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JUL 10 2012  
SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM CALHOUN COUNTY  
COURT OF COMMON PLEAS

Diane Schafer Goodstein, Circuit Court Judge  
Case No. 2008-CP-9-135

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

v.

William Jackson, ..... Appellant.

NOTICE OF APPEAL

William Jackson appeals from the Order of the Honorable Diane Schafer Goodstein dated October 26, 2011, and entered November 15, 2011 and from judgment entered thereon or to be entered thereon. William Jackson further appeals the Order of Judge Goodstein dated June 5, 2012 denying appellant's motion to alter or amend the Order of October 26, 2011. Appellant has not received written notice of the entry of the Order dated June 5, 2012. However, a copy of the Order of June 5, 2012 was mailed to the undersigned on June 12, 2012, prior to its entry, when the respondent mailed the Order of June 5, 2012 to the Clerk of Court for entry. This copy was received on June 14, 2012.

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by: James B. Richardson, Jr.  
Attorneys for Appellant.

July 9, 2012.

Notice of Appeal  
July 9, 2012  
Page Two

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THE STATE OF SOUTH CAROLINA  
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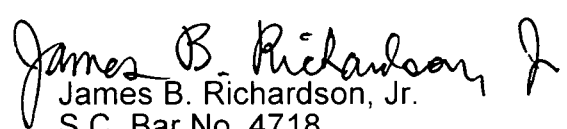
William Jackson, ..... Appellant.

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that I served a copy of the notice of appeal of William Jackson upon the respondent by first class mail, postage prepaid, addressed to respondent's attorneys at their address of record, namely:

Andrew C. English, III, Esq.  
George A. Taylor, Esq.  
Callison Tighe & Robinson  
P. O. Box 1390  
Columbia, SC 29202-1390

on July 9, 2012.

  
James B. Richardson, Jr.  
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July 9, 2012.

**Law Office of  
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July 9, 2012

**RECEIVED**  
JUL 10 2012  
**SC Court of Appeals**

Honorable Jenny Kitchings  
Clerk of the S.C. Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

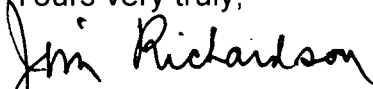
Re: W. Peter Buyck, Jr. v. William Jackson  
2008-CP-9-135

Dear Ms. Kitchings:

Enclosed for filing is the notice of appeal of William Jackson.

Thanking you, I remain

Yours very truly,

  
James B. Richardson, Jr.

cc: Hon. Kenneth Hasty  
Andrew C. English, III, Esq.  
George A. Taylor, Esq.  
William E. Booth III, Esq.



**James B. Richardson, Jr.**

*Attorney at Law*

1229 Lincoln Street

Columbia, South Carolina 29201

**TO:**

**Honorable Jenny Kitchens  
Clerk, S. C. Court of Appeals  
P. O. Box 11629  
Columbia, SC 29211**

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF CALHOUN )

FOR THE FIRST JUDICIAL CIRCUIT

W. Peter Buyck, Jr., )

Civil Action No.: 2008-CP-09-135

Plaintiff, )

-vs- )

William C. Jackson, )

**ORDER**

Defendant. )

\_\_\_\_\_>

This matter came before me for trial in St. Matthews on October 5 and October 6, 2010. Present at the trial were the Plaintiff, W. Peter Buyck, Jr. ("Plaintiff"), represented by Andrew C. English, III of Callison Tighe & Robinson, LLC and the Defendant, William C. Jackson ("Defendant" or "Defendant Jackson"), represented by William Booth, III of Booth Law Firm, LLC.<sup>1</sup>

This action was initiated by the filing by Plaintiff of his Lis Pendens, Summons and Complaint on September 18, 2008 and his Amended Complaint on October 9, 2008 seeking an order that Plaintiff has certain easement rights, established by prescription and/or by express grant, over a particular road, termed the "Red Road" herein, which traverses lands of Defendant Jackson. Plaintiff's Amended Complaint further seeks an injunction restraining and enjoining Defendant Jackson from obstructing the Red Road or otherwise interfering with Plaintiff's use of the Red Road. Although Plaintiff sought in his Amended Complaint to recover damages resulting from Defendant Jackson's interference with Plaintiff's use of the Red Road, Plaintiff

<sup>1</sup> Prior to the hearing of any evidence in this case, the parties stipulated to the dismissal of Defendant Lorraine Ruple Conrad, Trustee for the Lorraine Ruple Conrad Revocable Trust Under Agreement dated March 30, 2000 ("Defendant Conrad") from this action and the Court hereby orders that Defendant Conrad shall be dismissed from this action without prejudice.

elected not to proceed on this cause of action, rendering this matter essentially an easement case.<sup>2</sup> Defendant Jackson filed his Answer to the Amended Complaint on November 12, 2008 denying that Plaintiff has any right to use the Red Road.

Plaintiff and Defendant Jackson are the fee simple owners of adjacent tracts of real property located in Calhoun County, South Carolina. The Plaintiff's property, which shall hereinafter be referred to as the "Buyck Property," consists of approximately 700 acres and is located generally as shown on Exhibit A attached hereto and incorporated herein by this reference. The Buyck Property was initially acquired by Plaintiff's father, W.P. Buyck, and an uncle in 1942 and was ultimately conveyed to Plaintiff by deed of his father, W.P. Buyck, recorded on December 7, 1977 as Deed 6623 in the Calhoun County records. The Buyck Property is more particularly described on Exhibit B attached hereto and incorporated herein by this reference.

Defendant Jackson's property is hereinafter referred to as the "Jackson Property" and consists of approximately 108 acres located adjacent to the Buyck Property and generally as shown on the attached Exhibit A. In April of 2000, Defendant Jackson and Defendant Conrad (who has been dismissed from this action) purchased, as tenants-in-common, those tracts identified on Exhibit A as the Jackson Property and the Conrad Property, which properties at that time comprised one undivided tract of approximately 203 acres. The undivided 203-acre tract which has now been subdivided into the Jackson Property and the Conrad Property was once owned by Grace McAlister and therefore the 203-acre tract will be referred to herein as the "McAlister Tract." Thereafter, in May of 2000, Defendant Jackson and Defendant Conrad

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<sup>2</sup> Nonsuit was granted denying Plaintiff's claim for damages following Plaintiff's election to refrain from introducing evidence as to such damages.

effectively partitioned the McAlister Tract with Defendant Jackson receiving the Jackson Property by way of a deed from Defendant Conrad recorded with the Calhoun County Clerk of Court on May 22, 2000 in Book 141 at Page 319. The Jackson Property is more particularly described on Exhibit C attached hereto and incorporated herein by this reference.

