talking about. Your land is
8 adjacent to Mr. Snyder. Let's go back through your
9 testimony. You said he denied someone use of the road.
10 What were they going to use the road for?

11 A. The first, first of all the people that I had
12 farming my land, they had to go back, use the road to go
13 back to get to the back of my property.

14 Q. I want to show you a document here. I'm going to
15 show it to Attorney Jackson. I believe that's the acreage
16 there. I'll have it marked as Plaintiff's Exhibit 1 and
17 let's have this plat marked as Plaintiff's Exhibit Number
18 2.

19 (WHEREUPON, Plaintiff's Exhibit
20 Nos. 1 AND 2 were marked for
21 identification only.)

22 Q. Let's look at Plaintiff's Exhibit Number 2. Is
23 that your 24 acres you are referring to? Does that look
24 familiar?

25 A. I have -- as far as I know. I don't know too

1 much about a plat like this.

2 Q. It's similar to the document you brought to my
3 office, is that correct?

4 A. Yes.

5 Q. On that document could you show me where someone
6 is making use of your land. Perhaps what will help you is
7 a picture. See this picture?

8 (WHEREUPON, Plaintiff's Exhibit
9 No. 3 was marked for
10 identification only.)

11 Q. This is Plaintiff's Exhibit 3. Can you identify
12 that document?

13 A. Yes. This is when, when I had it appraised.

14 Q. Is that the road that we are referring to?

15 A. Yes, this is the road.

16 Q. Could you show me where that road runs, I'll go
17 through the plat with you and explain it to you, make sure
18 you understand.

19 A. This is 178. You can't see the highway, but this
20 is 178 right here.

21 Q. Would you look at the plat then and show me where
22 178 is. I'll give you some frame of reference. That's the
23 roadway. That's 178 right there.

24 A. Yes.

25 Q. If I was standing at 178, where does the road go?

1 A. I would say this is the road here.

2 Q. Right. Your Honor, for the court's edification,
3 we're referring to 178 which runs across this area here,
4 right there, and, then of course, he's referring to the
5 open roadway that runs across here. Sort of T-bones right
6 into 178. Is that correct?

7 A. You can see it right here. Here is the gate
8 right here. He moved it from 178 and put right there
9 halfway of my property.

10 Q. Let me make sure the court is aware. 178 runs
11 here. The area he's referring to is here. All the way
12 back here. And, of course, the first gate he says was
13 placed there and then it was moved back.

14 A. You also see he have a private property sign on
15 this light post.

16 Q. This particular road that you are referring to,
17 you have a picture of it there, that road was being used by
18 whom, sir?

19 A. By Mr. Snyder.

20 Q. Did you ever give Mr. Snyder permission to use
21 the road?

22 A. No.

23 Q. You said a couple years ago you had a problem
24 with regards to this issue?

25 A. Yes.

1 Q. When we talked about this, we talked about the
2 counterclaim that was filed in this particular case and it
3 was alleged that this particular road was being used for
4 more than ten years. You told me you didn't agree with
5 that. Why didn't you agree with that?

6 A. I didn't agree, because he didn't ask me about
7 cutting this road or using it going through my property.

8 Q. Is it your testimony that it hasn't been ten
9 years?

10 A. At least ten years or more.

11 Q. That you've had an ongoing dispute?

12 A. Yes.

13 Q. This road, you stated that he wouldn't allow
14 certain people to use. Who are the people he allowed to
15 use it?

16 A. I don't know who the people he allowed to use,
17 but I know that my cousin wanted to cut timber and a guy he
18 was using it for to farm my land, Lee McDaniel years ago,
19 he's dead now, but I have a guy now farming it and he told
20 me Mr. Snyder wouldn't let him use the road.

21 MR. JACKSON: I object to what he told him.

22 Q. You asked this court for a restraining order to
23 prevent him from using the road on your property?

24 A. Yes.

25 Q. Is there anything else you're requesting from

1 Mr. Snyder? You just want him to leave you alone?

2 A. I want him off my property.

3 Q. Other than that, is that it?

4 A. That's it. As long as he get off of my property.

5 MR. WALTERS: Your Honor, we have no further
6 questions.

7 EXAMINATION

8 BY MR. JACKSON:

9 Q. Mr. Kelley, Plaintiff's Exhibit Number 1, the
10 deed, you said you bought this property from your brother
11 Bennie Kelley?

12 A. Right.

13 Q. I'm looking at the deed and it was recorded back
14 in November 29, 1977. Does that sound right?

15 A. Sounds right.

16 Q. You have owned this property since 1977, is that
17 correct?

18 A. Yes.

19 Q. You continue to own it today with the exception
20 that you sold a 1-acre tract?

21 A. Right.

22 Q. This plat shows right there on Bowman Road is
23 where the one acre is that you sold, is that correct?

24 A. Right in the middle of 178.

25 Q. This plat you had prepared in 2005, is that

1 correct?

2 A. Yes.

3 Q. It shows the road in question that we are talking
4 about today, is that correct?

5 A. (Shakes head yes.)

6 Q. Has that road been there since 1977 when you
7 bought the property?

8 A. It was a dirt road like a little wagon road. My
9 brother, when he was going back to farm the land, that's --
10 there's no road like Mr. Snyder have or nothing.
11 Mr. Snyder cut the road through it.

12 Q. But there's always been --

13 A. There never was a road -- not a road. Just a
14 wagon road I would say.

15 Q. People used it, is that right?

16 A. My brother. Nobody --

17 Q. And other people used it?

18 A. No, no other people used it.

19 Q. What about the people that owned Mr. Snyder's
20 property before he owned it?

21 A. They didn't come through there. I don't know
22 nothing about that.

23 Q. You don't think those people used that road?

24 A. Nobody used -- as far I know about that road, it
25 was just a little wagon road to go back to the back of my

1 property which my brother had owned it and he was, he was
2 using the road to go back to the back of the property.
3 First it was a wagon road and then he bought a little
4 tractor. That's all it was, a tractor road.

5 Q. He's improved it, is that correct?

6 A. No, it was no improvement. Mr. Snyder is the one
7 who improved it.

8 Q. Mr. Snyder improved the road?

9 A. Right.

10 Q. Do you know when Mr. Snyder bought the property
11 and started using the road?

12 A. I don't know. I didn't keep...

13 Q. If I told you that according to his deed he
14 bought the property in 1989, would that sound about right?

15 A. I don't know. I don't know when he bought it.

16 Q. He's been using it since he lived there, isn't
17 that right?

18 A. As far as I know.

19 Q. Have you ever told Mr. Snyder he couldn't use
20 that road?

21 A. I never told him he couldn't, but I asked him why
22 he was using it.

23 MR. WALTERS: Excuse me, can I see what you're
24 referring to when you said if I told you 1989. I didn't
25 mean to interrupt your cross.

1 Q. I think that's all I have of Mr. Kelley.

2 THE COURT: Anything further, Mr. Walters?

3 EXAMINATION

4 BY MR. WALTERS:

5 Q. Attorney Jackson referred to a deed that was in
6 the name of Lee DeWayne Snyder and Harry L. Snyder. Let's
7 make sure this is clear for the court. If you would refer
8 to your plat, the property that Attorney Jackson is
9 referring to is on the, get your bearing on there, I guess
10 that would be north. Essentially what we got is, I'll make
11 it easy, I'll say the lower left hand corner here where it
12 simply says Lee DeWayne Snyder and it refers to tax map
13 number 2540002016.

14 MR. JACKSON: That's the 2005 tax map. The
15 numbers have changed from when he bought it in 1989, but
16 it's the same piece of property.

17 MR. WALTERS: It's this property here?

18 MR. JACKSON: Correct.

19 MR. WALTERS: Of course the easement that we are
20 referring to in this particular case is an easement that
21 ran from here to here, is that correct.

22 MR. JACKSON: No. Runs off --

23 MR. WALTERS: 178 all the way across.

24 MR. JACKSON: But he owns down here.

25 Q. Then there was another purchase, the point I want

1 to make out, Lee DeWayne Snyder made another purchase, and
2 you can see this, from Thomas Kennedy, probably this piece
3 over here.

4 MR. WALTERS: Should be adjacent to --

5 MR. SNYDER: It's a two piece tract that runs up
6 through here. This is the road we're talking about and
7 this is the last piece I bought.

8 MR. JACKSON: It's further back.

9 MR. WALTERS: If one tract -- I ask the court to
10 take judicial notice of the deed. That purchase was made
11 in May 2005 with regards to 36.831 acreage. I'm going to
12 mark that and put it in evidence.

13 (WHEREUPON, Plaintiff's Exhibit

14 No. 4 was marked for

15 identification only.)

16 Q. Mr. Kelley, would you look at that document. How
17 many acres did Mr. Snyder purchase? I believe it was for
18 the year 2005, is that correct?

19 A. Pardon me.

20 Q. It says 2005 at the bottom. I believe it was
21 36.831 acres, is that right?

22 A. I don't know how many, how many acres his was.

23 MR. WALTERS: I ask the court to take judicial
24 notice of it, the purchase that was made in 2005.

25 Q. Mr. Kelley, your testimony was that you referred

1 to it as a wagon trail or wagon road. Did I use your words
2 correctly?

3 A. Wagon road.

4 Q. When you say wagon road, what are you referring
5 to? Someone will come along --

6 A. That's like, you know, years ago at least 50
7 years ago my brother bought this property from a man named
8 Mr. George Morris. So when we, you know, go back there in
9 the wagon with a mule, that's all the road was, just a
10 wagon.

11 Q. During the time you purchased this property, was
12 Mr. Snyder operating a wagon and a mule?

13 A. I didn't know nothing about Mr. Snyder had
14 property back there. I never knew nothing about him and
15 his property in the back of mine until this road, I seen
16 this road was cut through my property.

17 Q. Is there another way to get to Mr. Snyder's
18 property?

19 A. There's plenty ways he could've went there. He
20 could go around off the highway right down below my
21 property. It's a road that go in the back around called
22 Snail Branch Road I think that's the name of it.

23 Q. It's called Snail Branch Road?

24 A. Yes, I think that's the name of it. He could've
25 used, he could've went in from that way to his property.

1 Q. Snail Branch Road, was that used for wagons or
2 was it used for cars?

3 A. For cars.

4 Q. As far as the ability to ingress and egress on
5 the property, there weren't any horses or mules during the
6 time you purchased this property that were using the road
7 you are referring to?

8 A. No.

9 Q. And the other way that you could get to his
10 property was a road that was traveled by cars?

11 A. Nearby. He could've got more closer to his
12 property that way then coming through mine.

13 Q. Can you explain to me or do you have any idea as
14 to why he wanted to use, you said wagon trail, as opposed
15 to the road that was actually cut that could go to his
16 house?

17 MR. JACKSON: I object to the question. He's
18 speculating as to what Mr. Snyder's reasons are.

19 MR. WALTERS: I'm asking Mr. Kelley what do you
20 think the reason was.

21 MR. JACKSON: It's speculation, Your Honor, and I
22 object to the question.

23 A. I feel like --

24 THE COURT: What's your question?

25 MR. WALTERS: I'm asking him of his own personal

1 knowledge as to why he believes that the Snail Branch Road
2 is better than the wagon trail.

3 THE COURT: I'll let him answer.

4 A. Rather than using the road that goes through my
5 property, he could have cut a road, go around the dirt road
6 and cut him a road that been closer to go to his property
7 from around in the back of the property. Do you understand
8 what I'm saying?

9 Q. But there is an existing road that can get to his
10 house?

11 A. He could've made a road.

12 Q. Instead of making a road, what was the name of
13 the road that he could use to get to his house?

14 A. Snail Branch Road.

15 Q. How long have you known Snail Branch Road to be
16 there?

17 A. That was there before -- that's the only way we
18 could go back to my old house years ago that's how long...

19 Q. How many years ago when you'd go to your house?

20 A. Before I was born. That road was there for
21 years.

22 Q. It was used for vehicles?

23 A. That was the road that people used to go back to
24 the house.

25 MR. WALTERS: Your Honor, I have no further

1 questions.

2 EXAMINATION

3 BY MR. JACKSON:

4 Q. Mr. Kelley, Snail Branch Road doesn't go to
5 Mr. Snyder's house, does it? It goes to your old house?

6 A. It goes right -- when you come off the highway on
7 that road, it's a fork road. You can either go straight or
8 branch around. That's where Mr. Snyder, take you to
9 Mr. Snyder's house.

10 Q. It doesn't go directly to his house? He has to
11 cut --

12 A. No. My road don't go directly to his house.

13 Q. You would have to cut another road to get to his
14 house?

15 A. Right, just like he cut a road through my
16 property.

17 Q. That road has been there for years and years and
18 years to your property, hasn't it?

19 A. That's not a road. That was just a wagon road
20 that we were using to come off the highway to go to the
21 back of my property that Mr. Snyder cut the road through.

22 Q. He's been using it as long as he's been living
23 there, hasn't he?

24 A. I don't know how long he's been using it.

25 MR. JACKSON: That's all I have, Your Honor.

1 MR. WALTERS: Your Honor, we have no further
2 questions.

3 THE COURT: Next witness.

4 MR. WALTERS: Your Honor, I'm not going to call
5 the gentleman that's sitting outside. That's the
6 Plaintiff's case.

7 MR. JACKSON: We call Harry Wimberly.
8 Thereupon,

9 HARRY WIMBERLY,
10 being first duly sworn to tell the truth, the whole truth
11 and nothing but the truth, as hereinafter certified,
12 testified as follows:

13 EXAMINATION

14 BY MR. JACKSON:

15 Q. Mr. Wimberly, would you state your full name for
16 the record please.

17 A. Harry Wimberly.

18 Q. Where do you, Mr. Wimberly?

19 A. 2782 Cattle Creek Road, Branchville.

20 Q. How long have you lived in the general area?

21 A. Born and raised there.

22 Q. Do you know Mr. Snyder here, Mr. Lee Snyder and
23 Mr. Harry Snyder?

24 A. Yes.

25 Q. How long have you known them?

1 A. Probably 25 years, maybe 30.

2 Q. Are you familiar with where Mr. Lee Snyder lives
3 now?

4 A. Yes, I am.

5 Q. Are you familiar with how to get to his house?

6 A. Yes, I am.

7 Q. I'm going to show you a copy of a plat that's
8 been marked as Plaintiff's Exhibit 2 which is a plat of
9 some property of Mr. Thelease Kelley. Do you know
10 Mr. Kelley? This gentleman over here?

11 A. I don't believe I do. I know some Kelleys, but I
12 don't believe I know that one.

13 Q. Are you familiar with his property on that plat
14 which is right off Bowman Road Highway 178?

15 A. Yes, sir.

16 Q. Do you see where Mr. Snyder lives in the back end
17 of that property?

18 A. Right.

19 Q. Do you see a road shown on that plat?

20 A. Right. Yes.

21 Q. Are you familiar with that driveway or road that
22 goes back to Mr. Snyder's house?

23 A. Yes, I know where it is.

24 Q. How long has that road been there?

25 A. It's been a road back in that property as long as

1 I can remember back when Mr. Willie Rast owned it. I don't
2 know how many years ago that's been, but I know probably --
3 I can remember back as far as maybe late '60s, early '70s.

4 Q. Can remember back say 1970 that would be almost
5 40 years, is that correct?

6 A. Yes, sir. And back into '60s, way back when deer
7 hunting wasn't territorial, you had pretty much free range
8 and we deer hunted from where I lived on Cattle Creek
9 campground all the way down to where we either killed a
10 deer or could catch the dogs. So I'm familiar. I've deer
11 hunted back in the late '60s and early '70s all the way out
12 to the Charleston Highway.

