THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Francis O. Johnson, Respondent,

v.

Mason C. Heyward, Berkeley Electric Cooperative, Inc., and Clementine Ravenel, Defendants,

Of whom Mason C. Heyward is the Appellant.

Appellate Case No. 2019-001216

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No. 2008CP1001054

INITIAL BRIEF OF APPELLANT

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2. DID THE TRIAL COURT ERR IN FINDING THAT THE RESURRECTION ROAD PATH WAS DEDICATED TO THE PUBLIC BY HEYWARD AND ACCEPTED BY THE COUNTY BY ALLOWING AMENDMENTS TO THE PLEADINGS AT TRIAL, CAUSING PREJUDICE TO HEYWARD AND DENYING HIM A FAIR TRIAL ON HIS ABANDONMENT CLAIM?

STATEMENT OF THE CASE

Plaintiff Francis O. Johnson commenced this action by filing a Summons and Complaint on February 25, 2008. This appeal arises out of Johnson's filing of a Summons and Complaint, where he requested a declaratory judgment, which would among other things, grant him a 25' right of way on Resurrection Road, located on Johns Island, County of Charleston (Complaint, p. 3). Heyward ultimately crossclaimed against the County of Charleston, a political subdivision of the State of South Carolina, wherein he requested that any public right-of-way along Resurrection Road be declared abandoned. The trial of the case occurred through several separate hearings, including January 20, 2010, May 28, 2010, and January 14-17, 2013.

In 2010, the Court issued a ruling granting Johnson a prescriptive easement along the Resurrection Road travel path, but which reserved the issue of the nature and scope of the easement. The Court issued an order described herein as an Order and Findings of Fact dated June 30, 2015 which has the effect of merging an alleged public right-of-way

and prescriptive travel path. Appellant Mason C. Heyward filed a Motion to Alter and Amend Judgment, For a New Trial, and For Relief from Judgment, July 15, 2015, which was denied on June 13, 2019. Heyward's counsel received written notice of entry of judgment of the order appealed from on June 19, 2019. Heyward timely served his Notice of Appeal on July 17, 2019.

FACTS

Plaintiffs Francis O. Johnson and Ralph Haynes, and Defendant Mason C. Heyward are property owners accessed by Resurrection Road, an unpaved travel way of varying width located in a rural portion of Johns Island, County of Charleston, State of South Carolina. Resurrection Road has existed "since dirt was new", and the travel way serves as ingress and egress access to 17 properties (January 15, 2013 Tr. p.115:19-23; p. 29:14-25). No high-density development presently exists on the Road; lots served by the Road include fields used for agriculture, and single-family residences on acreage (January 15, 2013 Tr. p. 158:2-160:16; 165:4-6).

Heyward's property is the servient tenement for the properties accessed by Resurrection Road, including those of Johnson and Haynes (Plaintiff's Ex. 5 and 6). Heyward's property on Resurrection Road consists of two adjacent lots: a larger lot consisting of unimproved acreage, and a "flag lot" on which his residence is located (Plaintiff's Ex. 6, Defendant's Ex. 9). The Resurrection Road travel path roughly follows one of the boundaries of Heyward's property and traverses Heyward's flag lot (Plaintiff's Ex. 5). Heyward's property came to be subdivided in this manner as a result of Charleston County requiring Heyward to dedicate 25 feet of access to the County of

Charleston if he wanted to rebuild his home, which was destroyed by fire in 1995. (Plaintiff's Ex. 7; January 20, 2010 Working Copy Order, p.2-3; January 15, 2013 Tr. at 132:12-19; 134:19-135:4).

Additionally, in 1998 an easement agreement was executed between Heyward and William L. Kerrison, which created an express right-of-way for the benefit of Kerrison on the existing travel way, subject to being moved to the County's purported 25' right-of-way, should the County improve it. This easement was recorded with the Charleston Register of Mesne Conveyance on April 30, 1999 (Plaintiff's Ex. 10).

