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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Joseph M. Strickland, Master-in-Equity

Appellate Case No.: 2017-001795
Civil Action No.: 2014-CP-40-01805

Country Properties, LLC,……...Respondent,

v.

Nancy Dunn Martin,……..Appellant.

INITIAL BRIEF OF APPELLANT

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II. Whether the Lower Court erred in holding that Respondent has a private twenty-foot-wide easement by prescription across Appellant's property.

III. Whether the Lower Court erred in holding that Respondent has a private twenty-foot-wide easement by grant across Appellant's property.

IV. Whether the Lower Court erred in holding the same private twenty-foot-wide easement is a public road open to the public for use by the public.

V. Whether the Lower Court erred in relying upon arguments and evidence regarding necessity.

STATEMENT OF THE CASE

This matter is before the Court pursuant to a Notice of Appeal filed by Appellant Nancy Martin ("Appellant" or "Martin") on August 22, 2017. Martin appeals the final order of Master-in-Equity Joseph Strickland following a bench trial and the order of Judge Strickland denying Martin's Motion to Alter or Amend Pursuant to Rules 59(e) and 52(b), SCRCP. [09/27/16 Order and 07/21/17 Form 4.]

This action began with a complaint filed by Respondent Country Properties, LLC ("Respondent" or "Country Properties") on March 18, 2014. [Complaint.] Respondent, who owns a large tract of property adjacent to Martin's, sought a judgment that Respondent could use a road through Martin's property. [Complaint, pp. 8–9.] The case was referred to the Master-in-Equity on July 28, 2014. [07/28/14 Order.] Following initial discovery, Appellant moved for summary judgment on September 14, 2015. [Mot. for SJ.] Following arguments on October 27, 2015, the motion was denied on November 10, 2015. [11/10/15 Order.]

A bench trial was held from March 21 to March 24, 2016. The final order was entered by the Trial Court a few months later on September 27, 2016. [09/27/16 Order.] Appellant filed a

motion to alter or amend on November 9, 2016, listing forty-two grounds for reconsideration. [11/09/16 Motion.] Months later, on July 21, 2017, the Trial Court denied the motion. [07/21/17 Order.] This appeal followed.

However, shortly after this appeal was filed, Appellant sought leave on August 30, 2017, to bring a Rule 60(b), SCRCP, motion before the Lower Court. This Court granted leave on October 5, 2017, and held this appeal in abeyance until the motion was heard and ruled upon by the Master-in-Equity. The motion for relief from judgment was filed on October 24, 2017. [10/24/17 Motion.] The motion was briefed and then argued before the Lower Court, which granted the motion and ordered a new trial on January 28, 2019. [01/28/19 Order.] Respondent filed a Rule 59(e) motion, which was denied by order filed March 20, 2019. [03/20/19 Order.] A second appeal followed.

Respondent appealed the new trial order primarily on the basis that the new evidence supporting the Lower Court's order concerned necessity. Martin filed a motion in the instant appeal on March 29, 2019, seeking to hold this appeal in abeyance until the second appeal on the new trial order was complete. The Court granted the appeal and this case remained in abeyance until the remittitur was issued in the second appeal. After briefing and oral arguments this Court ultimately entered an unpublished opinion reversing the Lower Court's order for new trial in the second appeal. *See Country Properties, LLC v. Nancy Dunn Martin*, 2021-UP-292 (S.C. Ct. App. filed Aug. 4, 2021). The remittitur was filed on August 20, 2021. The Parties then commenced briefing this appeal on the merits of the Lower Court's orders following the trial in March 2016.

STANDARD OF REVIEW

Determining the proper interpretation of a statute is a question of law and the appellate court can review that question *de novo*. *Palmetto Co. v. McMahon*, 395 S.C. 1, 3, 716 S.E.2d 329, 330–31 (Ct. App. 2011) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). A declaratory judgment action is not legal or equitable by definition; thus, the standard of review depends on the substance of the underlying issues. *Miller v. Dillon*, 432 S.C. 197, 205–06, 851 S.E.2d 462, 467 (Ct. App. 2020) (quoting *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)). "When a suit involves both legal and equitable issues, each cause of action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Id.*, at 206, 851 S.E.2d at 467 (quoting *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017)) (internal punctuation omitted).

The issue of whether a road has been dedicated to the public is an action in equity and the Court of Appeal may find facts in accordance with its own view of the preponderance of the evidence. *Town of Kingstree v. Chapman*, 405 S.C. 282, 301–02, 747 S.E.2d 494, 504 (Ct. App. 2013) (quoting *Mack v. Edens*, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1995)).

The issue of whether property has been adversely possessed is an action at law. *Miller v. Leaird*, 307 S.C. 56, 61, 413 S.E.2d 841, 843 (1992) (quoting *McDaniel v. Kendrick*, 386 S.C. 437, 441, 688 S.E.2d 852, 854 (Ct. App. 2009)). In a law action the appellate court's scope of review is limited to correcting errors of law unless the lower court's findings have no evidentiary support. *Bundy v. Shirley*, 412 S.C. 292, 302, 772 S.E.2d 163, 168 (2015) (citing *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by, In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018)).

The issue of whether an easement exists is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury. *Ward v. Evans*, 387 S.C.

401, 409, 693 S.E.2d 7, 11 (Ct. App. 2010) (quoting *Slear v. Hanna*, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998)). That is after a bench trial, this Court "reviews for errors of law and reviews factual findings only for evidence which reasonably supports the court's findings." *Town of Kingstree*, at 300, 747 S.E.2d at 503 (citing *Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct.App.1998)).

However, the extent of an easement is an action in equity and the appellate court may take its own view of the evidence on that issue. *Id.*, at 302, 772 S.E.2d at 168–69 (quoting *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008)). Additionally, "[i]f an action is viewed as interpreting a deed, it is an equitable matter and the appellate court may review the evidence to determine the facts in accordance with the court's view of the preponderance of the evidence." *K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 571, 682 S.E.2d 252, 256 (2009) (quoting *Slear*, at 410, 496 S.E.2d at 635).

STATEMENT OF THE FACTS

The River Place Partition

This story begins in 1884 when a three-person panel was appointed by the Fairfield County Court of Common Pleas to partition the lands of Mrs. Mary Peay Black. [*See* Pl. Ex. 18 (part of the judgment roll entry for *Desportes v. Myers, et al.*).] The panel recounts that they had visited the premises in question and appointed a surveyor to evenly divide Mary's lands amongst her six daughters. [*See* Pl. Ex. 18.] The first property they divided was "River Place." [Pl. Ex. 17.] The property called River Place was a large one, running along Raglin Creek at the Richland and Kershaw County border near the Wateree River. The property above Mary's belonged to the English family; the property below Mary's to her brother, Austin Black.

The commissioned surveyor undertook to subdivide the property into twelve pieces, two for each daughter. The panel portioned out the lots as follows:

Mattie LeCompte Black (DesPortes)	Tracts E and No. 1
Leila S. Black (Miller)	Tracts D and No. 2
Mary P. Black (Nance)	Tracts C and No. 3
Ella J. Black (Miller)	Tracts F and No. 4
Eunice L. Black (Palmer)	Tracts A and No. 6
Virginia J. Black (McSwain)	Tracts B and No. 5

[Pl. Ex. 18.] Each daughter received one numbered lot and one lettered lot. The letters and numbers correspond to the surveyor's plat. [Pl. Ex. 19.] It is difficult to align the Partition Plat with future, more geographically precise plats, but an understanding of the Black partition is key to tracing the rather confusing documents that lead us to the present day.

Partition Tract C

In 1911, a man named Cordero M. Martin purchased Partition Tract C from Mary Black Nance. The deed, recorded at Richland County Book X, page 383, was not entered into evidence by Respondent during its attempts to establish chain of title, but the 1892 transaction is referenced in Plaintiff's Exhibit 20, the notes of Respondent's title abstractor, Anna Williams. [Pl. Ex. 20., p. 2, ¶ 8.] Respondent does not contend, nor did the Lower Court find, that there was an easement in the deed between Mary Black Nance and Cordero Martin, Appellant's great-grandfather. In 1911, Cordero Martin deeded Partition Tract C to his wife, who went by the name "Ossie" Martin. That deed too was omitted from evidence by Respondent but is referenced in Ms. William's notes. [Pl. Ex. 20, p. 1, ¶ 7.] Tract C is the left-most, or western-most, tract at issue in this case.

Partition Tract D

In 1918, Ossie Martin added Partition Tract D to the land she received from her husband. [*See* Pl. Ex. 29.] Ossie purchased the property from John H. Miller. [Pl. Ex. 29.] Dr. Miller

presumably inherited Tract D from his late wife, Leila Miller, who died shortly after the partition was completed.[1] It is from this deed that Respondent forms part of its theory of easement by grant. The language of the deed reads as follows.

> In the County of Richland and State of South Carolina all of that plot or part, piece or parcel and tract of land situate, lying and being near Raglins Creek in said County and State aforesaid and said to contain One Hundred Forty (140) acres, more or less of land known as tract (D) upon the original plat for partition of the lands of Mistress Mary P. Black, decease, and others filed in the office of Clerk of Court of Common Pleas for Fairfield County S.C. and Bounded by the lands of Dr. Bernes, C.M. Martin share of Mattie C. Desportes and Mistress Ella I. Miller. With the Exception of a permanent right of way of Twenty (20) feet from a certain road passing by lands of C.M. Martin and this said road runs through this said plat and this said right of way to be in force from said road running through this said plantation back to said lands of J.H. Miller and Ella T. Miller said right of way to be left open and kept open for plantation uses of said J.H. Miller and Ella T. Miller, their successors or assigns forever and this to be binding for the right of way through said plat or plantation of land for purposes to be and is agreed to be binding forever upon said Osee M. Martin her heirs and assigns for plantation uses only, and for the protection of said property of said J.H. Miller and Ella T. Miller.

[Pl. Ex. 29.] The first and most critical piece of this language is use of the phrase "by the lands" for the description of the right of way. The lands of C.M. Martin was simply Tract C, as outlined above. If indeed this language does form an easement for the use of J.H. and Ella Miller, it is solely an easement through the purchased land, Tract D. However, Respondent's title abstractor, Ms. Williams, testified strongly that there was no reservation of any type of right of right in the Tract D chain of title. [Trial Tr., p. 77, ll. 10–16.]

[1] After Leila's death in 1885, Dr. Miller went on to marry Leila's sister Ella, which only served to add more confusion to the tracing of the Black Family land. *See* Yates Snowden & H.G. Cutler, *History of South Carolina Volume IV* 101 (Lewis Publishing Co. 1920), *available at* https://books.google.com/books?id=7EoUAAAAYAAJ&pg=PA2-IA1#v=onepage&q&f=false. As a matter of legal curiosity, it is worth noting that Dr. Miller's death led to a suit over his ownership of certain bank shares in a case captioned, *Chandler v. Abney*, 166 S.C. 523, 165 S.E. 190 (1932).

Ossie Martin's Land

After Ossie Martin received Tract C from her husband and purchased Tract D herself, her land was combined and then subdivided for the benefit of her heirs. [Def. Ex. 4.] The resulting plat, completed in 1930, shows Partition Tracts C and D subdivided into six pieces of 41 acres each. [Def. Ex. 4.] At that time, the land above Ossie's was still referred to by the English family name, while Dr. Burney (or Dr. Bernes, in the deed above) had acquired the "Austin Black land" below. Meanwhile, Mattie DesPortes' Estate still owned Partition Tract E to the right.

