THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Teasa K. Weaver, Master in Equity Court Judge

Case No. 2018-CP-46-01017

Trudy Bolin Mattox .....Respondent

v.

Benjamin J. Russell and Chere Mitchell .....Appellants

INTIAL BRIEF OF RESPONDENT

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January 8, 2021

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STATEMENT OF THE CASE

Trudy Bolin Mattox (hereinafter "Respondent") filed the Lis Pendens, Summons and Complaint in this case on April 6, 2018. Prior to either Appellant filing an Answer, Respondent filed an Amended Summons and Amended Complaint on May 9, 2018, alleging causes of action for an implied easement by necessity, a prescriptive easement, an easement implied by prior use, a permanent injunction and for interference with contractual relations. Respondent simultaneously sought a temporary injunction to be allowed to continue to use the dirt drive/gravel drive which is the subject of this action. A hearing on the Motion for Temporary Injunction was held before Honorable S. Jackson Kimball, Master in Equity for York County on May 17, 2018 resulting in an Order granting temporary injunction which was filed on May 22, 2018, which allowed Respondent continued use of the dirt road/gravel drive which is the subject of this action. Appellants Benjamin J. Russell (hereinafter "Appellant Russell") and Chere Mitchell (hereinafter "Appellant Mitchell") filed their Answer to the Amended Complaint on May 15, 2018, which was a general denial as to all causes of action.

The trial of the case was held on June 20, 2019 before Honorable Teasa K. Weaver, Master-in-Equity for York County. At the conclusion of her case, Respondent abandoned all causes of action in the Amended Complaint except for the cause of action seeking a prescriptive easement, and Respondent further made a motion to conform the pleadings to the proof and add the cause of action for a private easement by implication, which was not opposed by Appellants, and which was granted by the Court. Judge Weaver issued the Order dated February 4, 2020 granting Respondent a prescriptive easement across the existing dirt/gravel drive between Respondent's property and S. C. Highway 363 (secondary road SC 46-363 also known as Beaverdam Road), and further granted an implied easement across all of Appellant Russell's property.

Appellants filed a Motion to Reconsider on February 14, 2020. The hearing was held on this Motion on June 16, 2020, resulting in an Order to Amend pursuant to SCRCP 59(e). This Order confirmed the implied easement over Tracts 1-6, but held alternatively that if there was no implied easement over Tracts 1-6, which belongs to Appellant Russell, that there was still a prescriptive easement over the same property. The Order did not modify the finding of the prescriptive easement across the property of Respondent Mitchell. Appellants filed and served the Notice of Appeal on or about August 12, 2020.

STANDARD OF REVIEW

The standard of review for a case involving the determination of the existence of an easement was recently set out in *Simmons v. Berkeley Electric Cooperative, Inc.* 419 S.C. 223,797 S.E. 2d 387 (2016). This case clearly states that the determination of the existence of an easement is a question of fact in a law action, and that the scope of review of the appellate court is limited to the correction of errors of law, and that the Court will not disturb the Master's factual findings that have some evidentiary support. *Id.* at 394. More or less the same standard has been stated in

a slightly different manner in *Murrells Inlet v. Ward*, 378 S.C. 225, 662S.E.2d 452 (Ct. App. 2009), wherein it was held that "[i]n an action at law tried without a jury, the judge's findings of fact will not be disturbed on appeal unless there is no evidentiary support for the judge's findings." *Id.* at 455.

FACTS

In this case Respondent sought to establish a prescriptive easement or implied easement along a dirt drive/gravel drive which runs across the property of the two Appellants between the Respondent's property and a public road known as Beaverdam Road (also S-46-363). The real property which is the subject of this action is situated in York County, South Carolina, as shown on Exhibit A attached to the Amended Complaint. Exhibit B to the Amended Complaint is a plat of the 2018 survey (Pls. Trial Ex. 9) that Respondent had done of her property showing a "dirt drive/gravel drive" as the access roadway to her property, which is the subject of the dispute in this case.

Appellant Russell is the owner of the real property designated as Tracts 1-6 on Exhibit A to the Amended Complaint, Appellant Mitchell is owner of the property described as Tract 7 on Exhibit A to the Amended Complaint, and the Respondent is the owner of the tract designated as Tract 8 on Exhibit A. The Respondent acquired her property under the Last Will and Testament of her late first husband Carl Bolin, who died in 1990. The late Carl Bolin purchased the property from Ms. Mae Mitchell in 1975. The Respondent, her late husband, and her second husband Frank Mattox have used the dirt drive/gravel drive as their sole access to the property from 1975 until 2018 when Appellant Russell blocked the roadway in late 2017 or early 2018. Appellant Russell acquired his six (6) tracts of land between Beaverdam Road and Plaintiff's property during the time period between October 28, 2016 and December 21, 2017.

Respondent's property does not have frontage on a public road or highway. All owners of Tracts 2-6 on Exhibit A received an express grant of easement to said "dirt drive/gravel drive" through their deeds for access to their respective properties. Plaintiff's deed for Tract 8 conveyed said tract with reference to a plat showing the "dirt/gravel drive," without the language expressly granting the easement rights. Respondent claims to have had unfettered access to her property dating all the way back to 1975 until Defendant Russell blocked her access in late 2017 or early 2018.

