THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUL 0 8 2013

S.C. SUPREME COURT

APPEAL FROM 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UNPUBLISHED OPINION NUMBER 2013-UP-153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,

v.

Bobby Brent Shirley.....Petitioner.

Supreme Court Case No. 2013-001263

RESPONDENT'S RETURN TO THE AMENDED PETITION FOR WRIT OF CERTIORARI

Stephen A. Spitz, Esq.
S.C. Bar No. 5287
1134 Clearsprings Drive
Charleston, South Carolina 29412
843-377-2154 (p)
843-853-2519 (f)
Sc.spitz@prodigy.net

M. Brent McDonald, Esquire,
SCB # 78057
Smith Bundy Bybee & Barnett, P.C.
P.O. Box 1542
Mt. Pleasant, SC 29464
(843) 881-1623
Attorney for W. H. Bundy, Jr.

Other Counsel of Record:

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

TABLE OF CONTENTS

Respondent's Counter-Statement of Questions Presented

1. Assuming the Court of Appeals made an error (a matter that is speculative and unproven on this record) but promptly and fully corrected any alleged error, assuming one existed, with a subsequent May 20th Order, does it violate procedural due process to correct an error fully and completely or is that question now moot as a matter of law?

2. Does a joint stipulation of fact of permissive use and undisputed recognition of a servient owner's rights bar a prescriptive easement as a matter of law?

3. Does a Stipulated Set of Facts, voluntarily entered by both parties just prior to the trial's commencement, and read into the record by agreement, prevent the Petitioner from now arguing that the issue directly related to the Stipulations of Fact was never raised or considered below (when it was raised and argued at every level of this case without objection until Petitioner lost the appeal)?

4. Does Petitioner's own claimed use of a road properly permit him, under settled South Carolina law, to "tack" the time of a stranger's use of the road, when there is a gap of more than 16 years between the alleged periods of use and no connection at all between the two alleged periods of time?

5. Is a published prior case, decided two full months before oral argument in this case, fairly mentioned in the Court of Appeals' opinion?

6. When it is clear, as a matter of law, that the evidence for prescriptive easement does not really exist, and when it is equally clear that the lower court made errors of law with regard to settled prior rules of prescriptive easements and in making findings of fact that contradicted Stipulation of Fact Number 8, was it an error for the Court of Appeals to reverse an incorrect decision of law below?

Respondent's Counter-Statement of the Case

The Respondent does not agree with parts of the Petitioner's Statement of the Case. The disagreement includes:

A. Petitioner's Statements of the Case About Saxon Road are Inaccurate

At trial, Petitioner Shirley repeatedly claimed that the entire disputed road (which he now erroneously calls the Saxon Road) was public. But, the Special Referee, after initially finding the

road was public, reversed himself in a subsequent Order[1] and held the Road was not a public road. Since this subsequent finding was not appealed, it is now the law of the case that the entire disputed road was private and not public. Moreover, contrary to the Shirley's Statement of the Case, Saxon Road ends at the Miller property, and all county maintenance ends at the Miller property, not at the end of the Bundy property. Even Shirley unequivocally testified that the County only maintained the road up to the Miller's Property. See Appendix, Pg. 243: 2-20; see also Appendix, Pg. 174:7-25; Pg. 175:1-23 (Bundy testimony).

B. Petitioner's Statement Of The Case About The Gap of Time Between The End of Bennett's Use of the Road and Shirley Father's Beginning of Use is Lacking.

One of Shirley's fundamental problems is a failure to introduce evidence that he had 20 consecutive years of adverse use. In his Statement of The Case, he first cites the Special Referee[2] in arguing that it was unnecessary to do so.[3] He then notes that since the Bennetts used the disputed road, and that there were six different owners of the so-called dominant tract between 1969 (end of Bennett's use) and 1985 (beginning of his father's use), he claims he could use the Bennett's acts as his own. Petitioner fails to mention, however, that no evidence in the record exists as to whether or not any of these six intervening owners ever used the disputed road for 16 years (1969 - 1985). This unexplained gap of time, with no connection whatsoever between the end of Bennett's use (ending in 1969) and beginning of Shirley Father's alleged prescriptive use (starting in 1985), is, Respondent believes, fatal as a matter of law to his

[1] *See* Appendix p. 23, Special Referee Order on Motion to Alter of Amend
[2] *See* Amended Petition, Pg. 3 (first full paragraph).
[3] Respondent submits and the Court of Appeals found that this was an error of law.

prescriptive claim because he cannot tack the time when he has no connection to a long ago user. This lack of evidence is ignored in his Statement of the Case.

