THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 28 2019
S.C. SUPREME COURT

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Appellate Case No. 2016-001004

Heather Rousey Piper, Plaintiff,

v.

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

Of Whom Kerry Grissinger and Paul E. Lesondak are the Appellants,

and Of Whom Heather Rousey Piper is the Respondent.

FINAL BRIEF OF RESPONDENT, HEATHER ROUSEY PIPER

Jessica Clancy Crowson, Esq. SC Bar No.: 68626
Christopher L. Boguski, Esq. SC Bar No.: 100546
Rogers Lewis Jackson Mann & Quinn, LLC
1330 Lady Street Suite 400
Columbia, SC 29201
(803) 978-2832
Attorneys for Respondent

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. 2016-001004

Heather Rousey Piper, Plaintiff,

v.

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

Of Whom Kerry Grissinger and Paul E. Lesondak are the Appellants,

and Of Whom Heather Rousey Piper is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Jessica Clancy Crowson, Esq. SC Bar No. 68626
Christopher L. Boguski, Esq. SC Bar No.: 100546
Rogers Lewis Jackson Mann & Quinn, LLC
1330 Lady Street Suite 400
Columbia, SC 29201
(803) 978-2832
Attorneys for Respondent

May 23, 2017

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it ordered that an easement be granted to Respondent over that certain means of access referred to as the "Gandy Easement".

STATEMENT OF THE CASE

This is an appeal by the Appellants, Kerry Grissinger and Paul E. Lesondak (hereinafter, "**Grissinger**" and "**Lesondak**", or, collectively "**Appellants**"), which relates to an Order dated May 3, 2016 and filed May 9, 2016, granting to the Respondent, Heather Rousey Piper (hereinafter, "**Piper**" or "**Respondent**"[1]), an easement allowing access to her property.

This action was instituted by Piper through the filing of her Summons, Complaint, and Lis Pendens in Chester County, on January 20, 2015 (the "Complaint"). In her Complaint, Piper sought a declaratory judgment that she was entitled to an easement to her landlocked property located in Chester County, South Carolina, bearing TMS Number 080-03-04-010-000, (the "Landlocked Piper Parcel"). In the underlying action, Piper named as a Defendant Kerry Grissinger ("Grissinger"), owner of that certain piece of real property located in Chester County, South Carolina with TMS Number 080-03-04-009-000, which borders the Landlocked Piper Parcel (the "Grissinger Parcel"); William P. Hardee ("Hardee"), owner of that certain piece of real property located in Chester County, South Carolina with TMS Number 080-03-04-007-000, which borders the Landlocked Piper Parcel (the "Hardee Parcel"); and Defendant Paul E. Lesondak ("Lesondak"), owner of that certain piece of real property located in Chester County, South Carolina with TMS Number 080-03-04-008-000, which borders the Landlocked Piper Parcel (the "Lesondak Parcel").

On February 7, 2015, Defendant William P. Hardee filed an answer, *pro se*, which stated, in part, that Piper was entitled to an easement to her property. Mr. Hardee has not appealed the

[1] Appellants refer to Piper as "Rousey" in their Initial Brief.

Order of the trial court. On March 9, 2015, the Appellants filed an answer, *pro se*, generally denying any relief sought by Piper. Thereafter, on June 26, 2015, through counsel John Martin Foster, Appellants filed a Motion to Amend. Attached to this Motion was Appellants' Amended Answer and Counterclaims which sought, in part, punitive damages for trespass. The Appellants were not successful on their claim of trespass at trial, have not appealed their claim for such, and it is thus not discussed herein. On August 21, 2015, Piper filed her Answer to Respondents' Counterclaims.

A non-jury trial of the underlying matter was held on March 14 and 15, 2016 before the Honorable Paul Burch. On March 15, counsel for Piper, Jessica Crowson, counsel for Appellants, John Martin Foster, and Judge Burch conducted a site visit of the properties of the Parties. The sole issue at trial was to determine where Piper's easement to the Landlocked Piper Parcel is located. There was no dispute as to whether Piper was entitled to an easement. (R. p. 54, lines 9-18, p. 55, lines 4-8). Subsequent to trial, an Order was issued by the Court and filed on May 6, 2016, which found that Piper was entitled to an easement for ingress and egress, fifteen (15) feet in width, along that path known as the "Gandy Easement"[2].

