THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Circuit Court Case No.: 2015-CP-10-7000

Appellate Case No. 2020-000955

Thelma Smalls David, Bernard Brown, Benjamin Smalls, Edward Brown, Nicolette James, Robert Brown, Thomas Brown, and Debra Commodore,

Appellants,

vs.

Donna Lee Cox, Robert R. Cox, Jr., Shawn Thackeray, and Lowcountry Highlanders Farm, LLC,

and

Bohicket Farms, LLC,

Respondents.

RESPONDENTS' INITIAL BRIEF

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COUNTERSTATEMENT OF THE CASE AND THE FACTS

The Respondents ("the Coxes") live on rural Wadmalaw Island, in Charleston County, South Carolina. The Coxes are avid gardeners and professional landscape architects, and they have built a series of formal and informal gardens on their 30-acre property. The gardens are connected by dirt roads that the Coxes have constructed over time, and which they use for maintenance and enjoyment of the property.

This case involves allegations by eight (8) separate plaintiffs (now "Appellants"), who each claimed to hold easement rights on the Coxes' property, particularly in one of the roads that the Coxes constructed in about 1987 (the "Blue Road"). The Coxes built the Blue Road for their own use, but they also agreed with a farmer named James Brown that he could use the Blue Road to access nearby fields.[1] For years, Farmer Brown, and

[1] Farmer Brown and Donna Cox's now-deceased husband, Henry Lee, worked together to build the Blue Road. (Tr. p. 108, lines 8-16).

his relatives who helped him farm, used the Blue Road—with the Coxes' knowledge and permission—to get to and from his tomato and okra fields.

Farmer Brown died in about 2014. Shortly thereafter, the Coxes began to notice that all-terrain vehicles (ATVs) were roaring up and down the Blue Road at all hours of the night. They therefore dug a ditch across the Blue Road, to curtail its use by loud four-wheelers. (Answer; R. p. __).

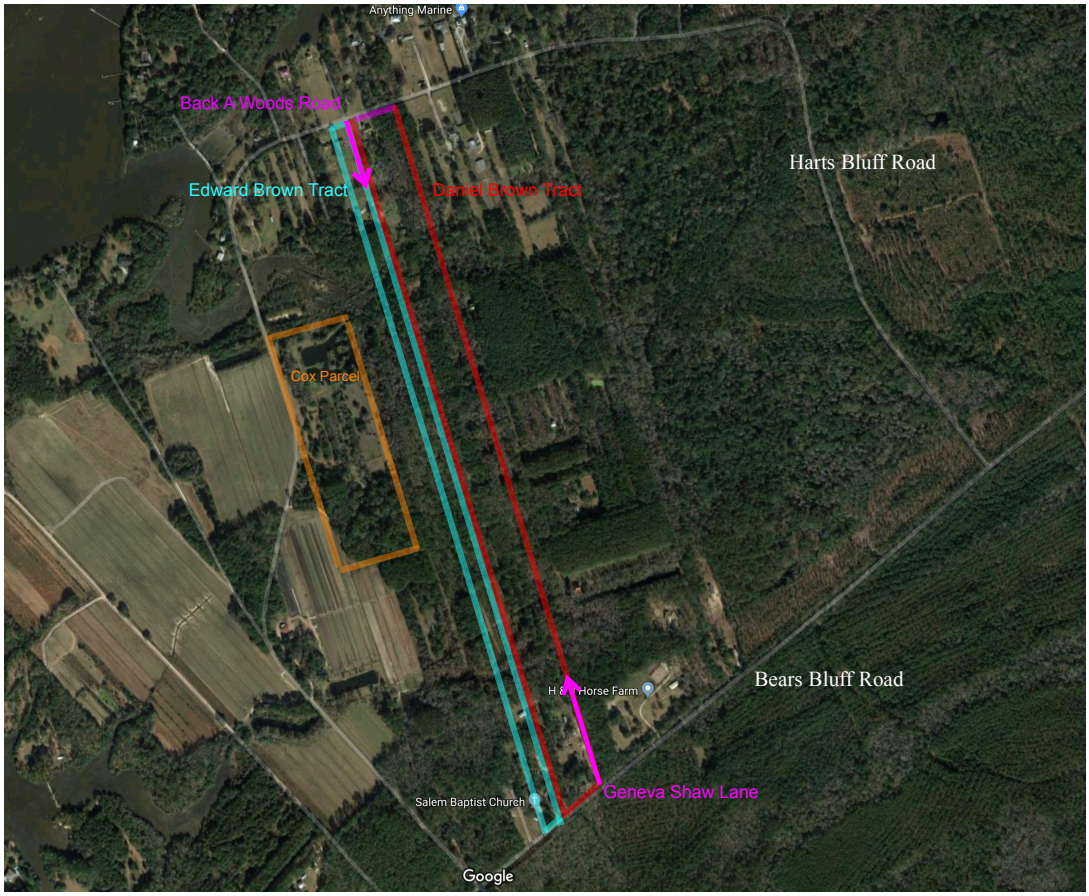
Certain of the Appellants (Thelma David, Bernard Brown, Edward Brown, and Benjamin Smalls) filed the underlying action on December 30, 2015, against the Coxes. The plaintiffs sought a declaratory judgment and injunction, apparently claiming that they held easements by prescription in the Blue Road. Plaintiffs contemporaneously filed a Motion for Preliminary Injunction; the circuit court denied the motion on March 2, 2016, for its failure to establish the requirements for temporary injunction. (R. p. _).

A. Transformation of the Appellants' property, over time.

Discovery revealed that the Appellants were not all related to one another (despite some having the last name "Brown"),[2] and they had interests in disparate parcels of land—none of which were adjacent to the Coxes' property. Appellant Edward Brown is Farmer Brown's brother; the parcel in which Appellant Edward Brown allegedly has an interest was owned by their father, Frank Brown, and it was used by Farmer Brown for

[2] Order, p. 3, footnote 1.

