THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Judge

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.

Respondents.

BOHICKET FARMS, LL,

Intervenor.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

On December 30, 2015, Appellants Thelma Smalls David, Bernard Brown, Benjamin Smalls, Edward Brown, Nicolette James, Gracie Moultrie a/k/a Gracie Smiley, Robert Brown and Thomas brought this action pursuant to the Uniform Declaratory Judgment Act, Chapter 33, Title 15 alleging an easement by prescription across property owned by Donna Lee Cox and Robert Cox and seeking to enjoin the Coxes from obstructing a public road/easement across their property. The easement is known variously as Inside/Gailliard Road or "blind road." The Coxes filed their Answer and Counterclaim alleging trespass by Appellants and others. The original complaint was amended by a Third Amended Complaint filed on September 10, 2018 adding Shawn Thackery and Lowcountry Highlanders Farm, LLC as defendants and alleging negligence and civil conspiracy. The Coxes answered the Third Amended Complaint and renewed their counterclaim for trespass. Appellants filed their Reply.

On November 16, 2018, Bohicket Farms, LLC filed its motion to intervene as the successor in interest to Shawn Thackery. The motion was granted. No answers were filed

by Shawn Thackery, Lowcountry Highlanders Farm, LLC or Bohicket Farms, LLC. Prior to the commencement of the trial, Thelma David and Benjamin Smalls withdrew as parties.

The case was tried before the Master-in-Equity for Charleston County on October 22 and 23, 2019. The issues in the case 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). Upon the close of Appellants' case, the Master granted the Coxes motion for involuntary dismissal under SCRCP Rule 41(b) by Order dated January 29, 2020. Appellants served their Notice of Appeal on February 28, 2020.

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). Appellate courts will uphold a master's factual findings if there is any evidence to support the decision. *Gooldy v. Storage Center-Platt Springs, LLC*, 811 S.E.2d 779, 422 S.C. 332 (2018).

"The determination of the existence of an easement is a question of fact in a law action and subject to any evidence standard of review when tried by a judge without a jury." *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775(1976). See *Kelley v. Snyder*, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012).

ARGUMENT

I. APPELLANTS MET THEIR BURDEN IN ESTABLISHING A PRESCRIPTIVE EASEMENT OR CLAIM OF RIGHT ACROSS RESPONDENTS' PROPERTY.

There is no dispute in this case that two easements, which we shall call "Old Blind Road" and "New Blind Road"[1] existed over the property of the Donna Cox and Lee Cox along with Donna Cox's late husband Henry Lee (R pp. 58, 70). Old Blind Road easement was used by the late Frank Brown who originally owned the property claimed by Appellants and who farmed this land, raised livestock and cut pulp until his death in 1968 (R.p. 57). Appellants and members of the general public have used the two easements to access several tracts of land for more than 65 years without permission of the Respondents or their predecessor in title (R.p. 59). The question addressed by the Master is whether Appellants established a prescriptive easement or claim of right to the permanent use of Old Blind Road and its replacement the New Blind Road.

The Master correctly set out the proof required of Appellants to prove an easement

[1] The exhibits referencing these two easements are also identified as the red road and blue road in the Transcript. Appellants shall use Old Blind Road and New Blind Road in this brief.

by prescription or claim of right. In *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015), the Supreme Court of South Carolina held:

> An easement is a right given to a person to use the land of another for a specific purpose. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App.2008). "An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription." *Kelley v. Snyder*, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct.App.2012). Here, Shirley sought an easement by prescription. "A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). To establish a prescriptive easement, one must show: (1) continued and 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. *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005).

Id. at412 S.C. 298, 772 S.E.2d 169-170. The Master determined that Appellants failed to prove any of the three elements of a prescriptive easement or claim of right. His findings are contrary to the evidence in the record.

