

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM CALHOUN COUNTY
Court of Common Pleas**

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2008-CP-9-135

W. Peter Buyck, Jr., Respondent,

v.

William Jackson, Appellant.

INITIAL BRIEF OF APPELLANT

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- III. Did the circuit court err in finding that the plaintiff's prescriptive easement, if proved, was appurtenant and not in gross?
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QUESTIONS PRESENTED

I.

Did the circuit court err in refusing to presume that the use of defendant's woodland road by the plaintiff and his father was permissive, not adverse under claim of right, where the road was through unenclosed woodland?

II.

Did the circuit court err in finding that the use of the defendant's woodland road by the plaintiff and his father established a prescriptive easement?

III.

Did the circuit court err in finding that the plaintiff's prescriptive easement, if proved, was appurtenant and not in gross?

IV.

Did the circuit court err in allowing the plaintiff to authorize the use of defendant's woodland road by anyone he chooses?

STATEMENT OF THE CASE

This action was commenced with the service and filing of a complaint dated September 18, 2008, by Peter Buyck, Jr., the respondent herein, against William Jackson, the appellant herein. The respondent claimed both an express and a prescriptive easement over a dirt road on appellant's 108-acre tract in rural Calhoun County. The respondent withdrew his claim to an express easement before trial. Respondent's claim to a prescriptive easement was tried on October 5 and 6, 2010, before the Honorable Diane Schafer Goodstein, Resident Judge of the First Judicial Circuit.

By Order dated October 26, 2011, and entered November 15, 2011, Judge Goodstein found that the respondent had established his ownership of a prescriptive easement.

The appellant timely served a motion under Rule 59, SCRPC, to alter or amend. The motion was denied by Order dated June 5, 2012 and entered June 14, 2012. Appellant service notice of appeal on July 9, 2012.

STATEMENT OF FACTS

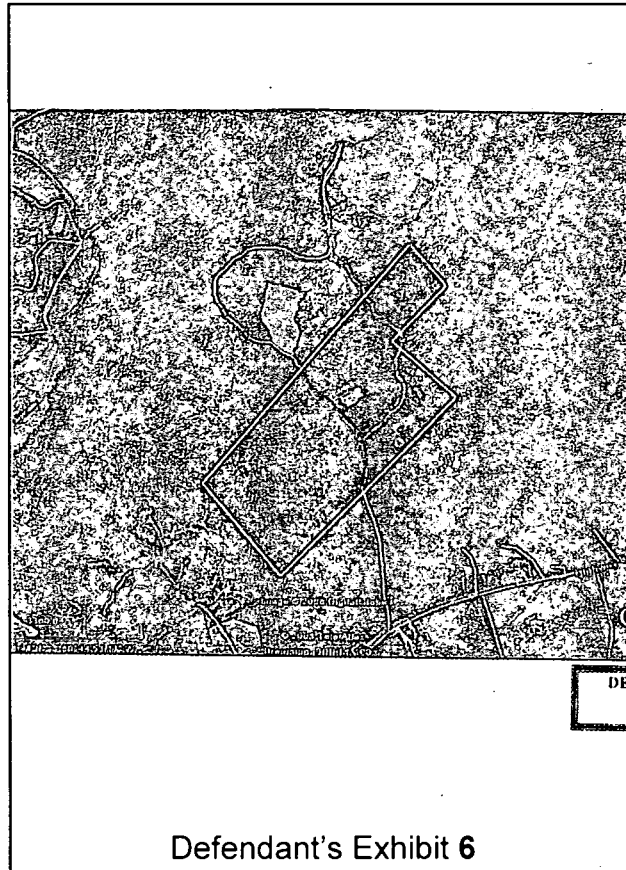
Peter Buyck, Jr., claimed to own a prescriptive easement over a dirt road on the defendant's 108-acre woodland tract, located on the western side of the Congaree River in rural Calhoun County, north of Fort Motte. The defendant's tract is the northern portion of a larger tract of 203 acres. This larger tract was called by the witnesses the McAlister tract, named for an earlier owner. The northern and southern portions of the McAlister tract were severed in 2000, with the northern portion going to the defendant, William Jackson, and the southern portion going to William Conrad. [Def. Exhs. 13 & 14.] The chain of title of the McAlister tract was not established prior to 1990, but the evidence shows that the tract was owned by Mrs. McAlister before 1984. In that year she granted to Mr. Buyck an express easement over a road on her tract. [Def. Exh. 4.]

On two sides of the McAlister tract are tracts owned by Mr. Buyck — a 700-acre tract on the northwest and a 200-acre tract on the southeast. The McAlister tract consisted entirely of unenclosed, unimproved woodland during the prescriptive period and long before, as discussed more fully below. The Congaree River bounds the McAlister tract on the northeast and Fort Motte Road on the southwest. In recent years a vacation cottage was built near the river bluff by the defendant Jackson on his 108-acre northern portion of the McAlister tract. William Conrad uses a cottage built by Mr. Nickells in the early 1990s, somewhere on the 95-acre southern portion of the McAlister tract. [Tr. 187/2 & 201/21–27.] No other improvements are found to this day on the McAlister tract. There is no evidence that the McAlister tract has ever been used for anything but timber production [Tr. 55] and recreation.

The road in question is one of two woodland roads across the defendant's property — the "left fork" and the "right fork" — used by Mr. Buyck to reach his adjacent 700-acre tract. Mr. Buyck possesses an express easement [Def. Exh. 4] over the left fork. He sought a prescriptive easement over the right fork.¹ The right fork and the left fork are the final segments of a dirt road reaching the 700-acre tract from Fort Motte Road. This dirt road crosses four woodlands tracts before reaching the 700-acre tract. First, the road passes over and separates the Pedings tract and the Stuck tract.² Next, the road crosses Mr. Buyck's 200-acre tract. It then crosses the McAlister tract to a point roughly a third of the way through the McAlister tract, where the road forks left and right. Both forks continue through the remainder of the McAlister tract to the 700-acre Buyck tract.

¹ Initially, Mr. Buyck claimed an express as well as a prescriptive easement over the right fork but withdrew this claim in his pretrial brief. [Plaintiff's Pretrial Brief.]

² The centerline of the road is the boundary between these two tracts.



On Defendant's Exhibit 6, above, the McAlister tract is outlined in yellow. Fort Motte Road (S-9-25) appears at the bottom of this aerial picture. The dirt road beginning at Fort Motte Road is shown as a white line as it crosses the Stuck tract, the Pedings tract, and the 200-acre Buyck tract, then is colored blue to the fork. The left fork (sometimes called "the hayfield road") continues as blue to the point where it reaches the 700-acre Buyck tract near a hayfield, then is white again. The right fork is colored red. The right fork leaves the McAlister tract for a short distance as it crosses the Bruner tract, then returns to the McAlister tract and reaches the 700-acre Buyck tract. The right fork continues into the Buyck tract to a point where it meets the continuation of the left fork.

Mr. Buyck holds an express easement for the use of the road from its beginning at Fort Motte Road, thence across the Pedings and Stuck tracts to his own 200-acre

tract. (Mr. Buyck owns the road in fee simple where it crosses his own 200-acre tract.) His easement resumes at the point where the road reaches the McAlister tract, continuing to the middle of the McAlister tract, where the road forks. From the fork, Mr. Buyck's express easement continues along the left fork of the road to the boundary of his 700-acre tract.³

Mr. Buyck received title to his 700-acre tract in 1976 by deed from his father, who had owned a half-interest in it since 1942 and sole title since 1960. The plaintiff used the year 1942 as the starting point for his claim to a 20-year period of prescriptive use of the right fork.⁴

³ In 1984, Mr. Buyck agreed with the owners of the McAlister tract, the Pedings tract, and the Stuck tract to exchange mutual easements for the use of this dirt road from where it begins at Fort Motte Road to the point where it forks on the McAlister tract. From that point the express easement granted to Mr. Buyck continues along the left fork of the road to the border of the 700-acre Buyck tract. The plaintiff alleged in his complaint that the 1984 easement included not the left fork but rather the right fork. This claim was withdrawn in plaintiff's pretrial brief, in which the plaintiff limited his claim to a prescriptive easement over the right fork. See plaintiff's pretrial brief and his opening statement, Tr. 11. A claim that the express easement granted by Mrs. McAlister included the right fork, which left her tract and passed over the Bruner tract, would require "the court to conclude that [Mrs. McAlister] gave an easement over property she did not own." *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985). Although not an issue after the plaintiff withdrew his claim pretrial, the only expert testimony was to the effect that the left fork, not the right fork, is the western-most segment of the express easement granted by Mrs. McAlister to Mr. Buyck. [Tr. 381-82.]

⁴ The 700-acre Buyck tract "goes back in the [Buyck] family to at least 1942 of continuous ownership." (Plaintiff's attorney, Mr. English, Tr. page 9, lines 15-17 ("Tr. 9/15-17"). See Plntf. Ex. 3.) "Tacking" is permitted when the plaintiff claims an easement appurtenant to his dominant estate. Tacking is unnecessary here, however, since Peter Buyck, Sr., owned at least a half-interest in the 700-acre tract during the entire prescriptive period of 1942 through 1962. The plaintiff, Mr. Buyck, Jr., testified that he has made the same use of the 700-acre tract as did his father before him. [Tr. 41/16-17.]

SUMMARY OF ARGUMENT

The circuit court made an outcome-determinative error of law when it applied the wrong legal presumption by presuming that the use of the right fork by Mr. Buyck and his father was adverse or under claim of right from its inception. The presumption is that the use was permissive, not adverse or under claim of right. South Carolina law requires clear and convincing evidence that a use presumed to be permissive at its inception has turned hostile. There was no such evidence.

Even if the plaintiff did establish a prescriptive easement, the circuit court erred in finding the easement to be appurtenant to the 700-acre tract of Mr. Buyck. Unless the easement is essentially necessary to the use of the 700-acre tract, it is not appurtenant but in gross. There is no evidence that the use of the right fork is essentially necessary. All the evidence is to the contrary.

Regardless of whether the easement, if proved, is appurtenant or in gross, the circuit court erred in allowing Mr. Buyck to authorize anyone he pleased to use the road. Reasonable limits should have been placed on the scope of Mr. Buyck's right to allow others to use this road over Mr. Jackson's property.

I.

The circuit applied the wrong presumption. The use of a woodland road across this unenclosed, unimproved timberland was presumably permissive, not adverse or under claim of right.

It is often critical to determine whether the plaintiff's claim to a prescriptive easement over unenclosed woodland is supported by a *presumption* of adverse use under claim of right.⁵ That was the case here. If the use of a road is presumed to be adverse, then a prescriptive right arises after twenty years unless the owner of the fee

⁵ In this brief, "adversity" and "adverse use" are shorthand for the longer phrase often found in the caselaw: "adverse under claim of right", or "adverse **and** under claim of right," or "adverse **or** under claim of right".

affirmatively rebuts the claim. If the use is presumed permissive, then no such use — no matter for how long — results in an easement unless the claimant affirmatively proves that the use originated adversely or that a user initially permissive became adverse. The nature of the presumption — permissive or adverse — depends upon the nature of the land.