The road that is at issue in this action, over which Plaintiff claims to have an easement, is shown and identified as the "Red Road" on Exhibit D and will herein be referred to as the "Red Road."<sup>3</sup> Another road runs along the boundary line between the Jackson Property and the Conrad Property and terminates upon the Buyck Property. This other road is shown and identified on Exhibit D and referred to herein as the "Blue Road." The Blue Road primarily provides access to a "hayfield" located on the Buyck Property near the boundary line between the Buyck Property and the Jackson Property.

In 1984, Grace McAlister, as owner of the McAlister Tract (comprised of the Jackson Property and the Conrad Property), granted an easement in favor of Plaintiff; which easement was recorded in the Office of the Clerk of Court for Calhoun County on June 7, 1984 in Book 6 at Page 2615 (the "McAlister Easement"). The McAlister Easement grants the following easement rights over the McAlister Tract for the benefit of the Buyck Property:

An easement or right-of-way, twenty (20) feet in width for ingress and egress from South Carolina Highway #S-9-25 and extending generally in a northwesterly direction from lands of the Grantee across lands of the Grantor herein to the property line of other lands of the Grantee and along the present existing road over the [203 acre tract of Grantor].

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<sup>3</sup> As discussed below, the Red Road shown on Exhibit D also crosses through the corner of a parcel of land owned by a neighboring property owner. The testimony shows that this neighboring property owner has never challenged Plaintiff's right to use the Red Road crossing his property, and therefore it was not necessary to make this owner a defendant to this lawsuit. For purposes of this Order, unless specifically stated otherwise, all references to the Red Road shall mean and refer to those portions of the Red Road shown on Exhibit D which are located upon the Jackson Property. Nothing contained in this Order shall be construed as an adjudication of any rights that Plaintiff and the aforementioned neighboring property owner may have vis-à-vis one another.

Plaintiff testified that he believed the McAlister Easement granted him access rights over both the Red Road and the Blue Road traversing the McAlister Tract. When cross-examined as to the language of the McAlister Easement referencing "the present existing road," Plaintiff testified that such "present existing road" would have been the Red Road which was the only main road that had ever been used for access to the Buyck Property. Defendant Jackson, however, claims that the road described in the McAlister Easement is in fact the Blue Road.

In any event, Plaintiff claims to have acquired a prescriptive easement over the Red Road for access to the Buyck Property for farming and logging activities as well as for recreational purposes. I find Plaintiff has presented ample evidence to establish a prescriptive easement over the Red Road for the aforementioned purposes, and therefore I will address the prescriptive easement claim first, which is dispositive of the remaining claims in this case.

#### I. PRESCRIPTIVE EASEMENT

The elements necessary for establishment of a prescriptive easement are (1) the continued and uninterrupted use or enjoyment of the right for the full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. Babb v. Harrison, 220 S.C. 20, 24-25, 66 S.E.2d 457, 458 (1951); Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 599-600 (Ct. App. 2005). Plaintiff has presented ample evidence, through the testimony of Plaintiff and many others, regarding the historic use of the Red Road which is sufficient to satisfy each of these elements necessary for the establishment of a prescriptive easement over the Red Road.

##### A. Continuous and Uninterrupted Use.

Plaintiff has shown that he and his predecessors in title, as well as numerous guests, invitees and licensees of Plaintiff, have used the Red Road crossing the Jackson Property

continuously and without interruption for a period far exceeding twenty years. In fact, the period of use has been established by Plaintiff to have begun as far back as the 1940s, and this use continued until the actions of Defendant gave rise to the instant lawsuit.

Plaintiff presented a number of witnesses who have testified to the following facts, and I find each and every one of these witnesses to be credible and reliable:

- Plaintiff, who is 64 years old, testified that he has used the Red Road for his entire life for access to the Buyck Property for farming and logging activities as well as for hunting, fishing and general recreation and that his father and uncle used the Red Road for these same purposes since 1942. During this period of continuous use, various types of vehicles have used and traveled the Red Road for access to the Buyck Property specifically including cars, trucks, farm trucks, tractors hauling equipment, tractor-trailers hauling crops, and logging trucks.
- Mark Buyck, a cousin of Plaintiff and member of the South Carolina Bar, testified that he has used the Red Road on a regular basis for access to the Buyck Property for general recreational purposes beginning around 1946 and continuing until around 1964, and that he continued use of the Red Road on a less regular basis thereafter, particularly during the late 1970s and the 1980s.
- Mike Nickells, who is 61 years old and a former owner of the McAlister Tract, testified that he used the Red Road for access to the Buyck Property as a child, with Plaintiff and Plaintiff's father. Mr. Nickells further testified that when he purchased the McAlister Tract in 1990, and during his ownership of the McAlister Tract for six years thereafter, he knew that Plaintiff and Plaintiff's family, as well as their invitees and licensees, had used the Red Road for access to the Buyck Property "for a long, long time" and were currently still using the Red Road. Mr. Nickells further testified that Plaintiff had used the Red Road to bring his tractor and other equipment onto the Buyck Property and for logging activities on the Buyck Property. Mr. Nickells testified that he did not think that he could stop Plaintiff from using the Red Road.
- Jack Brady, a retired Calhoun County farmer and owner of property along the Congaree River, testified that he used the Red Road as far back as the mid 1970s, and before, for access to the Buyck Property for recreational purposes.
- Robert Martin, a logger from Summerton, testified that he used the Red Road for access to the Buyck Property to cut timber as recently as 1994 and periodically over several years thereafter. Mr. Martin further testified that as long as 40 years

ago or more he engaged in logging activities including the removal of timber from the Buyck Property by means of the Red Road.

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

Even a witness called by Defendant Jackson, James Medlin, who is the President of the Buyck Hunt Club (which leases rights to hunt the Buyck Property), testified that he and the other members of the Hunt Club had used the Red Road for access to the Buyck Property for a period of approximately 40 years. Mr. Medlin also testified that he recalled logging activities previously taking place in the area — perhaps in the 1980s. The testimony further established that, prior to the acts of Defendant Jackson giving rise to this lawsuit, none of the witnesses were ever precluded from using the Red Road for the various purposes described above.

