STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

2014CP4001805

Country Properties, LLC,

Plaintiff,

vs.

Nancy Dunn Martin,

Defendant.

RICHLAND COUNTY FILED
2016 SEP 27 PM 12:16
JEANETTE W. WALKER C.C.P. & G.S.

Final Order

Hearing Date:	March 21-24, 2016
Judge:	Joseph M. Strickland
Court Reporter:	Amanda Creel Godfrey
Attorney for Plaintiff:	John W. Wells
Attorney for Defendant:	Joey R. Floyd

"I regard this case as one of the very greatest importance, the decision of which will control in a measure, one of the most constantly recurring grounds of controversy in reference to a right which is held to as tenaciously, and asserted as vigorously, as the recognized love of the Anglo Saxon for his land: The right to the use of a road. I have accordingly given it my most earnest and laborious consideration." Justice Cothran writing for the majority in Brasington v. Williams 143 S.C. 223, 141 S.E. 375 (1927).

This action is one brought by the Plaintiff to establish an easement across one property of the Defendant serving the property of the Plaintiff. The property of the Plaintiff, described herein below, will sometimes be referred to as the dominant estate and the property of the Defendant, also described herein below, will sometimes be referred to as the servient estate.

This case was commenced by the filing of a Summons and Complaint on March 18, 2014, seeking an easement across the lands of the Defendant on three separate theories, to wit; easement by deed; a private easement arising at law by prescription; and an easement by virtue of the fact that the road identified by the Plaintiff through the property of the Defendant is a public road. The Defendant filed and served her Answer and Counterclaim asserting various defenses including a general denial of the allegations by the Plaintiff; that the Plaintiff's claims are barred by the Statute of Limitations, abandonment of the easement and adverse possession of the easement by the Defendant. The Plaintiff filed a Reply which is a general denial of the allegations of the Defendant's Counterclaim.

This action was referred to me by a Consent Order of Referee of the Honorable L. Casey Manning dated July 7, 2014. Discovery was conducted by both sides, and the matter was set for trial during the week of March 21, 2016.

The Plaintiff appeared at the hearing in the person of James F. Podell, a member and principal of the Plaintiff limited liability company, represented by John W. Wells, its counsel of record. The Defendant appeared represented by Joey R. Floyd and Wesley D. Peel, both of whom have appeared as counsel of record for the Defendant. The case was tried before me without a jury.

FINDINGS OF FACT

1. That the Plaintiff is a limited liability company formed under the laws of the State of South Carolina with its principal place of business in the County of Richland, State of South Carolina.

2. That the Defendant is a citizen and resident of the County of Richland, State of South Carolina.

3. That the Plaintiff is the owner of a certain tract of land located partly in Kershaw County and partly in Richland County which was conveyed to the Plaintiff by deed of Pine Ridge Investments, LLC, dated March 11, 2009, and recorded in the RMC office for Richland County in Book 1515, at page 1554, the same being also filed in the ROD office for Kershaw County, the tract being described as follows:

All that piece, parcel or lot of land, with improvements thereon, if any, lying, situate and being in the State of South Carolina, Counties of Richland and Kershaw, located approximately ten (10) miles South of Lugoff, containing 1,023.07 acres, more or less, and being shown and described on a plat prepared for Gonzales Land and Timber, LLC, by Michael R. Mills, P.L.S., dated June 22, 2004, and recorded in the office of the ROD for Richland County in Book "951", at page 1618 and recorded in the office of the ROD for Kershaw County in Book "3121", at page 7. Said plat is incorporated herein by reference for a more complete and accurate description.

The 1,023.07 acres is split between Richland County, containing 383.63 acres and Kershaw County containing 640.07 acres.

4. That the Defendant is the owner of several tracts of land located in the County of Richland, State of South Carolina described as follows:

PARCEL 1:

All that certain piece, parcel or tract of land , situate, lying and being near Raglin Creek, east of U.S. Highway 601, in School District No. 2, in the County of Richland, and State of South Carolina, containing Sixty-Five and 06/100ths (65.06) acres, more or less, and bounded as follows: to wit: On the NORTH by property now or formerly of R. W. Lloyd; on the EAST by property now or formerly of R. W. Lloyd; on the SOUTHEAST and SOUTH by property now or formerly Astor V. Cleveland; and on the WEST by property now or formerly of Jessie Dunn Martin; said tract will more fully appear reference to a plat prepared for Rufus D. Lewis, Jr., by Edward R. Owens, R.L.S., dated October 18, 1976. Be all measurements a little more or less.

TMS# 38000-03-08 and 38000-03-08

This being the same property conveyed to the Defendant by deed of Laura Jane Lewis Allen, et al. dated November 15, 2012, and recorded in the RMC for Richland County in Book 1813, at page 244.

PARCEL 2:

All that certain piece, parcel or lot of land with improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, being shown and designated as Parcels 3, 4, 5, and 6, containing in the aggregate 164.0 acres, more or less, as shown on a plat surveyed for Heirs of Osie E. Martin by Jas. C. Covington, C.E., dated October 8, 1930, and recorded in the office of the RMC for Richland County in Plat Book R, at page 199; said parcels having such boundaries and measurements as shown on said plat which are specifically incorporated herein by reference thereto.

TMS # R38000-03-07 & R38000-03-15

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U.S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 1 and 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E. dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.20 acres on a plat prepared for Neal H. Higgins and Karen J. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded in Plat Book 55, at page 7626, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS #: R38000-03-06

ALSO: All that certain piece, parcel or lot of land, situate, lying and being about 23 miles east of the City of Columbia, and about one mile east of State Highway No. 26, now known as U. S. Hwy. 601, in the County of Richland, State of South Carolina, being more particularly shown as a portion of Tract 2 on a plat of land surveyed for the heirs of Mrs. Osie E. Martin by James C. Covington, C.E., dated October 8, 1930, recorded in the office of the Clerk of Court for Richland County in Plat Book R, at page 199; said property being more particularly shown and delineated as 23.30 acres on a plat prepared for Van A. Higgins and Linda L. Higgins by W. Frank McAulay, Jr., PLS# 3124, dated January 6, 1995, recorded May 19, 1995 in Plat Book 55, at page 7627, and having such shapes, courses, distances, metes and bounds as shown upon said latter plat, reference being craved thereto as often as necessary for a more complete and accurate description; be all measurements a little more or less.

