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August 27, 2012

The Honorable Daniel Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

S.C. Supreme Court

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United States Priority Mail

Re: Mountain View Baptist Church vs. Bobby Lee Burdine
On Certiorari to the Supreme Court of South Carolina

Dear Mr. Shearouse:

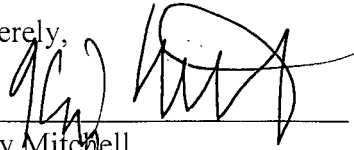
Enclosed for filing is the Petitioner's Brief in the above case. Also enclosed are the following:

- (1) Proof of service of the Petitioner's Brief to the opposing counsel.
- (2) Appendix.

S.C. Supreme Court

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Sincerely,

 s/ _____
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

On Certiorari to the Supreme Court of South Carolina
Opinion No. 2011-UP-061 (S.C. Ct. App. filed Feb. 16, 2011)

Mountain View Baptist Church Respondent.

v.

Bobby Lee Burdine Petitioner.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the magistrate had subject matter jurisdiction in a summary ejectment proceeding where Respondent failed to show that the relationship between the parties invoked the application of the summary ejectment statute as required by this Court's precedents?
2. Did the Court of Appeals err in holding that the magistrate had subject matter jurisdiction where Respondent's witnesses demonstrated that there was a legitimate dispute regarding the title of the property?

STATEMENT OF THE CASE

1. Case facts.

On November 26, 1958, R. Emma and Alonzo Burdine (the "Burdines"), Bobby Lee Burdine's parents, purchased lot 124 on the east side of Temple Street, an unimproved parcel of real property located in Greenville, South Carolina. (ROA. pp. 7-8). The transfer of that property to the Burdines from Louie E. Smith was memorialized in a deed recorded on December 6, 1958, in the Greenville County Register of Deeds Office. Shortly thereafter, however, the Burdines commenced construction on a home located on lot 2 on the north side of Temple Street, which is several lots over from the parcel located on lot 124 as indicated in the aforementioned deed. Upon completion the Burdine home acquired the street address of 108 Temple Street, Greenville, South Carolina (hereinafter the "subject premises," or "subject property"), and the Burdines moved in and lived there for the remainder of their lives until 2000. (ROA. pp. 16-17). Bobby Lee Burdine (hereinafter "Petitioner"), born August 5, 1956, grew up in the home located at 108 Temple Street and possessed and occupied the home subsequent to his parents' deaths in 2000. (ROA. p. 16). Petitioner still possesses and occupies this home as of the filing date of Appellant's brief. (ROA. p. 16).

On July 8, 1998, Mountain View Baptist Church, (hereinafter "Mountain View" or "Respondent"), purportedly purchased the lot and home located at 108 Temple Street, from Richard W. Locke, who had previously purchased the property from David Stone on January 18, 1996. (ROA. p. 10). On July 9, 1998, Mountain View recorded the deed that intended to memorialize the transfer of the property to the church. (ROA, p. 10). When Richard W. Locke sold the property to Mountain View he had never been on the property and did not know that the Burdine home existed on the lot. (ROA. p.18) Soon after this apparent transfer of the property to the church from Mr. Locke, Bobby Lee Burdine informed Mountain View's Pastor Stacey Mills that his family in fact owned the property. Over the next ten years Pastor Mills continued to see Bobby Lee Burdine on and around the property and would speak with him on occasion. (ROA. pp. 36-38).

In the summer of 2008 Mountain View purchased the property adjacent to 108 Temple Street, 110 Temple Street, and began to prepare to construct a parking lot thereupon with the intent that it eventually extend to the subject property. Petitioner again presented himself to Mountain View and asserted title to the property located at 108 Temple Street. Subsequently, Mountain View filed an application for ejectment against Petitioner in the Greenville County magistrate's court.

2. Procedural history.

On October 2, 2008, Respondent Mountain View applied to the Greenville County Magistrate's Court for a Rule to Vacate or Show Cause against Petitioner. (ROA. pp. 6-7). In the application for a writ of ejectment Respondent claimed ownership of the subject premises located at 108 Temple Street, Greenville, South Carolina 29601. (ROA. pp. 6-7). Respondent admitted that **no** landlord/tenant relationship existed between the parties and alleged that

petitioner “has unlawfully resided in the house located on the parcel of land ... and has failed to vacate the premises upon request of [Respondent]” (ROA. p. 6). Attached to the application was a copy of a deed, filed July 9, 1998, indicating that Respondent purchased the subject property from Richard W. Locke on July 8, 1998. (ROA. p 10). The magistrate issued and served upon Petitioner a Rule to Vacate or Show Cause, which was served on Petitioner on or about October 8, 2008. Petitioner did not respond to the Rule to Vacate or Show Cause.

On October 21, 2008, Magistrate Judge Leila Foster issued a writ of ejectment “in accordance with S.C. CODE ANN. § 27-40-710, 27-40-735, and 27-37-160”¹ against Petitioner requiring him to voluntarily vacate the premises by November 20, 2008. (ROA. p. 1). On October 27, 2008, counsel for Petitioner delivered a correspondence to Magistrate Judge Foster requesting that she suspend the execution of the writ and schedule a hearing on the matter (ROA. pp. 22-23). Magistrate Judge Foster set the matter for a summary ejectment proceeding before her on November 13, 2008.

