STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
James L. Braswell, Sr., Plaintiff, vs. James F. Amick, Defendant.	CIVIL ACTION NO.: 2017-CP-36-00214 Order of Judgment

Hearing Dates:	January 6th – 9th, 2020
Hearing Judge:	Grace Gilchrist Knie
Counsel for Plaintiff:	Robert W. Dibble & Jennifer Dowd Nichols
Counsel for Defendant:	Karl Stephen Brehmer
Court Reporter:	Joy E. Holston

This matter was before the Court from Monday, January 6th, 2020, through Thursday, January 9th, 2020, in Newberry County, SC, the Eighth Judicial Circuit for the purposes of a non-jury bench trial concerning a Declaratory Judgment Action pursuant to Rule 57, of the SCRCP, to determine the existence or non-existence of an easement across Defendant's land. Attorney Jennifer Dowd Nichols of Nichols and Price Law Firm and Attorney Robert W. Dibble, Jr., of Harrell, Martin & Peace, P.A., were present representing the interests of the Plaintiff, who was present. Attorney Karl Stephen Brehmer of Brown and Brehmer was present representing the interests of Defendant, who was present. Joy E. Holston was the Court Reporter.

PROCEDURAL BACKGROUND:

This action was commenced by the filing of a Summons and Complaint dated May 15th, 2017. A Lis Pendens was also filed on May 15th, 2017. Defendant was served with the Summons, Complaint, and Lis Pendens on July 27th, 2017. An Affidavit of Service was filed on August 4th, 2017. A Notice of Appearance of Counsel was filed on behalf of the Defendant on August 29th, 2017. Defendant filed a Motion to Dismiss, an Answer, and a Counterclaim on August 29th, 2017.

Plaintiff filed a Reply to Defendant's Motion to Dismiss, Counterclaim, and Answer on September 29th, 2017. Plaintiff filed a Motion for Injunction Pendente Lite and Advancement on the Calendar on October 31st, 2017. An Order was issued on December 15th, 2017, continuing the case and staying all action on the case pending mediation. On March 7th, 2018, Defendant filed a Notice of Motion and Motion for Summary Judgment. A Certificate of Mailing was filed March 8th, 2018, asserting that the Defendant had served on Plaintiff via UPS overnight mail a copy of the Defendant's Motion for Summary Judgment. Plaintiff filed a Motion to Amend the Complaint on March 12th, 2018. Plaintiff filed a Motion for Summary Judgment on April 24th, 2018. A Certificate of Service filed April 30th, 2018, stated that Plaintiff served the Defendant via first class mail with a copy of the Plaintiff's Motion for Summary Judgement. Defendant filed an Answer to the Amended Complaint and Counterclaim on April 30th, 2018. Plaintiff filed a Motion for Summary Judgment on May 1st, 2018. Plaintiff filed a Reply to Defendant's Counterclaim on May 1st, 2018. Defendant filed a Notice of Motion and Motion for Summary Judgment on May 1st, 2018. A Scheduling Order was issued on June 6th, 2018. Plaintiff filed a Motion to Compel on August 17th, 2018. On August 27th, 2018, a scheduling order was issued.

The matter was tried on December 3, 2018. On February 14th, 2019, an Order for a New Trial was issued. Defendant filed an Appeal to the South Carolina Court of Appeals on March 12th, 2019. An Order Relieving Counsel for Defendant was recorded on March 15th, 2019. A Remittitur from the Court of Appeals was filed May 2nd, 2019, stating that the Appellant wished to either withdraw or dismiss the appeal. Plaintiff filed a Motion for Injunction Pendente Lite and Advancement on the Calendar on October 1st, 2019. The hearing on Plaintiff's Motion was held on November 13th, 2019. Defendant filed a Motion for Continuance on December 2nd, 2019. An Order of Continuance was issued on December 3rd, 2019. The parties were before this Court on

Monday, January 6th, 2020, for the purposes of a non-jury bench trial on all issues. Both Mr. Braswell and Mr. Amick were present for the duration of the trial. The witnesses were sequestered at the commencement of the trial pursuant to the oral motion of the Defendant.

RELIEF REQUESTED IN PLEADINGS OF THE PARTIES:

The Plaintiff, in the original Complaint, first asserted the cause of action of declaratory judgment and for further relief pursuant to S.C. Code Ann. § 15-53-120. Plaintiff argued he is an interested person under a deed with respect to certain rights pertaining to the use of a 31.14 foot right of way over, across, and through land owned by the Defendant for the purpose of access, ingress, and egress to and from the Plaintiff's property. The Plaintiff also asserted the causes of action of easement by necessity, easement by prescription, easement by implication, and the entry of an injunction pendent lite and permanent enjoining of the Defendant from interfering with the right of the Plaintiff and his heirs and assigns use of the right of way.

The Defendant, in the first Motion to Dismiss, Answer, and Counterclaim, requested the Court dismiss for failure to state a claim for relief and failure to join one or more necessary parties pursuant to South Carolina Rules of Civil Procedure, Rule 8(a) and Rule 12(b)(6). The Defendant also requested the Court deny the Plaintiff's request for injunctive relief, enter a declaratory judgment that the Plaintiff was not entitled to any injunctive or other equitable relief, and that the right of way does not run over the Defendant's property, or in the alternative, is not wider than 12.5 feet. Further, Defendant requested the Court find that no easement by prescription, necessity, implication, or adverse possession applies to the right of way.