TMS# R3800-03-48

Parcel 2 was conveyed to the Defendant by Corrective Limited Warranty Fiduciary Deed of Dorothy Martin Tate and Nancy Dunn Martin as successor co-trustees of the Edward Frank Martin, Jr., Trust dated August 5, 2004, dated December 13, 2007, and recorded in the RMC office for Richland County in Book 1384, at page 3241. This corrective deed corrected a deed from the same grantor to the same grantee dated August 9, 2007, and recorded in the RMC office for Richland County on September 20, 2007, in Book 1359, at page 2178.

5. That the Plaintiff's tract is divided by Raglin Creek, which flows generally from west to east, and serves as the county line between Kershaw County to the north of the Creek and Richland County to the south of the creek. According to the property description in the Plaintiff's deed, approximately 384 acres of the Plaintiff's property is located south of Raglin Creek in Richland County, and approximately 640 acres of the Plaintiff's property lies to the north of Raglin Creek in Kershaw County.

6. That the Plaintiff's tract has road frontage on U. S. Highway 601 above Raglin Creek in Kershaw County, but the Plaintiff's tract has no public road access south of Raglin Creek. To the extent that Raglin Creek is a natural barrier to ingress and egress, the 384 acres of the Plaintiff's tract located south of Raglin Creek in Richland County has no access except via the easement that the Plaintiff seeks to establish in this action.

7. I find from the testimony presented at trial that at some point several years before the plaintiff purchased his property in March of 2009, Pine Ridge Investments, LLC, the Plaintiff's predecessor in title, built a dam across Raglin Creek with a narrow road across the top of the dam. After the Plaintiff purchased the property, it improved the dam somewhat, making it safe for a vehicle to cross, but the dam has been damaged by storms, as it appears from a photograph,

Plaintiff's Exhibit 37, showing a gap eroded from the dam, and during the historic rains of October 2015, the dam washed out completely. I find as a matter of fact from the greater weight of all of the testimony presented, that Raglin Creek is a substantial natural barrier to the Plaintiff's ability to access the 384 acres of its property south of Raglin Creek in Richland County, and while the property south of Raglin Creek can be accessed by foot and has at times been accessible by personal vehicle, the natural barrier of the creek does limit the Plaintiff's ability to access its lands south of the creek, particularly with large vehicles and equipment necessary to harvest timber on the lands in Richland County south of Raglin Creek.

8. That the Plaintiff's use of its tract is for recreation including hunting and fishing, and for growing and harvesting timber. This has been the historical use of the tract by all of the Plaintiff's predecessors in title during the time period relevant to this case.

9. That the use by the Defendant and her predecessors in title of her tract of land has been for recreation including hunting and, growing and harvesting timber.

10. That there is a dirt road leading from Highway U. S. 601 to the southern boundary of the Plaintiff's tract and extending through the Plaintiff's tract to property owned by James L. Guy, II. This road is located south of Raglin Creek and would provide access to the Plaintiff's 384 acres south of Raglin Creek but for a locked gate on the Defendant's property where the road passes through the Defendant's tract. This locked gate is the source of the controversy in this case.

11. That the first 2,900 feet or so of the road in question from U. S. Highway 601 and proceeding eastward is maintained by Richland County. Richland County has no record of any deeded easement to this portion of the road maintained by it and provides maintenance to that

portion of the road under the legal theory that an easement by prescription in favor of the public has arisen over time from the continuous and adverse use of the road by the public. The county maintained portion of Northeast Shady Grove Road extends eastward from U. S. Highway 601 past the Defendant's western property line and ends on the Defendant's property. The end of county maintenance sign on Northeast Shady Grove Road is just inside the Defendant's property.

12. That Richland County has named the portion of the road maintained by it Northeast Shady Grove Road.

13. That the dirt road in question is shown on the 2004 plat by Michael Mills of Glenn and Associates, Plaintiff's Exhibit 2, as Shady Grove Road and Dirt Woods Road. It is shown on the 1998 Robert H. Lackey Surveying, Inc. plat, Plaintiff's Exhibit 6, as N.E. Shady Grove Road and Existing Woods Road. It is shown on the 1969 Fred J. Hager plat, Plaintiff's Exhibit 8, as Woods Road. It is shown on the 1957 plat for Powe Veneer Company, Plaintiff's Exhibit 10, as Camp Road. All of these plats show a dirt road extending from U. S. Highway 601 eastward below Raglin Creek through the Defendant's tract to the lands of the Plaintiff and then extending to the Guy Property east of the Plaintiff's tract.

14. The road in question appears on aerial photographs from 2013, Plaintiff's Exhibit 42; 1981, Plaintiff's Exhibit 43; 1970, Plaintiff's Exhibit 44; 1951, Plaintiff's Exhibit 45; and 1943, Plaintiff's Exhibit 46. These aerial photographs show a road in the same location as the road depicted in the above mentioned plats. The road was receiving enough use to resist the overgrowth of vegetation and remain visible from the air from 1943 to 2013.

15. The road in question is shown as a light duty road on 1953 Leesburg Quadrangle Map prepared by the United States Department of the Interior Geological Survey, Plaintiff's Exhibit 41.

16. The road in question is shown on a 1939 map prepared by the South Carolina Highway Department, Plaintiff's Exhibit 49. On this map, it is shown as a double solid line, whereas private roads are depicted on this map by a dotted line, indicating that the South Carolina Highway Department considered the entire road back to the Plaintiff's property to be a public road in 1939.

17. The Plaintiff produced no less than four witnesses who testified that the road in question had received public maintenance from Highway U. S. 601 to the Plaintiff's property line during the 1950s and 1960s.

18. That no party or government authority has petitioned any court or initiated any action to close or abandon any portion of the road in question that was previously maintained by the public or designated as a public road by the South Carolina Highway Department. No party has complied with the requirements of §57-9-10 South Carolina Code of Laws Annotated to abandon or close the road in question or any part thereof.

