

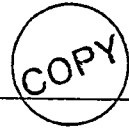
STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-26-4121

James Ray Johnson

James H. Hucks



PLAINTIFF(S)

Phyllis Hucks
DEFENDANT(S)

Submitted by: Jordan W. Hyman, Esq.

Attorney for : Plaintiff Defendant
or
 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), SCRPC; Rule 40, 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

RECEIVED
JUN 27 2016
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: See attached Order of 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)
James Ray Johnson	James H. Hucks	\$N/A
	Phyllis Hucks	\$N/A
		\$

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.

[Signature]
Circuit Court Judge Special Ref.

2015
Judge Code

May 27, 2016
Date

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 James Ray Johnson,)
 Plaintiff,)
 vs.)
 James H. Hucks and Phyllis Hucks,)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 C/A NO.: 2015-CP-26-4121

CLERK OF COURT
 HORRY COUNTY

ORDER OF JUDGEMENT

2016 MAY 24 AM 11:00

THIS MATTER CAME BEFORE THE COURT for a trial on the merits that took place on Wednesday, March 30, 2016, by consent reference to the Horry County Special Referee, Ralph P. Stroman, with finality and any appeal to the South Carolina Supreme Court. Present were Jordan W. Hyman, Esquire, counsel for the Plaintiff James Ray Johnson; and O. Terry Beverly, Esquire, counsel for the Defendants James H. Hucks and Phyllis Hucks.

This is an easement dispute between adjoining landowners in the Gunter's Island community in Galivant's Ferry, South Carolina. The Plaintiff claims that Defendant is unlawfully obstructed his right to access his property via an established easement across the Defendant's property. The Defendant disputes the existence of said easement.

The Plaintiff seeks a declaratory judgment that Plaintiff has an express easement by grant along, across, and over the property owned by Defendants pursuant to Plaintiff's deed, which was recorded in Deed Book 3457 at Page 870. Plaintiff also seeks a declaratory judgment to establish an easement along, across, and over

property owned by Defendants under the theories of 1) *easement by necessity* and 2) *easement by prior use*. The Defendants assert defenses of *Statute of Limitations, Merger of Title, Failure of Title, Abandonment, Taking, Trespass, Unjust Enrichment, Failure to Join, Estoppel by Deed, Laches, Waiver, Good Faith, and Estoppel*.

Prior to the commencement of the trial on the merits, the attorney's indicated to the Court that they had stipulated to the admissibility of forty-three (43) exhibits to be used during the trial. These exhibits consisted of various Deeds, instruments, photographs, surveys, plats, and other documents pertinent to this trial.

Based upon the testimony given, evidence presented, and after considering the arguments of counsel, this Court finds and hereby declares that Plaintiff has an express easement by grant along, across and over the property of Defendants as described in the survey. The Court also finds and hereby declares that Plaintiff is entitled to an Easement under the theories of *easement by necessity* and *easement implied by prior use*.

FINDINGS OF FACT

1. In reviewing the pertinent deeds in the chain of title of both the Plaintiff's property and the Defendants' property the finds as follows.
2. Dero Cook was the owner of several tracts of land in the community known as Gunter's Island in the Galivant's Ferry township of Horry County, South Carolina. The relevant tracts of land are described as a 185.7 acre tract (hereinafter referred to as "Northern Tract") and a 32.1 acre tract (hereinafter referred to as "Southern Tract"). These tracts were the tracts remaining after Dero Cook conveyed two tracts containing 30 acres and 11.6 acres to Charles H. Skipper

(See Exhibit 6) on February 18, 1960. This Deed contained the following handwritten language on its second page: "Grantor reserves the right of ingress and egress across said land, all past on above land is reserved." The Deed does not reveal a location as to said right of ingress and egress, nor does it provide to which tract (30 acres or 11.6 acres) it would apply.

