



conducted a pre-trial conference and stipulated to the submission of documents, exhibits, and deposition transcript excerpts.

The hearing on the merits started before me on Tuesday May 16, 2017 at 9:00 AM. The Defendant's Motion to Dismiss and/or for Summary Judgment was heard before the trial. I granted the Defendant's Motion to Dismiss the individual members of the Board of the Defendant, Beaufort County School District. I took the Defendant's Motion for Summary Judgment as to the remaining Defendant, the Beaufort County School District, under advisement and allowed the Plaintiffs to proceed with their case. I considered testimony from the Plaintiffs' witnesses including, Pedro Mendoza, Judith Mendoza, Cathy Aughtman, and Louis Dore. At the request of counsel, I conducted a site visit of the real property at issue. Following presentation of the Plaintiffs' case the Defense made a Motion for a Directed Verdict which I denied. I then considered the Defendant's witnesses including, John D. Polk, Cheryl Steel (Abstractor by stipulation), and Drew Davis. Counsel for the parties made closing arguments and thereafter submitted post trial memorandum. This Order follows.

## **II. SUMMARY OF FACTS**

The Plaintiffs own a 1/2 acre parcel of property adjacent to Blue Dolphin Drive, an access road which serves as the main entrance to Battery Creek High School from Possum Hill Road. Plaintiffs claim rights to access their property by way of Blue Dolphin Drive arising from an easement by necessity, prescription, and/or implied use. Blue Dolphin Drive is wholly and exclusively owned by the Beaufort County School District. Blue Dolphin Drive comprises the main entrance to Battery Creek High School and is not a public thoroughfare. Blue Dolphin Drive is intended exclusively for traffic associated with the High School, not to provide for, or accommodate, general access or public traffic.

At the time of filing this action, the Plaintiff, Pastor Mendoza, his wife, two adult daughters, two adult sons, including Plaintiff Pedro Mendoza, and a grandchild, resided together in Beaufort County. For over ten years prior to this action, the Mendozas have rented a mobile home on Lot 19 at 183 Joe Frazier Road, from John D. Polk, where they still reside as of the trial. Sometime during the litigation, the Plaintiff, Pastor Mendoza, left the country and is currently in Mexico.

John D. Polk is a lifelong Beaufort resident who owns and operates the John. D. Polk Insurance Agency. Polk owns numerous parcels of real property including the mobile home park where the Mendoza family lives.

During 2014, Pedro Mendoza and Polk discussed Mendoza looking for a piece of property to purchase and place a mobile home. Polk advised Mendoza of a parcel of property he owned in the area for which he had already applied for a septic permit. Mendoza and Polk inspected the property together and Mendoza went back several times to inspect the property. Mendoza agreed to buy the property from Polk for \$14,500.00. The transaction from Polk to Mendoza closed on October 3, 2014. The closing took place at Polk's offices. The transaction was closed by attorney Raymond Williams, Esquire. Mr. Williams represented Mr. Polk. The Mendozas did not have representation. Polk provided the Mendozas a General Warranty Deed without the benefit of title exam or title insurance. The "Owner's Affidavit" from Polk states: "That the lines and corners of said property are clearly marked, that there are no disputes concerning the location of lines and corners, that the property is free and clear from easements, or claims of easements, not shown by the public records, and that an undisputed right of access to said property exist from a public road".

In approximately November 2014, with Polk's June 9, 2009, septic permit, Judith Mendoza sought permission from applicable governmental agencies to proceed with installation of a mobile home on the property at which time she was advised they did not have legal right of access to the property at issue through the main entrance to Battery Creek High School. Mendoza went back to Polk about the access issue. Polk sent them to attorney Louis Dore who sold him the property.

Dore made written demand on the Beaufort County School District to allow the Mendozas access to the property at issue through the main entrance to Battery Creek High School. The Mendozas' request was denied and they were encouraged to investigate two other named/marked drives which connect the property to an adjacent public roadway, Possum Hill Road. The Plaintiffs did not investigate or inquire into the two other named/marked drives and instead initiated this legal action.

