THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017-CP-36-00214

James L. Braswell, Sr., ……..… Respondent – Appellant,

v.

James F. Amick, …… Appellant - Respondent.

INITIAL BRIEF OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in determining Plaintiff had a prescriptive easement from Highway 76 to his land across the Defendant's land measuring 12.5 feet from its western boundary?

STATEMENT OF THE CASE

The Respondent-Appellant, James L. Braswell, Sr. ("Plaintiff") filed a Lis Pendens, Summons and Complaint against James F. Amick ("Defendant") on May 15, 2017 seeking a declaratory judgment and other relief. The Plaintiff asserted a prescriptive easement right over, across and through the lands of the Defendant for access, ingress and egress to and from the Plaintiff's property and also sought an injunction permanently enjoining the Defendant from impeding and/or interfering with the Plaintiff's use of the right of way. The Plaintiff also asserted other easement rights, but those were later withdrawn.

The Defendant filed Answer and Counterclaim, and Motion to Dismiss on August 29, 2017. The Defendant alleged the Plaintiff failed to state a claim for relief and failed to join necessary parties in accordance with Rules 8(a) and 12(b)(6), SCRCP. The Defendant also asked the Court to deny the Plaintiff's request for an injunction and enter a declaratory judgment that the right of way in which the Plaintiff sought is not on the Defendant's property, or in the alternative, was not wider than 12.5 feet. The Defendant further asked the Court to determine that the Plaintiff did not have any type of easement.

On October 31, 2017, the Plaintiff filed a motion for Injunction Pendente Lite and Advancement on the Roster. An Order continuing the case and staying any further action pending mediation was entered on December 15, 2017 at the hearing. 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 Plaintiff filed an Amended Complaint and Counterclaim on April 30, 2108. The Plaintiff filed a response to the Defendant's Counterclaim on May 1, 2018.

The case was tried to conclusion before Judge Hocker from December 3, 2018 – December 5, 2018, but for reasons not relevant here, a new trial was granted. That Order was entered on February 14, 2019. 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 granted the motion. This trial followed. Thereafter, on January 22, 2020 Judge Nettles entered a written order granting the Plaintiff's motion for an injunction pendente lite.

This matter was tried again January 6, 2020 – January 9, 2020 before the Honorable Grace G. Knie. The Plaintiff withdrew his causes of action for easement by implication and necessity at the beginning of that trial.

An Order was issued by Judge Knie on February 10, 2020 granting the Plaintiff an easement by prescription over, across and through the lands of the Defendant. The easement began on the western boundary of the Defendant and was 12.5 feet in width. The Order also detailed that the scope of the easement was for access, ingress and egress to and from Highway 76 to the Plaintiff's property for the purposes of conducting farming operations on the Plaintiff's property. The Order was served on the parties on February 11, 2020.

The Defendant filed his Notice of Appeal on March 11, 2020. The Plaintiff was served with the Notice of Appeal on March 11, 2020.

STATEMENT OF FACTS

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. (Transcript, p. 58 – 69). 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. (Transcript, p. 65).

In and prior to 1964 Mr. Braswell was engaged in the dairy and farming business. (Transcript, p. 262). In 1964, he leased the northern portion of the 120 acres from Ms. Miller. (Id.) Mr. Braswell incorporated the leased property into his farming operation and grew row crops on that land to provide feed for his dairy herd. (Id.) Mr. Braswell accessed the leased property from Highway 76 by way of the Right of Way. (Transcript, p.229)

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. (Plaintiff's Exhibit 10) 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. (Plaintiff's Exhibit 8). The 4.04-acre tract was located between the 120 acres and Highway 76 and encompassed the entire Right of Way.

The plat refers to a 12.5 foot strip of land lying immediately to the West of the 4.04 acres. (Plaintiff's Exhibit 10). The deed refers to a dirt road to the West of the property. (Plaintiff's Exhibit 8). 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. [emphasis added]
>
> 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. (Transcript, p. 426).[1] Neither the owner of the 12.5 foot strip, nor the owner of the dirt road referred to in that deed (to the extent they are not the same) is a party to this action.

