THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
COURT OF COMMON PLEAS
THE HONORABLE MILTON G. KIMPSON
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2025-000737
CIVIL ACTION NO. 2022-CP-36-00142

Donald A. Brown, Jr.,

APPELLANT,

versus

Johnnie L. Dickert, Rachel B. Dickert and
Johnnie Kyle Dickert,

RESPONDENTS.

FINAL APPELLANT'S BRIEF

Carmen V. Ganjehsani (S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com

Charles V. Verner (S.C. Bar No. 10033)
PO Box 484
1226 College Street
Newberry South Carolina 29108
(803) 915-9798
sclawyer@me.com
Attorneys for Appellant
Donald A. Brown, Jr.

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II. The Trial Court erred in failing to enforce the agreement between Appellant Brown and the Respondents for the grant of an easement where there is clear evidence of an agreement between the parties and sufficient part performance of the agreement occurred.

STATEMENT OF THE CASE

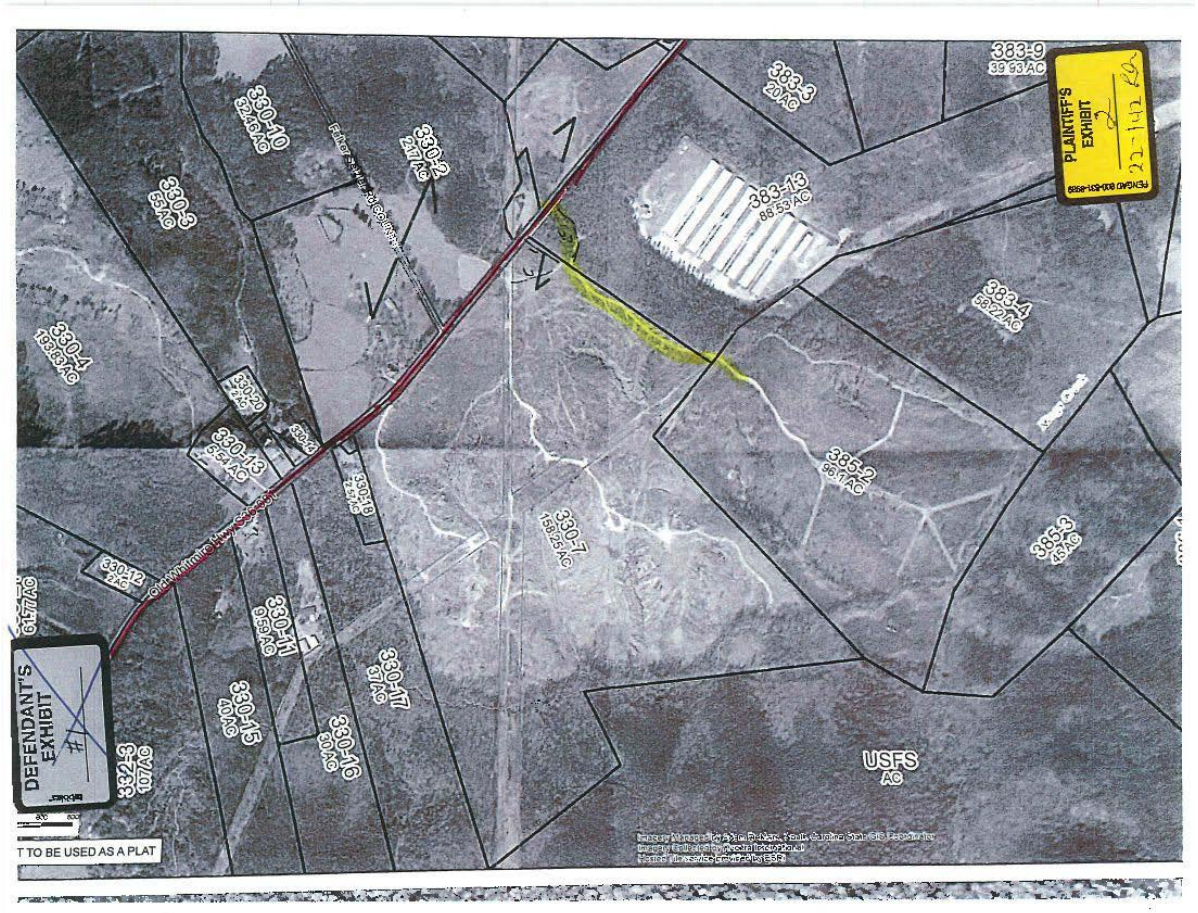
On April 12, 2022, Appellant Donald A. Brown, Jr. brought this action against Respondents Johnnie L. Dickert, Rachel B. Dickert, and Johnnie Kyle Dickert in the Court of Common Pleas for Newberry County to establish an appurtenant prescriptive easement across land owned by the Respondents and to enjoin the Respondents from interfering with or obstructing the use of such easement. [R.pp. 13-16; Compl.] The Respondents filed their Answer on June 9, 2022. [R.pp. 17-19; Answer.]

The case came before the Trial Court for a bench trial on July 11, 2024. The Honorable Eugene C. Griffith, Jr. presided over a few preliminary matters with The Honorable Milton G. Kimpson also sitting at the bench. Judge Kimpson presided over the bench trial with the consent of the parties. [R.pp. 43-234; Tr.]

On March 24, 2025, Judge Kimpson issued an Order denying Appellant Brown's claim for a prescriptive easement. Judge Kimpson further denied Appellant Brown's motion to enforce an agreement under which the Respondents agreed to deed an easement across their property to Appellant Brown. [R.pp. 1-12; Order.] Appellant Brown filed and served his Notice of Appeal on April 16, 2025.

STATEMENT OF FACTS

On October 26, 2021, Appellant Brown purchased an approximate 97-acre tract of land (the "97-acre tract") located in Newberry County from Brandon Nicole Gray Crumpton. [R.pp. 236-238; 133, l. 13 – 134, l. 20; Deed (Plaintiff's Ex. 3); Tr. pp. 91, l. 13 - 92, l. 20.] The 97-acre tract is shown below as the tract of land labeled as TMS No. 385-2:



[R.pp. 235; 243; Aerial map (Plaintiff's Ex. 2); see also Aerial map with stickers (Court Ex. 1).]