**III. SUMMARY HISTORY OF THE PROPERTY AT ISSUE**

The property at issue is a 1/2 acre (.57), more or less, unimproved lot referred to as Lot 51 Tax Map #: R100 028 000 0051 0000, located in proximity to Possum Hill Road, Beaufort, South Carolina. The property at issue was part of a parcel of 20 acres, more or less, owned at one time by Lillian D. Christiansen acquired by her from James Washington August 7, 1944 and contained within a parcel designated as Land Lot 33.

History of only the property at issue is laid out in the title work of Cathy Aughtman, the Plaintiffs' abstractor. Additional history of the complete Land Lot 33, including the property at issue, and relevant related property adjacent and in proximity is included in the title work of Cheryl Steele, the Defendant's abstractor. The Defendant's Title Work shows the other two

named/marked roadways potentially accessing the Plaintiffs' Property. A summary of the property at issue is as follows:

A. Pedro and Pastor Mendoza acquired the property on October 3, 2014 for \$14,500.00 from John D. Polk and Florence T. Polk as Trustees of the Polk Revocable Trust Agreement.

B. John D. Polk and Florence T. Polk as Trustees acquired the property on October 26, 2009 for \$1.00 from John D. Polk.

C. John D. Polk acquired the property on October 26, 2009 for \$1.00 from South Carolina Realty, LLC, of which he is the sole member.

D. South Carolina Realty, LLC/Polk acquired the property on November 14, 2007 for \$42,000.00 from River and Creek Land Company, LLC, of which Louis Dore is the sole member.

E. River and Creek Land Company, LLC/Dore acquired clear title to the property on October 30, 2007 by way of judicial Order in Case No. 2007-CP-07-002636.

F. River and Creek Land Company, LLC/Dore acquired contract title to the property on December 29, 2006 for \$25,000.00 from Vincent D. Marshall.

G. Vincent D. Marshall acquired the property on November 28, 1998 for \$10.00 "and other consideration" from Petterie G. Morral, f/k/a Petterie Gooding as heir of Rose Dessieso and Maynard Gooding.

The property at issue had been previously held by Petterie Gooding as part of a one (1) acre parcel, referred to in plats as "Lot 51", which she acquired in 1982 for love and affection from Rose Dessieso. Frank Dessieso and Rose Dessieso had acquired the property from Sarah Donaldson for \$100.00 in 1952. Rose Dessieso died intestate in 1986. Frank Dessieso died

intestate in 1962. Prior to transfer of the parcel at issue to Vincent Marshall in 1998, Petterrie Gooding had divided the one (1) acre parcel, Lot 51, and sold the other 1/2 acre, referred to in plats as both "Lot 51E" and as "Parcel C", to the Beaufort County School District for \$7,200.00 on August 31, 1990. "Lot 51E"/"Parcel C" along with two other properties, Parcel B obtained from Janiewese and Otis Adams, and Parcel A obtained from Edward Dunbar, were used to construct Blue Dolphin Drive, the entrance to Battery Creek High School from Possum Hill Road.

#### IV. SUMMARY OF CLAIMS

Plaintiffs' Complaint seeks an Order granting a permanent easement across property of the Beaufort County School District for access to the Plaintiffs' property. Plaintiffs claim an easement by necessity, prescription, and/or implied use.

#### VI. SUMMARY OF LAW

An easement may be established by express grant where the grantor includes it in a deed, or, by reservation where a grantor of property to another reserves it for his own benefit in the deed of the property conveyed. *See Sandy Island Corp.* 246 S.C. 414, 143 S.E. 2<sup>nd</sup> 803 (1965); *See also Douglas v. Medical Investors, Inc.* 256 S.C. 440, 182 S.E. 2d 720 (1971). Such is not the case in the matter at hand. In this case the Plaintiffs made no claim and presented no evidence of an express easement by grant, reservation, agreement, or other written instrument.