C. Petitioner's Statement of the Case Contradicts and Ignores Several Stipulations of Fact.

Although Shirley cites to the Special Referee's holding that Shirley developed a prescriptive use from 1985 through 2009 under his family's ownership of the dominant tract both Shirley and the Special Referee ignored (and actually even contradicted) several Stipulated Facts to make this erroneous conclusion of law. *See* Appendix pp. 4-5 (eight stipulated facts). It was specifically stipulated that Bundy's predecessors leased the disputed road to the S. C. Department of Natural Resources from 1985 through 2003. As a result of this uncontested fact, it was stipulated that a public agency of this State had a legal interest in the disputed property, including the disputed road, from 1985 through 2003. Accordingly, this Property and the disputed road, as a matter of uncontested fact, were publicly enrolled and the public itself (including Shirley) had public access to all portions to the future Bundy Property from 1985 to 2003[4] by permission and consent of the State of South Carolina itself.

D. In His Statement of the Case, Shirley Has Badly Confused The Time Sequence of Certain Events.

In his Statement of the Case, Shirley attempts to prove his hostile intentions, and to prove that he was always hostile and adverse to Bundy, by pointing to his own "violent outbursts." Amended Petition, p. 3. But, the uncontested evidence is that the parties started out as neighbors

[4] Respondent claims, of course, that these stipulations bar any prescriptive claim during this period of time as a matter of law. As it is fully settled that during the time of public ownership and public lease neither adverse possession nor prescriptive easement can be acquired. Davis v. Monteith, 289 S.C. 176, 179-80, 345 S.E.2d 724,

and friends when Bundy initially acquired the property in 2003 and thus it was stipulated that Bundy granted Shirley permission to set up a gate between the Miller Property and Bundy's Property in 2004, shortly after Bundy acquired the Property. Shirley's "violent outbursts" only came later in time – after Bundy retracted his former consent and permission to Shirley to continue to use Bundy's private road and Shirley became threatening. Those subsequent events, Respondent submits, can not change the stipulation that they initially started out their relationship as friendly new neighbors with Bundy's permission to Shirley to put up a gate on Bundy's private road. See Stipulation of Fact No. 8, Appendix, p. 5.

E. Shirley's Final Paragraph of his Statement of the Case is Based Upon Speculation Not Found in the Record.

Respondent agrees that on May 20, 2013, the Court of Appeals issued a Supplemental Order formally stating that the Court had reviewed the Petitioner's Reply to the Respondent's Return but found no reason for further rehearing. (The Court had previously accepted some of Petitioner's contentions in its Petition for Reconsideration by vacating its earlier decision and replacing it with a new Unpublished Opinion on May 8, 2013). The rest of the paragraph is based partially on speculation and is not part of the Record on Appeal.

---

726 (S.C. 1986) ("[A]dverse possession does not run against the [S]tate or its duly constituted political

Argument

Two Preliminary Matters

A. The Court of Appeals Decision Deliberately Elected Not To Address All The Issues In This Case. Accordingly, Even Granting Certiorari On All Six Questions Presented by Petitioner and Reversing The Court of Appeals Will Neither End this Case Nor Result In A Final Decision

In this case, the Court of Appeals was very clear that there were a number of questions as to which it felt no need to address on appeal. It held that since some issues were fully dispositive of the appeal, other issues by Respondent Bundy, that were fully briefed and argued to the Court of Appeals, were purposefully left undecided in the Court of Appeals' Unpublished Opinion. While Bundy certainly agrees that this was the right action to take, and the Court of Appeals was not required to address the remaining issues because it had disposed of the appeal, it does merit at least mentioning at the very outset that even granting certiorari here, even on all six questions presented by Petitioner Shirley, would not resolve this case or result in a final decision.

Specifically, it is clear that among the issues not addressed by the Court of Appeals are the following questions Bundy presented to the Court of Appeals:

1. **Did the Special Referee err in failing to rule that Shirley cannot adversely acquire a prescriptive easement over property in which the State of South Carolina has a legal interest?**

2. **Did the Special Referee err in failing to rule that the inequitable conduct of Shirley barred any relief sought by him in this action due to the doctrine of unclean hands and the doctrine that a party cannot profit from his own wrongs?**

---

subdivisions.").