13 Q. Have you ever used this particular road in
14 question?

15 A. I've gone back in there to hunt dogs.

16 Q. All the way back to the late '60s early '70s on
17 forward, is that correct?

18 A. Yeah. And then deer hunting changed up in the
19 last 20 years.

20 Q. Are you familiar that other people continued to
21 use that road?

22 A. As far as I know, yes, sir.

23 Q. You certainly know Mr. Snyder uses it to go back
24 to his property?

25 MR. WALTERS: Objection, Your Honor. He's

1 leading his witness.

2 Q. Do you know who else might use that road,
3 Mr. Wimberly?

4 A. Unless some of the landowners on the adjacent
5 side maybe go on the fields or something, I don't know. I
6 know Mr. Snyder used it and I've used it to go back to his
7 house.

8 Q. Thank you, Mr. Wimberly. Please answer any
9 questions Mr. Walters may have for you.

10 MR. WALTERS: I have no questions.

11 MR. JACKSON: We call Mr. Larry Rast.

12 Thereupon,

13 LARRY RAST,
14 being first duly sworn to tell the truth, the whole truth
15 and nothing but the truth, as hereinafter certified,
16 testified as follows:

17 EXAMINATION

18 BY MR. JACKSON:

19 Q. Mr. Rast, would you state your full name for the
20 record please?

21 A. Larry Alan Rast.

22 Q. Where do you live, Mr. Rast?

23 A. High Point, North Carolina.

24 Q. How long have you lived in that area, Mr. Rast?

25 A. Fifteen years.

1 Q. Where are you originally from?

2 A. Bowman.

3 Q. Born and raised in Bowman?

4 A. Born and raised in Bowman. Left Bowman in 1972.

5 Q. Are you familiar then with the property that's
6 now owned by Mr. Lee Snyder and Harry Snyder?

7 A. I am.

8 Q. How are you familiar with that property?

9 A. It was a property that my grandfather purchased
10 and my dad inherited and my dad sought my permission to
11 sell it to the Snyders whenever it was sold.

12 Q. Was your dad Willie McLauren Rast?

13 A. That's correct.

14 Q. Who is Loris C. Rast?

15 A. My mother.

16 Q. They sold it to the two Snyders, is that correct?

17 A. That's correct.

18 Q. Did you ever live on this property?

19 A. No.

20 Q. Did your parents ever live on this property?

21 A. No.

22 Q. But they owned it?

23 A. Yes.

24 Q. Did your grandparents live on it?

25 A. No.

1 Q. But your grandfather I think you said purchased
2 it?

3 A. Yes.

4 Q. Do you remember when he purchased it?

5 A. My grandfather died in 1952. So I do not know
6 when it was purchased.

7 Q. How would your grandparents and your parents get
8 to this property if you know?

9 A. There was an access road off of Highway 178.

10 Q. I'm going to show you a copy of a plat which is
11 in evidence marked as Plaintiff's Exhibit 2 and orient you
12 to Highway 178 which is up here. This is a plat of
13 Mr. Kelley's property and property owned by the Snyders
14 that I think your parents sold them is back here. Do you
15 see the access road you're talking about on there?

16 A. I do.

17 Q. Would you point that out?

18 A. Right here.

19 Q. It's that road right back there, is that correct?

20 A. Correct.

21 Q. How long has that road been there, Mr. Rast?

22 A. I can't say for certain. I can tell you that
23 when I was in high school, I was charged with farming that
24 property. We planted corn on it for a number of years and
25 then we planted soybeans on it. In the mid 1960s that road

1 needed to be opened wider in order to allow a combine to
2 cut the soybeans and I remember being there with my dad
3 with a chain saw and bush axe and I remember limbs were
4 being taken off because of the elevator on the combine and
5 the width of it.

6 Q. The road was widen then at that time, is that
7 correct?

8 A. It was widened and it was already in existence.
9 I have no idea how long the road had been there.

10 Q. When you were in high school farming this
11 property and using that road, about what year would that
12 have been?

13 A. I graduated high school in 1967. When I was in
14 eighth grade my dad turned over most of the farming to me.
15 So this would have been '63/64.

16 Q. You were an eighth grade farmer?

17 A. I was.

18 Q. Kind of young to be in charge of a farm
19 operation.

20 A. My dad worked public work.

21 Q. Did it continue to be farmed after that?

22 A. Daddy farmed it -- I had a younger brother so my
23 younger brother and my dad continued to farm it up until
24 sometime in the '70s. I'm not sure when they discontinued
25 farming.

1 Q. But they continued to own the property until they
2 sold it to the Snyders?

3 A. Correct.

4 Q. Let me ask you if you recognize this deed. You
5 may or may not. Have you ever seen the deed to the
6 Snyders?

7 A. No, I've never seen the deed. I do know that
8 when my dad got ready to sell it, he talked to me and asked
9 if I would ever come back to Bowman to farm it or if I
10 objected to him selling it and my brother and I had no
11 objection to his selling it.

12 Q. Back in the '60s when you were farming it, you
13 said the combine used this road to get back there?

14 A. Yes.

15 Q. What other kind of vehicles would use it?

16 A. The tractor and all the implements we pulled on
17 it plus our pick-up which carried in the fertilizers and
18 seeds, et cetera.

19 Q. Were other people using that road?

20 A. That I don't know.

21 Q. Were there people who lived back in that area
22 back there at that time?

23 A. I don't recall a dwelling that would have used
24 that road.

25 Q. Has that road ever been closed that you know of?

1 A. Not that I know of.

2 Q. When did you leave the Bowman area?

3 A. I left in July of 1972.

4 Q. Mr. Rast, please answer any questions Mr. Walters
5 may have for you.

6 EXAMINATION

7 BY MR. WALTERS:

8 Q. I just want to make sure I highlight some of the
9 points of your testimony. Number 1: You stopped farming
10 in 1970, is that correct?

11 A. Sometime during the '70s. I'm not sure of the
12 time. I left in '72 and as of that time we were still
13 farming. My brother is three years younger than me. They
14 would have continued farming until at least he graduated
15 high school. So sometime late '70s they would've still
16 been farming.

17 Q. Of course, you stated you don't know if other
18 people used the road?

19 A. No, I don't.

20 Q. As far as your testimony is concerned you stated
21 in the 1960s the road needed to be opened because you
22 remember your father and chain saw and combine had to come
23 through and you had to cut that road, is that correct?

24 A. We made it wider. The road was there. We just
25 made it -- enlarged.

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1 Q. The '60s you enlarged it, in the '70s you stopped
2 farming and it's now 2009, but since the late '70s you have
3 no idea if anyone else was using that road?

4 A. I have no knowledge.

5 Q. You can't testify that it's been continuous use
6 since the late '70s, is that correct?

7 A. I cannot testify to that.

8 MR. WALTERS: Your Honor, I have no further
9 questions.

10 MR. JACKSON: That's all I have for Mr. Rast. I
11 ask that he be excused.

12 MR. WALTERS: No objection, Your Honor.

13 MR. JACKSON: We call Curtis Spell.

14 Thereupon,

15 CURTIS SPELL,
16 being first duly sworn to tell the truth, the whole truth
17 and nothing but the truth, as hereinafter certified,
18 testified as follows:

19 EXAMINATION

20 BY MR. JACKSON:

21 Q. Mr. Spell, would you state your full name for the
22 record please.

23 A. Curtis Spell.

24 Q. Where do you live, Mr. Spell?

25 A. I live in Columbia.

1 Q. In Columbia?

2 A. Yes, sir.

3 Q. How long have you lived up there?

4 A. It was in 1953.

5 Q. You moved to Columbia in '53?

6 A. Yes, sir.

7 Q. Where did you live prior to that?

8 A. Bowman.

9 Q. Prior to moving to Columbia, you lived in Bowman?

10 A. Yeah.

11 Q. Your earlier life?

12 A. Yes, sir.

13 Q. Are you familiar then with the property of

14 Mr. Snyder, that Mr. Snyder owns?

15 A. Yes, sir.

16 Q. Are you familiar with the property Mr. Kelley
17 owns?

18 A. Yes, sir.

19 Q. I'm going to show you a copy of what's been
20 introduced into evidence as Plaintiff's Exhibit 2 and show
21 you the Bowman Road over there. Do you recognize this
22 property?

23 A. Yes, sir. The highway here and right down the
24 street there was Murray Road and the school where I went to
25 school at down there, couple of blocks. I say a couple of

1 blocks, about six blocks down on the left.

2 Q. That's on the Bowman Road?

3 A. Yes, sir. Yes, sir. I'm familiar with this road
4 going back...

5 Q. You're familiar with the road going back into the
6 Snyder's property?

7 A. Yes, sir.

8 Q. How long has that road been there?

9 A. I talked to my sister yesterday. I'm 78 years
10 old and she's 93 and she said --

11 MR. WALTERS: I object, Your Honor. I don't
12 think he can testify to what his sister said.

13 Q. You can't say --

14 A. Okay, I'm 78 years old and that road was there
15 when I was born.

16 Q. The road was there when you were born?

17 A. Yes, sir.

18 Q. You're 78 years old?

19 A. Yes, sir.

20 Q. During your 78 years has that road been used?

21 A. Yes, sir. People going -- it was a man living
22 back there, it was, I forgot the people name now. Anyway
23 when the people were living back there, there was a house
24 back there and they were living right there and we went to
25 school together with their children and they had to walk.

1 Q. You say you moved to Columbia in the '50s, is
2 that correct?

3 A. Yes, sir, '53.

4 Q. Since then do you continue to be familiar with
5 the property now that you are in Columbia?

6 A. Yes, sir. I come down, hunting season I be down
7 here every Saturday.

8 Q. You come down other times than that?

9 A. Every other weekend I was here.

10 Q. Do you have family in the Bowman area?

11 A. Yes, sir.

12 Q. Do you visit them often?

13 A. Yes, sir.

14 Q. Throughout this time period from the '50s while
15 you've been in Columbia, do you know whether or not that
16 road has been used?

17 A. It was used, only used by Mr. Snyder going into
18 the house. It was a road that goes all the way, but it's a
19 dead end road now, because they built a new road, they
20 built a couple new roads down there since 1950.

21 Q. This road that we are talking about here, is it
22 still open?

23 A. Yes, sir, this road right here is still open.

24 Q. Do people still use it?

25 A. Yes, sir.

1 Q. Have they used it throughout your lifetime?

2 A. Yes, sir.

3 Q. Thank you, sir. Please answer any questions

4 Mr. Walters may have.

5 EXAMINATION

6 BY MR. WALTERS:

7 Q. Mr. Spell, you stated you moved from Bowman in
8 1953, is that correct?

9 A. Yes, sir.

10 Q. How often do you come down a year?

11 A. I've been down here every other Saturday and
12 during the winter months I be down every Saturday.

13 Q. Mr. Spell, you stated you left Bowman in 1953, is
14 that correct?

15 A. That's right.

16 Q. You said you come back and you hunt, is that
17 right?

18 A. Right.

19 Q. How often do you hunt?

20 A. In the winter months I hunt deer. I hunt every
21 Saturday and sometimes on Wednesday.

22 Q. Those Saturdays that you came down, did you use
23 this road?

24 A. If we hunt that part over there, we use it.

25 Right.

1 Q. Where were you going?. Whose land were you
2 hunting on?

3 A. We rent land.

4 Q. Who were you renting land from?

5 A. Different -- the ones that live down there.

6 Q. Let's look at the map, the plat. Whose land were
7 you using, whose land were you using when you used that
8 road?

9 A. 178 coming off Bowman, we hunt each side of the
10 road all the way down, down to 95, each side of the road.

11 Q. Do you ever hunt Mr. Snyder's land?

12 A. Yes.

13 Q. How much do you pay Mr. Snyder to do that?

14 A. He's a member of the club.

15 Q. What club is he a member of?

16 A. Kelley Hunting Club.

17 Q. How many people are members of that club?

18 A. About 40.

19 Q. About 40 members?

20 A. Yes.

21 Q. How much does it cost to be a member of the club?

22 A. You pay according to what -- I own property down
23 there myself. We hunt my property.

24 Q. How many acres do you own?

25 A. About 100 acres down there my family and I own.

1 Q. To be a part of the club, do you have to own land
2 or do you pay dues?

3 A. No, you don't have to own land.

4 Q. Just pay dues?

5 A. Right.

6 Q. Do you hunt Mr. Snyder's land?

7 A. Yes.

8 Q. Mr. Snyder has some land, he has over a hundred
9 acres, wouldn't you agree?

10 A. I don't know how much he have.

11 Q. You and Mr. Snyder, how long have you been
12 members of the same hunting club?

13 A. About 10, 12, 15 years.

14 Q. He's allowed you to hunt his land, is that
15 correct?

16 A. Yes, and allow them to hunt my land.

17 Q. You have a good relationship because you allow
18 this exchange --

19 A. We're members. We're in club together. Right.

20 Q. Would that affect your testimony today knowing
21 that you are club members and you share land?

22 A. I'm here. I'm not in here for hunting. I'm in
23 here for regular purpose about this road. That's what it's
24 about, isn't it, about this road. Let's talk about the
25 road.

1 Q. I'm allowed to explore something called bias.

2 A. Okay. Carry on.

3 Q. You're allowed to hunt his land and he allows
4 you -- you allow him to hunt your land, is that correct?

5 A. Yes.

6 Q. How long have you all had that agreement?

7 A. Ever since we met.

8 Q. How many years ago was that?

9 A. About 12 to 15 years.

10 Q. Friendship of 12 to 15 years has evidently been
11 very, very nice?

12 A. Yes. I hope it always will be like that.

13 Q. You wouldn't say anything today to hurt

14 Mr. Snyder, would you?

15 A. No. No one.

16 MR. WALTERS: Your Honor, I have no further
17 questions.

18 MR. JACKSON: No further questions.

19 Thereupon,

20 MARION KENNEDY,

21 being first duly sworn to tell the truth, the whole truth
22 and nothing but the truth, as hereinafter certified,
23 testified as follows:

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EXAMINATION

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BY MR. JACKSON:

Q. Mr. Kennedy, state your full name for the record?

A. Marion Kennedy.

Q. Where do you live, Mr. Kennedy?

A. Bowman, right below Bowman.

Q. What is your address?

A. 8776 Charleston Highway.

Q. How long have you lived in the Bowman area,
Mr. Kennedy.

A. All my life.

Q. How old are you, sir?

A. Sixty-five.

Q. Are you familiar with the property of the two
Mr. Snyders here?

A. Yes, I am.

Q. Do you know Mr. Thelease Kelley over here?

A. Yes, I know him.

Q. Are you familiar with his property?

A. Not all of it. I know where.

Q. You know it's the property in front of the
Snyders?

A. Hm-hmm.

Q. I'm going to show you a plat that's been
introduced into evidence. It's Plaintiff's Exhibit 2 and

1 I'm going to show you the Bowman Road over here and this is
2 the plat of Mr. Kelley's property with Mr. Snyder's
3 property being back here. Are you familiar with that?

