In the

Supreme Court of Virginia

At Richmond

Record No. 160664

JOANNA PALMER,

Appellant,

– v. –

R. A. YANCEY LUMBER CORPORATION,

Appellee.

BRIEF OF APPELLEE

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INTRODUCTION

In her appeal, the Appellant, Joanna Palmer ("Palmer"), argues that the trial court erred in (I) establishing the scope of an easement by necessity by finding that certain modifications to an access road were reasonably necessary and (II) determining that the use of tractor-trailer trucks across the access road were reasonably necessary for the beneficial enjoyment of property owned by the Appellee, R.A. Yancey Lumber Corporation ("Yancey"). Palmer's arguments fail, however, for at least three reasons.

First, Palmer misstates the posture of the case at the trial court, arguing that the trial court erred in widening an existing easement. In fact, the parties had not established an easement previously and, because the parties could not agree on the scope of the easement, Yancey filed suit to establish an easement across property owned by Palmer. By stipulation before trial, the parties agreed that Yancey was entitled to an easement by necessity. The remaining issue and purpose of the trial was to establish the scope of that easement by necessity. The trial court did not widen any easement, but rather established the scope and width of the stipulated easement by necessity for the first time.

Second, the trial court's determination of the scope and width of the easement by necessity and the permitted use of tractor-trailers across the easement was in accordance and consistent with well-established Virginia law regarding easements by necessity. Despite Palmer's arguments to the contrary, these are not issues of first impression in Virginia. In effect, Palmer asks this Court to reverse decades of established Supreme Court precedent, specifically *Keen v. Paragon Jewel Coal Co.*, 203 Va. 175, 122 S.E.2d 543, (1961) and *Smith v. Virginia Iron, Coal & Coke Co.*, 143 Va. 159, 129 S.E. 274 (1925). In her argument to reverse *Keen* and *Smith*, Palmer conflates the elements of an easement by necessity with those of prescriptive and express easements and invites the Court to merge these types of easements together. She asks the Court to find that the scope of an easement by necessity should be limited to the parties' prior use and width of the access road as if it were a prescriptive easement. Alternatively, she asks the Court to add a new requirement that the parties consent to an easement by necessity as if it were an express easement.

Finally, the trial court's determination was well supported by the unrebutted testimony of Yancey's expert witnesses at trial. While Yancey presented a significant amount of evidence to assist the trial court in determining what was reasonably necessary for the easement by

necessity, Palmer presented no reliable or objective evidence of what was reasonably necessary or to rebut the testimony of Yancey's experts. As such, Palmer cannot show that the trial court's determination of what was reasonably necessary was plainly wrong or without evidence to support it.

Accordingly, for the reasons discussed in more detail below, Yancey respectfully requests that the Court affirm the Final Judgment Order entered by the trial court.

STATEMENT OF THE CASE

In her statement of the case, Palmer misstates the nature of her assignments of error, and the posture of the case at the trial level. Prior to trial, based on the uncontested evidence, Yancey and Palmer stipulated that Yancey was entitled to an easement by necessity across Palmer's Property to access Yancey's property. The only issue for determination at trial was the scope of that easement by necessity. Contrary to Palmer's Assignments of Error, the trial court did not ***expand*** the width of Yancey's easement. Rather, the court ***established*** the scope of Yancey's easement by necessity, after the parties stipulated that Yancey was entitled to such an easement.

The issue on appeal, therefore, is whether the trial court's determination of what is reasonably necessary was plainly wrong or without

evidence to support it. The trial court based its determination of what was reasonably necessary—and what was not reasonably necessary—on a significant amount of evidence, including the *unrebutted* testimony from Yancey's expert witnesses. Although Palmer did not like the trial court's decision, Palmer cannot reasonably contend that the trial court's judgment is not supported by sufficient evidence, when Palmer failed to present *any* reliable or objective evidence as to what is reasonably necessary to timber the property, or any testimony or evidence to rebut Yancey's expert witness. For these reasons, the trial court's ruling should stand.

STATEMENT OF FACTS

Yancey is a small, closely held family business started in 1959. Yancey owns 317 contiguous acres in fee simple located in Albemarle County and Nelson County, Virginia (the "Yancey Property"). (J.A. 29 at ¶ 1.) Palmer owns approximately 44 acres in Albemarle County ("Palmer's Property"). (J.A. 29 at ¶ 2.) Until 1828, Richard Richardson owned both the Yancey Property and Palmer's Property in fee simple (the "Richardson Property"). (J.A. 30 at ¶ 3.) The parties stipulated that, upon Richardson's death in 1828 and through the probate of his will, the Richardson Property was subdivided and the Yancey Property became landlocked. (J.A. 30 at ¶ 4.)

There are no express easements granting access for ingress and egress to the Yancey Property from any state road. (J.A. 30 at ¶ 5.) A private access road runs from State Route 736, through Palmer's Property and two other properties owned by third parties to the Yancey Property (the "Access Road"). (J.A. 30 at ¶ 7.) The Access Road is the sole means of ingress and egress from the Yancey Property to a public road. (J.A. 30 at ¶ 8.)

Palmer stipulated that the ability to timber the Yancey Property is reasonably necessary for the enjoyment of the Yancey Property. (J.A. 31 at ¶ 12.) As Yancey began preparing to log its 317 acres, its owner approached the owners of the three neighboring properties to request an express easement for use of the Access Road and to make reasonable improvements to improve the stability and integrity of the Access Road. (J.A. 63 at lines 10–20.) Two of the neighbors agreed, executing express easements for the Access Road; however, Palmer refused. (J.A. 63–64.) Based on Palmer's refusal, Yancey was left with no choice but to file suit to establish an easement by necessity so that it could access and timber its land.

MATERIAL PROCEEDINGS BELOW

On July 21, 2014, Yancey filed its Complaint in this matter seeking declaratory relief establishing an easement across Palmer's Property, and enjoining Palmer from interfering with its right to use such easement. In its Complaint, Yancey alleged that it was entitled to an easement across Palmer's Property as an easement by necessity (Count I), an easement implied by prior use (Count II), or a prescriptive easement (Count III). (J.A. 8–16.)

