STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, III, Special Circuit Court Judge

Trial Court Case No. 2011-CP-46-03182

Appellate Case No. 2014-000730

EARL DUKES, ... Appellant,

vs.

KENNITH W. FARRELL, MARY C. FARRELL and
MARTIN BOGDONOVITCH, Defendants,

of whom
KENNITH W. FARRELL and MARY C. FARRELL are the . .Respondents.

INITIAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal . . . . . .

Statement of Facts . . . . . .

Arguments . . . . . .

I. THE STANDARD OF REVIEW ON A GRANT OF SUMMARY JUDGMENT IS WHETHER THE EVIDENCE, AND ANY REASONABLE INFERENCES THEREFROM, SHOWS THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT.

II. THE CITATION OF LANGUAGE FROM THE MOTION ARGUMENT IS IRRELEVANT.

III. THE EVIDENCE CLEARLY DEMONSTRATES THE EXISTENCE OF AN APPURTENANT EASEMENT.

IV. THE APPURTENANT EASEMENT HAS A TERMINUS ON THE LAND OF THE PARTIES CLAIMING IT.

V. THE FEWELL DEED CREATED A DOMINANT AND SERVIENT ESTATE.

VI. THE RIGHT OF THE OWNERS OF THE APPURTENANT EASEMENT TO REPAIR OR REPLACE THE EXISTING DOCK AND PIER IS NOT A PART OF THIS APPEAL.

VII. IN THE ALTERNATIVE, THE EVIDENCE CLEARLY SHOWS THE EXISTENCE OF AN EASEMENT BY PRESCRIPTION.

CONCLUSION . . . . . .

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA SUPREME COURT

David v. *McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1 (2006)

Douglas v. Medi. Investors, Inc., 256 S.C. 440, 182 S.E.2d 720 (1971)

Ford v. State Ethics Comm'n, 344 S.C. 642, 545 S.E.2d 821 (2001)

Hardy v. *Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006)

Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993)

Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987)

Law v. *S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006)

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Russell v. *Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003)

Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965)

Slear v. *Hanna*, 329 S.C. 407, 496 S.E.2d 633 (1998)

Townes Assocs., Ltd. v. *City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)

Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997)

Woodson v. *DLI Properties, LLC*, Opinion No. 27344, January 8, 2014

CASES: SOUTH CAROLINA COURT OF APPEALS

Ballington v. Paxton, 327 S.C. 372, 488 S.E.2d 882 (Ct.App.1997)

Chastain v. *Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826 (Ct.App. 2009)

Hartley v. *John Wesley United Methodist Church of Johns Island*, 355 S.C. 145, 584 S.E.2d 386 (Ct.App.2003).

Jones v. *Daley*, 363 S.C. 310, 609 S.E.2d 597 (Ct.App. 2005)

Loftis v. South Carolina Elec. & Gas, 361 S.C. 434, 604 S.E.2d 714 (Ct.App. 2004)

Proctor v. *Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct.App. 2012)

Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct.App. 1996)

Smith v. Comm'rs of Pub. Works of City of Charleston, 312 S.C. 460, 441 S.E.2d 331 (Ct.App.1994)

Steele v. *Rogers*, 306 S.C. 546, 413 S.E.2d 329 (Ct.App. 1992)

RULES: SOUTH CAROLINA

Rule 201, S.C.A.C.R.

Rule 56(c), S.C.R.C.P.

Rule 58, S.C.R.C.P.

Rule 72, S.C.R.C.P.

CASES: CALIFORNIA

Wright v. *Best*, 19 Cal.2d 368, 121 P.2d 702 (1942)

CASES: KENTUCKY

Martin v. *Music* (Ky) 254 S.W.2d 701(1953)

CASES: MASSACHUSETTS

Jones v. *Stevens*, 276 Mass. 318, 177 N.E. 91, 76 A.L.R. 591 (1931)

CASES: RHODE ISLAND

Gonsalves v. *Da Silva*, 76 R.I. 474, 72 A.2d 227 (1950)

CASES: TENNESSEE

Lynn v. *Turpin*, 187 Tenn. 384, 215 S.W.2d 794 (1948)