4 A. Yes.

5 Q. Are you familiar with how people get from the
6 Bowman Road back to Mr. Snyder's?

7 A. Yes, that road.

8 Q. Do you see the road on here?

9 A. Yes.

10 Q. That's the road we're talking about. Are you
11 familiar with it?

12 A. Yes, I am.

13 Q. Tell the judge if you would, Mr. Kennedy, how
14 long has that road been there?

15 A. All my life. Ever since I can remember.

16 Q. That's been --

17 A. I'm 65. So I know ever since I can remember.

18 Q. Has that road always been open?

19 A. Yes, it was.

20 Q. Do people use that road?

21 MR. WALTERS: I'm going to object, Your Honor,
22 he's leading the witness.

23 MR. JACKSON: I'm asking if people have used the
24 road.

25 MR. WALTERS: It's a yes or no response.

1 THE COURT: Because the response requires a yes
2 or no does not make it a leading question.

3 MR. JACKSON: Has to suggest an answer.

4 THE COURT: Yes.

5 Q. Do people use that road, Mr. Kennedy?

6 A. Yes, we always did when we go back through there.

7 Q. You've used that road?

8 A. Yes. Yes. Years ago.

9 Q. What about recently, do you continue to use the
10 road or not?

11 A. Not recently, you know, because I had no reason.

12 Q. Have you ever observed others using the road
13 recently?

14 A. Oh, yeah.

15 Q. Has that road, again to your knowledge, ever been
16 closed down by anybody?

17 A. Not to my knowledge, not that I know of.

18 Q. Do you know whether or not anybody lives back
19 there now?

20 A. Yes, the Snyders.

21 Q. The Snyders live back there?

22 A. Yes.

23 Q. Do you know whether or not they use the road?

24 A. Yes, they does.

25 Q. Do you know whether or not other people might use

1 that road?

2 A. Yes, down in the community.

3 Q. Again you have lived in that area all your life?

4 A. All my life, yes.

5 Q. Thank you, sir. Please answer any questions
6 Mr. Walters may have.

7 MR. WALTERS: No questions.

8 MR. JACKSON: Your Honor, I call Lee Snyder to
9 the stand.

10 Thereupon,

11 LEE SNYDER,

12 being first duly sworn to tell the truth, the whole truth
13 and nothing but the truth, as hereinafter certified,
14 testified as follows:

15 EXAMINATION

16 BY MR. JACKSON:

17 Q. Mr. Snyder, state your full name for the record.

18 A. Lee DeWayne Snyder.

19 Q. Mr. Snyder, where do you live?

20 A. 8714 Charleston Highway, Bowman.

21 Q. How long have you lived there, Mr. Snyder?

22 A. Since 1991 or '92. '92 I believe it was.

23 Q. Let me show you a copy of a deed where you
24 purchased this property and ask you if in fact that is the
25 deed.

1 A. That is the deed.

2 Q. Who bought this property?

3 A. Me and my father.

4 Q. Is this your father over here?

5 A. That's correct.

6 Q. His name is Harry Snyder?

7 A. Harry Snyder.

8 Q. What year did you all buy the property according
9 to the deed?

10 A. We bought it in '89.

11 MR. JACKSON: Your Honor, we offer this deed into
12 evidence.

13 THE COURT: Any objection?

14 MR. WALTERS: No objection, Your Honor.

15 (WHEREUPON, Defendant's Exhibit
16 No. 1 was marked for
17 identification only.)

18 Q. I believe this lawsuit might be just against you,
19 but actually your dad owns this property too, is that
20 correct?

21 A. That's correct.

22 Q. Both of you continue to own it?

23 A. Hm-hmm.

24 Q. Did you move in when you bought the property?

25 A. No, I didn't.

1 Q. When did you move onto the property?

2 A. '91 or '92, I can't remember what the year was.

3 Q. You bought it in '89?

4 A. Hm-hmm.

5 Q. Moved in a couple-three years later, is that
6 correct?

7 A. Hm-hmm.

8 Q. I'm now going to ask you to look at Plaintiff's
9 Exhibit Number 2, a copy of that plat. Are you familiar
10 with that plat?

11 A. Yes, sir.

12 Q. Whose property does that show?

13 A. Shows Mr. Thelease Kelley's and my piece is in
14 back.

15 Q. Does it show the road as to how you get to your
16 property?

17 A. Yes, sir.

18 Q. That road goes from the Bowman Highway back to
19 your property?

20 A. That's correct.

21 Q. How long have you been using that road or do you
22 use that road?

23 A. Since '78 or '79 when I started coming up there.

24 Q. Before you owned it you mean?

25 A. That's correct.

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1 Q. Why were you using it back then?

2 A. Because we rented land from Mr. Willie Rast and
3 Mr. Ernest Moss.

4 Q. Why did you rent this land?

5 A. For deer hunting rights.

6 Q. You said what year was that?

7 A. That was in '79, '78. It was back between
8 them -- it was mid season when we started hunting up there.

9 Q. It was late '78/early '79, is that what you're
10 saying?

11 A. Right.

12 Q. Was the property being farmed at that time?

13 A. Yes, it was.

14 Q. Who was farming it?

15 A. I could not find that out.

16 Q. Was it Mr. Rast or his wife?

17 A. It had to be them, because as far as I know that
18 was the only people that farmed Mr. Willie Rast's property.

19 Q. But you were deer hunting on it?

20 A. I was deer hunting on it, yes, I was.

21 Q. Who also was deer hunting on it?

22 A. Probably -- well, we had 30 members back then.

23 Q. Thirty member of what?

24 A. Of the hunting club.

25 Q. Is that the hunting club Mr. Spell was talking

1 about?

2 A. Kelley Club, that's correct.

3 Q. Kelley Hunting Club. How long have you been a
4 member of that club?

5 A. Since '78/79.

6 Q. Mr. Spell said he joined 12 or 15 years ago.
7 Does that sound about right?

8 A. Yes.

9 Q. Then later you purchased this property, you and
10 your dad?

11 A. That's correct.

12 Q. While you were hunting how did you get back to
13 this piece of property?

14 A. We used that same road right there.

15 Q. Since you purchased it, how do you get back to
16 this piece of property?

17 A. It's the same road I've used.

18 Q. Do you ever use another way to get back to this
19 property?

20 A. Now I do. I come in from the back side off the
21 fields that I bought.

22 Q. You do have another way to get there?

23 A. That's correct.

24 Q. That's over some additional property you bought?

25 A. That's correct.

1 Q. Is that the property that I think --

2 A. That's correct.

3 Q. In relation to the plat, Plaintiff's Exhibit 2,
4 where is that property?

5 A. This doesn't show it. You have to use this one
6 here. This piece right here was split up in two pieces.
7 It should run down through here.

8 Q. Again Bowman Road is?

9 A. Bowman Road right there.

10 Q. Where is the road we are talking about?

11 A. This one right here. All the way down here.

12 Q. You now own all the way over to another road --

13 A. No, it's not a road. This is the road that it
14 joins up to now.

15 Q. Is there a primary way you get back to your
16 property?

17 A. From the 178 side.

18 Q. The road we're talking about?

19 A. That's correct.

20 Q. You continue to use that road?

21 A. Yes, sir.

22 Q. Have you put a gate on it?

23 A. Yes, I have.

24 Q. Mr. Kelley talked about putting a gate up near
25 178. Did you do that?

1 A. Yes, I did.

2 Q. Do you remember about when you did that?

3 A. That's when I first got up there.

4 Q. Before you built your house or after?

5 A. Yes, sir, I had dog pens up there and I put a
6 gate up there to keep anybody from going in there and
7 stealing the dogs.

8 Q. Did Mr. Kelley speak to you about that?

9 A. He didn't in general. I think it might have been
10 his nephew or something like that.

11 Q. Somebody spoke to you?

12 A. Well, somebody sent a message to me that I needed
13 to move the gate.

14 Q. What did you do as a result?

15 A. I took that gate down. I went back. Probably --
16 about 140 feet from my property right now.

17 Q. I'm going to show you again Plaintiff's Exhibit
18 Number 2, the plat. Why don't you step up here so
19 everybody can kind of see. About where on this plat would
20 you say that gate is now?

21 A. It's right before the gas line.

22 Q. There's a gas easement across there?

23 A. That's correct.

24 Q. It's right before that?

25 A. That's correct.

1 Q. When you moved the gate from 178, that's where
2 you moved it to?

3 A. That's correct.

4 Q. Has that gate been there continuously?

5 A. Yes, it has.

6 Q. Is it kept locked or is it just a gate?

7 A. 95 percent of the time it stays open. If we
8 leave on a trip or something, I lock the gate.

9 Q. Again since you bought this property, there's
10 been a gate on it?

11 A. That's correct.

12 Q. Pretty much, is that correct?

13 A. Yes, sir.

14 Q. That has been since 1989?

15 A. Yes.

16 Q. Mr. Kelley talked about somebody using the road
17 for cutting timber. What can you tell the court about
18 that?

19 A. The first logging crew he had in there, I come
20 home from second shift one night, I had to move limbs, tore
21 up the road, I had ruts 18 inches deep. I had to fix the
22 road after they got done. Pulled all the debris out to the
23 road so I can get back to the house.

24 Q. Why were there so many ruts in it?

25 A. They used the road to pull the trees down.

1 Q. Who maintains this road?

2 A. I do.

3 Q. Does anybody help you with that?

4 A. No.

5 Q. How long have you done that?

6 A. Since I bought the property.

7 Q. The first crew, you talked about what the first
8 crew did. Was there another crew?

9 A. Another crew come in.

10 Q. Was that very shortly after or much later?

11 A. That was probably three, three years ago and I
12 sent word to the loggers if you mess it up, let's get it
13 fixed, because I have to use that road and they said they
14 weren't going to fix the road so they quit using the road.
15 That was a done deal.

16 Q. Did you refuse to let them use the road?

17 A. I preferred them not to. That's what my words
18 was. I preferred them not to use it if they were going to
19 tear it. If they fixed it, fine, use it. If they didn't
20 want to fix it, please don't use it.

21 Q. So what did they do?

22 A. They didn't use it.

23 Q. Have there been other folks to farm Mr. Kelley's
24 property?

25 A. I rented it. Farmed it for about three years.

1 Q. You rented it from who?

2 A. Mr. Kelley.

3 Q. When was that?

4 A. Maybe about six years ago. Maybe seven.

5 Q. Did anybody else ever farm that property?

6 A. I want say Mr. Brown. What is his first name?

7 Q. You can't ask your dad. If you don't remember
8 that's okay.

9 A. We called him, I think it's Olin Brown used to
10 farm it.

11 Q. Did you ever refuse to let him use the road?

12 A. No. Of course, he come off the highway. There
13 was no access to the field from the road until I started
14 farming it, because I had to get another farmer, he had
15 bigger planters and all. I pushed him to swipe through
16 there so we could get in there with the tractor instead of
17 coming off the highway side.

18 Q. You're saying you couldn't get to the field from
19 the road in question?

20 A. That's correct.

21 Q. Why was that?

22 A. Because it was trees, I mean it's 30 or 40 feet
23 deep.

24 Q. You open up a way to get to the field?

25 A. Yes.

1 Q. That's used for farming?

2 A. That's correct.

3 Q. Other than these loggers, have you ever refused
4 for anybody to use the road?

5 A. I had a farmer in there about two years ago to
6 come in there and he asked if he could use the road, I said
7 I prefer him not to because all they're going to do is come
8 in and tear it up and leave and I got the problem.

9 Q. Did he use the road?

10 A. No, he did not.

11 Q. Was he able to farm the property?

12 A. Yes, he was.

13 Q. Let me ask you to look at your deed again.
14 According to the deed there's 103.983 acres, is that
15 correct?

16 A. That's correct.

17 Q. You had an old plat on it?

18 A. That's correct.

19 Q. Let's look down to the bottom where it says also.
20 Would you read that to the judge what it says on your deed.

21 A. It says, also all rights, title and interest in
22 an easement or right of way for ingress and egress over,
23 among and through 20-foot access road from highway property
24 here above described into US Highway 178.

25 Q. So your deed from Mr. and Mrs. Rast who were the

1 parents of the Mr. Rast that testified earlier?

2 A. That's correct.

3 Q. Purportedly gave you an easement?

4 A. That's correct.

5 Q. Based on that, what did you think?

6 A. I had a road there to use.

7 Q. Have you learned since that -- obviously you
8 found out there was a problem when Mr. Kelley brought suit?

9 A. That's correct.

10 Q. Did you know there was a problem prior to that?

11 A. As far as a suit?

12 Q. As far as anybody telling you you couldn't use
13 this road?

14 A. He came down and wanted me to.

15 Q. Who is he?

16 A. Mr. Kelley. Wanted me to come move the gate. I
17 offered to give him a key to the gate. I said I prefer to
18 leave the gate there so we don't have people coming in and
19 out as far as coming back there to my place. I got a wife
20 and two small boys and valuable things in there. That's
21 why I left the gate there.

22 Q. Did you give him a key?

23 A. He would not take the key.

24 Q. You offered him a key?

25 A. Yes, I did.

1 Q. But he wanted you to move the gate?

2 A. That's correct.

3 Q. Did he tell you why?

4 A. He just told me he wanted it off his property.

5 Q. What happened after that?

6 A. That was it and then I had to contact you.

7 Q. That's when the suit was brought, is that
8 correct?

9 A. Hm-hmm.

10 Q. Has Mr. Kelley ever told you that you couldn't
11 use this road?

12 A. Not to my face, no.

13 Q. Has anybody, up until the suit, has anybody ever
14 prevented you in any way from using this road?

15 A. No, they haven't.

16 Q. Have you ever hidden the fact that you were using
17 this road?

18 A. No, I haven't.

19 Q. What kind of vehicles do you drive up and down
20 this road?

21 A. Pick-up truck. If I come home from work late, if
22 I'm in a tractor-trailer, I bring the tractor-trailer down
23 it.

24 Q. Back in '78 when you started hunting on it, what
25 kind of vehicles were you using on it?

1 A. Farming equipment, trucks. Like I say,
2 Mr. Willie I can't speak for him, that's.

3 Q. Don't speak for anybody else. As far as you know
4 was this road able to be used by those kinds of vehicles
5 back then?

6 A. Yes.

7 Q. Again you've maintained the road?

8 A. Hm-hmm.

9 Q. Have you improved it any at all?

10 A. Yes, I have.

11 Q. What all have you done?

12 A. Put rock on it. Fixed the holes.

13 Q. I'm going to show you an aerial and somewhere in
14 my pile I have a better of this copy, I don't know what
15 I've done with it. Is that an aerial that you provided me?

16 A. Yes, sir.

17 Q. This is from 2005 I believe?

18 A. I don't remember the date on this aerial.

19 Q. Can you see the road on this aerial?

20 A. Right here.

21 Q. Can you step up here and show it to the judge and
22 Mr. Walters?

23 A. 178 runs here, that's the road that runs down
24 through there. I live right there.

25 MR. JACKSON: Your Honor, I offer this aerial

1 into evidence.

2 MR. WALTERS: No objection.

3 (WHEREUPON, Defendant's Exhibit
4 No. 2 was marked for
5 identification only.)

6 Q. Mr. Snyder, please answer any questions
7 Mr. Walters may have.

8 MR. WALTERS: Your Honor, we have no questions.
9 I simply want to recall one witness. That's not the
10 Defendant's case, I'm sorry.

11 MR. JACKSON: Let me call Harry Snyder.

12 Thereupon,

13 HARRY SNYDER,
14 being first duly sworn to tell the truth, the whole truth
15 and nothing but the truth, as hereinafter certified,
16 testified as follows:

17 EXAMINATION

18 BY MR. JACKSON:

19 Q. Tell us your name, Mr. Snyder?

20 A. Harry Lee Snyder.

21 Q. This is your son right here, is that right?

22 A. Yes, sir.

23 Q. You and he together bought this property in 1989?

24 A. Yes, sir.

25 Q. How long have you been familiar with the

1 property?

