IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Dale Van Slambrook, Master-in-Equity

Case No. 2012-CP-08-03013

Cynthia Jacqueline Jackson Mills,

Appellant,

v.

Janet Lynne Hudson, Henry Russell Jackson,
and Mildred Jackson Hudson,

Respondents.

INITIAL BRIEF OF THE APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in determining that an easement for ingress and egress was not "strictly necessary for enjoyment of the property," even though the property was rendered completely land-locked as a result of the 1935 conveyance to the Respondents' predecessor-in-title?

II. Did the trial court err in determining that Appellant's claim was barred by SC Code Sections 15-3-380 and/or 15-3-340 even though these code sections are inapplicable to easement by necessity actions?

III. Did the trial court err in its ruling on the Appellant's alternate theory for the date of severance being the 2008 order and in the weight the trial court gave to this portion of Appellant's case?

IV. Did the trial court err in determining that Appellant's claim was barred by the doctrine of *res judicata* since the 2006 case was a declaratory judgment action?

STATEMENT OF THE CASE

The Appellant commenced this action on October 17, 2012, with the filing of her summons and complaint. The complaint initially set forth two causes of action: The first cause was styled as a Wrongful Adverse Possession award, and the Appellant sought to set aside the judgment rendered against her in the case captioned, *Cynthia J. Mills v. Learline Jackson, Janet L. Hudson and Robert R. Hyden*, C/A No. 2006-CP-08-02581; the second cause of action was for an easement by way of necessity across real property owned by the Respondents herein, Janet Lynne Hudson Henry Russell Jackson, and Mildred Jackson Hudson.

The Respondents answered the complaint on November 27, 2012. The answer denied most of the factual allegations of the complaint. The answer also set forth three counterclaims: 1) to enforce the judgment rendered in the C/A No. 2006-CP-08-2581; 2) for abuse of process; and, 3) for sanctions pursuant to the Frivolous Civil Proceedings Sanctions Act.

The Appellant replied to Respondents' counterclaims on December 5, 2012. The reply denied the factual allegations of the counter claims and asserted the affirmative defenses of fraud, misrepresentation, and failure to state a claim for which relief can be granted.

On May 20, 2013, the case was referred to Robert E. Watson, Master-in-Equity for Berkeley County, to take testimony and render final judgment. On June 20, 2013, the Appellant filed a motion for summary judgment on the issue of easement by necessity. The motion was argued before Master Watson on October 3, 2013, and was denied from the bench.

Prior to trial, both sides submitted pre-trial briefs. Within hers, the Appellant withdrew her wrongful adverse possession claim.

On March 30 & 31, 2015, trial was held before the Honorable Dale E. Van Slambrook, Master-in-Equity for Berkeley County, and on April 27, 2015, Master Slambrook issued his Final Order, denying the Appellant's request for an easement.

On May 6, 2015, the Appellant moved for reconsideration of the Final Order, or in the alternative, for a new trial, and that motion was heard by Master Slambrook on July 23, 2015. On September 8, 2015, the Master issued his Order Denying Motion on the motion to reconsider.

On October 7, 2015, the Appellant filed and served her initial Notice of Appeal, and on October 16, 2015, the Appellant filed and served an amended Notice of Appeal.

STATEMENT OF FACTS

This is an action for an easement by way of necessity, for a tract of land that is otherwise completely landlocked, in Berkeley County, South Carolina. The Appellant is the owner of the dominant tract, and the Respondents are the owners of the servient tract. Both tracts derive from a common owner, Thomas Jackson, who was also the grandfather of all parties in this case. In 1923, Thomas Jackson obtained title to a tract of land identified as Lot 11, and said to contain 10.3 acres, more or less, located between U.S. Highway 17-A to the west and Branch Road to the east.

By a succession of deeds during the early 1930's, Thomas Jackson conveyed-out most of this property; the out-conveyances and their chronology are as follows:

a) Deed from Tom Jackson to Edward Clarke, dated May 8, 1931, and recorded in Book A58, Page 169. This is the property presently comprising TMS Nos. 180-00-02-023, -024 and -099.
b) Deed from Tom Jackson to J. W. Adkins, dated November 30, 1934, and recorded in Book A60, Page 80. This is the property presently comprising TMS No. 180-00-02-015.
c) Deed from Thomas Jackson to Fred Jackson, dated September 21, 1935, and recorded in Book A60, Page 273. This is the property presently comprising TMS Nos. 180-00-02-018, -020 and -021.
d) Deed from Thomas Jackson to Ruby Jackson, dated September 21, 1935, and recorded in Book A60, Page 274. This is the property presently comprising TMS Nos. 180-00-02-0017, -022 and -113. This is also the property now owned by the Respondents, and the proposed servient tract.