Around the time of the Great Depression, taxes went delinquent on Ossie's property. Fortunately, however, in 1936, Ossie's daughter, Florence Martin Van Horton, was able to repurchase the property from tax collector Ellen I. Butler. [Pl. Ex. 28.] The land in that deed was still identified as the two separate pieces that Ossie had owned. [Pl. Ex. 28.] The deed first referenced the 122 acres purchased by Cordero (Tract C) and the 140 acres purchased by Ossie (Tract D). The main change was an acknowledgement that on of the 41-acre subdivided parcels had been transferred to Cordero and Ossie's son, Alexander Myers Martin. [Pl. Ex. 28.] The tax deed did recite the easement language used by J.H. Miller when Tract D was conveyed. [Pl. Ex. 28.] Shortly thereafter, Florence Martin Van Horton conveyed the same properties described in the tax deed to her brother, Edward Frank Martin, Sr. [Pl. Ex. 27.] Once again, the same easement language was recited. [Pl. Ex. 27.] This deed, from 1939, became the last time any mention of the purported easement over Partition Tract D was ever made.

Subdivided Lots Three through Six

Nearly thirty years later, in 1967, Edward Sr. passed away. Edward Sr. left a life estate in the land to his wife Jessie Dunn Martin. When she passed in 1985, the land went to Edward Sr. and Jessie's children Jessie Martin Pratt, Edward Frank Martin, Jr., and Naomi Martin Jackson. [*See* Pl. Ex. 26.] However, at this point references to the land switched from those used in the tax

deed to those used in Ossie's subdivision plat. In 1990, Edward Jr.'s sisters, Jessie and Naomi, deeded their interest in "Parcels 3, 4, 5, and 6, containing in the aggregate 164.0 acres, more or less" to their brother. [Pl. Ex. 26.] At the time of the tax deed, roughly 221 acres were repurchased by Florence—that is, 122 acres, less 41, plus 140. There is no explanation offered by Respondent as to where the remaining land went.

Ultimately, Edward Jr., Appellant's father, deeded Parcels 3, 4, 5, and 6 into a trust created in 2004. [Pl. Ex. 25.] By that time, Richland County was treating Parcel 3 of Ossie's subdivision as a single lot with TMS Number R38000-03-15, while Parcels 4 through 6 were treated collectively as TMS Number R38000-03-07. Following Edward Jr.'s death in 2006, the two parcels (covering lots 3 through 6) were deeded to his daughter, Nancy Martin. [Pl. Ex. 24.] A corrective version of that deed was filed the next year in 2007, forming the last link in the chain of title for Lots 3 through 6. [Pl. Ex. 21.] That chain has been referred to by Respondent as covering the "Martin Tract." However, because Dr. Miller only deeded Ossie Martin 140 acres, it is clear that no matter how the property lines mutated in the intervening century, the purported easement in Dr. Miller's deed could not cross all 164 acres contained in Lots 3 through 6 as they exist today.

Partition Tract E

The next chapter in this story concerns Partition Tract E, inherited by Mattie LeCompte DesPortes from her mother through the Black partition. Tract E is a quasi-triangular lot on the right-most, or eastern-most, side of the lettered Black family tracts. Mattie retained this lot until her death, when it devolved upon her devisees, John A. DesPortes, Sr., Henry W. DesPortes, Jr., William S. DesPortes, and Eleanor D. Peay.[2] [Pl. Ex. 36.] These devisees were amongst her

[2] Like Dr. Miller, Mattie's death also inspired litigation, although in her case, it was a matter of construction of her will. *See DesPortes v. DesPortes*, 157 S.C. 407, 154 S.E. 426 (1930). In the

children. Subsequently, her grandson John A. DesPortes, Jr. came to stand in the shoes of his father, John Sr., as his devisee. [Pl. Ex. 36.] These collective beneficiaries sold Tract E to Cordero and Ossie's son Fletcher Randolph Martin in 1948. [Pl. Ex. 36.] The deed identifies the property as "tract 'E' of the Black Estate lands" containing "one hundred eight and two-tenths (108.2) acres, more or less." [Pl. Ex. 36.] No easement language was included in the deed.

This land changed hands multiple times through the following years and mysteriously, the parcel changed size significantly between Fletcher's purchase in 1948 and the sale of the property by his intestate heirs in 1971. [*Compare* Pl. Ex. 36 (description of 108.2 acres) *with* Pl. Ex. 33 (description of 65.51 acres); *see also* Trial Tr., p. 76, ll. 5–6.] Fletcher's heirs sold the tract to Joe Earl Taylor, C. Lem Harper, and John V. Green in in 1971. [Pl. Ex. 33.] Those three purchasers sold the property to Raymond R. Tucker in 1973. [Pl. Ex. 34.] The property then transitioned to Tucker Enterprises, Inc. by virtue of Raymond's will in 1975.[3] Tucker Enterprises, Inc. sold the property to Rufus Duncan Lewis, Jr. in 1976. [Pl. Ex. 32.] The next two purported transactions in the chain of title are not in evidence, other than notes made by Ms. Williams, the title abstractor for Respondent. Presumably, however, Rufus deeded the property to his wife, Charlotte P. Lewis in 1983. [*See* Pl. Ex. 30, ¶ 3.] Two years later, Charlotte deeded the property to her and Rufus' three children, Laura Jane Lewis Allen, Charlotte Lynn Lewis Grimes, and Rufus Duncan Lewis III. [*See* Pl. Ex. 30, ¶ 2.]

The property remained with the Lewis family under 2012, when Appellant bought back the property that used to belong to her Great Uncle, Fletcher Randolph Martin. [Pl. Ex. 31.] By that point, the land was described as containing 65.06 acres. Because the property was most recently

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will, there is a reference to land in Fairfield and Richland inherited from her mother, Mary P. Black. *Id.*, 154 S.E. at 427. Presumably this is a reference to the properties partitioned in 1884.

[3] None of the probate related documents are in evidence, but the transition is noted at Paragraph 5 of Ms. William's notes. [Pl. Ex. 30, p. 1.]

owned by the Lewis family, this parcel, TMS R38000-03-08, has been called the "Lewis Tract" for purposes of this case. There is no easement language anywhere in the chain of title for Partition Tract E or "the Lewis Tract" between the partition action in 1884 and the present day.

Plaintiff's Chain of Title

To remedy this lack of easement language, Respondent turns to its own chain of title. The most recent link in Respondent's chain is its purchase of 1,023.07 acres of land from Pine Ridge Investments, LLC for $900,000.00 in 2009. [Pl. Ex. 3.] This large parcel encompasses the Kershaw and Richland County line, with roughly 383.63 acres in Richland County and 640.07 acres in Kershaw County. [Pl. Ex. 3.] Pine Ridge in turn had purchased the acreage from Prospect Hill of Edisto Island, LLC in 2005. [Pl. Ex. 4.] Prospect Hill had purchased the property one year earlier from The Whitfield Company. [Pl. Ex. 1, p. 1, ¶ 3.] The Whitfield Company had purchased the land from Robert J. Sheheen, as Trustee, for $1,570,850.00 in 1999. [Pl. Ex. 5.]

The chain of title in evidence breaks down going backwards from Mr. Sheheen. A number of the deeds were omitted at trial, but once again Ms. William's notes do reference missing transactions, as does some of her testimony. [*See* Pl. Ex. 1.] In theory, the trust for which Mr. Sheheen acted purchased land from R.W. Lloyd in 1976. [Pl. Ex. 1, p. 1, ¶ 5.; Trial Tr., p. 27, ll. 18–23.] This appears to be the point where the upper and lower portions of the current property diverge and Ms. William's work focuses only on the Richland-side tract, which, at various points, is somewhere between 383 and 412 acres. [*See* Trial Tr., p. 27, l. 24–p. 28, l. 7.] Her notes say that the 412-acre parcel was obtained by R.W. Lloyd from East Highland Company in 1974. [Pl. Ex. 1, p. 1, ¶ 6 (it's unclear if that deed was ever recorded in Richland County, or just Kershaw); Trial Tr., p. 28, ll. 3–7.]

The East Highland Company purchased the 412 acres from Edwin P. Guy in 1969. [Pl. Ex. 7.] The next links in the chain are completed with multiple deeds, conveying partial interests.

Plaintiff's Exhibit 9 conveys a four-fifths interest in 455 acres from James E. Powe, Mary Emma P. Gray, Susan P. Huggins, and Charlotte P. Bourne to Edwin P. Guy. [Pl. Ex. 9.] Another deed, not amongst the trial exhibits, conveyed the other one-fifth interest in the property from Gary P. Jarman to Edwin P. Guy. [*See* Pl. Ex. 1, p. 1, ¶ 8 and Trial Tr., p. 31, ll. 1–7 (both referencing deed recorded in Kershaw in book HW at page 1097).] It is by no means entirely clear how the various interests conveyed by these deeds—largely not in the record—lay upon a map so as to identify specific property lines.

The Numbered Lots

It appears that Ms. Williams believed that the 455 acres combined with another large parcel to constitute the "Harriet English Place" of one thousand four hundred seventy-three acres deeded from George Kester to James E. Powe and Edwin P. Guy in 1944. [*See* Pl. Ex. 1, p. 1, ¶ 8; Pl. Ex. 11.] This 1944 deed conveyed a combination of properties that had been acquired by George Kester through multiple deeds. One of those was a deed from C.E. and May Borresteel dated June 2, 1939.[4] [*See* Pl. Ex. 11 (listing the predecessor deeds).] In that deed, Mr. and Mrs. Borresteel conveyed four hundred fourteen acres, consisting of Tract No. 1 and Tract No. 2 from the Black Partition Plat (*i.e.*, Mattie and Leila's numbered lots, which were the most southernly). [Pl. Ex. 12.] The deed, dated 1939, says that it is subject to the conditions set in a deed to Lura Mae Kinsland. [Pl. Ex. 12.]

The Borresteels in turn had received the 414-acre property from the Bordeau Company in a deed that is dated for the same year. [Pl. Ex. 13.] It appears from the language of the deeds that perhaps unpaid taxes had some effect on the transfers. The 414-acre property was deeded to the Bordeau Company by H.O. Williams, Dymple B. Williams, J.E. West, and Lydia West in 1938.

[4] Ms. Williams transcribed this name as Borresteel, which will be used herein. However, the undersigned believes the deeds reference C.E. and May Bonesteel.