Appellants filed their Notice of Appeal on May 20, 2016. Appellants served the Respondent with their Designation of Matter to be Included On Appeal and its Initial Brief of Appellant on December 20, 2016.

STATEMENT OF THE FACTS

At trial, the parties did not dispute the history of the parcels owned by the parties to this action. Respondent Heather Rousey Piper acquired the Landlocked Piper Parcel from her parents subsequent to her marriage around 2014. (R. pp. 56-57, p. 64). Piper's parents acquired the

[2] Appellants refer to this easement in their Initial Brief as the "Lesondak Easement". Throughout this Brief, Piper will use the term "Gandy Easement" as that is the term used in the trial court's Order and at trial.

Landlocked Piper Parcel from a prior owner, a Ms. Marie Gandy, in 2012. (R. pp. 70-71, p. 166). Piper presented multiple pictures showing the route known as the Current Easement and the Gandy Easement, while also showing the items and vegetation blocking the purported Hardee Easement. (R. pp. 75-90, pp. 283-324). While the Landlocked Piper Parcel abuts her parents' property, the Landlocked Piper Parcel is not and has never been accessible from Piper's parents' parcel. (R. p. 70, 105, 80). Following the testimony, the Parties agreed that they would visit the properties of the Parties. (R. p. 272).

During the trial, the Parties were questioned by Appellants' counsel about their contentious interactions with each other. This testimony, however, only went to show that a dispute existed between the Parties and did not provide any substantive information as to the existence, use, or non-use of the purported easements and thus, it is not included herewith.

History of Title

To establish the history of the parcels and to show the location of the prior routes of access as they appeared on recorded documents, counsel for Respondent entered certain plats and other instruments into evidence:

1. A conveyance of 4.25 acres by Andrew J. Taylor to T. C. Taylor, as grantee, dated November 19, 1951 and recorded in the Official Records of Chester County, South Carolina in Deed Book 371, at Page 79, on November 19, 1951, severing title and transferring the land that is now or substantially similar to the parcel of land known as the Hardee Parcel. (R. p. 97, pp. 338-340).
2. A conveyance of 4.90 acres by Andrew J. Taylor to Lucille T. Severance, as grantee, dated November 19, 1951 and recorded in the Official Records of Chester County, South Carolina in Deed Book 371, at Page 95, on November 24, 1951,

transferring a portion of the land that is now known as the Lesondak Parcel. (R. pp. 97-98, pp. 341-343).

3. A conveyance of 4.65 acres by Andrew J. Taylor to Zelma Taylor Miller, as grantee, dated October 18, 1952 and recorded in the Official Records of Chester County, South Carolina in Deed Book 373, at Page 92, on November 3, 1952, severing title and transferring the land that is now or substantially similar to the parcel of land known as the Landlocked Piper Parcel. (R. p. 99, 100, pp. 347-349).
4. A Deed of Distribution dated October 3, 1997 and recorded in the Official Records of Chester County, South Carolina in Deed Book 724, at Page 176, on October 7, 1997, and referencing Severance Drive as a "common roadway". (R. p. 98, 99, pp. 344-346).

Additionally, Piper testified that the following plats (collectively, the "Taylor Plats") all reference and depict a common roadway or driveway referred to as "Severance Drive":

1. A Plat dated November 15, 1951;
2. A Plat dated November 16, 1951; and
3. A Plat dated November 27, 1951. (R. pp. 92-93, pp. 325-330).

Piper additionally testified that Plaintiff's Exhibit G, a Plat from 2012, depicted the house previously located on the Landlocked Piper Parcel, as well as a gravel driveway showing the "Current Easement". (R. p. 94). Furthermore, Piper testified that Plaintiff's Exhibit H, a Plat from 1988, showed the Gandy Easement, this route of access being labeled as a dirt drive. (R. p. 95). Piper also testified the Gandy Easement was depicted on Plaintiff's Exhibit I. (R. p. 96).

