THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-In-Equity

Appellate Case No. 2022-001145
Circuit Court Case No. 2020 CP-22-00808

3D Land Holdings, LLC, Respondent,

v.

Willis J. Johnson, Virginia Smith,
Marcella Coachman, Toni Owens,
Brandon L. Carr and Henry Lee Green, Appellants.

REPLY BRIEF OF APPELLANTS

/s/ Cynthia Ranck Person
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INTRODUCTION

This is an appeal of a decision by a Master-in-Equity granting Respondent, 3D Land Holdings, LLC, a prescriptive easement over land owned by Appellants, Willis J. Johnson, Virginia Smith, Marcella Coachman, Toni Owens, Brandon L. Carr and Henry Lee Green, (hereinafter collectively referred to as "Coachman heirs"). The Coachman heirs filed their initial brief on September 15, 2022. Respondent filed its initial brief on October 24, 2022, and this brief is filed in reply thereto on behalf of the Coachman heirs.

REPLY TO MATTERS RAISED IN RESPONDENT'S INITIAL BRIEF

A.
PRETRIAL RULE 12(b)(6) MOTION TO DISMISS COMPLAINT

1. Evidence presented at trial should not be considered in examining Appellants' pretrial Motion to Dismiss Complaint for failure to state a cause of action.

Respondent 3D Land Holdings proposes that evidence presented at trial should be considered by this court in reviewing the Coachman heirs' Rule 12(b)(6), SCRCP, pretrial Motion to Dismiss the Complaint for failure to state a cause of action. Respondent argues that the well-established body of law limiting review of Rule 12(b)(6) pretrial motions to the four corners of the complaint should not apply because "the procedural posture in this case is uniquely distinguishable." (Respondent's Initial Brief, hereinafter "RIB," p. 5).

The Coachman heirs framed their first issue on appeal as follows:

> "The trial court erred in denying Coachman heirs' Motion to Dismiss and/or for Judgment on the Pleadings where the complaint failed to set forth facts sufficient to state a cause of action ... ."

(Appellants' Initial Brief, hereinafter "AIB," p. 6).

Respondent re-framed the issue as:

> "The factual allegations of the complaint, as deemed admitted by the Defendants' default *together with the evidence presented at the hearing* support the claim for an easement by prescription."

(RIB, p. 5) (emphasis added). Respondent's re-framed argument is neither logical nor based on proper legal authority. Appellants have found no legal precedent in the context of a Rule 12(b)(6) motion that permits a deficient complaint to be rectified by evidence adduced at trial.

In support of its proposition, Respondent, 3D Land Holdings, cites the case of Gilbert v. Miller, 356 S.C. 25, 586 S.E.2d 861 (2003), which discusses the well-settled principle that a *pretrial* Rule 12(b)(6) Motion to Dismiss is automatically converted to a *pretrial* Rule 56, SCRCP, Motion for Summary Judgment where affidavits or other evidentiary matters are submitted in response to the Motion to Dismiss. Respondent extrapolates from this principle that evidence adduced at trial should be considered in evaluating the pretrial Rule 12(b)(6) Motion to Dismiss in this case because "[a]t the hearing, the Master admitted evidence – without objection by the Defendants ... [and] to the extent there was evidence adduced supplementing the pleading, the question is no longer limited to the allegations of the complaint." (RIB, p. 6).

Gilbert involves the conversion of one *pretrial* motion to another pretrial motion based on *pretrial* evidentiary matters submitted as part of those pretrial motions. Gilbert does not suggest that evidence adduced at trial *after* a pretrial Rule 12(b)(6) motion has already been filed and decided could somehow be used retroactively to review the sufficiency of the complaint. In this case (as in all cases), evidence adduced at the final hearing did not exist at the time the pretrial Motion to Dismiss was filed or decided. It is curious to imagine how a court could possibly consider trial evidence that has not yet been given in making a decision on a pretrial motion. This would also defeat the requirement of a Plaintiff to plead a sufficient complaint.

In the present case, the Coachman heirs' Rule 12(b)(6) Motion to Dismiss was filed prior to trial. 3D Land Holdings, LLC, did not file a response nor did the court hold a hearing. The trial judge made his decision on the Motion to Dismiss prior to taking evidence at the final hearing.