The Plaintiff filed an Amended Complaint on March 12th, 2018. In the Amended Complaint, the Plaintiff asserted the causes of action of declaratory judgment and for further relief pursuant to S.C. Code Ann. § 15-23-120 related to the 31.14 foot right of way over the Defendant's

property, easement by necessity, easement by prescription, easement by implication, and request for an injunction pendent lite and permanent enjoining Defendant from interfering with the right of the Plaintiff and his heirs and assigns.

The Defendant filed an Answer to the Amended Complaint and Counterclaim on April 30th, 2018. The Defendant asserted a counterclaim for declaratory judgment, and requested the Court deny the Plaintiff's request for injunctive relief, deny the Plaintiff's requests for easement by prescription, necessity, implication, or adverse possession, enter declaratory judgment in favor of Defendant that no right of way exists, or, in the alternative, that if a right of way exists, it is limited to 12.5 feet in width and reasonable ingress/egress only. Defendant further asserted that reasonable ingress/egress means ingress/egress by persons or vehicles, which do no damage to the Amick land, does not change the nature, character, quality, or value of the land on which the right of way lies, and does not interfere with Mr. Amick's, his guests', invitees', heirs', or assigns' use of the Amick land.

At the commencement of this action, Plaintiff informed the Court and Defendant that he wished to withdraw his causes of action for easement by necessity and easement by implication. The amendment was not objected to by Defendant.

In factual summary, Mr. Braswell owns a 120 acre tract of land, which does not abut a public road. Mr. Amick owns the 17.08 acre tract between the 120 acre tract and Highway 76. The 120 acre tract is shown on a plat first surveyed in May of 1962 for Sula Miller by Claude Johnson. That plat shows a "R/W to Hwy" beginning on the northwestern boundary of the 120 acre tract. The "R/W to Hwy" crosses the extreme western portion of Mr. Amick's land and terminates on Highway 76.

Mr. Braswell seeks (1) a judgment declaring that he has an appurtenant, prescriptive easement for farming purposes at all times over, across, and through the western 22.75 feet of Mr. Amick's land to access the 120 acre tract to and from Highway 76 and (2) an injunction preventing anyone from interfering with his use of the easement for that purpose.

Mr. Amick denies the existence of any easement over, across, and through his land, but if one is found to exist, he seeks a judgment declaring the size, location, scope and use of the easement; or, in the alternative, that if a right of way exists, it is limited to 12.5 feet in width and reasonable ingress/egress only. Mr. Amick defined reasonable ingress/egress as meaning ingress/egress by persons or vehicles, which do no damage to the Amick land, does not change the nature, character, quality, or value of the land on which the right of way lies, and does not interfere with Mr. Amick's, his guests', invitees', heirs', or assigns' use of the Amick land.

FACTUAL BACKGROUND:

In 1962, Sula Miller owned property which encompassed both the 120 acres now owned by Mr. Braswell and the 17.08 acres now owned by Mr. Amick. In May of 1962, Ms. Miller obtained a plat of "Part of Sula Miller Land." The plat was prepared by Claude E. Johnson and set out the 120 acres as a separate parcel. In and prior to 1964, Mr. Braswell was engaged in the dairy and farming business. In 1964, he leased the northern portion of the 120 acres from Ms. Miller. Mr. Braswell incorporated the leased property into his farming operation and grew row crops on that land to provide feed for his dairy herd. Mr. Braswell accessed the leased property from Highway 76 by way of the R/W to Hwy. (hereinafter "Right of Way".)

On September 28, 1964, Mr. Johnson prepared a plat of 4.04 acres of Ms. Miller's land. The plat for the 4.04 acres was recorded on November 11, 1964, in the Office of the Clerk of Court for Newberry County in Plat Book U at page 61. Ms. Miller conveyed the 4.04 acre tract

to L.K. Bedenbaugh by deed dated November 28, 1964. The deed referenced the recorded plat. That deed was recorded in the Office of the Clerk of Court for Newberry County on November 28, 1964, in Deed Book 87 at page 429. The 4.04 acre tract was located between the 120 acres and Highway 76 and encompassed the entire Right of Way. At this point in time, the land encompassing the Right of Way was owned by an unrelated third party. It is contended by Plaintiff that Mr. Braswell's subsequent and continuous use of the Right of Way became adverse at that point in time and the prescriptive period began to run.

The plat refers to a 12.5 foot strip of land lying immediately to the West of the 4.04 acres. The deed refers to a dirt road to the West of the property. The property description in the deed to Mr. Bedenbaugh is as follows:

> All that certain piece, parcel and lot of land situated in the County of Newberry and State of South Carolina, being bounded as follows: on the north highway 76; on the east lands of Sula S. Miller, grantor, on the west by dirt road, on the south lands of Sula S. Miller and Zeda Bickley. A lot containing 4.04 acres, more or less, beginning at a point in center of U.S. Highway 76 marked by an iron pipe on side of highway and running with the highway 5(sic)55-50E. 214', to a point in center of highway marked by an iron pipe onside of highway then S44-00W 9.13 to an iron pipe then N45-00W 3.00 to an iron pipe then N73-00W 4:15 to an iron pipe then 5(sic)3-00W 5.40 to an iron pipe then S 44-00W 3.75 to iron pipe in center of highway, iron pipe by side of highway. Plat recorded in Plat Book "U" at page 61.