Use of the "Current Easement"

Currently, to access the Landlocked Piper Parcel, Piper exits Highway 321 (also known as Columbia Avenue) and turns onto a gravel roadway called Severance Drive. (R. p. 60). The Landlocked Piper Parcel has an address of 840 Severance Drive, and is generally located at the end of the gravel roadway which extends partially into the Lesondak Parcel and was maintained by the County of Chester up until a few years ago. (R. p. 56, pp. 62-63, p. 193). Piper then proceeds to her property by driving down Severance Drive and between the houses of Lesondak and Grissinger. (R. p. 63, pp. 279-280). This means of access was referred to as the "Current Easement" in the trial court's Order. At some point after Piper acquired the Landlocked Piper Parcel, she added gravel to the entrance of her property. The Parties contest whether this gravel extends past the Landlocked Piper Parcel and into the Lesondak Parcel or Grissinger Parcel. (R. p. 116, 127, 211). The "Current Easement" is currently passable with a car and Grissinger and Lesondak are aware that this is the route currently used by Piper to access the Landlocked Piper Parcel. (R. pp. 81-82, p. 218, 228, pp. 251-252).

Use of the "Gandy Easement"

Piper, 36 years old at the time of the trial, has lived near the Landlocked Piper Parcel since her childhood and indicated that the Severances and the Gandys were the families that historically owned the parcels which now comprise the land owned by the Parties to this action. (R. p. 65, 67, 100, 106). Specifically, the prior owner immediately before Piper's parents, Ms. Gandy, lived in a house that was located on what is now the Landlocked Piper Parcel. (R. p. 94, 166). At the trial, Piper and her father testified that Ms. Gandy and her relatives started living on the Landlocked Piper Parcel "many years ago", likely beginning in the 1960s. (R. p. 69, 166).

Piper, her father Dennis Rousey, and her mother Rosemary Rousey, all testified that Ms. Gandy accessed her house by passing along the left side of what is now Lesondak's house. (R. pp. 65-68, p. 170, 201, pp. 281-282). Dennis Rousey additionally testified that in the approximately forty-plus years that he has lived on his property (which abuts the Landlocked Piper Parcel), all prior and current owners of the Landlocked Piper Parcel, himself included, have used the Gandy Easement for access to the Gandy property (now the Landlocked Piper Parcel). (R. pp. 167-171). When Dennis Rousey purchased the Landlocked Piper Parcel in 2012, he bought this parcel knowing that the Gandy Easement existed. (R. p. 180, lines 13-25). With this existence in mind, Dennis Rousey purchased the Landlocked Piper Parcel with the belief that he was also acquiring the Gandy Easement and the right to use such easement for access to the Landlocked Piper Parcel. (R. p. 181, lines 10-14). Dennis Rousey stated that he believed he had obtained a right to use the Gandy Easement, and that he intended to and believed he had transferred the right to use the Gandy Easement to his daughter, Heather Piper, upon the transfer of the Landlocked Piper Parcel to her. (R. p. 182).

In regard to prior use of the Gandy Easement, Piper's parents testified that Ms. Gandy's house on the Landlocked Piper Parcel was used after Ms. Gandy moved out by Ms. Gandy's relatives and subsequently rented, and that during its occupancy the house was always accessed by the Gandy Easement by all such residents. (R. pp. 196-197, pp. 201-203). William Severance Lee, the grandson of Ms. Gandy, who grew up on this property, testified that when he lived with his grandmother, Ms. Gandy, in 1972 through 1976, the Landlocked Piper Parcel was accessed by prior owners[3] using the Gandy Easement. (R. p. 151, 155, 156). Mr. Lee, sixty-two years old at the time of the trial, testified that during his entire life, the only means of access to the Landlocked

[3] Specifically, Zelma T. Miller and later her brother, T. C. Taylor. Ms. Gandy inherited the property from her deceased husband (R. p. 157, 160).

Piper Parcel has been through the Gandy Easement. (R. p. 156). Mr. Lee stated that he had traveled the Gandy Easement "hundreds of times" to get the Landlocked Piper Parcel and that other members of his family[4] used this route as well. (R. p. 158, lines 14-20, pp. 157-161). Mr. Lee further testified that the Gandy Easement was used by other residents who later lived in Ms. Gandy's house on the Landlocked Piper Parcel. (R. pp. 160-161). Additionally, Mr. Lee testified that the Gandy Easement was the only means of access of which he was aware that would allow access to the Landlocked Piper Parcel. (R. pp. 155-156). This testimony was echoed by Grissinger who testified that after moving into the house on the Grissinger Parcel in 1996, he observed people traveling to the Landlocked Piper Parcel via the Gandy Easement. (R. p. 214).