At the January 20, 2010 hearing, the trial court made a preliminary ruling on the record on Plaintiff's claims referred to in the transcript as a "ruling" or "working copy" (January 20, 2010 Working Copy Order Tr. p. 1). The court stated at the time that the issues before the court did not involve a governmental taking (Id., Tr. p. 2-3), and that Johnson had established a right to a private, prescriptive easement (January 20, 2010 Tr. p. 3). The court stated that it did not believe it had the power to move an express, dedicated easement, and cited the binding South Carolina authority of Goodwin v. Johnson, 357 S.C. 49, 591 S.E.2d 34 (Ct. App. 2003) for that proposition (Id., Tr. p.4:23-6:23). The court's preliminary ruling left open the issue of the scope of the easement (Id., p.3:20-21, p.9:25-10:10). The court also stressed that it was concerned that Johnson's planned minor subdivision might place additional burden on Heyward's servient tenement (Id., Tr. p.4:13-22)[1].

[1] For purposes of clarity and brevity, the Appellant does not object to, or appeal from, any of the substantive findings of the 2010 ruling, saving and excepting those issues raised in Appellant's amended pleadings after the date of this hearing. The Appellant highlights the specific findings of the court in 2010 to demonstrate the issues in determining the scope of easement in 2013.

Subsequent to the 2010 hearing, the pleadings were amended with leave of court, and Charleston County was ultimately added as a party (Defendant Heyward's First Amended Answer and Crossclaim, p 3-4). Heyward claimed in his Amended Answer and Crossclaim that the County had abandoned the Resurrection Road right-of-way and/or travel path. (Id.)

The County, in its Answer, denied that the Resurrection Road 25' right-of-way was dedicated to the public, and assuming, *arguendo*, that it was, the right-of-way grant was not accepted by the County. (Charleston County Answer, p. 2). Heyward perfected statutory service on all the parties served by the road pursuant to S.C. Code Ann. § 57-9-10 et. seq. (2010), by the time of the hearing (Date, Affidavit of Publication, Date, Certificate of Service).

Additional hearings with Charleston County as a party commenced January 14, 2013. At the outset of the 2013 hearing, the court noted that the purpose of the hearing was to establish the location, scope, and extent of the easement (January 14, 2013 Tr. 13:22-14:4). At the 2013 hearings, the court considered the testimony of Mason Heyward, Francis Johnson, and Steven Johnson, P.E, a civil engineer qualified as an expert with the consent of all parties. At this hearing, no party testified that Resurrection Road was inadequate for the present use of residents. Francis Johnson testified that the existing road was adequate for existing use:

> Q: Would you agree that the existing dirt roadway to access your property is in some areas less than 25 feet wide?
>
> A: Yes.

> Q: Would you agree from your personal observation that those areas have been less than 25 feet wide since the
>
> time you bought the property?
>
> A: More or less. I would say yes....
>
> Q: Have you found the road, you personally, found the road sufficient for your access to the property?
>
> A: Me, personally? Yes. It can be used. I can access it, yes....
>
> (January 17, 2013 Tr. p.36:9-24).

Francis Johnson further testified uses that to his personal knowledge, the travel path had never been obstructed by Heyward:

> Q: But you have not physically been witness to somebody putting a chain across the road, parking their vehicle across the public road, standing in the middle of the public road, laying in the middle of the public road?
>
> A: Right.
>
> (Id., p. 46:1-6).

Francis Johnson purchased the property in 1977 with the idea of living there at a future date. After a failed land purchase agreement, Francis Johnson shifted his plans by considering subdividing his property for speculative development (January 17, 2013 Tr. p.43:11-44:3). Testimony of Sidi Limehouse at trial established the rural character of the properties along Resurrection Road (January 14, 2013 Tr. p. 67:16-69:1; 74:24-76:8).