2 A. In the late '70s. The same purpose for deer
3 hunting and stuff like that.

4 Q. Are you a member of this hunting club too?

5 A. Yes, sir. I'm an official of the hunting club.

6 Q. You're one of the big shots?

7 A. Yes, sir.

8 Q. You've been hunting on this property since '78?

9 A. Yes, sir.

10 Q. Has this road been there since then?

11 A. '78 I went back there many times to turn out
12 dogs, drive it, you know. Yes, sir.

13 Q. Has that road ever not been there?

14 A. No, sir.

15 Q. Has the road ever been blocked other than the
16 gate your son put up?

17 A. Just the gate.

18 Q. Has anybody told you you couldn't use that road?

19 A. No, sir.

20 Q. Since you bought the property is the same true?

21 A. That's true.

22 Q. Your son moved out there in '91 or '92, is that
23 correct?

24 A. Yes.

25 Q. You go visit him?

1 A. I stay on the property now, because my second
2 wife died and I live on the property with him now.

3 Q. How long have you lived there?

4 A. I'd say eight years, seven-eight years.

5 Q. Did you visit your son prior?

6 A. Oh, yes. Every weekend. I kept my dogs back
7 there and he fed them, but I come up there and take care of
8 my own dog pen.

9 Q. You used this road regularly yourself?

10 A. Yes, sir.

11 Q. And have been for a long time?

12 A. Yes, sir.

13 Q. Again anybody stopping you from using this road?

14 A. No, sir.

15 Q. Were you familiar with whether or not the road
16 was there before 1978 of your own knowledge?

17 A. I don't know. I know whenever we went to buy the
18 land, you know, we checked the deed, you know, that had the
19 easement to it. We wouldn't buy land-locked land, so.

20 Q. At the time that you bought it, was there any
21 other way to get to it other than this road?

22 A. No, sir. There's really not now. I mean there's
23 Woods Road back where he's talking about through the land
24 we just purchased from Thomas Kennedy, but there's
25 two-three woods ponds that you don't travel through there.

1 during the winter time. They fill up with water. It's
2 not, it's not so you can just drive it all the time you
3 come in there. It's not possible.

4 Q. You could get to his house another way, but you
5 really have to go another road do it?

6 A. It's a long way. It's half a mile through there.

7 Q. Are you familiar, Mr. Snyder, have you ever
8 stopped anybody from using that road?

9 A. Yes, sir.

10 Q. Tell us about that.

11 A. I didn't stop them. I had a little heart to
12 heart with the logger when they come in there the last
13 time. He come right before the gate and he pushed some
14 trees and stuff out to where he could go into the field
15 there and I told him, I says, and he was pulling a log
16 truck and I said Bubba you understand that this road will
17 not take that heavy truck and he says why. I said because
18 the banks are already sluffing off of this road. I said
19 there's three places down this road that's sluffing off and
20 drop down and bug chunks like, you know, size of that table
21 and one was right when he have to come out to make the
22 turn, it was right there, and I says you try to come out of
23 there with a tractor-trailer full with logs and that bank
24 gives away, which is already weakened, you're going upside
25 down in that canal and he went over there and looked at it.

1 with me and he says I see what you're talking about, I
2 appreciate you letting me know and he says I ain't coming
3 on this road. So he said I'll go talk, go talk to the
4 people in the front to see if I can come through their back
5 and that's what he did, but as far as stopping him, I
6 didn't say you could not come through. I just said you're
7 taking your equipment and somebody's life in danger,
8 because the canal is deep. It's deep. Deep ditch.

9 Q. Thank you, Mr. Snyder. Please answer any
10 questions Mr. Walters may have.

11 MR. WALTERS: No questions, Your Honor.

12 MR. JACKSON: That would be my case, Your Honor.

13 MR. WALTERS: I call Mr. Kelley.

14 THE COURT: Mr. Kelley, you're still under oath.

15 Thereupon,

16 THELEASE KELLEY,

17 testified as follows:

18 EXAMINATION

19 BY MR. WALTERS:

20 Q. Mr. Kelley, you've heard the testimony with
21 regards to the road itself. I want to go back and ask you
22 some simple questions. At any time did you give permission
23 during hunting season for somebody to use your land?

24 A. No.

25 Q. Have you ever known hunters to use this road?

1 A. No.

2 Q. How long have you owned this property?

3 A. At least about 30 years.

4 Q. There was testimony there was some people that
5 lived at the back of this property. Who do you know that's
6 lived at the back of this property other than Mr. Snyder?

7 A. I ain't never known nobody that lived back there
8 really.

9 Q. Nobody?

10 A. Not that I know of until Mr. Snyder moved back
11 in.

12 Q. Other than that, no one else?

13 A. Not that I know of. I remember Mr. Snyder moved
14 back there, that's when this road was cut. Everybody come
15 in there a witness there was road there, there never was a
16 road there as long as I know, but a little wagon road and
17 that road was to go back as far more or less the back of my
18 property.

19 Q. When was the road cut?

20 A. Since Mr. Snyder moved back there.

21 Q. Mr. Snyder testified he rented property from you.
22 What did he rent from you?

23 A. Mr. Snyder, when did you rent that property from
24 me? You said you rented property three years ago.

25 MR. JACKSON: Mr. Kelley.

1 Q. Just answer the question.

2 A. He just said it sitting here that he rent
3 property from me.

4 Q. When did Mr. Snyder rent property from you?

5 A. I'm going to let him tell you.

6 Q. Would you answer me and --

7 A. He never. He never.

8 Q. He's never rented property from you?

9 A. No. Never.

10 Q. You never entered into an agreement with him to
11 rent property?

12 A. Never. Never.

13 Q. His testimony was that he rented the property six
14 years ago?

15 A. He didn't rent no property from me.

16 Q. Did you ever rent the property to anyone?

17 A. Yes.

18 Q. Who did you rent it to?

19 A. To the Browns. I rent it to the Browns back
20 years ago and actually I rented to a man name, he live
21 right across the highway from here. What is his name and
22 he sub -- I rented to -- the Brown man was farming the
23 land, but this guy, it's a white man, that he paid, he was
24 paying me to rent the land. Mr. Brown wasn't farming the
25 land. I don't know the Brown man. I know, what's the man

1 name. I can't recall his name, but I can get his name.

2 Q. Was Mr. Snyder ever involved in that agreement?

3 A. Me and Mr. Snyder never had no agreement for
4 nothing. He had nothing. Nothing. I had no contact with
5 Mr. Snyder other than going back there twice to his house
6 about the gate. That's all the contact I had with
7 Mr. Snyder.

8 Q. You understand today's the date of your trial.
9 Is there any other information you want to provide the
10 court in regard to this particular property?

11 A. I want Mr. Snyder off my property.

12 MR. WALTERS: Your Honor, we have no further
13 questions.

14 EXAMINATION

15 BY MR. JACKSON:

16 Q. Mr. Kelley, where do you live?

17 A. I live in Mount Vernon, New York.

18 Q. How long have you been living there?

19 A. 1960.

20 Q. Thank you. That's all I have.

21

22

23

24 AT THIS TIME THE HEARING IS CONCLUDED.

25

State of South Carolina,
COUNTY OF ORANGEBURG.

ATTEST TRUE COPY
Haid Lamy
REGISTER OF DEEDS
ORANGEBURG COUNTY SOUTH CAROLINA

KNOW ALL MEN BY THESE PRESENTS, That I, Bennie Kelly

in the State aforesaid,
sum of Nineteen thousand six hundred and no/100 (\$19,600.00) Dollars
to me paid by Thelease Kelly
in the State aforesaid
have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the
said Thelease Kelly, the following described property:

All that certain piece, parcel or lot of land, situate, lying and being
in School District No. 2, Cow Castle Township, County of Orangeburg, State of
South Carolina, approximately two and one-half (2½) miles south of Bowman, and
containing twenty-eight (28) acres, more or less, and being bounded as follows:
On the North by lands now or formerly of George Moss; on the East by U. S. High-
way No. 178; on the South by lands now or formerly of the Estate of Tom Murray;
and on the West by lands now or formerly of Mittle and Weathers.

This being the same tract of land conveyed to Bennie Kelly by George Moss
by his deed, dated November 18, 1948 and recorded in the Office of the Clerk
of Court for Orangeburg County in Deed Book 155 at Page 111.

Entered In The Office Of Tax Assessor

Map 869 Block 00 Parcel 2

This 12 day of May 19 78

V. R. Benton
Tax Assessor

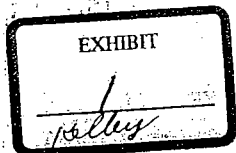
ORANGEBURG
COUNTY

030943

FILED FOR RECORD

1977 NOV 29 AM 10:17

J. J. RESHNEY, CLERK OF COURT
ORANGEBURG COUNTY, S. C.



TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Thelease Kelly, his

Heirs and Assigns forever.

And I do hereby bind myself and my Heirs, Executors and Administrators, to warrant and forever defend all and singular the said premises unto the said Thelease Kelly, his

Heirs and Assigns, against myself and my Heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS my Hand and Seal this 23rd day of November in the year of our Lord one thousand nine hundred and seventy-seven,

and in the two hundred and second

and Independence of the United States of America.

year of the Sovereignty

SIGNED, SEALED AND DELIVERED

IN THE PRESENCE OF

Karen W. Harden

John F. Shuler

Bennie Kelly (SEAL)

(SEAL)

STATE OF SOUTH CAROLINA,
ORANGEBURG COUNTY

PERSONALLY appeared before me Karen W. Harden and made oath that she saw the within-named Bennie Kelly sign, seal and, as his act and deed, deliver the within-written Deed for the uses and purposes therein mentioned, and that he, with John F. Shuler execution thereof, witnessed the

SWORN to before me this 23rd day of November, 1977

Notary Public of S. C.

My commission expires: 9-11-79

Karen W. Harden

STATE OF SOUTH CAROLINA,
COUNTY.

NO RENUNCIATION OF DOWER
(GRANTOR UNMARRIED)
do hereby certify

I, unto all whom it may concern, that Mrs. the wife of the within-named did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within-named

and assigns, all her interest and estate, and also all her right and claim of Dower of, in or to all and singular the premises within mentioned and released.

Given under my Hand and Seal, this

day of

, 19

Notary Public of S. C. (L. S.)

My commission expires:

State of South Carolina
County of Orangeburg

Bennie Kelly

TO

Thelease Kelly

TITLE TO REAL ESTATE

I hereby certify that the within Deed was filed for record in my office at M. o'clock on the 29th day of November, 1977, and was immediately entered upon the proper indexes and duly recorded in Book

BOOK 439 PAGE 1077

Clerk of Court
CLERK OF COURT
COUNTY, S. C.