Prior to the trial, the parties agreed on certain stipulations to streamline the presentation of evidence. (*See generally* J.A. 29-32.) Included in these stipulations were the agreements that (i) Yancey was entitled to an easement by necessity across Palmer's Property, via the Access Road; and (ii) the ability to timber the Yancey Property is reasonably necessary for the enjoyment of the Yancey Property. (J.A. 30 at ¶ 6; J.A. 31 at ¶¶ 11 and 12.) Yancey voluntarily dismissed Count II and III. (J.A. 31 at ¶ 13.) However, the parties could not agree on the scope of the easement by necessity.

On March 30 and 31, 2015, a bench trial was held in this matter. At trial, Yancey's expert witness, Larry Endsley—a forester with over 30 years of experience in the wood-products and forestry industry—provided

extensive testimony regarding what was reasonably necessary to timber the Yancey Property, and what alterations or modifications to the road were reasonably necessary to do so. (J.A. 138 at line 23 to J.A. 181.) After *voir dire* by her attorney, Palmer did not object to having Mr. Endsley declared an expert. (J.A. 132.) Conversely, Palmer presented no testimony, expert or otherwise, to rebut Mr. Endsley's testimony other than Palmer's lay opinion—lacking any experience in timbering, forestry, or road construction—that the Access Road was perfectly suitable, as is, for timbering the Yancey Property. (J.A. 358 at lines 5-13; J.A. 583 at line 25 to J.A. 584 at line 21.)

At the conclusion of the evidence, the trial court took the matter under advisement to consider the case law and review the exhibits. (J.A. 478 at lines 9–20.) On May 4, 2015, the trial court held a hearing to issue an oral ruling in the matter. (J.A. 478.) At that hearing, based on the stipulations of the parties, the trial court stated that the sole dispute before the trial court was "the scope of the easement by necessity." (J.A. 478 at line 21 to J.A. 479 at line 12.) The trial court explained that "the question before the Court is what steps are necessary to enable Yancey to timber the property." (J.A. 479 at lines 9-12.)

At the May 4, 2015 Hearing, the trial court ruled in Yancey's favor, providing in great detail the basis for her ruling. (J.A. 479–89.) Based on the stipulations of the parties and the evidence presented at trial, the trial court ruled that it was reasonably necessary for Yancey to use tractor-trailer trucks to timber its property and that certain improvements to the Access Road were reasonably necessary. (J.A. 482 at line 14 to J.A. 486 at line 7.) However, after considering the extensive evidence in the case, the trial court rejected certain improvements proposed by Yancey and Mr. Endsley in order to balance and protect the land interests of Palmer. (J.A. 484 at line 14 to J.A. 485 at line 2.) Because of the detailed nature of the trial court's ruling—which relied on the stipulations of the parties and the evidence presented at trial—the trial court requested that Yancey's counsel draft an order reflecting her ruling, which counsel for Palmer could review prior to submission to the court. (J.A. 487 at lines 3–9.)

Unable to reach an agreement on the phrasing of the order with Palmer, Yancey submitted a sketch order on October 6, 2015 and advised the trial court that it would seek dates for a hearing. On November 12, 2015, Palmer submitted her objections to the sketch order, and the matter was set for a hearing on November 23, 2015. Notably, in her objections to Yancey's sketch order, Palmer expressly consented to the finding that

tractor-trailers were reasonably necessary and may be driven across the easement. (J.A. 491 at ¶ 4.) Moreover, in her objections, Palmer asked that the width of the road be widened only so much as was needed to support tractor-trailers, specifically at the entrance and the rocky outcropping. (J.A. 492 at ¶ 15.) Palmer also asked that the order include language allowing Yancey to shave down the rocky outcropping to the level of the Access Road. (J.A. 493 at ¶ 17.)

Another hearing was held on November 23, 2015. However, at the suggestion of Palmer's counsel that the trial court should hear evidence about "whether 20 feet is reasonably necessary, or if it's more of a convenience," the trial court continued the hearing until January 8, 2016, to allow the parties to present additional evidence regarding what was reasonably necessary for Yancey to timber the Yancey Property.[1] (J.A. 517 at lines 15–21.) At the hearing on January 8, 2016, the trial court again heard extensive testimony from Yancey's expert witness regarding what was necessary to allow Yancey to timber the Yancey Property. (J.A. 523 at line 7 to J.A. 573 at line 22.) Again, Palmer did not present any

[1] In her statement of the material proceedings below, Palmer mischaracterizes the purpose of the January 8, 2016 hearing, stating that the hearing was "a bench trial … on the extent to which Yancey could widen, relocate, and change the road on Palmer's land." (Brief of Appellant at 2.)

expert witness or any other reliable or objective evidence regarding what was necessary to timber the Yancey Property. The only testimony Palmer presented at the hearing was Palmer's personal opinion as to what was reasonably necessary.[2] (J.A. 574 at line 20 to J.A. 582 at line 15.) At the hearing on January 8, 2016, the trial court finalized the language of, and entered, a Final Judgment Order.

Palmer grossly exaggerates the extent to which the Final Judgment Order permits Yancey to alter the Access Road. Contrary to Palmer's unfounded assertions that the Final Judgment Order granted Yancey permission to relocate or move the Access Road (Brief of Appellant at 9, 20), the Final Judgment Order very clearly states that the "roadbed itself cannot be altered or modified except as set forth in [the] Order," and clearly specifies the limited manner in which Yancey may alter or modify the Access Road. (J.A. 628-630 at ¶ 19; *see also* J.A. 482 at lines 14-18 ("I don't find that Yancey Lumber is trying to move the road from the left or to the right. I find that they are trying to make it manageable for the size

[2] At the November 23, 2015 Hearing, in discussing what width would be reasonable, the trial court indicated its likely reliance on the testimony of Yancey's expert witness, specifically asking counsel for Palmer "what evidence will you present that that is an unreasonable figure?" (J.A. 501 at lines 7-12.) Even after the opportunity and invitation from the trial court to present counter evidence, Palmer failed to present any reliable or objective evidence that the relief granted by the trial court was not reasonably necessary. (J.A. 574 at line 20 to J.A. 582 at line 15.)

vehicles that … are now going to be used to transport the lumber.") Despite Palmer's suggestions otherwise, the Final Judgment Order does not permit the Access Road to encroach into Palmer's yard or to disturb her shed or gas tank. (J.A. 628-630 at ¶ 19.)