Throughout the prescriptive period, the McAlister tract was unenclosed woodland. In its order denying reconsideration, almost as an afterthought the circuit court found that the McAlister tract is enclosed. This out-of-the-blue finding is unsupported by a scintilla of evidence. All the evidence shows that the McAlister tract is unenclosed. The videos in evidence as Defendant's Exhibits 16 & 17 show that no fence is present when the McAlister tract is entered from the 200-acre Buyck tract.⁶ At the points where each of the two forks of the road on the McAlister tract reach the 700-acre Buyck tract, there are gates on the Buyck tract, not the McAlister tract [Tr. 274–78], but no fence on either tract. The plaintiff does not suggest that there may have been a fence at some time in the past, but now removed. There is no evidence and no reason to think that this might be the case. Every South Carolinian knows that large timberland tracts in rural South Carolina are rarely if ever fenced. Even cultivated fields are seldom fenced. Fences are used in the countryside for cattle and other domestic animals, not timberland. The expense of fencing a timber tract of 203 acres, such as the McAlister tract, would be enormous, and would serve no purpose. This tract is deep in the woods of rural Calhoun County, where fencing could only mean

⁶ Videos show the absence of any fences on the boundaries of the McAlister tract. [See Def. Exhs. 16 & 17, found on a CD in the pocket part inside the back cover of the Record on Appeal.] Exhibit 16 records a drive from where the road enters the McAlister tract from the adjacent 200-acre Buyck tract to the fork, thence on the **right** fork to the point where the right fork reaches the 700-acre Buyck tract. Exhibit 17 records a drive from where the road enters the McAlister tract from the adjacent 200-acre Buyck tract to the fork, thence on the **left** fork to the point where the left fork reaches the 700-acre Buyck tract.

cattle, not timber.

The evidence leaves no doubt that the McAlister tract was at all relevant times unenclosed woodland. During the prescriptive period the tract was not only unenclosed but exclusively unimproved woodland. It continues unenclosed to this day, and remains unimproved woodland except for one house and one cottage built in relatively recent times on this 203-acre timberland tract. The right fork has always passed through unenclosed, unimproved woodland, as it does today.

Unenclosed woodland, such as the McAlister tract, once predominated in South Carolina. See, e.g., *Tyler v. Guerry*, 251 S.C. 120, 126, 160 S.E.2d 889, 891 (1968) (“unenclosed and unimproved woodland”). South Carolina has a rich history of jurisprudence on the subject of prescriptive rights-of-way across unenclosed woodland.⁷ The seminal case is *Lawton v. Rivers*, 2 McCord (13 S.C.L.) 445, 13 Am.Dec. 741 (1824). As recently as 1944, our Supreme Court noted that the holding in *Lawton* had been “consistently followed in a long line of decisions.” *Sanitary & Aseptic Package Co. v. Shealy*, 205 S.C. 198, 31 S.E.2d 253, 255 (1944), citing *Craven v. Rose*, 3 S.C. 72; *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15; *Poole v. Edwards*, 197 S.C. 280, 15 S.E.2d 349, and *Steele v. Williams*, S.C., 28 S.E.2d 644. The *Lawton* decision retains vitality today. See, e.g., *Boyd v. BellSouth Tel. & Tel. Co.*, 369 S.C. 410, 633 S.E.2d 136, 141 (2006), and *Hartley v. John Wesley United Methodist Church*, 355 S.C. 145, 584 S.E.2d 386, 388 (Ct. App. 2003), both citing *Lawton*. The *Lawton* case taught that the use of roads and other rights-of-way across unenclosed woodland is deemed to be

⁷ Cases involving a claim to a prescriptive easement across unenclosed woodland go far back. See, e.g., *M’Kee v. Garrett*, 1 Bailey (17 S.C.L.) 341 (1830); *Hogg v. Gill*, 1 McMull. (26 S.C.L.) 329 (1841); *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848); *Hutto v. Tindall*, 6 Rich. (40 S.C.L.) 396 (1853); *Sims v. Davis*, Cheves (25 S.C.L.) 1; *State v. Floyd*, 39 S.C. 23, 17 S.E. 505; *State v. Rodman*, 86 S.C. 154, 68 S.E. 343 (1910); *Slater v. Price*, 96 S.C. 245, 80 S.E.372 (1913); *State v. Miller*, 130 S.C. 152, 125 S.E. 298 (1923); *Savannah River Lumber Corp. v. Bray*, 189 S.C. 237, 200 S.E. 760 (1939); *Tyler v. Guerry*, 251 S.C. 120, 126, 160 S.E.2d 889, 891 (1968); *Cleland v. Westvaco*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993).

permissive, not adverse, until the opposite is proved. Nearly two centuries later, this continues to be the rule in South Carolina. See, e.g., *Tyler v. Guerry*, 251 S.C. 120, 126, 160 S.E.2d 889, 891 (1968) (mere use of old road over unenclosed woodland for more than 50 years “does not give rise to a right-of-way by prescription.”).

If the land over which the right-of-way runs is what the cases call “*improved*,” notice of a use of his property, presumably adverse, is imputed to the landowner. It is then incumbent upon the landowner to prove that the usage was permissive in its inception, or else to stop the adverse usage on pain of having the usage become prescriptive. However, our cases have taught from the *Lawton* case onward that where the land is *unenclosed woodland*, it is presumed that the use of a road through the woods is by permission of the landowner. The claimant must then carry the heavy burden of overcoming the presumption of permission by proving that the usage was adverse or under claim of right. Use of a right-of-way by permission, regardless of how long it lasts, can never ripen into a prescriptive easement. “[A] mere courtesy can never grow into a right.” *Witter v. Harvey*, 1 McCord (12 S.C.L.) 72 (1821).

The traditional openness of unenclosed woodlands was noted in our first prescriptive easement case, *Lawton v. Rivers*, 2 McCord (13 S.C.L.) 445, 452 (1823):

It has been decided in this state, that as long as lands remain open and unenclosed, every person may, of common right, pass over them, hunt upon them, etc. And it is within our daily observation, that as long as lands remain in that, they are considered as common for those purposes. Such a use cannot be considered adverse, whatever length of time it may continue, and therefore can furnish no evidence of right;

This theme was often repeated in the early cases. Soon after the *Lawton* case, the court made the same sort of observation in *Turnbull v. Rivers*, 3 McCord (14 S.C.L.) 131, 139 (1825):

The several occupants of the island were permitted to pass over the unenclosed lands of the defendant, in the same manner and to the same extent as all the rest of

the neighbors; Allowing the use of the way appears to have been a mere act of courtesy;

The traditions of the countryside were again noted in *Rowland v. Wolfe*, 1 Bailey (17 S.C.L.) 56, 58–59 (1828):

The use must be adverse to the claim of the owner of the land. Merely passing over an uncultivated and unenclosed forest, which is common to every one, cannot, by any lapse of time, give a right to any individual. To determine a question of this sort, we must look to the situation of the country and the habit of the people. We know that it is an indulgence allowed to every body, by the universal consent of the country, to make roads through unenclosed lands in any direction, without any kind of restraint. But no one ever dreamed, that by this kind of courtesy, a neighbor might, by and by, claim a right to such a road, to the exclusion of the owner of the soil. Such a use is not adverse: It deprives the owner of no right, and subjects him to no inconvenience. A privilege thus enjoyed, can never be claimed as a right.

A few years later, in *Hogg v. Gill*, 1 McMull. (26 S.C.L.) 329, 331 (1841), the court said:

When lands are enclosed, or otherwise specifically appropriated, any encroachment on them will soon be known and promptly resisted. . . . On the contrary, where the way runs entirely through wild and unappropriated forest, no such presumption could naturally arise. . . . Persons travel and use such a way under an implied, but revocable, license, and regard it as a mere convenience to be enjoyed at sufferance, without ever thinking of a right in themselves.

The reasons for the presumption of permissive use of rights-of-way over unenclosed woodland are clearly stated in the early cases. For example, in *Hutto v. Tindall*, 6 Rich. (40 S.C.L.) 396, 401–03 (1853), the Court stated:

To prohibit [those who travel a way over woodland] would be considered churlish; and would be ineffectual, unless a constant watch was kept to prevent them.

* * * * *

The use must be adverse to the owner of the land. Merely passing over uncultivated and unenclosed forest . . . cannot, by any lapse of time, give a right to any

individual.

The same idea was expressed in *State v. Miller*, 130 S.C. 152, 125 S.E. 298, 299 (1923):

The rule requiring that in addition to proof of the continuous use of a road for 20 years or more in order to establish a prescriptive right, 'when it passes over unenclosed woodland it must also be shown that the user was adverse,' proceeds upon the theory, soundly grounded in conditions which are a matter of common knowledge in this country, that the user of a road through unenclosed woodland is, in effect, a user by license or permission of the owner of the land.

This continues to be the rule in South Carolina, as elsewhere. See, e.g., *Tyler v. Guerry*, 251 S.C. 120, 126, 160 S.E.2d 889, 891 (1968) (road in existence for more than 50 years; "The property . . . is shown to be unenclosed and unimproved woodland and the mere use of what is referred to as the old road does not give rise to a right-of-way by prescription."); *Savannah River Lumber Corp. v. Bray*, 189 S.C. 237, 200 S.E. 760, 761 (1939) ("The rule in this state is that a prescriptive right arises in favor of the public after continuous use of a road for 20 years when it runs through cultivated land, but that, when it passes over unenclosed woodland, it must also be shown that the use was adverse and under a claim of right, and not by the owner's permission."), quoting *State v. Miller, et al.*, 125 S.C. 289, 118 S.E. 624 (1923).⁸ Accord: *State v. Rodman*, 86 S.C. 154, 68 S.E. 343 (1910); *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848); *Sims v. Davis & Taggart*, Cheves (25 S.C.L.) 1 (1839); *M'Kee v. Garrett*, 1 Bailey (17 S.C.L.) 341 (1830); *Hutto v. Tindall*, 6 Rich. (40 S.C.L.) 396,401 (1853) ("The use must be

⁸ *Savannah River Lumber* was a case involving a claim to a prescriptive easement in favor of the public and not a private individual. An even higher degree of proof is needed to prove a private easement than a public one. *Slater v. Price*, 96 S.C. 245, 80 S.E.372 (1913) ("[T]here is a difference between the quantum of proof necessary to establish a public and a private right of way; the former requiring less proof than the latter." (Hydrick and Fraser, JJ., dissenting, citing *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848)).

adverse to the owner of the land. Merely passing over uncultivated and unenclosed forest . . . cannot, by any lapse of time, give a right to any individual.”); *Cleland v. Westvaco*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993).

This is the general rule throughout the country. Cases from most jurisdictions are cited in the major treatises on the subject of prescriptive easements for the rule that no presumption of adverse use applies where the land over which the easement is claimed is unenclosed and unimproved, such as woodland. JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 5:3 n.10 (2005); 4 POWELL ON REAL PROPERTY § 34.10[2][c] n.23 (2d ed. 2008); 4 H. TIFFANY, *LAW OF REAL PROPERTY* § 1196.1 (3d Jones ed. 1939) (presumption of permissive use).

There is . . . a widely recognized exception to this general rule [of a presumption of adverse use] where the land involved is considered to be wild, unenclosed, or unimproved. In this situation there is generally a presumption of permissiveness, or at least no presumption of adverseness. . . . This rule is based upon the philosophy that “the law should and does encourage acts of neighborly courtesy.” [*Citing Weaver v. Pitts*, 191 N.C. 747, 749, 133 S.E. 2, 3 (1926).] . . . This philosophy is not by any means unique to North Carolina as most courts will apply it where the facts warrant. . . .

* * * * *

[U]nder modern theories of neighborliness, prescriptive rights are not favored in the law as they necessarily result in the forfeiture of the rights of others.