When an easement is not established by express grant, reservation, agreement or other written instrument, it may be established by implication or by use, but must be plain, unmistakable, supported by the evidence, necessary and not merely for convenience. *See Butler*

*v. Sea Pines Plantation Co.* 282 S.C. 113, 317 S.E.2d 464 (Ct. App. 1984); *See also Town of Kingstree v. Chapman*, 405 S.C. 282, 747 S.E.2d 494 (Ct. App. 2013). The Plaintiffs' Complaint alleges two causes of action, the first for an easement by necessity, the second for an easement by prescription. The Plaintiffs moved to include a claim for easement by implied use during the trial. As to all three claims, the Plaintiffs have the burden of proving all elements by clear and convincing evidence. *See Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015). Further, not all properties are entitled to access as a matter of right, equity, or law. *See Main v. South Carolina Department of Highways and Public Transportation*, 300 S.C. 453, 388 S.E.2d 792 (1990).

A. **Elements of an easement by necessity.** South Carolina has historically recognized the acquisition of an easement of right of way over another's land by necessity where the owner of an entire tract of land conveys a part of it to another, and the part conveyed is surrounded by the land of the grantor so that the grantee has no ingress **except** over the grantors' land and evidence supports that the grantor intended to grant all rights essential to the enjoyment of the land, **including access.** (Emphasis Added). *See Brasington v. Williams*, 143 S.C. 223, 238, 141 S.E. 375, 380 (1927); *See also Richards v. Trezvant*, 185 S.C. 489, 194 S.E. 362 (1927). The legal requirements of an easement by necessity are: (1) unity of title, (2) severance of title, and (3) necessity. *See Kennedy v. Bedenbaugh*, 352, S.C. 56, 572 S.E.2d 452 (2002). The owner of the dominant estate must show that their land-locked tract and servient tract were, at one time, owned by the same owner, that the necessity existed at the time of the division, and the owner claiming the easement must not have created the necessity which otherwise would not have existed. *See Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1985); *See also Graham v. Causey*, 284 S.C. 339, 326 S.E.2d 412 (1985). The access claimed must be necessary

and not merely a convenience or improved access over another available route to the claimant's property. *See Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 452 (2002).

B. **Elements of an easement by prescription.** A prescriptive easement does not arise from a grant, reservation, or by implication but rather it is established by conduct of the dominant estate contrary to the fee simple interest of the owner of a servient estate. *See Jones v. Daley*, 363 S.C. 310, 316 S.E.2d 597 (Ct. App. 2005). A prescriptive easement is akin to a claim of adverse possession evidenced by: "(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 [was] adverse under claim of right. *See Darlington County v. Perkins*, 269 S.C. 572, 576, 239 S.E.2d 69, 71 (1977); *See also Simmons v. Berkeley Elec. Coop., Inc.*, 797 S.E.2d 387 (SC 2016).

C. **Elements of an easement by implied use.** In order to establish an easement by implied use, the claimant must show: (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. *See Pendarvis v. Cook*, 391 S.C. 528, 706 S.E.2d 520 (Ct. App. 2011); *See also Boyd v. Bellsouth Telephone Telegraph Co.*, 369 S.C. 410, 633 S.E.2d 136 (2006).

D. **The facts do not support an easement by necessity, by prescription or implied use as claimed by the Plaintiffs.**

The Plaintiff Pedro Mendoza and his sister, Judith, testified that they knowingly and voluntarily bought a piece of property with open and obvious access issues without investigation or due diligence. The Plaintiffs bought the property without legal representation. The Plaintiffs

did not conduct a title search or obtain a title insurance policy. The Plaintiff Petro Mendoza and his sister, Judith, testified they “assumed” they had access to their property through the entrance to Battery Creek High School, in part, based on a five year old septic permit application given to them by John Polk from whom they purchased the property. The Plaintiff Pedro Mendoza and his sister, Judith, testified they have no personal knowledge or information of the existence of any legal access to the property at issue, its historical use, or any easement by right, necessity, prescription, or implied use.

Polk likewise testified he “assumed” he had access to the property through the entrance to Battery Creek High School based on his belief that Lois Dore, with whom he had done other land deals, and who was an attorney experienced in real estate and land matters, would not have sold him property that did not have direct access. Polk testified he has no personal knowledge or information of the existence of any legal access to the property at issue, its historical use, or any easement by right, necessity, prescription, or implied use. Polk testified he never made any inquiry regarding access or gave notice to the Defendant of his use or access to the property. Polk’s assertions and assumptions are contradicted by the express written exclusions in his Title Insurance Policy.