ARGUMENTS

I. THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE LOWER COURT ORDER DATED JULY 28, 2020 AS AMENDED BY ORDER TO AMEND PURSUANT TO RULE 59(E) DATED JULY 28, 2020 THAT RESPONDENT IS ENTITLED TO A PRESCRIPTIVE EASEMENT ACROSS APPELLANTS' PROPERTIES.

The elements for establishment of a prescriptive easement are set out in *Bundy v. Shirley,* 412 S.C. 292, 772 S.E. 2d 163 (2015). These elements are "(1) continued an uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse or under claim of right." In the same case, the Supreme Court makes it clear that for purposes of establishing the twenty (20) year adverse claim period, that a party may tack the period of use of prior owners to satisfy the twenty (20) year requirement if the prior owners were "ancestors and heirs," and also between parties in privity. *Id.* at 174.

In a more recent case, *Simmons v. Berkeley Electric Cooperative, Inc.* 419 S.C. 223, 797 S.E. 2d 387 (2016), the South Carolina Supreme Court confirmed the same three elements required to establish a prescriptive easement. The decision further clarified the third element of a prescriptive easement in stating, "[a]ccordingly, the third element of a prescriptive easement should be interpreted as requiring the claimant's use be adverse or, in other words, under a claim

of right contrary to the rights of the true property owner." *Id.* at 391. The Court noted that "[w]hen it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse." *Id.* at 392 (citing *Williamson v. Abbott*, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917)). Further, "'[o]pen' generally means that the use is not made in secret or stealthily. It may also mean that it is visible or apparent." *Simmons*, 797 S.E. 2d at 392 (quoting *Restatement* (Third) of Property (Servitudes) Section 2.17 (h) (2000)). The case also gives the definition of notorious as "'[n]otorious' generally means that the use is actually known to the owner or is widely known in the neighborhood." *Id.*

A. Evidence Supporting Prescriptive Easement

The Plaintiff had five witnesses who testified regarding the history of the usage of the roadway in question which is shown as both "dirt drive" and "gravel drive" on the plat of survey for Trudy C. Mattox dated January 10, 2018 prepared by CBS Surveying and Mapping Inc. (Pl.'s Trial Ex. 9). The first witness was Melvin Howell, who testified that he had lived in the area of this property his entire life, which at the time of the hearing was 72 years. (Trial Tr. 59:6-8). Mr. Howell, who was formerly a Magistrate, testified that Mae Mitchell, who previously owned all of the tracts acquired by Appellant Russell at issue in this case (Tracts 1-6), as well as Tract 8 owned by Respondent), was his mother's sister, (or his aunt). (Trial Tr. 57:15-18, 59:4-9, 60:2-11, 61:3-9). He further testified that at one point in his life, he went up and down the road at least weekly to pick up his Aunt Mitchell and take her to church. (Trial Tr. 60:19-23). He specifically recalled when his aunt sold the property to Carl Bolin in 1975. (Trial Tr. 61:3-6). Carl Bolin was the Respondent's first husband and the person from whom Respondent acquired the property by his Will upon his death in 1990. Mr. Howell further testified that he went up and down the road

regularly between 1975 and his aunt's death in 1985. He testified that he never had to have any owner's permission to go up and down the dirt road/gravel drive. (Trial Tr. 61:20-25). He testified that he did it openly in daylight or at night without anyone's permission. He further testified he continued to use the road occasionally after 1985, because he was friends with Carl Bolin. He testified that the dirt drive/gravel drive was the only method by which Carl Bolin ever accessed his property. (Trial Tr. 62:10-23). Additionally, he testified that during the period of time James R. Jones (a/k/a Ronnie Jones) owned one of the properties now owned by Respondent Russell, he never needed permission from Ronnie Jones to use the roadway. (Trial Tr. 63:24-25, 64:1). He further testified that neither Mae Mitchell (prior owner of Tracts 1-6 and Tract 8) nor Mary Mitchell (prior owner of Tract 7 now owned by Appellant Mitchell) ever attempted to limit or restrict the access of Carl Bolin to his property. He further testified that during his 72 years, he has never known of anyone who claimed the right to control access to the dirt drive/gravel drive. (Trial Tr. 69:19-25, 70:1-5). He also testified that the only way to access the property that came from the Mary Mitchell estate, which includes Tract 7 in this case, was by the dirt drive/gravel drive which is the subject of this action. (Trial Tr. 80:18-22).

Respondent's next witness, Oscar Ramsey, testified that he was 72 years old and that he had lived in York County his entire life. He estimated that he had been to Respondent's property approximately fifty (50) times, with the first time being in the late 1960s when the property was still owned by Mae Mitchell, one of Appellant Russell's predecessors in title. (Trial Tr. 80:16-25, 81:1-5). He further testified that the last time he had used the roadway was approximately thirty (30) days prior to the hearing. Mr. Ramsey testified that he used the road openly, and that on every occasion that he visited this property, he used the same roadway described on Respondent's Exhibit 9, and that his use of the roadway never required anyone's permission, and no one claimed

the right to demand permission. (Trial Tr. 82:23-25, 83:1-11). He also testified that he knew of no other access to Plaintiff's property except along the dirt drive/gravel drive described on Plaintiff's Exhibit 9. (Trial Tr. 84:15-18). He further testified that he was aware that a logger named William Wilson [sic-should be William Wilkerson] had harvested timber on the Mattox property approximately ten years ago, and that Mr. Wilkerson accessed the property via the dirt drive/gravel drive. (Trial Tr. 85:9-21). Finally, Mr. Ramsey testified that no one had ever attempted to deny him access through this roadway, including the portion of the roadway crossing the Mary Mitchell property, which includes Tract 7 now owned by Appellant Mitchell. (Trial Tr. 86:1-4).