J. Aldridge, *Real Property—Easements—Prescriptive Acquisition in North Carolina*, 45 N.C.L.REV. 284, 289–90, 294 (1966).

Another law writer has observed:

The prevailing rule regarding the establishment of easements by prescription seems to be that where the claimant has openly made continuous use of a way over lands, unmolested by the owner for a time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right; but where the way is across property that is unenclosed it will *prima facie* be deemed to be by permission of

the owner and not to be adverse to his title.

* * * * *

It is a matter of common knowledge that the owner of unenclosed and unused land frequently has no objection to his adjoining neighbor's passing over his premises. The presumption in such cases is that the user is permissive; and it is a perfectly natural presumption since the use conflicts with no present interest of the owner of the land. Thus on a showing that the land is unenclosed the ordinary presumption of adverseness may be rebutted and replaced by a presumption that the user was permissive.

* * * * *

As soon as the user becomes of such nature that a distinct and positive assertion of a right may be implied it ceases to be an enjoyment of neighborly courtesy and the landowner is called upon to appeal to the protection of the law.

* * * * *

Even in the case of ways across unenclosed woodlands, concededly presumed to be permissive, the generally established rule is that where there is an act of a clearly hostile character a prescriptive right may be acquired if such hostile conduct is pursued for the duration of the statutory period.

M. Dwyer, *Real Property: Prescriptive easements of way: Presumption as to adverse character of user of way over unenclosed urban land*, 19 CORNELL L.Q. 337, 338–40 (1934).

The circuit court erred in presuming that the Buycks' use of the right fork was adverse and under claim of right. It was presumed permissive initially and throughout. This crucial error of law controlled the outcome of the case, since there is an entire absence of evidence to overcome the presumption of permissive use.

II.

The circuit court erred in finding that the use of the right fork by the plaintiff and his father established a prescriptive easement.

The burden of proving a prescriptive easement rested with the plaintiff. *Babb v. Harrison*, 220 S.C. 20, 66 S.E.2d 457 (1951) (The claimant “carries with her the burden of proving that the use of such disputed area was adverse for the full period of twenty years in order to establish an easement by prescription.”), . . . quoted in *Morrow v. Dyckes*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997). The burden is a heavy one. It must be carried by clear and unequivocal evidence. *State v. Sartor*, 2 Strob. (33 S.C.L.) 60, 66 (1848); *Gibson v. Durham*, 3 Rich. (37 S.C.L.) 85, 87 (1846) (“[H]e who claims an easement on another’s land, must establish it clearly”); *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985) (“[T]he law is jealous of a claim to an easement, and the party asserting such a claim must prove his right to it clearly, *Polson v. Ingram*, 22 S.C. 541 (1885)”). Accord: JAMES W. ELY, JR. & JON W. BRUCE, THE LAW OF EASEMENTS AND LICENSES IN LAND § 5:3 (2011) (“Courts often stress the need for clear and convincing evidence.” [citing cases from 23 jurisdictions]).⁹ This mirrors the quality of evidence needed to prove adverse possession — clear and convincing evidence. *Miller v. Leaird*, 307 S.C. 56, 62, 413 S.E.2d 841, 844 (1992); *Jones v. Leagan*, 384 S.C. 1, 10, 681 S.E.2d 6, 10–11 (Ct. App. 2009); *McDaniel v. Kendrick*, 386 S.C. 437, 688 S.E.2d 852, 855 (Ct. App. 2009). Cf. *Lawton v. Rivers*, *supra*: “The testimony on all these points was too weak to take the land of one man and appropriate it to another.” 2 McCord (13 S.C.L.) at 450.

Prescriptive easement claims are disfavored. *Taylor v. Hampton*, 4 McCord

⁹ Our Court of Appeals cited and relied upon this leading treatise in *Matthews v. Dennis*, 365 S.C. 245, 616 S.E.2d 437, 440 n.9 (Ct. App. 2005).

(15 S.C.L.) 96, 100 (1827) (“[An easement] which one man claims in derogation of the rights of another is viewed with jealousy by the law, and is an object not highly entitled to its favor.”); *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 361, 639 N.W.2d 905, 911 (2002) (prescriptive easement claims are “treat[ed] . . . with disfavor”); *Powder River Ranch, Inc. v. Michelena*, 2005 Wyo. 1, 103 P.3d 876, 879 (2005). See: *Caribou Four Corners, Inc. v. Chapple-Hawkes, Inc.*, 643 P.2d 468, 471 (Wyo. 1982) (characterizing claim of prescriptive easement as “a judicially unpopular cause to take another’s land”); 1 THOMPSON ON REAL PROPERTY § 408, p. 523 (1st ed. 1924) (“It is for the claimant of the prescriptive right to establish the extent thereof. Nothing is presumed in his favor and he can claim nothing beyond what the user proves.”).

In the same way that adverse *possession* is the foundation of a claim of title by adverse possession, adverse *use* is the foundation of a claim of prescriptive easement.¹⁰ This is true in South Carolina as everywhere else. See, e.g., *Lawton v. Rivers*, 2 McCord (13 S.C.L.) 445, 449, 452 (1823);¹¹ *Rowland v. Wolfe*, 1

¹⁰ These two bodies of law — adverse possession and prescriptive easement — have been likened to twins, but not *identical* twins. *Felgenhauer v. Soni*, 121 Cal.App.4th 445, 449, 17 Cal.Rptr.3d 135, 138 (2004) (“[T]he courts have adopted language from adverse possession in stating the elements of a prescriptive easement. The two are like twins, but not identical.”); *Heuer v. County of Aitkin*, 645 N.W.2d 753, 757 (Minn. App. 2002) (“Rules pertaining to adverse possession are analogous to those governing easements by prescription.”); *Homan v. Hutchinson*, 817 S.W.2d 944, 948 (Mo. App. 1991) (“The method by which prescriptive rights are acquired is akin to the acquisition of title to real estate by adverse possession.”); *Scott v. Cannon*, 959 S.W.2d 712, 721 (Tex. Civ. App. 1998) (“The hostile and adverse character of the use necessary to establish an easement by prescription is the same as that which is necessary to establish title by adverse possession.”). See also: *Interior Trails Preservation Coalition v. Swope*, 115 P.3d 527, 529 (Alaska 2005) (pointing out that prescriptive easement claims focus on use rather than possession).

¹¹ “Three things appear to be necessary to establish a right by prescription: 1st. Use and occupation or enjoyment. 2nd. The identity of the thing enjoyed; and 3rd. That it should be adverse to the right of some other person. . . . The third requisite, to a right by prescription is, that the use should be adverse to the owner of the soil;”

Bailey (17 S.C.L.) 56 58–59 (1828);¹² *Nash v. Peden*, 1 Speers (28 S.C.L.) 17, 22 (1842);¹³ *Hutto v. Tindall*, Rich. (40 S.C.L.) 396,401 (1853);¹⁴ *Bailey v. Gray*, 53 S.C. 503, 31 S.E. 354, 358 (1898);¹⁵ *Crosland v. Rogers*, 32 S.C. 130, 10 S.E. 874 (1890);¹⁶ *Williams v. Haile Gold Mining Co.*, 85 S.C. 1, 66 S.E. 117, 118 (1909);¹⁷ *Slater v. Price*, 96 S.C. 245, 80 S.E.372, 375 (1913);¹⁸ *Babb v. Harrison*, 220 S.C. 20, 23 66 S.E.2d 457, 458 (1951);¹⁹ *Clemson Univ. v. First Provident Corp.*, 240

¹² “A right by prescription, is founded on a presumption, that a grant once existed, which has been lost by lapse of time. But lapse of time is not alone sufficient to afford such a presumption. The use must be adverse to the claim of the owner of the land.”

¹³ “[N]o prescriptive way can be established otherwise than by an adverse use of it for twenty years;”

¹⁴ “The use must be adverse to the owner of the land.”

¹⁵ “[A]s to prescription: As is said in the case [of *Lawton v. Rivers*, 2 McCord 445, 448 (1823)], ‘three things appear to be necessary to establish a right by prescription: (1) Use and occupation or enjoyment; (2) the identity of the thing enjoyed; and (3) that it should be adverse to the right of some other person.’”

¹⁶ “[A]n easement may come into existence . . . by adverse use for twenty years, which is prescription and presumes a grant”

¹⁷ “To acquire an easement by prescription, it must have been used in substantially the same way for the full period of 20 years, and adversely to the rights of the owner.”

¹⁸

This [jury] instruction authorized the finding that the easement was established by proof of 20 years’ permissive use. This court has never held that use alone, however long continued, will establish a private easement. On the contrary, it has always held that, to have that effect, the use must be adverse. *Lawton v. Rivers*, 2 McCord, 445, 13 Am. Dec. 741; *Bailey v. Gray*, 53 S.C. 514, 31 S.E. 354. . . . [It is a] universal rule that, to acquire a way by prescription, the use must be adverse. . . . [N]one of our cases hold that a private easement, such as that here claimed, can be established by use, unless it is adverse.

(Hydrick and Fraser, JJ., dissenting.)

¹⁹ The claimant “carries with her the burden of proving that the use of such disputed area was adverse for the full period of twenty years in order to establish an easement by prescription.”

S.C. 640, 652, 197 S.E.2d 914, 919 (1973);²⁰ *Horry County v. Laychur*, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993).²¹ This is the law of every state. See, e.g., 4 POWELL ON REAL PROPERTY § 34.13 (2d ed.2008);²² 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 796 p. 299 (3d Jones ed. 1939);²³ 7 THOMPSON ON REAL PROPERTY § 60.03(b)(6)(vi) p.513 (2d Thomas ed. 2006);²⁴ 1 THOMPSON ON REAL PROPERTY § 390 p. 504 (1st ed. 1924);²⁵ W. STOEBUCK & A. WHITMAN, THE LAW OF PROPERTY § 8.7 Prescription p. 452 (3rd ed. 2000).²⁶

²⁰ "An easement by prescription is predicated upon adverse use for the prescriptive period."

²¹ "This evidence was offered to refute the claim that use by the public was adverse, an element essential to proving the existence of a prescriptive easement."

²² "The theory of [a prescriptive easement] is that an adverse use made continuously and uninterruptedly for the prescriptive period ripens into the easement. Thus the scope of such easement is necessarily a primary function of the continued use or uses by which it was generated." *Citing Jackson v. City of Auburn*, 971 So.2d 696 (Ala. Civ. App. 1996), a case cited with approval in *Gressette v. South Carolina Electric & Gas Co.*, 370 S.C. 377, 635 S.E.2d 538 (2006).

²³ § 796. Prescription.

An easement may be acquired by the adverse user of another's land for a certain period, usually the same as that required to give title to land itself by disseisin or adverse possession.

²⁴ "To gain a prescriptive easement over someone else's land, one's use must be 'adverse, under claim of right . . .'" *quoting C & E Partnership v. Donnelly*, 235 Va. 301, 305, 367 S.E.2d 490, 492 (1988).

²⁵ "To effect this [*i.e.*, a prescriptive easement] there must be a distinct and positive assertion of a right hostile to the owner, and of which he has knowledge." *Citing Williamson v. Abbott*, 107 S.C. 297, 93 S.E. 15 (1917).

²⁶

[T]he elements for adverse use are enough the same as for adverse possession that the section on that subject is generally applicable here. Some differences need to be pointed out, however. The most basic difference is between "use" and "possession," for that determines whether activities that are adverse will gain an easement or estate for the claimant.