CASES: NEW YORK

Antonopulos v. *Postal Tel. Cable Co.*, 261 App.Div. 564, 26 N.Y.S.2d 403, *aff'd* 287 N.Y. 712, 39 N.E.2d 931 (1942)

Chain Locations of America, Inc. v. *Westchester County*, 20 Misc.2d 411, 190 N.Y.S.2d 12, *aff'd* (2d Dept) 9 App.Div.2d 936, 196 N.Y.S.2d 573 (1959)

CASES: VIRGINIA

Lester Coal Corp. v *Lester*, 203 Va. 93, 122 S.E.2d 901 (1961)

OTHER AUTHORITY

25 AM.JUR.2D *Easements and Licenses in Real Property* § 12 (2002)

25 AM.JUR.2D *Easements and Licenses in Real Property* § 13 (1966)

STATEMENT OF ISSUES ON APPEAL

I. THE STANDARD OF REVIEW ON A GRANT OF SUMMARY JUDGMENT IS WHETHER THE EVIDENCE, AND ANY REASONABLE INFERENCES THEREFROM, SHOWS THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT.

II. THE CITATION OF LANGUAGE FROM THE MOTION ARGUMENT IS IRRELEVANT.

III. THE EVIDENCE CLEARLY DEMONSTRATES THE EXISTENCE OF AN APPURTENANT EASEMENT.

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VI. THE RIGHT OF THE OWNERS OF THE APPURTENANT EASEMENT TO REPAIR OR REPLACE THE EXISTING DOCK AND PIER IS NOT A PART OF THIS APPEAL.

VII. IN THE ALTERNATIVE, THE EVIDENCE CLEARLY SHOWS THE EXISTENCE OF AN EASEMENT BY PRESCRIPTION.

STATEMENT OF THE CASE

KENNITH W. FARRELL and MARY C. FARRELL own a riverfront house and lot in York County, under a deed of Robert J. Edwards dated August 12, 2005, and recorded August 16, 2005 in Record Book 7331, Page 102 in the Office of the Clerk of Court for York County.

By that deed, the FARRELLS are successors in title from a deed of A. F. Fewell and Edward Fewell, Jr. to W. A. Bigham, dated and recorded March 2, 1965 in Deed Book 334 at Page 414 also in the Office of the Clerk of Court for York County. That deed from the Fewells to Bigham provides, in relevant part:

> It being understood that the Grantee herein, His heirs and assigns, shall have access to the Backwater in the cove on which the above described property is located, subject to the rights of the Wateree Power Company, or its Successors, and other Grantees from the Grantors herein, A.F. Fewell and Edward Fewell, Jr.

Since May 22, 2002, EARL C. DUKES has owned the real property identified by Tax Map No. 547-00-00-057. Most of that tract lies under the waters of Lake Wylie, with some thirty

feet of property between the boundary of the FARRELL'S property, and the waters of Lake Wylie (the Backwater referenced above), as shown on the Plat of Fisher-Sherer dated May 15, 2001. The FARRELLS' pier and dock are situated partly above the thirty feet and partly above the water, both of which are DUKES' property. DUKES is also a successor in title from the Fewells.

By Complaint filed August 19, 2011, DUKES claimed trespass and nuisance against the FARRELLS. The FARRELLS' Motion for Summary Judgment was heard on March 13 and 14, 2014 by the Special Circuit Court Judge. By Order dated April 3, 2014 and filed April 4, 2014, the Court found and held that the FARRELLS had an easement appurtenant to their property, which allows them to pass freely over the strip of land belonging to DUKES, pursuant to the quoted easement language in the deed of the Fewells, and allows access to Lake Wylie.

The Court found and concluded in the alternative that the FARRELLS established the necessary elements for an easement by prescription over DUKES' property for access to the waters of Lake Wylie. On both bases above, the Court granted the FARRELLS summary judgment as the existence of an easement and as to their right of access to Lake Wylie.

Finally, the Court found and concluded that genuine issues of fact for trial existed as to the extent and usage of the FARRELL'S easement. Summary Judgment on this point was denied. This appeal by DUKES followed.

ARGUMENTS

I. THE STANDARD OF REVIEW ON A GRANT OF SUMMARY JUDGMENT IS WHETHER THE EVIDENCE, AND ANY REASONABLE INFERENCES THEREFROM, SHOWS THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT.