South Carolina courts have consistently held that "Rule 12(b)(6) ... is not a vehicle for addressing the underlying merits of the claim." Doe v. Oconee Memorial Hospital, __ S.E.2d __ (2022), 2022, WL 4361698 (Ct. App. September 21, 2022) (citations omitted), and that "[i]n considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Doe v. Marion, 373 S.C. 390, 397, 645 S.E.2d 245, 247 (2007). "The circuit court may dismiss a claim when the defendant demonstrates the plaintiff's failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court," Hambrick v. GMAC Mortgage Corporation, 370 S.C. 118, 121-122, 634 S.E.2d 5, 7 (Ct. App. 2006).

2. Entry of default does not equate to an admission of liability where complaint is insufficient.

Respondent argues that "as parties in default, Defendants are deemed to have admitted the truth of the Plaintiff's allegations and to have conceded liability." (RIB p. 5). This argument neglects to recognize the requirement of a sufficient complaint in the first place as a prerequisite.

South Carolina courts are very clear that the entry of default does not admit the complaint states a cause of action. "[I]f a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error." Mutual Savings and Loan Association v. McKenzie, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980). The entry of default operates as an admission only of the well-pleaded allegations of the complaint. State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 488 S.E.2d 528, 530 (Ct. App. 1985),

and "[t]he facts pleaded must accordingly be sufficient to form a legal basis for the judgment taken by default, or it will be reversed on appeal or set aside on proper application." Gadsden v. Home Fertilizer & Chemical Co., 89 S.C. 483, 72 S.E. 15, 17 (1911).

Respondent cites three cases in support of its argument, Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998); Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978); and Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013). (RIB, pp. 5-6). All three cases address the rights and procedures relative to a final damages hearing in default cases where sufficiency of the complaint was not at issue. These cases have nothing to do with evaluating the sufficiency of a complaint in the context of a Rule 12(b)(6) pretrial motion, and they do not change well established law, as set forth above and in Appellants' Initial Brief (AIB, pp. 11-15), that entry of default does not amount to an admission of liability unless the underlying complaint alleges facts sufficient to state a cause of action.

A deficient complaint is not cured by entry of default nor do the cases cited stand for that proposition.

3. Admissions by entry of default are only to well pleaded facts, not legal or other conclusions.

While Appellants agree, as Respondent notes, that "a cause of action does not have to be pleaded in exact, precise legal language" or "*in haec verba*," (RIB, p. 16), it is, nevertheless, 3D Land Holdings' burden to establish a *prima facie* case by presenting ***facts*** on every element of the cause of action, not merely legal or other conclusions. "When a plaintiff states nothing more than legal conclusions, a claim should fail ... [and while the courts] recognize the pleadings must be liberally construed ... Rule 12(b)(6) ***requires*** the plaintiff to allege ***facts***" and not simply legal conclusions. Paradis v. Charleston County School District, 424 S.C. 603, 613-614, 819 S.E.2d 147, 153 (Ct. App. 2018) (emphasis added) (reversed on other grounds).

The rule that entry of default operates as an admission "does not apply to allegations which are not well pleaded, and hence conclusions of law are not admitted, as are not evidentiary facts, nor mere inferences or conclusions of facts, even if alleged in the pleading, nor inferences or conclusions from facts not stated, nor matters of opinion, nor surplusage and irrelevant matter." State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41, 53 (1935). Similarly, Rule 8(d), SCRCP, provides that "[a]verments in a pleading to which no responsive pleading is required or permitted *shall be taken as denied* or avoided." (emphasis added). Thus, "the court is required to presume all well pled *facts*, *not propositions of law*, to be true." HHHunt Corporation v. Town of Lexington, 389 S.C. 623, 636, 699 S.E.2d 699, 705 (Ct. App. 2010) (emphasis added).

Respondent's brief discusses the elements of prescriptive easement, but does not explain how those elements were established *by the complaint alone*, and instead incorporates references to trial testimony and documents throughout its arguments. Respondent essentially blends the Coachman heirs' *pretrial* Rule 12(b)(6) Motion to Dismiss for failure of the Complaint to plead facts on all the elements of a prescriptive easement, with their *post-trial* issue of failure to establish all the elements of a prescriptive easement by clear and convincing evidence. These are two completely separate issues on appeal with different standards of review and different bodies of law to be applied.

With respect to the issue of sufficiency of the complaint, the elements of a prescriptive easement required to be established by facts plead in the Complaint are: (1) continuous and uninterrupted use by Plaintiff for 20 years, (2) the identity of the thing enjoyed, and (3) use which is adverse, *i.e.*, contrary to the rights of the true property owner. Simmons v. Berkeley Electric Coop., Inc., 419 S.C. 223, 797 S.E.2d 387 (2016).