Respondent's third witness who testified regarding the use of the roadway was James R. Jones (also known as Ronnie Jones). He testified that he had lived in York County since he was 21 years old and that he would soon be 68 years old. (Trial Tr. 90:8-9, says "I'll be 78," but Respondent believes this was corrected at Trial Tr. 100:10 where he states "I'll be 68 this year."). Mr. Jones testified that Mae Mitchell, whom he called "Aunt Mae," was his "Daddy's sister." (Trial Tr. 91:4-8). He testified he was familiar with the dirt drive/gravel drive shown on Exhibit 9. (Trial Tr. 91:19-21). He further testified that he and his father bought some of the land along the dirt drive/gravel drive now owned by Appellant Russell in the 1970's. (Trial Tr. 93:2-6, 94:12-17). He acknowledged that the roadway in question went along the route shown as the dirt drive/gravel drive shown on Plaintiff's Exhibit 9, and that he was familiar with the two houses on that road owned by Ed Mitchell and Jeff Mitchell and his wife Mae Mitchell. (Trial Tr. 95:4-23). Mr Jones testified that he owned his property along that roadway from the mid-1970s until 2016, or approximately 40 years. (Trial Tr. 96:24-25, 95:1-2). He further testified that he went up and down that road regularly throughout that period, but that it decreased in the last twelve (12) years, because he no longer kept cows on that property. (Trial Tr. 97:7-11). He testified that the dirt

drive/gravel drive was the method by which both Trudy Mattox and her current husband, Frank Mattox, accessed the property, and also by which Carl Bolin accessed the property until his death in 1990. Mr. Jones testified that they have all used the road openly and that they did not need permission to go up and down the road, and that "as far as I know they had a right to do that. Yes, sir." He testified that he acknowledged their right to go up and down the road. He further testified that from the time Carl Bolin acquired the property, that they went down the dirt drive/gravel drive to access the property, and that Mae Mitchell never claimed she had the right to deny them access. He further testified that her permission was not necessary for them. (Trial Tr. 97:25, 98:1-20, 101:2-8).

The Respondent's fourth witness with direct knowledge of the usage of the roadway was her second and current husband Frank Mattox. Mr. Mattox confirmed the existence and location of the dirt drive/gravel drive shown on Respondent's Exhibit 9. (Trial Tr. 108:4-18). He testified that he had been friends with Respondent's first husband, Carl Bolin, before his death, and that he was familiar with the usage of the roadway going back approximately 30 years. (Trial Tr. 108:20-25, 109:1-13). Mr. Mattox testified that he had never gone to the property by any other route besides than the dirt drive/gravel drive. He testified that he and/or his wife use the roadway at least every month and sometimes as much as every other week, and that there was no other means for him or his wife to access the property. (Trial Tr. 110:15-18). He further testified that they used the dirt drive/gravel drive like they had the right to do so and in the light of day. He testified that they claimed the right to use the roadway. He further testified that he had never had any problem accessing the property through the dirt drive/gravel drive until it was blocked by Appellant Russell in late 2017 or early 2018. He testified that Mr. Russell blocked the roadway with an old car and a tractor. (Trial Tr. 111:15-25, 112:1-20). Regarding the extent or width of the roadway, Mr.

Mattox testified that the roadway was probably "fifteen feet wide, something like that maybe a little wider." (Trial Tr. 113:17-22). He further testified that they had had some timber cut off the property by Wilkerson Logging, and that Wilkerson Logging accessed the property through the dirt drive/gravel drive. (Trial Tr. 114:1-14). He testified that he never had to get permission from Ronnie Jones to use the roadway. (Trial Tr. 115:2-14).

Respondent Trudy Mattox was the last witness on the subject on the usage of the dirt drive/gravel drive for Respondent. She testified she had been married to Carl Bolin twenty-two (22) years at the time of his death, and that she was married to him when he acquired the tract of land from Mae Mitchell in 1975. Respondent inherited the land from him when he died in 1990 under his Last Will and Testament. (Trial Tr. 127:2-17, 131:1-10). She testified that during the entire period of her and her late husband's ownership up until the date of the hearing, the property had always been accessed by the dirt drive/gravel drive running from Beaverdam Road to their property as described on Respondent's Trial Exhibit 9. (Trial Tr. 127:22-25, 128:1). Respondent Mattox testified that prior to the time that Appellant Russell blocked the road in 2018, they never encountered any difficulties in accessing that road to their property, and that there was no one who claimed that they did not have the right to use the road. She testified they used the road openly and did not hide their usage from anyone. She testified they claimed the right to use it whenever they chose to do so. She testified the extent of the dirt drive/gravel drive was wide enough for farm equipment and logging trucks to go through the roadway. She testified that William Wilkerson Logging used the roadway to cut timber from their property. She testified that they have never had to get anyone's permission to access the property. (Trial Tr. 128:5-25, 129:1-15). She testified that Mae Mitchell never denied them access or usage of the roadway until her death in 1985. (Trial Tr. 130:3-7). Further, she testified that she probably used the dirt drive/gravel drive approximately

on a weekly basis for the previous forty-four (44) years, and that her and her current husband's use of the roadway had never been restricted or limited until it was blocked by Appellant Russell in late 2017 early 2018. (Trial Tr. 131:15-17, 132:1-12).