Mr. Amick admitted that he does not claim ownership of any portion of the 12.5 foot strip.[1] Neither the owner of the 12.5 foot strip, nor the owner of the dirt road referred to it in that deed (to the extent they are not the same) is a party to this action. Therefore, the ownership of that land and any claim Mr. Braswell may have in and to that land is beyond the jurisdiction of this Court and need not be discussed.

In October of 1971, Mr. Johnson re-surveyed the 120 acres owned by Sula Miller. No

[1] For purposes of this action the Court will consider that Mr. Amick claims no ownership interest in the 12.5 foot strip.

revisions were shown on the plat. That plat was recorded on May 5, 1972, in Plat book AG at page 28 in the Office of the Clerk of Court for Newberry County. On June 20, 1972, Mr. Braswell bought the 120 acre tract from Ms. Miller. The property description in the deed is as follows:

> All that piece, parcel or tract of land containing one hundred twenty and eighty-one-hundredths (120.80) acres, more or less, situate, lying and being in Tax District No. 3, in the County of Newberry, State of South Carolina, said property being bounded by lands of Harold Long, by lands of William Ballentine; by lands of Sula S. Miller, and by lands of Henry Parr. This tract of land is more particularly described on a Plat made by Claude E. Johnson, L.S. 1373, surveyed May 1962 – September 1964 – October 1971, and recorded in the office of the Clerk of Court for Newberry County in Plat Book AG at page 28. This is a portion of the property conveyed to A.B. Miller and Sula S. Miller by deed dated March 14, 1960, and recorded in the office of the Clerk of Court for Newberry County in Deed Book 75 at page 575, and a portion of the property inherited by Sula S. Miller from the Last Will and Testament of A.B. Miller on file in the office of the Probate Judge for Newberry County.[2]

That deed was recorded on June 20, 1972, in the Office of the Clerk of Court for Newberry County in Deed Book 109 at page 270.

The Braswells collectively referred to the western side of the 120 acre tract as the "Ballentine" side and the eastern portion of the 120 acre tract as the "Parr" side. After June of 1972, Mr. Braswell continued to access the Ballentine side of the 120 acre tract by way of the Right of Way. He accessed the Parr side by way of the farm road shown on the plat of the 120 acres. In the 1970s, Mr. Braswell's sons, James L. Braswell, Jr. and Mark Wayne Braswell, became active in the farming and dairy operations with their father, and they began jointly directing the activities of the employees connected with the dairy and farming operations.

The Braswells grew row crops on the Ballentine side and coastal Bermuda hay on the Parr side. Mark Wayne was primarily responsible for the row crops on the Ballentine side of the

[2] Although the deed description indicates Sula Miller received a portion of the property through her husband's estate, the testimony established that this property came entirely through deeds outside of that estate.

property. The Braswells accessed the Ballentine side of the property by using the Right of Way. Plowing, planting, fertilizing, irrigating and harvesting the row crops required the use of plows, harrows, cultivators, tractors, combines, sprayers, and farm trucks. The Braswells also used the Right of Way to bring windrowers and hay balers to harvest the coastal Bermuda hay on the Parr side of the property. The Braswells brought that equipment across the Right of Way as often as necessary to conduct their farming operations on the 120 acre tract. Those row crops were planted and harvested each year on a regular basis, sometimes twice a year. The coastal Bermuda hay was harvested three or four times each year.

Between 1978 and 1984, the Braswells constructed two ponds on the 120 acre tract and installed a system to irrigate the row crops on the Ballentine side. Operation of the irrigation system required access to the property, both day and night, as often as necessary for the purpose of moving the irrigation equipment and refueling the irrigation pumps. Mr. Braswell was able to cross the pond dam with lighter equipment to harvest the coastal Bermuda hay planted on the Parr side of the property, but he brought that equipment in to the 120 acre tract by using the Right of Way.

Between 1964 and 1988, the 4.04 acre tract changed hands several times. In 1988, Mr. Amick and Tamela Amick, his wife at that time, purchased 17.080 acres from H.L. Brock and Thelma D. Brock. The 17.080 acre tract encompassed the 4.04 acre tract. The property description in the deed is as follows:

> All that certain piece, parcel or tract of land, consisting of 17.080 acres, more or less, located on U.S. Highway No. 76, in the County of Newberry, State of South Carolina, with the following buttings, boundings and delineations, to-wit: Beginning at the Northernmost point and running on a southeasterly direction along the right-of-way of U.S. Highway No. 76 for a distance of 268.43 feet to an iron pin; thence running in a southwesterly direction along the tract of land conveyed to Grace K. Tarlton by Grady Tarlton for a distance of 410 feet to an iron pin; thence running in an southeasterly direction along the tract of land