In fact, the limited modifications permitted by the trial court are intended to protect the integrity and drivability of the Access Road, and therefore benefit everyone who uses the road.[3] (*Id.*) The Final Judgment Order contains provisions designed to protect the Access Road, the streams running through Palmer's Property, and Palmer's Property itself. For example, the Final Judgment Order required Yancey to "[w]ithin a reasonable time . . . take any and all action to prevent or repair damage to the [Palmer] Property by Yancey." (J.A. 628 at ¶ 17.) It also required Yancey to armor the streambed to minimize erosion and damage to water quality and to comply with state regulations. (J.A. 629 at ¶ 19(ix).) Finally, the Final Judgment Order required Yancey to maintain the Access Road and any improvements thereto. (J.A. 628 at ¶¶ 16 & 19(ii).)

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[3] Prior to trial in this matter, another neighbor performed a very limited timbering of their property in a hostile manner, without obtaining an express easement or a license, and without properly preparing the Access Road. This limited timbering activity using the Access Road led to significant damage to the road and Palmer's Property. This is the exact outcome Yancey wished to avoid, and the reason Yancey filed this suit.

The trial court also considered any burden to Palmer's Property and declined numerous recommendations by Mr. Endsley, such as removal of certain trees, widening of the Access Road in certain areas, and cutting trees and branches to bring more daylight to the Access Road. (J.A. 484 at lines 14-21.) In rendering its decision, the trial court carefully scrutinized the reasonable necessity for Yancey and minimized the additional burden on Palmer. (*See also* J.A. 594 at line 14 to J.A. 597 at line 17 (in which the trial court explains that the Final Judgment Order is intended to address both what is reasonably necessary for Yancey to timber the property, but also to address any burden imposed on Palmer).)

ARGUMENT

I. The Court Correctly Established the Scope of the Easement By Necessity.

A. Standard of Review

Palmer incorrectly states that the issue in Assignment of Error #1 is a question of law, and therefore applies the incorrect standard of review. (Brief of Appellant at 11.) Palmer argues that the Court erred by "allowing the dominant owner to expand the width of an established easement by necessity." (*Id.*) Palmer, however, misstates the posture of the case at the trial level as well as the trial court's ruling. No easement by necessity was "established" prior to this suit; rather, Yancey filed suit to establish an

easement. (J.A. 13-15.) Because Palmer stipulated at trial that Yancey was entitled to an easement by necessity, all that was required at trial was for the court to determine the scope (*i.e.*, the location, width, use, etc.) of that easement. As such, the Final Judgment Order did not "expand the width" of an established easement by necessity. Instead, the Final Judgment Order established the easement and in doing so set forth, *inter alia*, the scope and width of that easement. (*See* J.A. 627 at ¶ 14; 628-630 at ¶ 19.)

The scope of an easement is a question of fact. 28A C.J.S. Easements § 270. Palmer challenges the sufficiency of the evidence supporting the court's determination of the width and scope of the easement. As such, the judgment of the trial court should not be set aside unless it appears from the evidence that the judgment was plainly wrong or without evidence to support it. Va. Code Ann. § 8.01-680; *Haynie v. Brenner*, 216 Va. 722, 724, 222 S.E.2d 546, 548 (1976) ("Since [the trial court's] finding that the easement was not reasonably necessary for the enjoyment of the Haynie property is supported by substantial, competent and credible evidence, we will not disturb it."). Moreover, the Court must "consider the evidence in the light most favorable to the prevailing party." *Forster v. Hall*, 265 Va. 293, 299, 576 S.E.2d 746, 749 (2003).

B. The Court properly established the easement's scope based on unrebutted evidence as to what is reasonably necessary for use of the Yancey Property.

The holder of an easement by necessity is entitled to use the servient estate in any manner that is "*reasonably necessary* for the convenient enjoyment of the servitude." *Smith*, 143 Va. at 164 (emphasis added).[4] The "necessity" is "not a physical or an absolute necessity but a reasonable and practicable necessity." *Id*.

The parties stipulated at trial that Yancey was entitled to an easement by necessity and that timbering the Yancey Property was reasonably necessary for its use and enjoyment. (J.A. 31 at ¶¶ 11, 12.) The only determination for the Court, therefore, was what was reasonably necessary for Yancey to timber the property. In its ruling, the trial court determined that certain modifications and alterations were required in order to allow the use of tractor-trailer trucks, both of which are reasonably necessary to timber the property. (J.A. 627 at ¶ 15; J.A. 628-630 at ¶¶ 18–19.)

Assuming that the use of tractor-trailer trucks is reasonably necessary to timber the property, as discussed in Section II, *infra*, then the only determination for the trial court was what was reasonably necessary to

[4] The underlying principle for an easement by necessity is to promote the productive use of property. Restatement (Third) of Property (Servitudes) § 4.10, cmt. b (2000).

allow the use of tractor-trailer trucks on the Access Road. Yancey presented a significant amount of credible evidence through its expert Larry Endsley that the alterations to the Access Road permitted in the Final Judgment Order were reasonably necessary. Palmer presented no reliable or objective evidence to the contrary, despite invitation from the trial court to do so. (J.A. 501 at lines 7-12; *see supra* footnote 2.) As such, the court's ruling that the alterations/modifications are reasonably necessary cannot be plainly wrong or without evidence to support it.

Specifically, Larry Endsley testified at length regarding what alterations/modifications to the Access Road were reasonably necessary to allow the passage of tractor-trailer trucks. Mr. Endsley testified that he had visited the Property on numerous occasions to appraise the timber and evaluate the condition of the Access Road. (J.A. 133–135.) Based on his knowledge of and experience in the industry, Mr. Endsley testified as to what was reasonably necessary to timber the Yancey Property. (J.A. 138–181.) Mr. Endsley was a credible and qualified expert witness, with 30+ years of experience in designing, building, and consulting regarding access roads for timbering operations and Palmer did not object to his admission as an expert. (J.A. 131–132.)