On November 13, 2008, prior to the commencement of the summary proceeding, Petitioner filed an answer denying Respondent’s title to the subject property. (ROA. pp. 11-12). Petitioner’s answer averred that his parents built and resided in the home on the premises in excess of forty (40) years and that he continued to reside in the home. (ROA. pp. 11-12). Additionally, Petitioner asserted his claim to title of the subject property. (ROA. pp. 11-12). Accordingly, Petitioner denied that the action was within the jurisdiction of the magistrate’s court because no landlord/tenant relationship existed between the parties and because the title to the subject real property was in question. (ROA. p. 11). Petitioner submitted with the answer an undertaking affirming that if, within twenty (20) days, Respondent filed a summons and

¹ S.C. Residential Landlord Tenant Act, S.C. Code Ann. § 27-40-10, et. seq. (2007) (SCRLTA); and Eviction of Tenants, 27-37-10 et seq. (2007). It is unclear why the magistrate issued a writ of ejectment pursuant to the SCRLTA when it is undisputed that the parties did not have a landlord/tenant relationship.

complaint initiating a civil action concerning the title to the subject property in the circuit court, the Petitioner would, by and through his counsel, within 20 days accept service thereof. (ROA. pp. 11-12).

At the call of the case, Petitioner moved to set aside the writ of ejectment issued on October 21, 2008, and to dismiss Respondent's application for lack of subject matter jurisdiction based on the nonexistence of a relationship between the parties that would be proper for summary ejectment proceedings. (ROA. pp. 38-39). Additionally, Petitioner moved to dismiss the action based on lack of subject matter jurisdiction pursuant to S.C. Code of Laws § 22-3-20 due to the fact that title to the subject property was implicated because Petitioner and his parents had possessed and occupied the property since 1958. (ROA. pp. 39-40). Petitioner argued that because their possession was adverse to all other ownership claims he therefore asserted a legitimate claim regarding the title to the property pursuant to South Carolina statutory and common law. (ROA. pp. 26-41). The magistrate, without ruling on the sufficiency of Petitioner's undertaking or what would be an appropriate surety and without making any other findings on the record, denied Petitioner's motion and proceeded with the summary ejectment hearing. At the conclusion of the summary proceeding the magistrate found in favor of Respondent and issued a writ of ejectment.

On November 17, 2008, Petitioner applied to the Circuit Court of Greenville County for an order staying the execution and enforcement of the writ of ejectment (ROA. pp. 13-15). On November 20, 2008, Circuit Court Judge John C. Few heard Petitioner's motion and issued an order setting aside the writ of ejectment. (ROA. pp. 2-3). Judge Few found that because sufficient evidence existed that raised a legitimate question regarding the title to the subject property, the magistrate lacked subject matter jurisdiction to issue the writ of ejectment pursuant

to summary ejectment proceedings (ROA. pp. 66-73). Judge Few's Order was subsequently filed on November 26, 2008, and received by Respondent on December 2, 2008. On December 12, 2008, Respondent filed a motion for reconsideration which was denied by Judge Few by Order dated December 18, 2008. On January 8, 2009, Respondent filed a notice of appeal to the South Carolina Court of Appeals. On February 16, 2011, the Court of Appeals filed an unpublished, per curium opinion, Op. No. 2011-UP-061, reversing Judge Few's order setting aside the writ of ejectment. Notwithstanding the evidence of disputed title, the Court of Appeals found the magistrate had subject matter jurisdiction because Petitioner's undertaking was not executed by a surety and, therefore, did not comply with S.C. Code Ann. § 22-3-1140 relating to the magistrate's jurisdiction. *Mountain View Baptist Church v. Burdine*, Unpublished Opinion No. 2011-UP-061 (Filed February 16, 2011).

On March 2, 2011, Petitioner filed a petition for rehearing with the South Carolina Court of Appeals which denied the petition on April 25, 2011. On May 25, 2011, Petitioner filed a petition for writ of certiorari to review that decision. The Petition was granted by this Court on July 27, 2012.

ARGUMENT

- I. THE MAGISTRATE DID NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE RESPONDENT FAILED TO MAKE A *PRIMA FACIE* SHOWING NECESSARY TO INVOKE SUMMARY EJECTMENT PROCEEDINGS.

The South Carolina Court of Appeals erred in reversing the Circuit Court and reinstating the magistrate's writ of ejectment against Petitioner. Because the facts presented to the magistrate at the commencement of the summary hearing demonstrated a legitimate dispute between the parties regarding title to the subject property, the magistrate lacked subject matter jurisdiction, and the action should have been dismissed. It is axiomatic that lack of subject matter jurisdiction is a complete defense that may be raised at any stage of a proceeding, even for the first time on appeal before the Supreme Court. It cannot be waived, even by consent of the parties, and can and should be raised *sua sponte* by the court where it appears to be absent. See *Ex parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (1993); *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897 (1989). Accordingly, Petitioner respectfully requests this Court to reverse the South Carolina Court of Appeals and set aside the writ of ejectment issued by the magistrate as void for lack of subject matter jurisdiction.

