

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM THE KERSHAW COUNTY
Court of common pleas

Roderick M. Todd, Jr. Esquire, Special Referee

**UNPUBLISHED OPINION NUMBER 2013-UP-153
(S.C.Ct. APP. FILED APRIL 10, 2013, REFILED MAY 8, 2013)**

W. H. Bundy, Jr.,

Respondent,

vs.

Bobby Brent Shirley,

Petitioner.

**APPENDIX
VOLUME I OF II**

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INDEX

Record on Appeal.....	1
Final Brief of Appellant.....	567
Brief of Respondent.....	603
Final Reply of Appellant.....	632
April 10, 2013 Court of Appeals Opinion.....	658
Petition for Rehearing.....	661
Return of Appellant to Respondent's Petition for Rehearing.....	684
Reply.....	704
May 8, 2013, Order denying rehearing.....	715
May 8, 2013, Refiled Court of Appeals Opinion.....	716
May 20, 2013, Order denying Rehearing.....	719

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM THE KERSHAW COUNTY COURT OF COMMON PLEAS

Roderick M. Todd, Jr. Esquire, Special Referee

Case No.: 2012208007

W.H. Bundy, Jr.,

Appellant,

vs.

Bobby Brent Shirley,

Respondent.

**RECORD ON APPEAL
VOLUME I OF II**

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INDEX

	<u>PAGE</u>
Orders:	
Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011.....	1
Order on Appellant's Rule 59, SCRCP Motion, filed February 9, 2012.....	22
Order on Appellant's Rule 15, SCRCP Motion filed February 9, 2012.....	29
Pleadings:	
Amended Complaint filed April 20, 2009.....	30
Amended Answer and Counterclaim filed April 15, 2010.....	40
Reply to Amended Counterclaim filed April 26, 2010.....	46
Respondent's Counsel's Motion to Withdraw, dated July 12, 2011.....	52
July 25, 2011, Affidavit of John W. Wells.....	53
Appellant's Motion to Alter or Amend pursuant to Rule 59, SCRCP, dated July 20, 2011.....	55
Appellant's Motion to Amend the Complaint to Conform to the Evidence pursuant to Rule 15(b), SCRCP, dated July 20, 2011.....	87
Transcripts:	
Transcript of Hearing Vol. I, pp. 1-224, August 25, 2010.....	113
Transcript of Hearing Vol. II, pp. 226-301, August 26, 2010.....	339
Other Materials:	
Stipulation of Parties for Defendant Shirley's Chain of Title.....	417
Stipulation of Parties for Plaintiff Bundy's Chain of Title.....	468
Stipulation of Facts.....	520
Plaintiff's Exhibit 1, Oversize aerial photograph (To be provided by Kershaw Clerk).....	523
Plaintiff's Exhibit 2, Current Tax Map (To be provided by Kershaw Clerk).....	524

Plaintiff's Exhibit 3, Oversize Tax map (To be provided by Kershaw Clerk).....	525
Plaintiff's Exhibit 4, Letter from W.H. Bundy to Shirley, 9/12/05.....	526
Plaintiff's Exhibit 5, Letter from W.H. Bundy to Shirley, 9/12/05.....	527
Plaintiff's Exhibit 6, Letter from Babcock to Speedy, 3/08/06.....	528
Plaintiff's Exhibit 7, Easement from Driscoll to Bundy.....	533
Plaintiff's Exhibit 8, Photograph of gate.....	540
Plaintiff's Exhibit 9, Photograph of Bowater pipes.....	541
Plaintiff's Exhibit 10, Photograph of Bowater pipes.....	542
Plaintiff's Exhibit 11, Photograph of Bowater pipes.....	543
Plaintiff's Exhibit 12, Photograph of tree.....	544
Plaintiff's Exhibit 13, Photograph of tree	545
Plaintiff's Exhibit 14, Photograph of intersection.....	546
Plaintiff's Exhibit 15, Photograph of chimney.....	547
Plaintiff's Exhibits 16, Photograph of chimney.....	548
Plaintiff's Exhibit 17, Photograph of chimney and truck.....	549
Plaintiff's Exhibits 18, Photograph of gate.....	550
Plaintiff's Exhibits 19, Photograph of gate.....	551
Plaintiff's Exhibit 20, Photograph of gate.....	552
Plaintiff's Exhibit 21, Photograph of gate.....	553
Plaintiff's Exhibit 22, Photograph of gate.....	554
Plaintiff's Exhibit 23, Photograph of truck.....	555
Plaintiff's Exhibit 24, Photograph of road.....	556
Plaintiff's Exhibit 25, Photograph of road.....	557

Plaintiff's Exhibits 26, Video (To be provided by Kershaw Clerk).....	558
Defendant's Exhibit 1, 1956 aerial photograph (To be provided by Kershaw Clerk).....	559
Defendant's Exhibit 2, 1964 aerial photograph (To be provided by Kershaw Clerk)	560
Defendant's Exhibit 3, 1969 aerial photograph (To be provided by Kershaw Clerk)	561
Defendant's Exhibit 4, 1974 aerial photograph.....	562
Defendant's Exhibit 5, Current tax map aerial photograph.....	563
Defendant's Exhibit 6, 1994 Mylar tax map (To be provided by Kershaw Clerk)....	564
Defendant's Exhibit 7, 1977 aerial photograph tax map (To be provided by Kershaw Clerk).....	565
Defendant's Exhibit 8, Marett plat.....	566

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

W. H. Bundy, Jr.,

Plaintiff,

vs.

Bobby Brent Shirley,

Defendant.

IN THE COURT OF COMMON PLEAS

FINAL ORDER

2009-CP-28-00338

FILED FOR RECORD
2011 JUL 11 PM 3:58
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

SPECIAL REFEREE:

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JEFFREY M. THOMAS

This action is one for a Declaratory Judgment seeking a determination from the Court as to whether or not the Defendant has an easement over property owned by the Plaintiff. The Summons and Complaint was filed on March 24, 2009, and Amended on April 20, 2009, before the service of an Answer. The Defendant filed its original Answer and Counterclaim on June 19, 2009, which was amended on April 15, 2010. The Plaintiff thereafter filed a Reply to the Counterclaim thus joining the issues in the case. This matter was referred to me for a hearing and a final order appealable to the South Carolina Supreme Court by Order of the Honorable James Barber dated April 22, 2010.

A hearing was held on August 25th and 26^h, 2010, attended by the Plaintiff and his attorneys, Keith M. Babcock and M. Brent McDonald. The Defendant was present with his attorney, John W. Wells.

FINDINGS OF FACT

From the stipulations of the parties and the testimony presented and the documents introduced into evidence, I make the following findings of fact:

1. The parties have stipulated to the following facts, the Plaintiff's chain of title:
 - a. The Plaintiff is the current fee owner of seven (7) tracts of property described in that certain deed of Bowater Timber 1, LLC, to the Plaintiff dated March 14, 2003.
 - b. On December 22, 2003, Walter H. Bundy, Jr., conveyed a conservation easement on the Bundy Property to the Congaree Land Trust.
 - c. On March 14, 2003, Bowater Timber 1, LLC, conveyed the Bundy Property to Walter H. Bundy, Jr.
 - d. On November 27, 2001, Bowater Incorporated conveyed the Bundy Property to Bowater Timber 1, LLC.
 - e. On May 13, 1968, R.H. Cantey transferred a portion of the Bundy Property to Catawba Timber Company.
 - f. On December 20, 1960, Camden Equipment Company transferred a portion of the Bundy Property to Catawba Timber Company.
 - g. On October 31, 1960, Camden Equipment Company, Inc., and R. H. Cantey transferred a portion of the Bundy Property to Catawba Timber Company.
 - h. On October 24, 1960, H. E. Beard, Jr., and Roderick H. Cantey transferred a portion of the Bundy Property to Catawba Timber Company.
 - i. On October 19, 1960, James L. Sweet transferred a portion of the Bundy Property to Catawba Timber Company.
 - j. On or about September 26, 1960, R. H. Marrett, RLS, prepared a plat of the Bundy Property.
2. That the parties stipulate to the following facts regarding the Defendant's chain of title:

- a. The Defendant is the current fee owner of certain real property located in Kershaw County and identified as: All that piece, parcel or tract of land lying and being situate near Swift Creek in former School District No. 43, about ten (10) miles South of the City of Camden, Kershaw County, South Carolina, containing Thirty-Seven and Fourteen Hundredths (37.14) acres, more or less, and as depicted on the plat prepared by Tetterton & Riddick Surveyors, dated December 31, 1973, and recorded in the Register of Deeds for Kershaw County in Plat Book "35", at page 1596 (the "Shirley Property").
- b. On October 8, 2008, Karen J. Shirley transferred the Shirley Property to Bobby Brent Shirley.
- c. On May 3, 2007, Bobby Brent Shirley transferred the Shirley Property to Bobby Brent Shirley and Karen J. Shirley.
- d. On February 21, 2005, Bobby Shirley and Nollie T. Shirley transferred the Shirley Property to Bobby Brent Shirley.
- e. On or about May 10, 1985, D. William Whipple and Diana D. Whipple transferred the Shirley Property to Bobby Shirley and Nollie T. Shirley.
- f. On May 10, 1985, Donald L. Morris and Harriet Morris transferred their interest in the Shirley Property to D. William Whipple and Diana D. Whipple.
- g. On September 26, 1980, D. William Whipple transferred the Shirley Property to Donald L. Morris.
- h. In March 1979, Trius Corporation transferred its interest in the Shirley Property to D. William Whipple.
- i. On January 16, 1979, David L. Dickson transferred the Shirley Property to Trius Corporation.

- j. On May 5, 1975, William H. Able, Jr., transferred the Shirley Property to David L. Dickson.
 - k. On or about December 31, 1973, Tetterton & Riddick Surveyors, prepared a plat of the Shirley Property that is incorporated into every deed dated thereafter.
 - l. On December 21, 1973, W. M. Andrews transferred the Shirley Property to William H. Able, Jr.
 - m. On or about April 29, 1969, J. Douglas Montgomery, Master, transferred an interest in the Shirley Property to W. M. Andrews.
 - n. On November 4, 1968, Hobia Tillman Bennett and Annie Marie Bennett, as surviving children of Elijah Bennett, Sr., deceased, transferred their interest in the Shirley Property to W. M. Andrews.
 - o. On May 6, 1968, English Bennett transferred his interest in the Shirley Property to W. M. Andres.
 - p. On April 2, 1968, Margretha Harris transferred her interest in the Shirley Property to W. M. Andrews.
 - q. On March 29, 1968, Carrie Williams, et al. transferred their interest in the Shirley Property to W. M. Andrews.
 - r. On December 19, 1947, J. C. Gillis transferred the Shirley Property to Elijah Bennett.
3. That the parties entered into the following stipulation of facts prior to the trial of this case:
- a. Plaintiff W. H. Bundy, Jr., is the fee owner of seven (7) tracts of contiguous property located in Kershaw County, South Carolina and more fully described

- in the deed from Bowater Timber 1, LLC, to W. H. Bundy, Jr., dated March 14, 2003 (the "Bundy Property").
- b. From 1985 to 2003, the Bundy Property was leased by the Plaintiff's predecessors in title Bowater Incorporated and Bowater Timber 1, LLC, to the South Carolina Department of Natural Resources (the "Lease").
 - c. Between 1985 to 2003, the South Carolina Department of Natural Resources had a legal interest in the Bundy Property.
 - d. As a result of the Lease, the Bundy Property was enrolled in the South Carolina Department of Natural Resources Wildlife Management Area program.
 - e. The Lease and the Wildlife Management Area program allowed public access to all portions of the Bundy Property from 1985 to 2003 subject to the rules and regulations of the Wildlife Management Area program.
 - f. That Bowater Incorporated was the owner of all outstanding shares of Catawba Timber Company. Catawba Timber Company merged into Bowater Incorporated on December 31, 1980. At such time Bowater Incorporated was vested with all the property of Catawba Timber Company.
 - g. Neither Kershaw County nor any other public entity maintains or repairs any timber roads located on Tract 2 of the Bundy Property which is the tract at issue.
 - h. In 2004, Shirley put up a gate located on the property line between the Bundy Property and the property owned by the Miller Family with the permission of Bundy.
4. That on September 26, 1960, R. H. Marett prepared and signed a plat for the

Catawba Timber Company of the property conveyed to the Plaintiff by Bowater Timber 1, LLC, on March 14, 2003, which plat is recorded in Plat Book "27", at page 39, in the ROD office for Kershaw County.

5. That the R. H. Marett plat is incorporated into the Plaintiff's deed description of the lands crossed by the disputed road.
6. That the R. H. Marett plat shows a dotted line in the location of Saxon Road which, as depicted on the plat, is one continuous road including the portion now maintained by Kershaw County and the disputed road.
7. That the R. H. Marett plat predates the beginning of any public maintenance on any portion of Saxon Road which began in about 1968.
8. That Saxon Road ran from the State Highway known as Swift Creek Road to the Defendant's property line before either Sumter County or Kershaw County began maintaining any portion of it. The road all the way to the Defendant's property line was a road in existence prior to the decision of either county to maintain it.
9. That in about 1968, Sumter County began maintaining that portion of Saxon Road lying and being in Sumter County, and Kershaw County began maintaining that portion of Saxon Road from the Sumter-Kershaw County line to the last occupied residence on Saxon Road.
10. That no easements were obtained by Kershaw County prior to maintaining its portion of Saxon Road.
11. That Kershaw County provides road maintenance services by use of public funds, and therefore, Kershaw County cannot provide road maintenance services on private roads.
12. That Saxon Road is a public road.

13. That the disputed road as shown on the R. H. Marett plat, is not a side road intersecting with Saxon Road, but a continuation of Saxon Road.
14. That the alternate route to the Defendant's property designated as a blue line on Plaintiff's exhibit "2" is not depicted on the 1960 Marett plat.
15. That the 2003 sketch included in the Plaintiff's contract of sale, Defendant's exhibit "9", prepared by Bowater at the time of the sale to the Plaintiff shows the disputed road as a dotted line as a continuation of Saxon Road.
16. That the 2003 Bowater sketch in Defendant's exhibit "9" fails to show the alternate blue line route as leading to the Defendant's property.
17. That the 2003 Bowater sketch depicts the Plaintiff's alternate route shown by the blue line on Plaintiff's exhibit "2" as ending at the approximate location of the Rooster Pit, exactly where the Defendant testified that it stops. (Transcript page 198 I. 25 - page 199 I. 2)
18. That the alternate blue line route from Saxon Road to the Defendant's property is not shown on any map prepared by any person or entity.
19. That Elijah Bennett and his family bought the Defendant's tract of land on December 19, 1947, and held it until April 29, 1969.
20. That Elijah Bennett and his family used Saxon Road including the disputed road portion, as their sole access to the Defendant's property from 1947 until 1969, a period of over twenty (20) years.
21. That the testimony of Edward Bennett, the eighty-five (85) year old son of Elijah Bennett is clear and unequivocal that Saxon Road was the only road to the Defendant's property during the twenty-one (21) year ownership by the Bennett family. (Transcript page 243 I. 4, 5, I. 13-14)

22. That the Plaintiff's witness Rick Miller testified that originally Elijah Bennett used the road shown by the blue line to get to his property. (Transcript page 148 l. 14-21). Rick Miller also testified that he was fifty-five (55)-years old, (Transcript page 141 l. 25) placing his date of birth in 1955 or late 1954 at the earliest. Elijah Bennett began his farming operations in the spring of 1948 (Transcript page 230 l. 24 - page 240 l. 4) and died in 1957 (Transcript page 240 l. 9-12). This means that Rick Miller's testimony is based on his observations of the Bennett family's comings and goings from seven (7) years prior to his birth until he was two (2) years old.
23. I find that Rick Miller's testimony on the Bennett family's use of the alternate blue line route is not credible, and that his willingness to testify as to crucial events that occurred before he was born seriously undermines his credibility on other unrelated parts of his testimony.
24. I find that the use of Saxon Road, including the disputed portion, to access the property now owned by the Defendant between December 19, 1947, and April 29, 1969, was continuous. After the farming operations ceased, the Bennetts used the road to cut firewood (Transcript page 236 l. 22- page 237 l. 3) and they kept the field plowed (Transcript page 237 l. 14-18). The Miller family rented the property from the Bennetts during the 1960s, paying the taxes as rent and used the disputed road to access it (Transcript page 155 l. 1-17). It appears that the disputed road was in use in 1960 when R. H. Marett decided to depict it on his plat. The USDA aerial photographs from 1957, 1964, and 1969, introduced as Defendant's exhibits 1, 2, and 3, show the disputed road as clear of vegetation during the period from 1957 to 1969, indicating that it was being used frequently enough to resist the over growth of the surrounding forest and underbrush. I find from the testimony of Edward Bennett,

the aerial photographs and the R. H. Marett plat that the disputed road was in continuous use from 1948 until 1969 by the Bennett family and their tenant, Rick Miller's father.

25. That the disputed roadway was identifiable between December 19, 1947, and April 29, 1969, based on the aerial photographs, Defendant's exhibit 1, 2, and 3, and the R. H. Marett plat that identified its location.
26. That the use of the disputed road was adverse from December 19, 1947, until April 29, 1969. Edward Bennett stated that their use of the road was open obvious and without permission. (Transcript page 236 l. 1-14) Rick Miller testified that the Bennetts used the road only with permission from his grandmother. However, Rick Miller's grandmother could not give permission to use the disputed portion of the road because she is not in the Plaintiff's chain of title. Therefore, the grandmother's permission, even if given, does not defeat the adverse use of the disputed portion of the road because it was not on her property.
27. I find that the Defendant's parents who acquired the thirty-seven (37) acre tract on May 10, 1985, and the Defendant who acquired the property on February 21, 2005, used the disputed road continuously from 1985 until 2009 when the lawsuit was filed. The Defendant testified that the disputed road is the only way to get to his property. (Transcript page 175 l. 19 - page 176 l. 2) Rick Miller, just as he had for the Bennett family, testified that the alternate blue line route was used for a period of time just long enough to cut down the use period to under twenty (20) years. However, the use of an alternate route does not mean that the Shirley's never used the disputed road. Second, Rick Miller stated that he wanted to stop the Defendant from using the disputed road that runs through the Miller houses (Transcript page 152 l. 10-13)

giving him an interest in the outcome of this case. Finally, the credibility of Rick Miller as to the use of the blue line route is already badly compromised by his testimony concerning what would have to have been his prenatal observations of Elijah Bennett's use of the blue line route. Therefore, I find by a preponderance of the evidence that the Shirleys used the disputed road continuously for the required twenty (20) Year period.

28. That the Shirley family's use of the disputed road was adverse. As the Plaintiff put it, "It was hostile. There was a death threat. Yes. It was as hostile as you can get." (Transcript page 99 l. 18-19)
29. That Bowater 1, LLC, enrolled the Plaintiff's property into the Game Management Program of the South Carolina Department of Natural Resources at some time between 1985 and the conveyance of the property to the Plaintiff in 2003. The Plaintiff did not introduce a copy of the lease between Bowater and South Carolina Department of Natural Resources or any agreement detailing how the Game Management Program worked. The Defendant testified that a permit was required to hunt on Game Management areas (Transcript page 177 l. 10-14), and that he stopped purchasing the permit after his parents bought the thirty-seven (37) acre tract in 1985. (Transcript page 184 l. 8-16). Using the disputed road over the Bowater property without a Game Management permit would be use without permission and adverse to the interests of the owner, Bowater.
30. The Plaintiff introduced testimony from the Defendant's deposition to the effect that a game warden who was a friend of the Defendant gave the Defendant a key to a lock on a cable across the disputed road. (Transcript page 119 l. 15-18, page 133 l. 18-20) Chuck Thompson did not testify as to the reason for giving the Defendant the

key or whether he had the authority of the owner to give out the key. But the testimony as a whole strongly indicates the Defendant was going to use the disputed road with or without a key by going over the cable when it was down. (Transcript page 131 I. 7-10) When Rick Miller's mother erected a gate without giving the Defendant a key, the Defendant pulled the gate down with his truck. (Transcript page 166 I. 4-18).

31. That as to permissible use of the disputed road by the Shirley family:
 - a. No representative of Bowater testified that permission had been given by it in written or orally during its ownership of the Plaintiff's land.
 - b. No representative of South Carolina Department of Natural Resources testified that permission had been given by it in writing or orally during the enrollment of the Plaintiff's land in the Game Management Program.
 - c. No documentation was presented to show that the Defendant or his parents ever obtained a permit to go on the Game Management Lands between 1985 and 2003.
32. I find that the Defendant used the disputed road under the belief that he had a right to use the road from 1985 until 2009. This finding is based on the following testimony:
 - a. The Defendant stated that he believed that he had the rights to use the road. (Transcript page 187 I. 7-14)
 - b. When the Millers blocked the disputed road with a gate on their property, the Defendant took it down the next day after he visited Judge Hardin(sic). (Transcript page 185 I. 10-page 186 I. 17)
 - c. When the Plaintiff's timber operation blocked the disputed road in 2004, the Defendant told the Plaintiff that the disputed road was his road. (Transcript

page 100 l. 17-25)

33. That as to the period of ownership of the Defendant's tract by the Defendant and his parents from 1985 until the filing of this lawsuit in 2009, the Defendant and his father used the disputed road, that their use was continuous, that their use was adverse, and that their use was under a claim of right.
34. That the disputed road is the upper portion of Saxon Road which has been in existence for at least sixty (60) years, that the disputed road is the primary access to the thirty-seven (37) acre tract owned by the Defendant, if not the only access, and that the disputed road has been the primary access to the Defendant's property for over sixty (60) years. To the extent that owners have needed access to the Defendant's tract over the past sixty (60) years they have used the disputed road continuously. Looking at the tax maps, plats, sketches, and aerial photographs of the area, the disputed road prominently appears while no other access way consistently appears.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Court has jurisdiction over the parties and the subject matter of this action.

In response to the Plaintiff's action seeking to close the disputed roadway, the Defendant has asserted that the road should remain open as an easement by prescription. The determination of the existence of an easement is a question of fact in a law action. Revis vs. Barrett 321 S.C. 206, 467 S.E.2d 460(1996). The Defendant has also pled dedication of the disputed road as a public road and therefore not subject to obstruction by the Plaintiff. Determination of whether a roadway has been dedicated to the public is an action in equity. Tyler vs. Guerry 251 S.C. 120, 160 S.E.2d 889(1968).

The Defendant's burden of proof as to the public dedication of the disputed roadway is by strict, cogent and convincing evidence. Mack vs. Edens 320 S.C. 236, 464 S.E.2d 124(1995). The Plaintiff has asserted in his brief that the strict, cogent and convincing standard also applies to an easement by prescription. As authority for this proposition, the Plaintiff cites the above case of Mack vs. Edens and Clark vs. Hargrave 223 S.C. 84, 473, S.E.2d 474(Ct. App. 1996). However, neither case cited by the Plaintiff in its brief involves a prescriptive easement. In the absence of any prescriptive easement cases imposing a higher standard of proof, it appears that the burden of proof imposed upon the Defendant for a prescriptive easement is the preponderance of the evidence standard as in other civil litigation.

PUBLIC DEDICATION

South Carolinians have been using roads of various descriptions to access their homes, farms and other property for over three hundred years. Regular public maintenance of roads is of relatively recent origin. Mechanized equipment now used by the state and the counties to maintain roads was not widely available until the middle of the twentieth century. Prior to that, the public used roads which received little or no maintenance from any public entity for centuries. Saxon Road from the state highway to the Defendant's property line is a road that was in existence prior to use of the county motorgrader to maintain a portion of it. This is demonstrated by the September 26, 1960, R. H. Marett plat that forms the basis of the Plaintiff's property description and clearly shows Saxon Road in its present location. The Plaintiff's witness, Rick Miller, testified that the county maintenance of a portion of Saxon Road did not begin until 1968. Defendant's witness, Edward Bennett, testified he and members of his family rode mules down Saxon Road to the Defendant's property which was owned by the Bennett Family at the time back in 1948, some twenty (20) years before public

maintenance began on any portion of the road. The disputed portion of the road has been shown on the Kershaw County Tax Maps since mapping began in the 1970's. The road does not have broad public use because of its remote rural location. However, it appears that the disputed road has been used by the owners of the Defendant's tract as the primary access to that tract over the years.

Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use Horry County vs. Laychur, 315 S.C. 364, 434 S.E.2d 259(1993). Second, there must be, within a reasonable time, an express or implied public acceptance of the property offered for dedication. Helsel vs. City of North Myrtle Beach, 307, S.C. 24, 413 S.E.2d 821(1992). Even though a landowner must positively and unmistakably express his or her intention to dedicate property, the intent to dedicate may be implied from allowing lengthy public use of the land. Cleland vs. WestVaco Corp., 314 S.C. 508, 431 S.E.2d 264(ct. app. 1993). As with the intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property. Cleland vs. WestVaco supra.

In this case, two counties, both Sumter and Kershaw Counties, determined that Saxon Road was a public way and began providing maintenance to portion of the road about 1968. Catawba Timber Company depicted the entire road including the maintained portion and the disputed portion on its 1960 R.H. Marett plat. There is no evidence that Catawba Timber Company objected to the public maintenance of the county maintained portion of the road that ran through its property, and the testimony of the Defendant was to the effect that Catawba Timber Company and its successors never interfered with his use of the disputed portion of the road to access his property. This case is distinguishable from Cleland v.

WestVaco because in that case, no public maintenance was performed on the road.

Saxon Road is either public or it is not. If it is public, it should be public all the way from the State Highway to its dead end on the Defendant's property. Since the road was there long before county maintenance services were provided to any portion of it, the decision by the county as to where the maintenance services end does not make the unmaintained portion any less a public road than the portion that the county decided to maintain. If Saxon Road was not a public road in 1968, then Kershaw County and Sumter County had no business maintaining any part of it.

The Defendant's argument that Saxon Road was a public road was compromised by his decision in 2003 to approach the Plaintiff with the idea of erecting a gate on Saxon Road at the entrance to the Plaintiff's property, which gate was erected by the Defendant in 2003 or 2004. However, the gate which was later removed does nothing to change the nature of the road from public to private. In 1968 when the Miller family requested that Sumter County and Kershaw County maintain Saxon Road from the State Highway to their residences, Saxon Road, the whole of Saxon Road, from the State Highway to the Defendant's property was in existence. It is shown on the 1960, R.H. Marett plat. It is shown on the 1956, U.S. Department of Agriculture aerial photograph introduced as Defendant's Exhibit 1. It is shown on the 1964 U.S. Department of Agriculture aerial photograph produced as Defendant's Exhibit 2, and it is shown on the U.S. Department of Agriculture aerial photograph from 1969 introduced as Defendant's Exhibit 3. The whole road was either public or not in 1968. Two South Carolina counties determined that Saxon Road was a public road and began maintaining it up to the last residence on the road. The erection of barriers on the road by the Defendant or by the Miller family as was also mentioned in the testimony did not change the nature of the road from public to private. The gate simply becomes an illegal obstruction

of a public road. Forty years ago, two South Carolina Counties decided that at that time, Saxon Road was a public road. At that time, there was no distinction between the portion that the counties decided to maintain and the disputed portion except that no one maintained a residence beyond the point where Kershaw County decided to end its maintenance services. Therefore, I conclude as a matter of law that the Defendant has proved by strict, cogent and convincing evidence that two counties have considered Saxon Road to be a public road for more than four (4) decades. I further conclude as a matter of law that the political and economic decision of Kershaw County to end its maintenance at the last residence Saxon Road does nothing to control the legal nature of the road as a public or a private road. Saxon Road is a public road, and the disputed road in this case is unmistakably a portion of Saxon Road.

PRESCRIPTIVE EASEMENT

To establish a private right of way by prescription, one must show (1) continued use for twenty (20) years; (2) the identity by the thing enjoyed; and (3) use which is either adverse or under a claim of right. Horry County vs. Laychur 315 S.C. 364, 434 S.E. 2d 259(1993). The Defendant has offered evidence of the use of the disputed road since 1947 when Elijah Bennett purchased the property that is now owned by the Defendant. As stated above, the standard of proof of a prescriptive easement is the preponderance of the evidence standard.

I find by a preponderance of the evidence that the Elijah Bennett Family, including Elijah Bennett and his children established a twenty (20) year period of use of the disputed roadway between 1947 and 1969. The Defendant produced the testimony of Edward Bennett, an 85 year old son of Elijah Bennett. Mr. Bennett testified that he remembered using the disputed road to get back to the property now owned by the Defendant to farm it

in 1948. The travel was by wagon and mule in those days. Mr. Bennett further testified that they used the property to cut firewood, and that after his father ceased farming the property, the witness kept it plowed by plowing at least once a year with a tractor to keep trees from growing up in the fields. Mr. Bennett did not keep a log or a journal to so how many times he went to the property and how frequently he used the disputed road. The Defendant corroborated the testimony of Mr. Bennett by showing the aerial photographs, Defendant's Exhibits 1, 2, and 3, showing the road in continued existence in 1956, 1964, and 1969. Since the disputed road was not receiving public maintenance or scraping services, it is fair to conclude that the resistance of the road to over growth and vegetation resulted from its continued use through that period. Mr. Bennett was cross examined as to the use by the Bennett Family of an alternate route shown on Plaintiff's Exhibit 2 by a blue line. Mr. Bennett testified that they did not use the blue line route. The blue line route described extensively by the Plaintiff in his testimony was not shown on the R.H. Marett plat from 1960. In Defendant's Exhibit 9, which is the contract by which the Plaintiff acquired his property, Bowater included a sketch which, like the Marett plat depicts the woods roads by dotted lines. It is interesting that Bowater's sketch does not show the blue line route. The blue line route is not shown on any tax map or other map of the property.

In order to cut down twenty (20) year period of use by the Bennett family, the Plaintiff presented the testimony of Rick Miller. Mr. Miller is a member of the Miller family that owns the residences where the county maintenance of Saxon Road terminates. Mr. Miller testified that he wants to stop the Defendant from using Saxon Road as an access way to his property because of disputes between the Shirleys and the Miller families in the past and because the road goes through what Mr. Miller considers to be his property. Mr. Miller testified that Elijah Bennett originally used the blue line road shown on Plaintiff's Exhibit 2,

to access his property but at some point, began using the disputed roadway to access the Bennett Farm. The testimony of Edward Bennett and that of Rick Miller are directly in conflict on this point. Rick Miller says that the Bennetts used the blue line road to access their property during the early years of their farming operation. Edward Bennett denied that they ever used any road other than the disputed road. The glaring problem with Rick Bennett's testimony is his age. The Elijah Bennett farming operation began in 1948, and he died in about 1957. Rick Miller gave his age as 55 years old, meaning he was born in 1954 or 1955. For Rick Miller's testimony to be true, he would have to have witnessed the comings and goings of Elijah Bennett before he was born. Edward Bennett testified on cross examination that Elijah Bennett died in about 1957. At best, Rick Miller would have had to have made the observations forming the basis of his testimony when he was two (2) years old. In weighing the evidence comparing the testimony of Edward Bennett who was twenty-two (22) years old when he rode a mule down the disputed roadway to plow his father's field against the testimony of Rick Miller, I must conclude as a matter of law that the Defendant has established by a preponderance of the evidence that the Bennett Family used the disputed road to access property now owned by the Defendant. Rick Miller did testify that his family took over the farming of the Bennett Farm in the 1960s, under a lease arrangement with the Bennetts. However, his father used the disputed roadway to access the property just like the Bennetts, proving the Defendant's point that anybody who needed to get to the property now owned by the Defendant used the disputed roadway without permission throughout the twenty (20) year period that the Bennetts owned the property. The second element, the disputed roadway was always identified previously stated by the aerial photographs and the Marett plat. Finally, the use of the roadway by the Bennetts and their tenants, the Millers, was adverse to the rights of the landowner of the tract now owned by the Plaintiff. Edward

Bennett testified that his family used the disputed road openly in broad daylight.

The Plaintiff contends that the Edward Bennett testimony is insufficient to prove use of the disputed road during the Bennett ownership period. However, producing the testimony of an eighty-five (85) year old who used the road freely and openly during the 1940s and 1950s coupled with the testimony of the Plaintiff's witness who testified that his family used the road openly during the 1960s together with the aerial photographs showing the road in existence at the same time is as good as evidence gets to prove the continued use over time of an ancient roadway during ancient times.

I conclude as a matter of law that the Defendant has proved by a preponderance of the evidence that Elijah Bennett and his heirs used the disputed roadway continuously for a period of twenty (20) years in a manner that was adverse to the interests of the owners at that time of the tract now owned by the Plaintiff.

Having concluded that the Defendant established a prescriptive easement during the Bennett ownership period, it is unnecessary to establish a prescriptive easement during the Shirley ownership period. However, I do conclude as a matter of law that the Defendant has proved by a preponderance of the evidence that his parents and he used the disputed road continuously for a period of twenty (20) years. The Defendant adamantly testified that the disputed road was the only way to access his property and his testimony on this point is supported by the maps, plats and photographs in the record. As to establishing a prescriptive easement under a claim of right, all that the Defendant must prove is that he believed he had a right to use the road. Revis v. Barrett supra. The record in this case establishes that the Defendant believed that he had a right to use the disputed road and to control the use of the road. He reacted very badly to any interference with this right to both use of the road and control the use of the road by others. The Defendant's continued use

of the clearly identified disputed road under a claim of right establishes a prescriptive easement during the Shirley ownership period without the need to show that the use was adverse. Permission does not defeat an easement by prescription based on a claim of right. Revis v. Barrett supra. In Barrett, a prescriptive easement was found despite the fact that the servient landowner actually gave express written permission to use the disputed right of way.

As to the Defendant's claim that his use was adverse, the Plaintiff himself testified that the Defendant's use was "about as hostile as it gets". However, the Plaintiff did introduce evidence that the Defendant's use was permissive during the Game Management Program that allowed public hunting on the Plaintiff's property, and that permission to use the road was given by the Plaintiff himself. As to the Game Management Program, it was never established that the Defendant complied with the Department of Natural Resources rules and regulations for entering the Game Management lands, specifically, the need to obtain a permit. As to the evidence presented by the Plaintiff of permissive use, I find that the preponderance of evidence including that of the violent outburst by the Defendant establishes that the use of the disputed road by the Defendant was adverse and hostile.

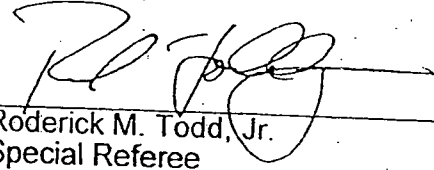
Finally, it appears that neither Sumter or Kershaw Counties ever obtained any right-of-way deeds when they began maintaining a portion of Saxon Road, indicating that both counties derived their right to maintain Saxon Road from a prescriptive easement.

Therefore, I conclude as a matter of law that the Defendant has established his right to use the disputed road as an easement to his property. The scope of the easement described in the testimony is that of a eight (8') foot wide, one lane road wide enough for one vehicle to pass.

FILED FOR RECORD
2011 JUL 11 PM 3:58
CLERK OF COURT
KERSHAW COUNTY, SC

ORDER

It is the Order of this Court that the Defendant is entitled to an easement, eight feet in width across the property of the Plaintiff in the location shown on the September 21, 1960, R. L. Marett plat, and that the Plaintiff is enjoined from obstructing said roadway.



Roderick M. Todd, Jr.
Special Referee

Camden, South Carolina

Date: July 7, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

W. H. Bundy, Jr.,)

Plaintiff,)

vs.)

Bobby Brent Shirley,)

Defendant.)

IN THE COURT OF COMMON PLEAS

ORDER

2009-CP-28-00338

FILED
AM 9:07
CLERK OF COURT
KERSHAW COUNTY, S.C.

This action is one for a Declaratory Judgment seeking a determination from the Court as to whether or not the Defendant has an easement and rights of egress and ingress over property owned by the Plaintiff. The Summons and Complaint was filed on March 24, 2009, and Amended on April 20, 2009, before service of the Answer. The Defendant filed his Answer and Counterclaim on June 19, 2009, which was amended on April 15, 2010. The Plaintiff thereafter filed a Reply to the Counterclaim thus joining the issues in this case. This matter was referred to me for a hearing and a final order with an appeal to the South Carolina Supreme Court.

A hearing was held on August 25th and 26th, 2010, resulting in a Final Order dated July 7, 2011. The Plaintiff thereafter filed a Motion to Alter or Amend the Order of July 11, 2011, pursuant to Rule 52 S.C.R.C.P. and Rule 59 S.C.R.C.P., along with another Motion disposed of by a companion Order. This Order disposes of the Plaintiff's Motion to Alter or Amend.

1

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Court

Jay McNeill
Clerk of Court Kershaw County

Plaintiff's Motion sets out thirty-seven (37) separate exceptions to the final order. After a careful review and consideration of the thirty-seven (37) exceptions noted in the Plaintiff's Motion and argued before me on August 15, 2011, the Plaintiff's Motion to Alter or Amend the Order of July 11, 2011, is granted in part and denied in part.

That portion of the Order, pages 13-16 and so titled and identified as "Public Dedication" is hereby deleted and thus Plaintiff's Motion is granted in that regard. Evidence presented upon review fails to meet the strict and cogent and convincing standard of proof necessary in a dedication matter. Plaintiff's noted exceptions 1-4 and 26-29 are hereby noted and the Order so amended.

Plaintiff's exceptions 5-6 are denied. The record supports the conclusion that the Bennett family used the disputed road for a period in excess of twenty years and tacking is not necessary.

Exception 7 is denied. I find the record establishes said use of the road to be adverse, notorious, hostile and continuous. See Order with transcript references, ¶ 24 and 26.

Exception 8 is denied. My interpretation of the transcript reference noted (163-164) is that the testimony noted addresses the permissive cutting of wood, not permissive use of the road in dispute.

Exceptions 9-10 are denied. I believe the presence of the road on the Marett plat is

entirely relevant, and reflects conditions on the ground that the surveyor observed at the time the plat was done. Again, with regards to the USDA photographs, I note this is relevant and corroborating evidence that the road was present, was used and was existing.

Exception 11 is denied. The court references Tyler v. Guerry, 251 S.C. 120, 160 S.E. 2nd 889 (1968). The standard applicable here is the preponderance of the evidence.

Exceptions 12-14 are denied. There is no doubt that relations between the parties are anything but cordial, or even civil. The hostile or even illegal acts Plaintiff complains of on the part of the Defendant do not, in the Court's opinion, destroy or pollute his prescriptive easement theory. I would suggest that the acts do show the adversity and notorious and hostile nature of the character and use of the road.

Exceptions 15-18 are denied. The Court is simply of the opinion that the enrolling of the Bundy property into the game management program, and the use of the road presumably by public third parties, does not affect any rights of Shirley in and to the prescriptive use of the road. Furthermore, the State of South Carolina never owned the Bundy parcel so therefore I find that any enrollment as a game management land does not rise to the level of a legal interest in the property. To the extent that the Order did not address exception 17-18, the Court believes that those requested findings are not necessary to resolve the issue as to whether Shirley has some prescriptive right to use and traverse the road in question.

Exceptions 19-22 are denied. Exception 23 is denied. Defendant testified he believed and felt he had a right to use the road and that his use of the road was not dependent upon anyone's permission to do so. Transcript 191-192. The testimony indicates and the totality of circumstances indicate to the Court his belief was firm and substantial. Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 584 S.E. 2nd 386 (Ct. App. 2003)

Exceptions 24-25 are denied. To the extent the Order in opinion of Plaintiff's counsel fails to note Defendant's use of the road was open, hostile, notorious and continuous, the Order is amended to include that as a finding of fact. With regards to this issue I would also note the portions of this Order discussing Exception 7 and Exceptions 12-14. Pittman as referenced in the list of exceptions proffered by Plaintiff, is not applicable.

Exception 30-32 are granted in part and denied in part. The Order as submitted fails to rule on Plaintiff's affirmative defense of estoppel and or waiver. To the extent the Order does not, the Order is modified to rule that the defenses of estoppel and or waiver are inapplicable. The Court sees no evidence of an estoppel or waiver. As to the remaining exceptions 31-32, the Court does not believe those matters are essential to the findings of the Court.

Exception 33 is denied. Revis V. Barrett, 321 S.C. 206, 467 S.E.2nd 460 (1996)

stands for the proposition that permissive use will not necessarily defeat a prescriptive easement under a claim of right.

Exception 34 is denied. In the opinion of the Court and looking at the testimony and totality of circumstances, Defendant believed he enjoyed some superior right to use the road, apart, distinct from and superior to any real or perceived rights of the public to do so.

Exception 35 is denied. Page 20, second paragraph of the Order states to the contrary.

Exception 36 is denied. The record is replete with testimony that Defendant used the road without regard to the rights of the Plaintiff. The hostility existing between the two parties and the incidents of personal conflict supports the view that Defendant used the road without due regard to the rights of the Plaintiff.

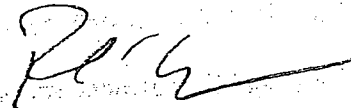
Therefore the Plaintiff's Motion is generally denied as to the section of the final order on prescriptive easement only, with the additions or modifications noted above.

I find and conclude as a matter of law that the Defendant has presented sufficient evidence that the road in question was in use for a period of time greater than twenty (20) years, and that the use of the road by the Defendant and his predecessors in title was both adverse and continuous. I conclude as a matter of law that the burden of proof for a prescriptive easement is by a preponderance of the evidence. The Plaintiff has presented evidence going back to the late 1940s that the road in question was the primary access, if not the

sole access to the Defendant's tract from that time to the present. The Plaintiff's Motion as to the public dedication theory supporting the Defendant's easement is granted because the evidence of public maintenance of the disputed road, public dedication and acceptance of the disputed road fails to meet the strict cogent and convincing standard of proof that is applicable to public dedication easement cases. Additionally use by the general public has not been shown. I am persuaded by the case of Tyler vs. Gary 251 S.E. 120, 160 S.E. 2d 889 (1968) where the South Carolina Supreme Court applied the preponderance of the evidence standard to the prescriptive easement claim and the strict cogent and convincing standard to the public dedication claims in that case, that the strict, cogent and convincing standard applies only in public dedication cases.

NOW THEREFORE IT IS ORDERED that the Plaintiff's Motion to Alter or Amend the Order of July 11, 2011, pursuant to Rule 52 S.C.R.C.P. and/or Rule 59 S.C. R.C.P. is granted as to the Defendant's claim of an easement based on a public dedication theory, and the Plaintiff's Motion is denied as to the Defendant's claim of an easement under a prescriptive easement theory with the additions or modifications noted herein. The final order dated July 7, 2011, and filed on July 11, 2011, is affirmed as to the grant of an easement of egress and ingress for usual and ordinary vehicular traffic by prescription of an eight (8') foot width easement across the property of the Plaintiff in the location shown on the September 21, 1960 R. L. Marrett plat. The Plaintiff and Defendant are enjoined from obstructing that roadway and taking any action frustrating or

impeding this right of use or inhibiting or restricting the use thereof.



Roderick M. Todd, Jr.
Special Referee

Camden, South Carolina

Date: 2-8-12

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

W. H. Bundy, Jr.,

Plaintiff,

vs.

Bobby Brent Shirley,

Defendant.

IN THE COURT OF COMMON PLEAS

2009-CP-28-00338

ORDER

This matter comes before me on a motion filed by the Plaintiff on July 21, 2011, seeking to amend pleadings to conform to the evidence. Rule 15(B) S.C.R.C.P. allows for the amendment of pleadings after judgment, but the amendment can only be allowed where it does not prejudice any other party, Rule 15(A) S.C.R.C.P. I find no prejudice here. The "wrongs" so alleged were fully and exhaustively explored at trial, both by Plaintiff and Defendant.

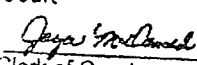
Therefore, based on the foregoing, the Plaintiff's Motion to Amend his pleadings is hereby granted, allowing Plaintiff leave to amend pleadings with reference to the proposition and defense that a Defendant cannot profit from his own wrong. In the opinion of the Court, having pled unclean hands, the proposition so amended is already pled. Since pleadings are amended liberally when justice so demands, I see no issue or prejudice in doing so here.


Roderick M. Todd, Jr., Special Referee

Camden, South Carolina

Dated: 2-8-12

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Clerk of Court Kershaw County

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS

)

) C/A NO.: 09-CP-28-00338

W.H. BUNDY, JR.,

Plaintiff,

v.

BOBBY BRENT SHIRLEY,

Defendants.

AMENDED SUMMONS

2009 APR 20 PM 2:32
CLERK OF COURT
KERSHAW COUNTY, S.C.

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the amended complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your answer to the said complaint upon the subscriber, M. Brent McDonald, Esquire, of Smith, Bundy, Bybee & Barnett, P.C., Post Office Box 1542, Mt. Pleasant, South Carolina 29465-1542, within thirty (30) days after service thereof, exclusive of the day of service; and if you fail to do so judgment by default will be rendered against you for the relief demanded in the complaint.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



M. Brent McDonald, Esquire

Post Office Box 1542

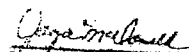
Mt. Pleasant, South Carolina 29465-1542

Telephone: (843) 881-1623

Attorney for Plaintiff

Charleston, South Carolina
April 17, 2009

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Court


Clerk of Court Kershaw County

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS

) C/A NO.: 09-CP-28-00338

W.H. BUNDY, JR.,

Plaintiff,

v.

BOBBY BRENT SHIRLEY,

Defendants.

AMENDED COMPLAINT
(Declaratory Judgment)

FILED FOR RECORD
7/15/09 PM 2:32

Plaintiff W.H. Bundy, Jr. ("Plaintiff"), as the owner of certain real property located in the County of Kershaw, State of South Carolina brings this action pursuant to the South Carolina Declaratory Judgment Act, codified at S.C. Code Ann. § 15-53-10 et seq., seeking a declaration of rights between Plaintiff and Defendant Bobby Brent Shirley ("Defendant").

Plaintiff alleges as follows:

PARTIES

1. Plaintiff is an individual residing in and owning real property in Kershaw County. Such property and the rights arising therefrom are the subject of this action.
2. The Defendant owns certain real property located in Kershaw County, State of South Carolina.

JURISDICTION AND VENUE

3. This Court has jurisdiction of the matter and over the parties. S.C. Ann. §§ 15-53-20 and 15-53-30; S.C. Code Ann. §§ 36-2-802 and 36-2-803; 42 U.S.C. § 1983.
4. Venue is proper in this County. S.C. Code Ann. §§ 15-7-10, -20, and -30.

BACKGROUND

5. That Plaintiff repeats and realleges Paragraphs 1 through 4, above, as if fully set forth herein verbatim.

6. Upon information and belief, in 1985, the Defendant's parents acquired a 37.14 acre parcel of property (at times hereinafter the "Shirley property") by deed from D. William Whipple and Diana D. Whipple. The deed expressly states that the Shirley property is a triangular shaped parcel that is surrounded on all sides by privately owned property. No access roads, ways, or easements are expressly included or referenced in any way in the deed.

7. In 2005, the Defendant's parents conveyed the Shirley property to the Defendant. This deed contained the exact language from the 1985 deed.

8. Upon information and belief, sometime between 1985 and 2005, the Defendant began traveling over the private lands adjacent to the Shirley tract pursuant to permission or revocable license given by the owners' of the private property to the Defendant and/or his parents.

9. Upon information and belief, the Defendant sporadically used different, varying and unconsidered routes over the property of those individuals who granted permission to either the Defendant and/or his parents. The Defendant traveled over the property on foot or with small vehicles.

10. In early 2003, the Plaintiff acquired certain real property which is the subject of this action from an entity known as Bowater, LLC (the "Bowater property"). The Bowater property is adjacent to the Shirley property. As discussed above, the Defendant, upon information and belief, traveled over the lands Bowater, LLC for a short period of time and pursuant to permission given by that entity in the form of a revocable license to either the Defendant and/or his parents. Upon Plaintiff taking possession of the property, the Plaintiff in fact observed the Defendant traversing over what was now the Plaintiff's property. It is currently unknown to the Plaintiff whether or not the Defendant continues to travel over the other private parcels adjacent to the Shirley property pursuant to permission from the owners of those parcels.

11. After becoming aware of the revocable license or permission given by his predecessor in title to the Defendant and/or the Defendant's parents, the Plaintiff extended the same courtesies and granted the Defendant permission to travel over his property.

12. Despite the Plaintiff's grant of permission to the Defendant to use his property, the Defendant began to physically threaten the Plaintiff and other landowners in the area when the Defendant noticed any one else within the vicinity of the chosen route over which the Defendant became increasingly protective.

13. Sometime prior to August 2004, the Defendant erected a gate on Plaintiff's property along the path of a route used by Defendant over the Plaintiff's property. Plaintiff immediately objected to the gate and demanded that the Defendant remove the same. Initially, the Defendants once again physically threatened the Plaintiff and refused to remove the gate.

14. Despite the Plaintiff's best efforts to have the Defendant remove the gate, the Defendant refused for two years. However, in an apparent recognition of the Plaintiff's rights in the property and the absence of their own, the Defendants eventually removed the gate sometime in 2006. During this dispute on numerous occasions in writing and orally, the Plaintiff revoked any permission he gave to the Defendant to use his property.

15. Since that time Plaintiff has become increasingly concerned that the Defendant continues to use his property despite his communication to the Defendant that he no longer has permission to use the property. At the time of the filing of this complaint, the Defendant continues to traverse over the property of the Plaintiff and/or plans to do so in the future.

16. In order to avoid unnecessary conflict and to ascertain the rights of the parties named in this action, Plaintiff files this Declaratory Judgment action asking the Court to determine what rights exist, if any, and should any such rights exist, which is denied, the extent of those rights relative to the property in question and the parties named herein.

FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment as to whether the Defendants have an easement over the property of the Plaintiff)

17. That Plaintiff repeats and realleges Paragraphs 1 through 16, above, as if fully set forth herein verbatim.

18. The Defendant periodically traveled over and upon Plaintiff's property pursuant to permission given to him by the Plaintiff.

19. The Defendant has no legal right to use or enter upon the Plaintiff's property for any purpose.

20. The Plaintiff is entitled to injunctive relief to prevent the Defendant from entering upon the property of the Plaintiff as the Plaintiff is without an adequate remedy at law and the Defendant's actions have caused and continue to cause irreparable harm to the Plaintiff.

21. Plaintiff hereby seeks a declaratory judgment that:

(1) The Defendant does not have an easement of any kind over and upon the lands of the Plaintiff and has no legal right to use or enter upon the property of the Plaintiff; and

(2) The Plaintiff is entitled to injunctive relief to prevent the Defendant from entering upon his property.

FOR A SECOND CAUSE OF ACTION

(In the alternative to the Plaintiffs first requested Declarations, should the Court decide that some easement exists, which is strictly denied, the Plaintiff seeks a Declaratory Judgment as to the type easement)

22. That Plaintiffs repeat and reallege Paragraphs 1 through 21, above, as if fully set forth herein verbatim.

23. Should the Court rule that some easement is held by the Defendant that permits the Defendant the use the property of the Plaintiff, which is strictly denied, the Plaintiff seeks a declaration as to the type of the easement, if any.

24. That the burden of proof is on the Defendant to show the existence of an alleged easement, if any, and the type of such easement, the existence of which is strictly denied.

25. The Plaintiff hereby seeks an alternative declaratory judgment as to:

(1) The type of easement that exists, if any.

FOR A THIRD CAUSE OF ACTION

(In the alternative to the Plaintiffs first requested Declarations, should the Court decide that some easement exists, which is strictly denied, and should the Court rule as to the type of such an easement, the Plaintiff seeks a Declaration as to what rights and duties, if any, the Defendant has pursuant to an easement of that type and the assignability and/or transferability of such an easement, if any).

26. That Plaintiffs repeat and reallege Paragraphs 1 through 25, above, as if fully set forth herein verbatim.

27. Should the Court rule that some easement is held by the Defendant that allows the Defendant to use the property of the Plaintiff, which is strictly denied, and the Court rules as to the type of such an easement, if any, the Plaintiff seeks a declaration as to the rights and duties, if any, the Defendant has pursuant to an easement of that type and the assignability and/or transferability of such an easement, if any.

28. That the burden of proof is on the Defendant to show the existence of any alleged easement, if any, the type of such easement, if any, and the rights duties available to or required by the Defendant, if any, under such easement, the existence of which is strictly denied. Moreover, the Defendant must show the scope of any easement, the existence of which is strictly denied, and the rights that exist thereunder.

29. The Plaintiff is entitled to injunctive relief to prevent the Defendant from using the property of the Plaintiff in any manner outside of the rights granted by this Court, the existence of which are strictly denied, and the Plaintiff is entitled to injunctive relief to require the Defendant to perform all duties attributable to the given easement, the existence of which is strictly denied, as the Plaintiff is without an adequate remedy at law

and the Defendant's actions have caused and continue to cause irreparable harm to the Plaintiff.

30. Plaintiff hereby seeks an alternative declaratory judgment as to:

(1) The rights and duties of the easement holder of the type in which the Court determines, if any, including,

(a) the width of the easement, if any;

(b) responsibilities of the parties relative to maintenance of the easement, if any;

(c) the permissible legal uses of the easement, if any;

(d) the extent and/or scope of the easement, if any;

(e) various other questions as may arise relative to the existence, nature, and extent of the easement, which is

strictly denied;

(2) That the easement, if any, is not assignable or transferable; and

(3) The Plaintiff is entitled to injunctive relief to prevent the Defendant from exercising any rights in excess of those determined by this action and the Plaintiff is entitled to injunctive relief for the failure of the Defendant to perform any duties as those duties may be determined by this action.

WHEREFORE, Plaintiff prays for judgment against Defendants declaring:

(a) (1) The Defendant does not have an easement of any kind over and upon the lands of the Plaintiff and has no legal right to use or enter upon the property of the Plaintiff; and

(2) The Plaintiff is entitled to injunctive relief to prevent the Defendants from entering upon his property.

(b) (1) In the alternative, the type of easement that exists, if any.

(c) (1) In the alternative, the rights and duties of the easement holder of that type, if any, including

(a) the width of the easement, if any;

(b) responsibilities of the parties relative to maintenance of the easement, if any;

(c) the permissible legal uses of the easement, if any;

(d) the extent of the easement, if any;

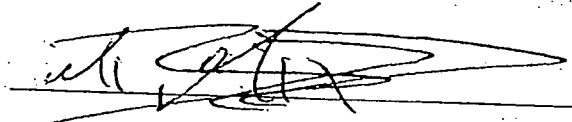
(e) various other questions as may arise relative to the existence, nature and extent of the easement, which is strictly denied;

(2) In the alternative, that the easement, if any, is not assignable or transferable; and

(3) In the alternative, the Plaintiff is entitled to injunctive relief to prevent the Defendants from exercising any rights in excess of those determined by this action and the Plaintiff is entitled to injunctive relief for the failure of the Defendant to perform any duties as those duties may be determined by this action.

(d) Costs of this lawsuit and reasonable attorney's fees; and

(e) Such other relief as this Court deems just and proper.



M. Brent McDonald
SMITH, BUNDY, BYBEE & BARNETT, P.C.
1037 Chuck Dawley Blvd., Bldg. F, Suite 100
Post Office Box 1542
Mt. Pleasant, SC 29465-1542
(843) 881-1623

ATTORNEY FOR THE PLAINTIFF

Mt. Pleasant, South Carolina

4/17

2009.