C. <u>The scope of an easement by necessity can expand over time.</u>

Citing inapposite, out-of-state cases, Palmer incorrectly argues that the scope of an easement by necessity cannot expand without consent of the servient land owner. Palmer's argument fails for several reasons. First, as discussed above, the trial court did not expand the width of an existing easement; rather, it established the size and scope of an easement by necessity for the first time. Second, contrary to Palmer's arguments, the scope of an easement by necessity can expand over time according to established Virginia law. This is not an issue of first impression in Virginia. Third, Palmer relies exclusively on cases involving express and prescriptive easements. Despite the fact that express and prescriptive easements differ fundamentally from easements by necessity, Palmer mistakenly tries to apply the unique elements of consent (express easements) and prior use (prescriptive easements) to easements by necessity.

1. Under settled Virginia law, the scope of an easement by necessity can change over time.

Contrary to Palmer's contention that there is no case law in Virginia answering the question of whether the scope of an easement by necessity can change, this Court held that the scope an easement by necessity can change over time in *Keen v. Paragon Jewel Coal Co.*, 203 Va. 175, 122 S.E.2d 543, (1961). In *Keen*, which is based on facts very similar to this

matter, the defendant Paragon Jewel Coal Co., Inc. ("Paragon") wished to mine coal from land it leased. *Keen*, 203 Va. at 177. In order to do so, Paragon would be forced to haul the coal across the adjoining property, owned by plaintiff Gallie Keen ("Keen"), as there was no other means to reach a public highway. *Id*. Although Paragon attempted to secure an easement from Keen, Keen refused. *Id*. Despite Keen's refusal, Paragon hauled the mined coal across Keen's Land, and Keen subsequently sued for damages. *Id*.

Paragon asserted the defense that it was permitted to haul the coal across Keen's land because it possessed an easement by necessity over Keen's land for all purposes to which its land may be reasonably devoted, which included hauling coal. *Keen*, 203 Va. at 176. The trial court agreed, granting judgment in favor of Paragon, from which Keen appealed. *Id*.

In affirming the trial court's judgment, this Court stated that an easement by necessity "is not limited to purposes connected with the use of the dominant tenement, since such a use existed at the time the easement was created, but is available for any and all purposes for which the dominant tenement may be adapted." *Keen*, 203 Va. at 179. Consistent with "[t]he prevailing view in this country … a way of necessity is not limited to such use of the land as was actually made and contemplated

at the time of the conveyance, but is a way for *any use* to which the owner may lawfully put the granted land *at any time*." *Id*. at 179 (emphasis added).

Although Palmer attempts to distinguish *Keen* from this matter arguing that *Keen* only addresses a new use of the easement, and not the width, Palmer misreads *Keen*. The Court in *Keen* expressly stated that the "**scope**" of an easement by necessity may change or evolve over time based on the increasing necessities of the dominant parcel. *Id*. at 546. Specifically, the Court held that "the scope of the way may increase to meet the increased necessities of the property." *Id.* The Court's opinion in *Keen* decisively answers the questions presented in Palmer's Assignments of Error.

Other trial courts in Virginia have reached similar conclusions. *Hayes v. Stafford City Bd. of Supervisors*, 23 Va. Cir. 143 at *4 (Grayson County 1991) ("In order that the owner of an easement may perform the duty of keeping it in repair, he has the right to enter the servient estate at all reasonable times to effect the necessary repairs and maintenance, or even to make original constructions necessary for enjoyment of the easement."); *Eagle Builders v. Houck*, 1990 WL 751362 (Grayson County 1990) ("The beneficiary of the right (of easement) is not restricted to the type of vehicles

or mode of travel existing at the time the easement was created, but he may use the right of way for any vehicle which his reasonable needs may require in the development of his estate."); *Wessynton Homes v. Burke*, 79 Va. Cir. 365 (Fairfax County 2009); *see* 25 Am.Jur.2d Ways of Necessity § 83, at 498 (1966) ("[A] way of necessity is held to be coextensive with the reasonable needs, present and future, of the dominant estate; it varies with the necessity . . . .).

It makes sense that implied easements by necessity must change over time; otherwise, ingress and egress for many easements by necessity would be forever limited to narrow horse and wagon trails. The Yancey Property became landlocked in 1828. The scope and width of the easement by necessity should not be limited to what was reasonably necessary in 1828, before the time of cars, trucks and today's modern logging equipment, or else it would be virtually unusable today. Fundamentally, an easement by necessity must change as the needs of the dominant parcel change over time. *See Keen*, 203 Va. at 179 ("The prevailing view in this country … a way of necessity is not limited to such use of the land as was actually made and contemplated at the time of the conveyance, but is a way for *any use* to which the owner may lawfully put the granted land *at any time*.").

2. *Palmer relies on inapposite out-of-state cases and Virginia cases of express and prescriptive easements.*

a. Palmer's out-of-state cases are inapposite.

Palmer has not cited to any Virginia cases in support of her argument that the width of an easement by necessity cannot change over time. Instead, Palmer relies on (i) cases from Indiana, Illinois, and West Virginia; and (ii) Virginia cases addressing *express* easements and *prescriptive* easements.

In support of her argument, Palmer first cites to *Dudgeon v. Bronson*, 159 Ind. 562, 64 N.E. 910, 910 (1902). *Dudgeon*, however, does not support Palmer's argument, as it addresses the availability of an easement by necessity when there's already an **express** easement. *Id*. ("But it appears from the complaint that, after the conveyance of the two tracts by Stone, a way 16 feet in width was granted to and accepted and used by the appellee…"). In fact, the court goes on to state that because an express easement existed, "no ground is shown for her claim to an additional strip as a way of necessity." *Id*. Under those facts, it is likely that Virginia law would also hold that an express easement cannot be expanded without consent. In our case, however, the facts were just the opposite: Yancey and Palmer were unable to agree on the scope and width of an express easement.

