THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE RICHLAND COUNTY
COURT OF COMMON PLEAS

The Honorable Joseph M. Strickland, Master-in-Equity

Appellate Case No.: 2019-000569

Country Properties, LLC.....Appellant,

vs.

Nancy Dunn Martin.....Respondent.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The underlying action was originally filed by Appellant Country Properties, LLC (hereinafter sometimes referred to as "Country Properties") on March 18, 2014. (*See* Complaint R. p. 53). Country Properties sought three separate declarations from the trial court. (Id.) It sought to establish the following: (1) an easement by express grant; (2) a prescriptive easement; and (3) an easement by public dedication over the property of Respondent Nancy Dunn Martin (hereinafter "Respondent"). (Id.) Though the three theories of recovery are distinct in their elements and proof, they each result in the same outcome—Country Properties would have the right to access its property over the property of Respondent. Country Properties also sought relief in the form of an injunction that would prohibit Respondent from blocking or obstructing the easement. (Id.) Respondent answered the complaint and counterclaimed on May 21, 2014. (*See* Answer and Counterclaim R. p. 62). The Answer was a general denial with certain other affirmative defenses. (Id.) The counterclaim was for adverse possession or prescription by a servient tenement. (Id.).

Country Properties filed a Reply to the counterclaim on May 29, 2014. (*See* Reply R. p. 69).

By order of the Honorable L. Casey Manning, the action was referred to the Master in Equity for Richland County, Judge Joseph M. Strickland. (*See* Order of Reference R. p. 1).

The case tried was tried before Judge Strickland on March 21-24, 2016. The trial court entered its Final Order on September 27, 2016 ("Final Order"). (*See* Final Order R. p. 4). The Final Order found that Country Properties had an express easement over the property of Respondent, an easement by prescription over the property of Respondent, and that the road in question was dedicated to the public. (Id.). Specifically, the Final Order made no distinction in the relief ordered for the express easement and easement by prescription. The trial court held as follows:

"ORDER

Based upon 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 within thirty (3) 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;
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."

(Id at p. 31 R. p. 36).

Respondent filed a Rule 59(e) and Rule 52(b), SCRCP, motion on November 9, 2016. (R.

p. 71). That motion was denied by the trial court on July 21, 2017. (Order denying Respondent's Post-Trial Motion R. p. 37). Respondent served a Notice of Appeal on August 22, 2017 ("First Appeal" R. p. 362). On August 30, 2017, Respondent filed a motion with this Court for leave to file a Rule 60(b)(2)-(3), SCRCP motion for relief with the trial court. (R. p. 81) This Court granted the Motion for leave to file the Rule 60(b) motion on October 5, 2017 and stayed the First Appeal. (R. p. 39) Respondent then filed the Rule 60(b) motion with the trial court on October 24, 2017 (R. p. 109). Country Properties filed a memorandum in opposition to the Rule 60 motion. (R. p. 129). On July 18, 2018, counsel for Country Properties and Respondent appeared before Judge Strickland for a hearing on the Rule 60(b) Motion. (Transcript of July 18, 2018 Hearing R. p. 229). On January 28, 2019, Judge Strickland entered an order granting the Rule 60(b) motion and ordered a new trial. (*See* Order Granting Rule 60(b) Motion R. p. 40). On February 6, 2019, Country Properties filed a Rule 59(e), SCRCP, Motion to Alter or Amend the Order granting the new trial. (R. p. 145). On March 14, 2019, a hearing was held on that motion. (Transcript of March 14, 2019 Hearing R. p. 250). Judge Strickland denied the Rule 59(e) motion on March 20, 2019 (Order Denying Rule 59(e) Motion R. p. 49). On March 26, 2019, Country Properties filed a Notice of Appeal of the Order Granting the Rule 60(b) motion and the Order Denying the Rule 59(e) Motion ("Second Appeal").

There is no monetary amount in controversy in this action as it is for declaratory and injunctive relief. There has not been any change in parties throughout the pendency of this action or appeal.