* * * * *

(continued...)

The courts have often equated the necessity of adverse use to a "claim of right" by the prescriptive user. See: *Earle v. Poat*, 63 S.C. 439, 41 S.E. 525, 531 (1902) ("[S]uch use must be adverse, or, what is the same thing, under a claim of right . . .") (Jones, J., dissenting). The phrase itself — *claim of right* — connotes an intention to claim adversely to the rights of the landowner.²⁷ The authors of the leading treatise on the subject of easements have observed:

Adverse use is sometimes characterized as a use made under a claim of right, but such a description is imprecise because a claim need not be formally asserted, nor must the use be made with the belief that it is lawful.

Indeed, it has been suggested that the phrase "claim of right" is often employed only to explain the requirement of adversity. The Supreme Court of Washington has aptly described the requisite adverse use as:

such use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right. Hostile use of real property by an occupant or user does not import ill will, but imports that the claimant is in possession or using it as owner, in contradistinction to possession or using the real property in recognition of or subordinate to the title of the true owner.

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²⁶(...continued)

[A]dverse possession must be "hostile," which means it must be without the record owner's permission. This is true also of prescription

²⁷ See, e.g., *Babb v. Harrison*, 220 S.C. 20, 23 66 S.E.2d 457, 458 (1951):

[The claimant to a prescriptive easement must prove] 'that the use or enjoyment was adverse and under claim of right. . . . [Claimant's] possession was not with intent to dispossess the [owner] for he thought it had all it was entitled to. Therefore, the possession . . . was not hostile, and nowhere in the case is there any evidence that [owner] had any notice of any claim.'

Quoting *Atlantic Coast R.R. v. Baker*, 143 S.C. 445, 141 S.E. 688, 701 (1927).

§ 5:8 (2011). Most courts treat the two concepts — “adversity” and “claim of right” — as synonymous.²⁸ See 4 POWELL ON REAL PROPERTY § 34.10[2][c] (2d ed. 2008) (“adversity” means “that the use made has been made not in subordination to the rights of the claimed servient owner, but rather has been made under claim of right”).

To acquire a prescriptive easement, the plaintiff must use the right-of-way for the prescriptive period (in South Carolina, 20 years) in disregard of the rights of the landowner, whether this usage is characterized as adverse or under a claim of right. See *Crigger v. Florida Power Corp.*, 436 So.2d 937, 944 n.16 (Fla. App. 1983) (“[A]dverse use must be made with an intentional disregard of the rights of the servient owner and under a claim of right.”); *Steifel v. Lindemann*, 33

²⁸ *Matthews v. Dennis*, 365 S.C. 245, 616 S.E.2d 437 (Ct. App. 2005) (“defining ‘claim of right’ as ‘without recognition of the rights of the owner of the servient estate,’” quoting 25 Am.Jur.2d *Easements and Licenses*, § 57, at 552 (2004)); *Pickar v. Erickson*, 382 N.W.2d 536, 538 n.1 (Minn. App. 1986) (“A ‘claim of right’ is often used synonymously with a ‘hostile’ or ‘adverse’ use.”). See, e.g., *Vandervoort v. McKenzie*, 117 N.C. App. 152, 160, 450 S.E.2d 491, 496 (1994) (“The meaning of the terms ‘adverse,’ ‘hostile,’ and ‘under claim of right’ are intertwined.”); *Kunkel v. Fisher*, 106 Wash.App. 599, 603, 23 P.3d 1128, 1129 (2001) (“The requirements of hostility (i.e. adversity) and claim of right are one and the same.”); *Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997) (“Under claim of right means that the claimant has used the way without recognition of the rights of the owner of the servient tenement.”); *Pitcock v. Fox*, 119 N.C.App. 307, 310, 458 S.E.2d 264, 267 (1995) (“A ‘claim of right’ is an intention to claim and use land as one’s own.”); 2 AMERICAN LAW OF PROPERTY § 8.54 (Casner ed. 1952) (“The word ‘hostile’ is frequently used as a term of art meaning that the claim is ‘adverse’ or under ‘claim of right,’ and that it is not subordinate to the title of the true owner.” quoting *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1328 (Alaska 1975)); *Warnack v. Coneen Family Trust*, 266 Mont. 203, 216, 879 P.2d 715, 723 (1994) (“[A]dverse use or adversity simply refers to the requirement that the easement must be exercised under a claim of right and not as a mere privilege or license.”); 7 THOMPSON ON REAL PROPERTY § 60.03(b)(6)(viii) p.519 (2d Thomas ed. 2006) (“*Under a Claim of Right* One translation of “adversity” is that the prescriptive easement claimant acts as though the use being made were already owned, that, it is not with the permission or by the grant of the owner.”); M. Dwyer, *Real Property: Prescriptive easements of way: Presumption as to adverse character of user of way over unenclosed urban land*, 19 CORNELL L.Q. 337, 340 n.17 (1934) (“The requirement that to be adverse the user must be under a claim of right does not necessitate an express declaration. It means simply that the user must be ‘as of right’, that is, without recognition of the right of the landowner to terminate it.” Citing *Phillips v. Bonadies*, 105 Conn. 122, 136 A. 644 (1927)).

Conn.App. 799, 810, 638 A.2d 642, 649 (1994) (“A claim of right exists only if the user does not recognize the right of the owner of the servient tenement to prevent the use.”); *Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997) (“Under claim of right means that the claimant has used the way without recognition of the rights of the owner of the servient tenement.”); *Pitcock v. Fox*, 119 N.C.App. 307, 310, 458 S.E.2d 264, 267 (1995) (“A ‘claim of right’ is an intention to claim and use land as one’s own.”).

Where no presumption of adverse use under claim of right aids the plaintiff in his claim, mere use — no matter for how long — is never enough. The plaintiff must rebut the presumption of permissive use by proving “some unequivocal act of adverse right” *State v. Sartor*, 2 Strob. (33 S.C.L.) 60, 66 (1848).

The reason of that is obvious — a private way is an easement in favor of another, in derogation of the rights of the owner; and hence is not to arise without clear, unequivocal proof of such facts as will give the right from the owner to the claimant.

Id. (per O’Neal, J.). The plaintiff must prove “a distinct and positive assertion of a right hostile to the owner, and brought home to him,” *Williamson v. Abbott*, 107 S.C. 400, 401, 93 S.E. 15 (1917).

To give a right-of-way through woodland, there must be some notorious assertion of right, by an act done, which would be equal to a *pedis possessio*²⁹

Watt v. Trapp, 2 Rich. (31 S.C.L.) 136, 139 (1845).

In *Nash v. Peden*, 1 Speers (28 S.C.L.) 17, 22–23 (1842), the court rejected a contention that clearing fallen trees and the like from the right-of-way was the kind of unequivocal proof of adverse use under claim of right which would rebut the presumption of permissive use:

²⁹ “Lat. A foothold; an actual possession. . . .” BLACK’S LAW DICTIONARY 1289 (4th ed. 1951), citing *Bailey v. Irby*, 2 Nott & McCord (10 S.C.L.) 343 (1820).

[N]o prescriptive way can be established otherwise than by an adverse use of it for twenty years; and where the way passes through forest land, the mere use, unaccompanied by any acts indicating that the party claims the use as a right, cannot give a right of way.

* * * * *

Removing fallen trees or changing the route are not such [acts] as establish a use hostile to the right of the owner of the soil. They are perfectly consistent with the supposition that the use was permissive, as all these roads through wood land are presumed to be, until some evidence is offered to give them a different character

In accord is the case of *Gibson v. Durham*, 3 Rich. (37 S.C.L.) 85, 87 (1846), where the court held that the claimant's removal of saplings from the right-of-way was "wholly insufficient to establish adverse use. . . . [H]e who claims an easement on another's land, must establish it clearly"

Public maintenance of the right-of-way is a factor pointing to adverse use, either by the public or by private user benefitted by the maintenance. *County of Darlington v. Perkins*, 269 S.C. 572, 239 S.E.2d 69 (1977); *Cleland v. Westvaco*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993). There is no evidence here of public maintenance.

A claim to a prescriptive easement calls for what has been called a "fact-intensive review of past use".³⁰ Unaided by any presumption of adverse user under claim of right, the plaintiff was required to prove by clear and convincing evidence "some unequivocal act of adverse right . . . ," *State v. Sartor, supra*, or "some notorious assertion of right, by an act done," *Watt v. Trapp, supra*. It was Mr. Buyck's heavy burden to demonstrate that his and his father's use of this

³⁰ *Rokesh v. Running*, 2002 S.D. 126, 652 N.W.2d 790, 793 (2002). See JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 5:3 (2011) ("Establishing a servitude by prescription is primarily a question of fact." [Citing *Nelums v. Cousins*, 304 S.C. 306, 308, 403 S.E.2d 681, 682 (Ct. App. 1991)]).

right-of-way over their neighbor's property was not a typical instance of neighborly courtesy in rural South Carolina but was intended to gain a property right in the land of their neighbor. There is no such evidence in this record.

In pertinent part, Mr. Buyck testified as follows about his use of the right fork:

Mr. Buyck was born in 1946. [Tr. 27/5.] All his life he has used what he describes as the "red road" from Fort Motte Road (S-9-25) to reach the 700-acre Buyck tract. The road crosses five tracts — the 21-acre Pedings tract, the 15-acre Stuck tract, the 200-acre Buyck tract, the McAlister tract, the Bruner tract, and the McAlister tract again — in order to reach the 700-acre Buyck tract. The road then continues across the 700-acre tract to the duck pond and finally the Congaree River. [Tr. 40/4-9.]

From the age of 6 or 7 Mr. Buyck would accompany "some of the people who worked on our place" as they went fishing in the river. Mr. Buyck's father, Peter Sr., used the 700-acre tract for "hunting, farming, logging, general recreation. Same things I would use it for, I guess." [Tr. 41/16-17.] To this list of uses Mr. Buyck added watching the wildlife. [*Id.* & Tr. 59/6//12 & Tr. 77/20 - 78/14.]

Mr. Buyck and his father and uncle were not the only ones who used the road to reach the 700-acre tract. It was also used by the group which leased deer-hunting rights on the 700-acre tract and Mr. Buyck's "friends that hunt with me." Occasionally he would authorize someone else to "go fishing and I'll allow them to go in and go right back out." [Tr. 46/2-5.] Occasionally Mr. Buyck would bring "a lot of friends" for fishing and a cookout on the tract. [Tr. 49/24 - 50/1.] "[A]ll kind of vehicles would go over the road." [Tr. 49/17-18.]

Before 1984, Mrs. McAlister would cut a small amount of timber on her

property each year. Mr. Buyck and the owners of the Pedings and Stuck tracts “never had any problem” with Mrs. McAlister’s timber contractor using the road from Fort Motte Road to the McAlister tract for this purpose. [Tr. 55/11–13.] But in 1984, when Mrs. McAlister wanted to clearcut her tract, her insurer wished her to obtain an express easement “rather than [go] by what we’ve always done,” *i.e.*, the traditional use of the road as a neighborly courtesy. [Tr. 55/18–19.] Mrs. McAlister suggested that not only should Mr. Buyck grant her an easement for her use of the road across his 200-acre tract, but that all four tract owners — Pedings, Stuck, Buyck, and McAlister — should exchange easements for the use of this road from Fort Motte Road to the boundary of the 700-acre Buyck tract. Mr. Buyck and the owners of the Pedings and Stuck tracts agreed with Mrs. McAlister’s proposal, and these easements were exchanged amongst the four owners. Mr. Buyck testified that the entire transaction was Mrs. McAlister’s proposal, that he proposed no part of it, and that he “never thought anymore about it.” [Tr. 55/23.] After 1984, Mr. Buyck continued to use both forks of the road on the McAlister tract, the same as before.³¹ [Tr. 56/6–16.]