Regarding the usage of the dirt drive/gravel drive from the time that Respondent's first husband Carl Bolin acquired it in 1975 through the time of the hearing in June of 2019, Plaintiff's five witnesses, based upon their testimony had approximately 200 to 225 years' knowledge, cumulatively, regarding the use of the roadway. Appellant Mitchell did not appear at the hearing and she did not testify, so she gave no testimony regarding prescriptive easement factors. On cross-examination, Appellant Russell candidly admitted that his only direct knowledge regarding the usage of the driveway was for the period of one or two years that he owned the property, as set forth in the following exchange:

> Q. All I am taking about is the usage of the drive from Beaverdam down to the Mattox property. Your knowledge of the historical usage of that's limited to the last couple of years, is it not?
>
> A. From Beaver Dam where it goes now to Chere's property right here?
>
> Q. Correct.
>
> A. Yes sir other than just hearsay that would be my knowledge.
>
> Trial Tr. 162:6-14.

B. Placement of the Gate by Appellant's Predecessor-in-Title, James R. Jones

Appellants argue that when James R. Jones, a nephew of Mae J. Mitchell and previous owner of property now owned by Appellant Russell, put a gate on the road and gave keys to other adjoining landowners to allow them to have entrance to the property, that "[t]he giving of keys is the giving of permission." (Appellants' Initial Br. 5). Appellants cite no authority for this quoted

language. Subsequently, Appellants cite *Bundy v. Shirley*, 412 S.C. 292, 772 S.E. 2d 63 (2015) for the proposition that once permission is granted to the landowner there is no longer adverse use under claim of right and for the proposition that "presence of gates is strong evidence of permissive use." (Appellant's Initial Br. 5)

The facts in *Bundy v. Shirley* are distinguishable from those in the instant case. In *Bundy v. Shirley,* Shirley was the owner of the alleged dominant estate seeking a prescriptive easement, and Bundy was the owner of the alleged servient estate. The factual/procedural history in that case clearly states, "[i]n early 2004, shortly after Bundy purchased the property, Shirley received permission from Bundy to erect a gate over the disputed road *in an effort to limit the public from using the surrounding property to dump trash.*" *Bundy*, 412 S.C. at 298 (emphasis added). In the instant case, witness James R. Jones, prior owner of a portion of the alleged servient estate in this case, went to the owners of the other affected properties, including the owner of the alleged dominant estate in this case, and discussed putting up the gate with them. In those discussions, he sought their approval to put up the gate and gave them keys for access. He testified that his reason for doing so was to protect the tractors that he kept on the property. (Trial Tr. 99:1-22).

Trial Judge Weaver, in the Order dated February 4, 2020, properly cited *Pittman v. Lowther*, 355 S.C. 536, 586 S.E. 2d 149 (S.C. Ct. App. 2003) for the proposition that "[t]he erection of gates by the servient owner for the greater convenience of his operations, and not as a barrier to passage, will not defeat a claim to a prescriptive easement of passage." (February 4, 2020 Trial Order, P. 4). The South Carolina Supreme Court affirmed the Court of Appeals decision in *Pittman v. Lowther*, 363 S.C. 47, 610 S.E. 2d 479 (2005). While those two appellate decisions denied the establishment of a prescriptive easement in those cases, the basis of their decision for defeating

the prescriptive easement was the interruption of the use of the prescriptive easement, which is distinguishable from the facts in the present case. The Supreme Court noted in its decision:

> We conclude actions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief. In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are sufficient to interrupt the prescriptive period.
>
> *Id.* at 481.

The testimony is clear that the usage of the roadway by the late Carl Bolin, and then by Respondent and her current husband Frank Mattox, was never interrupted when the gate was put up, that there was no hostility on the part of Mr. Jones, the servient landowner, to the continued use or the roadway by Respondent and her late husband, and that Mr. Jones did not intend to interrupt their usage of the roadway. The overwhelming evidence in the instant case supports Judge Weaver's Order and should be upheld. The prescriptive easement was not extinguished by the erection of the gate merely because the then servient estate owner, James R. Jones put up a gate for the sole purpose of protecting his property, not as a barrier to passage.

II. THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE LOWER COURT RULING THAT THERE IS AN EASEMENT IMPLIED BY LAW ACROSS THE PROPERTY (TRACTS 1-6) OF APPELLANT RUSSELL.

The primary legal authority supporting Judge Weaver's Order on the issue of an easement implied by law is set out as follows:

> Where a conveyance of land describes the parcel as bounded by a street designated in the conveyance, or refers to a map on which spaces for streets, parks or other common uses are shown, but the conveyance says nothing about the creation of an easement or dedication to public use, the conveyee of the land acquires an easement with respect to the street or the areas shown on the map.

> Such an easement inures to the benefit of the Grantee and his successors in title. The existence of the easement will be implied by law, unless it appears that the grantor specifically intended otherwise.
>
> *McAllister v. Smiley*, 301 S.C. 10, 389 S.E. 2d 857 (1990) (citations omitted); *see also Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 662 S.E. 2d 452 (Ct. App. 2008).