Steven Johnson, P.E., prepared a survey plat essential to understanding the issues of the case. Various versions of the plat were introduced, including Plaintiff's Exhibit 1 and 1A, and Plaintiff's Exhibit 5. Each iteration of these sketch plats shows the dirt

Resurrection Road travel lane as well as the 25' Right of Way. (January 14, 2013 Tr. at 23:1-12), and that the two overlap and separate in various locations (Id.) The dedicated right-of-way does not track with the Resurrection Road path (Id.) While they overlap in portions, they also deviate, including a complete void between the two (January 14, 2013 Tr. p. 38:4-39:17). Steve Johnson testified there were areas on the lands of Mason Heyward where the Resurrection Road travel path and the dedicated right-of-way did not converge, leaving a gap between the two of some size:

> Q. I have a follow-up question. Based on your able drawing of where the existing travel lane is and where the right-of-way is, are there a gap where those two do not converge?
>
> A. Yes, sir.
>
> Q. And on whose lands is that the case?
>
> A. That would be on Mason Heyward's lands....
>
> Q. Do you—again, using your skills as an expert surveyor and thumb-nailing things for a lack of a better term, could you estimate either the distance or the square footage of the area that constitutes the gap between the lands of—between the travel lane and the right of way described by ABCD?
>
> A. I would estimate 240 feet by probably 8 or 9 feet in that little crescent moon. That's guessing.
>
> (January 14, 2013 Tr. p. 38:4-10; 38:11-20).

Steven Johnson's testimony noted that while it was possible to build a road in the allegedly 25' dedicated right-of-way from 1996, there would be challenges in doing so. This area includes trees, low spots, and berms. (January 14, 2013 Tr. p.42:14-43:25). Widening the existing travel path would take place in a physically-constrained area (Id.,

p. 43:16-25). Steven Johnson's testimony showed that the travel path of the Resurrection Road varied from 24 feet to as little as 12 feet adjacent to the home of Heyward:

> Q; You have also previously identified the existing dirt path of Resurrection Road that people drive on?
>
> A: The traveling surface; yes sir.
>
> Q. Traveling surface. I think that's a good term. As a matter of fact, you measured the width of the road on one or more occasions; right?
>
> A. Yes sir, I have.
>
> Q. Can you tell me on the lands in the box that we have described what the variance in the width of the road is over that distance?
>
> A. It is from about 14 and a half feet to 12 feet to 13 feet to 10 feet to 24 feet at Betsy Kerrison.
>
> Q. Can you identify, just for the record for me, any road measurement that is fully outside the 25-foot right-of-way that is less than 25 feet?
>
> A. Less than 25; yes sir.....
>
> (Id., 37:2-19.)

The 2013 hearing was complicated by the position of Charleston County. At the commencement of the January 14, 2013, hearing, counsel for Plaintiff Francis Johnson and counsel for the third party defendant Charleston County stipulated that in exchange for the Plaintiff dismissing a civil conspiracy claim against Charleston County, the County would abandon the position taken in its Answer, and instead join the Plaintiff in position that the Resurrection Road right-of-way was dedicated to and accepted by the public, but that the County had no duty to maintain the road. (January 14, 2013 Tr. 6:17-10:24). James Neal, administrator of Charleston County's community road system, testified that Resurrection Road was not formally in the community non-standard road

program at the time of the trial. (January 15, 2013 Tr. p.9:20-11:1). He further testified that the County maintained or worked the existing road, as opposed to areas in a dedicated right-of-way outside the road area. (January 15, 2013 Tr. p.16:2-15). Neal also admitted that the program was developed to prevent the County having to go to court any time there was a question as to who had rights to a road (January 15, 2013 Tr. p. 40:24-46:10).

Charleston County depends in part on the consent of owners along a road to bring a road into the non-standard road system (January 15, 2013 Tr. p.7:7-59:2). During the pendency of the litigation, Mason Heyward received notice from the County about the non-standard road program. Through counsel, Heyward objected to maintenance of Resurrection Road by the County. (January 15, 2013 Tr. p.49:25-55:2.) The record of how roads are put into the system had only recently become formalized. (January 15, 2013 Tr. p. 43:9-44:17). By the County's own admission, it would seek to bring roads into "the system" only where consent could be obtained from all owners, due to the various costs of litigation (January 15, 2013 Tr. p.59:3-22).