When the defendant Jackson and a partner bought the McAlister tract in 2000, Mr. Buyck and Mr. Jackson “discussed the [right fork] a little” Mr. Buyck told Mr. Jackson that the right fork “was never — not an issue and had never been an issue.” [Tr. 57/1.] Mr. Buyck accepted a key to Mr. Jackson’s new gate at the fork and continued to use the right fork for the next eight or so years.

Neither the owner of the McAlister tract nor anyone else ever told either Mr. Buyck or, so far as he knew, his father that they could not use the right fork. [Tr. 45/4–9.] Mr. Buyck testified that he thinks he has a right to use the right fork

³¹ The plaintiff’s witness Nickells testified that Mr. Buyck used the left fork during the period 1990–96 when Mr. Nickells owned the McAlister tract. [Tr. 142/20 – 143/24.]

because he has always used it without complaint, and "it's the only road that everybody's ever used to go in and out of there; the loggers and everything else." [Tr. 46/8–16.] He testified that he believes he needs no permission to use the road from Fort Motte Road to the 700-acre tract, including the right fork. [Tr. 57/4–10.] No one has ever challenged his right or that of his father to use it. [Tr. 58/22 – 59/2.]

The right fork leaves the McAlister tract at one point and crosses the Bruner tract before returning to the McAlister tract and thence to the 700-acre tract. Mr. Buyck testified that the owner of the Bruner tract has never complained of his or his father's use of the right fork or prohibited it.³² He has never abandoned the right fork or stopped using it. Mr. Buyck testified that the Buyck Hunt Club leases the 700-acre tract from him for deer-hunting, as they did from his father. Mr. Buyck testified that his timber contractor used the right fork in connection with timber operations on the 700-acre tract in about 2002, without objection from Mr. Jackson.³³

In this testimony, there is nothing to overcome the presumption that during the prescriptive period and for decades thereafter, neither Mr. Buyck nor his father before him did anything to manifest an adverse user of the road in question under claim of right.³⁴

³² Mr. Buyck acknowledged that his claim to a prescriptive easement over the McAlister tract would apply equally to the portion of the right fork which passes over the Bruner tract. [Tr. 223/6–8.] The same thing applies to the Pedings tract and the Stuck tract. Of course the acquisition in 1984 of an express easement over these two tracts obviated any need to claim a prescriptive easement over the portion of the road which crosses these two tracts.

³³ Similarly, Mr. Buyck had no objection to Mrs. McAlister's timber contractor using the road over his 200-acre tract annually. It was not his idea but hers which led to the grant of an express easement to him over the left fork.

³⁴ The testimony of Mr. Buyck is summarized more fully in the Factual Addendum (continued...)

Mr. Buyck *believed* that he had a legal right to use the road. Such a belief is a necessary component of a claim to a prescriptive easement, but never sufficient. Others in the neighborhood believed it as well, mistakenly thinking that use alone for twenty years makes an easement. For example, Mr. Nickells, who owned the McAlister tract from 1990 until 1996, thought that the road across his tract had long-since become a road which not only Mr. Buyck but anyone could travel. Mr. Nickells testified that Mr. Buyck accessed his 700-tract by using the right fork, “like everybody else.” *Cf. Price v. Wilbourn*, 1 Rich. (30 S.C.L.) 58, 60 (1844) (“[E]very body used [the road]; such a use may establish a right in the public, but is not the characteristic of a private way.”). “Everybody else” included the Buyck Hunt Club, the Brunerdale Hunt Club, the electric cooperative, friends of the witness, and friends of Peter Buyck, Jr. Mr. Nickells testified that during the six years that he owned the McAlister tract, Mr. Buyck used both the right fork and the left fork to get to and from the 700-acre tract. [Tr. 142/20 – 143/24.] When he bought the McAlister tract, Mr. Nickells assumed that Mr. Buyck had the right to use all the roads. Mr. Nickells never objected to Mr. Buyck or anyone else using any road on the McAlister tract because he was a good neighbor. [Tr. 144/26 – 145/9.] “[Y]ou know, everybody used that road. It’s been there for a long, long time.” [Tr. 133/24–26.] Mr. Nickells believed that he could not stop Mr. Buyck if he wanted to by law, “because the road’s been open for over 20 years I’ve already heard that law before.” [Tr. 146/2–4.] Testimony to the same effect was offered by Mr. Conrad, who testified that he “had just always heard that if a road was open for a long period of time and the landowner did not close it, then whenever — or he could not close it after it had been used for a long period of

³⁴(...continued)
at the end of this brief, where the testimony of the other witnesses is also reviewed.

time.”³⁵ [Tr. 200/22–25.]

The claimant to a prescriptive right-of-way must certainly believe that he has a right of use, or must intend that his use be in disregard of the rights of the landowner.³⁶ The claimant’s state of mind, however, is never sufficient to perfect the claim.³⁷ There must be a “positive assertion of such right by plaintiff,” *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15 (1917), or “some unequivocal act of adverse right,” *State v. Sartor*, 2 Strob. (33 S.C.L.) 60 (1848), or “some notorious assertion of right, by an act done,” *Watt v. Trapp*, 2 Rich. (31 S.C.L.) 136, 139 (1845), sufficient to place the owner on notice that neighborly courtesy has been rejected and a claim to a legal right has begun. There is simply no evidence here of either thing — no positive assertion, no unequivocal act of adverse right. In the plaintiff’s evidence there is nothing to show that the plaintiff’s use of this road, like the use made of it by many others, was anything other than by permission of the owner in the fashion typical of unenclosed woodlands in South Carolina, as is presumed.

³⁵ These witnesses were simply mistaken about the law of old roads. Of course the defendant Jackson has never objected to use of the right fork by Mr. Buyck personally, together with family and friends in his personal company *gratis* for hunting, farming, logging, general recreation, and watching the wildlife, or substantially similar purposes. Since Mr. Buyck has an *express* easement over the *left* fork, within reason he can authorize whom he pleases to use the left fork to reach his 700-acre tract.

³⁶ *Hartley v. John Wesley United Methodist Church*, 355 S.C. 145, 584 S.E.2d 386 (Ct. App. 2003) (“[O]ur courts have held in order for a party to earn a prescriptive easement under claim of right he must demonstrate a substantial belief that he had the right to **use** the parcel or road based upon the totality of circumstances surrounding his use.”).

³⁷ See, e.g., *Morrow v. Dyckes*, 328 S.C. 522, 528, 492 S.E.2d 420, 424 (Ct. App. 1997), where the Court held that testimony that the present owner of the putative dominant estate thought that the previous owner had a right-of-way was insufficient to show that the previous owner ever *claimed* a prescriptive right-of-way. “[E]vidence establishing the mere fact of use does not necessarily equate with evidence showing the character of such use.” See: *Beckstead v. Price*, 146 Idaho 57, 190 P.3d 876, 881 (2008) (“The state of mind of the users of the alleged easement is not controlling; the focus is on the nature of their use.”).

Although the absence of this essential evidence is dispositive, other features of the history of usage of this right-of-way point to the same conclusion. The owners of the Pedings and Stuck tracts crossed one another's property with each use of the segment of the road crossing their tracts, since it bisected their parcels. The owner of the 200-acre Buyck tract had to cross the Pedings and Stuck parcels. The owner of the McAlister tract had to cross the Pedings and Stuck parcels and the 200-acre Buyck tract. The owner of the 700-acre Buyck tract had to cross the Pedings and Stuck parcels, and (after crossing his own 200-acre tract), the McAlister tract and the Bruner tract (if using the right fork). Apart from the controversy at issue in this case, there is no suggestion that the use of any of these rights-of-way across one another's property was anything other than "an enjoyment of neighborly courtesy," M. Dwyer, *supra*, 19 CORNELL L.Q. 337, 339 (1934). It was only at the instance of Mrs. McAlister's insurer in 1984 that affirmative easements were exchanged among these owners.

Also significant is the fact that, in the words of the witness Nickells, everybody used the right fork. The only way that the right fork could be reached was by traveling from Fort Motte Road across the Pedings and Stuck tracts, the 200-acre Buyck tract, and the eastern portion of the McAlister tract. It is inconceivable that all the traffic in the neighborhood was by persons claiming a prescriptive right over these four tracts, and yet there is nothing in the evidence to distinguish the character of Mr. Buyck's use from that of anyone else. See: *Hogg v. Gill*, 1 McMull. (26 S.C.L.) 329, 332 (1841) ("[A] presumption of a right of way by prescription was diminished by the fact that many, under the same circumstances, traveled the way, and that it passed over several tracts of land owned by different proprietors . . ."). The presumption of permissive use is strengthened by the fact that the road in question was in existence long before Mr. Buyck's father acquired

the 700-acre tract to which the road leads.³⁸ Mr. Buyck's father began using a road which others before him had used for an unknown length of time, with no suggestion by the plaintiff that anyone earlier had thereby acquired a prescriptive right.

The circuit court's failure to apply the presumption of permissive use was plain error. Only by applying the opposite presumption — that the use began as an adverse use under claim of right — could the circuit court find that a prescriptive easement came into being.

Since the circuit court labored under error of law, and since its conclusion is unsupported by any evidence, the finding of prescriptive easement should be reversed.³⁹

³⁸ The road and its two forks on the McAlister tract are seen in aerial photographs from the 1930s [Tr. 409/18 – 410/1] and may well be much older, but there is no evidence of their origin.

³⁹ The circuit court's judgment is bottomed upon the court's legal error in choosing the wrong legal presumption, but the judgment contains many factual errors as well. These contributed to the court's erroneous conclusions. For example, the court found that the plaintiff has "openly asserted" the right to use the road. [Order, p. 11.] There is no evidence whatever that the plaintiff has asserted to anyone — openly or privately — such a right. The court found that the plaintiff has authorized employees and business associates to use the right fork. [Order, pp. 7, 10, 12, 13 and elsewhere.] There is no evidence that the plaintiff has ever had any employees or business associates. The court found that Brock Conrad informed the defendant before they jointly purchased the McAlister tract that Mr. Buyck "had the right" to use the road. [Order, p. 14.] Mr. Conrad testified: "it was my understanding in the law, that you could not — could not close a road that had been used for that long of a period of time." [Tr. 185/13–16.] Mr. Conrad did not "inform the defendant" but only purported to offer his mistaken view of the law, that old roads cannot be closed. The court found that the defendant should have known from the notation on the preliminary plat that the plaintiff had a prescriptive easement over the road. [Order, pp. 14-15.] Nothing on the preliminary plat gives any evidence of a prescriptive easement in anyone's favor, but only that the surveyor was at first uncertain where the *express* easement lay. The court found that the left fork is an inadequate means of ingress to and egress from the 700-acre tract. The evidence shows that the left fork is not only adequate but is the best means of ingress to and egress from the tract as a whole. The court found that hunt club members spent a day clearing "the Blue Road" — the court's name for the left fork. The hunt club members cleared one of several roads *inside* the 700-acre tract — the road which leads from the hayfield to the duck pond. There is no evidence that the left
(continued...)

