In The

Supreme Court of Virginia

RECORD NO. 160664

JOANNA PALMER,

Appellant,

v.

R.A. YANCEY LUMBER CORPORATION,

Appellee.

BRIEF OF APPELLANT

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SCV: Submitted on 10-31-2016 16:35:51 EDT for filing on 10-31-2016

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NATURE OF THE CASE
AND MATERIAL PROCEEDINGS BELOW

This is a civil case about real property. The appeal asks the Court to review the law of easements and hold that (I) an easement by necessity, once established, cannot be widened or relocated without the servient owner's consent; and (II) the widening of an easement by necessity for tractor-trailer use is prohibited in this case because it is too burdensome on the servient owner.

On September 5, 2014, R. A. Yancey Lumber Corporation ("Yancey"; the "dominant owner") filed a complaint against Joanna Palmer ("Ms. Palmer;" the "servient owner"), and her lien holders, in the Albemarle County Circuit Court. App. 8–16. The complaint was to establish an implied easement by (1) necessity, (2) prescription, and/or (3) implication over Ms. Palmer's land. The complaint sought an injunction to improve, repair, and modify the easement to make it "wide enough" so that "all vehicles" could use the road for all purposes. App. 16.

On October 17, 2014, Ms. Palmer answered the complaint and denied that Yancey had an easement over her land and denied that repairs or improvements were needed for the existing road. App. 1–3.

On March 30, 2015 and March 31, 2015, a two-day bench trial was conducted with Judge Cheryl V. Higgins presiding. The parties stipulated

that Yancey had an easement by necessity over Palmer's land. App. 29–32. Yancey dismissed its claims for an easement by prescription and/or an easement by implication. *Id*. at 32.

The sole issue at trial was the widening and improvements to the road. The parties submitted evidence by testimony and exhibit and argued their positions. At the conclusion of the trial the circuit court took the issues under advisement and set a date for a ruling.

On May 4, 2015, the circuit court issued a ruling from the bench in favor of Yancey. App. 478–89. The circuit court asked Yancey's attorneys to prepare a final order.

On November 23, 2015, the circuit court heard argument on Ms. Palmer's objections to Yancey's final order. Finding sufficient cause, the circuit court reopened the evidence and heard argument on the final order.

On January 8, 2016, a bench trial was held on the extent to which Yancey could widen, relocate, and change the road on Palmer's land. A Final Judgment Order was entered from the bench. App. 623–35.

On February 3, 2016, Ms. Palmer filed her Notice of Appeal.

On September 22, 2016, this Court granted Ms. Palmer her appeal.

STATEMENT OF FACTS

For forty-two years, Joanna Palmer has lived on forty-four acres of land in Albemarle County, Virginia. She is a gardener and a landscaper by trade. She testified extensively about her enjoyment of her land and the privacy she treasures in her "little slice of paradise." App. 329.

Ms. Palmer's land is bounded by State Route 736 ("White Mountain Road"). Ms. Palmer has a one-lane, dirt and gravel driveway that branches into White Mountain Road. The road also serves as the access road for three other properties in "Grey Hollow." App. 308.

In the court record, there is a video of the road as it goes from White Mountain Road through Ms. Palmer's land. App. 293. There are numerous photographs of the road that show its appearance.[1] App. 294–302. A longtime resident gave a description of the road. App. 308–10 (Sauer). This "country lane" is the subject of the appeal. *Id*.

Yancey's land is at the end of this road. Ms. Palmer agreed that Yancey has an easement over the road since Yancey is landlocked and has no other access to a state road.

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[1] Much of the testimony at trial involved physical damages done to the road by a non-party neighbor, "Campbell," who ran logging trucks down the road in the wet, winter season that widened on the road. Ms. Palmer disputed Yancey's width measurement claiming they were inaccurate and wider than normal because of Campbell, and that the width would taper back to normal, which it did. Some of the photos show the damaged road.

Witnesses for both sides stated that the road had always been in the same location. App. 310–13 (Sauer); App. 65–67 (Yancey).

Ms. Palmer's house is not much more than fifty-feet from the road. It can be seen on the survey attached to the Final Judgment Order. App. 635. The road passes her house and through a waterway before it curves through a series of narrow points between water and bedrock, and then veers away into pasture and woods and up "Grey Hollow" into the other properties. There is one other house on the road besides Ms. Palmer's.

In 1958, Yancey purchased a 317-acre tract at the end of the road. App. 29. Dan Yancey testified that the primary purpose of purchasing the land was for "growing timber." App. 46.

Yancey cuts trees from this property and hauls logs to its sawmill in Crozet, Virginia. App. 47. It also bids its timber to other companies that come to the property to cut and haul the logs to different mills. App. 67. Yancey timbers this kind of property every "25, 27 years." App. 85. It timbered in "Grey Hollow" in the 1960s and in the 1980s. App. 47–48.