STANDARD OF REVIEW

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial court. *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992); *Southeastern Housing*

Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct.App. 2008). Likewise, the decision to grant or deny a new trial motion lies within the discretion of the trial court. *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct.App. 1999). Therefore, this Court's standard of review is to determine whether there was an abuse of discretion. *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004). An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support. *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997).

FACTS

The facts pertinent to the present appeal relate to a dam or dike existing at times on Country Properties' property on Raglin Creek. Country Properties' property is bisected by Raglin Creek. (Final Order p. 5, R. p. 4). The northern portion is in Kershaw County and the Southern portion is in Richland County. (Id.) The disputed road in question in the present case, Northeast Shady Grove Road, is a road and easement to the southern portion of the Country Properties' property over the lands of the Respondent. (Id at 6 R. p. 11). At trial there was evidence offered that the dam or dike was washed out and rebuilt over the years. (*See* Trial Transcript, p. 357, line 22-p. 359, line 12 R. pp. 217-219; *see also* Trial Transcript, p. 94, line 10-p. 95, line 18 R. pp. 196-197; *see also* Trial Transcript, pp. 109-110 R. pp. ; Trial Transcript, pp. 142-144 R. pp. ; Trial Transcript p. 338 R. p. 207; Trial Transcript, p. 345 R. p. 208; Trial Transcript, p. 352 R. p. 212).

Respondent testified at trial that when the dam or dike was in good repair it could provide a way of accessing the southern part of the Country Properties' property from the northern portion. (Trial Transcript, pp. 454-455 R. pp. 227-228). At the time of the trial, Country Properties member, James Podell, testified that the dam had been washed out by the October 2015 heavy rains. (Trial Transcript, pp. 357-359 R. pp. 217-219).

When the trial court issued its Final Order, Respondent again argued in her post-trial motions that Country Properties had additional access. (Respondent's Post-Trial Motions pp. 1-2 R. pp. 71-72).

After the issuance of the Final Order, the denial of Respondent's post-trial motions, and five days after the filing of a Notice of Appeal in the First Appeal, Respondent caused a picture to be taken by a drone operator of the dam on Country Properties' property. (Rule 60(b) Motion R. p. 109). Respondent asserted that this was "newly discovered evidence" that the dam had once again been rebuilt since trial. (Id.) Based upon this alone, Respondent requested a new trial pursuant to Rule 60(b).

ARGUMENT

"Whatever doesn't make any difference, doesn't matter."

-Chief Judge Sanders writing in *McCall v. Finley*, 294 S.C. 1, 362 S.E.2d (Ct.App. 1987).

I. The trial court erred in granting a new trial based upon alleged newly discovered evidence because the evidence will not change the result in a new trial and the evidence is immaterial to the elements of an easement by express grant, easement by prescription or an easement by public dedication.

The first and perhaps most fundamental abuse of discretion in the trial court's ordering of a new trial is found in the fact that none of the causes of action pled by Country Properties and found to be established by the trial court in the Final Order are defeated by some new additional means of access to the Country Properties' property. Additional or alternative access is not a defense to an express easement, a prescriptive easement or a public dedication. Notwithstanding this legal reality, the new additional means of access served as the sole basis upon which the trial court based its grant of a new trial pursuant to Rule 60(b)(2), SCRCP. This was error.

The *McCall v. Finley* statement of judicial procedure, cited above, is squarely found rooted

in the standard for relief under Rule 60(b)(2), SCRCP. In *Lanier v. Lanier*, 612 S.E.2d 456, 459, 364 S.C. 211 (2005) the South Carolina Supreme Court established the standard for relief under Rule 60(b)(2), SCRCP as follows: "To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: **(1) will probably change the result if a new trial is granted**; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) **is material to the issue**; and (5) is not merely cumulative or impeaching." (Emphasis supplied). The trial court abused its discretion in finding that Respondent met these elements.

a. An additional way to access the Appellant's property is not material to an easement by express grant and will not change the result in a new trial.