In October of 1971, Mr. Johnson re-surveyed the 120 acres owned by Sula Miller. No 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. (Plaintiff's Exhibit 16). 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

[1] For purposes of this action we consider the 12.5 foot strip and the dirt road referenced to in this deed to be co-extensive. Therefore, I consider this admission as proof that Mr. Amick claims no ownership interest in either that dirt road or the 12.5 foot strip. Hereafter, the dirt road referenced in the deed will be referred to as the 12.5 foot strip. 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

> 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. (Plaintiff's Exhibit 15).

The Plaintiff and his sons, James L. Braswell, Jr. ("Jimmy") and Mark Wayne Braswell, ("Mark Wayne") 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. (Transcript, p. 181, 228,). After June of 1972, Mr. Braswell continued to access the Ballentine side of the 120 acre tract by way of the Right of Way (Transcript, p. 179, 229). He accessed the Parr side of the property primarily by way of the farm road shown on the plat of the 120 acres. (Transcript, p. 181). In the 1970s, Jimmy and Mark Wayne, became active in the farming and dairy operations with their father and began jointly directing the activities of the employees connected with the dairy and farming operations (Transcript, p. 178, 227).

The Braswells grew (and still grow) 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 property. (Transcript, p. 179-181). Mark Wayne stopped working for his father in 2008. (Transcript, p. 178). Jimmy assisted with the harvesting of the crops grown on the 120 acre tract and was primarily responsible for the irrigation system on the Ballentine side of the 120 acre tract. (Transcript, p. 228). The Braswells accessed the Ballentine side of the property by using the Right of Way. Plowing, planting, fertilizing, irrigating and harvesting 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.

row crops required the use of plows, harrows, cultivators, tractors, combines, sprayers, and farm trucks. (Transcript, p. 182 – 187, 229 – 232, 278, 282-283). The Braswells also used the Right of Way to bring windrowers and haybalers 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. (Transcript, p. 181–190, 237) Those row crops were planted and harvested each year on a regular basis, most of the years it was two times a year. (Transcript, p. 200). 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. (Transcript, p. 188–191, 234-235). 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. Mr. Bedenbaugh conveyed the property to Henry E. Bickley by deed dated April 28, 1966 and recorded in the Office of the Clerk of Court on April 28, 1966 in Deed Book 90 at page 476. (Plaintiff's Exhibit 11).

Thereafter, Mr. Bedenbaugh purchased the tract again from Roy Bickley, administrator for the Estates of Zeda Bickley and Henry E. Bickley. Said deed was dated December 30, 1966

and recorded in the Office of the Clerk of Court for Newberry County in Deed Book 92 at page 492 (Plaintiff's Exhibit 12).

Mr. Bedenbaugh conveyed property that included the 4.04 acre tract to Oscar V. Harley, Sr. That deed was dated December 7, 1967 and was recorded in the Office of the Clerk of Court for Newberry County on December 7, 1967 in Deed Book 95 at page 85. (Plaintiff's Exhibit 13).

On February 22, 1971, Oscar V. Harley, Sr., conveyed property which included the 4.04 acre tract to Steven R. Gaston and Lynn B. Gaston by deed which was recorded in the Office of the Clerk of Court for Newberry in Deed Book 109 at page 560. (Plaintiff's Exhibit 14).

Steven R. Gaston and Lynn B. Gaston conveyed property which contained the 4.04 acre tract to Grady Tarleton by deed recorded in the Office of the Clerk of Court for Newberry County in Deed Book 109 at page 560. (Plaintiff's Exhibit 17). Grady Tarleton then conveyed the property to H.L. Brock and Thelma Brock by deed recorded in the Office of the Clerk of Court for Newberry in Deed Book 165 at page 6. (Plaintiff's Exhibit 18). A corrective deed was issued to the Brocks on November 16, 1979 (Plaintiff's Exhibit 20).

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 deed conveying the property to the Amicks was dated June 8, 1988 and was recorded in the Office of the Clerk of Court for Newberry County on June 10, 1988 in Deed Book 283 at page 183. (Plaintiff's Exhibit 21). 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.

The deed to Mr. and Mrs. Amick also conveyed to them a 25-foot easement on the eastern boundary of the 17.08-acre tract. However, the Defendant's title expert, Mr. White, testified unequivocally that the 25-foot easement had never been assigned to Mr. Braswell. (Plaintiff's Exhibit 21).