Yancey never had a written access easement for its property. The parties stipulated that the properties in "Grey Hollow" were once owned by a common grantor named Richard Richardson. App. 30. Richard Richardson died in 1828 and his land was partitioned for his heirs. App.

376–77. The country road has always been the only access point to the state road.[2] App. 30.

Ms. Palmer never questioned or denied Yancey, or any of her other neighbors in "Grey Hollow," the ability to use the road. "I understand they have an easement." App. 230.

In 2014, Yancey acquired access agreements from two of its neighbors in "Grey Hollow."[3] App. 285–99. The easements each had a width of fifty feet. Yancey asked Ms. Palmer for the same fifty-foot easement over her land and she refused. App. 63. She lived on the road, unlike the other two landowners. Yancey's lawsuit followed.

Yancey's chief complaint is that tractor-trailers cannot fit on the road as-is. It seeks the relief of a wider road, an "all weather road," to meet the "industry standard" for timbering property with tractor-trailers. App. 401–16.

Yancey's expert, Larry Endsley, testified that it was impossible for a tractor-trailer to make the sharp turn from White Mountain Road onto the driveway. App. 162–63. He also testified that several areas along the road were too narrow for a tractor-trailer to pass. App. 153–54.

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[2] There is no evidence in the record about the circumstances or existence of this road from 1828 to 1958 when Yancey purchased the property, except for its mention in a 1903 land record. App. 376.

[3] Campbell, at least, also uses his property for timbering.

The “clearance” that a tractor-trailer needs on this particular road is “12-foot tall, 8-foot-wide [corridor that a] box has got to go through. And so we’re looking for clearances on the edges. We’re looking for curve widening . . . .” App. 484.

Yancey’s expert asked for an entrance that is forty feet wide instead of fifteen-to-twenty feet wide. App. 139. This would involve land on each side of the road to be physically taken from Ms. Palmer. *Id*.; App. 330.

At the river crossing, Yancey asked that the road be widened several feet on each side to allow a straighter entrance for the tractor-trailers. App. 532–34. This included the request to cut an oak tree and take land away along the banks of the stream.

At the narrow points between the bedrock and the stream, Yancey asked that ten feet of rock and land be “physically removed.” App. 530–32.

These width expansions were mostly in the direction of Ms. Palmer’s house and yard. App. 575. (“[I]t’s making my yard smaller. I had a shed there. I have a gas tank. You know, it’s my home. And you’re taking my yard to straighten out a road to accommodate huge trucks to drive right past my house.”).

At trial, Dan Yancey and Larry Endsley both testified about the business efficiencies that could be gained if tractor-trailers could use the

road. “It costs me less to produce the same product with a tractor-trailer than it does a ten-wheeler, thus allowing me to actually pay more to the landowners.” App. 178 (Endsley).

Ms. Palmer never objected to the ten-wheeler trucks that Yancey used in the past. App. 345. She objects to tractor-trailers because their use would require a complete transformation of her road, her curtilage, her landscaping, and her home. *Id*. Her position is that the location of the implied easement was fixed and agreed on long ago between neighbors, and that it would be an additional burden to her if it were now changed.

Yancey’s position is that tractor-trailers are “reasonably necessary” for timbering. Tractor-trailers are the “industry standard.” It argued that an easement by necessity is “very broad” and that courts can allow the unilateral expansion of the scope and physical dimensions of the easement to accommodate tractor-trailers. App. 386. Essentially, it claims it gets a new and improved road solely by virtue of its easement by necessity.

Ms. Palmer’s reply is that the location of the road/easement has proved capable of supporting large vehicles, including logging trucks, for many years. App. 330. Ms. Palmer would lose the enjoyment of her land, and have a perpetually expanding easement that would forever cause uncertainty on her property if Yancey won the relief it sought.

The circuit court agreed with Yancey that tractor-trailers are the industry standard and it allowed widening and taking of land so that a tractor-trailer could fit on the road. App. 478–89. The circuit court limited the physical dimensions of the easement to the existing road, and applied specific instructions about where and how much extra land could be taken from Ms. Palmer. The result was the Final Judgment Order. App. 623–35.

ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT ERRED BY ALLOWING THE DOMINANT OWNER TO EXPAND THE WIDTH OF AN ESTABLISHED EASEMENT BY NECESSITY (Issue preserved at 3/31/15 Tr.382-422; 5/4/15 Tr. 14; Objections to Entry of Final Order filed 11/12/15; 11/23/15 Tr. 3; 1/8/16 Tr. 95, 104; Objections on page 9 of Final Judgment Order). App. 425–465; 489; 490–495; 497; 612; 621.