> conveyed to Grace K. Tarlton for a distance of 290 feet to an iron pin; thence running in a southwesterly direction along the right-of-way of a farm road and the lands now or formerly of Sula Miller Harley for a distance of 457.53 feet to an iron pin; thence running along the lands now or formerly of Sula Miller Harley in the aggregate of 320.22 feet to an iron pin located in a pond; thence running in a northwesterly direction along the lands of James Braswell for a distance of 329.31 feet to an iron pin; thence running in a northeasterly direction for a distance of 887.27 feet along the lands of James Braswell to an iron pin; thence thence (sic) running in a northwesterly direction for a distance of 198.05 feet to an iron pin; thence running in a northeasterly direction along the lands of William Ballentine for a distance of 604.97 feet to an iron pin, the point of beginning. Reference is hereby craved to and incorporated as a part of this description to a plat entitled "Tarlton Tract", prepared by Claude E. Johnson, L.S., dated August 14, 1979, which plat is of record in the office of the Clerk of Court for Newberry County in Plat Book AU at page 14.
>
> ALSO, all our right, title and interest which we own in a twenty-five (25) foot right-of-way, which is located on the eastern boundary of the property herein conveyed and on the eastern boundary of a 2.996 acre tract conveyed to Grace Tarlton September 7, 1979.
>
> This is the identical property conveyed to the Grantors herein by deed of Grady Tarlton dated September 7, 1979, recorded in the office of the Clerk of Court for Newberry County in Deed Book 165 at page 6.

That deed was recorded June 10, 1988, in the Office of the Clerk of Court for Newberry County in Deed Book 283 at page 183.

The deed to Mr. and Mrs. Amick also conveyed to them a 25 foot easement on the eastern boundary (not the easement that is the subject in this litigation) of the 17.08 acre tract. Testimony presented on behalf of Defendant avers that the 25 foot easement was never assigned to Mr. Braswell.

Sometime after 1992, Mr. Amick asked Mr. Braswell if gates could be placed at or near the entrance to the Right of Way from Highway 76. Although an inconvenience to Mr. Braswell and to his employees, Mr. Braswell did not object to gates being installed provided he had a key. Mr. Braswell purchased four 12 foot gates. Two of the gates (the first set of gates) were installed at the entrance of the Right of Way near Highway 76. The other two gates were installed

between Mr. Braswell's property and the Amicks' property. Mr. Amick and Mr. Braswell agreed that the first set of gates would be locked and that Mr. Amick and Mr. Braswell would each have a key to the lock.

There is a dispute between the parties regarding a later lock change by Mr. Amick on the first set of gates. However, upon Mr. Braswell's inability to unlock the first set of gates to drive down the Right of Way, Mr. Braswell removed those gates from the hinges so he could gain access to his property over the Amicks' property. Thereafter, Mr. Braswell, his sons, and his employees continued to use the Right of Way for all purposes, at all times as necessary, both day and night, to access the 120 acre tract from Highway 76 to conduct farming operations on the 120 acres.

In 2013, Mr. Amick[3] began to impede and hinder Mr. Braswell's use of the Right of Way by placing obstructions on or along the side of the road in the Right of Way. These obstructions made it difficult for Mr. Braswell to bring equipment to his property from Highway 76, but they did not prevent him from accessing the 120 acre tract. As the result of Mr. Amick's actions, Mr. Braswell filed this action on May 15, 2017. In October of 2017, Mr. Amick installed new gates at the end of the Right of Way near Highway 76 and did not give Mr. Braswell a key. Mr. Braswell objected to those locked gates and filed a motion for an injunction pendent lite on October 31, 2017. That motion was resolved by a Court approved agreement between the parties allowing Mr. Braswell to access his property using the Right of Way without any interference from Mr. Amick. Each party filed and withdrew a motion for summary judgment. The case was then tried to conclusion before Judge Hocker in December of 2018. Defendant made a motion for

[3] By deed dated August 20, 1997 and recorded on August 27, 1997 in the Office of the Clerk of Court for Newberry County, Tamela F. Amick conveyed her interest in the 17.080 acres to James Franklin Amick. Mr. Amick began dating his current wife in 2011.

a new trial which was granted. Mr. Amick then blocked the Right of Way with a trailer. The Plaintiff renewed his motion for an injunction pendente lite. The motion was heard on November 15, 2019, before Judge Nettles, and, at the conclusion of the hearing, the Court orally issued an immediate order regarding the parties conduct with the understanding that a more detailed written order would subsequently be issued. This trial followed.

APPLICABLE LAW & LEGAL ANALYSIS:

1. **Appurtenant Prescriptive Easement**.

