

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM FAIRFIELD COUNTY  
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

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Case No. 2012-CP-20-401  
Appellate Case No. 2013-001386

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Carol Reid Smallwood, Barbara Reid Strickland, Ann Reid Hamlin,  
William L. Reid, III, Judith Lawrence Medlin,  
Frances Patterson Lawrence .....Appellants,

v.

Helen M. Lee, Linda Lee and Joe Lee, Jr., as Co-Trustees of the  
Joseph H. Lee, Sr. Family Trust U/W .....Respondents.

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REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities ..... ii  
Argument in Reply ..... 1

I. THE APPELLANTS HAVE FULLY SHOWN THAT THEY  
HAVE MET THE REQUIREMENT OF CONTINUAL USE  
IN THEIR ESTABLISHMENT OF A PRESCRIPTIVE EASEMENT  
ACROSS THE RESPONDENTS' PROPERTY ..... 1

II. THERE WERE NO OVERT ACTS THAT INTERRUPTED  
THE APPELLANTS' USE AND ENJOYMENT OF THE  
PRESCRIPTIVE EASEMENT ..... 2

III. THE APPELLANTS HAVE FULLY SHOWN THE IDENTITY  
OF THE THING ENJOYED ..... 3

IV. THE APPELLANTS' USE OF THE EASEMENT ACROSS THE  
RESPONDENTS' PROPERTY WAS CLEARLY THROUGH A  
CLAIM OF RIGHT ..... 4

V. THE APPELLANTS HAVE MET THEIR BURDEN OF PROOF  
IN ORDER TO TACK ONTO THEIR ANCESTORS' PREVIOUS  
USE OF THE EASEMENT ..... 5

Conclusion ..... 6

## ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in their opening brief, the appellants offer the following points of clarification and rebuttal to the arguments raised by the respondents.

### I. THE APPELLANTS HAVE FULLY SHOWN THAT THEY HAVE MET THE REQUIREMENT OF CONTINUAL USE IN THEIR ESTABLISHMENT OF A PRESCRIPTIVE EASEMENT ACROSS THE RESPONDENTS' PROPERTY.

To establish the continual use requirement, the use must be only of a reasonable frequency as determined from the nature and needs of the claimant. Jones v. Daley, 363 S.C. 310, 318, 609 S.E.2d 597, 601 (Ct. App. 2005) (quoting 25 Am.Jur.2d Easements and Licenses Section 68 (1996)). “ . . . [T]he element of continued use does not require the use thereof every day for the statutory period or even on a weekly or even 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.” Id.

The respondents argue that the appellants' reliance on Jones is misplaced, claiming that the case was remanded for findings on the element of continual use. While it is true that the case was remanded for such findings, the appellants note that in so doing, the Court gave specific instructions on what the trial court should look to in making its determination, those instructions being set forth in the preceding paragraph above. As another court stated many years ago, “a right of way means a right to pass over another's land more or less frequently according to the nature of the use to be made of the easement; and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass.” Bodfish v. Bodfish, 105 Mass. 317, 319 (1870); see also Restatement (Third) of Property Section 2.17 (1998) (“How much use is necessary to demonstrate the required consistency of purpose depends on the character of the dominant estate and the normal use that an

owner of the claimed servitude would make.”)

The respondents take the position that even if the appellants’ parcel is a landlocked timber tract, the access needs dictated by timber harvesting practices are simply not sufficient to satisfy the continual use requirement. No authority is cited for that position. The appellants submit that based on the law cited in the paragraph above, this is an incorrect interpretation of the law, as it would not be sensible to require visits to a timber parcel any more often than is necessary for the care and harvesting of the timber on the parcel.

As the appellants showed in their opening brief, they have fully documented that they have met the continual use requirement, through their use, through their predecessors’ in title use, and through the testimony of their forester, Thomas A. Patrick.

## II. THERE WERE NO OVERT ACTS THAT INTERRUPTED THE APPELLANTS’ USE AND ENJOYMENT OF THEIR PRESCRIPTIVE EASEMENT.

A servient owner can interrupt the prescriptive period by engaging in “overt acts, such as erecting physical barriers, which causes a discontinuance of the dominant landowner’s use in the land, no matter how brief. Pittman v. Lowther, 363 S.C. 47, 52, 610 S.E.2d 479, 481 (S.C. 2005). “In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period.” Id.

The respondents contend that the erection of a fence by Joe Lee, Sr. in 1992 interrupted the statutory period, as did Helen M. Lee’s refusal to allow passage for the appellants’ timber crews in 2010. As for the fence in 1992, the appellants show in their opening brief that Joe Lee, Sr. requested that the appellants’ forester, Thomas Patrick, alter the route because of cattle using the pasture,

which Mr. Patrick agreed to. R. p. 65, lines 3-11. Further, Mr. Lee provided a gate in the fence to ensure the appellants' agents could access their timber parcel. R. p. 84, lines 3-7. This was not a "physical barrier" intended to prevent access; it was merely intended to serve as an accommodation for Mr. Lee, which Mr. Patrick, as a personal friend, agreed to. Nor does any conversation between the two reach the level of a "verbal threat" envisioned by case law. See Pittman v. Lowther, 363 S.C. 47, 610 S.E.2d at 481 (verbal threats must convey to the dominant landowner the impression that the servient landowner does not acquiesce in the use of the land). Without revisiting the appellants' argument in their opening brief, Mr. Lee's actions or requests simply did not operate as overt acts to interrupt the statutory period (which the appellants contend had already run by that time).

Nor did the actions of Helen M. Lee in 2010. As was testified by Judith Medlin and William L. Reid, III, they personally traveled the easement in their younger years, back to the 1950's and 60's, in the company of their elders, their predecessors in title and documented the longevity of the use. Thus, once again, by Mrs. Lee refusing their access in 2010, such did not act to interrupt their use as the prescriptive easement was firmly in place at that time.