Dore testified that he did not establish or confirm legal access at the time of his acquisition or in the subsequent quiet title to the property. Dore testified that he did not make any affirmative representations to Polk regarding access when he sold the property to Polk. Dore testified he never made any inquiry regarding access or gave notice to the Defendant of his use or access to the property

The Plaintiffs, Polk, and Dore all testified they have not sought access to the Property via Thomasina Drive or Smart Adams Lane, the named/marked unpaved roadways with terminus at

or in proximity to the Plaintiffs' property. The Plaintiffs testified they elected to sue the Beaufort County School District for access across the entrance to Battery Creek High School because it is an improved and paved roadway. Both alternative roadways are included in the chain of title from the original Land Lot 33 which includes and encompasses the Plaintiffs' property. The Plaintiffs cannot establish an easement by necessity when they have available alternate routes of access derived from a once unified parcel.

The physical layout and construct of the property appears inconsistent with the assertions and assumptions of the Plaintiffs and their witnesses. Dore, Polk, and Mendoza claim to have no basis to believe they did not have lawful access to the property at issue via the school access road. The Plaintiffs claim they could not have known the property at issue is exclusively owned by the Beaufort County School District. These assertions are not reasonable. Both Pedro Mendoza and Judith Mendoza attended Battery Creek High School. Louis Dore and John Polk are lifelong residents of Beaufort. Construction of Battery Creek High School commenced in approximately April 1990 and completed in approximately August 1991. The school access road at issue is clearly marked at its entrance on Possum Hill Road with a large marble sign: **"BATTERY CREEK HIGH SCHOOL 1 BLUE DOLPHIN DRIVE MAIN ENTRY"**. The school access road is closed to any other access between the school and Possum Hill Road. There are no other points of entry to the school access road from adjacent properties. The school access road is banked its entire length by an elevated concrete curb. The school access road is marked with a blue street sign which denotes a private roadway as opposed to a green street sign which denotes a public roadway. The school access road has remained in substantially the same condition since its construction in 1991. It is not reasonable that from the date of construction

since Dore, Polk, and/or the Plaintiffs could not have not seen the signage or been unaware of the limited use of the school access road for the benefit of Battery Creek High School.

It is undisputed that the property at issue was once historically part of a larger unified parcel, Land Lot 33; however, at the time of subsequent and sequential subdivisions of the larger parcel(s) there is no evidence of actual, intended, or expected establishment of access to the property at issue save and except the two alternative routes, Thomasina Drive and Smart Adams Lane, which remain currently in place. Further, the property at issue was not unified in title with the property to the east over which the Plaintiffs' witness, Dore, sought to establish a claim of access.

The current route of Blue Dolphin Drive connecting Battery Creek High School to Possum Hill Road consists of half of the one acre parcel formerly owned by Petterie Gooding and tracts owned by Dunbar (Parcel "A"), and Adams (Parcel "B"). The Dessieso's use and access to the one acre parcel ceased in or about 1982 when it was deeded to Petterie Gooding. The Plaintiffs' title work and claims are silent as to the former Adams and Dunbar parcels which comprise a portion of the school access road.

There is no evidence in the record of Petterie Gooding access or use of the property before she divided it and sold Lot 51E (Parcel "C"), the purported servient property, to the Beaufort County School District in 1990. There was no direct evidence Petterie Gooding intended to reverse, or otherwise evidenced, a claim of right of access across the parcel she sold to the Beaufort County School District for the benefit of the property at issue, the purported dominant property, now owned by the Plaintiffs. To the contrary, Petterie Gooding did not sell the parcel at issue to the Plaintiffs' predecessor in interest, Vincent D. Marshall, with any express grant or reservation of access; further, at the time of transfer in 1998, Battery Creek High School

was then completed and had been in place since 1991, such as would have constituted plain, open, and obvious evidence to Gooding, Marshall, Dore, Polk, and Mendoza that the school access road was not an authorized or otherwise legal access to the property at issue.