An appellate court reviews the grant of Summary Judgment under the same standard applied by the Trial Court. *David* v. *McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).[1] The Trial Court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), S.C.R.C.P.; *Russell* v. *Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and

1 This paragraph is quoted, with stylistic changes only, from *Chastain* v. *Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct.App. 2009).

all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Law* v. *S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). A Court considering Summary Judgment makes neither factual determinations nor considers the merits of competing testimony. *David* v. *McLeod Reg'l Med. Ctr.*, SUPRA, 367 S.C. at 250, 626 S.E.2d at 5. However, Summary Judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *Id.* To survive a motion for Summary Judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. *Steele* v. *Rogers*, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct.App. 1992).

In setting out their arguments, the Respondents note that, to their knowledge, there is no dispute over the facts in this case. The Appellant argues his right to a *de novo* review of the facts based upon the precedent reflected in *Hardy* v. *Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006). This is a misconstruction of procedure. What *Hardy* held, in relevant language, was:

> "The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." *Slear v. Hanna*, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). However, the determination of the scope of the easement is a question in equity. *Tupper* v. *Dorchester County*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997).
> [*Id.*, 369 S.C. at ___, 639 S.E.2d at 541.

There is no question here of a dispute as to the scope, extent or usage of the easement in question. That is precisely the point the Order of the Circuit Court has reserved for trial. [RECORD ON APPEAL, p.___.] The Order appealed deals with one issue: the existence of an easement allowing the FARRELLS access to the waters of Lake Wylie. Given that issue, the standard to be applied is that normal to Summary Judgment: does the evidence and any reasonable inferences therefrom demonstrate the existence of a genuine issue of material fact.

As this Court stated in *Jones* v. *Daley*, 363 S.C. 310, 609 S.E.2d 597 (Ct.App. 2005):

> Establishing the existence of an easement is a question of fact in a law action. *Jowers v. Hornsby*, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987); *Hartley v. John Wesley United Methodist Church of Johns Island*, 355 S.C. 145, 148, 584 S.E.2d 386, 387 (Ct.App.2003). The present matter was consensually referred to a special referee. Accordingly, our scope of review is limited to the correction of errors of law, and we will

not disturb the referee's factual findings that have some evidentiary support. *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 85-86, 221 S.E.2d 773, 775 (1976); *Hartley,* 355 S.C. at 148, 584 S.E.2d at 387.

[*Id.*, 363 S.C. 313, 609 S.E.2d ___.]

II. THE CITATION OF LANGUAGE FROM THE MOTION ARGUMENT IS IRRELEVANT.

In *Woodson* v. *DLI Properties, LLC*, Opinion No. 27344, January 8, 2014, the Supreme Court stated:

> Additionally, what the circuit court "might" have stated during the hearing on the motion for summary judgment is irrelevant, as a written order constitutes a final order and final judgment of the lower court. *See Ford v. State Ethics Comm'n,* 344 S.C. 642, 645-646, 545 S.E.2d 821, 823 (2001) (citing Rule 58, SCRCP) (stating "the written order is the trial judge's final order and as such constitutes the final judgment of the court"); *see also Hagood v. Sommerville,* 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCP; Rule 201(a), SCACR; *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993)) ("An appeal ordinarily may be pursued only after a party has obtained a final judgment.").
>
> [*Id.*, Page 8.]

To state the matter more simply, either the evidence demonstrates the existence of a genuine fact in dispute, or it does not. Colloquy between counsel and the Court, as cited by the Appellant, has no relevance.

III. THE EVIDENCE CLEARLY DEMONSTRATES THE EXISTENCE OF AN APPURTENANT EASEMENT.

In this case, the language of the deeds referenced in the Statement of the Case are undisputed. To repeat: both the FARRELLS and DUKES derive their lots from, and under, A. F. Fewell and Edward Fewell, Jr. as recited above. The 1965 from the Fewells to Bigham provides, in relevant part:

It being understood that the Grantee herein, His heirs and assigns, shall have access to the Backwater in the cove on which the above described property is located, subject to the rights of the Wateree Power Company, or its Successors, and other Grantees from the Grantors herein, A.F. Fewell and Edward Fewell, Jr.