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

W. H. Bundy, Jr.,)
Plaintiff,)
vs.)
Bobby Brent Shirley,)
Defendant.)

AMENDED ANSWER
AND COUNTERCLAIM

2009-CP-28-00338

FILED FOR RECORD
2009/08/15 PM 2:50
CLERK OF COURT
KERSHAW COUNTY, S.C.

The Defendant answers the Plaintiff's Amended Complaint as follows:

FOR A FIRST DEFENSE

1. The Defendant admits the allegations of Paragraphs 1, 2, 3, 4, 5, 6, and 7.
2. That the allegations of paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30, are denied.

FOR A SECOND DEFENSE

3. That each and every allegation of the First Defense is realleged here as if restated verbatim.
4. That all deeds in the Plaintiff's chain of title from October 19, 1960, when the Catawba Timber Company acquired the tract from James L. Sweet, H. E. Beard, Jr., Roderick H. Cantey, Camden Equipment Company, Inc., and R. H. Cantey, all take exception to any public roadways or rights of way extending into through or over or across the tract which is now owned by the Plaintiff.
5. That the Plaintiff took title from Catawba Timber Company's successor, Bowater Timber Company I, LLC, by deed dated March 14, 2003, and recorded in the ROD office for Kershaw County in Book "1316", at page 143, which deed also takes exception to rights of the public

for use for vehicular and pedestrian access that portion of the property conveyed herein with the boundaries of any public road or highway.

6. That all deeds in the Plaintiff's chain of title from 1960 to and including the deed to the Plaintiff refer to a plat dated September 26, 1960, and recorded in Plat Book "27", at page 39, in the ROD office of Kershaw County, which plat clearly shows a road extending to the Plaintiff's property crossing the Plaintiff's property and leading to the Defendant's property where it terminates.
7. That the public road leading from the Defendant's property to Swift Creek Road is called Saxon Road and is shown on the County of Kershaw Road Atlas as a county maintained road.
8. That Saxon Road is an ancient road which is public and maintained by Kershaw County by virtue of a prescriptive easement across the lands of third parties between the Plaintiff's property and the state highway known as Swift Creek Road.
9. That the Plaintiff's only right of access to his property and the Defendant's right of access to his property derive from an identical source; the prescriptive easement known as Saxon Road.
10. That if the Plaintiff prevails and obtains a judgment that Saxon Road is not a prescriptive easement, he will land lock his own property because without the prescriptive easement known as Saxon Road, the Plaintiff has no access to Swift Creek Road.
11. That the Defendant pleads the public nature of Saxon Road clearly acknowledged and set forth in all deeds throughout the Plaintiff's chain of title as a complete bar to any recovery by the Plaintiff against the Defendant by injunction or otherwise.
12. That the Defendant is informed and believes that he is entitled to judgment against the Plaintiff on the grounds that Saxon Road is a road that is publicly maintained by virtue of a prescriptive easement arising in favor of the public from its use by the public for more than twenty (20) years.

FOR A THIRD DEFENSE

13. That each and every allegation of the First and Second Defenses is realleged here as strongly as if restated verbatim.
14. That the Plaintiff took title to his property by deed dated March 14, 2003, recorded in the Office of the ROD for Kershaw County in Book "1316", at page 143, which deed incorporates by reference the plat dated September 26, 1960, and recorded in the ROD office for Kershaw County in Plat Book "27", at page 39, which plat incorporates the Defendant's right of way as an encumbrance upon the Plaintiff's property by clearly depicting the right of way on the plat.
15. That the Plaintiff took title to his property with actual and record notice of all the Defendant's rights of access to his property over and across the right of way shown on the Plaintiff's plat known as Saxon Road, and referred to in the Plaintiff's deed.
16. That the Plaintiff has accepted the benefit of the prescriptive easement known as Saxon Road, using it to access his own property.
17. That the Plaintiff is now estopped from denying the Defendant's right to access his property across the easement known as Saxon Road which is clearly shown on the Plaintiff's own plat which describes the Plaintiff's property, and which is used by the Plaintiff as the sole access to his property.
18. That the Defendant pleads the theory of easement by estoppel as complete bar to any recovery by the Plaintiff against the Defendant by injunction or otherwise.

FOR A FOURTH DEFENSE

19. That each and every allegation of the First, Second and Third Causes of Action is realleged here as if restated verbatim.
20. That the road used by the Defendant as access to the Defendant's property has been used in

a continuous and uninterrupted manner for the use and enjoyment of the Defendant's property for a period of more than twenty (20) years.

21. That the road is clearly identified on the September 26, 1960, plat that forms the basis for the Plaintiff's property description in the Plaintiff's deed.
22. That the use and enjoyment of the road by the Defendant and the Defendant's predecessors in title has been adverse to the rights of the Plaintiff and the Plaintiff's predecessors in title for a period of more than twenty (20) years or, alternatively, under a claim of right.
23. That in fact, the road depicted on the September 26, 1960, plat was used by the Bennett Family to farm the Defendant's tract of land for a period of time extending back to their ownership of the property which began in 1947.
24. The Defendant pleads that the road used by the Defendant to access his property is an easement by prescription, and the Defendant pleads his prescriptive easement as a complete bar to any recovery by the Plaintiff in this action.
25. That the Defendant is entitled to judgment against the Plaintiff on the grounds that the Defendant enjoys a prescriptive easement across the lands of the Plaintiff.

FOR A FIFTH DEFENSE

26. That each and every allegation of the First, Second, Third and Fourth Defenses is realleged here as strongly as if restated verbatim.
27. That when the Catawba Timber Company, Inc., prepared its September 26, 1960, plat of the property now owned by the Plaintiff, it clearly depicted the Defendant's access road as the sole access to the upper portion of Tract 2 of the Plaintiff's property.
28. That the plat showing the road was then recorded on October 20, 1960, in the office of the Clerk of Court for Kershaw County in Plat Book "27", at page 39.
29. That by recording on the public record the plat showing the subdivision of the property now

owned by the Plaintiff and the road connecting the various tracts, the Plaintiff's predecessor in title made a dedication of the road to the public.

30. The Defendant pleads an easement by dedication as a complete bar to the Plaintiff's recovery in this action.

**FOR A SIXTH DEFENSE
AND BY WAY OF COUNTERCLAIM**

31. That each and every allegation of the First, Second, Third, Fourth and Fifth Defenses is realleged here as strongly as if restated verbatim.
32. That the Defendant is informed and believes that he is entitled to a declaratory judgment declaring that Saxon Road is a public road from Swift Creek Road to the Defendant's property or, in the alternative, that the Defendant enjoys a private permanent easement appurtenant for ingress and egress and utilities from the Defendant's property to the terminus of Saxon Road, such private easement appurtenant being established as an easement by prescription as set forth above, or as an easement by estoppel as set forth above, or as an easement by dedication.

**FOR A SEVENTH DEFENSE
AND BY WAY OF COUNTERCLAIM**

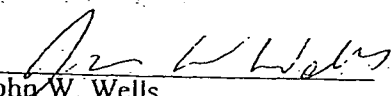
33. That each and every allegation of the First, Second, Third, Fourth, Fifth and Sixth Defenses is realleged here as strongly as if restated verbatim.
34. That the Defendant is informed and believes that the Defendant is entitled to a judgment granting the Defendant an injunction to prohibit the Plaintiff from interfering with the Defendant's unfettered right of access through the property of the Plaintiff on the road depicted on the Plaintiff's September 26, 1960, plat also known as Saxon Road.
35. That the Defendant is informed and believes that he is entitled to the injunction mentioned in Paragraph 34 on the grounds that Saxon Road is a public road from Swift Creek Road to the Defendant's property, and cannot be blocked or obstructed or, in the alternative, that the

Defendant has a private easement from the Defendant's property to the terminus of Saxon Road established by prescription, or by estoppel, or by dedication, giving the Defendant a private right to maintain unobstructed access to his property over and across Saxon Road as depicted on the Plaintiff's plat dated September 26, 1960.

WHEREFORE, the Defendant prays that the Court will issue its judgment declaring that Saxon Road is a public road from the Defendant's property to Swift Creek Road and enjoining the Plaintiff from blocking or obstructing the Defendant's access to his property over that road or, in the alternative, ruling that the Defendant has a private permanent easement appurtenant for ingress, egress and utilities from the end of the public portion of Saxon Road to the Defendant's property and enjoining the Plaintiff from blocking or obstructing the Defendant's access to his property over the roadway shown on the plat referred to herein.

BAXLEY, PRATT & WELLS, P.A.

BY:


John W. Wells
Attorney for Defendant
Three The Common At Lugoff
Post Office Box 10
Lugoff, SC 29078
(803) 438-4200

Lugoff, South Carolina

Dated:

April 15, 2010

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS
)
) C/A NO.: 2009-CP-28-00338

W.H. BUNDY, JR.,

Plaintiff,

v.

BOBBY BRENT SHIRLEY,

Defendants.

**REPLY TO AMENDED
COUNTERCLAIM**

JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

2010 APR 26 AM 11:00

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Plaintiff, W.H. Bundy, Jr., replying to the Defendant Bobby Brent Shirley's

Amended Counterclaims, alleges and shows unto the Court as follows:

1. Each and every allegation not hereinafter specifically admitted or modified is denied and strict proof demanded thereof.
2. No response is required to Paragraphs 1 – 30 of Defendant's Answer and Counterclaim as these paragraphs constitute the Defendant's Answer to the Plaintiff's Complaint. To the extent a response is required of the Plaintiff, Paragraph 1 is admitted and Paragraphs 2-30 of the Defendant's Answer and Counterclaim are denied.

**FOR A SECOND DEFENSE AND AS A REPLY
TO THE DEFENDANTS' COUNTERCLAIM**

3. With regard to Paragraph 31, Plaintiff repeats and realleges its responses in Paragraphs 1 through 2, above, as if fully set forth herein verbatim.
4. Paragraph 32 is denied. By way of a further response, the Defendant's counterclaims are barred by the failure of offer and acceptance, interruption, failure of

hostility, failure of exclusivity, lack of any representation, lack of necessary time to establish prescriptive rights, abandonment, and insufficiency of use.

5. With regard to Paragraph 33, Plaintiff repeats and realleges its responses in Paragraphs 1 through 4, above, as if fully set forth herein verbatim.

6. Paragraphs 34 and 35 are hereby denied.

7. With regard to the Defendant's WHEREFORE clause, to the extent any response is required from the Plaintiff the allegations made therein and/or the relief requested therein is denied.

**FOR A THIRD DEFENSE TO DEFENDANT'S COUNTERCLAIMS
AND BY WAY OF AN AFFIRMATIVE DEFENSE**

8. Plaintiff repeats and realleges its responses to allegations contained in Paragraphs 1 through 7, above, as if fully set forth herein verbatim.

9. The Defendant's Counterclaims fail to state facts sufficient to constitute a cause of action and should be dismissed pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure.

**FOR A FOURTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS
AND BY WAY OF AN AFFIRMATIVE DEFENSE**

10. Plaintiff repeats and realleges its responses to allegations contained in Paragraphs 1 through 9, above, as if fully set forth herein verbatim.

11. Plaintiff is informed and believes that the Defendant's counterclaims are barred by the doctrine of estoppel and/or waiver. Thus, the Defendant is barred from recovery owing to the doctrine of estoppel and/or waiver.

**FOR A FIFTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS
AND BY WAY OF AN AFFIRMATIVE DEFENSE**

12. Plaintiff repeats and realleges its responses to allegations contained in Paragraphs 1 through 11, above, as if fully set forth herein verbatim.

13. Plaintiff is informed and believes that the Defendant's counterclaims are barred by the doctrine of laches.

**FOR A SIXTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS
AND BY WAY OF AN AFFIRMATIVE DEFENSE**

14. Plaintiff repeats and realleges its responses to allegations contained in Paragraphs 1 through 13, above, as if fully set forth herein verbatim.

15. That the Defendant's counterclaims are barred by the doctrine of unclean hands.

**FOR A SEVENTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS
AND BY WAY OF AN AFFIRMATIVE DEFENSE**

16. Plaintiff repeats and realleges its responses to allegations contained in Paragraphs 1 through 15, above, as if fully set forth herein verbatim.

17. Defendant's counterclaims are barred due to permissive use.

**FOR A EIGHTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS
AND BY WAY OF AN AFFIRMATIVE DEFENSE**

18. Plaintiff repeats and realleges its responses to allegations contained in Paragraphs 1 through 17, above, as if fully set forth herein verbatim.

19. The Defendant's counterclaims are barred by the applicable statute of frauds.

**FOR A NINTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS
AND BY WAY OF AN AFFIRMATIVE DEFENSE**

20. Plaintiff repeats and realleges its responses to allegations contained in Paragraphs 1 through 19, above, as if fully set forth herein verbatim.

21. The Defendant's counterclaims may be barred by the applicable statute of limitations.

**FOR A TENTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS
AND BY WAY OF AN AFFIRMATIVE DEFENSE**

22. Plaintiff repeats and realleges its responses to allegations contained in Paragraphs 1 through 21, above, as if fully set forth herein verbatim.

23. Defendant's counterclaims are barred by the fact that the State of South Carolina held a lease on the property which is the subject of this action.

**FOR A ELEVENTH DEFENSE TO DEFENDANT'S COUNTERCLAIMS
AND BY WAY OF AN AFFIRMATIVE DEFENSE**

24. Plaintiff repeats and realleges its responses to allegations contained in Paragraphs 1 through 23, above, as if fully set forth herein verbatim.

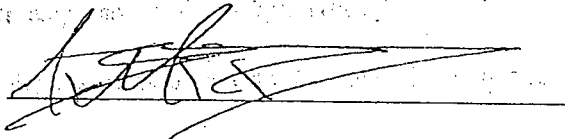
25. Defendant's counterclaims are barred by abandonment of any prescriptive easement—the existence of which is strictly denied.

**FOR A TWELVETH DEFENSE TO DEFENDANT'S COUNTERCLAIMS
AND BY WAY OF AN AFFIRMATIVE DEFENSE**

26. Plaintiff repeats and realleges its responses to allegations contained in Paragraphs 1 through 25, above, as if fully set forth herein verbatim.

27. Plaintiff hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its pleadings to assert such defenses.

WHEREFORE, Plaintiff prays the Defendant's counterclaims be dismissed with prejudice, demands that judgment against the Defendant be entered as set forth in its Complaint, and for cost of reasonable attorneys' fees, costs and disbursements of this action and for such other relief as this Court deems just and proper.



Keith M. Babcock
LEWIS & BABCOCK, LLP
1513 Hampton Street
Columbia, SC 29201
(803) 771-8000



M. Brent McDonald
SMITH, BUNDY, BYBEE & BARNETT, P.C.
1037 Chuck Dawley Blvd., Bldg. F, Suite 100
Post Office Box 1542
Mt. Pleasant, SC 29465-1542
(843) 881-1623

ATTORNEYS FOR THE PLAINTIFF

Mt. Pleasant, South Carolina
4/23 2010.

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS

)

) C/A NO.: 09-CP-28-00338

W.H. BUNDY, JR.,

Plaintiff,

v.

BOBBY BRENT SHIRLEY,

Defendant.

CERTIFICATE OF SERVICE

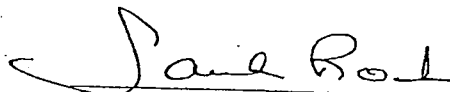
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

2010 APR 26 AM 11:00

FILED FOR RECORD

I, Sarah Foster Rock, the undersigned employee of Smith Bundy Bybee Barnett, P.C. attorneys for Plaintiff W. H. Bundy, Jr., do hereby certify that I have served all counsel in this action with a copy of the Plaintiff's Reply to Amended Counterclaim on this 23rd day of April, 2010, by US Mail to the following address:

John W. Wells, Esquire
Baxley, Pratt & Wells, PA
Three The Common at Lugoff
PO Box 10
Lugoff, South Carolina 29078
Attorney for Bobby Brent Shirley



Sarah Foster Rock
Paralegal to M. Brent McDonald, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

W. H. Bundy, Jr.,

Plaintiff,

vs.

Bobby Brent Shirley,

MOTION TO WITHDRAWAL

2009-CP-28-00338

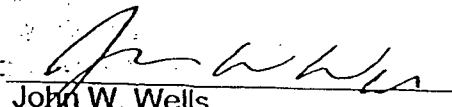
TO: KEITH BABCOCK AND M. BRENT MCDONALD, ATTORNEYS FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that four(4) days from the service hereof or as soon thereafter as counsel may be heard, the undersigned attorney for the Defendant will move before the Court of Common Pleas for the County of Kershaw, State of South Carolina, for an order allowing counsel to withdraw from the representation of Bobby Brent Shirley. This motion is made on the grounds that the client no longer desires to be represented by the attorney.

I SO MOVE.

BAXLEY, PRATT & WELLS, P.A.

BY:


John W. Wells
Post Office Box 10
Lugoff, SC 29078
(803) 438-4200

Lugoff, South Carolina

Dated:

July 12, 2011

FILED FOR RECORD
2011 JUL 12 PM 4:00
CLERK OF COURT
KERSHAW COUNTY S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

W. H. Bundy, Jr.,)
Plaintiff,)

vs.)

Bobby Brent Shirley,)
Defendant.)

IN THE COURT OF COMMON PLEAS

AFFIDAVIT

2009-CP-28-00338

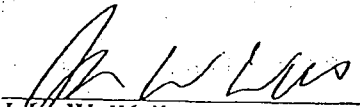
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CLERK OF COURT
KERSHAW COUNTY, S.C.

PERSONALLY appeared before me John W. Wells, who, being duly sworn, deposes and says that he is the attorney for the Defendant in this action. He says further that this action was tried before the Honorable Roderick Todd on August 25th through August 27th, 2010. The attorney's fee agreement with the Defendant called for a \$2,500.00 retainer fee, which was paid, and for time billing at \$250.00 per hour for time spent on the case. The attorney generated monthly statements to the Defendant accounting for time spent on the case by the time the final order was issued in this case on July 11, 2011, the outstanding fees and costs due to the attorney stood at Twelve Thousand Two Hundred Eighty-Three and 46/100 (\$12,283.46) dollars most of which had accumulated during the trial preparation, the actual trial of the case, and the preparation of the proposed order which required extensive time because of the numerous legal issues and factual issues in this case.

Upon learning on July 11, 2011, that the Court had issued a favorable order to the Defendant, the undersigned called the Defendant on the telephone to inform him of this fact. The attorney further informed the Defendant that an appeal was likely to follow, and that the billing would have to be addressed before the appeal process began. At that point, the Defendant began cursing at the undersigned, essentially accusing the undersigned of conspiring with the Plaintiff to pad the billing

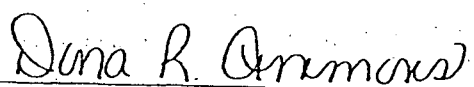
in this case. His other complaint was that the undersigned did not defend his honor vigorously enough when it was challenged during the trial. The undersigned pointed out to the Defendant that the Defendant had, at this point, won the case to which the Defendant stated that he could have won it without an attorney. The telephone conversation ended with the Defendant saying to the undersigned "fuck you" and hanging up.

The undersigned deduced from the telephone conversation that the Defendant does not trust him to represent him any further in this matter, that the Defendant has no intention of paying the attorney's fees and costs presently due, and that the Defendant wishes to be represented by another attorney that the Defendant did not name. For these reasons, the undersigned attorney for the Defendant has moved to withdraw from the case.


John W. Wells
Three The Common At Lugoff
Post Office Box 10
Lugoff, SC 29078
(803) 438-4200

SWORN to before me this 25th

day of July, 2011


Notary Public for South Carolina
My commission expires: 10-11-2017

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS

) C/A NO.: 2009-CP-28-00338

W.H. BUNDY, JR.,

Plaintiff,

v.

BOBBY BRENT SHIRLEY,

Defendants.

Notice of Motion and Motion
for an Order to Alter or Amend
the Order of July 11, 2011
pursuant to Rule 52, SCRPC,
and/or Rule 59, SCRPC

TO: JOHN W. WELLS, ESQUIRE, ATTORNEY FOR BOBBY BRENT SHIRLEY

Plaintiff W.H. Bundy, Jr. ("Plaintiff") will move before this Court within ten days of notice hereof or at the earliest possible time thereafter for an Order amending its Order of July 11, 2011 pursuant to Rule 52, SCRPC, and/or Rule 59, SCRPC. The Plaintiff incorporates herein each and every factual contention and legal position in its proposed order submitted to the Court, attached hereto as **Exhibit A**, and respectfully requests the Court to rule upon each and every argument made therein and amend its Order of July 11, 2011 accordingly and enter judgment in favor of the Plaintiff. Additionally, the Plaintiff states as follows:

- (1) The Court erred in finding that Saxon Road is a public road as there is no evidence in the record to support this conclusion.
- (2) The Court erred in finding as a matter of fact and/or law that Kershaw County provides road maintenance services by use of public funds; and therefore, Kershaw County cannot provide road maintenance services on private roads as there is no evidence in the record to support this conclusion.
- (3) The Court failed to make conclusions of fact and/or conclusions of law to support finding that Saxon Road, or any portion thereof, is a public road.
- (4) The Court erred in finding as a matter of fact and/or law that the disputed road as shown on the R.H. Marett plat, is not a side road intersecting with Saxon Road, but a

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CLERK OF COURT
KERSHAW COUNTY, S.C.

continuation of Saxon Road as there is no evidence in the record to support this conclusion.

- (5) The Court erred in finding as a matter of fact and/or law that Elijah Bennett and his family used Saxon Road including the disputed road portion, as their sole access to the Defendant's property from 1947 until 1969, a period of over twenty (20) years or more, as there is no evidence in the record to support this conclusion. Moreover, the only testimony in the record relating to the use of the Defendant's property by Elijah Bennett and/or his family was the testimony of Edward Bennett. Edward Bennett testified that his only direct knowledge of the Defendant's property and/or the disputed road was limited to the years of 1948 to 1960. Testimony of Edward Bennett, Transcript pp. 241-242.
- (6) The Court erred in finding that the years the Miller family used the Defendant's property and/or disputed road may be tacked onto the years the Bennett family used the Defendant's property as they are not in privity of title with the Defendant and/or there is no evidence to show that the Miller family met the requirements of a prescriptive easement. See Marrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (1997).
- (7) The Court failed to make any findings of fact as to whether the use of the disputed road, if any, by the Bennett family was notorious, continuous and/or uninterrupted and these findings are necessary to establish a prescriptive easement. Id.
- (8) The Court failed to find as a matter of fact and/or law that any use of by the Miller family of the disputed road was done with permission from the owner as this was the uncontested testimony. Testimony of Richard Miller, Transcript pp. 163-164.
- (9) The Court erred in finding as a matter of fact and/or law that the depiction of the disputed road on the R.H. Marett plat supports the conclusion that the Bennett family used the disputed road as the RH Marett plat was not done for the benefit of the Bennett Family and was not referred to in any way in their chain of title. Marrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (1997) ("evidence establishing the mere fact of use does not equate with evidence establishing the character of such use.")
- (10) The Court erred in finding as a matter of fact and/or law that the USDA aerial photographs support the conclusion that the Bennett family and/or the Defendant, as opposed to any other entity or individual including the owner of the property who used the property and its timber roads for logging operations, used the disputed road at any given time. Id.
- (11) The Court erred as a matter of law in holding that the standard of proof for establishing a prescriptive easement in this case is a preponderance of the evidence standard and not a strict, cogent and convincing standard of proof. also Clark v. Hargrave, 323 S.C. 84, 473 S.E.2d 474 (Ct. App. 1996); King v. Hawkins, 282 S.C. 508, 319 S.E.2d 361 (1984); 12 S.C. Jur. Easements § 10 (2011) ("A prescriptive easement is analogous to adverse possession...cases concerning amplify and further define the elements of adverse possession."); 25 AmJur.2d Easements and Licenses § 39 (2011) ("To establish an easement by prescription, the claimant must ordinarily

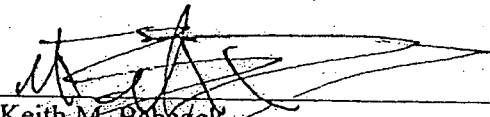
- prove by clear and convincing evidence a use of the subject property which is characterized as open and notorious, continuous and uninterrupted, adverse and under a claim of right, with the actual or imputed knowledge of the owner of the servient tenement.").
- (12) The Court erred as a matter of law and equity in finding that the Defendant's death threats and violent outbursts directed at the Plaintiff, the Defendant's use of property subject to the Game Management program without a permit, and/or the Defendant's tearing down of another's gate may be relied on by the Defendant to establish any element of adverse possession and/or a prescriptive easement and/or public dedication. Whitlock v. Creswell, 2 S.E.2d 838 (S.C. 1939); Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889); Wachovia v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (2010); Buckley v. Shealy, 635 S.E.2d 76 (S.C. 2006).
- (13) The Court erred in ruling that a criminal act may be relied upon by the Defendant to gain an advantage in a civil action and/or to establish a prescriptive easement. Id.
- (14) The Court failed to rule on the Plaintiff's affirmative defense of unclean hands in light of the testimony that the Defendant threatened the Plaintiff, the Defendant violated Game management laws, and tore down a gate.
- (15) The Court erred in finding as a matter of fact and/or law that the Plaintiff's property was enrolled in the South Carolina Department of Natural Resources Game Management Program did not prevent the Defendant from establishing the elements of a prescriptive easement.
- (16) The Court erred in failing to rule that the Defendant cannot establish a prescriptive easement on property in which the state has a legal interest. Davis v. Monteith, 289 S.C. 176, 179-80, 345 S.E.2d 724, 726 (1986); Kempner v. Aetna Hose, Hook & Ladder Co., 394 A.2d 238 (Del. 1978).
- (17) The Court failed to rule how Bowater, the owners of property enrolled in the Game Management Program, would have been put on notice that the Defendant did not have a permit to access the property as opposed to individuals, behaving lawfully, that did have permits, and the Court failed to rule how this could be "open" and "notorious" use of the disputed road. Cleland v. Westvaco, 314 S.C. 508, 511, 431 S.E.2d 264, 267 (Ct.App. 1994) citing Tyler v. Guerry, 251 S.C. 120, 160 S.E.2d 889 (1968).
- (18) The Court erred in failing to rule that the public policy of this State is best served by preventing individuals from asserting prescriptive rights on property that is enrolled in the South Carolina Department of Natural Resources Game Management Program.
- (19) The Court erred in failing to rule that the Defendant's testimony that he received a key to access the disputed road was conclusive of permissive use and could not then ripen into any prescriptive rights. Williamson v. Abbott, 93 S.E. 15 (1917); Tomlin Enterprises, Inc. v. Althoff, 103 P.3d 1069 (Mont. 2004); Vandervoort v. McKenzie, 412 S.E.2d 696 (N.C. App. 1992); Douglas v. Knox, 502 S.E.2d 490 (Ga. App. 1998).

- (20) The Court erred in basing any legal conclusion on the finding of fact that the testimony as a whole strongly indicates the Defendant was going to use the disputed road with or without a key by going over the cable when it was down.
- (21) The Court erred in failing to rule that the Defendant used the disputed road with permission from both Bowater and the Plaintiff as evidenced by the key sought and acquired by the Defendant, the game management program, and the express permission of the Plaintiff.
- (22) The Court erred in finding as a matter of fact that no representative from Bowater or the South Carolina Department of Natural Resources testified that permission had been given by it to anyone for use of the property, including the disputed road, in writing or orally during the enrollment in the Game Management Program. This finding is in direct contradiction with the stipulations reached by the parties and incorporated into the Court's order.
- (23) The Court erred in finding that the Defendant established that he used the disputed road from 1985 until 2009 because he believed he had a right to use the road. The Court failed to find what, if any, the basis of the right asserted may have been. Marrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (1997); Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct.App. 2003).
- (24) The Court erred in failing to find that Bowater's erection of a gate and the Miller's erection of a gate on the disputed road, though the Court found as a matter of fact that each gate was erected, constituted an interruption of the Defendant's use of the disputed road, if any. Pittman v. Lowther, 355 S.C. 536, 586 S.E.2d 149 (Ct.App. 2003).
- (25) The Court failed to rule whether or not the Defendant's use of the disputed road, if any, was open, notorious, hostile, and/or uninterrupted.
- (26) The Court failed to find any facts relative to an offer of the Plaintiff or his predecessors in title to dedicate the disputed road to the public. Therefore, the Court erred in ruling that the disputed road was dedicated to the public. Mack v. Edens, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct.App. 1995).
- (27) The Court failed to find any facts relative to an acceptance of any offer of dedication by the public for the disputed road to the public. In fact, the Court found that there has been no maintenance of the disputed road by the public and that there has been no broad public use. Therefore, the Court erred in ruling that the disputed road was dedicated to the public. Id.; Walker v. Guignard, 293 S.C. 247, 359 S.E.2d 528 (Ct.App. 1987).
- (28) The Court erred in finding that two counties, both Sumter and Kershaw, have determined that Saxon Road is a public road, though there is no evidence in the record relative the position of those Counties.
- (29) The Court erred in finding that Saxon Road is either public or it is not and that the public's maintenance of some portion of a road somehow makes other unmaintained roads public or acts to accept those portions in which the public has made no indication to accept, through maintenance or otherwise.

- (30) The Court failed to rule on the Plaintiff's affirmative defense of estoppel, though the Court finds that the Defendant erected a gate on the disputed road that he contends in this litigation is public.
- (31) The Court failed to rule what legal rights, if any, the Defendant and/or the public received from the RH Marett plat. Outlaw v. Moise, 222 S.C. 24, 71 S.E.2d 509 (1952).
- (32) The Court failed to rule whether or not the plat incorporated into the Defendant's chain of title shows his property as land locked.
- (33) The Court erred as a matter of law in ruling that permissive use does not defeat a claim of prescriptive easement based on a claim of right as permissive use can ever give rise to a prescriptive easement claim. Williamson v. Abbott, 93 S.E. 15 (1917).
- (34) The Court erred in finding that the Defendant asserted any right to the disputed road different from the rights of the general public and in ruling as a matter of law that this could give rise to prescriptive rights. Cleland v. Westvaco, 314 S.C. 508, 511, 431 S.E.2d 264, 267 (Cl.App. 1994)
- (35) The Court failed to rule whether or not the Plaintiff gave permission to the Defendant to use the disputed road.
- (36) The Court erred in finding that the Defendant used the disputed road without regard to the rights of the Plaintiff to the disputed road. Young v. Nix, 286 S.C. 134, 332 S.E.2d 773 (Cl.App. 1985).
- (37) The Court erred in finding that Kershaw County and Sumter County obtained a prescriptive easement through maintenance over roads they did not maintain. County of Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977).

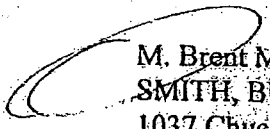
[Signature Page Follows]

Respectfully submitted,



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Mt. Pleasant, South Carolina
7/10 2011.

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS

) C/A NO.: 2009-CP-28-00338

W.H. BUNDY, JR.,

Plaintiff,

v.

BOBBY BRENT SHIRLEY,

Defendant.

CERTIFICATE OF SERVICE

I, Sarah Foster Rock, the undersigned employee of Smith Bundy Bybee Barnett, P.A., attorneys for Plaintiff W. H. Bundy, Jr., do hereby certify that I have served all counsel in this action with a copy of the Plaintiff's Notice of Motion and Motion for an Order to Alter or Amend the Order of July 11, 2011, pursuant to Rule 52, SCRCP, and/or Rule 59, SCRCP, on this 20th day of July, 2011, by U. S. Mail to the following addresses:

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Special Referee



Sarah Foster Rock
Paralegal to M. Brent McDonald, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS

) C/A NO.: 2009-CP-28-00338

W.H. BUNDY, JR.,

Plaintiff,

v.

BOBBY BRENT SHIRLEY,

Defendants.

ORDER GRANTING
INJUNCTION

This is a declaratory judgment action brought pursuant to S.C. Code Ann. 15-53-10 *et seq.* The central issue in this action is whether or not the Defendant Bobby Brent Shirley (hereinafter sometimes referred to as "Shirley") has a valid claim to an easement across property owned by Plaintiff W.H. Bundy, Jr. (hereinafter sometimes referred to as "Bundy") located in Kershaw County, South Carolina. Bundy asks this Court to declare that Shirley does not have any right, whether public or private, to travel over his property and that he is entitled to an injunction preventing the Defendant from entering upon his property. Shirley argues to the contrary and asserts that he has proven an easement over the Bundy property exists because it is either a public easement or because it is a private easement that Shirley has successfully proven by clear and convincing evidence is a prescriptive right.

On April 22, 2010, this action was referred to Special Referee Roderick M. Todd, Jr. by Order of the Honorable James R. Barber, III. A hearing was held before Special Referee Todd on August 25-26, 2010. Appearing on behalf of Plaintiff Bundy was Keith



M. Babcock, Esquire of Lewis and Babcock, LLP and M. Brent McDonald, Esquire of Smith, Bundy, Bybee, & Barnett, PC. Appearing on behalf of the Defendant Shirley was John Wells, Esquire of Baxley, Pratt & Wells, P.A.

After due and careful consideration of the evidence and testimony presented, and upon the observation of each witness testifying before this Court, I find as follows:

Stipulated Facts

Prior to the Hearing, the parties stipulated to the following facts:

- (1) Plaintiff W.H. Bundy, Jr. is the fee owner of seven (7) tracts of contiguous property located in Kershaw County, South Carolina and more fully described in the deed from Bowater Timber 1, LLC to W.H. Bundy, Jr., dated March 14, 2003 (the "Bundy Property").
- (2) From 1985 to 2003, the Bundy Property was leased by the Plaintiff's predecessors in title Bowater Incorporated and Bowater Timber 1, LLC to the South Carolina Department of Natural Resources (the "Lease").
- (3) Between 1985 to 2003, the South Carolina Department of Natural Resources had a legal interest in the Bundy Property.
- (4) As a result of the Lease, the Bundy Property was enrolled in the South Carolina Department of Natural Resources, Wildlife Management Area program.
- (5) The Lease and the Wildlife Management Area program allowed public access to all portions of the Bundy Property from 1985 to 2003 subject to the rules and regulations of the Wildlife Management Area program.
- (6) Bowater Incorporated was the owner of all outstanding shares of Catawba Timber Company. Catawba Timber Company merged into Bowater Incorporated

on December 31, 1980. At such time Bowater Incorporated was vested with all the property of Catawba Timber Company.

- (7) Neither Kershaw County nor any other public entity maintains or repairs any timber roads located on Tract 2 of the Bundy Property, which is the tract at issue.
- (8) In 2004, Shirley put up a gate located on the property line between the Bundy Property and the property owned by the Miller Family with the permission of Bundy.

The parties also stipulated to the chain of title for the Bundy Property and the chain of title to the Shirley Property.

Findings of Fact

- (1) By way of background, Saxon Road is a dirt road in Kershaw County that runs from Swift Creek Road until it reaches a cul-de-sac or "turn around" at property owned by the Miller family. Plaintiff's Exhibits 1-3. Saxon Road is maintained by Kershaw County. Shirley Testimony, Transcript pp. 130; Stipulated Facts; Plaintiff's Exhibit 26; Bundy Testimony, Transcript pp. 61-62.
- (2) The pathway in dispute in this case is a dirt logging road. Plaintiff's Exhibit 26; Plaintiff's Exhibits 1-3. The pathway in dispute runs across the property owned by the Miller family and across the Bundy Property until it terminates at a gate on the Shirley Property. The County does not maintain the pathway in dispute and has never maintained the pathway in dispute. Shirley Testimony, Transcript pp. 130; Stipulated Facts; Plaintiff's Exhibit 26; Bundy Testimony, Transcript pp. 61-62; Testimony of Richard Miller, Transcript p. 146.

(3) Defendant Shirley contends in this action that he has the right to use the pathway in dispute because it is a portion of Saxon Road which he contends is public. He also contends he has a prescriptive easement to use the pathway in dispute because he thought it was a portion of the public road. Shirley Testimony, Transcript pp. 187-188; pp. 202-203. Accordingly, Defendant Shirley seeks a declaration from this Court that he has an eight foot prescriptive easement to walk or drive a small vehicle across the Miller property and over the Bundy property to access his property to hunt and fish. Transcript pp. 289-290. Plaintiff Bundy contends that the pathway in dispute is a private logging road to which Defendant Shirley has no prescriptive right to use and seeks a declaration confirming this contention. Bundy Testimony, Transcript p. 87.

(4) This Court finds that it is uncontested that Defendant Shirley does not have an express easement to use the disputed pathway. See Shirley Chain of Title; Shirley Testimony, Transcript p. 134. There is also no evidence that there is any unification of title between the Bundy Property and the Shirley Property. Id.

(5) In late 1960, Catawba Timber Company (n/k/a Bowater¹) began to purchase various tracts of land located in Kershaw County, South Carolina. See Bundy Chain of Title. These various tracts were not subdivided by Bowater but were acquired individually and combined in fee ownership only. Id. Bowater used its property for timber purposes.

(6) Contiguous to the Bowater property were various tracts of property owned by the Miller family, Elijah Bennett and others. See Plaintiff's Exhibits 1-3; Testimony of

¹ Bowater went through a number of iterations in their name during the time period of relevance in this case. This Order will refer to the company as "Bowater."

Richard Miller, Transcript pp. 142-144. The Miller family has owned their property for at least 80 years. Testimony of Richard Miller, Transcript pp. 142-144.

(7) On December 19, 1947, Elijah Bennett purchased a 37.14² acre tract of farm land. See Shirley Chain of Title. The deed describes the Bennett Property as being surrounded on all sides by private property. Id. Elijah Bennett's son, Edward Bennett, testified that his family began to farm the property in the spring of 1948. Testimony of Edward Bennett, Transcript pp. 239-240. The Bennetts farmed the property for six or seven years until Elijah Bennett fell ill and passed away. Id. Edward Bennett testified that during that time, his family would access the Bennett Property by traveling over the Miller Property and over what would become the Bundy Property with wagons in order to farm their property. Testimony of Edward Bennett, Transcript pp. 232-243. This is the disputed pathway.

(8) Edward Bennett, however, was only able to testify as to what his family did with the property from 1948 until the time he was married prior to 1960. Testimony of Edward Bennett, Transcript pp. 241-242. Edward Bennett has no first hand knowledge of the use of the property by his family after 1960. Id. No other evidence of the Bennett family's ownership or use of the property was put into evidence by Defendant Shirley.

(9) Richard Miller has lived on the Miller property his entire life. He testified that the Bennetts used various routes to access their property and that they asked for and received permission from the Miller family to travel across the Miller property. Testimony of Richard Miller, Transcript pp. 147-148. Moreover, after the Bennett family stopped farming the Bennett Property, due to Elijah Bennett's illness, the Bennetts did not access

² At the time it was thought to be 42 acres, but a later survey corrected the inaccuracy. See Shirley Chain of Title. This property would eventually become the Shirley Property when it was purchased by his father.

or use the property in any way; the Miller family began farming the property starting in 1964 and continued farming it for a few years. Testimony of Richard Miller, Transcript pp. 149-150. During this time, the Miller family paid the taxes on the Bennett Property. Testimony of Richard Miller, Transcript pp. 154-155. In 1968, the Bennett Family sold the Bennett Property. See Shirley Chain of Title.

(10) From 1968 to 1985, the Bennett Property was owned by six (6) separate owners. See Shirley Chain of Title. There was no evidence presented by the Defendant as to any access or use of the Bennett Property during this time. There was no evidence presented by the Defendant as to any use of the disputed pathway during this time.

(11) While Bowater owned the Bundy Property, in 1985, it enrolled the property in a program established by the South Carolina Department of Natural Resources ("SCDNR") called the Wildlife Management Area ("WMA") program. See S.C. Code Ann. § 50-11-220; S.C. Code Ann. § 50-3-100. This program allowed SCDNR to enter into a lease with Bowater wherein the public was allowed to enter upon Bowater's property and hunt, bird watch, hike and do other outdoor activities. Bundy Testimony, Transcript, pp. 40-41.

(12) In 1985, while hunting on the Bowater property pursuant to the public rights granted by the WMA lease, Defendant Shirley became aware of the property formerly owned by the Bennett Family. Shirley Testimony, Transcript p. 176. On May 10, 1985, the Defendant Shirley's father purchased the 37.14 acre parcel of property (hereinafter referred to as the "Shirley Property"). See Shirley Chain of Title. Defendant Shirley's father purchased the Shirley Property pursuant to a deed that expressly states that the property is surrounded on all sides by privately owned property. Shirley Chain of Title. The Plat referenced in the deed shows the property as landlocked. Shirley Chain of Title;

Shirley Testimony, Transcript pp. 205-208. No access roadways or easements are expressly included or referenced in any way in the deed. Id. Saxon Road does not appear in anyway in the deed or plat. Id. The disputed pathway does not appear in any way in the deed or on the plat. Id.

(13) Until the early 1990s, Defendant Shirley and his father accessed the property by driving over property owned by Mr. Whit Boykin. See Testimony of Richard Miller, Transcript pp. 144-146; 165. They would then proceed over the property of Mr. and Mrs. Driscoll (also known as the Rooster Pit) and then over the property of Baynard Boykin, which is contiguous to the Shirley Property. Id. Due to a dispute with one of the Shirleys, however, Mr. Whit Boykin eventually put up a gate to prevent Defendant Shirley from crossing over his property. Id.

(14) At the hearing, Defendant Shirley initially denied that he ever used or was aware of this route; however, on cross examination he eventually admitted that he was aware of the route and in fact had used it on foot while hunting the Bowater property with other members of the public. Shirley Testimony, Transcript pp. 196-199. Defendant Shirley also denied the dispute with Whit Boykin relative to this route, but admitted that a dispute with Whit Boykin occurred over another private road on another property. Shirley Testimony, Transcript pp. 200-202.

(15) Having observed each of the witnesses in person, I find the testimony of Richard Miller to be consistent and credible relative to the use of the various pathways by Defendant Shirley to access his property. Therefore, I find that it was not until after 1990 and the dispute with Mr. Boykin that Defendant Shirley and his father began using the disputed pathway to access their property. At that time, Defendant Shirley would access

the property by driving his truck or walking up Saxon Road until it ended in a cul de sac or turnaround, where the public maintenance ended at the Miller Property. He would then drive through the yard of the Millers until he reached the Bowater property—the property subject to the WMA lease. Testimony of Richard Miller, Transcript pp. 144-145; Plaintiff's Exhibit 2. Defendant Shirley would then drive over the Bowater property to access his property. Id.

(16) The Millers initially asked Defendant Shirley to stop driving over their property. Testimony of Richard Miller, Transcript pp. 150-151. Eventually, subsequent to Shirley's use of the disputed pathway in the early 1990s, the Millers put up a wooden gate on their property to prevent Defendant Shirley from accessing his property by driving or walking over their property. Id. Shirley Testimony, Transcript pp. 185-186. Defendant Shirley pulled the gate down with a winch. Id.

(17) In addition to the Millers' gate, Bowater also had a cable gate strung at the property line between the Miller Property and the Bowater property which eventually would become the Bundy Property. Plaintiffs' Exhibits 9, 11, 12 and 26; Shirley Testimony, Transcript pp. 120-122; Stipulated Facts. During this time, the public was permitted to access the entire Bowater Property and the logging roads on the property pursuant to the WMA lease. Shirley Testimony, Transcript pp. 118-119; Stipulated Facts.

(18) Defendant Shirley testified that Bowater would take the cable down during hunting season to allow public access and put it back up during non-hunting season to prevent public access. Shirley Testimony, Transcript p. 127. He testified that he was given a key to the cable by an SCDNR game warden to access the Bowater Property and the disputed pathway in the instances in which Bowater had locked the cable. Shirley

Testimony, Transcript pp. 130-134; 208-209. The Bowater cable was up until the time Bundy purchased the Bowater property in 2003. Shirley Testimony, Transcript pp. 135-136.

(19) Bowater permitted Shirley to travel over its property because it permitted the entire public to travel over their property pursuant to the WMA lease. The only people Defendant Shirley observed using the Bowater property were hunters pursuant to the WMA lease. Shirley Testimony, Transcript pp. 138-139. Moreover, Shirley testified that he did not have any evidence of any hunters using the disputed pathway across the Miller's property and onto the Bowater WMA property until Bowater enrolled the property in the WMA program in 1985. Shirley Testimony, Transcript p. 140; Stipulated Facts. Richard Miller testified that the hunters used Shirley's original route to access the Bowater property and only very rarely did he see any hunters using the disputed pathway. Richard Miller Testimony, Transcript pp. 152-153.

(20) On March 14, 2003, Bundy purchased the Bowater property in order to put the property under a conservation easement. See Bundy Chain of Title; Bundy Testimony, Transcript pp. 38-39. Plaintiff Bundy's deed from Bowater references a 1960 Plat by R.H. Marett, a registered land surveyor, which depicts a dotted line in the vicinity of the disputed pathway. See Bundy Chain of Title; Bundy Testimony, Transcript p. 97. It also depicts other private logging roads. This plat is not in the chain of title of Defendant Shirley. Shirley Chain of Title.

(21) Up until the time Bundy purchased the property, the property was subject to the WMA lease, and it had public access via that lease. Shirley Testimony, Transcript pp. 135-136; Stipulated Facts. Upon conveyance, the WMA lease was extinguished and the

public no longer had a right to access the property. Shirley Testimony, Transcript pp. 204-205. In an effort to accommodate a neighbor, Plaintiff Bundy initially gave Shirley permission to continue to use the disputed pathway over that portion of the Bundy property despite the fact the property was no longer WMA property. Bundy Testimony, Transcript pp. 72-73. Defendant Shirley also asked Bundy if he could put up a gate on Bundy's property at the location of the previous Bowater cable in order to keep people out. Bundy Testimony, Transcript pp. 72-75; Shirley Testimony, pp. 117-118; 127-130; 211; Plaintiff's Ex. 8. Bundy gave Defendant Shirley permission to erect the gate. Id. At this time, Defendant Shirley did not assert any right to use the disputed pathway. Bundy Testimony, Transcript p. 74. Defendant Shirley did not assert that the disputed pathway was a public road. Id. In fact, the erection of a gate is contrary to that position. (22) Shortly after the erection of the gate, as Bundy testified, Defendant Shirley called him in a fit of rage regarding Bundy's timber operations on the property. Bundy Testimony, Transcript pp. 75-80. Defendant Shirley admits to this conversation and admits to "losing his cool" and "cussing him out." Shirley Testimony, pp. 190; 212-214. Shirley testified that the reason he lost his temper and cussed out Bundy was because a tree had fallen on the disputed pathway and his wife could not get out to his young son who was camping out for the first time by himself with some young friends on the Shirley property.³ Id.

³ The Court finds that Defendant Shirley's testimony was inconsistent. One example of this is that Shirley testified that the incident occurred in 2004 and his only son was 13 or 14 years old at the time. Shirley Testimony, p. 211. He also testified that his son was 28 years old at the August 2010 hearing. Shirley Testimony, p. 189. Therefore, in 2004 his son would have been 21 or 22 years old rather than a young boy.

(23) Bundy testified that Defendant Shirley not only cussed him out but that he threatened to kill him if anything like this ever happened again. Bundy Testimony, Transcript pp. 75-80.

(24) In the summer of 2005, as a result of the 2004 incident, Bundy called Shirley and demanded that he remove the gate and informed him that he no longer had permission to use his property to access the Shirley property. Bundy Testimony, Transcript pp. 80-84.

It was during this 2005 telephone conversation that Defendant Shirley first asserted to Bundy that he had some type of ownership rights in the disputed pathway and some type of right to maintain a gate on Bundy's property. Id. Shirley also again threatened to kill Bundy. Id. Shirley, however, refused to take the gate down and stop using Bundy's property to access the Shirley property. Bundy Testimony, Transcript pp. 84-85.

(25) In an exchange of letters dating from September 12, 2005 to March 23, 2006, Bundy again demanded that the gate be taken down and expressly informed Shirley that he no longer could travel across the Bundy property to access his property. Plaintiff's Exhibits 4-5.

(26) Shirley eventually removed the gate. Bundy Testimony, Transcript pp. 86-87. However, Shirley continues to enter upon the Bundy property for the purpose of accessing his property.

Standard of Review

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).

The determination of whether property has been dedicated to the public is an action in equity. State v. Beach Co., 271 S.C. 425, 248 S.E.2d 115 (1978); Mack v. Edens, 320 S.C. 236, 464 S.E.2d 124 (Ct. App. 1995).

The determination of the existence of an easement is an action at law and establishing the existence of the alleged easement is a question of fact in the law action. Pittman v. Lowther, 355 S.C. 536, 540, 586 S.E.2d 149, 151 (Ct.App. 2003). However, the question of the extent of a grant of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); see also Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001) (scope of easement is equitable matter in which reviewing court may take its own view of preponderance of evidence).

The burden is on the party asserting the right to an easement to prove the existence of the easement. Mack v. Edens, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct.App. 1995); see also Clark v. Hargrave, 323 S.C. 84, 473 S.E.2d 474 (Ct. App. 1996). Moreover, whether by dedication or prescription, the party asserting the right must prove the existence of the easement by "strict, cogent, and convincing" evidence. Mack v. Edens, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct.App. 1995); see also Clark v. Hargrave, 323 S.C. 84, 473 S.E.2d 474 (Ct. App. 1996). Finally, the doctrine of adverse possession or prescriptive rights must be strictly construed in favor of the owner of the title to the land. King v. Hawkins, 282 S.C. 508, 319 S.E.2d 361 (1984).

Conclusions of Law

I. Shirley does not have an easement of any kind over the Bundy property.

A. Shirley has failed to show by strict cogent and convincing evidence that there has been an implied public or private dedication of an easement over and upon the Bundy property

(1) Defendant Shirley first claims that the disputed pathway is public because there was an implied public and/or private dedication of an easement by the Bundy's predecessor in title, Bowater, of the disputed pathway.

(2) In support of this claim, Shirley argues that the dedication took place impliedly when Bowater recorded a plat by R.H. Marett, Registered Surveyor, depicting separate tracts owned by Bowater as well as surrounding property and out parcels. The plat also depicted trails, roads, logging roads and private roads on the property. The R.H. Marett plat, however, does not appear in Defendant Shirley's chain of title and is in no way referenced in Shirley's deed.

(3) It is well settled that in South Carolina, "[d]edication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use." Mack v. Edens, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct.App. 1995). "Second, there must be, within a reasonable time, an express or implied public acceptance of the property offered for dedication." Id. "[D]edication is an exceptional mode of passing an interest in land, and proof of dedication must be strict, cogent, and convincing." Id. "The acts proved must not be consistent with any construction other than that of a dedication, and dedication may not be implied from the permissive, sporadic, and recreational use of property." Id. "The record must contain evidence the owner of the property clearly, convincingly, or unequivocally intended to dedicate the property for public use." Id.

(4) "In the 1952 case of Outlaw v. Moise, 222 S.C. 24, 71 S.E.2d 509 (1952), the South Carolina Supreme Court held where land is divided into lots according to a plat showing streets and the lots are sold with reference to said plat, the owner dedicates the street to the public, but, there ordinarily must be an express or implied acceptance made within a reasonable time." Walker v. Guignard, 293 S.C. 247, 248-49, 359 S.E.2d 528, 529 (Ct.App. 1987)(emphasis in original). An acceptance may not be required of the grantee of a lot sold with reference to a plat depicting a road because the grantee automatically gains a private interest in the roads or streets. Id ("... where lands are platted and sales are made with reference to the plat, the acts of the owner in themselves merely create private rights in the grantees entitling the grantees to the streets and ways laid down on the plat or referred to in the conveyance")(emphasis added). However, these automatic rights "are purely in the nature of private rights founded upon a grant or covenant, and no public rights attach to such streets or lands until there has been an express or implied acceptance of the dedication evidenced either by general public use or by the acts of the public authorities." Id citing Outlaw v. Moise, 71 S.E.2d at 512 (emphasis added).⁴ Therefore, unless a party claiming that property has been impliedly dedicated can show that it received private rights in the road pursuant to the reference of a plat that depicts such a road in its own deed, the party must show public acceptance of the road depicted on the plat in order for any dedication to be complete.

(5) "As with intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance." Mack v. Edens, 320 S.C. at 239, 464 S.E.2d at 126. "Acceptance may be implied by the public or a public authority continuously using

⁴ "As between the owner, who conveyed lots according to the plat, and the grantees, the dedication is complete upon conveyance, even though the street is not accepted by the public authorities." Walker v. Guignard, 359 S.E.2d at 249.

or repairing the property." *Id.* "Also, acceptance and dedication may be demonstrated by a governmental authority not assessing taxes on the land." Mack v. Edens, 320 S.C. at 240, 464 S.E.2d at 126. Public acceptance may also be shown by "the extent and duration of the maintenance which the County [or other governmental entity] has performed on the road." County of Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977).

(6) In the present case, there was no implied offer of dedication because Bowater did not subdivide any property. In fact, the property has never been subdivided. Bowater acquired the property piecemeal and conveyed the property to Bundy in the same manner as it acquired the property. Therefore, the implied public dedication rule as outlined in Outlaw v. Moise, supra, and Blue Ridge Realty Company, Inc. v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965) is inapplicable because there has been no implied offer.

(7) Even if this court were to disregard the first prong of dedication (the offer) there is no evidence of any acceptance of the alleged implied dedication. There has not been widespread public use. See Testimony of Shirley, Transcript pp. 123; 140; Testimony of Richard Miller, Transcript pp. 154-155. There has not been any public maintenance. Stipulation of Facts; Shirley Testimony, Transcript pp. 130; Plaintiff's Exhibit 26; Bundy Testimony, Transcript pp. 61-62; Testimony of Richard Miller, Transcript p. 146. There has been no repair of the road by the public. *Id.*

(8) Importantly, Defendant Shirley only now, in this action, takes the position that the disputed pathway is public. Prior to this lawsuit, he erected a gate on the disputed pathway with the permission of Bundy for the express purpose of keeping the public off

the disputed pathway. Testimony of Shirley, Transcript p. 128. Shirley cannot now argue that the disputed pathway is public.

(9) This Court, therefore, finds that the Defendant has failed to show by strict cogent and convincing evidence that rights in the disputed pathway were dedicated in any way to the public or to Defendant Shirley privately.

B. Shirley has failed to show by strict, cogent and convincing evidence that he holds a prescriptive easement over and upon the Bundy Property.

(10) Defendant Shirley next claims that he has a private prescriptive easement to use an eight foot wide portion of the disputed pathway over the Miller Property and over the Bundy Property in order to walk or drive a small vehicle to access his property in order to hunt.

(11) To establish a prescriptive easement, the party asserting the right must show: (1) continued and uninterrupted use and enjoyment for the full period of 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under a claim of right. Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993).

(12) “Laychur...emphasized as to the first prerequisite not only that there must be a continued use for twenty years, there must be ‘continued and uninterrupted use or enjoyment of the right for a period of 20 years.’” Pittman v. Lowther, 355 S.C. 536, 540, 586 S.E.2d 149, 151 (emphasis in original) *citing* Laychur, 315 S.C. at 368, 434 S.E.2d at 261. Moreover, in the Lowther case, Lowther was the servient owner and his “repeated attempts to prevent Pittman, [the party seeking the prescriptive easement], from crossing Lowther’s land constitute[d] interruptions, however brief, in Pittman’s use and enjoyment of that portion of Wellington Road.” 355 S.C. at 541, 586 S.E.2d at 152 *citing* 25 Am.Jur.2d, Easements § 69 (1996) (“Any unambiguous act of the owner of the land

which evinces his intention to exclude others from the uninterrupted use of the right claimed breaks its continuity so as to prevent the acquisition of an easement therein by prescription....").