I hereby certify that the within Deed has been this

day of

A. D. 19

Recorded

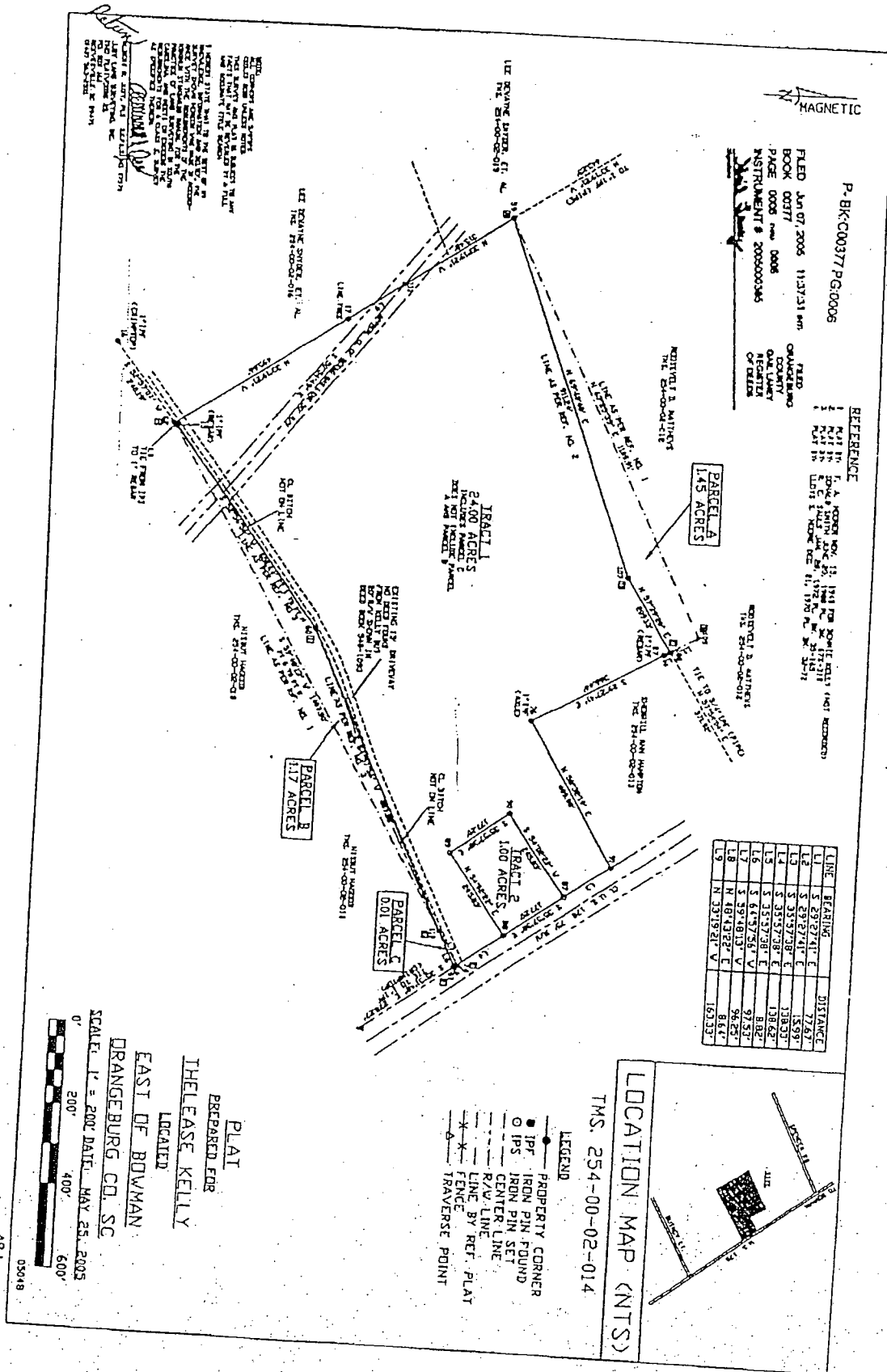
of Deeds, page

Auditor

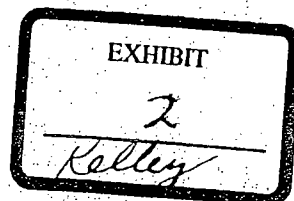
County

A. L. BOWETT & SON, PRINTERS, COLUMBIA, S. C.

0000077



0000078



PHOTOGRAPH ADDENDUM

File No. 05070179

Borrower or Owner N/A

Property Address Tract 1, Charleston Highway

City Bowman

Lender or Client Thelease Kelly

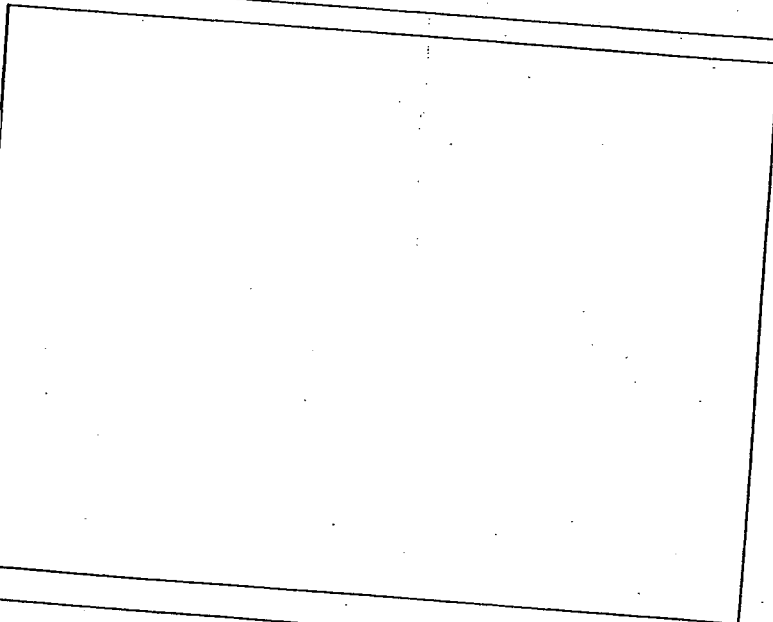
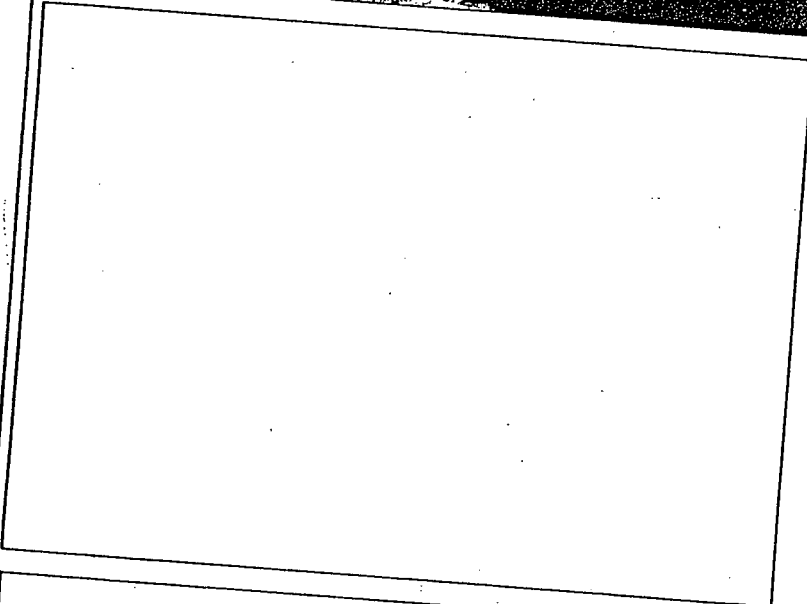
County Orangeburg

State SC

Zip Code 29018



Tract 1, Charleston Highway
Access Road



Johnston Appraisal & Assoc.

0000079

Ret: R & S

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS That I, Thomas Kennedy, in consideration of the sum of Seventy Seven Thousand Six Hundred Sixty Two and no/100 (\$77,662.00) Dollars, to me paid by Lee Dewayne Snyder, in the State aforesaid, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Lee Dewayne Snyder, his heirs and assigns, forever, the following described property, to-wit:

All that certain piece, parcel, or lot of land designated as 36.831 Acres, Tract H, situate, lying and being in Orangeburg County, State of South Carolina, as shown on a plat prepared for Trustees of Marion Kennedy and Estate of Gladys Kennedy by W. F. Stokes, RLS dated April 5, 1999 and recorded in the Office of the Register of Deeds for Orangeburg County in Plat Book C-307, at Page 3, and having all metes, bounds, courses, distances, directions and measurements as are shown on said plat, are incorporated herein and made a part hereof by reference.

This being a portion of the property conveyed to Thomas Kennedy by Deed of Ernestine K. Tindall and Thomas Kennedy as Trustees dated September 5, 2003 and recorded September 11, 2003 in the Office of the Register of Deeds for Orangeburg County in Deed Book 1003, at Page 207.

Tax Map No.: 0254-00-02-060 2046016

Grantee's Address: 8714 Charleston Hwy.
 Lorman, SC 29018

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned, unto the said Lee Dewayne Snyder, his heirs and assigns forever.

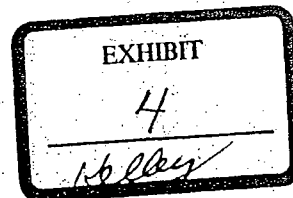
And I hereby bind myself, my heirs and assigns, to warrant and forever defend all and singular the said premises unto the said Lee Dewayne Snyder his heirs and assigns, against myself and my heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 4th day of May, in the year of our Lord two thousand five and in the two hundred twenty-ninth year of the Sovereignty and independence of the United States of America.

Orangeburg County 05-05-2005
 SOUTH CAROLINA
 County Revenue Stamp \$85.80
 State Revenue Stamp \$202.80

FILED May 05, 2005 04:38:40 pm
 BOOK 01094
 PAGE 0069 THRU 0070
 INSTRUMENT # 2005002214.

FILED
 ORANGEBURG
 COUNTY
 GAIL LAHEY
 REGISTER
 OF DEEDS



ENTERED IN THE OFFICE OF ASSESSOR
 MAP 0254 SHEET 00 BLOCK 02 PARCEL 060
 THIS 9 DAY OF May 2005
 ORANGEBURG COUNTY JIM McLEAN, COUNTY ASSESSOR

0000030

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Bernie L. Quidan
John L. Allen

+ Thomas Kennedy
Thomas Kennedy

STATE OF SOUTH CAROLINA,)
COUNTY OF ORANGEBURG,)

PERSONALLY appeared before me the undersigned witness who, on oath, says that s/he saw the within-named grantor, sign, seal, and as his/her act and deed, deliver the within-written Deed for the uses and purposes therein mentioned, and that deponent, with the other subscribing witness witnessed the execution thereof.

Bernie L. Quidan

SWORN to before me this 4th
day of May, 2005.

John L. Allen
Notary Public for South Carolina
My Commission Expires: 7-6-08

0000081

State of South Carolina
COUNTY OF ORANGEBURGMORSE, BARNWELL & REE
1989-3460

KNOW ALL MEN BY THESE PRESENTS, That

We, Willie McLauren Rast and Lois C. Rast

in the State aforesaid
sum of Thirty-six thousand three hundred ninety-four and 05/100
(\$36,394.05) dollars in consideration of the
to us paid by Lee DeWayne Snyder and Harry L. Snyder
in the State aforesaid,
have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said

Lee DeWayne Snyder and Harry L. Snyder, their heirs and assigns:

All that certain piece, parcel or tract of land, with any improvements thereon, situate, lying and being Southeast of the Town of Bowman, off S. C. Highway No. 178, County of Orangeburg, State of South Carolina, containing one hundred three and nine hundred eighty-three (103.983) acres, more or less, and being more particularly set forth and shown on a Plat for Willie and Lois Rast, prepared by Lloyd S. Moore, Jr., RLS, dated December 21, 1970, and recorded in the office of the RMC for Orangeburg County in Plat Book 32 at page 72, said tract being irregular in shape and bounded and measuring as follows: On the Northwest by lands now or formerly of Hazzard Irick and of Roosevelt Mathis, measuring thereon two thousand sixteen and forty-nine hundredths (2,016.49) feet; on the Northeast by lands now or formerly of Shelly Moss, measuring thereon one thousand four hundred eighteen and thirty-three hundredths (1,418.33) feet; on the Southeast by property of now or formerly of Kennedy, measuring thereon two hundred thirty-nine and sixty-nine hundredths (239.69) feet and by lands now or formerly of Moss, measuring thereon two hundred fifty-six and seventy-three hundredths (256.73) feet; on the East by property now or formerly of Moss and of Kennedy, measuring thereon a total distance of one thousand seven hundred ninety-nine and eighty-hundredths (1,799.80) feet; on the Southeast by property now or formerly of Kennedy, measuring thereon two hundred seventy-four and eighty-five hundredths (274.85) feet; on the South by lands of now or formerly of Kennedy, measuring thereon six hundred ninety-six and thirty-hundredths (696.30) feet; and on the Southwest by lands now or formerly of Kennedy, measuring thereon two thousand two hundred twenty-four and thirty-hundredths (2,224.30) feet; all measurements being more or less.

Being the same property conveyed to Willie and Lois C. Rast by deed of George L. Reed, Sheriff Orangeburg County, by deed dated February 28, 1957, and recorded in the office of the RMC for Orangeburg County of February 28, 1957, in Deed Book 208 at page 296; and by deed of David Bookhart to Willie M. Rast, dated August 5, 1964, recorded in the aforesaid office on August 5, 1964, in Deed Book 265 at page 389; and by deed of Hattie Mae P. Rast and Julia Mae R. Buck to Willie McLauren Rast, dated June 13, 1964, recorded in the aforesaid office in Deed Book 264 at page 258.

ALSO: All of our right, title and interest in an easement or right-of-way for ingress and egress over, along and through a 20-foot access road from the property hereinabove described to U. S. Highway No. 178.

ENTERED IN THE OFFICE OF TAX ASSESSOR
MAP 66 SHEET 66 BLOCK 01 PARCEL 603
THIS 10 DAY OF July 19 70
3044, H. Anderson
ORANGEBURG COUNTY TAX ASSESSOR

600-54S PAGE 1093



0000082

548 1094
TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belong-
ing or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said
Lee DeWayne Snyder and Harry L. Snyder, their

Heirs and Assigns forever.

And we do hereby bind ourselves and our Heirs, Executors
and Administrators, to warrant and forever defend all and singular the said premises unto the said

Lee DeWayne Snyder and Harry L. Snyder, their

Heirs and Assigns, against ourselves and our Heirs and against every
person whomsoever lawfully claiming, or to claim, the same or any part thereof.

WITNESS our Hands and Seals this 29th day of June
in the year of our Lord one thousand nine hundred and eighty-nine
and in the two hundred and eighty year of the Sovereignty
and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Robert F. McCurry, Jr.
Samuel F. Reid, Jr.

Willie McLauren Rast (SEAL)
Willie McLauren Rast
Lois C. Rast (SEAL)
Lois C. Rast

STATE OF SOUTH CAROLINA,
COUNTY OF ORANGEBURG }

PERSONALLY appeared before me Robert F. McCurry, Jr.
and made oath that he saw the within named Willie McLauren Rast and Lois C. Rast
sign, seal and as their Act and Deed, deliver the within written Deed, and that deponent with-
Samuel F. Reid, Jr. witnessed the execution thereof.

SWORN to before me this 29th day of June, 1989
(SEAL) Samuel F. Reid, Jr.
NOTARY PUBLIC
My Commission Expires 9/3/96

Robert F. McCurry, Jr. (L.S.)

The State of South Carolina
COUNTY OF ORANGEBURG

Willie McLauren Rast and Lois C. Rast

TO

Lee DeWayne Snyder and Harry
L. Snyder
101 Marvel Oaks circle
Ladson, South Carolina 29456

TITLE TO REAL ESTATE

I hereby certify that the within Deed was filed for
record in my office at 11 o'clock on
the 29th day of June
1989 and was immediately entered upon the proper
indexes and duly recorded in Book
of Deeds, page 1094-1093

Notary Public
for RMC
Orangeburg County, S.C.

I hereby certify that the within Deed has been this

day of June, 1989
in Book of Deeds, page
for Auditor County.

HORGER, BARNWELL & REID
ATTORNEYS AT LAW
409 AMELIA STREET, N.E.
POST OFFICE DRAWER 329
ORANGEBURG, S. C. 29118-0329

823- 531-3000

0000084

DEFENDANT'S
EXHIBIT
2
Snyder



The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted this the 28th day of October, 2010 at Orangeburg, South Carolina.

Glenn Walters, Attorney at Law, PA

A handwritten signature in cursive script, appearing to read "R. Bentz Kirby", written over a horizontal line.

R. Bentz Kirby

Glenn Walters

PO Box 1346

Orangeburg, South Carolina 29116

803-531-8844

Facsimile 803-513-3628

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

The Honorable O. Davie Burgdorf, Master-in-Equity

Case No. 2008-CP-38-900

Thelease Kelley,

Appellant,

-vs-

Lee Dewayne Snyder and
Harry L. Snyder,

Respondents

BRIEF OF APPELLANT

Glenn Walters Attorney at Law, PA
R. Bentz Kirby
Glenn Walters
Post Office Box 1346
Orangeburg, South Carolina 29116
(803) 531-8844

Attorney for Appellants

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err by ruling that the deed conveying them the property created a claim of right to constitute one of the elements of a creation of easement by prescription in favor of the Defendants?
2. Did the Trial Court err by ruling that the Defendants have an easement by prescription due to an adverse use for a period of twenty years?

STATEMENT OF CASE

The Plaintiff initiated this lawsuit on June 4, 2008, with the filing of a Summons and Complaint alleging that he owned a parcel of real estate and the Defendant, Lee Snyder, had created a private roadway over his property without his permission. The Plaintiff also alleged that he had given notice to the Defendant to cease using his property for any purpose. The Plaintiff also alleged he had no adequate relief at law and requested that an injunction be issued to restrain the Defendant from using the property and trespassing on the property owned by the Plaintiff. [R, pp 10-12]. The Defendant, Lee Snyder, answered and denied many of the allegations of the Complaint and asserted a Counterclaim that he and his father, Harry Snyder, had purchased certain property from Willie and Lois Rast and that the property included a conveyance of "All of our right, title, and interest in an easement or right-of-way for ingress and egress over, along and through as 20 foot access road from the property herein described to U.S. Highway No. 178." Further, the Answer and Counterclaim asserted that since the purchase of the property in 1989, the Defendant had used the road over the Plaintiff's property in a hostile and open manner uninterrupted "since his purchase of the property." The Defendant sought a declaratory judgment he had "obtained a prescriptive easement over the road in question. [R, pp 13-15].

The Plaintiff filed a reply in which he denied the allegations in the Counterclaim [R, p 16].

The matter was referred to the Master in Equity by a Consent Order of Reference. The matter came on to be tried before the Master in Equity on April 29, 2009. After hearing testimony the Court entered its Order, which among other rulings, added Harry Snyder as a Defendant based upon the trial testimony. [R, pp 1-7]. The Court ruled that the Plaintiff acquired his tract of land on November 29, 1977 by deed of Bennie Kelly, the Defendants acquired their property by a deed from Willie and Lois Rast on June 29, 1989, and that the deed contained an easement for a twenty (20) foot road from US Highway 178, and that there was testimony the road had been in use for longer than twenty years. [R, pp 1-7]. Based upon the evidence, the Court maintained that the use of the roadway had been continuous, open and notorious for a time period of more than twenty years and it had been hostile based upon the erection of a gate in the early 1990's. [R, pp 1-7]. The Court also found the roadway was used in such a manner for an excess of forty years and that the roadway had been identified on the ground and shown on a plat prepared for the Plaintiff. The finding also stated the claim of right was established by the Deed to the Defendants. [R, pp 1-7]. The Court finally concluded the Defendants had acquired an easement by prescription of ingress and egress from their property, but required the Defendants to remove the gate they had erected on the Plaintiff's property. [R, pp 1-7].

The Plaintiff filed a Motion to Alter or Amend the Judgment on the grounds it was not consistent with the evidence presented to the Court. [R, p 17]. The Court entered its Order Denying this Motion on November 10, 2009. [R, pp 8-9]. This appeal followed.