I find the testimony of each of Plaintiff's witnesses and Mr. Medlin (a defense witness) to be credible and reliable with respect to the historic use of the Red Road for farming, logging and recreational activities. Defendant Jackson did not present even one witness or any other evidence which refuted or contradicted the testimony set forth above regarding the historic use of the Red Road.

As mentioned above, Plaintiff's father and uncle initially purchased the Buyck Property in the 1940s and the property was subsequently conveyed to Plaintiff in 1977. To the extent necessary, periods of use may be "tacked" to make up the prescriptive period so long as the use by each owner during the prescriptive period meets the requirements necessary to establish a prescriptive easement. Matthews v. Dennis, 365 S.C. 245, 249, 616 S.E.2d 437, 439 (Ct. App.

2005). It is also worth noting that "in 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 at 318, 609 S.E.2d at 601 (stating further that this element "does not require the use thereof every day for the statutory period or even on a weekly or monthly basis; but simply the exercise of the right more or less frequently according to the nature of the use and the needs of the claimant").

Regarding the requirement that use be uninterrupted for the duration of the prescriptive period, our Supreme Court has held that in order to constitute an "interruption" of the prescriptive period, a servient owner must engage in overt acts which prevent use of the servient estate. Pittman v. Lowther, 363 S.C. 47, 52, 610 S.E.2d 479, 481 (2005) ("[w]e conclude actions are sufficient to interrupt the prescriptive period when the servient landowner engages 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"); see also Jones at 317, 609 S.E.2d at 600 (holding that "[i]t is undisputed that since [the servient owner]'s acquiescence to the [dominant owner]'s use, no overt actions were taken by the owners of the [servient parcel] to prevent use of the right of way prior to the actions that gave rise to this action. Jones's use, therefore, has satisfied the 'uninterrupted' requirement."); see also Matthews at 250, 616 S.E.2d at 440 (holding that conveyance of the roadway in question to the defendants did not "interrupt" the plaintiffs continuous use of the roadway).

Plaintiff and each of his witnesses testified that their use of the Red Road had never been challenged prior to Defendant Jackson's purchase of the Jackson Property in 2000. Indeed, Mike Nickells, a former *owner* of the McAlister Tract (which includes the Jackson Property) testified that he was not able to stop or prevent Plaintiffs or Plaintiffs licensees' and invitees' use of the

Red Road. Moreover, Mr. Medlin testified that prior to Defendant Jackson's purchase of his property, no one had ever challenged *his or his hunt club 's* use of the Red Road. Such testimony of a defense witness is important to Plaintiffs claims and I find it to be exceedingly probative. As discussed below, any actions taken by Defendant Jackson after his purchase in 2000, specifically any actions taken by Defendant Jackson to block the Red Road from use by Plaintiff, are irrelevant to a ruling on Plaintiffs prescriptive easement claim as Plaintiffs prescriptive easement rights over the Red Road ripened long before Defendant Jackson's purchase in 2000.

The evidence presented clearly shows the use of the Red Road by Plaintiff, and his family members, friends, employees and business associates for farming and logging activities as well as hunting, fishing and other recreational purposes (including use by the hunt club) continuously and without interruption since the 1940s — a period far longer than the required twenty years, and I find the evidence presented sufficient to satisfy the "continuous and uninterrupted use" requirement for establishment of a prescriptive easement.

B. Identity of Thing Enjoyed.

Plaintiff has also sufficiently established the location of the Red Road enjoyed by Plaintiff and his predecessors and this Red Road in question is shown and identified on Exhibit D. The entire length of the road encompassing the Red Road at issue runs from Fort Motte Road (SC 9-25), through the lands of another, then through other property of Plaintiff, then through the Jackson Property crossing the corner of a tract owned by a neighboring property owner and then re-entering the Jackson Property, and then has its terminus on the Buyck Property, being the dominant estate. There is no dispute over the physical location of the Red Road as the parties and all witnesses have recognized the location of the Red Road to be as shown on Exhibit D.

C. Use Either Adverse or Under a Claim of Right.

Plaintiff has also presented ample evidence that his use of the Red Road and the use by his predecessors was at all times either adverse or under a claim of right, which is sufficient to establish rights to the Red Road through prescription. In order to establish a prescriptive easement, it is only necessary that the use be adverse *or* under a claim of right. Jones at 315-316, 609 S.E.2d at 600-601 (noting that any interpretation of Nelums v. Cousins, 304 S.C. 306, 403 S.E.2d 681 (Ct. App. 1991), as requiring use that is both adverse *and* under a claim of right is incorrect; only a showing of use *either* adverse *or* under a claim of right is necessary); see also Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 406 (Ct. App. 1996) (holding that only use adverse *or* under a claim of right is required and that cases requiring use both adverse and under claim of right have misquoted the requirements of Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457 (1951), in this respect).

It is well settled that adverse use is presumed once the claimant of a prescriptive right establishes open, notorious, continuous and uninterrupted use. Poole v. Edwards, 197 S.C. 280, 15 S.E.2d 349, 350 (1941). Plaintiff, through his testimony and that of his witnesses, has presented ample evidence of open, notorious, continuous and uninterrupted use by himself and his predecessors so as to satisfy this presumption of adverse use, and no evidence has been presented by Defendant in rebuttal of this presumption.

In addition, Plaintiff and each of his witnesses testified that their use of the Red Road was based on a belief that they, or at least the Plaintiff, had the right to use the Red Road. This belief was premised upon the historic and long continued use of the Red Road by Plaintiff and his father and uncle since the 1940s and the general belief throughout the area that this was "Peter's

Road."<sup>4</sup> Mike Nickells, a former owner of the McAlister Tract, testified that he never tried to stop Plaintiff or anyone else from using the Red Road crossing his property because he did not think that he could stop them. Mr. Nickells further believed that Plaintiff and his family members, friends, employees and business associates had the right to use the Red Road. Accordingly, Plaintiff has shown that the use of the Red Road by himself and his family members, friends, employees and business associates has been under a claim of right, and there are several South Carolina cases on point with respect to this issue. See, e.g., Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005); Matthews v. Dennis, 365 S.C. 245, 616 S.E.2d 437 (Ct. App. 2005).