[Pl. Ex. 14.] The Williams and Wests were deeded the property by Lura Mae Kinsland and Claud S. Kinsland in 1930. [Pl. Ex. 15 and Pl. Ex. 16.][5] In 1926, Lura Mae Kinsland purchased land from Mattie LeC. DesPortes, J.H. Miller, and Ella Miller, the owners of Partition Tracts Numbers 1, 2, and 4, respectively. [Pl. Ex. 17.] Respondent bases it claim for an easement across Partition Tract E, the Lewis Tract, upon the language of this deed. The legal description in the deed is quoted in whole below.[6]

> [All that piece parcel or tract of land lying and being and situate in Richland County, South Carolina, containing four hundred and fourteen (414) acres, more or less, and bounded on the north by lands of W.L. Saunders, on the east by Wateree River, on the south by lands of W.B. Burney, and west by lands of mattie leC. DesPortes and Elle S. Miller, said tract being composed of Tract No. 1 allotted to mattie leC. DesPortes and Tract No. 2 allotted to Leila S. Miller (being conveyed by J.H. Miller) on a Partition Plat filed in Judgment Roll No. 1158 in the office of the Clerk of Court for Fairfield County S.C. in the action of Mattie LeC. DesPortes against John A. Myers and others and recorded in said office in Dock "A-K" page, 422. Also
> All that piece parcel or tract of land lying and being and situate in Richland County, South Carolina, consisting one hundred and sixty six (166) acres, more or less, and bounded on the North by lands of Moore Lumber Co., on the east by Wateree River, on the south by lands of W.L. Saunders and on the west by lands of Ella J. Miller, said tract being Tract No. 4 allotted to Ella J. Black (Now Miller) on Partition Plat above referred to.
> For a more particular description of both of said tracts reference may be had to Plat of G.T. Floyd C.E. dated 20th day of December 1926, which is made a part of this Deed. The grantors also hereby grant to the Grantee herein, her heirs and assigns, rights of way held by grantors by operation of law or be deed and] also convenient rights of way for cart and wagon road over the lands of the parties of the first part and each of them to the Burney lands, the Martin lands, and the English lands for the purposes of ingress and egress and access from the public road to such tracts of land. Said grantee, her heirs and assigns shall also have the right to construct and use cart and wagon roads connecting the said tracts of land hereby conveyed with each other by the nearest convenient route, the present roads upon said lands to be

[5] Note that Plaintiff's Exhibits 15 and 16, which are here referenced, are two consecutive pages (351 and 352) of the same deed, rather than two separate documents (the deed begins and ends at the dotted lines). [*See* Trial Tr., p. 41, ll. 16–18.] The separated pages appear to have confused all involved, because the Lower Court's order cites to Plaintiff's Exhibit 16 numerous times when Plaintiff's Exhibit 17 is clearly the one intended.

[6] The text of Plaintiff's Exhibit 17 as entered into evidence is largely illegible. Appellant has referred to a larger copy of the deed, as provided by Respondent in discovery, to make out the words. [Enlarged copy of legal description.]

> followed where [practical and convenient] and no lands at present under cultivation to be taken for roads without compensation being made for the same. The said rights of way to be appurtenant to and pass by conveyance of the tracts of land above described. The said right of way not to exceed twenty feet in width [and when _____ shall be confined to the same line and locality and it is hereby expressly understood and agreed by and between the grantors and the grantee that no one of the grantors is liable under his or her warranty to any part of the lands hereby conveyed by the other or others, each grantor being bound under the said conv___ of warranty only as to the tract owned by him or her...

[Pl. Ex. 17 (portions in brackets in original but not quoted in the Final Order).] Despite the fact that this language does not define a specific easement that is recognizable, and despite the fact that this language was between the owners of the numbered lots and their owners, rather than the lettered lots, and despite the fact that this document is nowhere in the chain of title for <u>any</u> of Appellant's properties, Respondent contends, and the Lower Court found, that this deed supported an easement by grant across the Lewis Tract. [*See* 09/27/16 Order, p. 25.]

Appellant's Other Tracts

However, even assuming that there are easements across the Martin and Lewis Tracts of Appellant's land, which is denied, it is important to note that Respondent entirely failed to establish chain of title or any easement whatsoever for the remaining two parcels of Appellant's contiguous land.[7] That is, Appellant owns the Lewis Tract and the Martin Tract, but she also owns two more parcels to the left of the Martin Tract, identified as TMS Numbers R38000-03-06 and R38000-03-48. [*See* Pl. Ex. 24, pp. 4–5.] The two parcels in question are, in theory, portions of Tracts 1 and 2 of the Ossie Martin plat from 1930. [*See* Def. Ex. 4.] But there is no evidence of where those

[7] In total, the disputed portion of road is nearly one mile long at approximately 4,500 feet. The disputed portion is not simply a driveway or shortcut, but an artery through all of Appellant's land. Notably, the disputed portion would have to begin at the end of county maintenance (where the County no longer claims any rights), rather than simply at Appellant's gate, given that there is some space between the two landmarks. [*See* Def. Ex. 3 (showing current location of Appellant's gate within a circle) and Def. Ex. 6 (showing end of county maintenance between "Parcel 'A'" and "Parcel 'B'").]

parcels came from and whether there is an easement by grant from before the year 2004, when Appellant's father purchased those parcels from distant cousins (descendants of Fletcher Randolph Martin). [*See* Pl. Ex. 24, pp. 4–5 (listing TMS -06 as being deeded to Edward Jr.'s trust in 2004 by Neal H. Higgins and Karen J. Higgins and listing TMS -48 as being deeded to the trust in 2004 by Stanley W. Higgins and Van A. Higgins).] Combined with the Martin and Lewis properties, Nancy and her father have now consolidated approximately 275 acres of Martin family land.

None of Respondent's expert or fact witnesses attempted to trace the chain of title for these two parcels of Appellant's property. This is notable because the public portion of the disputed road ends in the middle of these two parcels, as shown on Defendant's Exhibit 1.[8] [Def. Ex. 1.] To use any purported easement across the Martin and Lewis Tracts, Respondent must first establish a right to use the portion of the road after the end of county maintenance, which lies between TMS parcels -06 and -48, but before the property line for Parcel Number 3 (the left-most portion of the "Martin Tract"). The record reflects not a single attempt to do that. Without establishing a right to cross from the public road to the Martin Tract, there is no way that Respondent can use the easement sought in this case should it exist. However, Respondent's surveyor and title abstractor could point to no recorded easements on Appellant's land at all.

Respondent's Title Abstractor and Surveyor

Michael Mills, a professional surveyor, testified as an expert for Respondent. [Trial Tr. at p. 270, l. 8–13 (motion to qualify expert).] Notably, Mr. Mills reached the conclusion that there was no easement by grant in the chains of title for Appellant's property.[9] [Trial Tr. at p. 301, ll.

[8] This split between the two parcels on either side of the road demonstrates specifically why the public road ends where it does. A public road makes sense where it runs along the bisection of parcels, allowing each owner access. The public road ends where the bisection ends, where the houses end, and where a single owner negates the need for public access. [*See* Def. Ex. 1 (showing the yellow parcel lines on either side of the public road).]

[9] In the final order for this case, the findings of fact attempt to elude the conclusive statement of

10–15.] The primary point of Mr. Mill's testimony was that the road at issue in this case was identifiable on aerial photographs dating to 1943. [Trial Tr. at p. 294, l. 18–p. 295, l. 4.] However, the existence of the road is not disputed by Appellant. The question to be determined in this case is whether Respondent has a right to use the road. Mr. Mills stated he had no personal knowledge or professional opinion as to whether a prescriptive easement existed. [Trial Tr. at p. 298, ll. 1–4; p. 304, ll. 9–22.]

The conclusion of Mr. Mills regarding the lack of any easement by grant was by no means an anomaly. Indeed, the first person who testified at trial was Ms. Williams, Respondent's title abstractor. Respondent cannot escape Ms. Williams' conclusions on a basis that her search did not extend back enough time. She testified, "What I did was copy all of the deeds in the chain of title leading from now back to the beginning of time when it was issued by a decree of the Fairfield County Court is a partition deed." [Trial Tr., p. 20, l. 24–p. 21, l. 3.] Yet, Ms. Williams' notes, introduced into evidence by Respondent, do <u>not</u> reflect one of the two deeds upon which Respondent is relying for an easement by grant as part of the chain of any of Appellant's land. The other deed upon which Respondent relies for an easement by grant, Plaintiff's Exhibit 29, is only in the chain of title for Partition Tract D, not Tract C or E. The facts of this case do not support the contention that Respondent has a right to go between and through five parcels of Appellant's land to use a road nowhere identified in the chain of title documents Respondent has put into evidence.

Respondent's expert by stating that the easements by grant are from before date to which a typical title search would extend (between forty to sixty years). [*See* 09/27/16 Order, pp. 14–15, ¶ 39.] The reason for such time limitation is because of the statutes of limitation on real property interest, *see infra*.

Public Use

In addition to asserting an easement by grant, Respondent seeks to obtain access to Appellant's property by the declaration that her section of the road is a "public road." The gate on Appellant's property has been in place for half a century and Richland County has expressly disclaimed any interest in the road beyond the end of its maintenance. Nonetheless, the Lower Court found that the closed, private, dirt road was in fact a public road, albeit one the Lower Court said Richland County does not have to maintain.

The final order of the Lower Court indicates that four witnesses attested to the disputed portion of road being county maintained. [09/27/16 Order, p. 8, ¶¶ 17 & 19.] However, Algie Campbell's testimony shows only that he thought it was a county road. [*See* Trial Tr., p. 132, l. 14–p. 133, l. 9.] On cross, he admitted that he never saw a county operator running a motor grader on the road. [Trial Tr., p. 133, ll. 10–13.] He presented no specific information to suggest the road was county-maintained.

Ben Higgins did testify that he saw a motor grader on the road prior to the installation of the hunting club gate in 1970. However, this was the interchange on cross-examination when he was asked why he believed it was a county grader.

Q: So who did the maintenance, was it Richland County or Kershaw County?
A: I don't know. All I know it was a motor grader.
Q: You just saw them?
A: Yeah. Seen them go and scraping the road in and out.
Q: How do you know it was a county motor grader?
A: Because it's yellow.
Q: Aren't all motor graders yellow?
A: I don't know. I've never seen a pink one.
Q: Okay. So you don't know if it was a county guy or not, do you?
A: I'm assuming it was.

[Trial Tr., p. 182, ll. 9–23.]

Additionally, Mr. Higgins offered testimony on facts that contradicted his own conclusory impression that the disputed portion of the road was a county road during his youth. Specifically, Mr. Higgins testified that his uncle (who was married to his Aunt, Mattie Lee Martin Higgins) put up a gate on the road himself. [Trial Tr., p. 178, ll. 4–17; p. 183, l. 25–p. 186, l 17.] This action, by those older and likely more informed than teenaged Mr. Higgins, demonstrates that they believed the road was private. The gate apparently came down after Mattie decided she did not want to live on the property. [Trial Tr., p. 186, ll. 2–3.] The location of the gate was very close to where the current gate is.[10] [Trial Tr., p. 184, l. 15–p. 185, l. 10 (Mr. Higgins identifying the old Martin House, which was located slightly forwards from the current gate, as a landmark relative to the placement of his Uncle's gate).]

William Kirkland testified about his experiences as a child of nine or ten years old, when his great uncle, known to everyone as "Bubba Dunk," would let him drive his pickup truck on dirt roads in the swamp. [*See generally* Trial Tr., p. 187–89.] Mr. Kirkland's great-uncle was employed by Mr. Guy, who owned property above the Martins', to keep an eye on his property. [Trial Tr., p. 189, ll.6–10; p. 192, ll. 4–7.] As a child, Mr. Kirkland had seen motor graders on the road, although he did not offer any reason as to how he could know they were county graders. [Trial Tr. p. 190, ll. 1–19.] Notably, Mr. Kirkland's testimony directly contradicted the memory of Mr. Higgins. Mr. Kirkland said the graders sometimes went as far as the river, with no gates on the road at all.[11] [Trial Tr., p. 190, ll. 4–7.] Meanwhile, Mr. Higgins testified that graders

[10] Mr. Wessinger's testimony discussed the original location of the gate the hunting club put up in 1970 as being on land leased from the Higgins family. The Higgins in question were "Aunt Mattie" and her husband, who were first cousins of Appellant's father, E.F. Martin, Jr. That land is the site of the old Martin house. In the early 1980s, when the hunting club lost its lease with the Higgins (and prior to Appellant's father purchasing the land and leaving it to Appellant), the gate was moved back slightly towards "Tract 3" at its present location. [*See* Trial Tr., pp. 371–72.]