South Carolina property law balances the strict public policy of prohibiting magistrates from hearing cases involving legitimate issues of title to real property with the complementary policy of giving landowners, where appropriate, an expedited process for expelling squatters, trespassers and tenants. Thus, for a magistrate to assume subject matter jurisdiction of a summary ejectment proceeding, this Court requires property owners to make a preliminary showing that the action brought clearly comes within the particular statute pled. Here, the evidence presented to the magistrate at the preliminary hearing indicated, on its face, that a

legitimate dispute existed between the parties regarding the title to the subject property. Confronted with this evidence of a legitimate title dispute at the very outset of the case, the magistrate erred in continuing the summary ejection of trespassers proceeding filed by Respondent.

The prohibition on magistrates hearing actions where title is in dispute is deeply rooted in our law. Historically the South Carolina Constitution precluded state magistrates from having jurisdiction to decide actions involving the title to real property. S.C. CONSTITUTION OF 1895.² Upon later amendment, the South Carolina Constitution authorized the General Assembly to provide for the civil jurisdiction of the magistrate courts. S.C. CONST. ART. V, § 26. Thereafter, the legislature codified what is now the well-established exclusion of actions involving the title to real property from magistrate's court subject matter jurisdiction. S.C. CODE ANN. § 22-3-20(2) (2007). Article 11 under this chapter provides a further statutory safeguard to ensure that magistrates do *not* decide actions involving legitimate questions as to the title of real property. S.C. CODE ANN. § 22-3-1110, et seq. (2007). Pursuant to Article 11, such cases either get automatically transferred to the circuit court, or the parties are prohibited from raising the issue of title to real property. *Id.*

Equally historic is our state legislature's statutory policy of providing verifiable landowners an expedited procedure in magistrate's court to expel squatters or trespassers as well as tenants from the landowner's property. *See, e.g., Baldwin vs. Cooley*, 1 S.C. 256, 1870 Lexis 30 (S.C. 1870) ("The magistrate, in this case, has proceeded ... under the Act of 1866 entitled 'An Act to provide an expeditious mode of ejecting trespassers'"). Under this statutory

² The S.C. Constitution did not intend to allow the magistrate in any case to oust a man from the possession of his real estate and throw upon him the burden of proving his title. *Bamberg Banking Co. v. Matthews*, 132 S.C. 130, 128 S.E. 718 (S.C. 1925) (Watts, J., dissenting).

scheme,³ the landowner does not file a summons and complaint, but rather, makes an application for a notice to quit (in the case of an alleged trespasser), or a rule to vacate or show cause (in the case of an alleged holdover tenant). S.C. CODE ANN. § 15-67-610 (2007); S.C. CODE ANN. § 27-37-20 (2007). Neither the alleged trespasser, nor the alleged holdover tenant are required to file a written answer to the notice or the rule; rather, if they contest the ejectment they must simply make an appearance within the statutory period and show either: (1) a bona fide claim to possession in the case of an alleged trespasser; or (2) cause as to why they should not have to vacate the premises as a tenant. S.C. CODE ANN. § 15-67-620 (2007); S.C. CODE ANN. § 27-37-20, 60 (2007).

In order to reconcile these two separate public policies—affording landowners the convenience of summary proceedings while also ensuring that magistrates do not decide actions involving the title to real property—the South Carolina Supreme Court has consistently required plaintiffs attempting to utilize summary ejectment proceedings to make a preliminary *prima facie* showing that the dispossession action they bring falls within the particular ejectment statute pled. *Richland Drug Co. v. Moorman*, 71 S.C. 236, 50 S.E. 792 (S.C. 1905), (“The plaintiff claiming right of summary ejectment must bring himself within the statute by at least making before the magistrate a *prima facie* showing that he is the owner of the premises and that defendant is a trespasser.”); *Stewart-Jones Co. v. Shehan*, 127 S.C. 451, 121 S.E. 374 (S.C. 1924) ([N]ecessarily, therefore, it is competent for the magistrate to determine as a fact whether the relation of landlord and tenant exists ... [because] it is apparent that by merely asserting the claim that another is in possession of real estate as his tenant a party may not be permitted to use the summary statutory proceeding to eject the true owner of the premises”).

³ The language of which has essentially remained unchanged even into the modern S.C. Code of Laws, *see infra* fn 4.

This Court's decision in *Richland Drug Co.*, is illustrative. There the plaintiff initiated summary ejectment proceedings, pursuant to Code 1902, section 2972,⁴ by serving a notice to quit on the defendant concerning the premises described in the notice. *Richland Drug Co.*, 71 S.C. at 237. The day after he was served, the defendant appeared before the magistrate and presented a deed to the premises as evidence of his title and requested a hearing to determine the matter. *Id.* The magistrate did not inspect the deed, but agreed to set a day for the hearing and contacted the attorneys for plaintiff accordingly. *Id.* at 238. Instead of agreeing to a hearing date, the plaintiff asserted that the proceeding was summary, and, because more than five days passed with the defendant failing to give a bond, the duty of the magistrate was limited to ejecting the defendant from the property. *Id.* The magistrate declined to summarily eject the defendant without a hearing and the plaintiff applied to the Circuit Court for a writ of mandamus compelling the magistrate to issue the warrant of ejectment. *Id.*

Similar to the Court of Appeals decision in the instant case, the circuit court in *Richland Drug Co.* held that the summary ejectment of trespassers statute contemplates that only if the alleged trespasser satisfies the magistrate that a bona fide color or claim to possession exists *and* enters into a bond, then the person bringing the action is relegated to his action of law, during which the question of trespass is determined. *Id.* at 239. The Court determined that more than