A. Appellants proved open and notorious use by clear and convincing evidence.

As a threshold matter, there is no question of the existence of an easement. In concluding that Appellants failed to show open and notorious use of the easement across Respondents' property, the Master pointed to the limited portion of Appellant Edward

Brown's testimony where he stated that the Coxes' house was not visible from the Blind Road. (R. p. 21). In so finding, the Master determined the question of open and notorious from the viewpoint of the claimant or adverse possessor. This is contrary to this Court's holding in *Jones v. Leagan*, 681 S.E.2d 6, 384 S.C. 1 (S.C. App. 2009). In *Jones*, the Court held that the "determination of whether possession is open and notorious is made from the viewpoint of the legal owner exercising ordinary diligence, not of the adverse possessor." The Court further noted that the servient owner was asking it to assume that the exercise of ordinary diligence would not require him to view the lot claimed adversely from any closer than the Owens' house across the street. In response, the Court wrote: "We do not believe ordinary diligence is so limited." *Id.* 681S.E.2d, 614. "Second, even assuming, arguendo, both of the Owens' statements above are true, the other acts of ownership (e.g., the bush-hogging, brush burning, and the installation of the driveway) would still suffice to put Jones on notice of the Owens' possession had he exercised due diligence." *Id. Leagan*, 681 S.E.2d 6, 384 S.C. 1. Respondents presented no testimony with which the Master could weigh any exercise of due diligence by them or their predecessor in title regarding the use of the easement.

The testimony of Appellant Brown was even more informative on the point of open and notorious use of the easement in question. The undisputed testimony of Appellant Brown was that the New Blind Road was twenty-five to thirty feet wide (R.p.111). His late brother James farmed the Frank Brown property two to three times per week driving a nine-foot wide tractor pulling a cutter that was wider than the tractor (R.p.227). In addition, he used a sprayer for insects that was five feet wide and a Penske box truck for harvesting. From time to time, buyers would send an 18-wheeler to pick up cabbage (R.p. 190). In

addition, members of the Brown family hunted on their property during the day from deer stands they accessed by way of Blind Road (R. p. 39, lines 3-9). In addition, from 1989 to 2012, funeral processions traveled from Harts Bluff Road across Blind Road to a cemetery beyond the Frank Brown property. (R.pp. 78-79). Since the Respondents offered no contrary testimony, it is unknown whether they were aware of these acts or claim of rights by the users of Blind Road. Irrespective of their testimony, the evidence was sufficient to support a finding that Appellants' claim of right was open and notorious. Thus, Appellants carried their burden of proof on showing that their use of Blind Road was open and notorious.

B. Appellants met their burden of proving continuous use of Old Blind Road and New Blind Road for a period of twenty years.

The Master in Equity found that Appellants failed to show by clear and convincing evidence continuous use of New Blind Road because there was a 13 year gap in burials in the cemetery lot. (R.p. 21). Apparently, the failure of more than 13-15 family members to die and be buried in the cemetery between 1989 and 2012 was insufficient to meet the standards for continuous use of New Blind Road for funeral processions. Moreover, as stated hereinabove, the two to three times per week, James Browns used the New Blind Road during the 13 year period for farming of three tracts as stated hereinabove, or the hunting by members of the family or planting and wood cutting by Edward Brown in addition to the funeral processions did not impress the Master and were insufficient evidence. In *Kelley v. Snyder*, 396 S.C.564, 722 S.E.2d 813 (Ct. App. 2012), this Court held that "In order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant." 722 S.E.2d at 818. While the Master devoted limited attention to this element of a prescriptive

easement, he failed to give attention to the uncontroverted evidence in the record of nearly 70 years of continuous use of the Old and New Blind Road. Even after the construction of the New Blind Road, as discussed hereinabove, the facts showed that there was continuous use for over thirty years from its creation. Appellants clearly met their burden of proving continuous use for a period in excess of twenty years by clear and convincing evidence.