In the Findings of Fact in Judge Weaver's Order, there are very specific findings regarding the deeds and plats in the chain of title to Appellant Russell's property which support the creation of an easement by implication. All these deeds and plats were discussed in detail by the Respondent's expert witness Joanne Beckwith, who was qualified as an expert title abstractor. (Trial Tr. 10:18-19). The Respondent's Trial Exhibits 1-8 include the York County Tax Assessor's property cards and G.I.S. parcel reports for each tract, as well as the deeds, plats and estate documents which show up in the chain of title for each of the eight parcels involved in this case. Tracts 1-6 are owned by Appellant Russell, Tract 7 is owned by Appellant Mitchell, and Tract 8 is owned by Respondent Mattox. All these tract numbers match up with the tract numbers shown on Exhibit A to the Amended Complaint (R. ____) and the tract numbers referred to in Judge Weaver's February 4, 2020 Order. The Exhibit A to the Amended Complaint (R.____) also contains all the York County Tax Map Parcel Number references for all properties involved in this case, and the York County Tax Assessor maintains electronic interactive maps that are public records and are available for access online. (www.yorkcountygov.com). A printout of a Tax Assessor's map showing Tracts 1-6 was a portion of Appellants' Trial Exhibits 1-6, which depict the six tracts owned by Appellant Russell, and is included in the Record on Appeal. (R. ____).

A. <u>As to Tracts 1, 2, and 4 of Appellant Russell's Property</u>

The sequence of the properties starts with Tract 1 at Beaverdam Road along the dirt drive/gravel drive until it reaches the Respondent's property. Exhibit 1 includes the deed from

Stanley Mark Goss and Linda M. Goss to Respondent Russell recorded February 27, 2017 in Record Book 16251, Page 440 (Portion of Pl.'s Trial Ex. 1), and the deed from the heirs of Mae J. Mitchell to Mr. and Ms. Goss recorded March 7, 1990 in Record Book 29, Page 278 (Portion of Pl.'s Trial Ex. 1), both of which reference the plat recorded in Plat Book 104, Page 119, which is a plat of properties from the Mae J. Mitchell Estate (Portion of Pl.'s Trial Exs. 1, 2, 4 and 5). As noted by Ms. Beckwith, Plat Book 104, Page 119 references the roadway in question as "ingress-egress existing road." (Trial Tr. 17:4-5). In response to the question of whether she would report such information to an attorney if she was doing title work on this property, Ms. Beckwith testified that she would report such information "so the person who's purchasing Lot 1 knows that other people will be using that road." (Trial Tr. 17:10-17). The same plat is also referenced in multiple deeds in the chains of title to Tracts 1, 2 and 4 going back as far as 1990, which are deeds from the multiple heirs of Mae J. Mitchell, all recorded on March 7, 1990 in the York County Register of Deeds Office, respectively in Record Book 29, Page 254; Record Book 29, Page 257; Record Book 29, Page 260; Record Book 29, Page 263; Record Book 29, Page 266; Record Book 29, Page 269; Record Book 29, Page 272; and Record Book 29, Page 275 (Portion of Pl.'s Trial Exs. 1, 2 and 4).

The deed in the chain on title into Appellant Russell's Tract 2 is a deed from Joyce H. Jones recorded December 21, 2017 in Record Book 16754, Page 432 (Portion of Pl.'s Ex. 2), and the deed into Appellant Russell of Tract 4 is Record Book 16534, Page 221, recorded August 14, 2017 (Portion of Pl.'s Trial Ex. 4). All deeds in the chains of title for Tract 2 and Tract 4 going back as far as 1990 reference the identical Plat Book 104, Page 119 which shows the "ingress-egress existing road" going from Beaverdam Road beyond the location of the properties therein conveyed. On page 2 of Judge Weaver's February 4, 2020 Order, the Order notes: "In 1990, Tract 1, 2 and 4 were conveyed by the heirs of Mae J. Mitchell to predecessors in title of Russell. Each

deed described the TRACT by reference to recorded Plat 104 at Page 119. This plat shows a road marked as 'existing road', leading from Highway 363, and abutting or crossing TRACTS 1, 2, 3 and heading into TRACTS 5 and 6." (February 4, 2020 Order, P. 2)

B. As to Tracts, 3, 5 and 6 of Appellant Russell's Property

The deed into Appellant Russell for Tract 3 is a deed from James D. Jones recorded December 21, 2017 in Record Book 16754, Page 435 which incorporates by reference plat recorded in Plat Book 74, page 585. (Portion of Pl.'s Trial Ex. 3). Appellant's expert witness Ms. Beckwith testified that this plat showed the same roadway as Plat Book 104 at Page 119, leading from Beaverdam Road and continuing beyond Tract 3. She published the following language from the deed for Tract 3:

> Also conveyed herein is a right of way and easement for ingress and egress purposes along a county farm road leading south-southwesterly from South Carolina Highway S-363 as set forth and shown on the above-mentioned plat as will be located on the western and northwestern portions of said Lot 2 as above herein conveyed.
>
> (Trial Tr. 23:13-17)

The derivation clause on this deed into Appellant Russell shows that his grantor, James D. Jones, acquired his interest in the property from Mae J. Mitchell by deed recorded August 10, 1984 in Deed Book 773, Page 45. (Portion of Pl.'s Trial Ex. 3). The deed into James D. Jones could not have conveyed an ingress-egress easement to Appellant unless Mae J. Mitchell first conveyed one to him in his vesting deed, but there was no specific grant of easement contained in the vesting deed into Mr. Jones. The vesting deed into James D. Jones provided merely a reference to the same recorded Plat Book 74, page 585 as referred to in the deed into Appellant Russell. It is apparent that the reason Mr. Jones was able to give an ingress-egress easement to Appellant Russell was because Ms. Mae Mitchell intended to give Mr. Jones access, as shown by the recorded plat.