[11] If Mr. Kirkland is to be believed, and the Lower Court did rely on his testimony, then the public road actually extends all the way through Plaintiff's property past the Santee Cooper power lines

stopped and turned around at the "Guy gate." [Trial Tr., p. 175, ll. 9–14.] Mr. Kirkland described the roads he remembered as a small child as like a "super highway." [Trial Tr., p. 190, ll. 9–10.] But, when describing the disputed portion of the road as it stands today, he called it a "cow path." [Trial Tr., p. 196, ll. 16–17.] This suggests perhaps that he is given to hyperbole, as on both occasions it would have been a dirt road.

Angus LaFaye testified about his experience as forester. Briefly, Mr. LaFaye worked for H.R. Oliver in the mid- to late-1960s before going into the army. [Trial Tr., p. 219, ll. 12–18.] Eventually, Mr. LaFaye got involved in managing the timber on the "English Tract" for R.W. Lloyd, who purchased a portion of Respondent's current land in 1974. [Trial Tr., p. 219, l. 19–p. 220, l. 4; Pl. Ex. 1, ¶ 6.] Although Mr. LaFaye managed the timber on the English Tract for a majority of the owners between 1974 and 2005,[12] he admitted that he did not use Appellant's road at any point between 1969 and 2000. [Trial Tr., p. 226, ll. 19–24.] Mr. LaFaye stated that loggers who were cutting timber on the English Tract used Appellant's road to remove the timber in 2001. [*See* Trial Tr., p. 223, ll. 19–22 (giving date of sale); p. 222, ll. 20–24 (describing use of road).] Although he could not remember much about Appellant's gate, Mr. LaFaye did acknowledge that he had a master Santee Cooper key that would open Appellant's gate. [Trial Tr., p. 224, ll. 8–24; p. 232, ll. 12–17.] Mr. LaFaye seemed to be under the impression that the county maintained the road to the "English gate," but later acknowledged that if it was not a county road he thought it was a "community road." [Trial Tr., p. 221, ll. 9–12; p. 226, ll. 9–11.] He also acknowledged that

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to the Wateree River. Because the river was a source of food and recreation, this makes far more sense than a public road that dead-ends on Plaintiff's property with no destination and no benefit to any member of the public. Plaintiff has not evidenced any inclination to allow the public onto its property despite having put Mr. Kirkland forward as its witness.

[12] Mr. LaFaye testified that he worked with Mr. Lloyd, the Whitfield Company, and Prospect Hill of Edisto Island, LLC. [Trial Tr., p. 221, l. 22–p. 222, l. 19.]

roads can be maintained by private parties, when he indicated that Edwin Guy maintained "that" road.

Importantly, Gary Wessinger, who helped run the Dunn's Mountain Hunting Club that hunted on Appellant's property for many, many years while it belonged to her father, fully explained why someone could see motor graders on the private part of the road that belonged to Mr. Martin and even why a road might resemble a "super highway" to a child.

> Q: Who maintained the road on Ms. Martin's property after Dunn's Mountain started leasing that property?
> A: Me and my brother.
> Q: How did you maintain it?
> A: Well, we had tractors with the scrape blades and then we bought a motor grader.
> Q: Did you build any additional roads on the property?
> A: Yes, sir. On the line all the way around the property except for where the swamp part was. We cut roads all the way around the property, both sides of the road.
> Q: And who maintained all the roads on the property?
> A: We did.
> Q: What sort of conditions did Dunn's Mountain Hunt Club keep the roads in?
> A: We kept them where Mr. Martin could drive his Mercedes over them.
> Q: [Lots] of mud holes and that sort of stuff?
> A: No mud holes.

[Trial Tr., p. 373, l. 13–p. 374, l. 9.]

Despite acknowledging the fuzzy memories of the above witnesses, the Lower Court failed to take into account Appellant's own memories of the disputed section of the road. That is, she was allowed to drive on the road as a child and remembers the installation of the gate on what is now her property. [Trial Tr., p. 456, l. 13–p. 457, l. 15.] Appellant stated clearly that her section of the road has "never been county maintained to my knowledge." [Trial Tr., p. 459, ll. 4–5.]

Appellant's testimony was consistent with the testimony of Richland County's actual Right-of-Way Agent Randy Byrd, *i.e.*, the person whose job it is to know which roads are county and which roads are not. [*See* Trial Tr., p. 408, ll. 6–8; ll. 14–25.] Mr. Byrd has worked with

Richland County for over twenty-four years. [Trial Tr., p. 408, ll. 9–11.] Mr. Byrd explained with precision how much of NE Shady Grove Road (on the side of Highway 601 in question) is maintained by Richland County. Specifically, Richland County maintains approximately 2900 feet of road from Highway 601.[13] [Trial Tr., p. 409, ll. 19–22.] Having been to NE Shady Grove Road and having seen Appellant's gate, Mr. Byrd testified that the gate is "past where our maintenance agreement has ended. We do not maintain past where the motor grader turns around to where the gate is." [Trial Tr., p. 410, ll. 11–14.] Mr. Byrd further testified that there is an "end of county maintenance" sign on the road where the county road ends. [*See* Trial Tr., p. 411, ll. 11–18; *see also* Def. Ex. 2, p. 2 (depicting the sign).] Notably, Mr. Byrd's position had been consistent for years before this case was filed or tried—in 2009 he faxed Carl Bostic a map with a statement that "[w]e have the distance on our dirt road file as 2914'feet." [Def. Ex. 8, p. 3.]

In sum, no witness was able to provide specific knowledge of the county maintaining the disputed portion of road; the County and the property owner both deny that the County ever maintained the road; there is a perfectly logical explanation for seeing a motor grader on the private road; and no one addressed any other public road factor, such as taxes, in their testimony. Yet, the Lower Court determined that the road portion was public, despite it giving no benefit to the public and despite its only destination being Plaintiff's property.

Private Use

The third theory that Respondent has asserted is private easement by prescription. Multiple witnesses testified regarding their use of the road in question over the past decades. The Lower Court found that Respondent or its predecessors adversely used a key or added locks to a closed

[13] Mr. Byrd clarified that the approximately amounted to a discrepancy between his calculation of 2,903 feet and a County GIS technician's calculation of 2,914. [Trial Tr., p. 413, ll. 5–10.] That is, the "approximately" concerns a possible discrepancy of 11 feet.

gate and that created a "claim of right" for use of the road section in question. [*See* 09/27/16 Order, p. 15, ¶ 44.]

As part of its efforts at trying to establish an easement, Respondent dedicated significant resources to establishing that the road on Appellant's property exists. In aid of brevity, those portions of testimony will be omitted because Appellant does not contest the existence of the road. Rather, it is Appellant's contention that Respondent is not allowed to use her portion of the road without her permission. Evidence that proves the existence of a road, or even evidence that others have used the road, does not *ipso facto* give Respondent the legal right to use the road.

In addition to agreeing that the road exists, Appellant, Respondent, and the Lower Court also largely agree is the purposes for which the property of both parties is used. The primary purpose for the properties has been and continues to be recreation, hunting, and timber farming.[14] [*See, e.g.*, 09/27/16 Order p. 6, ¶ 8; Trial Tr., p. 15, ll. 19–23; p. 90, ll.14–16, p. 128, ll. 17–19; p. 152, l. 22–p. 123 l. 3; p. 223, ll. 14–16.] As is typical in rural areas, neighbors, hunters, and foresters may have used a road for those purposes, but that does not, without much more, give rise to a prescriptive easement for a neighboring property owner with three entrances of its own.

Although, the Lower Court did not specify which witnesses were relied upon to establish adverse use under a claim of right, it is helpful to review the testimony of those who said in one form or another that they openly used the disputed road. This review shows that these witnesses acted as permissive users, not adverse ones, with the possible exception of the current owner and its member, Mr. Podell.

Mr. Kirkland, who testified about his childhood experiences with Bubba Dunk, drove down the road as a child. At the time (circa late 1950s), there was no gate where there is one now, and

[14] This, of course, excepts the old Martin house on the property Mr. Martin purchased from the Higgins, which would have had a residential purpose some time ago.

young Mr. Kirkland simply drove down the road. He testified that this driving was "open." [Trial Tr., p. 191, ll. 5–7.] Mr. Kirkland was of course acting under the impression that he had the right to go down the road, but that was based on his impressions from his great-uncle. There is nothing in Mr. Kirkland's testimony suggesting that Bubba Dunk and he did not have express or implied permission from the various owners of Appellant's property at the time, including her grandfather, E.F. Martin, Sr. and her cousins, the intestate heirs of Fletcher Martin, to use the road for purposes like acting as a sort of game warden, [Trial Tr. p. 189, l. 7], or landlord, [Trial Tr., p. 168, l. 3], for Mr. Guy. After all, having a vigilant neighbor who looks after things can benefit a landowner. In point of fact, it could be quite possible that Appellant's predecessors in title felt no gate was necessary while someone like Bubba Dunk was patrolling the area because he would prevent "devilment" of the type one puts up a gate to stop.[15] Indeed, when Mr. Wessinger testified, he indicated that he knew Appellant's father gave permission to Bubba Dunk to use the road. [Trial Tr., p. 389, ll. 5–9.] All Mr. Kirkland's testimony can establish is that he personally, as a child, did not get express permission to drive his great-uncle's truck on the road with his great-uncle in the passenger seat.

Another witness was Cecil Lavon Brazell. Mr. Brazell's late brother was the principal in Pine Ridge Investments, LLC ("Pine Ridge"). [Trial Tr., 086, l. 22–p. 87, l. 2.] That company owned Respondent's property from 2005 until 2009. [*See* Pl. Ex. 1, ¶¶ 1–2.] Mr. Brazell visited the property as his brother's guest on several occasions. Mr. Brazell was largely uninformed about the property, originally pointing at the wrong road, guessing the date of purchase off by a few years, and not knowing how long the property was owned by Pine Ridge. [*See* Trial Tr., p. 88, l. 3–p. 89, l. 22.] When Mr. Brazell did visit the property and openly use the road he used a key

[15] *See* Trial Tr., p. 372, l. 24–p. 373, l. 3 (wherein Mr. Wessinger of the Dunn's Mountain Hunting Club testified that a gate was put up in 1970 to prevent "devilment").

given to him by his brother. [Trial Tr., p. 90, l. 23–p. 91, l. 22.] Once again, the witness is a guest of another person and has no first-hand knowledge of whether that person had permission or did not have permission to use the road.

The realtor assisted in the transition between Pine Ridge and the current owner, Country Properties, also testified. However, Harold Pickrel's testimony established nothing but use of the gate with either a key or a combination for a lock, despite the fact that he testified to openly riding on the road after unlocking the gate to pass through. [Trial Tr., p. 105, l. 12–p. 109, l. 6.] Nothing in Mr. Pickrel's testimony indicated any knowledge of his use being adverse or otherwise non-permissive.