At the time the Complaint was filed in 2020, Plaintiff had owned the land in question for under one year, far less than the required 20 years. The Coachman heirs specifically pointed this out in their Motion to Dismiss.[1] In an attempt to cure this deficiency in the pleading, Respondent repeatedly claims to rely on "tacking" predecessors in title. (RIB 9, 15, 23). South Carolina law is clear that when relying on tacking previous owners, "[t]he use by the previous owners must also satisfy *all of the elements of a prescriptive easement*." Paine Gayle Properties, LLC v. CSX Transportation., Inc., 400 S.C. 568, 585, 735 S.E.2d 528, 537 (Ct. App. 2012) (emphasis added). There is nothing in the Complaint about Plaintiff's predecessors in interest or their use or the character of their use of this road.

The Coachman heirs examined the Complaint in detail in its initial brief and will not repeat that detailed examination here. (AIB pp. 13-15). As set forth in the initial brief, viewing the well-pleaded facts in the light most favorable to 3D Land Holdings, the Complaint fails to set forth any facts to establish two of the three essential elements of a prescriptive easement, *i.e.*, (1) that Plaintiff *and* its predecessors in interest used the existing dirt road continuously and without interruption for a period of 20 years or more, *and* (2) that the nature of such continuous and uninterrupted use by Plaintiff and its predecessors in interest was adverse to the Coachman landowners, i.e., contrary to the rights of the property owner.

At best, the Complaint establishes the existence of a dirt road that Plaintiff has used to access his land since October 30, 2019, without challenge from the Coachman landowners. While 3D Land Holdings repeatedly claims to be relying on "tacking," at no point is it pleaded in the Complaint. There is no reference to any use or the nature and character of any use of this dirt

[1] Respondent refers to Appellants' Motion to Dismiss as general and non-specific with respect to this issue. The motion consisted of 12 pages and 60 paragraphs stating very particularly the grounds upon which the Coachman heirs requested dismissal of the Complaint. (Defendants' Motion to Dismiss).

road by Plaintiff's predecessors in title. The Complaint makes vague and general references that the existing road was utilized for many years or even "decades" without challenge, but there are no facts alleged to establish who used the road, when it was used, how frequently, over what period of time, for what purpose, under what circumstances, whether it was continuous, whether it was uninterrupted, whether it was by permission, whether it was adverse or contrary to the owners, or whether the Coachman landowners were aware of the use. These are all part of 3D Land Holdings' burden of proof.

In easement cases, South Carolina courts have been clear that "[e]vidence establishing the mere *fact* of use does not necessarily equate with evidence establishing the *character* of such use." Morrow v. Dyches, 328 S.C. 522, 528, 492 S.E.2d 420, 424 (Ct. App. 1997) (emphasis added). Thus, pleading the existence of a dirt road that was used by unspecified persons for unspecified times under unknown circumstances does not sufficiently describe the requisite character of use to state a cause of action. There is a complete absence of any facts set forth in the Complaint to establish a continuous, uninterrupted use for 20 years by Plaintiff *and* its predecessors in interest or that such use was adverse to the interests of the Coachman heirs.

4. Standard of review is same as trial court.

Notwithstanding well settled law that in reviewing a decision on a motion under Rule 12(b)(6), SCRCP, "the appellate court applies the same standard of review as the trial court." Doe v. Marion, supra., 397, 247, Respondent argues that "the appropriate scope of review extends only to correction of errors of law and the Master's findings of fact should not be disturbed on appeal where the admitted allegations together with the evidence of the real estate records supports the finding of easement by prescription." (RIB, p. 7).

Respondent has not offered any legal authority for departing from this well-established standard of review of a pretrial motion to dismiss, and, accordingly, Appellants submit that the proper standard of review is the same as the trial court as set forth in their initial brief. (AIB, p. 10).

For these additional reasons, the Coachman heirs submit that the Complaint fails to state a cause of action and should be dismissed with prejudice without further inquiry.