[RECORD ON APPEAL, p.___.]

The Circuit Court found and concluded that, under the quoted deed language, the FARRELLS owned an easement appurtenant to the property owned by them. The Appellant challenges this holding, and alleges that the easement in question is one in gross, rather than appurtenant. To this end, the Appellant cites *Tupper* v. *Dorchester Cty.*, 326 S.C. 318, 487 S.E.2d 187 (1997). In its discussion, the Court in *Tupper* stated:

> The character of an express easement is determined by the nature of the right and the intention of the parties creating it. 25 AM.JUR. (2d) *Easements and Licenses* § 13 (1966). An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer.
>
> [*Id.*, 326 S.C. 325, 487 S.E.2d 191; *Ftn. omitted.*]

More generally, the commentators of AMERICAN JURISPRUDENCE 2D characterize easements in gross as follows:

> Whether an easement in a given case is appurtenant or in gross depends mainly on the nature of the right and the intention of the parties creating it. Similarly stated, whether an easement is appurtenant or in gross is to be determined by the intent of the parties as gathered from the language employed, considered in the light of surrounding circumstances. Again, whether an easement is appurtenant or in gross is to be determined by a fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.
>
> Easements in gross are not favored by the courts, however, [Ftn.16, citing *Antonopulos* v. *Postal Tel. Cable Co.*, 261 App.Div. 564, 26 N.Y.S.2d 403, *aff'd* 287 N.Y. 712, 39 N.E.2d 931 (1942); *Lynn* v. *Turpin*, 187 Tenn. 384, 215 S.W.2d 794 (1948)] and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate.[Ftn.17, citing *Wright* v. *Best*, 19 Cal.2d 368, 121 P.2d 702 (1942); *Martin* v. *Music* (Ky) 254 S.W.2d 701(1953); *Jones* v. *Stevens*, 276 Mass.

318, 177 N.E. 91, 76 A.L.R. 591 (1931); *Todd* v *Nobach*, 368 Mich. 544, 118 N.W.2d 402 (1962); *Chain Locations of America, Inc.* v. *Westchester County*, 20 Misc.2d 411, 190 N.Y.S.2d 12, *aff'd* (2d Dept) 9 App.Div.2d 936, 196 N.Y.S.2d 573 (1959); *Gonsalves* v. *Da Silva*, 76 R.I. 474, 72 A.2d 227 (1950); *Lester Coal Corp.* v *Lester*, 203 Va. 93, 122 S.E.2d 901 (1961)]. Thus, if an easement is in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the parties as to its use, and there is nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant and not an easement in gross. 18 If doubt exists as to its real nature, an easement is presumed to be appurtenant and not in gross.

[*Id.*, 25 AM.JUR.2D *Easements and Licenses in Real Property* § 12 (2002); *Ftn.s omitted other than as cited.*]

The Respondents would note the quoted language of the Fewell deed, *supra*: "the Grantee herein, His heirs and assigns, shall have access to the Backwater in the cove" [RECORD ON APPEAL, p.___; *emphasis added.*] The deed includes the words of inheritance. The Court must assume that the Grantors in the Fewell deed intended their deed language to have full effect, and the grant of rights to "the Grantee herein, His heirs and assigns" to have their full legal effect.

As in *Proctor* v. *Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct.App. 2012)., the language quoted from the Fewell deed is also followed in that deed by the phrase:

> TOGETHER with all and Singular the Rights, Members, Hereditaments and Appurtenances to the said premises belonging, or in anywise incident or appertaining.
>
> [RECORD ON APPEAL, p.___.]