After the 2013 hearings , the parties submitted proposed orders, and on June 30, 2015, the Court issued an Order adopting the proposed new Resurrection Road travel path as configured by Steve Johnson in his proposed plat, merging and moving the travel path and conflating it with the dedicated right of way (June 30, 2015 Findings of Fact and Order, p.22). The Court ordered preparation of plats in recordable form within 45 days of the issuance thereof. (Id., p. 22-23). The plat dimensions as ordered by the court would merge the existing travel path and the 25' right-of-way, which has the effect of taking

from Mason Heyward a significant area where no road or path is currently located. Among other things, the Order also directed:

> "THIRD: The southernmost boundary line between the Existing Dirt Road known as Resurrection Road be moved or relocated to the south between points A and H on the Johnson survey and plat so as to widen the prescriptive easement from the said point A to point H to a uniform width of twenty-five (25') feet.....
>
> SIXTH: The area of the existing 25' Right-of-Way to the west point of point H on the Johnson survey and plat is impassible because of vegetative and topographical features and that the area be returned by the Count of Charleston in its natural state to Mason C. Heyward as the compensation for the portion of the "radish patch used to recreate the uniform twenty-five (25') foot of the westernmost portion of Resurrection Road."
>
> -(Findings of Fact and Order, pp.22-23).

After receiving the June 30, 2015 Order, Heyward's counsel timely filed a Rule 52, 55, 59, and 60 Motion seeking a new trial, or in the alternative, clarifications to the Court's ruling, which Heyward believed was the result of mistake on behalf of the court (Notice of Motion and Motion to Alter and Amend Judgment, For a New Trial, and For Relief from Judgment, July 15, 2015). Specifically, Heyward argued that the Resurrection Road existing pathway could be moved by the Court through the powers of equity into the footprint of the 25' road (Id., p. 7). This would also comport with the terms of the 1998 easement agreement, where the parties contemplated that if a 25' improved road was ever built, the use of the old Resurrection Road path would be extinguished (Plaintiff's Exhibit 10). Heyward further requested that the Court clarify whether there had been an effective dedication of Resurrection Road to the public given the testimony about the community road system and Heyward's objection to the road's

inclusion in the program (Notice of Motion and Motion to Alter and Amend Judgment, For a New Trial, and For Relief from Judgment July 15, 2015, p. 5). Heyward also asked the court to review its finding that the reconfiguration of access was in fact an exaction or taking form Heyward to the County of Charleston, without compensation, by Charleston County or Johnson (Id., p.2-3). Finally, Heyward renewed his request to find that the road had been abandoned by the then-existing statutory process contained in S.C. Code Ann. § 57-9-10 (2010) et. seq., together with his renewed objection that Charleston County was allowed to amend its pleadings or stipulate that Resurrection Road was public at trial. Heyward's requests for a new trial and reconsideration were denied by Order dated June 13, 2019 (Order Denying Motion to Reconsider, New Trial, and Rules 60 Relief). This appeal was timely filed on July 25, 2019.

Subsequent to the filing of the appeal, Johnson's agents began road improvement work, and Heyward posted a supersedeas bond to stop the work after his request for a bond was approved by the trial court (Motion for Supersedeas Bond, and Order Granting Supersedeas Bond). This post-judgment matter is brought to the attention of the Court because while the trial court has ruled Resurrection Road is public, a private actor has taken acts to improve what is claimed to be a public road, perhaps in reliance on the unclear nature of the Final Order in the case.

ARGUMENT

I. THE COURT ERRED IN MERGING AN EXISTING, DEDICATED RIGHT OF WAY WITH AN EXISTING ROAD, THEREBY CREATING AN EASEMENT LARGER IN SIZE AND SCOPE THAN EITHER INDIVIDUAL SERVITUDE, AND THUS OVERBURDENED APPELLANT'S SERVIENT TENEMENT.

STANDARD OF REVIEW

The determination of the extent of a grant of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). Thus, the Court of Appeals may take its own view of the evidence. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The Court of Appeals may reverse a factual finding by the trial court in such cases when the appellant satisfies the court the finding is against the greater weight of the evidence. Campbell v. Carr, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct.App.2004).