II. THE CIRCUIT COURT ERRED BY ALLOWING THE DOMINANT OWNER TO USE TRACTOR-TRAILERS ON THE ROAD BECAUSE OF THE ADDITIONAL BURDEN ON THE SERVIENT OWNER (Issue preserved at 3/31/15 Tr.382-422; 5/4/15 Tr. 14; Objections to Entry of Final Order filed 11/12/15; 11/23/15 Tr. 3; 1/8/16 Tr. 95, 104; Objections on page 9 of Final Judgment Order). App. 425–465; 489; 490–495; 497; 612; 621.

SUMMARY OF ARGUMENT

The law in Virginia is unclear when it comes to changing the physical dimensions of an easement by necessity. Ms. Palmer asks this Court to put a rule in place so that landowners can be clear about their rights when they are party to what is, or what might become, an easement by necessity.

Yancey's rule of "whatever is reasonably necessary" should not be favored because of the uncertainty that it causes with regard to land rights and road locations. Yancey offers no bright-line rule and gives too much leeway to the dominant owner.

Ms. Palmer's rule is that an easement by necessity, once located, cannot be widened or relocated without the express of implied consent of the servient owner. Tractor-trailers are generally a permissible use on an easement, however their use is not allowed if it would change the physical dimensions and character of an established road.

The physical dimensions of the easement were agreed to when the location was set many years ago. Changing the location and width, many years later, would thwart the implied understanding between the original dominant and servient owners. Yancey can use the easement for timbering. They have always used it for timbering. Its right to timber *more efficiently* should not be greater, or given more weight, than Ms. Palmer's rights to privacy and quiet enjoyment of land.

The case law Yancey offered to support its argument did not show that an easement by necessity could be widened or relocated. It showed that an easement by necessity could be *used* for all lawful purposes. This broad statement about an easement's use does not authorize Yancey to

unilaterally change the physical dimensions of an easement. There is a general rule against widening of easements in Virginia and the additional burden it may involve to the servient owner.

There is no case law in Virginia about widening an easement by necessity. Widening is not allowed for prescriptive or express easements. Several states have ruled on easements by necessity and have held that width expansion is not allowed without express of implied consent. *Dudgeon v. Bronson*, 159 Ind. 562, 64 N.E. 910 (1902).

Yancey fails to consider the rights of the servient landowner. This is a blind spot in their argument because the burden on Ms. Palmer is out of balance with the proposed use. Ms. Palmer would lose land, and the character of her land would change against her will, among other things.

Ms. Palmer stands for the rights of servient landowners and declares that the law must protect people like herself. Unilateral expansion by the dominant owner cannot be allowed. Ms. Palmer's rule is in conformity with the treatises and the case law. Changing the width and relocating an easement by necessity without consent should not be allowed.

The assignments of error and authorities below will show why this Court should rule in favor of Ms. Palmer and grant her prayer that the

circuit court's decree that allowed an easement by necessity to expand and should be reversed.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY ALLOWING THE DOMINANT OWNER TO EXPAND THE WIDTH OF AN ESTABLISHED EASEMENT BY NECESSITY.

A. Standard of Review.

An implied easement by necessity is when "(1) the parcels were under common ownership at one time and that, when severed, a need for the easement arose, (2) the easement is reasonably necessary for the enjoyment of the parcel, and (3) other reasonable means of ingress and egress are lacking." *Carstensen v. Chrisland Corp*., 247 Va. 433, 438 (1994).

Whether or not the dominant owner of an easement by necessity can expand the width of and relocate an access road is a question of law. *Mulford v. Walnut Hill Group*, 282 Va. 98, 106 (2011). The trial court's findings of fact are given deference and will be upheld unless plainly wrong or due to a misapplication of the law of easements. *Id*.

The circuit court decreed that Yancey could expand the width of it easement by necessity so that tractor-trailers could use an old road. This decree was plainly wrong and misapplied the law of easements. The circuit

court erred when it allowed the *use* of the easement to trump the physical *dimensions* of the easement.

B. Width Expansion Without Consent is Prohibited.

There is no case law in Virginia that squarely answers the question of whether the width of an easement by necessity can be expanded to accommodate a new use of the easement. Ms. Palmer claims this is an issue of first impression in Virginia.

While Virginia has not answered this issue squarely, courts in other states have ruled that a dominant owner cannot unilaterally expand the width of an easement by necessity without consent. "[W]hen the way is once selected, it cannot be changed by either party without the consent of the other." *Dudgeon v. Bronson*. The Supreme Court of Indiana explained:

> Having accepted a way of a certain width, and over a particular part of the lands owned by the party holding the servient estate, the appellee has no right to change it, but must be confined to the way thus selected. The grounds of the complaint are mere matters of inconvenience. That the way once selected and agreed upon is too steep or too narrow or too wet does not entitle the appellee to demand a new way, or to increase the width or change the direction of the old one.