3. Dero Cook thereafter conveyed 217.8 acres in the form of the 185.7 acre Northern Tract and of the 32.1 acre Southern Tract to Leroy Skipper (See Exhibit 7). This Deed expressly incorporated a plat map drawn by J.F. Thomas on March 2, 1961 into the Southern Tract. (See Exhibit 7). This incorporated plat reveals what appears to be a road beginning on Gunters Lake Road and traversing across the Southern tract along its western boundary line directly to the 30 acre tract owned by Charles H. Skipper. (See Exhibits 1 and 7).
4. At some point between 1973 and 1984, Leroy Skipper died. His heirs at law, which included Charles H. Skipper, conveyed the Northern Tract and the Southern Tract to the Plaintiff, James Ray Johnson, by deed on May 5, 1984 (See Exhibit 9).
5. On July 9, 1984, Charles H. Skipper conveyed to Plaintiff, James Ray Johnson, his heirs and assigns and forever, a "Right of Way Easement" across his property as described as follows:

BEGINNING of the Gunters Lake Road near the juncture of land belonging to Jimmy Ray Johnson, Charles H. Skipper and Dero Cook Estate leaving the Gunters Lake Road and following the old road shown on that certain plat made for Leroy Skipper by S.D. Cox, Jr., R.L.S, dated March 2, 1961, and is incorporated herein as part of this description, crossing the land of Jimmy Ray Johnson, thence running parallel with Charles H. Skipper and the Dero Cook Estate Land, running then N 45

deg. 50'E for a distance of 471 feet, running thence eastward along the boundary of Charles H. Skipper to the extreme East for a distance of approximately 1,820 feet.

SAID right of way to have a width of Twenty (20) feet.

6. On November 6, 1986, Charles H. Skipper conveyed both his 30 acre tract and 11.6 acre tract by Deed to Willie Jo Baxley (See Exhibit 11).
7. On January 27, 1993, Plaintiff conveyed by Deed to John Howard Alford 1.0 Acre from the Southern Tract (Exhibit 12).
8. On March 25, 2004, Plaintiff conveyed by Deed to Leonard Lee Crowe, II and Lorraine Crowe 7.16 acres from the Southern Tract (Exhibit 14).
9. In early December 2004, Plaintiff proposed to convey the remaining 23.54 acres of the Southern Tract to an entity by the name of Monkey Business Photography, LLC. Benjie Andrew, member of the LLC, had a plat drawn on December 8, 2004 subdividing the Southern Tract into four different tracts (Tract B containing 14.04 acres; Tract C containing 5.36 acres; Tract D containing 2.44 acres; and Tract E containing 1.7 acres)(Exhibit 23).
10. On December 14, 2004, Plaintiff conveyed the four tracts as referenced above (Tract B containing 14.04 acres; Tract C containing 5.36 acres; Tract D containing 2.44 acres; and Tract E containing 1.7 acres) by Deed to Monkey Business Photography, LLC (Exhibit 15).
11. On December 14, 2004, Willie Jo Baxley conveyed by deed to Monkey Business Photography a 1.7 acre parcel along the western boundary line of his property (Exhibit 16) approximately 471 feet in length and 100 feet in width known as

Tract A on the above referenced plat (Exhibit 23). Simultaneously, on December 14, 2014, Monkey Business conveyed by deed to Willie Jo Baxley 1.7 acres known as Tract E along Gunters Island road (Exhibit 17).

12. On December 30, 2005, Plaintiff, James Ray Johnson conveyed by deed the Northern Tract to Monkey Business Photography, LLC (Exhibit 18) in exchange for a note and mortgage securing said property in the amount of \$175,000 (Exhibit 18A). As of this date, Monkey Business Photography held fee simple title to both (1) the Northern Tract; and (2) Tracts A, B, C, and D of the Southern Tract.

13. On August 8, 2006, Monkey Business Photography, LLC conveyed by deed Tract A consisting of 1.17 acres and Tract B consisting of 14.04 acres to an entity by the name of Outback Source, LLC (Exhibit 19).

14. On August 8, 2006 Monkey Business Photography, LLC conveyed by deed the Northern Tract to Outback Source, LLC (Exhibit 21) who also agreed to assume the mortgage given by Monkey Business Photography to Plaintiff on December 30, 2005. As of this date, Outback Source, LLC held fee simple title to both (1) the Northern Tract; and (2) Tracts A and B of the Southern Tract.

15. On April 28, 2010, Outback Source, LLC conveyed by way of a Deed-in-Lieu of foreclosure the Northern Tract to Plaintiff (Exhibit 21).

16. On February 8, 2012, Outback Source, LLC conveyed by Deed Tract A consisting of 1.17 acres and Tract B consisting of 14.04 acres to the Defendants (Exhibit 22).