Sometime in the early nineties, Mr. Amick asked Mr. Braswell if gates could be placed at or near the entrance to the Right of Way from Highway 76. (Transcript, p. 268). Mr. Amick testified that he went to Mr. Braswell on Mr. Braswell's property to ask about putting up gates and where to purchase gates. (Transcript, p. 408) Mr. Braswell furnished the gates and Mr.

Amick hung the gates. (Transcript, p. 268). The gates did not benefit Mr. Braswell or his operations in anyway. The gates were an inconvenience to Mr. Braswell because he and his employees had to get out of a vehicle, open the gates, drive through the gates, get out of the vehicle again and close the gates. (Transcript, p. 267). Nevertheless, Mr. Braswell did not object to gates being installed provided he had a key. (Transcript, p. 268) Two of the gates (the first set of gates) were installed at the entrance of the Right of Way near Highway 76, where the current gates are at the present time. (Transcript, p. 409) The other two gates were installed between Mr. Braswell's property and the Amicks' property. Around 2000, Mr. Amick started locking the gates and provided Mr. Braswell with a key. (Transcript, p. 412).

Sometime thereafter, without notifying Mr. Braswell, Mr. Amick changed the lock on the first set of gates and did not provide Mr. Braswell with a key to the new lock. When Mark Wayne, while working for Mr. Braswell, was unable to unlock the first set of gates to drive down the Right of Way, he removed those gates from the hinges so he could gain access to the 120 acre tract. (Transcript, p. 201) 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 2015, Mr. Amick[3] began to complain of the Braswells use of the right of way and Mr. Amick began to try to impede and hinder Mr. Braswell's from using 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. (Transcript, p. 283). As the result of Mr. Amick's actions, Mr. Braswell filed this action on May 15, 2017. In October of

[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.

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 tried to conclusion before Judge Hocker, but for reasons not relevant here, a new trial 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 granted the motion. This trial followed. Thereafter, on January 22, 2020 Judge Nettles entered a written order granting the Plaintiff's motion for an injunction pendente lite.

STANDARD OF REVIEW

The Respondent-Appellant agrees with the Standard of Review set forth by the Appellant-Respondent.

ARGUMENT

1. The Order of Judgment is not controlled by errors of law and it did apply the current test for prescriptive easements even though the Order of Judgment did not specifically say "open" and "notorious".

I. 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, 662 S.E.2d 452 (Ct. App. 2008). Easements are created by express grant or arise as a matter of law. Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 (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.") Id. at 382.

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 Tel. Tel. Co., 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). In order to establish a prescriptive easement, "the claimant must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's right for a period of twenty years." Simmons v. Berkeley Electric Cooperative, Inc., 419 S.C. 223, 797 S.E.2d 387 (2016).

In Simmons, the Plaintiff brought a declaratory judgment action against Berkeley Electric Cooperative and St. John's Water Company after he discovered a water main, which was installed in 1977, was discovered on his property in 2005. Mr. Simmons purchased the property in 2003. The case ultimately rested on whether the use by St. Johns satisfied the adverse use element. The Supreme Court at that point clarified that the adverse use element must be "open" and "notorious". Id.

A. Identity of the Thing Enjoyed

The Court in Simmons held that the claimant of the easement must show the identity of the thing enjoyed. The thing being enjoyed in this matter is the right of way that Mr. Braswell

has used since he purchased the property in 1972, and the same road he used when he leased the property from Mrs. Miller. The right of way was identified in various ways during the trial.

First, the testimony of Mr. Braswell and his sons establishes that the right of way is in the same location, and has been used in the same manner and with the same frequency that has been used since Mr. Braswell leased the land from Sula Miller and then later when he purchased the 120 acre tract in 1972. Mark Wayne testified that he began working for his dad around 1979 (Transcript, p. 178) and that he used the right of way on Mr. Amick's property to transport the equipment that was needed to prepare, cultivate and harvest the crop that was grown on the 120 acre tract. (Transcript, p, 178, 194). He testified that access to the row crop side in general was via Mr. Amick's property. (Transcript, p. 181) He also testified that he had been accessing the 120 acre tract prior to 1979 via Mr. Amick's property because "when you grow up on a farm – it's part of you." (Transcript, p. 194). His testimony also included memories of when he was a small child accessing his father's property via the right of way across Mr. Amick's land. (Transcript, p. 195). Mark Wayne was born in 1964. (Transcript, p. 194).

