THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

Appellate Case No.: 2019-000569
Civil Action No.: 2014-CP-40-01805

Country Properties, LLC, ...Appellant,

v.

Nancy Dunn Martin, ...Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the trial court abused its sound discretion by granting Respondent a new trial pursuant to Rule 60(b)(2), SCRCP.

STATEMENT OF THE CASE

This matter is before the Court pursuant to a Notice of Appeal filed by Country Properties, LLC ("Appellant") challenging the order of the Honorable Joseph M. Strickland, which granted property owner Nancy Martin ("Respondent" or "Martin") a new trial on the issue of whether Appellant may impose an easement upon Martin's land. (R. pp. 362–63). This case originated in 2014. (R. p. 53). Appellant filed an action in Richland County Circuit Court seeking passage through Martin's land on a number of theories. (R. pp. 53–61).

The suit was referred by consent to Master-in-Equity Strickland for trial. (R. p. 3). Following the introduction of extensive testimony and exhibits, the trial Court entered an order granting Appellant passage through Martin's land on all of the alternative theories in Appellant's complaint, including public road, easement by prescription, and easement by express grant. (R. pp. 6–36). Following a motion to reconsider, Respondent appealed the trial court's final order to the Court of Appeals. (R. pp. 362–63). That appeal, on the merits of the final order, remains pending. (R. p. 39).

Shortly after the appeal was filed, Martin requested leave from this Court to file a Rule 60(b) motion with the lower court. (R. pp. 81–86). Leave was granted, and the original appeal remains held in abeyance. (R. p. 39). Respondent filed a Rule 60(b) motion seeking a new trial on the basis of new evidence or fraud. (R. pp. 109–120). Following a motion hearing on July 18, 2018, Judge Strickland granted the Rule 60(b) motion, citing new evidence presented by Martin. (R. pp. 40–48). Appellant filed a motion to alter or amend which was denied, and filed the instant appeal. (R. pp. 145–49; 367–68).

STANDARD OF REVIEW

Review on appeal of the decision to grant a new trial is a clearly "delimited" inquiry confined by the abuse of discretion standard. *S.C. Dep't of Highways & Pub. Transp. v. Mooneyham*, 275 S.C. 205, 206, 269 S.E.2d 329, 330 (1980). "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17–18, 594 S.E.2d 478, 482 (2004) (citing *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)). "'The rule is well settled that a motion for a new trial on after-discovered evidence is addressed to the discretion of the Circuit Court, and the refusal of such motion will not be reviewed, unless it appears that there was abuse of discretion . . . .'" *Miller v. Atl. C. L. R. Co.*, 95 S.C. 471, 475–76, 79 S.E. 645, 647 (1913) (citing *State v. David*, 14 S.C. 428; *State v. Workman*, 15 S.C. 540; *Sams v. Hoover*, 33 S.C. 401, 12 S.E. 8; *Seegers v. McCreery*, 41 S. C. 549, 19 S.E. 696; and *Peeples v. Werner & Co.*, 51 S.C. 401, 29 S.E. 2). That is, "the decision by the trial judge will not be disturbed unless his finding is wholly unsupported by the evidence, or the conclusion reached has been controlled by error of law." *Mooneyham*, 275 S.C. at 207, 269 S.E.2d at 330 (citing *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 127, 226 S.E.2d 696, 697 (1976)).

STATEMENT OF THE FACTS

In 2009, Appellant purchased a one-thousand-acre tract of land lying on the border of Richland and Kershaw Counties. (R. pp. 53–54). Martin owns a few smaller adjacent parcels in Richland County, which have been in her family for many years. (*See* R. p. 223, l. 23–p. 224, l. 16). A dirt road runs through the middle of Respondent's land. This dirt road begins at the terminus of county maintenance of a road called NE Shady Grove Road. This county road connects Martin's private property to Highway 601. Between Martin's property and the highway, several other landowners have small tracts on either side of Shady Grove Road. However, Martin's

parcels begin at the end of county maintenance and are not demarcated by the road like the neighboring properties. (*See* R. p. 361 for a map).