Palmer next cites to *Johnson v. Lunsford*, 113 W. Va. 270, 168 S.E. 382 (1933), for the same proposition. *Johnson*, however, does not address whether the width of an easement by necessity can expand over time. *Id*. Rather, *Johnson* addresses the question of whether the owner of a servient estate, who permitted the owner of the dominant estate to use an alternate route (the barn road) in addition to an existing route (by the creek), could then withdraw permission to use that alternate route. *Id*. In fact, *Johnson* does not address the width of an easement at all. *Id*.

Palmer next cites to *Gacki v. Bartels*, 369 Ill. App. 3d 284, 859 N.E.2d 1178 (2006). *Gacki*, however, merely stands for the proposition that, where an easement by necessity is granted, the court must determine the location, width, and scope of that easement, including the reasonable use thereof. *Id*. at 293. The parties having stipulated to the existence of an easement by necessity, that is precisely what the trial court has done here. It is established law in Virginia, however, that easements by necessity can change over time and, to the extent Palmer's out-of-state cases contradict established Virginia law, they should not be followed by this Court.

b. <u>Consent is only required to modify express easements.</u>

The only Virginia cases Palmer cites to uniformly address express and prescriptive easements. *See Cushman Virginia Corp. v. Barnes*, 204

Va. 245, 249, 129 S.E.2d 633, 637 (1963) (express easement); *City of Lynchburg v. Smith*, 166 Va. 364, 366, 186 S.E. 51, 52 (1936) (express easement); *Fairfax Cty. Park Auth. v. Atkisson*, 248 Va. 142, 445 S.E.2d 101 (1994) (express easement); *Shooting Point, L.L.C. v. Wescoat*, 265 Va. 256, 258, 576 S.E.2d 497, 498 (2003) (express easement); *Waskey v. Lewis*, 224 Va. 206, 209, 294 S.E.2d 879, 880 (1982) (express easement); *Willis v. Magette*, 254 Va. 198, 491 S.E.2d 735 (1997) (prescriptive easement); *Martin v. Moore*, 263 Va. 640, 561 S.E.2d 672 (2002) (prescriptive easement).

Virginia courts treat express easements differently from easements by necessity. Express easements, like contracts, are based on the agreement of parties. *Starkweather v. Bullock*, 32 Va. Cir. 120 (1993) ("The location and dimensions of an easement created by express grant are defined by and limited to the provisions of the grant."). As such, it logically follows that the servient land owner must consent to the expansion or modification of an express easement.[5]

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[5] Even in express easement cases, which are construed more narrowly than easements by necessity, the courts have found that the dominant estate is not limited to the type of vehicles or modes of travel existing when the easement was created. *See Eagle Builders*, 1990 WL 751362; *Wagoner v. Jack's Creek Coal Corp.*, 199 Va. 741, 744, 101 S.E.2d 627, 629 (1958). This does not imply that easements by necessity should be narrowly construed the same as express easements, but rather suggests

Palmer argues, without citation, that "[c]onsent is fundamental in easement law." (Brief of Appellant at 16.) This is clearly a misstatement of Virginia law. Consent is only a requirement of express easements. Consent or permission is a defense to prescriptive easements and adverse possession. No Virginia court has ever held that consent is a requirement for an easement by necessity. Such a ruling would be inconsistent with the law of easements by necessity and would merge express easements and easements by necessity into a single legal concept.

Palmer asks this Court to reverse years of established Virginia law and create a new rule that "an easement by necessity, once established, cannot be widened or relocated without the servient owner's consent." (Brief of Appellant at 22.) Palmer further explains that under the new law that she invites this Court to adopt, if Yancey's new use does not fit into the physical boundaries of the established easement, Yancey must either obtain the servient owner's consent or "be prohibited from its desired use." (*Id*.) Palmer's proposed change in the law demonstrates the importance of the holdings in *Smith* and *Keen* to protect parcels that depend on an easement by necessity for continued viability. In *Smith*, this Court held that

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that the trial court's ruling would likely stand *even if* it were addressing a more strictly-construed express easement.

the holder of an easement by necessity is entitled to use the servient estate in any manner that is "reasonably *necessary* for the convenient enjoyment of the servitude." *Smith*, 143 Va. at 164. In *Keen*, this Court held that "the scope of the way may increase to meet the increased necessities of the property." *Keen,* 203 Va. at 179.

Under the principle of *stare decisis,* the decisions in *Smith* and *Keen* should be followed. *Pulliam v. Coastal Emergency Services*, 257 Va. 1, 509 S.E.2d 307 (Va., 1999). In *Pulliam*, this Court affirmed the trial court based, in part, on principles of *stare decisis*, stating that "the doctrine of *stare decisis*, one of the most important principles in the structure of our law, should here apply with all its force." *Id.* at 25–26, 509 S.E.2d at 321. Just as in *Pulliam*, *Keen* and *Smith* have been cited with approval many times without any indication to the bench, the bar, or the public that flagrant error or mistake exists in those decisions.

Second, if the Court overturned the holdings in *Smith* and *Keen* and rewrote Virginia law, unknown future uses of land would depend on the consent of servient landowners. Having no incentive to consent, servient landowners would be unlikely to grant such consent and important uses of landlocked parcels would be "prohibited." Palmer's reliance on cases related to express easements for the proposition that consent is required to

establish an easement by necessity is misplaced, and contradicts Virginia's well-established law regarding easements by necessity.

c. The historic width and scope is a fundamental characteristic of prescriptive easements, not easements by necessity.

Virginia courts also treat prescriptive easements differently from easements by necessity. One essential characteristic of prescriptive easements is that they are generally limited in scope to the prior use of the easement. *McNeil v. Kingrey*, 237 Va. 400, 411, 377 S.E.2d 430, 436 (1989) ("The extent and mode of enjoyment of an easement by prescription depends upon the extent of the user during the prescriptive period and the customary mode of enjoyment thereof during that period."). As such, it makes sense that Virginia courts have held that prescriptive easements cannot change over time without a change in the prior use.