Id. at 910.

The Supreme Court of West Virginia has similarly held that the location of an easement by necessity, after it has been set, cannot be relocated. "The initial use by the former owner of plaintiff's land of the

creek route for thirty years without objection was a practical location of his way of necessity. That way having become fixed, the dominant owner could not thereafter change the location as a matter of right." *Johnson v. Lunsford*, 168 S.E. 382 (1933).

In *Gacki v. Bartles*, 859 N.E.2d 1178 (Ill. App. 2006), an Illinois Appellate Court ruled that the scope and width of an easement by necessity should be reviewed in the same way as express easements.

> [W]hen an easement is "implied," courts must attempt to ascribe an intention to the parties who themselves did not put any such intention into words at the time of the conveyance. As such, in determining the location, width, and scope of an easement, a court must rely upon the implication at the time of severance. (citations omitted)
>
> *Id*. at 1187. [4]

In Virginia, the width of an express easement cannot be widened over the objection of the servient owner. *Cushman Virginia Corp. v. Barnes*, 204 Va. 245, 252 (1963) ("Where the width of a right of way is not specified in the grant, then it is limited to the width as it existed at the time of the grant.") (quoting *Good v. Petticrew*, 165 Va. 526, 533 (1936)).

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[4] This is a different analysis than *Keen v. Paragon Jewel Co.*, 203 Va. 175 (1961) where the issue is use of the easement and not physical expansion. Generally, when one conveys an easement by necessity, you are not confined to the use made at severance but all reasonable and lawful uses.

In *City of Lynchburg v. Smith*, 166 Va. 364 (1936), the dominant owner wanted to expand the width of the easement to lay new pipes next to where old pipes were located, but the servient owners did not consent. The court denied the expansion of width, reasoning:

> If the city, under the terms of its easement, can lay this additional new cast iron pipe line at this time, it could lay another next year, or twenty years hence, *ad infinitum*, and thus break up and destroy the uses of the landowners' property for a consideration, which, as shown by the easements are de minimis, and although under the easement and in accordance with the law, they are only permitted to use the property without owning it as fee simple owners.

Id. at 372 (emphasis added).

In Virginia, once an express easement is located, the dominant owner cannot unilaterally relocate it. *Fairfax Co. Park Auth. v. Atkisson*, 248 Va. 142, 148 (1994) ("When a way is once located it cannot be changed by either party without the consent of the other.") (Citing *Eureka Land Co. v. Watts*, 119 Va. 506 (1916)).

In *Shooting Point, LLC v. Wescoat*, 265 Va. 256, 576 S.E.2d 497 (2003), an express easement case, the dominant owner sought improvements to an access road. The dominant owner wanted an expansion of width to account for a nine-foot “shift” in the road, away from a tree line. Like Yancey, the dominant estate argued that it would be

inconvenient to locate the easement in the historic width because it did not fit its current needs and would be unsafe.

Despite these inconveniences, the Court in *Shooting Point* upheld the servient owner's right to the historic location and width of the road. "We initially observe that, generally, when a fixed location of a granted easement is established, that location may be changed only with the express or implied consent of the persons interested." *Id*. at 502. Because the servient owner did not consent, the relocation was not allowed.

Virginia has followed this same analysis for judicial easements created by partition. In *Waskey v. Lewis*, 224 Va. 206 (1982), the court had to decide the width of a road that had been created by partition. *Waskey* held that the width of the easement is the historic width of the road because that was the best evidence of intent between the parties. *Id*. at 211 ("Where no width is expressed in the instrument creating a new right of way, the determination of width is made by reference to the intention of the parties to the grant, as determined by the circumstances existing at the time and affecting the property").

The width of a prescriptive easement cannot change once it is set. *Willis v. Magette*, 254 Va. 198 (1997); *Martin v. Moore*, 263 Va. 640, 561, S.E.2d 672 (2002). A dominant owner gets no more than the land area of

the prescriptive use. "When, as here, an easement by prescription has been established, the width of the way and the extent of the servitude is limited to the character of the use during the prescriptive period." *Id*. at 679.

A prescriptive easement is the only *special* easement that can deviate from the general rule that you look to the beginning for the (implied) *dimensions* of the easement, and that you need consent to change the way once it is located and agreed upon.

This Court should make its rule based on *Shooting Point* and express easement law. Courts should look to the time of the severance of the parcels to determine the location and width that was originally agreed to between neighbors. This is how the other states have decided this issue and it would make for a clear and sound rule in Virginia.

Applied to the case at hand, there was an implied agreement among the parties as to the width of the road. The road has always followed the same path. The location was agreed to when the parcels were severed many, many years ago. The width cannot be changed without Ms. Palmer's consent and she does not consent.