An easement is a right given to a person to use the land of another for a specific purpose. *Murrells Inlet Corp. v. Ward,* 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct.App.2008). An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription. *Frierson v. Watson,* 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct.App.2006). "A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." *Id.* (quoting *Sandy Island Corp. v. Ragsdale,* 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965)). "As a general rule, to constitute a grant of an easement, any words clearly showing the intention to grant an easement are sufficient." *Ten Woodruff Oaks v. Point Development*, 683 S.E.2d 510, 385 S.C. 172 (S.C. App., 2009). "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention." *Id.*

In the Final Order, the trial court found that Country Properties' chain of title and Respondent's chain of title established a specifically located twenty (20) foot wide express

easement by grant. (Final Order, pp. 24-26 R. pp. 29-31). The evidentiary basis for this finding was as follows:

Plaintiff's Chain	Defendant's Chain	"Lewis" Chain
Plaintiff Ex.1	Plaintiff's Ex. 20	Plaintiff's Ex. 30
Plaintiff Ex. 18	Plaintiff Ex. 18	Plaintiff's Ex. 36
Plaintiff Ex. 19	Plaintiff Ex. 19	Plaintiff's Ex. 37
Plaintiff Ex. 17	Plaintiff Ex. 29	Plaintiff's Ex. 35
Plaintiff Ex. 15	Plaintiff Ex. 28	Plaintiff's Ex. 34
Plaintiff Ex. 16	Plaintiff Ex. 27	Trial Transcript – Williams, pp. 66-67
Plaintiff Ex. 14	Trial Transcript Williams, p. 60	Plaintiff's Ex. 32
Plaintiff Ex. 13	Plaintiff's Ex. 26	Trial Transcript Williams, pp. 64-65
Plaintiff Ex. 12	Plaintiff's Ex. 25	Plaintiff's Ex. 31
Plaintiff Ex. 11	Plaintiff's Ex. 24	
Trial Transcript Williams, pp. 36-49	Plaintiff's Ex. 21	
Plaintiff Ex. 9		
Plaintiff Ex. 10		
Plaintiff Ex. 7		
Plaintiff Ex. 8		
Trial Transcript Williams, pp. 27-28		
Plaintiff Ex. 5		
Plaintiff Ex. 6		
Plaintiff Ex. 4		
Plaintiff Ex. 3		
Plaintiff Ex. 2		

(Plaintiff's Chain R. pp. 270-308, 174-187 ; Defendant's Chain R. pp. 308-344, 188; Lewis Chain R. pp. 345-360, 189-192).

The existence of a new additional means of access is immaterial to the trial court's finding of an express easement by grant. Alternative means of access or additional easements are not relevant to establishing a specifically located easement by grant. Likewise, the repaired dam will not change the result in a new trial. How can it be argued that the trial court will read the deeds differently because a dam has been repaired? The deeds will be the same deeds admitted into

evidence in the trial of this matter and the repaired dam will not and cannot change their language. Importantly, because the Court found the same twenty (20) foot wide easement pursuant to an express grant and prescriptive easement, discussed below, the finding of the express grant easement precludes any way for the Respondent to prove that the result will change in a new trial. As such, the trial court abused its discretion in granting the Rule 60(b) motion and in granting a new trial based on newly discovered evidence that is immaterial to the finding of an easement by express grant and newly discovered evidence that will not and cannot change the result in a new trial.

b. An additional way to access the Appellant's property is not material to an easement by prescription and will not change the result in a new trial.

In order to establish a prescriptive easement, 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. *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 797 S.E.2d 387 (2016). The establishment of a prescriptive easement must be shown by clear and convincing evidence. *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015).

The elements of a prescriptive easement are not related to nor dependent upon the existence or non-existence of an additional means of access. A new trial with evidence of a repaired dam will not change the outcome of the prescriptive easement finding as the repaired dam is immaterial to the establishment of a prescriptive easement. Therefore, the trial court abused its discretion in granting the Rule 60(b) motion and in granting a new trial.

c. An additional way to access the Appellant's property is not material to a finding of public dedication and will not change the result in a new trial.