The members of the Appellant LLC desired access to Respondent's dirt road as means of accessing the Richland County side of its property; however, access to the dirt road had historically been limited to guests of Respondent and a locked gate prevented entry by others. Respondent declined to give Appellant access to her land. Appellant then sued Martin to gain access to her land in 2014. (R. pp. 53–61). The complaint filed by Appellant alleged three different and conflicting legal theories. First, Appellant argued that it had a "deeded right of access" through Martin's parcels. (R. pp. 56–57). Second, Appellant argued that it has a "permanent prescriptive easement." (R. pp. 57–59). Third, Appellant asserted that the road through Respondent's land is a public road. (R. pp. 59–60). Lastly, Appellant also sought injunctions forbidding Martin to keep Appellant off her land. (R. p. 59). Respondent answered asserting that Appellant has no legal means to impose its use of her road and counterclaimed adverse possession or prescription of any prescriptive easement. (R. pp. 62–67).

The case ultimately went to trial before Judge Strickland on March 21, 2016. The parties presented testimony and evidence over the course of four days. Martin prepared evidence and elicited testimony to rebut each of Appellant's legal theories, including testimony regarding the restricted access to the road that Appellant was denied permission to use, the history of the deeds to the property, and the county's opinion that the dirt road was not public.[1] However, Martin was not prepared to address Appellant's argument that it needed access to her road because of Raglin

[1] (*See, e.g.*, R. p. 208, l. 21–p. 209, l. 10 (wherein Appellant's member admits he asked permission to use Respondent's gate and road); p. 194, ll. 10–16 (wherein Appellant's title abstractor admits that there is no reference to a right-of-way in Respondent's chain of title); p. 222, ll. 18–20 (wherein Richland County's right-of-way agent testified that Respondent's road is deemed a private road by the County)).

Creek, which runs through its thousand-acre tract. (*See* R. p. 361 for a map). It is not disputed that Appellant has other means of access to its property. However, Appellant insisted that Raglin Creek formed a natural barrier that prevents it from accessing the Richland County portion of its tract from the Kershaw County side. (*See, e.g.*, R. p. 195, ll. 11–15 (wherein Appellant elicits testimony that the creek is "very much" a barrier to "breaching that side of the property")). Appellant testified about a recent wash-out of a dam that transected the creek, forming a pond and access road. (R. p. 218, l. 7–p. 219, l. 12).

This creek figured heavily into Appellant's trial presentation and into the final order ultimately signed by the trial judge—even though Appellant now argues that the creek is irrelevant to the Court's analysis in this case. Following a motion for reconsideration, Martin appealed the lower court's final order, which contained rulings favorable to Appellant on *all three* necessarily contradicting legal theories.[2] (R. pp. 367–68; 6–36). Shortly after that appeal was filed, Martin obtained new evidence regarding the status of the creek dam in question. Martin then filed with this Court for leave to file a Rule 60(b) motion with the lower court. (R. pp. 81–86). After obtaining leave, Respondent filed a motion seeking a new trial while its original appeal was held in abeyance. (R. pp. 39; 109–120). At the motion hearing held by the lower court, Respondent illustrated the impact the creek had on the final order and explained how the new evidence might impact the court's analysis in the order. (*See generally* R. pp. 229–44). Specifically, the evidence, consisting of drone photos of the creek and dam, show that the dam is in good repair and fully

[2] This first appeal remains pending before this Court and is currently held in abeyance (Case No. 2017-001795). Presumably, if this appeal is affirmed the first appeal becomes moot, or if this appeal is reversed, this Court will go on to review the case directly on the merits. In the latter circumstance, Respondent will demonstrate that Appellant failed to establish or prove an easement under any of the theories upon which it relied.

crossable. (R. pp. 117–120). This contradicts the surprise evidence offered at trial regarding the degradation of the dam and the natural barrier it created.

Judge Strickland ruled in favor of Martin, concluding that a new trial should be granted on the basis of the new evidence. (R. pp. 40–48). Judge Strickland indicated that the new evidence shed a different light on his view of the evidence at trial. (R. p. 259, l. 24–p. 260, l. 6). Appellant filed a Rule 59 motion, which was denied following an arguments hearing. (R. p. 49). Appellant filed the instant appeal, arguing that—despite the heavy emphasis on the creek in their evidence presentation at trial, the heavy emphasis on the creek in its proposed order, and the heavy emphasis on the creek in the court's final order—the creek dam is immaterial to the case. Appellant disputes the determination of the trial judge that his own non-jury ruling is likely to change based on Martin's new evidence. Contrary to Appellant's arguments, Martin is entitled to a new trial to rectify the record and receive a verdict based on the full gamut of evidence available to the fact-finder.

ARGUMENT

Ultimately, property rights and personal rights are the same thing.