"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), quoting Frierson v. Watson, 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct. App. 2006). Easements are created by express grant or arise as a matter of law. Brasington v. Williams, et al., 143 S.C. 223, 141 S.E. 375, 382 (1927) ("There seems to have been nine methods recognized under the common law for the creation of an easement, namely, by grant, estoppel, way of necessity, implication, dedication, prescription, ancient window doctrine, reservation, or condemnation."). Under South Carolina law, "A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." Boyd v. BellSouth Telephone Telegraph Co., Inc., 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). In order to establish a prescriptive easement, "the claimant must prove by clear and convincing evidence: (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." Simmons v. Berkeley Electric Cooperative, Inc., 419 S.C. 223, 229, 797 S.E.2d 387, 390 (2016), quoting Darlington County. v. Perkins, 269 S.C. 572, 576, 239 S.E.2d 69, 71 (1977). The Court in Simmons went on to clarify the third element of a prescriptive easement by stating:

> "While this Court has recently articulated the third element of a prescriptive easement as requiring the claimant's use be "adverse or under a claim of right," this Court has not always articulated the third element this way." Simmons, 419 S.C. at 230, 797 S.E.2d at 391.

In 1823, the Constitutional Court of Appeals of South Carolina determined three things are necessary to establish a right by prescription: (1) use and occupation or enjoyment; (2) the identity of the thing enjoyed; and (3) that it is adverse to the right of some other person. Lawton v. Rivers, 13 S.C.L. 445, 451 (2 McCord) (1823). In 1917, this Court relied on Lawton and determined: "To establish a right by prescription, it is necessary to prove three things: (1) The continued and uninterrupted use or enjoyment of the right for the full period of 20 years; (2) the identity of the thing enjoyed; (3) that the use or enjoyment was *adverse, or under claim of right.*" Williamson v. Abbott, 107 S.C. 397, 400, 93 S.E. 15, 15–16 (1917). By placing a "comma" after the term "adverse," this Court intended to modify the term "adverse," not create another method to establish a claim. Accordingly, the third element of a prescriptive easement should be interpreted as requiring the claimant's use be adverse or, in other words, under a claim of right contrary to the rights of the true property owner." Simmons, 419 S.C. at 230-231, 797 S.E.2d at 391.

The Court of Appeals in Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005), held that continuous use "must only be of reasonable frequency as determined from the nature and needs of the claimant". Id., 363 S.C. at 318, 609 S.E.2d at 601, citing Cuthbert v. Lawton, 3 McCord 194, 14 S.C.L. 194 (Ct. App. 1825) (Establishing the long held principle of South Carolina law that once a right of way by prescription has been established by twenty years of continuous use, a later diminishment in the frequency of that use does not necessarily nullify the established right by prescription). The Supreme Court in Bundy v. Shirley, 412 S.C. 292, 312, 772 S.E.2d 163, 174 (2015), affirmed the definition of continuous use requirement set out by the

Court of Appeals in Jones. The Simmons Court, while overturning part of Jones, did not disturb the holding in either Jones or Bundy in respect to the definition of continuous use.

The photographs taken by the United States Department of Agriculture, Plaintiff's Exhibits, are persuasive to the Court. Those photographs clearly show the existence and location of a road within the Right of Way and the increased use of the road between 1959 and 1994. There was testimony that those photographs showed a road crossing Mr. Amick's land within the Right of Way. The evidence establishes that Mr. Braswell used that Right of Way adverse to the successive fee owner(s) of the 4.04 acre tract for twenty (20) consecutive years between 1964 and 1984.

There was testimony that the Right of Way was impassable in and after 1988. That testimony is not consistent with the location or condition of the road on the Right of Way as depicted in the USDA photographs. There was testimony that in 1988 a large portion of Mr. and Mrs. Amick's land, including the Right of Way, had to be cleared. There is a dispute between the parties as to the extent of clearing that was required. It is clear that Mr. Braswell used the Right of Way for access to the 120 acres from Highway 76 for a period in excess of 20 years beginning in November of 1964 in a manner that was adverse and under a claim of right contrary to the rights of the successive, underlying fee owners prior to Mr. Amick purchasing the 17.08 acre tract.

The record also establishes that Mr. Braswell's use of the Right of Way has been continuous and uninterrupted within the meaning of Boyd, Jones, Bundy, and Simmons. Jones and Bundy established the definition of continuous use as noted above. Mr. Braswell has used the Right of Way over, across and through the western portion of Mr. Amick's property as reasonably necessary from time to time to conduct farming operations on the 120 acre tract

before and since November 28, 1964, when Ms. Miller conveyed the 4.04 acres to Mr. Bedenbaugh. Thus, he has met his burden of proving the continuous and uninterrupted use necessary to meet the requirements of that element of a prescriptive right under Boyd, Jones, Bundy and Simmons.

Mr. Braswell has also established the identity of the "thing" as required by Simmons. The plat recorded in Book AG at page 28 shows the Right of Way to be located on the extreme western side of Mr. Amick's land. There was testimony that the "R/W to Hwy" notation on the Braswell plat might indicate an easement. The USDA photographs show the road within, or close to the proximity of the Right of Way.

There was also testimony presented by Plaintiff's witness, Mr. Dominick, that the plat recorded in Book AG at page 28 had a scale of one-inch equals 5 chains. There was testimony that if anything on the plat had not been drawn to that scale that fact would normally have been noted on the plat. Using that scale and three accepted measurement standards he calculated the average width of the "R/W to Hwy" to be 31.14375 rounded to 31.14 feet. He testified that in his experience it is not normal to have such an odd dimension and, therefore, that it was his opinion the width of the "R/W to Hwy" shown on the plat was 30 feet.

