THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2020-000458
Civil Action No. 2017-CP-36-00214

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

v.

James F. Amick,…… Appellant – Respondent.

FINAL BRIEF OF APPELLANT – RESPONDENT

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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 Defendant's land measuring 12.5 feet from its western boundary in 1984 when Plaintiff purchased his land in 1972; Defendant's land was undeveloped and substantial portions were heavily wooded until 1988; there is no evidence Plaintiff's use was actually known to the prior owners of Defendant's land until 1979 nor any evidence that Defendant's use was widely known.

STATEMENT OF THE CASE

Respondent-Appellant James L. Braswell, Sr. ("Plaintiff"), filed a Summons, Complaint, and Lis Pendens on May 15, 2017 against James F. Amick ("Defendant") wherein asserting causes of action of declaratory judgment and for further relief pursuant to S.C. Code Ann. § 15-53-120. Plaintiff claimed he was an interested person under a deed with respect to certain rights pertaining to the use of a right of way over, across, and through land owned by Defendant for the purpose of access, ingress, and egress to and from Plaintiff's property. 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 Defendant from interfering with the right of Plaintiff and his heirs and assigns use of the right of way.

Defendant filed a Motion to Dismiss, Answer, and Counterclaim on August 29, 2017. 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 Rules 8(a) and 12(b)(6), SCRCP. Defendant also requested the Court deny Plaintiff's request for injunctive relief, enter a declaratory judgment that Plaintiff was not entitled to any injunctive or other equitable relief, and that the right of way does not run over 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.

Plaintiff filed a Motion for Injunction Pendente Lite and Advancement on October 31, 2017. (R. p. 44). An Order was issued on December 15, 2017, continuing the case and staying all action on the case pending mediation. Plaintiff filed an Amended Complaint on April 3, 2018 asserting causes of action for declaratory judgment and further relief pursuant to S.C. Code Ann. § 15-23-120 for an easement by necessity, easement by prescription, easement by implication, and request for an injunction pendent lite and permanent enjoining Defendant from interfering with the alleged right of Plaintiff and his heirs and assigns. (R. p. 32). Defendant filed an Answer to the Amended Complaint and Counterclaim on April 30, 2018. (R. p. 38). Plaintiff and Defendant filed their respective Motions for Summary Judgment on May 1, 2018. Plaintiff filed a Reply to Defendant's Counterclaim on May 1, 2018.

This matter was tried on December 3, 2018. On February 14, 2019, an Order for a New Trial was issued. Defendant filed an Appeal to the South Carolina Court of Appeals on March 12, 2019. A Remittitur from the Court of Appeals was filed May 2, 2019, stating that the Appellant wished to either withdraw or dismiss the appeal.

The parties appeared before the Honorable Grace Gilchrist Knie on January 6, 2020, for the purposes of a non-jury bench trial on all issues. At the start of the trial, Plaintiff withdrew his causes of action for easement by necessity and easement by implication. The trial was concluded on January 9, 2020.

On February 10, 2020, Judge Knie issued an Order of Judgment wherein providing Plaintiff and his heirs, successors, and assigns are entitled to a prescriptive easement measuring 12.5 feet from the western boundary of Defendant's property, 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 Plaintiff's property. (R. p. 7). The parties received notice of the Order of Judgment that is the subject of this appeal on February 11, 2020.

On March 11, 2020, Defendant filed and served his Notice of Appeal. Plaintiff served his Notice of Appeal on March 13, 2020 which was filed on March 16, 2020.

STATEMENT OF FACTS

In 1962, Sula Miller owned property which encompassed both the 120 acre tract now owned by Plaintiff and the 17.08 acre tract now owned by Defendant that are the subject of this appeal. (R. p. 396). 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 tract which depicts a "R/W to Hwy" that borders the western boundary of Ms. Miller's property between the 120 acre tract and Highway 76. (R. p. 76).

On June 28, 1956, Plaintiff went into the dairy and farming business. (R. p. 200, lines 8-9). While Sula Miller still owned both properties, Plaintiff leased the northern portion of the 120 acre tract from Sula Miller. (R. p. 200, lines 12-14). Plaintiff used the leased property to grow crops to provide feed for his dairy herd. (R. p. 200, lines 12-14).

On September 28, 1964, Mr. Johnson prepared a plat of 4.04 acres of Ms. Miller's land that was recorded on November 11, 1964, in the Office of the Clerk of Court for Newberry County in Plat Book U at page 61. (R. p. 240, line 6). Ms. Miller conveyed the 4.04 acre tract to L.K. Bedenbaugh by deed dated November 28, 1964 which was recorded in the Office of the Clerk of Court for Newberry County on November 28, 1964, in Deed Book 87 at page 429. (R. p. 64, lines 17-18). Said deed referenced the plat recorded in plat book U at page 61. (R. p. 240, line 6).