3. **Did the Special Referee err in failing to require Shirley to establish an easement by prescription by the standard of proof of clear and convincing evidence instead of a mere simple preponderance of the evidence?**

4. **Did the Special Referee err in ruling that there was any evidence in the record showing that the Bennett use was adverse and continuous for 20 years.**

While the existence of these unresolved issues and others is hardly dispositive, it does suggest at least one reason why this case is not a particularly great candidate for a Petition to be granted.

B. This is an Unreported Decision, With No Impact on Precedent in This State, Grounded Solely Upon a Claim of a Single Private Party Against Another Private Party for a Routine Prescriptive Easement over a Dirt Road.

It repeats the obvious when it is pointed out that this is an unreported decision with no precedential value, except as provided by Rule 268(d)(2), of the South Carolina Appellate Rules. As argued subsequently in some detail, this is a standard, settled case of property law, with no conflict with prior rules or cases of this court, no federal question, no conflict with other courts, no novel question of law, and in fact nothing to distinguish it from countless other prescriptive easement claims made for centuries in South Carolina. It is a very fact intensive case.

Again, this hardly precludes the Court's discretion, but it does counsel that since Petitions for Certiorari are, by their very nature, normally highly discretionary – this unreported opinion arrives in this Court with close to a presumption that it should not be further reviewed, particularly because, as Respondent sees the matter, it was properly decided by the Court of Appeals applying standard prescriptive easement rules to the facts.

Response to Argument 1

Citing only two cases, State v. Newman, 384 S.C. 395, 683 S.E.2d 268 (2009) (which was a criminal case where a prison inmate was found guilty of taking a hostage. He claimed on appeal that he was convicted under a state statute he asserted was so vague as to deny him due process) and South Carolina DSS v. Beeks, 325 S.C. 243, 481 S.E.2d 703 (1997) (which Petitioner claims is "on point[5]" and dealt with a trial court's refusal to permit a relevant witness to be either examined or cross-examined), Petitioner's counsel now argues that the Court of Appeals in this case violated his client's due process rights by denying him any opportunity to be heard at "a meaningful time and in a meaningful manner." Accordingly, Petitioner ends his Argument I with the conclusion that "Certiorari must be granted in this case to cure the **procedural** due process violation by the Court of Appeals." Amended Petition, p. 6. (emphasis supplied to the word "procedural").

However, neither case cited by Petitioner is relevant to this case nor supports the Petitioner's claims of a due process violation in this case. Moreover, even assuming there was an error in the Court of Appeals, because it was promptly and fully cured by an Order of May 20, 2013, Petitioner's argument is moot as a matter of law.

Petitioner's first case, State v. Newman, was a criminal appeal by a prison inmate whose sole contention was that the trial judge should have dismissed the charges against him because the applicable statute, Section 24-13-450 of the S.C. Code, was "unconstitutionally vague." 683 S.E.2d 268. This Court disagreed and held the statute granted sufficient warning of what was criminal conduct to pass constitutional scrutiny. This Court further found that the inmate lacked

standing to raise the constitutional void for vagueness argument. It is a hard to see how that case has much to do with this case. That case was criminal. This case is civil. That case dealt with a statute. This case deals with no statute. That case dealt with a due process claim that a particular statute was "void for vagueness." This case has no such claim. Candidly, the two cases have very little in common.

Petitioner also relies upon S.C.DSS v. Beeks, 481 S.E.2d 703. In Beeks, a mother claimed she was denied due process by being precluded from presenting relevant evidence at a trial court hearing and from confronting and examining the Guardian Ad Litem (GAL). It was admitted that the GAL's report was introduced at trial, and relied upon by the trial judge, but the GAL herself was, by the lower court's own ruling, prevented and barred from testifying as was the child involved. In this type of case, it had been previously settled under South Carolina law that a party should have the right to cross-examine the GAL and any witness whose testimony forms the basis of the GAL's recommendation. Given this prior precedent, this Court found that due process required examination of the GAL.