Mr. Dominick also prepared Plaintiff's Exhibit 26, which shows the fence between the 12.5 foot strip and Mr. Ballentine's (now Long's) property, and the location of the fence posts at both ends of the Right of Way. The western most fence posts are each 5.5 feet east of the fence. The distance between the fence posts on the Highway 76 side is 29.75 feet. The distance between the fence posts on the other end of the Right of Way is 29.6 feet. It is alleged by Plaintiff that he, Mr. Braswell, has been effectively using approximately seven (7) feet of the 12.5 foot strip and approximately 22.75 feet in width of the western side of Mr. Amick's property to access the 120

acre tract. Based on this evidence, I find and conclude that Mr. Braswell has identified an easement within the holding of Boyd and Simmons. However, the exact size of the easement is in dispute between the parties. Mr. Amick contends that the width of the easement is at the most 12.5 feet of the western side of Mr. Amick's property.

The record contains consistent testimony that the use by Mr. Braswell of the Right of Way was under a claim of right adverse to the true owners of the underlying property. It is undisputed that the 4.04 acre tract, which is part of Mr. Amick's 17.08 acre tract was owned by unrelated third parties after November 28, 1964. It has been alleged by Plaintiff that he used the Right of Way as though he owned it. It is uncontested that when Mr. Amick changed the lock on the first set of gates, Mr. Braswell took down those gates and continued to use the Right of Way to access the 120 acres. Each time someone objected to Mr. Braswell's use of the Right of Way after his prescriptive easement had been established [2], Mr. Braswell ignored those objections and continued to drive his equipment to and from Highway 76 to farm his land. No one ever successfully prevented Mr. Braswell from accessing the 120 acres by way of the Right of Way until 2019, when Mr. Amick placed a trailer across the Right of Way. By that time, Mr. Braswell had acquired an easement by prescription over, across and through Mr. Amick's land. This evidence establishes that Mr. Braswell has used the Right of Way since 1964 under a claim of right adverse to each successive owner of the 4.04 acre tract. Thus, the last element set out by the Court in Simmons has been established.

Mr. Braswell has also established that the easement is appurtenant to the 120 acre tract. The Court of Appeals in Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012), held that "an appurtenant easement inheres in the land, concerns the premises, has one terminus on

[2] See Kelley v. Snyder, 396 S.C. 564, 722 S.E.2d 813 (Ct. App. 2012)

the land of the party claiming it, and it essentially necessary to the enjoyment thereof... It also passes with the dominant estate upon conveyance." Rhett, 401 S.C. at 492, 736 S.E.2d at 881, citing Windham v. Riddle, 381 S.C. 192, 201-202, 672 S.E.2d 578, 583 (2009). The Court of Appeals held "easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate." Smith v. Commissioners of Public Works of City of Charleston, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994), citing Am.Jur.2d, Easements and Licenses § 13 (1966).

There is no question that one terminus of the easement is on Mr. Braswell's land. It is also clear from the record that the easement is essential to Mr. Braswell's enjoyment of his land. The evidence revealed the 25 foot easement on the eastern boundary of Mr. Amick's property. He presented testimony that the easement had never been assigned to Mr. Braswell. Mr. Braswell contends that it is impossible to bring heavy equipment across the pond dams. Under these circumstances, both of these elements have been established.

Although the elements necessary to establish that an easement is appurtenant have been recited in several cases (See Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Springob v. Farrar, 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999)), the Courts have not clearly defined either the term "inhere in the land" or the term "concerns the premises." See Shirley We Can Figure This Out: The Continued Confusion Surrounding Prescriptive Easements, 68 S.C.L.Rev. 795 (2017) (Clark, at 808). However, in several cases, South Carolina Courts have held that roadways used for access, ingress, and egress to the dominant estates classify as appurtenant easements. See Smith v. Commissioners of Public Works of City of Charleston, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994) (holding that the owners of the dominant estate had an appurtenant easement across the servient estate of ingress and egress to a canal);

Proctor v. Steedley, 398 S.C. 561, 574, 730 S.E.2d 357, 364 (Ct. App. 2012) (affirming the Special Referee's holding that an easement for an access road across the servient estate was an appurtenant easement).

The Court finds and concludes that a Right of Way exists in the 120 acre tract and is "related to" the 120 acre tract. The easement exists on Mr. Amick's land and obviously inheres in and concerns Mr. Braswell's land because the easement is the only practical means by which he can gain access to his land for his farming equipment.

Mr. Braswell has established by clear and convincing evidence all of the elements necessary to establish an appurtenant, prescriptive easement over the Right of Way on the extreme western side of Mr. Amick's land (the easement). The western boundary of the easement is co-extensive with the western boundary of Mr. Amick's land. The eastern boundary of the easement is a distance east of the western boundary of Mr. Amick's land. The northern terminus of the easement is the southern boundary of the right of way of Highway 76. The southern terminus of the easement is the northern boundary of the 120 acre tract. However, the Court is not convinced that the size/width of the easement is as large as the Plaintiff contends.