The 4.04 acre tract is located between the 120 acre tract and Highway 76 and its western boundary was bounded by a dirt road measuring 12.5 feet which separated the 4.04 acre tract from the neighboring Ballentine property. (R. p. 65, lines 1-7).

The 1964 plat refers to a 12.5 foot strip of land lying immediately to the west of the 4.04 acres, and the deed refers to a dirt road to the west of the property. (R. p. 65, lines 1-7). 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.

(R. p. 62, lines 2-18).

Defendant does not claim ownership of any portion of the 12.5 foot strip. (R. p. 340, lines 5-7). The owner of the 12.5 foot strip referred to in that deed upon which the dirt road exists, at least in part, is not a party to this action; therefore, the ownership of that strip is not the subject of this action. For purposes of this action, the Court considered that Defendant claimed no ownership interest in that strip. (R. p. 12).

In October of 1971, Mr. Johnson re-surveyed the 120 acre tract owned by Sula Miller which was recorded on May 5, 1972, in Plat book AG at page 28 in the Office of the Clerk of Court for Newberry County. (R. p. 68, lines 3-9). On June 20, 1972, Plaintiff 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.

(R. p. 412). 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. (R. p. 412).

Plaintiff and his sons 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. (R. p. 119, lines 24-25) (R. p. 167, lines 18-21). Defendant's property is on the Ballentine side of the 120 acre tract. Plaintiff had and continues to have access to the 120 acre tract on the Parr side, and Plaintiff accessed 120 acre tract on the Parr side by way of the farm road shown on the plat of the 120 acre tract. (R. p. 120, lines 16-19 – p. 181, line 25 - p. 182, lines 1-4).

Between 1964 and 1988, the 4.04 acre tract changed hands six times. (R. pp. 397, 400, 402, 403, 406, 407). On April 28, 1966, Mr. Bedenbaugh conveyed the 4.04 acre tract by deed to Henry E. Bickley which was recorded in deed book 90 at page 476. (R. p. 63, lines 14-16)

Certain property that included the 4.04 acre tract was purchased again by Mr. Bedenbaugh from Roy D. Bickley, administrator, c.t.a., of the Estates of Zeda B. Bickley and Henry E. Bickley on December 30, 1966, and the deed for said conveyance was recorded in deed book 92 at page 492. (R. p. 65, lines 9-12).

On December 7, 1967, Mr. Bedenbaugh conveyed said property that included the 4.04 acre tract by deed to Oscar V. Harley, Sr. which was recorded in deed book 95 at page 85. (R. p. 66, lines 13-15).

On February 22, 1971, Oscar V. Harley, Sr. conveyed said property that included the 4.04 acre tract by deed to Steven R. Gaston and Lynn B. Gaston which was recorded in deed book 103 at page 278. (R. p. 67, lines 3-5).

On October 10, 1972, Steven R. Gaston and Lynn B. Gaston conveyed said property that included the 4.04 acre tract by deed to Grady Tarleton which was recorded in deed book 109 at page 560. (R. p. 69, lines 5-8).

On September 7, 1979, Grady Tarleton conveyed said property that included the 4.04 acre tract by deed to H. L. Brock and Thelma Brock which was recorded in deed book 165 at page 6. (R. p. 69, lines 16-18).

On June 8, 1988, Defendant and his wife at that time, Tamela Amick, purchased 17.080 acres from H. L. Brock and Thelma D. Brock which included the 4.04 acre tract. (R. p. 70, lines 19-21). 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.

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. (R. p. 416).

Defendant, his ex-wife, Tamela Adkins, and Mark Richardson testified that in 1988 significant portions of Defendant's property was overgrown with brush and trees and with the help of family and friends, they cleared the dirt road with hand tools and chainsaws to make the ingress and egress passable. (R. p. 261 - p. 369, lines 3-5 - pp. 313-318).

Sometime around 1992, Defendant installed gates provided by Plaintiff across the dirt road and several years later locked the same but gave Plaintiff a key. (R. p. 206, lines 4-14 - p. 319, lines 16-25 – p. 324, lines 9-10). Two of the gates were installed at the entrance of the dirt road near Highway 76. (R. pp. 321-322). The other two gates were installed between Plaintiff's property and the Defendant's property. (R. pp. 321-322). Defendant and Plaintiff agreed that the first set of gates would be locked, and Defendant gave Plaintiff a key to the lock. (R. p. 321, lines 21-22).

Defendant testified that Plaintiff's and his employees' use of the dirt road increased substantially around 2006 and Plaintiff's invitees were not using the dirt road respectfully which led to him changing the lock. (R. pp. 330-331). Plaintiff and his employees then removed those gates from the hinges or cut the lock with bolt cutters. (R. pp. 331, lines 21-24 – p. 140, lines 8-15). Defendant continued to attempt to stop Plaintiff and his employees from using the dirt road even parking trailers across it which led to this action being filed by Plaintiff in 2017. (R. pp. 345, lines 9-15).