III.

The circuit court erred in finding that the plaintiff's prescriptive easement, if proved, was appurtenant. If it existed at all, it was in gross.

The evidence shows that the plaintiff's easement for the use of the right fork — if it existed — is not essentially necessary to the enjoyment of the putative dominant estate, the 700-acre tract. This is true because the plaintiff enjoys access to the 700-acre tract via the left fork. Hence, it is an easement in gross and not appurtenant.

The nature of an easement — whether appurtenant or in gross — is an element of the *scope* of the easement, not its existence. Hence, this issue lies on the equity side of the case, where the Court on appeal examines the preponderance of the evidence. *Proctor v. Steedley*, Op. No. 4999 (S.C. Ct. App. 7/11/12); *Windham v. Riddle*, 370 S.C. 415, 418, 635 S.E.2d 558, 559 (Ct. App. 2006), *aff'd*, 381 S.C. 192, 672 S.E.2d 578 (2009). *Accord: Pendarvis v. Cook*, 391 S.C. 528, 706 S.E.2d 520 (Ct. App. 2011); *Inlet Harbour v. South Carolina Dept. of Parks, Recreation & Tourism*, 377 S.C. 86, 659 S.E.2d 151 (2008).

The question of whether an easement is appurtenant or in gross is a mixed question of law and fact. *Kershaw v. Burns*, 91 S.C. 129, 74 S.E. 378, 379 (1912). The distinction between the two kinds of easement has been stated many times.

³⁹(...continued)

fork was cleared by the hunt club or by anyone or ever needed clearing. The evidence shows that it did not need clearing and was in regular use by all sorts of farm machinery and vehicles. See Def. Exh. 17, a drive of the left fork, and Def. Exh. 22, a video of a drive over Road 3 (the continuation of the left fork after it reaches Mr. Buyck's 700-acre tract). *And see* Def. Exh. 7, a collection of photographs showing all manner of vehicles driving the left fork during the pendency of this action. One of them is towing a boat, obviously bound for the Congaree River.

Individually, these erroneous factual findings were prejudicial but none, individually, may have been reversible error. Cumulatively, however, they so infected the circuit court's factual view of the case as to lead the court to enter an erroneous judgment.

Recently in *Windham v. Riddle*, 381 S.C. 192, 201–02, 672 S.E.2d 578, 583 (2009), our Supreme Court reiterated:

An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965). In contrast, an 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*, *supra*; 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).

The requirement that an easement be “essentially necessary to the enjoyment thereof” in order to be appurtenant to a dominant estate has long been the case. In addition to the authorities marshaled in *Windham v. Riddle*, *supra*, see, e.g., *Whaley v. Stevens*, 21 S.C. 221 (1883); *Kershaw v. Burns*, 91 S.C. 129, 74 S.E. 378 (1912); *Shia v. Pendergrass*, 222 S.C. 342, 72 S.E.2d 699 (1952); *Keane/Sherratt Partnership v. Hodge*, 292 S.C. 459, 357 S.E.2d 193 (Ct. App. 1987).

The plaintiff claimed essential necessity by making three points: First, the left fork does not give as convenient a point of access to the part of 700–acre tract nearest the river as does the right fork. Second, historically the right fork has been used more often than the left fork as the way in and out of the tract. Third, the plaintiff contends that the left fork is in worse condition than the right fork.

The plaintiff has historically used the right fork to reach the northern portion of his 700–acre tract because it is a more convenient means of accessing that part of the tract. To reach that portion of the tract using the left fork, it is necessary to drive what the parties labeled as “Road 3” from where the left fork reaches the

700-acre tract to the area of the duck pond. The plaintiff's witnesses described Road 3 as more trail than road, but witness Mills drove it shortly before trial without difficulty using two-wheel drive in his pickup truck. [Tr. 373.] A videotape of Mr. Mills' drive confirms that Road 3 is much the same as the other roads involved in this case. See Def. Exh. 22, a video of Mr. Mills drive over Road 3. It takes about five minutes longer to reach the area of the duck pond using the left fork and Road 3, versus using the right fork and the Duck Pond Road. [Tr. 269.]

The case of *Ballington v. Paxton*, 327 S.C. 372, 488 S.E.2d 882 (Ct. App. 1997), is closely in point. There the Court held:

In this case, the evidence at trial established that, while perhaps not as convenient as the route across Paxton's property, there are other means of access to the pond. Therefore, because the easement is not necessary for the use of the dominant estate, the easement must be characterized as an easement in gross rather than an appurtenant easement.

Id. at 380, 488 S.E.2d 887 (footnote omitted). To like effect is the case of *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944) (“[T]here must be an actual necessity and not a mere inconvenience to entitle a person to [an appurtenant easement].”). Accord: *Fisher v. Fair*, 34 S.C. 203, 13 S.E. 470 (1891) (easement was in gross where easement holder had other means of access to his property); *Tupper v. Dorchester County*, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997) (“[T]here is other access which is simply less convenient. Accordingly, the trial court erred in finding that the easement was ‘necessary to the enjoyment of the dominant estate.’”). The left fork is a more convenient means of access to the central and southern portions of the 700-acre tract than is the right fork. In any event, “convenience merely is no foundation of a legal right.” *Capers v. McKee*, 1 Strob. (32 S.C.L.) 164 (1847).

The plaintiff contends that the right fork is in better condition than the left

fork. Photographs and videotapes in evidence show plainly that this is not true. Exhibit 16 is a video of a drive of the right fork. Exhibit 17 is a video of a drive of the left fork. The left fork is more level and in better condition than the right fork. The evidence shows that cars, trucks, tractors and other farm equipment steadily used the left fork throughout the pendency of this action. [Def. Exh. 7.] One vehicle was shown towing a boat to the 700-acre tract. The boat could only have been bound for the Congaree River via Road 3. [Def. Exh. 7, photograph of 4/16/09.]⁴⁰

In any event, the condition of the left fork is the responsibility of the plaintiff, not the defendant. "In general, the beneficiary of the easement, not the owner of the burdened property, is obligated to maintain the easement." *Khalil v. Motwani*, 376 N.J. Super. 496, 506, 871 A.2d 96, 102 (2005), *citing* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.13(2) (2000); *DeHaven v. Hall*, 753 N.W.2d 429, 437 (S.D. 2008) ("The owner of a servient estate has no duty to maintain the easement. The duty of maintaining the easement rests with the easement owner (*i.e.*, dominant estate)").

Claiming an appurtenant easement, it was Mr. Buyck's burden to prove that the right fork was not only convenient but essentially necessary to access his 700-acre tract. He presented no such evidence. The left fork not only accesses the tract but is a *better* means of accessing the tract as a whole than is the right fork.

⁴⁰ The circuit court found that the left fork was only made passable in July 2010 by a day's work in clearing the way by the members of the Buyck Hunt Club. This is simply incorrect. The left fork was in good condition and used by all manner of large farm equipment long before July 2010, as the evidence shows. [Def. Exh. 7.] The hunt club members did not clear the left fork on the McAlister tract, which needed no clearing. They cleared Road 3 — the road which leads from the hayfield to the duck pond. [Tr. 99.]

IV.

The circuit court erred in allowing the plaintiff to authorize the use of defendant's woodland road by anyone he chooses.

It was error for the circuit court to allow Mr. Buyck to authorize anyone and everyone in the world to use Mr. Jackson's road. This is true regardless of whether the easement, if proved, is appurtenant or in gross.

An easement in gross is a personal privilege of the holder of the easement. It is reasonable that the plaintiff's easement be used not only by the plaintiff himself but by his family and friends in his company.⁴¹ However, the plaintiff's personal privilege to use this right-of-way does not extend to the members of the hunt club. The members of the club are not even invitees but mere licensees on the 700-acre tract. The club pays the plaintiff an annual fee to hunt deer on the 700-acre tract.⁴² Although the plaintiff refers to the arrangement as a "hunting lease," which is the name commonly given it in South Carolina as elsewhere, the arrangement is not a lease. *David Lee Boykin Family Trust v. Boykin*, 661 So.2d 245 (Ala.Civ.App. 1995). A lease grants possession of the estate to the lessee. The hunt club does not have possession of the tract. Rather, a valid hunting lease

⁴¹ See *Ballington v. Paxton*, 327 S.C. 372, 378, 488 S.E.2d 882, 885 (Ct. App. 1997), where the order under appeal provided that, "so long as [a holder of the right-of-way] is present, any of his or her family members, or non-family members, shall be permitted to use the easement" Cf. *Levinson v. Costello*, 74 N.J. Super. 539, 181 A.2d 791 (1962) (right-of-way granted to property owners was broad enough to allow use by guest of property owner invited for specific occasion in the personal company of easement holder). See also: *Gowen v. Cote*, 875 S.W.2d 637 (Mo. App. 1994).

⁴² The plaintiff does not contend that his easement is commercial in nature. In Section 12 of the annotation entitled "Scope of prescriptive easement for access (right of way)," 79 A.L.R.4th 604, 632, seven cases are cited which hold that the scope of a prescriptive easement acquired to reach a dominant tenement used for agricultural purposes is insufficient in scope to allow its use for a commercial enterprise. No cases are cited to the contrary.

grants a profit à *prendre* to the holder, "giving the holder the right to take the product of the land of another." *Ex parte Bedingfield*, 283 S.C. 561, 562, 324 S.E.2d 312 (1984). A valid profit à *prendre* is an estate in land, and therefore comes within the statute of frauds. *Palachucola Club v. Withington*, 159 S.C. 446, 157 S.E. 621 (1931). If not in writing, no profit is created. Instead, the holders of an oral hunting lease are mere licensees. H. HOVENKAMP & S. KURTZ, *THE LAW OF PROPERTY* § 10.1.4 p. 328 (5th ed. 2001) ("An attempt to create a . . . profit which fails because the deed of conveyance is defective will result in a license."). "A license does not vest in the licensee any estate or interest in the land. . . . It conveys only the temporary privilege of being on the land for some agreed purpose." *Hilton Head Air Service, Inc. v. Beaufort County*, 308 S.C. 450, 457, 418 S.E.2d 849, 853 (Ct. App. 1992). *Accord*: 1 THOMPSON ON REAL PROPERTY § 282, p. 362 (1st ed. 1924); JAMES W. ELY, JR. & JON W. BRUCE, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 1:4 (2011). There is no evidence that the arrangement between Mr. Buyck and the Buyck Hunt Club or its members is in writing or ever has been. Its members are mere licensees when they hunt the 700-acre tract.

The holder of an easement in gross has no right to license anyone he pleases to share his personal privilege. In *Stone v. Brickey*, 70 S.W.3d 82, 88 (Tenn. App. 2001), the plaintiff appealed a trial court order limiting the use of a prescriptive easement to himself and his tenants, and refusing to allow the plaintiff to authorize hunters to use the easement. The court affirmed, stating:

[T]he right to use an easement is normally confined to the easement holder and his privies. [Plaintiff's] argument is without merit.

See also: *Council v. Sanderlin*, 183 N.C. 253, 111 S.E. 365, 368 (1922), where the plaintiffs reserved hunting privileges on land they conveyed, and were held to

be "without the right to extend such privilege to others."