19. At this point, it would be useful to compare the history of the 2,900 foot portion of Northeast Shady Grove Road that currently receives maintenance services from Richland County (hereinafter county maintained portion) with the disputed portion of the road that lies east of the end of county maintenance sign, and up to and beyond the Plaintiff's southern property line (hereinafter the disputed portion). According to the combined testimony of witnesses Algie Campbell, W. D. Kirkland, Bennie Higgins and Angus Lafaye, both the county maintained

portion and the disputed portion of the road in question received public maintenance services from 1945 until at least 1969. Both portions of the road are equally indicated as a public road on the 1939 South Carolina Highway Department Map, Plaintiff's Exhibit 49. Both portions of the road are equally vivid and distinct on the 1943 aerial photograph, Plaintiff's Exhibit 46, and the 1970 aerial photograph, Plaintiff's Exhibit 44. There is ample testimony from witnesses Campbell, Kirkland and Higgins that they enjoyed unfettered use of both portions of the road as members of the public during the 1940s, 1950s, and 1960s. There is no evidence of a written or recorded easement conveying either portion to Richland County. There is no evidence of a formal dedication of either portion to the public for use as a public road. From 1945 until at least 1969, both portions of the road, the part now maintained by Richland County and the disputed portion, enjoyed equal status as a publicly maintained road.

In 1962, the South Carolina General Assembly enacted into law §57-9-10 South Carolina Code of Laws Annotated which requires any interested person or, the State or its political subdivisions to file a court action to close a road and to give notice of that court action to other landowners whose property would be affected by the road closing.

In about 1970 the Dunn's Mountain Hunt Club began to lease the hunting rights on the property now owned by the Defendant and property to the west of the Defendant's tract owned by a man named Higgins. The hunt club installed a steel gate across the road in question on the Higgins property in about 1970 according to the Defendant's witness, Gary Wessinger. That gate was later moved in 1982 eastward onto the property of the Defendant according to Wessinger. It appears that after the gate was installed, Richland County stopped maintaining the

disputed portion of the road while it continued to maintain the 2,900 foot portion of the road that it maintains today.

In summary, both the county maintained portion of the road and the disputed portion of the road were equally public until at least 1969. The statutory requirement for closing a public road became law in 1962 while both portions were under equal public maintenance and equal public use. The Dunn's Mountain Hunt Club, and later the Defendant's predecessor in title, began erecting gates across the road in 1970, but neither they nor Richland County complied with the statutory requirements for closing a public road. Therefore, the disputed portion of the road is still a public road because the legal requirement to close it to the public has never been met.

20. The compelling irony in this case is that the Defendant would be wholly without access to her property if the public easement to the first 2,900 feet of Northeast Shady Grove Road had not arisen at law from the very public maintenance and public use of the road described by the Plaintiff's witnesses. The Defendant readily accepts the benefit of the public easement providing access to her property, but seeks to deny that same benefit to the two landowners, the Plaintiff and Guy, whose lands are further down the road. If the public use and public maintenance were not as the Plaintiff's witnesses Campbell, Kirkland, Higgins and Lafaye testified that they were, the Defendant herself would be landlocked.

21. I find by strict, cogent and convincing evidence as set forth above that the continuous widespread public usage of the disputed portion of Northeast Shady Grove Road from 1945 through 1963, without challenge or interference from the previous owners of the Defendant's tract, establishes the public character of the road. This conclusion is fortified by the extent and

duration of the public maintenance performed on the disputed portion of Northeast Shady Grove Road from 1945 until 1969 which was equal in all respects to the public maintenance on the 2,900 foot section of the road that is currently maintained by Richland County as a prescriptive easement.

22. I find by strict, cogent and convincing evidence that Northeast Shady Grove Road was a public road from U. S. Highway 601 to the plaintiff's property line where, according to testimony of the Plaintiff's witnesses, the county motor grader turned around at until the first gate was erected in 1970.

23. I find by strict, cogent and convincing evidence that the §57-9-10 South Carolina Code of Laws Ann. requiring a judicial proceeding to abandon or close a public road was in effect in 1970 when the first gate was put up on Northeast Shady Grove Road.

24. I find by strict, cogent and convincing evidence that the judicial proceeding required under §57-9-10 South Carolina Code of Laws Annotated to close the disputed portion of Northeast Shady Grove Road and to cut off the Plaintiff's legal right to use the disputed portion of the road has never been filed.

25. That the Defendant's property includes a tract containing 213.53 acres as shown on a plat prepared by Bostick Surveying for Nancy D. Martin dated February 15, 2010, Plaintiff's Exhibit 22, and an adjacent tract, sometimes referred to as the Lewis Tract, containing 64.68 acres as shown on a plat prepared by Bostick Surveying for Nancy D. Martin, et al. dated September 9, 2012, Plaintiff's Exhibit 23. Both plats show the disputed portion of the road in question and label it Black Dog Road.

26. That the 213.53 acre tract shown on Plaintiff's Exhibit 22 was conveyed to the Defendant on August 9, 2007, by the trustees of the Edward Frank Martin, Jr. Trust, Plaintiff's Exhibit 24.

27. That the 213.53 acre tract show on Plaintiff's Exhibit 22 was passed down to the Defendant's father, Edward Frank Martin, Jr. through his mother and sisters from his father, Edward Frank Martin, Sr. who died owning it on December 15, 1967.

28. That Edward Frank Martin, Sr. obtained this tract from Florence Martin Van Horten by deed dated December 29, 1939, Plaintiff's Exhibit 27, which deed imposes a twenty (20) foot permanent right of way on the property "from said road running through the plantation back to the lands of J. H. and Ella T. Miller."

29. That the easement in favor of J. H. and Ella T. Miller derives from a deed by J. H. Miller to Ossee M. Martin dated November 18, 1918 reserving the identical easement over the lands now owned by the Defendant, Plaintiff's Exhibit 29.

30. That the lands of J. H. and Ella T. Miller, referred to in Plaintiff's Exhibit 27 as the tracts served by the twenty (20) foot right of way, are now a portion of the Plaintiff's tract south of Raglin Creek.