The 97-acre tract of land owned by Appellant Brown is adjacent on the western portion of the property to an approximate 158-acre tract of land (the "158-acre tract") in

which Respondents Johnnie L. Dickert and Rachel B. Dickert own a life estate and for which Johnnie Kyle Dickert owns the remainder interest. The Respondents' 158-acre tract of land is shown above as TMS No. 330-7. [R.pp. 183, ll. 11-14; 203, ll. 10-18; 235; Tr. pp. 141, ll. 11-14; 161, ll. 10-18; Plaintiff's Ex. 2.]

Appellant Brown's 97-acre tract of land does not border a public road and is land-locked. [R.p. 235; Plaintiff's Ex 2.] Access to the 97-acre tract of land has been through a field road running through the 158-acre tract of land. [R.p. 235; Id. (marked in yellow on map).] Murray Gray testified at trial that he previously owned the 97-acre tract. [R.p. 58, ll. 4-5; Tr. p. 16, ll. 4-5.] Mr. Gray inherited the 97-acre tract from his mother in 1991. [R.pp. 58, l. 19 – 59, l. 3; Id. at pp. 16, l. 19 - 17, l. 3.]

Mr. Gray's mother inherited the 97-acre tract from Mr. Gray's grandfather who purchased the 97-acre tract around 1955. [R.pp. 59, l. 4-60, l. 2; Id. at pp. 17, l. 4 - 18, l. 2.] Mr. Gray's family has owned the 97-acre tract continuously since that time. [R.p. 60, ll. 3-5; Id. at p. 18, ll. 3-5.] The 97-acre tract was primarily used by the Gray family for timber. [R.p. 60, ll. 6-7; Id. at 18, ll. 6-7.] The Gray family had a company called the Murray Company which timbered the land. [R.pp. 59, l. 12; 60, ll. 18-21; Id. at pp. 17, l. 12; 18, ll. 18-21.]

To access the 97-acre tract of land, Mr. Gray's family used a dirt road on the 158-acre tract of land now owned by the Respondents. [R.pp. 60, l. 25 – 61, l. 6; 62, ll. 14-25; 63, ll. 8-14; 121, ll. 6-11; Id. at pp. 18, l. 25 - 19, l. 6; 20, ll. 14-25; 21, ll. 8-14; 79, ll. 6-11.] The 158-acre tract was purchased by the Dickert family in 1973, although Respondent Johnnie Dickert did not inherit the 158-acre tract from his father until 2005. [R.p. 203, ll. 8-18; Id. at p. 161, ll. 8-18.]

Mr. Gray was not aware of any other manner to access the 97-acre tract by vehicle other than through the dirt road on the 158-acre tract. [R.pp. 61, ll. 11-13; 63, ll. 15-17; Id. at pp. 19, ll. 11-13; 21, ll. 15-17.] Mr. Gray testified that as far as he knew, since his grandfather purchased the 97-acre tract in 1955, his family had been using the access road on the 158-acre tract to reach the 97-acre tract. [R.p. 64, ll. 20-23; Id. at p. 22, ll. 20-23.] Mr. Gray further testified that he had personally been using the access road himself across the 158-acre tract to reach the 97-acre tract since the 1980s. [R.pp. 63, l. 22 – 64, l. 1; Id. at pp. 21, l. 22 - 22, l. 1.] He averred he had a right to access the 97-acre tract through the road on the 158-acre tract. [R.p. 64, ll. 2-4; Id. at p. 22, ll. 2-4.] Mr. Gray's family placed their own lock to which Mr. Gray had a key on a gate across the road on the 158-acre tract, while the Respondents' family had their own lock. The locks were placed to keep out third parties. [R.pp. 64, ll. 4-11; 67, ll. 2-4; 76, ll. 19-24; Id. at pp. 22, ll. 4-11; 25, ll. 2-4; 34, ll. 19-24.]

Mr. Gray at one point gave hunting rights to the 97-acre tract to a gentlemen and his son and gave them a key to the lock. [R.p. 64, ll. 11-13; Id. at p. 22, ll. 11-13.] Mr. Gray notified the Dickert family that the gentleman and his son would be hunting the 97-acre tract so that the Dickert family would be aware that someone was on the 97-acre tract hunting. [R.p. 64, ll. 13-19; Id. at p. 22, ll. 13-19.]

Mr. Gray testified that he did not believe he had to get the Dickert family's permission to use the dirt road on the 158-acre tract to access the 97-acre tract and that he had a right to use the road. [R.pp. 65, ll. 4-6, ll. 17-18; 76, ll. 16-18; Id. at pp. 23, ll. 4-6, ll. 17-18; 34, ll. 16-18.] Mr. Gray stated it was common knowledge that the Dickert family knew he was coming back and forth through the road on the 158-acre tract. [R.p. 65, ll. 7-

8; Id. at p. 23, ll. 7-8.] Mr. Gray was friends and good neighbors with the Dickert family, and he wanted to be a good neighbor and leave the road in good shape and fix any issues if the Dickert family ever called with any problems regarding Mr. Gray's use of the road. [R.pp. 64, l. 25 – 65, l. 14; Id. at pp. 22, l. 25 - 23, l. 14.] Mr. Gray was respectful of the Dickert family's property, but Mr. Gray nevertheless understood that he had an easement on and the right to use the road across the 158-acre property to reach his 97-acre tract. [R.pp. 76, ll. 14-18; 77, ll. 15-20; Id. at pp. 34, ll. 14-18; 35, ll. 15-20.]