Another witness was a forester who worked on Respondent's property when it was owned by the Whitfield Company that acquired the property in 1999. Gordan Baker was given access to the disputed road at some point and he then used that access to add another lock to the chain for his use. [Trial Tr., p. 236, ll. 8–18.] This would have been no earlier than 1999. [Trial Tr., p. 234, ll. 2–5.] Interestingly, although Mr. Baker stated that he continued working on the property when it was owned by Prospect Hill of Edisto Island, LLC (which owned the property for about a year in 2004–05), Respondent did not call any owner or principal of that company to the stand even though Mr. Baker identified current state Representative Kirkman Finlay as being such a person. [*See* Trial Tr., p. 234, ll. 6–13; *see also* Pl. Ex. 4, p. 3 (deed signed by Kirkman Finlay III as manager and sole member of Prospect Hill).] Once again, the witness' testimony did not establish that there was adverse use by a predecessor in title, or even by Mr. Baker himself, who indicated he was originally given access to the gate. [*See* Trial Tr., p. 236, ll. 9–10.] In fact, with Mr. Baker's cohort Angus LaFaye, also a forester, Respondent failed to even establish use. Mr. LaFaye stated that he did not use the road from 1969 until 2000. [Trial Tr., p. 226, ll. 19–22.] For this

reason, Mr. LaFaye cannot establish use, adverse or otherwise, by Mr. Lloyd or his trustees for the time period before the Whitfield Company bought the property in 1999.

Notably, Mr. Podell, a member of the current owner, is the only witness who has acted in a hostile and adverse way. However, before that happened Mr. Podell enjoyed use of the road like anyone else who had received access from a permissive user. Mr. Podell said he previously had access to the gate on Appellant's property. [*See* Trial Tr., p. 346, ll. 15–16 (" . . . I was able to use the gate and all of a sudden I wasn't.").] This loss occurred after one of the multiple "lock cleanings" that have been done by Appellant or her predecessors in interest. [Trial Tr., p. 381, l. 17–p. 382, l. 17; p. 383, ll. 4–16; p. 391, ll. 3–16; Def. Ex. 12 (showing a sign posted in advance of lock cleaning in 2005).] When the lock that Mr. Podell had been using was removed he took it upon himself to go cut the chain on the gate and add his own lock. [Trial Tr., p. 346, ll. 20–23.] It too was removed. [Trial Tr., p. 346, ll. 21–25.] Because of this, Appellant does not dispute that Mr. Podell has been a hostile neighbor who has trespassed and acted illegally. His behavior has certainly caused Appellant to withdraw any permission that might other been expressly or impliedly given. But prior to Mr. Podell, all other witnesses simply drove down a road or used a key or combination to open the gate. The other witnesses thought they had permission. None of them testified that a key was stolen, that they drove around or rammed through a gate, that they had been told to leave and kept using the road, or that they otherwise acted hostilely in any fashion. Mr. Podell cannot and did not show that his predecessors in title acted in the same adverse way he did.

ARGUMENT

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal.
>
> —19 S.C. Jur. *Constitutional Law* § 121 (footnote omitted).

Appellant is in ownership and possession of land that has been in her family for decades. Because the area along the Wateree River has been the location of plantations and farms for hundreds of years, there are numerous dirt roads crisscrossing the land. For instance, Respondent has access to three different entry points on its land. However, the road in question in this appeal is not a mere entry point. The road traces a path directly through the middle of Appellant's family land for nearly a mile. Over the years, Appellant and her father gave certain people permission to use that road, such as a local hunting club. In exchange, that club helped maintain the private dirt road.

Respondent, for reasons it avows have nothing to do with necessity, seeks to invade Appellant's property and use the road right through the middle of her land without her permission. Respondent will attempt to mold any legal theory to its purposes to make that happen—regardless of whether one theory contradicts another. Respondent is so intent on gaining access to a road it admits is not necessary, that it has pursued this litigation for years.

Appellant can show that the Lower Court erred in ruling in Respondent's favor and in granting access to her property for several reasons. The first reason is that Respondent's claims are all barred by statutes of limitation.

I. The Lower Court erred in not dismissing Respondent's case under S.C. Code Ann. §§ 15-3-340, -360, or -380.

There are three sections in the Title 15 statutes of limitation which bar the claims of Respondent in this case. Statutes of limitations are not mere technicalities but serve a fundamental purpose in our justice system. *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App.

1996) (citing 54 C.J.S. *Limitations of Actions* § 2, at 16–17 (1989)). Each of these Title 15 statutes stem from the important public policy of finality. *See Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005) (citations omitted) ("The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation."). Statutes of limitation exist to prevent a defendant from being forced to litigate stale claims and to prevent potential plaintiffs from sitting on their rights. *See id.* at 175–76, 609 S.E.2d at 552 (citing *In re Elkay Indus., Inc.*, 167 B.R. 404, 408–09 (D.S.C. 1994)).

In this case, Respondent has haled Appellant into court to debate deeds that are roughly one hundred years old. Respondent is attempting to find an easement that does not exist in blurry, illegible documents that fall long outside a traditional title search and long outside the temporal limitations of the law.

The first statute to consider—Section 15-3-380—is the longest and most liberal, giving a party forty years to seek recovery of a real property interest by virtue of written instrument, *e.g.*, an easement by grant. *See* S.C. Code Ann. § 15-3-380.

> No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period.

Id. This is a longstanding statute, having been construed as early as 1901. *See Sutton v. Clark*, 59 S.C. 440, 38 S.E. 150 (1901). Put simply, this law holds that no one can bring suit against a property owner claiming an interest in said property by virtue of a deed or other document unless that person, or someone whose shoes he or she stands in, was actually in possession of the claimed interest within the last forty years. Unless that criterion is met, the person who has had the property for the last forty years has clean title.

It is undisputed that the Martin family caused a steel gate to be installed at the front part of the private road in 1970. The man who installed it testified at trial. [Trial Tr., p. 372, ll. 3–23.] Everyone who had access to the private road had to have access to open the chain on the gate. Everyone who had a lock that could open the gate was given that opportunity by permission. During the forty-year period preceding this suit no one had access to the road who was not a permissive user or a guest or agent of a permissive user. Neither Respondent, nor any of its predecessors, had possession as a matter of right to an easement by grant during that period. This is demonstrated in part by three particular facts. One is that Respondent's member Mr. Podell asked permission to use Appellant's gate and was denied. [Trial Tr., p. 345, l. 21–p. 346, l. 10.] Another is that once denied, Mr. Podell vandalized Appellant's gate to add his own lock. [Trial Tr., p. 346, ll. 20–23.] The third is that when Mr. Podell did this, Appellant removed the lock. [Trial Tr., p. 346, ll. 24–25.] She did this because the road has and does remain in the exclusive control of Appellant, Appellant's predecessors in interest, and agents of Appellant or her predecessors, like the members of the Dunn's Mountain Hunting Club. Even if there was an easement by grant through Appellant's property at some point long past, which is denied, neither Respondent, nor any qualifying person under Section -380 had actual possession of that easement in the forty-year period preceding this lawsuit. By virtue of, *inter alia*, the barrier placed on the private road in 1970, the right to any hypothetical easement had long since been extinguished by the time this suit was filed in 2014.[16]

For these reasons, the claim for easement by grant in this case is invalid as a matter of law. This argument was raised by Appellant in a motion for summary judgment, at trial, and in her

[16] The Lower Court's final order relies upon findings regarding purported deeds from 1918 (¶ 29), 1926 (¶ 34), and 1939 (¶ 28), as well as purported public use from 1945 through 1969 (¶ 19). [09/27/16 Order, pp. 8–13.] All of these dates well precede the statute of limitations period.

motion for reconsideration prior to appeal. [*See, e.g.*, 09/14/15 Memo in Sppt.; Trial Tr., p. 517, ll. 2–6; 11/09/16 Rule 59 Motion, p. 5.] The Lower Court erred in not applying this statute of limitations to this case based on the facts plainly and uncontrovertibly in evidence.

The next statute—Section 15-3-340—simply provides that no suit for the recovery or possession of real property unless the party in question, or his or her predecessor, was in possession within the last ten years. *See* S.C. Code Ann. § 15-3-340.

> No action for the recovery of real property or for the recovery of the possession of real property may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action.

Id. This statute provides a simple ten-year cutoff based on possession. In reference to an earlier codification of this statute, the Supreme Court has held than an "action" is an "ordinary proceeding by which a party prosecutes another party for the enforcement of a right." *Walsh v. Evans*, 112 S.C. 131, 136, 99 S.E. 546, 547 (1919).

The third statute—Section 15-3-360—contains a two-part statute of limitations. First, no claim can be made more than ten years after the right to make entry upon the property accrues. Secondly, even if that cutoff is met, the claim must <u>also</u> be brought within one year of "making such entry" upon the property in question. *See* S.C. Code Ann. § 15-3-360.

> No entry upon real estate shall be deemed sufficient or valid as a claim unless an action be commenced thereupon within one year after the making of such entry and within ten years from the time when the right to make such entry descended or accrued.

Id. Nowhere in the Lower Court's final order was there a finding made that Respondent was in possession of the supposed right of entry within one year from the date this suit was brought. Moreover, the Court specifically identified that the prescriptive use was proved from "1939 when it appeared on the South Carolina Department of Highways Map through the 2004 Gonzales Plat." [09/27/16 Order, p. 16, ¶ 47.] The ending period of 2004 is well in advance of a one-year period

as set by Section -360; indeed, it dances on the pinhead of the ten-year limitation, given that the Gonzales plat is dated 2004 and this case was brought in 2014. If there was supposedly prescriptive use of the road in question in 1939, as the Court's order seems to find,[17] then the latest point this case could have been brought on a prescriptive theory, was 1969 (twenty years of possession followed by the ten-year limitations period, assuming possession was maintained). That is forty-five years before this suit was filed.

Setting aside prescription and moving to easement by grant, this case fails the limitations equally as badly. The purported grants relied on by Respondent are from deeds dated 1918 and 1926. [Pl. Ex. 17; Pl. Ex. 29.] In point of fact, the Court notes how old the purported easements by grant from these documents are when stating "both easement deeds cited above were greater than sixty years old and therefore outside the scope of a sixty year title search . . . ." [09/27/16 Order, p. 14, ¶ 39.] How could any suit brought more than eighty years after the date of the most recent alleged grant reflected in a deed comply with the ten-year portion of the statute of limitations in Sections -340 and -360, much less the one-year time period in -360? Respondent can point to no deed more recent than 1926 that allegedly reflects an easement. This is fatal to a claim filed eighty-eight years later.

Lastly, the claim for a use of a public road also fails to meet the requirements of these statutes. The Court's findings regarding the public road are explicitly based upon alleged public use until the year 1970, when the Martins caused a gate to be erected. [09/27/16 Order, p. 11, ¶ 22.] Thus, the purported public access had been cut off for forty-four years at this time this case was filed. Clearly, the public was no longer interested in the use of the road, but more importantly,

[17] This is supported by the finding that Appellant and her predecessors in title never gave Respondent or its predecessors permission to use the road. [09/27/16 Order, p. 15, ¶ 45.] If true, this means that all use by Respondent or its predecessors was always prescriptive, meaning that the statute of limitations was exceeded by decades.

Respondent was foreclosed as a matter of law from bringing a claim for use of this allegedly public road nearly a half century later.