As a result of the last conveyance cited above, the deed to Ruby Jackson, the remaining lands of Thomas Jackson were rendered completely landlocked. This deed is a general warranty deed, and describes the property conveyed as follows:

> All that certain piece, parcel or tract of land, situate lying and being in the County and State aforesaid, Measuring and Containing three (3) acres, and Butting and Bounding as follows to wit: North by lands of Fred Jackson, East by lands formerly of H. L. Barker, South by lands of Wesley Adkins, West by lands of Frank Mizell.

After Thomas Jackson's death in 1947, the Appellant's father, John H. Jackson, acquired title to five-sixths (5/6ths) of the residual lands of Thomas Jackson, by way of intestate succession and a deed from some of his siblings, including Ruben Jackson, dated January 21, 1969, and recorded in Book A194, Page 79. This is also a general warranty deed, and describes the property conveyed as follows:

> All that certain piece, parcel or lot of land, situate, lying and being in Second St. John's Parish, Berkeley County, South Carolina, Measuring and Containing two (2) acres, more or less, and Butting and Bounding as follows: on the North by lands of Reuben Jackson, formerly a part of the same tract; on the East by lands of Edward Clark, formerly a part of the same tract; on the South y lands formerly of C. A. Jones, now said to be lands of Burden; and on the West by lands of J. W. Adkins, formerly a part of the same tract; being the remaining portion of a tract of land said to contain ten and 3/10 (10.3) acres conveyed to Thomas Jackson by D. E. Hill by deed dated January 20, 1923 and of record in the Office of the Clerk of Court for Berkeley County in Book A-51 at page 227, which said ten and 3/10 (10.3) acres is said to be shown and delineated and designated as Tract No. 11 on a plat of the Barker Tract prepared by McCrady Brothers & Cheves in November 1918 and of record in said Office in Plat Book B at page 12.

The Appellant acquired title to all of the residual lands of her grandfather, including the outstanding one-sixth (1/6) interest, through the estate of her mother, Eunice Jackson, and by a deed from several cousins, recorded December 16, 1983, in Book A537, page 172. The Appellants deed for the outstanding one-sixth (1/6) interest recites verbatim the same legal description as the deed to her father, John H. Jackson. This property is identified in the current Berkley Tax Map System as 180-00-02-016.

In 2006, in a case captioned, *Cynthia J. Mills v. Learline Jackson, Janet L. Hudson and Robert R. Hyden*, C/A No. 2006-CP-08-02581, the Appellant herein brought a declaratory judgment action to confirm ownership of the southern portion of the tract now clearly vested in the Respondents. The Appellant's theory in that case was that her property was actually a flag lot, with access to U.S. Highway 17-A.

It is undisputed that, *at the very least*, prior to the 1935 conveyance to the Respondents' father, Ruben Jackson, both properties were owned by Thomas Jackson, who was the grandfather of both the Appellant and the Respondents. It is also undisputed that the 1935 conveyance (as adjudicated in the 2006 lawsuit) rendered the remaining lands of Thomas Jackson (the property now owned by the Appellant) completely landlocked and without any other access for ingress and egress.

STANDARD OF REVIEW

This is an action to establish an easement by way of necessity. 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. Hardy v. Aiken, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006). In a law case tried by the judge without a jury, the court reviews for errors of law and reviews factual findings only for evidence which reasonably supports the court's findings. Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (S.C. App. 1998). However, the determination of the scope of the easement is a question in equity. Hardy, 369 S.C. at 165, 631 S.E.2d at 541. On appeal in an action in equity, the appellate court may find facts in accordance with its views of the preponderance of the evidence. Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005).

ARGUMENTS

I. THE TRIAL COURT ERRED IN DETERMINING THAT AN EASEMENT FOR INGRESS AND EGRESS WAS NOT "STRICTLY NECESSARY FOR ENJOYMENT OF THE PROPERTY," EVEN THOUGH THE PROPERTY WAS RENDERED COMPLETELY LAND-LOCKED AS A RESULT OF THE 1935 CONVEYANCE TO THE RESPONDENTS' PREDECESSOR-IN-TITLE.

This appeal stems from the denial of a claim for easement by necessity. Although there are a number of issues addressed by the trial court in this case, there is actually just one question that this court need address to resolve this case: Did the trial court err in determining that an easement for ingress and egress was not "strictly necessary for enjoyment of the property retained," even though the property was rendered completely land-locked as a result of the 1935 conveyance to the Respondents' predecessor-in-title?