FACTS

The Plaintiff obtained his title to the property in question from his relative, Bennie Kelly, pursuant to a Deed dated November 23, 1977 and recorded on November 29, 1977 at Deed Book 439 at Page 1077. [R, pp 76-7]. The derivation clause states that Bennie Kelly acquired it by a deed

dated November 18, 1948. The property description does not mention that the property is subject to any easement. [R, pp 76-7]. The Defendants obtained their property pursuant to a deed from Willie and Lois Rast, dated June 29, 1989, and recorded on June 29, 1989 in Deed Book 548 at Page 1093. [R, pp 82-83]. In the deed to the Defendants there is the following recital:

Also: All of our right, title, and interest in an easement or right of way for ingress and egress over, along and through a 20-foot access road from the property hereinabove described to U.

S. Highway No. 178.

[R, pp 82-3]. However, the deed does not provide any derivation for the right of way or easement, nor does it state what property it lies over. [R, pp 82-3]. The Court acknowledged this in its Order when it stated that “However, all parties agree that there appears to be no other deeded easement to this roadway on the records of Orangeburg County.” [R, p 4].

The Plaintiff testified at trial there was no roadway when he purchased the property but he did acknowledge there was what he called a “dirt road like a little wagon road.”, that his brother used the road as a wagon or tractor road to get to the Plaintiff’s property to farm and that Snyder cut a road through there after he purchased the property. [R, pp 26, l. 6- p 27, l. 7] The Plaintiff further testified that he and his brother had used the road for a wagon and a mule going back for fifty (50) years. [R p 30, l. 4-16]. The Plaintiff testified that he never gave permission to the Defendants to use the road, as far as he knew no other party had used it to access the Defendant’s property until the Defendants cut a road over the property, put up a fence and a private property sign, and that it was not a road until the Defendants cut one through after they purchased the property. [R pp 26, l. 6- 27, l. 18; p. 29, l. 25- 30, l. 16; p 33, l. 4- l. 24; pp 72, l. 20- p. 75, l. 11].

The Defendants testified and presented several witnesses who testified they were aware that

a road had been there for some number of years and it had been used to access the Defendants' and other parties property for hunting and farming over the years. Mr. Harry Wimberly testified he was aware of using the road to go deer hunting over the years and that he and the Defendants had used it to go back to the Snyders' house on their property. [R, pp, 35, l. 16- p. 37 l. 7]. Larry Rast testified that he had used the road to access the property sold to the Defendants to farm the property in the 1960s and that he had done so until sometime in the 70s when his family stopped farming the land. However, he testified he did not know if others were using the road to access the property and he could not testify that it had been continuously used since the time he stopped going there in the 70s. [R, pp 39, l. 7- 43, l. 7].

Curtis Spell testified that he was familiar with the property but had moved from the area to Columbia in 1953. He said the access road was there as long as he could recall and he was 78 years old. He also testified that people still use the road and he used it to access land to hunt. He also testified that he and at least one of the Defendants were members of the same hunt club and had been good friends for 12 to 15 years before the trial. [R, pp 43, l. 24 - p. 50, l. 15]. Mr. Marion Kennedy testified that he knew the Plaintiff and was familiar with the property in question. He stated that people used the access road to get to the Defendants' property. He said he had used the road, but had not recently used it. [R, pp 51, l.9- 54, l. 4].

The Defendants also testified. Harry Snyder testified they had rented the property to deer hunt prior to purchasing it and they used the access road. This started in about 1979. He also testified he uses another road to access the property as well. He admitted he put up a gate after they purchased the property and that the Plaintiff sent word through a nephew and asked him to take the gate down and he did. He then moved it to the second location. He also testified that the first

logging crew had obstructed the road and torn the road up. He also testified that Mr. Kelly asked him to move the gate but did not tell him he could not use the road and that he maintained and had improved the road. [R pp 55, l. 18- p. 67, l. 24]. Mr. Harry Snyder testified that they have used the road since they rented the property in the late 70s, the road had not been blocked except for the gate they erected, he was not familiar with the property prior to renting it to hunt and that he had asked a logger not to use the road because it would damage the road. [R pp 68, l. 23- p. 72, l. 8].

Thus, it is clear that the gate was not erected for more than 20 years as it was erected no earlier than when the property was purchased in 1989. There was conveyance of an "easement" in the deed to the Defendants, but there is no evidence indicating where that easement lay, or even what easement the grantors owned as they conveyed three (3) separate properties to the Defendants and there was not reference to any easement or right of way ever created by an owner of the property conveyed to the Plaintiff. Further, there is no evidence that any use of the "road" was hostile under a claim of right until at least the erection of the gate.

ARGUMENTS

I. THE TRIAL COURT ERRED IN RULING THE DEFENDANTS HAD A PRESCRIPTIVE EASEMENT UNDER A CLAIM OF RIGHT

On direct appeal from a final judgment of a master-in-equity, the scope of review is the same as that for review of a case heard by a circuit court without a jury. Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (S.C.App. 2009); Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). In the case of Pittman vs. Lowther, ____ SC ____, 610 S.E.2d 479 (S.C. 2005), the Supreme Court stated, "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. Slear v. Hanna, 329 S.C. 407, 496 S.E.2d 633 (1998). To establish a prescriptive easement, there must be continued and uninterrupted use or enjoyment of the right for a period of twenty years, identity of the thing enjoyed must be proven, and use must be adverse or under claim of right. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993).” However, the claim of an easement by claim of right is not invalidated because there is a mistake in the belief of ownership. Matthews v. Dennis, 365 S.C. 245, 616 S.E.2d 437 (S.C.App. 2005).

In the instant case the Defendants attempt to establish a claim of right from their deed which was granted to them on June 29, 1989. [R, pp 82-3]. However, this case was instituted on June 4, 2008 less than twenty (20) years after the conveyance of the deed with the easement language. Thus the Court was clearly in error to rule as it did in its Order on page five (5) that the claim of right existed against both the Plaintiff and his Grantor for more than twenty (20) years as there is no evidence that any claim of right existed prior to the deed to the Defendants in 1989. In fact, on page 3 of the Order, the Court even concedes that there is no recorded easement over the property of the Plaintiff other than the deed to the Defendants. Thus, the factual holdings within the Order are incorrect and there is no evidence to support a finding of a claim of right existing for more than twenty (20) years as the Deed in question was granted less than nineteen (19) years prior to the suit being instituted in response to the failure of the Defendants to remove the gate and private property sign. [R, pp 1-7, pp 19, l. 15- p. 20, l.10, pp. 22, l. 5- p. 25, l. 4, p 79].

It being clear that there is no claim of right, the Court should further examine the evidence to see if there is sufficient evidence to support a finding of an easement by prescription through a continued and uninterrupted use or enjoyment of that right for a period of twenty years which is adverse. Pittman vs Lowther, supra.

II. THE TRIAL COURT ERRED BY RULING THE DEFENDANTS
HAD A PRESCRIPTIVE EASEMENT PURSUANT TO AN ADVERSE
USE FOR A PERIOD OF TWENTY YEARS.

The testimony of the Plaintiff was that he lives in New York and had done so since 1960. [R, p 75, l. 16-20]. He further testified that while he did not give the Defendants permission to use the road in question, he never knew it was being used by any third parties until the Defendants improved the road, put up a gate and a sign saying it was private property. [R, pp 19, l. 15- p. 25, l. 4; pp 26, l. 6- p 27, l. 22]. As far as the Plaintiff knew, no one was using the road, but his brother and some others to access the Plaintiff's property until after the Defendants purchased their property. [R, pp 26, l. 6 - p. 27 l. 18]. Both the Plaintiff and the Defendant testified that the Defendants improved the road after they bought the property in 1989, less than twenty (20) years before the law suit was instituted. [R, pp 26, l. 6- p 27, l. 9, p. 33, l. 10-24; p 67, l. 7-12]. The Defendants testified that the gate was put up after they purchased the property in 1989. [R, pp 59 l. 22 - 61, l. 15] Therefore, based upon the testimony of the Plaintiff and the Defendants, the earliest the gate was put up was in 1989, less than twenty years before the law suit was filed. While there was testimony, as set forth in the facts above that the road in some form was there and used for deer hunting prior to 1989, the record is devoid of any evidence that the use of the road was adverse prior to the gate being put up and Mr. Kelly instituted the lawsuit after he had requested that the gate be removed and the Defendants refused and put up a sign saying it was private property.

In order to prove the existence of a prescriptive easement, it must be proved that the use of the property was adverse for a period of twenty years. Pittman v. Lowther, supra. As set forth in Horry County vs Laychur, supra, the use of property can also be permissive. Because it is one of the elements of the cause of action, the person seeking to prove the existence of an easement must show

that the use of the easement was adverse. There is no testimony by any party that the use of the property was ever adverse until the gate was put up after the purchase of the Defendants' property in 1989. Thus, there is no evidence to support the fact that the use of the property has been adverse for more than twenty (20) years. The court simply seems to make the leap of logic that because a road was there and was used prior to the purchase of the property that the easement was created. However, there is no testimony by any of the witnesses that the use was ever adverse, except the testimony which relates to the time period which is less than twenty (20) years prior to the law suit being instituted.

The Plaintiff's testimony was that he and his brother had used the "wagon" or "tractor" road and he knew of no other use until the road was "cut" by the Defendants and a gate was put up. Further, the evidence of the use being adverse is the testimony about the use by the loggers, which also occurred after the purchase of the property in 1989. [R, pp 19, l 15-24, pp 20, l. 11- p 21, l. 13; p. 23, l.2- p 24, l. 12; pp 61, l. 16- p. 62, l. 22; pp 71, l. 7- p. 72, l. 8]. Thus, there is no competent evidence that the use was ever adverse until after the purchase of the property by the Defendants in 1989. Therefore, there is not "any evidence" to support the findings of the court that the use of the claimed easement was adverse for twenty (20) years.

CONCLUSION

The finding that there is a claim of right to support an prescriptive easement is not supported as there is no testimony that the claim of right existed before 1989. Further, the Defendants testified they examined the deed to ensure they had an easement because they did not want to buy landlocked land. [R, p 70, l 15-19]. Thus it is not reasonable to find there was a right of use as the Defendants' testimony defeats any claim they believed they had a claim of right. This case is the opposite of

Matthews v. Dennis, supra, where the persons testified they had used the easement for years under the assumption there was legal documentation granting them an easement. Therefore, this holding should be reversed.

If there is no prescriptive easement under a claim of right, the prescriptive easement must be proved by evidence confirming it has been used for a continued uninterrupted period of twenty (20) years under adverse circumstances.¹ There is no evidence or testimony that the use of the easement was adverse until the gate was put up after the purchase in 1989. The Plaintiff testified that was when he first knew that anyone besides his brother and others used the road to do anything other than for access to his property. While there was testimony establishing the use of the road prior to the twenty (20) year period, there was no evidence it was adverse until after 1989. The Court simply recites the fact the property was used and makes the leap of logic to conclude the use was adverse. The facts it does recite are those such as the erection of the gate, which is less than twenty (20) years ago. The mere fact the road was used for more than twenty (20) years does not establish the fact it was adverse. In fact, the only reliable evidence on this issue is that it became adverse less than twenty years ago when the gate and sign were erected and the use to the loggers was denied. Therefore, the Defendants failed on this issue of proof as well.

Based upon the evidence actually admitted there is no reliable evidence establishing a claim of right or adverse use for more than twenty (20) years and therefore the Defendants have failed on the burden of proof to establish a prescriptive easement. Having failed in this proof, it was error for

¹ The Plaintiff's plat and photograph, Exhibits 2 and 3 show the road and the Plaintiff testified the Defendants had cut a road where the wagon road had been. Therefore, the Plaintiff must admit the element of the identity was proved at trial by all the parties testimony and exhibits.

the Court to deny the injunction sought by the Plaintiff and to find the Defendants have an easement by prescription. Therefore, the Order of the Court should be reversed and the case should be remanded to the trial court with instructions to enter an order granting the injunction sought by the Plaintiff.

Respectfully submitted, this the 17th day of November, 2010, at Orangeburg, South Carolina.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AN ORDER GRANTED IN
COURT OF COMMON PLEAS

The Honorable O. Davis Burdick, Master in Equity

Case No. 2008-CP-38-900

Heather Kelley

Appellant

E. Dewayne Snyder and
Harris L. Snyder

Respondents

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. WAS THE TRIAL COURT CORRECT IN RULING THAT THE DEFENDANTS OBTAINED A PRESCRIPTIVE EASEMENT UNDER A CLAIM OF RIGHT?
2. WAS THE TRAIL COURT CORRECT IN RULING THAT THE DEFENDANTS OBTAINED A PRESCRIPTIVE EASEMENT DUE TO AN ADVERSE USE FOR A PERIOD OF OVER TWENTY YEARS?
3. WAS THE ORDER OF THE TRIAL COURT CORRECT SINCE THE RESPONDENTS PROVED THAT THE USE OF THE ROADWAY IN QUESTION WAS HOSTILE AND ADVERSE TO THE APPELLANT?

STATEMENT OF THE CASE

The Plaintiff filed his Summons and Complaint on June 4, 2008 seeking an injunction prohibiting the Defendant, Lee Dewayne Snyder, from using the private roadway over his property without his permission. The Defendant filed his Answer and Counterclaim on July 3, 2008 requesting that Court find that he held a prescriptive easement on a 20-foot right-of-way over the Plaintiff's property for use of the roadway in question. The Plaintiff filed his Reply to the Counterclaim on July 15, 2008. The case was referred by consent to the Master-in-Equity for Orangeburg County.

A final hearing on the case was held on April 29, 2009 in regard to this matter, and it was determined that Harry L. Snyder should be made a party Defendant to the action since he was also an owner of the property that was the subject of this action. Based on the evidence presented at trial, the Master-in-Equity for Orangeburg County determined that the Defendants had presented sufficient evidence and had proven all of the elements necessary to show that a prescriptive easement had been established to the roadway in question and had denied the Complaint of the Plaintiff. The Court further determined

way referred to and used by the Defendants to obtain access to their property, which is located behind the property of the Plaintiff as shown on the same plat. The Defendants used the roadway in question to obtain access to the property from Highway 178, which is also shown on the same plat. Therefore, the roadway in question is easily identifiable, an element of a prescriptive easement.

The Defendants obtained title to their property by deed from Willie McLauren Rast and Lois C. Rast, dated June 29, 1989 and recorded on June 29, 1989 in Deed Book 548 at Page 1093 in the Office of the Register of Deeds for Orangeburg County (R. p. 82-83). This deed conveyed the property to the Defendants, Lee Dewayne Snyder and Harry L. Snyder, conveying them 103.983 acres. This deed also shows specifically on it a 20-foot right-of-way, which specifically refers to the easement in question that is the subject of this litigation.

The Plaintiff testified in this case that he had never given permission to the Defendants to use the roadway in question. He testified that prior to the Defendants expanding the roadway and using it, it had been "a little wagon road" (R. p. 13, l. 9) that was not used very extensively. He indicated that it was only the Defendants that began using the roadway after they moved onto the property when they purchased it in 1989. However, the Plaintiff conceded that he has lived in Mt. Vernon, New York since 1960 (R. p. 62, l. 17, 19). Based on the findings of the lower Court, the Master gave little or no credibility to the Plaintiff's testimony about the wagon road and its limited use.