17. Wade Schaffner, Real Estate Title Abstractor, testified at trial that he had the

opportunity to perform a full title search and examined the public records of Horry County as to the chains of title to both the Northern Tract of the Plaintiff and Tracts A and B of the Defendants.

18. He concluded and the exhibits confirm that the verbiage of the July 9, 1984 Right of Way Easement from Charles H. Skipper to Plaintiff James Ray Johnson (See Exhibit 10) is located in every Deed of conveyance of the Northern Tract from April 28, 2010 back to its inception on July 9, 1984. These include the following which contain specified derivation clauses referencing said right of way easement:

- a. Deed of Outback Source, LLC to James Ray Johnson dated April 28, 2010 and recorded April 29, 2010 in Deed Book 3457 at Page 870.
(Exhibit 21).

This being the identical property conveyed to Outback Source, LLC by Deed of Monkey Business Photography, LLC recorded on August 9, 2006 in Deed Book 3140 at Page 586, Office of the ROD for Horry County, South Carolina.

- b. Deed of Monkey Business Photography, LLC to Outback Source, LLC dated August 8, 2006 and recorded August 9, 2006 in Deed Book 3140 at Page 586. (Exhibit 20).

This being the identical right-of-way easement conveyed to Jimmy Ray Johnson by instrument of Charles H. Skipper dated July 9, 1984, and recorded March 27, 1985 in the Office of the Register of Deeds for Horry County in Deed Book 944 at page 183.

The within property is the same as heretofore acquired by the grantor by deed of Jimmy Ray Johnson, said deed being recorded December 30, 2005 in Deed Book 3029 at page 1170, records of Horry County.

- c. Deed of James Ray Johnson to Monkey Business Photography, LLC dated November 30, 2005 and recorded December 30, 2005 in Deed Book 3029 at Page 1170. (Exhibit 18).

This being the identical right-of-way easement conveyed to Jimmy Ray Johnson by instrument of Charles H. Skipper dated July 9, 1984, and recorded March 27, 1985 in the Office of the Register of Deeds for Horry County in Deed Book 944 at page 183.

19. An examination of the "Property Description Rider" in Exhibit 21 reveals that Outback Source, LLC conveyed the Northern tract to Plaintiff along with an express right of way easement of twenty (20) foot as described below:

ALSO ALL AND SINGULAR that certain 20' Right-of-way Easement described as follows:

BEGINNING of the Gunters Lake Road near the juncture of land belonging to Jimmy Ray Johnson, Charles H. Skipper and Dero Cook Estate leaving the Gunters Lake Road and following the old road shown on that certain plat made for Leroy Skipper by S.D. Cox, Jr., RLS, dated March 2, 1961, and is incorporated herein as part of this description, crossing the land of Jimmy Ray Johnson, thence running parallel with Charles H. Skipper and the Dero Cook Estate Land, running then N 45 deg. 50'E for a distance of 471 feet, running thence eastward along the boundary of Charles H. Skipper to the extreme East for a distance of approximately 1,820 feet.

This being the identical property conveyed to Outback Source, LLC by Deed of Monkey Business Photography, LLC recorded on August 9, 2006 in Deed Book 3140 at Page 586, Office of the ROD for Horry County, South Carolina.

20. Faye R. Todd, Real Estate Title Abstractor and witness for the Defendants' testified that she also searched the title of Defendants' property prior to Defendants' closing on February 8, 2012. In her testimony, Ms. Todd admitted that she located Plaintiff's deed in her title search; however, she testified that she

nor the closing attorney ever disclosed to Defendants' the existence of Plaintiff's 2010 Deed from Outback Source, LLC. Furthermore, she testified that she was unsure whether or not an easement existed on Defendant's property.

21. Kenneth Jordan, a licensed surveyor, performed a boundary survey on Plaintiff's property on or around November 11, 2014 (See Exhibit 2). This survey indicates an exact location for the twenty (20) foot right of way easement. Mr. Jordan testified that in ascertaining the location of this easement, he relied on the verbiage contained in the original grant of the Right of Way Easement located in Deed Book 944 Page 18 (Exhibit 10). This included (1) the old road shown on that certain plat made for Leroy Skipper by S.D. Cox, Jr., R.L.S., dated March 2, 1961 (Exhibit 1 and 7); (2) crossing of the land of Jimmy Ray Johnson; (3) thence running parallel with Charles H. Skipper and the Dero Cook Estate land for a distance of 471 feet.