Respondent's entire case is premised almost entirely upon writings and actions that took place before the year 1970. In the time period since the prescriptive use supposedly started, in the time period since the grant was supposedly given, in the time period since the public was barred from using the road, multiple generations have been born and then died, wars have started and then ended, epidemics have raged and then been treated, the internet was lauded and then decried, and this nation has had ten different presidents. Indeed, this very Court was not reconstituted until more than a decade after the gate went up in 1970. The law does not allow a party, or its predecessor, to sit on their hands for decades before then invading the private property rights of their neighbor. Nancy Martin is entitled by law to clean title to her land because it is long past time Respondent's unreasonable, unseasonable, and insatiable quest to use her road be put to bed.

II. Respondent does not have a private, prescriptive easement through Appellant's property.

The first theory of easement Respondent has attempted to use is that of prescriptive easements. "A prescriptive easement is an implied easement that awards property rights, in the form of a servitude, to the long time, adverse user of a piece of property." Donald C. Morgan, *Balancing Interests: How the Prescriptive Easement Doctrine Can Continue to Efficiently Support Public Policy*, 50 Wake Forest L. Rev. 1253, 1255 (2015) (footnote omitted). Finding a prescriptive easement across someone's private property is an extraordinary solution for extraordinary situations. This is not one of those situations. The finding of a prescriptive easement is not a statutory matter, but rather a common law remedy based on certain public policy concerns. Those public policy concerns are not present in this case.

Our courts have recognized for centuries the drastic nature of easements by prescription, which are involuntary for the servient estate, without notice via the estate's chain of title, and without notice via facts consistent with an easement by necessity. A prescriptive easement can only be awarded where there is adverse and hostile use of the property in question. Without this hostile behavior, the awarding of a prescriptive easement would be without any regard for the rights of the property owner. That is, "'[i]t would shock that sense of right which must be felt equally by legislators and by judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title.'" *State v. Miller*, 130 S.C. 152, 156, 125 S.E. 298, 300 (1924) (hereinafter "*Miller II*") (quoting *Kirk v. Smith ex dem Penn*, 22 U.S. 241, 288, 6 L. Ed. 81 (1824)).

Because prescriptive easements date from old common law and that law has mutated in various ways over the years, the South Carolina Supreme Court took the opportunity to clarify the elements and standard of proof in a 2015 case. *See Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015).[18] This case was tried just under a year after the Court clarified the law of prescriptive easements. Importantly, the Court stressed that the appropriate standard of proof in South Carolina is clear and convincing evidence. *Id.* at 305–06, 772 S.E.2d at 170–71. This standard is applied in prescriptive easement cases because the award of a prescriptive easement is in derogation of the rights of the property owner. *Id.* For purposes of context, it is worth noting that clear and convincing evidence is the standard in parental rights termination cases. *See* 21 S.C. Jur. *Children and Families* § 50.

[18] Interestingly, Respondent's attorneys, John Wells and Brent McDonald, were each on either side of that case, while Mr. McDonald's current law partner, W.H. Bundy, Jr., was the plaintiff. In the *Bundy* case, the Court of Appeals and Supreme Court both determined that the special referee incorrectly granted a prescriptive easement to Mr. Shirley for use of Mr. Bundy's private road. *Bundy*, at 315, 772 S.E.2d at 175.

As Judge Ralph King Anderson, Jr. explained in his book on jury charges, "Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit; and the witnesses must be lacking in confusion as to the facts in issue." Anderson, *S.C. Requests to Charge—Civil*, § 1-3 General Instructions - Burden of Proof (citations omitted). Importantly, "[t]he evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Id.* As demonstrated by the transcript of the trial in this case, numerous witnesses were confused, were recalling fuzzy memories, and did not inspire the type of certainty necessary to find a prescriptive easement by clear and convincing evidence.

The testimony adduced by Respondent shows only that a number of people, none of whom were actual property owners, have used Appellant's road over the years—either before a gate was installed or with a key or combination to access a lock. The evidence does not show that those users were adverse or hostile to the property rights of Appellant or her predecessors in title.[19] No one rammed the gate, took the gate off its hinges, or tried to drive around the gate. To prove a prescriptive easement a party must clearly and convincingly prove that actions were taken that openly and notoriously challenged a property owner's rights. For instance, in a 2005 case, a prescriptive easement was found where, among other things, evidence showed that the road in question was part of the 911 system and the local government had put up a street sign. *See Matthews v. Dennis*, 365 S.C. 245, 249, 616 S.E.2d 437, 440 (Ct. App. 2005). Here, there is no

[19] Moreover, it is arguable that many of these witnesses were members of the general public and a private prescriptive easement cannot be established without showing use that is exclusive and different from the right which could be asserted by members of the general public. *See Cleland v. Westvaco Corp.*, 314 S.C. 508, 511, 431 S.E.2d 264, 266 (Ct. App. 1993).

indication at all that anyone other than permissive users, with access via keys or lock combinations, have the right to use Appellant's road.

Moreover, all parties agree that Appellant's property and Respondent's property are used for hunting, recreation, or timber farming. These purposes create a certain recognized practice of permissive use amongst hunters and foresters. That is, even long-term recreational use of a road will likely not give rise to a prescriptive easement—private or public. *See Cleland* at 511–12, 431 S.E.2d at 266–67; *Mack*, 320 S.C. at 240, 464 S.E.2d at 126; *see also State v. Beach Co.*, 271 S.C. 425, 433, 248 S.E.2d 115, 119 (1978) ("Dedication is not implied from the permissive, sporadic and recreational use of the property, even though some of it has been used extensively."). One of the reasons for this was pointed out during the trial—hunting dogs do not respect property lines. [Trial Tr., p. 162, l. 18.] It is a fairly common practice amongst those in rural settings to drive on other people's private property to call for a lost dog or follow its collar tracker. To stop everyone from coming onto rural, unoccupied land, the owner would have to build a guardhouse, put up cameras, and pay someone to stay on site around the clock with a shotgun. That cannot possibly be the legal standard required to prevent a prescriptive easement. Thus, a certain amount of permissive, recreational, or forestry related use of a road is to be expected without that use giving rise to a permanent derogation of the owner's rights.

The only person who has exhibited adverse, hostile behavior is Mr. Podell, member of Respondent, the current owner. But he also asked to use a key to the gate, which is evidence of permissive use. [Trial Tr., p. 346, ll. 2–23.] Even Mr. Podell's former partner in Respondent, Claude Campbell, seemed to understand that he had not actually done anything adverse to Appellant's rights when he said that he did not, but should have, cut the chains to inspire Appellant to seek his arrest and file suit against him. [Campbell Depo. Tr., p. 39, ll. 12–25 (deposition testimony of the late Mr. Campbell admitted as Court's Exhibit 1 at trial).] Mr. Podell's cutting

of Appellant's chain on the gate is the only open, notorious, adverse, and hostile behavior in the record and that behavior is insufficient to establish a prescriptive easement for two reasons.

First, even assuming *arguendo* that there was a pattern of adverse use, the pattern has been severed each and every time Appellant or her predecessors conducted a "lock cleaning" to remove any unauthorized locks that may have been added by guests, friends, or agents of other permissive users. These lock cleanings have been conducted routinely for years. [Trial Tr. p. 381, l. 17–p. 382, l. 17; p. 383, ll. 4–16; p. 391, ll. 3–16; Def. Ex. 12 (showing a sign posted in advance of lock cleaning in 2005).] Respondent does not and cannot dispute that these lock cleanings occurred—after all, Mr. Podell admitted that the locks he installed via vandalism were removed. [Trial Tr., p. 346, ll. 20–25.]

The law says that "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**." 12 S.C. Jur. *Easements* § 10 (citing *Pittman v. Lowther*, 363 S.C. 47, 52, 610 S.E.2d 479, 480 (2005)) (emphasis added). The Court gave numerous examples of using such means to stop a prescriptive easement.[20] The Supreme Court specifically addressed the issue of requiring anything more, like say, a guard with a gun, because anything more would "encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes." *Pittman*, at 52, 610 S.E.2d at 480.

[20] *Pittman*, at 50–51, 610 S.E.2d at 480–81 (2005) (citing *Talbot's, Inc. v. Cessnun Enterprises, Inc.*, 566 P.2d 1320 (Alaska 1977); *Kelley v. Westover*, 56 Ark.App. 56, 938 S.W.2d 235 (1997); *Serrano v. Grissom*, 213 Cal.App.2d 300, 28 Cal.Rptr. 579 (1963); *Ludwick v. Kassenbrock*, 253 S.W.2d 628 (Ky.1952); *Pugh v. Conway*, 157 Ind.App. 44, 299 N.E.2d 214 (1973); *Dalton v. Real Estate & Improvement Co.*, 201 Md. 34, 92 A.2d 585 (1952); *Rice v. Miller*, 306 Minn. 523, 238 N.W.2d 609 (1976); *Ormiston v. Boast*, 68 Wash.2d 548, 413 P.2d 969 (1966)).

Because a prescriptive easement is a drastic alteration in the normal rights of a property owner, all a property owner has to do to avoid a prescriptive easement is to halt use of the thing in question one single time in the twenty-year adverse use period with use of something like a gate. Furthermore, that is all the property owner should do, to avoid unnecessary violence. In this case, not only is there evidence of lock cleanings on multiple instances that would have prevented any unauthorized person from having access to the road, there is the specific removal of Mr. Podell's locks from the gate. Mr. Podell testified that he specifically lost access to the road. [Trial Tr., p. 346, ll. 15–16 (" . . . I was able to use the gate and all of a sudden I wasn't.").] The prescriptive period was interrupted and a physical barrier discontinued Respondent's use of Appellant's road. Under the law in this state, that clock is stopped and there cannot be a prescriptive easement awarded to Respondent, per Respondent's own testimony. To hold that there is a prescriptive easement based on this evidence is an error of law.

The other reason Mr. Podell's behavior does not support a prescriptive easement is failure to meet the minimum time requirement of twenty years. "One claiming a prescriptive easement must establish the continued and uninterrupted use or enjoyment of the right for 20 years . . . ." 12 S.C. Jur. *Easements* § 10 (footnote omitted). A party "may 'tack' the period of use of prior owners in order to satisfy the twenty-year" requirement, but the "use by the previous owners must also satisfy **all the elements** of a prescriptive easement." *Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 584–85, 735 S.E.2d 528, 537 (Ct. App. 2012) (citing 25 Am.Jur.2d *Easements & Licenses* § 63 (2004 & Supp.2012); *Babb v. Harrison*, 220 S.C. 20, 23, 66 S.E.2d 457, 458 (1951)) (emphasis added). This means, among other things, that the use must be adverse and uninterrupted. Respondent cannot meet these requirements.

None of Respondent's hostile behavior could have occurred any earlier than its purchase of its property in 2009. At the time suit was filed in 2014, that was five years at most, but as

evidenced by Mr. Podell's testimony, Respondent was initially able to use Appellant's road with other people's locks. Thus, not only does Respondent's adversity fail to meet the twenty-year standard, there is a clear interruption in any adverse behavior for the first part of Respondent's ownership.

However, assuming that Mr. Podell's qualified for the full term of Respondent's ownership, there is insufficient evidence of prior owners meeting the requirements to satisfy the elements of a prescriptive easement. First, it must be recognized that not a single witness called to the stand by Respondent was an actual prior owner of the property. The witnesses may have known prior owners or may have been retained in limited specific capacities by prior owners, but none were prior owners. Members of the public cannot establish a prescriptive easement specific to Respondent and to so find would be an error law.