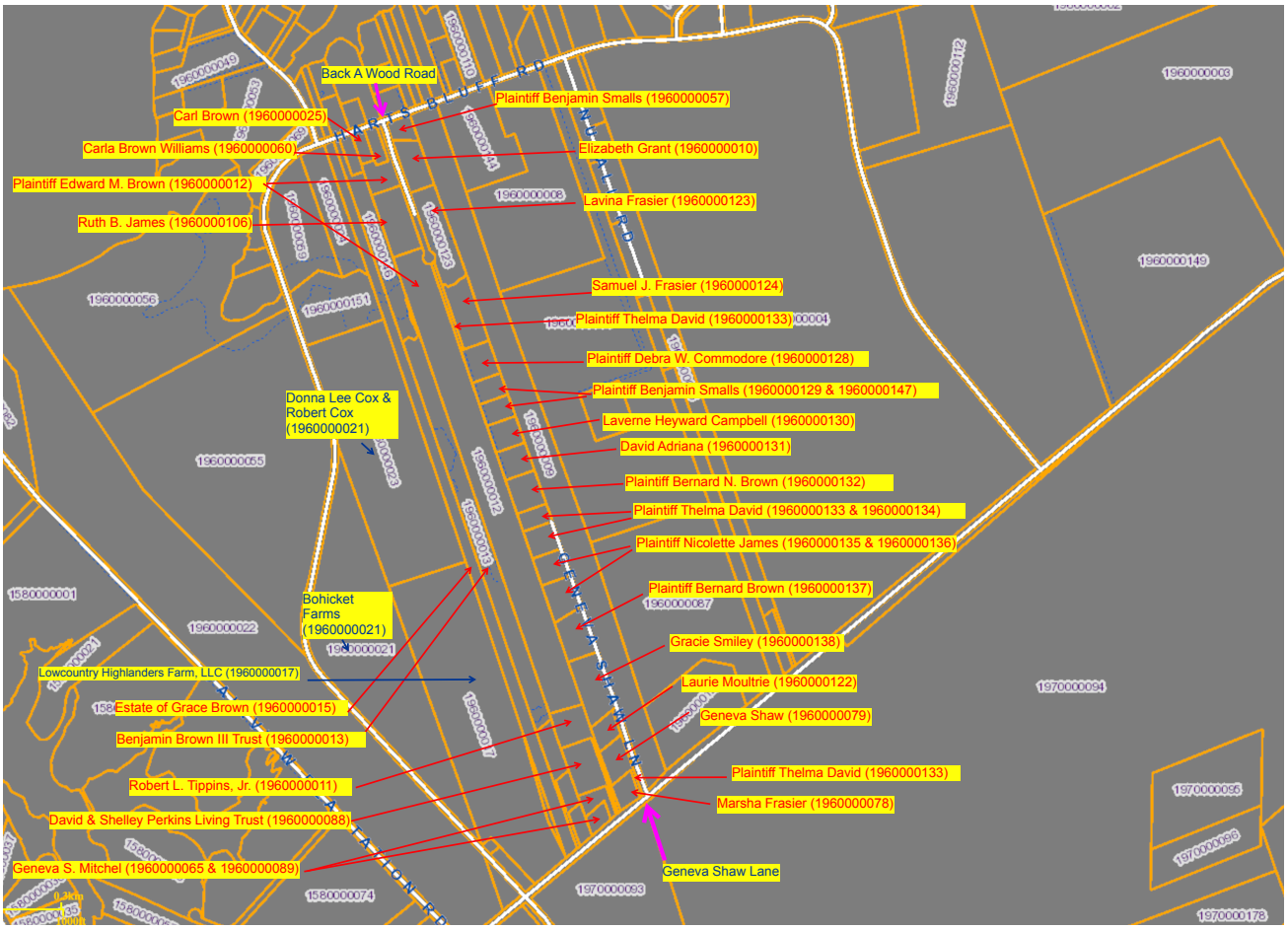
farming.[3] The other original plaintiffs, Thelma David, Bernard Brown, and Benjamin Smalls, had all acquired their parcels from the Estate of Daniel Brown. Prior to about the year 1990, the property at issue used to look something like this, with the main thoroughfares of Hart's Bluff Road and Bear's Bluff Road encircling the property:



Plaintiffs allege that they have easements from Harts Bluff Road, across the Coxes' parcel shown above, across at least two intervening tracts, to the Edward Brown Tract and Daniel Brown Tract shown above.

[3] Appellant Bernard Brown is Edward Brown's nephew and may one day inherit an interest in the tract; **however** as a plaintiff in this lawsuit he was alleging an easement to a very different parcel, which he bought from the Estate of Daniel Brown.

As discovery progressed in the lawsuit, the Coxes discerned that Appellant Edward Brown—who was also the attorney of record for the plaintiffs—sought to gain access over the Blue Road for **numerous** other parcels and persons, who were not named parties in the lawsuit. The Charleston County GIS map shows that the Edward Brown Tract and the Daniel Brown Tract were long ago subdivided, and the new properties have various owners. For example, the Edward Brown Tract now is divided into five (5) parcels, and the Daniel Brown Tract is now divided into fifteen (15) parcels (apparently in preparation for development of a subdivision):



(Def. Ex. 31, R. p. _).

The Coxes filed a Motion for Joinder pursuant to Rule 19 of the South Carolina Rules of Civil Procedure, requesting that the plaintiffs be ordered to add as necessary parties: (1) as defendants, all owners of land over which the alleged easement crosses; and (2) as plaintiffs, all those who wish to access property via the alleged easement. The Court granted the Coxes' Motion for Joinder on September 15, 2017. (Order, R. p. _). Appellants amended their Complaint, several times, to add and subtract additional parties and allegations.[4]

The Third Amended Complaint alleged that there was a public road on the Coxes' property. Alternatively, it alleged that a dirt road on their property was an easement. Significantly, the Third Amended Complaint did **not**: (1) identify with any specificity the interests of the individual plaintiffs, nor (2) the type of easements that were being alleged (although there were sparse allegations and conclusory statements going to the theories of easement by necessity or prescription); nor (3) did it identify the particular parcels belonging to each plaintiff; and (4) it also incorrectly referred to several different dirt paths as if they were all one road.

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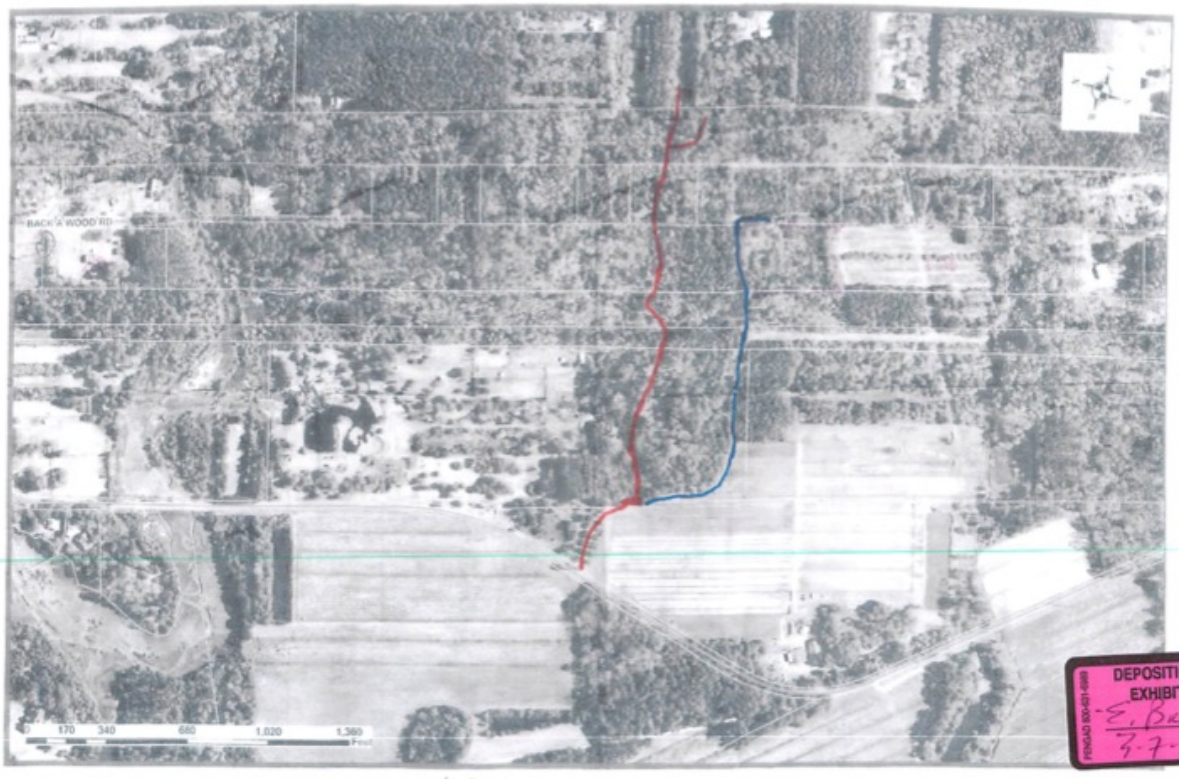
[4] The Third Amended Complaint added Nicolette James, Thomas Brown, Robert Brown, and Debra Commodore as plaintiffs. The same amended complaint added as a defendant Shawn Thackery, who is the predecessor in interest to Respondent Bohicket Farms. However, the plaintiffs did not seek any relief nor make substantive claims against Thackery. (*See, e.g.*, Third Amended Complaint, ¶ 6, R. p. _). Bohicket Farms subsequently filed a Motion to Intervene, which was granted by Order dated February 11, 2019.