At some point before Piper's parents acquired the Landlocked Piper Parcel, a prior owner of the Lesondak Parcel, Sam Austin, added an extension to the existing house on the Lesondak Parcel, building this extension within a few feet of the Gandy Easement. (R. p. 113, 243). Despite this addition, the Gandy Easement has remained passable and is still in use. (R. p. 82, pp. 243-244). Mr. Austin testified that he was aware of an existing "driveway" and easement running next to the house—the Gandy Easement. (R. p. 239, 240, 243, pp. 261-262, p. 265). Mr. Austin further testified that he attempted to reroute Severance Drive; however, his testimony seems to indicate that this "rerouting" resulted in what is now the Current Easement. (R. pp. 241-242, p. 245).

Piper testified that she was unaware of any other way Ms. Gandy accessed the Landlocked Piper Parcel, other than the Gandy Easement, and that the same has remained open and usable for "many years". (R. p. 71, pp. 82-83). Furthermore, upon questioning by Piper's counsel, it appeared that Grissinger had used the Gandy Easement to access the landlocked, and otherwise inaccessible, Grissinger Parcel shortly after moving onto the Grissinger Parcel in 1996[5]. (R. pp. 237-238).

---

[4] Aunt and uncle, grandmother, and other family members.

[5] Grissinger testified that he has lived in his house for twenty years (R. p. 224).

At trial, there was also testimony from the Parties regarding obstructions recently placed in the Gandy Easement. While the parties may dispute the actual timeline[6] of when objects were placed in the Gandy Easement, Piper testified that Lesondak placed certain objects, including logs, in the area of the Gandy Easement after Piper filed her Complaint. (R. p. 84, 89, 254). Additional confrontations have occurred between the Parties; however, no other permanent objects[7] have been placed in either the Gandy Easement or the Current Easement. At the time of trial, the Gandy Easement was passable with a car. (R. p. 82).

Existence of the "Hardee Easement"

Piper additionally testified that Severance Drive appears on certain instruments and appears to continue along the left side of Grissinger's House, bordering the Hardee Parcel. (R. pp. 71-72). In the Order, this route was referred to as the "Hardee Easement". The Parties did not dispute that this area is currently wooded, such trees preventing passage through this area. (R. p. 118, 195, 225). The testimony at trial was that the Hardee Easement has never been used as a means of access to the Landlocked Piper Parcel by Piper, Piper's parents, or any prior owners of the Landlocked Piper Parcel, including Ms. Gandy. (R. p. 71, lines 10-25, p. 204, lines 14-25).

Rosemary Rousey testified that the alleged Hardee Easement has never been cleared, thereby never allowing access to the Landlocked Piper Parcel. (R., p. 205, lines 2-6). The Parties also testified that Grissinger has placed certain items, such as a utility building, a trailer, and a Land Cruiser, near the left side of his house. (R. p. 72, 175, pp. 223-224). These items prohibit passage through the purported Hardee Easement. (R. p. 73, 79, lines 15-25, p. 80, p. 81, lines 1-4). Grissinger testified, however, that these items are not within the right-of-way, contrary to

[6] Lesondak testified that he placed the logs "about a year ago" from the time of the trial, which would be roughly March 2015, (R. p. 254); the Complaint was filed January 20, 2015.

[7] The testimony of the Parties indicated that at certain times vehicles may be parked on or near the Original Easement (R. p. 109, 125).

recorded surveys, but did concede these items must be moved to facilitate access if this route were to be used. (R. p. 224, 231). When questioned by the Court about Grissinger's knowledge of any prior use of the Hardee Easement, Grissinger could not establish that this route had ever been used. (R. pp. 233-234).

ARGUMENTS

The Appellants did not properly preserve the issues raised in their Initial Brief for appellate review. Even assuming, *arguendo*, that the Appellants did properly preserve any issues raised in their Initial Brief, which Respondent contends they did not, Piper has shown that she has an easement to the Landlocked Piper Parcel—known as the Gandy Easement—through an easement implied by prior use, a prescriptive easement, or an easement by necessity.

Therefore, this Court should deny Appellants' request to vacate the trial court's Order dated May 2, 2016, should not remand this action for further proceeding, and should affirm the trial court's Order.