C. Appellants met their burden of proving uninterrupted use of Old and New Blind Road for a period exceeding 20 years.

The undisputed evidence at trial is that Frank Brown and his descendants owned a large tract of land that they farmed for over 65 years and accessed via Blind Road. Blind Road extended from Harts Bluff Road across Respondents' property, the property owned by Daniel Brown, the property owned by the William Brown, son of Frank Brown, before reaching Frank Brown property and the cemetery beyond the Brown property owned by Thelma David (R.pp. 55-57). Carl Eaton, Respondents' predecessor in title, built a house about 15 yards from Old Blind Road (R.p. 62) Appellants and their families continued to use Old Blind Road to access their farmland after this house was built.

Appellant Edward Brown testified about a 1974 confrontation between Eaton and him when Eaton stopped his vehicle while brandishing a gun and demanded that he get out. A similar incident happened with Brown's nephew Bernard Brown. However, the Browns did not discontinue using the Old Blind Road (R.pp. 64-65). With a focus on the confrontation between Eaton and Brown, the Court found that Eaton had interrupted the Frank Brown heirs use. However, in making this finding, the Master failed to consider that by 1974, Frank Brown and his descendants had been using Old Blind Road for more than the required 20 years to constitute a prescriptive easement.

Assuming the actions of Eaton were intended to interrupt the 20-year prescriptive easement period, it was ineffective. Moreover, there was no testimony that Eaton conveyed any threats to James Brown who farmed three tracts of land adjacent to the Eaton property using heavy equipment. The South Carolina Supreme Court has 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 sufficient to interrupt the prescriptive period. See *Pittman v. Lowther*, 363 S.C. 47, 52, 610 S.E.2nd 479, 484. However, the Court has not held that such actions are effective after the prescriptive period has run. Appellants' use of Old Blind Road and New Blind Road has exceeded the required prescriptive period by a multiple of three. Therefore, the Master erred in finding that Appellants did not establish the element of uninterrupted use by clear, convincing and uncontroverted evidence.

II. THE PRESCRIPTIVE EASEMENT WAS RELOCATED BY AN AGREEMENT WITH APPELLANTS AT THE REQUEST OF HENRY LEE, AND RESPONDENT DONNA LEE COX IN ORDER TO MOVE BLIND ROAD AWAY FROM ITS PROXIMITY TO THEIR HOME.

The record reflects that Henry Lee and Donna Lee purchased their property on Harts Bluff Road in 1983. (R. p. 65) After their purchase, they installed a gate across Blind Road. (R. p. 66) James Brown immediately sought an injunction from the Circuit Judge of the Ninth Judicial Circuit in the case of *James W. Brown v. Henry J. Lee,* Case No. 84-CP-10-1734 (R.p. 282). The Court issued a temporary injunction ordering the removal of the gate by Henry Lee. Henry Lee responded to the complaint by stating that "he had opened the gate for free access by the plaintiff." (R.p.69 lines 4-10) Appellant Edward Brown, who represented his brother James Brown in the lawsuit, testified that shortly after the issuance of the restraining order, he and his brother met with Henry Lee and Donna Lee

who offered to move the road from 15 yards near his house to a point closer to the south end of the property (R.pp. 69-72). The New Blind Road was created with the assistance of Henry Lee (R.p71, lines 1-12). The testimony at trial was that the road was simply relocated by agreement of the parties. (R.p. 71, lines 13-156) The Master in Equity, however, determined that the construction of New Blind Road by agreement constituted a permissive use, not adverse and could not ripen into an easement by prescription (R.pp. 19-20). Appellant maintains that the agreement was simply a relocation of the prescriptive easement creating Old Blind Road.

In *Goodwin v. Johnson* 357 S.C. 49, 591 S.E.2d 34 (S.C. Ct. App. 2003), this Court, in analyzing the relocation of easements by necessity by the court, wrote:

> "Prescriptive easements are ... quite different from express grant easements. Express grant easements, once acquired, are much more difficult to alter. A prescriptive easement, however, differs markedly from an express grant easement, because the prescriptive easement is not fixed by agreement between the parties or their predecessors in interest."
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> "Authority exists specifically supporting the power of a court sitting in equity to relocate easements created by necessity. *See* William B. Johnson, Annotation, *Locating Easement of Way Created by Necessity,* 36 A.L.R.4th 769 § 2 (1985) (once an easement by necessity's location has been fixed, it cannot be changed except by agreement of the parties *or by a court for equitable reasons.)"*