B.
FINAL HEARING

1. Burden and standard of proof.

Respondent 3D Land Holdings spends a great deal of its brief reviewing the deeds and plats presented at trial and the testimony of its sole witness, Attorney Weathers. Even assuming that all of Weathers' testimony and every single item of evidence presented by Respondent at trial was proper and admissible, the most it establishes is that a dirt road exists on the Coachman heirs' property and that it appears to have been used for some unspecified period of time. Neither the documents produced at trial nor the testimony of Mr. Weathers established who used the road, when, for how long, and under what circumstances, and no amount of rehashing the documents and trial evidence can bring facts on those essential elements into existence.

As set forth above, evidence of use does not establish the character of that use. Morrow, supra., 528, 424. Applying that principle to this case, the existence of a dirt road on the Coachman heirs' land that appears to have been used, does not mean that it was Respondent's predecessors in title who used it without Respondent presenting some independent evidence of that. Even if Respondent's predecessors had indeed used the road, it is still not proper to assume that their use was continuous and uninterrupted for a period of twenty years, or was without

permission of the Coachman heirs, or was open, notorious, and used in a manner that was adverse to the interests of the Coachman heirs where Respondent did not offer one shred of evidence to establish that.

Given the lack of any proof about who used the road or any details about when and how it was used, there are a myriad of equally, if not more, plausible explanations for the existence of the dirt road on the Coachman land. For example, perhaps the dirt road was regularly used by the Coachman family themselves as a driveway to access their own properties that are situated on either side of that very dirt road. Perhaps the road was used by third parties and was never used by the Respondent's predecessors in title. Perhaps the dirt road was an easement in gross expressly given by the Coachmans to specific members of the Dereef family. Given the lack of evidence presented, all of these scenarios are equally likely. The possibilities are endless because there was no evidence presented by Respondent about the reality of the situation with respect to the identity of the user and the nature, extent and character of use, all of which are its burden to establish with actual facts not assumptions.

Not only is it Respondent's burden to prove each separate element of a prescriptive easement, but South Carolina law requires that "[the] party claiming a prescriptive easement has the burden of proving all elements by *clear and convincing* evidence," which is a higher standard of proof than is normally required in a civil case. Bundy v. Shirley, 412 S.C. 292, 306, 772 S.E.2d 163, 170 (2015) (emphasis added). Thus, in South Carolina, a prescriptive easement "is not to arise without *clear, unequivocal proof* of such facts as will give the right from the owner to the claimant." Id. at 305, 170.

Unlike the Coachman heirs, Respondent 3D Land Holdings was given every opportunity to call any fact witness it wished at the final hearing to provide evidence on the necessary

elements of a prescriptive easement, but Respondent did not elect to call witnesses who had actual firsthand knowledge. Instead, Respondent chose to rely on the testimony of a single witness who had no personal or firsthand familiarity with the facts beyond his review of documents. Mr. Weathers admitted that he was not personally aware of how the dirt road was used, by whom or with what frequency, or whether or not the road was an easement in gross and used by the Dereefs with the permission of the Coachmans. (AIB, pp. 22-23). Neither the documents nor Mr. Weathers' testimony provide ***any*** evidence, and certainly not clear and convincing evidence, that 3D Land Holdings and its predecessors in title used the dirt road continuously and without interruption for a period of 20 years, and that such use was adverse and against the rights of the Coachman heirs.

"In order to establish continuity of use by tacking, a claimant must show that predecessors in title ***actually used*** the alleged easement" and tacking is not permitted when "it is ***unclear that use by claimant's predecessor was adverse***." Bundy, supra, 413, 175 (emphasis added). That burden falls squarely on Respondent 3D Land Holdings and it was not met.

2. Coachman heirs have the right to argue that permissive use defeats a prescriptive easement.

Respondent 3D Land claims that the Coachman heirs are not permitted to argue the well settled point of law that permissive use defeats a prescriptive easement. (RIB, pp. 16-17). Respondent further refers to the Coachman heirs' argument on this point as "vague" and "conclusory" (RIB, p. 17), and states that:

> It does not appear that the Defendants made this permissive use argument in their motion to dismiss or at the hearing. Under appellate preservation rules, Defendants are bound to the grounds as stated at trial, and they should not be allowed to argue this ground on appeal.

(RIB, p. 16, fn. 19) (citations omitted).