Where a property is rendered completely landlocked, with no other access, strict necessity is met.

The rules for establishing an easement by necessity are well established and repeated throughout South Carolina jurisprudence; a summary of the basic framework can be found in the recent case of Paine Gayle Properties, LLC v CSX Transportation, Inc., 400 S.C. 568, 589, 735 S.E.2d 528, 539 (S.C. App. 2012):

> The elements of a claim for easement by necessity are: (1) unity of title, (2) severance of title, and (3) necessity. Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 418–19, 633 S.E.2d 136, 140–41 (2006). "To establish unity of title, the owner of the dominant estate must show that his land and that of the owner of the servient estate once belonged to the same person." Kennedy v. Bedenbaugh, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002). Severance of title means that title to a larger tract was "severed" by conveyance of a part to the plaintiff's predecessor in title and of a part to the defendant's predecessor in title; "they both claim, from a common source, different parts of the integral tract, which necessarily assumes a severance." Brasington [v. Williams], 143 S.C. at 246, 141 S.E. at 382; see also Turnbull v. Rivers, 14 S.C.L. 131, 139 (Ct.App.1825) ("The necessity by which a person derives a right of way, is when one person sells to another lands inclosed on all sides by other lands. Here[,] the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land.").
> *****
> "The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible." Boyd, 369 S.C. at 420, 633 S.E.2d at 141. "South Carolina requires only 'reasonable necessity' to imply an easement: while the owner of the servient estate must prove more than convenience, he need not show the [easement] is absolutely necessary." Graham v. Causey, 284 S.C. 339, 341, 326 S.E.2d 412, 414 (Ct.App.1985), disapproved of on other grounds by Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987) (citations omitted). "The necessity element of easement by necessity must exist at the time of the severance and the party claiming the right to an easement must not create the necessity when it would not otherwise exist." Boyd, 369 S.C. at 420, 633 S.E.2d at 141 (citations omitted) (emphasis added). This is so because it is the severance that creates the necessity for an easement and, thus, allows the law to impute to a landowner a right to cross an adjacent parcel. See Turnbull, 14 S.C.L. at 139 ("The necessity by which a person derives a right of way, is when one person sells to another lands inclosed on all sides by other lands. Here[,] the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land.")

Also, an easement by necessity is not limited to grantees who receive landlocked property from their grantors: "A right-of-way from necessity, is where a man having several tracts of land, sells one which is surrounded by the others, having no way of ingress and egress but through one of those reserved. So, even if he reserves the tract in the middle for himself, he is entitled to a way through necessity." Poole v. Edwards, 197 S.C. 280, 15 S.E.2d 349, 350 (1941). However, in the case of an easement by necessity in favor of a grantor who landlocks himself, the easement must be "strictly necessary" to the enjoyment of the property; the case of Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 (1927) discusses this distinction at length:

> According to the established English doctrine, which is supported by some of the later American authorities, if the owner of both the *quasi* dominant and the *quasi* servient tenements conveys the former, reserving the latter, all such continuous and apparent *quasi* easements as are reasonably necessary to the enjoyment of the property granted pass to the grantee, giving rise to easements by implied grant. If, on the other hand, the *quasi* servient tenement is granted, while the *quasi* dominant tenement is retained, no easement is reserved, by implication, *unless it is strictly* (italics added) necessary to the enjoyment of the property retained. These rules are founded on the principle that a grantor shall not derogate from his own grant.
>
> *****
>
> So it is evident that, in determining the degree of necessity required to establish such an easement, a marked distinction is made between a case in which the *grantor* is claiming the easement over the land conveyed, as being expressly or impliedly reserved to him, and a case in which the *grantee* is claiming the easement over the land remaining in the title of the *grantor*. Under the cases cited, particularly Crosland v. Rogers, 32 S. C. 130, 10 S. E. 874, it is held that it is *less difficult* for the plaintiff in the circumstances last stated to establish his easement of necessity than for the plaintiff in the circumstances first stated, for in that event the plaintiff would be claiming in derogation of his own grant, while in the other the grantor will be presumed to have granted that without which the land conveyed by him could not be enjoyed.

In the present case, it is undisputed that, *at the very least*, prior to the 1935 conveyance to the Respondents' father, Ruben Jackson, both properties were owned by Thomas Jackson, who was the grandfather of both the Appellant and the Respondents. It

is also undisputed that the 1935 conveyance (as adjudicated in the 2008 court order) rendered the remaining lands of Thomas Jackson completely landlocked and without any other access for ingress and egress. Therefore, as a practical matter, the present case turns solely on the meaning of "strict necessity."