STANDARD OF REVIEW

Declaratory judgments are neither legal nor equitable. Felts v. Richland Cnty., 303 S.C. 354, 400 S.E.2d 781 (1991); Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 542 S.E.2d 752 (Ct.App.2001). The standard of review for a declaratory judgment action is, therefore, determined by the nature of the underlying issue. Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 557 S.E.2d 670 (2001); Wiedemann, 344 S.C. at 236, 542 S.E.2d at 753; *see* Travelers Indem. Co. v. Auto World of Orangeburg, Inc., 334 S.C. 137, 511 S.E.2d 692 (Ct.App.1999) (recognizing that a suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of underlying issue). The determination of the existence of an easement is a question of fact in a law action. Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987). In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) citing Chapman v. Allstate Ins. Co., 263 S.C. 565, 211 S.E.2d 876 (1974).

ARGUMENTS

I. THE ORDER OF JUDGMENT IS CONTROLLED BY ERRORS OF LAW BECAUSE IT FAILS TO APPLY THE CURRENT TEST FOR PRESCRIPTIVE EASEMENTS AND THE SUBTEST FOR ADVERSE USE AS SET FORTH IN SIMMONS.

The South Carolina Supreme Court recently relied on Williamson to establish the current law regarding prescriptive easements. *See* Simmons v. Berkeley Elec. Coop., Inc., 419 S.C. 223, 797 S.E.2d 387 (S.C. 2016) and Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163 (S.C. 2015) citing Williamson v. Abbott, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917). In Williamson, Bundy, and Simmons, the South Carolina Supreme Court quoted Lawton v. Rivers, **"**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." Lawton v. Rivers, 13 S.C.L. 445, 451 (2 McCord) (1823). In Simmons, the South Carolina Supreme Court clarified some longstanding misperceptions regarding the third element holding, "adverse use and claim of right cannot exist as separate methods of proving the third element of a prescriptive easement as the two terms are, in effect, one and the same." Simmons, 419 S.C. at 232, 797 S.E.2d at 392. In that regard, the South Carolina Supreme Court created a new and succinct test for establishing a prescriptive easement. Simmons, 419 S.C. at 233, 797 S.E.2d at 392. In Simmons, the court held:

> Thus, we believe the test for a prescriptive easement can be simplified as follows: In order to establish a prescriptive easement, the claimant must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years.

Id. The Simmons Court further provided a subtest for determining "adverse use" that requires the claimants use to be "open" and "notorious". *Id*. The Supreme Court held, "'Open' generally means that the use is not made in secret or stealthily. It may also mean that *it is visible or apparent* . . .

'Notorious' generally means that the use is *actually known to the owner, or is widely known in the neighborhood*." *Id.* citing Restatement (Third) of Property (Servitudes) § 2.17(h) (2000). (emphasis added).

In Simmons, the South Carolina Supreme Court acknowledged that its previous decisions helped give rise to the erroneous application of the law in prescriptive easement cases and took the opportunity to clarify the law of prescriptive easements in South Carolina. Simmons, 419 S.C. at 230, 797 S.E.2d at 391. The Order of Judgment misconstrues current law by referencing only a few general excerpts from Simmons that support Plaintiff's position, and there is no reference to the test or subtest for a prescriptive easement as established by the Supreme Court in Simmons which is now required under South Carolina law. (R. pp. 17-18). *See* Simmons, 419 S.C. at 233, 797 S.E.2d at 392. In fact, the words "open" and "notorious" are not used even a single time in the Order of Judgment. The failure to apply the current test and subtest to the facts of the present case is unquestionably an error of law which demands this Court reverse the decision of the Circuit Court.

In Simmons, the plaintiff, Roosevelt Simmons, purchased land on Johns Island in 2003 and commenced a declaratory judgment action against defendants Berkeley Electric Cooperative and St. John's Water Company after his discovery in 2005 that St. John's installed a water main in 1977.[1] Simmons, 419 S.C. at 223, 797 S.E.2d at 387. The Court of Appeals affirmed the decision of the Master in Equity granting summary judgment to St. John's.[2] *Id.* St. John's submitted testimony of the engineer involved in the design, permitting and construction of the water main who claimed it was fully installed in 1978 and was used continuously and uninterruptedly for more than twenty

[1] The Supreme Court upheld the portion of the Court of Appeals Judgment applicable to Berkeley Electric Cooperative on the basis that its use was within the scope of express easement. Simmons, 419 S.C. at 223, 797 S.E.2d at 387.

