THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2016-001104

Heather Rousey Piper, Respondent,

v.

Kerry Grissinger,
William P. Hardee, and
Paul E. Lesondak,

of whom:
Kerry Grissinger and
Paul E. Lesondak,
are the Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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25 AM.JUR.2D *Easements and Licenses* § 134 (2002)

ARGUMENT

This Court stated the standard of review in *Goodwin* v. *Johnson*, 357 S.C. 49, 591 S.E.2d 34 (Ct.App. 2003)

1. WHAT IS THE STANDARD OF REVIEW?

> The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury. *Slear* v. *Hanna*, 329 S.C. 407, 496 S.E.2d 633 (1988); *Pittman v. Lowther*, 355 S.C. 536, 586 S.E.2d 149 (Ct.App. 2003); Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct.App. 1996); *Smith v. Commissioners of Pub. Works*, 312 S.C. 460, 441 S.E.2d 331 (Ct.App. 1994); *see also Jowers* v. *Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987) (decision of trier of fact as to whether or not easement exists will be reviewed by Supreme Court as an action at law); *Hartley* v. *John Wesley United Methodist Church*, 355 S.C. 145, 584 S.E.2d 386 (Ct.App. 2003) (determination of existence of easement is action at law; establishing existence of easement is question of fact in law action). In an action at law tried without a jury, the judge's findings of fact will not be disturbed on appeal unless there is no evidence to support the judge's finding. *Townes Assocs., Ltd.* v. *City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).
>
> [*Id.*, 357 S.C. at 52-53, 591 S.E.2d at ___.]

2. WHERE DOES THE BURDEN OF PROOF LIE IN AN EASEMENT ACTION?

The Respondent argues in her Brief that the Appellants failed to preserve the issues relating to easements which they argue by their Brief. Rather, Respondent states: ". . . the Order simply states that the trial court was asked to determine the location of an easement to the Landlocked Piper Parcel . . . " [Initial Brief Of Respondent, p.12-14.]

This statement of the issue is fundamentally wrong: the Circuit Court was asked to determine the existence of an easement to Respondent's real property and its location. It is axiomatic that the burden of proving an easement is on the party claiming it. The commentary of AMERICAN JURISPRUDENCE 2D states this precept as follows:

A party claiming an easement has the burden of proof, . . . [Ftn.46, citing:

Johnson v. *Coshatt*, 591 So.2d 483 (Ala. 1991);

Swift v *Kniffen*, 706 P2d 296 (Alaska 1985);

Manitowoc Remanufacturing, Inc. v. *Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991);

Chaconas v. *Meyers*, 465 A.2d 379 (Dist.Col.App. 1983);

Gibson v. *Buice*, 394 So.2d 451 (Fl.App. Dist 5 1981) ;

Davis v. *Gowen*, 83 Idaho 204, 360 P.2d 403, 88 A.L.R.2d 1192 (1961);

Schnider v. *M.E.H. Realty Inv. Co.*, 193 S.W.2d 69; 239 Mo.App. 546 (Mo.App. 1946);

Warnack v. *Coneen Family Trust*, 266 Mont. 203, 879 P.2d 715, 51 St.Rep. 739 (1984);

Grint v. *Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984);

Michelsen v. *Harvey*, 107 Nev. 859, 822 P.2d 660 (1980);

OPINION OF THE JUSTICES, 139 N.H. 82, 649 A2d 604, 139 (1994);

Brooks v. *Tanner*, 101 N.M. 203, 680 P.2d 343 (1984);

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Hollingsworth v. *Williamson*, 300 S.W.2d 194 (Tex.Civ.App. Waco 1957);

Pettus v. *Keeling*, 232 Va. 483, 352 S.E.2d 321 (1987);

Jamison v. *Waldeck United Methodist Church*, 191 W.Va. 288, 445 S.E.2d 229 (1994);

Prazma v. Kaehne, 768 P.2d 586 (Wyo. 1989).]

[25 AM.JUR.2D *Easements and Licenses* § 134 (2002); *paragraphing and citation form changed.*]

[T]he burden of proof rests with the person asserting the easement to show the existence of <u>all facts necessary</u> to create by implication an easement appurtenant to his estate. [Ftn. 52, citing, *inter alia*, *Schnider* v. *M.E.H. Realty Inv. Co.*, *supra*; *Trattar* v. *Rausch*, 154 Ohio St. 286, 95 N.E.2d 685, 43 Ohio Ops. 186 (1950); *Othen* v. *Rosier*, 226 S.W.2d 622, 148 Tex. 485 (1950).]

[25 AM.JUR.2D *Easements and Licenses* § 134 (2002); *emphasis added.*]

Obviously, along with existence of the easement, its location is among the "facts necessary" to establish the same.