By definition, the easement granted cannot have been intended as being incapable of transfer. No evidence indicating that the right to access was non-transferable exists. Faced with similar language, the Court of Appeals in *Proctor* stated:

> Generally, the phrase "heirs and assigns" will not convert an easement in gross to an appurtenant easement when the elements of an appurtenant easement are not otherwise present. *Douglas v. Medi. Investors, Inc.*, 256 S.C. 440, 447–48, 182 S.E.2d 720, 723 (1971); *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 423, 143 S.E.2d 803, 808 (1965); *Ballington v. Paxton*, 327 S.C. 372, 381, 488 S.E.2d 882, 887 (Ct.App.1997). However, such language is relevant to the determination of the grantor's intent. *Douglas*, 256 S.C.

at 448, 182 S.E.2d at 724;*Sandy Island,* 246 S.C. at 423, 143 S.E.2d at 808; *see also Smith v. Comm'rs of Pub. Works of City of Charleston,* 312 S.C. 460, 468, 441 S.E.2d 331, 336 (Ct.App.1994) (stating that the phrase "all and singular, the rights, members, hereditament and appurtenances to the said premises belonging, or in anywise incident or appertaining[,]" which followed a deed's property description, showed an intent to grant all rights essential to the enjoyment of the premises conveyed).

[*Proctor* v. *Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct.App. 2012).]

The only other evidence of the intent of the Grantors in the Fewell deed are the uncontradicted Affidavits of Mr. FARRELL and Dennis K. Edwards, his predecessor in title, which evidences an unbroken usage of a pier since (at least) 1976. [RECORD ON APPEAL, p.___.]

On the basis of all evidence submitted, the dock and pier, and the easement in question are, in the language of AMERICAN JURISPRUDENCE 2D above, an "appropriate and useful adjunct of the land conveyed". Their continued existence and use of the same by Bigham and the FARRELLS as their successors was the intention of the original grantors. The easement exists and is appurtenant to the real property owned and occupied by the FARRELLS.

IV. THE APPURTENANT EASEMENT HAS A TERMINUS ON THE LAND OF THE PARTIES CLAIMING IT.

The Respondents would note that the Appellant seems to rely for his argument on the language of *Tupper* v. *Dorchester County, supra*, by which the Supreme Court characterizes an appurtenant easement as follows:

[A]n appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. *Id.*; *Smith* v. *Commissioners*, 312 S.C. 460, 441 S.E.2d 331 (Ct.App. 1994); *Carolina Land Company, Inc.* v. *Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975); *Sandy Island Corp.* v. *Ragsdale*, [246 S.C. 414, 423, 143 S.E.2d 803, 808 (1965)]; 12 S.C. JURIS. *Easements* § 3. It also passes with the dominant estate upon conveyance. *Carolina Land Co., Inc.* v. *Bland, supra.* Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. 12 S.C. JURIS. *Easements* § 3(c).

[*Id.*, 326 S.C. at 325-326, 487 S.E.2d 191]

The Appellant argues that because the Fewell grantees retained ownership of the (mainly) underwater tract now held by DUKES at the time of their deed into Bigham [RECORD ON APPEAL, p.___.], the easement did not have one terminus on the land of the party claiming it. This argument is totally misconceived. On the grant into Bigham (the FARRELLS' predecessor in title), the Fewells as Grantees made the lot now held by DUKES subservient to the easement granted to Bigham and his successors. The right of Bigham and the FARRELLS to access the backwater and the cove was from the FARRELLS' land, that is, one terminus was on their land.

V. THE FEWELL DEED CREATED A DOMINANT AND SERVIENT ESTATE.

The Respondents understand DUKES to argue that an easement cannot have been created because the Fewell Grantees in their deed [RECORD ON APPEAL, p.___.] continued to own the property under the waters of the cove and now owned by DUKES. The obvious intent of that deed was to allow Bigham (and his successors) access to the water. The ownership of the property underneath, or next to, the water by the Fewell Grantees is merely proof that they had the authority to make the grant of easement which was made.

VI. THE RIGHT OF THE OWNERS OF THE APPURTENANT EASEMENT TO REPAIR OR REPLACE THE EXISTING DOCK AND PIER IS NOT A PART OF THIS APPEAL.

Respondents reiterate that the Order appealed from has reserved for trial any questions of the extent and usage of the FARRELLS' easement. [RECORD ON APPEAL, p.___.] By their counsel's reading of the Appellant's Brief, Appellant seems to raise questions about those matters in arguing against the Court's determination that an easement exists. South Carolina precedent, *e.g. Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 464-465, 441 S.E.2d 331, 334 (Ct.App. 1994), makes it clear that these are distinct questions. The basis for the Circuit Court's decision, both as to law and existing evidence, is cited herein. Any matters as to extent or usage of the easement have been reserved. These matters have no relevance in this appeal.