Despite the order on joinder, Edward Brown later identified, at trial, **multiple** persons and parcels—who were not ever named as plaintiffs—whom he alleged "would benefit from" the alleged easements. (Transcript p. 88, line 5-p. 90, line 5; p. 133, line 19- p. 135, line 19, R. pp. _).

Much discovery was conducted, including that the Coxes took the individual depositions of seven (7) plaintiffs; they also conducted extensive title searches on each of the plaintiffs, trying to determine what property they owned. Through discovery, the Coxes determined that the plaintiffs lacked privity with one another (a necessary element of their case). The Coxes also learned that the numerous parcels owned by the plaintiffs were far-flung, separated from the Coxes' own property by several intervening tracts of land, owned by persons who were not ever made party to the lawsuit. Finally, the Coxes discerned that the Appellants were conflating two separate purported roads on the Coxes' parcel. In his deposition, Edward Brown depicted the two roads like this:



(Defendants' Tr. Ex. 28, R. p. _).[5] Although there are widely differing viewpoints on the

[5] Because of the ink color used by Edward Brown, the Respondents refer to the two roads as The Red Road and The Blue Road. Appellants call them The Old Blind Road (which is The

proper delineation of the two roads[6]—and whether they are even roads at all—**there is no dispute that the Appellants do not claim to have used the Red Road ("Old Blind Road") at all, since before 1987.** (Tr. tr. pp. 104, line 21-p. 105, line 6; Final Order, p. 4).

B. The Daniel Brown Tract

Appellants Thelma David, Benjamin Smalls, Debra Commodore, Bernard Brown, and Nicolette James each acquired their property from the Estate of Daniel Brown. (Order, pp. 2-6). Daniel Brown's once large tract of property (*see supra*) was subdivided in 2006, apparently with the intent of developing a subdivision. (Pl. Trial Ex. 7, R. p. _). The subdivision plat does not in any way indicate that access to the subdivided parcels is over the Coxes' distant, non-adjacent property. Instead, the subdivision plat depicts two ingress-egress easements[7]—one stretching from Back-a-Wood Road (to Harts Bluff Road in the North) and the other from Geneva Shaw Road (to Bears Bluff Road in the South). The plat clearly provides for access by those roads: "We hereby dedicate the NEW 20' INGRESS-EGRESS EASEMENTS to the use of the property owners forever. Owners of these lots and their heirs and assigns guarantee its maintenance until such time it is accepted into the public maintenance system." (Pl. Ex. 7, R. p. _). This dedication is signed by Appellants Thelma David and Benjamin Smalls, among others.

Red Road) and The New Blind Road (which is the Blue Road). (*See* Tr. tr. p. 103, line 18-p. 104, line 3).

[6] Brown drew them and described them slightly differently at trial, although he also testified at trial that the Red Road/Blue Road depiction at his deposition was accurate. (*See* Tr. tr. p. 104, lines 11-20, p. 108, line 23-p. 110, line 11) *and* Plaintiffs' Trial Ex. No. 3).

[7] Neither of which is the Red Road nor the Blue Road.

(Final Order, p. 5-6). In other words, the planned subdivision has access specified along already-existing roads, with no relation to the Coxes' distant property.

C. The Edward Brown Tract

Appellants Edward Brown, Robert Brown, and Thomas Brown—who are all the brothers of Farmer Brown—each acquired their property from the estate of their father, Frank Brown. Frank Brown had 10 children, who gradually subdivided their father's land, over the course of many years. (Tr. tr. p. 11, line 12-p. 17, line 6; pp. 92-94; pp. 98-102; *and see* Def. Tr. Exs. 13, 14) (R. pp. _). In the course of one of those subdivisions, the property was platted and the plat was recorded. As access to the property, the plat depicts a 50' Right of Way, named Back-a-Wood Road, and it states: "We hereby dedicate the 50' road right-of-way to the use of the property owners. The owners and their heirs and assigns guarantee its maintenance." (Def. Ex. 14). This dedication is signed by Appellant Edward Brown, among others. (*Id.*; Final Order, p. 5). Therefore, similar to the Daniel Brown Tract, the Edward Brown Tract provides for access from an already-existing road, and not through the Coxes' distant property.

D. The Trial

The case came to trial before the Master-in-Equity for Charleston County, The Honorable Mikell R. Scarborough. The Appellants are wrong in their Statement of the Case that "the issues were narrowed to the existence of an easement by necessity, easement by prescription, and the existence of the easement by permission of the servient landowners (the Coxes)." (*App. Br.* p. 2). In fact, due to the vagueness of Appellants'

thrice-amended Complaint, the Coxes were **never** certain of precisely the sort of easements that the plaintiffs claimed, whether in gross or appurtenant, prescriptive or by necessity; nor were they certain of the alleged dominant estates, nor of the identity of the particular easement holders. Despite years of discovery and multiple amendments to the pleadings, plaintiffs had never articulated an understandable theory that would entitle them to recovery. Therefore, the Coxes had no choice but to come to trial prepared to defend against any or all of those claims, by any or all of the eight named plaintiffs, between whom there was neither privity of blood nor of estate, and whose parcels were disparate, distinct, and not adjacent to the Coxes'.

On the first day of trial, counsel for Appellants summarily announced that two of the named plaintiffs "have withdrawn as Plaintiffs in this case." (Trial. tr. p. 8). The Coxes had not received any prior notice of such withdrawal. Indeed, those named plaintiffs never showed up at trial.

The Appellants' case consisted only of the testimony of Edward Brown (the lawyer who drafted and filed the case), who lacked privity with the majority of the plaintiffs. An engineering expert, Horry Parker, also testified. On the second day of trial, counsel announced that an additional plaintiff, Nicolette James, had also withdrawn from the case. (Tr. tr. p. 82, line 25-p.83, line 9).

After the plaintiffs completed the presentation of their evidence, the Coxes moved for involuntary dismissal, pursuant to Rule 41(b). The Master granted the Coxes' motion by verbal order at trial, as well as by written Final Order, dated January 29, 2020. (Tr. tr. p. 226, line 12-p. 237) (R. pp. _). Judge Scarborough's Final Order makes findings of fact

and renders conclusions of law, including that the Appellants had failed to establish easements by necessity or prescription, in gross and appurtenant. Appellants did not make a motion to alter or amend the order.

Appellants[8] served their Notice of Appeal on the Respondents on February 28, 2020. Pursuant to Rule 203, their Notice should therefore have been filed with the Court of Appeals no later than March 9, 2020, but it was not. More than 120 days later, Appellants moved the Court of Appeals for an extension of time in which to file their Notice of Appeal, which this Court granted on August 12, 2020.

[8] It is unclear to Respondents whether all of the plaintiffs are also appellants, or whether those who withdrew from trial are not parties to this appeal.

STANDARD OF REVIEW

Pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure, "[a]fter the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." "Rule 41 allows the judge as the trier of facts to weigh the evidence, determine the facts, and render a judgment against the plaintiff at the close of his case if justified." *Johnson v. J.P. Stevens & Co., Inc.*, 308 S.C. 116, 417 S.E.2d 527, 529 (1992), *citing* H. Lightsey & J. Flanagan, *South Carolina Civil Procedure* 368 (1985). Involuntary dismissal, or non-suit, is appropriately granted when the plaintiff fails to meet his burden of proof. *Id*.