The trial court *presumes* that "strict necessity" requires a showing of "circumstances surrounding the [conveyance] so substantial and obvious that the grantee and his successors could never deny that the grantor had no other choice but to cross the grantee's land." (Order Denying Motion, p. 6) First, please note that this language is not found in any of the case law –the trial court is inserting its own rationale for the rule in error. Second, note that the trial court's basis for this rationale is the fact pattern of the *Brasington* case, where just as with the present case, the grantor retained the interior tract for himself and had no other means of access, except through the property that the grantor had previously conveyed-away. The trial court seems to suggest that, because the retained property in *Brasington* was surrounded by a river (as opposed to other real property owned by strangers) "strict necessity" was met. However, this is a distinction without significance – if the property is completely surrounded, be it by a river or by other properties of strangers, it is landlocked (and therefore useless to its owner) just the same. And in fact, at least in the case of a property that abuts a waterway as in *Brasington*, access might be had by boat (See, e.g., Paine Gayle Properties, LLC v. CSX Transporation, Inc.); in the case of a property completely surrounded by strangers, as is the case with the Appellant's property, there is no other possible access.

The trial court further suggests that "strict necessity" would require evidence of the circumstances surrounding the 1935 conveyance, demonstrating why Thomas

Jackson's retained tract should have access across the tract conveyed to Ruben in the 1935 deed and nowhere else. (Order Denying Motion, p. 6) The trial court suggests this could have come in the form of direct eyewitness testimony about how Ruben and Thomas were handling the access issue or what physical conditions affected Thomas' property. This is without merit. First, the Respondents do not dispute that the 1935 conveyance rendered Thomas Jackson's residual tract completely landlocked and without any other access – no further showing than this is necessary.[1] Second, there is, in fact, testimony from both the Appellant and the Respondent Henry Russell Jackson that access to the property was actually never an issue the death of the Respondents' father, Ruben Jackson, in 1985. (*See*, e.g., Trial Transcript, p. 155, lines 7-10, p. 157, lines 4-8, p. 160, lines 22-25, p. 161, lines 1-12, p. 160, lines 3-12, p. 92, lines 9-25, p. 93, lines 1-25, p. 94, line 1, which is quoted in full under Argument II of this brief). Finally, the trial court seems to suggest that "strict necessity" cannot be met, because the Respondent could attempt to purchase an easement across stranger's lands; as the trial court states, "[Respondents presented evidence indicating] no geographical or topographical impediments to accessing a public right of way across lands to the east, south or west of [Appellant's] property….there is a county maintained dirt road a short distance to the south of Plaintiff's property with high ground in between." (Order Denying Motion, p. 6) This argument is also without merit. It is undisputed that the properties to the east, south and west are the property of strangers. It is also undisputed that in order to access the dirt

[1] The court seems to be confusing the many cases where a property has access on multiple sides, but seeks an easement by necessity for an alternate path. In these cases, the court will consider the facts and circumstances of the properties in question, on the basis that, "[t]he necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible." Boyd v. Bellsouth Telephone Telegraph Company, Inc., 369 S.C. 410, 420, 633 S.E.2d 136, 141.

road mentioned by the trial court, the Appellant would need an easement across the property to her south, which was never a part of her grandfather's lands. There is no way that the Appellant (or for that matter, even the courts) could ever require a stranger to grant an easement over their property for the Appellant's use. See, e.g., South Carolina Constitution, Article I, Section 13. Furthermore, if you really think this proposition through, *every property* is abutted by *some other property*, so for the trial court to suggest that "strict necessity" requires some manner of physical impediment on all other boundaries is misguided and completely misses the point of an easement by necessity.

What, then, does "strict necessity" mean? One principle that is repeated throughout our easement by necessity jurisprudence is that, "[t]he necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible." Boyd v. Bellsouth Telephone Telegraph Company, Inc., 369 S.C. 410, 420, 633 S.E.2d 136, 141 (2006) (applying "necessity" standard for easement by necessity to easement implied by prior use). See also, Paine Gayle Properties, LLC v CSX Transportation, Inc., 400 S.C. 568, 589, 735 S.E.2d 528, 540 (S.C. App. 2012) (easement by necessity denied for property otherwise surrounded by water, because at the time of severance in 1878, access by water would have been reasonable); Morrow v. Dyches, 328 S.C. 522, 529, 492 S.E.2d 420, 424 (S.C. App. 1997) ("the easement must be more than merely convenient, but it does not need to be absolutely essential" / easement denied because dominant tract had access to public road); Jowers v. Hornsby, 292 S.C. 549, 550, 357 S.E.2d 710, 711 (1987) ("The party claiming an easement must prove more than convenience, but he need not show that the easement is absolutely essential" / easement denied because dominant tract had access