With respect to easements by necessity, however, Virginia law is settled that they can change over time based on the reasonable necessity of the dominant parcel. *Keen*, 203 Va. at 179. As such, easements by necessity cannot be limited to the historic width of an access road. Palmer's reliance on cases related to prescriptive easements is misplaced, and contradicts Virginia's well-established law regarding easements by necessity.

d. There was no evidence of an "implied agreement" and Palmer failed to argue the existence of an "implied agreement" at trial.

Palmer also argues, for the first time, that there was an "implied agreement among the parties as to the width of the road." (Brief of Appellant at 16.) First, this argument was never made at trial. In fact, she makes it for the very first time on page 16 of her Brief. Because Palmer failed to present this argument to the trial court and because the trial court did not have an opportunity to rule on it, it cannot be considered on appeal. Rule 5:25; *Martin v. Ziherl*, 269 Va. 35, 39, 607 S.E.2d 367 (2005); *Goins v. Commonwealth*, 251 Va. 442, 463, 470 S.E.2d 114, 128 (1996). Second, there was no evidence of any implied agreement among the parties. The only evidence at trial was that the parties had attempted, but failed, to reach an agreement as to the width of the easement. (J.A. 63–64.)

3. *Other jurisdictions have held that easements by necessity may change over time.*

Contrary to Palmer's assertion, courts in other jurisdictions treat easements by necessity the same as courts in Virginia—permitting the dominant estate to use the servient estate in any manner that is reasonably necessary for the convenient enjoyment of the servitude, regardless of whether such use reasonably increases the scope of such easement. *See e.g. Beck v. Mangels*, 100 Md. App. 144, 640 A.2d 236 (1994) ("We hold

that the scope of ingress/egress ways of necessity may reasonably increase with the dominant estate's necessary and reasonable needs as those needs exist, present and future."); *Stock v. Ostrander*, 233 A.D.2d 816, 818, 650 N.Y.S.2d 416, 418 (1996) ("In determining the extent of plaintiffs' easement, '[i]t is to be assumed [that the original parties who created the easement] anticipated such uses as might reasonably be required by a normal development of the dominant tenement.'"); *Prince v. Edgington*, No. 949, 1983 WL 3254, at *4 (Ohio Ct. App. Aug. 11, 1983) ("An easement by necessity 'is not limited in its use to the original use of the lands, but expands and fluctuates to meet the growth, development and changed condition of such lands.'"). While this Court does not need to look outside of Virginia decisions to affirm the trial court's decision, decisions from courts in other states concur with Virginia courts that the scope of an easement by necessity can expand over time.

II. The Court Correctly Determined That Tractor-Trailer Trucks Are Reasonably Necessary for Enjoyment of the Servitude.

A. Standard of Review

Palmer also misstates the standard of review regarding the trial court's determination that the use of tractor-trailers to timber the property is appropriate. Palmer incorrectly argues that whether the use of tractor-trailer trucks is reasonably necessary is a question of law. (Brief of

Appellant § II(A).) As with the trial court's determination of the appropriate width of the easement by necessity discussed in Section I, *supra*, the court's determination that tractor-trailer trucks are reasonably necessary is merely a determination of the appropriate scope or use of the easement by necessity, which is a question of fact. 28A C.J.S. Easements § 270A. Accordingly, the judgment of the trial court should not be set aside unless it appears from the evidence that the judgment was plainly wrong or without evidence to support it. Va. Code Ann. § 8.01-680; *Haynie v. Brenner*, 216 Va. at 724.[6]

B. Palmer misstates the law regarding easements by necessity.

1. There is no "additional burden" test regarding easements by necessity under Virginia law.

Although Palmer couches her argument in terms of "whether the use of an easement is an 'additional burden' on the servient estate," no "additional burden test" has been applied to an easement by necessity under Virginia law. Palmer incorrectly states that "[t]he general rule is that the use and degree of use can change so long as there is not an additional burden." (Brief of Appellant at 24.) In support of this argument, Palmer

[6] Notably, the two cases cited by Palmer where this Court reviewed a trial court's determination of the scope of an easement correctly use the "plainly wrong" standard. *See Hayes v. Aquia Marina, Inc.*, 243 Va. 255, 260, 414 S.E.2d 820, 823 (1992); *Shooting Point, L.L.C. v. Wescoat*, 265 Va. 256, 264, 576 S.E.2d 497, 501 (2003).

cites to *Hayes v. Aquia Marina, Inc.*, 243 Va. 255, 414 S.E.2d 820 (1992). (*Id*.) *Hayes*, however, states the general rule for **express easements**, not for easements by necessity. *Hayes*, 243 Va. at 257. In *Hayes*, the Court states:

> As a general rule, ***when an easement is created by grant or reservation*** and the instrument creating the easement does not limit the use to be made of it, the easement may be used for "any purpose to which the dominant estate may then, or in the future, reasonably be devoted." … However, no use may be made of the easement which is different from that established at the time of its creation and which imposes an additional burden upon the servient estate.

Id. at 258–59 (emphasis added).

Palmer likewise cites to *Ellis v. Simmons*, 270 Va. 371, 619 S.E.2d 88 (2005), in support of her argument "[t]he taking of land has proved to be an additional burden in every Virginia case on the subject of easements" and is therefore prohibited. (Brief of Appellant at 24.) *Ellis,* however, addresses only prescriptive easements which are very different from easements by necessity. *Ellis*, 270 Va. at 376. As discussed above, prescriptive easements are based on prior use and therefore the scope of a prescriptive easement is limited to the boundaries of the prior use. Easements by necessity are not based on prior use and therefore do not carry the same limitations. *Ellis* does not stand for the proposition that an

easement by necessity cannot expand over time. *Ellis v. Simmons*, 270 Va. 371, 376, 619 S.E.2d 88, 91 (2005).