A prescriptive easement can be established under a "claim of right" when a party is under the mistaken belief that he has a right to use the property. Loftis v. South Carolina Electric & Gas Co., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004). In addressing this issue, the Loftis Court held that "a party may earn a prescriptive easement under a claim of right if 'he demonstrate[s] a substantial belief that he had the right to use' the property in a manner consistent with the alleged easement." *Id.* at 440, 604 S.E.2d at 717 (quoting Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003)).

In order for use to be considered "under a claim of right" a party must "demonstrate a substantial belief that he had the right to *use* the parcel or road based upon the totality of the

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<sup>4</sup> Plaintiff testified that he thought he had the right to use the Red Road because he had always used it, and his father and uncle had always used it before him, and no one had ever challenged his right to use it. Plaintiff testified that "it's the only road that everybody's ever used to go in and out of there; the loggers and everyone else." Plaintiff further testified that he never asked permission of anyone to use the road because he didn't need anyone's permission. Brock Conrad, who participated in the initial purchase of the McAlister Property with Defendant Jackson, testified that it was his belief that Plaintiff had an easement to go across the Red Road. Even Defendant's witness, James Medlin, testified that he thought Plaintiff and his father had the right to use the Red Road based on the fact as he stated that "it's been open so many years."

circumstances surrounding his use." Matthews at 250, 616 S.E.2d at 440 (emphasis in original) (expressly disagreeing with the plaintiffs contention that a claim of right cannot be established based on a mistaken belief of ownership); Hartley at 151, 584 S.E.2d at 389; see also Jones at 316, 609 S.E.2d at 600 (requiring either a "justifiable claim of right" or adverse use). In this respect, our Court of Appeals has found a prescriptive easement to exist in a case where "[p]laintiffs have established that theirs has always been a belief that they have had a right to use of the subject roadway for ingress and egress, and had openly done so for well in excess of twenty years." Matthews at 250, 616 S.E.2d at 440.

Our courts have found easements to have been established by prescription in circumstances almost identical to the case at hand. In Jones, infra, the dominant owner believed she had a right to use the access because her family had used it to get to and from their land "as long as she could remember." 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005), The dominant owner's family members testified that "they openly asserted their perceived right to use the pre-existing path with the full knowledge and acquiescence of the servient owner and the Court held that there was "abundance" of testimony reflecting the easement holder's claim of right to the easement in that the easement holder demonstrated "a substantial belief that she had the right to use the property in a manner consistent with the alleged easement, originating from her family's prior use of the access." Id.

Likewise, in Matthews, the plaintiff testified that members of her family had always used the roadway in question for access and that, while acknowledging they may not have had legal documents granting them the right to do this, they thought they had the right to use the roadway. 365 S.C. 245, 250-51, 616 S.E.2d 437, 440 (Ct. App. 2005). Our Court of Appeals held this use

was under a claim of right sufficient to support the establishment of a prescriptive easement. *Id.* at 250, 616 S.E.2d at 440.

Similarly, in Hartley, the Court held that a sufficient claim of right was established by testimony of many residents that they had used the roadway in question since childhood and claimed their right flowed from their own continuous use of the road and use by prior generations of their families. 355 S.C. 145, 153, 584 S.E.2d 386, 390 (Ct. App. 2003). The Court went on to hold that it was clear that the residents and their predecessors in title "carried on a tradition of use for several decades" and that "the residents relied upon their use by their predecessors in title to gird their belief that they held a claim of right to use [the roadway]." *Id.* at 152, 584 S.E.2d at 388.

Based upon the overwhelming and unrebutted testimony presented at trial on this issue and the controlling precedent discussed above, I find that the use of the Red Road by Plaintiff and his predecessors was not only open, notorious, continuous and uninterrupted and therefore considered adverse, but was clearly under a "claim of right"; thus satisfying the final element necessary for a prescriptive easement. The Plaintiff and all witnesses called by Plaintiff testified that Plaintiff and his family members and employees and friends have always used the Red Road for access to the Buyck Property, for farming and logging activities as well as for recreational purposes and that, prior to the actions of Defendant Jackson, this use had never been challenged or interrupted. Each of these witnesses testified that they always believed that Plaintiff and his father before him had the right to so use the Red Road. Plaintiff himself testified that he always believed he had the right to use the Red Road for these purposes.. No evidence or testimony was presented by Defendant Jackson as to the use of the Red Road by Plaintiff prior to his purchase of the Jackson Property, much less that anyone interrupted Plaintiff's use thereof. During cross-

examination, several of Plaintiff's witnesses were questioned as to whether they investigated their right to use the Red Road for access to the Buyck Property or why they believed they had the right to use the Red Road for such access. The witnesses' responses to these inquiries were consistent - that they used the Red Road because Plaintiff instructed them to do so and because they believed Plaintiff had the right to use the Red Road, or that the Red Road was the Plaintiff's road. These responses are entirely consistent with a finding that Plaintiff's use of the Red Road was under a claim of right.

Based on the foregoing, I find a prescriptive easement has been established over the Red Road, for the benefit of Plaintiff and his successors and assigns and appurtenant to the Buyck Property, for the purposes of providing ingress to, and egress from, the Buyck Property by means of the Red Road for use of the Buyck Property by Plaintiff and his family members, friends, employees and business associates for farming and logging activities as well as for hunting, fishing and other recreational purposes (including use of the Red Road by the members of the Buyck Hunt Club and other such organizations). As is consistent with the easement law of this State, the prescriptive easement which Plaintiff has established, and which is recognized herein, is for the benefit of and appurtenant to the Buyck Property, permanent in nature, and the burdens and benefits thereof run with the title to the Jackson Property and the Buyck Property, respectively.<sup>5</sup>

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<sup>5</sup> In order for an easement to be considered an appurtenant easement it must inhere in the land, concern the premises, have a terminus on the land of the benefitted property, and must be essentially necessary to the enjoyment of the benefitted property. Clearly the Plaintiff's prescriptive easement concerns the Buyck Property, and the Red Road has a terminus upon the Buyck Property. In addition, and as stated elsewhere in this Order, I find that based upon the testimony and evidence presented, the Blue Road is inadequate for access to the Buyck Property for Plaintiff's historical purposes — particularly for logging and farming operations, but also for hunting and recreational use of the majority of the Buyck Property. Therefore Plaintiff's prescriptive easement is essentially necessary to the enjoyment of his property.