—Calvin Coolidge[3]

Appellant emphatically states that it has never claimed to *need* use of Respondent's private road to access its property. (*See, e.g.*, App. Initial Br. at p. 10). Presumably then, the reason Appellant has forced Respondent to participate in years of litigation to protect her property rights is either mere convenience or simple antagonism.[4] The final order entered in this case resulted

[3] Calvin Coolidge, Have Faith in Massachusetts: Massachusetts Senate President Acceptance Speech (Jan. 7, 1914), *available at* https://www.coolidgefoundation.org/resources/have-faith-in-massachusetts/.

[4] Notably, Appellant's member, Mr. Podell, testified on cross that when he was denied permission to access to Respondent's private property—which he does not claim to actually need—he twice cut the chain on her gate and added his own lock. (R. p. 209, l. 20–p. 347, l. 2). This property

from a bench trial and reflected the narrative Appellant put forward at trial: Raglin Creek forms a natural barrier that bisects Appellant's property along the county line and prevents Appellant from having access to the Richland County side of its land. (*See, e.g.*, R. p. 165, l. 1–p. 166, l. 5 (Appellant's opening statement, wherein counsel described the creek and dam and stated, "we claim it's an inadequate access to get to our property down here."); p. 195, ll. 11–12 (wherein Appellant's attorney elicited testimony that Raglin Creek is "a barrier to breaching that side of the property"); p. 203, ll. 2–4 (wherein Appellant's attorney elicited testimony about not being to use the creek dam to export timber from the Richland County side of Appellant's property); and p. 204, l. 20–p. 206, l. 1 (wherein Appellant's member testified on direct about the creek, the difficulty of crossing it, and the fear his wife had of driving across)). Respondent's new evidence goes to contradict the theme of Appellant's trial presentation and the court's resulting order. Yet, Appellant now argues that the theme of its case is entirely immaterial to its legal theories. Respondent's evidence calls into question Appellant's credibility and the legal sufficiency of its evidence. A trial is a search for the truth—disparateness in testimony goes to the weight and credibility of testimony and the finder of fact is given broad discretion in determining credibility or believably. *See Small v. Pioneer Mach.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997) (citing *Small v. Pioneer Machinery, Inc.*, 316 S.C. 479, 450 S.E.2d 609 (Ct. App. 1994) and *Hanna v. Palmetto Homes, Inc.*, 300 S.C. 535, 389 S.E.2d 164 (Ct. App. 1990)). Judge Strickland has the discretion to correct injustice pursuant to Rule 60(b) and he rightly determined that Respondent is entitled to a new trial.

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damage was done without resort to any legal authority, and demonstrates a lack of respect for the rights of his neighbors and the rule of law.

I. THE TRIAL COURT PROPERLY GRANTED A NEW TRIAL BASED ON NEW EVIDENCE.

The trial court granted Respondent a new trial pursuant to Rule 60(b)(2), which provides that "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]" Rule 60(b)(2), SCRCP. This Court has adopted the following test for this rule:

> 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 v. Lanier, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) (citing James F. Flanagan, *South Carolina Civil Procedure* 484 (2nd ed. 1996)). Judge Strickland addressed these elements in his order granting Respondent a new trial on January 26, 2019. (R. pp. 42–44). He noted that the new evidence would likely change the outcome of a new trial. (R. p. 43). While it is true that necessity is not, in and of itself, an element in Appellant's causes of action, *need* can and did play an important role in the circumstances that led the lower court to initially rule in Appellant's favor. Property law is always influenced by the surroundings and characteristics of the property with which it is concerned. The need of one party or group versus the other is the origin point of almost every legal doctrine or mechanism that infringes on the otherwise inviolate rights of property owners to do what they will with and on their land. Need gives rise to eminent domain, to the exigent circumstances exception to warrant requirements, and to the dedication of public roads. Need—even if it does not rise to the legal definition of necessity—is nonetheless usually the impetus underlying a request for an easement by grant, the adverse behavior leading to

a prescriptive easement, or the willingness of a county to take on maintenance of a new section of road. Thus, even when necessity is not a required legal conclusion, need may still be a foundational finding of fact. *Cf.* Rule 401, SCRE (stating that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Appellant clearly relied on this logic when presenting its case to the lower court. However, Respondent was surprised by Appellant's reliance on evidence relating to need at trial—particularly given that Respondent had previously been able to easily traverse the dam Appellant claimed had washed out at trial. (*See* R. at p. 228, ll. 4–9). The change in circumstances of the dam alleged at trial inspired Respondent to search for new evidence. That evidence throws a great deal of new light on the factual foundation for Appellant's case and will likely change the result of Judge Strickland's earlier final order.

a. The trial court properly concluded that the new evidence will likely change the result in a new trial.