"No particular formality is necessary to effect a common law dedication." *Boyd v. Hyatt*, 294 S.C. 360, 364, 364 S.E.2d 478, 480 (Ct.App.1988). "An intention to dedicate may be implied

from the circumstances." *Id.* "Any act or declaration on the part of the dedicator which fully demonstrates his intention to appropriate land to public use, or from which a reasonable inference of his intent to dedicate may be drawn, is sufficient." *Id.* "However, absent an express grant, one who asserts a dedication must demonstrate conduct on the part of the landowner clearly, convincingly and unequivocally indicating the owner's intention to create a right in the public to use the property in question adversely to the owner." *Id.*

"South Carolina law recognizes two types of implied dedication-one where the question of implied dedication arises from the sale of land with reference to maps or plats; the other when the dedication arises ... from an abandonment to or acquiescence in public use." *Town of Kingstree v. Chapman*, 405 S.C. 282, 747 S.E.2d 494 (S.C. App., 2013). "A dedication need not be made by deed or other writing but may be effectually made by acts or declarations." *Id.* "Intent to dedicate may also be implied from long public use of the land to which the owner acquiesces." *Id.* "As with intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property." *Id.* "The use, repair, and working of the streets by public authorities is a mode of acceptance." *Id.*

The elements of public dedication are not related to nor dependent upon the existence or non-existence of an additional means of access to or on private property. It is impossible to imagine how the alleged repair of a private dam on private property would change a finding that a road is a public road. Indeed, the offer of dedication was found to have been made by "Defendant and her predecessors" and accepted by "members of the public" and the receipt of "regular public maintenance". (Final Order pp. 27-28 R. pp. 32-33). Nowhere is the conduct of Country Properties relevant to the offer and acceptance of the public dedication. Country Properties cannot by

repairing a dam divest the public of a public road.

A new trial with evidence of a repaired dam will not change the outcome of the public dedication finding as the repaired dam is immaterial to the public dedication of the road in question. Therefore, the trial court abused its discretion in granting the Rule 60(b), SCRCP motion and in granting a new trial.

II. The trial court erred in ruling that Appellant based its claim to the easement on necessity.

In the trial court's order granting the Rule 60(b), SCRCP, motion and ordering a new trial, the Court focused primarily on whether or not the alleged newly discovered evidence "eliminat[ed] any need for Plaintiff to traverse [Defendant's] property". (Order Granting Rule 60(b) Motion p. 4 R. p. 40). The trial court stated "[t]his development suggests that the Plaintiff's need for the use of the Defendant's property may be significantly less than indicated at trial." (Order Granting Rule 60(b) Motion p. 3 R. p. 42). Indeed, the Court concluded that "[t]he evidence now suggests the Plaintiff can access all of its property via routes that do not transect Martin's property, which changes the court's analysis." (Order Granting Rule 60(b) Motion p. 4 R. p. 43). This focus and basis for ordering a new trial was in error.

First, need and necessity, as shown above, are not material to a claim for an express easement, prescriptive easement or public dedication. Second, this issue of need or necessity was expressly addressed by the parties and the trial court at the trial of this matter as follows:

"THE COURT: Now does the -- does the fact that the dam was washed away, and I think Mr. Floyd said a road as well, does that change anything as far as your theory, Mr. Wells?

MR. WELLS [Appellant Attorney]: Judge, we never claimed -- we did not claim a easement by necessity, which is an easement because he has no other access. So I don't think that changes the law in the case."

(Trial Transcript, p. 18, line 15-22 R. p. 170).

It was an abuse of discretion for the trial court to base its sole reason for ordering a new trial on the absence or existence of necessity or need for access when no such cause of action (i.e. a claim for easement by necessity) was claimed by Country Properties at the trial of the action and need and necessity are not legal elements of or defenses to the types of easements actually claimed and found in the Final Order.