The Order of the Circuit Court stated its determination upon what is "the most appropriate (or feasible) means of access", without other findings of fact. [RECORD ON APPEAL, p.___.] That language does not state a proper ground for determining an easement under South Carolina precedent. That precedent recognizes a) easement implied by prior use, b) prescriptive easement and c) easement by necessity. There are no other bases for the establishment of an easement. In order to establish her claimed easement, or locate the same, the Respondent must demonstrate that she has proven the elements of at least one of those categories.

The Appellants reiterate that there is no question as to the Respondent's right to access her property by the area designated as common roadway on the 1951 Plat, which is basically that also shown on the 2012 Plat as Severance Road (referred to in the Circuit Court's Order as the "Hardee easement").

In her pleadings and at trial, ROUSEY did not deny the existence of this 1951 common roadway easement. She does not wish to use that easement. RECORD ON APPEAL, p.___.

3. WHAT IS THE STANDARD OF PROOF REQUIRED TO ESTABLISH AN EASEMENT?

The commentary of AMERICAN JURISPRUDENCE 2D sets out the current state of precedent as to the standard of proof required of a party wishing to establish an easement:

> A party claiming an easement has the burden of proof, [Ftn.46, cited above] which, in general, must be established by clear and convincing evidence. [Ftn.47, citing *Swift* v. *Kniffen, supra*; *Grint* v. *Hart, supra*; *Michelsen* v. *Harvey, supra*; *Pettus* v. *Keeling, supra*; *Jamison* v. *Waldeck United Methodist Church, supra.*]
>
> There is also authority that the burden of proof must be established by—
>
> —. a preponderance of the evidence. [Ftn.48, citing *Chaconas* v. *Meyers*, supra; *Warnack* v. *Coneen Family Trust, supra*; *Potts* v. *Burnette*, 301 N.C. 663, 273 S.E.2d 28 (1981).][1]
>
> —. clear and positive proof. [Ftn.49, citing *Gibson* v. *Buice, supra.*]
>
> —. a balance of the probabilities. [Ftn.50, citing OPINION OF THE JUSTICES (NH), *supra.*]

1 Appellants note that the cited North Carolina case deals with easement by prescription, and thus directly conflicts with *Bundy* v. *Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 170 (Ct.App. 2015), cited *infra.*

—. clear and satisfactory evidence. [Ftn.51, citing *Brooks* v. *Tanner, supra*; *Palisades Sales Corp.* v *Walsh, supra.*]

. . .

Furthermore, one seeking an implied easement has the burden to prove the existence of such easement [Ftn.53, citing *Kennedy* v. *Papp*, 294 Ark. 88, 741 S.W.2d 625 (1987); *Myers* v. *Stickley*, 180 W.Va. 124, 375 S.E.2d 595 (1988).] by clear and convincing evidence [Ftn.54, citing *Abbott* v. *Herring*, 62 N.Y.2d 1028, 479 N.Y.S.2d 498, 468 N.E.2d 680 (1984); *Myers* v. *Stickley, supra.*] and must establish that the easement was apparent to the party who should have knowledge of it. [Ftn.55, citing *Campbell* v *Great Miami Aerie No. 2309, Fraternal Order of Eagles*, 15 Ohio St.3d 79, 15 Ohio B.R. 182, 472 N.E.2d 711 (1984).]

Insofar as Appellants can determine, the only South Carolina precedent on point deals with the standard of proof required for an easement by prescription. *Bundy* v. *Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 170 (Ct.App. 2015) is the latest in a line of precedent requiring clear and convincing proof for an easement by prescription.

Appellants argue that the bulk of precedent supports the conclusion that clear and convincing proof is required for all claims of easement in South Carolina.

4. HAS THE RESPONDENT ESTABLISHED THE ELEMENTS FOR AN EASEMENT IMPLIED BY PRIOR USE?

The Respondent has claimed an easement implied by prior use. Our Supreme Court has held that:

> [A]n easement implied by prior use exists when: (1) the dominant and servient tracts of land originated from a common owner; (2) the use was in existence at the time the original grantor severed the tracts; and (3) the use was apparent, continuous, and necessary for enjoyment of the dominant tract.
>
> [*Boyd* v. *Bellsouth Telephone*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006).[2]]

2 Respondent's Brief restates and renumbers the elements for easement by implied use in *Boyd, supra.* For the purpose of this argument, that restatement and renumbering are moot: the Appellants' argument goes to the elements clearly stated in *Boyd* above.