22. An examination of the survey (Exhibit 2) and of an existing Plat dated December 14, 2004 (See Exhibit 23) reveals a boundary line of approximately one hundred (100) feet located in the northwest corner of the Defendants' property. This is the *only* location where the property of the Plaintiff and Defendants' adjoin. As such, there could be no other location for the 20 foot easement conveyed from to Plaintiff from Outback Source, LLC than within said 100 foot boundary.

23. Mr. Jordan further testified that in surveying the Plaintiff's property, he was tasked with walking the said property. He testified that all of the traversable roads on Plaintiff's property originate at the above referenced boundary line and that access by a motor vehicle would not be feasible at any other location.

24. Plaintiff testified that the Northern Tract is used primarily for hunting, fishing, and other wildlife activities. As such, Plaintiff and his family members did not access this property on an everyday basis as its use was somewhat seasonal.

25. Plaintiff testified that from the period of 2010 when he reacquired the property until late 2014 he had accessed the Northern Tract in the following manner:

- a. From Gunter's Island Road across Defendants' property through what is now the Defendant's driveway;
- b. From Gunter's Island Road up the existing 30 foot access easement, across the Defendants' property along the western boundary as provided in Ken Jordan's survey (See Exhibit 2); and
- c. From Gunter's Island Road up the existing 30 foot access easement, across the neighboring property, referred to as the "Kelly Jones" property directly adjacent to the western boundary of Defendant's property.

26. Plaintiff testified that prior to Defendants' acquisition of their property in February of 2012, Plaintiff was contacted by the Defendants regarding their interest in purchasing Tract A and B of the original Southern Tract from Outback Source, LLC. As a result, Plaintiff testified that he accompanied the Defendants to the property whereby they had a discussion concerning possible locations in which Defendants would build a residential home in the event they chose to purchase the property.

27. Plaintiff testified that during their discussion, he specifically informed them that he owned a 20 foot right of way easement over and across said property to his property. Plaintiff indicated that Defendants responded that this easement "would

- not be a problem.” The Defendants deny these events, however, they do admit having a telephone conversation with Plaintiff prior to purchasing the property.
28. Plaintiff testified that from 2010 until late 2014, he had no issue accessing his property in any of the above manners.
29. Plaintiff testified over the past several years he had been in contractual negotiations with the United States Department of Agriculture (USDA) concerning the establishment of a conservation easement on his property as part of the “Wetlands Reserve Program.” Under this program, this easement would be permanent in nature; however, Plaintiff and his family would still retain rights to use the property.
30. Plaintiff testified that on August 20, 2014 he and the USDA entered into a contract for the establishment of said conservation easement. (Exhibit 25). Plaintiff informed Defendants of his intentions sometime in late 2014.
31. Plaintiff testified that he had the right of way easement surveyed on November 13, 2014 as required by the USDA. (Exhibit 2). Plaintiff testified that upon learning of the survey, Defendants became very upset and immediately began blocking Plaintiff’s access to his property.
32. The Defendants testified at trial that they had no knowledge of any easement prior to purchasing their property, and that an easement would prejudice their property by allowing unwanted traffic and noise across their property.

CONCLUSIONS OF LAW

“An easement is a right which one person has to use the land of another for a specific purpose.” *Steele v. Williams*, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944).

This right of way may arise by grant, from necessity, by prescription, or by implication by prior use. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006); *Steele*, 204 S.C. at 132, 28 S.E.2d at 647–48.

Express Easement by Grant

This Court finds there to be an express easement by grant over and across the Defendant's property as indicated in the Deed of Outback Source, LLC to James Ray Johnson dated April 28, 2010 and recorded April 29, 2010 at Deed Book 3457 at Page 870.

Courts in South Carolina have routinely held that a grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments. *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct.App.2001) (quoting 28A C.J.S. *Easements* § 57 (1996)). Furthermore, the language of an easement determines its extent, and clear and unambiguous language in grants of easement must be construed according to terms which have used, taken, and understood in the plain, ordinary, and popular sense. *Id.*

In applying the law of this state to the facts of this case, this Court finds that the Outback Source, LLC the prior owner/common grantor of both the Northern Tract and Tract A and B of the Southern Tract clearly and unambiguously intended to provide Plaintiff a right of way access over an across Tract A and B as indicated by the language in the deed from Outback Source to James Ray Johnson on April 28, 2010 (Exhibit 21).