VII. IN THE ALTERNATIVE, THE EVIDENCE CLEARLY SHOWS THE EXISTENCE OF AN EASEMENT BY PRESCRIPTION.

The Circuit Court also found, in the alternative, that the FARRELLS have established the

necessary requirements for an easement by prescription. This Court has set out those requirements for establishing an easement by prescription in *Jones* v. *Daley*, 363 S.C. 310, 609 S.E.2d 597 (Ct.App. 2005):

> In order to establish an easement by prescription, a party must only show: (1) the continued and uninterrupted use or enjoyment of a right for a 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. *Horry County v. Laychur,* 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993); *Loftis v. South Carolina Elec. & Gas,* 361 S.C. 434, 604 S.E.2d 714, 716 (Ct.App. 2004). The source of the referee's understandable confusion on this matter was discussed and resolved in this court's case of *Revis v. Barrett,* 321 S.C. 206, 209 n.1, 467 S.E.2d 460, 462 n.1 (Ct.App. 1996). To establish an easement by prescription, one need only establish either a justifiable claim of right *or* adverse and hostile use. *Id.*
>
> [*Id.*, 363 S.C. 316, 609 S.E.2d ___.]

The Affidavits of Dennis Edwards and Mr. FARRELL demonstrate the continued and uninterrupted or enjoyment of the pier and access to the backwater for a period since 1976, that is, for at least thirty-eight (38) years. No contrary evidence has been adduced. To the extent a claim of right is necessary, it is shown by the Fewell deed cited and quoted above. In the alternative to an easement appurtenant, such easement was adverse.

CONCLUSION

By the existing evidence, no genuine issue of material fact exists to dispute the Circuit Court's finding and conclusion that the FARRELLS are possessed of an easement appurtenant to access to the Backwater in the cove on which their property is located. In the alternative, and in the presence of the uncontradicted evidence presented, the FARRELLS have an easement by

prescription to the same end. Any matter raised as to the extent and usage of that easement have been preserved for trial.

Respectfully submitted,

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December 10, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellants complies with Rule 210(b), S.C.A.C.R.

December 10, 2014

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents and Designation of Matter to be included in the Record on Appeal, dated December 10, 2014, on the following counsel of record:

J. Cameron Halford
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Attorneys for Appellant

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a

conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

December 11, 2014

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December 11, 2014

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Earl Dukes, Appellant,
v. Kennith W. Farrell, Mary C. Farrell and Martin Bogdonovitch, Defendants,

of whom Kennith W. Farrell and Mary C. Farrell are the Respondents..

Appellate Case No. 2014-000730

Dear Ms. Kitchings:

In accordance with Rules 208 and 209, S.C.A.C.R., enclosed herewith please find the original and one (1) copy of the Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal, together with Certificate of Service for the same in the above referenced case..

By copy of this letter, I am serving the attorney for the Respondents with copies of the said Initial Brief and Designation of Matter, as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

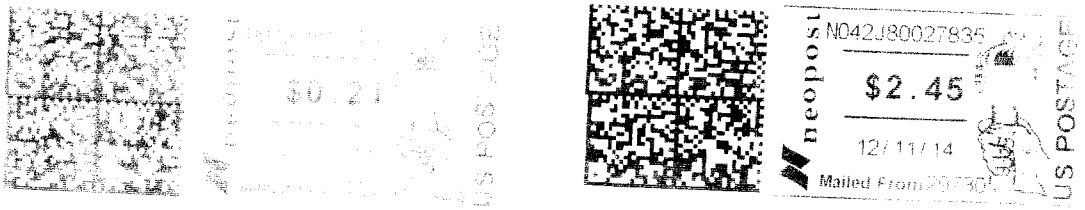
Sincerely yours,

John Martin Foster

jmf/
enclosures

cc: Client File

J. Cameron Halford
Halford, Niemiec & Freeman, LLP
Attorneys for Appellant
238 Rockmont Drive
Fort Mill, SC 29708



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TO:

THE HONORABLE JENNY ABBOTT KITCHINGS
CLERK OF THE COURT OF APPEALS
POST OFFICE BOX 11629
COLUMBIA, S.C. 29211