(13) In the present case, Defendant Shirley failed to demonstrate by strict, cogent, and convincing evidence that he or his father used the disputed pathway uninterrupted for the full 20 years. Initially, to the extent Shirley argues that Edward Bennett's testimony established a prescriptive easement, this argument fails. Bennett testified that his family only farmed the property and used the path for 6 or 7 years. He also testified that his knowledge of the Bennett/Shirley property was only up to 1960. The Bennetts purchased the Bennett/Shirley property in 1948. Therefore, Edward Bennett's testimony is limited to only a 12 year period. This is insufficient to reach the 20 year requirement for a prescriptive easement. Moreover, Richard Miller testified that his family leased the property from 1964 until the Bennetts sold it in 1968 and that the Bennetts did not use or access the property during that time. Therefore, since the Bennett Family only owned the property for 20 years, any interruption or non-use prevents a claim to a prescriptive easement allegedly established by the Bennett Family.

(14) Defendant Shirley introduced various aerial photographs from 1956 to 1974, with each purporting to show the disputed pathway. See Defendants Exhibits 1-4. These aerials, however, are insufficient to establish the use of the disputed pathway by anyone in particular. Indeed, the aerial photographs depict other logging roads on the timber property which the Defendant does not claim to be public. The photographs fail to show any distinction between public and private roads and fail to show the use of the disputed pathway by the Defendant or his predecessors in interest.

(15) With regard to Defendant Shirley's attempted establishment of the uninterrupted use of the disputed pathway for 20 years, his father acquired the property on May 10, 1985.⁵ Until the early 1990s, the Shirleys accessed their property from another direction—over the property of Mr. Whit Boykin and others. These years do not count toward the 20 years because that route is not the same as the disputed pathway. Therefore, even if this court were to assume the Shirleys began to use the disputed pathway in 1990, this action was commenced in 2009 and the Defendant is unable to prove use for the requisite 20 years.

(16) Moreover, in the early 1990s, the Millers constructed a wooden gate in an attempt to stop Shirley from crossing over their property which is a portion of the disputed pathway. This act would constitute a legal interruption under Lowther as explained previously.

(17) In 2004, Shirley sought and Bundy gave permission to erect a gate on his property and to travel over his property. This permissive use also constitutes an interruption of any adverse use.

(18) As a result, Shirley cannot establish by strict, cogent, and convincing evidence that there was uninterrupted use for the full 20 years.

(19) Even if this Court were to disregard the foregoing and find that the requisite 20 years had been met by the Defendant, the Defendant must prove by strict, cogent, and convincing evidence the second element of a prescriptive easement—the identity of the thing enjoyed must remain uninterrupted for the full period: Pittman v. Lowther, *supra*.

Said another way, the nature, location and character of the easement sought by prescription must remain consistent and not subject to change or alteration.

⁵ Shirley acquired the property from his father in 2005.

(20) Defendant Shirley has failed to satisfy the second element by strict, cogent, and convincing evidence. The evidence shows that the location of the easement sought by Shirley has changed over time. Moreover, the particular rights asserted by Shirley have also changed over time. For example, Shirley now argues that the disputed pathway is a public road and he has a right to use it because the public has a right to use the disputed pathway. See Shirley Testimony, Transcript pp. 127-129; 202-203. However, as set forth above, Shirley put a gate up on the disputed pathway to prevent the public from using it. Whatever rights he asserted in 2004 to establish the identity of that which he sought to use or enjoy are different from the rights he now asserts which are rooted in public rights. Therefore, Defendant Shirley failed to establish the second element of a prescriptive easement.

(21) As to third element necessary to establish a prescriptive easement, the claimant must establish that the use was open, hostile, notorious, continuous, and uninterrupted, the use will be determined to have been adverse. Poolé v. Edwards, 197 S.C. 280, 283, 15 S.E.2d 349, 350 (1941). The claimant may also prove the third element by establishing that the use was under a "claim of right." South Carolina courts have held that a party may earn a prescriptive easement under a claim of right if "he demonstrate[s] a substantial belief that he had the right to use the parcel or road based upon the totality of circumstances surrounding his use" and in a manner consistent with the alleged easement. Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct.App. 2003)(emphasis added); see also 25 Am. Jur. 2d Easements and Licenses, § 57, at 552 (2004) (stating "an intent to claim adversely may

be inferred from the acts and conduct of the dominant users" and defining "claim of right" as "without recognition of the rights of the owner of the servient estate").

(22) In the present case, Defendant Shirley attempted to present evidence to show that he used the disputed pathway "under a claim of right." The asserted claim of right was that the disputed pathway was public. However, Shirley erected a gate on the disputed pathway. Therefore, based upon the totality of the circumstances, Shirley is unable to now argue that his easement by prescription was established under a claim that he had the same rights as the public to use the disputed pathway.

(23) Permissive use is also fatal to both a claim of right assertion and an adverse possession theory. "It is the well settled rule that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since user as of right, as distinguished from permissive user, is lacking, if permissive in its inception, such permissive character will continue of the same nature, and no adverse user can arise, until there is a distinct and positive assertion of a right hostile to the owner, and brought home to him." Williamson v. Abbott, 93 S.E. 15 (1917).

(24) From 1985 to 2003 the Bundy Property was subject to the WMA lease wherein the public could enter upon the lands of Bowater and use the roads located on the property or simply walk the entirety of the property, including the disputed pathway. These years do not count toward the 20 year period because the use, if any, was permissive. Shirley has testified that he was aware of the public's WMA access over the land during this period and he was aware of that right prior to purchase of the Shirley property. The law is clearly set forth in Williamson v. Abbott, 93 S.E. 15 (1917) where

the South Carolina Supreme Court held that use that begins as permissive “cannot ripen into an easement by prescription.”

(25) Bowater, in short, granted permission through the State program and the State Game Wardens to authorize and permit people on their property. This Court does not seek to and the law does not allow the transformation of this good faith, highly valuable public service into a program that could give rise to secret claims that individuals are actually on the land to claim an adverse prescriptive easement.

(26) The testimony reflects that Shirley was on the disputed pathway by permission and that the state program of open access was the reason he was on the property. His testimony is also clear that he had to have a key to use the property, and that he obtained the key from the State Game Warden. These facts prevent his current argument that he was using the disputed pathway under his own independent claim of right because the road was public. The State itself was only on the property and managing the premises by express permission and consent of the owner—Bowater.

(27) The key itself, which Shirley admits he obtained from the State Game Warden, and which he testified “he had to use,” is clear evidence that he was on the Bowater land by permission and not adversely. See Tomlin Enterprises, Inc. v. Althoff, 103 P.3d 1069 (Mont. 2004) (Adjacent property owner’s use of strip of land on property owned by company, which strip of land was owned by company, and which strip provided access to road, was permissive based on neighborly accommodation, and thus adjacent owner’s use of strip was not adverse when the adjacent property had a key to the gate); Vandervoort v. McKenzie, 412 S.E.2d 696 (N.C. App. 1992) (key was evidence of permissive use). Douglas v. Knox, 502 S.E.2d 490 (Ga. App. 1998) (where a record owner has placed a

locked gate across an access way, but has provided the adverse claimant with a key or other means of entry, such conduct may be taken as "strong evidence" of a mere license to use the road).

(28) Moreover, in South Carolina, "[t]he long-term use by the public of a road through unenclosed and unimproved woodland does not give rise to a right-of-way by prescription." Cleland v. Westvaco, 314 S.C. 508, 511, 431 S.E.2d 264, 267 (Ct.App. 1994) citing Tyler v. Guerry, 251 S.C. 120, 160 S.E.2d 889 (1968). The use must be exclusive and different from any rights asserted by the general public in order to establish a private right of prescription. Cleland v. Westvaco, 314 S.C. at 511, 431 S.E.2d at 266.

(29) Shirley's claim to a prescriptive easement, to be valid, must be based upon notice to the real owner that someone is truly entering the property and that their entry is different than the public using the property. Shirley must have had an independent claim of right that he was entitled to be on the property. However, the testimony of Defendant Shirley is clear that he has no "independent right," but was merely present on the property along with the other members of the public – all of whom were invited on the land by Bowater.

(30) Finally, one cannot adversely acquire a prescriptive easement over property in which the State of South Carolina or its political subdivisions has a legal property interest. See Davis v. Monteith, 289 S.C. 176, 179-80, 345 S.E.2d 724, 726 (1986) ("[A]dverse possession does not run against the [S]tate or its duly constituted political subdivisions."). That period of time wherein the government has a legal interest in the property may not be used to satisfy any portion of the prescriptive period. See e.g. Kempner v. Aetna Hose, Hook & Ladder Co., 394 A.2d 238 (Del. 1978).

(31) The State of South Carolina had a legal interest in the property from at least 1985 to 2003 due to its lease and the property's enrollment in the WMA program. During this time, no rights of prescription could be gained by Shirley. It would be bad public policy, contrary to South Carolina law, and spell the end of the WMA program if private individuals could quietly gain private rights in the property that was enrolled in the WMA program.

(32) Pursuant to the foregoing, the Defendant Shirley failed to establish by strict, cogent and convincing evidence the necessary elements to establish an easement by prescription over the property of Plaintiff Bundy.

II. Shirley's inequitable conduct throughout the time period relevant to his claims deny him any rights to the equitable powers of this Court

(33) Additionally, this Court finds pursuant to its equitable jurisdiction that the Defendant has come to this Court with unclean hands due and owing to his actions through the years that are the subject of this lawsuit. Therefore, I find that any equitable relief sought by the Defendant is denied on this independent ground. *See Wachovia v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (2010) (holding that the doctrine of unclean hands bars equitable relief and further holding that no person should profit from their own wrongdoing or rest a cause of action on their own unlawful acts); *See also Buckley v. Shealy*, 635 S.E.2d 76 (S.C. 2006) (holding that a party by their own misdeeds can be found by the South Carolina Supreme Court of not be deserving of equitable relief.

III. The Plaintiff is entitled to the issuance of a permanent injunction preventing Shirley from entering upon the property of the Plaintiff.

(34) The Court concludes that the Plaintiff is entitled to the issuance of an injunction preventing the Defendant from entering onto the lands of the Plaintiff for any purpose.

The Plaintiff is without an adequate remedy at law to prevent the Defendant from entering his property, and the conduct of the Defendant necessitates the issuance of an injunction.

It is therefore ORDERED, ADJUDGED AND DECREED and the Court declares as follows:

- (1) The Defendant does not have an easement of any kind over and upon the lands of the Plaintiff and has no legal right to use or enter upon any of the property owned by the Plaintiff;
- (2) The Plaintiff is entitled to injunctive relief to prevent the Defendant from entering upon his property; and
- (3) The Defendant is hereby permanently enjoined from entering upon the property of the Plaintiff.

IT IS SO ORDERED!

Roderick M. Todd, Jr.
Special Referee

_____, S.C.
_____, 2011

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS
)
) C/A NO.: 2009-CP-28-00338

W.H. BUNDY, JR.,

Plaintiff,

v.

BOBBY BRENT SHIRLEY,

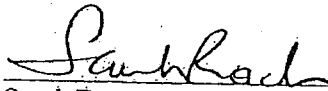
Defendant.

CERTIFICATE OF SERVICE

I, Sarah Foster Rock, the undersigned employee of Smith Bundy Bybee Barnett, P.C. attorneys for Plaintiff W. H. Bundy, Jr., do hereby certify that I have served all counsel in this action with a copy of the Plaintiff's Notice of Motion and Motion for an Order to Alter or Amend the Order of July 11, 2011, pursuant to Rule 52, SCRCP, and/or Rule 59, SCRCP, on this 20th day of July, 2011, by U. S. Mail to the following addresses:

John W. Wells, Esquire
Baxley, Pratt & Wells, PA
PO Box 10
Lugoff, South Carolina 29078
Attorney for Bobby Brent Shirley

Roderick M. Todd, Jr. Esquire
P.O. Drawer 99
Camden, SC 29020
Special Referee



Sarah Foster Rock
Paralegal to M. Brent McDonald, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS
)
) C/A NO.: 2009-CP-28-00338

W.H. BUNDY, JR.,

Plaintiff,

v.

BOBBY BRENT SHIRLEY,

Defendants.

Notice of Motion and Motion
to Amend the Complaint to
Conform to the Evidence
Pursuant to Rule 15(b) S.C.R.C.P.

FILED FOR RECORD
2011 JUL 21 PM 2:27
JOHN W. WELLS
CLERK OF COURT
KERSHAW COUNTY, S.C.

TO: JOHN W. WELLS, ESQUIRE, ATTORNEY FOR BOBBY BRENT SHIRLEY

Plaintiff W.H. Bundy, Jr. ("Plaintiff") will move before this Court within ten days of notice hereof or at the earliest possible time thereafter for an Order or as soon thereafter as counsel may be heard, move the Court at the Charleston County Judicial Center, 100 Broad Street, Charleston, South Carolina, for an order allowing Plaintiff to amend its Complaint to conform to the evidence presented at trial. Said Motion is made pursuant to S.C.R.C.P. 15(b). In support of this Motion Plaintiff states as follows:

1. A hearing in this matter was held before Special Referee Roderick M. Todd on August 25-26, 2010.

2. At the hearing on this matter, the Plaintiff testified that the Defendant threatened to kill him on at least two occasions relative to the dispute over the pathway which is the subject of this action. Bundy Testimony, Transcript pp. 75-84. The Defendant testified and admitted to "losing his cool" and "cussing him out." Shirley Testimony, pp. 190; 212-214.

3. At the hearing on this matter, the Defendant testified that he ripped down a gate put up by the Miller family in order to access the pathway which is the subject of this action. Shirley Testimony, Transcript pp. 185-186; *see also* Testimony of Richard Miller, Transcript pp. 150-151; 166-167.

4. At the hearing on this matter, the Defendant testified that he believed that any individual wishing to "go on" property subject to the South Carolina Department of Natural Resources Game Management Program was required to have a permit. Shirley Testimony, Transcript pp. 177-178. The parties stipulated that the property over which the disputed pathway traverses was subject to the South Carolina Department of Natural Resources Game Management Program from 1985 until 2003. Stipulated Fact, 5. The Defendant, however, testified that after he purchased his property, he no longer purchased a game management permit, though he testified he continued to "go on" the game management property. Shirley Testimony, Transcript pp. 183-184.

5. The Defendant based his claim asserting a prescriptive easement over the property of the Plaintiff upon these actions.

6. On July 11, 2011, the Special Referee entered an Order finding in favor of the Defendant. A copy of said order is attached hereto as **Exhibit A**.

7. Relative to the present motion, the Special Referee found as a matter of fact and/or law in the Order¹ as follows:

¹ The Plaintiff contemporaneously herewith files a Motion to Amend the Judgment pursuant to Rule 52, SCRPC, and/or Rule 59, SCRPC. This motion is made subject to the relief requested therein and this motion in no way waives any relief sought in the Motion to Alter or Amend.

- a. "That the Shirley Family's use of the disputed road was adverse. As the Plaintiff put it, 'It was hostile. There was a death threat. Yes. It was as hostile as you can get.'" Order, p. 10.
 - b. "Using the disputed road over the Bowater property without a Game Management permit would be use without permission and adverse to the interest of the owner, Bowater." Order, p. 10.
 - c. "When Rick Miller's mother erected a gate without giving the Defendant a key, the Defendant pulled the gate down with his truck." Order, p. 11.
 - d. "He [the Defendant] reacted very badly to any interference with his right to use the road and control the use of the road by others." Order, p. 19.
 - e. "As to the Defendant's claim that the use was adverse, the Plaintiff himself testified that the Defendant's use was 'about as hostile as it gets.'" Order, p. 20.
 - f. "As to the Game Management Program, it was never established that the Defendant complied with the Department of natural Resources rules and regulations for entering the Game Management lands, specifically, the need to obtain a permit." Order, p. 20.
 - g. "As to the evidence presented by the Plaintiff of permissive use, I find that the preponderance of the evidence including that of the violent outburst by the Defendant establishes that the use of the disputed road by the Defendant was adverse and hostile." Order, p. 20.
8. Based upon the foregoing, the Defendant introduced at trial evidence of illegal, violent, criminal, wrongful, inequitable and improper acts and asked the Court to establish private rights—specifically a prescriptive easement—in his favor.
9. The Plaintiff asks this Court for an order allowing the Plaintiff to amend its pleading to add the legal and/or equitable defense that the Defendant cannot be permitted to profit from his own wrongs or to take advantage of his own wrongs or to found any claim upon his own inequity or to acquire property by his own crime. Whitlock v. Creswell, 2 S.E.2d 838 (S.C. 1939); Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).
10. Rule 15(b), SCRCP, states, in pertinent part, as follows:

"[A]mendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment..."

11. That the instant motion is not the result of undue delay, bad faith or dilatory motive on the part of the Plaintiff.

12. That permitting Plaintiff to amend his complaint will not prejudice the Defendant.

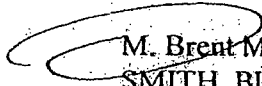
13. That this motion is supported by the common law of South Carolina and the Rules of Civil Procedure and such memorandum as may be submitted.

WHEREFORE, based on the foregoing, the Plaintiff respectfully requests that this Court grant Plaintiff's motion for leave to amend his complaint to add the foregoing defense.

Please be present to defend if so minded.

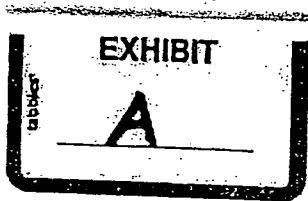
Respectfully submitted,


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1513 Hampton Street
Columbia, SC 29201
(803) 771-8000


M. Brent McDonald
SMITH, BUNDY, BYBEE & BARNETT, P.C.
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ATTORNEYS FOR THE PLAINTIFF

Mt. Pleasant, South Carolina
7/10 2011.



STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

W. H. Bundy, Jr.,
Plaintiff,

vs.

Bobby Brent Shirley,
Defendant.

IN THE COURT OF COMMON PLEAS

FINAL ORDER

2009-CP-28-00338

FILED FOR RECORD
2011 JUL 11 PM 3:58
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

SPECIAL REFEREE:
ATTORNEY FOR PLAINTIFF:

ATTORNEY FOR DEFENDANT:
COURT REPORTER:

RODERICK M. TODD, JR.
KEITH M. BABCOCK, ESQUIRE
M. BRENT McDONALD, ESQUIRE
JOHN W. WELLS, ESQUIRE
JEFFREY M. THOMAS

This action is one for a Declaratory Judgment seeking a determination from the Court as to whether or not the Defendant has an easement over property owned by the Plaintiff. The Summons and Complaint was filed on March 24, 2009, and Amended on April 20, 2009, before the service of an Answer. The Defendant filed its original Answer and Counterclaim on June 19, 2009, which was amended on April 15, 2010. The Plaintiff thereafter filed a Reply to the Counterclaim thus joining the issues in the case. This matter was referred to me for a hearing and a final order appealable to the South Carolina Supreme Court by Order of the Honorable James Barber dated April 22, 2010.

A hearing was held on August 25th and 26th, 2010, attended by the Plaintiff and his attorneys, Keith M. Babcock and M. Brent McDonald. The Defendant was present with his attorney, John W. Wells.

FINDINGS OF FACT

From the stipulations of the parties and the testimony presented and the documents introduced into evidence, I make the following findings of fact: ATTEST True, Correct & Certified

1. The parties have stipulated to the following facts, the Plaintiff's chain of title:
 - a. The Plaintiff is the current fee owner of seven (7) tracts of property described in that certain deed of Bowater Timber 1, LLC, to the Plaintiff dated March 14, 2003.
 - b. On December 22, 2003, Walter H. Bundy, Jr., conveyed a conservation easement on the Bundy Property to the Congaree Land Trust.
 - c. On March 14, 2003, Bowater Timber 1, LLC, conveyed the Bundy Property to Walter H. Bundy, Jr.
 - d. On November 27, 2001, Bowater Incorporated conveyed the Bundy Property to Bowater Timber 1, LLC.
 - e. On May 13, 1968, R.H. Cantey transferred a portion of the Bundy Property to Catawba Timber Company.
 - f. On December 20, 1960, Camden Equipment Company transferred a portion of the Bundy Property to Catawba Timber Company.
 - g. On October 31, 1960, Camden Equipment Company, Inc., and R. H. Cantey transferred a portion of the Bundy Property to Catawba Timber Company.
 - h. On October 24, 1960, H. E. Beard, Jr., and Roderick H. Cantey transferred a portion of the Bundy Property to Catawba Timber Company.
 - i. On October 19, 1960, James L. Sweet transferred a portion of the Bundy Property to Catawba Timber Company.
 - j. On or about September 26, 1960, R. H. Marrett, RLS, prepared a plat of the Bundy Property.
2. That the parties stipulate to the following facts regarding the Defendant's chain of title:

- a. The Defendant is the current fee owner of certain real property located in Kershaw County and identified as: All that piece, parcel or tract of land lying and being situate near Swift Creek in former School District No. 43, about ten (10) miles South of the City of Camden, Kershaw County, South Carolina, containing Thirty-Seven and Fourteen Hundredths (37.14) acres, more or less, and as depicted on the plat prepared by Tetterton & Riddick Surveyors, dated December 31, 1973, and recorded in the Register of Deeds for Kershaw County in Plat Book "35", at page 1596 (the "Shirley Property").
- b. On October 8, 2008, Karen J. Shirley transferred the Shirley Property to Bobby Brent Shirley.
- c. On May 3, 2007, Bobby Brent Shirley transferred the Shirley Property to Bobby Brent Shirley and Karen J. Shirley.
- d. On February 21, 2005, Bobby Shirley and Nollie T. Shirley transferred the Shirley Property to Bobby Brent Shirley.
- e. On or about May 10, 1985, D. William Whipple and Diana D. Whipple transferred the Shirley Property to Bobby Shirley and Nollie T. Shirley.
- f. On May 10, 1985, Donald L. Morris and Harriet Morris transferred their interest in the Shirley Property to D. William Whipple and Diana D. Whipple.
- g. On September 26, 1980, D. William Whipple transferred the Shirley Property to Donald L. Morris.
- h. In March 1979, Trius Corporation transferred its interest in the Shirley Property to D. William Whipple.
- i. On January 16, 1979, David L. Dickson transferred the Shirley Property to Trius Corporation.

- j. On May 5, 1975, William H. Able, Jr., transferred the Shirley Property to David L. Dickson.
 - k. On or about December 31, 1973, Tetterton & Riddick Surveyors, prepared a plat of the Shirley Property that is incorporated into every deed dated thereafter.
 - l. On December 21, 1973, W. M. Andrews transferred the Shirley Property to William H. Able, Jr.
 - m. On or about April 29, 1969, J. Douglas Montgomery, Master, transferred an interest in the Shirley Property to W. M. Andrews.
 - n. On November 4, 1968, Hobia Tillman Bennett and Annie Marie Bennett, as surviving children of Elijah Bennett, Sr., deceased, transferred their interest in the Shirley Property to W. M. Andrews.
 - o. On May 6, 1968, English Bennett transferred his interest in the Shirley Property to W. M. Andres.
 - p. On April 2, 1968, Margretha Harris transferred her interest in the Shirley Property to W. M. Andrews.
 - q. On March 29, 1968, Carrie Williams, et al. transferred their interest in the Shirley Property to W. M. Andrews.
 - r. On December 19, 1947, J. C. Gillis transferred the Shirley Property to Elijah Bennett.
3. That the parties entered into the following stipulation of facts prior to the trial of this case:
- a. Plaintiff W. H. Bundy, Jr., is the fee owner of seven (7) tracts of contiguous property located in Kershaw County, South Carolina and more fully described

- in the deed from Bowater Timber 1, LLC, to W. H. Bundy, Jr., dated March 14, 2003 (the "Bundy Property").
- b. From 1985 to 2003, the Bundy Property was leased by the Plaintiff's predecessors in title Bowater Incorporated and Bowater Timber 1, LLC, to the South Carolina Department of Natural Resources (the "Lease").
 - c. Between 1985 to 2003, the South Carolina Department of Natural Resources had a legal interest in the Bundy Property.
 - d. As a result of the Lease, the Bundy Property was enrolled in the South Carolina Department of Natural Resources Wildlife Management Area program.
 - e. The Lease and the Wildlife Management Area program allowed public access to all portions of the Bundy Property from 1985 to 2003 subject to the rules and regulations of the Wildlife Management Area program.
 - f. That Bowater Incorporated was the owner of all outstanding shares of Catawba Timber Company. Catawba Timber Company merged into Bowater Incorporated on December 31, 1980. At such time Bowater Incorporated was vested with all the property of Catawba Timber Company.
 - g. Neither Kershaw County nor any other public entity maintains or repairs any timber roads located on Tract 2 of the Bundy Property which is the tract at issue.
 - h. In 2004, Shirley put up a gate located on the property line between the Bundy Property and the property owned by the Miller Family with the permission of Bundy.
4. That on September 26, 1960, R. H. Marett prepared and signed a plat for the

Catawba Timber Company of the property conveyed to the Plaintiff by Bowater Timber 1, LLC, on March 14, 2003, which plat is recorded in Plat Book "27", at page 39, in the ROD office for Kershaw County.

5. That the R. H. Marett plat is incorporated into the Plaintiff's deed description of the lands crossed by the disputed road.
6. That the R. H. Marett plat shows a dotted line in the location of Saxon Road which, as depicted on the plat, is one continuous road including the portion now maintained by Kershaw County and the disputed road.
7. That the R. H. Marett plat predates the beginning of any public maintenance on any portion of Saxon Road which began in about 1968.
8. That Saxon Road ran from the State Highway known as Swift Creek Road to the Defendant's property line before either Sumter County or Kershaw County began maintaining any portion of it. The road all the way to the Defendant's property line was a road in existence prior to the decision of either county to maintain it.
9. That in about 1968, Sumter County began maintaining that portion of Saxon Road lying and being in Sumter County, and Kershaw County began maintaining that portion of Saxon Road from the Sumter-Kershaw County line to the last occupied residence on Saxon Road.
10. That no easements were obtained by Kershaw County prior to maintaining its portion of Saxon Road.
11. That Kershaw County provides road maintenance services by use of public funds, and therefore, Kershaw County cannot provide road maintenance services on private roads.
12. That Saxon Road is a public road.

13. That the disputed road as shown on the R. H. Marett plat, is not a side road intersecting with Saxon Road, but a continuation of Saxon Road.
14. That the alternate route to the Defendant's property designated as a blue line on Plaintiff's exhibit "2" is not depicted on the 1960 Marett plat.
15. That the 2003 sketch included in the Plaintiff's contract of sale, Defendant's exhibit "9", prepared by Bowater at the time of the sale to the Plaintiff shows the disputed road as a dotted line as a continuation of Saxon Road.
16. That the 2003 Bowater sketch in Defendant's exhibit "9" fails to show the alternate blue line route as leading to the Defendant's property.
17. That the 2003 Bowater sketch depicts the Plaintiff's alternate route shown by the blue line on Plaintiff's exhibit "2" as ending at the approximate location of the Rooster Pit, exactly where the Defendant testified that it stops. (Transcript page 198 l. 25 - page 199 l. 2)
18. That the alternate blue line route from Saxon Road to the Defendant's property is not shown on any map prepared by any person or entity.
19. That Elijah Bennett and his family bought the Defendant's tract of land on December 19, 1947, and held it until April 29, 1969.
20. That Elijah Bennett and his family used Saxon Road including the disputed road portion, as their sole access to the Defendant's property from 1947 until 1969, a period of over twenty (20) years.
21. That the testimony of Edward Bennett, the eighty-five (85) year old son of Elijah Bennett is clear and unequivocal that Saxon Road was the only road to the Defendant's property during the twenty-one (21) year ownership by the Bennett family. (Transcript page 243 l. 4, 5, l. 13-14)

22. That the Plaintiff's witness Rick Miller testified that originally Elijah Bennett used the road shown by the blue line to get to his property. (Transcript page 148 l. 14-21). Rick Miller also testified that he was fifty-five (55) years old, (Transcript page 141 l. 25) placing his date of birth in 1955 or late 1954 at the earliest. Elijah Bennett began his farming operations in the spring of 1948 (Transcript page 230 l. 24 - page 240 l. 4) and died in 1957 (Transcript page 240 l. 9-12). This means that Rick Miller's testimony is based on his observations of the Bennett family's comings and goings from seven (7) years prior to his birth until he was two (2) years old.
23. I find that Rick Miller's testimony on the Bennett family's use of the alternate blue line route is not credible, and that his willingness to testify as to crucial events that occurred before he was born seriously undermines his credibility on other unrelated parts of his testimony.
24. I find that the use of Saxon Road, including the disputed portion, to access the property now owned by the Defendant between December 19, 1947, and April 29, 1969, was continuous. After the farming operations ceased, the Bennetts used the road to cut firewood (Transcript page 236 l. 22- page 237 l. 3) and they kept the field plowed (Transcript page 237 l. 14-18). The Miller family rented the property from the Bennetts during the 1960s, paying the taxes as rent and used the disputed road to access it (Transcript page 155 l. 1-17). It appears that the disputed road was in use in 1960 when R. H. Marett decided to depict it on his plat. The USDA aerial photographs from 1957, 1964, and 1969, introduced as Defendant's exhibits 1, 2, and 3, show the disputed road as clear of vegetation during the period from 1957 to 1969, indicating that it was being used frequently enough to resist the over growth of the surrounding forest and underbrush. I find from the testimony of Edward Bennett,

the aerial photographs and the R. H. Marett plat that the disputed road was in continuous use from 1948 until 1969 by the Bennett family and their tenant, Rick Miller's father.

25. That the disputed roadway was identifiable between December 19, 1947, and April 29, 1969, based on the aerial photographs, Defendant's exhibit 1, 2, and 3, and the R. H. Marett plat that identified its location.

26. That the use of the disputed road was adverse from December 19, 1947, until April 29, 1969. Edward Bennett stated that their use of the road was open obvious and without permission. (Transcript page 236 l. 1-14) Rick Miller testified that the Bennetts used the road only with permission from his grandmother. However, Rick Miller's grandmother could not give permission to use the disputed portion of the road because she is not in the Plaintiff's chain of title. Therefore, the grandmother's permission, even if given, does not defeat the adverse use of the disputed portion of the road because it was not on her property.

27. I find that the Defendant's parents who acquired the thirty-seven (37) acre tract on May 10, 1985, and the Defendant who acquired the property on February 21, 2005, used the disputed road continuously from 1985 until 2009 when the lawsuit was filed. The Defendant testified that the disputed road is the only way to get to his property. (Transcript page 175 l. 19 - page 176 l. 2) Rick Miller, just as he had for the Bennett family, testified that the alternate blue line route was used for a period of time just long enough to cut down the use period to under twenty (20) years. However, the use of an alternate route does not mean that the Shirley's never used the disputed road. Second, Rick Miller stated that he wanted to stop the Defendant from using the disputed road that runs through the Miller houses (Transcript page 152 l. 10-13)

giving him an interest in the outcome of this case. Finally, the credibility of Rick Miller as to the use of the blue line route is already badly compromised by his testimony concerning what would have to have been his prenatal observations of Elijah Bennett's use of the blue line route. Therefore, I find by a preponderance of the evidence that the Shirleys used the disputed road continuously for the required twenty (20) Year period.

28. That the Shirley family's use of the disputed road was adverse. As the Plaintiff put it, "It was hostile. There was a death threat. Yes. It was as hostile as you can get." (Transcript page 99 l. 18-19)
29. That Bowater 1, LLC, enrolled the Plaintiff's property into the Game Management Program of the South Carolina Department of Natural Resources at some time between 1985 and the conveyance of the property to the Plaintiff in 2003. The Plaintiff did not introduce a copy of the lease between Bowater and South Carolina Department of Natural Resources or any agreement detailing how the Game Management Program worked. The Defendant testified that a permit was required to hunt on Game Management areas (Transcript page 177 l. 10-14), and that he stopped purchasing the permit after his parents bought the thirty-seven (37) acre tract in 1985. (Transcript page 184 l. 8-16). Using the disputed road over the Bowater property without a Game Management permit would be use without permission and adverse to the interests of the owner, Bowater.
30. The Plaintiff introduced testimony from the Defendant's deposition to the effect that a game warden who was a friend of the Defendant gave the Defendant a key to a lock on a cable across the disputed road. (Transcript page 119 l. 15-18, page 133 l. 18-20) Chuck Thompson did not testify as to the reason for giving the Defendant the

key or whether he had the authority of the owner to give out the key. But the testimony as a whole strongly indicates the Defendant was going to use the disputed road with or without a key by going over the cable when it was down. (Transcript page 131 l. 7-10) When Rick Miller's mother erected a gate without giving the Defendant a key, the Defendant pulled the gate down with his truck. (Transcript page 166 l. 4-18).

31. That as to permissible use of the disputed road by the Shirley family:
- a. No representative of Bowater testified that permission had been given by it in written or orally during its ownership of the Plaintiff's land.
 - b. No representative of South Carolina Department of Natural Resources testified that permission had been given by it in writing or orally during the enrollment of the Plaintiff's land in the Game Management Program.
 - c. No documentation was presented to show that the Defendant or his parents ever obtained a permit to go on the Game Management Lands between 1985 and 2003.
32. I find that the Defendant used the disputed road under the belief that he had a right to use the road from 1985 until 2009. This finding is based on the following testimony:
- a. The Defendant stated that he believed that he had the rights to use the road. (Transcript page 187 l. 7-14)
 - b. When the Millers blocked the disputed road with a gate on their property, the Defendant took it down the next day after he visited Judge Hardin(sic). (Transcript page 185 l. 10-page 186 l. 17)
 - c. When the Plaintiff's timber operation blocked the disputed road in 2004, the Defendant told the Plaintiff that the disputed road was his road. (Transcript

page 100 l. 17-25)

33. That as to the period of ownership of the Defendant's tract by the Defendant and his parents from 1985 until the filing of this lawsuit in 2009, the Defendant and his father used the disputed road, that their use was continuous, that their use was adverse, and that their use was under a claim of right.
34. That the disputed road is the upper portion of Saxon Road which has been in existence for at least sixty (60) years, that the disputed road is the primary access to the thirty-seven (37) acre tract owned by the Defendant, if not the only access, and that the disputed road has been the primary access to the Defendant's property for over sixty (60) years. To the extent that owners have needed access to the Defendant's tract over the past sixty (60) years they have used the disputed road continuously. Looking at the tax maps, plats, sketches, and aerial photographs of the area, the disputed road prominently appears while no other access way consistently appears.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Court has jurisdiction over the parties and the subject matter of this action.

In response to the Plaintiff's action seeking to close the disputed roadway, the Defendant has asserted that the road should remain open as an easement by prescription. The determination of the existence of an easement is a question of fact in a law action. Revis vs. Barrett 321 S.C. 206, 467 S.E.2d 460(1996). The Defendant has also pled dedication of the disputed road as a public road and therefore not subject to obstruction by the Plaintiff. Determination of whether a roadway has been dedicated to the public is an action in equity. Tyler vs. Guerry 251 S.C. 120, 160 S.E.2d 889(1968).

The Defendant's burden of proof as to the public dedication of the disputed roadway is by strict, cogent and convincing evidence. Mack vs. Edens 320 S.C. 236, 464 S.E.2d 124(1995). The Plaintiff has asserted in his brief that the strict, cogent and convincing standard also applies to an easement by prescription. As authority for this proposition, the Plaintiff cites the above case of Mack vs. Edens and Clark vs. Hargrave 223 S.C. 84, 473, S.E.2d 474(Ct. App. 1996). However, neither case cited by the Plaintiff in its brief involves a prescriptive easement. In the absence of any prescriptive easement cases imposing a higher standard of proof, it appears that the burden of proof imposed upon the Defendant for a prescriptive easement is the preponderance of the evidence standard as in other civil litigation.

PUBLIC DEDICATION

South Carolinians have been using roads of various descriptions to access their homes, farms and other property for over three hundred years. Regular public maintenance of roads is of relatively recent origin. Mechanized equipment now used by the state and the counties to maintain roads was not widely available until the middle of the twentieth century. Prior to that, the public used roads which received little or no maintenance from any public entity for centuries. Saxon Road from the state highway to the Defendant's property line is a road that was in existence prior to use of the county motorgrader to maintain a portion of it. This is demonstrated by the September 26, 1960, R. H. Marett plat that forms the basis of the Plaintiff's property description and clearly shows Saxon Road in its present location. The Plaintiff's witness, Rick Miller, testified that the county maintenance of a portion of Saxon Road did not begin until 1968. Defendant's witness, Edward Bennett, testified he and members of his family rode mules down Saxon Road to the Defendant's property which was owned by the Bennett Family at the time back in 1948, some twenty (20) years before public

maintenance began on any portion of the road. The disputed portion of the road has been shown on the Kershaw County Tax Maps since mapping began in the 1970's. The road does not have broad public use because of its remote rural location. However, it appears that the disputed road has been used by the owners of the Defendant's tract as the primary access to that tract over the years.

Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use Horry County vs. Laychur, 315 S.C. 364, 434 S.E.2d 259(1993). Second, there must be, within a reasonable time, an express or implied public acceptance of the property offered for dedication. Helsel vs. City of North Myrtle Beach, 307, S.C. 24, 413 S.E.2d 821(1992). Even though a landowner must positively and unmistakably express his or her intention to dedicate property, the intent to dedicate may be implied from allowing lengthy public use of the land. Cleland vs. WestVaco Corp., 314 S.C. 508, 431 S.E.2d 264(ct. app. 1993). As with the intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property. Cleland vs. WestVaco supra.

In this case, two counties, both Sumter and Kershaw Counties, determined that Saxon Road was a public way and began providing maintenance to portion of the road about 1968. Catawba Timber Company depicted the entire road including the maintained portion and the disputed portion on its 1960 R.H. Marett plat. There is no evidence that Catawba Timber Company objected to the public maintenance of the county maintained portion of the road that ran through its property, and the testimony of the Defendant was to the effect that Catawba Timber Company and its successors never interfered with his use of the disputed portion of the road to access his property. This case is distinguishable from Cleland v.

WestVaco because in that case, no public maintenance was performed on the road.

Saxon Road is either public or it is not. If it is public, it should be public all the way from the State Highway to its dead end on the Defendant's property. Since the road was there long before county maintenance services were provided to any portion of it, the decision by the county as to where the maintenance services end does not make the unmaintained portion any less a public road than the portion that the county decided to maintain. If Saxon Road was not a public road in 1968, then Kershaw County and Sumter County had no business maintaining any part of it.

The Defendant's argument that Saxon Road was a public road was compromised by his decision in 2003 to approach the Plaintiff with the idea of erecting a gate on Saxon Road at the entrance to the Plaintiff's property, which gate was erected by the Defendant in 2003 or 2004. However, the gate which was later removed does nothing to change the nature of the road from public to private. In 1968 when the Miller family requested that Sumter County and Kershaw County maintain Saxon Road from the State Highway to their residences, Saxon Road, the whole of Saxon Road, from the State Highway to the Defendant's property was in existence. It is shown on the 1960, R.H. Marett plat. It is shown on the 1956, U.S. Department of Agriculture aerial photograph introduced as Defendant's Exhibit 1. It is shown on the 1964 U.S. Department of Agriculture aerial photograph produced as Defendant's Exhibit 2, and it is shown on the U.S. Department of Agriculture aerial photograph from 1969 introduced as Defendant's Exhibit 3. The whole road was either public or not in 1968. Two South Carolina counties determined that Saxon Road was a public road and began maintaining it up to the last residence on the road. The erection of barriers on the road by the Defendant or by the Miller family as was also mentioned in the testimony did not change the nature of the road from public to private. The gate simply becomes an illegal obstruction

of a public road. Forty years ago, two South Carolina Counties decided that at that time, Saxon Road was a public road. At that time, there was no distinction between the portion that the counties decided to maintain and the disputed portion except that no one maintained a residence beyond the point where Kershaw County decided to end its maintenance services. Therefore, I conclude as a matter of law that the Defendant has proved by strict, cogent and convincing evidence that two counties have considered Saxon Road to be a public road for more than four (4) decades. I further conclude as a matter of law that the political and economic decision of Kershaw County to end its maintenance at the last residence Saxon Road does nothing to control the legal nature of the road as a public or a private road. Saxon Road is a public road, and the disputed road in this case is unmistakably a portion of Saxon Road.

PRESCRIPTIVE EASEMENT

To establish a private right of way by prescription, one must show (1) continued use for twenty (20) years; (2) the identity by the thing enjoyed; and (3) use which is either adverse or under a claim of right. Horry County vs. Laychur 315 S.C. 364, 434 S.E. 2d 259(1993). The Defendant has offered evidence of the use of the disputed road since 1947 when Elijah Bennett purchased the property that is now owned by the Defendant. As stated above, the standard of proof of a prescriptive easement is the preponderance of the evidence standard.

I find by a preponderance of the evidence that the Elijah Bennett Family, including Elijah Bennett and his children established a twenty (20) year period of use of the disputed roadway between 1947 and 1969. The Defendant produced the testimony of Edward Bennett, an 85 year old son of Elijah Bennett. Mr. Bennett testified that he remembered using the disputed road to get back to the property now owned by the Defendant to farm it

in 1948. The travel was by wagon and mule in those days. Mr. Bennett further testified that they used the property to cut firewood, and that after his father ceased farming the property, the witness kept it plowed by plowing at least once a year with a tractor to keep trees from growing up in the fields. Mr. Bennett did not keep a log or a journal to so how many times he went to the property and how frequently he used the disputed road. The Defendant corroborated the testimony of Mr. Bennett by showing the aerial photographs, Defendant's Exhibits 1, 2, and 3, showing the road in continued existence in 1956, 1964, and 1969. Since the disputed road was not receiving public maintenance or scraping services, it is fair to conclude that the resistance of the road to over growth and vegetation resulted from its continued use through that period. Mr. Bennett was cross examined as to the use by the Bennett Family of an alternate route shown on Plaintiff's Exhibit 2 by a blue line. Mr. Bennett testified that they did not use the blue line route. The blue line route described extensively by the Plaintiff in his testimony was not shown on the R.H. Marett plat from 1960. In Defendant's Exhibit 9, which is the contract by which the Plaintiff acquired his property, Bowater included a sketch which, like the Marett plat depicts the woods roads by dotted lines. It is interesting that Bowater's sketch does not show the blue line route. The blue line route is not shown on any tax map or other map of the property.

In order to cut down twenty (20) year period of use by the Bennett family, the Plaintiff presented the testimony of Rick Miller. Mr. Miller is a member of the Miller family that owns the residences where the county maintenance of Saxon Road terminates. Mr. Miller testified that he wants to stop the Defendant from using Saxon Road as an access way to his property because of disputes between the Shirleys and the Miller families in the past and because the road goes through what Mr. Miller considers to be his property. Mr. Miller testified that Elijah Bennett originally used the blue line road shown on Plaintiff's Exhibit 2,

to access his property but at some point, began using the disputed roadway to access the Bennett Farm. The testimony of Edward Bennett and that of Rick Miller are directly in conflict on this point. Rick Miller says that the Bennetts used the blue line road to access their property during the early years of their farming operation. Edward Bennett denied that they ever used any road other than the disputed road. The glaring problem with Rick Bennett's testimony is his age. The Elijah Bennett farming operation began in 1948, and he died in about 1957. Rick Miller gave his age as 55 years old, meaning he was born in 1954 or 1955. For Rick Miller's testimony to be true, he would have to have witnessed the comings and goings of Elijah Bennett before he was born. Edward Bennett testified on cross examination that Elijah Bennett died in about 1957. At best, Rick Miller would have had to have made the observations forming the basis of his testimony when he was two (2) years old. In weighing the evidence comparing the testimony of Edward Bennett who was twenty-two (22) years old when he rode a mule down the disputed roadway to plow his father's field against the testimony of Rick Miller, I must conclude as a matter of law that the Defendant has established by a preponderance of the evidence that the Bennett Family used the disputed road to access property now owned by the Defendant. Rick Miller did testify that his family took over the farming of the Bennett Farm in the 1960s, under a lease arrangement with the Bennetts. However, his father used the disputed roadway to access the property just like the Bennetts, proving the Defendant's point that anybody who needed to get to the property now owned by the Defendant used the disputed roadway without permission throughout the twenty (20) year period that the Bennetts owned the property. The second element, the disputed roadway was always identified previously stated by the aerial photographs and the Marett plat. Finally, the use of the roadway by the Bennetts and their tenants, the Millers, was adverse to the rights of the landowner of the tract now owned by the Plaintiff. Edward

Bennett testified that his family used the disputed road openly in broad daylight.

The Plaintiff contends that the Edward Bennett testimony is insufficient to prove use of the disputed road during the Bennett ownership period. However, producing the testimony of an eighty-five (85) year old who used the road freely and openly during the 1940s and 1950s coupled with the testimony of the Plaintiff's witness who testified that his family used the road openly during the 1960s together with the aerial photographs showing the road in existence at the same time is as good as evidence gets to prove the continued use over time of an ancient roadway during ancient times.

I conclude as a matter of law that the Defendant has proved by a preponderance of the evidence that Elijah Bennett and his heirs used the disputed roadway continuously for a period of twenty (20) years in a manner that was adverse to the interests of the owners at that time of the tract now owned by the Plaintiff.

Having concluded that the Defendant established a prescriptive easement during the Bennett ownership period, it is unnecessary to establish a prescriptive easement during the Shirley ownership period. However, I do conclude as a matter of law that the Defendant has proved by a preponderance of the evidence that his parents and he used the disputed road continuously for a period of twenty (20) years. The Defendant adamantly testified that the disputed road was the only way to access his property and his testimony on this point is supported by the maps, plats and photographs in the record. As to establishing a prescriptive easement under a claim of right, all that the Defendant must prove is that he believed he had a right to use the road. Revis v. Barrett supra. The record in this case establishes that the Defendant believed that he had a right to use the disputed road and to control the use of the road. He reacted very badly to any interference with this right to both use of the road and control the use of the road by others. The Defendant's continued use

of the clearly identified disputed road under a claim of right establishes a prescriptive easement during the Shirley ownership period without the need to show that the use was adverse. Permission does not defeat an easement by prescription based on a claim of right. Revis v. Barrett supra. In Barrett, a prescriptive easement was found despite the fact that the servient landowner actually gave express written permission to use the disputed right of way.

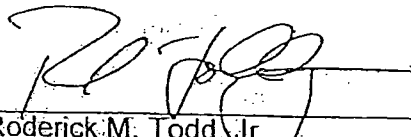
As to the Defendant's claim that his use was adverse, the Plaintiff himself testified that the Defendant's use was "about as hostile as it gets". However, the Plaintiff did introduce evidence that the Defendant's use was permissive during the Game Management Program that allowed public hunting on the Plaintiff's property, and that permission to use the road was given by the Plaintiff himself. As to the Game Management Program, it was never established that the Defendant complied with the Department of Natural Resources rules and regulations for entering the Game Management lands, specifically, the need to obtain a permit. As to the evidence presented by the Plaintiff of permissive use, I find that the preponderance of evidence including that of the violent outburst by the Defendant establishes that the use of the disputed road by the Defendant was adverse and hostile.

Finally, it appears that neither Sumter or Kershaw Counties ever obtained any right-of-way deeds when they began maintaining a portion of Saxon Road, indicating that both counties derived their right to maintain Saxon Road from a prescriptive easement.

Therefore, I conclude as a matter of law that the Defendant has established his right to use the disputed road as an easement to his property. The scope of the easement described in the testimony is that of a eight (8') foot wide, one lane road wide enough for one vehicle to pass.

ORDER

It is the Order of this Court that the Defendant is entitled to an easement, eight feet in width across the property of the Plaintiff in the location shown on the September 2, 1960, R. L. Marett plat, and that the Plaintiff is enjoined from obstructing said roadway.



Roderick M. Todd, Jr.
Special Referee

Camden, South Carolina
Date: July 7, 2011

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CLERK OF COURT
KERSHAW COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS
)
) C/A NO.: 2009-CP-28-00338

W.H. BUNDY, JR.,

Plaintiff,

v.

BOBBY BRENT SHIRLEY,

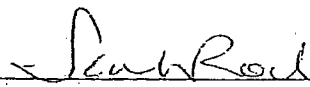
Defendant.

CERTIFICATE OF SERVICE

I, Sarah Foster Rock, the undersigned employee of Smith Bundy Bybee Barnett, P.C. attorneys for Plaintiff W. H. Bundy, Jr., do hereby certify that I have served all counsel in this action with a copy of the Plaintiff's Notice of Motion and Motion to Amend the Complaint to Conform to the Evidence Pursuant to Rule 15(b), SCRPC, on this 20th day of July, 2011, by U. S. Mail to the following addresses:

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**TRANSCRIPT OF:
BUNDY VS SHIRLEY HEARING
VOLUME I**

AUGUST 25, 2010

W. H. BUNDY,

VS

BOBBY BRENT SHIRLEY

09-CP-26-0338

REPORTER: JEFFFREY M. THOMAS

1 State of South Carolina) Court of Common Pleas
2 County of Kershaw) No.: 2009-CP-28-00338
3
4

5 W.H. Bundy, Jr.,)
6 Plaintiff,)
7 vs.) HEARING
8 Bobby Brent Shirley,) VOLUME 1
9 Defendant.) August 25, 2010
10

11
12 Hearing, reported by Jeffrey M. Thomas,
13 Registered Professional Reporter and Notary Public
14 in and for the State of South Carolina; said hearing
15 taken before Special Referee Roderick M. Todd, Jr.,
16 pursuant to agreement and in accordance with the
17 South Carolina Rules of Civil Procedure, at the
18 Kershaw County Courthouse, 1124 Broad Street,
19 Camden, South Carolina, on August 25, 2010, at the
20 hour of 9:30 a.m.
21

22
23 GARBER REPORTING SERVICE, INC.
24 POST OFFICE BOX 12348
25 COLUMBIA, SOUTH CAROLINA 29211
(803) 256-4500

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1 CONTENTS

2 HEARING

3		Page
4	W.H. BUNDY, JR.	
5	Direct Examination by Mr. Babcock	32
6	Cross Examination by Mr. Wells	95
7	ReDirect Examination by Mr. Babcock	111
8	RICK MILLER	
9	Direct Examination by Mr. Babcock	141
10	Cross Examination by Mr. Wells	153
11	ReDirect Examination by Mr. Babcock	162
12	BOBBY BRENT SHIRLEY	
13	Direct Examination by Mr. Wells	174
14	Cross Examination by Mr. Babcock	193
15	ReDirect Examination by Mr. Wells	217
16	ReCross Examination by Mr. Babcock	219
17	Certificate of Reporter	225
18	Word Index	

15 * * * * *

16 EXHIBIT INDEX

17	Exhibits:	Marked at Page
18		
19	(Exhibits retained by Special Referee Todd.)	
20	Plaintiff's Exhibits 1-25	12
21	Defendant's Exhibits 1-8	12
22	Defendant's Exhibit 9	95

23 * * * * *

1 This Hearing is taken in accordance
2 with the South Carolina Rules of Civil Procedure.

3 THE COURT: This is the matter of
4 W.H. Bundy, Jr. versus Bobby Brent Shirley. It's
5 Case Number 09-CP-28-00338. It's pending in the
6 Court of Common Pleas, Fifth Judicial Circuit. This
7 matter was referred to me by order dated April the
8 22nd, 2010 as Special Referee to hear this matter.

9 The Parties present this morning,
10 Mr. Bundy represented by Keith Babcock and Brent
11 McDonald, who are both present in the courtroom.
12 Mr. Shirley represented by Mr. John Wells who is
13 also present in the courtroom.

14 The Court is informed that there exists
15 certain stipulations of evidentiary matters which
16 might simplify the process going forward. So,
17 Mr. Babcock, if you would like to just go over those
18 on the record.

19 MR. BABCOCK: Yes, sir.

20 THE COURT: And we can get those out
21 of the way.

22 MR. BABCOCK: The Parties have agreed
23 and have signed stipulations concerning the chains
24 of title for both Mr. Shirley and Mr. Bundy along
25 with some additional factual stipulations. Let me

1 hand them up to the Court at this point, and then I
2 will review them with the Court as permissible.

3 Your Honor, first looking to Mr. Bundy's
4 chain of title stipulations there, and we have
5 attached the various deeds to the -- to the
6 stipulations.

7 And looking at the stipulation, as you can
8 see, Exhibit A shows the property description.
9 Exhibit B, again, looking at Mr. Bundy's
10 stipulation, shows in December of 2003 a conveyance
11 of a conservation easement involving the property --
12 dealing with all properties at issue.

13 Exhibit C shows the conveyance to Mr.
14 Bundy from Bowater Timber One. Exhibit D shows a
15 conveyance between two Bowater entities; Bowater
16 Incorporated and Bowater One. Exhibit E shows a
17 conveyance by Mr. Cantey to a portion of the
18 property to Catawba Timber Company.

19 And as indicated in the footnote, Bowater
20 was the owner of the lots being shared with Catawba
21 Timber. Exhibit F shows a conveyance between Camden
22 Equipment Company of a portion of the property to
23 Catawba. Exhibit G shows, again in 1960, a
24 conveyance between Camden Equipment and Cantey of a
25 portion of the property to Catawba.

1 Exhibit H shows another conveyance to
2 Catawba. And Exhibit I shows another conveyance to
3 Catawba. So the property was coming together to
4 Catawba. There also is a final exhibit, Exhibit G,
5 in Mr. Bundy's chain of title, a plat in September
6 of 1960 by R.H. Marett.

7 THE COURT: That would be Exhibit J?

8 MR. BABCOCK: I'm sorry. Exhibit J,
9 yes, sir.

10 THE COURT: So various Camden
11 Equipment to Cantey, and then a very significant
12 amount of property that -- in Kershaw County that
13 comes out of Cantey and Camden Equipment. All of
14 that -- all of those derivative deeds went to
15 Bowater -- went to Catawba. Bowater owns Catawba.
16 And in the derivative deed from Mr. Bundy from
17 Bowater is Exhibit C?

18 MR. BABCOCK: Correct.

19 THE COURT: Okay.

20 MR. BABCOCK: That's correct. Then,
21 Your Honor, similarly for Mr. Shirley, for his chain
22 of title. And Exhibit Number 1 shows the property
23 description. Exhibit A shows a transfer from Karen
24 Shirley to Bobby Brent Shirley of her interest in
25 the property.

1 THE COURT: Is that a spouse?

2 MR. BABCOCK: That was a spouse, Your
3 Honor. And then Exhibit B shows a transfer going
4 backwards in time in May of 2007 from Bobby Brent
5 Shirley to Bobby Brent and Karen Shirley. In 2005 a
6 conveyance to Mr. Shirley from his parents Bobby
7 Shirley and Nollie Shirley. That is Exhibit C.

8 Exhibit D is the 1985 deed by -- from the
9 Whipples by which Mr. Shirley's parents acquired the
10 property. And Exhibit D is a conveyance from Morris
11 to Whipple of the Shirley property.