Id. at 55-56. The thrust of the Court's analysis in *Goodwin* makes clear that an easement

by necessity like an easement by prescription can be relocated by agreement of the parties. In the instant case, Henry Lee recognized that the Frank Brown heirs and others had established a claim of right to use Old Blind Road. In removing the gate following the issuance of the temporary injunction, he recognized their legal claim of right. In order to accomplish his goal of stopping the traffic passing within 45 feet of his residence, he proposed, and James Brown, on behalf of all users, agreed to relocate the easement to the New Blind Road. For over 30 years thereafter, Henry and Respondents did not interfere with this claim of right to use New Blind Road until November 16, 2015 when Respondents dug a ditch across New Blind Road (R.p. 81).

The Master rejected the only facts in the record about the creation of the New Blind Road and concluded that the use of New Blind Road was "always with permission." (R.p. 19). The Master cited *Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015) and the facts therein to support his determination. The *Bundy* Court held that "permissive use of property cannot ripen into an Easement by prescription." 412 S.C. at 307, 772 S.E.2d at 171. The Master correctly stated the facts in Bundy where Shirley, the alleged dominant estate holder asked Bundy, the alleged servient estate holder, for permission to construct a gate on Bundy's property. The *Bundy* 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." Id. At 311, 772 S.E.2d at 174. The facts in *Bundy* do not align with the facts in the instant case. As noted above, Lee placed a gate across the Old Blind Road to prevent its use by Frank Brown heirs and others. James Brown sought and received a temporary injunction to force the removal of the gate. This act alone supports a finding of hostility to any right of Lee to block Blind road. Upon service of the

temporary order, Lee immediately removed the gate without a contest. In his answer to Brown's complaint filed by legal counsel, Lee stated that the gate was opened and Brown had free access. Shortly thereafter, it was Lee who requested a meeting with Brown in an attempt to negotiate an arrangement which recognized Brown's right to access his property using a road across Lee's property and Lee's interest in removing traffic that passed too close to his residence. They jointly constructed the new road. There is no evidence that Brown sought the permission of Lee to relocate Blind Road. It was Lee who sought Brown's agreement to relocate Blind Road. This was direct acknowledgment of Brown's right to use Old Blind Road. The facts in the current case were not addressed by the *Bundy* court.

Appellants find significant the fact that Lee assisted in the construction of the New Blind Road. This has been held to be a requirement where a servient property owner seeks to relocate an easement by agreement of the parties. In *Goodwin*, supra, the Court cited the drafters of the Restatement (Third) of Property: Servitudes § 4.8 (2000), which provides that, in certain situations, the owner of the servient estate can relocate an easement unilaterally. Section 4.8 of the Restatement reads, in pertinent part:

> (3) Unless expressly denied by the terms of an easement, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
>
> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or

(c) frustrate the purpose for which the easement was created.

Goodwin 357 S.C. 55-56. Appellants submit that Lee's payment of the cost of constructing New Blind Road confirms the fact that this was a relocation at Lee's request. Moreover, the Appellants and Lee worked out an arrangement for the relocation of the easement to New Blind Road that did not increase the burden on Appellants as owners of the easement nor frustrate the purpose for which the easement was created-access to farmland, the cemetery and ultimately the lots created in the Carl Brown. The Master's conclusion that use of the New Blind Road was a permissive act is not supported by the record in this case.

III. THE NEW BLIND ROAD IS THE ONLY ACCESS THAT APPELLANTS HAVE TO THEIR PROPERTY.

Appellants argued to the Master that the New Blind Road is their only access to their properties and the cemetery. In rejecting this argument, the Master found that the evidence shows that the New Blind Road is not essentially necessary to the Appellants enjoyment of the purported dominant estates and therefore, this lack of necessity alone defeats their claim for an appurtenant easement (R.p. 25). The Master cited *Tupper v. Dorchester County,* 326 S.C. at 325-326, 487 S.E.2d at 191 where the Court held that "An appurtenant easement inheres in the land, concerns the premises, and has one terminus on the land of the party claiming it and is essentially necessary to the enjoyment thereof..." *Id.* at 326 S.C. 325, 487 s.e.2d at 191. Appellants maintain that the record does not support the Master's finding that Appellants have not proven an easement appurtenant as shown hereinbelow.