thru alley); Hayes v. Tompkins, 287 S.C. 289, 290, 337 S.E.2d 888, 890 (S.C. App. 1985) (easement granted even though dominant tract abutted public road, because large gully on the dominant tract separated it from that road); Graham v. Causey, 284 S.C. 339, 326 S.E.2d 412, 414 (S.C. App. 1984)(based on facts of case, appears to describe "'absolute necessity' standard" as situation where no other access to dominant tract is available except thru servient tract / easement granted even though dominant tract abutted road, because fence separated dominant tract from road and dominant tract was bounded on all other sides by lake and property of strangers); Brasington v. Williams, 143 S.C. 223, 141 S.E. 375, 383 (1927) ("the word 'necessary' meant that there could be no other reasonable mode of enjoying the dominant tenement without this easement" / easement granted even though dominant tract was surrounded by navigable waters, because river banks deemed to treacherous to provide reasonable access to waterway).

Most of the above referenced cases are addressing scenarios where a property already has one or more means of access, and the plaintiff is merely seeking an alternate means of access by way of necessity; the question in these cases then becomes one of the degree of reasonableness of the existing means of access. However, these cases are still useful because they illuminate what is meant by "necessity" generally, and by "absolute" or "strict" necessity, in the context of an easement by necessity – simply put, "necessary" seems to mean something greater than merely a more convenient means of access, but need not be absolute and irresistible, and "absolute" or "strict" necessity seems to mean simply *no other access*. In the present case, the Appellant has *no other access* to her property because the property is completely landlocked, surrounded on all other sides by

the property of strangers, and without the easement requested, there is no possible way for the Appellant to access and enjoy her property.

Therefore, Appellant has clearly satisfied all of the elements for an easement by necessity, and the trial court erred in denying same.

II. THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT'S CLAIM WAS BARRED BY SC CODE SECTIONS 15-3-380 AND/OR 15-3-340 BECAUSE THESE CODE SECTIONS ARE INAPPLICABLE TO AN EASEMENT BY NECESSITY.

The trial court further held that the Appellant's claims are barred by SC Code Sections 15-3-380 and 15-3-340. Respectfully, these arguments seem to ignore clear and undisputed testimony from both the Appellant and the Respondents, and Appellant submits that these code sections are simply inapplicable to the facts of this case.

> S.C. Code Ann. §15-3-380 states:
> No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period.

> S.C. Code Ann. § 15-3-340 states:
> No action for the recovery of real property or for the recovery of the possession of real property may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action.

To begin with, it is not at all clear that either of these code sections are applicable to an action for easement by necessity. Clearly, SC Code Section 15-3-340 is inapplicable as that section only applies to actions for the recovery of ownership or possession of property, and not for the establishment of an easement. This is clear from a

plain reading of the statute's language, and further, Appellant has been unable to find any instances of this section being applied in the context of an easement, and in fact, the Appellant would note the facts from a great number of the South Carolina easement by necessity cases suggest that the severance arose more than ten years before the action was brought. SC Code Section 15-3-380 bars an action for "recovery of real property *or for any interest therein*." The trial court's argument here seems to be that an easement is a type of interest in real property, and therefore, *at least this first portion* of the statute might be satisfied; however, the Appellant would content that the better interpretation of this language would be to bar exclusive or partial ownership of real property (e.g., where a person might be claiming ownership as one of many heirs – a fraction interest), but not as a bar to actions seeking to establish an easement by necessity. And again, Appellant has found no instances of this section being applied in the context of an easement, and in fact, there are at least some cases where the facts suggest that the severance arose more than forty years before the action was brought. *See*, e.g., Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (S.C. App. 1997); Hayes v. Tompkins, 287 S.C. 289, 337 S.E.2d 888 (S.C. App. 1985). However, in any event, even if the first portion of SC Code Section 15-3-380 is satisfied, the second portion of the statute ("*unless* the person claiming, his ancestor or grantor, *was actually in the possession of the same or a part thereof* within forty years from the commencement of such action") clearly fails. It is undisputed that the Appellant and her father, John Jackson (her predecessor-in-title), regularly accessed their property using the Respondents' property; even the Respondent Henry Russell Jackson acknowledged this with his testimony at trial:

Questioning by Mr. Watts of the Respondent, Henry Jackson:
Page 155
7 **Q. Did you or your family, your parents, share**

8 **this property with anybody else?**
9 A. Cynthia's father and my father raised pigs,
10 hogs out there.
*****

Questioning by Mr. Inglese, of the Respondent, Henry Jackson:
Page 157
4 **Q. Okay. How far back does your memory serve**
5 **you with regard to this property?**
6 A. In probably the early '50s. I farmed most
7 of it for Cynthia's daddy. I farmed 42 acres of rental
8 property for him.
*****
Page 160
22 **Q. And you said that you're aware of Cynthia's**
23 **father and your father sharing the property?**
24 A. Raising pigs. I didn't say sharing the
25 property.
Page 161
1 **Q. So they shared pigs or --**
2 A. My dad got a percentage. Now, what, I don't
3 know.
4 **Q. And your father was Rubin Jackson?**
5 A. Rubin, yes.
6 **Q. And my client's father was --**
7 A. John.
8 **Q. -- John Jackson. So they were interacting**
9 **on the property to some degree.**
10 A. Yes.
11 **Q. And both were benefitting from it.**
12 A. Right.
*****
Page 160
3 **Q. So it's possible that other family members**
4 **and/or my client could have been visiting the property**
5 **and you might not have known it?**
6 A. Oh, yeah.
7 **Q. And you said that there was a period of**
8 **time, I didn't catch the years, but about a 15-year**
9 **period where nobody was on Tract B?**
10 A. That's right.
11 **Q. What were those years?**
12 A. Like I say, '66, '67, until the mid '80s.

The Respondent's own testimony demonstrates that the Appellant's father, John Jackson, was accessing and using his property, together with the Respondent's father (John's brother), Ruben Jackson, while John Jackson was still living. Of course, the Appellant also testified at trial on the issue of her access to the property:

Questioning by Mr. Inglese, of the Appellant:
Page 92
9 **Q. And prior to that time, what is your**

10 **understanding regarding how access to 016 was obtained**
11 **historically or previously to your ownership?**
12 A. Well, we always had access to it. When we
13 got Pudgy Mason to survey it off, he just squared it
14 off, okay, back in the day. But, anyway, we've always
15 went through, okay, the 017 property to get to the 016,
16 and it was always understood, and when my uncle passed
17 away in '85, we -- you know, it became an issue at that
18 point, you know.
19 **Q. And when you refer to 017, today --**
20 A. Which is --
21 **Q. -- that would include what we're looking at?**
22 A. 017 and 133. Is that correct?
23 **Q. 113.**
24 A. 113. Okay.
25 **Q. The area just south of what's today 017.**
Page 93
1 A. Right. Right.
2 **Q. Would you like to show the Court -- Can you**
3 **just point to the area that your understanding**
4 **historically of where access to 016 would have been?**
5 A. It would have been from the -- and I
6 understood that I owned it.
7 **Q. You can take this blue marker and just mark**
8 **your understanding.**
9 A. My understanding is that --
10 **Q. 17A?**
11 A. Yeah. We always went in here. We always
12 came in here. From here, you know, we come in this way
13 and come in here.
14 **Q. Okay. Thank you.**
15 A. It was probably to this area in here,
16 because there is a ditch that runs in this line right
17 here. I don't know whether that's been brought about,
18 but there is a ditch. The county doesn't own it. The
19 state doesn't own it. But it's always been a ditch
20 right there along the side. So I've always went in,
21 you know, we crossed over this property to get there.
22 But it became an issue back in 1985 when -- after my
23 uncle passed away. But my dad accessed it that way,
24 and so did I, anybody, to get to that property. We'd
25 walk from one parcel to the other parcel, and we would
Page 94
1 go in that way.

Clearly, it was undisputed that the Appellant and her father before her had been accessing and using their lands through the Respondents' property, and yet the trial court orders simply ignore this fact from the testimony.

In any event, for purposes of applying SC Code Section 15-3-380, the present action was filed in 2012, and the testimony at trial demonstrates that access only first

became an issue after the death of the Respondents' father, Ruben Jackson, in 1985, so the forty year requirement of SC Code Section 15-3-380 cannot be met.

III. THE TRIAL COURT ERRED IN ITS RULING ON THE APPELLANT'S ALTERNATE THEORY FOR THE DATE OF SEVERANCE BEING THE 2008 ORDER AND IN THE WEIGHT THE TRIAL COURT GAVE TO THIS PORTION OF APPELLANT'S CASE.