31. That the only road fitting the description in Plaintiff's Exhibit 27 running through the Defendant's property to the Plaintiff's property, which is shown on the 1939 South Carolina Highway Department Map, Plaintiff's Exhibit 49, and the 1943 aerial photograph, Plaintiff's Exhibit 46, is the disputed portion of Northeast Shady Grove Road.

32. That as to the 64.68 acre tract owned by the Defendant shown on Plaintiff's Exhibit 23, it is shown as 65.61 acres on a plat prepared for the Estate of F. R. Martin by Keels Engineering Company dated May 25, 1970, Plaintiff's Exhibit 35.

33. That according to the August 15, 1971 deed from Sara Martin Goff et al. to Joe Earl Taylor et al., Plaintiff's Exhibit 33, this tract of the Defendant is identical to the tract conveyed to Fletcher R. Martin by the heirs of Mattie L. C. Desportes by deed dated September 24, 1948, Plaintiff's Exhibit 36, which deed describes and conveys Tract E from the 1884 plat of the property partitioned in the 1885 lawsuit of Mattie L. C. Desportes v. John A. Myers et al., the 1884 plat being Plaintiff's Exhibit 19.

34. That on December 21, 1926, Mattie L. C. Desportes was the owner of Tract E (now the Defendant's 64.68 acre tract acquired from Lewis in 2012) when the said Mattie L. C. Desportes signed a deed to the Plaintiff's predecessor in title, Lura Mae Kinsland, Plaintiff's Exhibit 16, conveying to Kinsland Tract 1 from the 1884 partition suit, Plaintiff's Exhibit 19, when she imposed upon Tract E:

"also convenient rights of way for cart and wagon road over the lands of the parties of the first part and each of them to the Burney lands, the Martin lands, and the English lands for the purposes of ingress and egress and access from the public road to such tracts of land. Said grantee, her heirs and assigns shall also have the right to construct and use cart and wagon roads connecting the said tracts of land hereby conveyed with each other by the nearest convenient route, the present roads upon said lands to be followed where (illegible) and no lands at present under cultivation to be taken for roads without compensation being made for the same. **The said rights of way to be appurtenant to and pass by conveyance of the tracts of land above described.** The said right of way not to exceed twenty feet in width (illegible)." (Emphasis added)

35. That the tracts conveyed to Kinsland by Mattie L. C. Desportes, J. H. Miller and Ella T. Miller, formerly Ella Black, were Tract 1, Tract 2 and Tract 4 from the 1884 partition plat, Plaintiff's Exhibit 19, which now form the southeastern corner of the Plaintiff's tract, and the easement conveyed in Plaintiff's Exhibit 16 was for the purpose of giving those tracts now owned by the Plaintiff access to the public road.

36. That on December 21, 1926 when they signed the deed to Lura Mae Kinsland, Plaintiff's Exhibit 16, conveying Tracts 2 and 4 from the 1884 partition plat together with the rights of way to reach those lands which are now a part of the Plaintiff's tract, J. H. Miller and Ella T. Miller owned and through Plaintiff's Exhibit 16 conveyed to Kinsland, her heirs and assigns the right of way over the Defendant's tract described in the November 18, 1918 deed to Ossee M. Martin, Plaintiff's Exhibit 29, and later described on the deed to the Defendant's grandfather, Plaintiff's Exhibit 27.

37. I find by a preponderance of the evidence that the Plaintiff's Exhibit 16 conveyed the twenty (20) foot easement on the Defendant's 213 acre tract shown on the 2010 Bostick Plat, Plaintiff's Exhibit 22, and the easement over the Defendant's 64.68 acre tract shown on the 2012 Bostick Plat, Plaintiff's Exhibit 23, to Lura Mae Kinsland, the Plaintiff's predecessor in title, and expressly made both easements into appurtenances to pass by conveyance of Tracts 1, 2, and 4 from the 1884 partition plat which are now part of the Plaintiff's tract.

38. I find that both easements imposed on both of the Defendant's tracts flowed to the Plaintiff by and through the language "Together with all and singular, the rights, members, hereditaments, appurtenances to the said premises belonging or in anywise incident appertaining," which language is found in each deed in the Plaintiff's chain of title and which language was meant to convey the said easements, which were appurtenances to the Plaintiff's tract.

39. That at the time of the research of Shady Grove Road performed by Michael Mills in 2014, both easement deeds cited above were greater than sixty years old and therefore outside of the scope of a sixty year title search, which is the standard of practice for title searches in South

Carolina, although many real estate attorneys now use a forty year standard. This explains why Michael Mills testified that he did not discover an easement to Shady Grove Road.

40. I find by clear and convincing evidence that the Plaintiff and its predecessors in title used the disputed portion of the road in question for a period exceeding twenty (20) years.

41. I find by clear and convincing evidence that the use by the Plaintiff and its predecessors in title was continuous and uninterrupted for the full twenty (20) year period.

42. I find by clear and convincing evidence that the use by the Plaintiff and its predecessors in title was adverse to the rights of the Defendant.

43. I find by clear and convincing evidence that efforts by the Defendant and her predecessors in title to stop the adverse use of the road in question by erecting and locking a gate on the road failed. The Plaintiff produced numerous witnesses who testified that they used the road openly and notoriously in spite of the Defendant's efforts, and the Defendant's witnesses testified that adverse users were cutting the chain on the gate and installing their own locks.

44. I find by clear and convincing evidence that the Plaintiff's use of the road in question was under a claim of right, that the members of the limited liability company believed they had a right to use the road in question because it appeared prominently on the 2004 Gonzales Plat, Plaintiff's Exhibit 2, and because its predecessors in title maintained a lock on the gate and used the road whenever they needed to do so.

45. I find no evidence that the Defendant or her predecessors in title ever gave the Plaintiff or any of those using the road in question under the plaintiff or his predecessors in title permission to use the road. The only people who received permission to use the road from the Defendant or her father were her surveyor, her foresters, the members of Dunn's Mountain Hunt Club and

Santee Cooper; and in the end she withdrew her permission from the hunt club and Santee Cooper.

46. I find by clear and convincing evidence that the Plaintiff and its predecessors in title back to 1976 were business entities and a trust which could only use the disputed road in and through their employees, agents, foresters, timber crews, surveyors, real estate agents, and invited guest, who hunted and fished on the Plaintiff's tract together with members of hunt clubs who leased the hunting rights to the Plaintiff's tract and that these persons used the road in question with a frequency commensurate with the use of the property for hunting, fishing and, growing and harvesting timber. From 1976 to the present, no individual person has owned the Plaintiff's tract.