Finally, Palmer cites to *Keen* in support of her argument that "[t]he 'additional burden' test gets applied to easement by necessity case [sic]." (Brief of Appellant at 24.) Palmer misleadingly quotes only a small portion of one sentence of the case. (*Id*.) In fact, the Court's determination that "no additional burden" existed was not considered at all regarding the scope of the easement by necessity, but rather regarding whether a lessee of land was entitled to usage of the easement the same as the fee simple owner. *Keen*, 203 Va. at 180.

> If the owner of the fee simple as the owner of the coal and owner of the surface had the right to use the road for all needful purposes, no additional burden is put upon the servient tenement if coal products are hauled over the road by one person and surface products by another. It is the tenement itself to which the easement of necessity is appurtenant, and not the person or persons who may make use of it.

Id.

Palmer cites to no case stating that there is an "additional burden" test when establishing the scope of an easement by necessity. Indeed, the creation of an easement by necessity, by definition, would create an

additional burden on the servient estate, as it creates an easement where one otherwise did not exist.

Without conceding that the use of tractor-trailers on the Access Road constitutes an additional burden, unlike express easements, the holder of an easement by necessity is entitled to use the servient estate in any manner that is "reasonably necessary for the convenient enjoyment of the servitude." Restatement (Third) of Property (Servitudes) § 4.10 (2000); *see Smith*, 143 Va. at 164. An easement by necessity "is not limited to purposes connected with the use of the dominant tenement, since such a use existed at the time the easement was created, but is available for any and all purposes for which the dominant tenement may be adapted." *Keen*, 203 Va. at 179. The "necessity" is "not a physical or an absolute necessity but a reasonable and practicable necessity." *Smith*, 143 Va. at 164. Accordingly, so long as the trial court's determination that the use of tractor-trailers to timber the property was reasonably and practicably necessary was not plainly wrong or without evidence to support it, the ruling should stand.

2. Palmer's "public policy" arguments are not supported by Virginia law.

Palmer also argues that the Court should reverse the trial court based on seven separate public-policy arguments. (Brief of Appellant § II(C).)

Palmer, however, fails to cite to a single authority that suggests public policy is a valid consideration by courts in the determination of the scope of an easement by necessity. (*Id*.) Even if it were, the cases Palmer cites do not support her arguments.

For example, Palmer cites to *Ellis* to support her argument that "[a] servient owner's loss of land is an additional burden that prohibits expansion by the dominant estate." (Brief of Appellant § II(C)(1).) As stated above, however, *Ellis* addresses the law of prescriptive easements only, and is therefore inapplicable. *Ellis*, 270 Va. at 376. If a loss of land prohibited all easements by necessity, as argued by Palmer, by definition, no easement by necessity could ever be granted. This is not the law.

Palmer next cites to *Luther v. Jeffers*, 387 F. Supp. 182 (W.D. Va. 1974), in support of her argument that the Final Judgment Order would change the character of the land, and therefore should be overturned. (Brief of Appellant § II(C)(2)). Palmer's reliance is misplaced, however, as *Luther* too addresses the law of prescriptive easements, not easements by necessity. *Id*. at 183. Moreover, Palmer again greatly exaggerates the effect of the modifications of the Access Road to the "character" of the property. Contrary to a plain reading of the Final Judgment Order (J.A. 623), a review of the video of the Access Road (J.A. 293 (Tr. Exh. 98)), and

a review of expert witness Larry Endsley's testimony (J.A. 125–181, 523–555, 570–571), the modifications to the Access Road do not "[t]ransform[ ] a country lane into a commercial trucking road" (Brief of Appellant at 27), or otherwise change the character of the property. In fact, the trial court made great efforts to ensure that the scope of the easement would have limited impact on Palmer's Property. (*E.g.,* J.A. 484 at lines 14–21.)

Without citation, Palmer next argues that the Court should overrule the trial court based on a lack of consent. (Brief of Appellant § II(C)(3).) Palmer conflates the characteristics of an easement by necessity and an express easement. If the law required consent to establish the scope of an easement, then by definition all easements would be express easements. Palmer essentially asks to rewrite the law to eliminate prescriptive easements and easements by necessity. This is not the law in Virginia. *See, e.g.*, *Keen*, 203 Va. 175.

Palmer next argues that the trial court should be overturned because the Final Judgment Order was "a judicially authorized taking of private land for private use." (Brief of Appellant § II(C)(4).) First, Palmer raises this argument for the first time on appeal. Because Palmer failed to present this argument to the trial court and because the trial court did not have an opportunity to rule on it, it cannot be considered on appeal. Rule 5:25;

Martin, 269 Va. at 39; *Goins*, 251 Va. at 463. Second, Palmer cites to *Boyd v. C.L. Ritter Lumber Co.*, 119 Va. 348, 89 S.E. 273, 273 (1916). *Boyd*, however, does not address easements at all, let alone easements by necessity, but rather is a case involving the attempted condemnation—under chapter 75 of the Acts of 1912—of a portion of the defendant's land for the purpose of constructing a tramroad to haul logs and lumber owned by the petitioner over the land sought to be condemned. *Id*. As such it is entirely inapplicable. Again, if the establishment of an easement by necessity was an unconstitutional taking, then no easement by necessity could ever exist as the granting of such an easement is always detrimental to the servient estate. Following Palmer's logic, the law of prescriptive easements and adverse possession would also constitute unconstitutional "takings."

Again without citation, Palmer argues that the trial court should be overturned because she lacked notice of the possibility of an easement by necessity. (Brief of Appellant § II(C)(5).) This Court addressed this argument in *Keen*, ruling that a landowner is on notice of the possibility of an easement by necessity where, as here, the necessity is "plainly visible" and "apparent to any person," and where a review of the recorded title would show "land was surrounded on all sides by the lands of strangers."

Keen, 203 Va. at 180. Although testimony on this subject was unnecessary at trial due to the parties' stipulation to an easement by necessity, the Court can take judicial notice of the land records, which necessarily put Palmer on notice.