Consent is fundamental in easement law. Without consent, there would be uncertainty. The servient owner would have a floating cloud of an

easement on its property (a perpetual title defect). The physical dimensions of the easement would be subject to the whims of the dominant neighbor. The servient owner could never know, for sure, where to plant a tree or a garden, or to locate a shed or a fence because of the uncertainty of the easement and the type of transportation it, or its successors, might propose for use in the future.

Consent between neighbors is a simple and natural rule. Neighbors bargain for consent, or they are at an impasse. In this case, when bargaining did not work, Yancey sued Palmer.

While Yancey is allowed to test the law when no clear rule is stated, the circuit court erred when it held that the width of easements by necessity could be expanded over Ms. Palmer's objection. Other states have decided this issue against the dominant owner and the clear trend in Virginia is to disfavor expansions of width because of the uncertainty it would create, the "reasonableness" litigation it would foster, and because it would ruin agreements between neighbors.

C. Yancey's Four Cases

Yancey won the argument at the circuit court. The circuit court decreed that Yancey was entitled to use tractor-trailers because it was the

industry standard. Thus, it was entitled to expand the physical dimensions of the road/easement to accommodate tractor-trailers.

Yancey provided four cases for its authority. It offered *Waggoner v. Jack's Creek Coal Corp*, 199 Va. 741 (1958) to argue that all vehicles could be used on the easement. *Waggoner* held that a "wagon haul road" was not restricted to wagons only. "[W]here a right of way is granted or reserved it may be used for any purpose to which the land accommodated thereby may reasonably be devoted." *Id.* at 744.

The physical dimensions of the road were not at issue in *Waggoner*. The problem for Yancey is that tractor-trailers cannot fit on the road and Yancey does not have Ms. Palmer's consent. *Waggoner* supports Ms. Palmer's argument that "[e]ven where there has been a definite location of an easement, it may be changed with the express or implied consent of the persons interested" *Id*. at 746.

Waggoner is an express easement case. Yancey uses this express easement case to make its point about vehicles, in the same way that Ms. Palmer uses express easement cases to make her argument about width expansion. If Yancey is to be followed here, and *Waggoner* relied on (which Ms. Palmer says is okay), then the Court should follow the express easement cases about relocating or widening an established road.

Yancey offered another express easement case, *Eagle Builders v. Houck*, 1990 WL 751362 (Grayson County 1990), for support that it could have a “secondary easement” for maintenance purposes. Road maintenance responsibilities are not an assignment of error and Ms. Palmer is not in disagreement about the ability of a dominant owner to have a “secondary easement” for maintenance purposes.

Yancey offered *Smith v. Va. Iron & Coke* (1925). This is case about the establishment of an easement by necessity. Ms. Palmer stipulated that Yancey had an easement. The establishment of the easement by necessity was not at issue in this case.

Smith defines an easement by necessity and quotes from the respected treatise on Virginia property rights, Minor on Real Property (Second Edition, Ribble): “a grant of land or other property carries with it, by implication, as incident thereto, everything *reasonably necessary* to the enjoyment of the thing granted, which it is in the power of the grantor to bestow." *Id*. at § 98 page 164. *Smith* is offered as a setup to Yancey’s main case, *Keen v. Paragon Jewel Coal Co*.

The problem is that *Keen* is not a case about width expansion. It is a case about a plaintiff, similar to *Waggoner*, who wanted to stop the dominant owner from making a *new* use of road (to use the road for coal

hauling). The Court said that the dominant owner of an easement by necessity was allowed to use the road for coal hauling because it was allowed to use the road for anything reasonably necessary.

Ms. Palmer argues that if Yancey can unilaterally change the physical dimensions of the road, for anything that is reasonably necessary, the road could be transformed into a two-lane road, or a four-lane road, or a road with a rail tram, "*ad infintum*." *City of Lynchburg* at 372. Yancey cannot change the physical dimensions without consent under *Keen*.

D. Palmer's Rule

Location and width of an easement constitutes the outline of what was agreed to between the original grantor and grantee. Every use that can fit within the lines of an easement is allowed. 130 A.L.R. Annotated, page 770.

> The kind of way, and the sort of and quantity of traffic over it are to be determined by the reasonable necessities for the enjoyment of the land. By the weight of authority in America, its limits of the way are to be determined simply by the needs of the land at the time of the creation of the way, but the scope of the way may increase to meet the increased necessities of the property.

Minor (Second Edition, Ribble) § 98 at 134.

Ms. Palmer agrees with Minor as it pertains to the *use* of an easement. Minor does not address the physical dimensions issue.