As stated above, it is important to note that no evidence whatsoever was presented by Defendant Jackson relating to the character and use of the Red Road at any time prior to his acquisition of the Jackson Property in 2000. To be clear, I find that Plaintiff's prescriptive easement rights over the Red Road were established long before Defendant Jackson took title to the Jackson Property, and he therefore took title subject the rights of Plaintiff, and Plaintiff's licensees and invitees, to use the Red Road. No evidence presented by Defendant Jackson as to Plaintiff's use of the Red Road after Defendant Jackson's purchase of the Jackson Property is relevant to this analysis.

Although our technical analysis with respect to this case ends with the finding that Plaintiff has, in accordance with the applicable and binding case law of this State, established a prescriptive easement over the Red Road, it is worth mentioning that this result is not unduly harsh as to Defendant Jackson. Brock Conrad testified that he advised Defendant Jackson, prior to his purchase of the McAlister Tract (and subsequently the Jackson Property), that Plaintiff had the right to use the Red Road for access to the Buyck Property and that Plaintiff and his predecessors had used the Red Road for many, many years. Mr. Conrad further advised Defendant Jackson that he did not think the Red Road could be closed after such an extended period of use by Plaintiff and Plaintiff's predecessors. In addition, the preliminary survey prepared for Defendant Jackson in connection with his initial purchase of the McAlister Tract noted that the road subject to the McAlister Easement could be either the Red Road or the Blue Road. The subsequent, recorded, version of this survey prepared for Defendant Jackson included a note as follows:

Location of [the McAlister Easement] is unplottable. The description describes an easement along the present existing road. There's no way to determine from the description which road the deed is referring to.

Although this survey was subsequently revised after this litigation was commenced, the information described above was that which Defendant Jackson was aware of at the time of his purchase. In other words, until such time as this dispute arose, the opinion of the surveyor was that the location of the McAlister Easement was unknown and "unplottable." The testimony of Mr. Conrad and the substance of the surveyor's notes support but one conclusion: that Defendant Jackson knew or at least should have known of the rights of the Plaintiff to use the Red Road when he purchased the Jackson Property. <sup>6</sup>

The purpose of the foregoing analysis, though not essential to my finding that a prescriptive easement has been established in favor of Plaintiff, is simply to illustrate the fact that Defendant Jackson purchased the Jackson Property with actual knowledge (or at the very least inquiry notice) of Plaintiff's easement rights in the Red Road. As the evidence has shown, Plaintiff's prescriptive easement rights in this Red Road were established long before Defendant Jackson's purchase of the Jackson Property. Therefore, Defendant Jackson purchased the Jackson Property subject to those easement rights and, in this particular case, I believe with knowledge of those easement rights.

D. Necessity Argument Inapplicable.

Defendant has gone to great lengths to introduce testimony and evidence relating to the use and condition of the Blue Road, which serves as an additional access to the Buyck Property. Although there is conflicting testimony in this regard, upon my review of all evidence presented, which includes photographs and video footage of both the Blue Road and the Red Road, I find

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<sup>6</sup> Defendant Jackson has testified that the use of the Red Road for access to the Buyck Property disrupts Defendant Jackson and his wife at their home that they have built in relatively close proximity to the Red Road. Although this fact might be unfortunate, Defendant Jackson was made aware of the use and nature of the Red Road prior to his purchase of the Jackson Property and prior to his construction of his home at this particular location.

the Blue Road to be inadequate for access to the Buyck Property for Plaintiff's historical purposes — particularly for logging and farming operations, but also for hunting and recreational use of the majority of the Buyck Property. <sup>7</sup>

However, the condition and status of the Blue Road is simply not relevant with respect to Plaintiff's claim for a prescriptive easement over the Red Road. Even if, for the sake of argument only, the Blue Road was in perfectly acceptable condition and usable by Plaintiff for access to the Buyck Property for all purposes, that fact would have no application to the analysis of whether Plaintiff has established a prescriptive easement over the Red Road. Necessity is not a requirement for the establishment of a prescriptive easement. <sup>8</sup> See Babb at 24-25, 66 S.E.2d at 458 (setting forth the three elements necessary to establish a prescriptive easement, which elements do not include any mention of necessity); JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 5.2 (2011) ("Moreover, necessity is not an element in proving a prescriptive easement"); see also 28A C.J.S. *Easements* § 110 (2011) (noting that "[e]asements by necessity and easements by prescription are distinguished from each other since they arise by virtue of different and mutually exclusive conditions." and that therefore different

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<sup>7</sup> In reaching this conclusion I have placed great weight not only upon the testimony of the Plaintiff and other witnesses called in the Plaintiff's case who testified as to the unsuitable condition of the Blue Road, but also upon the testimony of certain of Defendant Jackson's witnesses. James Medlin, a witness for the defense and the President of the Buyck Hunt Club, testified that it took 23 men a full day to clear the Blue Road such that it could be traveled by hunters for their purposes, and that the Blue Road was not in a condition that could be traveled by any vehicle other than an all terrain vehicle, and not by a car or truck without four wheel drive. Another witness for Defendant Jackson, Michael R. Mills who is Defendant Jackson's surveyor and who has a forestry background, testified that a logging truck must have a ten or eleven foot clearance, at a minimum, in order to pass. Upon my review of the photographs and video footage presented I do not find it plausible that a logging truck, or even a larger truck utilized in farming operations or hauling farm machinery, could safely travel the Blue Road to and from those areas of the Buyck Property which are in question.

<sup>8</sup> Defendant Jackson has relied upon the case of Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997), for his claim that necessity is a requisite element to establishment of a prescriptive easement. Tupper, however, was not a prescriptive easement case, but instead involved an express easement sought to be established by virtue of a recorded plat. Clearly a different test is applicable to such situations.

rules apply to acquisitions of rights by prescription and acquisitions of rights by necessity.) (citing Clemson Univ. v. First Provident Corp., 260 S.C. 640, 197 S.E.2d 914 (1973) and Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 (1927)). Certainly (unless of course an easement is being claimed through necessity) nothing prevents a landowner from having two easements providing access to his property — particularly when the parcel of land in question consists of 700 acres, as with the Buyck Property.