12 Exhibit F is September of 1980 is a
13 conveyance between Whipple and Morris. Exhibit G is
14 a conveyance of the property between Trius
15 Corporation and Whipple. And Exhibit H, 1979, is a
16 conveyance between Gibson and Trius. Exhibit I is a
17 conveyance in 1975 between Able Dickson.

18 Exhibit J is a survey of the property in
19 December of 1973 by Tetterton & Riddick. Exhibit K
20 is a conveyance in 1973 from Andrews to Able.
21 Exhibit L is an April of '69 conveyance from Master
22 to Andrews.

23 And next coming out of the estate, as you
24 can see, Your Honor, these next exhibits all are
25 getting property out of the estate. That would be

1 L, M, N, O, and P. And then you have the final
2 conveyance, Exhibit Q, is a 1947 deed from Gillis.

3 Finally, Your Honor, we have a stipulation
4 concerning several -- eight facts which are
5 stipulated between the parties. And if I may just
6 read them into the record at this point?

7 THE COURT: Yes, sir.

8 MR. BABCOCK: Number 1, Plaintiff W.
9 H. Bundy, Junior, is fee owner of seven tracts of
10 continuous property located in Kershaw County, South
11 Carolina and more fully described in the deed from
12 Bowater Timber One, LLC, to W. H. Bundy, Junior,
13 dated March 14th, 2003.

14 The second stipulation is that from 1985.
15 to 2003 the Bundy property was leased by the
16 Plaintiff's predecessor entitled Bowater
17 Incorporated and Bowater Timber One, LLC, to the
18 South Carolina Department of Natural Resources. And
19 that is referred to as the lease.

20 Between 1985 to 2003 -- Number Three.
21 Between 1985 to 2003 the South Carolina Department
22 of Natural Resources had a legal interest in the
23 Bundy property.

24 Number Four, as a result of the lease, the
25 Bundy property was enrolled in the South Carolina

1 Department of Natural Resources Wildlife Management
2 Area Program.

3 Number Five, the lease and Wildlife
4 Management Area Program allowed public access to all
5 portions of the Bundy property from 1985 to 2003
6 subject to the rules and regulations of the Wildlife
7 Management Area Program.

8 Number Six, that Bowater Incorporated was
9 the owner of all outstanding shares of the Catawba
10 Timber Company. And Catawba Timber Company merged
11 into Bowater Incorporated on December 31, 1980. At
12 such time Bowater Incorporated was vested with all
13 the property of Catawba Timber Company.

14 Number Seven, neither Kershaw County nor
15 any other public entity maintains or repairs any
16 timber roads located on Tract 2 of the Bundy
17 property which is the tract at issue.

18 In 2004 Mr. Shirley put up a gate located
19 on the property line between the Bundy property and
20 the property owned by the Miller family with the
21 permission of Mr. Bundy.

22 THE COURT: I will file these
23 stipulations which I will note for the record have
24 been executed by Mr. Babcock and by Mr. Wells on
25 behalf of their respective clients. There is no

1 issue as to any of these -- anything in the chain of
2 title, plats. All of that comes in. No clerk, no
3 other stuff therein?

4 MR. BABCOCK: That's correct, Your
5 Honor.

6 THE COURT: Very well. All right.
7 Gentlemen, are we ready to proceed?

8 MR. BABCOCK: Yes, Your Honor. If we
9 could have brief opening statements?

10 THE COURT: Yes, sir.

11 MR. WELLS: Your Honor, I believe
12 there were more stipulations that we have agreed to.
13 I think we had agreed that the tax maps from Kershaw
14 County would come in without objection and without
15 laying a foundation by somebody from the mapping
16 office.

17 MR. BABCOCK: That's correct, Your
18 Honor.

19 MR. WELLS: The tax maps have three
20 forms that I know of. There are the mylars that you
21 have seen before which is stick drawings, the aerial
22 photographs from flyovers, and the old tax mapping.
23 And then, you know, now you go on line and you can
24 pull up this format.

25 And I think both parties have probably

1 used both types. Secondly, I think that we had
2 agreed that the old aerial photographs of the
3 Department of Agriculture could come in without the
4 presence of an Agricultural employee.

5 THE COURT: These are U.S. Department
6 of Agriculture?

7 MR. WELLS: Right. They are flyovers
8 for the purpose of preparing soil maps by the
9 Department of Agriculture, but they fly over, of
10 course, all Kershaw County. To the extent they show
11 anything that is relevant in the case.

12 MR. BABCOCK: And in response to
13 that, the Department of Agriculture map that I'm
14 aware of is in reference to the 1910 or 1919 one,
15 correct?

16 MR. WELLS: No. These are flyovers
17 -- I don't think I'm going to use that, the 1910.

18 MR. BABCOCK: All right.

19 MR. WELLS: But these are the
20 flyovers from 1956, 1964, 1969, and 1974.

21 THE COURT: 1956?

22 MR. WELLS: Correct.

23 THE COURT: 1969?

24 MR. WELLS: 1964, 1969, and the 1974.

25 MR. BABCOCK: Your Honor, I think if

1 we can look at those maps, I think that would take
2 care of the problem.

3 THE COURT: Why don't you all look at
4 that and -- you all look at that for just one
5 second. You all go ahead and --

6 (Discussion off the record.)

7 MR. WELLS: I think that we have an
8 agreement on the maps. If we could go ahead and get
9 them marked and maybe mark some of the Plaintiff's
10 exhibits.

11 THE COURT: Absolutely.

12 MR. WELLS: And that would move
13 things along.

14 MR. BABCOCK: If we could take a
15 brief break and mark them all, we can do that.

16 THE COURT: Please do. I'm going to
17 work on my chair issue.

18 (Discussion off the record.)

19 (Defendant's Exhibits Nos. 1 through
20 8 marked.)

21 (Plaintiff's Exhibits Nos. 1 through
22 25 marked.)

23 THE COURT: Gentlemen, have you all
24 marked what you intend and have agreed to mark?

25 MR. BABCOCK: Yes, Your Honor. We

1 have marked Plaintiff's Exhibits 1 through 25.
2 There will also be a video, which Mr. Wells has
3 seen, which we will be offering as an additional
4 exhibit. We will be offering that as Exhibit 26 I
5 understand without objection.

6 MR. WELLS: Without objection.

7 THE COURT: And do you have any --
8 did you put any Defendant's stuff in, Mr. Wells?

9 MR. WELLS: Defendant's 1 through 8.

10 THE COURT: Defendant's 1 through 8.

11 MR. WELLS: And those are the maps
12 that we just went over.

13 THE COURT: Also without objection?

14 MR. BABCOCK: Yes, sir.

15 THE COURT: Okay. Items have been
16 marked. Stipulations read. Anything else we need
17 to do?

18 MR. BABCOCK: Just -- and I always
19 get worried about this for later purposes, but we
20 have offered the exhibits we just referenced. And
21 they are now into evidence as I understand it.

22 THE COURT: Yes.

23 MR. BABCOCK: And we also have
24 various exhibits which are part of the stipulations
25 which are also into evidence?

1 THE COURT: The stipulation of
2 Bundy's chain of title, the stipulation of Shirley's
3 chain of title, and the stipulation of facts
4 executed by both attorneys are in evidence.

5 MR. BABCOCK: Thank you, Your Honor.

6 THE COURT: And just in looking
7 through the files, the file is kind of thick, I
8 think the operative pleadings are this. And correct
9 me if I'm missing something. It appears there is an
10 Amended Complaint from April of 2009. There is --
11 there is an Amended Answer and Counterclaim --

12 MR. WELLS: Yes, Your Honor.

13 THE COURT: -- from April the 15th of
14 2010. And there is a reply to the Amended
15 Counterclaim of April 2010 by the Plaintiff. So I
16 think those -- that encapsulates the operative
17 pleadings that we are operating under.

18 MR. BABCOCK: Yes, Your Honor.

19 THE COURT: Okay. Gentlemen, I would
20 like to hear, if it comports with what you all wish
21 to do, opening remarks, statement. And I'll be
22 happy to hear from you at this time.

23 MR. BABCOCK: Thank you, Your Honor.

24 THE COURT: Let me just -- one thing
25 for the -- just scheduling. I would anticipate

1 going until about 1:00 o'clock if that is okay with
2 everybody. Take an hour. Come back at 2:00.

3 I have a 10-minute pretrial in Family
4 Court next door at 3:30. So I would anticipate
5 taking a break at 3:30 for about 10 minutes. And
6 let me get beat up over there for a few minutes.
7 And then we'll come back. And we'll go for as long
8 as you need to go today.

9 MR. BABCOCK: We've been talking for
10 planning purposes, I think because of the amount of
11 material and documents that we have been able to
12 stipulate to, that really can shorten the
13 presentation of evidence. So I think we'll be able
14 to get a lot of the trial done today.

15 THE COURT: Okay. Okay.

16 MR. WELLS: Yes. And I have a
17 material witness that is subpoenaed for tomorrow
18 morning. I was thinking the Defense would probably
19 be tomorrow. If we get through the Plaintiff's case
20 today -- and, of course, I will probably call the
21 Defendant.

22 THE COURT: Absolutely.

23 MR. WELLS: We would like to call him
24 tomorrow.

25 THE COURT: Absolutely. We will do

1 whatever we need to do to accommodate each side in
2 the presentation of evidence and witnesses as they
3 deem fit. Mr. Babcock, I would be more than happy
4 to hear from you, sir.

5 MR. BABCOCK: Thank you, sir. This
6 case comes down to one pretty straightforward issue.
7 And that is for a declaration by this Court as to
8 what rights, if any, Mr. Shirley has in what I'm
9 going to refer to as the disputed pathway across Mr.
10 Bundy's property.

11 Simply put, it's the Plaintiff's position
12 that he has no rights to use that pathway. And we
13 believe that when the evidence is considered in
14 light of the law in this state that that will be the
15 determination in this case.

16 Now, there are some things that are
17 undisputed concerning that issue. One thing that is
18 undisputed is that the deed in 1985 by which Mr.
19 Shirley's parents received title to the property
20 showed that the property at issue was surrounded by
21 other properties. In other words, that it was
22 landlocked.

23 Second, the plat that is within the chain
24 of title, I believe it's 1973 from Mr. Tetterton &
25 Riddick, similarly depicts the property as being

1 bounded on all sides by other property.

2 And it's also without dispute that there
3 is no written easement or any other writing that
4 would provide Mr. Shirley with rights over Mr.
5 Bundy's property on this disputed pathway.

6 Now, for orientation purposes, Your
7 Honor -- I'm referencing Plaintiff's Exhibit 1. But
8 for orientation purposes, Sumter Highway running
9 from Camden to Sumter would be here. Then Swift
10 Creek Road is a roadway off of 521 that you would
11 use to get back to Saxon Road.

12 THE COURT: Camden is up here,
13 correct?

14 MR. BABCOCK: No. Camden is down
15 here.

16 THE COURT: Camden is down here?
17 Camden and Sumter.

18 MR. BABCOCK: Swift Creek Road up to
19 Saxon Road. And then you are going to hear
20 testimony concerning the Miller property. That is
21 right there. And then Bundy's property is in here
22 and the Shirley property is over here.

23 Now, we have blow-ups that show there is a
24 space in Mr. Bundy's property between Saxon Road,
25 the Miller tract, the Bundy tract, and the Shirley

1 tract. And the Shirley tract is, I think,
2 approximately 37 acres in size.

3 Now, as you can see from this aerial,
4 which was from the early to mid-'90s, we are talking
5 about a heavily wooded piece of land. And that
6 comes as no surprise because Mr. Bundy acquired the
7 property from Bowater who used it for timber
8 purposes.

9 The evidence will also show that the Saxon
10 Road is maintained, by maintained scraped because
11 it's a dirt road, by the County up to the Miller
12 property. And that is where the County maintenance
13 ends.

14 Now, we've submitted our brief to you. As
15 you can see on Pages 9 and 10, there are both legal
16 and equitable aspects to this case, which I don't
17 need to go through because we've given you the
18 pretrial brief, but that sets forth those issues.

19 Now, Mr. Shirley and his parents acquired
20 the property in 1985. At that point in time Mr.
21 Shirley had come to know about this property as a
22 result of being able to hunt on the Bowater property
23 by the Wildlife Management Program.

24 Bowater in the '70s had put their property
25 into that program. Hunters were allowed access over

1 their property. And as a result of that, he had
2 seen this property which ultimately became the
3 Shirley property, and later purchased it.

4 Now, the use by Mr. Shirley of his
5 property and his parents has always been for
6 recreational purposes. There is no house out there.
7 There is no structure. It's used for recreational
8 purposes.

9 The testimony will also show a couple of
10 things, some in dispute and some not. There is
11 going to be a dispute as to whether Mr. Shirley has
12 always used this way to get to his property.

13 We will present testimony that, in fact,
14 for a period of years he used another route and
15 ultimately got into a conflict with an owner named
16 Whit Boykin whose property he had to cross.

17 He then was stopped from using that
18 property, and then had to use the property which I
19 refer to as the disputed pathway over the Miller
20 tract. It also -- and this will be undisputed, that
21 there was a chain put at the entrance to the Bowater
22 property that is near the Miller property.

23 And that Mr. Shirley obtained a key to
24 that chain to be able to use it. And that is
25 indicative, as the case law shows, of a permissive

1 use. And that is very important in this case
2 because a permissive use precludes a prescriptive
3 easement.

4 Now, Mr. Bundy acquired his property,
5 which had been the Bowater property, in 2003 and
6 turned it into a conservation easement or put a
7 conservation easement on it. That concluded the
8 Wildlife Management aspect of the property. And so
9 it was no longer used for Wildlife Management.

10 Now, in Mr. Bundy's chain of title there
11 is no question that there is a plat made in 1960 for
12 Bowater. And it shows the various Bowater tracts
13 that had been pulled -- were being pulled together.
14 And it also shows the little trail going to Mr.
15 Shirley's property. That's what Bowater did.
16 Bowater pulled the property together, and they had a
17 plat prepared. That is in Mr. Bundy's chain.

18 THE COURT: And, Mr. Babcock, just
19 for reference purposes, that would be Exhibit J on
20 the stipulation, the 1960 plat?

21 MR. BABCOCK: Yes, sir.

22 THE COURT: By R.H. Marett?

23 MR. BABCOCK: Yes, sir.

24 THE COURT: Okay.

25 MR. BABCOCK: Now, the fact that is

1 in Mr. Bundy's chain is important because it's not
2 in Mr. Shirley's chain. If it were in Mr. Shirley's
3 chain we would have a different situation.

4 It is clear that when a developer gets a
5 piece of property, puts in roads, subdivides it, and
6 conveys out that people get rights to the roadway
7 dedicated to the public, their rights are acquired
8 in the roadway.

9 This is the exact opposite. Bowater
10 accumulated the property, had a little trail shown
11 on the property. This is in Mr. Bundy's chain.
12 That does not establish a public way. That does not
13 establish any type of easement over that property
14 because it stays together in Mr. Bundy's chain. And
15 that is important.

16 What's also important is that, as the
17 testimony will show, shortly after Mr. Bundy bought
18 the property he and Mr. Shirley had a discussion
19 about putting up a gate where -- basically where the
20 Bowater chain had been.

21 And Mr. Bundy gave Mr. Shirley permission
22 to put up that gate provided they both had keys.
23 Again, continuing a permissive use of the property.

24 At least one of the reasons we are here
25 today is because later in 2005 Mr. Bundy will

1 testify that Mr. Shirley called him basically in a
2 fit of rage, was upset about something to do with
3 what Mr. Bundy was having done with the property.
4 He had some timber work being done on the property
5 that morning.

6 And during that phone call threatened to
7 kill Mr. Bundy. Thereafter at about the time of the
8 letter that we've marked in 2005, and that will be
9 Exhibit 4, Mr. Bundy wrote Mr. Shirley or actually
10 called Mr. Shirley first and said he wanted the gate
11 taken down.

12 And, again, had a rage-filled response
13 from Mr. Shirley again threatening to kill him.
14 Thereafter he wrote the letter to Mr. Shirley and
15 ultimately -- Exhibit 5 which we will get to, is a
16 letter by me in March of 2006 to Mr. Shirley's
17 attorney. At that point the gate was taken down.

18 And as a result of that we are here today
19 to establish that Mr. Shirley has no rights to this
20 passage. Now, he asserts several kinds of rights,
21 but all of them fail for evidentiary and legal
22 reasons.

23 Number One, he claims that this is a
24 public roadway. There is absolutely no indication
25 of that fact whatsoever. And, in fact, his own

1 testimony about putting a gate on the property
2 really estopped that kind of a position.

3 He also raises prescriptive easement,
4 private dedication, and easement by estoppel
5 arguments all of which -- and I'm not going to spend
6 time at this point. We briefed that in our pretrial
7 brief. All of those fail for reasons of not
8 satisfying the law to establish those sorts of
9 causes of action.

10 There is one other point from an
11 evidentiary standpoint that I think is significant
12 to understand before we start actually presenting
13 the evidence is that there is going to be testimony
14 about a predecessor in title, Mr. Elijah Bennett and
15 his family, who owned the property that later became
16 Mr. Shirley's property from December of 1947 to
17 March of 1968, 20 years and three months.

18 There then were a series of owners, as
19 Your Honor may recall, between that conveyance out
20 in 1968 and ultimately the 1985 conveyance to Mr.
21 Shirley, but the evidence will show, and Mr. Bennett
22 will testify, that his family farmed the property
23 for a seven or eight-year period.

24 Thereafter his father got sick. And later
25 they conveyed the property -- the property was

1 conveyed out of the estate. Two things of
2 significance here. Number One is the fact that the
3 use of -- Mr. Bennett's family did use the pathway
4 at issue, but it was with permission of the Miller
5 family.

6 And we will present evidence to show that.
7 In addition, the Miller family farmed the property
8 for a couple of years during the time that the
9 Bennett family owned it.

10 THE COURT: The Shirley property?

11 MR. BABCOCK: The Shirley property,
12 yes, sir. And for the Bennett ownership to have any
13 legal effect here, if prescriptive easement is the
14 theory, it would had to have been used throughout
15 that 20-year period. It was not.

16 The Millers used it to farm. And the
17 permission that was given to begin with negates that
18 ownership. Finally, Your Honor, there are going to
19 be, as we pre-marked various maps and plats that the
20 Defendant will show, I think when we look at those
21 carefully it will be clear that those do not show
22 that the pathway at issue has any kind of public
23 nature to it.

24 And really when you look at these
25 individually, they really don't support Mr.

1 Shirley's position. So we come here today seeking a
2 declaration that Mr. Bundy is the owner of this
3 property and Mr. Shirley has no rights.

4 THE COURT: Thank you, Mr. Babcock.
5 Mr. Wells?

6 MR. WELLS: Judge, this is a
7 prescriptive easement case. This is an ancient road
8 that goes from Swift Creek Road to a paved highway
9 all the way to Mr. Shirley's property.

10 Two counties out of the 46 counties in
11 South Carolina believe this is a prescriptive
12 easement. Both Sumter County, which maintains its
13 portion up to the County line, and Kershaw County
14 maintain this road by prescriptive easement. There
15 is no deeded easement in the chain of title to
16 either county.

17 THE COURT: Where is the Sumter
18 County line?

19 MR. WELLS: It's approximately in
20 here.

21 THE COURT: Okay.

22 MR. WELLS: Here is Swift Creek Road.
23 Sumter maintains it up to about here. And then
24 Kershaw County maintains it up to where these houses
25 are. Kershaw County made a decision to maintain the

1 road up to the last residence.

2 There are no residences on the Defendant's
3 property. And there are no residences on the
4 Plaintiff's property. So it's maintained up to the
5 last resident. But if it's prescriptive easement,
6 it's a prescriptive easement.

7 The fact that the County decided to stop
8 scraping at some point doesn't change the nature of
9 the road as a prescriptive easement. So part of our
10 claim is it's either a prescriptive easement or it's
11 not. The County thinks that it is. And we think
12 that it is.

13 We will show that the road has been there
14 for at least 60 years going back to the late 1940s.
15 It is -- we will contend is the only access to the
16 Defendant's property. It is the access that has
17 always been used.

18 We will bring in the ancient landowner.
19 He's pretty ancient, he's 85 years old, who will say
20 that he used this road to go up and plow this by
21 mule. So we are claiming that it is a prescriptive
22 easement.

23 Now, prescriptive easement has three
24 elements that you are probably aware of. Number
25 One, which is the continuous use for 20 years.

1 Number Two is the identity of the thing. And Number
2 Three is a choice. It can either be adverse use for
3 20 years or it can be under a claim of right. So
4 Number Three gives you two choices as to how to go
5 about that, which we've pled the alternative choice.

6 Now, first of all, the use for 20 years.
7 Mr. Shirley will show that his parents came into
8 possession in 1985, and that they have used this
9 road as the road to their property since that time.

10 We are also going to show that it's been
11 used prior to that. The best evidence of the
12 continued use is, of course, the fact that the road
13 exists. And it appears on all of these old aerial
14 photographs. It has not been scraped, so it has
15 been maintained. And it has resisted the
16 undergrowth by its continuous use, people going in
17 and out.

18 The identity of the thing will be beyond
19 dispute because the road is shown on the 1960 plat
20 by which Mr. Bundy acquired his property, first of
21 all. It's shown on every tax map that Kershaw
22 County has produced. And it is clearly identified
23 as a road.

24 The adverse use, first of all we will
25 introduce evidence that Mr. Shirley's use was open

1 and notorious. He did not sneak back there by
2 night. He went back there openly and used this road
3 for the period from 1985 until the lawsuit was filed
4 in 2009.

5 Now, much will be made about this Wildlife
6 Management area thing, but for a Wildlife Management
7 area you have to have something to use a Wildlife
8 Management area. You have to get a permit. In
9 order to hunt on a Wildlife Management area you have
10 to have a hunting license and you have to get a
11 permit to access the area.

12 We contend that there will be no evidence
13 that Mr. Shirley had a permit to use the Wildlife
14 Management area, and therefore his use continues to
15 be adverse. Also the Wildlife Management area is
16 open for hunting season. Of course, the Shirleys
17 owned this property and they accessed this land.

18 There was a mention of the Millers giving
19 him -- giving the Bennetts permission, I think in
20 the past, to use the property, but the Miller
21 property is just in this area here. It doesn't
22 really extend over the Bundy property which is in
23 dispute.

24 If you look at the chain of title, that
25 came out of Cantey who owned, I believe, Tract 2.

1 MR. WELLS: -- as a matter of law.

2 THE COURT: And I'm looking at
3 Exhibit J to the stipulation of Bundy's chain of
4 title which is in evidence. Is this the -- is this
5 dotted line, is that --

6 MR. WELLS: That is where the road
7 is.

8 THE COURT: That is the road?

9 MR. BABCOCK: That is the middle of
10 the Miller property there.

11 THE COURT: That is the Miller. This
12 is Bennett.

13 MR. WELLS: That is the Cantey
14 portion.

15 MR. BABCOCK: Here, this is Miller.
16 And then Bennett is back here. This is Bundy.

17 THE COURT: That is Bundy and that is
18 Bennett and now Shirley?

19 MR. BABCOCK: Correct.

20 THE COURT: Okay.

21 MR. WELLS: If you will notice on
22 that plat, the surveyor doesn't make any distinction
23 there between the County maintained portion and the
24 portion that goes up to Mr. Shirley's property.
25 It's all designated by the same type of dotted line

1 he has designated where it crosses Mr. Bundy's
2 property before it gets to the Miller property as a
3 County maintained road.

4 And then it proceeds onto Mr. Shirley's
5 property as a -- we believe a prescriptive easement.
6 So we believe it is a prescriptive easement.

7 Kershaw County believes that it is a prescriptive
8 easement. And also we believe that Mr. Bundy is
9 bound by the incorporation of that plat into his
10 deed as a matter of law. And he is encumbered by
11 this road which leads to Mr. Shirley's property.

12 THE COURT: Thank you, Mr. Wells.

13 MR. BABCOCK: Your Honor, the first
14 witness for the Plaintiff is Mr. Bundy.

15 THE COURT: Mr. Bundy. Mr. Bundy,
16 let me swear you in. Raise your right hand. Do you
17 swear to tell the truth, the whole truth, and
18 nothing but the truth so help you God?

19 MR. BUNDY: I do.

20 WHEREUPON:

21 WALTER HENRY BUNDY, JR., being duly
22 sworn and cautioned to speak the truth, the whole
23 truth and nothing but the truth, testifies as
24 follows:

25 DIRECT EXAMINATION

1 BY MR. BABCOCK:

2 Q. Could you give us your full name, please,
3 sir.

4 A. Walter Henry Bundy, Junior.

5 Q. And how old are you?

6 A. Fifty-nine.

7 Q. And where do you live?

8 A. I live off 521, 1768 Sumter Highway.

9 Q. And is that property sometimes known as
10 Carter Hill?

11 A. Yes.

12 Q. And I can't believe I have to ask this,
13 but if you could try to make sure you talk loudly
14 enough so the court reporter can hear you and also
15 His Honor.

16 A. I will.

17 Q. How long have you lived there?

18 A. I bought the property in 1988. And I
19 moved in after Hurricane Hugo in 1989. Roughly
20 1990.

21 Q. About how large is that piece of property?

22 A. Thirty acres.

23 Q. Do you own some other property nearby?

24 A. Yes. I own the piece of property that is
25 called the Rooster Pit that I bought in 1991 or '92

1 which is about 45 acres. And then there is this
2 Bowater property which I think is around 450 acres.

3 Q. And when did you acquire the Bowater
4 property?

5 A. It closed, I believe, in March of 2003.

6 Q. And is the portion of the property you
7 acquired from Bowater where the pathway is that is
8 in dispute?

9 A. Yes, it is.

10 Q. All right. Mr. Bundy, if you could come
11 down. And what I'd like you to do, sir, just to be
12 oriented, but on the record I would like for you to
13 now show us what is shown on Exhibit 1 in terms of
14 the various roads that are shown and the relevant
15 properties.

16 A. All right. Well, I talked about where I
17 live. This is where I live here on Carter Hill.
18 This is Swift Creek Road. It runs down this way.
19 This is Boykin Mill Pond over here. And you come
20 down Swift Creek Road, take a left on Saxon Road,
21 S-a-x-o-n.

22 If you go there and look, there are two
23 signs, one that says Saxon on the left, and another
24 one going in the other direction. But at any rate,
25 you go down this dirt road, and you come to this

1 portion here.

2 This is the corner of my property right
3 here where this orange line is. And the property
4 itself is bounded by this orange line that goes this
5 way. It goes up through here. It goes down. It
6 goes to Swift Creek. It follows Swift Creek all the
7 way around, comes back down this way. Comes down.
8 And it goes straight this way.

9 And then it comes over here to this little
10 short of odd-shaped piece. That is the Rooster Pit
11 or at least this portion of it was. When I bought
12 the Bowater property it always included this little
13 tiny piece here. And it comes back down this way.
14 So it's this property.

15 There are a couple of out-parcels inside
16 the property, one of which is where the Millers
17 live. That is this piece right here. There is
18 another out-parcel right in here. And I think a
19 lady named Speaks or Speaker or something like that.

20 Q. All right. The Miller residence, how
21 many --

22 A. I think there are four or five buildings
23 in this area right here. Saxon Road, when it gets
24 to the Miller property, stops. The County stops
25 scraping it. It's a private road. It says No

1 Trespassing. And it goes through the Miller
2 property to the point where it basically is within
3 inches of a play-set.

4 And it's just -- basically it divides some
5 of their yards which is a path. And then it goes
6 down through this little wooded area which is
7 their -- which is on the edge of the property.

8 And then it find its way on the Bowater
9 property which is now mine. Mr. Shirley's property
10 is in this area over in here bounded on this side by
11 a piece of property that used to be owned by Mr.
12 Mayor Boykin which is now owned by Rick Boykin. And
13 bounded on this side by me and on this side by me
14 and this side by Boykin.

15 Q. And you made reference to the end of the
16 public maintenance. Would you show us? And then I
17 would like you to take your pen with an X -- why
18 don't you use actual pen?

19 A. Okay.

20 Q. Here you go. That would be great. And
21 just show us and then put an X where the maintenance
22 concluded.

23 A. The maintenance concluded right here.
24 That is where they stop it. They turn around. And
25 they ride the road. You can see it's scraped. And

1 they have a swale that dumps the water on this side,
2 but it stops right there. Right where that X is.

3 You couldn't get a scraper in there if you
4 wanted to put one in there. There is just not
5 enough room for it. It wouldn't fit.

6 Q. Okay. Thank you, Mr. Bundy. If you would
7 return to the stand, please. Mr. Bundy, you are a
8 lawyer, correct?

9 A. Yes, sir.

10 Q. And how long have you practiced law?

11 A. I got my license in 1978.

12 Q. And where -- what is the name of your
13 firm?

14 A. Smith, Bundy, Bydee & Barnette.

15 Q. And where is the firm office located?

16 A. Mt. Pleasant, South Carolina.

17 Q. Now, how do you work that out in terms of
18 living up here and having your firm located down in
19 Charleston?

20 A. I've been doing it since 19 -- roughly
21 1999. It's gotten easier over the years because of
22 the internet and those kinds of things, but I have a
23 room in my home that is dedicated as my home office.
24 And now I have sufficient computer stuff that I
25 actually have a live feed from my conference room in

1 Mt. Pleasant so I can attend depositions
2 electronically without having to go to Charleston.

3 Q. So you are able to pretty much work out of
4 your home?

5 A. Yes, I do. I work out of my home. Now
6 it's gotten to where I only go to Mr. Pleasant about
7 once every other week for a day unless I have to go
8 to court, obviously.

9 Q. Sure. Let's talk a little bit about the
10 Bowater tract itself. You acquired it from the
11 Bowater Company as you testified?

12 A. That's correct.

13 Q. And when did you acquire the property?

14 A. I believe we closed in March of 2003.

15 Q. And the various Bowater tracts were
16 conveyed to you at one point in time; is that right?

17 A. That's correct, yes, sir.

18 Q. After you received title to the Bowater
19 property, what did you do with the property?

20 A. I contacted the Congaree Land Trust and
21 entered into a conservation easement with them.

22 Q. And was that over the entire Bowater
23 property?

24 A. It was over the entire Bowater property.
25 In addition to that I added in the Rooster Pit. So

1 it made it roughly a 500-acre tract.

2 Q. And, just for the record, explain to us
3 how the conservation easement works.

4 A. Well, as I understand it what a
5 conservation easement is, when you buy a piece of
6 property you have a certain bundle of rights which
7 would include the right to subdivide it. There is
8 very little zoning in this area of the country. You
9 can turn it into whatever.

10 And I wanted to conserve the property in
11 perpetuity as a single tract. And so I gave up the
12 right to subdivide the property. I gave up the
13 right to build dwellings on the property, save and
14 except I maintained the right to build two, I think,
15 they are 2000-foot structures. Very small sort of
16 structures.

17 I maintained the right to continue with
18 normal farming operations, although I don't really
19 farm it, but I do have a tree farm so to speak. I'm
20 slowly turning it back into a Long Leaf Pine
21 Plantation. So when I cut the Lob Lollies, I only
22 plant Long Leaf. But mostly I'm trying to put it
23 back together in a more natural state.

24 MR. BABCOCK: With the Court's
25 indulgence.

1 BY MR. BABCOCK:

2 Q. Now, Mr. Bundy, you are familiar with the
3 fact that the Bowater tract was used with the
4 Wildlife Management Program before you bought it?

5 A. Yes, sir, I am.

6 Q. And that use of the Wildlife Management
7 Program ended when you bought the property; is that
8 right?

9 A. Yes, it did. The lease was between the
10 State of South Carolina through its political
11 subdivision or agency, the DNR, Department of
12 Natural Resources. And that lease terminated when
13 they ceased to own the property.

14 Q. And could you explain for us for the
15 record just generally how the Wildlife Management
16 Program works?

17 A. Well, what the Wildlife Management Program
18 is, is the way that the State through the D.N.R.
19 provides for the public places to hunt, bird watch,
20 camp, and enjoy the outdoors. I think the timber
21 companies were -- participated in it pretty
22 extensively in the '70s and '80s. And even now
23 because I think it generates goodwill for the timber
24 companies.

25 People appreciate the fact that they can

1 use their property, go on it and hunt and bird watch
2 and those type of things. It's my understanding
3 that that property is used -- can be used year
4 around. It can only be hunted on during hunting
5 season, but it's accessible to the public year
6 around for bird watching and camping and all of
7 that. It depends on what use D.N.R. decides to make
8 of the property.

9 Q. And there is a lease, I think you
10 indicated, between the property owner and --

11 A. Yes. There is a written lease between the
12 landowner and the D.N.R. In that D.N.R. obtains
13 right to the property, the ability to exclude
14 people, allow people to come onto it.

15 Q. It conveys ownership rights?

16 A. Leasehold, yes. They are the lessee.
17 They have all the rights that a lessee has. I guess
18 whatever legal rights a lessee has.

19 Q. But not beyond that?

20 A. Yes.

21 Q. Okay. Mr. Bundy, I would like to bring
22 you back down to look at Exhibit 1. And I'd like
23 you to show us the access when you bought the
24 property in 2003 that you had to the Bowater tract.

25 A. There were -- when I bought the property

1 there were several accesses to the property. There
2 was a road -- if I could backup. When I -- before I
3 bought the Bowater tract, I bought this piece right
4 here, what they call the Rooster Pit. And it -- as
5 you can see a line down here. That was the
6 boundary.

7 It's not shown on this exhibit, but it was
8 a piece of property of this size, about 45 acres.
9 And according to the local lore, it's called the
10 Rooster Pit because they, in fact, used to fight
11 gamecocks down there. If you go up here and look,
12 in this area here you can see where this land is
13 terraced for people to sit on. I've been told a
14 story by Boykin and others --

15 THE COURT: We don't want to get into
16 that.

17 THE WITNESS: Exactly. But at any
18 rate, it was used. There is a road -- there was a
19 road. The way I accessed this property was I came
20 down this road, took this road right here, followed
21 it along this road across the Bowater tract, which
22 at that time was the Bowater tract.

23 And that allowed me to access the Rooster
24 Pit. And that road goes here. Goes all the way
25 down here, and goes across --

1 BY MR. BABCOCK:

2 Q. Let me stop you there just for the record
3 here. And just describe -- coming off Swift Creek
4 Road?

5 A. Off Swift Creek Road. Take a left on
6 Saxon Road. And where it turns, where you see the
7 name Saxon Road, where it makes a turn to the right,
8 instead of going right you go straight. There is a
9 road right there. A dirt road right there.

10 And it goes up this way, across this
11 little piece of property. There is another road.
12 And it gets you to the Rooster Pit. That is one
13 access to the property. Another access to the
14 property was coming around Saxon Road, there was a
15 road through the middle right here. There is also
16 access to the road -- to the property --

17 Q. Why don't you go back and show that middle
18 road?

19 A. Right here. And that road is still there.

20 Q. And you are gesturing just above the words
21 Saxon Road and going straight across to the left; is
22 that right?

23 A. Right. If you go out to that property
24 today you can see it goes all the way across. That
25 is the road I currently use to access my property,

1 this road right here.

2 Now, at the present time all of this has
3 been clear-cut and replanted it with Long Leaf Pine.
4 There is another access to the property which is
5 before you get to where they stopped scraping the
6 road is the Miller property.

7 Q. Where you put the X?

8 A. Where I put the X. They also stopped
9 scraping the road right before it on the right. And
10 that is also the Bowater property. You can access
11 the property here. The road goes around this way.

12 There used to be a little helicopter pad
13 here where Bowater used to land helicopters to spray
14 herbicides. And then the road goes down this way.
15 There is another road that goes all the way down
16 through here.

17 Q. You are gesturing straight up from --

18 A. Straight up, right. And those are the --
19 I never used this. I never used this access past
20 this X. It's just not a way I want to go back to my
21 property because you have to go through the Miller
22 property to get to it.

23 Q. Now, what I would like you to do is show
24 us and then draw the disputed pathway, the --

25 A. All right. Well, you can't really see it

1 on this exhibit, but --

2 Q. Would it be easier to look at the --

3 A. Actually, I can get you pretty close.

4 Well, actually --

5 Q. Let me show you Exhibit 2 which is the tax
6 map.

7 A. All right. Exhibit 2 was taken at the
8 time when this was earlier plated. And that is the
9 road I was talking about earlier. You go up Saxon
10 Road, you can see where that road cuts right across.

11 Q. The Rooster Pit?

12 A. To the Rooster Pit. There is one way to
13 the Rooster Pit up through here, up through here and
14 this way. The other way to the Rooster Pit is all
15 the way up here crossing that little piece right
16 there to get to there.

17 Q. Okay. Let me stop you right there and put
18 that up so it's easier to use.

19 A. How is that?

20 Q. You got it up?

21 A. Yes.

22 Q. All right. Using Exhibit 2.

23 A. All right. The disputed pathway that --

24 Q. Let me bring that down. We can put some
25 pins here. It might be a little easier. All right.

1 A. The disputed pathway at present -- see,
2 also there is a road that goes around this way and
3 then goes on back through here. The disputed
4 pathway is -- you go through the Miller property to
5 get to the disputed pathway. And when you get out
6 of the Miller property, the road that I am -- that
7 is in question here or the pathway that is in
8 question is this little white line here. It goes
9 down this way and ends up right here at Mr.
10 Shirley's gate.

11 Q. All right.

12 A. So this is the disputed pathway right
13 here.

14 Q. I would like you to do a couple things for
15 us for the record, Mr. Bundy.

16 A. Okay.

17 Q. First on Plaintiff's Exhibit 2, if you
18 would take a red pen and put an X on Exhibit 2 where
19 the end of the State -- excuse me. Where the end of
20 the maintenance is before the Miller property.

21 A. All right. A red X at the end of the
22 maintenance is right here. Right there. The Miller
23 property.

24 Q. And what I'd next like you to do is to
25 take an orange marker and show us on Exhibit 2 the

1 location of the pathway in dispute.

2 A. All right. It would be that.

3 Q. Wait a minute. That should dry. And just
4 so that the record is clear, again taking the red
5 pen why don't you just label on Exhibit 2 Mr.
6 Shirley's property and call it Shirley.

7 A. (Witness complied.)

8 Q. All right. And if you would, show us
9 where your property is in relation to the pathway
10 for Bundy?

11 A. My property is from -- is the whole
12 pathway.

13 Q. Right. But just in that area. Just label
14 it.

15 A. All right. Okay.

16 Q. Now -- all right. There is going to be
17 testimony later on, are you aware of another means
18 to access -- another means that was available to
19 access Mr. Shirley's property at the time that you
20 bought the property?

21 A. Sure.

22 Q. Show us and then we'll put it in a
23 different color.

24 A. Okay. It's my understanding that Mr.
25 Shirley --

1 Q. Before you draw it, just show us.

2 A. Okay. Before he got into the dispute with
3 the Boykins, or his dad did or whatever, he used to
4 come down Saxon Road. Instead of taking a right and
5 going through the Miller property, went straight
6 down that same dirt road that I used to use after I
7 purchased it to get to the Rooster Pit.

8 And he followed this white line here. And
9 there is a road that is back up in the woods back
10 here. And then he would come down that little
11 pathway right there and branch into the orange road,
12 what we previously marked as orange, and go to his
13 property.

14 So that would allow him to get into his
15 property without having to go through the Miller's
16 property. Not going through the Miller's property
17 and not going around Saxon Road. It's a straight
18 shot. That road also is the same road that goes
19 down to this intersection here. It also goes back
20 up here. It goes to -- there is a gate now where
21 Mr. Ricky Boykin has put it.

22 That road also goes back down in that area
23 as well, but the simplest and shortest way, in fact,
24 to get to his property, the quickest way would have
25 been the way he was doing it or somebody was doing

1 it previous which is to go that way. That way he
2 would avoid the Millers entirely. Wouldn't have to
3 drive through their yard. Wouldn't have to any of
4 that.

5 Q. Why don't you take the blue Magic Marker
6 and show that?

7 A. Okay. What you do is you come down Saxon
8 and you get on this way and follow that line there.
9 Go this way and back into this. And you end up in
10 the same place. And then you follow that little --
11 you want me to put the blue over the orange or
12 just --

13 Q. No. No. Just -- you are connecting with
14 the orange?

15 A. Connect to the lower part of the -- what
16 is now the disputed pathway.

17 Q. And, for the record, just below where
18 you've written in the word Bundy; is that right?

19 A. Right.

20 Q. And that road you use today?

21 A. You can use it until you get to about
22 right here. About right there.

23 Q. And why can you not use it beyond that?

24 A. Because when I clear-cut -- when I had
25 this area here clear-cut, I put a berm -- a ditch

1 and a berm up around the perimeter of this piece
2 here to keep -- so that it would be protected.

3 So basically the first portion of this
4 road until about right here, which is about halfway
5 up the Boykin property, is on the Boykin property.
6 From that point forward it's Bowater property and
7 now my property. So in order to get to the --

8 THE COURT: Tax Map 36713.

9 THE WITNESS: Boykin.

10 THE COURT: Is that --

11 THE WITNESS: Alice Boykin.

12 THE COURT: Alice Boykin.

13 THE WITNESS: The Estate. It's a
14 trustee.

15 THE COURT: That's Whit's --

16 THE WITNESS: Whit's widow. That's
17 correct.

18 THE COURT: Okay. This triangle is
19 part of you?

20 THE WITNESS: That is part of me.
21 That was what I purchased from Bowater.

22 THE COURT: This is the Rooster Pit?

23 THE WITNESS: That is the Rooster
24 Pit.

25 THE COURT: This is Ricky --

1 THE WITNESS: Ricky now owns that.
2 Mr. Shirley owns that.

3 THE COURT: Okay.

4 THE WITNESS: And I own this piece
5 right here.

6 THE COURT: Okay.

7 THE WITNESS: So basically what the
8 deal was is when I bought the Rooster Pit in order
9 -- and the way I went to the Rooster Pit was up this
10 road. I had my -- the seller to me, I required that
11 he go to Bowater and get a recorded easement so that
12 I could access this property.

13 So because you have to cross -- I had to
14 cross Bowater property from here to here. And so
15 when I decided to clear-cut this and plant the Long
16 Leaf Pines, I went along the property line and put a
17 berm in. And that left Ms. Boykin's road about
18 halfway up. So that road goes, it stops, and then
19 that is the end of it.

20 BY MR. BABCOCK:

21 Q. Okay. And it was partially on --

22 A. Partially on Boykin, partially on Bowater,
23 correct.

24 Q. So if there was a dispute with Mr. Whit
25 Boykin --

1 A. If Whit. Boykin decided at some point that
2 you couldn't cross his land, you would not be able
3 to take that route that I just outlined here in
4 blue.

5 Q. All right. Thank you, Mr. Bundy. If you
6 would go back to your seat, please.

7 MR. BABCOCK: And we also have, Your
8 Honor, as Exhibit 3 a blow-up of a portion of
9 Exhibit 2 focusing on the Miller property and the
10 pathway in dispute.

11 BY MR. BABCOCK:

12 Q. And, Mr. Bundy, if you could just show us
13 on Exhibit 3 the Miller property and the pathway in
14 dispute there.

15 A. Okay. Exhibit 3. The Miller property is
16 that odd-shaped four-sided trapezoid, I guess, with
17 a lot of tax map numbers in it. That is the Miller
18 property. And if you look at Saxon Road, the blue
19 line, it pretty much stops where the scraping stops
20 with the Miller property.

21 As you can see, this thing shows all kinds
22 of logging roads or whatever you want to call it,
23 logging path. The disputed pathway that we are
24 talking about is this road right here that goes down
25 to Mr. Shirley's property.

1 Q. And just for the record purposes, let's
2 take the same orange marker that you used with
3 Exhibit 2 and on Exhibit 3 show the pathway in
4 dispute.

5 A. (Witness complied.)

6 Q. So you have taken your orange pen and
7 shown what I've called the disputed pathway?

8 A. Which is across my property, yes.

9 Q. Correct. What I would like to do at this
10 point, Mr. Bundy, is to show the video so we can see
11 some of what we've been looking at on a map at this
12 point in time.

13 MR. BABCOCK: And, Your Honor, this
14 is about maybe -- can we move that any closer?

15 THE WITNESS: Judge, you want to come
16 down here and sit and I'll stand behind you. If
17 it's all right with you, I'll just stand here.

18 MR. BABCOCK: I once asked a judge to
19 move with the Army Corps of Engineers, and I was
20 told that like Mohammed, I would come to the
21 mountaintop.

22 THE COURT: Well --

23 MR. BABCOCK: At that point I started
24 moving real quick. Okay. What I'd like to do, Mr.
25 Bundy, with this video which we are going to offer

1 as the next Plaintiff's Exhibit 26 --

2 THE COURT: This is entered in as 26
3 by -- without objection.

4 MR. WELLS: No objection.

5 MR. BABCOCK: What I'd like to do is
6 to show this video. And, Your Honor, it's got two
7 sides to it. It's got a map that will show you
8 where you are using that aerial which we marked as
9 Exhibit 1. That is the bottom half.

10 The top half is the video as you are
11 actually seeing the property itself. And as we are
12 going, Mr. Bundy, if you want to explain something,
13 if you would just say, "Stop," and we'll pause it so
14 you can explain.

15 THE WITNESS: Okay.

16 MR. BABCOCK: Okay?

17 THE WITNESS: All right.

18 (Played video.)

19 THE WITNESS: Your Honor, what you
20 are doing now is you are turning onto Saxon Road off
21 of Swift Creek Road. This is the portion of the
22 property that is on the road -- it's not on my
23 property. It's the portion that is scraped. It's
24 right -- stop it a minute. Okay?

25 (Video stopped.)

1 THE WITNESS: There you are right
2 there. And this is the -- this is that -- this is
3 where that turn is. If you want to look where you
4 are on there, you are right here. Okay? So that --

5 THE COURT: We are turning left on
6 Saxon?

7 THE WITNESS: Turning left on Saxon
8 headed this direction.

9 THE COURT: With the Boykin property
10 being on the left?

11 THE WITNESS: On the left. That's
12 correct. It's on the left. And, see, this is that
13 orange line where it sort of came out a little bit.
14 Okay. Go ahead.

15 (Video played.)

16 THE WITNESS: And this is just to
17 give you an idea of what it looks like. And it's
18 the scraped road. And I think we are in Sumter
19 County. That is Sumter County at that point. On
20 the right is a little subdivision that was put in in
21 the last, I don't know, 10 years.

22 MR. BABCOCK: Make sure you keep
23 talking up for the court reporter, Mr. Bundy.

24 THE WITNESS: Okay. And on the right
25 here is -- that is Bennett street. That is right

1 there. You are right on the money. All right. Now
2 you are still on Saxon Road. You are about to the
3 point here pretty soon -- all right. Stop it right
4 here.

5 (Video stopped.)

6 THE WITNESS: Right around in here
7 there is a sign that says -- from the other
8 direction, end of County maintenance. What that is
9 is the end of Sumter County maintenance. Go ahead.

10 (Video played.)

11 THE WITNESS: I know where you are
12 coming. You are coming onto the corner of my
13 property right coming up. All right. Stop it right
14 there. Stop right there.

15 (Video stopped.)

16 THE WITNESS: This is where the road
17 is. It's on the Boykin property. That is right
18 there. And it's right there. The same thing. It's
19 right there. That is the berm I put up that goes
20 down that way.

21 THE COURT: And the road is this way?

22 THE WITNESS: Yes, sir. Yes, sir.
23 That road follows it until you get about two-thirds
24 of the way down which is probably about right here.
25 And then the berm cuts the road off because the road

1 is now on Boykin.

2 THE COURT: How high are those berms?

3 THE WITNESS: Probably about
4 six feet.

5 THE COURT: Okay.

6 THE WITNESS: All right. Go ahead.

7 (Video played.)

8 THE WITNESS: All right. Now you are
9 on -- now you are following that line right there
10 coming around. And, again, we are on scraped
11 property. I own both sides of the road at this
12 point. I own the property over here which is
13 planted pines.

14 THE COURT: Now in Kershaw County?

15 THE WITNESS: Yes, sir. And berms --
16 you see the berm is on your left still. I had it
17 put all the way around because otherwise there is no
18 way to keep people out. Keep people from throwing
19 trash and all of that kind of stuff. Okay. Stop.

20 (Video stopped.)

21 THE COURT: The Plaintiff's Exhibit 1
22 was taken -- this was an aerial taken before it was
23 clear-cut?

24 THE WITNESS: Oh, yes.

25 THE COURT: And as we look at that,

1 the berm has been built?

2 THE WITNESS: Yes, sir.

3 THE COURT: And it's clear-cut on the
4 left-hand side.

5 THE WITNESS: That's correct. And
6 it's planted in Long Leafs.

7 THE COURT: And it looks like on the
8 left it's still --

9 THE WITNESS: On the right.

10 THE COURT: I mean on the right it's
11 still planted?

12 THE WITNESS: That's correct. I
13 thinned it out and planted Long Leafs in and amongst
14 those areas so I don't have to clear-cut.

15 MR. BABCOCK: From a timing
16 standpoint, Mr. Bundy, this video was done, I
17 believe, last fall?

18 THE WITNESS: Right.

19 MR. BABCOCK: And this picture was
20 taken somewhere in the early to mid-'90s, Exhibit 1?

21 THE WITNESS: Yes, sir. This would
22 have been taken well before I bought the property
23 because when I bought the property this area up here
24 on the left-hand portion had been clear-cut. And
25 this portion to the right, which shows it had been

1 clear-cut, had been grown back.

2 MR. BABCOCK: Well, before you bought
3 the Bowater property?

4 THE WITNESS: Right. That's correct.

5 MR. BABCOCK: Okay.

6 (Video played.)

7 THE WITNESS: You are coming up now
8 to an intersection of Blackhawk Lane. Stop it right
9 there.

10 (Video stopped.)

11 THE WITNESS: And that is Blackhawk
12 Lane. Mr. Baker lives over here, the gentleman from
13 Columbia. He recently bought an easement from me to
14 get to this property across Blackhawk Lane. I sold
15 him an easement to his property. Even though -- I
16 don't think the County scrapes that road. I think
17 he just uses a disc or something, but at any rate he
18 needed an easement to get to the property, so he
19 purchased one from me. All right. Go ahead.

20 (Video played.)

21 THE WITNESS: I think it will show
22 you -- that is Blackhawk Lane. All right. Now, you
23 are getting ready to come up to on your left my --
24 stop right there. Stop.

25 (Video stopped.)

1 THE WITNESS: What you just saw was
2 my current access here. I don't know if you can
3 back it up. But there is a gate and a fence there
4 now. There is a road all the way across here. That
5 is how I get to my property now. That is how I
6 access my property. All right. Go ahead.

7 (Video played.)

8 THE WITNESS: Now, is where you
9 are -- it's on your right. You are going to see a
10 little access. Those are the Speaks or whatever,
11 the people that live on the right. And a little
12 out-parcel. Now you are headed up the hill because
13 the Millers are on top of a hill. Now, my property
14 is on both sides of the road. The left-hand side
15 is a hill -- well, sort of a hill.

16 THE COURT: Well, not a hill in the
17 traditional sense.

18 THE WITNESS: A turnback is what we
19 use to call it.

20 THE COURT: All right.

21 THE WITNESS: Stop it right there.

22 (Video stopped.)

23 THE WITNESS: Now, right here is this
24 road, another access to my property. This road
25 right here.

1 MR. BABCOCK: Is this the helicopter
2 pad?

3 THE WITNESS: That is the helicopter
4 pad right here on your left. That's correct. It's
5 got a gate on it as well. All right. Go ahead.

6 (Video played.)

7 THE WITNESS: What you are coming up
8 on is the Miller property. All right. Where the
9 Millers live coming up. This is where you can see
10 the dirt. You can see where they stopped scraping
11 is right there. The Millers have a Keep Out sign,
12 No Trespassing sign.

13 THE COURT: Can you back up and --

14 MR. BABCOCK: Brent, can you go back?

15 (Video stopped and re-wound.)

16 MR. MCDONALD: I have to pull up on
17 it. I just can't see it.

18 MR. BABCOCK: That's fine.

19 THE COURT: We're glad you are here,
20 Brent.

21 MR. MCDONALD: I got the job because
22 I'm the youngest, but my knowledge --

23 THE COURT: I don't believe there is
24 anybody in this courtroom here that could do it.

25 (Tape played.)

1 THE COURT: All right. Can somebody
2 tell me where the end of County maintenance is?

3 THE WITNESS: Yeah. It's right
4 there. You can see where they pushed the dirt up on
5 either side.

6 THE COURT: Basically right in this
7 area?

8 THE WITNESS: Yeah. Right where
9 their property line starts, right. That is where
10 the -- where it -- stop right there.

11 (Video stopped.)

12 THE WITNESS: That is it right here.
13 That is where I put that X. Go ahead.

14 (Video played.)

15 THE WITNESS: The house on the right
16 is where Rick Miller lives, right over here. There
17 is a house there and a house here. They are
18 related. It's a family sort of compound place. And
19 right now what you are doing is you are going
20 through the center of the Millers' property. We are
21 still on the Miller property here. We are still on
22 the Miller property. Still on the Miller property
23 here. All right. Stop right there.

24 (Video stopped.)

25 THE WITNESS: All right. Now, where

1 you are now is right here. And you can see from
2 this a little red ball. That is where you are.
3 That and that are two posts that Bowater put up.
4 But those are Bowater posts. What you are looking
5 at in front of you is the property that I bought.

6 MR. BABCOCK: Okay.

7 THE WITNESS: Now you are -- that is
8 the shot of the posts. Now you are on the disputed
9 pathway. That area there is the property line, the
10 boundary line.

11 MR. BABCOCK: The boundary line
12 between the Miller property and your property?

13 THE WITNESS: The Miller property and
14 my property. This is the access or the road or
15 pathway in dispute. Stop it right there a minute.

16 (Video stopped.)

17 THE WITNESS: What you can see here
18 is where somebody had put up a cable on this tree,
19 and it wouldn't go over the cable.

20 (Video played.)

21 THE WITNESS: This is where the gate
22 was that I let Mr. Shirley put up.

23 THE COURT: On that tree?

24 MR. BABCOCK: Well, near that tree.
25 It wasn't on the tree. It was right around that

1 area. That was the area. Going down. This is --
2 stop it a minute.

3 (Video stopped.)

4 MR. BABCOCK: Just for the record,
5 that tree was shortly after on this path you left
6 the Miller property and got onto your property,
7 correct?

8 THE WITNESS: Right.

9 (Video played.)

10 THE WITNESS: All right. Now it
11 appears to be --

12 THE COURT: Now, it appears to be
13 skirting --

14 THE WITNESS: I can show you on the
15 other map. Where you are now is about right here.
16 You haven't gotten to that intersection yet. I was
17 going to point that out. You haven't gotten to that
18 intersection yet.

19 THE COURT: Okay.

20 THE WITNESS: Okay. All right. Stop
21 it right there.

22 (Video stopped.)

23 THE WITNESS: What you are looking at
24 here is that intersection. Right here you are
25 looking at it. So if you took that left right

1 there, you can take that road all the way back up to
2 here. What I do when I access my property is I
3 cross the road here and get on this road. And I go
4 down. And I get here. And I go all back through
5 here or I can take and go this way on a back road.