"Scope" in the above-quote is the scope of the use, not the expansion of the easement itself. What Minor says about location of the easement is that the servient owner gets to choose the location of the easement and cannot be burdened by the dominant owner's use of the easement. *Id*. at 135 ("the [dominant owner] of the easement is bound to exercise his right so as to occasion the least possibly injury or inconvenience to the owner of the servient tract.").

A more recent treatise on the law of easements comes from Bruce and Ely. They describe how the servient owner chooses the location and how this location does not change without consent. "As a general rule, neither the easement holder not the owner of the servient estate may change the dimensions of a fixed easement without the consent of the other party." Bruce and Ely, THE LAW OF EASEMENTS AND LICENSES IN LAND, West, 2009, § 7:18, p. 7-47 (citing *Dudgeon*).

Bruce and Ely say that minor relocations are allowed (one-inch), or relocations can be allowed if the whole purpose of the easement is defeated by the lack of expansion. *Id*. Yancey's proposed use of tractor-trailers is not a minor relocation of an inch but a large expansion of many feet. Moreover, its use of the easement is not defeated if it cannot use tractor-trailers because it can timber its property with ten-wheel trucks.

Use does not trump physical dimensions. Historic width, location, and the burden on the servient estate can trump use. Yancey's request to use tractor-trailers on the road is a mere convenience, not a necessity.

The rule should be that an easement by necessity, once established, cannot be widened or relocated without the servient owner's consent. If Yancey's new use *does not fit* within the physical boundaries of the agreed-upon easement, Yancey must either bargain for the expansion or be prohibited from its desired use. It should lose its case in court.

Ms. Palmer asks this Court to deny Yancey's request to expand the width of its easement by necessity and reverse the circuit court's expansions in the Final Judgment Order.

II. THE CIRCUIT COURT ERRED BY ALLOWING THE DOMINANT OWNER TO USE TRACTOR-TRAILERS ON THE ROAD BECAUSE OF THE ADDITIONAL BURDEN ON THE SERVIENT OWNER.

A. Standard of Review

For express easements the "party alleging that a particular use of an easement is unreasonably burdensome has the burden of proving his allegation." *Shooting Point* at 502 citing *Hayes v. Aquia Marina, Inc.,* 243 Va. 255, 259 (1992). In prescriptive easement cases, the burden is on the dominant owner. *McNeil v. Kingrey*, 237 Va. 400, 406 (1989).

The “additional burden” test gets applied to easement by necessity case. *Keen* at 180 (“no additional burden is put upon the servient tenement”). The definition of what exactly constitutes an additional burden is vague but it clearly includes the taking of land and additional width from the servient owner.

The ultimate conclusion as to whether the use of an easement is an “additional burden” on the servient estate is a question of law. *Mulford* at 106. The trial court’s findings are given deference and will be upheld unless plainly wrong or due to a misapplication of law. *Id*.

B. <u>The Final Judgment Order is an Additional Burden</u>

The circuit court allowed Yancey to turn a ten-foot easement into a twenty-foot easement. App. 628–30. Yancey got a forty-foot commercial entrance, which involved the physical taking of land. *Id*. It was allowed to physically take land at the ford. *Id*. It allowed Yancey to remove bedrock, boulders, and trees from Ms. Palmer’s land. *Id*. It basically got a straight line that plows over everything in its path.

The circuit court gave Yancey all of this and gave Ms. Palmer no compensation for her loss. The circuit court put limits on Yancey’s further expansions beyond the minimum that was required for a tractor-trailer.

This was the circuit court's reasonable outcome, but it was plainly wrong, because it overlooked the additional burden to Ms. Palmer.

The taking of land has proved to be an additional burden in every Virginia case on the subject of easements. See *e.g.*, *Ellis* at 91 ("An increase in the area of the dominant estate increases the burden of an easement upon the servient estate as a matter of law.").

The general rule is that the use and the degree-of-use can change so long is there is not an additional burden. *Hayes* at 258–59. This means that Yancey can theoretically put a residential subdivision on its property and increase the traffic and degree of use of the road. Theoretically, Yancey can use tractor-trailers on the road as long as they fit within the boundaries of the easement. But no case authorizes Yancey to take away additional land from the servient owner to make this happen.

The Final Judgment Order imposes a great burden on Ms. Palmer, despite its attempt at fairness.[5] It would be bad policy and bad precedent to allow Yancey the expansion it seeks because it would be the first time

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[5] Yancey wanted much more than what the circuit court ended up giving it. It wanted a sweeping fifty-foot easement that would allow it to move the road anywhere it wanted, up to Ms. Palmer's doorstep. App. 490–95. Of course, it claimed, it would never do that. But the perpetual nature of something like an easement casts a cloud on title and who knows how the next owner might propose to expand the easement again.

that the taking of land would be allowed like this in Virginia without it being labeled an “additional burden” by an appellate court.

The taking of land at the entrance of the road is an additional burden to Ms. Palmer.