[2] The Master in Equity determined an encroachment permit served as an express easement in favor of St. Johns, and St. Johns established a prescriptive easement to the extent that the water main was not covered under the express easement. Simmons, 419 S.C. at 228, 797 S.E.2d at 389.

years which the Master in Equity and Court of Appeals determined satisfied the first two elements of establishing a prescriptive easement. Simmons, 419 S.C. at 230, 797 S.E.2d at 391. St. John's case came down to whether its use satisfied the third element requiring such use be adverse which is one of the issues before the Court in the present case. *Id.*

The Supreme Court then applied the subtest for adverse use which requires St. John's to prove its use was open and notorious. The Supreme Court questioned whether St. John's could prove its use was open because the land was heavily wooded and undeveloped and there were no markings indicating the water main's place on the land. Simmons, 419 S.C. at 233, 797 S.E.2d at 392. Furthermore, the Supreme Court questioned whether St. John's could establish its use was notorious. Simmons, 419 S.C. at 234, 797 S.E.2d at 393. The Supreme Court disagreed with the Master's determination that the water main was widely known or notorious because a majority of the area's residents were getting their water out of a spigot. *Id*. The Supreme Court noted Simmons' water also came from a spigot but was supplied by a water well. *Id*. And knowledge that the water was coming from the main does not necessarily mean the its location is widely known. *Id*. "Or, in other words, it does not necessarily mean it is widely known that St. John's Water is using Simmons' property for the use of the water main." *Id*.

In Bundy, the South Carolina Supreme Court, took the occasion to articulate standard of proof in prescriptive easement cases quoting Williamson, "a private way is an easement in favor of another, in derogation of the rights of the owner; and hence is not to arise without clear, unequivocal proof of such facts as will give the right from the owner to the claimant." Bundy, 412 S.C. at 305, 772 S.E.2d at 170 citing Williamson, 107 S.C. at 401, 93 S.E. at 16. The Supreme Court further provided, "Given that a prescriptive easement results in diminished rights of the property owner, we find that a claimant seeking a prescriptive easement must be held to *a*

strict standard of proof. Accordingly, we join the majority of state jurisdictions and hold that *a party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence*. Bundy, 412 S.C. at 306, 772 S.E.2d at 170 (emphasis added).

The Order of Judgment fails to provide any findings of fact or application of the law that would show Plaintiff's use of the dirt road was open and notorious by clear and convincing evidence. The evidence in the record cannot establish that Plaintiff's use was "open" because such use was not readily visible or apparent. Simmons and the present case are similar in many respects.[3] The evidence in the record is abundantly clear that significant, relevant portions of Defendant's property were heavily wooded and undeveloped until Defendant personally cleared the brush and trees and ultimately built a house between 2002 and 2008. (R. pp. 314-315). The record provides no evidence anything was installed to mark the dirt road such as a fence or gravel prior to 1988. Moreover, the term dirt road is somewhat of a misnomer. The evidence in the record unequivocally shows this was never a maintained dirt road by the State, County, or otherwise. In fact, the only indication that there was a road are ruts which were often covered by debris, brush, vegetation, and grass due to Plaintiff's infrequent and sporadic use prior to 2006. (R. p. 261 - p. 369, lines 3-5 - pp. 313-315).

At trial, the Geographic Information System (GIS) Analyst for Newberry County, Robert Beard, testified that as late as 2002, the aerial photographs show the dirt road "kind of *disappears* before it gets to the back of the property line" and appears to be only a grassy area about two-thirds of the way down before you get to Plaintiff's property. (R. p. 284, lines 24-25 - p. 285, lines 1-21). Mr. Beard further testified that the same aerial photograph six years later, in 2008, clearly shows the dirt road across the property that is not shown in the 2002 aerial

[3] Simmons differs from the present case in that the Supreme Court was reviewing the appeal of the Master's grant of St. John's Motion for Summary Judgment whereas the present case is an appeal of a final judgment.

photograph. (R. p. 287, lines 1-24). The dirt road was only two parallel ruts with grass in between and on both sides even after increased use in 2006. (R. p. 144). The evidence in the record cannot reasonably establish that Plaintiff's use was "open" because such use was not readily visible or apparent as defined by the Simmons Court.

Even if the evidence in the record provided some evidence upon which to reasonably conclude the Plaintiff proved his use was open, Plaintiff undeniably cannot establish his use was notorious. There is no evidence the prior owners of Defendant's property had actual knowledge of Plaintiff's use until 1979 at the earliest when the Brocks purchased the property. Moreover, there is no evidence of any indication Plaintiff's use was widely known in the neighborhood. Even if there was evidence that it was widely known in the neighborhood Plaintiff was using the dirt road to access the 120 acre tract, there is no evidence that the location of the dirt road was widely known. It is undisputed there is a 12.5 right of way that provides access to the 120 acre tract on the western boundary of Defendant's property, and Defendant claims no interest in that right of way. (R. p. 340, lines 5-7). Any purported widely known use of the dirt road by Plaintiff would reasonably be assumed to be within that right of way and not located on Defendant's property. Plaintiff and his sons even admit several times in their respective testimony that they assumed his use of the dirt road was in the right of way. (R. p. 193, lines 13-18 – p. 204, lines 1-17 – p. 275 lines 4-5). If the Plaintiff assumed his use was within the right of way when in effect it was actually outside the right of way, the use of the adjacent property could not have been hostile and adverse and therefore fails to meet the requirement for a prescriptive easement.