The Defendants argue that their Deed contains no reference to any easement across their property and as a result, they had no knowledge of and were afforded no

notice of this easement prior to purchasing their property on February 8, 2012.

The Supreme Court in *Spence v. Spence* thoroughly addressed the concepts of Notice with regard to both *Actual Notice* and *Constructive/Inquiry Notice* in the context of a real estate transaction.

A purchaser of real property has actual notice of a title defect or other claim, lien, or interest adverse to his own in a particular property when he actually knows about the defect of claim, or when a reasonable person, if made aware of the same information known to the buyer, would be charged with actual notice of the defect or claim. *Spence v. Spence*, 368 S.C. 106, 118, 628 S.E.2d 869, 875 (2006). Actual notice may consist of facts or conditions observed by a prospective purchaser as well as information conveyed orally or in writing to him. *Id.*

Constructive or Inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world. The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim. *Epps*, 139 S.C. at 499, 138 S.E. at 303 ("recording amounts to notice, whether known or unknown, because the means of information are at hand"). The law imputes to a purchaser of real property notice of the recitals contained in the written instruments forming the purchaser's chain of title and charges him with the duty of making such reasonable inquiry and investigation as is suggested by the recitals and references therein contained. *McDonald v. Welborn*, 220 S.C. 10, 16, 66 S.E.2d 327, 330 (1951); *LoPresti v. Burry*, 364 S.C. 271, 276, 612 S.E.2d 730, 732-33

(Ct.App.2005).

A description of an easement in a recorded document is sufficient when it contains language that acts as a guide to the location of the easement on the land such that the easement is capable of being rendered to a certainty by reference to something extrinsic to which it refers. *See Binkley*, 348 S.C. at 71, 558 S.E.2d at 909.

In reviewing the testimony of the Plaintiff, Mr. Schaffner, and Ms. Todd, in conjunction with the documents admitted into evidence, this Court finds that the evidence overwhelmingly demonstrates that Defendants were afforded both actual and constructive notice of the easement.

The testimony revealed that prior to closing on the property, Defendants were orally informed by the Plaintiff of his ownership of the Northern Tract, which directly adjoins the property that Defendants were purchasing. Furthermore, Plaintiff testified that he attended the property with the Defendants and explicitly mentioned having an easement across said property. Lastly, the photographs provided to the court also indicate an access gate on the southeastern portion of Defendant's property (Exhibit 37) as well as a road leading directly to Plaintiff's property (Exhibit 4). The court finds that the facts mentioned hereinabove amount to actual notice.

Moreover, this Court finds that the Defendants were clearly put on constructive and/or inquiry notice. First, Plaintiff's Deed was recorded less than two years prior to the Deed of the Defendants. Plaintiff's Deed would have undoubtedly appeared in the Defendants' chain of title. Furthermore, both of the title abstractors who searched the title on Defendant's property confirmed discovery of Plaintiff's deed during their testimony at trial. Lastly, the surveyor testified that he relied on the information

contained in the easement description of Plaintiff's Deed in ascertaining the location of easement.

Therefore, since Plaintiff's Deed was clearly in the Defendants' chain of title, the law imputes the Defendants with notice of the Plaintiff's easement, as it was specifically their duty to inquire and investigate as to any possible encumbrances on their property. Since Defendants failed to do so, they cannot now claim that they were not afforded notice of Plaintiff's easement.

Easement by Necessity

Even if this Court were to find that there exists no easement by grant over and across the property of the Defendants, this Court finds that Plaintiff is entitled to an Easement by Necessity.

The legal requirements of an easement by necessity are: (1) unity of title, (2) severance of title, and (3) necessity. *Boyd v. Bellsouth Tel. Co.*, 369 S.C. 410, 419-20, 633 S.E.2d 136, 140-41 (2006) (citing *Brasington v. Williams*, 143 S.C. 223, 238, 141 S.E. 375, 380 (1927)). 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. *Id.* In other words, a petitioner would have to show that their land-locked tract and respondent's tract were, at one time, owned by the same owner. *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002).