⁴ "If any person shall have gone into or shall hereafter go into possession of any lands or tenements of another without his consent or without warrant of law, it shall be lawful for the owner of the land so trespassed upon to apply to any magistrate to serve notice on such trespasser to quit the premises; and if after the expiration of five days from personal service of such notice such trespasser refuses or neglects to quit, it shall then be the duty of such magistrate to issue his warrant to any sheriff or constable, requiring him forthwith to eject such trespasser, using such force as may be necessary; *Provided however*, That if the person in possession shall, before the expiration of the said five days, appear before the magistrate and satisfy him that he has a bona fide color of claim to the possession of such premises, and enter into bond to the person claiming the land, with good and sufficient surety, to be approved by the magistrate, conditioned for the payment of all such costs and expenses as the person claiming to be the owner of the lands may incur in the successful establishment of his claim by any of the modes of proceeding now provided by law, the said magistrate shall not issue his warrant as aforesaid." The language of this provision is essentially the same language of the current code section authorizing summary ejectment of trespassers. *See* S.C. CODE ANN. § 15-67-610 and 620 (2007).

five days elapsed since the plaintiff initiated the proceedings and the defendant failed to enter into the bond and concluded, therefore, that the magistrate should have issued the warrant of ejectment as a matter of law. *Id.* The Circuit Court issued the writ of mandamus and the defendant appealed to the S.C. Supreme Court to set aside the writ.

This Court reversed the writ of mandamus and held that the summary ejectment statute does not apply to someone with an ownership interest in the premises, but, did apply to an alleged trespasser who, nevertheless, has a bona fide color of claim to possession.⁵ *Id.* at 240. According to the Court, the statute gives such an alleged trespasser the privilege of demonstrating such a claim to possession to the magistrate within five days and executing a bond, which in turn operates to prevent the court from issuing the warrant of ejectment.⁶ *Id.* It did not follow, however, that a magistrate, as a matter of law, is compelled to issue a warrant in all cases where a person served with a notice to quit fails to comply with the provisions of the statute. *Id.*

In some cases, the Court reasoned, a defendant in possession, even though he does not avail himself of the privilege of executing the bond within five days after notice to quit, and thereby preventing the warrant from being issued, will appear and demand a hearing as to whether the case is one falling within summary ejectment proceedings. *Id.* When this occurs the magistrate must conduct a hearing on the matter to determine if the plaintiff can make a least a *prima facie* showing that he is the owner of the premises and that defendant is a trespasser. *Id.* If it initially appears, however, that the defendant has an ownership interest in the property and for that reason refuses to quit the premises, the statute does not apply and the magistrate must

⁵ See, e.g., *Sires v. Moseley*, 60 S.C. 504, 39 S.E. 7 (S.C. 1901) (Court upheld ejectment of trespasser where defendant did not claim title to the property and failed to prove a bona fide color of claim to possession).

⁶ In the case where the defendant avails himself of the privilege, the magistrate would determine the issue of defendant's claim to possession and each party has the right to appeal the decision to the Circuit Court. S.C. CODE ANN. § 15-67-640 (2007).

dismiss the summary ejectment proceeding. *Id.* at 239. The plaintiff would then be left to the ordinary remedy for recovery of possession of land.⁷ *Id.*

Accordingly, applying these fundamental and well-established principles to the case at hand, for the magistrate to have maintained the summary ejectment proceeding against Petitioner held on November 13, 2008, the magistrate would have had to make a preliminary finding that that the action was governed by the summary ejectment of trespassers statute.⁸ Necessarily, then, the magistrate was required to determine that Respondent initially demonstrated a valid claim of ownership over the subject premises and was further required to find facts that facially showed that Petitioner was an unlawful, tortuous trespasser thereupon. S.C. CODE ANN. § 15-67-610 (2007); *Baldwin vs. Cooley*, 1 S.C. 256, 870 LEXIS 30, (S.C. 1870) (finding that defendants who during the relevant time were heirs possessing the property at the acquiescence of the executor of the grantor's will were not trespassers in an action brought by purchaser. "They did not enter against the consent of the party have the fee, and ... hence the [summary ejectment] Act is not applicable to such a case ... nor was it intended to reach such cases. It was to reach open, flagrant trespassers"). Furthermore, if the initial facts presented at the commencement of the summary ejectment proceeding show that Petitioner did not quit the premises because of a valid claim to ownership of the property, the magistrate was required to dismiss the proceeding.

Richland Drug Co., 71 S.C. at 237. Here, the information initially presented to the magistrate

⁷ See, e.g., *Little vs. Little*, 223 S.C. 332, 75 S.E.2d 871 (S.C. 1953) ('Trespass to try title.' Action filed in the circuit court where "plaintiff alleged that he was owner of and in lawful possession of described premises and that defendant had trespassed thereon, and defendant denied both plaintiff's possession and title, and set up an affirmative defense that the land was owned by the mother of the parties, [the] cause became one of trespass to try title"). See, *Dargan v. Tankersley*, 380 S.C. 480, 671 S.E.2d 73 (S.C. 2008) (Quiet title action brought in Circuit Court, and subsequently transferred to the Master-in-Equity, seeking to establish ownership of a parcel of real property).