The Respondent's Brief never addresses the existence of either the claimed LESONDAK easement or the GRISSINGER easement as of the time when the original grantor severed the tracts [Element (2) in *Boyd, supra.*] Her Brief refers to no testimony or document in the Record on Appeal to establish this element.

The Respondent's Brief never addresses the existence of evidence to show any continuous use of either the LESONDAK or the GRISSINGER easement as access to the Respondent's property [Element (3) of *Boyd, supra.*] Her Brief refers to no testimony or document in the Record on Appeal to establish this element.

All the stated elements in *Boyd* and in South Carolina precedent must be demonstrated in order to establish an easement implied by prior use. The Respondent has failed to establish at least two of those elements. Any claim of an easement implied by prior use of the claimed easements over LESONDAK or GRISSINGER must fail.

5. HAS THE RESPONDENT ESTABLISHED THE ELEMENTS FOR A PRESCRIPTIVE EASEMENT?

The Respondent argues the existence of a prescriptive easement. In *Boyd* v. *Bellsouth Telephone, supra,* the Supreme Court sets out the elements of prescriptive easement::

> To establish a prescriptive easement, the party asserting the right must show: (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under a claim of right. *Horry County v. Laychur,* 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993); *Shia v. Pendergrass,* 222 S.C. 342, 351, 72 S.E.2d 699, 703 (1952). When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse. *Poole v. Edwards,* 197 S.C. 280, 283, 15 S.E.2d 349, 350 (1941).
>
> [*Boyd* v. *Bellsouth Telephone,* 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006).]

The Respondent's Brief argues the existence of evidence for twenty years' continuous use on the claimed LESONDAK easement (named by the Respondent as the "Current easement") or the GRISSINGER easement (named by the Respondent and Circuit Court as the "Gandy easement"). Her Brief cites no testimony or document in the Record on Appeal to establish this element.

The Respondent's Brief argues, but cites no evidence and fails to reference the Record on Appeal, for use of the designated GRISSINGER easement prior to the purchase of the ROUSEY property by the Respondent's parents in 2012.

The Appellants again note this Court's recognition that proof of an easement by prescription must be by clear and convincing evidence. *Bundy* v. *Shirley*, *supra*. That evidence is not present in this case. The Respondent's claim of prescriptive easement fails.

6. HAS THE RESPONDENT ESTABLISHED THE ELEMENTS FOR AN EASEMENT BY NECESSITY?

The Respondent argues the existence of an easement by necessity. The *Boyd* Court laid out the elements for an easement by necessity:

> The party asserting the right of an easement by necessity must demonstrate: (1) unity of title, (2) severance of title, and (3) necessity. *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002). . . .
>
> The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible. *Jowers* [*v Hornsby*], 292 S.C. at 550-51, 357 S.E.2d at 711 (citing *Steele v. Williams*, 204 S.C. 124, 28 S.E.2d 644 (1944); *Merrimon* [*v McCain*], 201 S.C. at 76, 21 S.E.2d at 404; *Lawton v. Rivers*, 13 S.C.L. (2 McCord) 445 (1823)).
>
> [*Boyd* v. *Bellsouth Telephone*, 369 S.C. 410, 418-420, 633 S.E.2d 136, 140-141 (2006).]

The evidence in this matter makes clear the former unity of title of the tracts in question, and their severance. The question, therefore, is whether the Respondent has demonstrated that either the claimed LESONDAK or GRISSINGER easements are necessary to her in light of the unquestioned existence of the platted common easement along the HARDEE tract.

As indicated above, the question of degree of necessity was treated in *Jowers* v. *Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987). The Supreme Court there stated:

> In South Carolina, the degree of necessity which is required is "reasonable necessity." The party claiming an easement must prove more than convenience, but he need not show that the easement is absolutely essential. Graham v. Causey, supra. The necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible. *Steele* v. *Williams*, 204 S.C. 124, [292 S.C. 551] 28 S.E.2d 644 (1944); *Merrimon* v. *McCain*, 201 S.C. 76, 21 S.E.2d 404 (1942); *Lawton* v. *Rivers*, 13 S.C.L. (2 McCord) 445 (1823). *See also* ANNOT., 10 A.L.R.4th 447 (1981).
>
> [*Id.*, 292 S.C. at 550, 357 S.E.2d at 711.]