Respondent Johnnie Dickert testified on behalf of the Respondents. His father and uncle owned the Dickert Lumber Company which purchased the 158-acre tract in 1973. [R.pp. 182, ll. 19-23; 200, ll. 11-17; Id. at pp. 140, ll. 19-23; 158, ll. 11-17.] Johnnie Dickert himself was not involved with the company. [R.p. 200, ll. 11-14; Id. at p. 158, ll. 11-14.] As previously noted, Johnnie Dickert did not actually come into possession of the 158-acre tract until 2005. [R.p. 203, ll. 8-18; Id. at p. 161, ll. 8-18.]

Mr. Gray acknowledged that his grandfather's company and the Dickert Lumber Company, both being in the lumber and timber business, had a working relationship and gentlemen's agreement whereby if one family could not fulfill an order, the other family would. [R.pp. 66, ll. 6-14; 184, ll. 13-22; Id. at pp. 24, ll. 6-14; 142, ll. 13-22.] While pursuant to the purported gentlemen's agreement Mr. Gray would correct any damage to the access road after using it, Mr. Gray still maintained his right to use the road across the 158-acre tract to reach the 97-acre tract. [R.pp. 65, ll. 4-18; 69, ll. 12-18; 77, l. 15 – 78, l. 2; 186, ll. 1-9; Id. at pp. 23, ll. 4-18; 27, ll. 12-18; 35, l. 15 – 36, l. 2; 144, ll. 1-9.]

Mr. Gray eventually sold the 97-acre tract to his daughter, who thereafter sold the tract to Appellant Brown. [R.pp. 58, ll. 6-18; 134, ll. 15-22; Id. at pp. 16, ll. 6-18; 92, ll.

15-22.] Mr. Gray testified that when Appellant Brown purchased the 97-acre tract from Mr. Gray's daughter, Mr. Gray represented to Appellant Brown that there was a right to access the 97-acre tract through the road across the 158-acre tract. [R.p. 78, ll. 3-8, ll. 17-19; Id. at p. 36, ll. 3-8, ll. 17-19.]

Michael Wise, a poultry farmer, testified at trial that he purchased an 88.53 acre tract (the "Wise property") identified as TMS No. 383-13 from Respondent Johnnie Dickert in 2014. This tract of land abuts Old Whitmire Highway and sits next to the 158-acre tract. [R.pp. 81, l. 11 – 82, l. 11; 83, ll. 1-11; 182, ll. 15-20; 235; Id. at pp. 39, l. 11 - 40, l. 11; 41, ll. 1-11; 141, ll. 15-20; Plaintiff's Ex. 2.] Behind the Wise property sits the 97-acre tract which was owned by Mr. Gray when Mr. Wise purchased his property. [R.p. 83, ll. 19-25; Tr. p. 41, ll. 19-25.]

Previously, the road across the 158-acre tract was accessed directly from Old Whitmire Highway, but when Mr. Wise purchased the 88.53 acre tract, he wanted to place chicken houses on the property. To do so, DHEC regulations required Mr. Wise to have a 400 foot buffer around his chicken houses, and he had to purchase an extra two acres of property from Respondent Johnnie Dickert. This resulted in a change of access to the 97-acre tract which was then reached by first entering the Wise property and then continuing on the road crossing the 158-acre tract. [R.pp. 81, l. 11 – 83, l. 18; 86, l. 9 – 88, l. 6; 100, ll. 23-24; 101, ll. 5-8; 183, l. 23 – 184, l. 7; 235; Id. at pp. 39, l. 11 - 41, l. 18; 44, l. 9 – 46, l. 6; 58, ll. 23-24; 59, ll. 5-8; 141, l. 23 - 142, l. 7; see Plaintiff's Ex. 2.] Mr. Wise further testified that he had to take down the Dickert gate in front of the old access entrance to the road across the 158-acre tract. [R.pp. 88, l. 24 – 89, l. 8; Tr. pp. 46, l. 24 - 47, l. 8.]

Mr. Wise confirmed that the 97-acre tract did not front any public highways or roads. He considered the 97-acre tract a landlocked property. [R.p. 84, ll. 1-5; Id. at p. 42, ll. 1-5.]

During the period of time that he owned his property, from 2014 to 2019 when he then sold it to Mike Longshore, Mr. Wise testified that he was at the property seven days a week and would see logging trucks accessing the 97-acre tract through the road crossing through the 158-acre tract. [R.pp. 84, l. 6 – 85, l. 23; Id. at pp. 42, l. 6 - 43, l. 23.] He was also familiar with hunters using the road to access the 97-acre tract. [R.p. 88, ll. 10-17; Id. at p. 46, ll. 10-17.] Mr. Wise testified he believed Mr. Gray had a right to access the 97-acre tract through the road. [R.pp. 88, ll. 7-9; 89, ll. 4-8; Id. at pp. 46, ll. 7-9; 47, ll. 4-8.]

Terry Longshore testified at trial that he had been familiar with the 97-acre tract since 1993. [R.pp. 112, ll. 12-8; 112, l. 24 – 113, l. 1; Id. at pp. 70, ll. 12-18; 70, l. 24 - 71, l. 1.] He hunted on the 97-acre tract. [R.pp. 113, ll. 2-4; 114, ll. 16-19; 117, ll. 10-14; Id. at pp. 71, ll. 2-4; 72, ll. 16-19; 75, ll. 10-14.] He also accessed the 97-acre tract through the road crossing the 158-acre tract. [R.pp. 116, ll. 5-20; 117, ll. 17-19; Id. at pp. 74, ll. 5-20; 75, ll. 17-19.] According to Mr. Longshore, the only way to reach the 97-acre tract was through the 158-acre property because of gullies 30-40 feet deep at other potential access points that could not be crossed with a vehicle. [R.pp. 117, l. 19 – 118, l. 5; Id. at pp. 75, l. 19 - 76, l. 5.]