The question of whether an easement exists is a factual question in an action at law. *Bundy v. Shirley*, 412 S.C. 292, 302, 772 S.E.2d 163, 168 (2015); *Jowers v. Hornsby*, 292 S.C. 549, 552, 357 S.E.2d 710, 711 (1987), *citing Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976) ("We hold that the determination of the existence of an easement is a question of fact in a law action. The decision of the trier of fact as to whether or not an easement exists will be reviewed by this Court as an action at law."). Appellate courts will uphold a master's factual findings if there is any evidence to support the decision. *Id*. at 552, 221 S.E.2d at 711 ("In an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is **no evidence** to support the judge's finding.") (emphasis added); *Gooldy v. Storage Center-Platt Springs, LLC*, 811 S.E.2d 779, 422 S.C. 332 (2018).

ARGUMENT

Respondents respectfully request that this Court would affirm the Order on appeal, in which the Master-in-Equity correctly found that the facts and law did not support the Appellants' claims. As set forth below, there is evidence that supports the Master's rulings that Appellants did not meet their heavy burden of proof to establish their claims for prescriptive easements, nor did they satisfy any of the elements of their claims for easements by necessity. Further, the Appellants' argument that the purported easements were relocated by agreement was not preserved for appeal, and this Court should not entertain it. Finally, this Court should affirm the Master's Order on numerous other grounds, pursuant to Rule 220 of the South Carolina Appellate Court Rules.

I. The evidence supports the Master's finding that Appellants failed to meet their burden of proof on numerous essential elements of their individual claims for prescriptive easements.

Contrary to the first sentence in Appellants' Brief on this issue, there are not "two easements" (nor any easements at all) on the Coxes' property.[9] There are several private dirt roads, including the Coxes' driveway, that the Coxes have constructed over time for the purpose of accessing their own gardens. One question presented at trial was whether the Appellants had established prescriptive rights in one of those roads (The Blue Road,

[9] Throughout their brief, the Appellants use a term of law, "easement," to refer to the private dirt roads at issue. This is wrong, and it is potentially confusing to this Court. To be clear, the purpose of the plaintiffs' suit was to ***attempt to prove*** that the private roads on the Coxes' property were easements. The Master correctly found that the Appellants had failed to establish the existence of any easements on the Coxes' land. Therefore, as this Court reads Appellants' Brief, the Coxes ask that it would (mentally) correct the brief's multiple erroneous references to the "Blind Road" as "easements."

which Appellants call the "New Blind Road"). The Master correctly found that they had not, and he properly dismissed their claims. Because there is evidence in the Record to support the Master's findings, this Court should affirm. *See Jowers*, 292 S.C. at 551-552, 357 S.E.2d at 711 (clarifying the proper scope of review in actions on the existence of an easement, holding that it is a question of fact in a law action, and explaining that "[i]n an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is no evidence to support the judge's finding.").

A. Appellants had the strictest burden of proof, which they failed to meet.

In the case of *Bundy v. Shirley*, the Supreme Court explained that there is a heightened standard of proof as to the elements of a prescriptive easement. 412 S.C. 292, 306, 772 S.E.2d 163, 170 (2015). The Court held that "[g]iven 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**." *Id*. at 306, 772 S.E.2d at 170, *quoting Williamson v. Abbott*, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917) ("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."); *also quoting* 2 Am. Jur. 3d. *Proof of Facts* 125 § 3 ("This stricter standard of proof may be a result of the general opinion expressed by courts and commentators that prescriptive rights are not favored in the law since they result in corresponding losses or forfeitures of rights of other persons.").

To establish prescriptive easements, the Appellants each had the **independent burdens**[10] of proving, by clear and convincing evidence, each and every one of the elements of their claim: (1) the identity of the thing enjoyed; (2) open, notorious, continuous and uninterrupted use; (3) for a period of 20 years; and (4) adverse to the true property owner's rights. *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 797 S.E.2d 387 (2016) (clarifying and restating the test for easement by prescription to eliminate the Court's previous error in finding a "claim of right" to be an independent method of establishing adverse use). The failure to prove any one of the elements is fatal to their claims. The evidence submitted by Appellants at trial was insufficient to prove that their use was open and notorious, continuous and uninterrupted, for a period of 20 years, and adverse to the Coxes—in fact the Appellants' own evidence demonstrates the opposite.

The Master weighed the evidence, and he found that Appellants failed to meet their burden on **several** of the essential elements necessary to prove the existence of prescriptive easements. This Court should give deference to the Master's factual findings and affirm the Order. *Gooldy*, 811 S.E.2d 779, 422 S.C. 332 (2018) (Appellate courts will uphold a master's factual findings if there is **any evidence** to support the decision.).

Importantly, unless this Court finds that there was no evidence to support the Master's Order—on each of the elements discussed below and in Issue II—it must affirm.

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[10] The Master properly found that the Appellants are not all connected by privity of title nor blood, and that they were seeking access to numerous disparate parcels. (Final Order, p. 2). They are therefore incapable of "tacking" one another's use to establish their separate claims. *See Bundy* at 314, 772 S.E.2d 163; Final Order, p. 10.

B. There is evidence to support the Master's factual finding that Appellants did not establish open and notorious use by clear and convincing evidence.

This element involves the question of whether the Plaintiffs' use was not hidden from the Coxes, so that any purported adverse use would be driven home to them. *See Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 797 S.E.2d 387 (2016). In their Brief on this element, Appellants point to testimony that the road was wide, and that it was used by Farmer Brown for various purposes. This argument disregards that the Coxes built the road, for their own use, and its width is immaterial. It further ignores the fact that Farmer Brown and others had the Coxes' permission to use the road. As discussed, *infra*, this use by permission could never ripen into adverse use.

The Master's ruling was supported by the evidence at trial. Importantly, the Coxes' property is very large (30 acres) and has many large trees. Edward Brown was the only Plaintiff to testify at trial. His testimony was not clear and unequivocal that the road in question was in view of the Coxes' house—indeed, Brown stated that he did not believe that the road was visible by them. (Tr. tr. p. 72) (R. p. _). If people other than Farmer Brown and those with permission were using the road (a claim for which there was sparse evidence, and certainly not clear and convincing), it can be inferred from Edward Brown's own testimony that their use was hidden from the Coxes. Thus, there is evidence to support the Master's finding on this element, and this Court should affirm.

C. There is evidence to support the Master's factual finding that Appellants did not establish by clear and convincing evidence continuous use, for 20 years.

Appellants Thelma David, Benjamin Smalls, Debra Commodore, and Bernard Brown all acquired their tracts from the 2006 subdivision of the land of Daniel Brown.

They did not have privity with Edward Brown or members of the Brown family, and thus could not tack the alleged adverse use of those claimants (and vice-versa).[11] *See Bundy*, 412 S.C. 292, 314, 772 S.E.2d 163 ("Nonetheless, Shirley cannot establish the period of prescription merely by referencing the twenty-two-year ownership by the Bennett family. Instead, there are specific requirements that must be met. As explained by one secondary source: 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 . . . 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.").

Edward Brown testified that the Daniel Brown family had a cemetery on one of the lots in their subdivision, and he alleged that the Blue Road was at times used for funeral processions. (Tr. tr. p. 38, line 2-p.39, line 20, p. 45, line 8-p. 46) (R. pp. _). Importantly, no members of the Daniel Brown family attested to their use of the road for funeral procession and burial. Brown stated that he did not have any relatives buried in the cemetery, but that he attended either one or two of the funerals of those buried there.

[11] Significantly, the Brown Family's purported use was not adverse, since Farmer Brown was using the road with permission. (*See infra*).