All this evidence clearly supports Judge Weaver's factual findings regarding Tract 3 in the Order. (February 4, 2020 Order, P. 2)

Expert witness Joanne Beckwith's testimony clearly supports the Court's factual findings regarding Tract 5 as well. The pertinent deed and plat references are confirmed in her testimony. The Tract 5 deed into Appellant Russell is found in Record Book 16027, Page 236 recorded October 28, 2016, which was re-recorded March 10, 2017 in Record Book 16274, Page 131, and the pertinent plat references as to Parcel 2 of that deed are Plat Book 62, Page 33; Plat Book 61, Page 237; and Plat Book 104, Page 119. (Portion of Pl. Exs. 1 and 5). Ms. Beckwith confirmed that all of the plats show the segment of the roadway described on Plaintiff's Exhibit 9, as either a "farm road" or "ingress and egress," and all of them show the roadway extending beyond the Respondent Russell's Tract 5. (Portion of Pl.'s Ex. 5; Trial Tr. 25: 20-25, 26: 1-25, 27: 1-24) Again, Ms. Beckwith published the language in the deed into Respondent Russell which states:

> 'Also conveyed herein to the above grantee, her heirs and assigns forever is all right, title, and interest of Grover M. Carter and any right of way and easement for ingress/egress purposes along the county farm road leading from S.C. Highway 363 and any and all interest in any other rights of way or easements as granted by her [predec-predec-or whatever] and titled to previous owners of the above-described two parcels of real property.' That's the predecessors.
>
> (Trial Tr. 29:16-23)

As with Tracts 1-4 discussed previously, Ms. Beckwith confirmed that the title to Tract 5 was traceable back to the estate of Mae J. Mitchell. (Trial Tr. 28:25, 29:1-17).

As to Tract 6, as was the case with Tract 3, Appellant Russell acquired said tract by deed from James D. Jones, who previously acquired it from Mae J. Mitchell. (Portion of Pl. Ex. 6) Ms. Beckwith's testimony confirmed these conveyances, the two deed references, the fact that this parcel is 2.55 acres, and that the conveyances were described by reference to the plat recorded in Plat Book 62, Page 33. She confirmed that the plat shows a portion of the same roadway shown

on Plaintiff's Exhibit 9, and that the deed into Appellant Russell grants him an easement for ingress and egress along the roadway up to S.C. Highway Number S-363. She also confirmed that the prior deed from Mae Mitchell to James D. Jones likewise granted Mr. Jones an access easement all the way from Tract 6 back to S.C. Highway Number S-363. (Portion of Pl.'s Ex. 6; Trial Tr. 30:1-25, 31:1-25, 32:3-16). Ms. Beckwith also confirmed that all of Tracts 1-6 presently owned by Appellant Russell were all at one time owned by Mae Mitchell. (Trial Tr. 32:24-25, 33:1).

C. As to Tract 8 owned by Respondent Mattox

As set forth in the Statement of Facts herein previously, Carl E. Bolin acquired the property now owned by Respondent (Tract 8) by deed from Mae J. Mitchell recorded on or about June 17, 1975 in Deed Book 514, Page 120. (Portion of Respondent's Trial Ex. 8). This conveyance occurred prior to any conveyances of Tracts 1-6. This deed incorporated by reference two plats, respectively recorded in Plat Book 47, Page 181 and Plat Book 47, Page 176. *Id.* The two (2) acre parcel depicted on Plat Book 47, Page 176 fits in at the very northeastern corner of the thirty-six (36) acre parcel depicted in Plat Book 47, Page 181. Plat Book 47, Page 181 shows the roadway coming to the two (2) acre parcel with a notation "To Road S-46-363." Likewise, the Plat Book 47, Page 176, which also depicts the two (2) acre parcel, shows a roadway contiguous to and immediately north of the two (2) acre parcel. The testimony from the trial indicates that this is the same roadway as the dirt drive/gravel drive running between Tract 8 and Beaverdam Road.

Applying the legal standard for the creation of an easement by implication, as previously set forth herein, by virtue of all of the recorded plats showing the roadway running between Beaverdam Road and Respondent's property, and through the cumulative testimony of all of the Respondent's witnesses, it is pretty clear that Mae J. Mitchell intended for Carl Bolin and his successors and assigns to access their property by way of the dirt drive/gravel drive. The testimony

is substantial, clear and convincing that they have in fact used that as their access across all of Respondent Russell's (Tracts 1-6) that were previously owned by Mae Mitchell at the time of the transfer of Tract 8 from her in 1975 until the time that the roadway was blocked by the Appellant Russell in late 2017 or early 2018.

II. EVEN IF IT IS DETERMINED THAT RESPONDENT DID NOT ESTABLISH A PRESCRIPTIVE EASEMENT ACROSS APPELLANT RUSSELL'S PROPERTY, THERE IS SUBSANTIAL EVIDENCE TO SUPPORT THE LOWER COURT RULING THAT RESPONDENT HAS ESTABLISHED A PRESCRIPTIVE EASEMENT ACROSS THE PROPERTY OF APPELLANT MITCHELL.