In determining whether to grant a motion for a new trial, the judge is given great discretion—even in criminal cases. *See State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1994) (citing *State v. Simmons*, 279 S.C. 165, 303 S.E.2d 857 (1983)) ("It is well settled that the grant or refusal of a new trial is within the discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of that discretion."). There are many possible reasons for this broad discretion, not the least of which is the fact that trial judges have the best vantage point to assess witness credibility and the weight to be assigned to the evidence presented. *See Williams v. Moore*, 400 S.C. 90, 102, 733 S.E.2d 224, 230 (Ct. App. 2012) (quoting *Madren v. Bradford*, 378 S.C. 187, 191–92, 661 S.E.2d 390, 393 (Ct. App. 2008)) (stating in a property case that "[q]uestions

regarding credibility and weight of evidence are exclusively for the trial judge"). This is no doubt especially true in a bench trial. *Id.*

Appellant is now seeking to renounce the narrative theme of its presentation to the lower court, arguing that all the evidence it presented and argued in relation to Raglin Creek and the dam is not relevant to the legal queries at play. This argument ignores the fact that evidence that shows a lack of full candor with the court by making a showing of need where there is none, could in and of itself be enough to change the outcome of a case because it has the potential to shift completely the weight and credibility of the evidence. Such a determination is entirely within the purview of the lower court that heard and solely decided the case. Judge Strickland reached the conclusion that this new evidence will probably change the outcome in a new trial and no one is more qualified to reach this conclusion than the fact-finder in the underlying order.

The new evidence offered by Respondent not only casts doubt on Appellant's narrative of the facts at trial and in its proposed order, it casts doubt on the existence of any prescriptive easement. Appellant has sought access to drive through the middle of Respondent's land based on three theories, the first of which is easement by prescription. A prescriptive easement is established by the conduct of the dominant estate owner. *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169–70 (2015) (quoting *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006)). There are three elements of a prescriptive easement: "(1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse or under claim of right." *Id.* (citing *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005)). Because a finding of a prescriptive easement forcefully deprives a servient property owner of their rights, the evidence standard is clear and convincing. *Id.*, at 306, 772 S.E.2d at 170.

Appellant did not prove these elements by clear and convincing evidence at the trial, but this failure is cast into even greater relief by the new evidence offered by Respondent. Particularly, the photos of the fully functional and traversable dam show that it is quite likely Appellant does not need to use Respondent's road and quite likely has not maintained the kind of continuous use needed for a prescriptive easement. Indeed, the new evidence casts serious doubt on any findings and conclusions supporting that first element because, it appears the record in the case that the lower court extrapolated adverse use of Respondent's road based on testimony that Appellant had to use her road to get to the Richland County side of its property. The court expressly found, "the 383 acres of the Plaintiff's tract located south of Raglin Creek in Richland County has no access except via the easement that the Plaintiff seeks to establish in this action." (R. p. 10, para. 6). The court also concluded that a prescriptive easement was imposed based on the "totality of the circumstances." (R. p. 28). Where one believes that a portion of property is *only* accessible by one route, and one believes that an owner *has* accessed that portion of property, one must make the inference that use of that single route occurred. The photos showing a perfectly useable dam contradict Appellant's contentions that it had no choice but to use Respondent's road for such activities as logging and suggests that any use of Respondent's road would have been patchy and disconnected.[5]

[5] Appellant argues that the trial court erred in basing its ruling on the Rule 60(b)(2) motion on an easement of necessity. As explained, evidence of *need* can affect rulings on issues not related to an easement by necessity. Nowhere in the lower court's recent orders was there any mention of an easement by necessity. Moreover, if any of the lower court's order wrongly relied on an easement by necessity, it would be the final order that Respondent has appealed. That order, proposed by Appellant, emphasized repeatedly that Appellant has no means to access the Richland County side of its land, demarcated by the creek, except Respondent's road. *See* Argument I, subpart c, *supra*. Appellant should be estopped from this hypocritical argument because it expressly stated in its opening statement at trial, "we claim it's an inadequate access to get to our property down here." (R. p. 166, ll. 2–4). What else but a claim of easement by necessity could this be?

b. The trial court properly found that Respondent's evidence was new and could not have been discovery before trial.