Faced with a situation similar to this case in *Morrow* v. *Dyches*, 328 S.C. 522, 492 S.E.2d 420 (Ct.App. 1997), this Court of Appeals stated:

> Only reasonable necessity is required; thus, the easement must be more than merely convenient, but it does not need to be absolutely essential. *Jowers* v. *Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987). . . . Although the Morrows claim necessity because they wish to use the CSX tract for large tractor-trailers to access the rear of their store, their claim fails because the entire eastern side of their tract borders on and is accessible by a public road. The doctrine only provides reasonable access to the dominant estate when there is none; it does not provide a means for ensuring a preferred method of access to a particular portion of a tract when access to the tract is otherwise available. Cf. *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct.App. 1985) (easement by necessity across adjoining land was upheld because a deep gully separated the dominant estate from a bordering public road).
>
> [*Morrow* v. *Dyches*, 328 S.C. 522, 529, 492 S.E.2d 420, 424 (Ct.App. 1997)].

The Respondent denies the applicability of *Jowers* and *Morrow*, supra, by attempting to distinguish what level of "reasonable access" the existing, Hardee easement provides. Respondent states in her Brief:

> In fact, the Hardee Easement is currently blocked, has never been used as a route of access to the Landlocked Piper Parcel, and making this route accessible would rise well above the level of a "mere inconvenience".
>
> [INITIAL BRIEF OF RESPONDENT, p.20.]

The above characterization of the evidence as to the Hardee Easement is, at best, strained. The evidence at trial indicated a) that some trees would have to be cut and b) there is a utility building which, if in the way, could be moved. [RECORD ON APPEAL, Transcript of Hearing, p.26, l.18 – p.27,l.18; p.71,l.22 – p.76,l.9.]

As Respondent rightly points out, similar issues were addressed by our Supreme Court in *Jowers* v. *Hornsby, supra*. That Court stated, in relevant part:

> The trial court found that appellant had an alternate means of access to his property through an alleyway which is shown on the county tax map and referred to in the deed by which appellant acquired his property. While the trial court noted that the alleyway is

covered by underbrush and growth, it found that the mere inconvenience of clearing this alleyway is not a sufficient burden on the appellant to satisfy the reasonable necessity requirement.

[*Id.*, 292 S.C. at 551, 357 S.E.2d at 711.]

The Respondent has clear access by the platted common roadway (the Hardee Easement). The other easements she seeks to establish over the Appellants' properties (including that granted by the Circuit Court's Order) are those she prefers. Under the established precedent of this State as recited in *Morrow* and *Jowers, supra,* the Respondent has failed to demonstrate necessity in those claimed easements over the property of GRISSINGER or LESONDAK.

The Appellants again point out that allowance of either of the non-platted easements would necessitate either a) a roadway almost in front of GRISSINGER's home, or b) within a few feet of the windows of LESONDAK's home. Thus, equity mandates the denial of those claimed easements on the grounds of necessity.

CONCLUSION

The burden of establishing an easement rests on the Respondent. She has failed to acknowledge, or cite to evidence for, the elements required for easements by prior use or by prescription. As to easement by necessity, the first question must be how "necessity" is reviewed by this Court. The Appellants maintain "necessity" to be a mixed question of law and fact. The evidence at trial is insufficient –both in law and in equity – to establish an easement by necessity. The Respondent is free to use the Hardee easement to which she already has rights.

Respectfully submitted,

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March 20, 2017

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CERTIFICATE OF COUNSEL

The undersigned certifies that the final Reply Brief of Appellants complies with Rule 211(b), S.C.A.C.R.

March 24, 2012.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
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Appellate Case No. 2016-001104

Heather Rousey Piper, Respondent,

v.

Kerry Grissinger,
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of whom:
Kerry Grissinger and
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are the Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellants and Designation of Matter to Be Included in the Record on Appeal, dated March 20, 2017, on the following counsel of record:

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by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known addressees) of those attorney(s) and/or persons set out below, all pursuant to Rule 233(b), S.C.A.C.R.

March 20, 2017

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March 20, 2017

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
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Re: Heather Rousey Piper, Respondent
v. Kerry Grissinger, William P. Hardee, and Paul E. Lesondak,
of whom Kerry Grissinger and Paul E. Lesondak are the Appellants
Appellate Case No.: 2016-001104

Dear Ms. Kitchings:

In accordance with Rules 208 and 209, S.C.A.C.R., enclosed herewith please find the original and one (1) copy of the Appellants' Initial Reply Brief, together with the Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorneys for the Respondent with copies of the Initial Reply Brief, as evidenced by the Certificate of Service.

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

Sincerely yours,

John Martin Foster

jmf/
enclosures

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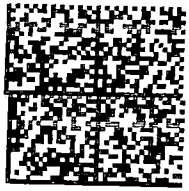

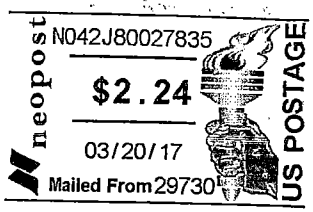

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TO:

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