Mr. Harry Wimberly testified for the Defendants that he is familiar with the road in question and that he has known of this existence since the 1960's and 1970's when he used it himself for the purposes of hunting (R. p. 23, l. 7-13). Mr. Wimberly is also

familiar with other people continuing to use the road in question (R. p. 23, l. 21-23). Mr. Larry Rast testified for the Defendants and indicated that his grandparents owned this property for some period of time and that his father inherited the property from his grandfather (R. p. 25, l. 10-13). He further testified that his father and mother sold the property to the Defendants, Lee Dewayne Snyder and Harry L. Snyder, (R. p. 25, l. 10-12). Mr. Rast testified that while he was in high school he was in charge of farming this particular piece of property and that he used the road in question to gain access to the property in question for his farming purposes. He graduated from high school in 1967, and he was farming the property during the mid-1960's (R. p. 26, l. 23-25, p. 27, l. 1-6). Mr. Rast testified that his parents continued to farm the property after he graduated from high school and that they continued to own the property up until they sold it to the Snyders (R. p. 27, l. 14-25, p. 28, l. 2-4). Mr. Curtis Spell testified for the Defendants that he is 78 years old and that the road in question was there when he was born (R. p. 32, l. 15-20). Mr. Spell testified that during his 78 years people were using the road and there were people living in the back during certain periods of time (R. p. 32, l. 22-25, p. 33, l. 1). Mr. Spell testified that even though he now lives in Columbia, he continues to come to Bowman every other weekend and has family in the area and visits them often (R. p. 33, l. 5-14). Mr. Spell further testified that the road in question is still open and people still use it and have used it throughout his lifetime (R. p. 33, l. 22-25, p. 34, l. 1-3). Mr. Marion Kennedy testified for the Defendants that he has lived in the Bowman area all of his 65 years. He testified that he is familiar with the property of Thelease Kelley and knows Mr. Kelley (R. p. 38, l. 14-23). Mr. Kennedy testified that he is familiar with the road in question and that people use that road and have used that road continuously (R. p.

40, l. 5-14, p. 41, l. 1-2). The Defendant, Lee Dewayne Snyder, testified that he personally had been using the road in question since 1978 or 1979 because he had been renting land from Mr. Willie Rast and Mr. Earnest Moss for deer hunting rights since that time. As a result, he had been using the road in question even before he purchased his property in 1989. He further testified that after buying his share of the property in 1989, he moved into his home on the property in 1991 or 1992 (R. p. 43, l. 1-7), and has certainly used the road on a daily basis since he has moved into the property. The Defendant, Harry L. Snyder, also testified that he has also been using the road in question since 1978 when he began hunting on the property as well and has been using the property regularly since that time (R. p. 56, l. 8-9; p. 57, l. 9-10).

The Plaintiff then testified on re-direct examination that he never gave permission to any hunters to use the road in question and that he had owned the property for at least thirty (30) years (R. p. 59, l. 20-24; p. 60, l. 2-3). As a result, it is clear that the use of the road in question by the many hunters and hunt club members that have used the property for years certainly creates a hostile, adverse and continuous use of the road for a period in excess of twenty (20) years as evidenced by the testimony in this matter. It is clear from testimony of the Plaintiff that he has given permission to no one for use of the road in question, but it is also clear from the testimony of the many witnesses presented by the Defendants that many people have used this road for a long period of time and that the Plaintiff has acquiesced and done nothing to prevent the use of the road in question for well over thirty (30) years until the initiation of this lawsuit.

ARGUMENTS

I. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE DEFENDANTS HAVE ESTABLISHED A PRESCRIPTIVE EASEMENT UNDER A CLAIM OF RIGHT.

On direct appeal from a final judgment of a master-in-equity, the scope for review is the same as that for review of the case heard by a circuit court without a jury. Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (S.C.App. 2009). Thus, 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. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (S.C.App. 1976). The elements to establish a prescriptive easement are undisputed in South Carolina. The case law establishes that in order to have a prescriptive easement, the party asserting the right must show: (1) continued use for twenty (20) years; (2) the identity of the thing enjoyed; and (3) use, which either adverse or under a claim of right. Boyd v. Bell South Telephone, 369 S. C. 410, 633 S.E.2d 136 (S.C.App. 2006).

The Appellants argue that the Respondents failed to prove and the Court erred in determining that a claim of right was established by the evidence in this case. In order for a party to earn a prescriptive easement under claim of right, you must demonstrate a substantial belief that you had the right to use the parcel or road based upon the totality of circumstances surrounding its use. Jones v. Daley, 366 S.C. 310, 609 S.E.2d 597 (S.C. App. 2005). In this case, it seems clear that the Snyders have established a claim of right based on the fact that their deed from Mr. and Mrs. Rast showed that the property that they purchased included the 20-foot right-of-way from Highway 178 back to the tract of land that was included in the sale itself. The deed also showed that it was the belief of

the sellers, Mr. and Mrs. Rast, that they owned the 20-foot right-of-way that they could convey to the Snyders and that they did convey to the Snyders in the deed in question that was part of the transaction. The circumstances further show through the testimony of the son of the sellers, Larry Rast, who testified in this case, that the Rast family owned this property for many years. Larry Rast indicated that his parents sold the property to the Snyders and that the property was previously owned by not only his parents, but also by his grandparents. (R. p. 26, l. 10; p. 27, l. 10) He testified that he farmed this particular piece of property while he was in high school and that it was thereafter farmed by his younger brother and was otherwise farmed by his parents and grandparents at other times. (R. p. 26, l. 23-25; p. 27, l. 11-16 and l. 23-25) He further indicated that at all times this same road was used in order to gain access to the property from Highway 178 throughout the ownership of the property by the Rast family. (R. p. 27, l. 1-16) As a result, these circumstances surely would indicate that the Rast family felt like they had an easement, which gave them the right to use the road in question to gain access to the property they owned behind that of the Appellant and that they had the right to sell this easement to the Snyders in the transaction in 1989. As a result, it seems clear that all these circumstances and the use of the road for many years by the Rast family, as well as the use of the road by the many hunters who used the road in question, gives rise to the justifiable belief by the Rast family and the Snyders that they had a right to use the easement in question that was both understandable and reasonable under the circumstances in this case.

It seems further reasonable that under the totality of circumstances in this case that Thelease Kelley and prior to him his brother, Bennie Kelley, had owned the adjoining property for a period of over fifty years and that throughout that time, neither of them had

done anything to prevent the Rast family or the Kelley family from using the road in question. This would give rise to a reasonable belief that the Rasts and the Kelleys had the right to use this easement to gain access to their property. This is also reasonable under South Carolina law since a prescriptive easement is not implied by law, but is established by the conduct of the dominant tenement owner. Boyd v. Bell South Telephone, 369 S. C. 410, 633 S.E.2d 136 (S.C.App. 2006).

II. THE TRIAL COURT WAS CORRECT IN RULING THE DEFENDANTS HAD ESTABLISHED A PRESCRIPTIVE EASEMENT PURSUANT TO AN ADVERSE USE FOR A PERIOD IN EXCESS OF TWENTY YEARS.

The Plaintiff argued that the Defendants' claim for a prescriptive easement fails because the Defendants have owned the property for less than twenty years prior to the initiation of this litigation. However, the Plaintiff's argument fails because the Defendants are allowed to tack the period of use of prior owners in order to satisfy the 20-year requirement. Morrow v. Dyches, 328 S.C.522, 492 S.E.2d 420 (S.C.App. 1997); Matthews v. Dennis, 365 S.C.245, 616 S.E.2d 437, (S.C.App. 2005). It is clear from the derivation contained in the deed from the Rast family to the Snyders that the predecessors in title in this matter have owned this property since at least 1964. As a result, it is clear from the evidence of the Synder's deed (Defendant's Exhibit #1) and from the testimony of Larry Rast as to how long his family had owned the property prior to being sold to the Snyders (R. p. 26), that the period which the road had been present was for well more than twenty years. The evidence further shows that the Plaintiff, Thelease Kelley, purchased the property from his brother, Bennie Kelley, (R. p. 6) in 1977 (R. p. 76-77) and owned the property for approximately thirty years at the time the litigation was filed.

As a result, it seems clear that the adverse use period requirement of twenty years had easily been met in this case as a result of the tacking the ownership of the Synders to the Rast family, the predecessors in title to this matter.

The Plaintiff further argues that there is no evidence that the use of the road was adverse to the interest of the Plaintiff until the gate was erected by the Defendants in this matter. Certainly, the erection of the gate in the early 1990's was adverse to the Plaintiff, and the Plaintiff chose to do nothing about the gate for a period of well in excess of ten years. However, the Defendants would argue that the use of the road by the Defendants and their predecessors in title, as established by the witnesses and found by the lower Court, for a period of well in excess of forty years is certainly adverse to the Plaintiff and his brother. The law in South Carolina has been simplified in establishing the elements of a prescriptive easement. To establish an easement by prescription, one need only establish either a justifiable claim of right or adverse and hostile use. Jones v. Daley, 366 S.C. 310, 609 S.E.2d 597 (S.C. App. 2005). As a result, one does not have to prove an adverse or hostile use when a justifiable claim of right is established. However, the Respondents would argue that an adverse and hostile use certainly has been established in this case. In addition, the Respondents would argue that it is simply not appropriate for the Appellant in this case to live his life in Mt. Vernon, New York and rarely, if ever, come to the property in Bowman, South Carolina and then be able to claim in Court that he does not know what is going on at the property in Bowman. It is certainly very easy to never go to the property and never look at the property and then be able to deny that you don't know what is going on in regard to your property. Certainly, the Court must and does place duties on the property owners to look after their property and to inspect their

property on some basis so that they can come back later and simply claim that they did not know. For this reason, a prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner. Boyd v. Bell South Telephone, 369 S. C. 410, 633 S.E.2d 136 (S.C.App. 2006). Thus, prescriptive easements can and must be established when the dominant tenement owner is apathetic and fails to protect his own property.

III. AS AN ADDITIONAL SUSTAINING GROUND, THE RESPONDENTS PROVED THAT THE USE OF THE ROAD IN QUESTION WAS ADVERSE FOR OVER TWENTY YEARS.

The Respondents would argue that even if the Court is not correct determining that a justifiable claim of right was established by the evidence in this case, it is clear that the use of the roadway in question for a period of well over forty years by the Respondents and their predecessors in title as well as by the witnesses provided by the Respondents and other hunters as testified to by those witnesses shows that the use by these persons was adverse to the rights of the Appellant. Jones v. Daley, 366 S.C. 310, 609 S.E.2d 597 (S.C. App. 2005). The Jones case establishes that one needs to establish either a justifiable claim of right or adverse and hostile use. It seems clear that the testimony of many witnesses in this case shows that the use of the roadway, not only by these witnesses, but by the hunters and others referred to by the witnesses shows that the use of the roadway by those persons was adverse and hostile to the rights of Thelease Kelley and his brother, Bennie Kelley, for a period of at least forty years. Although Thelease Kelley may not have known about this use because he lived in Mt. Vernon, New York, certainly the use was adverse and hostile to him. The witness, Larry Rast, testified that

the roadway was widened in the 1960's in order to allow for farm equipment to go to the property that now belongs to the Respondents. (R. p. 27 l. 1-10) The testimony of Marion Kennedy and Curtis Spell both show that many people have used this roadway in question for a period of time well in excess of forty years during which the property was owned by either Thelease Kelley or his brother, Bennie Kelley. The use of this roadway by multiple people for such a long period of time is clearly adverse and hostile to the ownership of the property by the Kelleys. The Court should keep in mind that use of an easement can only be shown to be adverse and hostile when it is used by persons other than the owner. As a result, the Respondents would argue that they have established a prescriptive easement to their property by use of the property for a period in excess of twenty years through adverse and hostile use, even if they failed to do so through a claim of right. The Respondents would argue that this is an additional sustaining ground to uphold the decision of the lower Court.

CONCLUSION

There is significant and substantial evidence in the record that a prescriptive easement has been established under a claim of right for a continuous uninterrupted period of twenty years or more by the Defendants in this matter. Additionally, the Respondents proved that the use of the roadway for more than twenty years was adverse and hostile to the Appellant. As a result, the decision of the Master-in-Equity should be affirmed.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Thelease Kelley, Appellant,

v.

Lee Dewayne Snyder and Harry L. Snyder,
Respondents.

Appeal From Orangeburg County
Olin D. Burgdorf, Circuit Court Judge

Opinion No. 4929
Heard December 5, 2011 – Filed January 25, 2012

AFFIRMED

R. Bentz Kirby, of Orangeburg, for Appellant.

James B. Jackson, Jr., of Santee, for
Respondent.

SHORT, J.: In this land dispute involving a road on Thelease Kelley's property that leads to the property of Lee Snyder and his father Harry Snyder^[1] (Respondents), Kelley appeals the master's order granting Respondents a prescriptive easement to use the road "for ingress and egress" from their property to a public road. We affirm.

FACTS

Kelley purchased twenty-eight acres of land from his brother on November 23, 1977. The property description did not mention the property was subject to an easement.^[2] Respondents purchased their property from Willie and Lois Rast on June 29, 1989, and the deed included an easement for a twenty-foot access road from U.S. Highway 178 to Respondents' property, which appears to be the road at issue in this case.^[3] A new survey of Kelley's land was completed on May 25, 2005, showing Kelley's twenty-four acres, the one-acre parcel he sold, and the roadway in question.

Kelley lives in New York, but has owned the property since purchasing it in 1977, and although he acknowledged Respondents had been using the "wagon road" since purchasing their property, he claimed he never gave Respondents permission to use the road to access their property.^[4] Kelley testified Respondents never asked him for permission to use the road or "cut it"; however, he never told them they were not allowed to use the road. Kelley maintains the road was barely passable by any vehicle other than a

wagon until Respondents "cut" a road through after they purchased the property and put up a gate and private property sign. He claims the parties have had an "ongoing dispute" about the road for more than ten years, but the only contact he had with Respondents was comprised of two conversations about the gate they erected on the road. Kelley testified he asked Respondents to move the gate when they installed it, and they moved it back about halfway down his property. He then asked Respondents why they did not move it to their property line, and they replied they had an easement and a right to do what they wanted with his property. Lee Snyder (Lee) testified Kelley asked him to move the gate, but he said he preferred to leave the gate to prevent people from using it. He offered Kelley a key to the gate, but Kelley refused to take it.

Respondents testified Kelley never forbade them from using the road, and no one has ever prevented them from using it. Respondents also assert local residents have used the road for years to access their property and other property for hunting and farming.^[5] Larry Rast, son of Willie and Lois Rast, testified he and his father widened the road to accommodate farm equipment in the mid-1960s, and his family used the road to farm their property until the 1970s. Resident Harry Wimberly testified he used the road as far back as the late 1960s to hunt, and he has used it to access Respondents' house. Curtis Spell, who grew up in the area, testified he is seventy-eight years old, and the road was there when he was born. Marion Kennedy also testified the road has been there as long as he can remember, and he is sixty-five years old. He also testified he has seen others use the road, in addition to Respondents. Before purchasing the property, Respondents rented the land from the Rasts and used the road to hunt the land.

Lee testified he is the only person who maintains the road on Kelley's property. Respondents also admitted they have exercised some control over the road by telling loggers and a farmer they "preferred them not to use it," and the loggers and farmer acquiesced.^[6] Kelley testified there were other ways Respondents could have accessed their property, including an existing road. Lee testified that in addition to the road on Kelley's land, he and his father also use another road to access their property, which traverses some additional land they purchased.