In this matter there was clear unity of title of both the Northern Tract (dominant tenement) and Tracts A and B (servient tenement), because the common grantor, Outback Source, LLC, owned all of the Northern Tract of the Plaintiff and the property of the Defendants prior to conveying these properties in 2010 to Plaintiff and 2012 to

Defendants. Further, there was severance of title to both tracts of the dominant and servient tenement, because the common grantor, Outback Source, LLC, conveyed the Northern Tract to the Plaintiff in 2010 and thereafter conveyed the remaining portions of the property to the Defendants in 2012.

The South Carolina Supreme Court in *Boyd v. Bellsouth Tel Co.* held that the necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, however, it need not be absolute and irresistible. *Boyd v. Bellsouth Tel. Co.*, 369 S.C. 410, 420, 633 S.E.2d 136, 141 (2006). The necessity element 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." *Id.* (citations omitted).

In reviewing the aerial photographs and survey that were admitted into evidence, it is clear that an easement across the Defendant's property is absolutely necessary under the circumstances. First, Plaintiff's property is completely land-locked and the closest accessible public road is to the south at Gunter's Island road. In addition, it appears that all of the traversable roads on Plaintiff's property originate at one location; the boundary line of Plaintiff's property where it adjoins the northwest corner of the Defendants' property. An easement at any other location would amount to trespass and place an undue burden on the Plaintiff to essentially build a road for ingress and egress to his property.

The Defendants argued at trial that there exists no necessity for an easement across their property because that language in the Deed from Dero Cook to Charles H. Skipper (See Exhibit 6) already conveyed an easement, which they refer to as the "Dero

Cook easement" across the Skipper property, which is now owned by Willie Jo Baxley. This Court disagrees.

The specific language in the above referenced deed fails to indicate any metes and bounds or any other type of description that would assist the court or any surveyor in locating the purported Dero Cook easement. If the Court were to adopt the position of the Defendants, it would be forced to speculate and or guess as to the location of this said easement.

The court would also note that in examining the plat incorporated in the Deed from Dero Cook to Leroy Skipper (Exhibits 1 and 7) it is clear that the 30 acre parcel owned by Charles H. Skipper in 1960 and thereafter conveyed to Willie Jo Baxley in 1986 stretched across what is now considered Tract A of Defendant's property. Furthermore, the old road shown in the above referenced plat extends directly to Tract A. Therefore, it is very possible that the purported Dero Cook easement is located within Tract A at the very same location as the easement provided in the survey.

The facts, testimony, and evidence before this Court conform in all respects with that in *Boyd* and its progeny; an easement by necessity is hereby established as a matter of law.

Easement by Prior Use

Even if the Court were to find that there exists no easement by grant over and across the property of the Defendants, this Court finds that Plaintiff is entitled to an Easement by Prior Use.

In *Boyd v. Bellsouth Tel Co., Inc.*, 369 S.C. 410, 633 S.E.2d 136 (2006), the South Carolina Supreme Court clarified the elements necessary to establish an

easement implied by prior use. The Court held that the party asserting the right to an easement implied by prior use must establish the following: (1) unity of title; (2) severance of title; (3) the prior use was in existence at the time of unity of title; (3) the prior use was not merely temporary or casual; (4) the prior use was apparent or known to the parties; (5) the prior use was necessary in that there could be no other reasonable mode of enjoying the dominant tenement without the prior use; and (6) the common grantor indicated an intent to continue the prior use after severance of title. See *Boyd v. Bellsouth Tel. Co.*, 369 S.C. 410, 420, 633 S.E.2d 136, 141 (2006).

Since the elements of unity of title and severance of title were previously established in the preceding paragraphs, the Court need not readdress these elements.

In this matter, prior use of the access over and across Tracts A and B most certainly existed at the time title of the two properties were unified in Outback Source, LLC in August of 2006, as this was the only way in which Outback Source could have legally accessed the Northern Tract. Since there existed no other means of access by Outback Source to the Northern Tract without trespass; use of the access was necessary and essential for the enjoyment of the Northern Tract. Furthermore, it is clear in examining the language of Plaintiff's deed (Exhibit 21) that Outback Source, LLC intended for use of this access to continue after conveying the Northern Tract to Plaintiff.

Lastly, the court is satisfied that prior use of the access was known and/or apparent to the Defendants as evidenced by the testimony of Plaintiff and Defendants and the aerial photographs submitted into evidence which indicate a clear pathway to the Northern Tract over and across Tracts A and B.

The facts, testimony, and evidence before this Court conform in all respects with that in *Boyd* and its progeny; an easement by prior use is hereby established as a matter of law.