In their brief, Appellants argue that the Court erred by finding that Respondent had an easement by prescription. The primary basis of their argument is that one of the prior owners of property now owned by Appellant Russell, namely Mr. James R. Jones, erected a gate across the roadway. Mr. Jones clearly testified that Mrs. Mattox and her late husband Carl Bolin traveled up and down the road openly, without the need to get anyone's permission, and that they did not hide the fact that they were doing so. He further testified that they had a right to do so, and he acknowledged their right to do so. (Trial Tr. 97:25, 98:1-22). Mr. Jones indicated that the reason he put up a gate was to protect tractors and other equipment he kept on the property, that he discussed it with other property owners along the roadway, and that all of them were given a key. He further stated that he sought their permission to put up the gate. (Trial Tr. 98:23-25, 99:1-22). He further testified that after Mae Mitchell sold Carl Bolin his property, Mr. Bolin and Respondent used that roadway for access, and that Mae Mitchell, who still owned property between Respondent's property and Beaverdam Road, acknowledged that they had the right to travel that road and that she did not have the right to deny them access. Mr. Jones clearly stated that their use of the road was not permissive. (Trial Tr. 100:14-25, 101:1-8).

The lower court order dealt with this issue of permission directly and persuasively, citing *Pittman v. Shirley*, and specifically set out the substantial factual basis from Mr. Jones' testimony. (February 4, 2020 Order, P.4). Mr. Jones' testimony on this subject was substantiated by other witnesses. Melvin Howell, nephew of Mae J. Mitchell, testified that Mr. Jones gave him and other people who needed it a key, and that Mr. Jones' permission was not needed to use the roadway on any occasion. (Trial Tr. 63:14-16, 21-25, 64:1). Witness Oscar Ramsey explained the common joint usage of gates by multiple property owners of rural properties that have the primary purpose of keeping out strangers, and not people who have need to travel the roadway. (Trial Tr. 88:2-14). Respondent's husband testified that the gate was erected not to control access by Mr. Jones, but because Mr. Jones had equipment and belongings to protect, and that he did not have to get Mr. Jones' permission to continue to use the road after the gate was erected. (Trial Tr. 115:5-14).

Appellants will no doubt note a brief exchange in opposing counsel's cross examination in support of their argument that Respondent's use of the roadway was permissive. The exchange is as follows:

> Q. And I believe you stated in your deposition that Ronnie didn't ask you permission to put the gate up.
>
> A. No, he did not.
>
> Q. Okay. And he did, though, come to you and give you a key to use to access—to get through the gate, is that correct?
>
> A. Yes, sir, he did.
>
> (Trial Tr. 136:6-11).

The testimony above was directly contradicted by Mr. Jones, who said he did ask the permission of the other property owners on the road. (Trial Tr. 99:15-17). He also clearly stated that his purpose was to protect his tractors and equipment. (Trial Tr. 99:18-22).

Even if the Court of Appeals determines that putting up the gate created permissive use over property owned or controlled by Mr. Jones at that time, this would not preclude establishment of a prescriptive easement over Tract 7 owned by Appellant Mitchell. Respondent Mitchell did not appear at the trial and she offered no testimony on the prescriptive easement factors. Additionally, Appellant Russell candidly admitted that he had no knowledge, other than hearsay, as to the usage of the roadway prior to acquiring some of the property in 2016. (Trial Tr. 162:6-14). The evidence presented by Respondent's five (5) witnesses with more than two hundred (200) cumulative years of living in the community as previously discussed was uncontroverted regarding the prescriptive easement factors at to Tract 7. Since Mr. Jones did not own Tract 7, Appellant Russell cannot rely on his theory of alleged permissive use caused by the erection of the gate as a basis for defeating the lower court's finding of prescriptive easement across Appellant Mitchell's property. As such, there is substantial evidentiary support as to the Master's findings of a prescriptive easement across Tract 7 owned by Appellant Mitchell. That easement, combined with either the easement by implication or the prescriptive easement across Tracts 1-6, is sufficient to justify affirming the lower court decision.

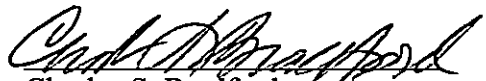
CONCLUSION

The undisputed evidence is that Respondent and her first husband have used the dirt drive/gravel drive which is the subject of this lawsuit as their exclusive means of access from 1975 until the present. All witnesses who testified were people with strong local ties to the community in question, and two of the witnesses were nephews of Mae Mitchell, the person who previously owned all the properties in question except for Tract 7 owned by Appellant Mitchell. Appellant Mitchell did not appear at the trial and testify, and Appellant Russell had direct knowledge of the usage of the roadway only going back to sometime in 2016. The location and extent of the

easements were established to the satisfaction of the Court in granting a 12.5' wide easement across all Tracts 1-7. With regard to witness credibility in a bench trial, the credibility of the testimony is a matter for the finder of fact to judge. The reviewing court has an obligation to defer to the fact finder's assessment of witness credibility. *Hoyler v. State*, 428 S.C. 279, 833 S.E.2d 845 (Ct. App. 2019).