E. Historic Use of the Red Road was not Permissive.

Defendant Jackson has presented evidence presumably in support of a claim that Plaintiff's and his predecessors' historic use of the Red Road was permissive. This evidence relating to "permission" is entirely based upon actions taken by Defendant Jackson after his purchase of the Jackson Property in 2000.<sup>9</sup> I find that, based upon Plaintiff and his predecessors' historic use of the Red Road since the early 1940s, the Plaintiffs prescriptive easement rights had ripened and been fully perfected long before Defendant Jackson's purchase of his property in 2000. No actions taken by Defendant Jackson after the perfection of Plaintiff's prescriptive easement can alter or diminish Plaintiff's previously established rights. Defendant Jackson purchased the Jackson Property subject to Plaintiffs prescriptive easement.

F. Plaintiffs Prescriptive Easement has not been Abandoned.

Defendant argued that the Plaintiff "disavowed" any claim to the Red Road by obtaining the express grant of the McAlister Easement. This argument is misplaced. Even if I found that the McAlister Easement was for the Blue Road as contended by Defendant, and which issue is discussed more fully below, the fact that Plaintiff obtained a written easement over a road in

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<sup>9</sup> Defendant Jackson and others testified that after Defendant Jackson's purchase of the Jackson Property in 2000, Defendant Jackson erected a gate across the Red Road and provided Plaintiff with a key to the gate.

another location, serving another portion of Plaintiff's property (the hayfield), does not affect or in any way prevent Plaintiff from establishing a prescriptive easement over the Red Road. There is no legal principle limiting a landowner to one access route to his property. In addition, the testimony at trial established that Plaintiff's use of the Red Road continued unchanged following the grant of the McAlister Easement and Plaintiff never took any action to "disavow" or abandon his easement. It is well settled that abandonment of established easement rights requires an affirmative act of the easement holder evidencing such abandonment. Witt v. Poole, 182 S.C. 110, 188 S.E. 496 (1936) (stating that "to justify the conclusion that there has been an abandonment, there must be some clear and unmistakable affirmative act or series of acts indicating a purpose to repudiate ownership"); see also 2 AM. JUR. PROOF OF FACTS 3D *Establishment of Prescriptive Easement* 125 (2011) ("[a]bandonment has to do with an unequivocal act of the claimant inconsistent with the further assertion of prescriptive rights and evidencing an intentional relinquishment of those rights"). Clearly such acts are not present in the instant case.

G. Plaintiff's Prescriptive Easement has a Terminus.

Defendant Jackson also contends that the easement claimed by Plaintiff does not have a terminus on the Buyck Property. I disagree. Defendant Jackson's contention is based on the fact that a small portion of the Red Road actually leaves the Jackson Property, crosses over certain property owned by another, and then re-enters the Jackson Property before terminating on the Buyck Property. In support of this contention, Defendant Jackson relies upon Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997), and Moore v. Reynolds, 285 S.C. 574, 330 S.E.2d 542 (Ct. App. 1985). Both of these cases, however, involve easements by express grant and analyze terminus issues with respect to express grants.

Regardless, it is clear that Plaintiff has established through prescription an easement across the Red Road<sup>19</sup> and therefore the terminus of the entire easement, taken as a whole, is clearly upon the Buyck Property. There is no evidence that the neighbor has ever challenged Plaintiff's prescriptive easement rights across his property and in fact Plaintiff and others testified to this effect. Therefore, it has not been necessary for Plaintiff to litigate his rights in Court, as has been necessary with respect to Defendant Jackson. The fact that Plaintiff has not been forced to litigate with his neighbor who, according to the record, has never challenged Plaintiff's use of the portion of the Red Road crossing his property, does not derogate the quality of the prescriptive easement established by Plaintiff over the Red Road by creating any terminus issue with respect thereto.

An established prescriptive easement, by its nature, exists of its own accord. It is not a prerequisite to the creation or recognition of a prescriptive easement that a legal action be undertaken to create or confirm prescriptive easement rights which have not been challenged. The prescriptive easement which exists over the Red Road and traverses the Jackson Property as well as a corner of a neighbor's property has its terminus upon the Buyck Property. If neighboring owner in question were to challenge Plaintiff's right to cross his property, then those issues between Plaintiff and his neighbor would be adjudicated in a separate lawsuit.

## II. EASEMENT BY EXPRESS GRANT

Both parties have advanced arguments relating to the grant of the McAlister Easement. Plaintiff argues that, in addition to his prescriptive rights over the Red Road, the McAlister Easement grants Plaintiff express easement rights over the Red Road. Defendant Jackson argues

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<sup>19</sup> Again, nothing contained in this Order shall constitute and adjudication of any rights between Plaintiff and the referenced neighboring property owner with respect to Red Road or either party's rights relating thereto and nothing contained herein shall be construed to make any findings, rulings or declarations with respect to that portion of the Red Road which is not located upon the Jackson Property.

that the rights granted Plaintiff in the McAlister Easement relate to the Blue Road only, and not the Red Road. Defendant Jackson further argues that Plaintiff's acquisition of an express easement (allegedly) over the Blue Road had the effect of terminating or causing an abandonment of Plaintiff's prescriptive rights over the Red Road.

I find the testimony and evidence presented concerning the McAlister Easement, and whether the existing road over which Ms. McAlister granted easement rights was the Red Road or the Blue Road, to be inconclusive. Specifically, I do not find the evidence sufficient to conclude as a matter of law that the McAlister Easement describes and grants access rights over the Blue Road only.<sup>11</sup> However, no legal determination relating to the McAlister Easement, including the location of the easement rights granted therein, is necessary in order to dispose of this case on the merits. A prescriptive easement has already been proven in Plaintiff's favor over the Red Road, and no interpretation of the McAlister Easement is necessary to support such a finding. Likewise, no interpretation of the McAlister Easement could be used to destroy or derogate any such prescriptive easement rights.