> I would prefer not to have tractor trailers going by my house. I would prefer not to widen my road [direct examination omitted] -- because of the width, it would have to become, my house would become visible from the road if they cut those corners off. The entrance would look like a development entrance. It's not the place that I bought. I worked hard to buy a little slice of paradise.
>
> App. 329 (Palmer).

The taking of land at the ford is an additional burden to Ms. Palmer.

> This is where I have my firewood. My shed is right in here. I have gas, I have propane, so there's a gas tank the other side of the shed. And if you start cutting this, this is my yard. I planted the pines there. They were seedlings. I put them in. And this is all part of my yard. It's winter. It doesn't look very pretty, but it is.
>
> App. 258 (Palmer).

The taking of land at the rocky outcropping would is an additional burden to Ms. Palmer.

> I've got bulbs. I've got vines. I've got wildflowers. It's rough looking. I mean, it's part of the woods. I just refined, you know, added to it. And it's not just one boulder. It's a rock outcropping. I don't know how you can cut part of it without destroying it, without it collapsing. I don't know. I'm not an

> engineer but I know it's all of one. And it's always been there. God made it. This is not disrepair.

App. 331 (Palmer).

C. Policy Arguments

There are a number of policy reasons why the changes Yancey requests would be an additional burden to Ms. Palmer. These arguments counsel against the widening and relocating of the easement by necessity.

1) Loss of Land. This has been discussed above. *It is the most important policy reason for denying Yancey the relief it seeks*. A servient owner's loss of land is an additional burden that prohibits expansion by the dominant estate. *Ellis* at 91 ("[A]ny increase in the burden of a prescriptive easement upon the servient estate, whether caused by a change of use or by an increase in the area of the dominant estate, is prohibited in Virginia.")

2) Loss of Character of Land. Changing the character of a road places an additional burden on the servient owner. Land is "unique," where "each piece of real property has its peculiar value." *Gaynor v. Hird*, 11 Va. App. 588, 592 (1991). To remove bedrock and pave over dirt and trees, would transform a "country lane" into a heavy, commercial logging road and it would change the character of Ms. Palmer's home. App. 309 (Sauer). See *Luther v. Jeffers*, 387 F. Supp. 182, 183 (1974) (denying expansion of an easement because it would change the character of the property).

Palmer describes:

> I had willows and alders that framed the entrance. It was beautiful. It was quiet. It was private. It was unnoticeable unless somebody was looking for it. And that's the life I chose. If it becomes 40-foot wide, I just can't even, I can't even want to live there. It just, it would take the joy out of the place for me to have it wide open. And if he cuts those curves that he's talking about, you will see my house from the road which you can't do now. This -- I've been there 40 years.

App. 334–35 (Palmer).

Transforming a country lane into a commercial trucking road is an additional burden to Ms. Palmer. See BRUCE AND ELY 8:13 at 8-43 (describing how the use of different vehicles can be a "substantial new burden" on the servient owner even if the usage is not new).

3) Consent. This issue has been covered in the brief already. The Court should not allowed the unilateral expansion of an easement without consent because it frustrates private agreements and would set a bad precedent for Virginians past, present, and future.

4) Private Taking. The circuit court's Final Judgment Order was a judicially authorized taking of private land for private use. "[T]aking private property for a private use, against the will of the owner, [cannot] be done in *any case*." *Boyd v. C.L. Ritter Lumber Co.*, 119 Va. 348, 89 S.E. 273, 274, 275 (1916) (emphasis added).

Taking the private property is a violation of The Constitution of Virginia, Article 1, § 11. "No private property shall be damaged or taken for public use without just compensation to the owner thereof." *Id*.

5) Notice. Ms. Palmer did not have notice that her private driveway could become a commercial entrance, or that it could expand into her yard. She never had notice that her humpback rocks and trees could be "removed," over her objection. App. 539.

6) Balance the Equities. Easement law is rooted in equity. In this case, the harm done to Ms. Palmer is out of balance with the benefit gained by Yancey. Yancey timbers its property every twenty-to-thirty years. Yancey wants to transform Ms. Palmer's land and then not come back for several decades. It wants to gain efficiencies, which is reasonable, but not at the sole expense of another landowner.

"My best scenario is to end up at zero. I have nothing to gain here. And it's cost money that I don't have, that I have to come up with in order to get an attorney because I couldn't fend my way through this stuff." App. 345.

7) Increased Litigation. Reasonableness litigation, of the kind endorsed in this case, should be disfavored when it comes to important rights like ownership, boundaries, and use of land. In this case, because

there was no clear rule, the dominant owner, with its much greater resources, brought a lawsuit against a woman who lived in a "shack in the woods" with the argument that their proposal was *reasonable*. App. 251.