⁸ Respondent admits no landlord/tenant relationship existed between the parties and its Brief to the S.C. Court of Appeals appears to accept the premise that Respondent initiated the action under S.C. CODE ANN. § 15-67-610, et seq. (2007), however the application for ejectment filed with the magistrate does not specifically state the code section upon which they rely. (ROA. p. 6).

below clearly showed that Petitioner was not a flagrant trespasser or squatter, and indeed that he had a legitimate claim regarding the title to the subject property through adverse possession.

The magistrate had evidence at the commencement of this action demonstrating a legitimate dispute regarding the title to the subject property, thereby precluding a finding that the relationship between the parties brought the action within the jurisdiction of the summary ejectment proceeding. First, in the application for ejectment, Respondent states it purchased the subject property in July of 1998. (ROA. p. 6). Respondent admits Petitioner was residing in the house located on the subject property when they brought the action in October 2008, and admits no landlord-tenant relationship existed, and never existed, between the parties. (ROA. p. 6). Petitioner did not respond in writing to the Rule to Vacate issued by the magistrate, but was granted a hearing concerning the writ of ejectment issued thereafter. (ROA. pp. 22-23).

On the day of the hearing, Petitioner submitted an answer stating that he resided and continued to reside on the subject premises and that his occupancy was lawful and had continuously existed by him and his parents for a period in excess of forty (40) years. (ROA. p. 11). Additionally, Petitioner informed the court in pre-trial communication on the record, that in 1958 his parents mistakenly built a home on the subject property that Respondent claimed to have purchased in 1998. (ROA. p. 36). Petitioner also informed the magistrate that he grew up in this home and that his parents lived in the home until 1999 or 2000, at which time he began occupying and exclusively possessing the home, and that such possession continued through the day of trial—a fact corroborated by the Respondent's application. (ROA. pp. 36-37). Petitioner, therefore, properly asserted a claim to the title of the subject property pursuant to South Carolina adverse possession law. *Miller v. Leaird*, 307 S.C. 56, 62, 413 S.E.2d 841, 844 (S.C. 1992).

Acquiring title by adverse possession requires proof of actual, open, notorious, hostile, continuous, and exclusive possession by the claimant, or by one or more persons through whom he claimed, for the full statutory period. *Jones v. Leagan*, 384 S.C. 1, 681 S.E.2d 6 (S.C. Ct. App. 2009) quoting *Miller*, 307 S.C. at 61. In South Carolina, adverse possession may be established if the elements of the claim are shown to exist for at least ten years. S.C. CODE ANN. § 15-67-210 (2007). Here, Alonza and Emma Burdine used, occupied, and claimed ownership of the subject property actually, openly and notoriously, exclusively, continuously and hostilely from 1958 until at least 1999. They did everything required by South Carolina law to effectuate ouster of any other entity's claim to the subject property and to obtain title to the property themselves through adverse possession. Even the fact that the Burdines' possession of the subject property was based on an apparently erroneous belief in their recorded ownership of the property does not defeat their claim to title through adverse possession. *Perry v. Heirs at law and Distributees of Gadsden*, 316 S.C. 224, 449 S.E.2d 250 (S.C. 1994); *Wigfall v. Fobbs*, 295 S.C. 59, 367 S.E.2d 156 (S.C. 1988). Accordingly, because Petitioner's parents acquired title to the property by adverse possession between 1958 and 1999, Petitioner had a claim to an interest in the subject property as their heir. *Clark v. Hargrove*, 323 S.C. 84, 473 S.E.2d 474 (S.C. Ct. App. 1996).

Petitioner argued to the magistrate that, based on the long possession and occupation of the property by both Petitioner and his parents, Petitioner had an interest in the title to the property through adverse possession pursuant to the "ten year statute, ... the 20 years for presumption of credit, of common law, as well as the forty (40) year statute." (ROA. pp. 39-40). As these facts presented to the magistrate indicated a clear issue regarding the title to the subject property, Petitioner moved to dismiss Respondent's action because the magistrate did not

have jurisdiction to proceed with a summary ejectment. (ROA. p. 39). Presented with these preliminary facts, the magistrate erred by assuming jurisdiction and proceeding to hear the case.

The magistrate erred by failing to refuse summary ejectment jurisdiction over the matter and dismiss the action accordingly. The pleadings and evidence presented to the magistrate at the commencement of the summary proceedings demonstrate that Petitioner and his predecessors occupied and possessed the subject property up to forty (40) years before Respondent's claim to the title in 1998 and that Petitioner was occupying the premises at the time Respondent brought the action in 2008. Because Petitioner raised a legitimate claim to title to the subject premises, the preliminary facts, even in the light most favorable to Respondent, failed to establish the necessary *prima facie* showing that the relationship of the parties came within the summary ejectment of trespassers statute. The magistrate was required, therefore, to dismiss the application pursuant to § 22-3-20(2) so that Respondent or Petitioner, could bring an action to determine title in circuit court.⁹ Accordingly, the S.C. Court of Appeals should have affirmed Judge Few's holding that because the case presented a legitimate question of title of the subject property it therefore followed that the magistrate did not have jurisdiction "to kick these people out of their home. [That] only the circuit court can." (ROA. p. 74).