As discussed above, there is nothing in the law to prevent an owner from having two access roads serving his property. I have already determined and held that Plaintiff has acquired

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<sup>11</sup> Plaintiff testified that when the McAlister Easement was negotiated he thought it would allow him access rights over both the Red Road and the Blue Road, and that in the least he thought his access rights would be over the Red Road as the Red Road is his primary access to the Buyck Property. Michael R. Mills, Defendant Jackson's surveyor, testified that he believed the McAlister Easement to describe the Blue Road. However, the previous surveys of the McAlister Property prepared for Defendant Jackson first identified both the Red Road and the Blue Road as being subject to the McAlister Easement, and then later included a note that the location of the McAlister Easement grant was unplottable. Mr. Mills further testified that the road which traveled in a northwesterly direction as contemplated in the McAlister Easement would have to be the Blue Road, and cannot be the Red Road as the Red Road did not travel in a northwesterly direction. However, the McAlister Easement was one of a chain of easements granted to form one access way traveling from Fort Motte Road up to the Buyck Property. On cross-examination, Mr. Mills testified that the road beginning at Fort Motte Road, taking the right fork on the McAlister Property and then continuing northward on the Red Road to the boundary of the Buyck Property was also a road that traveled in a northwesterly direction — and again this northwesterly route was over the Red Road instead of the Blue Road. Based on the foregoing conflicting testimony, I find that no legal conclusion can be made as to the location of the easement rights granted in the McAlister Easement.

a prescriptive easement to use the Red Road for access to the Buyck Property for farming and logging activities and for recreational use. According to the testimony, Plaintiff's use of the Red Road began in the early 1940s and continued uninterrupted thereafter until Defendant purchased the Jackson Property in 2000. As such, Plaintiff and his predecessors had perfected their prescriptive rights in the Red Road long before the grant of the McAlister Easement in 1984. Accordingly, the grant of the McAlister Easement in Plaintiff's favor, providing Plaintiff access to the Buyck Property over one of the two existing roads upon the McAlister Tract, truly has no bearing or effect upon Plaintiff's prescriptive easement rights and thus a legal determination as to the true location of the easement rights granted in the McAlister Easement is unnecessary.

### III. PERMANENT INJUNCTION

Based upon the foregoing, I have determined that a prescriptive easement has been established over the Red Road for the benefit of Plaintiff and his successors and assigns for the purposes of providing ingress to, and egress from, the Buyck Property by means of the Red Road for use of the Buyck Property by Plaintiff and his family members, friends, employees, business associates, and any others given permission to use the Red Road, for farming and logging activities as well as for hunting, fishing and other recreational purposes (including use of the Red Road by the members of the Buyck Hunt Club and other such organizations, with permission from Plaintiff). As such an easement has been duly established by Plaintiff, I find that Plaintiff is entitled to a permanent injunction restraining and enjoining Defendant Jackson from obstructing the Red Road or otherwise interfering with Plaintiff's rights to the use of the Red Road as set forth in this Order.

The Red Road easement has always been used as the primary road. Moreover, it travels to very desirable part of the property, including the Congaree River, and it has always been

utilized for various purposes by many people. It is clear that Mr. Conrad knew the Red Road, knew why it was used, knew who used it, and knew how it was used. Considering all of the evidence, it was always the intention for the Red Road to run with the land. Mr. Jackson knew prior to buying the property that the Red Road was the primary road. It is clear to the Court that he has chosen to build a cabin in the face of the history of this easement. Moreover, Mr. Jackson indicated in his testimony that prior to purchasing the land he and Mr. Conrad toured the property and witnessed the existence and use of the Red Road.

In order for an easement to be considered an appurtenant easement it must inhere in the land to which it is appurtenant, have a terminus on the land of the benefitted property, must be essentially necessary to the enjoyment of the benefitted property, and pass with the property. Whaley v. Stevens, 21 S.C. 221, 224 (1884); Steele v. Williams, 204 S.C. 123, 28 S.E.2d 644, 646 (1944). Clearly, the Plaintiff's prescriptive easement concerns the Buyck Property, and the Red Road has a terminus upon the Buyck Property. In addition, and as stated elsewhere in this Order, I find that based upon the testimony and evidence presented, the Blue Road is inadequate for access to Buyck Property for Plaintiff's purposes — particularly for access to the Congaree river. Thus, Plaintiff's prescriptive easement is clearly essentially necessary to the enjoyment of his property.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Lorraine Ruple Conrad, Trustee for the Lorraine Ruple Conrad Revocable Trust Under Agreement dated March 30, 2000 shall be and hereby is dismissed from this action by stipulation and agreement of the parties; AND

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a prescriptive easement has been established and is judicially recognized herein over the Red Road (as such

Red Road is shown and depicted on Exhibit D hereto), for the benefit of Plaintiff and his successors and assigns and appurtenant to the Buyck Property, for the purposes of providing ingress to, and egress from, the Buyck Property by means of the Red Road for use of the Buyck Property by Plaintiff and to whom he grants permission; AND

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the prescriptive easement recognized herein shall benefit the Buyck Property as the dominant estate and burden the Jackson Property as the servient estate and the burdens and benefits of said easement shall run with the title to the Jackson Property and the Buyck Property, respectively; AND

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Order shall be recorded in the real property records for Calhoun County and indexed under the names of both Plaintiff and Defendant Jackson in both the Grantor and Grantee indices; AND

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Jackson is and shall be permanently enjoined from obstructing the Red Road or otherwise interfering with any of Plaintiff's rights to the use of the Red Road as set forth in this Order.

AND IT IS SO ORDERED.



The Hon able Diane S. Goodstein  
Presiding Judge

October 2011  
St. George, South Carolina



EXHIBIT B

BUYCK PROPERTY

All that certain piece, parcel or tract of land situate in Amelia Township, Calhoun County, South Carolina, about eight (8) miles north of the Town of St. Matthews, containing seven hundred ten (710) acres, more or less, and bounded as follows: On the north by Congaree River; on the northwest by High Hill Creek and Congaree Rive and lands of H. P. Paulling; on the south by lands of Menriette and D. D. Buyck now owned by O'Neal; all of which is more accurately described by metes, bounds and directions on a plat thereof made by F. H. Grambling, Sur. and record of which is found in Plat Book 2 at Page 9 in the Office of the Clerk of Court for Calhoun County, South Carolina

## EXHIBIT C

### JACKSON PROPERTY

All that certain piece, parcel or tract of land, together with all improvements thereon, situate, lying and being approximately three miles west of the Town of Fort Motte, in the County of Calhoun, State of South Carolina, containing 108.653 acres, more or less, and shown and delineated on a plat dated March 30, 2000, last revised April 27, 2000, prepared for William C. Jackson by J.H. Walker & Associates and recorded in the Office of the Register of Deeds for Calhoun County, South Carolina, in Plat Book 4122 at Page \_\_\_, such plat being incorporated herein by reference as if fully set forth herein. Said 108.653 acres is bounded on the southwest by property now or formerly of Rocco D. Cassone, the center line of the private unpaved road being the line; on the northwest by property now or formerly of W.P. Buyck, Jr., on the northeast by property now or formerly of Allen P. Burner, et al; and on the southeast by property now or formerly of W.P. Buyck, Jr.