47. I find by clear and convincing evidence that the Plaintiff has proved the identity of the thing enjoyed, the road in question, from 1939 when it appeared on the South Carolina Department of Highways Map through the 2004 Gonzales Plat.

48. I find by clear and convincing evidence that the Plaintiff has proven the elements of an easement by prescription.

49. I find that the Defendant has failed to prove by clear and convincing evidence that she has adversely possessed the road for a ten (10) year period. The Plaintiff produced witnesses who testified to using the road adversely to the Defendant's interests within a ten (10) year period prior to the filing of the lawsuit.

CONCLUSIONS OF LAW

THE PRESCRIPTIVE EASEMENT

The prescriptive easement derives from the presumption of a lost grant. "It is enough if the use of the way cannot be reconciled with the right of the owner of the land otherwise than by supposing a license or grant, and in that case, if sufficient time has elapsed, the law presumes a grant." Craven v. Rose 3 S.C. 72 (1871). The law presumes from the use of the way by the claimant, that he must have a grant of an easement that has been lost.

In order to establish an easement by prescription, a party must show: (1) The continued and uninterrupted use or enjoyment of a right for a full period of Twenty (20) years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. Horry County v. Laychur, 315 S.C.364, 434 S.E.2d 259 (1993). Once a right of way by prescription has been established by 20 years of continuous use, a later diminishment in the frequency of that use does not necessarily nullify the established right by prescription. Culthbert v. Lawton 3 McCord 194 14 S.C.L.194 (Ct. App. 1825). "Furthermore, in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant." Jones v.Daley 363 S.C.310, 609 S.E.2d 597 (2005). "The element of continued use does not require the use thereof every day for statutory period, or even on a weekly or monthly basis; but simply the exercise of the right more or less frequently according to the nature of the use and the needs of the claimant." Jones v. Daley supra. The needs of the claimant in this case include only hunting sporadically, taking timber occasionally, showing the property for sale and surveying the property.

The standard of proof for establishing an easement by prescription is proof by clear and convincing evidence. Bundy v. Shirley 412 S.C. 292, 772 SE 2d 163 (2015). As to the twenty year use element, the Plaintiff produced testimony that members of the Plaintiff LLC, James Podell, and Claude Campbell used the disputed road to access their property before and after they acquired title to it on March 11, 2009. It produced testimony that Cecil Brazell had used the disputed road to hunt the property as an invited guest during the ownership period of Pine Ridge Investments LLC and that Harold Pickrel used the disputed road to show the property under the ownership period of Pine Ridge Investments LLC. It produced testimony that Angus Lafaye and Gordon Baker had used the disputed road to provide forestry services to both the Whitfield Company and Prospect Hill of Edisto Island during their ownership periods from 1999 to 2005. Also, Billy Cate used the disputed road to show the property during the Whitfield Company and Prospect Hill ownership periods. Mike Mills testified that he used the disputed road to survey the Plaintiff's tract in 2004. Also, Gordon Baker testified that timber harvests were conducted on the Plaintiff's tract during the Whitfield company period of ownership and the Prospect Hill period, and that the log trucks used the disputed road to hall the timber out. The Defendant's witnesses testified that the log trucks caused damage to the disputed road when the timber was cut on the tract now owned by the Plaintiff. Tim Dargan testified that he used the disputed road to provide forestry services to Robert J. Sheheen as Trustee of the Lloyd Trust. Mr. Dargan produced and distributed Plaintiff's Exhibit 38, which is an advertisement inviting potential buyers to use the disputed road to access the property and giving out the combination of the lock on the gate. Jamie Guy II testified that he used the disputed road to hunt the property now owned by the Plaintiff under a hunting lease that was in effect during the Lloyd and Lloyd Trust

ownership period from 1974 until 1999. Angus Lafaye testified that he used the disputed road to provide forestry services to the then owner of the land now owned by the Plaintiff from 1968 until 1969. Jamie Guy II testified that he has used the disputed road to access the property now owned by the Plaintiff and his property behind it continuously from the early 1950s until the filing of this lawsuit. Algie Campbell, W. D. Kirkland and Benny Higgins testified as to their use of the disputed road during the 1940s, 1950s, and 1960s. Claude Campbell testified that he had first used the disputed road to visit his uncle Fletcher Martin in 1939. In addition to the use witnesses as produced by the Plaintiff, the testimony of the defense witnesses, including the Defendant herself, that unauthorized locks had to be removed from the chain on the Defendant's gate from 1982 until 2009 proves adverse use by the owners of the unauthorized locks over a twenty year period.

A party may "tack" the period of use of prior owners in order to satisfy the twenty year requirement. Morrow v. Dyches 328 S. C. 522, 492 S. E. 2nd 420 (1997). I conclude as a matter of law that the owner can make use of the road through his agents, foresters, surveyors, realtors, timber crews, and hunters who hunted by invitation of the owner or as members of a hunting club that has leased the hunting rights to the property. In this case the property now owned by the Plaintiff has been owned by a trustee and various business entities since December 30, 1976, which entities must act through their agents, contractors, and lessees, and so forth.

I conclude as a matter of law that the Plaintiff has met his burden of proof as to use of the disputed road for a twenty year period.

I conclude as a matter of law that the Plaintiff has met his burden of proof as to the identity of the thing enjoyed by introducing the various plats, aerial photographs, and maps cited above in the paragraphs 13 and 14 of the Findings of Fact.

