

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF NEWBERRY
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2009CP3600415

John S Frick	Keith Fulmer Benny A Bush S C Electric & Gas Justin Chadwick	Eleanor F Bush Joseph R Childers Newberry County Victoria Chadwick
PLAINTIFF(S)	DEFENDANT(S)	

Submitted by: _____ Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit);
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRCP; Bankruptcy; Other: _____
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other: _____

RECEIVED

JUL 09 2014

SC Court of Appeals

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:
 Order of Final Judgment

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

S/ Frank R. Addy, Jr. 2159 02/20/2014
 Circuit Court Judge Judge Code Date

For Clerk of Court Office Use Only

This judgment was entered on February 24, 2014, and a copy mailed first class or placed in the appropriate attorney's box on February 24, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

William Chadwick Jenkins PO Box 190 Newberry, SC 29108

William H. Edwards PO Box 5709 West Columbia, SC 29171
Rudolph C. Barnes Jr. 156 Barnes Trail Little Mountain, SC 29075
Austin J. Tothacer Jr. PO Box 156 Newberry, SC 29108
Jay Evan Bressler 220 Operation Way Mail Code C222 Cayce, SC 29033
Eleanor F Bush 1714 Nursery Rd Little Mountain, SC 29075
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Joseph R Childers 1630 Wheeland School Rd Little Mountain, SC 29075
Justin Chadwick 1622 Wheeland School Rd Little Mountain, SC 29075
Victoria Chadwick 1622 Wheeland School Rd Little Mountain, SC 29075

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Jackie S. Bowers (mwm)

Jackie S Bowers - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF NEWBERRY)
)
 John S. Frick,)
)
 Plaintiff,)
)
 vs.)
)
 Keith Fulmer, Eleanor F. Bush,)
 Benny A. Bush, Joseph R. Childers,)
 S.C. Electric and Gas, Newberry County,)
 Justin Chadwick, and Victoria Chadwick,)
)
 Defendants.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE EIGHTH CIRCUIT

C/A #2009-CP-36-00415

ORDER OF FINAL JUDGMENT

FILED
 NEWBERRY COUNTY
 2019 FEB 24 AM 10 19
 JACKIE S. BOWERS
 CLERK OF COURT

This matter came before the Court by agreement of the parties on Friday, November 1, 2013 on a bench trial. Present at the trial were W. Chad Jenkins, Esquire for the Plaintiff John S. Frick, William H. Edwards, Esquire and Rudolph C. Barnes, Jr., Esquire for the Defendant Keith Fulmer, Jay E. Bressler, Esquire for the Defendant SCE&G, and Austin J. Tothacre, Esquire for the Defendant Newberry County. The other Defendants are in default and were not present or represented at the trial.

The ultimate issue before the Court is whether an unimproved road in Newberry County that begins at Wheeland School Road and runs through the properties of the Defendants (with the exception of Newberry County) to the property of the Plaintiff and terminates at Lake Murray is a public road or a private easement for access and egress. The road in question was once part of a road that connected Wheeland School Road with Macedonia Church Road and was flooded in 1930 with the creation of Lake Murray so that it no longer connected the two public roads. The Court holds that the road in question was abandoned as a public or neighborhood road and is now a private easement for the Plaintiff and all the Defendants except for Newberry County.

FINDINGS OF FACT

Based on the testimony and evidence presented, I find the following facts:

1. The road in question was once part of a neighborhood road that connected two public roads, Wheeland School Road and Macedonia Church Road in the Little Mountain community of Newberry County. The road runs south from Wheeland School Road and passes in order through properties now owned by Defendants Chadwick, Childers, Bush, Fulmer and SCE&G and then passes onto Plaintiff's property.

2. The road in question was permanently separated from the remaining part of the neighborhood road when Lake Murray flooded the original road in 1930 and made it impossible to travel the original road from Wheeland School Road to Macedonia Church Road.