Mr. Gray, who owned the 97-acre tract at the time, gave Mr. Longshore permission to use the road across the 158-acre tract and provided him a key to the Gray lock on the gate. Mr. Gray never told Mr. Longshore that he needed the Dickert family's permission to use the road, and Mr. Longshore never had to get the permission of the Dickert family

to use the road. Mr. Longshore relied solely upon Mr. Gray for road access. [R.pp. 118, ll. 6-11; 121, ll. 21-25; 123, ll. 8-13; Id. at pp. 76, ll. 6-11; 79, ll. 21-25; 81, ll. 8-13.] Mr. Gray told Mr. Longshore that the Gray family had a right of way across the access road on the 158-acre tract for years. [R.p. 123, ll. 3-4; Id. at p. 81, ll. 3-4.]

Mr. Longshore testified the Dickert family was aware that he was hunting on the 97-acre tract, and they never prevented him from crossing their property or accused him of trespassing. [R.p. 118, ll. 12-17; Id. at p. 76, ll. 12-17.] Even after Respondent Johnnie Dickert thought Mr. Longshore had caused damaged to the road, he did not deny Mr. Longshore access to the road. [R.pp. 125, l. 24 – 126, l. 26; Id. at pp. 83, l. 24 – 84, l. 25.]

Mr. Longshore was not aware of the Dickert family ever telling Mr. Gray or him that the access road could not be used to reach the 97-acre tract, and no one ever stopped Mr. Longshore from using the road to reach the 97-acre tract. He had been openly using the road since 1993. [R.p. 120, ll. 1-15; Id. at p. 78, ll. 1-15.] Mr. Longshore was respectful of the Dickert family property and tried not to cause any damage to it when crossing the road. [R.p. 119, ll. 15-25; Id. at p. 77, ll. 15-25.]

Appellant Brown testified that prior to his purchase of the 97-acre tract, he became familiar with the property because the company he worked for assisted Mr. Gray in managing his properties. The 97-acre tract was one of the properties that he began managing for Mr. Gray in 2012 or 2013. [R.pp. 134, l. 25 – 135, l. 3, ll. 11-12; Id. at pp. 92, l. 25 - 93, l. 3, ll. 11-12.] Appellant Brown testified 97-acre tract was used for timber harvesting. [R.p. 135, ll. 13-15; Id. at p. 93, ll. 13-15.] Appellant Brown himself also hunted the 97-acre tract. [R.p. 139, ll. 6-20; Id. at p. 97, ll. 6-20.]

Appellant Brown testified that access to the 97-acre tract was from Old Whitmire Highway, past the chicken houses through the Wise property, and then through the bulldozed, developed road over the 158-acre tract. [R.pp. 135, l. 22 – 136, l. 9; 137, ll. 1-3; Id. at p. 93, l. 22 - 94, l. 9; 95, ll. 1-3.] Mr. Gray never told Appellant Brown that he needed the Respondents' permission to cross the 158-acre tract to reach the 97-acre tract. [R.p. 137, ll. 4-7; Id. at p. 95, ll. 4-7.] Appellant Brown further testified that the Respondents never prevented him at that time from using their property to reach the 97-acre tract and were aware that he was using their property. [R.pp. 137, ll. 1-7; 143, l. 19 – 144, l. 7; 145, ll. 12-14; Id. at pp. 97, ll. 1-7; 101, l. 19 - 102, l. 7; 103, ll. 12-14.] He was never told by the Respondents or anyone else that he needed permission from the Respondents to use the access road. [R.p. 145, ll. 1-4; Id. at p. 103, ll. 1-4.]

Appellant Brown also testified that there was no other way to reach the 97-acre tract other than through the road crossing the 158-acre tract because deep gullies surrounded the property on other sides. [R.p. 137, ll. 15-23; Id. at p. 95, ll. 15-23.] He also cannot access the 97-acre tract through the chicken houses on the former Wise property because of DHEC regulations, and the US Forest Service touches another side of his property which he is not allowed to access. [R.p. 143, ll. 1-9; Id. at p. 101, ll. 1-9.]

Appellant Brown testified that he always left the road in good shape and would fix any areas damaged after using the road. [R.p. 138, ll. 13-25; Id. at p. 96, ll. 13-25.] He was respectful of the 158-acre tract when using it to reach his property. [R.pp. 140, l. 20 – 141, l. 1; Id. at pp. 98, l. 20 - 99, l. 1.] At one time, Respondent Johnnie Dickert was unhappy about some damage to the access road which Appellant Brown fixed, but even then,

Respondent Johnnie Dickert did not stop Appellant Brown from using the road. [R.p. 144, ll. 8-22; Id. at p. 102, ll. 8-22.]

After Appellant Brown purchased the 97-acre tract, the Respondents blocked his access to the road crossing the 158-acre with a locked gate. [R.pp. 141, l. 19 – 142, l. 12; Id. at pp. 99, l. 19 – 100, l. 12.] He has been locked out since the summer of 2021 and has not had access to get equipment to his property since then. [R.p. 142, ll. 9-12; Id. at p. 100, ll. 9-12.] Therefore, Appellant Brown had to file this lawsuit to restore access through the easement. [R.p. 142, ll. 15-19; Id. at p. 100, ll. 15-19.]

After the lawsuit was filed, Appellant Brown and the Respondents reached an agreement whereby the Respondents would deed a twenty (20) foot easement if Appellant Brown would survey, grade, ditch, and gravel a new access road from Old Whitmire Highway through the 158-acre tract to the existing road on the 158-acre tract. [See R.pp. 239-241; 147, l. 18 – 148, l. 14; 206, l. 1 – 208, l. 4; Ltr. dated May 27, 2022 (Defendants' Ex. 6); Ltrs. dated December 21, 2022 (Defendants' Exs. 7 and 8); Tr. pp. 105, l. 18 – 106, l. 14; 164, l. 1 - 166, l. 4.] Appellant Brown also agreed to put up a gate or other barrier to keep third parties off the property. [R.p. 148, ll. 2-7; Tr. p. 106, ll. 2-7.] The written offer from the Respondents did not specifically mention any requirement of a gate, and Appellant Brown understood that he only had to put up a barrier to keep third parties from entering the property. [R.pp. 239-240; 164, l. 18 – 165, l. 1; Defendants' Exs. 6 and 7; Tr. pp. 122, l. 18 - 123, l. 1.]