Given the fact that property was heavily wooded and undeveloped, it would be difficult, if not impossible, to see the exact location of the dirt road from Highway 76 and certainly not well enough for the neighborhood to know the dirt road was partially on Defendant's land. This

is especially true prior Plaintiff's alleged increased use after the installation of the ponds in the early 1980s which would indicate minimal use for at least 80% of the prescription period. It is important to note that the Order of Judgment does not provide Defendant or any of his predecessors in interest had actual knowledge that Plaintiff was using Defendant's land in addition to the right of way. Judge Knie only found inquiry notice which is insufficient to satisfy the "notorious" element of the subtest for adverse use. (R. p. 23). In Simmons, the Supreme Court clearly provided that "notorious" means that the "use is *actually* known to the owner. . ." Simmons, 419 S.C. at 234, 797 S.E.2d at 393. Therefore, Plaintiff cannot rely on mere inquiry notice to establish his use was notorious. *See Id.*

In the absence of a finding of fact by Judge Knie or clear and convincing evidence in the record that Plaintiff's use was open and notorious, this Court must determine that Plaintiff failed to establish that his use of the dirt road was adverse under current South Carolina law as set forth in Simmons. As a result, the Order of Judgment is controlled by errors of law, and its finding that Plaintiff had an easement by way of prescriptive right leading from Highway 76 across the land of Defendant to the land of Plaintiff measuring 12.5 feet from the western boundary of Defendant's land must be reversed.

II. THE ORDER OF JUDGMENT IS CONTROLLED BY ERRORS OF LAW BECAUSE THE RELIEF GRANTED FAR EXCEEDS THE SCOPE OF RELIEF ALLOWED FOR APPURTENANT PRESCRIPTIVE EASEMENTS UNDER WILLIAMSON, BUNDY, AND SIMMONS.

The Order of Judgment provides the prescriptive easement was established in 1984 because the prescriptive period began 20 years earlier after November 28, 1964 when the 4.04 acre tract was sold by Ms. Miller to Mr. Bedenbaugh. (R. p. 25). The Order of Judgment further provides that the

prescriptive easement was appurtenant to the 120 acre tract whereby making it the dominant estate. (R. p. 21).

The record is clear that Plaintiff was merely a tenant in 1964, and he did not purchase the 120 acre tract until June 20, 1972. (R. p. 67, lines 11-19 - p. 200, lines 10-14). It is well established law in South Carolina that a "party may 'tack' the period of use of prior owners in order to satisfy the 20-year requirement." Bundy, 412 S.C. at 292, 772 S.E.2d at 174 citing Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App.1997). However, there is no evidence in the record nor any finding of fact in the Order of Judgment that Ms. Miller or even members her family used of the dirt road after November 28, 1964.

Plaintiff called Ms. Miller's grandson, Mickey Johnson, to testify on his behalf. (R. p. 101, line 15). Mr. Johnson testified that he was born in 1953 to Ms. Miller's son, A.C. Lee Johnson, who kept his airplane on the 120 acre tract. (R. p. 102). Mr. Johnson testified that he recalled riding in his father's vehicle to the airplane when he was 9 or 10 years old. (R. p. 105, lines 3-22). Mr. Johnson further testified that he could not recall when his father sold the plane. (R. p. 105, lines 23-24). Mr. Johnson's testimony indicates any use of the dirt road by Ms. Miller's family was in 1962 or 1963, and he admitted on cross examination that their use of the dirt road was prior to Plaintiff leasing the property from Ms. Miller. (R. p. 113, lines 2-19).

Plaintiff produced no evidence that Ms. Miller nor her family used the dirt road to access the 120 acre tract after Ms. Miller sold the 4.04 acre tract to Mr. Bedenbaugh. Thus, the record provides the only use of the dirt road to access the 120 acre tract between November 28, 1964 and June 20, 1972 was by Plaintiff and his employees.

Although South Carolina Courts have yet to rule directly on the issue, those jurisdictions and authorities that have contemplated the effect of a lessee's adverse use to establish prescriptive

easements are in agreement.[4] Plaintiff failed to produce a copy of any purported lease agreement he entered into with Ms. Miller. The only evidence in the record that there was a lease agreement is based on the testimony of Plaintiff and Mr. Johnson. (R. p. 111, lines 9-12 - p. 200, lines 12-14). Mr. Johnson testified that he remembered Ms. Miller saying she had leased Plaintiff the Property. (R. p. 111, lines 9-12). In the Order of Judgment, Judge Knie held that it was Plaintiff's position that his use of the dirt road was never permissive; therefore, his use of the dirt road could not have been in the terms of the lease. (R. p. 25). As a result, Plaintiff cannot establish he is entitled to a prescriptive easement because a tenant's adverse use that is not within the terms of his tenancy will remain a trespass which cannot ripen into a prescriptive easement no matter how long it continues. *See* Ammer v. Arizona Water Co., 169 Ariz. 205, 210 818 P.2d 190, 195 (Ariz. App. 1991).