A. The Master failed to consider a prior plat and order issued by him providing for access to Appellants' property by a Farm Road which connects to the new Blind Road.

The central question presented in this case is whether an easement exist across the Coxes property so as to provide access to the property owned by the Estate of Grace Brown, Ben Brown and Frank Brown (TMS Nos. 196-00-00-015, 013 and 012) (R.p. 56). The testimony at trial also revealed that the easement across the Coxes property as required for access to property owned by the heirs of Daniel Brown (R.pp. 78, 85, 173, 174). In finding that the New Blind Road across the Coxes property was not essentially necessary to the enjoyment of Appellants' lots, the Master based his decision on the existence of other access as depicted on the plats in evidence (R.p. 25). 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* in which he concluded, *inter alia*, that "Carl Brown will provide a road easement to Benjamin Brown, III, provided that Benjamin Brown, II does not have access from Bears Bluff Road or in the alternative from a dirt road formerly known as Old Blind Road" (R.p. 289). In addition, the Master further disregarded the plat recorded pursuant to his Order in the Brown case on December 10, 2010 which plat contains a vicinity map showing the farm road referenced in Brown order running across the Edward Brown property west to Hart's Bluff Road (R.p. 296). This plat further shows that nearly three years after the Master's Order, the marshes severing access to the Carl Brown property along Back-A-Wood Road from Hart's Bluff or Bears Bluff Road were still without connecting bridges. 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. Moreover, testimony at trial is uncontradicted that the Back-A-Wood easement was never created on the ground and the proposed easement remained severed by the marshes shown on the Brown plat which shows sole access from New Blind Road to the

farm road (R.pp. 175-183). The testimony clearly shows that Appellants and other users of the New Blind Road had no other access to their properties.

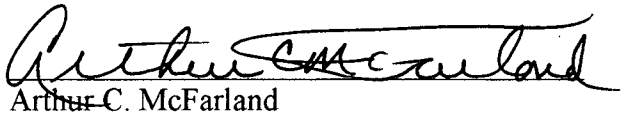
B. <u>The Master's determination that the Appellants could access their property from Back-A-Wood Road failed to consider that the easement provided on a plat had not been created on the ground and to do so would cost the heirs of Frank Brown more than $1.2 Million</u>.

As stated in the section III. A, hereinabove, Back-A-Wood Road has not been created and the Appellants sole access to their property is from Harts Bluff Road along the New Blind Road as it crosses the Coxes property. In determining that the New Blind Road was not necessary for Appellants to enjoy their property, the Master completely disregarded the testimony of Wyatt Horry Parker, a bridge construction estimator. Mr. Parker testified that the construction of a two-lane bridge across the marshes reflected on the plat recorded at L10, page 339 would run 230 feet and cost approximately $1.25 Million. This would not include the cost of permitting with certain federal, state and county agencies (R.p. 210). Appellants submit that such a cost is prohibitive for these families owning small lots and farmland. While not stated in the Brown Order, the Master certainly recognized that until such a bridge is constructed, it was required that alternate access to the Appellants property would must occur over New Blind Road. Nothing has changed in terms of access for these families from 2008 through 2020 except the ditch dug by the Coxes across New Blind Road barring access to their lands and the cemetery. The decision of the Master effectively bars these families from accessing their property. This is not fair, equitable or just.

CONCLUSION

For the reasons stated, this Court should reverse the Order dismissing Appellants claims under SCRCP Rule 41(b) and refer this case to the Master for full hearing on the merits of Appellants case or in the alternative for a finding of the existence of a prescriptive easement across the Coxes property along the New Blind Road.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellants complies with Rule 211 (b), SCACR.

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