(Tr. p. 110, line 18-p. 112, line 7, R. p. __). Numerous photographs of headstones were entered into evidence, and the dates on the headstones show that burials occurred in the years 1989, 1996, 2009, 2010, and 2012. (Pl. Ex. 17, R. p._). Significant evidence supports the Master's finding that there was not clear and convincing evidence sufficient to prove continuous use of the road for funeral processions, including (1) the thirteen-year gap, between the years 1996 and 2009, (2) the lack of any testimony regarding more frequent use, and (3) the lack of testimony on the subject by any member of the Daniel Brown family. This Court should therefore affirm the Master's finding on this element, under the "any evidence" standard of review.

D. There is evidence to support the Master's factual finding that Appellants did not establish by clear and convincing evidence uninterrupted use.

Edward Brown testified at great length about an altercation between himself and the Coxes' predecessor in title, Carl Eaton. According to Brown, Eaton shouted at him not to use the road, while waving a pistol; Brown got out of his car and wrestled Eaton to the ground, took the pistol from Eaton, and later threw it in a creek. (Tr. tr. p. 126, line 22- p. 129, line 6) (R. pp._). Brown also testified that Eaton had similar confrontations with Appellant Bernard Brown. (Tr. tr. p. 25, lines 3-12). This testimonial evidence obviously supports the Master's finding that the plaintiffs' use was interrupted.

Although Edward Brown testified that that Eaton's threats and confrontation did not actually deter plaintiffs from using the road, the law in South Carolina is clear that Eaton interrupted the use. In the case of *Pittman v. Lowther*, our Supreme Court examined the question of what actions by a servient landholder constitute an interruption in

prescriptive use. *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005). The Court held that "verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period." *Id*. Edward Brown's testimony about the violent confrontation between himself and Eaton illustrates the Court's rationale for this holding. The Court found: "[t]o adopt an interpretation of 'effective interruption' which requires a servient landowner to take actions in addition to erecting barriers like fences and cables, would encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes." *Id*.

The trial court was in the best position to weigh the evidence. Brown's testimony, coupled with the holding in *Pittman*, supports the Master's finding that the violent confrontations over use of the subject road constituted interruptions in the prescriptive period.[12]

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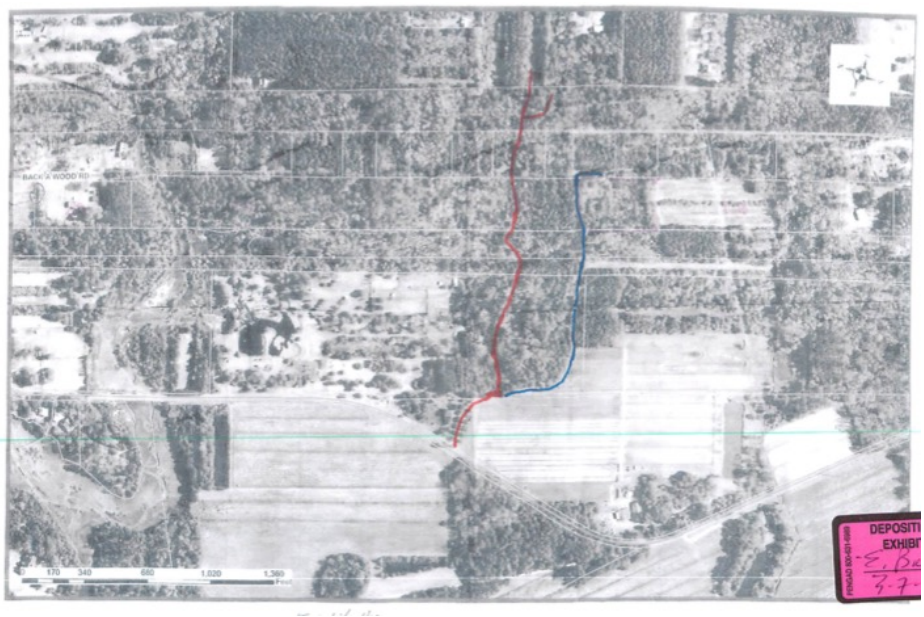
[12] Further, this Court may affirm on any ground that appears in the Record. In Appellants' Brief, as they did at trial, Appellants often attempt to conflate the Old Red Road (which Appellants call "Old Blind Road") with the New Blue Road (Appellants' "New Blind Road"). **They are not the same thing**, and this Court should not permit itself to become confused. (*See* Defendants' Tr. Ex. 28, R. p. _). The evidence was unequivocal that alleged prescriptive use—if any—of the Old Red Road was discontinued and abandoned in **1985**. The first element of a prescriptive easement is clear and convincing proof of the identify of the thing enjoyed. The thing enjoyed cannot be both the Old Red Road (which was unequivocally abandoned) and the New Blue Road. Appellants filed the lawsuit for the purpose of establishing an easement in the New Blue Road, which they failed to do by clear and convincing evidence. This Court should disregard the numerous instances in Appellants' brief where they attempt to conflate the two roads.

II. Appellants' "relocation" argument fails for numerous reasons, each independently fatal.

The thrust of the Appellants' second issue on appeal is that the Blue Road is the relocated reincarnation of the Red Road, which Appellants were using under a claim of right. This Court should affirm the trial court because: (a) the question of whether the Red Road was relocated as matter of law was not ruled upon, and the issue is abandoned; (b) for the sake of argument, the law does not support Appellants' argument that Farmer Brown relocated the alleged easement; and (c) for the sake of argument, there is evidence to support the Master's factual finding that the Appellants' use of the Blue Road was permissive in character and thus ineffective to establish an easement by prescription.

Edward Brown testified at trial that there used to be a road, which he called the "Blind Road," which crossed the Coxes property. He spoke at some length about all the people who purportedly used the road back in the 1950s. The Master was in the best position to adjudge his credibility. He was the only witness to testify about purported use. Brown claimed that "Blind Road" was a public road, although there was no documentary evidence to this effect.[13] Brown drew the alleged "Blind Road" at trial, as well as in his deposition; "Blind Road" was the "Red Road":

[13] However, if the old Blind Road (the Red Road) was indeed a public road, it further defeats Appellants' claim for a prescriptive easement, since "[i]t is generally held that the use and enjoyment of a way in common with the public, as shown by the record in this case, is not exclusive within the meaning of that term nor used in reference to the acquisition of a private right of way by a prescription." *Shia v. Pendergrass*, 222 S.C. 342, 352, 72 S.E.2d 699 (1952).



(Def. Ex. 28).

Regardless of whether there is any credence to Brown's testimony about the old Red Road, **the Red Road was not the subject of this lawsuit**. Brown stated that the Red Road was never again used after about 1985. (Tr. tr. p. 104, line 21; *see also* Final Order, p. 4, "Thereafter the Old Red Road was no longer used . . .") (R. p. _). The first essential element of a claim for prescriptive easement is clear and convincing proof of the identity of the thing enjoyed. In this case, the thing enjoyed was a <u>new</u> road, which Donna Cox's husband built, with the help of Farmer Brown, and which the Coxes gave Farmer Brown license and permission to use. This new road was depicted by Edward Brown as the "Blue Road." (*See supra;* Def. Ex. 28).