Kelley filed a complaint on June 4, 2008, alleging Respondents had created a twenty-foot private roadway on his property without his permission, and he had given notice to Respondents to cease using his property for any purpose. He sought an injunction to restrain Respondents from using the property and trespassing on his land. Respondents filed an answer, asserting as a counterclaim that Respondents had purchased property from the Rasts, which included a conveyance of "[a]ll our right, title and interest in an easement or right-of-way for ingress and egress over, along and through a 20-foot access road from the property herein described to U.S. Highway No. 178." Additionally, Respondents asserted they had used the road in an open and hostile manner continuously since purchasing the property in 1989; therefore, Respondents sought a declaratory judgment that they obtained a prescriptive easement over the road. The matter was referred to a master in equity by a consent order of reference, and the master granted Respondents "a prescriptive easement to use the twenty (20)-foot roadway in question . . . for purposes of ingress and egress to their property."^[7] Kelley filed a motion to reconsider, which the master denied. This appeal followed.

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." Pittman v. Lowther, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005). "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." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

Kelley argues the master erred in ruling Respondents had a prescriptive easement under a claim of right and pursuant to an adverse use for a period of twenty years.[8]

An easement is a right given to a person to use the land of another for a specific purpose. Murrells Inlet Corp. v. Ward, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App. 2008). An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription. Frierson v. Watson, 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct. App. 2006). "A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." Boyd v. BellSouth Tel. Tel. Co., 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). To establish a prescriptive easement, the party asserting the right must show: (1) continued and uninterrupted use of the right for twenty years; (2) the identity of the thing enjoyed; and (3) use which is either adverse or under a claim of right. Horry Cnty. v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993). "To establish an easement by prescription, one need only establish either a justifiable claim of right or adverse and hostile use." Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005) (emphasis added). There is no requirement of exclusivity of use to establish a prescriptive easement. Id. at 317, 609 S.E.2d at 600. The party claiming a prescriptive easement bears the burden of proving all of the elements. Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997).

I. Identity

Kelley concedes the identity of the roadway, the second element necessary to establish a right by prescription. Therefore, we need not address this element.

II. Continuous and Uninterrupted

Kelley does not specifically challenge the master's finding that Respondents' use of the road was continuous and uninterrupted, the first element necessary to establish a right by prescription. "[I]n order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant." Jones, 363 S.C. at 318, 609 S.E.2d at 601. "When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." Boyd, 369 S.C. at 419, 633 S.E.2d at 141.

Although Respondents' need for using the road has evolved over time, testimony indicates Respondents used the road with reasonable frequency for each of those needs. Lee

testified he began using the road in 1978 or 1979 for hunting purposes. He did not explicitly state how often he used the road for hunting; however, the fact that he was a member of a hunting club that used the road suggests he used it with reasonable frequency to hunt. Lee further testified that after he bought the property in 1989, he kept dogs on his land and used the road to get to the dogs. In order to care for his dogs, Lee had to have used the road frequently. Finally, Lee testified that when he moved to his land in 1991 or 1992, he used the road to get to his house.

The record also supports the master's finding that Respondents' use of the road was uninterrupted during the prescriptive period. The servient owner may interrupt the prescriptive period by engaging in "overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief." Pittman, 363 S.C. at 52, 610 S.E.2d at 481. "In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period." Id. Respondents testified Kelley did not prevent them from using the road, and Harry testified the only obstruction he has ever seen on the road is the gate they erected. Although Kelley asked Respondents to move the gate, there is no indication that Kelley's request conveyed to Respondents the impression that he did not acquiesce in Respondents using the road. In fact, after Lee moved the gate back, Kelley merely asked why Lee put it there instead of on his land. Further, Kelley never told Respondents they could not use the road. Therefore, the testimony shows Respondents' use of the road was uninterrupted during the prescriptive period.

III. Claim of Right

A party claiming a prescriptive easement under a claim of right "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." Hartley v. John Wesley United Methodist Church, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003); see Revis v. Barrett, 321 S.C. 206, 209, 467 S.E.2d 460, 462 (Ct. App. 1996) (holding a party's belief that she had a right to use a road flowed from a claim of right that originated with her parents' use of the roadway to access the property, and her use of the road for a substantial period of time to access her property); Morrow, 328 S.C. at 528, 492 S.E.2d at 424 (noting a party's belief that he had a right-of-way may be sufficient for a prescriptive easement pursuant to a claim of right). "The law granting a prescriptive easement under claim of right does not mandate a party to believe that he holds actual title or that he intends to acquire it." Hartley, 355 S.C. at 151, 584 S.E.2d at 389.

Here, there is evidence that Respondents believed they possessed the right to use the road. Respondents' deed indicated the Rasts had a right of ingress and egress over the road and were conveying that right to Respondents. Harry Snyder testified that before purchasing the land, they checked the deed to make sure it had an easement because they would not have purchased land-locked land. As such, Respondents used the road to access their land, and improved and maintained the road. Additionally, before purchasing the property, Respondents rented the land from the Rasts and used the road to hunt the land. There was also ample evidence the Rasts used the road under a claim of right. The language in the deed, stating the Rasts were conveying "[a]ll of our right, title and interest in an easement or right-of-way for ingress and egress over, along and through" the road,

indicates the Rasts believed they had a right to use the road. Larry Rast testified he and his father widened the road in the mid-1960s to accommodate their farming equipment. Additionally, Larry testified his grandparents owned the land prior to his parents, and they also used the road to access the land.

Kelley asserts the master erred in ruling that the claim of right existed against both Kelley and his grantor for more than twenty years because there was no evidence that any claim of right existed prior to the deed to Respondents in 1989. Respondents purchased their land on June 29, 1989, and Kelley filed his complaint on June 4, 2008; therefore, Respondents' claim of right as landowners extends back just shy of nineteen years. Regardless, "[a] party may 'tack' the period of use of prior owners in order to satisfy the 20-year requirement." Morrow, 328 S.C. at 527, 492 S.E.2d at 423 (citing 25 Am. Jur. 2d Easements and Licenses § 70 (1996)). "[T]he time of possession may be tacked not only by ancestors and heirs, but also between parties in privity in order to establish the 20-year period." Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 430, 489 S.E.2d 223, 226 (Ct. App. 1997). Tacking of periods of prescriptive use is permitted where "there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefitted by the inchoate servitude." Matthews v. Dennis, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Ct. App. 2005) (quoting Restatement (Third) of Property: Servitudes § 2.17 (2000)). If tacking is used, the use by the previous owners must have also been adverse or under a claim of right. See Morrow, 328 S.C. at 528, 492 S.E.2d at 424. Therefore, tacking the Rasts' claim of right over the road to Respondents' claim of right, Respondents have well over twenty years of use of the roadway.

IV. Adverse Use

"When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." Boyd, 369 S.C. at 419, 633 S.E.2d at 141. Then, the burden shifts to the title owner of the servient tenement (Kelley) to rebut the presumption that the use was adverse. Sanitary & Aseptic Package Co. v. Shealy, 205 S.C. 198, 203, 31 S.E.2d 253, 255 (1944). An "intent to claim adversely may be inferred from the acts and conduct" of the dominant users. Matthews, 365 S.C. at 250 n.10, 616 S.E.2d at 440 n.10 (quoting 25 Am. Jur. 2d Easements & Licenses § 57, at 552 (2004)).

Kelley impliedly concedes Respondents' use of the road after they purchased their land in 1989 was adverse, in that they erected a gate and asked loggers and a farmer not to use the road. However, Kelley argues Respondents are not entitled to a prescriptive easement based on adverse use because "there is no competent evidence that the use was adverse" for the full twenty years. Kelley states, "there is no testimony by any of the witnesses that the use was ever adverse, except the testimony which relates to the time period which is less than twenty (20) years prior to the law suit being instituted."

Because Respondents established the use was open, notorious, continuous, and uninterrupted, and Kelley did not appeal this finding, the use is presumed to have been adverse. It is Kelley's burden to rebut the presumption. Larry Rast testified his family used the road to access their land for farming, and they widened it in the mid-1960s to accommodate their farming equipment. Additionally, Larry testified his grandparents owned the land prior to his parents, and they used the road to access the land, as well. Kelley did

not present any evidence that he gave the Rasts permission to use or improve the road; therefore, Kelley has failed to rebut the presumption of adverse use. Also, as tacking is permitted to establish the 20-year period, when the Rasts' adverse use of the road is tacked to Respondents' adverse use, Respondents have well over twenty years of adverse use of the roadway.

CONCLUSION

Because the existence of the easement is in issue, and the existence of an easement is a question of fact in a law action, we are subject to an any evidence standard of review, and we will not disturb the master's findings of fact unless there is no evidence that reasonably supports the findings. We find the evidence supports the master's finding that Respondents are the owners of the twenty-foot right-of-way easement, by both claim of right and adverse use; therefore, we affirm the master's order.

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

-
- [1] Because Harry Snyder co-owned the land, the court joined him as a defendant.
 - [2] At some point, Kelley sold a one-acre tract of the land.
 - [3] All parties agree there appears to be no other deeded easement to this roadway on the records in Orangeburg County.
 - [4] The road is unpaved and runs the entire length of one side of Kelley's land, connecting Respondents' land to U.S. Highway 178.
 - [5] Kelley testified he never gave any hunters permission to use his land, and he has never known any hunters to use the road.
 - [6] The loggers and farmer were using Kelley's land with his permission.
 - [7] The master also ordered Respondents to move their gate to their property; however, the parties have not appealed that portion of the order.
 - [8] It is not clear whether the master granted Respondents a prescriptive easement on grounds of adverse use, a claim of right, or both, and the parties concede the master's order is unclear. The master based the prescriptive easement on several findings of fact he made in his order. In finding of fact number four, the master found that based on Respondents' deed, "[t]he use and enjoyment of the roadway in question was both *adverse* to [Kelley] and his predecessor in title since 1989 *under a claim of right*." (Emphasis added.) The master also found in finding of fact number four, that Respondents "*claim their right* to the roadway in question pursuant to their deed, which indicated that a twenty (20)-foot easement was granted to them by their predecessors in title." (Emphasis added.) In finding of fact number one, the master found "[t]he roadway in question has been used continuously, openly and notoriously for a period in excess of twenty (20) years" and "the use [of the roadway] by [Respondents] and others [has] been *hostile* to the ownership of

[Kelley] and his predecessor in title, as evidenced by the fact that [Respondents] have maintained a gate thereon since the early 1990s." (Emphasis added.) The master never clarified if he granted Respondents a prescriptive easement on the ground of adverse use or under a claim of right, or on both.

The South Carolina Court of Appeals

Thelease Kelley,

Appellant,

v.

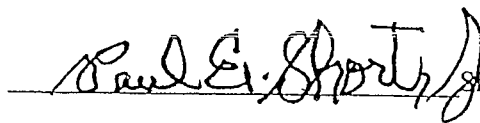
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Harry L. Snyder,

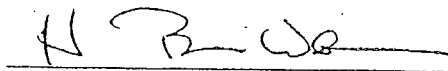
Respondents.

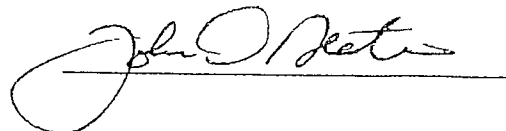
The Honorable Olin D. Burgdorf
Orangeburg County
Trial Court Case No. 2008-CP-38-00900

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

 Short, J.

 Williams, J.

 Geathers, J.

Columbia, South Carolina

cc: R. Bentz Kirby, Esquire
James B. Jackson, Jr, Esquire

FILED

29 March 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

RECEIVED

FEB 09 2012

SC Court of Appeals

The Honorable O. Davie Burgdorf, Master-in-Equity

Case No. 2008-CP-38-900

Thelease Kelley,

Appellant,

-VS-

Lee Dewayne Snyder and
Harry L. Snyder,

Respondents

PETITION FOR REHEARING
AND MEMORANDUM IN SUPPORT

Comes now the Appellant, and does hereby make his Petition for a Rehearing and respectfully represents unto this Honorable Court as follows:

The findings of the Master were not reasonably supported by the evidence. The court acknowledged in footnote 3 that there was not a proper history of any deeded easement in the records of Orangeburg County. There is no record of any grant of an easement by the holder of the property belonging to Thelease Kelly. Therefore, the deed to the Respondents does not reasonably support any of the findings of the Master, or any claim of right. In Hartley vs John Wesley United Methodist Church, 355 SC 145, 584 SE2d 386 (Ct App. 2003) there were other factors involved including the fact that the County had maintained the road. In this instance, the Appellant testified that he and his

brother had used the road and he knew nothing of any adverse use until the Respondents began to maintain the road. Additionally, in Hartley, the easement was the only ingress and egress. In this case, the Respondents admit that they have other access roads to their property. This case is more like Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (S.C.App. 2009), and the deed should be ambiguous at best as the grantor in this case had no right to make any grant of an easement and it should not be relied upon by the Master or by this Court.

Kelly did rebut the presumption the use was adverse for more than twenty (20) years. As demonstrated on the Record of this case, Kelly testified that the road in question was used by his permission by his brother and other persons farming his land with his permission. He had no notice of any adverse use until the gate was put up by the Respondents. He undertook measures he believed were reasonable to have them stop using the road, and when they refused, he brought this action within twenty (20) years. The primary case law used by this Court to justify its decision was Boyd vs BellSouth Tel. Tel. Co., 369 S.C. 410, 633 S.E.2d 136 (S.C. 2006). Boyd involved a case where Bell South was the common owner of the two properties and it had used the easement. The type of easement discussed was an easement by necessity. In this case, there is no easement by necessity and the Court's reliance on **Boyd** is misplaced. Further, the holding of the Court ignores the evidence that Kelly did rebut the evidence was not adverse for more than twenty years and that he acted to protect his rights within the allowable time period.

There was no evidence the use by any previous owners was adverse and so the use of the theory of tacking was inappropriate. There is no evidence in the record that any use of this road prior to the time the road was improved by the Respondents. Therefore, the Court's characterization that the Appellant did not rebut the implication it was adverse is not supported. The Appellant presented

testimony that he did not know anyone was using the road other than the use by his brother and others with his permission until the Respondents improved the road. He had no knowledge of any claimed use prior to this time and there was no evidence he was aware of this use. He established through his testimony sufficient evidence to rebut the presumption and the Court should reconsider its holding in the opinion.

CONCLUSION

The Respondent submits that there was no reasonable evidence to support the findings of the Master or of this Court and the Court should rehear this matter and reverse the published opinion. Further, Respondent asserts that the reliance upon the case law by the Court of Appeals was misplaced as those cases are distinguishable on factual and legal grounds. Therefore the Appellant requests that the Court rehear this case.

Respectfully submitted this the 9th day of February, 2012 at Orangeburg, South Carolina.

Glenn Walters, Attorney at Law, PA



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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

RECEIVED
FEB 09 2012
SC Court of Appeals

The Honorable O. Davie Burgdorf, Master-in-Equity

Case No. 2008-CP-38-900

Thelease Kelley,

Appellant,

-vs-

Lee Dewayne Snyder and
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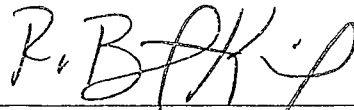
Respondents

CERTIFICATE OF SERVICE

On this the 9th day of February, 2012, the undersigned hereby served a copy of the Motion for Rehearing on counsel for the Respondents by placing a copy in the United States Mail, postage fully paid and addressed to their attorney at the following address:

James B. Jackson, Jr.
PO Drawer 349
Santee, SC 29142

Glenn Walters, Attorney at Law, PA



R. Bentz Kirby
Attorney for the Appellants