On its face, Rule 60(b)(2) requires that evidence relied upon to grant relief must be "newly discovered evidence which *by due diligence* could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(2), SCRCP (emphasis added). There are several reasons that Respondent met this requirement. Prior to trial, Respondent was given the opportunity to inspect Appellant's property, including the creek and dam in question. When she visited the property, she crossed the fully functional dam. (*See* R. p. 228, ll. 4–9). Respondent had no reason prior to trial to believe that changed, nor did she have further opportunity or reason to see or inspect the dam, which lies in the middle of Appellant's one-thousand-acre estate. Prior to trial, Appellant had listed repairs to the dam in its discovery, but never updated the discovery regarding any further damage or repairs. (*See* R. pp. 159–61).

Appellant correctly argues that it did not plead easement by necessity and Respondent was somewhat surprised to observe the emphasis placed on the *need* to use her road as justification for an easement by prescription, by deed, or by public dedication. Appellant's member testified in detail about the "wash-out" of the dam at trial and entered a photo of the dam into evidence. (*See* R. pp. 212–21; 360). Mr. Podell stated that the dam fell into disrepair in relation to a storm or the October 2015 flood. (R. p. 219, ll. 8–12). Prior to this "wash-out" the Appellant had spent $70,000 bolstering and improving the dam. (*See* R. p. 212, ll. 1–18). Prior to Mr. Podell's testimony, Respondent had every reason to believe that the dam was as solid as it was after the $70,000 of repairs, like it was when she was able to visit. To date, Respondent has no way to know precisely when the repairs were completed, and Appellant has declined to provide any clarification on that point despite its arguments about the timing of the new evidence. Respondent could not have discovered the new evidence with due diligence prior to trial because she had made efforts to

ascertain the state of the dam and was never given any indication that further inspection would be necessary or as important to Appellant's case as it turned out to be. Further, the discovery of the new evidence required the use of a drone to obtain footage of the dam—not something that would fall within the normal parameters of discovery or documentation prior to a bench trial on an easement. There is no doubt that Respondent met the standard for new evidence in Rule 60(b)(2).

c. Evidence about the Raglin Creek dam is material, had a significant impact on the lower court's final order, and is not cumulative.

There is also no doubt that the evidence is new and material. "Material" is defined as "Having some logical connection with the consequential facts" or "Of such a nature that knowledge of the item would affect a person's decision-making . . . ." *Black's Law Dictionary* 1066 (9th ed. 2009). Judge Strickland noted at the hearing for Appellant's Motion to Alter or Amend that he was "convinced that something – something I didn't hear about at the trial was – actually had taken place." (R. p. 259, l. 24–p. 260, l. 6). The trial court's order addressed in great detail Raglin Creek and the dam across it. Indeed, in the conclusion, the order stated that Respondent's private property has been used by the Plaintiff to reach the "portion of the Plaintiff's property lying south of Raglin Creek in Richland County, which creek has obstructed access to this portion of the Plaintiff's property from U.S. Highway 601 for most of that seventy year period." (R. p. 35). This was the final in a long string of references to the creek and its "natural barrier." Evidence that directly bears on the status of the dam and Appellant's access to its property must necessarily be material to an order which discusses that same matter in such detail. (*See* R. pp. 10–12). Moreover, where that evidence *directly contradicts* Appellant's statements about the disrepair of the dam at trial, it cannot be cumulative. The aerial photos show a fully functional dam, while Appellant testified at trial that it was "washed out." Respondent has successfully cast doubt on Appellant's presentation of testimony and evidence at trial; Respondent has successfully

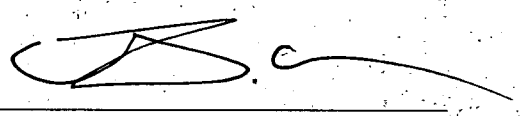
persuaded the trial judge to reconsider his rulings in light of new evidence; and Respondent has successfully met her burden of proof to receive a new trial as ordered, pursuant to Rule 60(b)(2), SCRCP.

CONCLUSION

The trial court properly concluded that Respondent met her burden of proof and is entitled to a new trial. For the foregoing reasons, Respondent requests that the Court affirm the order of the trial judge and remand this case for new trial so that Martin may continue to protect her rights as a property owner.

Respectfully submitted,

BRUNER, POWELL, WALL & MULLINS, LLC



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this final brief complies with Rule 211(b), SCACR.

Chelsea J. Clark, Esquire

Columbia, South Carolina
August 23, 2019