But perhaps, more importantly, twenty years before 2014, when this suit was filed, is 1994. Even if second- or third-hand witnesses are enough to establish prior owner use, there must still be evidence of each and every owner back for twenty years to meet the requirement for continuous and uninterrupted. Assuming *arguendo* that Mr. Brazell's visiting his brother counted for Pine Ridge from 2005 until 2009; that Gordan Baker's work as a forester counted for Prospect Hill and the Whitfield Company from 1999 until 2005; there is no one who can testify to adverse use, or any use at all, during the ownership of the Trustees for R.W. Lloyd, Robert Sheheen and Henry Savage. That is, Angus LaFaye testified about his work for Mr. Lloyd as a forester, but he specifically stated that he did not access Appellant's road between 1969 and 2000. [Trial Tr., p. 226, ll. 18–22.] Therefore, even if non-owner, non-employee witnesses could establish use by prior owners, and even if they could establish adverse use, no one testified that there was use, adverse or otherwise, on behalf of the owner of Respondent's land from 1994 until 1999. That time period is critical, because without it, there can be no twenty-year period established. To

conclude that there was a prescriptive easement without adverse use by some the trustees for Mr. Lloyd, Mr. Lloyd himself, or some agent of Mr. Lloyd is an error of law. For all of the above reasons, the Lower Court erred as a matter or law and fact in concluding that Respondent has a prescriptive easement through the middle of Appellant's land. After all, the burden of proof is clear and convincing evidence.

III. Respondent does not have a private easement by grant through Appellant's property.

Respondent has also sought to demonstrate an easement by grant across three of Appellant's tracts of land. Respondent has failed. As the documents and testimony in this case show, the only possible easement by grant, which for very valid reasons Appellant denies, is over the land purchased by Ossie Martin. Even if that easement does exist and even if it is appurtenant, it only covers the middle of Appellant's land (the Black Partition Tract D). There is no easement language of any variety whatsoever in the chains of title for Black Partition Tracts C or E, which are also part of Appellant's land. Respondent's only other theory of an easement by grant is language contained in a portion of its chain of title, not Appellant's. This too fails.

The law states that "[a]n easement may be established by express grant or by express reservation in a deed or other instrument." 12 S.C. Jur. *Easements* § 6 (citing *Sandy Island Corp. v. Ragsdale*, 246 S. C. 414, 143 S. E. 2d 803 (1965)). "Property owners are charged with constructive notice of instruments recorded in their chain of title." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn,* 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (multiple citations omitted). "'To afford notice of a provision in a recorded instrument, the language must be so intelligible and significant that it would naturally raise a well-grounded suspicion in the mind of a reasonably prudent person, or a person of ordinary diligence and understanding, sufficient to suggest an inquiry that would lead to a knowledge of the facts.'" *Id.*,

at 71–72, 558 S.E.2d at 909 (quoting *Fuller-Ahrens P'ship v. S.C. Dep't of Highways & Pub. Transp.*, 311 S.C. 177, 183, 427 S.E.2d 920, 924 (Ct. App. 1993)).

Setting aside the Martin Tract and Appellant's land closer to Highway 601, the question becomes, does Respondent have an easement by grant across the Lewis Tract. The Lewis Tract is, with some variation in acreage, the original Tract E in the Black Partition of 1884. The question is then, in the chain of title for Partition Tract E, is there any express grant or reservation of an easement. The answer is quite clearly, no. Respondent's title abstractor traced the chain of title for Tract E from 1884 until the present day. [*See* Pl. Ex. 30 (containing the abstractors notes on the Lewis Tract).] None of the deeds in the chain reserve or grant an easement to cross the tract. Neither Respondent's title abstractor, nor its expert in surveying were able to point to an easement in the chain of title for Partition Tract E. Without an easement across the Lewis Tract, which is the one where the disputed road purportedly crosses into Respondent's property, there is absolutely no point in examining the issue of easement by grant any further. Because no other easement by grant, without one over the Lewis Tract, would connect the purported dominant and servient estates via the disputed road.

Apparently recognizing this issue, Respondent has attempted to shoehorn in a purported easement by grant from <u>its</u> chain of title. However, the law requires that the purported servient estate owner be given notice, via their chain of title, of any easement by express grant or reservation. *Binkley*, at 71–72, 558 S.E.2d at 909. The purported easement language in question comes from Plaintiff's Exhibit 17, which is part of Respondent's chain of title, not Appellant's. [*See* Pl. Ex. 17.] The evidence on this point is unequivocal. Respondent's title abstractor testified to the chain of title for Partition Tract E. Plaintiff's Exhibit 17 is not in that chain, either in her testimony, or in her corresponding notes. [*See* Pl. Ex. 30.] If Respondent's professional title abstractor, with thirty years' experience did not find the deed in her research on Partition Tract E,

how could any reasonable property owner be expected to be on notice of that deed? [*See* Trial Tr., p. 19, ll. 11–12 (Ms. Williams stating her experience).] No reasonable person could, under the law on notice, possibly suspect that there was any sort of easement across the Lewis Tract if tracing the chain of title back to 1884 did not reveal it.[21] To hold that Plaintiff's Exhibit 17 provides that there is an easement by grant across the Lewis Tract is an error of law and entirely unsupported by the record.

Assuming *arguendo* that Respondent could establish an easement by grant over the Lewis Tract, the next question becomes whether an easement by grant can be established over Partition Tracts C and D. Tract C was purchased by Cordero Martin, Appellant's great-grandfather in 1911 from Mary Black Nance, per Ms. William's notes. [Pl. Ex. 20, p. 2, ¶ 8.] That deed was not put into evidence by Respondent, even though it is listed in Ms. Williams' notes. There is no easement language in that deed, much less in evidence, that gives rise to any right by Respondent to cross Partition Tract C, which is part of the property owned by Appellant closest to Highway 601.

Years later, in 1918, Appellant's great-grandmother, Ossie Martin, separately purchased Partition Tract D from Dr. John H. Miller. [Pl. Ex. 29.] That deed did contain language about an easement.

> In the County of Richland and State of South Carolina all of that plot or part, piece or parcel and tract of land situate, lying and being near Raglins Creek in said County and State aforesaid and said to contain One Hundred Forty (140) acres, more or less of land known as **tract (D)** upon the **original plat for partition of the lands of Mistress Mary P. Black**, decease, and others filed in the office of Clerk of Court of Common Pleas for Fairfield County S.C. and **Bounded by the lands of Dr. Bernes, C.M. Martin** share of Mattie C. Desportes and Mistress Ella I. Miller. With the Exception of a permanent right of way of Twenty (20) feet from a certain road passing **by lands of C.M. Martin** and this **said road runs through this said plat** and this said right of way to be in force from said road running through this

[21] Moreover, if one were to locate the deed language and attempt to determine where the purported easement was located, it would be in vain. The language of Plaintiff's Exhibit 17 is exceptionally general and vague and does not identify a road running through the middle of Tract E. [*See* Pl. Ex. 17.]

> said plantation back to said lands of J.H. Miller and Ella T. Miller said right of way to be left open and kept open for plantation uses of said J.H. Miller and Ella T. Miller, their successors or assigns forever and this to be binding for the right of way through said plat or plantation of land for purposes to be and is agreed to be binding forever upon said Osee M. Martin her heirs and assigns for plantation uses only, and for the protection of said property of said J.H. Miller and Ella T. Miller.

[Pl. Ex. 29 (emphases added).] Assuming *arguendo* that this language is operative and runs with the land, the details contained in the language are key. The language makes it clear that Cordero (or C.M.) Martin owns the land towards the highway (Partition Tract C). This deed cannot grant an easement in Cordero's property, nor does it. The most important phrase is "by the lands." This deed identifies a road passing by the lands of Cordero Martin. This deed also identifies the land owned by Dr. Bernes (or Burney) below the Black Partition property. When looking at the original plat, Plaintiff's Exhibit 19, it makes far more sense that such a road would run along the bottom property line between Cordero and Dr. Burney's land. This is particularly so, when the following facts are considered. First, the River Place Plantation divided by the Fairfield panel in 1884 is not the whole plantation.[22] That is, Austin Black, owned an additional part below that became Dr. Burney's land. Austin's land has a residence notated on the Black Partition Plat, just below Tracts D and E, which presumably was accessible by road. [*See* Pl. Ex. 19.] If there is no easement language in the deed to Cordero Martin of Tract C; if the deed for Tract D contains the phrase "by the lands" of Cordero Martin; if the deed contains the phrase "through this said plantation;" and if there is a residence located along the bottom partition property line, then it makes far more sense that the purported easement concerns a road running along the bottom property line, not through the middle of the property. It would not have been within the power of Dr. John H. Miller, the

[22] This is also consistent with the language in Plaintiff's Exhibit 17, which says "through the plantation." [Pl. Ex. 17.] The plantation would include the whole of River Place Plantation, including Mary Black's brother Austin's land, and not just the portion received by Mary Black that was partitioned upon her death.

grantor, to give an easement through the lands of Cordero Martin, which were purchased from Dr. Miller's sister-in-law, Mary Nance, and this deed language comports with that fact by referencing a road running by Cordero's land.

Importantly, even if one takes as fact that the deed to Ossie Martin from J.H. Miller contains an express easement through Tract D, there is still no easement through Tract C. No one has testified to or produced any shred of paper about an easement by grant through Tract C. Moreover, even the most generous interpretation of notice law could not graft the easement through Tract D onto Tract C, because the chains of title had already diverged at the time that Dr. Miller sold Tract D to Ossie Martin. Mary Nance did not reserve an easement for any of her relatives in 1911 and that is conclusive as to the issue of Tract C. Viewing this in the light most favorable to Respondent, there is a possible easement that was reserved more than a century ago (well before any normal title search) as to Tract D. But Appellant owns at the very least part of Tract C and all of Tract E and there is no easement by grant across those Tracts. Thus, the Lower Court erred as a matter of law and evidence in concluding that there was an easement by grant in favor of Respondent and should, therefore, be reversed.

IV. The Lower Court erred in holding the same private twenty-foot-wide easement is a public road open to the public for use by the public.

In addition to finding a private easement by prescription and a private easement by grant, the Lower Court also found that Appellant's road is a public road—albeit not one the County has to maintain. This holding too was in error. In the first instance, a public road cannot also have a private prescriptive easement. Our state Supreme Court has ruled that "adverse possession does not run against the state or its duly constituted political subdivisions." *Davis v. Monteith*, 289 S.C. 176, 179, 345 S.E.2d 724, 726 (1986) (citations omitted). A private easement by prescription

simply cannot be granted when Richland County, as a political subdivision of the State, holds an interest in the public road. The Lower Court's order is therefore inherently contradictory.

Granting the public access to private land is an exceptional mode of passing an interest in land. *See Mack*, at 239, 464 S.E.2d at 126. For that reason, proof of dedication must be "strict, cogent, and convincing." *Id.* While dedication may potentially be implied from long public use, an owner of land must nevertheless express an intention to dedicate his property to public use in a "positive and unmistakable manner before a dedication may be perfected." *Cleland*, at 510, 431 S.E.2d at 266 (citing *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992) and *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 317, 433 S.E.2d 875, 883 (Ct. App. 1992)). There is no evidence, nor did the Lower Court find, that there was ever an official public dedication of the road. Thus, the only remaining option is what it essentially a public prescriptive easement where a dedication can be implied. In such cases, much like with private prescriptive easements, courts have required evidence of adverse use for twenty continuous years. *See Miller II*, at 155, 125 S.E. at 299 (quoting *Sims v. Davis & Tygart*, 25 S.C.L. 1, 34 Am. Dec. 581 (S.C. App. L. 1839) (the use "'must be something hostile to [the owner's] entire dominion over his property'").