Affirmative Defenses of Defendants

The Defendants asserted in their Answer to Plaintiff's Amended Complaint affirmative defenses of *Statute of Limitations, Merger of Title, Failure of Title, Abandonment, Taking, Trespass, Unjust Enrichment, Failure to Join, Estoppel by Deed, Laches, Waiver, Good Faith, and Estoppel.*

There exists no authority in the South Carolina that recognizes an affirmative defense of *Taking* with regard to a private action between neighboring landowners. As such, the affirmative defense of *Taking* is inapplicable in this matter.

Furthermore, it settled law in this state that the *Statute of Limitations* can afford no bar to an easement. See *E.R. Parkins et al. v. Benejah Dunham*, 34 S.C.L.224, 227 (Ct. App. 1848). Therefore the affirmative defense of *Statute of Limitations* does not apply in this matter.

Plaintiff also argued at trial the defense of *Prescriptive Use*, however, since this defense was never plead in Defendants Answer, it will not be considered.

Merger of Title

The Defendants plead and argued at trial that in the event it was determined that Plaintiff was granted an easement over and across Tracts A and B that said easement would be extinguished as a result of the merger of the easement with the fee ownership of the property. This Court disagrees.

The Defendants correctly argue that the general rule regarding merger of title in

regard to easement disputes is that an easement is extinguished if the titles to both the dominant and servient tenements become vested in fee in the same person. See *Haselden v. Schein*, 167 S.C. 534, 166 S.E.2d 634, 635 (1932). However, even if the court were to adopt the position of Defendants that said easement was extinguished by merger when Monkey Business and/or Outback Source, LLC became the fee simple owners to both properties, Defendants argument still fails as a matter of law since Outback Source, LLC reconveyed the easement to Plaintiff in 2010 (Exhibit 21.)

Failure of Title

The Defendants plead and argued at trial that any easement claim by the Plaintiff would be invalid for failure of title in that the grantor of the easement did not have title to the property over which the easement was granted. This court disagrees.

It is clear in examining the chain of title that at the time Outback Source, LLC conveyed the Northern Tract and easement to the Plaintiff, it also held fee simple title to Defendants property (Tract A and B). This is the property over which the easement was granted. Therefore, the defense of *Failure of Title* does is inapplicable in this matter.

Abandonment

Defendants plead and argued at trial that if Plaintiff were to have been granted an easement across Defendants property, then such easement was abandoned when Plaintiff conveyed and divested himself of all title to the property in question.

Much like Defendants argument of merger of title, the *abandonment* argument is immaterial and inapplicable in this matter since the chain of title clearly reflects that Plaintiff reacquired the Northern Tract in 2010 by deed from Outback Source, LLC which also granted him an express right of way across the property then owned by

Outback Source, LLC. (See Exhibit 21).

Furthermore, courts in this state have consistently held that the party asserting abandonment has the burden of proof to show abandonment by clear and convincing evidence. *Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct.App.1998) and that it is the question of intent of the owner which is the primary inquiry. See *Judy v. Kennedy*, 398 S.C. 471, 478, 728 S.E.2d 484, 488 (Ct. App. 2012).

The court does not find that Defendants have satisfied this high burden nor did the testimony and evidence presented in this case support a finding of intent by the Plaintiff to abandon the easement.

Trespass

The Defendants plead and argued at trial that the Plaintiff's entry onto the property of the Defendants without the express permission of the Defendants is an unlawful entry onto the Defendant's property.

Since this Court has already found there to be an easement over and across Defendant's property, Plaintiff's entry onto Defendant's property at the specified location of the easement would not constitute trespass.

Unjust Enrichment and Failure to Join

The Defendants plead in their Answer the affirmative defenses *Unjust Enrichment* and *Failure to Join* as complete and affirmative defenses to this action.

Plaintiff testified that the Northern Tract was conveyed to him in lieu of foreclosure on that mortgage on the property which had been assumed by Outback Source (Exhibit 18A). The access easement was included in Plaintiff's Deed and was part of the value of the property. Therefore, access to the Northern Tract would not

unjustly enrich the Plaintiff as access to the Northern Tract was part of the basis of the bargain.

The courts in this state have held that the defense of failure to join indispensable parties is waived if not raised at trial. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 596, 541 S.E.2d 257, 262 (2001). Therefore, since this defense was not raised at trial it will not be considered.