A. Appellants did not get a ruling on the issue of relocation of the Red Road, and this issue is not preserved.

As a critical initial matter, the Appellants' Brief, which states at the top of page 9 that the "Master in Equity, however, determined that the . . . [block quote]," is a confusing

formatting error in the brief, which lends the mis-impression that the Master ruled on this issue. Actually, the Master did not rule on the question of relocation of any easement, and the Appellants did not file a Motion to Alter or Amend the Order. As such, this issue cannot be appealed. *Great Games v. SC Dept. of Revenue*, 339 S.C. 79, 529 S.E.2d 6 (2000) (noting that post-trial motions are necessary to preserve for appeal issues that the trial court does not rule upon). **This Court should not entertain Appellants' unpreserved argument on relocation, and it should therefore affirm the Final Order.**

B. Appellants' relocation argument is wrong as a matter of law.

Without conceding Appellants' failure to preserve the issue, Respondents will address their faulty arguments. Appellants attempt to create confusion about the differences between an easement by prescription, versus an easement by necessity, versus an express easement. As this Court knows, those are three very different types of easements, and the bodies of law surrounding them is not interchangeable, due to the nature of the rights. Express easements are almost impossible to modify, since they are established by contract and run with the land. **Once they have been established**, easements in general are difficult to modify, and such modification requires—at a minimum—the consent of every owner of an interest in the easement. *Corbin v. Cherokee Realty Co.,* 229 S.C. 16, 91 S.E.2d 542 (1956) (easement cannot be unilaterally altered without consent of all owners); *see also Goodwin v. Johnson*, 357 S.C. 49, 54, 591 S.E.2d 34 (Ct. App. 2003), *citing* 28A C.J.S. Easements § 157 (1996) ("As a general rule, in the absence of statutes to the contrary, the location of an easement cannot be changed by either party without the other's consent, after it has been once established either by the express terms

of the grant or by the acts of the parties, except under the authority of an express or implied grant or reservation to this effect.") (footnotes omitted); F.M. English, Annotation, Relocation of Easements, 80 A.L.R.2d 743 § 4 (1961) ("Language is frequently found in the cases to the general effect that an easement, once located, cannot be relocated without the consent of the parties thereto."); *see also Sheppard v. Justin Enterprises,* 646 S.E.2d 177, 373 S.C. 518 (Ct. App., 2007) (affirming circuit's court's order requiring servient estate holder to restore easement after its unilateral modification, because of increased burden on the dominant estate).

First, this appeal pertains to unestablished easements, which the plaintiffs in their lawsuit were seeking to establish, by prescription or necessity. Logically, an easement that does not exist cannot be relocated, by agreement of the parties or otherwise. Significantly, the *Goodwin v. Johnson* case cited by Appellants was strictly limited to the question of a master-in-equity's ability to relocate an easement by necessity, which previously had been judicially established. *See Goodwin*, 357 S.C. 49, 591 S.E.2d 34 (Ct. App. 2003).

Second, Appellants argue that "James Brown, on behalf of all users, agreed to relocate the easement." (Appellants' Br. p. 9). There is no evidence in the Record to support the Appellants' contention that Farmer Brown did, or had the authority to, modify any alleged easement on behalf of (allegedly) multiple other tracts of land purporting to be dominant estates (**with which he did not have privity**). As a matter of law—if, *arguendo*, the Red Road was indeed an established easement—then the consent of **every** (alleged) dominant tract with an interest was necessary before it could be

abandoned or modified. *Ralph v. McLaughlin*, 428 S.C. 320, 353-354, 834 S.E.2d 213, 230-231 (Ct. App. 2019). As a matter of law, (if an easement existed), Farmer Brown was not capable of unilaterally relocating it on behalf of estates (or persons) with which he lacked privity.

C. The Master correctly held that permissive use defeated the Appellants' claims for prescriptive easements.

Further, the Appellants' argument about the relocation of the Red Road and the Blue Road center around a "claim of right" theory, which was abolished in 2016 by the Supreme Court. If this Court finds that the issue of relocation (a) has been preserved and (b) that it is not incorrect as a matter of law, then this Court should nonetheless affirm the Final Order since Appellants' use was permissive.

The law in this State deliberately makes it very difficult to acquire an easement by prescription, for the sound reason that prescriptive easements result in the corresponding loss of a landowners' rights to his own property. *Bundy*, 412 S.C. 292, 772 S.E.2d 163 (2015) ("Essentially, by claiming a prescriptive easement, a claimant seeks for a property owner to forfeit rights to the subject property.").

In this case, the Coxes learned—the very hard and expensive way—that no good deed goes unpunished. For many years, they permitted Farmer Brown to use a private road on their property, so that he could conveniently access his crops in a nearby field.[14] The Coxes could hardly have imagined that, three years after Farmer Brown died, they would be sued by eight different people, who claimed that Farmer Brown's use was

[14] They had an agreement about it, which could legally be termed a "license."

adverse and that, through it, those people were each entitled to easements to their numerous, far-flung parcels of land, and that, furthermore, any number of unnamed persons and parcels were also entitled to easements over the Coxes' property. (*See*, Tr. tr. p. 133, line 19-p. 135, line 19).

In addition to the elements of a prescriptive easement that are discussed in "Issue I," above, Appellants were also required to prove that their use was adverse and hostile to the Coxes. *Bundy*, 412 S.C. 292, 772 S.E.2d 163. This Court should disregard Appellants' "claim of right" argument and affirm the Master's finding that permissive use defeated Appellants' prescriptive easement claims. (Order, pp. 11-12).

i. The Appellants' "claim of right" argument is improper.

The Appellants are incorrectly making their argument under a "claim of right" theory, which has been abolished in South Carolina. Appellants contend "[Respondents] recognized that the Frank Brown heirs and others had established a claim of right to use Old Blind Road . . . [Respondents] did not interfere with this claim of right to use the New Blind Road . . . [t]his was a direct acknowledgement of Brown's right to use Old Blind Road." (*See,* App. Br. pp. 9-10). In 2016, our Supreme Court overruled the cases in this State that formerly may have allowed a prescriptive easement to be established under a claim of right theory. *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 797 S.E.2d 387 (2016).

The *Simmons* Court discussed at great length prior misunderstanding by litigants and courts as to the meaning of the phrase "claim of right." *Id.* Previously, a claimant could establish a prescriptive easement either by proving adverse use or by

demonstrating a perceived right to use a way (a "claim of right"), which was not necessarily adverse or hostile. When it overruled those prior decisions, the *Simmons* Court clarified:

> As a threshold matter, we hold the Court of Appeals erred in recognizing two methods of proving the third element of a prescriptive easement. We acknowledge that this Court's decisions have helped give rise to this error and now take this opportunity to clarify the third element of a prescriptive easement. . . . A brief review of additional authority on this issue is instructive. First, the terms "adverse use" and "claim of right" are, in effect, quite similar. For example, Black's Law Dictionary defines "adverse use" as "a use without license or permission." "Claim of right" is defined as: (1) The possession of a piece of property with the intention of claiming it in hostility to the true owner; or (2) A party's manifest intention to take over land, regardless of title or right. American Jurisprudence also recognizes that "[u]nder the law of prescriptive easements, the essence of a 'hostile' use, which has been referred to interchangeably in the case law as 'adverse,' 'hostile,' 'nonpermissive,' or 'under a claim of right,' is a lack of permission from the true owner."...
>
> Secondly, 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." *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."). Therefore, to the extent that there is a difference between the two terms, there still could not be a legitimate claim of right without adverse use.
>
> Accordingly, we hold 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. Thus, we overrule those decisions that express a contrary conclusion of law . . . Instead, courts in this state **should only determine whether the claimant's use was indeed adverse**.

Id., 419 S.C. at 232-234, 797 S.E.2d at 391-392 (emphasis added) (some internal citations omitted). In other words, courts in the past were wrong to find easements by prescription based on non-hostile use "of right," which was essentially permissive. The South

Carolina Supreme Court has now explained that easements by prescription are not to be found without clear and convincing evidence of adverse use.[15]

In the trial of this case, below, the Master discussed the *Simmons* case, correctly applied its test, and specifically found that Appellants' use of the road was permissive and not adverse. (Tr. tr. pp. 231-233, Order pp. 10-13) (R. p. __).

ii. The Master correctly evaluated Appellants' use under *Simmons* and *Bundy* and found it was permissive.