Appellant Brown performed the work required of him pursuant to the parties' agreement. [R.pp. 140, ll. 17-19; 148, ll. 7-8; Tr. pp. 98, ll. 17-19; 106, ll. 7-8.] Appellant Brown paid for an access easement survey which marked the new easement. [R.pp. 148, l.

19 – 149, l. 11; Id. at pp. 106, l. 19 -107, l. 11.] The only difference between the agreed upon easement and the previous access was that with the new easement, the entry point to the road crossing the 158-acre tract would be from Old Whitmire Highway instead of having to first enter through the former Wise property. [R.pp. 149, l. 15 – 150, l. 9; Tr. pp. 107, l. 15 - 108, l. 9.]

Appellant Brown spent around $6,000.00 complying with the parties' agreement, including amounts paid for the survey, mulching, installation of piping and the building of the new road, cement, and a cable barrier. [R.pp. 150, ll. 8-14; 151, ll. 17-21; 153, ll. 23-25; 244-251; Id. at pp. 108, ll. 8-14; 109, ll. 17-21; 111, ll. 23-25; Invoices (Court Ex. 3).] He also graveled the road. [R.pp. 168, l. 25 – 171, l. 3; 252; Tr. pp. 126, l. 25 - 128, l. 3; Court's Ex. 4.] He did each thing required of the parties' agreement. [R.pp. 166, ll. 3-5, ll. 18-19; 170, ll. 23-25; Tr. pp. 124, ll. 3-5, ll. 18-19; 128, ll. 23-25.] The court was notified by the parties in July 2023 that the case had resolved. [R.pp. 52, ll. 8-10; 152, ll. 3-5; Id. at pp. 10, ll. 8-10; 110, ll. 3-5.]

Respondent Johnnie Dickert acknowledged that pursuant to the parties' agreement, that after Appellant Brown built the new road, Johnnie Dickert would contact Appellant Brown and let him know if there were any deficiencies to be corrected and provide Appellant Brown the opportunity to correct any such deficiencies. [R.pp. 207, l. 24 – 208, l. 11; Id. at pp. 165, l. 24 – 166, l. 11.]

Instead, Appellant Brown was sent a letter that he was in breach and he was provided no opportunity to correct any alleged deficiencies. [R.p. 242; Ltr. dated January 12, 2024 (Defendants' Ex. 9).] The Respondents' January 12, 2024 letter notified Appellant Brown that he was in breach of the agreement and therefore, the Respondents revoked

Appellant Brown's right to use the agreed upon easement after Appellant Brown had performed the required work. Respondent Johnnie Dickert was not satisfied with the cable barrier Appellant Brown had installed, although according to Appellant Brown, Johnnie Dickert never informed him a cable would be insufficient. [R.p. 170, ll. 10-12; Tr. p. 128, ll. 10-12.] The offer letter also did not require a gate. [R.pp. 239-240; Defendants' Exs. 6 and 7.] Johnnie Dickert also claimed that Appellant Brown allegedly interrupted a guest hunting on the 258-acre property even though Appellant Brown was not aware anyone was hunting and stayed on his own property. [R.p. 155, ll. 5-11; Tr. p. 113, ll. 5-11.] This was further unrelated to the agreement that an easement would be granted if Appellant Brown performed the required work.

Appellant Brown testified that he remains willing to correct any issues that the Respondents may have that are required pursuant to the parties' agreement. [R.p. 171, ll. 1-4; Id. at p. 129, ll. 1-4.]

STANDARD OF REVIEW

The determination of the existence of an easement is a question of fact in a law action, and the appellate court's scope of review is limited to the correction of errors of law. Simmons v. Berkeley Elec. Coop., Inc., 419 S.C. 223, 236, 797 S.E.2d 387, 394 (2016). The appellate court will not disturb the lower court's finding unless they lack evidentiary support. Id.

ARGUMENT

I. The Trial Court erred in denying Appellant Brown an appurtenant prescriptive easement after failing as a matter of law to apply the presumption of adverse use after a claimant or his predecessors in title have enjoyed an easement openly, notoriously, continuously, and uninterruptedly for a period of twenty (20) years.

In failing to grant Appellant Brown an appurtenant prescriptive easement over the 158-acre tract of land, the Trial Court failed as a matter of law to apply the legal presumption that when a claimant or his predecessors in title have enjoyed an easement openly, notoriously, continuously, and uninterruptedly for a period of twenty (20) years, such use is presumed to be adverse and will entitle a claimant to a prescriptive easement unless such presumption is rebutted. In this case, the evidence established that Murray Gray, Appellant Brown's predecessor in title, used the access road across the 158-acre tract openly, notoriously, continuously, and uninterruptedly for twenty (20) years prior to the named Respondents coming into possession of the 158-acre tract and claiming that Mr. Gray's use was permissive only. Because Mr. Gray's prior use of the 158-acre tract had already ripened into an established prescriptive easement, the Respondents cannot as a matter of law nullify Mr. Gray's, and subsequently Appellant Brown's, right to a prescriptive easement in the access road across the 158-acre tract.

"An easement is a right given to a person to use the land of another for a specific purpose." Kelley v. Snyder, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012). "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). "[E]stablishing a prescriptive easement does not confer ownership

of property; it only confers the right to use that property." Carolina Ctr. Bldg. Corp. v. Enmark Stations, Inc., 433 S.C. 144, 162, 857 S.E.2d 16, 26 (Ct. App. 2021).

To establish a prescriptive easement, "the claimant must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years." Simmons v. Berkeley Elec. Cooperative, Inc., 419 S.C. 223, 233, 797 S.E.2d 387, 392 (2016). Critical to this appeal, "when it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse." Id. (quoting Williamson v. Abbott, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917)) (emphasis added).