Based on the applicable standard of review, as set forth previously herein, Respondent has greatly exceeded the minimum standard of "some evidentiary support" required by *Simmons v. Berkeley Electric Cooperative, Inc.*, 419 S.C. 223, 797 S.E.2d 387 (2016). The February 4, 2020 lower court Order states: "Based upon the testimony, Plaintiff established by clear and convincing evidence that Plaintiff and Plaintiff's predecessors-in-interest used the gravel DRIVE for ingress and egress between Beaverdam Road Road/Highway 363 and TRACT 8 for more than 20 years openly, notoriously and continuously." (February 4, 2020 Order, P. 3-4). Judge Weaver's February 4, 2020 Order was further modified by Order to Amend Pursuant to Rule 50(e) dated July 28, 2020 to clarify that Respondent was also granted a prescriptive easement across Tract 7 and that Respondent was granted an easement by implication, or alternatively an easement by prescription across Tracts 1-6. The lower court's ruling should be affirmed.

Respectfully submitted,



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Teasa K. Weaver, Master in Equity Court Judge

Case No. 2018-CP-46-01017

Trudy Bolin Mattox .....Respondent

v.

Benjamin J. Russell and Chere Mitchell .....Appellants

PROOF OF SERVICE

I, certify that I served the Initial Brief of Respondent by depositing copies of the same in the United States mail, postage prepaid on January 8, 2021, addressed to James W. Boyd Esquire, Post Office Box 36425 Rock Hill, SC 29732.

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January 8, 2021

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JAN 11 2021
SC Court of Appeals

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January 8, 2021

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Trudy Bolin Mattox, Respondent v. Benjamin J. Russell and Chere Mitchell, Appellants, Case No. 2018-CP-46-01017
Our File No. 5530.01

Dear Ms. Kitchings:

Enclosed herewith for filing in the above refenced case are Respondent's Initial Brief, Respondent's Designation of Matter to be Included in the Record on Appeal, and Proofs of Service for each of those documents, showing they have all been served on opposing counsel James W. Boyd.

By copy of this letter, I am notifying Mr. Boyd of these filings, and I am enclosing copies of those documents with his copy of this letter.

Sincerely,

Charles S. Bradford
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Attorney for Appellant

cc: James W. Boyd Esquire
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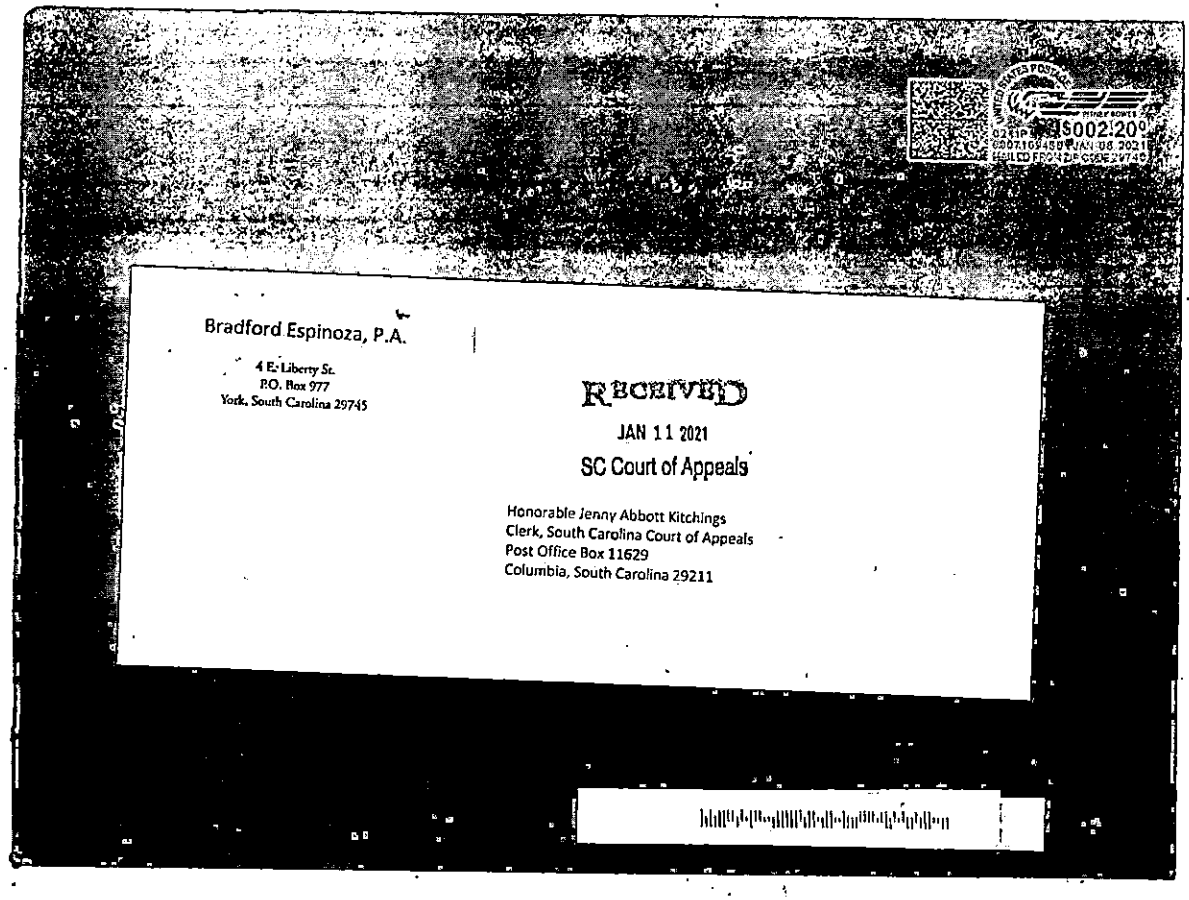
Enclosures as stated



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