I conclude as a matter of law that the use of the disputed road by those using the road under the Plaintiff and its predecessors in title was adverse. "When the claimant has established that the use was open, notorious, continuous and uninterrupted, the use will be presumed to have been adverse." Kelley v. Synder 396 S. C. 564, 722 S. R. 2d 813 (2012). The Plaintiff's witnesses who testified as to the use of the disputed road generally used it to hunt, survey the Plaintiff's property, cruise timber, and cut timber, all of which are daytime activities. Many of them testified that their use was open and notorious. Most of them used motor vehicles. It is difficult to imagine a use of a dirt road more adverse than sending fully loaded log trucks down it as witness Gordon Baker described. Witness Tim Dargan put the combination of his lock on the gate in a sales flier and distributed it to potential purchasers. The lock cleaning testimony of the Defendant's hunt club witnesses showed that unauthorized users cut the chain on the Defendant's gate and installed unauthorized locks on the chain continually during the 1970s, 1980s, 1990s, and 2000s, so that periodic lock cleanings were necessary to remove the unauthorized locks. After each lock cleaning, the accumulation of unauthorized locks would start again, indicating that the adverse users simply ignored the efforts by the Defendant to restrict their use. The act of cutting the Defendant's chain and installing a lock not authorized by her is an act in defiance of the Defendant's right to control the road or her property, the quintessential adverse use, and according to the Defendant's witnesses, it went on all the time during the twenty year period prior to the filing of this lawsuit.

The Defendant asserts that the Plaintiff and its predecessors in title used the disputed road by permission granted by the Defendant and her predecessors in title, and that the use was permissive and not adverse. There is no evidence in the record that the Plaintiff or any of its witnesses ever received permission from the Defendant or her predecessors in title except witness Bennie Higgins and witness Jamie Guy II. Witness Bennie Higgins, who used the disputed road as a member of the public and was otherwise not associated with any owner of the Plaintiff's tract, testified that he obtained a key to a gate on the road from Wessinger (Transcript p. 180, line 20) in the 1970s. Gary Wessinger denies giving Higgins a key (Transcript p. 390, line 1). But if this key was given to Bennie Higgins it was while the gate across the disputed road was on the property of one Higgins, also leased by the hunt club before the gate was moved to the Defendant's property in 1982 according to Defendant's witness Gary Wessinger. Even if witness Higgins got a key to the gate he was not an owner of the Plaintiff's tract at the time, and the gate was not located on the Defendant's tract at that time. As to witness Jamie Guy II, the Defendant's witnesses associated with the Dunn's Mountain Hunt Club testified that Mr. Guy's lock was not removed from the Defendant's gate during the various lock cleanings because Mr. Guy had an arrangement with the Defendant's father to use the disputed road. Mr. Guy came back to testify in reply that no such arrangement existed, and that he never sought or received permission from the Defendant or her father to use the disputed road.

The Defendant cites the case of Bundy v. Shirley supra as authority for the proposition that the gates erected by the hunt club prove permissive use of the road. In that case Shirley, who was seeking to prove a prescriptive easement over the lands of Bundy, built a gate across the road on Bundy's property with Bundy's permission. The Supreme Court held that by going

to Bundy and obtaining permission to build the gate, Shirley acknowledged Bundy's right to control the use of the road, and the act of obtaining permission to build the gate rendered Shirley's use of the road permissive rather than adverse. Also in Bundy v. Shirley, Bundy's property had been leased to the State of South Carolina as game management lands under a program where the public was allowed to enter onto private property leased to the state to hunt and carry on other recreational activities during the twenty year use period. The Supreme Court expressed doubt as to whether Shirley's use of the road while the lands were open to the public constituted adverse use. Finally, during the game management lease, the South Carolina Department of Natural Resources erected a cable gate across the road. Shirley sought and obtained a key from the SCDNR game warden which he used to unlock the SCDNR gate and use the road. Obtaining the key from the game warden, the lessee of the owner Bowater was evidence of permissive use.

In this case, the Plaintiff had nothing to do with the construction or maintenance of the gates across the disputed roadway. The Defendant's property has never been leased to the state for use by the public. The Plaintiff has never obtained a key from the Defendant or any lessee of the Defendant. After the Defendant removed the Plaintiff's lock from her gate in 2009, the Plaintiff made several attempts to contact the Defendant to discuss the matter. When these efforts proved unsuccessful it ultimately filed this lawsuit. None of the facts that led the Supreme Court to conclude that Shirley's use of the road was permissive in Bundy V. Shirley supra are present in this case. Under Williamson v. Abbott 107 S.C. 397, 93 S. E. 15 (1917). "The asking and obtaining of permission" is necessary to stamp the character of the use as not having been adverse. In this case the Defendant and her predecessors in title erected a gate

across the disputed road, by all accounts refused to give the Plaintiff or the Plaintiff's predecessors in title permission to use the disputed road, and the Plaintiff and its predecessors in title continued to use the road whenever they needed to do so in spite of the gate. In order to support a finding of permissive use, the Defendant, a tenant of the Defendant, or someone claiming authority under the Defendant would first have to give permission to the Plaintiff or someone claiming under it to use the road or at least provide a key, which never happened in this case. Finally, the case of Craven v. Ross 3 S.C. 72 (1871) held that, "The way had been used for the required period over land enclosed and occupied by the defendant and during a portion of that time the plaintiff had, in order to use it, opened a gate placed by the defendant at the entrance of the land. It therefore followed that if the use was of the character stated in the evidence, it was necessarily adverse." In other words, continued use by the Plaintiff after the Defendant erects a gate on the road has been held to be evidence of adverse use.

A party claiming a prescriptive easement under a claim of right must demonstrate a substantial belief that he had the right to use the road based upon the totality of the circumstances. Hartley v. John Wesley United Methodist Church 355 S.C. 145, 584 S. E. 2d 386 (Ct. App. 2003). The law granting a prescriptive easement under claim of right does not mandate a party to believe that he holds actual title or that he plans to acquire it. Hartley v. John Wesley United Methodist Church, supra. James Podell testified that he believed that he had the right to use the disputed road because it was shown on the 2004 Mills plat, Plaintiff's Exhibit 2, that was used in drafting the deed to the Plaintiff and referred to it in the property description, based on statements made by his closing attorney in reference to the right to use the road at his closing, and based on the fact that he was able to use the disputed road to access his property

throughout the process of purchasing the Plaintiff's tract. Likewise, other witnesses produced by the Plaintiff who used the road under prior owners testified that they believed that they had the right to use the road because it had been used for a considerable time to access the Plaintiff's tract and because it had received public maintenance services in the past. I conclude as a matter of law that the Plaintiff has proved by clear and convincing evidence that the Plaintiff and its predecessors in title used the disputed road under a claim of right. I conclude as a matter of law that the Plaintiff has proved that it has a private prescriptive easement to use the disputed road across the lands of the Defendant to access the lands of the Plaintiff.