The Lower Court held that Appellant's road became public as of 1939 and was used until 1969. [09/27/16 Order, p. 28.] Notably, in 1939, the "Lewis Tract" now owned by Appellant was owned by the heirs of Mattie Desportes. Fletcher Martin did not purchase the land from her heirs until 1948. [*See* Pl. Ex. 36.] No mention was made in that deed of a public road. Given that the land was still owned by the family receiving the partition in 1884, it seems quite remarkable to suggest that a public road ran through the Lewis Tract at that time. In 1939, the "Martin Tract" properties were deeded to E.F. Martin, Sr. [Pl. Ex. 27.] No mention was made in that deed of a public road. But more mysterious is that absolutely no evidence was entered into the record about

who owned the two parcels now owned by Appellant that are closest to Highway 601.[23] Those parcels were owned by the Higgins family around 1970, when the gate went up, but the Lower Court declared a public road in 1939 without even knowing who own that land at the time.

The year 1939 was well before the gate went up in 1970 on what is now Appellant's land, suggesting the road, such as it was at that time, was open.[24] Somewhat ironically, case law around 1939 makes it clear that a public dedication was much harder to achieve in relation to a road through unenclosed woodlands. *See Miller II*, at 155, 125 S.E. at 299 (quoting *Hutto v. Tindall*, 40 S.C.L. 396, 400, 6 Rich. 396, ___ (S.C. App. L. 1853) ("'A distinction must therefore be observed, between the claim of a way through inclosed and cultivated land, and of a way over uninclosed woodland"). The reasoning on this issue appears to date back to at least 1839. *See Sims*, 25 S.C.L. at 4 ("Most of the land is uninclosed, and I can scarcely conceive it possible that the riding over such lands, and, especially, along a road which has originated in the implied assent of the owner, can be even a technical trespass, until the implied permission has been revoked."). In 1924, the South Carolina Supreme Court held, "The foregoing expressions are sufficient to indicate that the rule requiring that in addition to proof of the continuous use of a road for 20 years or more in order to establish a prescriptive right, 'when it passes over uninclosed woodland it must also be shown that the user was adverse,' proceeds upon the theory, soundly grounded in conditions which are a matter of common knowledge in this country, that the user of a road through

[23] This matters particularly because the Court relied on Claude Campbell using the road "in 1939" to visit his great-uncle, Fletcher Martin, whose wife Julia was a Campbell. [09/27/16 Order, p. 18.] However, it is of absolutely no moment for purposes of public dedication that Mr. Campbell visited a relative on their own property. Of course, Fletcher and his family could get to their own house, which was admittedly not far in and likely at the site of the "old Martin house" which is located at the end of the part of the road Richland County actually does maintain. [Campbell Depo. Tr., p. 8, ll. 17–19; p. 9, ll. 10–24; p. 39, ll. 5–7 (Mr. Campbell explaining who Fletcher and Julia were and how far down the road their house was).]

[24] Notably, the Lower Court's timeline did not consider the earlier gate put up by Mr. Higgins near the old Martin House.

uninclosed woodland is, in effect, a user by license or permission of the owner of the land." *Miller II*, at 156, 125 S.E. at 299. This case is still law now, but it was certainly law in 1939 when the dedication of the road to the public was found by the Lower Court.[25] At that time, the property was unenclosed. The burden upon Respondent is, therefore, to prove twenty years of adverse, hostile use of the road in order to establish a public, prescriptive easement. All Respondent has shown is that people used the open, unenclosed road for perfectly reasonable and expected purposes like hunting or fishing. That is not adverse use and a public dedication cannot be implied.

As stated in the *Cleland* case, even extensive permissive, recreational use of property is not sufficient to create an implied public dedication. *Cleland*, at 510, 431 S.E.2d at 266 (citing *Hoogenboom*, at 317, 433 S.E.2d at 883 and *Beach Co.*, at 433, 248 S.E.2d at 119). The fact that various property owners left the land unenclosed and allowed people to use the road to access certain parts of the swamp or river for recreational purposes—no matter how long that occurred—is not sufficient to give rise to a public prescriptive easement. The simple matter is that the owners allowed people to use the road and then in 1970, decided to cut down on the number of people doing "devilment" on the property as they had a right to do.

The Lower Court determined that county motor graders were on the disputed section of road until 1970 as part of a basis for finding public dedication. [09/27/16 Order, p. 11, ¶ 22.] However, no witnesses could give specific reasons to believe any motor grader was county, particularly when the Dunn's Mountain Hunting Club had their own grader to use on the road. However, even though county maintenance over a long period of time can be a factor in reaching a dedication determination, seeing county motor graders on a dirt road, is by no means conclusive

[25] Indeed, the Court was merely reiterating what it has stated the year before in *Miller I*, where it also quoted *Hutto v. Tindall*. *See State v. Miller*, 125 S.C. 289, 291–93, 118 S.E. 624, 625 (1923) (quoting at length *Hutto v. Tindall*, 40 S.C.L. 396, 6 Rich. 396 (S.C. App. L. 1853)).

evidence. *See Mack*, at 240, 464 S.E.2d at 126–27 (considering maintenance as factor). Testimony suggested that "Bubba Dunk" Kirkland took it upon himself to see that roads were scraped, by county employees or otherwise. [Trial Tr., p. 168, ll. 2–6.] Moreover, county employees have been known to do favors for people without it be evidence of intent to dedicate their property to the public. For instance, if a county is paving a road, they might put some extra asphalt into a driveway to help smooth out the transition. That does not make the driveway a public road. In this case, Respondent is also trying to turn Appellant's road into a public driveway to its private property. The public has no known interest in driving to Respondent's own gate and then turning around.

One piece of evidence frequently used by Courts in assessing claims of public dedication where there is no written document is whether or not a private owner pays taxes on the road in question. *See Hoogenboom*, at 313–14, 433 S.E.2d at 881 (giving detailed legal history of the exemption of public roads from taxation as part of public versus private analysis); *see also Mack*, at 240, 464 S.E.2d at 126–27 (finding no evidence of exclusion from taxation support for conclusion that road was not accepted by the public). The State does not generally charge property taxes to its political subdivisions, such as towns or counties, and thus public roads are generally carved out from any acreage assessment for property taxes. Because of this county geographic information systems (or "GIS" maps) often reflect public roads by carving that property out of the tax map number-identified plats. You can see such carveouts in Defendant's Exhibit 1 for Highway 601 and the portion of NE Shady Grove Road on the opposite side of Highway 601 from Appellant's property. [Def. Ex. 1 (lower left-hand corner).] These carveouts allow for the calculation of the taxable acreage of property. There is not even a property line along which a road could run reflected on Appellant's property, much less a carveout reflecting a public un-taxed

road. [Def. Ex. 1 (lower left-hand corner).] Appellant pays property taxes on her full acreage because her full acreage is owned by her in fee simple and has no public road through it.

To show a public road there must be cogent, strict, and convincing evidence. The "acts proved must not be consistent with any construction other than that of a dedication . . . ." *Mack*, at 239, 464 S.E.2d at 126. All Respondent has shown is that local people used an unenclosed road for recreational purposes, entirely consistent with the law at the time. There has been no evidence of adverse use that could create a public prescriptive easement that would dedicate the property of at least two different owners to the public. The Lower Court ignored this and failed to even acknowledge the testimony of Richland County's right-of-way agent. Mr. Byrd, who has access to all of Richland County's records on public roads, and who works with the County's GIS technician who maps those roads, stated that the County's file reflects that the public part of NE Shady Grove Road ends 2900 feet from Highway 601. [Trial Tr., p. 409, ll. 18–22.] Mr. Byrd took that position well before this case was even filed. [*See* Def. Ex. 8, p. 3 (stating public road is 2914 feet long in 2009).]

The Lower Court's order defies logic by finding a county road of which the County has no record. To do so the Lower Court relies on two maps. [*See* Exs. 41 and 49.] Neither map has the name of the purported public road and neither map was actually made by Richland County. The Lower Court erred as a matter of law and failed to show that Respondent met the burden of proof in establishing that Appellant's private property is actually a County road, going nowhere but Respondent's gate, that does not actually have to be maintained by the County. Rather, the Lower Court has essentially ordered Appellant to open her private property to the public and put the liability of maintenance and any injury to the public on her. The law and the facts do not support this result.

V. The Lower Court erred in relying upon arguments and evidence regarding necessity.

This Court has already determined that was limited latitude for the Lower Court to consider evidence concerning necessity. *See generally Country Properties, LLC v. Martin*, No. 2019-000569, 2021 WL 3401190 (S.C. Ct. App. Aug. 4, 2021) (hereinafter "Country Properties I"). There is no legal claim for an easement by necessity in this case.[26] Nonetheless, the trial transcript and final order are riddled with evidence, findings, and conclusions about necessity. That is, Respondent contended that the flow of Raglin Creek through its property obstructed its access to the lower, Richland County portion of its property. [*See, e.g.*, 09/27/16 Order p. 5–6, ¶¶ 5–7; Trial Tr., p. 12, ll. 19–23; p. 13, ll. 2–4; p. 89, ll. 11–15; p. 94, ll. 10–16; and p. 324, l. 1–p. 325, l. 1.] Indeed, the Lower Court referenced Appellant's road as potentially being the "sole" means of access to that part of Respondent's property. [*See* 09/27/16 Order, p. 30 (in the last sentence on the page).] Given that there was no legal cause of action for necessity, which Respondent acknowledged, it was inappropriate to introduce arguments and evidence on the issue of necessity, and it was legal error for the Lower Court to make findings and conclusions about necessity. This is specifically recognized in this Court's binding prior order, which is now the law of the case. *See Country Properties I* at *1 (holding that "alternative means of access have no relation whatsoever to easement by grant or by public dedication"); *Judy*, at 458, 674 S.E.2d at 153 (multiple citations omitted) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."). The portions of the record and the Lower Court's

[26] "Judge, we never claimed – we did not claim a[n] easement by necessity, which is an easement because he has no other access." [Trial Tr., p. 18, ll. 19–21 (Respondent's counsel John Wells, speaking to the court).] Further, Respondent's member Mr. Podell stated that the use of Appellant's road was purely a financial issue. [Trial Tr., p. 362, l. 25–p. 364, l. 9.]

final order which address the nature of the creek, the dam over the creek, or contain statements about obstruction, sole access, or necessity should be considered stricken and expressly ignored in the Court's consideration of this case.

CONCLUSION

Respondent failed at trial in meeting any of the burdens of proof that were upon it. The Lower Court's order failed to consider the statutes of limitation applicable in this case and wrongly awarded both public and private easements that fail to meet the legal parameters to infringe upon Appellant's property rights. The land in question has been in Appellant's family for generations and until Respondent bought the neighboring property, had peacefully coexisted with those seeking to use the disputed road for hunting or forestry. Respondent is the first to try and attempt adverse possession of an easement and Respondent cannot show that others have been adverse in the past. Moreover, Respondent's attempts to establish an easement by grant fail to fully comprehend and examine the chains of title of the five tracts Appellant owns or to fully understand the notice laws applicable to easements by grant. Three weak easement theories do not make one strong easement. Appellant prays for reversal of the Lower Court's order.

Respectfully submitted,

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November 29, 2021