Palmer next argues that the trial court should be overturned because a balancing of the equities weighs in Palmer's favor. (Brief of Appellant § II(C)(6).) Palmer has again failed to identify any authority that suggests a balancing of the equities is required for a court to determine the scope of an easement by necessity. (*Id.*) Regardless, to the extent that a trial court is required to consider a balancing of the equities, the trial court did so here and determined that tractor-trailer trucks were reasonably necessary (rather than absolute necessity), as were certain modifications of the Access Road. (J.A. 482 at line 14 to 486.) This Court should not now supplant its determination regarding the reasonable necessity of such accommodations unless the trial court's determination was plainly wrong or without evidence to support it.

Finally, and again without any authority, Palmer argues that "reasonableness litigation … should be disfavored." (Brief of Appellant § II(C)(6).) First, Palmer failed to present this argument to the trial court and because the trial court did not have an opportunity to rule on it, it cannot be

considered on appeal. Rule 5:25; *Martin*, 269 Va. at 39; *Goins*, 251 Va. at 463. Second, contrary to Palmer's argument, the "reasonableness standard" is prolific throughout Virginia's legal system, and is not a valid basis to overturn the trial court's well-reasoned decision. Also, for the reasons discussed in Part I(B)(2)(b) *supra*, the "reasonableness" standard set forth in *Keen* and *Smith* and a myriad of other decisions should be upheld under the principle of *stare decisis*.

C. The trial court's ruling that tractor-trailers are reasonably necessary is supported by ample, credible evidence.

Contrary to Palmer's unsubstantiated contention that the trial's determination that tractor-trailer trucks are reasonably necessary was "plainly wrong" (Brief of Appellant at 24), the trial court's determination of what is reasonably necessary to timber the property, including the use of tractor-trailers, was well supported by the unrebutted testimony of Yancey's expert witness, Larry Endsley. Mr. Endsley testified at length during the trial, and again at the January 8, 2016 hearing, regarding what he believed was reasonably necessary to timber the Yancey Property—which included the use of tractor-trailer trucks. (J.A. 159–181; J.A. 523 at line 7 to J.A. 573 at line 22.)[7] Included in Mr. Endsley's testimony were the reasons why the

[7] Notably, Mr. Endsley testified that many, if not all, of the improvements to the Access Road would be necessary even if Yancey was to use smaller,

use of tractor-trailer trucks is necessary to timber the property, due in part to the size of the tract of land as well as the type of trees that were to be logged, but also that the use of tractor-trailer trucks is the standard in the industry. (*Id.*)

Mr. Endsley's testimony was not only reliable and persuasive on its own merits, but it was unrebutted as Palmer did not call any witnesses, expert or otherwise, to rebut Mr. Endsley's testimony. Instead, Palmer relied on her own self-serving opinion that tractor-trailer trucks are not favored by her, and that the road is adequate as is. (See *e.g.* J.A. 335 at lines 15–24.) Palmer also testified, however, that she had no experience in the timbering and forestry industry, has never worked in the trucking industry, or had any experience in the logistics of modern timbering. (J.A. 358 at lines 5-13; J.A. 583 at line 25 to J.A. 584 at line 21.) Simply put, Palmer's opinion of what is preferable to her or what she believes is reasonably necessary to timber the Yancey Property is irrelevant, as it lacks any foundation. The trial court's lengthy explanation of its decision as to why the use of tractor-trailer trucks was reasonably necessary was

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10-wheel trucks to timber the property, as evidenced by the damage done to the roadway during the limited timbering performed by Yancey and Palmer's neighbor. (J.A. 159–181.)

supported by a significant amount of evidence and was not plainly wrong or without evidence to support it. (J.A. 482 at line 19 to J.A. 484 at line 2.)

D. The Court's ruling took the rights of the servient owner into account.

Palmer's final section of her argument cobbles together various arguments previously made throughout her brief, again largely without citation to any authority. These arguments, however, continue to be without basis. The one case cited in Section II(D) by Palmer is *Goodwyn v. Johnson*, 357 S.C. 49, 591 S.E.2n 34 (S.C. App. 2003), a case from the South Carolina Court of Appeals. *Goodwyn*, however, is inapplicable to the facts at hand. *Goodwyn* addressed the question of whether the servient landowner could move a previously established easement by necessity—the location of which was established by a previous court order—to an entirely new location on the servient estate. *Goodwyn*, 357 S.C. at 51–52.

Neither assignment of error addresses moving the easement from one location to another (let alone whether the servient owner can do so); nor did the Final Judgment Order move an easement to a new location. (*See* Final Judgment Order.) Rather than moving the easement, the Final Judgment Order ***established*** the Access Road as the location of the

easement by necessity.[8] (*Id.*) Indeed, the trial court expressly found that Yancey was ***not*** attempting to move an easement to a new location. (J.A. 482 at lines 14-18 ("I don't find that Yancey Lumber is trying to move the road from the left or to the right. I find that they are trying to make it manageable for the size vehicles that … are now going to be used to transport the lumber.").)

Palmer next argues that to allow the trial court's ruling to stand "is to endorse a floating easement that is 'flexible and fluid.'" (Brief of Appellant at 30.) The easement by necessity established by the trial court, however, is anything but "flexible and fluid," as it was established after more than two years of litigation, a two-day bench trial, two subsequent hearings, and an appeal. Contrary to Palmer's argument, it is the parties seeking an easement by necessity who would suffer if the Court adopted Palmer's argument that an easement by necessity should only be permitted where the parties consent, as suggested by Palmer.

The trial court's determination that the modifications to the Access Road and the use of tractor-trailers are reasonably necessary for the enjoyment of the Yancey Property is both consistent with well-established

[8] Notably, the court in *Goodwyn* confirms that the law treats, and should treat, express easements and easements by necessity differently because an express easement "is akin to a contract and is bargained for by the parties." *Goodwyn*, 357 S.C. at 55.

Virginia law regarding easements by necessity, and well supported by the unrebutted testimony of Yancey's expert witness. Accordingly, the trial court's ruling should stand.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Court should affirm the judgment of the Circuit Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 28, 2016, the Brief of Appellee was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the same were sent via overnight delivery to the clerk's office. This same date, a copy of the Brief of Appellee was sent via email to all counsel of record, at the email addresses below:

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Counsel for the appellee does not waive oral argument.

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