EASEMENT BY GRANT

The standard of proof applicable to establishing an easement by grant, has not been elevated to a higher standard of proof than the preponderance of the evidence standard applied generally in civil actions in South Carolina.

As a result of an 1885 partition suit, J. H. Miller became the owner of Tract D shown on the 1885 partition plat, Plaintiff's Exhibit 19, which became the greatest part of the Defendant's primary 213 acre tract, and the same J. H. Miller owned Tract 2 on Plaintiff's Exhibit 9, which became a portion of the Plaintiff's tract below Raglin Creek. Ella T. Miller, the wife of J. H. Miller, got Tract F and Tract 4 in the same partition suit, which later became a portion of the Plaintiff's tract. Mattie L. C. Desportes got Tract E, which became the Defendant's 64.68 acre tract, and Tract 1, which became the southeastern most portion of the Plaintiffs tract, all as shown on the 1884 plat, Plaintiff's Exhibit 19.

In 1918 J. H. Miller sold Tract D to one Ossee Martin, Plaintiff's Exhibit 29, but because he still owned Tract 2 and his wife, Ella, stilled owned Tracts F and 4, J. H. Miller was careful to

reserve for himself and his wife a twenty (20) foot easement through Tract D to provide access to Tract F, Tract 2 and Tract 4 that later became part of the Plaintiff's tract below Raglin Creek.

On December 21, 1926, J. H. Miller conveyed Tract 2, Ella T. Miller conveyed Tract 4, and Mattie L. C. Desportes conveyed Tract 1 from the 1884 partition plat to the Plaintiff's predecessor in title, Lura Mae Kinsland. In order to provide access to Tracts 1, 2, and 4, all of which are part of the Plaintiff's tract, the 1926 deed to Lura Mae Kinsland grants a right of way over the cart and wagon roads owned and controlled by the grantors, J. H. Miller, Ella T. Miller, and Mattie L. C. Desportes leading to and providing access to these tracts. At the time of the 1926 conveyance, Mattie L. C. Desportes stilled owned Tract E from the 1884 partition that later became the Defendant's 64.68 acre tract. J. H. Miller and Ella T. Miller owned in 1926 the twenty (20) foot right of way over Tract D, which is now the greater portion of 213 acre tract that had been reserved to them in the 1918 deed to Ossee Martin in order to provide access to the same Tracts 2 and 4 that they conveyed to Lura Mae Kinsland. In Plaintiff's Exhibit 16, the twenty (20) foot wide easement retained by J. H. Miller in his 1918 deed of Tract D to Ossee Martin, plus a right of way over Tract E, now the 64.68 acre Lewis tract owned by the Defendant, were granted with the stipulation that existing roads be used where possible. Plaintiff's Exhibit 16 conveys a twenty foot easement across both of the Defendant's tracts serving property that was to become the southeastern corner of the Plaintiff's tract, south of Raglin Creek in Richland County.

Also the 1926 Kinsland deed specifically provides that the rights of way conveyed by that deed were to become appurtenances to Tracts 1, 2, and 4' and pass by conveyance of said lands. Every deed from Lura Mae Kinsland to the Plaintiff in the chain of title conveying a portion of

Tracts 1, 2, and 4, included the language, "Together with all and singular, the rights, members, hereditaments and appurtenances to said premises belonging or in any wise incident or appertaining." This language comes directly from §27-7-10 *South Carolina Code of Laws Ann.*, which sets forth the statutory deed form drafted by the General Assembly. It is not meaningless or flowery language to impress the reader. It means that the conveyance of lands also includes appurtenances such as easements and rights of way that are necessary for the use and enjoyment of the land. In this case, the deeds in the Plaintiff's chain of title after the Lura Mae Kinsland deed, Plaintiff's Exhibit 16, conveyed the appurtenances from grantor to grantee, which included the easements and rights of way over the two tracts owned by the Defendant, which were necessary to provide access to these tracts. Therefore, I conclude as a matter of law that the Plaintiff has proved by a preponderance of the evidence that it has a twenty (20) foot wide easement by grant over the lands of the Defendant following the course of the only west to east road through the lands of the defendant to the lands of the Plaintiff, which is the disputed road. This is a private easement appurtenant in favor of the Plaintiff.

PUBLIC EASEMENT BY DEDICATION

Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Horry County v. Laychur 315 S.C. 364, 434 S. E 2d 259 (1993). Second, there must be within a reasonable time, an express or implied public acceptance of the property offered for dedication. Helsel v. City of North Myrtle Beach 307 S. C. 24, 413 S. E. 2d 821 (1992). Even though a land owner must positively and unmistakably express his or her intention to dedicate property, the intent to dedicate may be implied from allowing lengthy public use of the land. Cleland v. Westvaco

Corp. 314 S. C. 508, 431 S. E. 2d 264 (Ct. App. 1993). No formal acceptance of the land by a public authority is necessary to complete the dedication; acceptance may be implied by the public's continuous use of the property. Boyd v. Hyatt 294 S. C. 360, 364 S. E. 2d 478 (Ct. App. 1988). Acceptance of offer of dedication also may be recognized through a public authority's using, repairing or working the streets. Helsel v. City of North Myrtle Beach supra.

The public easement by dedication where the dedication is proved by the owner's acquiescence in public use and maintenance of the road, and the acceptance of the dedication is proved by public maintenance of the road, is similar to a prescriptive easement in favor of the public but the elements are not identical.

In a public dedication case, the twenty (20) year use period for use by the public does not apply. "Where there has been an intended dedication by the owner of the property, no specific duration of use is required to show acceptance. The sufficiency of the use depends on the circumstances of each case." Boyd v. Hyatt supra. (finding public use for 13 years sufficient evidence of acceptance by the public)

The standard of proof for a public dedication of a right of way is strict, cogent and convincing evidence. Mack v. Edens 320 S. C. 236, 464 S, E, 2d 124 (1995).