The Master correctly found that the Appellants' case failed, because permissive use can never transform into adverse use sufficient to prove an easement by prescription. *Bundy*, 412 S.C. at 307-310, 772 S.E.2d at 171-174, *citing Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15 (1917).

> 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., *quoting Williamson* (emphasis added). "The asking and obtaining of permission . . . from the owner of the servient estate, stamps the character of the use of as *not having been adverse, or under claim of right*, and therefore, as lacking that essential element which was necessary for it to ripen into a right by prescription." *Id*. at 310, 772 S.E.2d at 173 (emphasis added by the *Bundy* Court).

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[15] *Simmons* and *Bundy* can be viewed as companion cases, both authored by Chief Justice Beatty, which together had the effect of clarifying the previously somewhat muddled law in this State on easements by prescription.

This rule in South Carolina just makes common sense. First, permissive use is no different from a license, which is revocable at any time. Further, the purpose behind the elements of an easement by prescription is to ascertain whether a landowner has consciously given up his right to his property by allowing adverse use, without interruption, for a period of 20 years. Obviously, a landowner would not ever think to interrupt a use that he is actually allowing and has agreed upon.

The *Bundy* Court applied this rule to a fact pattern in which Shirley (the alleged dominant estate holder) asked Bundy (the alleged servient estate holder) for permission to construct a gate on Bundy's property. Noting that "when a claimant uses property with the permission of the owner, he or she acknowledges the owner's rights and uses the property without an affirmative, hostile act," the Court found that "[b]y contacting Bundy regarding the gate, Shirley implicitly acknowledged Bundy's right to the property, thus defeating Shirley's own claim of right theory." *Bundy* at 311, 772 S.E.2d at 174.

The fact pattern in this lawsuit mirrors that of *Bundy*. The evidence shows that Farmer Brown (and Appellant Edward Brown) met with Donna Lee Cox and her now-deceased husband, Henry Lee, to discuss building a road on the Coxes' property. (Tr. tr. pp. 107-108, R. p.).[16] At that meeting, they came to an agreement. Farmer Brown worked together with the Coxes to build the road (on the Coxes' property), and the Coxes allowed

[16] The Coxes do not know whether this Court wants to go off into the weeds of the Appellants' argument concerning the temporary order from 1984, which was subsequently dissolved (Def. Ex. 30.) Just in case the Court is so inclined: (1) the pleadings were not admitted at trial for the truth of the matter asserted (Tr. p. 28, R. p. _); and (2) Henry Lee's Answer unequivocally denied each of the Complaint's allegations (Pl. Ex. 13, R. p. _). Further, the Master had the pleadings before him, weighed them as evidence, and nonetheless found that Appellants had not met their heavy burden of proof. His findings are entitled to deference by this Court.

Farmer Brown to use it. *Id*. Counsel for plaintiffs conceded that there was an agreement as to the use of the road. (Tr. tr. pp. 210-211) (R. p. _). The Master weighed the evidence and found that the testimony and evidence did not indicate adverse use, clearly and convincingly.

Edward Brown's own testimony, that there was an "agreement" between Farmer James Brown and the Coxes, supports the Master's finding that the use was permissive and could not ripen into an easement by prescription. (Tr. tr. p. 31, line 7) (R. p. _) (significantly, Brown also testified that he lacked first-hand knowledge of the terms of the agreement: "I wasn't there when this was done. I didn't actually see him do this, but my understanding of the agreement was . . . [t]hey were going to move . . .The Old Blind Road . . ."). That evidence of use by agreement and with permission is sufficient to require this Court to affirm, pursuant to the "any evidence" standard of review.

III. Appellants failed to meet their burden of proof on numerous essential elements of their individual claims for easements by necessity.

The Appellants' third issue on appeal is just plain wrong, from the first sentence, which identifies purported dominant parcels that were not even parties to this lawsuit.[17] The Appellants' argument goes on—confusingly and erroneously—to argue that an order from 2008, in an entirely other case, **to which none of the Respondents were**

[17] Despite having been ordered to amend their complaint to add as a party every parcel with an interest in the alleged easement, the Appellants never identified or named the property owned by the Estate of Grace Brown, nor the property owned by the Estate of Ben Brown, (TMS Nos. 196-00-00-015, -013). But they now contend on appeal that the "central question presented in this case is whether an easement exist [sic] across the Coxes property so as to provide access to the property owned by the Estate of Grace Brown, Ben Brown, and Frank Brown." (App. Br. p. 12).

parties, somehow ought to have bound the Coxes and the Master in this present case. In other words, the Appellants seem to be arguing that because Judge Scarborough made an order, in a different case, from 10 years ago, with different parties, discussing different property, in which the Respondents were not named, and in which the Respondents' rights were not—in any way—determined, then that order should nonetheless have required the Master to find that the Appellants (who are different from the parties to that other case) have an easement. *See Appellants' Brief*, pp. 12-13 ("In making this finding, the Master disregarded an order he issued on February 19, 2008 in the case of *Benjamin Brown, III v. Carl Brown* . . . Consequently, the Master's Order in *Brown* providing for easement access from the farm road to Old Blind Road (New Blind Road at the time) would be effective."). Respondents respectfully ask that this Court would disregard this entire misguided argument by the Appellants.

What the Master correctly found is that the evidence shows the plaintiffs have other access to their property, which defeats their claims for easements by necessity. This was a finding of fact, going to the question of the existence of an easement, and this Court should uphold it unless there is no evidence to support it. Because there **is** evidence to support the Master's finding of lack of necessity, this Court should affirm. *See Jowers*, 292 S.C. at 551-552, 357 S.E.2d at 711 (clarifying the proper scope of review in actions on the existence of an easement, holding that it is a question of fact in a law action, and explaining that "[i]n an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is no evidence to support the judge's finding.").

A. Appellants' argument that the access to their property—which they guaranteed—"has not been created" is immaterial.

At trial, several recorded plats were admitted into evidence. Defendants' Trial Exhibit No. 14 is a plat showing the subdivision of the land of Frank Brown (Appellant Edward Brown's father) (TMS 196-00-0012). Prior to the subdivision, the property had direct access to Harts' Bluff Road. Upon subdivision, a new way was created, dedicated, and granted for access. The recorded plat depicts a 50' Right of Way, named Back-a-Wood Road, and it states: "We hereby dedicate the 50' road right-of-way to the use of the property owners. The owners and their heirs and assigns guarantee its maintenance." (Def. Ex. 14). This dedication is signed by Appellant Edward Brown, his brother Carl Brown (trustee of the Frank Brown estate), and an heir of Daniel Brown, Lillian Washington. Back-a-Wood Road, as platted, gives access to Harts' Bluff Road. This plat delineates the interests of Appellants Edward Brown, Thomas Brown, and Robert Brown. (*See* Order, pp. 2-6).

Appellants Thelma David, Bernard Brown, Benjamin Smalls, Nicollette James, and Debra Commodore acquired their property with reference to another plat. (Plaintiffs' Exhibit 7). That plat depicts two ingress-egress easements, one stretching from Back-a-Wood Road (and Harts' Bluff Road) and the other from Geneva Shaw Road (and Bears' Bluff Road), and it states: "We hereby dedicate the NEW 20' INGRESS-EGRESS EASEMENTS to the use of the property owners forever. Owners of these lots and their heirs and assigns guarantee its maintenance until such time it is accepted into the public maintenance system." (*See* Pl. Ex. 7). This dedication is signed by Appellants Thelma Smalls and Benjamin Smalls, among others. (Order, pp. 2-6).