Jimmy testified that he always used the right of away across Mr. Amick's property to access the Ballentine side of Mr. Braswell's 120 acre tract. (Transcript, p. 229). Jimmy testified that one particular piece of equipment, a six-row, 30 inch planter was used on the Ballentine side of the 120 acre tract and it was transported using the right of away across Mr. Amick's land and that piece of equipment was used since at least the 1960's. Jimmy further testified that an irrigation system was started on the Ballentine side of Mr. Braswell's 120 acre tract within a few years of Mr. Braswell purchasing the property. Jimmy testified that when checking the irrigation system, the right of way across Mr. Amick's land is the means of access to the Ballentine side of the property where the irrigation system is located. (Transcript, p. 235).

Mr. Braswell testified that the right of way is the same as far as he could remember back (Transcript, p. 260). His testimony also included recollections of seeing Mrs. Sula Miller's son using the right of way to access his plane that was housed on the 120 acre tract prior to Mrs. Miller selling the property. (Transcript, p. 263). Mr. Braswell also testified that the right of way he used was 25 feet in width. (Transcript, p. 275).

Bart Dominick, a South Carolina licensed land surveyor, prepared Plaintiff's Exhibit 26, which is a plat-like drawing of how the right of way looks today. The drawing by Mr. Dominick 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. Thus, Mr. Braswell has been effectively using seven (7) feet of the 12.5 foot strip and 22.75 feet of the western side of Mr. Amick's property to access the 120 acre tract.

Second, 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. (Plaintiff's Exhibit 16). Mr. Tarbert, the Defendant's surveyor, testified that the "R/W to Hwy" notation on the Braswell plat might indicate an easement. (Transcript, p. 308). The USDA photographs show the road to be within the Right of Way. (Plaintiff's Exhibits 28 through 31). Mr. Amick admitted the "R/W to Hwy" (the right of way) shown on that plat was entirely on his property. The USDA photographs are the most empirical and unbiased evidence in the record as they clearly show the existence of the road throughout the years since Mr. Braswell purchased his 120 acre and Mr. Amick purchased his property.

Mr. Dominick testified the plat recorded in Book AG at page 28 had a scale of one-inch equals 5 chains. He also testified that if anything on the plat had not been drawn to that scale that fact would have been noted on the plat. (Transcript, p. 101, 102, 140). 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, concluded the width of the "R/W to Hwy" shown on the plat was 30 feet. (Transcript, p. 100, 153).

Through the evidence offered above, the right of way across Mr. Amick's land has been identified as the thing enjoyed as required by the Court in Simmons. This satisfies the first element of a prescriptive easement.

B. Open, Notorious, Continuous, Uninterrupted Use

The second element required to established a prescriptive easement by the Court in Simmons is the use by the claimant must be adverse, which was further defined to be open, notorious, continuous, and uninterrupted.

1. Open

The Court in Simmons, held that "'Open' generally means that the use is not made in secret or stealthily. It may also mean visible or apparent." Id. at 233, 392. In Simmons, the water main at question was underground and the property was "heavily wooded and undeveloped" and the water meter was hidden by bushes, which is why the Court determined that issue alone was "sufficient to warrant a reversal of the Court of Appeal's decision to uphold the master's grant of summary judgment in favor of St. John's Water" Id. at 233, 393.

In the Braswell matter, the right of way in question in this matter is out in open and is visible. It is visible on the USDA photographs (Plaintiffs Exhibits 28 -34). Further, the Braswells did not access the easement in a secret or stealthily way. The Braswells described the various farming equipment they used on their property, and that the equipment was transported to the Braswell property via the right of way across Mr. Amick's land. (Transcript, p. 179-190, 228-23, 235-238). The equipment described by the Braswells are large pieces of equipment and due to the size, cannot be easily hidden. They accessed the easement at all times, both day and night, depending on the need for the access. (Transcript, p. 179-190, 228-23, 235-238). Further, the Braswell plat had a "R/W to Hwy" notation, drawn to scale indicating the approximate location and width of the easement. (Plaintiff's Exhibit 16).