"When a tenant's adverse use is within the terms of his tenancy, it inures to the benefit of his landlord." *Id.* citing Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953). A lessee's adverse use inures to the benefit of the landowner which permits the landowner to make use of a lessee's use to establish a prescriptive easement by the landowner only if the lease permits the use of the right of way. *See* 7455 Inc. v. Tuala Nw., LLC, 274 Or App 842, 362 P.3d 1185 (Or. App. 2015) citing 28A CJS Easements § 27 (2008). "[A] tenant cannot originate adverse use in his or her landlord's favor unless the lease, expressly or impliedly, includes the easement . . . Unless the lease is effective to cover the right of way, Plaintiff's adverse use of way under it cannot [i]nure to the benefit of the lessor." *Id.* citing Deregibus v. Silberman Furniture Co., 121 Conn. 633, 638, 186 A. 553, 555 (1936). Thus, "[i]f a tenant initiates an adverse use that is not within the terms of his tenancy, the

[4] "A prescriptive easement appurtenant to a dominant tenement can only be created in favor of the person who has a fee simple estate in the dominant tenement." Ammer v. Arizona Water Co., 169 Ariz. 205, 818 P.2d 190 (Ariz. App. 1991) citing 2 G. Thompson, Commentaries On The Modern Law Of Real Property § 321 (1980); 4 H. Tiffany, The Law Of Real Property § 1193 (1975).)

use will remain a trespass and will not ripen into a prescriptive right no matter how long it continues." Ammer, 169 Ariz. at 210, 818 P.2d at 195. In Ammer, the Arizona Court of Appeals held:

> [s]ome courts explain this rule by noting that it is the landlord, the holder of fee title, who must assert any prescriptive rights that accrue as a result of the tenant's adverse use . . . If the tenant's adverse use is not within the terms of his tenancy, the landlord will not be liable for the tenant's trespass in a suit brought by the owner of the property that is being adversely used. The courts reason that where there is no basis for subjecting the landlord to the penalties that arise from the trespass, there is no basis for according him the benefits that arise from it either.

Id. at 210, 818 P.2d at 195. The Ammer Court's explanation was quoted by the Oregon Court of Appeals in deciding to adopt the rule after its "review of the rules governing prescriptive easements appurtenant, the underlying rationales for those rules, and cases from other jurisdictions." 7455 Inc., 274 Or App at 844, 362 P.3d at 1186.

The Order of Judgment improperly applies the Supreme Court's decision in Bundy to determine Plaintiff is entitled to an appurtenant prescriptive easement to use the dirt road over Defendant's land. In Bundy, the South Carolina Supreme Court affirmed, as modified, the decision by the Court of Appeals reversing the special referee's decision that the plaintiff, Bobby Brent Shirley, was entitled to a prescriptive easement to use a disputed dirt road over the land of the defendant, W.H. Bundy, leading to Plaintiff's Property.[5] Bundy, 412 S.C. at 297, 772 S.E.2d at 166. Prior to Mr. Bundy purchasing the purported servient parcel in 2003, his predecessor in title allowed the property to be used by the public through the South Carolina Department of Natural Resources Wildlife Management Area Program subject to certain regulations. *Id*. Mr. Shirley's property was purchased by his parents in 1985 and conveyed to him in 2005. *Id*. In 2004, Mr. Shirley put up a gate on the disputed road with the permission of Mr. Bundy. Mr. Shirley attempted to utilize the use

[5] The special referee found Mr. Shirley was entitled to the easement. The Court of Appeals reversed. Bundy v. Shirley, Op. No. 2013–UP–153, 2013 WL 8507861 (S.C.Ct.App. filed May 8, 2013).

of the dirt road by his predecessors' in title[6], the Bennetts, because he could not establish the requisite 20 year prescriptive period base on his ownership alone. *Id.*

The Supreme Court determined Mr. Shirley was correct that the adverse use to establish a claim for prescriptive easement need not be continuous to him personally, but he could not establish the period of prescription simply by referencing prior ownership because there are specific requirements that must be met. The Supreme Court went on to cite The Law of Easements and Licenses in Land which provides:

> Successive uses of land by different persons may be tacked, or added together, to satisfy the prescriptive period. Tacking is permitted when the successive adverse users are in privity of estate. Although the requirement of privity has been variously defined, the prevailing view is that there must be some relationship whereby the successive users have come into possession under or through their predecessors in interest. It follows that claimant may not tack the claimant's adverse use to that of strangers, nor may a claimant tack the claimant's adverse use to that of a predecessor in title when the predecessor's usage terminated before claimant acquired the land. Moreover, a claimant cannot tack adverse use with prior adverse use when intervening parties used land with permission. *Nor is tacking permissible when it is unclear that use by claimant's predecessor was adverse.* In order to establish continuity of use by tacking, *a claimant must show that predecessors in title actually used the alleged easement*.