III. The trial court erred in granting a new trial based upon alleged newly discovered evidence because the evidence is at best cumulative.

"To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) **is not merely cumulative or impeaching**." *Lanier*, 612 S.E.2d at 459. (Emphasis supplied).

As stated above, the sole basis for granting the Rule 60(b) motion and ordering a new trial was the alleged newly discovered evidence of the rebuilt dam that provides an additional means of access on Country Properties' property. The trial record in this case, however, is replete with evidence that the dam over the years has washed out or been damaged and then been rebuilt. (*See* Trial Transcript, p. 357, line 22-p. 359, line 12 R. pp. 217-219; *see also* Trial Transcript, p. 94, line 10-p. 95, line 18 R. pp. 196-197; *see also* Trial Transcript, pp. 109-110 R. pp. 198-199; Trial Transcript, pp. 142-144 R. pp. 200-202; Trial Transcript p. 338 R. p. 207; Trial Transcript, p. 345 R. p. 208; Trial Transcript, p. 352 R. p. 212).

In fact, this Court noted this in the factual findings in the Final Order. (*See* Final Order, Paragraph 7 R. p. 5). The fact that a dam was rebuilt once again as has been attempted throughout this property's history is not new evidence. This is the essence of cumulative evidence. The trial court

abused its discretion in granting the new trial based upon newly discovered evidence that at best was cumulative.

IV. The trial court erred in granting a new trial based upon alleged newly discovered evidence because the alleged newly discovered evidence is not new evidence.

"To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) **has been discovered since the trial;** (3) **could not have been discovered before the trial;** (4) is material to the issue; and (5) is not merely cumulative or impeaching." *Lanier*, 612 S.E.2d at 459. (Emphasis supplied).

The fact that the dam had repeatedly been washed out and rebuilt was presented at the trial. Indeed, the Respondent argued in her post-trial motion that Country Properties had alternative means of access. (Respondent's Post-Trial Motions, pp. 1-2 R. pp. 71-72). The problem for Respondent, as presented above, is that alternative means of access does not matter in an express easement, prescriptive easement, and public dedication case.

Moreover, the trial court held that the dam was again rebuilt after the trial of the case. (Order Granting Rule 60 Motion R. p. 40). However, evidence that did not exist at the time of the trial cannot serve as a basis for a Rule 60(b)(2) motion. *See* Baicker-McKee, Janssen, and Corr, *Federal Civil Rules Handbook*, p. 1259 (2016)("Implicit in these [Rule 60(b)(2)] elements is the recognition that the evidence must be evidence of facts that were in existence at the time of trial, though not discovered until after trial.") [1] The reasoning for this is sound. Every case, like the case at hand, would drag on and on and breathe new life into itself as the post-trial future unfolds.

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[1] In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules. Gardner v. Newsome Chevrolet–Buick, Inc., 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

The trial court abused its discretion in finding that the aerial photo showing the dam on August 27, 2017 was "new evidence" that would support granting a Rule 60(b)(2) motion for a new trial.

V. The Court erred in ruling that the Respondent met its burden of proof for relief under Rule 60(b)(2), SCRCP.

The movant on a Rule 60(b)(2) motion based on alleged newly discovered evidence has the burden of proof. *Lanier*, 612 S.E.2d at 459. All that the Respondent has submitted is an aerial photograph taken by a drone on August 27, 2017. This aerial photograph is insufficient to establish the *Lanier* elements.

The trial court abused its discretion in finding that Respondent met its burden of proof by submitting an aerial photo showing the dam on August 27, 2017 to support the granting of a Rule 60(b)(2) motion for a new trial.

CONCLUSION

For the reasons stated herein, the Order granting the Respondent's Rule 60(b), SCRCP Motion for a New Trial should be reversed and the September 27, 2016 Final Order should be reinstated.

Respectfully Submitted,

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August 16, 2019

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CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellant Country Properties, LLC complies with Rule 211(b), South Carolina Appellate Court Rules.

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