2. Notorious

The Court in Simmons, held that "'Notorious' generally means that the use is actually known to the owner, or is widely known in the neighborhood." Id. at 234, 392. In Simmons, Mr. Simmons claimed he was unaware of the water main. The Court in Simmons disagreed with the Master's finding that the water main was "widely known or 'notorious'". Id. at 234, 393.

In the Braswell matter, the opposite is true. There is no testimony or anything in the record that establishes that Braswell's use of the right of way was not known to the true owners. Mr. Braswell's testimony indicates he knew of the predecessors in interest to Mr. Amick. (Transcript, p. 266). In the testimony of Mr. Amick, he indicated he knew Mr. Braswell and that he worked the property behind him as it was one of the reasons he wanted to put up gates to keep his horses off Mr. Braswell's property. If Mr. Amick was not aware that Mr. Braswell used the

right to way to access the 120 acre tract, why did Mr. Amick not put up a permanent fence in order to keep his horses on his property.

Mr. Amick testified that when he purchased the property in 1988, the access to the property was covered in vegetation and it took him several years to clear out. (Transcript, p. 401-403). This is in stark contrast to the USDA photographs from 1984, 4 years before Mr. Amick purchased the property, and the USDA photograph from 1989, one year after Mr. Amick purchased the property. (Plaintiff's Exhibit 30 and 29, respectively). In both pictures, it is clear the access to Mr. Amick's property was free of vegetation and that the right of way used by Mr. Braswell from Highway 76 to his 120 acre tract was clearly visible. The USDA photographs from 1984 and 1989 are demonstrative of the existence of the right of way both prior to Mr. Amick's purchase and after Mr. Amick's purchase and are in direct opposition to Mr. Amick's testimony about the condition of the location of the right of way when he purchased the property in 1988.

The USDA photographs were also interpreted by was also supported from testimony by William Dominick and Robert Beard. (Transcript, p. 122-125, 359-361). Both Mr. Dominick and Mr. Beard where able to locate the right of way from Highway 76 to Mr. Braswell's property on the USDA photographs. (Transcript, p. 122-125, 359-361). As noted earlier, Mr. Dominick is South Carolina licensed land surveyor, indicated in his studies to become a professional land surveyor, he took classes in aerial photography interpretation. (Transcript, P. 92-94). Mr. Beard is the Newberry County Geographic Information Systems Analyst for a little over 14 years and has experience with reading aerial photography and mapping (Transcript, p. 339, 345- 347).

3. **Continuous and Uninterrupted**

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. at 318, 601. The Supreme Court in Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163 (2015) affirmed the definition of continuous use requirement set out by the Court of Appeals in Jones. The Simmons Court did not disturb the holding in either Jones or Bundy in respect to the definition of continuous use. Therefore, 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.

The testimony establishes that the Braswells used the right of way to access the 120 acre tract, which they used for farming purposes (Transcript, p. 179-190, 228-23, 235-238). The testimony further shows that the frequency of the use was established by the farming operations. (Transcript, p. 179-190, 228-23, 235-238). Mark Wayne established in his testimony that the Ballentine side was used for row crops and the Parr side was used to grow coastal Bermuda hay. The testimony further demonstrated that the Braswells had a summer crop and a winter crop, two crops a year. During each of those crops, there was a time for preparing the fields, planting the crop, fertilizing the crop, watering the crop and harvesting the crop and the right of way across Mr. Amick's property was used each time the Braswells needed to cut silage, plant crops, fertilize the crops, irrigate the crops and check on the crops. (Transcript, p. 179-190, 228-23, 235-238). Jimmy's testimony demonstrates the planting, cultivating, irrigating and harvesting of the crops grown on the Ballentine side of the 120 acre tract since he has been employed with his father in 1974. (Transcript, p. 227, 228, 238, 238). Mark Wayne testified that he used the right of way to complete his job since 1979 (Transcript, p. 194). The use of the right of way by the

Braswells was of reasonable frequency that was determined by the nature and needs of the farming operation and meets the definition of continuous use prescribed in Bundy.