Bundy, 412 S.C. at 313-4, 772 S.E.2d at 175 citing James W. Ely, Jr., and Jon W. Bruce, *The Law of Easements and Licenses in Land,* § 5:19 (Westlaw/Next 2015) (emphasis added). Accordingly, the South Carolina Supreme Court held that Shirley could not tack the use of his predecessors in title because there was no evidence they actually used the dirt road. Bundy, 412 S.C. at 314, 772 S.E.2d at 175.

The present case differs factually from Bundy in some respects which requires the Court of Appeals to rule on an unsettled area of law in South Carolina. In the present case, Plaintiff's predecessor in title could not have obtained a prescriptive easement prior to his ownership

[6] The pertinent ownership relied on by Shirley was the Bennett family 22-year ownership between December 19, 1947 and April 29, 1969. Bundy, 412 S.C. at 297, 772 S.E.2d at 166.

because Ms. Miller owned both tracts until November 28, 1964 and sold the 120 acre tract approximately seven and half years later on June 20, 1972. (R. p. 67, lines 11-19 - p. 200, lines 10-14). The Order of Judgment erroneously determined that Plaintiff's use of the dirt road from 1964 to 1984 satisfied the requirement of 20 years of continual use even though Plaintiff only owned the 120 acre tract for approximately twelve and a half years.

Notwithstanding, Bundy is clear that specific requirements that must be met for Plaintiff to establish the 20 year prescriptive period was satisfied after only twelve and half years of ownership. *See* Bundy, 412 S.C. at 313, 772 S.E.2d at 175. Plaintiff must show Ms. Miller actually used the dirt road between November 28, 1964 and June 20, 1972 by clear and convincing evidence. *Id*. There is no evidence, much less clear and convincing evidence, in the record upon which Plaintiff can rely to show Ms. Miller actually used the dirt road between November 28, 1964 and June 20, 1972. Plaintiff's sole witness that testified as to the Miller family's use of the dirt road relied on vague recollections as a child, and his testimony merely establishes use by the Miller family during the time Ms. Miller owned both tracts of land. (R. p. 113, lines 2-19). Consequently, such use could not have been adverse, and Plaintiff cannot rely on it to establish that the 20 year prescriptive period began in 1964.

In the absence of evidence that Ms. Miller actually used the dirt road, Plaintiff is forced to rely on his use of the dirt road which only inures to Ms. Miller's benefit if the evidence in the record shows the easement was included in his lease with Ms. Miller. The present case and Ammer are analogous in many ways including the fact that the claimants' purported adverse use began while they were tenants before eventually purchasing the property, and the claimants asked the court to apply their adverse use during their tenancy to the prescriptive period.

In Ammer, the claimants leased a tract of land in 1971 to build a general store and a parking lot which encompassed land owned by AWC before purchasing the tract of land in 1979. Ammer, 169 Ariz. at 207, 818 P.2d at 192. In 1984, the Ammers sold the business and leased the property to the new owners. Ammer, 169 Ariz. at 208, 818 P.2d at 193. In 1988, AWC informed the Ammers the parking lot was encroaching on its property and put up a fence resulting in the Ammers filing an action against AWC seeking a prescriptive easement on the basis that that they and their lessees had continuously used the property for parking since 1971.[7]

The Ammer Court determined that "If a tenant whose adverse use is within the terms of his tenancy subsequently purchases the leased property, he will be permitted to tack the periods of his adverse use as a tenant to the periods of his adverse use as holder of fee title to establish a prescriptive right." Ammer, 169 Ariz. at 210, 818 P.2d at 195 citing Toto, 37 Del.Ch. at 432-34, 144 A.2d at 238-40; 4 H. Tiffany, The Law of Real Property § 1207 (1975). "If a tenant initiates an adverse use that is not within the terms of his tenancy, the use will remain a trespass and will not ripen into a prescriptive right no matter how long it continues." *Id*. citing Bell, 78 R.I. at 41-42, 78 A.2d at 364.

In the instant case, Plaintiff failed to produce a copy of any purported lease agreement he had with Ms. Miller and the only evidence in the record of a lease agreement is the testimony of Plaintiff and Mr. Johnson. (R. p. 111, lines 9-12 - p. 200, lines 12-14). Neither Plaintiff's nor Mr. Johnson's testimony showed the lease included the easement; therefore, Plaintiff's use of dirt road cannot inure to the benefit of Ms. Miller. Furthermore, Judge Knie found, as provided in her Order of Judgment, that it was Plaintiff's position that his use of the dirt road was never permissive. (R. p. 25). Consequently, it is an error of law to rely on the decision in Bundy to

[7] The requisite prescriptive period in Arizona is 10 years. Ammer, 169 Ariz. at 210, 818 P.2d at 195.

establish continuity of use by tacking when Plaintiff's use clearly did not inure to the benefit of his predecessor in title because such use was not in the terms of the lease. *See* Bundy, 412 S.C. at 313-4, 772 S.E.2d at 175 ; Ammer, 169 Ariz. at 210, 818 P.2d at 195.