The Appellant also argued that the 2008 order (from her 2006 action to quiet title to the property now vested in the Respondents) may have been the date of severance. In one sense, this argument is irrelevant to this appeal because it is undisputed that a severance resulted from the 1935 deed to Ruben Jackson; and therefore, it is not really necessary reach this alternate theory. However, one thing that is significant from this argument is that it gives context to the Appellant's actions with regards to the property and demonstrates the reasonableness of same. The 2008 order adjudicated for the first time and, quite frankly, in a surprising manner, that the property traditionally used by the Appellant (and her father before her) to access her property were either: 1) actually part of the lands conveyed to Ruben Jackson in 1935; or, 2) were subsequently acquired by the heirs of Ruben Jackson through adverse possession.

This result was surprising for a number of reasons. First, because a plain reading of the two deeds in question (the deed into the Respondents' father, Ruben Jackson, for three (3) acres and the deed into the Plaintiff's father, John H. Jackson, for two (2) acres, more or less,..."being the remaining portion of [the lands of] Thomas Jackson") suggests that the grant to Ruben Jackson contained approximately three (3) acres (certainly not the four (4) plus acres ultimately adjudicated to have been included in the 1935 deed to Ruben). Second, if we take the alternate theory upon which the 2008 order rests – adverse possession by the heirs of Ruben Jackson – please consider the following, which

is supported by the testimony in this case: 1) the portion of property at issue in the 2006 lawsuit was historically vacant land. It wasn't until 1997 or 1998 (less than 10 years before the filing of the 2006 lawsuit), when the Respondent Janet Lee Hudson placed a mobile home on a portion of the property, that any *exclusive*, physical occupation could have begun – this is supported by the testimony presented in the present case, including that of the Respondent Henry Russell Jackson, who, again, did testify at trial that the Appellant's father, John H. Jackson, regularly worked the land in question. (*See*, e.g., Trial Transcript, p. 155, lines 7-10, p. 157, lines 4-8, p. 160, lines 22-25, p. 161, lines 1-12, p. 160, lines 3-12, which is quoted in full under Argument II of this brief); 2) the 2008 order fails to note a beginning date for the adverse possession, the exclusive acts constituting the adverse possession, and/or the extent of the area adversely possessed. This is why the Appellant put forth as an alternative argument for the date of severance, that the 2008 order was the point in time that a reasonable person would first be on notice and have a clear adjudication of ownership for the property in question,[2] and therefore, it wasn't until the 2008 order was issued that the Appellant would have actually realized her property was landlocked.

Again, however, even if the true point of severance was the 1935 deed to Ruben Jackson, at the very least, the vague and inconsistent language used to describe the property conveyed in the 1935 deed, coupled with the fact that the Appellant believed the property in question was part of her lands *because she regularly used the property to access her lands*, demonstrates that title to the Respondents' property was questionable and disputed, at best, until the 2008 order, and that the Appellant's actions have been

[2] And again, please remember: 1) that the Appellant (and her father before her) regularly used the property in question to access her property; and, 2) that the property in question was vacant land before the Respondent Janet Lee Hudson placed a mobile home across it in 1997 or 1998.

reasonable, under the circumstances.

IV. THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT'S CLAIM WAS BARRED BY THE DOCTRINE OF *RES JUDICATA* BECAUSE THE 2006 CASE WAS A DECLARATORY JUDGEMENT ACTION.

To establish *res judicata*, the Defendant must prove the following three elements: 1) identity of the parties; 2) identity of the subject matter; and 3) adjudication of the issue in the former suit. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106, (1999).

First, the Appellant would note that the Defendants in the 2006 case (2006-CP-08-2581) are not the same as the Respondents in the present case: In the 2006 case, the Defendants were Learline Jackson, Janet L. Hudson and Robert R. Hyden; In the present case, the Respondents are Janet Lynne Hudson, Henry Russell Jackson and Mildred Jackson Hudson.