Standard of Review

"An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription." Kelly v. Snyder, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012). An action to determine the scope or extent of an easement is a question in equity. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). However, "[t]he 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." Pittman v. Lowther, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005) (emphasis added). The termination of an easement by abandonment is a factual question in an action at law. Eldridge v. City of Greenwood, 331 S.C. 398, 417, 503 S.E.2d 191, 201 (Ct. App. 1998). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge

will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

Here, the Appellants appear to dispute the lower Court's ruling that Piper shall be entitled to an easement along the Gandy Easement. Given that the Parties dispute whether the existence of this particular easement is the most reasonable means of access to the Landlocked Piper Parcel, the appropriate scope of review for the instant proceeding is that of a factual question in an action at law, subject to an any evidence standard. Eldridge, 331 S.C. 398, 503 S.E.2d 191.

i. **The Appellants did not properly preserve the issues raised in their Initial Brief for appellate review.**

As an initial matter, the Appellants did not properly preserve the issues raised in their Initial Brief for appellate review.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The record must show that an issue has been properly raised to the lower court. *See* York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726 (1997) (an objection made during an off-the record conference which is not made part of the record does not preserve the question for review). Furthermore, the lower court must rule upon the issue for it to be preserved on review. Tupper, 326 S.C. 318, 487 S.E.2d 187.

In the present case, Appellants present the issues of whether Piper established that she had an easement implied by prior use, a prescriptive easement, or an easement by necessity. Appellants question whether Piper established the necessary elements at trial, and Appellants base their appeal on these allegations. The recitation of these elements is misleading; however, as the basis of Appellants' appeal is Appellants' dissatisfaction with the particular easement found to exist by the

trial court. Still, in their Initial Brief, Appellants state that no evidence was presented to show that Piper has an easement by implied prior use or a prescriptive easement. (Appellants Brief, p. 3-4). Appellants then state that the easement granted by the trial court in the Order should not have been granted, stating that alternate routes to the Landlocked Piper Parcel exist, but do not specifically deny that Piper is entitled to an easement by necessity. (Appellants Brief, p. 4-5). At trial, however, counsel for Appellants did not raise these issues to the trial court. As such, these issues were neither raised to nor ruled on by the trial court, resulting in issues that are not properly preserved for appeal or properly before this Court.

Furthermore, the Order makes no ruling as to whether Piper was entitled to an easement implied by prior use, a prescriptive easement, or an easement by necessity. Instead, the Order simply states that the trial court was asked to determine the location of an easement to the Landlocked Piper Parcel and that based upon the filed pleadings, testimony, trial exhibits, and site visit to the applicable properties, the Court found that the means of access referred to as the "Gandy Easement" was the most appropriate means of access. (R. p. 2) The Order makes no reference to the elements of an easement implied by prior use, a prescriptive easement, or an easement by necessity. Counsel for Respondents made no post-trial motions challenging this Order or seeking to clarify that the elements of the stated easements were not met.

Simply put, Appellants are dissatisfied with the trial court Order granting Piper access via the Gandy Easement and have attempted to base this appeal on issues that were never raised to or ruled upon by the trial court. Thus, it is improper for this Court to consider whether Piper has established an easement implied by prior use, a prescriptive easement, or an easement by necessity as these issues have not been raised by Appellant at the trial or ruled on by the trial Court.

As such, and for the reasons stated above, Appellants did not properly preserve the issues raised in their Initial Brief for appellate review and this Court should deny Appellants' appeal. The foregoing notwithstanding, should this Court find the issues raised by Appellants to be properly preserved, in an abundance of caution, we shall address these issues individually as well.

ii. **Respondent has established she is entitled to an easement implied by prior use.**

At trial, Piper established that she is entitled to an easement implied by prior use. In order to establish an easement implied by prior use, the party claiming the easement must establish the following seven[8] elements: "(1) unity of title; (2) severance of title; [3] the prior use was in existence at the time of unity of title; [4] the prior use was not merely temporary or casual; [5] the prior use was apparent or known to the parties; [6] the prior use was necessary in that there could be no other reasonable mode of enjoying the dominant tenement without the prior use; and [7] the common grantor indicated an intent to continue the prior use after severance of title." Boyd v. Bellsouth Telephone Telegraph Co., 369 S.C. 410, 417, 633 S.E.2d 136, 139 (2006).