Respondent, in support of the magistrate maintaining jurisdiction to issue the writ, conflates the mandates of Title 22, Article 11 with the requirements of S.C. Code Ann. § 15-67-620 and urges this Court to expand the initial requirements on recipients of a notice to quit well beyond what is required by the summary ejectment statute. [Respondent's Return to Writ of Certiorari, p. 6]. Respondent asserts, pursuant to S.C. Code Ann. § 15-67-620 and § 22-3-1110, that a "challenged party in possession" must submit an answer that raises a colorable claim of title within five (5) days of being served with the notice to quit and only after posting a

⁹ See *supra* fn 7.

corresponding surety bond. [Respondent's Return to Writ of Certiorari, pp. 6-7]. According to Respondent this answer must be in writing, signed by the 'defendant,' filed with the magistrate's court and served on Respondent within that time. [Respondent's Return to Writ of Certiorari, pp. 7-8]. Respondent contends, then, that because Petitioner did not file and serve his written answer raising a question of title to the subject property within the five days (or thirty days from the date of service) and did not post a surety bond, the S.C. Court of Appeals correctly reinstated the writ of ejectment against Petitioner. [Respondent's Return to Writ of Certiorari, p. 7-8]. Respondent position—and the Court of Appeals reasoning—however, contravenes this Court's interpretation of the requirements of S.C. Code Ann. § 15-67-620 as well as the initial jurisdictional obligation imposed upon applicants of summary ejectment actions as espoused by this Court in *Richland Drug Co.*

Contrary to Respondent's assertion, S.C. Code Ann. § 15-67-620 does not require the recipient of a notice to quit to file an answer, but only appear before the magistrate within five days. At that time the recipient must satisfy the magistrate that he has a bona fide color of claim to the *possession* of the premises, not a claim to *title* as Respondent suggests. If the person likewise executes a bond, the court will not issue a warrant of ejectment and will hear the applicant's action. In the instant case, as in *Richland Drug Co.*, Petitioner did not consider himself a trespasser and, therefore, did not respond to the notice to quit. Likewise, Petitioner requested a hearing and sought a determination whether the action filed by Respondent was one falling within the statute. Whereas Respondent, like the plaintiff in *Richland Drug Co.*, posits that the magistrate, as a matter of law, is compelled to issue a warrant of ejectment in all cases where a person served with a notice to quit failed to comply with the provisions of S.C. Code Ann. § 15-67-620, in *Richland Drug Co.* this Court held that under these circumstances the

magistrate must conduct a hearing to determine if the plaintiff can make at least a *prima facie* showing that he is the owner and that Petitioner is a trespasser. *Richland Drug Co.*, 71 S.C. 236, 50 S.E. 792 (S.C. 1905). Thus, prior to attempting to apply Title 22, Article 11 to an action brought under S.C. Code of Laws § 15-67-620—which would expand the initial requirements placed upon a lawful occupant of real property served with a notice to quit the premises—Petitioner is required to convince the magistrate that the action is properly within the court’s summary ejectment jurisdiction.

Here, the Court of Appeals’ decision held that the magistrate had subject matter jurisdiction solely because, in its view, Petitioner failed to comply with Article 11 of Title 22. Because, however, plaintiff failed to present a *prima facie* case showing that a summary ejectment proceeding was even applicable, however, the provisions of Article 11 were not implicated and could not have therefore determined the magistrate’s exercise of jurisdiction in this case. As set forth above, this Court has plainly held that property owners invoking summary proceedings must bring themselves within the particular ejectment statute by initially demonstrating the relationship between the parties is one contemplated by the respective statute. Because the facts presented at the commencement of this action demonstrated that Petitioner had a legitimate ownership interest in the subject property, the magistrate could not have decided the summary ejectment of trespasser proceeding without determining the issue of title to the subject property.¹⁰ Magistrates are precluded from determining title to real property in summary ejectment proceedings and it was, therefore, error for the magistrate to assume jurisdiction in this action. The Circuit Court was correct, then, in setting aside the writ of ejectment because the

¹⁰ See, e.g. *Ex Parte Wingate*, 166 S.C. 440, 165 S.E. 176 (S.C. 1932) (Finding that the determination of the matter necessary relied upon the issue of title to the property and that because the court did not have jurisdiction to decide the question of title to real property, the court’s adjudication was without authority of law).

magistrate did not have subject matter jurisdiction. The Court of Appeals therefore erred in reversing Judge Few's stay of the writ of ejectment due to the lack of the magistrate's subject matter jurisdiction

II. THE MAGISTRATE DID NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE RESPONDENT'S OWN SHOWING BROUGHT THE TITLE TO THE SUBJECT PROPERTY INTO QUESTION.

Even if the summary ejectment proceeding could properly be maintained and the provisions of Article 11 of Title 22 are therefore applicable, the action should still have been dismissed for lack of subject matter jurisdiction. To ensure plaintiffs do not bring actions involving title to real property into magistrate's courts, Article 11 of Title 22 requires magistrates to dismiss any action where a plaintiff's own evidence brings the title of real property into question. S.C. CODE ANN. 22-3-1150 (2007). This applies regardless of whether defendant has perfected the undertaking specified in S.C. Code Ann. § 22-3-1120 and relied on by the Court of Appeals here. Because Respondent's presentation of its case-in-chief demonstrated that a legitimate question existed regarding the title to the subject property, the Court of Appeals erred in finding that the magistrate had subject matter jurisdiction of the summary ejectment proceeding pursuant to Article 11.