The Coachman heirs filed a timely Notice of Appeal and were under no further obligation to make an objection at trial or otherwise "preserve" the right to argue on appeal that Respondent 3D Land Holdings failed to meet its burden of proof on critical elements of its purported cause of action. Indeed, one of the issues raised in the Coachman heirs' Notice of Appeal, was that Respondent did not meet its burden of proving a prescriptive easement. (Notice of Appeal; AIB, p. 6). A critical element that Respondent had the burden to prove was that the alleged use by its predecessors in title was "adverse" or against the rights of the owner. The Coachman heirs have every right to argue and cite law to the effect that the Respondent has not met that burden because the evidence presented at trial does not rule out permissive use, and permission defeats the element of adversity. (AIB, pp. 21-22).

Respondent's brief goes on to discuss "presumptions" and "shifting burdens" in the context of permissive use. (RIB, pp. 16-17). Under the law, a rebuttable presumption arises only after a Plaintiff has met his burden of proving adversity. If and when a Plaintiff proves an adverse use, the burden then shifts to Defendants to prove a permissive use. To prove an adverse use, Plaintiff is required to prove a use that was enjoyed "openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years." Carolina Center Building Corp. v. Enmark Stations, Inc., 433 S.C. 144, 154, 857 S.E.2d 16, 22 (2021).

In this case, the Coachman heirs submit that Respondent has not met its burden of proving adversity, so the presumption and shifting of the burden is a moot issue. If, however, Respondent were found to have met the burden of proving adversity, the Coachman heirs should have been given an opportunity to rebut that presumption with proof of permissive use. As set forth in their initial brief and hereinafter, they were denied the opportunity to present any evidence for any purpose. (AIB, pp. 25-26).

3. Whether the dirt road is the "only access" is irrelevant to a prescriptive easement.

Respondent repeatedly describes the dirt road in question as the "only access" to its property. (RIB, pp. 10, 11, 15). This is a legal conclusion, but even if it were a fact, it is of no significance as it is not an element of a prescriptive easement. Even if the dirt road were the only access to Respondent's lot, that does not, in and of itself, imply use by Respondent's predecessors in title and it certainly does not imply the nature or character of whatever any use may have been.

The reality of this situation is that Respondent 3D Land Holdings, LLC, is an experienced developer who purchased this land-locked lot of heirs' property at its own risk knowing that litigation was pending over the alleged easement, and knowing that a decision had not yet been rendered. Indeed, 3D Land voluntarily substituted as a Plaintiff in this case. (February 17, 2022, Court Order). The lot Respondent purchased is bounded on the north and south by other land owned by the Dereef heirs. The Coachman land lies south of the Dereef land and does not abut Respondent's parcel. Respondent's lot is bounded on the east and west by other heirs' property belonging to other families who are not related to either the Dereefs or the Coachmans.

Respondent 3D Land Holdings assumed the risk of not having access when it purchased a land-locked parcel surrounded by heirs' property as the first owner outside of the Dereef family in more than a hundred years. 3D Land Holdings does not have a right to use the Coachman heirs' road simply because it exists even if it is the only access to this property. There is no unity of title that would permit the finding of an easement by necessity, and this case is limited to a prescriptive easement. Thus, whether or not the dirt road is the "only access" to the land-locked lot purchased by 3D Land Holdings is completely irrelevant and should not be considered in this context.

4. Standard of review with respect to evidence presented at trial.

Both Appellants and Respondent acknowledge that "[t]he standard of review for a declaratory judgment action is ... determined by the nature of the underlying issue." Bundy, supra. 301, 168, and both agree that in an easement case, "[t]he determination of the existence of an easement is a question of fact in a law action" and "the determination of the extent of an easement" is a matter in equity. Id. at 303, 168.

In equitable matters, "an appellate court may review the trial judge's findings *de novo*." Plott v. Justin Enterprises, 374 S.C. 504, 510, 649 S.E.2d 92, 95 (Ct. App. 2007). Hardy v. Aiken, 369 S.C. 160, 631 S.E.2d 539 (2006). In actions at law, the reviewing court must determine whether the trial court's findings of fact are "reasonably supported by evidence." Ritter and Associates, Inc. v. Buchanan Volkswagen, Inc., 405 S.C. 643, 649, 748 S.E.2d 801, 804 (2013). "Questions of law may be decided with no particular deference to the trial court ... [and] [t]his court may correct errors of law in both legal and equity actions." South Carolina Department of Transportation v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 13 (Ct. App. 2008).

Appellants submit that this case presents a hybrid of legal and equitable issues, but even if the most strict standard is employed, the grant of a prescriptive easement is improper because there is a complete absence of evidence on essential elements. Accordingly, not only is the finding of a prescriptive easement not "reasonably supported" by the evidence, there are necessary elements that are not supported by ***any*** evidence. When there is no evidence presented on essential issues, the finding cannot be affirmed.