To establish an easement implied by prior use, necessity means "that there could be no other reasonable mode of enjoying the dominant tenement without this easement". Crosland v. Rogers, 32 S.C. 130, 10 S.E. 874, 875 (1890). An easement implied by prior use can be determined from a reasonable inference of what the original landowners intended. 25 Am. Jur. 2d Easements and Licenses § 22. "While the necessity elements for the two types of easements obviously are similar, the need required for an easement by prior use may be less than required for an easement by necessity." Boyd, 369 S.C. at 421, 633 S.E.2d at 141; *see* Russakoff v. Scruggs, 241 Va. 135, 400 S.E.2d 529, 533 (1991) (easement implied by prior use "requires a showing of need which, by definition, may be less than that required for establishing an easement by necessity, but must be

[8] An Easement Implied by Prior Use is shown by seven elements; however, the Boyd court's opinion incorrectly numbered the factors.

something more than simple convenience"). "An easement implied by prior use will not be extinguished if the easement is no longer necessary." Boyd, 369 S.C. at 420, 633 S.E.2d at 141. Easements by prior use are implied by law. Clemson Univ. v. First Provident Corp., 260 S.C. 640, 652, 197 S.E.2d 914, 919 (1973).

In their Initial Brief, Appellants state that Piper did not show that the Gandy Easement (Lesondak Easement) or the Current Easement (Grissinger Easement[9]) were in existence when the title to the tracts was severed or that use of either easement was continuous. In support of this, Appellants cite to only three criteria for the establishment of an easement implied by prior use, which was not the seven-factor test used by the Boyd court, as stated herein. (Appellants' Brief, p. 3-4). During the trial, however, Piper established all seven necessary elements set forth in Boyd required for the establishment of an easement implied by prior use through the means of access provided by the Gandy Easement. Piper testified regarding the (1) unity of title owned by Andrew J. Taylor; (2) the subsequent conveyances by Andrew J. Taylor severing unity of title and rendering the Landlocked Piper Parcel and the Grissinger Parcel landlocked[10]; (3) that prior owners of the Landlocked Piper Parcel, the Millers and Ms. Gandy, both used the Gandy Easement to access the home originally located on the Landlocked Piper Parcel; (4) the prior use was not merely temporary or casual in that it was the only way used by prior owners and renters to access the Landlocked Piper Parcel from the 1960s until present; (5) the prior use was known and apparent to the parties (specifically, Piper's parents and Mr. William Severance Lee were aware of historical use by Ms. Miller and Ms. Gandy, and Grissinger and Lesondak are aware of Piper's current use); (6) that the Landlocked Piper Parcel is not accessible by other methods other than the Gandy

[9] Appellants use this term for the easement referred to as the "Current Easement" in the trial court's Order.
[10] The Appellants state that the "evidence in this matter makes clear the former unity of title of the tracts in question, and their severance." Appellants' Brief, p. 5.

Easement (or the Current Easement); and (7) that the common grantor, Andrew J. Taylor, intended that the grantees continue to access the Landlocked Piper Parcel through the Gandy Easement, as indicated in the language of the instruments presented at trial. Boyd, 369 S.C. at 417, 633 S.E.2d at 139.

Here, there can be no dispute that the record contains the required elements to find Piper has established an easement implied by prior use via the Gandy Easement. As such, this Court should uphold the ruling of the trial court, establishing that Piper has access as provided by the Gandy Easement.

iii. **Respondent has established she is entitled to a prescriptive easement.**

Additionally, Piper established that she is entitled to a prescriptive easement. In order to show that she has a prescriptive easement, Piper demonstrated at trial that the following prerequisites have been met: "(1) the continued and uninterrupted use or enjoyment of the right for a period of 20 years; (2) the identity of the thing enjoyed; and (3) the use must be adverse under claim of right." County of Darlington v. Perkins, 269 S.C. 572, 576, 239 S.E.2d 69, 70 (1977). "A party may 'tack' the period of use of prior owners in order to satisfy the 20-year requirement." Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997). "When the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." Boyd, 369 S.C. at 419, 633 S.E.2d at 141 (citing Poole v. Edwards, 197 S.C. 280, 283, 15 S.E.2d 349, 350 (1941)). A prescriptive easement is established by the conduct of the dominant tenement owner. Id. However, a servient landowner's overt actions may interrupt the prescriptive period if they cause a discontinuance of the dominant landowner's use. Pittman, 363 S.C. at 52, 610 S.E.2d at 481.