"'Open' generally means that the use is not made in secret or stealthily. It may also mean that it is visible or apparent." Simmons, 419 S.C. at 233, 797 S.E.2d at 392 (quoting RESTATEMENT (THIRD) OF PROPERTY (Servitudes) § 2.17(h) (2000)). "'Notorious' generally means that the use is actually known to the owner, or is widely known in the neighborhood." Simmons, 419 S.C. at 234, 797 S.E.2d at 392 (quoting RESTATEMENT (THIRD) OF PROPERTY (Servitudes) § 2.17(h) (2000)). "[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 v. Daley, 363 S.C. 310, 318, 609 S.E.2d 597, 601 (Ct. App. 2005), overruled on other grounds by Simmons, 419 S.C. at 232, 797 S.E.2d at 392.

To satisfy the twenty (20) year prescriptive period, the claimant can tack his use to use by prior owners, provided the prior owners' use also satisfies the prescriptive easement

elements." Carolina Ctr. Bldg. Corp., 433 S.C. at 155, 857 S.E.2d at 22; see also Braswell v. Amick, 442 S.C. 618, 625, 900 S.E.2d 475, 479 (Ct. App. 2024).

Mr. Gray's testimony established the identity of the easement and further established that its use was open, notorious, continuous, and uninterrupted for at least twenty years, thereby entitling Appellant Brown to the presumption that that the use of the access road on the 158-acre tract was adverse. As an initial matter, the Trial Court found that Appellant Brown had established the identity of the easement. [R.p. 5; Order, p. 5 n.1.] Therefore, Appellant Brown has satisfied the identity element for the establishment of a prescriptive easement.

Mr. Gray testified that the 97-acre tract, purchased by his grandfather, had been in his family since around 1955. [R.pp. 59, l. 4 – 60, l. 2; Tr. pp. 17, l. 4 – 18, l. 2.] As far as he knew, his family had used the access road across the 158-acre tract since his grandfather purchased the 97-acre tract. [R.p. 64, ll. 20-23; Id. at p. 22, ll. 20-23.] Mr. Gray had himself been using the access road across the 158-tract to reach the 97-acre tract for as long as he could remember, at least since the 1980s. [R.pp. 61, ll. 4-6; 63, l. 22 – 64, l. 1; Id. at pp. 19, ll. 4-6; 21, l. 22 – 22, l. 1.] He testified that he had a right to access the 97-acre tract through the 158-acre tract and did not believe he needed anyone's permission to use the road. [R.pp. 64, ll. 2-4; 65, ll. 4-6, ll. 15-17; 76, ll. 16-18; Id. at pp. 22, ll. 2-4; 23, ll. 4-6; ll. 15-17; 34, ll. 16-18.] Mr. Gray testified it was common knowledge that he was coming back and forth through the access road on the 158-acre tract. [R.p. 65, ll. 7-8; Id. at p. 23, ll. 7-8.] Mr. Gray's family also put their own lock on the gate to the access road. [R.pp. 64, ll. 2-11; 67, ll. 1-6; 76, ll. 19-24; Id. at pp. 22, ll. 2-11; 25, ll. 1-6; 34, ll. 19-24.]

Mr. Gray gave hunting rights to the 97-acre tract to a gentleman and his son and gave them a key to the lock on the gate to the access road. [R.p. 64, ll. 11-13; Id. at p. 22, ll. 11-13.] Mr. Gray did not testify that he had to ask for anyone's permission to grant access rights across the 158-acre tract to others. Being neighborly, Mr. Gray did make the Dickert family aware of others hunting on the 97-acre tract. [R.p. 64, ll. 13-19; Id. at p. 22, ll. 13-19.]

Terry Longshore testified at trial that he had been familiar with the 97-acre tract since 1993 and hunted on the tract. [R.pp. 112, ll. 12-18; 112, l. 24 – 113, l. 1; 114, ll. 16-19; 117, ll. 10-14; Id. at pp. 70, ll. 12-18; 70, l. 24 – 71, l. 1; 71, ll. 2-4; 72, ll. 16-19; 75, ll. 10-14.] He also accessed the 97-acre tract through the road on the 158-acre tract. [R.pp. ___; ___; Id. at pp. 74, ll. 5-20; 75, ll. 17-19.]

Consistent with Mr. Gray's testimony, Mr. Longshore confirmed that Mr. Gray gave him permission to use the access road on the 158-tract and provided him a key to the Gray lock on the gate. Mr. Longshore never had to obtain permission from the Dickert family to use the road. [R.pp. 118, ll. 6-17; 121, ll. 21-25; 123, ll. 8-13; Id. at pp. 76, ll. 6-17; 79, ll. 21-25; 81, ll. 8-13.] Mr. Gray informed Mr. Longshore that the Gray family had a right of way across the access road on the 158-acre tract for years. [R.p. 123, ll. 3-4; Id. at p. 81, ll. 3-4.] Mr. Longshore had been using the access road since 1993, and the Dickert family was aware of him using the road and never tried to stop him. [R.p. 120, ll. 1-15; Id. at p. 78, ll. 1-15.] Even after Respondent Johnnie Dickert thought Mr. Longshore had caused damaged to the road, he did not deny Mr. Longshore access to the road. [R.pp. 125, l. 24 – 126, l. 25; Id. at pp. 83, l. 24 – 84, l. 25.] This evidence is consistent with the fact that the Gray family had a right to use the access road.

When Appellant Brown eventually purchased the 97-acre tract from Mr. Gray's daughter, consistent with Mr. Gray's use of the 158-acre tract, Mr. Gray represented to Appellant Brown that there was a right to access the 97-acre tract through the road across the 158-acre tract. [R.p. 78, ll. 3-8, 11. 17-19; Id. at p. 36, ll. 3-8, ll. 17-19.]

The access road across the 158-acre tract had therefore been used openly by Mr. Gray and his family with knowledge by the Dickert family. Mr. Gray and his family also used the access road continuously and without interruptions for more than twenty (20) years. [R.pp. 63, l. 25 – 64, l. 1; Id. at pp. 21, l. 25 – 22, l. 1.] Under South Carolina law, Mr. Gray and his family's use was therefore presumed to be adverse. See Simmons v. Berkeley Elec. Cooperative, Inc., 419 S.C. 223, 233, 797 S.E.2d 387, 392 (2016). The Trial Court, however, failed to recognize this presumption and instead found, contrary to the presented evidence, that Mr. Gray and his family's use of the access road was by permission from the inception of the use of the road.