Estoppel and Estoppel by Deed

The Defendants plead the affirmative defense of estoppel and argued at trial that Plaintiff should be estopped from asserting any right or claim of entitlement to an easement across Defendant's property under the theories of *Estoppel* and *Estoppel by Deed*.

The Court of Appeals in *Binkley* addressed the issue of estoppel in relation to easement disputes. The first element that a party seeking to assert equitable estoppel must prove is a lack of knowledge and of the means of knowledge of the truth regarding the facts in question. *Binkley*, 348 S.C. at 70, 558 S.E.2d at 908. However, a properly recorded title normally precludes an equitable estoppel against assertion of that title due to the requirement that the party raising the estoppel be ignorant of the true state of the title or reasonable means of discovering it. *Id.* at 909.

Since it is clear that Plaintiff's Deed was on record and that Defendants had actual and constructive notice of the easement, Defendants have failed to meet the first element of estoppel, lack of knowledge of the extent of the easement and of the means by which to obtain knowledge.

The Court in *Hipps v. Hipps* addressed the issue of Estoppel by Deed or "After-

Acquired Title.” That court found that estoppel by deed arises in such a situation if the grantor specifically conveys not only his present interest but also any interest he may later acquire. *See Hipps v. Hipps*, 288 S.C. 564, 567-68, 343 S.E.2d 669, 671 (Ct. App. 1986). Since it is clear that Plaintiff was the grantee of the easement in 2010, this defense would not apply in this matter.

Laches and Waiver

The Defendants plead in their Answer the affirmative defenses of *Laches* and *Waiver* as a bar to Plaintiff’s claim of entitlement to an easement across Defendant’s property.

The equitable “doctrine of laches” is defined as neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. *Id.* at 528.

It is clear in examining the chain of title that Plaintiff held title to his property for just four (4) years prior to Defendants’ obstructing the easement. Plaintiff further testified that he orally informed Defendants that he owned an easement across their property and that there he experienced no problems accessing his property until he ultimately disclosed to Defendants his plans to establish a conservation easement on his property. Therefore, this court finds that there was no delay as Plaintiff filed this action immediately after being denied access to his property.

The Defendants argued at trial that an easement would constitute prejudice as they believe that noise and traffic would inhibit the enjoyment of their home. The court is

not persuaded by this argument as it appears clear in the photographs provided that Defendants built their home and other structures a distance away from the location of the easement. Furthermore, it is well settled in this state that equity follows the law and the court's equitable powers must yield in the face of an unambiguously worded statute. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 255, 715 S.E.2d 348, 355 (Ct. App. 2011). Since Defendants had at least constructive notice of the easement by virtue of the recording statute, this court must follow the law and deny the equitable relief requested by Defendants.

This Court does not find that Plaintiff has performed any affirmative acts that would arise to *waiver* of his right to exercise access to his property via the easement across Defendants' property.

Good Faith

The Defendant plead in their Answer and argued at trial that have acted in good faith and have not directly or indirectly induced or willfully, intentionally, or recklessly engaged in any of the acts alleged by Plaintiff.

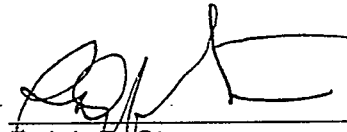
The testimony of both the Plaintiff and the Defendants indicated to the court that the Defendant, immediately after learning of Plaintiff's plans to establish the conservation easement on his property, began blocking Plaintiff's access to his property. The court does not find that these actions constitute good faith on part of the Defendants.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court finds and hereby declares the following:

- A. That Plaintiff has an express easement by grant along, across and over the property of Defendants. This easement shall be located as described in that certain Boundary survey prepared by Ken Jordan dated November 13, 2014 and incorporated herein to this Order.
- B. That Plaintiff is entitled to an easement by necessity along, across and over the property of Defendants. This easement shall be located as described in that certain Boundary survey prepared by Ken Jordan dated November 13, 2014 and incorporated herein to this Order.
- C. That Plaintiff is entitled to an easement by prior use along, across and over the property of the Defendants. This easement shall be located as described in that certain Boundary survey prepared by Ken Jordan dated November 13, 2014 and incorporated herein to this Order.

AND IT IS SO ORDERED.



Ralph P. Stroman
Special Referee for Horry County

Conway, South Carolina

May 24, 2016