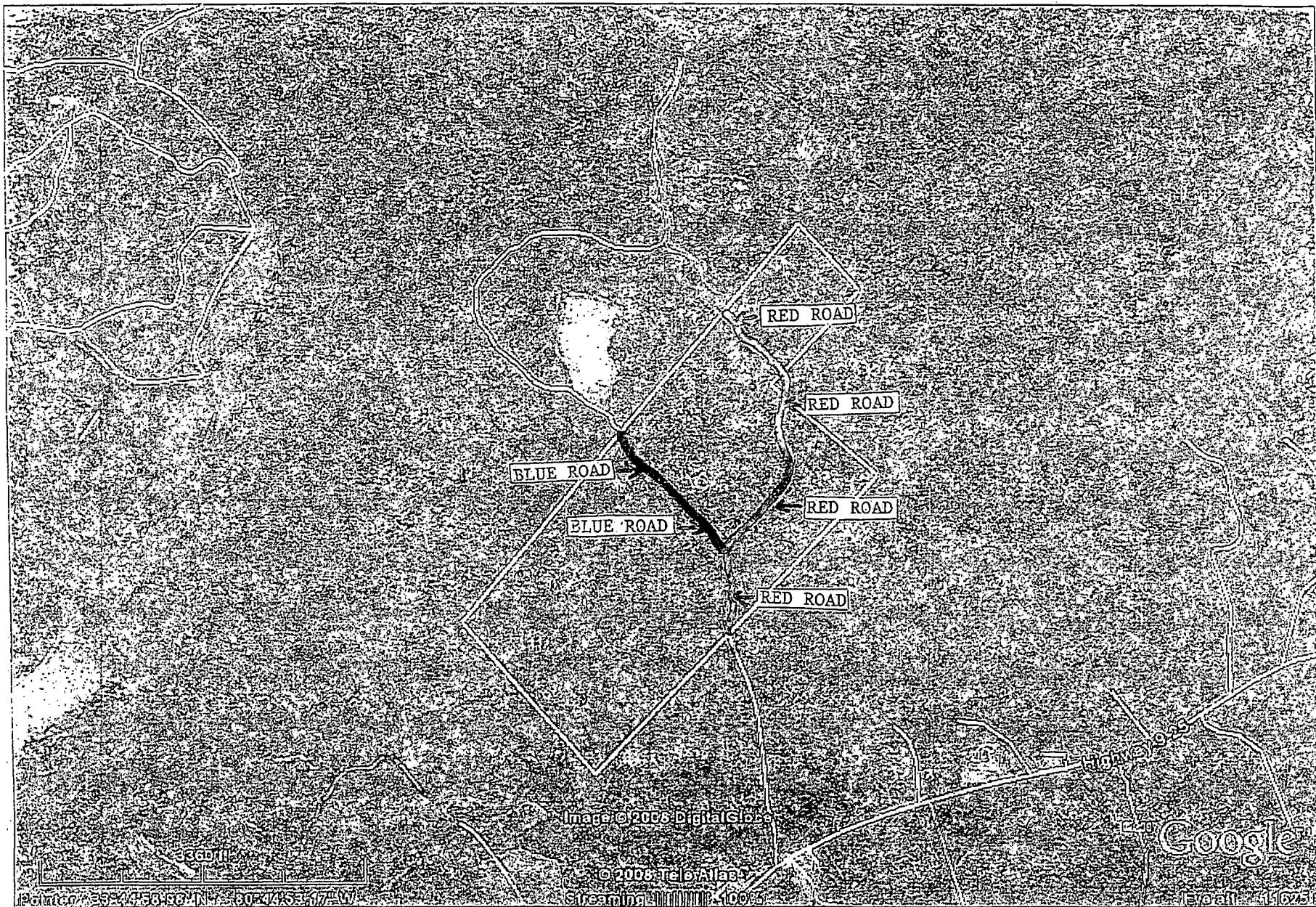


EXHIBIT D

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CALHOUN )

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT

W. Peter Buyck, Jr., )  
 )  
Plaintiff, )

Civil Action No.: 2008-CP-09-135

-vs-

William C. Jackson, )  
 )  
Defendant. )

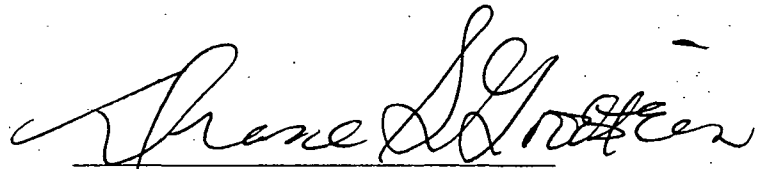
**ORDER**

This matter comes before me on motion of the Defendant, William C. Jackson, to alter or amend this Court's prior Order dated October 26, 2011 and entered on November 15, 2011.

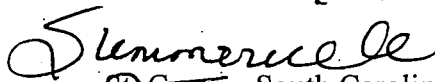
Having fully considered the matters set forth in the Order, the matters raised in Defendant's Motion to Alter or Amend, the Plaintiff's Memorandum in Opposition to Defendant's Motion, and the submissions of counsel, this Court is not inclined to alter or amend its Order. Specifically, this Court finds that the Defendant's property is not unenclosed woodlands as has been argued by the Defendant in his Motion to Alter or Amend.

Accordingly, the Motion of the Defendant, William C. Jackson, is hereby DENIED.

AND IT IS SO ORDERED.



The Honorable Diane S. Goodstein  
Presiding Judge, First Judicial Circuit

  
St. George, South Carolina  
June 5, 2012