3. Plaintiff presented anecdotal evidence of two (2) homes on the road being accessed via the roadway, as well as mail delivery to those homes, prior to the 1950's.¹ Testimony was also presented concerning Boy Scout troops periodically using the road to access natural areas. There were also isolated incidents of trespassers, and the presence of cables and/or gates at various locations across the road since the 1950's negates any intent of the owners to dedicate the road to public use. As early as the 1950's, the predecessors in title to Defendants Chadwick had erected an obstruction across the road on their property to prevent cattle from getting off their property. As early as 1970's, both the Defendant Fulmer and Plaintiff's predecessor in title, Champion Paper Company, erected cables or gates across the road on their property. A gate across the road on Defendant Fulmer's property has been present since at least the early 1980's. At times, the gate was in a questionable state of repair, and Plaintiff maintained that he was

¹ Defendant Fulmer contests this assertion and maintains the homes were vacant. The court is aware that Mr. Fulmer is older than Mr. Frick, and accordingly, Mr. Fulmer may possess a broader historical knowledge of the roadway's usage than Plaintiff.

denied access to his property after purchasing the property, although Defendants maintain that Plaintiff was offered a key to the gate, which he refused to accept. No one has lived along the road in question since at least the 1950's.

4. There was no evidence of public maintenance of the road by Newberry County since 1930. Maintenance of the road has been provided by landowners for access and egress in building and maintaining transmission lines, periodic personal use of the property by the private landowners, and for logging operations. The road has never been paved and has never been used to provide utilities to the properties of any of the parties or their predecessors in title. Defendant Newberry County does not own any property affected by the road in question and has no rights in or obligations associated with the road in question.

5. The remaining part of the original road that runs from Wheeland School Road to Lake Murray is not a neighborhood or public road but a woods road approximately ten (10) to twelve (12) feet in width and since 1930 has served the Plaintiff and Defendants and their predecessors in title as adjoining landowners as a private easement appurtenant for access and egress.

6. Plaintiff Frick purchased a block-shaped tract (TMS #645-9) on or about June 13, 2003. This tract adjoins a peninsula-shaped tract (TMS #645-8) which Plaintiff Frick purchased on or about May 19, 2003. As part of the resolution of another lawsuit in 2006, Plaintiff Frick purchased a sixty-six (66) foot wide strip of land connecting the block-shaped tract to a public road known as Wheeland Road. Though the two properties adjoin, they are separated by a creek, which prevents vehicular access from the peninsula-shaped tract to Wheeland Road by way of the sixty-six (66) foot wide strip of land.

7. Some Defendants have reported encounters with trespassers along the road. Instances of vandalism, illegal hunting, and marijuana cultivation have also taken place in years past.



CONCLUSIONS OF LAW

Based on the testimony and evidence presented and the above findings of fact, I conclude as follows:

1. **The road in question was abandoned under the common law after Lake Murray permanently flooded the original road that once connected two public roads.** The statutory provision for the abandonment or closing of a public road does not abrogate the common law relating to abandonment. See S.C. Code §§ 57-9-10 and, 57-9-40 (1976). Common law abandonment of a public road is still recognized. See *id.* and City of Myrtle Beach v. Parker, 260 S.C. 475 (1973). Common law abandonment is satisfied by “[nonuses] by the public for a long period of time with the intention to abandon.” K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, ___, 683 S.E.2d 252, 259 (2009). A clear intent to abandon must be established. The intent to abandon requires that the public use of the property must become impossible or the object of that use must totally fail. City of Myrtle Beach v. Parker, 260 S.C. 475, 486, 197 S.E. 2d 290 (1973). The public use of the road in question became impossible and totally failed when Lake Murray flooded the original road in 1930 and there was “nonuse by the public” for more than eighty (80) years, so that the requirements of common law abandonment have been met by clear and convincing evidence. There is no evidence on record to overcome the public’s intent to abandon. There is no evidence on record of Newberry County maintaining the road in any meaningful way since 1930. Any maintenance to the road has apparently been provided by the landowners whose property abuts the road.