The hunt club members are limited to the use of the left fork, where Mr. Buyck possesses an unlimited express easement.⁴³

Even if the plaintiff's easement, if proved, is appurtenant, the circuit court should not have allowed Mr. Buyck to authorize the whole world to use the defendant's road. See *Levinson v. Costello*, 74 N.J.Super. 539, 181 A.2d 791 (1962), cited above, where the easement was appurtenant. See also: *Gowen v. Cote*, 875 S.W.2d 637 (Mo. App. 1994). Allowing Mr. Buyck to authorize whomsoever he will to use Mr. Jackson's road destroys the security of this tract, located deep in the woods of Calhoun County, and makes it impossible for Mr. and Mrs. Jackson to use their property as they intended. See Mrs. Jackson's testimony, beginning at page 431 of the transcript.

⁴³ The evidence is that the hunt club members in the past have used both the left fork and the right fork, depending upon where they wished to hunt. [Tr. 333/22 – 334/25; Tr. 337/6–1; Tr. 340/6–16.] The hunters had no trouble using the left fork exclusively during the two-year pendency of this action, when their membership increased. [Tr. 335.]

CONCLUSION

The presumption is that the use of this old road by Mr. Buyck and his father was with the landowner's permission, as has always been the case with roads over unenclosed woodland in South Carolina. There was no evidence that the use ever turned hostile to the rights of the landowner.

Even if an easement was established, it was in gross, not appurtenant. Use of the right fork is not essentially necessary to the enjoyment of the putative dominant estate. It is not necessary at all.

Finally, if an easement was proved, the holder of the easement should not have been allowed to license anyone he chooses to use this road over the defendant's property, and that is true regardless of whether the easement is appurtenant or in gross.

For these reasons the appellant asks the Court to reverse.

Respectfully submitted,

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October 5, 2012.

FACTUAL ADDENDUM

Summary of Testimony

The plaintiff, **Peter Buyck, Jr.**, testified as follows:

He is 64 years old, having been born in 1946. [Tr. 27/5.] All his life he has used what he describes as the “Red Road” from Fort Motte Road (S-9-25) to reach the 700-acre Buyck tract. The “Red Road” crosses five tracts — the Pedings tract, the Stuck tract, the 200-acre Buyck tract, the McAlister tract, the Bruner tract, and the McAlister tract again — in reaching the 700-acre Buyck tract.⁴⁴ The “Red Road” then continues across the 700-acre tract to the Congaree River. [Tr. 40/4-9.]

From the age of 6 or 7 Mr. Buyck would accompany “some of the people who worked on our place” as they went fishing in the river. Mr. Buyck’s father, Peter Sr., used the 700-acre tract for “hunting, farming, logging, general recreation. Same things I would use it for, I guess.” [Tr. 41/16-17.] To this list of uses Mr. Buyck added watching the wildlife. [*Id.* & Tr. 59/6//12 & Tr. 77/20 – 78/14.] The only structure on the 700-acre tract is a shelter. [Tr. 44/5-18.]

Mr. Buyck and his father and uncle were not the only ones who used the right fork to reach the 700-acre tract. It was also used by the group which leased deer-hunting rights on the 700-acre tract and Mr. Buyck’s “friends that hunt with me.” He testified that occasionally he would authorize someone else to “go fishing and I’ll allow them to go in and go right back out.” [Tr. 46/2-5.] Occasionally Mr. Buyck would bring “a lot of friends” for fishing and a cookout on the tract. [Tr.

⁴⁴ A single dirt road leads from Fort Motte Road to a point near the middle of the 203-acre McAlister tract. There it forks right and left. Both forks continue through the remainder of the McAlister tract to the 700-acre Buyck tract. The right fork is the last segment of what Mr. Buyck referred to as “the Red Road.” It is the right fork over which he seeks a prescriptive easement. The right fork is sometimes referred to as “Road No. 2” in the examination of some witnesses. [See Tr. 67/16 – 68/18.]

49/24 – 50/1.] “[A]ll kind of vehicles would go over the road.” [Tr. 49/17-18.]

The 700-acre tract was logged every five or ten years, on average. [Tr. 46/19–26.]

Mr. Buyck denied ever having used the left fork (also referred to as “the hayfield road”) to get to the 700-acre tract. However, he later testified that he had never used the left fork “for primary access” to the 700-acre tract, but only to get to the hayfield. “I used the Blue Road (*i.e.*, the left fork) to get to the hayfield.” [Tr. 57/21 – 58/1.] Mr. Buyck testified that the left fork is “not in that good condition” [Tr. 81/16–19] or even in “terrible condition” [Tr. 50/10–11] and portions of it are very narrow. [Tr. 80/13 – 81/7.] The road is wide enough for the equipment of the lessee of the hayfield, Mr. Gates [Tr. 87/8–14], but not wide enough for other (undescribed) equipment. [Tr. 82/19.]

Before 1984, Mrs. McAlister, who then owned the McAlister tract, would cut a small amount of timber each year. Mr. Buyck and others “never had any problem” with Mrs. McAlister’s timber contractor using the Red Road from Fort Motte Road to the McAlister tract to access the McAlister tract for this purpose. [Tr. 55/11–13.] But in 1984, when Mrs. McAlister wanted to clearcut her tract, her insurer wished her to obtain an express easement “rather than [go] by what we’ve always done,” *i.e.*, the traditional use of the Red Road. [Tr. 55/18–19.] Mrs. McAlister suggested that not only should Mr. Buyck grant her an easement for her use of the Red Road across his 200-acre tract, but that all four tract owners — Pedings, Stuck, Buyck, and McAlister — should grant one another mutual easements for the use of the dirt road from Fort Motte Road to the boundary of the 700-acre Buyck tract.⁴⁵ Mr. Buyck and the owners of the Pedings tract and the

⁴⁵ This was what the witnesses all called “the Red Road” from Fort Motte Road up to the fork on the McAlister tract, then progressing along the left fork up to the
(continued...)

Stuck track agreed, and these easements were exchanged amongst the four owners. Mr. Buyck testified that the entire transaction was Mrs. McAlister's proposal, and that he "never thought anymore about it." [Tr. 55/20–25.] After 1984, Mr. Buyck continued to use the right fork of the road on the McAlister tract, the same as before. [Tr. 56/6–16.]

When Mr. Jackson and Mr. Conrad bought the McAlister tract in 2000, Mr. Buyck and Mr. Jackson "discussed the road [*i.e.*, the right fork] a little" [Tr. 56/25–26.] Mr. Buyck told Mr. Jackson that the right fork "was never — not an issue and had never been an issue." [Tr. 57/1.] Mr. Buyck accepted a key to Mr. Jackson's new gate to the fork, and continued to use the right fork with Mr. Jackson's permission for the next eight or so years.

Neither the owner of the McAlister tract nor anyone else ever told either Mr. Buyck or, so far as he knew, his father that they could not use the right fork. [Tr. 45/4–9.] Mr. Buyck testified that he thinks he has a right to use the right fork because he has always used it without complaint, and "it's the only road that everybody's ever used to go in and out of there; the loggers and everything else." [Tr. 46/8–16.] He testified that he believes he needs no permission to use the Red Road from Fort Motte Road to the 700-acre tract, including the right fork. [Tr. 57/4–10.] No one has ever challenged his right or that of his father to use it. [Tr. 58/22 – 59/2.]

The right fork leaves the McAlister tract at one point and crosses the Bruner tract before returning to the McAlister tract and thence to the 700-acre tract. Mr. Buyck testified that the owner of the Bruner tract has never complained of his or his father's use of the right fork or prohibited it. [Tr. 48/5 – 49/8.] He has never

⁴⁵(...continued)
boundary of the 700-acre tract.

abandoned the Red Road or stopped using it. [Tr. 57/15–20.]

Mr. Buyck testified that the Buyck Hunt Club leases the 700-acre tract from Mr. Buyck for deer-hunting, as they did from his father. [Tr.90/11–17.]

Mr. Buyck testified that his timber contractor used the right fork in connection with timber operations on the 700-acre tract in about 2002, without objection from Mr. Jackson. [Tr. 110/8–21.]

Mark Buyck testified as follows:

Mark Buyck is a cousin of the plaintiff, Peter Buyck, Jr. The fathers of these two were cousins. The witness and his father hunted on the 700-acre tract in the late 1940s. They used the right fork to get to and from the tract. In college in the early 1950s, the witness and some friends would hunt on the tract. The witness resumed hunting on the tract in 1962 and continued until a few years ago. He knew of no access to the 700-acre tract except upon the right fork. No one ever challenged the witness's use of the right fork. He thought that Peter Buyck, Sr., owned the McAlister tract. [Tr. 121/20 – 122/3.] After a family wedding about eight or ten years ago, the witness and others picnicked on the river on the 700-acre tract. The witness recalls no fork in the road. [Tr. 126/16–25.]

James M. Nickells testified as follows:

Mr. Nickells is 61 years old. He grew up with the plaintiff, Peter Buyck, Jr., whom he calls a dear friend. [Tr. 144/23–25.] As a little boy, the witness went down to the river once with Buyck Sr. and Jr. They used the right fork. "It wasn't but one road as far as I can remember." [Tr. 134/6.]

Mr. Nickells bought the McAlister tract in 1989 from Mrs. McAlister. Before closing the purchase, Mr. Nickells was concerned about getting an easement from Fort Motte Road to the tract. [Tr. 141/22-25; 142/17–19.] His attorney verified that express easements provided access to the tract from Fort Motte Road. [Tr.

141/13–19.] The 1989 deed into Mr. Nickells references a 1963 plat by Oliver, which depicts both the right fork and the left fork. [Tr. 139–41.]

During the six years that Mr. Nickells owned the McAlister tract, Mr. Buyck used both the right fork and the left fork to get to and from the 700-acre tract, as did the members of the hunt club, since the club had tree stands both near the hayfield and near the river. [Tr. 142/20 – 143/24.] Mr. Buyck accessed his 700-tract by using the right fork, “like everybody else.” [Tr. 133/18–21.] “Everybody else” included the Buyck Hunt Club, the Brunerdale Hunt Club, the electric cooperative, and friends of the witness and Peter Buyck, Jr. [Tr. 133/23–24.] When he bought the McAlister tract, the witness assumed that Mr. Buyck had the right to use the Red Road. [Tr. 134/19–21.] The witness saw Mr. Buyck go up to the hayfield with hay equipment. [Tr. 136/9–14.] The witness never challenged Mr. Buyck’s right to use the Red Road (which includes the right fork). Mr. Nickells never objected to anyone using either road because he was a good neighbor. [Tr. 144/26 – 145/9.] “[Y]ou know, everybody used that road. It’s been there for a long, long time.” [Tr. 133/24–26.] Mr. Nickells believed that Mr. Buyck had a right to use the Red Road (including the right fork) and could not be stopped. [Tr. 145/20–25.] Mr. Nickells believed that he could not stop Mr. Buyck if he wanted to by law, “because the road’s been open for over 20 years I’ve already heard that law before.” [Tr. 146/2–4.] Mr. Nickells added: “Plus, he had the right [of] way before I moved out there. So, you know, that’s the way I feel about it.” [Tr. 146/5–6.]

In 1995 Mr. Nickells sold the McAlister tract to Dr. Cosone.

Jack R. Brady testified as follows:

Mr. Brady, 80 years old, has known Mr. Buyck and his father all his life. In the mid-1970s Mr. Brady and his father helped Mr. Buyck Sr. to rid the 700-acre

tract of wild hogs, which were destroying his crops. The went to and from the tract on the Red Road and the right fork. Mr. Brady knew of no other way. Mr. Brady knew of no challenge to Mr. Buyck's right to use the Red Road and the right fork, which the Buycks had always used. [Tr. 153/17–22.] Mr. Brady thought that the Buycks owned all the property from Fort Motte Road to the river. [Tr. 156/23–25.]