Second, the subject matter of the 2006 case was a declaratory judgment action to confirm ownership of the property (which is now clearly vested in the Respondents). This is significant because "[a] declaratory judgment in not *res judicata* as to matters not at issue and not passed upon. 22A Am.Jur.2d Declaratory Judgments § 239 (1988). The doctrine "is only a bar to matters which were actually litigated, not those that might have been litigated." Id. § 240. Nor is it an absolute bar to subsequent proceedings where the parties are seeking other remedies, even though based on claims that could have been asserted in the original action." Robinson v. Asbill, 328 S.C. 450, 492 S.E.2d 400 (S.C. App. 1997). The 2006 case simply declared the Respondents' as owners to the property in question, and therefore, the present action to establish an easement is not barred by *res judicata*. This fact is further supported by the comments of Master Watson at the motion

for summary judgment in the present case (it is significant to note that Master Watson was also the trial judge in the 2006 case):

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Page 26
14      MR. WATTS: But I was suggesting that that
15 opened the door to the issue of access, which is before
16 us today in this particular court, and so it must have
17 been discussed and you must have ruled.
18      THE COURT: I didn't rule anything denying
19 her access in my order.
20      MR. WATTS: Okay.
21      THE COURT: I didn't do that. That issue
22 was never in front of me in that case, so...
```

Transcript from Motion for Summary Judgment Hearing, p. 26, lines 14-22.

Furthermore, "[i]n a subsequent suit between the same parties on the same claim, a judgement in the former suit is conclusive as to every matter that might have been determined; but, where the second suit is upon a different claim, the former judgement is conclusive only as to those issue actually determined." Lyerly v. Yeadon, 199 S.C. 363, 375, 19 S.E.2d 648 (1942). In the 2006 case, the claim was for a judicial determination of ownership of the property, and, as noted in the above transcript selection, the question of an easement was never before Master Watson in the 2006 case and he never ruled on that issue. The present case is an action to establish an easement by way of necessity. Therefore, the former suit is not conclusive as to the issue of an easement by necessity because that issue was never determined in the 2006 case.

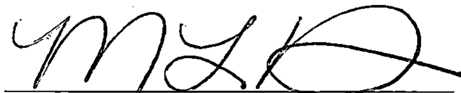
Finally, the trial court erred in suggesting that the Appellant was required to request the easement in the 2006 case, because the issue of whether or not she was entitled to an easement would not have been ripe until the decision finding that she did not own the property. One who believes that they own land would not reasonably think it necessary to grant themselves an easement or to assert a claim for an easement.

However, once it was determined that Appellant did not own the land, it became apparent that an easement was necessary.

CONCLUSION

As this Court stated in Morrow v. Dyches, "the whole point of the easement by necessity doctrine is to ensure that landlocked parcels have access to a public road…which is one of the rights essential to the enjoyment of land." Without access, the Appellant's property is completely useless to her. For the reasons set forth herein, the Appellant respectfully submits that the Court of Appeals should reverse the trial court's Final Order and Order Denying Motion in this case, order that the Appellant is entitled to an easement by way of necessity across the lands of the Respondents in order to establish access for ingress and egress to the public road, and remand for a determination of the precise location of the easement.

Respectfully Submitted,



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December 21, 2015
Charleston, South Carolin

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Dale E. Van Slambrook, Master in Equity

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SC Court of Appeals

Case No. 2012-CP-08-3013

Cynthia Jacqueline Jackson Mills, Appellant,

v.

Janet Lynne Hudson, Henry Russell Jackson, and Mildred Jackson Hudson, Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief and Designation of Matter to be Included in Record of Appeal on Janet Lynne Hudson, Henry Russell Jackson, and Mildred Jackson Hudson by depositing a copy of it in the United States Mail, postage prepaid, on December 21, 2015, addressed to their attorney of record, Patrick R. Watts, Esq., Post Office Box 2046, Summerville, South Carolina 29484.

December 21, 2015

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December 21, 2015

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VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
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Post Office Box 11629
Columbia, South Carolina 29211

Re: *Cynthia Jacqueline Jackson Mills vs. Janet Lynne Hudson, Henry Russell Jackson And Mildred Jackson Hudson*
Case No.: 2012-CP-08-3013
Appellate Case No.: 2015-002175

Dear Ms. Kitchings:

Enclosed for filing is one (1) original and one (1) copy of Appellant's Initial Brief in the above-referenced case. Also enclosed are the following:

(1) Appellant's Designation of Matter to be Included in the Record on Appeal; and

(2) Proof of service of Appellant's Initial Brief and Designation of Matter to be included in the Record on Appeal on the respondents.

Please return one, file stamped copy to our office. I have enclosed a stamped, self-addressed envelope for your convenience. Thank you for your assistance. Please do not hesitate to contact our office should you have any questions or concerns.

Sincerely,

Mary Lee Hutson, Esq.

Enclosures

cc: Patrick Watts, Esq. (Via U.S. Mail)

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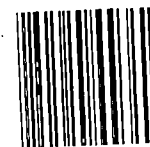

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