2. Is Mr. Amick a bona fide purchaser for value and took subject to the easement.

Mr. Braswell contends that Mr. Amick is not a bona fide purchaser for value without notice because in 1988 both he and his wife were put on inquiry notice of the fact that someone was using a road across the property they were considering buying. An easement by prescription is not within the scope of the recording act. Means, The Recording of Land Titles in South Carolina (Herein a Bona Fide Purchaser of Land): A Title Examiner's Guide, 10 S.C.L.Q. 346, pp. 358-363 (1957). The authorities are split on whether the purchaser of the servient estate without notice of the unrecorded easement takes free and clear of the prescriptive easement. Id.

However, under the doctrine of inquiry notice, a purchaser of the servient estate with inquiry notice of the easement when he purchased the land takes subject to the unrecorded easement. Id.

The USDA photographs taken periodically between 1959 and 1994 show a road within the Right of Way leading from Highway 76 to the land now owned by Mr. Braswell. Prior to Mr. Braswell leasing the land, Ms. Miller's son kept an airplane on the Ballentine side of the 120 acre tract and drove a car down that road to get to his airplane. Based on the existence of the road in the Right of Way as shown in the 1984 and 1989 USDA photographs, Mr. Amick either knew or should have known the road existed and that someone was using it to cross the property he was purchasing. To the extent there was any question as to whether the road was on the property Mr. Amick was buying or on the strip of land lying West of that property, the existence of the road, at a minimum, put Mr. Amick on inquiry notice of that road and on inquiry notice that someone was using it to cross the property he was purchasing. There was testimony that Plaintiff used the Right of Way with the knowledge of the Brocks from whom Mr. and Mrs. Amick purchased the 17.08 acre tract.

In Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006), the Court held:

> "Constructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed. As this Court has explained in a case involving the transfer of real property,
> If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry and which that diligence might not disclose. There must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter."

Spence, 368 S.C. at 120-121, 628 S.E.2d at 876, citing Black v. Childs, 14 S.C. 312, 321–322

(1880).

Reasonable diligence by Mr. Amick and his wife in 1988 would have led to the knowledge that the Right of Way had been and was being used by Mr. Braswell to access his land from Highway 76. That resulting knowledge is well within the range of the inquiry necessitated by the obvious existence of the road, and there is a direct connection between the existence of the road and the facts which would have been disclosed had reasonable inquiry been made in 1988. Therefore, Mr. Amick does not fall within the protected class of a purchaser for value without notice and took his property subject to Mr. Braswell's prescriptive easement.

3. Permissive Use

The Court in Simmons also held that it "is well-established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse" Simmons, 419 S.C. at 232, 797 S.E.2d at 392, citing Bundy, 412 S.C. at 310, 772 S.E.2d at 173; See 2 Am. Jur. Proof of Facts 3d 197 § 6, at 218 (1988). The Defendant has asserted permissive use as a defense to the claim of a prescriptive easement. It is Mr. Braswell's position that his use of the Right of Way was never permissive and became adverse after Sula Miller, on November 28, 1964, sold to L.K. Bedenbaugh the 4.04-acre tract, which the included the entire Right of Way.

The relevant testimony establishes that Mr. Braswell had acquired an easement by prescription well before 1988 when Mr. and Mrs. Amick purchased the property. Mr. Amick's objections after the prescriptive easement was established cannot destroy the easement. To the extent that Mr. Amick consistently objected to the use of the Right of Way by Mr. Braswell, those objections cannot defeat an established prescriptive easement. If Mr. Amick had given Mr. Braswell permission to use the Right of Way, Mr. Amick would not have had reason to object to

his use of the Right of Way. Therefore Mr. Amick cannot successfully assert this defense.

4. Scope of the Easement

The evidence in the record establishes that Mr. Braswell has conducted farming operations on the 120 acre tract since he leased it in 1964. Those farming operations necessarily involved the use of personnel and equipment to prepare the land for planting crops and fertilizing, cultivating, irrigating, spraying, and harvesting those crops and transporting those crops and silage off of the 120 acres. The equipment used to do those things included plows, harrows, cultivators, trucks, combines, sprayers and all other types of equipment necessary to successfully farm the 120 acres with row crops and coastal Bermuda hay. The equipment varied in width, it is estimated that the combines were are least 20 feet wide. That equipment has been driven or pulled by the Braswells and their employees over the easement on a regular and on an as needed basis at least since 1964.

By the end of 1984, the construction of the two ponds on the 120 acre tract was complete. Those ponds were built to provide water for irrigation systems, which were run by a pump or pumps. Each pump had to be refueled periodically, and that refueling operation sometimes took place at night. The irrigation of crops is an integral part of Mr. Braswell's farming operation and did not unreasonably expand the use or scope of the prescriptive easement.

The largest equipment used by the Braswells in their farming operation is a combine, which has a width of 20 feet. There is no evidence in the record that the combine has not or cannot stay within the easement that has been used and created.

ARGUMENTS OF COUNSEL:

It is Mr. Braswell's position that he has proven by clear and convincing evidence the elements necessary under Boyd, Jones, Bundy, and Simmons to establish an appurtenant easement by prescription in the Right of Way over, across, and through the western 22.75 feet of Mr. Amick's land for access to the 120 acre tract from Highway 76 for farming purposes. Plaintiff further argues that in order to meet the "continuous use" requirement, Mr. Braswell need only prove that he used the right of way with reasonable frequency as determined by the nature and the needs of his farming operation.