5. Coachman heirs should have been permitted to offer evidence at the final hearing.

Respondent argues that because default had been entered, the Coachman heirs were not entitled to present evidence at the final hearing, and that they were "limited to cross examining the witnesses and objecting to evidence." (RIB, p. 27). The cases cited by Respondent in support of its position are cases in which the defaulting parties' admissions to the complaint had resulted in liability. As set forth above, the entry of default operates as an admission *only* of the well-pleaded allegations of the Complaint. State ex rel. Medlock, supra. 530. "[I]f a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error." Mutual Savings and Loan Association, supra. 632, 424.

Furthermore, unlike the facts in the present case, the cases cited by Respondent involve facts where there was a clear distinction between liability and damages and the defaulting parties' admissions clearly constituted "liability." Howard, supra., involved the conversion of a car for money; Roche, supra., was a slip and fall case; and Limehouse, supra., was a RICO claim.

Rule 55(b)(2), SCRCP, provides in pertinent part as follows:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper ... .

(emphasis added). In this case, admission of the well-pleaded facts of the Complaint left a multitude of unanswered questions on matters critical to the issue before the court. An easement case is different than a personal injury or other case where there is a bright line between liability and damages. In an easement case, it is hard to pinpoint where "liability" ends and "damages" begin.

In the interest of justice and to "establish the truth," as set forth in Rule (55)(b)(2), at a minimum, the Coachman heirs should have been permitted to present relevant evidence on any matter that was not admitted by virtue of the entry of default, and it was error of law and abuse of discretion for the trial court to prevent them from doing so. Even if the trial court found that Respondent 3D Land Holdings had met its burden of proof on the element of adverse use, this raises a ***rebuttable*** presumption and the Coachman heirs should have been given an opportunity to present evidence of use by permission in order to rebut.

There would have been no delay of the hearing or prejudice to Respondent 3D Land. The Coachman parties and witnesses were all present at the hearing and ready, willing, and able to testify. An independent non-party witness was also present and available to testify. Leon Young, the eighty-year-old grandson of the original Dereef family, a predecessor in title to Respondent, who still owns one of the three subdivided Dereef parcels, was present and willing to testify about the use of the road and the nature and extent of that use. (Transcript, p. 73, ln. 18 - 21).

If establishing the truth had been the goal, as it should have been, relevant testimony from an objective non-party witness who had personal firsthand knowledge and was present in the courtroom and available to testify should not only have been permitted, but welcomed. Both at the start of the hearing and again after 3D Land Holdings rested its case, the Coachman heirs requested to introduce evidence of facts other than those well-pleaded facts that had been admitted in the complaint by virtue of entry of default. The court denied this request and permitted no evidence whatsoever to be presented by or on behalf of the Coachman heirs, even from independent non-party witnesses. (Transcript p. 10, ln. 16 – p. 11, ln. 2) (Transcript p. 73, ln. 18 – p. 74, ln. 3); (Transcript p. 74, ln. 8 – p. 75 ln. 5).

The trial court's refusal to hear testimony from the very witnesses who possessed firsthand knowledge of the use and character of use of the existing road and instead relying solely on testimony offered by a local attorney who had no personal or firsthand knowledge of the underlying facts, as the basis for rendering final judgment, was an abuse of discretion and error of law that resulted in great prejudice to the Coachman heirs'.

6. Significance of exhibits entered into evidence without objection.

Respondent repeatedly references documents that were admitted into evidence "without objection," (RIB, pp. 4, 6, 10, 15). The lack of objection by the non-moving party to the admission of documents does not preclude the non-moving party from making its own argument about the significance of the evidence admitted. There is no implication inherent in the lack of objection that the non-moving party agrees with the moving party's argument about the significance of that evidence. In this case, counsel for the Coachman heirs specifically noted this on the record and the judge confirmed when various exhibits were introduced and admitted into evidence. (Transcript, p. 14, ln. 11 – p. 15, ln. 19).

7. Appellants preserved evidentiary issues for appeal.

Coachman heirs raised the following evidentiary issues in their appeal: (1) admission of Weathers' testimony as an expert, (2) admission of Weathers' testimony as beyond the scope of expertise as offered and admitted, (3) admission of Weathers' testimony that constituted legal conclusions, (4) admission of inadmissible hearsay, and (5) Weathers' reference to and reliance on inadmissible hearsay. Respondent argues that the Coachman heirs did not properly preserve those issues for appeal and/or that they were harmless error.