2. **The road in question has not been rededicated to the public use.** Aside from isolated incident of trespassing, there was no credible evidence of any public maintenance or any public use of the road in question since it has only been used by property owners and their invitees since



1930; accordingly, the road has not been rededicated to public use. A landowner must "express in a positive and unmistakable manner the intention to dedicate his property to public use," followed by an "express or implied public acceptance of the property offered for dedication." Mack v. Edens, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1995). For the public to accept a dedicated roadway, there must be evidence that the general public began using the road. Acceptance and/or the existence of a public way are not proven where the road is used merely by a limited class of people, such as abutting landowners and their licensees. In Burrell v. Kirkland, the court noted "...the route must be used by the public generally and not by particular individuals. In other words, the use must not be by a limited community or class of people." 242 S.C. 201, 208, 130 S.E.2d 470, 473 (1963). Except for occasional trespassers, the road in question has been used only by a limited class of people: the landowners, licensees, family and friends. "Permissive, sporadic, and recreational use" of a roadway across private property by the public is not sufficient to overcome the burden of "strict, cogent, and convincing" proof required to demonstrate that the owner intended to dedicate the road to public use. *Id.* Therefore the occasional use of the road with the express or implied permission of adjoining landowners did not establish intent to rededicate the road to the public after it was abandoned in light of the obvious intent of the landowners to prevent public access with cables and gates. Based on the findings of fact there has been neither a rededication of the road to public use nor the acceptance of the road for public use.

3. As adjoining landowners the Plaintiff and Defendants have an easement appurtenant over the woods road that is ten (10) to twelve (12) feet in width for access and egress. "In the event of the abandonment of a public highway, title thereto to the center of the road remains vested in the abutting property owners on either side." Andrews v. McDade, 201 S.C. 24, 21



Id. As such, Plaintiff and any of the landowner Defendants have only the right, absent the consent of all landowning parties, to maintain the road in good, passable condition for motor vehicles. This right, however, does not extend to paving, widening or utilizing the road for utilities.

4. The gate to the road on Defendant Fulmer's property does not unreasonably interfere with the Plaintiff's use of his property so long as the Plaintiff is provided a key or combination to the lock on the gate. An easement that grants one landowner the privilege to cross the property of another does not extinguish the other landowner's right of self-preservation. The owner of the servient estate may erect a locked gate across the easement depending on the circumstances of the case. Defendants agreed to keep the gate open during the pendency of this case and not close it without the consent of all affected landowners, but the gate can be closed if necessary to protect the property rights of the Defendants from public abuse so long as it meets the following criteria:

1. It does not "unreasonably interfere with the right of passage of the dominant estate;"
2. It is "necessary for the preservation of the servient estate;" and
3. It is "necessary for the use of the servient estate."

Brown v. Gaskins, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct. App. 1997). See also, Thomas v. Mitchell, 287 S.C. 35, 336 S.E.2d 154 (Ct. App. 1985); and Judy v. Kennedy, 398 S.C. 471, 728 S.E.2d 484 (Ct. App. 2012).

Though the gate may be an inconvenience for Mr. Frick, it is not an unreasonable interference with his use of the easement when balanced against the prevention of public trespass and illegal activity on the servient estates of the Defendants Fulmer and SCE&G. The Court of Appeals has held that maintaining a locked gate across the course of an easement is justified



when instances of trespass have been reported by the owner of the servient estate. Brown v. Gaskins, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct. App. 1997). In Brown, the Court found that a locked gate blocking an easement on the servient estate was justified where the servient estate suffered trespassers, vandalism, littering and theft. 284 S.C. at 32, 324 S.E.2d at 640. In Thomas v. Mitchell, 287 S.C. 35, 336 S.E.2d 154 at 155 (Ct. App. 1985), the Court found that a locked cable erected over an easement on the servient estate was necessary for the efficient use of the servient estate and did not impose an unreasonable burden on the dominant estate's use of the easement where the servient estate had suffered trespassers, night hunters and vandals and where the dominant estate owner did not live on the property and had a locked cable across the easement as it entered his property. In Judy v. Kennedy, *supra*, the servient estate had fewer problems with trespassers than in Brown or Thomas, but the Court held that the owner of the servient estate was entitled to maintain a locked gate across the easement without unduly burdening the dominant estate so long as the dominant estate owner was provided with a means to open the gate.

The Defendants Fulmer and SCE&G have the right to protect their property as servient estates from trespassers, litter and criminal activity with a locked gate across the easement so long as the Plaintiff and any others whose easement is blocked by the gate are provided the means to unlock the gate.