It is the Defendant's position that Plaintiff does not have an easement by grant from Sula Miller by way of deed dated June 20, 1972. Defendant also argues that Plaintiff has not established a prescriptive easement traversing the Defendant's property because the Plaintiff has not established by clear and convincing evidence that he has unequivocally established proof of such facts as will give the right of a prescriptive easement from Defendant to Plaintiff, or, in the alternative, that if a right of way exists, it is limited to 12.5 feet in width and reasonable ingress/egress only. Defendant further asserted that reasonable ingress/egress means ingress/egress by persons or vehicles, which do no damage to the Amick land, does not change the nature, character, quality, or value of the land on which the right of way lies, and does not interfere with Mr. Amick's, his guests', invitees', heirs', or assigns' use of the Amick land.

FINDINGS AND CONCLUSIONS:

The Court acknowledges and appreciates the amount of research and preparation for the trial by all counsel, as well as, the professionalism of all counsel and the parties in their presentations to the Court.

The Court has considered the testimony presented, Plaintiff's numbered exhibits entered into evidence 1-43, Defendant's numbered exhibits entered into evidence 1-24, the locus in quo and Mr. Braswell's real estate, which were admitted into evidence via viewing by the Court with counsel of record and the Court Reporter present, the arguments of counsel, the applicable law, and after consideration of the record, the Court finds and concludes as follows:

That the property involved in this case is located entirely in Newberry County, South Carolina. Both parties are citizens of South Carolina. This Court has jurisdiction over the parties and the subject matter of the action. Venue is proper in Newberry County; it is further,

Ordered, Adjudged and Decreed, that based upon the foregoing, the Court finds and concludes that the Plaintiff, Mr. Braswell, and his heirs, successors, and assigns are entitled to an easement by way of prescriptive right for the Plaintiff, his immediate family, and his employees, servants and agents, of the easement leading from Highway 76 across the land of the Defendant to the 120 acre tract. However, the following conditions are applied: the width and size of the easement is 12.5 feet from the western boundary of Mr. Amick's land, and the scope of the easement is for access, ingress, and egress, to and from Highway 76 for the purpose of conducting farming operations on the 120 acre tract. The easement may be used by Mr. Braswell and his immediate family for all purposes. The Braswells' agents, servants, and employees are also entitled to use the easement, but that use is limited to access, ingress, and egress at all times necessary in connection with the conduct of farming operations on the 120 acres. Any other use of the easement without the permission of the owner(s) of the servient estate is prohibited. Mr. Amick has admitted he claims no ownership interest in the 12.5 foot strip that is not the subject of this litigation, therefore Mr. Braswell is free to clear the 12.5 foot strip of trees and brush without interference from Mr. Amick. (Mr. Amick admitted that he does not claim ownership of

any portion of the 12.5 foot strip. The owner of the 12.5 foot strip is not a party to this action. Therefore, the ownership of that land and any claim Mr. Braswell may have in and to that land is beyond the jurisdiction of this Court and need not be discussed). The clearing will potentially eliminate or substantially lessen any movement of the road to the east towards Mr. Amick's house and ensure that Mr. Braswell's equipment stays within the easement. It is noted that Mr. Amick may place a fence or other landmark on the eastern boundary of the easement which is 12.5 feet in width east of his western property line. That will delineate the eastern boundary of the easement and will ensure the Braswells do not encroach on that portion of Mr. Amick's land, which is not subject to the easement. It is presumed that if the 12.5 foot strip is cleared and the eastern boundary of the easement is delineated, the parties will be able to peacefully co-exist in the future; it is further,

Ordered, Adjudged and Decreed, that based on the foregoing, Mr. Amick, his successors, heirs, assigns, agents, servants, employees, guests, invitees and family are hereby enjoined from interfering with the use of the easement for access, ingress, and egress to and from the 120 acre tract and Highway 76 as outlined above; it is further

Ordered, Adjudged and Decreed, that the Court finds and concludes that with regard to the easement the following conditions will apply: persons or vehicles of those who access the easement will do no damage to the Amick land, and will not change the nature, character, quality, or value of the land on which the easement lies, and to the extent possible will not interfere with Mr. Amick, his guests', invitees', heirs', or assigns' or use of the Amick land; it is further,

Ordered, Adjudged and Decreed, that upon this Order becoming final, the Clerk shall record it among the land records of Newberry County, South Carolina, at the expense of Mr. Braswell and shall index it in the name of Mr. Amick as grantor and in the name of Mr. Braswell as grantee. Otherwise, each party shall bear his own costs and fees incurred in this action.

IT IS SO ORDERED.

/s/Grace Gilchrist Knie
Honorable Grace Gilchrist Knie
Presiding Judge, Eighth Judicial Circuit

February 10th, 2020
Spartanburg, South Carolina

Newberry Common Pleas

Case Caption: James L Braswell Sr. VS James F Amick

Case Number: 2017CP3600214

Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760