6 THE COURT: And that is also the road
7 that you testified that goes all the way out --

8 THE WITNESS: Yes.

9 THE COURT: -- to Saxon Road?

10 THE WITNESS: Correct.

11 THE COURT: That you said either Mr.
12 Shirley or his predecessors in title have used that
13 for access to their property?

14 THE WITNESS: Correct. That is
15 correct.

16 THE COURT: And it's labeled in blue,
17 basically, on Plaintiff's Exhibit 2.

18 THE WITNESS: Yes, sir. That's
19 correct. Go ahead.

20 (Video played.)

21 THE WITNESS: Now you are on the
22 portion of the road that I use to get to -- to get
23 down to the bottom of my property. I don't use the
24 road until you get here, but I use it when I get
25 here. That is why the road is the way it looks. I

1 run a tractor down there and other things.

2 MR. BABCOCK: Make sure you keep
3 talking up.

4 THE WITNESS: Oh, I'm sorry. Now,
5 where you -- stop right here.

6 (Video stopped.)

7 THE WITNESS: Now, where you are is
8 right there where that orange line intersects with
9 the white line that goes on up to right there.

10 MR. BABCOCK: And it's just on
11 Exhibit 2, close to the capital B in Bundy?

12 THE WITNESS: Yeah. Just to the left
13 and bottom of the capital B. So if you were to --
14 if you were to stay on this road you are on, you
15 would end up down in here toward the top of the
16 mountain. But Mr. Shirley goes left here to get to
17 his property.

18 MR. BABCOCK: And just so we are
19 clear on the record, that is on the top of the
20 capital B?

21 THE WITNESS: Right. All right. Go
22 ahead.

23 (Video played.)

24 THE WITNESS: Now you are going --
25 you are going right past that intersection. You are

1 down to the last little leg.

2 THE COURT: Long Leaf?

3 THE WITNESS: Uh-huh. Yeah. You are
4 now coming up on Mr. Shirley's gate. That sign says
5 No Trespassing. That is it.

6 (Video stopped.)

7 MR. BABCOCK: I think we got it
8 marked, that tape, as the next exhibit.

9 MR. WELLS: Without objection.

10 THE COURT: Entered without
11 objection.

12 BY MR. BABCOCK:

13 Q. Mr. Bundy, you made reference to a couple
14 easements that you were involved in with your
15 property?

16 A. Yes, sir.

17 Q. First let me hand you Exhibit 6. And what
18 is shown by Exhibit 6?

19 A. Exhibit 6 is an easement that I obtained
20 when I bought the Rooster Pit from Richard and
21 Frances A. Chrystal so that I could get to my
22 property.

23 MR. BABCOCK: Your Honor, a copy of
24 that, of some of these things.

25 BY MR. BABCOCK:

1 Q. And --

2 THE COURT: We've already got one
3 that is in?

4 MR. BABCOCK: Yes, sir. That is an
5 extra copy for you, yes, sir.

6 BY MR. BABCOCK:

7 Q. And then I'm going to hand you a document
8 which we marked as Plaintiff's Exhibit 7. And can
9 you identify that for us?

10 A. Yes. This is the easement that Mr. Baker
11 purchased from me. And I guess Clifton Baker,
12 Junior, Kevin C. Baker, and David H. Wilson
13 purchased this easement from me so that they could
14 cross my property to get to theirs.

15 THE COURT: Is that the -- when we
16 were watching the video there was a piece of
17 property on the right-hand side of the road?

18 THE WITNESS: Yes, Your Honor.

19 BY MR. BABCOCK:

20 Q. Why don't you -- taking Exhibit 2, locate
21 for us where these two easements would be on that
22 exhibit.

23 A. Well, the easement from Bowater would be
24 on Plaintiff's Exhibit 2. The easement I got from
25 Bowater was the easement that started at the blue

1 line and went all the way up to the Rooster Pit.

2 THE COURT: That is the Driskol?

3 THE WITNESS: Right. That is the
4 Driskol easement because what -- this easement, you
5 see that little road right there once you get to the
6 corner right there -- this way or you can go that
7 way. That is the easement for the Driskols. The
8 Driskols went to Bowater and got an easement so they
9 could --

10 THE COURT: This easement refers to a
11 plat. So this easement -- the Driskol easement
12 leads from Saxon Road, which is the County
13 maintained, probably Sumter maintained road, going
14 all the way up 30 feet in width to what point?

15 THE WITNESS: It goes up to this
16 point to the Rooster Pit.

17 THE COURT: To the Rooster Pit? The
18 corner of the Rooster Pit?

19 THE WITNESS: It's just an access so
20 that I can get to the Rooster Pit. And once I got
21 to the Rooster Pit I can go a couple of different
22 ways.

23 BY MR. BABCOCK:

24 Q. Mr. Bundy, for clarity with the record,
25 since we've been talking about the Rooster Pit a

1 good bit, how about you just mark the Rooster Pit on
2 Exhibit 2 with a red pen, please, sir.

3 A. I'll just write Rooster Pit. How about
4 that?

5 Q. Thank you.

6 THE WITNESS: And, Your Honor, you
7 were asking about the Baker -- let me show you the
8 Baker --

9 BY MR. BABCOCK:

10 Q. Before you get, just for the record, Mr.
11 Bundy, you are referencing the Baker easement which
12 is Exhibit 7?

13 A. Seven, correct.

14 Q. And you are now going to demonstrate where
15 that would be located on Plaintiff's Exhibit 2?

16 A. Right. That is an easement that comes off
17 of Saxon Road. I'll put -- an easement that comes
18 off of Saxon Road and goes to right there.

19 Q. You just marked it in blue. And why don't
20 you put Baker underneath that.

21 A. I put Baker easement. Okay?

22 Q. All right. Now, you showed us some
23 various roads through the property, but just so we
24 are clear on the record, are there various logging
25 roads in your property?

1 A. Oh, yeah, there are logging decks, logging
2 roads. There are roads that have been there. There
3 are roads that have been abandoned. There are roads
4 that have been changed. I mean, you know, timber
5 companies are always -- you know, when they cut the
6 timber they always make their own roads and just
7 abandon them or don't use them or do use them,
8 whatever they want to do.

9 Q. Now, Mr. Bundy, let's talk a little bit
10 about your coming to -- into contact with Mr.
11 Shirley. When did you have your first contact with
12 Mr. Shirley?

13 A. My recollection is is that I took a deer
14 head to him to be mounted years and years ago. And
15 that was my first contact with him. That was well
16 before I ever bought the Bowater tract. It was
17 probably, I don't know, mid-'90s, something like
18 that.

19 Q. Any controversy between the two of you at
20 that point in time?

21 A. No.

22 Q. Now let's move forward in time to when you
23 first had any discussions with him concerning -- him
24 being Mr. Shirley, concerning the property that you
25 bought from Bowater. Tell us about that.

1 A. My recollection is is that I was -- I was
2 out in front of my house down on 521.

3 Q. About when would this have been?

4 A. It would have been after I bought the
5 property sometime in probably the latter part of
6 2003 maybe, because I closed in March. It would
7 have been after that.

8 And I was out in front of my house. I may
9 have had a mail box then. I may not have. I may
10 have been out there walking. I don't know what I
11 was doing. I can't remember.

12 Mr. Shirley said that I was jogging. That
13 may well be true. At any rate, his -- he and his
14 father pulled over to the side of the road, and we
15 had a discussion. And the notion of a gate came up
16 at -- where I showed you when we saw the video that
17 Mr. Shirley and I had a discussion about a gate.

18 And I gave him permission to put a gate up
19 and permission to cross my land. And my
20 recollection is at some point in time he may have
21 delivered a key to me, but I never used it. That
22 was not an access or a route that I used. So I
23 never -- I doubt I ever used that key.

24 If I did, I may have used it one time or
25 twice, but I don't know if I ever used that. That

1 is just not the way I accessed my property because I
2 didn't like driving on the Millers' property.

3 They've got small children out there.
4 It's just not -- and the road is narrow. There is a
5 speed bump. I mean, it's just -- I don't like
6 riding through people's property because their
7 houses are very close to that little pathway through
8 there.

9 Q. All right. Looking at Plaintiff's Exhibit
10 3, can you take your blue pen and put an X --

11 A. You want to know where the gate was?

12 Q. Yeah. I want you to show us -- mark that
13 as the gate.

14 A. (Witness complied.)

15 Q. And I'm going to ask you to do the same
16 thing on Exhibit 2.

17 A. (Witness complied.)

18 Q. Show the Court.

19 A. Right there. Right at the boundary
20 between the Miller's property and my property -- in
21 and around that area where there are two steel
22 posts.

23 THE COURT: On the video where the
24 two steel posts were on either side, you were in the
25 wooded area. Two steel posts, and the property

1 opened up after those?

2 THE WITNESS: Right. Trees on the
3 right where somebody had put a cable up at some
4 point.

5 BY MR. BABCOCK:

6 Q. Now, in this conversation, Mr. Shirley and
7 his father were there?

8 A. Yes, but I don't recall if his father got
9 out of the truck. I think they just pulled up. I
10 think I only talked to Mr. Shirley.

11 Q. Okay. When you say Mr. Shirley, the
12 Defendant in this case?

13 A. That's correct.

14 Q. The son or the father?

15 A. His father is deceased now.

16 Q. Okay. Now, during that discussion was
17 there any assertion made by Mr. Shirley concerning
18 this being a public road?

19 A. No.

20 Q. Was there any assertion made by Mr.
21 Shirley that he had some right to use the property?

22 A. No. I was glad in some respects because I
23 saw it as sort of an indication that he understood
24 it was my land, that I was the new landowner. And I
25 was just trying to get along. If he wanted to put

1 up a gate and use it, as long as we could get along,
2 he could cross my property as long as we could get
3 along, you know, as long as everything was fine,
4 like anybody could use it.

5 Q. You were giving permission to him to use
6 it?

7 A. Yes. Permission to put up a gate. It
8 didn't matter to me because I didn't use the road.
9 I didn't use it for a lot of reasons. One, it
10 wasn't convenient. Two, I didn't like driving
11 through the Millers' homestead. I just didn't care
12 for that, especially at night and stuff.

13 Q. Now, at a later point in time did a
14 dispute occur with Mr. Shirley?

15 A. Well, I don't know if you would call it a
16 dispute. I mean --

17 Q. Well, let's call it disagreement.

18 A. Something. I'll describe it to you. You
19 can characterize it any way you want. I was in my
20 office at my house. After I bought the Bowater
21 property they had recently clear-cut this bottom
22 piece.

23 THE COURT: How long after are we
24 talking about?

25 THE WITNESS: Talking probably within

1 eight or nine months, something like that. Seven or
2 eight months.

3 THE COURT: First part of 2004,
4 thereabouts?

5 THE WITNESS: First part of 2004.
6 The history behind this is that basically when I
7 bought the Bowater tract they had clear-cut this
8 area that you can see here in Exhibit 2. Okay?

9 So you can imagine what it looked like. I
10 mean, they just go in there and they tear everything
11 up. And it looks terrible. Okay? And if you want
12 to put planted pines and planted Long Leaf Pines in
13 there in containerized pines, you can't go in there
14 and plant it on stumps. You got to clean the place
15 up. Get the stumps out of the way.

16 You know, take a big bulldozer and go
17 through there and plow all of that stuff up because
18 they plant those things by hand. It's not a
19 mechanical planter. And so I hired a company to go
20 out there and do the mechanical clearing, cleaning
21 that place up instead of herbicides which have other
22 issues regarding wildlife and all of that. So I
23 didn't want to do that.

24 So anyway, that was going on. And I
25 wasn't even over there. I didn't go over there. I

1 mean, I wouldn't know how to tell them how to do it.
2 I mean, I pay them by the acre to do it, and they do
3 it.

4 And then the next thing when they get it
5 done, then you buy the Long Leafs and plant them.
6 So I'm at my desk working at my office in my house.
7 And my phone rings, not my business phone but my
8 local phone.

9 And as soon as I pick up the phone I
10 couldn't get it to my ear because it was screaming
11 on the other end. It was just like a -- it was like
12 somebody was screaming at me, cussing me out. And I
13 held the phone away from my ear for awhile.

14 All I said was hello. And just sort of
15 all of this sound comes out. So I remember holding
16 the phone away from my ear and listening to somebody
17 just scream and holler, yell and cuss me, and all
18 kinds of things.

19 And I finally figured out after about two
20 or three minutes who it was. It was Mr. Shirley.
21 As near as I could tell from his conversation
22 somebody had -- his wife was on that road and -- the
23 disputed pathway. And she had been impeded in her
24 progress down that road because one of the bulldozer
25 operators had pushed some stuff over and it was in

1 the road.

2 I mean, they were out there working on my
3 land trying to clear it. And so he at that point,
4 you know, said that if I ever -- something to the
5 effect that if I ever blocked his wife again he
6 would kill me. He threatened to kill me.

7 And so, you know, it went on. And finally
8 he slammed the phone down. All I said was hello.
9 That is all I ever said to him was hello. I got
10 chewed out, cussed out about as bad as I've ever
11 been cussed out.

12 And then finally there was the threat, if
13 it happens again I'm going to kill you. And I was
14 upset. I ain't proud of it, but I was scared. I'm
15 scared of Mr. Shirley. I think he has the ability
16 and capability to kill me because he hunts. He's a
17 good hunter.

18 And there is no reason why at night he
19 couldn't say he just thought it was a deer and shoot
20 me. And I'm satisfied that he would have done that.
21 I believe it today.

22 I had a conversation with people about the
23 conversation and came to the conclusion that I was
24 not going to go back there for awhile. So I didn't
25 go back there for awhile. I went and got a

1 concealed weapons permit so I could carry a weapon.

2 And my wife would not let me go back there
3 after dark unless I took somebody with me. So I
4 took his threat seriously. I tried to stay away
5 from him. I stayed off my own property because I
6 was scared to go on my own property. So that is
7 what happened.

8 And I lived that way for about a year, I
9 guess, or maybe a little more, maybe a little less.
10 I can't remember. And had no more contact with him.
11 And then I finally got enough backbone to say, you
12 know, I don't want Mr. Shirley having a gate on my
13 property because even after this -- whatever that
14 phone call was, I would go back there sometimes.

15 And Mr. Shirley would use that gate. He
16 would lock it behind him and leave his truck on my
17 land blocking the gate so that he could walk down
18 the disputed path to go down to his land to hunt
19 deer because if he drove down there obviously it
20 makes some noise and might disturb the deer.

21 So he then took to blocking the road with
22 his truck, locking the gate up, and walking down the
23 pathway. So now I've got a man on my property who
24 has threatened to kill me, who is an accomplished
25 woodsman, who has bragged to me at some point about

1 various capabilities as a woodsman, who is now
2 walking down my road at night armed. Okay?

3 So that didn't suit me. At least if he
4 was in a truck you could see or hear him coming. So
5 I called him up one day. And I think there is a
6 letter.

7 BY MR. BABCOCK:

8 Q. Let me hand you Plaintiff's Exhibit 4.
9 Identify that if you would, sir.

10 A. And this is the -- September of 2005,
11 which is before deer season begins around here which
12 is September the 15th. It occurred to me during the
13 summer of 2005 after that conversation -- that
14 conversation took place probably a year earlier,
15 maybe even a little bit more, still had his gate up
16 there and he was still blocking the road.

17 And I was still uncomfortable with him
18 being on my land. So I thought to myself, deer
19 season is coming up. And I've got to put up with
20 this all over again. I can't even hunt deer on my
21 own property after dark. And that is just no way to
22 live.

23 I paid a lot of money for this land. I
24 don't have all of that money to be throwing away on
25 land I can't access. So I called him up and I said,

1 "Mr. Shirley, this is Bill Bundy. I've decided I
2 want you to take the gate down. I want you to take
3 your gate down. I gave you permission to put it up,
4 but I want it down."

5 And it was the same thing over again
6 except this time he asserted ownership rights to my
7 property. He said, "That is my road. That is my
8 land. That is my gate. If you touch that gate I
9 will kill you. If you touch it, I will kill you."

10 Q. Let me stop you right there, Mr. Bundy.
11 Was that the first time you ever heard Mr. Shirley
12 assert --

13 A. That is the second time he's threatened to
14 kill me.

15 Q. Let me finish. Is that the first time you
16 heard him assert ownership rights to that roadway?

17 A. Oh, yeah. Yeah. That was first time he
18 -- that was the first time he took the position --
19 it was not like he asserted ownership rights to the
20 road. It was like he was asserting ownership rights
21 to everything that I had. The road was not really
22 the discussion.

23 He was -- as near as I could tell from his
24 attitude, his notion of property rights and mine are
25 vastly different. I think once he -- once I

1 permitted him to put a gate up there, I think he
2 felt he had ownership rights to the entire
3 500 acres. That was the impression I got.

4 You couldn't -- you couldn't rationally
5 talk to him. I couldn't have a conversation with
6 him like we are having now about, well, maybe we
7 could do this or that. And it wasn't like, you
8 know, the first time it came up, as maybe I would
9 have done if the situation had been reversed, maybe
10 called up Mr. Shirley and said, "You know, Mr.
11 Shirley, I'm on this road. And we are doing
12 something down at the property. And I'm being
13 blocked. Do you mind coming over here and, you
14 know, helping me get this thing done."

15 Instead it was, "I'm going to kill you.
16 If it ever happens again I'm going to kill you."

17 Q. You are going back to the first
18 conversation?

19 A. The first conversation. In fact, after
20 that conversation after I calmed down I drove over
21 to the property to see what the story was. And when
22 I got there there was nothing in the road. There
23 was a man on a bulldozer. And I said, "What
24 happened?" And he said, "This fellow came and just
25 started yelling at me and said he was going to get

1 his gun -- "

2 MR. WELLS: Your Honor, I object to
3 what the bulldozer driver said as hearsay.

4 THE COURT: Sustained.

5 THE WITNESS: As a result of that
6 conversation I was satisfied that it was not a good
7 thing.

8 BY MR. BABCOCK:

9 Q. Now let's go back to the second
10 conversation you were just telling us about. Tell
11 us about --

12 A. The second conversation was --

13 Q. -- what the second conversation was about.

14 A. "I want you to take the gate down." And
15 basically it was another threat, okay, and
16 another -- and even more broadly held notion by him
17 that he had dominion and control over me and my
18 property. Okay? So --

19 Q. Another threat to kill you?

20 A. Yeah. Yeah. And so at that point I said,
21 all right. I'm going to write him a letter
22 confirming that I've asked him to move the gate,
23 because I assumed he wouldn't kill me for writing a
24 letter. And I wrote him a letter. And I didn't put
25 in the letter what he said because I didn't want to

1 inflame this guy any more.

2 Q. Let me stop you right there. You are
3 referencing a letter we've marked as Plaintiff's
4 Exhibit 4; which is a letter from you to Mr. Shirley
5 dated September 12, 2005; is that right?

6 A. "This is to confirm that I called you
7 Monday morning, September 12, to request that you
8 remove your gate from my property. It is my
9 understanding from our conversation it appears to
10 me, sir, you claim you have a right to maintain a
11 gate on my property."

12 That is really -- that was really more or
13 less what he said. It really wasn't so much that he
14 owned the road, but that he had a right to keep a
15 gate on my property. And I had no right to remove
16 it. And that is when he -- I said, "Well, I'm going
17 to take it down if you don't take it down."

18 He said, "If you move my gate I'll kill
19 you." So he was now claiming ownership interest in
20 things on my property. And the purpose of this
21 letter is to formally request that you remove your
22 gate.

23 I did that so that there would be some
24 record. Based upon our conversation, I have no
25 reason to believe that you will voluntarily do so.

1 That is the nicest thing that I could say about the
2 conversation.

3 However, it's necessary for me to put the
4 request in writing. Unless I hear from you to the
5 contrary, I assume that you will refuse to remove
6 your gate. And I'll, in order to resolve this
7 problem, file a declaratory judgment action, et
8 cetera, et cetera. I've retained the services of
9 Ken Dubois. Well --

10 Q. Did the gate get removed at that point?

11 A. Oh, no. Uh-uh. He got a lawyer. And it
12 was -- I think it took us -- I had to hire you
13 and -- because Ken didn't want to get involved for
14 whatever reason. And I had to hire you to get
15 involved.

16 Q. Let me hand you a document which we've
17 marked as Plaintiff's Exhibit 5. This is a letter
18 of March 8, 2006, from me to Mr. Spee; is that
19 correct?

20 A. That's correct.

21 Q. And at that point in time Mr. Spee was
22 representing Mr. Shirley?

23 A. That's correct. And it's now six months
24 later and the gate is still there.

25 Q. And what was -- that was a letter you

1 instructed me to write for you?

2 A. Yes.

3 Q. And if you could, just read that letter
4 for us.

5 A. "Dear George, Bill Bundy has requested I
6 assist him with regard to a matter involving Mr.
7 Shirley. In that regard he has forwarded me some
8 correspondence this past fall. There does not
9 appear to be any legal basis for Mr. Shirley for
10 maintaining a gate on the road located on Mr.
11 Bundy's property. Regardless of whether Mr. Shirley
12 has any right of access over the Bundy land, which
13 we would contest, he clearly has no right to
14 maintain a gate. If you don't remove it by March
15 31st we are going to bring a lawsuit. We do contest
16 Shirley's right to access across Bundy's property.
17 Mr. Shirley has apparently indicated at some point
18 in the past he had some type of order. We have not
19 been able to locate any such document. If one
20 exists, I would appreciate it if you would provide
21 it."

22 Q. And there was never any kind of order
23 provided, was there?

24 A. No.

25 Q. All right. And was the gate subsequently

1 taken down after that letter?

2 A. After that letter I believe it was, yes.

3 Q. Now, this lawsuit was begun in April of
4 2009?

5 A. Right.

6 Q. Why did you bring this lawsuit?

7 A. I brought this lawsuit because I do not
8 believe that Mr. Shirley has any right to cross my
9 property without permission which I had previously
10 given to him.

11 Q. And then revoked?

12 A. Which I have revoked, yes, because he
13 abused it. I think it's a privilege to cross my
14 property. And he abused it by threatening me if he
15 didn't get exactly what he wanted. Threatening me
16 if I wouldn't, you know, succumb to his demands.

17 He's a bully. He tried to bully me. And
18 I'm not going to be bullied, you know. So I don't
19 want him on my property. And, Two, I'm scared of
20 him. I have no doubt that he will -- that he will
21 do what he says that he will do. I have no doubt.
22 He may do it after this is over with. I don't know
23 what he's got planned. I don't want him on my land.

24 Q. Mr. Bundy, you had some pictures taken of
25 some of the things we've discussed today. I'm going

1 to hand you a series of photographs marked
2 Plaintiff's Exhibits 8 through 25. And if you will
3 wait one minute while I give His Honor a set, too.
4 All right. Let's start with the first photograph
5 and identify Exhibit 8?

6 A. Exhibit 8 is a photograph of the gate that
7 I allowed Mr. Shirley to put up.

8 Q. And if you will, show His Honor as you go
9 through each exhibit, the photograph, and explain
10 what it shows?

11 A. This is the gate that I allowed Mr.
12 Shirley to put up. Exhibit 8.

13 Q. Go to Exhibit 9.

14 A. Exhibit 9 is subsequent to a picture taken
15 -- well, subsequent to Exhibit 8, which shows a --
16 two posts at that same location. That is my
17 property line. My property is on the right. Miller
18 property is on the left. That is what we previously
19 marked as gate.

20 If you look at that pine tree, in pretty
21 much the middle of the picture you will see two blue
22 paint marks on that pine tree. That is the standard
23 marking that Bowater uses to mark its property line.
24 So if you are in the woods and you see a tree with
25 two blue lines facing you, you are on the edge of

1 their property. And if it's on the other side of
2 the tree with no blue markings, it's someone else's
3 property.

4 Q. Next is Exhibit 10?

5 A. Exhibit 10 is essentially the same picture
6 from a different direction. Exhibit 11 is the same
7 picture showing the blue marks on the Bowater
8 property. Also shows the Bowater pole that they've
9 used at some point.

10 Exhibit 12 is where someone has put in a
11 -- a tree has been damaged because it grew over a
12 cable that was on a tree. Exhibit 13 is the same
13 thing, to block that road. Exhibit 14 --

14 THE COURT: That same tree that is on
15 the video?

16 THE WITNESS: Yes, sir. Exhibit 14
17 is -- if you look -- looking at Exhibit 14, believe
18 it or not that little bit of white sand on the left
19 is part of this disputed pathway. It doesn't look
20 like a pathway. It doesn't look like a road, but
21 that is part of it. If you took that left and drove
22 up that portion you would come to the Miller
23 property where the gate was.

24 BY MR. BABCOCK:

25 Q. Why don't you show His Honor where that

1 would be on Exhibit 2.

2 A. Where Exhibit 14 is, Judge, is you are
3 standing right where I've got Bundy written on
4 Exhibit 2. And you are looking up the blue mark.
5 That road in the middle is the blue line. So that
6 is the alternate route that was used to come down
7 the blue line coming to here.

8 And if you take a left in this photograph,
9 Exhibit 14, that takes you back up to here. All
10 right. Exhibit 15. Exhibit 15 is the -- are the
11 remains of an old house that exists of the Rooster
12 Pit. It exists -- these remains -- if you look at
13 Exhibit 2, see where I've got marked Rooster Pit?

14 If you look to the right you will see sort
15 of a cleared field with a dot in the middle of it.
16 Right below that dot there are these chimney ruins.
17 And that is where I believe someone is going to
18 testify somebody used to live there years ago. That
19 is on the Rooster Pit property.

20 And Exhibit 16 is another photograph of
21 more ruins. Exhibit 17 is a picture of the same
22 thing. Exhibit 18. Exhibit 18 is a picture of a
23 gate. That gate is located on the Rooster Pit at
24 the boundary between what is now Ricky Boykin's
25 property and the Rooster Pit.

1 When I bought the Rooster Pit Maynard
2 Boykin owned this. And in order to timber his
3 property he had to ask permission to cross my land.
4 He did. And I allowed him permission to cross my
5 property so he could cut timber on his property
6 because he didn't have an easement either, but when
7 Rick bought this property he put a gate here.

8 And it's right in the middle -- sort of in
9 the middle top line of the Rooster Pit. If you look
10 at 18, and you go to 19, that is further back from
11 the same gate. You are standing on the Rooster Pit
12 property looking.

13 20 is closer. Now, if you look down
14 Exhibit 20, you can see that this road extends all
15 the way down through here. It extends down through
16 here. There is another way to get to Mr. Shirley's
17 property down back through here as well. There are
18 old roads on back through here.

19 So I'm satisfied that in addition to being
20 about to get to his property from the blue line,
21 there were also ways to get to his property, and I'm
22 sure it was used by others in the past, going across
23 the Rooster Pit, across what was Maynard's property,
24 and now Mr. Shirley's property. One of numerous
25 accesses.

1 21 is just another photograph. 22 shows
2 that the gate is locked. 23 is standing at the gate
3 looking back on the Rooster Pit property. 24 is
4 standing right where the gate is and looking down
5 the road to where the pond is. And 25 is looking in
6 the other direction, the same thing.

7 THE COURT: So basically 18 through
8 25, this last little set, is on the border between
9 the Rooster Pit property and the property now of
10 Ricky Boykin?

11 THE WITNESS: That is correct, Your
12 Honor.

13 BY MR. BABCOCK:

14 Q. Mr. Bundy, just a few more questions.
15 With regard to this lawsuit, what is your position
16 as to whether there is some type of public roadway
17 going through your property to Mr. Shirley's
18 property, the disputed pathway?

19 A. What is my position?

20 Q. Yes, sir.

21 A. It's not public. By no stretch of the
22 imagination is it public. One, you don't put up a
23 gate on a public road. Mr. Shirley asked me if he
24 could put up a gate. I gave him permission to put
25 up a gate so he could close that road to everybody

1 else but himself and me.

2 And I gave him permission to cross my land
3 to cross that road. That alleged public road ends
4 on his property. So I guess he gets to decide when
5 it's public, where it's public, and where it stops.
6 That is not my understanding of a public road.

7 It's not wide enough to be a public road.
8 It's not maintained by the public. I don't use it.
9 You know, it's going through the Millers' property.
10 That is clearly not going through a public road.
11 That is basically driving through somebody's yard.
12 So it's just inconceivable to me it's a public road.

13 Q. Now, I know, Mr. Bundy, your primary
14 practice is dealing with construction law; is that
15 right?

16 A. Yes, sir.

17 Q. You are not a real estate lawyer, are you?

18 A. No, sir.

19 Q. So we've already briefed and argued the
20 legal issues with the judge, but you brought this
21 case also for a determination by the Court that
22 there is no other type of easement across your
23 property; is that right?

24 A. That's correct.

25 Q. In bringing this declaratory judgment, you

1 also had a request that if the Court disagreed with
2 our position and found that there was some type of
3 easement that it declare what was entailed in that
4 easement; is that right?

5 A. Yes.

6 Q. What is your position with regard to if
7 there were an easement to be found, what would be
8 the -- what would be that easement?

9 A. That easement -- obviously I don't agree
10 to it, but that easement, if there is one, shouldn't
11 be any more than use that has been made of the
12 property before which is either walking down that
13 property, which would be my preference, because it's
14 basically a woods trail. It's not a road. It's a
15 trail.

16 So the right to walk down the property to
17 get to the property. At most, the right to drive a
18 regular size vehicle, a small pickup truck or
19 something like that, but that is it because, you
20 know, it's just not very wide. The road is probably
21 only about eight feet wide or nine feet wide. I've
22 got trees out there growing.

23 So that would be the extent of it. It's
24 clearly not the right to put up dates on my
25 property. I don't think that he has a right to

1 alter my property.

2 Q. Now, Mr. Bundy, for the record, does Mr.
3 Shirley have any kind of house down on his property?

4 A. I've never been on his property to my
5 recollection, but I do not believe that he does, no.

6 Q. You are unaware of any type of structure
7 on the property, are you?

8 A. Not to my knowledge, no.

9 MR. BABCOCK: With the Court's
10 indulgence. If you would, answer any questions
11 Mr. Wells may have.

12 THE WITNESS: Yes, sir.

13 THE COURT: Mr. Wells, you want to
14 take 10? You all want to take 10?

15 MR. WELLS: That would be good.

16 MR. BABCOCK: Thank you, Your Honor.

17 (Discussion off the record.)

18 (Defendant's Exhibit #9 marked.)

19 CROSS EXAMINATION

20 BY MR. WELLS:

21 Q. Mr. Bundy, when you bought your property
22 in 2003 from Bowater it started with a contract, did
23 it not?

24 A. Yes, sir.

25 Q. And is this a copy of your contract which

1 is Defendant's Exhibit 9?

2 A. Yes, sir.

3 Q. And on the last page of that contract did
4 they attach a sketch of the property?

5 A. Yes, sir.

6 Q. And on the sketch did it show the road
7 that is in dispute as a dotted line?

8 A. It shows a bunch of dotted lines on here.
9 I'm sure someone could interpret it to show at least
10 a portion of that disputed road. Yes, it shows the
11 road. It shows with dotted lines paths into the
12 property.

13 Q. And you agreed to buy the property that
14 was shown on that sketch; is that right?

15 A. And as described in the deed, yes. I
16 think the language of the deed would -- I don't
17 know.

18 Q. Speaking of the deed, you later on closed
19 the property in March of 2003?

20 A. Yes, sir.

21 Q. And you received a deed from Bowater One,
22 LLC; is that correct?

23 A. Yes, sir.

24 Q. And that deed I think is Exhibit C in the
25 stipulation regarding the Plaintiff's chain of

1 title. Let me just show you Exhibit A, which is the
2 property description, and ask you to read the first
3 paragraph in that -- on that page of the property
4 description.

5 A. All of the certain tracts and parcels of
6 land situated in School District 43, Dekalb Township
7 of Kershaw County, South Carolina, being Tract
8 Number 2, Tract Number 3, Tract Number 6 showing a
9 plat of the survey made by R.H. Marett, registered
10 surveyor, on September 26, 1960, a copy of which
11 appears of record at Plat Book 27, Page 39 in the
12 records of said County and being more fully
13 described according to said plat as follows.

14 Q. Okay. And me show you Defendant's
15 Exhibit 8 and ask you if that is the Marett plat?

16 A. I believe it is, yes.

17 Q. And so that plat includes the disputed
18 roadway as well, does it not?

19 A. This plat has a dotted line on it.

20 Q. Okay.

21 A. It shows it's a path to me, at most.

22 Q. So when you bought the property you knew
23 you were buying the road; is that right?

24 A. No, that is not right.

25 Q. Do you have any other plats of your

1 property?

2 A. Not with me, no. Not that I'm aware of.

3 Q. Now, when you had these conflicts with Mr.
4 Shirley he asserted that he had a right to use that
5 road?

6 A. Well, yeah, I guess you would say that. I
7 think the first one he asserted more than a right.
8 It's never really been a right to use the road. It
9 was as if the road and all the adjacent property
10 belonged to him. It's hard to really pinpoint what
11 he was saying. It was all very disjointed. And it
12 was very loud and very rude.

13 Q. I understand that. Very upsetting for
14 you; is that correct?

15 A. I wasn't as upset as he was. He was the
16 one that was upset. I was just listening. I was
17 just the recipient of all of his anger.

18 Q. Let's take the first conversation that I
19 think that you testified about. Let me ask you
20 about the substance of that. Was his complaint that
21 obstacles had been put in the road and blocked the
22 road from your clearing operation?

23 A. That was part of his complaint. I think
24 the rest of his complaint was that I had money. And
25 there was a long discussion about the fact that I

1 had money. And I wasn't going to push him around.
2 And it was all of this sort of screaming at me about
3 being rich or something. That was as big a
4 complaint as any of the rest of them.

5 Q. But in the first conversation he asserted
6 to you that he had the right to keep that road free
7 of obstacles; isn't that correct?

8 A. I think his assertion was that I didn't
9 have the right to mechanically clear my property in
10 such a manner that I used the road, too.

11 Q. But he asserted that he had the right to
12 go and come down that road; is that correct?

13 A. That is one of the assertions. The other
14 assertion he made was that I didn't have a right to
15 use it.

16 Q. And would you characterize that
17 conversation as being hostile?

18 A. It was hostile. There was a death threat.
19 Yes. It was as hostile as you can get.

20 Q. Would you characterize that conversation
21 as being adverse?

22 A. Yes. Sure.

23 Q. And the second conversation I think was
24 initiated by you; is that correct? You called him
25 on the phone on the second one about the gate?

1 A. I asked him to remove his property from my
2 property.

3 Q. Okay. And his reaction to you on that
4 occasion I think was adverse as well; is that
5 correct?

6 A. Well, yeah, but the property right he was
7 asserting was a little different the second time.
8 The second time he was asserting that I had no right
9 to have him remove his property from my property.

10 That once I had given him permission -- as
11 near as I can reconstruct it, is that once I had
12 given him permission to put a gate on my property,
13 that from that point forward the gate could not be
14 moved. That it was his gate. And it was -- to the
15 extent that it was there, I had no dominion or
16 control over what was on my property.

17 Q. Was it in that conversation or the first
18 one that he said, "That is my damn road," or
19 something to that effect?

20 A. That isn't what he said, but that is close
21 enough. He took -- yeah. He took the position that
22 it was his road, his gate. And essentially, you
23 know, I had no rights in and about that road. It
24 was not only his right, but the fact that I had
25 none. He was going to tell me what to do, how to

1 use my property, when I could use my property, and
2 for what use I could make of my property. That is
3 pretty --

4 Q. All right. Now, I guess I'm going
5 backwards. The first ever conversation that you had
6 with him in your driveway, do remember that one?

7 A. The first conversation that I ever had
8 with him was when I took him a deer head to be
9 mounted.

10 Q. All right. The conversation, which would
11 be the second conversation maybe, which was at your
12 driveway when he and his father stopped the pickup.
13 You were out at the end of your driveway. Do you
14 remember that one?

15 A. That is my recollection, yes.

16 Q. In fact, you said I think it was in 2003,
17 shortly after you had purchased the property?

18 A. I believe so, yes.

19 Q. Okay. And when he talked to you that day
20 he was talking about the road from the Miller
21 property to his property. That is the route that he
22 was talking about putting a gate on?

23 A. Yes.

24 Q. Okay. Now, actually since you bought your
25 property, since you've come to this place, he has

1 been using that route as the route to access his
2 property; isn't that correct?

3 A. You would have to ask him.

4 Q. Okay. So you testified that you think
5 that he used another route, but he never used that
6 while you've owned the property, did he?

7 A. I do not believe -- he may have, but, you
8 know, the route was there to use. He may have used
9 it. He may not have. You will have to ask him.
10 The route was there. I don't know whether he used
11 it or not, but it was there.

12 Q. You yourself don't have any personal
13 knowledge that he ever used it? You never saw him
14 on it? Let me ask you that.

15 A. I have no recollection of seeing him on
16 it.

17 Q. All right. And the second route that you
18 testified that he could use -- let me find
19 Plaintiff's Exhibit 2. Plaintiff's Exhibit 2 is the
20 exhibit with the blue line.

21 THE COURT: Go back, Mr. Wells. You
22 were just asking -- now that we have a map in front
23 of us, you asked him a series of questions about a
24 route and whether Mr. Bundy had ever seen him use
25 that particular route.

1 BY MR. WELLS:

2 Q. Have you ever yourself seen him on the
3 blue line route as shown on Plaintiff's Exhibit 2?

4 A. I have no recollection of it.

5 Q. All right. In fact, the blue line route
6 crosses your property just like the orange line
7 route, doesn't it?

8 A. The route -- you mean my property -- what
9 I own now?

10 Q. Correct.

11 A. The first portion of it does not. About
12 halfway between where Saxon Road turns to the right
13 here, where this blue line begins, and about
14 anywhere between half to two-thirds of the way up
15 that road is the Boykin property. So it's not --
16 it's not on my property. It only intersects my
17 property about two-thirds of the way up.

18 Q. All right. But there is no way that Mr.
19 Shirley can get all the way from the publicly
20 maintained portion of Saxon Road to his property
21 without crossing some piece of Bundy property; is
22 that correct?

23 A. Right.

24 Q. Using the blue line?

25 A. Using the blue line, correct.

1 Q. And I think you testified earlier that one
2 of your goals in filing this lawsuit was to get him
3 off of your property completely; is that right?

4 A. That would be what I desired.

5 Q. So it really doesn't matter whether he
6 uses the blue line or the orange line. You don't
7 not him to use either one?

8 A. You know, I would -- I granted him
9 permission to cross my property. And I got treated
10 very badly. I got threatened. And I do not believe
11 that the route is going to change his personality or
12 his demeanor as a man. So it's got really nothing
13 to do with the route. It's the individual that
14 wants to use the route.

15 Q. It really doesn't matter which route.
16 What you are asking for today is to cut him off from
17 access to his property. There would be none?

18 A. There would be a route. He can always
19 come through Mr. Boykin's property. He can get one
20 of his other neighbors to give him access. And they
21 get along just fine. I mean, Ricky Boykin owns all
22 the property all the way to 521. He's got roads
23 back through there. There are plenty of other ways
24 for him to get to his property.

25 Q. Speaking of alternate roads, Plaintiff's

1 Exhibit 2 does not show another road coming all the
2 way to his property through Boykin's property, does
3 it?

4 A. Well, just because it doesn't -- it's
5 there. I mean, it's down through the woods. These
6 are woods all the way around. The woods cover the
7 road just like if you look at other exhibits of this
8 same area, you will see some of these paths
9 disappear based upon the vegetation, the time of
10 year, and the altitude of the plan.

11 Q. But the answer is you don't -- you can't
12 show it? It doesn't show it?

13 A. Sure. I can show it to you. It's right
14 down through here. You see where that little drain
15 is down through there? It goes right through there.
16 You asked me if I could show a picture. I can show
17 a picture. It's right there. It's right there.
18 And goes right through there. I've walked it before
19 when Maynard used to own it, when the Capeharts used
20 to own it. There are abandoned roads. There are
21 all kind of roads down through here.

22 Q. But he can't use any of those roads
23 without going over your property?

24 A. No. He can use those roads by going over
25 Mr. Boykin's property. He can talk to Ms. Alice

1 Boykin. Maybe she'll let him use her roads.

2 Q. Now, you talked about the Game Management
3 Program. That did not exist during your ownership
4 of the --

5 A. The program still exists.

6 Q. Okay. It did not apply to your property
7 after you bought it?

8 A. I did not sign a lease in my conservation
9 easement probably -- I don't know if this speaks
10 directly to it, but to answer your question, no, I
11 did not put my property in that program.

12 Q. Okay. And the rules and regulations of
13 the Wildlife -- excuse me. The Department of
14 Natural Resources under the leases are governed by
15 the leases; is that right?

16 A. Obviously so.

17 Q. Well, you testified that you have some
18 knowledge of the --

19 A. Right. It will be governed by the lease
20 and the general law.

21 Q. And don't you agree that you have to have
22 a permit to get on the Game Management property?

23 A. No, I don't think so. You may have to
24 have a permit to hunt on it, but I don't think you
25 need any permit to access it.

1 Q. Let me just show you a document provided
2 to me by your attorney. What is the caption of that
3 document?

4 A. State of South Carolina, Department of
5 Natural Resources, agreement to establish and
6 operation of a Wildlife Management area.

7 Q. Okay. Turn over to Paragraph 7 on the
8 second page.

9 A. I would note for the record this does not
10 relate to this property. This is a piece of
11 property in -- I don't think it relates to this
12 property. It describes an American Timberland Two,
13 LLC. This is not my property, right?

14 Q. Right. Turn to Paragraph 7 on Page 2.

15 A. Uh-huh.

16 Q. What does that paragraph say?

17 A. This paragraph says pay lessor, who is the
18 American Timberland Two, LLC, 65 percent of all
19 funds received each year for the sale of Wildlife
20 Management area permits based on the following
21 formula. Okay. That is what it says.

22 Q. Okay. Do you have any evidence --

23 A. Do you mind if I look at that while you
24 are talking? Thanks.

25 Q. Do you have any evidence that Mr. Shirley

1 ever purchased a Wildlife Management area permit?

2 A. I don't know, but Mr. Shirley has a
3 history of not purchasing permits to hunt. So I
4 don't know what he's done.

5 Q. Okay. Let me be more specific. Do you
6 have any evidence that Mr. Bobby Shirley ever
7 purchased a permit to allow him access to the Game
8 Management property?

9 A. I don't -- I don't think that you need a
10 permit to access the Game Management property. I
11 disagree with your premise there.

12 Q. Well, I'm asking you do you have any
13 evidence that he ever bought one?

14 A. Those are two different questions. I have
15 no evidence he ever bought one.

16 Q. Do you have any evidence Mr. Brent Shirley
17 ever purchased a permit to access the --

18 THE COURT: Are you talking about the
19 same person?

20 MR. WELLS: Brent Shirley is the one
21 here. I asked him about Bobby Shirley who was his
22 father.

23 THE COURT: Okay.

24 THE WITNESS: Mr. Shirley testified
25 in his deposition he hunted that property. I assume

1 that he complied with the law, but maybe he didn't.

2 BY MR. WELLS:

3 Q. You don't have any record that he
4 purchased a permit to access the property?

5 A. In his testimony he testified in his
6 deposition that he hunted on the W.M.A. property.
7 Okay? So either he purchased a permit or he hunted
8 illegally on the property, one or the other.

9 Q. But you don't know if he purchased a
10 permit, for what year he would have purchased the
11 permit?

12 A. He testified he had over 15 game
13 violations for poaching it. So I don't know what
14 his attitude would have been towards this property.

15 Q. So he is a record poacher?

16 A. Yes, sir, according to his own testimony.

17 Q. And if he poached out there on the Game
18 Management property, he would be using it adverse to
19 the interests of the leaseholder who would be the
20 Department of Natural Resources. Wouldn't that be
21 true?

22 A. Well, and that would be another good
23 reason why I wouldn't want him on my land.

24 Q. So just because there was a Game
25 Management lease on the property, that doesn't mean

1 that he ever had permission to go on there and hunt?

2 A. Well, except in his deposition he said
3 they gave him a key. So I don't know -- if you got
4 a key to something, like a key to your house, I
5 assume you've got permission to use the key. I
6 don't know why they would give him a key and not
7 give him permission to use it.

8 Q. In all you had three discussions with
9 Mr. Shirley about using this road; is that correct?

10 A. I had one conversation with him, and I got
11 chewed out twice. Characterize it any way you want.

12 Q. The first one would you characterize maybe
13 as being civil?

14 A. A civil conversation between adults, yes.

15 Q. And the second two were -- he used foul
16 language?

17 A. Yes.

18 Q. Did he use foul language in both of the
19 second two conversations?

20 A. Yeah.

21 Q. But he was asserting his right to use that
22 road; is that right?

23 A. He was asserting his right to end my life
24 if I didn't do what he wanted me to do. That is
25 what right he asserted.

1 Q. You can't get much more adverse than that,
2 can you?

3 A. No, you can't. No, you can't. It's my
4 understanding that is against the law.

5 MR. WELLS: Those are all the
6 questions I have.

7 REDIRECT EXAMINATION

8 BY MR. BABCOCK:

9 Q. Mr. Bundy, Mr. Wells showed you a contract
10 of sale to your property. I think it was marked as
11 Exhibit 9. And he asked you some questions about
12 the diagram map that is attached to it. This
13 doesn't indicate there is any kind of a recorded
14 plat, does it?

15 A. No.

16 Q. And looking at this map, are there various
17 dotted lines shown?

18 A. They are all over this map. In fact, that
19 road that goes across the Rooster Pit. It goes on
20 to the Rooster Pit and goes on down that road. I
21 believe it's a little dotted line, whatever it is.

22 Q. Would you just show the judge what you are
23 pointing to.

24 A. It shows a little path going down that
25 way. All kinds of dots on that map, logging roads.

1 Landing pads. All kinds of stuff.

2 Q. No indication on this map what those
3 dotted lines are supposed to be?

4 A. No. No, sir.

5 Q. Just so we are clear on the record, I want
6 to go back. You testified to two conversations with
7 Mr. Shirley in which threats were made to kill you?

8 A. That's correct.

9 Q. I want to go to the very first one that
10 you testified occurred when you picked up the phone
11 and initially did not know who you were even talking
12 to; is that right?

13 A. Correct.

14 Q. Now, in that conversation did Mr. Shirley
15 make any assertion as to either owning the road or
16 having an ownership interest in the road or having
17 some kind of easement in the road, anything of that
18 nature?

19 A. No. It was more of just a tirade about
20 blocking his wife in.

21 THE COURT: Let's -- for the record,
22 let's just discount the deer head conversation. And
23 we'll knock that out as being Number One, the first
24 conversation. So the first conversation would be in
25 the driveway --

1 MR. BABCOCK: With the gate?

2 THE COURT: The second conversation
3 would be the second conversation.

4 MR. BABCOCK: The one we are talking
5 about?

6 THE COURT: The one we are talking
7 about. The third conversation would be -- the
8 second conversation is about the stuff being in the
9 road, my wife can't get down the road. The third
10 conversation is remove the gate. Okay?

11 MR. BABCOCK: Using that
12 nomenclature --

13 THE COURT: Sorry.

14 MR. BABCOCK: No, that is good. That
15 is good.

16 BY MR. BABCOCK:

17 Q. Using that nomenclature, we are talking
18 about the second conversation right now. In that
19 second conversation was there any assertion by Mr.
20 Shirley that he owned the road?

21 A. No.

22 Q. Was there any assertion that it was a
23 public road?

24 A. No.

25 Q. Was there any assertion that he had an

1 easement over that road?

2 A. No.

3 Q. Was there any assertion by him that he had
4 any right to that road or to use the road?

5 A. I guess you could imply since he cursed me
6 out because his wife was blocked that he somehow
7 did, but other than that is it. It would -- you
8 would have to imply it.

9 Q. I'm not asking for an implication. I'm
10 asking for what he said.

11 A. No. There was no direct assertion, no.

12 MR. BABCOCK: Thank you, sir.

13 THE COURT: Mr. Bundy, you may step
14 down.

15 MR. BABCOCK: Your Honor, we have two
16 relatively short, but probably half hour, plus or
17 minus a little bit, witnesses plus some deposition
18 excerpts which we wanted to offer. And it's now
19 about 12:30.

20 I didn't know whether for your planning
21 purposes -- we've got the excerpts marked. And if
22 we gave them to you rather than us going through the
23 process of reading them into the record, which we
24 are happy to do, if you were just able to read them
25 that would take care of getting that evidence before

1 you.

2 THE COURT: That is perfectly fine
3 with me in a non-jury setting. That seems to be the
4 most efficient way to handle that.

5 MR. WELLS: How are they marked?
6 Just underlined?

7 MR. BABCOCK: Yes.

8 THE COURT: Are the other portions
9 redacted or --

10 MR. BABCOCK: I've got two formats.
11 One with the entire deposition, but just
12 underlining. And then just the page which have the
13 designated text. It has some words that weren't
14 designated, but let me show it to you. Your Honor,
15 I'm happy to do the reading of the questions and
16 answers if that is preferrable. I can do it either
17 way.

18 THE COURT: What do you prefer,
19 Mr. Wells?

20 MR. WELLS: I think what we need to
21 do is put the marked deposition in, the whole
22 deposition, because it goes in -- you may have a
23 question as to what came before it. I think if part
24 of it comes in, all of it needs to come in.

25 THE COURT: Well, if Mr. Babcock does

1 not want to put that in, then the other option is
2 why don't we just read it or you can just provide a
3 redacted blacked out. Either way, it doesn't --

4 MR. BABCOCK: I'm happy to go ahead
5 and read --

6 THE COURT: Let's just read it.

7 MR. BABCOCK: That is the traditional
8 method.

9 THE COURT: Just do it the
10 traditional manner. And if he does not want me to
11 see something or -- that is up to him. So -- and,
12 gentlemen, I will do whatever you all want to do.
13 If you want to do this. If you want to take these
14 two small witnesses and then break, that is fine.
15 Whatever you all's schedules -- whatever you all
16 need to do is perfectly fine.

17 MR. BABCOCK: I would rather have
18 this testimony at this point, Your Honor.

19 THE COURT: Yes, sir.

20 MR. BABCOCK: All right. Your Honor,
21 this is portions of the deposition of Brent Shirley,
22 Defendant, which was taken on September 17th, 2009.
23 We have for the Court the original deposition should
24 we need that later.

25 There have been deposition designations

1 which were sent to Mr. Wells and I believe to Your
2 Honor. And we would offer a copy of that for the
3 record in this case to be included in the record.
4 All right.

5 THE COURT: That is by letter dated
6 August 20th, 2010?

7 MR. BABCOCK: I believe so.

8 THE COURT: Yes, I have it here.

9 MR. BABCOCK: And here is one for the
10 record.

11 THE COURT: Thank you.

12 MR. BABCOCK: All right.

13 Mr. McDonald, let's go to Page 16, Line 10.

14 Q. Okay. Did you put a gate up out there at
15 any point?

16 A. Me and Mr. Bundy both agreed to put the
17 gate up.

18 Q. Okay.

19 A. He Was the one that wanted me to put the
20 gate up.

21 Q. Mr. Bundy wanted you to put the gate up?

22 A. Yes, sir. He said listen, I said well I
23 got a gate. I got a gate and we'll both put it up.

24 Q. So you had a gate and what else?

25 A. And he had a key, I had a key. Yes, sir.

1 I had a farm gate. A real nice farm gate.

2 Q. Okay.

3 A. It was both of ours. It wasn't my idea,
4 and I said, you know, that's good because when we
5 got that property we had to pick up refrigerators
6 that was dumped on that road. That was before he
7 come along. This was whenever it was Bowater Plant.

8 Q. Okay.

9 A. Whenever the public used to go back there
10 and hunt it with a game management permit.

11 Q. Okay.

12 A. They hunted that whole tract that he
13 bought.

14 Q. What do you mean, game management permit?

15 A. Game management. That's -- you can buy a
16 permit from the D.N.R. and you hunt game management.
17 That's for the public to hunt.

18 Q. Okay.

19 A. That's the State gives the public the
20 right to hunt.

21 Q. Okay.

22 A. But you got to have a permit.

23 Q. Okay.

24 A. Okay. That's how I found this land out
25 to buy to start with. When I hunted all that 2000

1 acres, or whatever, he bought, that was all game
2 management and Bowater.

3 Q. Okay.

4 A. And there was people back there hunting
5 all the time.

6 Q. So Bowater owned it?

7 A. Yes, sir.

8 Q. Okay. But Bowater enrolled it in some
9 program with the State?

10 A. They did. That's right.

11 Q. Okay. And then that allowed --

12 A. The public to go back there.

13 Q. -- the people that had the permit to go
14 back there and hunt Bowater's property?

15 A. Exactly. And that road was the way to
16 get in there. The game -- I met the game wardens
17 quite a few times in there. One of my friends that
18 we hunted together, Chuck Thompson.

19 Q. Uh-huh.

20 A. He's not a game warden now, but he used
21 to -- after I bought that property -- after daddy
22 bought that property, he would go back there and
23 check on it for people throwing out trash, was the
24 main deal.

25 Q. Wait. Chuck Thompson is your friend?

1 A. Chuck Thompson, yes, sir.

2 Q. Chuck Thompson works up at the Department
3 of Public Works?

4 A. Yes, that's right.

5 MR. BABCOCK: Now going over to
6 Page 19, Line 9.

7 Q. Where did you put up the gate?

8 A. All right. Where Bowater put two big
9 pipes in the ground, that was the way they used to
10 do it. They had a cable across it.

11 Q. All right. Let me back up. So
12 Bowater --

13 A. They always put two big pipes --

14 Q. Okay.

15 A. -- at the entrance of the game management
16 area.

17 MR. BABCOCK: Now going over to
18 Page 20, Line 7.

19 Q. And what we were talking about before we
20 were marking these exhibits was that Bowater had a
21 couple of pipes out there at the edge of their
22 property.

23 A. Yes, sir, exactly. That's it. That's
24 it. That's the pipes.

25 Q. So you recognize Plaintiff's Exhibit 1?

1 A. Yes, sir.

2 Q. Okay. And those are the pipes that
3 you're talking about?

4 A. Bowater always had those pipes up.

5 Q. Okay. And you said earlier that they had
6 a chain across, or a cable?

7 A. No, they had a cable.

8 Q. Okay.

9 A. And they take the cable down when it's
10 hunting season.

11 Q. So Bowater puts the cable up there --

12 A. Yes, sir.

13 Q. -- and then when it's hunting season,
14 because they have this program with the State to let
15 the public hunt it --

16 A. Exactly.

17 Q. -- they take the cable down and let the
18 public in, and out, of there?

19 A. Yes, sir. And you was going to ask me a
20 question awhile ago where the gate was. It was
21 right there.

22 Q. So you put your gate behind those two
23 posts that are depicted on Plaintiff's Exhibit 1?

24 A. The gate. Mr. Bundy, he went there and
25 seen it.

1 MR. BABCOCK: Let's take a look at
2 what was marked as Plaintiff's Exhibit 1. Do you
3 have and do we have that here? Your Honor,
4 Plaintiff's Exhibit 9 was Plaintiff's Exhibit 1 in
5 that deposition. Now going over to Page 25, Line
6 19.