As to the manifest intent of the Defendant's and her predecessors in title to dedicate the disputed road for public use, the Plaintiff produced testimony that the disputed road was open to the public and used by members of the public having no association with the Plaintiff's property or the Defendant's property from 1944 until 1963 or 1964. Witnesses Campbell, Kirkland, and Higgins testified that the disputed road was well maintained by county road scrapers during this time period. "The roads were like a super highway back then," according to W. D. Kirkland

(Transcript p. 186). Witness Angus Lafaye testified that the county did maintenance on the disputed road when he did forestry work on the Plaintiff's tract in 1968 and 1969 when it was owned by Richard Lloyd. So the Plaintiff has satisfied the public dedication requirement by presenting the uncontroverted testimony of members of the public who used the disputed road for a lengthy period of time. The Plaintiff has satisfied the public acceptance of the dedication requirement by presenting testimony that the disputed road received regular public maintenance from 1944 until at least 1969. The Plaintiff also introduced the 1939 South Carolina Highway Department Map showing the disputed road as a public road.

The disputed portion of Northeast Shady Grove Road and the portion now maintained by Richland County appear to have been equally public rights of way from 1939 until 1969 in terms of public use and public maintenance. The General Assembly passed a statute requiring a legal action to be filed in order to abandon or close a public road in 1962 while the disputed road was still under county maintenance according to the testimony of the Plaintiff's witnesses. The Defendant's predecessors in title began erecting gates on the road in 1970, but they never filed the legal action required by §57-9-10 *South Carolina Code of Laws Ann.* Having failed to comply with the requirements of notice and due process mandated by the State in order to abandon a public road, the Defendant and her predecessors in title have failed to legally extinguish the public character of the road that it enjoyed in 1962 when §57-9-10 was enacted. Therefore I conclude as a matter of law that the disputed portion of Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's property line is a public road until the Defendant or Richland County complies with the applicable statute to close it.

STATUTE OF LIMITATIONS

The statute of limitations applicable to prescriptive easement actions is ten (10) years from the time the easement is obstructed. §15-3-340 *South Carolina Code of Laws Ann.* Bowen v. Team 6 Rich. 298, 40 S. C. L. 298 (1853). The ten (10) year statute under current §15-3-340 *South Carolina Code of Laws Ann.* is the only statute of limitations that has ever been used in a prescriptive easement case. §15-3-360 *South Carolina Code of Laws Ann.* has never been applied in a prescriptive easement case, and it cannot be applied to a claim for prescriptive easement because the Claimant in a prescriptive easement case is forced to rely on multiple entries on the servient estate which must occur at least twenty (20) years prior to the filing of the lawsuit. If he files the action within one (1) year of each entry upon which he relies he will never have twenty (20) years of continuous use when filing the suit.

ADVERSE POSSESSION OF THE EASEMENT BY DEFENDANT

The Defendant has not adversely possessed the easement over Shady Grove Road, because she has not obstructed the adverse use of the road for the full ten (10) year period required under the Statute of Limitations §15-3-340 *South Carolina Code of Laws Ann.* and the common law. Bowen v. Team supra. The Plaintiff produced testimony of witnesses James Podell, Claude Campbell, Lafaye, Baker, Cate, Pickrel, Cecil Brazell, Mac Brazell, Mills and Guy to prove use of the disputed road within ten (10) years of the filing of suit. Adverse possession is the same legal issue as the running of the Statute of Limitations since the cause of action for adverse possession is based on the running of the ten (10) year Statute of Limitations.

Evidence of adverse use of the road by the Plaintiff and others within ten (10) years of the filing of the action defeats the Defendant's claim of adverse possession.

CONCLUSION

In conclusion the Plaintiff has proved that the disputed road appears on maps, plats and aerial photographs dating back to 1939. It has received public maintenance in the past and use by the public. Those performing work, hunting and fishing under the Plaintiff and his predecessors in title have use the road to reach the Richland County side of the Plaintiff's tract South of Raglin Creek in spite of the gates erected by the Defendant and her predecessors in title for a period exceeding twenty years. The efforts by the Defendant to curtail such use by erecting gates, coupled with the stubborn determination of the Plaintiff and its predecessors to continue such use, establishes that the use was adverse. Finally, the deed to the Defendant's grandfather, E. F. Martin, Sr., imposes a twenty (20) foot easement on her property extending from west to east to provide access to the predecessors in title to the southeastern corner of the Plaintiff's tract, placing the Defendant on notice that she owes the Plaintiff access across her property to its lands lying south of Raglin Creek. The prescriptive easement is based on the theory of a lost grant, and in this case, the lost grant has turned up in the 1939 deed to E. F. Martin, Sr. and the 1926 deed to Lura Mae Kinsland. Considering all of these facts together, it is manifest that the Plaintiff is entitled to at least a private easement to use this road that has endured for seventy years, and has been used by the Plaintiff and its predecessors in title as the principal, if not the sole, access to that portion of the Plaintiff's property lying south of Raglin Creek in Richland County, which creek has obstructed access to this portion of the Plaintiff's property from U.S. Highway 601 for most of that seventy year period.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered:

1. That the Plaintiff has a private twenty (20) foot wide easement across the lands of the Defendant to use the disputed portion of Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's southern property line as shown on the 2004 Gonzales plat, Plaintiff's Exhibit 2. The Defendant is enjoined from obstructing the Plaintiff's use of the road by a locked gate or any other device. To the extent that the Defendant keeps a gate across said road, the Defendant is ordered to provide the Plaintiff with a means of opening the gate such as a key or combination to any lock on the gate within thirty (30) days of the signing of this order. This easement is appurtenant to the tract now owned by the Plaintiff and shall run with the land to the Plaintiff's successors and assigns; and

2. Northeast Shady Grove Road from the end of county maintenance sign to the Plaintiff's southern property line as shown on the 2004 Gonzales plat, Plaintiff's Exhibit 2, is declared to be a public road open to the public for use by the public, provided that Richland County is not required by this order to provide maintenance services to the portion of Northeast Shady Grove Road past its end of county maintenance sign. The Defendant is ordered to remove her gate from this road within thirty (30) days of the signing of this order.

AND IT IS SO ORDERED.

Joseph M. Strickland
Master in Equity for Richland County