### III. THE APPELLANTS HAVE FULLY SHOWN THE IDENTITY OF THE THING ENJOYED.

In response to the respondents' brief, the appellants maintain that they have fully and substantially identified the easement that has been used to access their timber parcel for many years. The easement was not only verbally identified through testimony but also through reference to aerial photographs, R. p. 152-155, which were introduced at trial. The respondents' reference to testimony of Thomas Patrick is of no assistance, as those passages merely discuss the original, disputed easement and the temporary transition to the 1992 route requested by Joe Lee, Sr. The appellants

submit that the evidence submitted at trial is more than sufficient to identify the easement enjoyed by the appellants and their predecessors in title since 1912.

IV. THE APPELLANTS USE OF THE EASEMENT ACROSS THE RESPONDENTS' PROPERTY WAS CLEARLY THROUGH A CLAIM OF RIGHT.

A party claiming a prescriptive easement under a claim of right must show a substantial belief that he had the right to use the property based on the totality of circumstances surrounding his use. Paine Gayle Properties, LLC v. CSX Transportation, Inc., 400 S.C. 568, 583-84, 735 S.E.2d 528, 536-37 (Ct. App. 2012). This "claim of right of right is without recognition of the rights of the owner of the servient estate." Id. at 584, 735 S.E.2d at 537. The asking of permission stamps the character of the use as not having been under a claim of right, and therefore as lacking that essential element which is necessary for it to ripen into a right by prescription. Id.

The respondents claim that appellant Judith Medlin testified that she remembered family members asking for permission to cross the respondents' property. As recounted in the appellants' opening brief, her testimony was as follows:

“Q. Do you remember any of your family members asking for permission?

A. Yes.

Q. Who asked for permission?

A. Well, I personally called Miss Lee in recent years to not really ask permission but to say we have the right to cross your property. I did not ask for permission. I was asking - - I was telling her that we needed to thin our timber and we needed to come through.”

R. p. 39, lines 24-25 - p. 40, lines 1-7.

It is evident that Ms. Medlin corrected and clarified her statement regarding permission. She did not ask for permission but informed Ms. Lee that it was time for timber operations and they needed to use their easement.

The respondents next state that even if permission was not requested, “asking Lee to acknowledge their right to cross the property demonstrates recognition of the rights of the Respondents. Because the Respondents have have [sic] demonstrated such recognition, their use of the Respondents’ property cannot have been under claim of right.” Respondents’ Brief at 10. The respondents cite no law for this proposition and it seems to demonstrate circular reasoning. The theory that when one intends to use an easement under a claim of right, and when the servient landowner resists the use, informing the servient landowner that she would like the right acknowledged, somehow negates the claim of right does not represent sound logic.

The respondents also claim that when appellant William L. Reid, III used the easement and stopped by the residence to let Ms. Lee know he was coming through, this equated to permissive use. This was simply a common courtesy that certainly does not operate to extinguish his claim of right to the easement. It is not consistent with permissive use; it is consistent with being friendly and respectful to another and does not erase his claim of right.

The appellants have demonstrated their claim of right to use the easement, as is fully explained in their opening brief, notwithstanding the respondents’ arguments.

#### V. THE APPELLANTS HAVE MET THEIR BURDEN OF PROOF IN ORDER TO TACK ONTO THEIR ANCESTORS’ PREVIOUS USE OF THE EASEMENT.

Parties may tack to the period of the prior owners to satisfy the twenty year prescriptive easement period if the prior owners are in privity and the prior owners’ use was adverse or under a claim of right. Kelley v. Snyder, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct. App. 2012). The respondents state that “[t]here was no evidence presented at trial that the previous owners of the Reid property used the Lee property for access on dates sufficient to establish continued and uninterrupted

use for a full period of twenty years.” Respondents’ Brief at 10-11. It does not appear that the respondents contest that the appellants are in privity with their ancestors, their predecessors in ownership. They are contesting that the previous owners used the easement under a claim of right.

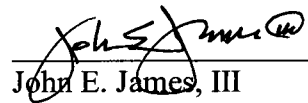
First, while the full period of the previous owners’ twenty years use has been proven in this case through testimony, to claim a right it is not required that one must meet the continued and uninterrupted use for a full period of twenty years. Testimony from both Judith Medlin and William L. Reid, III, as set forth in the appellants opening brief illustrates their predecessors claim of right. Appellants’ Brief at 8-9. Moreover, Thomas Patrick testified that when he was retained to act as the previous generation’s forestry consultant, one of the owners at the time instructed him to access the property using the easement that is being disputed at this time. R. p. 89, lines 11-19. This clearly illustrates that the appellants’ predecessors claimed a right to the easement.

Finally, the respondents state that “[w]hen asked if he knew if his father ever spoke to any of the Lee’s about coming across their property Reid said, ‘I would assume he would be respectful and let them know he was coming across.’ “ Respondents’ Brief at 11. The respondents seem to posit that this statement shows that the appellants’ ancestors did not claim a right to use the easement. Again, common courtesies simply do not operate to negate a claim of right.

#### CONCLUSION

For these reasons, as well as those addressed in the appellants’ opening brief to this Court, the trial court’s ruling must be reversed.

Respectfully submitted.



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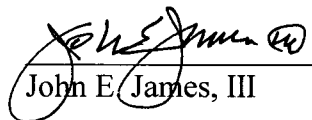
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CERTIFICATE

I certify that the Reply Brief filed on behalf of the Appellants complies with Rule 211 (b),  
South Carolina Rules of Appellate Procedure.

  
John E. James, III

December 2, 2013