In response, the Coachman heirs rely on the arguments and citations to the record set forth in their initial brief. (AIB, pp. 18-24). In addition, Rule 103(a)(1)(a), SCRE, provides that

in order to preserve an issue relative to the admission of evidence, a timely objection must appear of record and grounds are required only "if the specific ground was not apparent from the context."

Counsel for the Coachman heirs made objections as set forth in the citations to the record contained in its initial brief. (AIB, p. 18-24). All objections either stated the grounds or the grounds were apparent from the context. It is well settled that once an objection is made to a line of questioning and ruled upon by the judge, counsel does not have to repeatedly make the same objection in order to preserve the issue for appeal. State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978).

With respect to the admission of testimony from Mr. Weathers, Respondent's expert witness, counsel for Respondent made a specific and detailed offer stating the grounds for proposed admission, (Transcript, p. 17, ln. 20-21; p. 19, ln. 15-19; p. 22, ln. 3-10), and in direct response thereto, counsel for the Coachman heirs objected. The context made the basis for objection quite clear without the necessity of counsel for Coachman heirs repeating what Respondent's counsel had just said. The fact that the judge did not inquire about the basis for the objection supports that the grounds were obvious. (Transcript, p. 22, ln. 12-15; p. 18, ln. 2).

8. Reference to matters not of record.

Respondent's initial brief makes reference to matters not of record and states that at "[a] hearing held before the Master on January 10, 2022, the Court ruled and ordered a declaratory judgment for Plaintiff granting a right of access over the road in question," (RIB, p. 2, referencing Tr: 16:11-14). The brief also states "[i]t appears that there also was a hearing on February 14, 2022," and that "[t]he Master thought a resolution had been reached; however, before he entered a formal written order based on his bench ruling, the Defendants retained

counsel and appeared in the action by filing several motions," (RIB, pp. 2-3). It goes on to say that "[s]ince the earlier hearings had not been transcribed, the Master convened a third hearing on June 16, 2022, at which Defendants appeared with Counsel." (RIB, p. 4).

While this may well be Respondent's recollection or interpretation of events, these representations are not supported by the lower court record and they are very different from the background as related by the judge at the final hearing and what the Coachman heirs understood to have taken place. The judge stated on the record at the final hearing that "previously ... some of the individuals were here and there was a ***discussion*** and we thought a ***resolution*** had been reached. Clearly, based on your representation, one was not, so that's why we are here again today." (Transcript, p. 9, ln. 25 – p. 10, ln. 4).

A "resolution" based on a "discussion" is far different than an "order" or "bench ruling" or a "declaratory judgment" based on a "hearing" as characterized by Respondent. Counsel for the Coachman heirs was not involved in the case during these events, and does not dispute that this may be the understanding and recollection of counsel for Respondent. (Transcript, p. 15, ln. 22 – p. 16, ln. 23). These are matters, however, that are not of record and should not be raised, discussed, or considered in the context of this appeal.

CONCLUSION

For the foregoing reasons and the reasons set forth in their initial brief, the Coachman heirs respectfully request this court to grant the following relief:

1. Reverse the trial court's denial of their Motion to Dismiss the complaint for failure to state a cause of action and enter judgment in favor of the Coachman heirs.

2. Reverse the trial court's finding of a prescriptive easement on the basis that it is not reasonably supported by the evidence and/or that Respondent failed to prove a prescriptive easement by clear and convincing evidence, and enter judgment in favor of the Coachman heirs.
3. In the alternative, if this court does not reverse the decision of the lower court and enter judgment in favor of the Coachman heirs, then they would request this court to remand the case and allow them to present relevant evidence on permissive use and any matter that was not admitted by virtue of the entry of default.

Respectfully submitted,

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November 3, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-In-Equity

Appellate Case No. 2022-001145
Circuit Court Case No. 2020 CP-22-00808

3D Land Holdings, LLC, Respondent,

v.

Willis J. Johnson, Virginia Smith,
Marcella Coachman, Toni Owens,
Brandon L. Carr and Henry Lee Green, Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that APPELLANTS' REPLY BRIEF was served this 3rd day of November, 2022, upon Respondent by placing a copy of same in the U.S. Mail, postage prepaid, addressed to its counsel of record:

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November 3, 2022

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