7 Q. Did you bring the posts to help him put
8 the gate up?

9 A. Yes, I did.

10 Q. Why did you put the gate up?

11 A. Why did I put the gate up? Because Mr.
12 Bundy wanted a gate up. That would serve for both
13 of us.

14 Q. Why would it serve for both of you?

15 A. It would keep people from taking trash
16 out and dumping it in the roads that we had to clean
17 up, and keep night riders out.

18 Q. Okay. So did you ever catch anybody
19 dumping trash out there?

20 A. No, sir.

21 Q. There was just trash out there?

22 A. There was refrigerators, and things, that
23 you had to cut up, you know, pick up and haul off.
24 They would do that at night.

25 Q. Did you ever catch any night riders out

1 there?

2 A. No, sir, I never.

3 Q. So you never saw anybody back there?

4 A. Only during the time that -- when we
5 bought that property, the game management was still
6 going on, and people were going in, and out,
7 hunting.

8 Q. Okay. So when you bought the property,
9 Bowater already had the agreement with the State
10 that we talked about, right?

11 A. That's right.

12 MR. BABCOCK: Going over to Page 27,
13 Line 1.

14 Q. Bowater had the agreement with the State
15 at the time that you bought your piece of property?

16 A. Yes, sir.

17 Q. Okay.

18 A. Yeah, they kept hunting. Those people
19 kept hunting all around me.

20 Q. Until the time that Bowater sold to Mr.
21 Bundy?

22 A. That's right. There you go. Yes, sir.
23 There you go.

24 MR. BABCOCK: Next Page 27, Line 15.

25 Q. Why did you take the gate down?

1 A. Mr. Bundy said to take the gate down.

2 MR. BABCOCK: Going over to Page 51.

3 The question actually starts at Line 15.

4 Q. Okay. So you are saying it's a public
5 road through the Miller's property?

6 A. That's a public road, yes, sir.

7 Q. Okay. Okay. And it's your testimony
8 that it's a public road up to the Miller's property,
9 across the Miller's property, across the Bowater
10 property, and all the way up to where your gate is
11 on your property?

12 A. That's right... That's right.

13 Q. That's your testimony?

14 A. Uh-huh.

15 Q. Okay. And is that the reason why you
16 didn't ask permission from the Millers?

17 A. Yes, sir. It's been going that way for
18 years.

19 Q. Okay.

20 A. For a hundred years.

21 Q. Okay. Do you think that's the reason why
22 your father didn't ask permission from the Millers?

23 A. Been that way for years and years.

24 Q. Okay. Because he didn't need permission
25 because it was a public road?

1 A. Yes, sir.

2 Q. Okay. And you didn't need permission
3 because it was a public road?

4 A. That's right.

5 Q. Okay. Did you ever ask permission from
6 Bowater?

7 A. No, sir.

8 Q. Okay.

9 A. All they wanted was to see a permit to go
10 in there if they was there to check you.

11 Q. Okay. So they, actually, came down and
12 checked to see if you had a permit?

13 A. Maybe. Every once in a while, they'd
14 check your license out.

15 MR. BABCOCK: Going over to Page 55,
16 Line 1.

17 Q. Okay. You said earlier that you knew the
18 Whipples. How do you know the Whipples?

19 A. No. That's -- my dad called them to find
20 out -- we knew that the land was not game
21 management.

22 Q. Okay. How did you know that?

23 A. My dad went to the courthouse and found
24 out who owns it. He was from Waxhaw, North
25 Carolina.

1 Q. I got you.

2 A. And he said well, if you're interested in
3 selling this -- buying this land, my dad said yes, I
4 want to buy it.

5 Q. I got you.

6 A. So they sold it.

7 Q. Okay. So you didn't know anything about
8 the property, your dad just went down to the
9 courthouse and saw the Whipples --

10 A. I told him to look it up.

11 Q. I got you. But you didn't know the
12 Whipples?

13 A. No, not personally.

14 Q. Okay. And you didn't go out there with
15 the Whipples?

16 A. And they never did anything with that
17 property. They never cut it, they never done
18 anything.

19 Q. Okay. Did they even go out there?

20 A. They did it for a tax shelter, he told my
21 dad. That's just a deal.

22 Q. I got you. So they didn't even ever go
23 out there, it was just a tax shelter?

24 A. They never did.

25 MR. BABCOCK: Going over to Page 57,

1 Line 17.

2 Q. Okay. And then the only other gate that
3 was out there, to your knowledge, is the one that
4 Bowater had up?

5 A. That's right.

6 Q. They had the cable on?

7 A. That's the cable.

8 Q. Exactly. That they would take down?

9 A. They locked it off during off season
10 hunting.

11 Q. Okay. Okay.

12 A. That was their little plan to do.

13 MR. BABCOCK: Going over to Page 63,

14 Line 2.

15 Q. When you put your gate up, did you apply
16 to an encroachment permit from Kershaw County?

17 A. No, sir.

18 Q. Okay. Well, if you take the position
19 that it's a public road, why did you think that you
20 could put a gate up?

21 A. Mr. Bundy owned the property. Remember?
22 He bought it.

23 Q. Yes.

24 A. That was going, you know, right there.

25 Q. Okay.

1 A. And on the side, each side.

2 Q. So you thought if you had Mr. Bundy's
3 permission to put a gate up --

4 A. No, he wanted to put it up.

5 Q. Okay. But you put the gate up, that much
6 is clear?

7 A. Yeah, I guess. I put the gate up.

8 Q. And you put the gate up because you
9 thought you had Mr. Bundy's permission?

10 A. Mr. Bundy wanted to do that.

11 Q. Okay.

12 A. And I said hey, that's just right, that's
13 just right for both pieces of property.

14 Q. Okay. Is that a yes?

15 A. Yes, sir. That's just what I said. He
16 wanted to do it. That was just right for me. I
17 said that's just right. Keep people out.

18 Q. Do you think that maybe you should have
19 contacted Kershaw County?

20 A. No, sir.

21 Q. Okay. How did you put a gate up on a
22 public road? It's been your testimony that it's a
23 public road. How do you do that?

24 A. I don't know.

25 Q. You don't know? Did you even think about

1 it?

2 A. No, sir.

3 Q. Did the Millers -- again referring to the
4 Millers, generally. Did the Millers ever say
5 anything to you about the gate?

6 A. No, sir.

7 Q. Okay. Never had a conversation with them
8 about it?

9 A. No, sir.

10 Q. Okay. So just to be clear you put up the
11 gate --

12 A. Mr. Bundy wanted it up.

13 Q. Okay. But you put it up?

14 A. He made that clear.

15 Q. Okay.

16 A. Yes, sir, I put it up, but Mr. Bundy
17 wanted it up.

18 Q. And then you took it down a couple of
19 years later?

20 A. Because he told me to take it down.

21 Q. Okay.

22 A. And I said okay. Mr. Bundy wanted me to
23 take it -- put it up and take it down.

24 Q. Okay. Did the County ever say anything
25 to you about the gate?

1 A. No, sir.

2 Q. Okay.

3 A. The County don't scrape all the way back
4 there any more. They stopped right there at the
5 Miller's house.

6 Q. Okay.

7 A. Remember? They stopped.

8 Q. Have you ever seen the county back there
9 scraping it?

10 A. No, sir, I haven't.

11 Q. Okay.

12 A. They turned around where the -- in front
13 of their houses.

14 Q. Okay. With the motor grader?

15 A. That's right, to keep it smooth.

16 Q. Okay. I got you. And you put the gate
17 up past where they turn around with the motor grader
18 after you go across the Miller's property?

19 A. Yes, sir. At the end of where the
20 Miller's property stops, and Bundy's starts.

21 MR. BABCOCK: Going over to Page 77,
22 Line 7.

23 Q. When Bowater had its cable up in the off
24 season, the off hunting season?

25 A. Yes, sir.

1 Q. How did you get back to your property?

2 A. I hadn't bought it, then. It wasn't
3 sold, then.

4 Q. What do you mean?

5 A. Because it wasn't sold.

6 Q. What wasn't sold?

7 A. Whenever off season -- and my property,
8 there was no -- let me see, now. How did I get
9 back? Either the cable was down, or whatever. It
10 was down. It was down.

11 Q. Okay. So you could only get back
12 there --

13 A. Now, I'm trying to understand what you're
14 saying.

15 Q. I got you.

16 A. Yes, sir.

17 Q. So when the cable was up in the off
18 season --

19 A. Uh-huh.

20 Q. How did you get back to your property?

21 A. The cable was down, I reckon, until
22 Bundy -- until it was all nothing there.

23 Q. Okay.

24 A. Let me think now.

25 Q. Take your time.

1 A. I can't recall. The cable was down
2 because we'd go, in and out, to our property.

3 Q. Okay.

4 A. Yes, sir.

5 Q. So you only went to your property when
6 the cable was down?

7 A. I believe they left it down. I know it
8 was -- they got a gate, they got a cable there and
9 they just clipped it, clipped the lock.

10 Q. Who clipped the lock?

11 A. It must be the D.N.R..

12 Q. Okay.

13 A. It had to be because, still, the cable
14 was there. Uh-huh.

15 Q. Okay. The cable was there, it just --

16 A. They put the lock and just clipped it
17 because Chuck always went in there. Chuck told me
18 this, and that, and the other. He had a key and
19 all.

20 Q. Okay.

21 A. Yeah.

22 Q. Did you have a key?

23 A. Yeah.

24 Q. You had a key to the cable?

25 A. Yes, uh-huh.

1 Q. Okay. So that's how you got back there
2 when the cable was up?

3 A. They just left it down.

4 Q. Okay.

5 A. And then the next thing I know, Bundy
6 wants a gate up and I said that would be just
7 perfect. Let's do that instead of the cable.

8 Q. So we're just talking about the time when
9 Bowater owned it for right now, okay?

10 A. Yes, sir.

11 Q. Okay. So you had a key to Bowater's
12 cable?

13 A. I had to.

14 Q. Okay.

15 A. I had to.

16 Q. Yeah.

17 A. That is back in the 80s.

18 Q. Who gave you -- Bowater gave you that
19 key?

20 A. Chuck Thompson and the game warden.

21 Q. They gave you the key?

22 A. I believe that's the way it was. To the
23 lock.

24 Q. Did Bowater give the game wardens a key?

25 A. I don't know.

1 Q. You don't know how they got a key?

2 A. I don't know that.

3 Q. Okay.

4 A. I don't know how that works.

5 Q. Okay.

6 A. I don't know how it works.

7 Q. And did you ever have to use your key?

8 A. Not really. It was down back and forth.

9 Q. Okay. But you did have to use it
10 sometimes?

11 A. Yes.

12 MR. BABCOCK: Page 81, Line 15.

13 Q. Okay. But you don't have a recorded
14 easement?

15 A. No, sir.

16 Q. Okay.

17 A. It's not recorded.

18 Q. So do you have any -- can you offer any
19 testimony as to how you got that easement?

20 A. I just went -- I just went just like
21 everybody else did over a hundred years.

22 Q. Okay.

23 A. I just went that road.

24 Q. Okay. So that's it? That's it, that's
25 all the testimony you have to offer?

1 A. (NODDING.)

2 Q. Is that yes?

3 A. Yes, sir.

4 Q. Okay. You don't have anything in writing
5 that says that you can use the road?

6 A. No, sir.

7 Q. Okay. The only thing you have is a key
8 that you got to the cable from Bowater --

9 A. That's been a long time ago about that
10 key, and that key, and that lock, somehow it was
11 down, up, down and stayed down until Bundy said
12 let's put the gate up, and that will be cool, that
13 will be better.

14 Q. Okay.

15 A. That is all I know about the key. I
16 can't remember. It was -- they kept coming in
17 there.

18 Q. Go ahead.

19 A. They kept coming in there, the game
20 warden kept checking the land and this, that, and
21 the other.

22 Q. And that's your buddy, Chuck Thompson.

23 A. And they come -- yes, sir.

24 Q. Okay.

25 A. All of them is.

1 Q. Go ahead.

2 A. Joe Taub, and all of them, you know, they
3 kept coming in, and out, until the cable was just
4 down.

5 Q. Okay.

6 A. It wasn't up all the time. It wasn't.

7 Q. Because it wasn't up during hunting
8 season, right?

9 A. No, it was down. It was down.

10 Q. Okay.

11 A. That cable was down. If you really want
12 to get to it, I'm pretty sure. And I said all this
13 junk that keeps going in there we have to clean out,
14 and Bundy comes along and says let's put a gate up.

15 Q. Okay. So the cable was there --

16 A. The cable is still there.

17 Q. -- up until the time Bundy got the
18 property?

19 A. Yes, sir.

20 Q. Okay.

21 A. Where the lock was locked on it. I had a
22 key. There's a guy from Lancaster, he was over the
23 Bowater, and I can't recall his name, and he was --
24 I can't remember his name, but he talked to my
25 daddy.

1 Q. Okay. So your dad talked to somebody
2 from Bowater?

3 A. About that.

4 MR. BABCOCK: Page 84, Line 13.

5 Q. Did your dad have a key?

6 A. Yeah.

7 Q. So you both had a key?

8 A. I reckon.

9 MR. BABCOCK: Page 85, Line 21. I'm
10 sorry. Line 6.

11 Q. Okay. Before you purchased -- before
12 your father purchased the piece of property that you
13 now own, do you know if he did any type of due
14 diligence?

15 A. What is that?

16 Q. Do you know if he did any research on the
17 property before he purchased it?

18 A. No, sir.

19 Q. Okay. Did you do any other research on
20 the property before you inherited it?

21 A. We just bought it from the real estate
22 people.

23 MR. BABCOCK: Dropping down to
24 Page 85, Line 21.

25 Q. Okay. Mr. Shirley, has Mr. Bundy ever

1 made any representation to you about whether or not
2 this road is public?

3 A. I don't understand. Made what?

4 Q. Has Mr. Bundy ever said to that this road
5 is public?

6 A. I haven't heard him tell me that.

7 Q. Okay. And you haven't had any other --
8 you can't remember any other conversations with
9 Bundy, other than the ones we talked about earlier?

10 A. That is it.

11 Q. Okay. Did Mr. Bundy ever make any
12 representations to you that you, Brent Shirley, had
13 an easement to drive over the Miller's property, and
14 over his property?

15 A. No.

16 Q. No?

17 A. No.

18 MR. BABCOCK: Going to Page 86, Line
19 25.

20 Q. In all of your time driving across the
21 Miller's property, and across Bundy's property,
22 formerly the Bowater property, did -- the only
23 people you ever see up there were the people that
24 were using Bowater property for hunting?

25 A. The other people that hunted it, some

1 people I didn't know that were that Bowater
2 property.

3 Q. But that's the only people that you saw
4 up there were the hunters?

5 A. That is it.

6 MR. BABCOCK: Page 89, Line 15.

7 Q. Do you have any testimony how long you
8 believe the public has driven over the Miller's
9 property, and over Bundy's property, which used to
10 be the Bowater property, up into your property?

11 A. How long they did it?

12 Q. Yes.

13 A. The time they turned that into hunting,
14 game management, hunting

15 Q. Okay. Do you know when that was?

16 A. I don't.

17 Q. Okay.

18 A. It was late 70s, early 80s.

19 Q. So it was just a short amount of time
20 before you purchased your property?

21 A. That's right.

22 Q. Okay. And the game management permit,
23 that's for the State of South Carolina, correct?

24 A. That's right.

25 Q. And, I guess, is it your understanding

1 that the State of South Carolina has some lease

2 A. They had to agree with the timber company
3 to do that.

4 Q. Certainly.

5 A. They had to do something like that.

6 MR. BABCOCK: Page 97, Line 13.

7 Q. Got you. Do you have any evidence that
8 the public ever came up there, drove across the
9 Miller's property and into the Bowater property
10 prior to it being -- prior to when they were allowed
11 to hunt out there?

12 A. I don't know about that. Nobody even
13 knew that exists. I didn't even know that land was
14 back there before I knew that I got the game
15 management map.

16 MR. BABCOCK: And that is the end of
17 the designation, Your Honor. I guess in a sense we
18 had Mr. McDonald questioning and answering at the
19 same time. Your Honor, it's about 1:00 o'clock.
20 The next witness will take more than --

21 THE COURT: Why don't we start back
22 at 2:00 o'clock? Is that sufficient with everybody?
23 And remember I've got to go get beat up at 3:30 for
24 about 10 minutes. So we'll go from 2:00 until about
25 3:30, which is a good breaking point. And then

1 we'll resume very shortly thereafter. Is that okay
2 with everybody?

3 MR. BABCOCK: Thank you, Your Honor.

4 THE COURT: All right.

5 (Lunch recess 12:51 to 2:00.)

6 MR. BABCOCK: Your Honor, our next
7 witness is Mr. Rick Miller.

8 THE COURT: Mr. Miller, let me swear
9 you in. Raise your right hand. Do you swear to
10 tell the truth, the whole truth, and nothing but the
11 truth so help you God?

12 MR. MILLER: I do.

13 THE COURT: All right. Come up and
14 have a seat.

15 WHEREUPON:

16 RICK MILLER, being duly sworn and
17 cautioned to speak the truth, the whole truth and
18 nothing but the truth, testifies as follows:

19 DIRECT EXAMINATION

20 BY MR. BABCOCK:

21 Q. Mr. Miller, could you give us your full
22 name, please, sir?

23 A. Richard Ricky Miller.

24 Q. And how old are you, sir?

25 A. Fifty-five.

1 Q. And where do you live, sir?

2 A. Say again?

3 Q. Where do you live?

4 A. 1586 Saxon Road.

5 Q. And you were here earlier this morning.

6 Did you hear testimony about the Miller property?

7 A. Yes, I did, sir.

8 Q. And do you live where the Miller property
9 is?

10 A. Yes, I do.

11 Q. How many different houses are there out
12 there?

13 A. There are four different houses out there.

14 Q. Who all lives out there?

15 A. My sister-in-law lives in one. My mother
16 lives in another one. And I'm in one. And my
17 grandmother is living in the other one.

18 Q. Okay. And how long has your family had
19 family members out there?

20 A. Well, about -- my family live out there
21 all of their life. My dad died at 79. My mom died
22 at 80. And they was living there all of their life.
23 And I've lived there for 55 years, two years
24 exception is during the Army time.

25 Q. And what do you do for a living?

1. A. Well, I work for myself now. I'm
2 medically retired now.

3 Q. Where did you work before you got retired?

4 A. Mancore at Lugoff, South Carolina.

5 Q. Now, you've heard when you were in the
6 courtroom this morning I think the testimony about
7 Mr. Shirley and Mr. Bundy and how Mr. Shirley uses
8 or gets to certain property of his over Mr. Bundy's
9 property. You heard that?

10 A. Right.

11 Q. What I'd like you to do, sir, is first
12 tell us how Mr. Shirley gets to his property now.

13 A. Comes through my yard to get to his
14 property right there.

15 Q. And can you come down and show us on
16 Plaintiff's Exhibit 2 -- wait just a second, sir.
17 And if you can -- how about stand on this side. The
18 court reporter needs to hear what you are going to
19 say.

20 A. Okay.

21 Q. And what I want you to do is point in a
22 way that His Honor can see what you are showing.
23 And then we'll describe it in the record. Okay?

24 A. This is Saxon Road right here where I live
25 at. And this is where the County line stops right

1 here.

2 Q. All right. Where the X is is where the
3 County line stops?

4 A. It stops right there.

5 Q. And that is where they stop maintaining?

6 A. That is where they stop maintaining that
7 road right here.

8 Q. Okay. And then where is the -- your
9 family's property?

10 A. Family property is right here. Family
11 property is right in this area right here. And on
12 the other side is where the Bundy's land is right
13 there.

14 Q. And where it says gate, is that where it
15 is?

16 A. Right there at the gate.

17 Q. So right now when Mr. Shirley goes to his
18 property, how does he go? Just show us.

19 A. Straight through right here. Straight
20 through my yard right here.

21 Q. And then where does he go?

22 A. Into Mr. Bundy's right here.

23 Q. And that is where the orange is?

24 A. Where the orange is right there.

25 Q. Now, is that the way that Mr. Shirley has

1 always used to get to his property?

2 A. No, it wasn't.

3 Q. Okay. Tell us how he originally got to
4 his property.

5 A. Okay. He got to his property right here
6 where this blue line is running up through here, up
7 near here where the Rooster Pit is. Cross over with
8 a little road, go down the side of that. Right
9 there that runs back into the road to Mr. Bundy's
10 right there. Part of it goes up and the other part
11 comes right out right here.

12 Q. And then Mr. Shirley's family bought the
13 property in '85. About how long did they use that
14 route?

15 A. They used that route up into the early
16 part of 1980 or '90, somewhere along in there.

17 Q. They bought it in '85. The early 1990s?

18 A. Right. Right.

19 Q. And why did they stop using that route, do
20 you know?

21 A. I think he and Mr. Whit Boykin had a
22 dispute. And somehow or another they started coming
23 around using this road right here.

24 Q. The one they are using now?

25 A. The one they are using now.

1 Q. And the dispute, there was a gate put up
2 on Mr. Boykin's property?

3 A. Yeah. There was a gate put up there after
4 the dispute was made.

5 THE COURT: Where was the gate?

6 THE WITNESS: It was coming up here
7 was a cable running across right up in here to get
8 around Whit Boykin and Ms. Alice Boykin and Bowater
9 coming up through here, there was a cable across the
10 road here.

11 BY MR. BABCOCK:

12 Q. Now, while you are down here, did the
13 County or anybody ever maintain any pathway going
14 through your property?

15 A. No. Nobody ever did.

16 Q. And how about going onto Mr. Bundy's
17 property? Did anybody with the County or anybody
18 ever maintain that road?

19 A. No, they didn't.

20 Q. Do you remember was the maintenance of
21 Saxon Road going up to your property, has that
22 always been the case or do you remember when that
23 started?

24 A. It started back in the early -- about
25 1968. This was a little wagon road coming all the

1 way here. And my mother got Whit Boykin and Alice
2 Boykin to give permission to build that road through
3 there. And Bowater -- she called Bowater. And
4 Bowater gave her permission to use as much as she
5 wanted to get this road built through here. We had
6 to walk from this road all the way out here to catch
7 the bus out to the main highway.

8 Q. Okay. You can go back and take your seat,
9 sir. Now, do you remember when or are you aware
10 that the Bennett family owned what is now Mr.
11 Shirley's property?

12 A. Yes, I do.

13 Q. And we've had a stipulation that the
14 Bennett family owned that tract in December of 1947
15 until March of 1968. I believe Elijah Bennett was
16 the father's name; is that right?

17 A. Exactly.

18 Q. How did Elijah Bennett and his family get
19 to the property which is now the Shirley property?

20 A. They got to their property with permission
21 from my grandmother to come through our way right
22 here, but before that permission they was using that
23 right there in the blue to get to that property.

24 Q. So originally they used the blue, but
25 after permission they used the road -- used the way

1 Mr. Shirley uses now?

2 A. Right.

3 Q. Coming through your property and then onto
4 the orange of Mr. Bundy's property?

5 A. Exactly.

6 THE COURT: Would you go over that
7 again, Mr. Babcock?

8 MR. BABCOCK: Sure.

9 BY MR. BABCOCK:

10 Q. Can you see okay from where you are?

11 A. Uh-huh.

12 Q. Because if I get a little distance, I have
13 a hard time. All right. As long as you can see.
14 Originally Mr. Elijah Bennett used the blue road,
15 blue pathway?

16 A. Blue pathway to get to his property.

17 Q. To get to his property. And then came up
18 here and then got onto that portion in orange?

19 A. Right there.

20 Q. And then got here?

21 A. Right here.

22 Q. All right. And at some point in time --
23 do you remember when it was or do you know when it
24 was that he started using this other way?

25 A. I can't recollect that right now. Maybe

1 my sister possibly could pick you up on that.

2 Q. All right. This is how they did
3 originally?

4 A. Right. Exactly.

5 Q. And then at some point in time they asked
6 permission to use -- to go through your property?

7 A. Go through our property.

8 Q. And use the orange?

9 A. Exactly.

10 Q. Because that was a little shorter way, I
11 guess?

12 A. Yes. Yes, it was.

13 Q. Now, Mr. Elijah Bennett got sick at some
14 point; is that right?

15 A. Well, that is what my grandmother tells me
16 on that.

17 Q. Okay. Did your family farm what is now
18 the Shirley tract?

19 A. My father did.

20 Q. All right. And when was that?

21 A. Right about '64. Through the '60s.

22 Q. And when your family farmed it, did
23 Mr. Bennett's family farm it?

24 A. No.

25 Q. So were they out there at all during that

1 time when you all farmed it?

2 A. No.

3 Q. And you all farmed it for a few years?

4 A. For a few years.

5 Q. Now, when Mr. Shirley started driving
6 across your property, how did he drive?

7 A. It was pretty fast. I had talked to his
8 father many times about him coming through my yard
9 with speed. As you see, I had the County -- I had
10 the County come out and put some signs, 15 miles per
11 hour. And he continued on doing it. I have a speed
12 trap I put there myself to slow them down coming
13 through.

14 Q. All right. When did you put that speed
15 trap in?

16 A. I put the speed trap there about three
17 years ago.

18 Q. And before that did you or any family
19 members make any effort to try to stop him from
20 using your property?

21 A. Well, my mother did at first.

22 Q. All right. And what did she do?

23 A. She put up a -- she put up a wooden gate
24 down at the end to our line just before you get to
25 the orange right there. When you got to Mr. Bundy's

1 by my grandmother's house, at the end it's right
2 here.

3 Q. Why don't you just come and show us. I
4 think I know what you are saying.

5 A. Okay. It would have been right here. Put
6 up a gate.

7 Q. Close to where the word is gate?

8 A. Uh-huh. Right up in here. So a little
9 bit up in here.

10 Q. So it would have been on your property?

11 A. On our property.

12 Q. Okay.

13 A. As a matter of fact, some of our property
14 was on the other side of the gate.

15 Q. So it was inside the property line?

16 A. Inside the property line.

17 Q. Okay. And what happened to that -- what
18 kind of barricade was it?

19 A. Well, it was a wooden fence across the
20 road, something my mother -- it was put up by my
21 brother.

22 Q. And what happened to that?

23 A. He took the winch and pulled it down.

24 Q. And about when was that?

25 A. That was back in the early part of the

1 '80s.

2 THE COURT: Who did that?

3 THE WITNESS: Mr. Shirley.

4 BY MR. BABCOCK:

5 Q. You said in the '80s?

6 A. In the '90s.

7 Q. Did your family ever give Mr. Shirley or
8 his father any permission to use your property?

9 A. No, we never did.

10 Q. And do you want him to continue to use
11 your property?

12 A. No, I want to stop that traffic from
13 coming through.

14 Q. Now, I want to go back in time to when
15 Bowater owned the property. Do you remember there
16 was a Wildlife Management Program?

17 A. Right.

18 Q. How did the -- how did the hunters access
19 the Bowater property back at that point in time?

20 A. As far as I can remember when the hunters
21 was coming in they was using the blue line to get to
22 that property and going down the edge line to get
23 into the back.

24 Q. Did the hunters use your property to get
25 back into the Bowater property?

1 A. Every now and then there was a vehicle
2 went back there, but it wasn't that often going
3 through. I don't know whether it was hunters or
4 not, you know, because so many go down there, turn
5 around, and come back. I don't know if they missed
6 their route or what, but the most hunters that was
7 hunting that land was using that blue line there.

8 Q. All right. And since the Wildlife
9 Management Program ended after Mr. Bundy got his
10 property, other than Mr. Shirley, has anybody else
11 used that road through your property or the pathway
12 through your property onto the orange to get --

13 A. No.

14 MR. BABCOCK: Okay. With the Court's
15 indulgence. Answer any questions Mr. Wells might
16 have.

17 CROSS EXAMINATION

18 BY MR. WELLS:

19 Q. Mr. Miller, the property owned by you is
20 confined to this little area here shown in the
21 middle of the map; is that right?

22 A. That's right.

23 Q. And you don't own any of the property
24 south of that Swift Creek Road?

25 A. No.

1 Q. And until 1968 I believe you said this was
2 just a wagon road, Saxon Road?

3 A. Exactly.

4 Q. And there was no public maintenance of it?

5 A. No.

6 Q. But you and your family drove across it?

7 A. Yes.

8 Q. So you just thought that you could use it?

9 A. No. Was given permission by old fellow
10 white guy name of Dupree who they bought that land
11 from. Back during that time Bowater would let you
12 cross or you call and for permission, they would let
13 you cross.

14 Q. Bowater owned the property that is now
15 owned by Bundy; is that right?

16 A. Uh-huh.

17 Q. And isn't it true that your family had to
18 use this road to get to there? That is the only way
19 you could get to your property?

20 A. Exactly.

21 Q. It was not publicly maintained?

22 A. No.

23 Q. You just used it?

24 A. Used it.

25 Q. All right. Now, I think you testified

1 also that at some point in 1964 your daddy rented
2 the Shirley property?

3 A. Uh-huh. I wouldn't call it rented. Back
4 then during that time they just call it -- you work
5 it, you pay the taxes, whatever.

6 Q. Okay. That was the arrangement?

7 A. Right.

8 Q. Your daddy paid the taxes on it?

9 A. Paid the tax on it. Just used it for that
10 season or whatever.

11 Q. And you say he farmed it?

12 A. Yes, he did.

13 Q. How did he get to it?

14 A. Through the little road by my grandmother.

15 Q. And he used this orange -- did he use this
16 orange line --

17 A. Exactly.

18 Q. -- on Defendant's Exhibit 2?

19 A. Uh-huh.

20 Q. But he didn't own this property where
21 Bundy owns now, did he?

22 A. No.

23 Q. He just used the road?

24 A. Right.

25 Q. So he did exactly what Brent Shirley is

1 doing now?

2 A. Well, I'll put it this way. I don't know
3 who cut the road. My father could have cut it back
4 then, but there was not road back during that time.
5 It was hand-cut.

6 Q. Okay. But he used this little path or
7 road --

8 A. Right.

9 Q. -- which Brent Shirley is using now?

10 A. Right.

11 Q. And when he went to the Shirley property,
12 that is the way he got there?

13 A. Yes.

14 Q. That is the way the Bennetts got there?

15 A. With permission that is the way they got
16 there.

17 Q. Well, they got your permission?

18 A. That's right.

19 Q. But they didn't have this person's
20 permission, did they?

21 A. I don't -- it don't concern me about how
22 he got permission on that. Him coming through my
23 yard, that is what I'm concerned about. Getting
24 permission to come through my place.

25 Q. Okay. But we are concerned today with who

1 had permission to use after you leave your property.
2 And you don't know anything about whether they had
3 permission to do that?

4 A. I don't know whether my father did or not.
5 I don't know.

6 Q. They just did it; isn't that right?

7 A. Yeah.

8 Q. So the Bennetts farmed this property from
9 '47 I think when they bought it until when?

10 A. In the '60s.

11 Q. Okay. And then your father farmed it
12 beginning in '64?

13 A. Uh-huh. For a few years.

14 Q. And all of that time people were just
15 going up and down this orange road whenever they
16 needed to get back there to farm; isn't that right?

17 A. No. Only my father was going up and down
18 that road.

19 Q. Okay. Your father and earlier the
20 Bennetts when they went up and down?

21 A. Yeah. We give them permission to come
22 through that way, but otherwise they were using the
23 other way. I was just showing -- being kind for
24 using their place to let them come through.

25 Q. I think you testified earlier that somehow

1 going this way is shorter than going straight?

2 A. But if you look at it now, we didn't cover
3 that. If you call it Shoe Make, Mr. Bennett knows
4 Shoe Make comes back, still crosses Mr. Brent's
5 land, but that wasn't brought up in there. They
6 would cross over this creek to come up back of our
7 house and then go around to it right there. But if
8 they go all the way around by the Baptist Church and
9 come in, that would be a longer way before that. We
10 call it Shoe Make.

11 Q. But he did -- the Bennetts did use this
12 route which includes this orange line?

13 A. Uh-huh.

14 Q. And that is in the 1950s up to 1964?

15 A. I'm thinking '60s right now because I
16 bought it in '55. And I didn't carry it too much
17 back that far.

18 Q. What is the difference between Mr. Shirley
19 using this piece of property, this little road
20 through Mr. Bundy's property, to get to his place
21 and you using this road to get to your place before
22 it was County maintained? What is the difference?

23 A. You are speaking before my time. I was
24 young then, so I can't answer that. If my parents
25 were still here they could probably tell you the

1 difference. I can't really tell you the difference.

2 Q. But ever since you've been born this has
3 been a road?

4 A. Yeah, right.

5 Q. And ever since you've been born it went
6 back here to the Bennett place whether it was the
7 Bennetts or your daddy using it; isn't that right?

8 A. That's right.

9 Q. And your address I think is Saxon Road?

10 A. Exactly.

11 Q. Since Mr. Shirley has been using this road
12 shown by an orange line, how often does he go back
13 there?

14 A. Pretty regular. If it's not him, it's his
15 son goes back there.

16 Q. Okay. Do you see them when they come
17 through your property?

18 A. I can hear them. His son got a loud
19 running truck, a car, a station wagon. But anyway,
20 his truck runs loud. Somebody comes there a lot
21 with a station wagon. I don't know whether it's
22 owned by them or not.

23 Q. And do you know when they bought the
24 property back in '85?

25 A. I remember seeing him come through, but I

1 didn't know him that well.

2 Q. Okay. Have they always gone through their
3 pretty regularly as you say?

4 A. I wouldn't say they went through their
5 regularly because they used the other route. Then
6 they started coming through pretty regular.
7 Whatever happened between them, just like I say, I
8 don't know, but they started all of a sudden coming
9 through our yard to get there.

10 Q. Since they've been using this part through
11 your yard that you are aware of though, do they do
12 it pretty regularly?

13 A. Yes.

14 Q. Go in and out?

15 A. Exactly.

16 Q. Is it restricted to deer hunting season or
17 is it year round?

18 A. It's year round, but mostly it's deer
19 hunting season. They come through a lot during deer
20 hunting season.

21 Q. And they have a pond back there, don't
22 they?

23 A. I don't know what they have back there.

24 Q. You've never seen it?

25 A. No. He don't allow it. He's got No

1 Trespassing signs. I don't cross nobody's land with
2 No Trespassing signs.

3 Q. Is there a spring back here behind your
4 property?

5 A. Exactly.

6 Q. Is it on your property or is it on
7 Bowater?

8 A. It's on my property.

9 Q. Okay. Is it kind of in this I would say
10 northwest corner --

11 A. Uh-huh.

12 Q. -- of your property? You never saw Mr.
13 Shirley drive up the road that is depicted by the
14 blue line, did you?

15 A. Yeah, I've seen him go through there many
16 times.

17 Q. How did you see him?

18 A. By me passing by going through. And we
19 have a foot path that goes up to here. And you can
20 see him use that back road. We walked that road as
21 kids. We walked those roads. I know every road
22 back there. I've lived there all my life. So my
23 brother and I used to do a lot of walking. I do a
24 lot of hunting, too.

25 Q. And you say the hunters did not use the

1 roads to your property?

2 A. They very seldom used that road coming
3 through there. Every now and then I would see a car
4 go through there. I've seen the game warden go
5 through there a couple times, but the hunters always
6 use the other road. There really wasn't that much
7 hunting during that time that they had that
8 management. Wasn't that much hunting going on, not
9 in my area.

10 MR. WELLS: Those are all the
11 questions I have.

12 REDIRECT EXAMINATION

13 BY MR. BABCOCK:

14 Q. Mr. Miller?

15 A. Uh-huh.

16 Q. You were asked some questions about Saxon
17 Road where it's now scraped and maintained by the
18 County, and how you all used that road before it was
19 maintained by the County. Do you remember those
20 questions?

21 A. Right. Right.

22 Q. All right. And when you used that
23 roadway, your family knew it wasn't on their
24 property, correct?

25 A. Correct.

1 Q. You knew it was somebody else's property?

2 A. Correct.

3 Q. And I think -- did you testify that you
4 had asked for permission to use that?

5 A. Yes. To get it paved.

6 Q. Okay. And then it got paved. And knew
7 you were using someone else's property?

8 A. Exactly.

9 Q. And you never asserted any right to that,
10 did you?

11 A. No.

12 Q. All right. The yellow road from your
13 property to what is now Mr. Shirley's property, you
14 knew that was Bowater property, correct?

15 A. Right.

16 Q. And you all didn't think that you owned
17 that, did you?

18 A. No, we didn't.

19 Q. And you don't know whether anybody called
20 Bowater for permission to use that, do you?

21 A. No, but I could recollect that now if you
22 don't mind. Any time we used to do firewood, we
23 would call Bowater and ask if we could cut firewood.
24 It's okay to cut firewood, but don't cut no pines.

25 Q. So you called and asked permission?

1 A. We would call and ask for permission
2 before we messed with anything on the property.

3 Q. Because it was their property?

4 A. That's right.

5 MR. BABCOCK: Thank you, sir.

6 THE COURT: Mr. Miller, your daddy
7 farmed the Shirley property?

8 THE WITNESS: Exactly.

9 THE COURT: And what year was that?

10 THE WITNESS: It was around '64.

11 THE COURT: Around 1964?

12 THE WITNESS: Uh-huh.

13 THE COURT: And how long did he farm
14 that?

15 THE WITNESS: I think it was probably
16 about four years.

17 THE COURT: About four or five? Four
18 years?

19 THE WITNESS: About four years.

20 THE COURT: And your daddy would
21 therefore leave your property and use the orange
22 line to get back to the farm?

23 THE WITNESS: Yes, Your Honor.

24 THE COURT: Okay. In 1985 Mr.
25 Shirley or his parents actually purchased that

1 property?

2 THE WITNESS: I would say they did.

3 THE COURT: And I believe you
4 testified that for some years after that the
5 Shirleys used the blue line to get to the property?

6 THE WITNESS: Exactly.

7 THE COURT: And how long did they use
8 that to the best of your recollection?

9 THE WITNESS: Into the early '90s.

10 THE COURT: And then after that how
11 did they use -- get to their property?

12 THE WITNESS: Started coming through
13 my yard.

14 THE COURT: Did they use that
15 exclusively?

16 THE WITNESS: Exactly.

17 THE COURT: They didn't use the blue
18 line any longer?

19 THE WITNESS: They didn't use the
20 blue line any longer because there was a cable
21 across the blue line during this time.

22 THE COURT: Do you remember what year
23 that would have been?

24 THE WITNESS: Well, not really, Your
25 Honor.

1 THE COURT: Okay. And you testified
2 that your mama put up a gate?

3 THE WITNESS: Exactly.

4 THE COURT: What year did your mama
5 put up a gate?

6 THE WITNESS: That was in the '90s,
7 around about '98, somewhere along in the '90s. In
8 the '90s.

9 THE COURT: About 1998?

10 THE WITNESS: Exactly.

11 THE COURT: And how long did that
12 gate stay up?

13 THE WITNESS: It stayed up about a
14 day or so.

15 THE COURT: And what happened to that
16 gate?

17 THE WITNESS: Mr. Brent Shirley put a
18 cable to it on a winch and pulled it down.

19 THE COURT: Did you see that?

20 THE WITNESS: My brother did.

21 THE COURT: Anything else happen
22 after that? Any other gate put up?

23 THE WITNESS: No, wasn't no gate, but
24 they had a dispute.

25 THE COURT: Who had a dispute?

1 THE WITNESS: Brent Shirley and my
2 mother did.

3 THE COURT: Over the use of --

4 THE WITNESS: Going through and --
5 what happened, my father used to fish in the creek.
6 And --

7 THE COURT: Swift Creek?

8 THE WITNESS: Swift Creek. He would
9 walk down that road and fish. And somehow or
10 another Brent Shirley caught him and said he stepped
11 on his beans. And it wasn't long that one of
12 gentlemen that works with me was getting some parts
13 off his truck. And so when we got to work he said
14 that Mr. Shirley's son cursed your daddy out. My
15 father, he wouldn't say anything.

16 So when he came to work and he told me
17 about it, then my mom -- you know, my mom got hot
18 about it. She went and approached him about it.
19 And that is when the argument got started.

20 My mother put a gate up, got nasty with
21 him. That is when the gate was put up. Other than
22 that, we were fine. But if you don't want me on
23 your land, don't cross my land. Just like that. So
24 that is how the disturbance.

25 THE COURT: You all's properties back

1 there where your family lives --

2 THE WITNESS: Right.

3 THE COURT: -- do they all touch
4 where the road ends or do you have -- I mean, does
5 one family member have to go across another family
6 member to get to their property.

7 THE WITNESS: They all touch. All is
8 just one thing in a circle.

9 THE COURT: It's just one thing in a
10 circle?

11 THE WITNESS: Right.

12 THE COURT: Okay. Any questions as a
13 result of that, Mr. Babcock?

14 MR. BABCOCK: Not from the Plaintiff,
15 Your Honor.

16 MR. WELLS: None from the Defendant.

17 THE COURT: Thank you, sir.

18 MR. BABCOCK: And Mr. Miller is here
19 under subpoena. If he may be excused?

20 THE COURT: Mr. Miller, unless you've
21 got nothing else to do, I'm going to let you go.

22 THE WITNESS: I'll just wait on my
23 sister.

24 MR. BABCOCK: And, Your Honor, his
25 sister Bertha Thompson is here, but her testimony

1 would really be duplicative of his. So we are not
2 going to call her.

3 THE COURT: Whatever you want to do.

4 MR. BABCOCK: Your Honor, that is the
5 case for the Plaintiff.

6 MR. WELLS: Judge, for the record,
7 the Defendant would move for a directed verdict.
8 The grounds for the directed verdict are that the
9 evidence, even taken in the light most favorable to
10 the Plaintiff, is that the Plaintiff took his
11 property by deed from Bowater.

12 We've referred to the 1960 Marett plat
13 which clearly depicted the road in question on the
14 plat. And as a consequence that plat became part of
15 his property description, road and all. And so he
16 is bound by the road shown on the plat.

17 The case on point is Blueridge Company
18 versus Williams, Blueridge Realty at 145 SE 2nd 922.
19 It's a 1965 case. And in that case several lot
20 owners bought or had deeded to them the turnaround
21 circle in a cul-de-sac.

22 It was deeded to them by Greenville
23 County. And they proceeded to erect a wall through
24 the turnaround circle. And their neighbors
25 objected. And, of course, the Supreme Court ruled

1 that the cul-de-sac had to stay open.

2 It said the purchaser of land delineated
3 by a plat is bound by the easements created by the
4 plat. And we submit that the easement -- this
5 easement is shown on the plat that is incorporated
6 into the Bundy deed by the property description.
7 And therefore they are bound as a matter of law by
8 this easement.

9 We would also argue that the evidence in
10 the light most favorable for the Plaintiff is that
11 this road has been in use for a period of more than
12 20 years. It has been in continuous use. It is
13 well, well identified. And that the use has been
14 adverse even to the point I think we heard a threat,
15 a death threat.

16 And it also has been under a claim of
17 right. There has been testimony that Mr. Shirley
18 testified or said that this was his road. And he
19 believed that it was his road. So we believe that
20 we are entitled to a directed verdict as a matter of
21 law.

22 MR. BABCOCK: Your Honor, that is
23 absolutely wrong. Let's look at the claims made by
24 the Defendant in this case. And I want to look at
25 this Marett plat that is in Mr. Bundy's chain of

1 title.

2 There is no question that the 1960 Marett
3 plat was in Mr. Bundy's chain of title. No question
4 about that. What is significant is that it's not in
5 Mr. Shirley's chain of title. The Blueridge case --
6 if you look at the Blueridge case, the Court makes a
7 lot of sense.

8 The plated subdivision showing roadways,
9 you had owners within that platted subdivision in a
10 cul-de-sac tried to get the County -- did get the
11 County to close off part of that road giving the
12 deed to them. And other people in the subdivision
13 said no. That is a platted subdivision.

14 When you've got a platted subdivision
15 you've got rights for everybody because they can see
16 that platted subdivision. It then enures to their
17 benefit. The plat in Mr. Bundy's property would
18 have been unknown to Mr. Shirley or anybody else.
19 It's just Mr. Bundy's chain of title. So the Marett
20 plat doesn't confer any rights to Mr. Shirley.

21 If it were otherwise, anybody else could
22 claim that they had some right to Mr. Shirley -- Mr.
23 Bundy's property as a result of that plat. So there
24 is no case law. And the case law that we've given
25 to you shows that it is essential to look at the

1 chain of title when deciding how a plat impacts
2 property.

3 All Bowater did was put a plat in showing
4 what was on its property. And that is what Mr.
5 Bundy bought. So the Blueridge case and that theory
6 simply doesn't work because it's in Mr. Bundy's
7 chain.

8 The second issue about this road in use
9 for more than 20 years, the testimony that has been
10 presented here is quite clear. The use by Mr.
11 Shirley of the roadway in question, the orange,
12 started in the early 1990s. Before that they had
13 used the blue route.

14 So you've got the route they've been using
15 in the early 1990s. Even if you accept that it was
16 adverse initially, and there has been no testimony
17 about it being adverse. And, in fact, we've cited a
18 case to you when you've got wooded enclosures and
19 whatnot people don't know what is going on back
20 there.

21 So Bowater would have had no knowledge of
22 what Mr. Shirley was or wasn't doing. But even if
23 they had, you wouldn't have a 20-year period because
24 you have the early '90s to 2009 when this case was
25 brought. That is not 20 years. So the adverse

1 testimony has only been in the more recent past in
2 2005, '04 or '05. And -- I think in 2006. That is
3 not enough.

4 It's very -- and we've briefed this in the
5 brief. To prove a prescriptive easement is a very
6 difficult thing to do. You are held to a very
7 strict standard. It can't be loopy goopy. And they
8 simply haven't established the standard for
9 prescriptive easement.

10 THE COURT: Well, at this point,
11 Mr. Wells, I am going to deny your motion for a
12 directed verdict. The Marett plat -- I mean, it's
13 my understanding that the obligation of a surveyor
14 is to report what he sees on the ground at a certain
15 point in time.

16 And when I look at that, I see a woods
17 road. We see them all the time. What rights are
18 established by what is on the ground, I do not know.
19 And the surveyor does not know. The surveyor was
20 putting something on the ground that he saw at that
21 particular time.

22 So at this point I am going to deny your
23 motion for a light most favorable and deny your
24 motion for a directed verdict. And we will plow
25 through.

1 MR. WELLS: Your Honor, I call Brent
2 Shirley.

3 THE COURT: Raise your right hand.
4 Do you swear to tell the truth, the whole truth, and
5 nothing but the truth so help you God?

6 MR. SHIRLEY: Yes, sir.

7 THE COURT: Have a seat.

8 WHEREUPON:

9 BRENT SHIRLEY, being duly sworn and
10 cautioned to speak the truth, the whole truth and
11 nothing but the truth, testifies as follows:

12 DIRECT EXAMINATION

13 BY MR. WELLS:

14 Q. Mr. Shirley, where do you live?

15 A. In Camden. 611 Wateree Street.

16 Q. Okay. And what do you do for a living?

17 A. I'm a taxidermist.

18 Q. All right. And do you do anything else?

19 A. Yes, sir. Me and my son, we paint murals
20 and do artwork, portraits and whatever.

21 MR. BABCOCK: Your Honor, do you have
22 any objection if I sit back here so I can see?

23 THE COURT: Absolutely not. Please
24 do.

25 BY MR. WELLS:

1 Q. Now, in 1985 I believe your father bought
2 some property?

3 A. Yes, sir.

4 Q. Who did he buy that from?

5 A. From a real estate -- from Mr. Whipple
6 through the real estate guy.

7 Q. And how did that sale come about?

8 A. Ms. Kirby sold that. She was the lady
9 that was the real estate at that time. She took my
10 daddy down there because I told him about this land,
11 where it was at. You know, then he contacted
12 Whipple. So through her, she got -- she drove a
13 Cadillac down that road. I'll never forget. A
14 silver gray Cadillac.

15 Q. Now, you say down that road?

16 A. Right by the Miller's house.

17 Q. Look at Defendant's Exhibit 2.

18 A. Yes, sir. Right by the Miller's house.

19 Q. Is that the orange road?

20 A. Yes, sir.

21 Q. On Defendant's 2?

22 A. Yes.

23 Q. Is that the route she took?

24 A. Yes, sir. And from that day on there is
25 no other way that I have been to my property but

1 that way. That is the only way. There is no other
2 road.

3 THE COURT: Hold on. Let's proceed
4 the way that Mr. Wells wants you to proceed. We are
5 talking your daddy buying the property in 1985.

6 THE WITNESS: Right.

7 THE COURT: He bought it through a
8 real estate agent. The real estate agent, as a lot
9 of them do, drive a big Cadillac.

10 THE WITNESS: That is what Ms. Kirby,
11 she always had.

12 BY MR. WELLS:

13 Q. Now, how did you find this property?

14 A. When I was hunting the Game Management
15 area land, that is how I found it. I said, wow,
16 this is -- got marks on one tree. So I contacted
17 them.

18 Q. Now, was that the Bundy property, the
19 property that is now owned by Bundy?

20 A. Yes, sir.

21 Q. The Game Management piece?

22 A. Yes, sir.

23 MR. WELLS: Let me put this tax map
24 up.

25 MR. BABCOCK: Which exhibit is that?

1 MR. WELLS: This is Defendant's 6.

2 THE COURT: Six? Here's a clip,
3 John.

4 BY MR. WELLS:

5 Q. You were hunting the Bundy property?

6 A. Yes, sir.

7 Q. Now, tell me how the Game Management
8 Program works. How do you get on the Game
9 Management area?

10 A. Well, you got a map. They give maps out
11 in all the counties that tells you where you can go
12 out to Game Management areas to hunt. And before
13 you go on that property, you have to have a permit
14 along with your hunting license.

15 Q. Is the permit different from the hunting
16 license?

17 A. Yes, sir.

18 Q. Do you have to pay for the permit?

19 A. It's extra. I think it was about \$10 back
20 then.

21 Q. Okay. And you have to pay for the hunting
22 license?

23 A. Yes, sir.

24 Q. Now, the hunting license runs, I think,
25 from July 1st to June 30th each year; is that right?

1 A. Uh-huh.

2 Q. And then you have buy another one?

3 A. That's right.

4 Q. How about the Game Management permit?

5 A. It only lasts a season, a hunting season.

6 Q. But do you have to guy a new one every
7 year or do you buy a lifetime permit or what do you
8 do?

9 A. A new one each year.

10 Q. So before your parents bought the piece of
11 property that this is -- is this the piece right
12 here?

13 A. Yes.

14 Q. And it's marked Number 1. It's Tract
15 Number 1 on this tax map. Before your parents
16 bought that, did you purchase the Game Management
17 permit --

18 A. (Nodded head.)

19 Q. -- to hunt the Bowater property?

20 A. Yes, sir. All around. Went all the way
21 through the creek.

22 Q. Okay. Did your parents hire an attorney
23 when they purchased the property?

24 A. Yes, sir.

25 Q. Who did they hire?

1 A. Mr. Jacobs.

2 Q. And how did they know him?

3 A. Well, he came in the store a lot. I mean,
4 did some foxes and whatever. Been awhile back. A
5 long time.

6 Q. Did he handle the closing?

7 A. Yes, sir.

8 Q. Was there ever any mention of a problem
9 with the road or access to the property?

10 MR. BABCOCK: Object to the form,
11 Your Honor. That would be hearsay.

12 THE COURT: Were you at the closing?

13 THE WITNESS: No, sir, I wasn't.

14 THE COURT: I'll sustain.

15 BY MR. WELLS:

16 Q. I'm going to show you some other pictures
17 and ask you -- this is Defendant's Exhibit 1. Can
18 you find your property on Defendant's Exhibit 1?

19 A. That is the little road down to it right
20 there.

21 Q. All right. Could you put an X on
22 Defendant's Exhibit 1 where your property is?

23 A. (Witness complied.)

24 Q. Is that a field?

25 A. That is a field.

1 Q. Where you put the X?

2 A. That's right.

3 Q. Now, where is the road that is used to
4 access your property?

5 A. Right in there. See, this is -- all their
6 houses wasn't even on there -- on this picture.
7 It's right back here is her house is, maybe one
8 house back then. '57.

9 Q. Now, let me show you another one, which is
10 Defendant's Exhibit 2. And what is the date on that
11 one?

12 A. '64.

13 Q. Can you find your property on that
14 picture?

15 THE COURT: Plaintiff's Exhibit 2 is
16 what year?

17 MR. BABCOCK: That is the most
18 recent. That is probably within the last two or
19 three years.

20 THE COURT: Okay. And then
21 Defendant's Exhibit 2?

22 MR. WELLS: Defendant's Exhibit 1 is
23 1956.

24 THE COURT: All right.

25 BY MR. WELLS:

1 Q. Can you find your property on Defendant's
2 Exhibit 2?

3 THE COURT: Which is what year?

4 MR. WELLS: '64.

5 THE WITNESS: It should be right in
6 here.

7 MR. BABCOCK: Objection, Your Honor.
8 Wait a minute. Your Honor, that is totally
9 improper. The witness has to answer questions on
10 his own. Counsel can't show the witness things.

11 THE COURT: Well, let's get oriented
12 here. Put an X where your property is.

13 BY MR. WELLS:

14 Q. Let me show you Defendant's Exhibit 3.
15 Can you find your property on that one?

16 A. (Witness complied.)

17 Q. Put an X. You got an X there where your
18 property is on that one?

19 THE COURT: What year is Exhibit 3?

20 THE WITNESS: '69.

21 BY MR. WELLS:

22 Q. Let me show you Defendant's Exhibit 4.

23 A. There is my field right there.

24 THE COURT: And Exhibit 4 is what
25 year?

1 MR. WELLS: Exhibit 4 is 1974.

2 BY MR. WELLS:

3 Q. Let me show you Defendant's Exhibit 7 and
4 see if you can find it on this photograph.

5 A. Right in here. There is the Miller house.

6 COURT REPORTER: Could you keep your
7 voice up, please, sir.

8 THE COURT: You need to speak up, Mr.
9 Shirley.

10 THE WITNESS: That is the road that
11 goes into the field.

12 THE COURT: Looking at Defendant's
13 Exhibit Number 7?

14 MR. BABCOCK: What year is this?

15 MR. WELLS: 1977.

16 BY MR. WELLS:

17 Q. Now, Mr. Shirley, after your parents
18 bought the property, how did you get back there?

19 A. That one way. No other way. No other
20 way.

21 Q. The Plaintiff has shown a blue line on
22 Plaintiff's Exhibit 2 going by Mr. Whit Boykin's
23 property.

24 A. No, sir. I don't --

25 Q. Did you use that route to access your

1 property?

2 A. Never have. I never have. That is one
3 way in right by the Miller house.

4 Q. When you were hunting the property as a
5 part of the Game Management Area Program, which way
6 did you use to get back to the Bowater site?

7 A. That entrance.

8 Q. Which entrance?

9 A. Where they had the iron posts, you know,
10 by the Miller -- that same -- on my road.

11 Q. The same road --

12 A. Yes, sir.

13 Q. -- that you are saying that you use now?

14 A. Yes, sir.

15 Q. Did other hunters use that road as well or
16 did they use another route?

17 A. They used that road. I don't know where
18 they could go on around the other property part
19 unless they just crossed over somebody else's
20 property. This was specially meant -- when they put
21 those pipes down and that cable, that was for the
22 Game Management. You see it everywhere. That is
23 the Game Management logo. I mean, that is what they
24 do.