DISCUSSION

In the series of hearings in this case, Francis Johnson testified that the existing access to his property is sufficient. (January 17, 2013 Tr. p.36:9-24). Nonetheless, Johnson seeks to modify the existing Resurrection Road lane of travel and increase its size and scope. (Findings of Fact and Order, pp.22-23). The Findings of Fact and Order, in moving the road and creating a uniform 25' travel way, are contradictory to South Carolina jurisprudence on the treatment of prescriptive easements. In Goodwin v. Johnson, 357 S.C. 49, 591 S.E.2d 34 (S.C. App. 2003), the South Carolina Court of Appeals ruled on the novel issue of the relocation of a prescriptive easement or easement

by necessity. Id., 53. In doing so, the Court looked to the Restatements on property and servitudes, and also to several cases from Maryland, a jurisdiction that adopts the proposition that an easement of necessity may be moved for various equitable reasons Id., 55-57.

The Goodwin opinion cited the Maryland case of Hancock v. Henderson, 202 A.2d 599 (1964), where the court allowed the relocation of an easement when, effectively, an old road used to access the property had ceased to function as such. The Court ruled, in language repeated in Maryland cases and adopted by the South Carolina Court of Appeals that "in the absence of agreement, the trial court 'should exercise jurisdiction in locating an adequate right of way over the servient tenement in a manner so as to permit ingress and egress of vehicular traffic, but also in a manner least burdensome to the servient tenement.'" Goodwin v. Johnson at 53-57, *citing* Hancock v. Henderson, 236 Md. 98, 202 A.2d 599 (1964) at 603.

The South Carolina Court of Appeals indicated in the Goodwin v. Johnson opinion that courts of equity should apply the general principles of the Restatements of Servitudes to the problem of the necessity and equity of moving an easement. "A Court using its equity powers may relocate an easement when the relocation will not "(a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created" (Id. at 57 citing Restatement (Third) of Property: Servitudes Section 4.8 (2000). Any movement of the easement, regardless of width, would not enhance the utility of the scope of the easement provided, and just as significantly, would increase the

burden on Heyward given the proximity of the travel way of the road to his home. Widening the road from 12 feet adjacent to his home to 25 feet is unduly burdensome.

As to the physical dimensions or width of any easement, the court committed error in conflating the 25' dedicated travel path with the Resurrection Road travel way. In Moore v. Reynolds, 285 S.C. 574, 330 S.E.2d 542 (Ct. App. 1985), the Court held: "It is a well-settled rule that where a deed grants a right of way but does not fix its width, a determination of the width of the easement becomes a matter of construction of the instrument with strong consideration being given to what is reasonable, convenient, and necessary to accomplish the purposes for which the right of way was created. Patterson v. Duke Power Company, 256 S.C. 479, 183 S.E. 2d 122 (1971); ...' In any event the intention of the parties must be the object of such inquiry.' 25 Am. Jur. 2d Easements and Licenses Section 78.'" Moore at 578, 330 S.E.2d at 545. Widening the traveled road to 25 feet in an area near Heyward's home when the present road is much smaller, and failing to locate the road in the alleged 25' right-of-way is unduly burdensome, inconvenient, and excessive to what is necessary for a right-of-way, especially in light of the fact that Francis Johnson has stated that the existing travel path is adequate for his use. (January 17, 2013 Tr. p.36:9-24). It is improper for the court to further burden Heyward. As this Court stated in Rhett v. Gray:

> "'[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.'" Clemson Univ. v. First Provident Corp., 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) (quoting 25 Am. Jur. 2d Easements and Licenses § 72 at 478). Although to the extent of the easement, the rights of the easement owner are paramount to those of the landowner, the easement owner's rights are not absolute but

> are limited, so the owners of the easement and the servient tenement may have reasonable enjoyment. Id. (citation omitted). The owner of an easement has all rights incident or necessary to its proper enjoyment, but nothing more. Id."
>
> -Rhett v. Gray, 401 S.C. 478 , 493-494, 736 S.E.2d 873, 881 (Ct. App. 2012).