The Code of Laws of South Carolina excludes magistrates' jurisdiction over civil actions "when the title to real property shall come in question, except as provided in Article 11 of this chapter." S.C. CODE ANN. § 22-3-20(2) (2007). Article 11's eight sections, when read together, ensure that magistrates do not decide legitimate issues of title to real property in actions brought in their court. In fact, in the cases where the magistrate retains jurisdiction under Article 11, the

defendant is precluded from bringing the issue of title as a defense. S.C. CODE ANN. § 22-3-1140 (2007). In those cases, the magistrate can proceed with the action, but is still prohibited from considering the issue of title to real property to decide the matter. Furthermore, as a failsafe, in cases where the magistrate proceeds under Article 11, if the plaintiff's case-in-chief raises a question as to the title of real property, then the magistrate is *required* to dismiss the action. S.C. CODE ANN. § 22-3-1150 (2007).

Article 11 contemplates that a plaintiff's initial filing in magistrate's court is an action within one of the statutorily enumerated in S.C. Code Ann. § 22-3-10 and does not bring title to real property into question. If that is the case, then thereafter, under the four corners of the statute, if a defendant wishes to raise the issue of title to real property as a defense, he must do so in accordance with S.C. Code Ann. § 22-3-1110. The defense must be raised in writing and additionally at the time of answering the defendant must deliver to the magistrate a written undertaking that has been executed by a sufficient surety and approved by the magistrate. S.C. CODE ANN. § 22-3-1120 (2007).¹¹ The undertaking must state that if the plaintiff delivers to the magistrate within twenty days a copy of a summons and complaint for the same cause of action filed in circuit court, then the defendant will within twenty days after such deposit accept service thereof. S.C. CODE ANN. § 22-3-1120 (2007). When the defendant files the answer and undertaking with the magistrate the magistrate is required to dismiss the pending action. S.C. CODE ANN. § 22-3-1130 (2007). Plaintiff is then allowed to bring an action in Circuit Court, but the action filed, and subsequently accepted by defendant pursuant to the undertaking, must be the

¹¹ The statute continues: "In case of failure to comply with the undertaking the surety shall be liable for not exceeding one hundred dollars." S.C. CODE ANN. § 22-3-1120 (2007).

exact action plaintiff filed in magistrate's court. *High v. Wingo*, 84 S.C. 246, 66 S.E. 185 (S.C. 1909).¹²

Even where there is some arguable defect in the undertaking,¹³ however, and defendant is precluded from raising a disputed title defense, the case must still be dismissed for lack of subject matter jurisdiction where plaintiff's evidence brings title into question. This is a basic and necessary corollary in the statute to satisfy the overarching requirement that matters of title are for the circuit court. So, in situations where the defendant does not deliver the required undertaking to the magistrate, the magistrate retains jurisdiction of the action and proceeds with hearing the matter accordingly. S.C. CODE ANN. § 22-3-1140 (2007). Furthermore, during such proceedings the defendant is precluded from affirmatively raising title of real property against plaintiff's claims. S.C. CODE ANN. § 22-3-1140 (2007). When the case is heard, however, if the plaintiff's own showing brings title to real property into question, and the defendant disputes such title, the magistrate is then required to dismiss the action. S.C. CODE ANN. § 22-3-1150 (2007); *Stewart-Jones Co. v. Shehan*, 127 S.C. 451, 121 S.E. 374 (S.C. 1924) (“[I]t appeared on the trial from the plaintiff's own showing that the title to real property was in question, and that such title was disputed by the defendant, and hence that the magistrate was without jurisdiction”).¹⁴

In this case, in addition to contesting the applicability of the summary ejectment statute and requesting a hearing on the matter, Petitioner filed an answer and undertaking which denied

¹² S.C. CODE ANN. § 15-67-610 (2007) gives magistrate courts exclusive jurisdiction over summary ejectment of trespasser actions with the Circuit Courts serving in an appellate capacity. Because a plaintiff could not file an application pursuant to § 15-67-610 with the Circuit Court, as would be required under *High*, arguably Article 11 was not intended to apply to applications made to the magistrate under the summary ejectment of trespassers statute.

¹³ The magistrate below did not rule on the sufficiency of Petitioner's undertaking or what would be an acceptable surety prior to assuming jurisdiction of the summary ejectment proceeding.

¹⁴ The court in *Stewart-Jones Co.* found that even though the Circuit Court found that the plaintiff introduced the question of title to the real property, the magistrate, as a preliminary matter could not have found that a landlord/tenant relationship existed to invoke summary ejectment proceedings. *Id.*

Respondent's title and in fact claimed title to the property based on the lengthy occupation and possession of the premises by Petitioner and his parents. Additionally, prior to trial, Petitioner moved to dismiss based on the lack of subject matter jurisdiction because there was a legitimate question as to the title of the subject property. The magistrate denied Petitioner's motion and proceeded to hear Respondent's case. Therefore, presumably because Petitioner failed to comply with the statute, pursuant to S.C. Code Ann. § 22-3-1140,¹⁵ Petitioner was precluded from introducing evidence relating to the title of the subject property in his defense. Because Respondent's own showing brought the title of the subject property into question, however, the magistrate should have dismissed the action pursuant to S.C. Code Ann. § 22-3-1150.