Subsequent to the entry of the Order granting Piper the access provided by the Gandy Easement, the South Carolina Supreme Court clarified the third element "adverse or under a claim of right." Simmons v. Berkeley Elec. Coop., Inc., Op. No. 2013-001477 (S.C. Sup. Ct. filed Nov. 2, 2016) ("the third element of a prescriptive easement should be interpreted as requiring the claimant's use be adverse or, in other words, under a claim of right contrary to the rights of the true property owner"). With such clarification for the third requirement, the Simmons Court restated the test for a prescriptive easement to be as follows: "the claimant must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years." Id. Specifically, the Court stated that adverse use and claim of right cannot exist as separate methods of proving the third element of a prescriptive easement as the two terms are, in effect, one and the same." Id.

In their Brief, Appellants argue that no evidence was presented that would show use of the "Current Easement" prior to Piper's parents' purchase of the property in 2012. (Appellants' Brief, p. 4). While Appellants do not seem to take issue with the establishment of a twenty-year period of use for the Gandy Easement, it was clear at trial that Piper established that both the Gandy Easement and the Current Easement have been used for a period exceeding twenty years. County of Darlington, 269 S.C. at 576, 239 S.E.2d at 70.

As stated above, it appears that Grissinger would have used either the Current Easement or the Gandy Easement to access his house which he has lived in for twenty years, as his parcel is landlocked and there is no other means of access to the Grissinger Parcel. As such, to say that the Current Easement was not used until 2012 is incorrect when the Current Easement has been in use for at least twenty years, or prior to 1996, given that this was the means of access to the house on the Grissinger Parcel and is the current route used by Grissinger himself. In regard to the use of

the Gandy Easement, the testimony above reveals that this was the only means of access to the Landlocked Piper Parcel since the 1960s, and Appellants have not shown or argued otherwise.

Piper has also shown the remaining two elements required to establish a prescriptive easement: the identity of the thing enjoyed, and a use that is adverse to the claim of right. County of Darlington, 269 S.C. at 576, 239 S.E.2d at 70. The identity of the thing enjoyed cannot be disputed in this case as the Parties have recognized and identified that potential means of access exist, as shown by the Gandy Easement and the Current Easement depicted on multiple exhibits presented at trial. Furthermore, the Parties do not dispute that Piper's use has been adverse under claim of right of either Lesondak or Grissinger, as the testimony by all Parties reflects that Piper's passage through either the Gandy Easement or the Current Easement has been contentious. Further, any interruption of either the Gandy Easement or the Current Easement has occurred after the filing of this action. Finally, and under a Simmons analysis, the Parties do not dispute that Piper's use of the Gandy Easement or the Current Easement has been open and notorious.

The record supports Piper's contention that she met the required elements to find that Piper has established a prescriptive easement through either the Gandy Easement or the Current Easement under both the prior test for a prescriptive easement (under Boyd), and the new test (under Simmons). *See* Simmons, Op. No. 2013-001477. As such, this Court should uphold the ruling of the trial court, establishing that Piper has access as provided by the Gandy Easement.

iv. **Respondent has established she is entitled to an easement by necessity.**

Finally, Piper has established that she is entitled to 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. Boyd, 369 S.C. at 418–19, 633 S.E.2d at 140–41 (citing Kennedy v. Bedenbaugh, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002)). The party claiming an easement [by

necessity] must prove more than convenience, but he need not show that the easement is absolutely essential." Jowers v. Hornsby, 292 S.C. 549, 550, 357 S.E.2d 710, 711 (1987). "The necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible" Id. *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). "[T]he whole point of the easement by necessity doctrine is to ensure that landlocked parcels have access to a public road; thus, the doctrine presumes or implies that the grantor intended for the grantee of a landlocked parcel to have access, which is one of the rights essential to the enjoyment of land." Morrow v. Dyches, 328 S.C. 522, 529, 492 S.E.2d 420, 424 (Ct. App. 1997). "An easement by necessity does not require a preexisting use during unity of title". Boyd, 369 S.C. at 420, 633 S.E.2d at 141 (2006). Easements by necessity are implied by law. Clemson Univ., 260 S.C. at 652, 197 S.E.2d at 919.