The record demonstrates that Francis O. Johnson's entitlements and rights in the easement are satisfied by its present uses. Materially adding to these by widening the easement grants Francis O. Johnson something more than "rights incident or necessary to... proper enjoyment" (Id.), and is therefore unduly burdensome. The scope of the easement must therefore be limited by this Court. This position is supported by the fact that the plain language of the Kerrison easement (Plaintiff Ex. 10) does not define a width of the existing Resurrection Road in feet; instead, the easement is confined to the road as it existsIn this case, testimony at trial and the initial findings of the Court both demonstrated that the extant Resurrection Road is an undulating road varying in width from approximately 12 to 24 feet (January 14, 2013 Tr. 37:2-19). Anything more is in excess to the rights due the owner of the dominant tenement as identified in Rhett v. Gray.

Based on the sufficiency of the road for current uses and the dimensions of the road ably provided to the Court by Steve Johnson without objection, The Court should not confer an easement greater than the existing physical dimensions of the Resurrection Road dirt travel lane. Because the road is still used, is serviceable, is sufficient for ingress and egress, and has not been shown deficient for any current use, there should not be a consideration of expansion of the road. To add the 25' right of way, portions of

which are wholly unused, to the travel lane, which is as narrow at 12 feet, is to overburden the easement, particularly in the areas adjacent to Heyward's home.

Because the court improperly moved the travel path while simultaneously widening it, it had the effect of overburdening Heyward's servient tenement. Because of this error, this Court must properly limit the scope of the easement in conformity with South Carolina jurisprudence and/or direct the trial court to re-try the matter consistent with a finding that the scope of easement initially granted was overbroad and unduly burdensome to Heyward.

ARGUMENT

II. THE COURT ERRED IN FINDING THAT THE RESURRECTION ROAD PATH WAS DEDICATED TO THE PUBLIC BY HEYWARD AND ACCEPTED BY THE COUNTY BY ALLOWING AMENDMENTS TO THE PLEADINGS AT TRIAL, CAUSING PREJUDICE TO HEYWARD AND DENYING HIM A FAIR TRIAL ON HIS ABANDONMENT CLAIM.

STANDARD OF REVIEW

Issues not raised in the pleadings cannot be a basis for relief at trial where not tried by the implied consent of the parties. Dunbar v. Carlson, 533 S.E.2d 913, 341 S.C. 261 (S.C.App. 2000). Motions to amend pleadings are within the sound discretion of the trial judge, and the party objecting must establish prejudice. Foggie v. CSX Transp., Inc., 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993). A failure to exercise discretion amounts to an abuse of discretion. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) Where the trial judge is vested with discretion, but his ruling reveals no discretion was, in

fact, exercised, an error of law has occurred. Balloon Plantation v. Head Balloons, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct.App.1990).

DISCUSSION

In his Amended Answer and Crossclaim, Heyward petitioned for the abandonment of the public portion (if any) of the Resurrection Road travel way (Amended Answer at p.2-3). In the County's Answer to the Crossclaim, it denied that there was a dedication of easement, and assuming *arguendo* that there was, it was not accepted. Simultaneously therewith, Heyward's counsel served by publication a Notice for Road Abandonment in the Charleston Post and Courier by the prescribed means, and served adjacent landowners by the statutorily-prescribed manner to abandon the road (Affidavit of Publication, filed Oct. 29, 2010.) At the first day of the 2013 hearings, counsel for the County informed the trial court that it would change its position to state that Resurrection Road was dedicated to the public and accepted. (January 14, 2013 Tr. p. 6:17-10:24). Counsel for Heyward objected to this amendment of the pleadings, and the court took the objection under advisement (Id.)

Heyward raised this objection again in his Notice of Motion and Motion to Alter and Amend Judgment, For a New Trial, and For Relief from Judgment. The Court's Order Denying Motion to Reconsider, New Trial, and Rule 60 Relief merely states that the court found that the pleadings conformed to proof at trial pursuant to Rule 15 (b). However, the Order and the trial transcript fail to state in the record the reason for amendment to the evidence, beyond merely stating, "I find the pleadings conformed to the proof at trial." (Order Denying Rule 60 Relief at p. 2). This conclusory statement is

not in conformity with Rule 15 (b) SCRCP, which states in relevant part: "Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence. In the event the Court should try issues not raised by the pleadings, it shall state in the record all such issues tried and the reason therefor."