The application for ejectment indicated that Respondent purchased the property in 1998. At trial Respondent's primary witness, pastor Stacy Mills, testified that immediately upon purchasing the subject property, Petitioner "apparently got some notion of our owning the property and her came over ... and he was making a ruckus about us owning the property." (ROA. pp. 43-44). Pastor Mills further testified that:

"After that point [purchasing surrounding property in 2008] we began to have surveys and get bids from other companies to come in and give us a quote on actually making it a formal parking area. That's when [Petitioner] began to present again as the owner of the property." (ROA. p. 48).

Moreover as Respondent's own evidence made clear even after Petitioner asserted an issue regarding the title to the property, Respondent waited ten years to file this summary action. Additionally, during this time Respondent did not exercise any form of possession over the subject property. Respondent offered no evidence of possession and Pastor Mills testified that he had never even been inside the home located thereon. Pastor Mills further testified that:

Pastor Mills went on to testify that:

¹⁵ There is no evidence in the record that the magistrate ever made any finding to this effect.

"[A]round July/August of this year [2008] we purchased another piece of property which is right next door to the property in question ... and we have been preparing to formalize a parking area ... And when we began to move in that direction is when **Mr. Burdine, presented himself again to us that he had rights and claim to that property**, and that is when we decided to seek legal action to **find out what our interests are** and to protect the interests of the church." (Emphasis added.) (ROA. pp. 45-46).

Furthermore, when asked upon cross-examination whether Respondent had taken any action whatsoever regarding the subject property prior to the summer of 2008, Pastor Mills testified that:

"Other than, you know, seeking to have an amicable agreement about it, no sir, with the Burdines prior to their passing." (ROA. p. 50)

"We --- we sought to have an amicable agreement with them about the --- the property to find out more about their having lived there, or what was transpiring, because there was no deed. We tried to research all of that to find out titles and exactly when did they build their house. We were trying to find out more information." (ROA. P. 50).

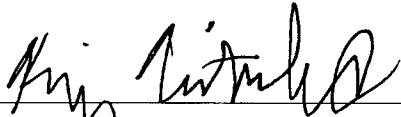
It is obvious from Pastor Mills' testimony that Respondent was uncertain of its property interest in the subject property from the time it purchased the property in 1998 until the time it brought a summary ejectment action against Petitioner in 2008. Not only was Respondent aware of the possession by Petitioner's parents prior to allegedly purchasing the subject property in 1998, but at the time of purchase they became aware that Petitioner claimed an ownership in the subject property as well. Furthermore, Respondent never assumed any actual or constructive ownership of the subject property at any time subsequent to the alleged purchase and prior to bringing this action in 2008. In fact, prior to this action, Respondent sought to enter into an amicable agreement with Petitioner's parents concerning the subject property because there was no deed concerning the Burdine's ownership. It was not until the Burdines had long been dead and Petitioner again asserted his ownership of the subject property in the summer of 2008 that Respondent decided to seek legal advice to determine what their interests in the subject property were.

In sum, this evidence presented by Respondent in its case in chief unmistakably indicates that there was and is a legitimate question as to the title of the subject property. The Court of Appeals, nonetheless found that the magistrate had summary ejectment jurisdiction to hear the matter because Petitioner's undertaking was not secured by a surety not exceeding one-hundred dollars (\$100.00), and did not, therefore, comply with S.C. Code Ann. § 22-3-1140. From this the Court concluded that pursuant to S.C. Code Ann. § 22-3-1140 the magistrate retained jurisdiction to hear the matter and Petitioner was precluded from raising the issue of title as a defense. In so ruling the Court of Appeals erred as a matter of law by ignoring the very next section, S.C. Code Ann. § 22-3-1150, which requires that even if an undertaking has not been properly perfected, the magistrate must dismiss the action if the evidence introduced by the Respondent's own showing brings the title of real property into question. Because Respondent's witness testified that title to the subject property was in question, S.C. Code Ann. § 22-3-1150 required the magistrate to dismiss this summary ejectment action. Accordingly, the Court of Appeals erred in reversing the circuit court's order setting aside the writ of ejectment, the Court should reverse the decision of the Court of Appeals.


CONCLUSION

For the reasons stated, and upon the foregoing authorities cited, the decision of the Court of Appeals should be reversed and the writ of ejectment issued against Petitioner dismissed for lack of subject matter jurisdiction.

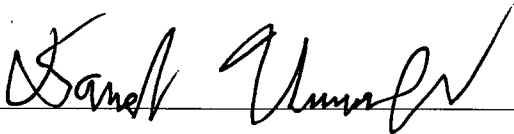
Respectfully submitted,



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STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

On Certiorari to the Supreme Court of South Carolina
Opinion No. 2011-UP-061 (S.C. Ct. App. filed Feb. 16, 2011)

Mountain View Baptist Church..... Respondent,

v.

Bobby Lee Burdine..... Petitioner.

PROOF OF SERVICE (corrected)

I certify that I have served the Petitioner's Brief and Appendix on Mountain View Baptist Church by depositing a copy of it in the United States mail, Return Receipt Requested, on August 27, 2012, addressed to the attorney of record: Candy Kern-Fuller of Upstate Law Group, LLC, 200 East Main Street, Easley, SC 29640.

August 31, 2012



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