Appellants assert that Piper has "clear access" to her property by the "platted common roadway (the Hardee Easement)." (Appellants' Brief, p. 5). However, this statement is in direct controversy of the testimony offered by all of the Parties at trial. Appellants attempt to support this argument by citing to Morrow v. Dyches, cited above. The situation presented in Morrow is in no way similar to the present issue faced by Piper. In Morrow, the eastern side of the Morrow's land was bordered and accessible by a public road. The Landlocked Piper Parcel is entirely landlocked and has no access to a public road. In deciding what constituted an easement by necessity, the Morrow Court stated that the doctrine of easement by necessity exists to ensure a landlocked parcel has access to a public road. Morrow v. Dyches, 328 S.C. at 529, 492 S.E.2d at 424. The Court further elaborated by stating that an easement by necessity exists by providing "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.**" Id. (emphasis added).

Here, Appellants argument that Piper has access to her property through the purported Hardee Easement is unavailing and misleading in that no other means of access to the Landlocked Piper Parcel exist. 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". Jowers v. Hornsby, 292 S.C. at 551, 357 S.E.2d at 711 (finding that the "mere inconvenience" of clearing an existing alleyway of underbrush was not a sufficient burden to satisfy the reasonable necessity requirement).

Putting aside Appellants contention that the Hardee Easement is a feasible means of access to the Landlocked Piper Parcel, Piper has established that she is entitled to an easement by necessity through either the Gandy Easement or the Current Easement by showing (1) unity of title, (2) severance of title, and (3) necessity. Boyd, 369 S.C. at 418–19, 633 S.E.2d at 140–41. As stated in Section iii, above, Piper testified regarding the (1) unity of title owned by Andrew J. Taylor; and (2) the subsequent conveyances by Andrew J. Taylor severing unity of title and rending the Landlocked Piper Parcel and the Grissinger Parcel landlocked[11]. In regard to necessity, the testimony of the parties revealed that no other feasible means of access currently exists to the Landlocked Piper Parcel, other than the Gandy Easement and the Current Easement. As discussed, the purported Hardee Easement is currently not passable, would require the removal of multiple objects not under control of Piper, in addition to the costs of clearing and removal of well-established trees, and has never been used as a means of access to the Landlocked Piper Parcel.

[11] The Appellants state that the "evidence in this matter makes clear the former unity of title of the tracts in question, and their severance." Appellants' Brief, p. 5.

Finally, given the topography of the land between the Landlocked Piper Parcel and her parents' parcel, access cannot be and has never been facilitated from Piper's parents' land.

Simply put, the Landlocked Piper Parcel is landlocked and the Parties do not dispute that Piper is entitled to access. Here, the Gandy Easement and the Current Easement are not only convenient, but also necessary. Jowers, 292 S.C. at 550, 357 S.E.2d at 711 (1987). Appellants' contention that "clear access" is provided by the Hardee Easement, thereby rendering the Gandy Easement and the Current Easement only convenient and thus not necessary, is incorrect.

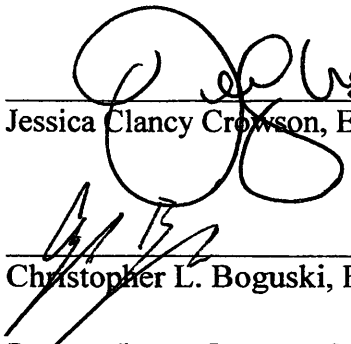
Accordingly, this Court should uphold the ruling of the trial court and confirm the easement as described in the Order dated May 2, 2016.

CONCLUSION

For the reasons stated above, this Court should deny Appellants' request to vacate the trial court's Order dated May 2, 2016, should not remand this action for further proceeding, and should affirm the trial court's Order.

[Signature Page Follows]

Respectfully Submitted,



Jessica Clancy Crowson, Esq. SC Bar No. 68626

Christopher L. Boguski, Esq. SC Bar No.: 100546

ROGERS LEWIS JACKSON MANN & QUINN, LLC
1330 Lady Street Suite 400
Columbia, SC 29201
(803) 978-2832
Attorneys for Respondent

May 23, 2017