Robert C. Martin testified as follows:

Mr. Martin has been in the timber business since the 1940s. Mr. Martin testified that he first harvested small trees for chipping on the 700-acre tract in 1994. [Tr. 150/1–5.] He then corrected this to say that his first harvesting was “[m]aybe 40 years ago or more” [Tr. 161.] Mr. Martin used the Red Road and the right fork to reach the 700-acre tract. He worked the 700-acre tract in about 2004, using the same road. [Tr. 164/23 – 165/9] The right fork was “the easiest way” to reach the chipping site. [Tr. 165/22 – 166/9; Tr. 171/16–20.]

W. Brock Conrad testified as follows:

Mr. Conrad was Director of Wildlife and held various other posts with South Carolina Wildlife until his retirement in 1999. When Mr. Conrad was in college in 1955, on a fishing trip he first met Peter Buyck, Jr., who then was 9 or 10 years old. In the 1970s in the course of his duties, Mr. Conrad visited the 700-acre tract, reaching it on the Red Road and the right fork. [Tr.180/20–26.]

When the McAlister tract was offered for sale by Dr. Cosone in 1999, Mr. Conrad was interested in buying but needed a partner. He found Mr. Jackson, the defendant, and showed him the tract. On their first visit they rode both the right fork and the left fork. [Tr. 184/2–16.] Mr. Conrad reviewed the deed from Mr. Nickells to Dr. Cosone and found that the McAlister tract enjoyed access easements from Fort Motte Road across the Pedings and Stuck tracts, and the 200-acre Buyck tract. [Tr. 184/17–25.] He also discovered Mr. Buyck's easement

across the McAlister tract. [Tr. 184/26 – 185/3.] Speaking of the right fork, Mr. Conrad testified: “it was my understanding in the law, that you could not — could not close a road that had been used for that long of a period of time.” [Tr. 185/13–16.] Mr. Conrad testified that he knew the Buyck family, and knew that the right fork was “the main road” that they used to reach the 700-acre tract. [Tr. 185/20–23.] When this witness and Mr. Buyck would visit the 700-acre tract together, they always took the right fork. [Tr. 186/3–15.]

There was a single structure on the McAlister tract. This was “a little house” [Tr. 187/2] built by Mr. Nickells during the period of his ownership. [Tr. 201/21–22.]

In their discussions about buying the McAlister tract, Mr. Jackson told Mr. Conrad that he would be interested in relocating the right fork. [Tr. 188–89.] Mr. Conrad told Mr. Jackson that Mr. Buyck “had an easement as far as I was concerned. And — and I knew he had a prescriptive easement as well, because I knew how — how long I had even been using — been using it myself. And the hunting club, that was established at that time, had been using the road.” [Tr. 189/12–16.] “And I knew that the hunting club had been using it for all these years and his friends had been using it for all these years. So I told William [Jackson] that I didn’t want to get involved with [trying to relocate the right fork].” Mr. Conrad “had just always heard that if a road was open for a long period of time and the landowner did not close it, then whenever — or he could not close it after it had been used for a long period of time.” [Tr. 200/22–25.]

After buying the McAlister tract jointly from Dr. Cosone, Mr. Conrad and Mr. Jackson divided it, with the center line of the Red Road and the left fork as the dividing line.

Over the years since he and Mr. Jackson bought the McAlister tract, Mr.

Conrad has seen traffic using both the right fork and the left fork to get to and from the 700-acre tract. [Tr. 202/12–25.] The right fork “is considered the main road down to the river.” [Tr. 205/12.] It takes considerably longer to reach the duck pond near the river by traveling the left fork than the right fork. [Tr. 205/24 – 206/3.] Once the 700-acre tract is reached via the left fork, the road from there to the duck pond is bad. [Tr. 206/4–14.] Depending upon rainfall, the duck pond may be inaccessible via the left fork but accessible via the right fork. [Tr. 208/4–8.] (At trial, the parties agreed to call the continuation of the right fork, after it reaches the 700-acre tract, the “Duck Pond Road”. [Tr. 15–19.]) The continuation of the left fork, once it reaches the 700-acre tract, is at least twice the length of the Duck Pond Road to reach the duck pond, and the road is bad. [Tr. 212/6–13.]

The Buyck Hunt Club was in existence in the 1970s. [Tr. 203/4–6; Tr. 179/1–3.] Mr. Conrad is one of five or six friends of Mr. Buyck who hunt the duck pond on the 700-acre tract with Mr. Buyck. [Tr. 203/9–14.]

William Jackson testified as follows:

Soon after he and Mr. Conrad bought the McAlister tract, Mr. Jackson erected a gate at the entrance to the right fork. He gave Mr. Buyck a key to the gate. In 2008, when Mr. Jackson realized that many people had keys to the lock, he changed the lock, replacing it with a type for which copies could not be made. Again he gave a key to the new lock to Mr. Buyck. When logging trucks were seen using the right fork soon thereafter, Mr. Jackson found the key that he had given Mr. Buyck hanging on a tree near the gate. Again Mr. Jackson changed the lock but this time did not give Mr. Buyck a key. Soon thereafter the bolt that the new lock fits into was cut in half with a torch. [Tr. 220/20–21.] Mr. Jackson gave a key to the logging foreman, telling him that he wanted the logging company to finish its

work. [Tr. 240/3–8.] The logging company used Mr. Jackson's property, near the house that Jackson had built, as a staging area for its equipment. [Tr. 240/23 – 241/4.]

Mr. Jackson testified that the time to drive the right fork to the 700-acre tract is about four minutes. The time to drive the left fork to the 700-acre tract is about two minutes. [Tr. 254/23 – 225/7.] During the past two years, while traffic to and from the 700-acre tract was limited to the left fork, Mr. Jackson observed various types of farm equipment, boats, hunters' vehicles, trucks, passenger vehicles, and four-wheelers traveling the left fork to and from the 700-acre tract. [Tr. 257/18 – 258/7.]

Mr. Jackson testified that in the time leading up to 2007, the amount of traffic on the right fork appeared to increase. During the early years after his acquisition of the McAlister tract in May 2000, it was usually Mr. Buyck who was seen using the right fork, but as time went on he was rarely seen, yet the traffic increased. [Tr. 260/4–8.] The traffic occurred not just during hunting season but all through the year, at all hours, to the point where his wife was becoming afraid to be there by herself. The Jacksons' house was broken into twice. [Tr. 259/25.]

The Jacksons have permission from Dr. Bruner, the owner of the Bruner tract, to use the portion of the right fork which crosses the Bruner tract. [Tr. 429–30.]

James M. Medlan testified as follows:

Mr. Medlan, 69 years of age, is founder and president of the Buyck Hunt Club. [Tr. 328/9–15.] Mr. Medlan dealt with Mr. Buyck Sr., beginning two or three years before his passing (in 1976). [Tr. 328/26 – 329/2.] The club hunts deer on the 700-acre tract. The club normally has 23 members, but has 25 this year. [Tr. 321/1–3.] The club pays a fee to Mr. Buyck. The club members leave their

vehicles at the hayfield and travel from there on all-terrain vehicles. [Tr. 324/18–22.] By agreement with Mr. Buyck, the club takes care of the roads inside the 700-acre tract. [Tr. 325/5–16.] That has been the agreement for almost forty years. [Tr. 325/17–19.]

The right fork is Mr. Medlan's favorite route into the 700-acre tract. [Tr. 329/7–10.] No one ever told him that he could not use the right fork. [Tr. 15–17.] Mr. Medlan believes that Buyck Sr. & Jr. "had a right to use the [right fork], because it's been open so many years" [Tr. 329/18–23.] The club members would use both the right fork and the left fork to reach the 700-acre tract, depending on where they intended to hunt. [Tr. 333/22 – 334/25; Tr. 337/6–1; Tr. 340/6–16.] The club built Road No. 3 as an all-terrain vehicle trail in the late 1970s or early 1980s. [Tr. 335/12–16.] The right fork and the left fork were in about the same condition in the 1980s. [Tr. 336/19–23; Tr. 340/22–25.]

The members of the club worked on Road No. 3 on July 31, 2010; using a front-end loader tractor and a Bobcat. They filled holes and repaired sand beds. [Tr. 330/6–8.]

Michael R. Mills testified as follows:

Mr. Mills is a land surveyor. As part of his field work in this case, Mr. Mills drove from Fort Motte Road on the Red Road, the left fork, and Road No. 3 to its joining with the Duck Pond Road, thence back to the point of beginning via the Duck Pond Road, the right fork, and the Red Road. [Tr. 7–17.] The drive was made in a pickup truck using two-wheel drive. [Tr. 373/4–10. See Def. Exh. 22.] Mr. Mills opined that the easement granted by Mrs. McAlister in 1984 followed the Red Road from the eastern boundary of the McAlister tract and thence the left fork to its boundary with the 700-acre tract. His conclusion was based upon the fact that this path is northwesterly, as described in the easement, and is situated

entirely upon the McAlister tract. [Tr.381–82.] This route is unlike the right fork which at one point moves in a northeasterly direction [Tr. 385/5–7] and departs the McAlister tract and crosses the Bruner tract before returning to the McAlister tract. The owner of the Bruner tract did not join in the mutual grant of easements by Pedings, Stuck, Buyck, and McAlister. [Tr. 407/8–17.]

Both the right fork and the left fork are seen in aerial photographs back to the 1930s. [Tr. 409/18 – 410/1.]

Mr. Mills has a bachelor's degree from Clemson University in forest management [Tr. 345/17–20] and is experienced with forest management. Mr. Mills testified that logging equipment could use the left fork as well as the right fork in accessing the 700-acre tract. [Tr. 390/9–22.] Mr. Mills testified that logging equipment can travel on a road as narrow as ten or eleven feet. [Tr. 401/3–4.] Eleven feet is the standard width of one lane of traffic on a paved highway. [Tr. 401/6–7.]

Barbara A. Jackson testified as follows:

Mrs. Jackson, the defendant's wife, testified that she was concerned about meeting a truck driven by one of the hunt club hunters on a curve of the right fork while out walking her dogs. She had the same concern when her nieces and nephews played on the road or drove a golf cart there. [Tr. 416/3–18.]

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CALHOUN COUNTY
COURT OF COMMON PLEAS

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

W. Peter Buyck, Jr., Respondent,

v.

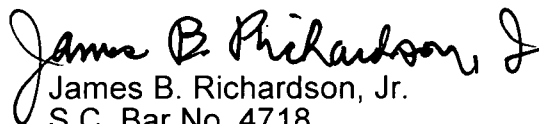
William Jackson, Appellant.

CERTIFICATE OF SERVICE

I certify that I served a copy of the appellant's initial brief and designation upon the respondent by first class mail, postage prepaid, addressed to respondent's attorneys at their address of record, namely:

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

on October 5, 2012.



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October 5, 2012.

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SC Court of Appeals

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October 5, 2012

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

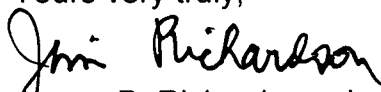
Re: W. Peter Buyck, Jr. v. William Jackson
2008-CP-9-135

Dear Ms. Kitchings:

Enclosed for filing are the initial brief and designation of the appellant.

Thanking you, I remain

Yours very truly,


James B. Richardson, Jr.

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

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