Critically, the Trial Court's Order ignores Mr. Gray's testimony of his and his family's open, notorious, continuous, and uninterrupted use of the access road which gives rise to the presumption of adverse use. The Trial Court's finding that permission was present from the inception of the road's use misconstrues the testimony.

The Trial Court based its ruling on an alleged gentlemen's agreement between the Gray family timber company and the Dickert family timber company. The testimony of from both Mr. Gray and Respondent Johnnie Dickert as to any agreement was that the two families had a longstanding working relationship whereby if one company had a timber order that could not be filled, the other family company would complete it. [R.pp. 66, ll. 6-14; 184, ll. 13-22; Tr. pp. 24, ll. 6-14; 142, ll. 13-22.]

While the purported gentlemen's agreement acknowledged that Mr. Gray would correct any damage to the access road after using it, Mr. Gray still maintained his right to use the road across the 158-acre tract to reach the 97-acre tract. [R.pp. 65, ll. 4-18; 69, ll. 12-18; 77, l. 15 – 78, l. 2; 186, ll. 1-9; Id. at pp. 23, ll. 4-18; 27, ll. 12-18; 35, l. 15 – 36, l. 2; 144, ll. 1-9.] Conduct by Mr. Gray evidenced his right to use the access road, including granting permission to Mr. Longshore to use the access road without obtaining any permission from the Dickert family. Conduct by the Dickert family in failing to prevent anyone from using the access road despite alleged damage to the road also evidences the acknowledgement that there was a right of Mr. Gray to use the road. [R.pp. 125, l. 24 – 136, l. 25; 144, ll. 8-22; Id. at pp. 83, l. 24 – 84, l. 25; p. 102, ll. 8-22.]

Counsel for the Respondents, during a line of questioning regarding the two families' working relationship, asked Mr. Gray whether he knew the road belonged to Respondent Johnnie Dickert and whether he was using the road with Respondent Johnnie Dickert's permission. [R.pp. 67, ll. 11-23; 70, l. 21 – 71, l. 4; Id. at pp. 25, ll. 11-23; 28, l. 21 - 29, l. 4.] But Respondent Johnnie Dickert himself did not come into possession of the 158-acre tract until 2005. [R.p. 203, ll. 8-9; Id. at p. 161, ll. 8-9.] And by that point, the access road had already been used by Mr. Gray and his family openly, notoriously, continuously, and uninterruptedly for twenty (20) years, resulting in a presumption that the use of the access road was adverse.

Therefore, the use of the access road on the 158-acre tract had already ripened into a prescriptive easement before the Respondents became owners of the 158-acre tract. The Trial Court erred as a matter of law in not properly applying the presumption of adverse

use. Testimony regarding any alleged permission after the establishment of the prescriptive easement does not convert the prescriptive use into permissive use.

During trial, the Respondents also emphasized several times that Mr. Gray had never claimed ownership in the access road across the 158-acre tract. [R.pp. 67, ll. 11-15; 70, ll. 4-6; 186, ll. 10-13; Tr. pp. 25, ll. 11-15; 28, ll. 4-6; 144, ll. 10-13.] The elements for obtaining a prescriptive easement, however, do not require the dominant landowner to intend to take ownership of that portion of the servient estate. Carolina Ctr. Bldg. Corp., 433 S.C. at 162, 857 S.E.2d at 26.

In addition, the fact that Mr. Gray and his family were authorized to have their own lock and key on the gate to the access road on the 158-acre tract did not extinguish their established right to use the road. [R.pp. 64, ll. 2-11; 67, ll. 1-6; 76, ll. 19-24; Tr. pp. 22, ll. 2-11; 25, ll. 1-6; 34. ll. 19-24.] Rather, this simply is evidence of the Dickert family's acquiescence to and recognition of the Gray family's right to use the road. See Sanitary & Aseptic Package Co. v. Shealy, 205 S.C. 198, 204, 31 S.E.2d 253, 255 (1944) (holding the servient estate owner's recognition of and acquiescence to the dominant estate owner's right to use the easement did not show permissive use).

For the reasons set forth above, the Trial Court erred in failing to grant Appellant Brown an appurtenant prescriptive easement to the access road over the 158-acre tract. The Trial Court ruled that there was permissive use of the access road that never ripened into a claim of right [R.p. 7; Order, p. 7]; however, in making this ruling, the Trial Court failed as a matter of law to apply the presumption of adverse use after a claimant has shown he or his predecessors in title have enjoyed an easement openly, notoriously, continuously, and uninterruptedly for a period of twenty (20) years. The prescriptive use of an easement

for twenty (20) years does not transform into permissive use after a subsequent title holder of the servient estate claims he gave permission. Accordingly, Appellant Brown requests this Court to reverse the Trial Court's failure to grant Appellant Brown an appurtenant prescriptive easement.

II. The Trial Court erred in failing to enforce the agreement between Appellant Brown and the Respondents for the grant of an easement where there is clear evidence of an agreement between the parties and sufficient part performance of the agreement occurred.

In the alternative, the Trial Court further erred in not enforcing the agreement by the Respondents to grant Appellant Brown a twenty (20) foot easement across the 158-acre tract after Appellant Brown performed the requirements of the parties' agreement. The Trial Court based its decision on Rule 43(k), SCRCP which provides:

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

Id.

First, pursuant Rule 43(k), the parties did inform the court of the agreement between them at a July 2023 docket meeting which counsel for the Respondents did not dispute at trial. [R.pp. 52, ll. 8-10; 152, ll. 3-5; Tr. pp. 10, ll. 8-10; 110, ll. 3-5.]