Landowners need clear rules when it comes to ownership, boundaries, and use of easements. If the Court follows the circuit court and rules in favor Yancey's rule, every dominant owner of an unwritten easement by necessity will be able to go to court and claim that their expansion ideas are reasonable, and if the other party does not show up or is too poor to defend it, or cannot afford an expert witness, their land interests will change without consent, and without a fair fight.[6]

D. The Rights of the Servient Owner.

When one creates an easement, the general rule is that the servient owner chooses the location and width. Minor §98 at 135. The rights of the servient landowner are of paramount importance.

The South Carolina case of *Goodwyn v. Johnson*, 357 S.C. 49, 53, 591 S.E.2d 34 (S.C. App. 2003) reinforces the idea that the servient owner's rights of locating an easement outweigh the dominant owner's right to subsequent relocation. That case surveyed the law of easements

[6] Yancey may have calculated that the costs of litigation would be less than the cost of simply paying Ms. Palmer for the additional land. Whether or not this is the case, it is sets up a bad policy and is inequitable.

among the states and concluded that there was a majority view that easements by necessity cannot be relocated without consent, and the minority view that the *servient* owner can make modest location changes. Nowhere does it say or indicate that the dominant owner can relocate an easement or expand its width over the servient owner's objection.

When you purchase real property that has an access road across the real property of another, you are basically stuck with what you get. It would certainly benefit dominant owners, like Yancey, if the rule allowed you to widen and enlarge and generally improve and relocate roads, in any "reasonable" way that you like, without the servient's consent.

To agree with Yancey is to endorse a floating easement that is "flexible and fluid" to forever haunt the servient property. App. 413. To agree with Ms. Palmer is to keep the easement at what it was originally intended to be, as agreed among neighbors.

Ms. Palmer's rule is not perfect. There can be certain Acts of God that can change the location of an easement by necessity without consent, such as rising waters, erosion, and other like matters that would frustrate the entire purpose of the right of access.

What is needed is a bright-line rule that you cannot expand without consent, and if other cases arise in the future to test this rule then they can

be treated accordingly. Yancey wants to be able to physically expand a road for all purposes, whether it be for tractor-trailers, larger machinery, or two lanes for a residential subdivision. It does not want basic access; it wants better access. This should not be allowed.

Ownership of land is one of the most fundamental rights a citizen of our country can enjoy. It is the basic fabric of our life under a rule of law. Yancey's requests are too burdensome to impose on Ms. Palmer's right to privacy and her right to the quiet enjoyment of her land.

Yancey is not prohibited from using tractor-trailers, *per se*, but under the circumstances of this case the use of tractor-trailers would impose an "additional burden" on Ms. Palmer.

The circuit court erred that Yancey's use of tractor-trailers was not an additional burden on Ms. Palmer. She asks this court to *reverse* the circuit court's decision and enter a final judgment order in her favor.

CONCLUSION AND REQUEST FOR RELIEF

The circuit court erred when it found that Yancey could expand the width of its implied easement by necessity without Ms. Palmer's consent, and that the expansion of land was not an additional burden to Ms. Palmer.

Ms. Palmer asks this Court to *reverse* the circuit court and enter a final judgment order denying Yancey's request to expand the width of its easement by necessity.

Ms. Palmer asks that this court award her the costs for this appeal.

Respectfully submitted,
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By counsel

October 31, 2016

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CERTIFICATE

1. The Appellant is Joanna Palmer. Counsel for the Appellant is J. Addison Barnhardt, Esquire, (VSB# 83132), Grisham & Barnhardt, PLLC, 414 East Market Street, Suite D, Charlottesville, Virginia 22902. Mr. Barnhardt's telephone number is (434) 293-2939, his email address is jab@grisham-barnhardt.com, and his facsimile number is (434) 293-0691.

2. The Appellee is R. A. Yancey Lumber Corporation. Counsel for the Appellee is W. Alexander Burnett (VSB# 68000) and Andrew O. Mathews (VSB# 77038), WILLIAMS MULLEN, Post Office Box 1320, Richmond, Virginia 23218-1320. The telephone number is (804) 420-6481, the facsimile number is (804) 420-6507, and the email addresses are aburnett@williamsmullen.com and amathews@williamsmullen.com.

3. On this 31st day of October, 2016, pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, an electronic copy of the Brief of Appellant and Appendix were filed, via VACES, and ten copies of this Brief of Appellant and three copies of the Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia. On this same day, an electronic copy of the Brief of Appellant, was served via email and an electronic copy on CD of the Brief of Appellant and Appendix was served, via UPS Ground Transportation upon counsel for the Appellee.

4. The Opening Brief of the Appellant contains 7,239 words, exclusive of its cover page, table of contents, the table of authorities, and the certificate.

J. Addison Barnhardt
Counsel for Appellant