25 And people park -- whoever gets there

1 first to hunt that Game Management, it's a rule that
2 they will have a pull off -- a little place where
3 you pull off and park their car. And if you see
4 somebody there, you won't go there. You will go
5 somewhere else. That wasn't but a little -- you
6 know, it wasn't a great gigantic place to hunt. It
7 was a little small area.

8 Q. All right. After you bought -- excuse me.
9 After your parents bought the property that you own
10 now --

11 A. Yes, sir.

12 Q. -- did you continue to buy a Game
13 Management area permit --

14 A. No.

15 Q. -- every year in order to hunt?

16 A. No.

17 Q. Why not?

18 A. Because I had my own place to hunt.

19 Q. Okay. Why did your family buy this
20 property?

21 A. For us to hunt. And we was going to build
22 a pond in the future. And we did. We built a pond.

23 Q. Does it have fish in it?

24 A. Yes, sir.

25 Q. Do you use the pond to fish?

1 A. Yes, sir.

2 Q. When was the pond built?

3 A. About four years after we got the
4 property.

5 Q. You got it in 1985?

6 A. About four years. We had bulldozers go
7 down there and fix the dam on it and all.

8 Q. How did you get the bulldozers down there?

9 A. Through that road by the Millers.

10 Q. Do you remember the gate that Mr. Miller
11 was talking about that his mother put up?

12 A. Yes, sir.

13 Q. What happened there?

14 A. Well, I went -- my daddy was in the
15 hospital at the time with heart trouble. And I'll
16 never forget that. I went down there and the
17 gate -- she had a little wooden gate put up there.

18 And I had to go back there. I had some
19 ducks back there. I was feeding my ducks, Mallards.
20 And I turned around and said, "Damn, there is a gate
21 up here." So I went back and talked to Rolly
22 Jacobs. No. No. I'm sorry. Not him. Not Rolly.
23 It was Magistrate Hardin. And he told me --

24 MR. BABCOCK: Objection, Your Honor.

25 BY MR. WELLS:

1 Q. You can't say what the judge told you.
2 What did you do?

3 A. Sir?

4 Q. What did you do?

5 THE COURT: Hold on. You can't say
6 what somebody else told you, okay, if they are not
7 here.

8 THE WITNESS: Oh, okay.

9 THE COURT: As a result of you seeing
10 Judge Hardin, what happened?

11 THE WITNESS: He told me --

12 THE COURT: No. No. Don't tell me
13 what he said. Tell me what happened.

14 THE WITNESS: I took the gate down.

15 THE COURT: Okay.

16 THE WITNESS: I took it down the next
17 day. I'm sorry. I didn't know.

18 THE COURT: That's okay. You just
19 can't say what somebody else said.

20 THE WITNESS: I'm not a court person.

21 THE COURT: I understand. Listen to
22 the questions that Mr. Wells is asking.

23 BY MR. WELLS:

24 Q. Did you continue to use the road that is
25 marked on Defendant's -- excuse me. Plaintiff's 2

1 with the orange line?

2 A. Yes, sir.

3 Q. You continued to use that?

4 A. Yes, I did.

5 Q. After the gate was put up and taken down?

6 A. Uh-huh.

7 Q. Mr. Shirley, what gives you the right to
8 use that road?

9 A. Because I think it's my road to go into my
10 property that we bought. My daddy bought it.

11 Q. What do you base that on?

12 A. Because it continues -- it's the Saxon
13 Road. It continues all the way through there. That
14 is Saxon Road.

15 Q. Do you know what the address of your
16 property is?

17 A. It's -- I got it on my paperwork over
18 there. I don't know exactly, but I have an address
19 to build a house.

20 Q. What is the address -- what is the house
21 address?

22 A. It's Saxon Road. It's 84 or 85 V or
23 something like that. It's on that paper over there.
24 And my boy, he told me he wants to build a cabin,
25 that is what his goal is, for that right at the

1 pond.

2 Q. Okay. Any other reason why you believe
3 that you have the right to use that road?

4 A. That is a continuation of -- I think it
5 is, of Saxon Road going in. It's the only way I got
6 to go. There is no other way. There is no other
7 road. And people keep saying there is, and there is
8 not. There is not another road.

9 Q. Let me ask you about Defendant's
10 Exhibit 7. I think Mr. Bundy was indicating that
11 there is a route to your property through Mr. Ricky
12 Boykin's property. Through the woods over here
13 somewhere, is there a road?

14 A. No. There is no road.

15 Q. Does it exist?

16 A. I don't know of a road back there. If
17 there was I would -- the lady that we got the
18 property from, she said here is the way you go to
19 it. And that was the way she took us in there.

20 Q. The way she took you, you are saying was
21 the orange line road?

22 A. Yes, sir.

23 Q. Have you had arguments with the Millers?

24 A. Well, she just didn't want us to go flying
25 by, you know, my boy. And he was learning to drive.

1 And he got -- he was going too fast. I said, Colt,
2 slow down. Don't be -- you know, you got to be
3 right to these people, man.

4 THE COURT: How old is Colt now?

5 THE WITNESS: Colt is 28, yes, sir.

6 BY MR. WELLS:

7 Q. All right. Since your parents bought the
8 property in 1985, have you continuously used that
9 road to access your property?

10 A. Yes, sir, the only way. That is the only
11 way. There ain't no other way.

12 Q. And what do you go back there to do?

13 A. I go hunting. And we will go back -- if
14 we need a tree to paint on a canvas, we will go
15 there and take a photo of it. I got big old oak
16 trees. And we do a lot of art work. And I go back
17 there and do whatever I want to do. Just the other
18 day Colt went back with some of his friends and shot
19 skeet, you know. Just anything. Right over the
20 pond, you know.

21 Q. Now, tell me about the gate that you put
22 up after Mr. Bundy bought the property. Why did you
23 put the gate up?

24 A. Well, it was purposely for both of us to
25 keep people out from putting trash in on the road.

1 Throwing out junk.

2 Q. Did he agree to do that?

3 A. Yes, sir.

4 Q. And do you remember the incident where the
5 road was blocked by the clearing contractor?

6 A. Yes, sir.

7 Q. What happened?

8 A. I lost my cool. And told him -- my wife
9 couldn't get by -- my boy, he was a younger boy. A
10 young boy with his friends. That was the first time
11 he ever went alone by himself, you know, camping
12 out. And it was blocked. And I said, hey, you got
13 to move this tree, man. Yeah. Yeah, I was mad.

14 Q. Okay. And the final time when he asked
15 you to move the gate, do you remember talking to him
16 that day?

17 A. Yes, sir.

18 Q. Did you threaten him that day?

19 A. No. No. I have not -- I heard his
20 statements before. I did not threaten him to kill
21 nobody. You don't do that. Yeah, I cussed the man
22 out. Yeah. I can say that. I got mad, but I
23 didn't say I was going to kill him. That is a bad
24 deal. You don't do that. You don't do that.

25 Q. Now, when Bowater owned the Bundy

1 property, let me go back to that, do you remember
2 the cable being across a post?

3 A. Yes.

4 Q. How did you get back to your property at
5 that time?

6 A. Via the game warden. I knew him real
7 good. He gave me a key.

8 Q. Do you know if he had the sanction of
9 Bowater to do that?

10 A. I don't know. All I know is I had a key.
11 That was good of him to do that.

12 Q. Did you go in and out whenever you wanted
13 to?

14 A. Yes, sir.

15 Q. Did anyone ever give you written
16 permission to use that road?

17 A. No.

18 Q. Did Mr. Bundy ever give you written
19 permission to use that road?

20 A. No, sir.

21 Q. Has anybody ever given you oral permission
22 to use that road?

23 A. No, sir.

24 Q. Have you ever felt the need to seek
25 permission to use that road?

1 A. No.

2 Q. When you first came to the property was
3 that road in existence?

4 A. Yes. Sure it was.

5 Q. Was it cleared so that a person could
6 drive down it?

7 A. Yes.

8 Q. Did it look approximately like it looks
9 now?

10 A. Yes, sir, it did. Wide open. I mean,
11 yeah. It wasn't grown up or nothing. Just like
12 somebody had been using it, which they were.

13 Q. Let me ask you that question. When you
14 bought the property was that road grown over in any
15 way?

16 A. No, because there were night riders that
17 went back there and done their thing. Women and
18 men, you know.

19 Q. Did it appear that it had been in constant
20 use?

21 A. Yes, sir.

22 Q. And that is when you bought the property
23 in 1985; is that right?

24 A. Yes, sir.

25 MR. WELLS: Those are all the

1 questions I have.

2 MR. BABCOCK: Your Honor, when did
3 you indicate your conference was?

4 THE COURT: At 3:30.

5 MR. BABCOCK: Okay.

6 THE COURT: Can we do five minutes?

7 MR. BABCOCK: Sure.

8 THE COURT: Would that interrupt
9 anything?

10 MR. BABCOCK: No, that would be good.

11 (Discussion off the record.)

12 CROSS EXAMINATION

13 BY MR. BABCOCK:

14 Q. Mr. Shirley, we haven't met before, but my
15 name is Keith Babcock. And I'm here on behalf of
16 Mr. Bundy today. You were previously asked some
17 questions about exhibit -- or Defendant's Exhibit 6.
18 Do you remember that?

19 A. Yes, sir.

20 Q. All right. And what is this a plat of, do
21 you know?

22 A. A plat of Sumter County and Kershaw
23 County.

24 Q. Do you know where it came from?

25 A. No.

1 Q. I'd like you to come down here if you
2 would, sir. Now, the line -- this little dotted
3 line here, is that the line that you use to get to
4 your property today?

5 A. Yes, sir.

6 Q. That is what you use, right?

7 A. Yes.

8 Q. And that is a little broken hashmark line,
9 correct?

10 A. Yes.

11 Q. Saxon Road down here is straight lines,
12 correct?

13 A. Uh-huh.

14 Q. And if you look here at the parcel that
15 says 21, there is no broken lines on that pathway,
16 is there?

17 A. No, sir.

18 Q. None at all. A couple of lines over here,
19 but nothing over here, is there?

20 A. Correct. That's right.

21 Q. And now --

22 A. That is the way they drew it.

23 Q. This is your exhibit, sir.

24 A. I know.

25 Q. Up to the property line and not beyond,

1 correct?

2 A. (Nodded head.)

3 Q. Okay. You can have a seat, sir. Now,
4 your first experience with this property was when
5 you were hunting it pursuant to the Wildlife
6 Management Program, correct?

7 A. Right.

8 Q. And your family bought the property in
9 1985. How long before then were you hunting the
10 Bowater property with the Wildlife Management
11 Program?

12 A. Maybe, I don't know, seven or eight years,
13 maybe. Maybe, something like that.

14 Q. So you were out there for a few years, and
15 you found this property which you ultimately -- your
16 family ultimately purchased; is that right?

17 A. Yes.

18 Q. Now, in your seven or eight years on the
19 property before. So I guess we are talking late
20 '70s, '80s, something like that; is that fair?

21 A. Yes, sir.

22 Q. You hunted all over Bowater property?

23 A. Uh-huh.

24 Q. So you were familiar with this property in
25 general?

1 A. Yes.

2 Q. And you know there are lots of different
3 paths and pathways through the property, isn't
4 there, correct?

5 A. There would be old wagon roads maybe on
6 that creek around.

7 Q. Sure. And there were also roads where
8 Bowater was getting timber and paths that they
9 caused?

10 A. Yes, sir. Uh-huh.

11 Q. Now, I want to be real clear on this
12 point. There is a line in blue on Plaintiff's
13 Exhibit 2.

14 A. Uh-huh.

15 Q. And that was a way that people accessed
16 this Bundy tract, the Bowater tract, at one point in
17 time, didn't they?

18 A. I don't know about that.

19 Q. All right. Well, wait a minute. You know
20 the property?

21 A. The little land -- the road stops right
22 here, peters out.

23 Q. Well, let's go slow. So you are aware of
24 a road here, the first part of the blue?

25 A. Yes, sir.

1 Q. All right. And you are saying you are not
2 aware of a road beyond that?

3 A. Never have I ever used it.

4 Q. Well, I didn't ask you that. But you
5 could hunt property without actually using that
6 road. You were familiar with that road though,
7 weren't you?

8 A. I never went on that road. I wasn't
9 aware.

10 Q. I'm asking a different question. I'm
11 going to get to that question in a minute. I'm
12 asking if you are familiar with there being a road
13 there?

14 A. I knew there was a road coming up. It's a
15 straight shot.

16 Q. Okay. That's right. And that road, that
17 straight shot just as you called it, that is
18 shown -- get oriented here. That is shown -- if we
19 look at Defendant's Exhibit 1, you showed your
20 property back here. That is shown right here where
21 Saxon Road comes -- that road goes back up there,
22 isn't it? Sure it is.

23 A. Sure nothing. I don't believe that. I
24 believe this is my road here.

25 Q. That is your road here. This is the other

1 road, the one we were just looking at right here,
2 the blue. That is where it splits, isn't it? It's
3 right back there. And, in fact, when we look at
4 Defendant's Exhibit 1, there are all kinds of little
5 roadways in this general area, aren't there?

6 A. (Nodded head.)

7 Q. That is a yes, isn't it?

8 A. Yes, sir.

9 Q. And then if we look at Defendant's
10 Exhibit 7, just to orient ourselves here, there is
11 the Miller tract there, right?

12 A. Right.

13 Q. And your tract is back over here, right?

14 A. Yes, sir.

15 Q. And the way you are saying you go now is
16 to come up Saxon Road, go through the Miller
17 property, and then come on over, correct?

18 A. That's right.

19 Q. And that road we were just looking at,
20 that blue road is right here. And you can see that
21 path right the way through, can't you?

22 A. It goes to the Rooster Pit, doesn't it?

23 Q. That's right. You know that road. Now I
24 want to ask you --

25 A. And it stops right there.

1 Q. At the Rooster Pit?

2 A. Yeah.

3 Q. Okay. But the road now goes to the
4 Rooster Pit. And I want to ask you again, with this
5 road that you now remember, isn't it true that you
6 used this road for a period of time because it was a
7 straight shot to go back to this property --

8 A. No, sir.

9 Q. Let me finish my question. Isn't it true
10 that you did use that road for a period of time?

11 A. I just -- the exact way by foot, but I
12 knew it was there.

13 Q. All right. So now you know it was there,
14 but you are denying ever having used it?

15 A. It stops. It goes until it stops.

16 Q. Let me ask you this. Did you ever have a
17 dispute with Mr. Boykin --

18 A. No, sir.

19 Q. Let me finish my question, sir.

20 A. You keep saying that --

21 Q. Let me finish my question. Did you ever
22 have a dispute with Mr. Whit Boykin concerning going
23 across his property?

24 A. No, sir.

25 Q. You deny that ever occurred? You deny

1 that ever occurred?

2 A. Yes, sir. I never went across his
3 property.

4 Q. You deny having a dispute with him or you
5 deny going across his property, which?

6 A. I didn't have a dispute right down there.

7 Q. Did you have a dispute with him on
8 something else?

9 A. Something else, yeah.

10 Q. You did have a dispute with him. What was
11 that something else?

12 A. That was another road. That was somewhere
13 else. That was another place.

14 Q. All right. When was that dispute?

15 A. It had nothing to do with this.

16 Q. Okay. But Mr. Whit Boykin owns property
17 here, doesn't he?

18 A. Yes.

19 Q. All right. Where is -- can you show us
20 where --

21 A. I don't know where his property is.

22 Q. All right. But if you are coming up the
23 blue line, it's before you get to your property,
24 isn't it?

25 A. Yes, sir.

1 Q. Is that right?

2 A. I reckon.

3 Q. Now, your dispute with Mr. Whit Boykin,
4 what was that about?

5 A. He pulled us over on the road one night.
6 We was driving.

7 THE COURT: Are you talking about an
8 old man?

9 THE WITNESS: Yes, sir. A long time
10 ago. And something we wasn't even doing. Anybody
11 could drive on the road like that. He had us
12 stopped in the road, Mr. Boykin.

13 BY MR. BABCOCK:

14 Q. And when did this occur?

15 A. And he thought we were doing something we
16 wasn't. He thought -- he had the wrong people that
17 time, all kind of crazy stuff.

18 Q. There was a dispute then?

19 A. Yes, sir.

20 Q. Did you all have an argument?

21 A. Yes, sir.

22 Q. Did you lose your temper? Did you lose
23 your temper?

24 A. No. My daddy did. He was driving.

25 Q. So your daddy lost his temper?

1 A. Yeah.

2 Q. And when did this occur?

3 A. That was between -- daddy was cussing him
4 out and stuff. I was sitting in the truck.

5 Q. Okay. And this would have been sometime
6 maybe in the late '80s?

7 A. In the '70s, early '70s.

8 Q. How do you remember that?

9 A. Because I know.

10 Q. You sure it wasn't in the '80s?

11 A. No, sir. I think it was in the '70s.

12 Q. Now, the reason you think you've got the
13 right to use this what I call the disputed pathway
14 way to get to your property is because you think
15 that it's part of Saxon Road?

16 A. Yes, sir.

17 Q. And you think Saxon Road is fully a public
18 roadway; is that right?

19 A. It's continuing off that road.

20 Q. That isn't what I asked you. You
21 testified in your deposition -- we are going to look
22 at that in a minute, but I think you testified
23 several times in your deposition that you thought
24 you had the right to use this because it was a
25 public road. You remember that, don't you?

1 A. Yes, sir.

2 Q. All right. And you were using it just
3 because you had the same rights as everybody else?

4 A. That is the way to get to my property.

5 Q. But you believe it to be a public road?

6 A. I guess.

7 Q. All right. Well, that is what you
8 testified to, wasn't it?

9 A. Yes, sir.

10 Q. And for the time that you've been using
11 Saxon Road and then your pathway to get to your
12 property, through that entire time Saxon Road has
13 been maintained by the County up to the Miller
14 property, correct?

15 A. Right.

16 Q. And there is a big difference in terms of
17 how Saxon Road looks when you leave the Miller
18 property -- when you get up to the Miller property
19 and then when you cross their property, isn't there?

20 A. Yes, sir.

21 Q. It doesn't look at all like up to their
22 property. No County maintenance, is there?

23 A. No, sir.

24 Q. And there is no maintenance back with the
25 orange, is there?

1 A. No, sir.

2 Q. And you saw the video which we played
3 earlier today. That showed the way the property
4 looked a year ago, didn't it?

5 A. Yes, sir.

6 Q. And it looks pretty much the same today.
7 Grown up a little bit more, but pretty much the
8 same, doesn't it?

9 A. It's not grown up. I bush-hogged it the
10 other day.

11 Q. You bush-hogged --

12 A. I bush-hogged my field. So I just
13 bush-hogged, you know, so it wouldn't be scraping my
14 truck.

15 Q. All right. But so then it looks about
16 like it did on the video?

17 A. Yes, sir.

18 Q. Now, when the Wildlife Management Program
19 was in existence you saw other hunters back on the
20 Bowater property, correct?

21 A. (Nodded head.)

22 Q. Of course, as we know that program ended
23 when Mr. Bundy bought the property in 2003. So as I
24 think you testified in your deposition, the only
25 other people you've seen back here or using this

1 pathway were the hunters when the Wildlife
2 Management Program was in business, correct?

3 A. Correct.

4 Q. And since that time nobody else?

5 A. That's right.

6 Q. Just so we are clear -- and I know you are
7 not a lawyer, so I'm not asking for a legal question
8 on this. I'm just going to ask you to read a
9 portion of the deed to yourself. And I'm going to
10 look at Exhibit D. And there is a property
11 description in the middle of Exhibit D. You've
12 looked at this before, haven't you?

13 A. Yes, sir.

14 Q. I'd like you to take a look at that
15 property description in the middle of Exhibit D.
16 You see that?

17 A. Yes, sir.

18 Q. And it talks about the different sides of
19 your property. And it shows that there is other
20 people who own every side around the property?

21 A. Right.

22 Q. No reference to any road, correct?

23 A. That's right.

24 Q. No reference to Saxon Road, is there?

25 A. No, sir.

1 Q. And no reference to any easement, is
2 there?

3 A. No.

4 Q. And the same is true -- let me show you
5 Exhibit C to your stipulation or the stipulation
6 concerning your property. And that property
7 description also -- I'll let you read it. That is
8 virtually the same property description. It talks
9 about the different sides of the property?

10 A. Yes.

11 Q. And that there are private owners on each
12 side, correct?

13 A. Yes.

14 Q. No reference to any roadway, correct?

15 A. Uh-huh.

16 Q. You have to --

17 A. Yes.

18 Q. There is no reference there. And there is
19 no reference to Saxon Road, is there?

20 A. No, sir.

21 Q. And there is no reference to any easement,
22 is there?

23 A. No, sir.

24 Q. And I'm going to hand you the plat of your
25 property which is also in the stipulated chain which

1 is a 1973 plat prepared for somebody who owned the
2 property before. You've seen this, haven't you,
3 sir?

4 A. Yes, sir.

5 Q. And if we look at that plat, it shows on
6 one side Tract Number 6; is that right?

7 A. Yes.

8 Q. And then it shows -- that would be Bowater
9 Tract Number 6, correct?

10 A. Correct.

11 Q. And on one side Tract Number 2, correct?

12 A. Yes.

13 Q. And, again, Bowater's tract. And then
14 another tract that says now formally with -- is that
15 what it says?

16 A. Right.

17 Q. Nothing shown with regard to any roadway,
18 correct?

19 A. On this one, yes, sir.

20 Q. That's right. And nothing shown
21 concerning Saxon Road, is there?

22 A. No, sir.

23 Q. And nothing shown concerning any easement,
24 is there, sir?

25 A. (Shook head.)

1 THE COURT: Is that a yes or a no?

2 THE WITNESS: No, sir.

3 BY MR. BABCOCK:

4 Q. Let me ask you an easier question. Is
5 there anything shown about an easement on that
6 survey I just showed you?

7 A. No, sir.

8 Q. Now, I want to talk a little bit about the
9 Bowater cable. And looking at Plaintiff's
10 Exhibit 2, the Bowater cable was about where this
11 line is showing the gate, correct?

12 A. Yes, sir.

13 Q. All right. Right after you get on what
14 was the Bowater property, after you've left the
15 Miller tract, correct?

16 A. Right.

17 Q. And when you first came to that -- to be
18 hunting back there, you saw that cable, correct?

19 A. That's right.

20 Q. And that cable was there up until I guess
21 at some point in time after Mr. Bundy -- before Mr.
22 Bundy bought the property, correct?

23 A. Yes, sir.

24 Q. And you were given a key to that gate,
25 correct?

1 A. Yes, sir.

2 Q. And that was given to you by -- who gave
3 you that key?

4 A. The game warden did.

5 Q. All right. And also is it Chuck Thompson?

6 A. Yes, sir.

7 Q. Who is he with?

8 A. He was the game warden for the County of
9 Kershaw County.

10 Q. So you were able to use that then to get
11 back to your property, unlock the gate, and go back
12 to the property?

13 A. Yes, sir.

14 Q. And that gate or cable, as I understand
15 it, was pretty much up there -- down during hunting
16 season, but put up after hunting season; is that
17 correct?

18 A. That's right.

19 Q. So that is why to get to the property you
20 would have needed the key to get back there?

21 A. Yes, sir.

22 Q. And they gave you the key?

23 A. That's right.

24 THE COURT: When did you get the key,
25 what year?

1 THE WITNESS: I don't know. It's
2 been a long time. I got a key --

3 BY MR. BABCOCK:

4 Q. Sometime after you bought the property so
5 you could get back there when it was off season,
6 right?

7 A. Yes, sir.

8 MR. BABCOCK: Now, I want -- I don't
9 want to make you late.

10 THE COURT: If you are at a good
11 stopping place?

12 MR. BABCOCK: This is a good stop.

13 THE COURT: Let's stop here. Okay.

14 (Discussion off the record.)

15 MR. BABCOCK: We had -- I'm sorry.
16 How long did they give you?

17 THE COURT: Well, it's just kind of
18 hard to say. I think it's safe to say that you've
19 probably got another good 20 minutes.

20 MR. BABCOCK: I don't have that much.
21 I just didn't know -- I didn't know what I was
22 working with.

23 THE COURT: Yeah. It's just one of
24 those things.

25 BY MR. BABCOCK:

1 Q. Okay. All right. Mr. Shirley, you had a
2 conversation with Mr. Bundy about putting up the
3 gate?

4 A. Yes, sir.

5 Q. And you ultimately put up the gate. And
6 Mr. Bundy bought his property in 2003. So it might
7 have been like later in 2003, maybe early 2004,
8 sometime in there?

9 A. Yes.

10 Q. And you put up the gate at that point in
11 time. And you put it up in about the same location
12 the Bowater cable was, correct?

13 A. Yes, sir.

14 Q. And we've got that shown on Defense
15 Exhibit Number 6 and labeled gate right there.

16 A. Uh-huh.

17 Q. Now, I want to make sure I understand the
18 conversation that you had with Mr. Bundy when you
19 called him up and was mad because -- you were mad
20 because there was a log down?

21 A. Yes, sir.

22 Q. And your son was having a birthday party
23 or something like that?

24 A. Yes, sir. He was with some friends
25 camping on the pond down there.

1 Q. How old was he at that point?

2 A. He wasn't driving. It was like right
3 before he started driving.

4 Q. So I think you indicated in your
5 deposition he was 13, 14, something like that?

6 A. Yes, sir.

7 Q. And this would have been in the 2004 time
8 period. 2004, 2005, somewhere in there, correct?

9 A. Yes, sir.

10 Q. And you got mad?

11 A. (Nodded head.)

12 Q. Is that right?

13 A. That's right.

14 Q. And you were mad because there was a log
15 down?

16 A. A tree. The whole top of a tree laying
17 across the road.

18 Q. And so you called Mr. Bundy up, and you
19 cussed him out, didn't you?

20 A. Yes, I did. My wife couldn't get down to
21 my boy. Something could have happened.

22 Q. So you called him up. So you called him
23 up, and instead of saying, hey, Bill Bundy, what is
24 up here? There is log down. My wife can't get
25 through. You just started cussing him out, is that

1 right?

2 A. Yes, sir.

3 Q. And you cussed him out for a period of
4 time. He didn't even know who was calling. And
5 after you did that, you were real mad, weren't you?

6 A. No, I wasn't that mad.

7 Q. Well, come on, Mr. Shirley. Your wife
8 couldn't get through because of the log in the
9 drive. You are upset. And you called him up and
10 you cussed him out?

11 A. I did.

12 Q. All right. So you are mad?

13 A. Okay.

14 Q. All right. And you were so mad that you
15 threatened to kill him, didn't you?

16 A. No, I did not. No, sir. No, sir.

17 Q. All right.

18 A. I did not. No.

19 Q. So you were mad. You lost your temper?

20 A. Yes.

21 Q. You cussed him out. Said all kinds of
22 things to him. You agree with all of that?

23 A. Yes.

24 Q. But you say you didn't say you would kill
25 him?

1 A. No, not kill nobody.

2 Q. But you cussed him out, and you lost your
3 temper, didn't you?

4 A. Yes, sir.

5 Q. And that has happened before, hasn't it,
6 losing your temper and cussing people out? That has
7 happened. You've got a temper, don't you?

8 A. You have, too. Everybody has it seems
9 like.

10 Q. Everybody has, but not everybody calls up
11 somebody and cusses them out.

12 A. Yes, sir.

13 Q. Not everybody does that.

14 A. That is wrong. That is wrong.

15 Q. All right. So you've got that kind of a
16 temper, don't you?

17 A. Yes, sir.

18 Q. Short fuse some people call it. That is
19 right, isn't it? Isn't it?

20 A. Probably.

21 Q. Okay. Now, let's go to the next
22 conversation with Mr. Bundy when he called you and
23 asked you to take down the gate. You remember that
24 conversation?

25 A. Yes, sir.

1 Q. Your short fuse lit in again, didn't it?

2 A. Yes, sir.

3 Q. And you got mad again, didn't you?

4 A. (Nodded head.)

5 Q. That is a yes, isn't it?

6 A. Yes.

7 Q. And you cussed him out again, didn't you?

8 A. I did.

9 Q. Now, all he's asked you to do is take down
10 the gate, but you decided to cuss him out. Or I
11 guess maybe you didn't decide. You just lost your
12 temper, right?

13 A. Yes, sir.

14 Q. And when you lost your temper on that
15 conversation you threatened to kill him then, didn't
16 you?

17 A. No, I did not. I did not. No. You don't
18 do that. You don't go kill people. No.

19 Q. Have you ever threatened to hurt somebody?

20 A. No, sir.

21 Q. You've never said, "I'm going to hurt
22 you"?

23 A. No.

24 Q. Never?

25 A. I'm not big enough to hurt nobody.

1 Q. Never in your entire life?

2 A. I'm not big enough to hurt nobody. Look
3 at me. I'm not a big person, a strong person.

4 Q. Plenty of scrappy guys I've known who have
5 been small people.

6 A. No.

7 Q. Did you ever get in fights when you were
8 younger?

9 A. Yes. Everybody did.

10 Q. And you also got into situations where you
11 were trespassing on property, didn't you?

12 A. Yes.

13 Q. All right. In fact, you were arrested and
14 convicted I think eight or 10 times on that?

15 A. Yes.

16 Q. When was the last time you got in a fight
17 with someone?

18 A. I don't know. Been a long, long time. A
19 real fight, no. I don't fight. I did when I was
20 back -- when I was a little boy.

21 Q. Back when you were a little boy?

22 A. Back -- way back like that.

23 Q. You got charged with assault and battery
24 just a few years ago on something, didn't you?

25 A. That was not.

1 Q. It was a process server. Are you denying
2 that you were charged?

3 A. Who?

4 Q. With that process server?

5 A. Yes, but I didn't do anything.

6 Q. You were charged, weren't you?

7 A. I didn't have to do anything. I mean,
8 that was it. They said I did.

9 Q. They said that you did?

10 A. Yes, sir.

11 Q. But even though they said you did, you say
12 you didn't?

13 A. That's right.

14 Q. Just like you said you didn't threaten to
15 kill Mr. Bundy; is that right?

16 A. That's right.

17 MR. BABCOCK: That is all I have.

18 REDIRECT EXAMINATION

19 BY MR. WELLS:

20 Q. Mr. Shirley, did you ever use any route
21 other than this dotted line to get to your property?

22 A. No, sir. That is the only way.

23 Q. And Mr. Babcock asked you about being
24 convicted for trespassing in the past?

25 A. Yes.

1 Q. Have you ever been convicted of
2 trespassing?

3 A. That was back when I was about 20 years
4 old. 20, 25, like that.

5 Q. It's not in your nature to ask permission,
6 is it?

7 A. No, sir.

8 Q. Did you ever feel the need to seek
9 permission to use the road to your property?

10 A. No, sir.

11 Q. Did you ever seek permission from anyone
12 to use that road?

13 A. No, sir.

14 Q. Did you ever get permission from anybody
15 to use that road?

16 A. No, sir.

17 Q. Did you believe that you had the right to
18 use that road?

19 A. I got the right.

20 MR. WELLS: That is all the questions
21 I have.

22 THE COURT: Do you have a follow-up?

23 MR. BABCOCK: I do. A very brief
24 one.

25 THE COURT: Yes, sir.

1 RECROSS EXAMINATION

2 BY MR. BABCOCK:

3 Q. You never asked permission to use that
4 road because you thought it was a public road,
5 right?

6 A. Yes, sir.

7 Q. And you thought, just like everybody else,
8 you had a right to use that road?

9 A. That's right.

10 MR. BABCOCK: That is all I have.

11 THE COURT: Gentlemen, I've asked
12 some questions for clarification purposes. I have a
13 couple substantive questions that I should have
14 asked if there was any problem with me doing so.
15 Mr. Babcock, do you have any --

16 MR. BABCOCK: No objection.

17 THE COURT: Mr. Wells?

18 MR. WELLS: No objection.

19 THE COURT: At the very beginning of
20 your testimony you said that you never had used the
21 blue line?

22 THE WITNESS: Yes, sir.

23 THE COURT: A straight shot as you
24 called it?

25 THE WITNESS: That's right.

1 THE COURT: Do you have any knowledge
2 that your parents used that --

3 THE WITNESS: No, sir.

4 THE COURT: -- line?

5 THE WITNESS: No, sir. My dad never
6 used that line. We used the road that the lady that
7 sold us the property, that is the way she took us in
8 there. And that is the only way I've ever used that
9 road by Mr. Miller's house.

10 THE COURT: So neither your mother
11 nor your father, your testimony is, used the blue
12 line either?

13 THE WITNESS: Never used that blue
14 line. Never.

15 THE COURT: How old was your father
16 when he bought this property?

17 THE WITNESS: I think he was --

18 THE COURT: Was he in declining
19 health when he bought it?

20 THE WITNESS: Yes, sir. He was.

21 THE COURT: Did he ever go back
22 there?

23 THE WITNESS: Yeah, with me. He
24 never drove by himself. He had heart trouble.

25 THE COURT: So you would drive your

1 father back there?

2 THE WITNESS: Yes, sir. Me and my
3 mother.

4 THE COURT: And you would use the
5 blue line or the orange line? The blue line, the
6 straight shot, or through the Miller property?

7 THE WITNESS: Through the Miller
8 property always. Never ever went the other way. If
9 it was, it petered out. That road just went to
10 nothing in there.

11 THE COURT: I want to ask you a
12 question about you getting a key to the Bowater
13 gate.

14 THE WITNESS: Yes, sir.

15 THE COURT: And that key came from a
16 D.N.R. game warden?

17 THE WITNESS: Yes, sir.

18 THE COURT: And there has been some
19 testimony that that guy was Thompson or Chuck
20 Thompson?

21 THE WITNESS: Yes, sir. We used to
22 hunt together a lot. He used to be a game warden.

23 THE COURT: All right. Do you have
24 any knowledge as to where he got the key from?

25 THE WITNESS: The guy that was over

1 Bowater was Mr. Flanders from Lancaster. Flanders.
2 And he's a friend of -- a good friend with Freddie
3 Myers up here at the timber company. And that is
4 how I remember his name. I talked to Freddie the
5 other day. And if I need to know, you know, his
6 name -- Mr. George Flanders. That was his name. He
7 was over that property way back.

8 THE COURT: Did anybody else have a
9 key to that gate?

10 THE WITNESS: Just me and my daddy.

11 THE COURT: So you had two keys or
12 one key?

13 THE WITNESS: I had one key. And I
14 think daddy had a key just in case something might
15 have happened to me back there. Breakdown and get
16 somebody to go back in the woods.

17 THE COURT: Now, again, at the very
18 beginning of your testimony we were looking at some
19 plats. And in response to a question as to your use
20 of the blue straight shot you said, no, but then you
21 made some comment about setting foot on it or
22 hunting or something like that?

23 THE WITNESS: Yes, sir.

24 THE COURT: Did you use that road to
25 hunt?

1 THE WITNESS: No, I just wanted to
2 see what was over there, to check it out. The
3 hunting part I did was the other place.

4 THE COURT: So you didn't use the
5 road to get back and forth?

6 THE WITNESS: No, sir.

7 THE COURT: You were on foot?

8 THE WITNESS: Foot.

9 THE COURT: That is all I have.
10 Mr. Babcock?

11 MR. BABCOCK: No follow-up, Your
12 Honor.

13 THE COURT: Mr. Wells?

14 MR. WELLS: No follow-up.

15 THE COURT: Step down.

16 MR. WELLS: Judge, my next witness is
17 scheduled for tomorrow morning. He will be here at
18 9:00 or 9:30 in the morning. So I don't have any
19 other testimony to offer this afternoon. And I
20 think it might be about time for your Family Court
21 if we can take a break.

22 THE COURT: Well, I guess we
23 shortened it too much. If that is the case, if that
24 is when they are scheduled to appear, then I guess
25 that is what we need to do.

1 MR. WELLS: For planning purposes, by
2 the way, that would be my only witness. I believe
3 he will be a brief witness tomorrow morning. And it
4 may be --

5 MR. BABCOCK: We may have some in
6 reply. I don't know. I'll have to see what
7 happens.

8 MR. WELLS: I think we will be
9 through by lunchtime.

10 THE COURT: Okay. Well, let's
11 congregate then at 9:30 in the morning. And we'll
12 hear from that last witness of Mr. Wells, possibly
13 some reply, and closing arguments. Okay?

14 MR. BABCOCK: Great. Thank you, Your
15 Honor.

16 THE COURT: Thank you all so much.
17 We'll stand until tomorrow morning at 9:30.

18 (Whereupon, the hearing was recessed
19 until 8/26/10 at 9:30 a.m.)
20
21
22
23
24
25

1 Certificate of Reporter
2

3 I, Jeffrey M. Thomas, RPR and Notary
4 Public in and for the State of South Carolina, do
5 hereby certify that I reported the Hearing of Bundy
6 v. Shirley on the 26th day of August, 2010: that the
7 witness was first duly sworn by me, and that the
8 foregoing 224 pages constitute a true and correct
9 transcription of the said hearing.

10 I further certify that I am neither
11 attorney nor counsel for, nor related to or employed
12 by, any of the parties connected with this action,
13 nor am I financially interested in said cause.

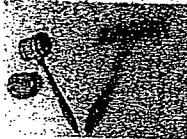
14 I further certify that the original of
15 said transcript shall be hereafter sealed and
16 delivered to Roderick M. Todd, Jr., Esquire, Special
17 Referee, P.O. Drawer 99, Camden, South Carolina
18 29021.

19 In witness whereof I set my hand and seal
20 this 30th day of September, 2010.

21
22
23
24
25
My Commission
expires 12/14/17


Jeffrey M. Thomas, RPR
and Notary Public for the
State of South Carolina

Garber Reporting Service



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TRANSCRIPT OF:
BUNDY VS SHIRLEY HEARING
VOLUME II

AUGUST 26, 2010

W. H. BUNDY,

VS

BOBBY BRENT SHIRLEY

09-CP-26-0338

REPORTER: JEFFFREY M. THOMAS

1 State of South Carolina) Court of Common Pleas
2 County of Kershaw) No.: 2009-CP-28-00338
3
4

5 W.H. Bundy, Jr.,)
6)

7 Plaintiff,)

8 vs.)

HEARING
VOLUME 2

9 Bobby Brent Shirley,)
10 Defendant.)

August 26, 2010

11
12 Hearing, reported by Jeffrey M. Thomas,
13 Registered Professional Reporter and Notary Public
14 in and for the State of South Carolina; said hearing
15 taken before Special Referee Roderick M. Todd, Jr.,
16 pursuant to agreement and in accordance with the
17 South Carolina Rules of Civil Procedure, at the
18 Kershaw County Courthouse, 1124 Broad Street,
19 Camden, South Carolina, on August 26, 2010, at the
20 hour of 9:17 a.m.
21

22
23 GARBER REPORTING SERVICE, INC.
24 POST OFFICE BOX 12348
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(803) 256-4500

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1 CONTENTS

2 HEARING

3		Page
4	EDWARD BENNETT	
5	Direct Examination by Mr. Wells	230
6	Cross Examination by Mr. Babcock	238
7	Certificate of Reporter	302
8	Word Index	

9 * * * * *

10 EXHIBIT INDEX

11 Exhibits: Marked at Page

12
13 (None were proffered.)14
15 * * * * *

1 This Hearing is taken in accordance
2 with the South Carolina Rules of Civil Procedure.

3 THE COURT: Mr. Wells, I think it's
4 still your case.

5 MR. WELLS: I call Edward Bennett.
6 Mr. Bennett, we need you to go sit up here in this
7 chair by the flag.

8 THE COURT: Mr. Bennett, go ahead and
9 have a seat. And I'll swear you in. Okay? Go
10 ahead and have a seat. And I'm going to swear you
11 in. Go ahead and sit down. All right.

12 Mr. Bennett, look at me. Raise your right hand. Do
13 you swear to tell the truth, the whole truth, and
14 nothing but the truth so help you God?

15 MR. BENNETT: I do.

16 THE COURT: All right. Now, you can
17 put your hand now. I need you to speak up because
18 this gentleman over here to your right takes down
19 everything you say. Okay? So try to speak as loud
20 as you can. Okay?

21 MR. BENNETT: Okay.

22 THE COURT: All right.

23 WHEREUPON:

24 EDWARD BENNETT, being duly sworn and
25 cautioned to speak the truth, the whole truth and

1 nothing but the truth, testifies as follows:

2 DIRECT EXAMINATION

3 BY MR. WELLS:

4 Q. Mr. Bennett, tell the Court your full
5 name. Tell the Court what your name is.

6 A. Edward Bennett.

7 Q. Okay. And where do you live, Mr. Bennett?

8 A. Near Bennett's Cross Road.

9 Q. Okay. Are you in Sumter County or Kershaw
10 County?

11 A. Sumter County.

12 Q. Okay. And if you don't mind my asking,
13 how old are you today?

14 A. Eighty-five.

15 Q. Okay. And who was your daddy?

16 A. Elijah Bennett.

17 Q. Okay. And how many brothers and sisters
18 did you have?

19 A. Twenty-two.

20 Q. Okay. And all of those were the children
21 of Elijah Bennett?

22 A. Twenty-one of them, and adopted one. That
23 makes 22.

24 Q. Okay. Now, do you remember when your
25 father bought a piece of farmland from Mr. J.C.

1 Coolie Gillis?

2 A. I remember when he bought it. I remember
3 what year it been.

4 Q. And did you know Mr. Gillis?

5 A. Yes, sir.

6 Q. How did you know him?

7 A. I known him ever since I was a little boy.

8 Q. Okay.

9 A. My daddy used to -- he used to run a
10 filling station.

11 Q. Okay. And after your daddy bought the
12 property from Mr. Coolie Gillis, what did he use it
13 for?

14 A. Farming.

15 Q. Okay. Now, let me try Defendant's
16 Exhibit 6 which is a plat. I'm not going to ask you
17 to move.

18 MR. BABCOCK: Your Honor, if I might
19 come in?

20 THE COURT: Sure. Come on inside.

21 BY MR. WELLS:

22 Q. Can you find on Exhibit 6 the plat of the
23 property that your daddy bought?

24 A. Yes, sir. It's the road.

25 Q. Okay. And are you pointing to -- well,

1 where is the piece of land?

2 A. Right here.

3 Q. All right. Let the record show he pointed
4 to Parcel Number One on Defendant's Exhibit 6.

5 Okay. And how did your family get to the parcel
6 that you've just pointed at?

7 A. Traveled this road.

8 Q. Okay. And let the record show that he is
9 pointing to Saxon Road. Do you know who lived in
10 this little square or --

11 A. Purtel Boykin.

12 Q. Okay. Ms. Purtel Boykin?

13 A. Right.

14 Q. And do you remember, did she have a house
15 in here?

16 A. Right.

17 Q. Did you go by her house to get to --

18 MR. BABCOCK: Objection to leading,
19 Your Honor.

20 THE COURT: Yeah. Don't lead the
21 witness.

22 BY MR. WELLS:

23 Q. All right. Now, was there another route
24 that you all used to get --

25 A. That is the only way I know.

1 Q. Okay. Was there another road that came --
2 and I'm pointing down here along the borderline of
3 Parcel 13. Was there another road down this way
4 that you all could use?

5 A. Not to get to the farm.

6 Q. All right. The road I just indicated
7 down, Parcel 13, where did it go? Was there a road
8 there?

9 A. That would go across Horseshoe.

10 Q. Okay. Do you remember the Rooster Pit?

11 A. Yes, sir.

12 Q. Where was the Rooster Pit?

13 A. It was sitting back in here.

14 Q. Okay. Was there a road to the Rooster
15 Pit?

16 A. Coming from the Boykin road.

17 Q. Okay.

18 A. Rooster Pit had been a ways in.

19 Q. Did the road that went through the Rooster
20 Pit go all the way to your farm?

21 A. No. Coming in from the Boykin way, coming
22 through the Rooster Pit.

23 Q. Okay. Did you ever go to the Rooster Pit?

24 Did you ever go to the Rooster Pit when you were a
25 boy?

1 A. Yes, sir, many times.

2 Q. What would you all do there?

3 A. Picked up trash. And he would pay us with
4 dead chickens.

5 Q. Okay. If you picked up trash, they would
6 give you the dead chickens to take home and cook?

7 A. Right. Used to go to the Rooster Pit
8 before my daddy bought the land.

9 Q. Now. I'm pointing on Defendant's
10 Exhibit 6 to the part of Saxon Road down here below
11 where you pointed.

12 THE COURT: Bring it up here, John.

13 MR. WELLS: All right.

14 THE COURT: I'm not real sure.

15 BY MR. WELLS:

16 Q. The part of Saxon Road before you get to
17 where Ms. Purtel Boykin lives?

18 A. Right.

19 Q. Back in those days, when you were farming
20 this property, was that portion of the road any
21 better or worse than the portion after you went past
22 Ms. Purtel Boykin's house?

23 A. All about the same. Just been a wagon
24 road. People travel it, but it's just a little
25 road.

1 Q. Okay. Now, when you went to farm your
2 property, did you all use a car?

3 A. A car?

4 Q. Yeah.

5 A. A wagon and mule.

6 Q. Okay. How did you get back there?

7 A. Wagon.

8 Q. How many people went with you to farm?

9 A. Four.

10 Q. And that would be who?

11 A. My daddy and my other two brothers.

12 Q. Okay. And what would you take with you to
13 ride in or on?

14 A. The wagon.

15 Q. Okay. And how many mules?

16 A. Four.

17 Q. Okay. And how many rode in the wagon?

18 A. Two.

19 Q. And how many rode on the mules?

20 A. Two.

21 Q. Okay. And where were the plows?

22 A. On the wagon.

23 Q. Okay. And when you got there was there a
24 mule for each boy?

25 A. That's right.

1 Q. Okay. Do you remember asking permission
2 from anybody to use that road?

3 A. No, sir. Ain't no problem. No problem.

4 Q. Did you all sneak back there in the
5 nighttime or did you just go back there in the broad
6 daylight?

7 A. Go back in the broad daylight. Early in
8 the morning. Go back there. We tried to finish at
9 least 2:00 o'clock with four mules.

10 Q. Why by 2:00 o'clock? I think you told me
11 before. Why did you have to finish by 2:00 o'clock?

12 A. That's right. Finished about 2:00 o'clock
13 because didn't have no lunch or no feed for the
14 mules.

15 Q. Okay. Now, when you weren't farming the
16 property, what else did you do back there? What
17 other uses did you make of that property? Other
18 than plowing and farming, what other uses did you
19 have for the property?

20 A. Nothing.

21 Q. Okay. After your father --

22 A. Cut a little wood. Cut a little wood back
23 there.

24 Q. Would that be firewood?

25 A. Right.

1 Q. Okay. And when you cut firewood, which
2 route would you use to get back there?

3 A. The same route. That is the only way.

4 Q. Okay. Now, after your father stopped
5 farming it, did you keep it plowed? After your
6 father stopped actually growing crops back there,
7 did your family continue to plow the field?

8 A. No.

9 Q. Okay. And do you remember whether or not
10 your daddy used or rented the property to the
11 Millers? Do you remember that?

12 A. I don't remember that. I was married.

13 Q. You had left the home by then?

14 A. That's right. He might have did, but I
15 don't remember. There are years -- after he stopped
16 farming it, I used to go back there, the man I used
17 to work with, I used to go back there with a tractor
18 and keep it plowed once a year.

19 Q. Eventually you used a tractor back there?

20 A. Right.

21 Q. You graduated from the mules up to a
22 tractor?

23 A. No, I just go back there. And the man I
24 used to work with, I borrowed his tractor and go
25 back there and plowed it once a year.

1 Q. Okay. Why did you do that?

2 A. To keep it from growing trees.

3 THE COURT: Who was that? What was
4 his name?

5 THE WITNESS: The man I used to get
6 his tractor? Thomas Geddings.

7 MR. WELLS: Those are all the
8 questions I have.

9 THE COURT: Mr. Bennett, this
10 gentleman is going to ask you some questions, too.
11 Okay?

12 THE WITNESS: (Nodded head.)

13 CROSS EXAMINATION

14 BY MR. BABCOCK:

15 Q. Mr. Bennett?

16 A. Yes, sir.

17 Q. Good morning.

18 A. Good morning.

19 Q. My name is Keith Babcock. We haven't had
20 a chance to meet before. And I've got a few
21 questions for you. Okay?

22 A. All right.

23 Q. And I understand that you are 85. That is
24 great. You are looking great. We are going to be
25 asking questions going back a good way in time,

1 going back to the early '40s and the '50s. And so
2 that is a long time ago.

3 And if I ask something that you don't
4 remember, that is perfectly okay because you are
5 going back to a time -- I wasn't born until '51.

6 A. Right.

7 Q. So you are going back to a time I couldn't
8 remember. And I can't remember things not that long
9 ago. So if I ask you anything that you don't
10 remember, just tell me you don't remember. Is that
11 fair?

12 A. Right.

13 Q. Okay. Now, we've all had people look at
14 the title recorded in the courthouse to find out
15 when land was bought and when land was sold. So we
16 know the exact date that your dad got the deed to
17 the property. And we know when it was ultimately
18 sold. Okay?

19 So we know that the property was deeded to
20 your dad on December 19th, 1947. So I guess you
21 would have been about 22 or so at that point in
22 time; is that right?

23 A. Something like that.

24 Q. Okay. So after the land -- after your dad
25 got title to the land, you all started farming it

1 the next spring?

2 A. Right.

3 Q. Spring of '48?

4 A. Right.

5 Q. Okay. And as I understand it your family
6 farmed the property for six or seven years,
7 something like that?

8 A. Right.

9 Q. And then I think your father got sick,
10 unfortunately, and he passed away around I think you
11 said at your deposition 1957 or so?

12 A. Right.

13 Q. Okay. Now, your dad was the one who
14 actually owned the property?

15 A. Right.

16 Q. And, as you said, you know where the
17 Millers live now?

18 A. Right.

19 Q. And their -- I guess their grandmother was
20 Ms. Purnel Boykin.

21 A. Yeah, Purnel.

22 Q. Purnel Boykin. And your dad knew Purnel
23 Boykin, didn't he?

24 A. That's right.

25 Q. All right. And so he could have had

1 conversations with her that you wouldn't know about;
2 is that right?

3 A. Right.

4 Q. Sure. Okay. So you farmed the land for
5 six or seven years. And then your dad got sick.
6 And then you plowed the land, I think you said,
7 about one time a year?

8 A. Right.

9 Q. To keep it from growing up?

10 A. Yes, sir.

11 Q. And you did that for a period of time.
12 And then you said -- I think you said you didn't
13 know for sure if the Millers had farmed the property
14 because you left home?

15 A. That's right.

16 Q. All right. When did you leave home, do
17 you remember?

18 A. No, I don't remember. I left home right
19 after I married.

20 Q. Okay. All right. Let's try and think of
21 it this way. Do you remember when President Kennedy
22 got elected? Do you remember President Kennedy?

23 A. Right.

24 Q. Okay. He got elected in 1960. Did you
25 get married before President Kennedy got elected?

1 A. Right.

2 Q. Okay. So it was sometime maybe in the
3 late '50s when you got married?

4 A. That's right.

5 Q. And that is when you left home?

6 A. Right.

7 Q. And after you left home, you really don't
8 know what the Millers might have done with that
9 property, do you?

10 A. No, sir, I don't.

11 Q. Okay. Your real knowledge is up to the
12 time you left home?

13 A. That's right.

14 Q. Okay. And there are all kinds of pathways
15 and trails back in this property, aren't there? Do
16 you remember that?

17 A. Where?

18 Q. Different -- all through here there are
19 different pathways and trails like to get to the
20 Rooster Pit and things like that?

21 A. Right.

22 Q. Okay. And, in fact, there was a trail
23 that went around the Miller house. You remember
24 that, don't you?

25 A. That's right.

1 Q. All right. And sometimes you all would
2 use that trail to go around the Miller property to
3 get to your land, right?

4 A. No. There is one road. The only way to
5 get there.

6 Q. Well, let me show you on Plaintiff's
7 Exhibit 3. Do you see some of these roads that go
8 around the property?

9 A. Right.

10 Q. You remember on occasion you used some of
11 those roads, wouldn't you?

12 A. We traveled this road here all the time.

13 Q. You never took that other route?

14 A. Never.

15 Q. I'm going back a long time. Are you sure
16 on that?

17 A. I'm sure on that.

18 Q. All right.

19 A. That is the only way to get to the field.

20 Q. All right. And that other road --

21 A. This other road, it go across Horseshoe,
22 go to the right there. That might be it there. Go
23 up by --

24 Q. All right. And this other route, do you
25 remember whether or not there was another pathway up

1 here running along the straight line -- I'm looking
2 at a straight line not labeled Saxon Road on
3 Defendant's Exhibit -- Plaintiff's 3? Do you
4 remember that?

5 A. It goes to --

6 Q. Do you remember that road?

7 A. Where it is now?

8 Q. This road -- instead of going this way, a
9 road going this way, straight up. Do you remember
10 that?

11 A. No, I don't remember that road.

12 Q. All right. So you don't remember that
13 way, one way or the other?

14 A. No.

15 Q. Okay. Did your dad ever go up to the
16 property without you?

17 A. With us?

18 Q. Did he go sometimes without you?

19 A. Yeah, he would go there sometimes with
20 others.

21 Q. All right. And did he ever go up there
22 sometimes with some of your other brothers?

23 A. Right.

24 Q. And I guess sometimes maybe he would farm
25 with them and sometimes with you?

1 A. That's right.

2 Q. All right. Do you remember Shoe Make
3 Creek?

4 A. That's right.

5 Q. All right.

6 A. That is this road I tell about the other
7 road go to, Shoe Make.

8 Q. All right. Where is Shoe Make Creek, can
9 you tell us?

10 A. It comes around that away. This road goes
11 to the field. And this road cuts around this way
12 and go to Shoe Make Creek.

13 Q. All right.

14 A. Going up by Dr. Schriber.

15 THE COURT: Go by who?

16 THE WITNESS: Dr. Schriber.

17 THE COURT: Dr. Schriber?

18 THE WITNESS: Right.

19 THE COURT: Is that Herbert Schriber?

20 THE WITNESS: He is a doctor.

21 THE COURT: Okay.

22 THE WITNESS: He been dead some years
23 ago now.

24 MR. BABCOCK: With the Court's
25 indulgence. Thank you, Mr. Bennett. I appreciate

1 it.

2 THE WITNESS: You are welcome.

3 THE COURT: Any redirect?

4 MR. WELLS: No, no redirect.

5 THE COURT: All right. Watch your
6 step. You got to step down. All right?

7 THE WITNESS: Thank you.

8 MR. WELLS: Judge, we would move to
9 introduce all of the Defense exhibits that were
10 previously marked. And with that the Defense rests.

11 MR. BABCOCK: Your Honor, I think we
12 previously moved all of the exhibits in.

13 THE COURT: Yes. We marked and
14 identified and both parties have moved those items
15 which were marked as exhibits into evidence. So we
16 will go through that prior to us leaving today. The
17 Defense has rested. Mr. Babcock?

18 MR. BABCOCK: The Plaintiff has no
19 reply, Your Honor. What we would request at this
20 point, it's always -- you are always unsure in a
21 non-jury setting about motions at the conclusion of
22 all the evidence, but rather than having directed
23 verdict motions separate from closing arguments, if
24 we could have the directed verdict motion and the
25 closing argument as one?