Further, while Appellant Brown is aware of the Supreme Court's decision S.C. Hum. Affs. Comm'n v. Zeyi Chen, 430 S.C. 509, 846 S.E.2d 861 (2020) holding that the requirements of Rule 43(k) are mandatory, Appellant Brown nevertheless submits that Rule 43(k) is not unlike the statute of frauds in requiring certain agreements to be in writing and signed, including any agreement "[t]o charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them." See S.C. CODE

ANN. § 32-3-10. But the courts will not require strict compliance with the statute of frauds where one party "has suffered a definite, substantial, detrimental change of position in reliance on the contract." Springob v. Univ. of S.C., 407 S.C. 490, 497, 757 S.E.2d 384, 387-88 (2014) (internal citations omitted).

In addition, the courts may enforce the performance of an oral agreement for acquisition of an interest in land, despite the statute of frauds, where sufficient part performance has occurred. Gibson v. Hrysikos, 293 S.C. 8, 13, 358 S.E.2d 173, 175-76 (Ct. App. 1987). To compel performance of such a contract, the court must find: "(1) clear evidence of an agreement; (2) that the agreement has been partly carried into execution on one side with the approbation of the other; and (3) that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract." Id. at 13-14, 358 S.E.2d at 176.

In this case, the Respondents agreed in writing through counsel that they would deed a twenty (20) foot easement to Appellant Brown if he would survey, grade, ditch, and gravel the new access road. [R.p. 240; Ltr. dated December 21, 2022 (Defendants' Ex. 7).] While not addressed in the Respondents' written proposal to Appellant Brown, Appellant Brown also agreed to install a gate or other barrier to keep third parties off the property. [R.p. 148, ll. 2-7; Tr. p. 106, ll. 2-7.]

Appellant Brown performed the work required of him pursuant to the parties' agreement. [R.pp. 140, ll. 17-19; 148, ll. 7-8; Id. at pp. 98, ll. 17-19; 106, ll. 7-8.] He spent around $6,000.00 complying with the parties' agreement, including amounts paid for the survey, mulching, installation of piping and the building of the new road, cement, and a cable barrier. [R.pp. 150, ll. 10-14; 151, ll. 17-21; 153, ll. 23-25; 244-251; Id. at pp. 108,

ll. 10-14; 109, ll. 17-21; 111, ll. 23-25; Invoices (Court Ex. 3).] Appellant also graveled the road. [R.pp. 168, l. 25 – 170, l. 3; 252; Tr. pp. 126, l. 25 – 128, l. 3; Court Ex. 4.] He did each thing required of the parties' agreement. [R.pp. 166, ll. 3-5; 170, ll. 23-25; Tr. pp. 124, ll. 3-5, ll. 18-19; 128, ll. 23-25.]

Respondent Johnnie Dickert acknowledged that pursuant to the parties' agreement, after Appellant Brown built the new road, Johnnie Dickert would contact Appellant Brown and let him know if there were any deficiencies to be corrected and provide Appellant Brown the opportunity to correct any such deficiencies. [R.pp. 207, l. 24 – 208, l. 11; Id. at pp. 165, l. 24 – 166, l. 11.] But instead, Appellant Brown was simply sent a letter that he was in breach and he was provided no opportunity to correct any alleged deficiencies. [R.p. 242; Ltr. dated January 12, 2024 (Defendants' Ex. 9).] Appellant Brown remains willing to correct any issues that the Respondents have pursuant to the agreement. [R.p. 171, ll. 1-4; Tr. p. 129, ll. 1-4.]

The parties had an agreement with the terms evidenced by the Respondents' December 21, 2022 letter to Appellant Brown. See Byrd v. Livingston, 398 S.C. 237, 243, 727 S.E.2d 620, 622 (Ct. App. 2012) (requiring a meeting of the minds between the parties with regard to the essential and material terms of the agreement to have a valid and enforceable contract). Appellant Brown performed his part of the agreement and remains willing to perform any remaining obligations. Gibson, 293 S.C. at 13-14, 358 S.E.2d at 175-76. He added improvements to the Respondents' land in furtherance of the agreement for the grant of the easement across the 158-acre property. Notwithstanding the provisions of Rule 43(k), Appellant Brown is entitled to the enforcement of the parties' agreement which regards a contract involving the grant of an interest of land. Accordingly, Appellant

Brown requests this Court to reverse the Trial Court's refusal to enforce the agreement between the parties for the grant of the easement to Appellant Brown.

CONCLUSION

For the reasons set forth herein, Appellant Brown respectfully requests this Court to (1) reverse the Trial Court's denial of an appurtenant prescriptive easement; or, in the alternative, (2) reverse the Trial Court's denial of the agreement between Appellant Brown and the Respondents for the grant of an easement.

Respectfully submitted,

/s Carmen V. Ganjehsani
Carmen V. Ganjehsani (S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com

Charles V. Verner (S.C. Bar No. 10033)
PO Box 484
1226 College Street
Newberry South Carolina 29108
(803) 915-9798
sclawyer@me.com
Attorneys for Appellant
Donald A. Brown, Jr.

November 4, 2025.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Appellant's Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

/s Carmen V. Ganjehsani
Carmen V. Ganjehsani (S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com

Charles V. Verner (S.C. Bar No. 10033)
PO Box 484
1226 College Street
Newberry South Carolina 29108
(803) 915-9798
sclawyer@me.com
Attorneys for Appellant
Donald A. Brown, Jr.

November 4, 2025.

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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant Donald A. Brown, Jr. do hereby certify that I have this date served the foregoing Final Appellant's Brief, dated November 4, 2025, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Amended Order dated April 24, 2024, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

Karl Stephen Brehmer
Andrew C. Brehmer
BREHMER LAW FIRM, LLC
PO Box 7966
Columbia, SC 29202
ksb@brehmerlawfirm.com
acb@brehmerlawfirm.com
Attorney for Respondents

/s Carmen V. Ganjehsani
Carmen V. Ganjehsani (S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
Attorneys for Appellant
Donald A. Brown, Jr.

Dated: November 4, 2025.