There is no evidence that Petterie Gooding, Vincent Marshall, Dore, Polk, or Mendoza ever communicated with Beaufort County School District or otherwise sought to establish open and notorious claims to right of access across Beaufort County School District property. The claims of access at issue in this case were unknown to the Defendant until this action.

The property at issue has historically been, and is currently, an unimproved parcel of vacant land. There was no evidence of regular or specific use of the property at issue engaged by Plaintiffs or any prior owner. The only evidence in the record the property at issue was accessed was testimony by Dore, Polk and by Mendoza it had been bush-hogged from time to time, but none could provide specifics on scope or frequency, and their testimony was contradictory on how the route was used to access the property. Any use of the property at issue has been temporary and casual at best and not apparent or otherwise known to the Defendant or its predecessors.

There are two other available routes of access to the property at issue. Both Thomasina Drive and Smart Adams Lane are named/marked and improved unpaved drives which run from Possum Hill Road and appear to terminate at the property line of the Plaintiffs' property. Thomasina Drive and Smart Adams Lane provide access to multiple other parcels in the immediate area of proximity, and adjacent to, the property at issue. Thomasina Drive and Smart Adams Lane appear to run from Possum Hill Road up to or in proximity to the Plaintiffs' property line. Smart Adams Lane and Thomasina Drive are contained within Land Lot 33 and included in a once unified parcel which also contained the Plaintiffs' Property. Smart Adams

Lane and Thomasina Drive are access roads which appear on plats of record to the adjacent properties. Smart Adams Lane is contained within a single parcel formerly part of Land Lot 33, and, while shown on plats is not referenced in deeds. Thomasina Drive traverses several parcels formerly part of Land Lot 33. Thomasina Drive is preserved in plats and deeds as an "access road", "20' easement", and "an easement for the purpose of ingress and egress 20.0 ft wide". The Plaintiffs, Polk, and Dore testified they have not investigated or attempted to utilize these two roads because the entrance to Battery Creek High School is an improved and paved roadway, more convenient and direct.

## VI. CONCLUSION

While the Defendant meets the burden and may have been granted Summary Judgment, regardless, the Plaintiffs fail to meet the necessary elements for an easement by necessity, by prescription, and/or by implied use by a preponderance of the evidence. The Plaintiffs' claims for an easement by necessity, by prescription, and/or by implied use across Beaufort County School District property should be denied.

The Plaintiffs failed to show by preponderance of the evidence express grant, reservation, or intent by a unified grantor to establish an easement across the property of the Beaufort County School District upon which Blue Dolphin Drive, the school access road for Battery Creek High School, is constructed.

The Plaintiffs failed to show by preponderance of the evidence that an easement by necessity, prescription, or implied use exists by clear and convincing evidence.

The Plaintiffs failed to show by preponderance of the evidence open, obvious, notorious, continuous, and adverse use or claim of right or access.

The Plaintiffs failed to show by preponderance of the evidence regular or specific use of the property at issue beyond casual or temporal use as indicia of ownership such as would have put the Defendant on notice of their claims.

The Plaintiffs failed to show by a preponderance of the evidence they do not have other potential available routes of access to the property.

The Plaintiffs admitted they elected not to use the other alternative routes of access to the property and brought this action because the school access road is improved, more convenient and direct.

**IT IS NOW THEREFORE HEREBY ORDERED AND ADJUDGED**, the Plaintiffs' claims for an easement by way of necessity, prescription, and/or implied use across Beaufort County School District property should be and is hereby denied. The parties shall each bear their own respective costs, fees, and expenses, including attorney fees.

**AND IT IS SO ORDERED.**

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Marvin H. Dukes, III  
Master-In-Equity and Special Circuit  
Court Judge

Beaufort, South Carolina

\_\_\_\_\_, 2017.



**Beaufort Common Pleas**

**Case Caption:** Pedro Mendoza , plaintiff, et al VS Beaufort County School District  
, defendant, et al  
**Case Number:** 2015CP0700869  
**Type:** Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

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