1 THE COURT: I have no objection to
2 that.

3 MR. WELLS: As long as we are
4 protected on the record.

5 THE COURT: I want to make sure for
6 the record that we are going to do the arguments and
7 motions in this non-jury setting together to the
8 degree that each party shall be protected on the
9 record by making the appropriate motions which I
10 will listen to as part of final argument and rule on
11 those motions after the argument is had.

12 MR. BABCOCK: Thank you, Your Honor.

13 THE COURT: Okay.

14 MR. BABCOCK: May it please the
15 Court, this case, and I guess it's true whenever you
16 get into land and easement cases, has a lot of
17 specific legal issues that come into play in
18 determining what rights the parties do or don't have
19 with regard to the land.

20 We've moved for declaratory judgment that
21 Mr. Shirley has no legal interest in the pathway
22 going across Mr. Bundy's property. And looking in
23 the deeds that have been presented, those deeds all
24 show that when Mr. Shirley and his father obtained
25 title to the property, the property was described as

1 being landlocked, bordered on all sides by other
2 people's property.

3 That is the same thing that the 1973 plat,
4 also part of the chain of title, shows. So there
5 are no recorded easements. There is nothing
6 recorded which gives Mr. Shirley rights to this
7 property. That is clear.

8 The ball then shifts to Mr. Shirley's side
9 of the argument. And they have filed defenses and
10 counterclaims claiming that there are various
11 reasons why they have either a public or private
12 dedication and a prescriptive easement or an
13 easement by estoppel. Those are the legal issues
14 raced by the Defense in this case.

15 It's very important as we look at the
16 evidence to remember that in this case they have the
17 burden of showing those different defenses and
18 counterclaims. And not only do they have that
19 burden, they have a very high burden. They have to
20 meet the strict, cogent, and convincing level. The
21 highest burden I think that you can have in a civil
22 setting. So that is where they've got to get to to
23 sustain their position.

24 But I think when you look at the evidence,
25 even if it were a lesser standard, even if you got

1 down to the preponderance, the evidence does not
2 sustain their position legally.

3 All right. Let's look at the different
4 arguments that have been made concerning what rights
5 Mr., Shirley has to this property. The first
6 argument is that there is some kind of implied
7 public or private dedication. And we know that
8 there is no actual dedication. That has not
9 occurred. So it's got to be an implied public or
10 private dedication.

11 And when you look at what has to be shown
12 there, there are two elements. There has got to be
13 an intent to dedicate. And that intent, under the
14 Mackey Edens case which we cited in our brief, must
15 be positive and unequivocal.

16 The second element is there has to be a
17 public acceptance of the dedication. And there is
18 simply is no evidence of an intent to dedicate and
19 no evidence of public acceptance of a dedication.
20 So both elements are lacking.

21 What we have here are a couple things.
22 First we've got the Wild Life Management use of the
23 property, but that doesn't have anything to do with
24 any kind of dedication. That was a lease between
25 Bowater and the State to allow people onto the

1 property for the purposes of participating in that
2 program. So that doesn't help the Defendant.

3 And we know that neither Bowater nor Mr.
4 Bundy did any actual dedication. What the Defense
5 tried to point to is a plat in Mr. Bundy's chain of
6 title, the 1960 Marett plat. That plat simply
7 shows, as Your Honor noted yesterday, what the
8 surveyor would have seen when he was out there.

9 That doesn't mean it's public, private, or
10 anything. It just shows you what he saw. And,
11 frankly, that is true of any of these other ariels
12 or maps, it just shows you what was seen. It
13 doesn't show that it's public.

14 What is important in terms of the chain,
15 and we cited the Outlaw case, is when you have a
16 situation where you've got a recorded plat for a
17 subdivision, and then you start deeding it out, the
18 people who get parcels get rights to the roadways in
19 that subdivision because they've gotten -- common
20 grantor, deeded plat, they are taking with those
21 rights. And that is absolutely true.

22 And that is also if you look at the
23 Blueridge Realty case that counsel cited yesterday,
24 that is what they are talking about there, too.
25 They cite the Outlaw case in Blueridge. In

1 Blueridge what you had, kind of an interesting
2 situation up in Greenville, you had a platted
3 subdivision. You had parcels out. And then you had
4 a cul-de-sac.

5 And some landowners around that cul-de-sac
6 who wanted to cut off that road. And they worked
7 out a deal with Greenville County who would have
8 deeded the roadways when the plat was dedicated.
9 Greenville County then deeded that portion back to
10 them. They looked at it in a road closing
11 situation.

12 And some other property owners said, "Wait
13 a minute. You can't do that. We've got a right to
14 that roadway, too." And that makes perfect sense.
15 Blueridge is consistent with Outlaw. All it is is a
16 publicly dedicated subdivision plat and the rights
17 of individuals to roadways on that plat.

18 And what we've got here is almost the
19 exact opposite. And if we look at -- if we look at
20 the Marett plat, Exhibit J on the Bundy title, what
21 we see very obviously is a landowner, Catawba and
22 then Bowater, who has pulled together different
23 parcels and filed something showing what it's got
24 parcel-wise.

25 And that is showing what Bowater has. It

1 doesn't say that it's public or private. It just
2 shows us what it had. And it conveyed its land to
3 Mr. Bundy. And that is in his chain. But that
4 doesn't go outside Mr. Bundy and Mr. Bowater. Maybe
5 there was a Mr. Bowater, but the Bowater Company.

6 So that does not satisfy any kind of
7 dedication or any kind of rights being transferred
8 to Mr. Shirley or his parents. So legally that
9 doesn't help them at all because it's not in their
10 chain.

11 And as we argued yesterday, his situation
12 with that chain is no different than anybody else.
13 It's not my chain, your chain, or his chain. It's
14 Bill Bundy's chain.

15 Now, when you look at what happens with
16 Saxon Road and the history of Saxon Road, it's
17 consistent with what we just talked about. The
18 testimony yesterday was very clear that Saxon Road
19 was originally -- and as Mr. Bennett said today,
20 originally it was just a mule kind of road going
21 into the Miller area and the same coming out.

22 But what happened in the 1960s was we
23 heard yesterday that I guess it was Mr. Miller's
24 mother or grandmother wanted to get a way so the
25 kids could get to school. And she came -- she had

1 been using permissively this roadway before. And
2 that is the important thing, Your Honor. There is
3 nothing wrong with somebody using something by
4 permission. It happens all the time.

5 So they had been using this roadway before
6 by permission. To get the roadway worked out, she
7 came to the landowners and got permission to have
8 the County come in and start scraping it. And that
9 is what they did. And they scraped it right to
10 there. And that is what they've been doing ever
11 since, right to the edge of their compound.

12 And that road, because of what has
13 happened over the years, that is now public. But
14 the public aspect stopped where the maintenance
15 stopped. It doesn't continue on right through the
16 middle of the Miller property onto the Bundy
17 property to get to the Shirley property.

18 So that is the only area that would be
19 public, and that is not the roadway in dispute.
20 Now, if you look at the various aerials and whatnot
21 you will see various trails throughout this area as
22 you would expect. The property was used for a
23 period of time, and then Bowater cut trails for
24 timber. There are various trails shown throughout,
25 but they don't distinguish public versus private.

1 And, interestingly, the roadway -- the
2 path that is shown on Defendant's Exhibit 6, which I
3 believe was from the '70s with the County, does not
4 show any road or any path or anything going through
5 the Miller's property here. There are a couple
6 lines here, unclear exactly what that is, but
7 nothing over here.

8 So there simply is no public road,
9 dedicated or otherwise. That is simply not the
10 evidence in this case at all. Let's go next to the
11 prescriptive easement. What do you have to show for
12 a prescriptive easement? Well, you've got to have
13 three things. You've got to have continued and
14 uninterrupted use and enjoyment for 20 full years.
15 Any breaks, you've got to start over again.

16 You've got to have the same thing being
17 enjoyed being the same throughout. And the use must
18 be either adverse or under claim of right. You've
19 got to show all three, and you've got to have them
20 to the strict, cogent, and convincing level.

21 We've got two time periods to look at, and
22 both periods fail in this case. The first period,
23 and remember we had Mr. Bennett's family titled to
24 Elijah Bennett, Mr. Bennett's dad, on the property
25 from December of 1947 and started farming in the

1 spring of '48. And then the deeds out start in
2 March of 1968.

3 So you've barely got 20 years there, but
4 the testimony -- and you can take the testimony on
5 either direction here. You had testimony from
6 Mr. Miller that he remembered the Bennett family
7 using another route initially to get back there.

8 Mr. Bennett doesn't remember that other
9 route. We're going back a long time, but that is
10 what Mr. Miller remembers. So if another route was
11 used, and whether it was going straight up or even
12 just around the house at all, then the 20 years
13 doesn't work.

14 In addition, as Mr. Bennett testified, he
15 didn't always go with his dad. Sometimes it was the
16 other brothers. Twenty-two brothers and sisters is
17 a lot. And that is -- but it gives Dad good choices
18 in terms of how you go back because you've got lots
19 of boys. And so other boys could have gone on
20 occasion. And any time they used a different path,
21 that would create a different way. It's not the
22 constant use.

23 But most significantly here is you don't
24 get the 20 years at all to because unfortunately
25 after Mr. Bennett's dad passed away, after they

1 farmed it for that seven or eight-year period, and
2 locating it chronologically we are talking '56, '57
3 for Elijah Bennett's death, they didn't continue to
4 farm it.

5 And as Mr. Bennett testified, really his
6 knowledge of the property continued for a few years
7 beyond when he plowed it. And then he moved
8 away when he got married which we figured out was
9 before President Kennedy around 1958. So what we've
10 got is at best a 10-year period there.

11 And, in fact, that is consistent with the
12 Millers' testimony that for a period of time in the
13 early '60s they farmed the land. And they didn't
14 believe they had a right to it, to that pathway, but
15 they were using it as they used the other land,
16 permissively.

17 So their use of the land doesn't help at
18 all. If it's a different person that doesn't work.
19 So they lose on the 20 years no matter how you look
20 at it.

21 In addition, we've got really
22 uncontroverted testimony about the permission given
23 to the Bennett family although Mr. Jack Bennett here
24 didn't receive -- he wasn't the owner. It was his
25 dad. And it makes sense that that contact would

1 have been with the actual owner of the property, the
2 dad.

3 All right. Let's look at -- we jump
4 forward. Various owners between 1968 and 1985. No
5 testimony as to who did what when out there at all
6 or if anybody went there during that time period.
7 So we jump forward to the 1980s. And what do we
8 know about the 1980s?

9 Well, Bowater had put their property in
10 this Wildlife Management Program. Mr. Shirley went
11 out there in the early '80s, a few years before the
12 '85 purchase. He hunted the land. Various other
13 people hunted the land out there. The public had
14 every right to come on that property pursuant to the
15 lease.

16 And he saw the property, liked the
17 property, the Shirley property, and ultimately his
18 dad purchased that property. Again, with the
19 situation knowing that as the deed reflects property
20 owners on all sides. Now, there is contradictory
21 testimony about how the Shirley family accessed the
22 property in the initial years.

23 There is no controversy about what started
24 in at least the early 1990s, but there is a dispute
25 as to whether they came straight up with the pathway

1 that we drew in on Plaintiff's Exhibit 2, I believe.

2 THE COURT: Was that the orange line
3 or the blue line? There you go.

4 MR. BABCOCK: Thank you. If we look
5 at Plaintiff's Exhibit 2, you had testimony by
6 Mr. Bennett -- I'm sorry. Mr. Miller that this blue
7 line was the way to access the property. Mr. Bundy
8 also testified that as a way to get back there.

9 And Mr. -- and the testimony by Mr. Miller
10 was that that was the way they used for a period of
11 time early on, and then came and started going
12 through. So we've got a dispute between the
13 parties, and I'll talk about that in a minute.

14 But what we do now is a couple things.
15 Under the Cleveland case, which we cited in our
16 brief -- and at this point I would request that my
17 pretrial brief be incorporated into my argument for
18 the record.

19 THE COURT: Yes, sir.

20 MR. BABCOCK: But in that case where
21 you've got woodlands in an enclosed area, you can't
22 have the prescriptive easement situation unless
23 there is some reason that the land -- that the
24 landowner would know you are being used because you
25 can't see the person using the property. It makes

1 sense.

2 And so you have no knowledge by Bowater
3 that Mr. Shirley is using this property and thinks
4 he's got some right to come on the property in terms
5 of the pathway. And that is a problem for them
6 because they've got to show that they satisfy all of
7 the elements.

8 The Wildlife Management Program, which was
9 used until 2003, doesn't help them because again
10 that is limited to the lease between Bowater and the
11 State for the public to come on the property and do
12 whatever hunting and fishing.

13 There is nothing particular in that
14 program about using that pathway to get back to that
15 piece of property. So that Wildlife Management
16 Program doesn't help them at all. And, in fact, any
17 time you try to get prescriptive rights involving
18 the State, you can't do that. The State was leasing
19 the property at that time.

20 Now, the law also shows that when you have
21 any kind of break, any kind of interruption, that
22 stops your 20-year clock. And we briefed that in
23 our brief, too. And what we know is that Bowater
24 had a chain fence, a cable, but more importantly the
25 testimony was uncontradicted that Mr. Miller's mom,

1 I think it was, put up a barrier that ultimately Mr.
2 Shirley pulled down.

3 Well, putting up that barrier also stops
4 your 20-year clock. That is a problem that they
5 can't overcome. And then you've got Mr. Bundy's
6 demand in 2005. That also ends your clock. So they
7 are not going to be able to establish their 20 years
8 for those various reasons. They can't get there.

9 You've also got the fact that Mr. Shirley
10 was unequivocal that he thought he was using that
11 path because it was public. He didn't say anything
12 about coming and talking to Mr. Bennett. He didn't
13 say anything about talking with anybody else. He
14 said that he thought that he could use that pathway
15 because it was public. He said that on numerous
16 occasions on the stand and also in the deposition
17 testimony that we cited.

18 But look at what he did. He knew that
19 there was a Bowater chain that he ultimately got a
20 key to. And a chain on that pathway is not
21 consistent with a public road. He also had a
22 conversation with Mr. Bundy about putting the gate
23 up. He put a gate up.

24 If it's a public road, you don't put a
25 gate up. So putting that gate up is totally

1 inconsistent with thinking that it's public. What
2 he really saw and why he thought it was public was
3 when during the Wildlife Management days people
4 being able to go back there and people I'm sure used
5 that path when they were hunting back there.

6 So he had seen the public using that, but
7 that is all he had seen. That is all he knew. And
8 that may be why he thought it was public, but then
9 he started chaining it off. So that simply doesn't
10 make sense for him and doesn't help their case at
11 all.

12 We've also cited some cases, Your Honor,
13 when you've got situations with gates and keys.
14 There is an indication that that is a permissive
15 use. And we've cited cases for that proposition in
16 our brief. So when you look at all of those facts
17 and apply it to the law, and the standard required,
18 the prescriptive easement fails and fails miserably.

19 The final argument they had was an
20 easement by estoppel. And that is an awfully hard
21 thing to prove. In fact it's been cited in the Boyd
22 case there is a question even whether you can have
23 that still in South Carolina, but if you can, the
24 elements are, Number One, as related to the party
25 estopped, conduct which amounts to a false

1 representation or concealment of material facts or a
2 lease which is calculated to convey the impression
3 that the facts are otherwise than and inconsistent
4 with those that the parties subsequently -- Two, the
5 intention or at least expectation that the conduct
6 shall be acted upon by the other party. And, Three,
7 knowledge, actual constructive of the real facts.

8 As for the party claiming estoppel they
9 are, One, lack of knowledge and the means of
10 knowledge of the truth as to the facts in question.
11 Two, reliance upon the conduct of the party
12 estopped. And, Three, action based on such a
13 characterization -- those elements are cited in our
14 brief. And there simply is nothing to support an
15 estoppel argument here.

16 At the end of the day with regard to any
17 of the facts, you come down to that jury charge
18 which we all hear about weighing what somebody says,
19 looking at their demeanor, considering the reason
20 they have to testify and the way they testify, the
21 standard charge we've heard.

22 THE COURT: Credibility and
23 believability.

24 MR. BABCOCK: All of those things.
25 And that falls to you in this case. So let's look

1 at the witnesses who testified and look at it
2 through that light.

3 We've got Mr. Bundy. And Mr. Bundy came
4 in here. He's a lawyer. He's an officer of the
5 court. That doesn't mean just because a lawyer
6 comes in he is to be believed, but he is a lawyer
7 and an officer of the court. And we have to look at
8 his demeanor as he testified.

9 He told his story very clearly and
10 consistently and was very straightforward in his
11 presentation. So with his testimony he described
12 what I'll call the alternate route to access what is
13 the Shirley property. And he also told you about
14 the threats on his life, the two conversations where
15 he was threatened. And he was very clear about
16 hearing those things, reacting to those things, and
17 what he did and why. Now, there was simply no
18 inconsistency in anything that he testified to.

19 Ricky Miller. Rick Miller. He came in
20 here. You judge his demeanor. Judge how he was
21 consistent with his testimony. And, of course, we
22 talk about consistency. It's important to look at
23 what the person says on direct and what the person
24 says on cross.

25 He was consistent throughout in terms of

1 his recollection. And he told several things. The
2 permission that his family had given originally to
3 the Bennetts through Elijah Bennett. He talked
4 about the route that was taken originally by the
5 Shirleys.

6 And then he also told us about a barrier
7 that his mother placed there in the early 1960s that
8 ultimately Mr. Shirley took down. What is
9 interesting about that is it's entirely consistent
10 with the barrier in the early 1990s. Yes, early
11 1990s. I'm sorry. Early 1990s. I misspoke. The
12 early 1990s.

13 So the Shirleys had used another route for
14 those first few years in the late '80s then changed
15 their route after the dispute with Mr. Boykin,
16 started using the Miller property. The Millers get
17 upset because they are coming through there pretty
18 quick and put up a barrier that he ultimately tears
19 apart, tears down.

20 That makes sense. And ultimately for you,
21 like any decider of fact, logic and common sense in
22 terms of how you meld together these different
23 stories is very important. So that rendition of
24 events is very logical. And it makes a lot of
25 sense.

1 You also heard with regard to the actual
2 paving of the road and the permission that was
3 sought by them. And Mr. Wells tried to ask some
4 questions about how the Millers' use of that road
5 was any different than the Shirley use. Well, there
6 is a big difference. The Millers knew it wasn't
7 their property and weren't trying to make it their
8 property. They went places with permission. And
9 that is how they did it.

10 All right. Now we shift to the other side
11 of the table. And we've got two witnesses there.
12 And Mr. Bennett has come in and told us as well as
13 he remembers going back a good long way to the late
14 '40s and early '50s as best he recalls, but as we
15 previously discussed there may have been other times
16 when other brothers went up there and other routes
17 were taken.

18 We don't know. What we do know is that
19 eventually the Bennetts did use the pathway through
20 the Miller property, but with permission and only
21 for a limited period of time.

22 Who was the other witness for the
23 Defendant? Mr. Shirley himself. Mr. Shirley got up
24 and testified to some things on direct and then
25 testified to other things when I got the chance to

1 question him on cross.

2 If you remember, when we started talking
3 about that other route going up at first Mr. Shirley
4 didn't remember anything about a roadway there or
5 pathway there at all. And then as we talked further
6 about that blue line on Exhibit 2, he remembered it
7 going part way. And then later he remembered it
8 going further up to the Rooster Pit.

9 So at every time he remembered more and
10 more of a road he said that he didn't remember at
11 all in the beginning. He also said on direct
12 examination -- I think we decided yesterday that the
13 second conversation would be the first phone call
14 with the threat.

15 THE COURT: We threw out the deer
16 head initial contact.

17 MR. BABCOCK: Yes. We went with
18 Number One being the -- what I'll call the gate
19 conversation when the gate got put up. Number Two
20 being the conversation Mr. Bundy talked about with
21 the first threat. And Number Three being the second
22 threat.

23 So on direct examination he remembered
24 having cussed out Mr. Bundy and lost his temper on
25 Number Two, denied it on Number Three. That is what

1 he testified to on direct. On cross he admitted he
2 had cussed him out on that third one, and he had
3 lost his temper. And that he had with both
4 conversations lost his temper, cussed him out,
5 agreed with everything that Mr. Bundy said up to the
6 point of threatening to kill him. That is only
7 thing that he said that he didn't say.

8 Now, he admits he's got a bad temper. He
9 admits he's got a short fuse. And his testimony is
10 consistent with that. You've got a person who has
11 had a series of trespassing situations and whatnot
12 and just has a temper.

13 So when we look at the conversation Number
14 Two and Number Three, what we've got to do is to
15 figure out what happened. And there are three, I
16 think, possibilities. Mr. Bundy can be telling the
17 truth or he can be lying. Mr. Shirley can be
18 telling the truth or he could be lying, but there is
19 a third possibility. That third possibility is that
20 Mr. Shirley lost his temper, was running at the
21 mouth saying whatever. He was mad, mad, mad. And
22 he just got talking. And he was on the phone. And
23 those words kept coming and kept coming. And out of
24 his mouth came the threat.

25 Your third possibility is he may not

1 remember all that he said in that temper-filled
2 conversation where he's using all kinds of cussing
3 and expletives with Mr. Bundy.

4 What does make sense is this. If somebody
5 has threatened your life on any level, you are going
6 to remember it. And you are going to know what
7 happened. It can be that Mr. Shirley simply doesn't
8 remember because he was so hot and he was so angry
9 that those words came out and he doesn't remember,
10 but regardless, Mr. Bundy testified that they did.
11 And you are going to have to evaluate his testimony
12 and his demeanor as he told us what was told to him
13 in those threats.

14 Now, Mr. Shirley's actions are really the
15 occasion we are here, but not the cause. And by
16 that I mean if you had somebody acting differently
17 Mr. Bundy might have been able to work something out
18 for the man to use his property as he allowed him to
19 do at the beginning.

20 But when you have somebody acting the way
21 that Mr. Shirley did, even using his testimony,
22 there is perfect cause for Mr. Bundy to say, "I've
23 had enough. We are not going to be just getting
24 along because we are not getting along." And to
25 look at what the law says about the use of his

1 property. And then to ask that the court uphold
2 what the law is on this case in terms of his
3 ownership rights to his property.

4 One other point in Mr. Shirley's
5 testimony, you may recall there was testimony about
6 his son going over the property and driving back
7 there. And I think you asked him how old the son
8 was. He said he was 28. Well, when I questioned
9 him about the incident that caused the second
10 conversation he said that his son was back there
11 with some other friends of the son I think camping
12 out or whatnot. And that it was before his son had
13 gotten his driver's license.

14 And I said, "So it would be about 13, 14,
15 something like that?" And he said, "Yes." So
16 you've got a son who is 13 or 14 in 2004 all of a
17 sudden who is 28 in 2010. So those numbers don't
18 work. Those numbers don't come close to working.

19 As I said when I started, we start with
20 what is actually on record. And those deeds and
21 plats show that the property is surrounded on all
22 sides by other people's property. Mr. Wells tried
23 to ask a question or two concerning Judge Jacobs
24 and, you know, what he did with regard to the deed.

25 All we know is Judge Jacobs did the deed.

1 We don't know whether he was asked to do a title
2 opinion or whether he did a title opinion. We don't
3 know what he did or didn't tell Mr. Shirley's
4 parents, who are actually the owners that he did the
5 deed for.

6 We have no knowledge of what Mr. Jacobs --
7 Judge Jacobs told them, what he did, anything of
8 that sort. The mere fact that he drafted a deed is
9 of no assistance to them at this point.

10 What we do know is the things that I have
11 said. And those are all the reasons that as a
12 matter of law Mr. Shirley's defenses and
13 counter-claims fail in this case.

14 Now I'm at the point where when you are a
15 defendant, and that is really what I am on the
16 defenses and counter-claims you are always in a
17 quandary. You've shown why the other side's case
18 fails, but when you are a defendant you think, well,
19 I better talk about damages because I don't want it
20 to go un-talked about. I always hate being in that
21 position, but I'm there.

22 THE COURT: But I understand that
23 position.

24 MR. BABCOCK: I'm there. We think
25 it's clear that there is no easement or right for

1 Mr. Shirley when you look at the facts and apply the
2 law, but in the event that Your Honor feels
3 otherwise what is clear is the only right that they
4 can have are the rights that have been -- that have
5 been used in the past.

6 So how have they used the property.
7 They've used it for recreational purposes. There is
8 no house out there. There is no structure out
9 there. They've used it to get back using a truck to
10 get back to the property for recreational purposes.

11 Whatever use is permitted at this point
12 cannot be greater than the past use. You can't --
13 if you get something by prescription, it can't be
14 bigger than what you used. So regardless of what
15 Mr. Shirley's intent is to build something back
16 there, and that is what I understood him to say
17 yesterday, and I don't know whether it will be a
18 residence or a cabin or what they were thinking,
19 they do not have -- could have no right to do that.

20 There is no right to take construction
21 vehicles back there to do that. There is no right
22 to have the property being used as a residence or
23 anything like that. They can't have that right
24 because they haven't done it in the past. And if
25 they haven't done it in the past, they can't have

1 something greater. And they can't have that type of
2 right now.

3 Your Honor, we think when you look at all
4 of the evidence and the law, and the law is real
5 important. The law is always important, but as I
6 said particularly in these kind of cases with the
7 elements and requirements. It's real important that
8 those elements and requirements be considered and
9 they be held to their burden. And their burden is
10 strict, cogent, and convincing evidence. They don't
11 meet that burden. I don't even think they meet the
12 reasonable or the preponderance standard, but they
13 clearly don't meet that burden.

14 And since they don't meet that burden, we
15 respectfully request a declaration that Mr. Shirley
16 has no right to be using this pathway. Thank you.

17 THE COURT: Mr. Wells, can I have two
18 minutes, please?

19 MR. WELLS: Yes.

20 (Discussion off the record.)

21 THE COURT: All right, Mr. Wells?

22 MR. WELLS: May it please the Court,
23 the Defense for the record moves for a directed
24 verdict granting the Defendant an easement by
25 prescription and by the incorporation of the

1 disputed roadway into the Plaintiff's deed as argued
2 previously.

3 And having made that motion, then I will
4 proceed to the closing argument which will also be
5 the argument -- the legal argument on the motion.

6 THE COURT: Which I will, in turn,
7 give Mr. Babcock a chance to further address if he
8 needs to do that at the conclusion of your argument.

9 MR. WELLS: Thank you. From the
10 Defense standpoint, this case is all about revenge
11 against Mr. Shirley for his foul mouth and his
12 treatment of Mr. Bundy and to teach Mr. Shirley a
13 lesson by land-locking this piece of property.

14 Now, we have pled that he has an easement
15 by prescription by use of a road that is ancient.
16 It appears on all of these flyovers 1956, 1964,
17 1969, 1974, 1977. It is the road to the Shirley
18 property.

19 I have to defend that road even though
20 it's been there forever. Everybody has used that
21 road to get back to this piece of property. As
22 Mr. Bennett testified, it's the only road to the
23 piece of property, but I have to defend it and
24 defend it and defend it because Mr. Bundy is mad at
25 Mr. Shirley.

1 Now, we are claiming that we have an
2 easement by prescription. And an easement by
3 prescription requires that we show continuous and
4 uninterrupted use for 20 years. We have to show the
5 identity of the thing. And we have to show, this is
6 our choice, it was adverse. The use was adverse or
7 a claim of right.

8 Now, Mr. Babcock said something earlier in
9 his opening statement that struck me as strange in
10 that he said that permissive use defeats adverse use
11 and it defeats a claim of right. We dispute that.
12 We believe that is not the law of South Carolina.

13 It might by the law of some other states,
14 but it's not the law of South Carolina. Now, to
15 support that notion he cited a 1917 case called
16 Williams versus Abbott, but if you read that case,
17 the case is about a ditch.

18 And they brought a ditch-digger to court.
19 And the ditch-digger told the court that he had
20 asked permission to dig the ditch before he dug the
21 ditch from the surrogate landowner. And that case
22 actually says if you get permission in the inception
23 of an easement, if you go to the man before you ever
24 start using it, and before in this case he dug the
25 ditch, and ask for permission, then it can't ripen

1 into a prescriptive easement. That is what that
2 case says.

3 The more recent case on a prescriptive
4 easement under a claim of rights theory is the 1996
5 case of Revis versus Barrett. And Ms. Revis, she
6 actually got written permission during the 20-year
7 period from Barrett's attorney.

8 And far from defeating her claim under a
9 claim of rights, the Supreme Court actually cited
10 that permission, that level of permission, as
11 bolstering her claim under a claim of rights theory.
12 It was one of the factors that gave her a claim of
13 rights.

14 Of course, in the Revis case she also
15 based her claim of right on the fact that this she
16 believed was a public road, just like Mr. Shirley in
17 this case. This was a road that had been a public
18 highway. And they moved the road over. And it was
19 a way they were using to get in the Revis case.

20 But we believe that if you look at the
21 more recent case, that permission is an impediment
22 to an adverse claim, but not to a claim of right.
23 And, as I say, in Revis versus Barrett she had
24 written permission. Certainly don't have that here.

25 There was another thing that they claimed,

1 and that was that the State had an interest in this
2 property which is the wildlife. And that that
3 somehow defeated Mr. Shirley's claim to a
4 prescriptive easement. And they stated a cite in
5 this case called Davis versus Montief which is cited
6 in their brief.

7 If you read that case, it's not even a
8 prescriptive easement case. It is an adverse
9 possession case where someone tried to adversely
10 possess a piece of property that was owned by a
11 school district. And we submit that that is
12 absolutely not on point to anything in this case,
13 distinguishable from all of the facts.

14 We are claiming a prescriptive easement.
15 We have two different 20-year periods that we can
16 establish. And we say once a road, always a road.
17 Once an easement, always an easement.

18 Now, the first period is from December of
19 1947 when Elijah Bennett acquired this property
20 which Mr. Shirley now owns until 1969 which is
21 actually the last deed out of the Bennett family.

22 The purchaser from the Bennetts had to
23 acquire his title by several different deeds with
24 there being so many heirs of Elijah Bennett.

25 Mr. Bennett testified clearly today that they used

1 this road, the road in dispute. It was the only
2 road to get to his property.

3 And that during the years that they used
4 it that he farmed the property. That was the road
5 that was used to farm, to cut firewood, and then to
6 plow the property after it ceased being used for
7 farmland.

8 The property must have been plowed, too,
9 for the intervening years because Ricky Miller
10 testified that his daddy was able to use that field
11 to farm in '64 through '68 I think he said. So they
12 kept the field open by continually plowing it up and
13 not allowing it to be overgrown.

14 We would also submit that the use of the
15 property by the tenant of Elijah Bennett and his
16 heirs is tantamount to the use of property by the
17 landowner. I mean, he used the road and tenants
18 used the road. Everybody used the road for a period
19 of 20 years uninterrupted.

20 And this is a little trick. These are
21 clever, clever people that try to figure easements.
22 This is a little trick they have been playing for
23 the last 36 hours. They say that somehow Ms. Purteil
24 Boykin gave permission to the Bennetts. And that
25 that somehow defeats our claim to a prescriptive

1 easement.

2 I want to remind the Court that the only
3 thing before the Court today is the prescriptive
4 easement shown by the orange line on Plaintiff's
5 Exhibit 2. Nothing in the Miller compound is
6 relevant to the establishment of a prescriptive
7 easement from the Bowater line, the Bundy line, to
8 the Shirley line.

9 The Millers had no right to give anybody
10 permission to use the portion of the road that is in
11 dispute because they didn't own it. So if they
12 allowed or gave permission to anybody to use the
13 road in front of their property, that doesn't count
14 in this case because that is not what we are arguing
15 about. We are arguing about the road over the Bundy
16 property.

17 The same way they use this barrier that
18 Ms. Miller -- Ricky Miller says his mother erected
19 in 1960. That doesn't count either because that is
20 not on our road. That is not on the road that is in
21 dispute. That is a blocking of another piece of
22 road.

23 Now, that piece of road may be litigated
24 in the future. And the Millers may bring a claim to
25 try to stop Mr. Shirley from using that portion of

1 the road, but that is not what is before the Court.
2 So any barrier or interruption from a barrier, which
3 there was still not an interruption because
4 Mr. Miller testified that Mr. Shirley removed the
5 gate or the barrier as soon as it was put up.

6 But any barrier or gate in the Miller
7 property doesn't count in this case because that is
8 not the road that is in dispute and before the
9 Court. That is what we call in the law a red
10 herring to distract the Court.

11 Now, the Bennetts did not keep a log of
12 their farming activities. They did not keep a
13 calendar from which we can go back and see what days
14 they cut wood and what days they plowed.

15 I can't show that, but I can show that
16 there was a road there in 1956 by the aerial
17 photographs which is in the latter part of the
18 Bennett farming. I can show there was a road there
19 in 1964. The road was still clear. I have
20 Mr. Bennett to say they used it.

21 And we submit that we have slam dunk
22 proved use by the Bennett family and its tenants,
23 the Millers, for the full 20-year period from 1947
24 to 1969.

25 Now, kind of interesting with Ricky

1 Miller, too. He said, you know, the Bennetts
2 weren't going up there, and they didn't have any
3 right to use that. He said, "My daddy farmed it."
4 And I said, "How did he get there?" "He used the
5 road." So that was the road. That was the only
6 road. That is the way to get there.

7 One more thing about Ricky Miller. He
8 admitted that they had had a dispute with Mr.
9 Shirley. He also talked about the fact that he
10 doesn't like the Shirleys going through there, the
11 speed of the vehicles or whatever. He wants to
12 knock Mr. Shirley out. He has a bias and an
13 interest in this case.

14 And I believe we submit that Ricky Miller
15 knows the 20-year rule. All he's got to do is --
16 you know, he doesn't have to shave -- he doesn't
17 have to say Mr. Shirley never used road. He doesn't
18 have to say Mr. Bennett never used the road. All
19 he's got to do is shave a few years off those
20 20-year periods.

21 Just kind of get that use of that
22 alternate road that we can't find on any of these
23 maps, just kind of move that use of that alternate
24 road kind of into the early '90s. That will solve
25 all of Mr. Miller's problems of traffic through

1 their property. And that is what he testified to.

2 He testified that Mr. Shirley used an
3 alternate route. And Mr. Shirley adamantly denies
4 that he did. But Mr. Shirley has an interest in
5 doing that. We all know that. He is a party. But
6 Mr. Miller also said that the Bennetts used that
7 alternate route. This alternate route that
8 Mr. Bennett says wasn't even there because he says
9 the Rooster Pit road ended at the Rooster Pit.

10 Mr. Bennett, who is the only witness that
11 appeared in this courtroom who has no interest in
12 this matter at all, says, no, there wasn't another
13 road. Never was one. We used Saxon Road all the
14 way through.

15 The second prescriptive period is 1985 to
16 2009 when this case was filed. That is the period
17 that the Shirleys owned the property. They used it
18 openly. You can't get much more adverse than Mr.
19 Shirley's relationship with Mr. Bundy.

20 Now, I don't think that the law requires
21 the adverse user to cuss at the surrogate landowner
22 every time he drives by and flip him the finger or
23 anything like that. I think that you just have to
24 use it openly and notoriously, go up and down the
25 road, during the 20-year period.

1 The Plaintiff has said, "Well, you know,
2 Game Management had a lease on that area for the
3 years that Bowater owned it." But the testimony on
4 that was clear, that you had to have a permit to get
5 on the Game Management area to gain permission. And
6 this is all about permission. To get permission to
7 use the Game Management area you had to buy a
8 permit.

9 And there is no evidence that Mr. Shirley
10 bought a permit during the 20-year period. He said
11 that he had a permit before they bought the property
12 to go out there. That is how he found it. Once
13 they bought the property, he didn't see the need to
14 buy a permit anymore. There is no evidence that he
15 had a permit or that he had any right to use the
16 Game Management area during the 20-year period.

17 Now, there is clear evidence that they
18 used this road in that period. And Mr. Miller said
19 he used another route for awhile although, like I
20 say, when you look at those aerials, the road is
21 hard to pick out, but that is for the Court to
22 decide.

23 There was something made of the key. And
24 I know that Mr. Babcock cited the case earlier, this
25 Cleveland case. Cleveland versus Wesvaco. That was

1 a case where the public used a landing called Moe's
2 Landing. Mr. Cleveland, who was trying to bring
3 that case and establish the easement, did not own
4 the land at the end of prescriptive easement that he
5 was trying to establish. It was just a public piece
6 of land on the river.

7 And he was trying to establish a
8 prescriptive easement through Wesvaco's property to
9 his place. And that is where the Court said, "Well
10 you know, you have to have this special exclusive
11 relationship with -- in order to get -- establish a
12 prescriptive easement. You can't just say I'm a
13 member of the general public."

14 Well, we submit that that case is not on
15 point because Mr. Shirley owned the property at the
16 terminal of the easement. And the Cleveland case
17 also says you have to talk about an exclusive right
18 separate from that of the public.

19 And that is the right that Mr. Shirley was
20 asserting with these gates because he was asserting
21 that since it's a public road he thought the public
22 could go through there, but he wanted to control
23 which public went through there and which public
24 didn't and when they went and when they didn't.

25 So that is why he had the -- Mr. Bundy put

1 up the gate and then put up a second gate. And, of
2 course, there was this testimony about a cable
3 across there that only Mr. Shirley had a key to.
4 Mr. Shirley -- both Mr. Shirley and the game warden.

5 Now, they have cited some key cases. I
6 submit to you that none of the key cases are South
7 Carolina cases. There is no South Carolina key case
8 that amounts to permissive use.

9 But we would show that the key did not
10 come from the landowner who was Bowater. The
11 testimony was that the key came from the Game Warden
12 who was friends with Mr. Shirley.

13 But I would say that we have done all that
14 we can do to show adverse use over a period of 20
15 years. Mr. Shirley testified that is the road he
16 used, that is the only way going in and out.

17 But we have also pled under a claim of
18 right. As a matter of fact, that is why we amended
19 the answer this spring. Under a claim of right, all
20 Mr. Shirley has to establish for the 20-year period
21 is that he used the road believing with a good faith
22 belief that he had a right to use it based on some
23 facts.

24 It defeats their claim that permission
25 defeats the prescriptive easement. The claim of

1 right gets us out of the permission problem. The
2 claim of right asserted by Mr. Shirley is based on
3 some factors.

4 First of all, he was shown the property.
5 The real estate agent used this road to show him the
6 property. Second of all, the road in question is a
7 mere continuation of Saxon Road. It is not a road
8 that deviates to the right. It's not a road that
9 deviates to the left. It is Saxon Road just like
10 the public road leading up to his property.

11 Secondly, or thirdly, it has been adopted
12 and included on all the tax maps of Kershaw County
13 as a road. It is in Mr. Maret's plat from 1960
14 showing it as the way to get there. And as Mr.
15 Shirley testified, he knows that his parents took
16 this to a lawyer when they bought it.

17 Now, much has been made about the chain of
18 title issue, Mr. Bundy's chain versus Mr. Shirley's
19 chain. I submit that chains of title don't belong
20 to people. Chains of title are records that are
21 kept in the public record in Kershaw County.

22 The way we check titles -- and I had a
23 discussion one time with Judge Manning over in
24 Columbia about a real estate case. And I remember
25 Judge Manning saying, "Well, back in Dillon County

1 when I use to search titles this is the way we did
2 it."

3 So he had a working knowledge of title
4 searches. So when I send my searcher to the
5 courthouse to search a title, she has to search the
6 property itself. And then she knows that she has to
7 search anything between that property and the
8 nearest public road to establish whether it has
9 access or not.

10 If we had been searching the Shirley
11 property my title searcher would have searched. She
12 would have found the Marett property because when
13 she didn't find a road at the Shirley property, she
14 would have gone -- had to go and searched the
15 property next door between it and the nearest road.

16 She would have searched the Bowater/Bundy
17 property and found the Marett plat. It would have
18 shown a road -- it would have shown the entire road
19 which is now Saxon Road.

20 Out of an abundance of caution my law firm
21 would have taken the step of calling Lorraine at the
22 Public Works Department for Kershaw County. And we
23 would have checked to see whether Saxon Road is a
24 public road because that is what we would ask.

25 And Lorraine would look up on her schedule

1 of roads. And she would tell us, "Yes, Saxon Road
2 is a public road." And she would be telling me the
3 truth. So the searcher who searched this piece for
4 Mr. Shirley would have -- if they had checked the
5 road going in would have believed that it was part
6 of the public road. I would have fallen for it if I
7 would have been checking the title.

8 The facts in evidence show that Mr. Bundy
9 bought his property. He was sent a contract that
10 showed this road on it before he bought it. He
11 closed subject to a plat which showed this road on
12 it. He knew this road existed.

13 And that is another thing about checking
14 title. You know, we had this come up this week.
15 You get these plats, and they show these woods roads
16 on them. And my deal is if the woods road ends on
17 my client's property, as has been pointed out, a lot
18 of these woods roads just end on the Bundy property.
19 I'm not very concerned. And that is what I had this
20 week. I had a woods road that went into my client's
21 property, but it's --

22 MR. BABCOCK: Your Honor, I'm going
23 to -- had this been a jury trial I would have
24 objected a lot earlier, but this is totally improper
25 for what he's doing on some other case in his office

1 this week. It has nothing to do with the evidence
2 before this Court, nothing to do with the issues for
3 this trial. So I object to that argument.

4 THE COURT: I'll note your objection.
5 Mr. Wells, if you can tie it in relevantly to what
6 we are doing today.

7 MR. WELLS: When you see a plat like
8 the Marett plat, and you see the dotted line going
9 to the neighbor's property, I believe you are on
10 notice that you have an easement across your
11 property. I believe that creates sufficient notice
12 to have Mr. Bundy bound by that easement as a matter
13 of law.

14 In summary, we have established two
15 20-year periods. We've established the Bennett
16 period even though, as I say, they don't have a log
17 of every time they went out there and plowed with
18 the mule. We've established their 20-year period.

19 We've established the Bundy 20-year period
20 from 1985 to 19 -- to 2009. We have established as
21 strong a case of an easement by prescription as can
22 be established under the law.

23 Now, Mr. Babcock said earlier that you
24 can't establish a prescriptive easement through
25 woodlands or a wooded area. He's citing this

1 Cleveland case. If that were the case, if that were
2 the law of South Carolina, most of the people in
3 Kershaw County would not have access to their
4 property because most of the roads in Kershaw County
5 were public county roads or established by
6 prescriptive easement through woodlands. These old
7 wagon roads through the woods warped into the dirt
8 road system we have today.

9 In this case, of course, the Game
10 Management people knew the Shirleys were back there.
11 The Game Warden knew Mr. Shirley and gave him a key.
12 So there is no question they knew they were back
13 there using it. And they allowed him to use it from
14 1985 to 2009.

15 So we believe that we have established a
16 strong case for continued use of this property not
17 one, but two 20-year periods. And we would ask the
18 Court to find that he does have an easement.

19 We do argue on the scope of the easement.
20 I believe the easement would be an eight-foot
21 easement. That is about what people have talked
22 about. As far as taking heavy equipment back there
23 to build or not build a place, there was testimony
24 they took heavy equipment back there before to build
25 a pond which is how the pond got built on the

1 Shirley property.

2 I don't think the Court can tell him what
3 he can do and can't do back there, but I think
4 you've got to at a minimum have an eight-foot
5 easement for ingress and egress or however the Court
6 decides to define the road that we saw on the video.
7 It looked like an eight-foot easement to me.

8 I don't think that he can claim a 50-foot
9 easement or anything that would warp into a road or
10 a subdivision, but we are just asking for it to be
11 an eight-foot easement such as it is right now. And
12 such as it has been since Mr. Bennett took his wagon
13 back there in 1948. Thank you.

14 MR. BABCOCK: May it please the
15 Court. Let me address the last point first. In
16 terms of if there is an easement, and we strenuously
17 deny that there is an easement, but simply bringing
18 heavy equipment there one time and a pond being
19 constructed is not continuous use.

20 Whatever use was done throughout the time
21 has been simply to go back there to hunt and fish
22 and taking a truck back there. So if there is an
23 easement, it is not for equipment to go back there.
24 It is for a truck to go back there or somebody to
25 walk back there.

1 Your Honor, I learned a long time ago that
2 when people try to go outside what has been
3 presented to the Court they are concerned. And they
4 are scared. And we just heard a lot of testimony
5 about what Lorraine would have said, what his title
6 searcher would have done and whatnot, and how these
7 things would have occurred. And there is not one
8 stitch of testimony on any of that. Not at all.

9 So when you get talking like that it's
10 because you've got a weak case. And they've got a
11 weak case. And just to protect myself for the
12 record, we have moved for the directed verdict for
13 the reasons that I just indicated in my closing
14 argument, that there has been no public dedication,
15 no private dedication, no prescriptive easement, and
16 no easement by estoppel, which are all the defenses
17 raised and counter-claims raised in this case. And
18 we ask for a directed verdict on that and a
19 declaration that Mr. Bundy has the rights to that
20 pathway and Mr. Shirley does not.

21 Now, let's go back and look at several of
22 the points raised. First off, this is not a case
23 about revenge, but it is a case occasioned by Mr.
24 Shirley's actions that has put Mr. Bundy in a
25 position where he is forced to assert his rights to

1 his property.

2 And because he's been forced, because he's
3 been threatened, he's coming to Court and he's
4 asking you to enforce his rights that are the law of
5 this state. And, again, when you start trying to do
6 things by prescription or by invocation, dedication
7 it's a high standard because it needs to be a high
8 standard.

9 The normal way rights are conveyed is by
10 deeds or easements that are recorded. And if you
11 are going to go a different route, you are held to a
12 very high standard because you are going against
13 what the rights are.

14 These maps and plats, we've talked about
15 them. I'm not going to go back again. There are
16 various trails, various indications. They don't
17 establish what is public or private. What
18 establishes it is the kind of testimony we heard
19 which showed this is not a public route.

20 And Mr. Shirley's own actions in
21 acquiescing with the Bowater gate and putting a gate
22 up himself are totally inconsistent with the concept
23 of this being a public road.

24 Permissive use. Mr. Wells wants to talk
25 about the Revis case. I urge you to look at the

1 Revis case. The letter there that he referenced is
2 a letter that was written by one of the attorneys.
3 And it says, "I'm authorized to write this letter on
4 behalf of Thomas Barrett. You have a suit pending
5 against him asking that an obstacle, apparently a
6 cement block, be removed from a common roadway and
7 that your client's right to use the roadway is
8 recognized."

9 He then went on to say, "I know of no
10 reason why your client should not simply -- on the
11 side of the road. Mr. Barrett," his client, "had no
12 intention of obstructing the roadway which he
13 recognizes to be a joint and common right-of-way."
14 Joint and common right-of-way. That is very
15 different than permission to use my property. They
16 recognize a joint right-of-way there.

17 The issue with the State and prescription
18 against the State, you can't have adverse possession
19 against the State and get a prescriptive easement.
20 You can't have adverse possession.

21 So I certainly think that during the time
22 period that Wildlife Management had the lease on the
23 property, they've got a real problem getting over
24 that legal hurdle. And let's go to their two
25 20-year periods. And I don't want to talk about

1 them long because I talked about them before, but
2 what is important is the testimony in this court,
3 what people actually said.

4 And Mr. Bennett came into court today and
5 told you very clearly what he did on the property
6 with his dad starting in the late '40s, going up to
7 1958 when he got married and moved out. That is
8 where your Bennett testimony stops. You don't have
9 testimony going up to 1968 or '69.

10 No one has testified to that except for
11 the Millers. The Millers talked about farming it
12 for several years in the early '60s. I think three
13 or four years around '64. That is the testimony.
14 And they are not just any tenant, Your Honor. They
15 are the tenant of the property that this easement,
16 and I'll get to that in a minute, that Mr. Wells
17 wants to create would go across.

18 They are using the property knowing they
19 don't have the right to use it, but they are
20 permissively going back to farm there. They are not
21 using it in an open or hostile fashion. They don't
22 think they own it. They are simply using a path to
23 go back there. So the Millers' use of that property
24 clearly kills any use of the Bennett 20-year time.

25 And contrary to what Mr. Wells said, that

1 prescriptive right that they are trying to claim for
2 Mr. Shirley has got to go from Mr. Bundy's property
3 across the Miller property to the end of where Saxon
4 Road is maintained and where the public is. It's
5 got to go that whole distance because it's got to
6 get to a public area. And it's got to be the two.
7 You can't just stop at the Millers.

8 THE COURT: So what you are saying,
9 Mr. Babcock, is with regard to that 20-year period,
10 if the Miller use is, quote, permissive, it's that
11 permissive use by the Millers to get back to this
12 property cannot be tacked onto the use of the
13 Bennetts because of that permissive use. And thus
14 the 20-year period cannot, as a matter of law, be
15 met?

16 MR. BABCOCK: Yes, sir. Because they
17 have to think they are -- they've got to satisfy
18 those elements, too. It's got to be -- the open
19 hostile claim of right, adverse, those things. They
20 are not going back there thinking that they have a
21 claim of right or it's adverse. So you've got at
22 most, if you give them all the benefit on Bennett, a
23 14, 15, 16 years. They don't get anywhere close to
24 20 years.

25 Going over to the adverse situation. When

1 Mr. Bundy bought his property and first started
2 interacting with Mr. Shirley he allowed him to use
3 this pathway. There was nothing adverse about it.
4 He believed that it was his land. He believed he
5 was permitting in a neighborly way Mr. Shirley to
6 use his land to get back there.

7 It changed when he was threatened and
8 cussed out. And at that point you've got adverse,
9 but you see the problem with that argument for Mr.
10 Shirley is it's got to be -- is it a claim of right
11 or adverse the whole way back. It can't just be
12 adverse at one point and then say, okay, that gives
13 me the entire time to my property.

14 So that adverse nature doesn't help him
15 for the full period of time. He's got to have
16 either a claim of right or adverse for the full 20
17 years.

18 Let's look again at what Mr. Shirley
19 testified to both at his deposition and in court.
20 It's not -- it's always interesting because we, as
21 lawyers, try to focus on the legal arguments and
22 make legal arguments for our client, but the key
23 thing is what the client testified to.

24 And what he testified to was he thought
25 that it was a public right-of-way. And that his

1 rights were because it was a public right-of-way.
2 That is what he said he thought he had the reason to
3 use it, but then that is inconsistent with both
4 having a Bowater chain for which he had a gate, and
5 then putting up the gate with Mr. Bundy.

6 So, in truth, Mr. Shirley really wasn't
7 giving any thought to how he got back there. He had
8 seen other people using it. He used it. And he
9 didn't think he was doing it either prescriptively
10 or come up with this public road theory, but that
11 doesn't jive with what his testimony was.

12 The truth of the matter is he just used
13 that because he'd seen other people use it. And he
14 wasn't going through any legal analysis. People had
15 used it. So he wanted to use it, but then close it
16 off? Sure, we will close it off.

17 Your Honor, I talked a good long while
18 earlier. I'm not going to rehash all I said
19 earlier. We've looked at the elements. We've given
20 you -- I can't take credit for the full brief.
21 Parts of it I'll take credit for, but not the full
22 brief. Mr. Smith had much of the law that we put in
23 there, but I think when you look at the standard,
24 it's a very high standard; strict, cogent,
25 convincing evidence. They failed to meet their

1 standard on their causes of action. And we would
2 again request that this Court finds that an easement
3 does not exist on any method over Mr. Bundy's
4 property. And Mr. Shirley does not have a right to
5 use it. Thank you.

6 THE COURT: All right. Gentlemen, I
7 am going to -- I'm going to deny the cross-motions.
8 I think that there are substantial issues of fact
9 here which need for the benefit of the world, and
10 particularly these two people, need to be written
11 down on paper.

12 So I'm going to deny those motions. I'm
13 going to take this matter -- this is not something
14 that needs to or can be ruled immediately from the
15 bench. I am going to spend some time with your
16 briefs, with the cases, with review of the
17 transcript, and review of the items of evidence that
18 have been presented.

19 I'm going to give this some thought full
20 time because it needs and deserves thought full
21 time. So therefore I am not going to issue from the
22 bench any order today, but that I'm denying those
23 motions.

24 And I would hope that we could get this
25 resolved in a very reasonable amount of time. So

1 therefore if there is nothing else, I would call
2 this hearing as being concluded. I would like to
3 spend a minute with the two lawyers and go over our
4 list of exhibits to make sure that we have
5 everything in order and we have a complete and good
6 file of this that I can thereafter take, read,
7 review, and discern what the facts are. Okay.
8 Thank you all very much.

9 MR. BABCOCK: Thank you, Your Honor.

10 MR. WELLS: Your Honor, still on the
11 record, there was a map yesterday that Mr. Shirley
12 was having trouble with the identification. And I
13 think there was an objection to his identification
14 of his road on that map.

15 And we would -- this is Defense Exhibit 2.
16 We would concede to leave that or to strike that
17 from the evidence if you would prefer. It's one of
18 the photographs.

19 THE COURT: This is one of the
20 photographs that Mr. Shirley had a problem with
21 finding the property because a lot of that property
22 is not wooded. It's all field. And I believe he
23 put an X somewhere.

24 MR. WELLS: We would offer as a
25 curative step to exclude that photograph from your

1 consideration.

2 THE COURT: I want to look at the
3 photograph. I want to look at the photograph as to
4 where -- I mean, it's in. As to where -- I mean,
5 it's a 19-whatever picture. And it looks a heck of
6 a lot different than it does today. And I know
7 that. So we'll just -- I would prefer to leave it
8 in because I think that those maps are entirely
9 relevant to the issue at hand.

10 MR. WELLS: Thank you.

11 THE COURT: Okay? Now, what I would
12 suggest if we could do, Mr. Wells, is just for my --
13 so I don't have to keep going back and forth, I mean
14 can we agree that, for instance, on Defendant's
15 Exhibit Number 2, can we write the date up here that
16 we've all talked about?

17 MR. BABCOCK: There was a date on
18 some of them, Your Honor.

19 MR. WELLS: There is a date on them.
20 You have to look at it.

21 THE COURT: There is? Okay. I got
22 you. I got you.

23 MR. WELLS: It's in the upper
24 right-hand corner. No, the upper left-hand corner.

25 THE COURT: I see. '69.

1 MR. WELLS: That is how they do --

2 THE COURT: Okay.

3 MR. WELLS: Except for the big '74
4 one, and it's hidden down at the bottom.

5 THE COURT: All right. Will you all
6 take a moment and go through this with the court
7 reporter and make sure that we have a complete set
8 of that? Off the record.

9 (Whereupon, the hearing was concluded
10 at 11:10 a.m.)

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Certificate of Reporter

I, Jeffrey M. Thomas, RPR and Notary Public in and for the State of South Carolina, do hereby certify that I reported the Hearing of Bundy v. Shirley on the 26th day of August, 2010: that the witness was first duly sworn by me, and that the foregoing 76 pages constitute a true and correct transcription of the said hearing.

I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties connected with this action, nor am I financially interested in said cause.

I further certify that the original of said transcript shall be hereafter sealed and delivered to Roderick M. Todd, Jr., Esquire, Special Referee, P.O. Drawer 99, Camden, South Carolina 29021.

In witness whereof I set my hand and seal
this 30th day of September, 2010.

My Commission
expires 12/14/17

Jeffrey M. Thomas
Jeffrey M. Thomas, RPR
and Notary Public for the
State of South Carolina