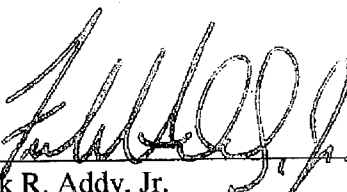
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the road running from Wheeland School Road through the property of the landowning Defendants to the property of the Plaintiff is a private easement appurtenant, having been abandoned as a public road, assuming for the moment that it was ever a public road; that the Plaintiff and the landowning Defendants each hold title to the center of the road for the length it crosses their respective



properties; that Plaintiff and the landowning Defendants have a ten (10) to twelve (12) foot easement appurtenant to, in, along and across this road for egress and ingress to Wheeland School Road; that Plaintiff shall be allowed to use the road for his and his licensees' egress and ingress to his otherwise landlocked tract; that no party and no parties' successor in interest may, without the consent of all landowning parties, expand the scope of this easement and may not improve, widen, run utilities or otherwise materially increase the use of the road and/or the associated burden on the servient tenements; and that the gate currently on Defendant Fulmer's property may be locked provided all parties have a key or combination to the lock.

Counsel for Defendant Fulmer shall ensure that a copy of this order is indexed in the public records for Newberry County in such a way that any subsequent, prospective purchaser of real estate abutting the roadway in question is put on notice of this court's holding.

IT IS SO ORDERED.



Frank R. Addy, Jr.
Judge, Court of Common Pleas
Eighth Judicial Circuit

February 20, 2014
Greenwood, South Carolina

John S. Frick

Keith Fulmer

PLAINTIFF(S)

DEFENDANT(S)

SCANNED

Submitted by: JUDGE	Attorney for Defendant	<input type="checkbox"/> Plaintiff	<input type="checkbox"/>
		<input type="checkbox"/> Self-Represented Litigant	<input type="checkbox"/>

Disposition Type (Check One)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

FILED
 NEWBERRY COUNTY
 28th JUN 12 PM 11 24
 JACKIE S. BOGERT
 CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Currently before the court is Plaintiff's motion to reconsider this court's order dated February 20, 2014 and filed February 24, 2014. Having reviewed all relevant materials, including the transcript of the bench trial, the court finds as follows. All previous rulings are upheld, with the exception of the width of the easement granted to Plaintiff and any subsequent landowners over Defendant's property.

In its original ruling, the court found Plaintiff has a 10-12 foot wide easement appurtenant for egress and ingress to his property from Wheeland Road. After a thorough review of the record, this shall be amended to reflect Plaintiff and any subsequent landowner shall have a fourteen (14) foot wide easement appurtenant for egress and ingress to Plaintiff's property from Wheeland Road. It is noted the record does reflect conflicting testimony as to the exact width of the road; however, the court finds a fourteen foot easement is appropriate in light of the circumstances and testimony at trial. Mr. Van Hoffman, a former SCE&G employee who previously worked on the land and was familiar with it, testified the road was around twelve feet wide. Tr. at 119. The court gave extra credence to Mr. Hoffman's testimony, as he is a neutral witness to this action. Further, Defendant Fulmer testified it would be accurate to say the road is between fourteen and twenty feet wide for the most part. Tr. At 156.

Again, all previous rulings are upheld except the ruling as to the width of the easement Plaintiff is granted across Defendant's property. This shall be amended to reflect a fourteen (14) foot easement. Having fully reconsidered this matter, the court's order of February 20, 2014 is modified as outlined above.

Order Information

This order ends does not end the case.

Additional Information for the Clerk : _____

Complete if judgment requires payment of a sum of money or affects title to real or personal property

JUDGMENT AGAINST PLAINTIFF:

JUDGMENT AGAINST DEFENDANT:

Judgment Amount \$ _____
 Taxable Costs \$ _____
 Attorney's Fees \$ _____
 Interest \$ _____
 Other: \$ _____
Total Amount to be Enrolled: \$ _____

Judgment Amount \$ _____
 Taxable Costs \$ _____
 Attorney's Fees \$ _____
 Interest \$ _____
 Other: \$ _____
Total Amount to be Enrolled: \$ _____

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interests or costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Handwritten Signature]

2159

June 9, 2014

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 12th day of June, 2014 and a copy mailed first class this 12th day of June, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Chad Jenkins PO Box 190
 Newberry SC 29108
 ATTORNEY(S) FOR THE PLAINTIFF(S)

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 Jackie S Bowers (mwm)
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