The claimant must also demonstrate that the use of the prescriptive easement was uninterrupted. Mr. Braswell's testimony establishes that he has used the right of way since at least 1964 without any interruption. Jimmy testified that it wasn't until around 2015 when Mr. Amick started to complain and tried to interfere with the Braswells use of the right of way (Transcript, p. 256). No one stopped Mr. Braswell from using the right of way, not one told him he could not use the right of way beginning in 1964. Mr. Braswell offered testimony that posts were put up either when Mrs. Brock or Mr. Bedenbaugh owned Mr. Amick's property, and they never questioned him (Mr. Braswell) going in and out. (Transcript, p. 266). Jimmy's testimony establishes that Mr. Amick only started complaining about the situation around 2015. (Transcript, p. 256). By the testimony alone, the use of the right of way was uninterrupted until at least 2015.

C. **Contrary to the True Property Owner's Rights for a Period of Twenty Years**

The last element of establishing a prescriptive easement is to show it use for a period of twenty years contrary to the true property owner.

Braswell testified that he began leasing the property from Sula Miller, the original owner, around 1964. He grew crops on the land of Mrs. Miller for his farming purposes. Mrs. Miller sold the 4.04 acre tract that contains the right of way in 1964. He testified he used the right of way to access the leased property. (Transcript, p. 270). Mr. Braswell purchased 120 acres from Sula Miller in 1972, and he continued to grow crops on the property for farming purposes. Mr. Braswell continues to grow crops for his farming purposes on the 120 acre tract today. His

testimony shows he used the right of way for a period of at least 20 years which were uninterrupted and that he or his employees use the right of way across Mr. Amick's land at any time that was needed. (Transcript, p. 266). Jimmy's testimony demonstrates the planting, cultivating, irrigating and harvesting of the crops grown on the Ballentine side of the 120 acre tract since he has been employed with his father in 1974 (Transcript, p. 227, 228, 238, 238). Mark Wayne testified that he used the right of way to complete his job since 1979 (Transcript, p. 194). No one stopped Mr. Braswell from using the right of way, not one told him he could not use the right of way beginning in 1964. He used it as if he owned it. If the twenty years is calculated from 1964, the year in which Mr. Braswell began to use the right of way to access the property in which he leased, the twenty-year period would culminate in 1984.

The Appellant-Respondent has argued in his initial brief that the twenty-year period could not have started in 1964 as the Order of Judgment states because there was no evidence in the record that demonstrated Mrs. Miller's use of the right of way after she sold the property to Mr. Bedenbaugh. The Appellant-Respondent contends that Mr. Braswell's use of the right of way from 1964 to 1972 would be considered a trespass since Mrs. Miller did not have the authority over the right of way after she sold the property. The Appellant-Respondent cited several cases supporting that position, all of which were out of state and would not necessarily be the law in South Carolina. Even if the starting period of when Mr. Braswell leased the property in 1964 is not the appropriate time to start the clock to determine the prescriptive easement, he did purchase the property in 1972, and it can be used as starting point. If the twenty-year period was calculated from 1972, that means Mr. Braswell would have to demonstrate his use contrary to the true owner's right until 1992 – 4 years after Mr. Amick purchased his property. The testimony provided at trial demonstrate the Mr. Braswell has used the right of way contrary to

the true owners use until at least that time. Mr. Braswell testified that no one ever said anything to him about his comings and goings. Jimmy testified it was around 2015 when Mr. Amick began to complain of the Braswells use of the right of way and attempt to impede Mr. Braswell's use of the right of way. Even once Mr. Amick attempted impede Mr. Braswell's use of the right of way, Mr. Braswell continued to use the right of way as he had done since 1964. The record establishes that it appears Mr. Amick first locked the gate, without providing a key to Mr. Braswell, sometime around 2000 – 8 years after Mr. Braswell's use of the right of way would have equaled to a prescriptive easement. Mr. Amick's objections after Mr. Braswell had established the prescriptive easement cannot defeat and established prescriptive easement.