Regardless of whether the 50′ roads were ever actually built, this guaranteed access is unquestionably enforceable—as a matter of law—by every person who takes title to a lot subject to the plat. *Carolina Land Co. v. Bland*, 265 S.C. 98, 217 S.E.2d 16, 20 (1975) (holding that purchasers of subdivided lots platted into streets and sold by reference to the plat acquired an appurtenant easement in a road that was never opened or used). Not only is the access enforceable, but—importantly—it is enforceable **against the Appellants who are signatories (and <u>not</u> against Respondents).**

Neither of the recorded plats, by which Appellants took title, depicts as access either the purported Red Road or the Blue Road across the Coxes' property. This is so for at least three reasons. First, the composite properties originally touched and had access via Harts' Bluff Road and/or Bears' Bluff Road (*see* Statement of Facts, *supra*). Second, the Red Road and Blue Road were not established easements in favor of Appellants or their predecessors in title. And, third, the developers of the property (i.e., Appellants Edward Brown, Thelma David, Benjamin Smalls, *inter alia*) <u>guaranteed</u> ingress and egress by way of Back-a-Wood Road and Geneva Shaw Road.

B. Appellants' argument, that it would be prohibitively expensive to construct the access that they have guaranteed, is irrelevant to the Respondents.

Appellants claim that the dedicated ingress-egress easements that they themselves granted and promised to maintain are prohibitively expensive . . . and so, they argue, this Court should require the Coxes to permit numerous strangers to come across their own property, at all hours of the day and night, on rapidly-developing Wadmalaw Island, on their way to a burgeoning subdivision. Respectfully, the Appellants are seeking a remedy

from entirely the wrong source. This is a mess of the Appellants' own making, and their proper redress is against one another.

As the Master found, the Appellants never had unity of title with the Respondents. The subdivision plats are not in Respondents' chains of title. The easement dedications are in no way binding on the Respondents, who are not signatories.

To the contrary, Appellants Edward Brown, Thelma David, and Benjamin Smalls were the developers of the Appellants' property. They created the lots, and they had them platted. It was they who dedicated access via Back-a-Wood Road and Geneva Shaw Lane, and it is they who are bound to create it. **If** the Appellants' properties are effectively landlocked, it is not because of any action by the Coxes, but rather due to Appellants' act of subdividing the property in a manner that makes ingress and egress prohibitively expensive.

As to the question of necessity, the evidence (i.e., two recorded plats depicting access) supports the Master's finding that Appellants have other access to their property, and this Court should sustain his Final Order.

IV. This Court should affirm on several other grounds, pursuant to Rule 220.

"The appellate court may affirm any ruling, order, decision, or judgement upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. The following additional sustaining grounds compel affirmance of the Trial Order:

A. Appellants' interests are not the same, and the evidence is not clear and convincing as to their distinct allegations of easements.

One thing that was particularly significant about the underlying trial is that the Appellants had only one witness, Edward Brown, testify as to the facts surrounding the purported existence of prescriptive easements—a question of fact in a law action. There was no testimony whatsoever from Appellants Bernard Brown, Nicolette James, Robert Brown, Debra Commodore, Thomas Brown, Thelma David, or Benjamin Smalls as to whether they **ever** used the dirt road in question, openly, notoriously, continuously and without interruption, for a period of 20 years, and contrary to the true property owner's rights. Edward Brown testified only briefly (and without firsthand knowledge) as to their use of the road.

The Appellants do not contest the Order's factual finding that they are not all related by blood, and that there is not privity of estate among them. (Order, p. 2). In fact, the Appellants claimed that numerous, disparate parcels of land constituted the dominant estates, and that the purported road at issue wound on and on and on to access these distinct tracts. (*see, e.g.*, Tr. tr. p. 59, R. p._). In order to support the claims of these individual dominant estates, the individual, unrelated Appellants would have had to demonstrate clear and convincing proof of their independent claims. Due to their lack of testimony, the Master reasonably found that they failed to do so.

B. Arguments of counsel, below.

The Coxes hereby incorporate, as independent grounds for affirmance of the trial court's Final Order, their arguments on page 182, line 22 through page 199, and again on

pages 217 (where it mistakenly says "Mr. MacFarland" at line 4, but means "Ms. Tillman") through page 223. (R. pp. __).

C. Appellants did not appeal the Master's findings on their lack of unity of title and severance of title.

As an additional sustaining ground, there are three essential elements to prove easement by necessity, and Appellants only appealed the Master's findings on one element. The elements of a claim for easement by necessity are: (1) unity of title; (2) severance of title; and (3) necessity. *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528, 539 (Ct. App. 2012). "To establish unity of title, the owner of the dominant estate must show that his land and that of the owner of the servient estate once belonged to the same person." *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002). "Severance of title means that title to a larger tract was 'severed' by conveyance of a part to the plaintiff's predecessor in title and of a part to the defendant's predecessor in title; 'they both claim, from a common source, different parts of the integral tract, which necessarily assumes a severance.'" *Id*. (*quoting Brasington v. Williams*, 143 S.C. 223, 141 S.E. 375; *citing Turnbull v. Rivers*, 14 S.C.L. 131, 139 (Ct. App. 1825) ("The necessity by which a person derives a right of way, is when one person sells to another lands inclosed [sic] on all sides by other lands. Here[,] the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land.")).

The Final Order holds that no evidence was submitted by any plaintiff as to unity of title with the Coxes, nor severance of title from the Coxes. (Order, pp. 8-9). Because Appellants only appealed the third element (necessity), the Master's finding on unity and

severance are the law of the case. Therefore, this Court should affirm, for Appellants' failure to prove all three essential elements of their claims for easement by necessity.

D. The Appellants do not have easements appurtenant.

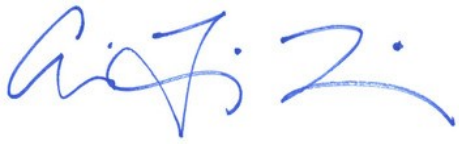
Because Appellants did not appeal the Final Order's determination that they do not hold easements appurtenant, that is the law of this case. (Order, pp. 15-17). **If** this Court should find that no evidence supports the Final Order on the numerous issues discussed above, then the scope of remand must be limited to the question of whether Appellants established prescriptive easements in gross.

CONCLUSION

There is evidence in the Record to support the Master-in-Equity's factual findings in this action at law; the existence of any such evidence compels affirmance under the applicable standard of review. For the reasons set forth above, this Court should uphold the Final Order.

Respectfully submitted,

FORD WALLACE THOMSON LLC



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December 1, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Circuit Court Case No.: 2015-CP-10-7000

Thelma Smalls David, Bernard Brown, Benjamin Smalls, Edward Brown, Nicolette James, Robert Brown, Thomas Brown, and Debra Commodore,

Appellants,

vs.

Donna Lee Cox, Robert R. Cox, Jr., Shawn Thackeray, and Lowcountry Highlanders Farm, LLC, and Bohicket Farms, LLC,

Respondents.

PROOF OF SERVICE

I hereby certify that I served the within *Respondents' Initial Brief* on counsel for the Appellants by emailing it to their attorneys' AIS address of record on December 1, 2020:

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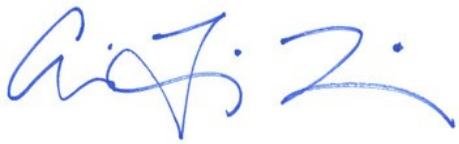
[signature appears on following page]

Respectfully submitted,



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