On the other hand, even if we assume that the use of the dirt road was implied in the lease, Plaintiff still fails to satisfy the third element that requires his use be adverse. In Bundy, the South Carolina Supreme Court addressed the effect of permissive use on prescriptive easements holding,

> It is the well-settled rule that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since user as of right, as distinguished from permissive user, is lacking, if permissive in its inception, such permissive character will continue of the same nature, and no adverse user can arise, until there is a distinct and positive assertion of a right hostile to the owner, and brought home to him.

Id. at 16.

Williamson sets forth the framework for the current law on prescriptive easements and the effect of permissive use which was recently cited Simmons and Bundy. *See* Simmons, 419 S.C. at 223, 797 S.E.2d at 387 and Bundy, 412 S.C. at 292, 772 S.E.2d at 163. The Order of Judgment provides the evidence in the record establishes that Plaintiff conducted farming operations on the 120 acre tract since he leased it from Sula Miller in 1964 which was prior to the conveyance of the 4.04 acre tract to L.K. Bedenbaugh on November 28, 1964. (R. p. 200, lines 12-14). At the time Plaintiff claims began driving or pulling equipment across the dirt road to the 120 acre tract, Sula Miller owned both the 120 acre tract and 4.04 acre tract. If the lease agreement implies permission from Sula Miller to Plaintiff, then the lease is tantamount to a license to use the dirt road for Plaintiff's farming purposes. Accordingly, Plaintiff's use of the dirt road would be permissive in its inception which cannot ripen into an easement by prescription.

The Order of Judgment erroneously accepts Plaintiff's premise that his continued use of the dirt road somehow automatically became adverse on November 28, 1964 when Ms. Miller sold the 4.04 acre tract to Mr. Bedenbaugh. (R. p. 19). However, Plaintiff does not automatically become an adverse user by mere conveyance in South Carolina. Plaintiff's use of the dirt road remains permissive and cannot ripen into an easement by prescription unless there is a distinct and positive assertion of a right hostile to Mr. Bedenbaugh which is brought home to him. *See* Williamson, 107 S.C. at 397, 93 S.E. at 15.

Plaintiffs failed to produce any evidence that his use of the dirt road was ever a distinct and positive assertion of a right hostile to Mr. Bedenbaugh. In fact, Plaintiff admits in his testimony he always assumed his use was in the right of way. (R. p. 213, lines 4-5). Moreover, there is no evidence, much less clear and convincing evidence, that Mr. Bedenbaugh had any knowledge of Plaintiff's use of the dirt road. The only mention of Mr. Bedenbaugh in Plaintiff's testimony related to the placement of some posts; however, Plaintiff could not recall whether it was Mr. Bedenbaugh or the Brocks who installed the posts. (R. p. 204, lines 4-7). It is important to note the disparity in Plaintiff's testimony because Mr. Bedenbaugh was the first unrelated third party to purchase the 4.04 acre tract in 1964, and the Brocks were fifth unrelated third party to purchase the property containing the 4.04 acre tract fifteen years later in 1979.

Defendant maintains the Supreme Court's holding in Williamson providing a "distinct and positive assertion of a right hostile to the owner, and brought home to him" requires Plaintiff to show clear and convincing evidence that Mr. Bedenbaugh had actual knowledge of any alleged adverse use by him. Notwithstanding, at a minimum, Plaintiff must show clear and convincing evidence that his adverse use in 1964 was "open and notorious" as provided in Simmons. In its analysis, the Simmons Court cites Bundy which provides 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*. 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) ("Any use of property which is not hostile or adverse to the interests or title of the property owner cannot ripen into a prescriptive right.")

As previously articulated, the Order of Judgment fails to find and the evidence in the record undoubtedly fails to show that Plaintiff's use was open and notorious. Consequently, if we assume that Plaintiff's use of the dirt road was implied in the lease, then his use was permissive in its inception which cannot ripen into an easement by prescription because it fails to satisfy the third element that requires his use be adverse.

CONCLUSION

Based upon the reasons stated, this Court should reverse the judgment of the circuit court because the Order of Judgment fails to apply the current law under Simmons which requires Plaintiff's use be open and notorious for such use to be adverse, and the relief granted under Bundy was an error of law because the prescriptive period could not have begun in 1964 as provided hereinabove.

Respectfully submitted,

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Columbia, South Carolina
September 14, 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

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SC Court of Appeals

Appellate Case No. 2020-000458
Civil Action No. 2017-CP-36-00214

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

v.

James F. Amick,…… Appellant – Respondent.

CERTIFICATE OF COUNSEL

I, James D. Floyd, hereby certify that the Final Brief of Appellant – Respondent complies with Rule 211(b) of the SCACR.

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