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." Id. at 232, 797. Mr. Amick asserted permissive use as a defense to the claim of a prescriptive easement. Mr. Braswell contends that he never sought permission from anyone to use the right of way, he believed he had a right to use the right of way as it shown on the plat when he purchased the 120 acre tract. He contended he had a 25 foot right of way over Mr. Amick's land, and this was further supported by Mr. Amick asking permission from Mr. Braswell to put the gates up, which was several years after Mr. Amick purchased his property. (Transcript, p. 268). If Mr. Amick gave permission to Mr. Braswell to use the right of way, it makes no sense that he would also object to the Braswells use of the right of way. Further, any permission after the 20-year prescription period was established, would not negate the prescriptive easement. If 1964 is used as the starting point, the permission would have had be granted by at least 1984, which was four years prior to Mr. Amick purchasing the land, which is not a legal possibility. If 1972 is used as the starting point, Mr. Amick would have had to given

permission by 1992, and nothing in the record supports Mr. Amick having given such permission in that time frame.

Using either 1964 or 1972, Mr. Braswell has demonstrated he continuously used, without interruption, the right of way for a period of twenty years. Even if the Appellant-Respondent alleges that he attempted to stop the Braswell's use in or around 2000, it was still several years after Mr. Braswell established a prescriptive easement.

D. Appurtenant Easement

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 the land of the party claiming it, and it essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance" citing Windham v. Riddle, 381 S.C. 192. 672 S.E.2d 578 (2009). The Court of Appeals in Smith v. Commissioners of Public Works of City of Charleston, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994) quoted with approval Am.Jur.2d Easements and Licenses § 13 (1966) "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". Id. at 467, 366

There is no question that one terminus of the easement is on Mr. Braswell's land. (Plaintiff's Exhibit 16). It is also clear from the record that the easement is essential Mr. Braswell's enjoyment of his land. Mr. White pointed out the 25-foot easement on the eastern boundary of Mr. Amick's property. However, he unequivocally testified that easement had never been assigned to Mr. Braswell. (Transcript, p. 318). Therefore, Mr. Braswell cannot use that easement to access his property. It is impossible for Mr. Braswell to bring heavy equipment

across the pond dams. (Transcript, p. 243). 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 e.g. 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 also Shirley We Can Figure This Out, 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 e.g. Smith (holding that the owners of the dominant estate had an appurtenant easements 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.)

There seems to be no significant difference between the term "inhere in the land" and the term "concerns the premises", and the Courts do not address the terms specifically as separate. One term contains a noun "inhere," and one term contains a verb "concerns" otherwise they are essentially the same. The Oxford online dictionary defines "inhere" as "exist essentially or permanently in" and defines "concern" (in the verb form) as "relate to; be about." Applying these definitions to the right of way used by Mr. Braswell over Mr. Amick's land should lead to the conclusion that the right of way exists in the 120 acre tract and is "related to" or "be about" the 120 acre. The easement exists on Mr. Amick's land and obviously inheres in and concerns Mr. Braswell's land because the easement is the only means by which he can gain access to his land.

(Plaintiffs Exhibits 28-34, Plaintiff's Exhibit 16). By the reasons set forth above, Mr. Braswell has established that the right of way is appurtenant to the 120 acre tract.

CONCLUSION

Based upon the reasons stated above, this Court should uphold the judgment of the circuit court. The Order of the Judgment did not fail to apply the current law under Simmons, even though the order did not specifically use the words "open" and "notorious". Further, the relief granted under Bundy was not an error of law because even if the prescriptive period could not have begun in 1964, the prescriptive period should be construed to have begun in 1972. Further, there is sufficient evidence in the record that shows Mr. Braswell demonstrated the elements defined by the Court in Simmons to pass the test for establishing a prescriptive easement by 1992, 20 years after he purchased the property from Mrs. Miller in 1972.

Respectfully submitted,

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July 16, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2017-CP-36-00214

James L. Braswell, Sr., ……..… Respondent – Appellant,

v.

James F. Amick, …… Appellant - Respondent.

PROOF OF SERVICE

I, Jennifer Dowd Nichols, hereby certify that I have served the Initial Brief of Respondent-Appellant on James F. Amick by service using AIS E-mail pursuant to South Carolina Supreme Court Order 202-05-29-02 to his attorneys of record Karl S. Brehmer, Esq. at ksb@brownandbrehmer.com and James D. Floyd, Esq. at jdf@brownandbrehmer.com, Attorneys for Appellant – Respondent.

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