The court erred in trying the issue of implied dedication over Heyward's objection, and Heyward was unfairly prejudiced by the change in position agreed upon by Francis Johnson and the County at trial. The last-minute change of position by the County at trial is the definition of prejudice. The court must consider whether the objecting party has had opportunity to prepare for the issue raised by the proposed amendment. Soil & Material Engineers, Inc. v. Folly Associates, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct.App.1987) ("Simply because an amendment to conform to proof was made late in the trial affords no basis for holding that the amendment comes too late. The question is one of prejudice to the opposing party."). Folly Assocs., 293 S.C. at 501, 361 S.E.2d at 781 (Ct.App.1987). "In considering potential prejudice to the opposing party, the court should consider whether the opposing party has had the opportunity to prepare for the issue now being raised formally." Id., quoting H. Lightsey & J. Flanagan, South Carolina Civil Procedure at 291. Where late amendment of pleadings would cause prejudice to the opposing party, the court has the ability to deny the amendment or grant a continuance. Ball v. Canadian American Express Co., 314 S.C. 272, 275 442 S.E. 2d (S.C. Ct App. 1994). "Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." Id., 314 S.C. at 275, 442 S.E.2d at 622.

Heyward relied on the position of the County for at least a year prior to the trial of the case, and after he had properly filed his abandonment claim. Francis O. Johnson and the County read their stipulation effectively amending the pleadings into the record on the first day of the 2013 hearings, which was a trial on the merits. The effect of the allowance of the amendment and/or stipulation between Francis O. Johnson and the County was to deprive Heyward of the right to properly try that issue and shows extreme prejudice, given that Heyward had no reason not to rely on the representations made by the County, which were central to his case. Moreover, and regardless of the relative prejudice to Heyward, it was error of law and abuse of discretion to allow the described amendment, but to not provide a basis that was more than conclusory in nature, as required by the plain language of Rule 15 (b), SCRCP.

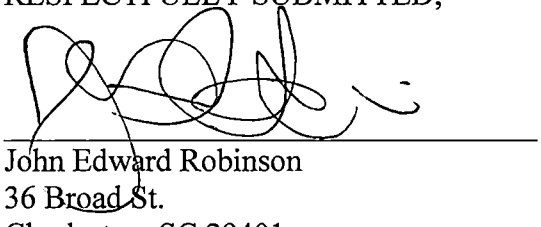
Because the late nature of the amendment of pleadings and/or stipulation voided Heyward's ability to prepare for the issues raised, and because the trial court did not include in the record sufficient reason for its rulings allowing the amendment or stipulation, the trial court committed an abuse of discretion and error of law.

CONCLUSION

For the reasons stated, Heyward respectfully submits that the trial court committed an error of law in (A) expanding the scope of an easement so as to overburden the existing easement and thus harming the servient tenement owned by Heyward; and (B) that it was an abuse of discretion and error of law to allow the County's amendment of its Answer and/or enter its stipulation with Francis O. Johnson at trial, thus prejudicing

Heyward and denying him a fair trial. For the foregoing reasons, the trial court must be reversed.

RESPECTFULLY SUBMITTED,



January 1, 2020

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THE STATE OF SOUTH CAROLINA
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Of whom Mason C. Heyward is the Appellant.

Appellate Case No. 2019-001216

The Honorable Mikell R. Scarborough
Charleston County
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CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief of Appellant and the Designation of Matter To Be Included In the Record On Appeal via Hand Delivery on January 2, 2019 to the Clerk of Court of the South Carolina Court of Appeals.

January 2, 2020

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January 2, 2020

VIA HAND DELIVERY
Clerk, SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Francis O. Johnson, Respondent, v. Mason C. Heyward, Berkeley Electric Cooperative, Inc., and Clementine Ravenel, Defendants, Of whom Mason C. Heyward is the Appellant, Case No. 2019-001216.

Dear Ms. Allen:

For the above case, please find attached the Initial Brief of Appellant and the Designation of Matter to Be Included In the Record on Appeal.

Sincerely,

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