But, Beeks provides no guidance here. In contrast to Beeks, no witness was excluded in this trial. Similarly, no cross-examination was denied. Actually, what the Petitioner now complains about is something entirely different. He complains of the actions of the Court of Appeals, in considering his Motion to Reconsider. This complaint forms the sole basis of the Petitioner's claim of a due process violation and is alleged to have occurred based upon the following time-line of events.

1. On January 9, 2013, the Court of Appeals heard oral argument in this case.

[5] See Amended Petition p. 6.

2. On April 10, 2013, The Court of Appeals issued its First Unpublished Opinion.

3. On April 24, 2013, Shirley filed a Petition for Reconsideration. His Petition pointed out a number of things he felt were in error, including a scrivener's error in the First Unpublished Opinion.

4. On May 3, 2013, Bundy filed a Return to that Petition for Reconsideration.

5. On May 8, 2013, Shirley filed a Reply to Bundy's Return.

6. On May 8, 2013, the Court of Appeals withdrew its First Opinion and re-filed in its place a Second Unpublished Opinion. In the Second Unpublished Opinion, the Court of Appeals corrected a number of things that Shirley had pointed out in his Petition (such as the date of oral argument in the opinion being wrong). It also issued an Order denying any further Rehearing.

7. Shirley's counsel then sent a letter to the Clerk of Court of the Court of Appeals asking whether the Revised Opinion of May 8, 2013, had been issued prior to his Reply or after his Reply had been considered. A copy of the letter is attached as **Exhibit A.**

8. On May 20, 2013, the Court of Appeals issued another Order explaining the Court had explicitly and expressly considered Petitioner's Reply of May 8th, but concluded that no further Rehearing was necessary in this case.

As lawyers are sometimes fond of saying – the May 20, 2013, Order "speaks for itself." This Final Order by the Court, denying further Reconsideration, explicitly and expressly stated that the Reply by Shirley had been filed on May 8th and it also expressly and explicitly states that **the Court of Appeals considered and reviewed the Reply**. On this set of facts, where is there any procedural due process violation?

Shirley was not only afforded a meaningful hearing in January, but when he was disappointed with the results, he was afforded every opportunity under the appellate rules to file a Motion for Reconsideration which in part was adopted by the Court of Appeals. The Court elected to withdraw its first opinion and file a second different opinion. Further, when Shirley

wrote the Clerk of Court of the Court of Appeals a letter questioning whether his Reply Brief was considered, he was told by the Court of Appeals in another formal Order of May 20th that the Reply Brief was considered but that there were no grounds for the granting of a rehearing.

In short, Shirley's Petition for Rehearing and his Reply were considered fully (but only partially acted upon) and we have the formal signatures of all three Judges in the Court of Appeals in the May 20, 2013 Order that his Reply was fully considered. Counsel for Respondent Bundy is unaware of any case - anywhere - that calls for more than what Shirley has received.

Procedural due process is a flexible standard, not based upon technicalities, and no particular form of procedure is necessary. In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). Here, even assuming an error (and that is far from clear as it is simply uncertain whether or not the Reply brief was or was not considered prior to the issuance of the May 8, 2013 denying Rehearing) it was fully corrected, explicitly and clearly, by the May 20, 2013 Order of the Court of Appeals. To draw a quick analogy, it would be as if in Beeks, the case the Petitioner relies upon in his argument for a due process violation, a motion for reconsideration had been filed in that case, the trial judge realized her error, and reopened the proceedings and permitted the GAL to be examined and cross-examined prior to making a final decision.

In this case, since no party is ever entitled as a matter of law to a hearing on a Petition for Rehearing in South Carolina, and because, if an error was made, it clearly was corrected – Respondent is unaware of any case that holds a corrected error, even assuming that there was one, automatically calls for a Writ of Certiorari. Moreover, Petitioner certainly does not cite any case that **a corrected error creates a due process violation.** Indeed, there is a very sound argument that any due process violation, even assuming one ever existed, is now clearly moot

under the standard rules of mootness[6]. In short, there is no procedural due process violation on this record and there is no demonstrated prejudice on this record. There is no actual injury, and Shirley received, precisely and exactly, what he should have received—judicial consideration of his Petition and Reply.

Response to Argument II

Petitioner Shirley next argues that the Court of Appeals improperly cited the case of Paine Gayle Properties, LLC v. CSX Transportation, Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012) and misapplied its holding and the law cited therein by finding that permissive use is a bar to a prescriptive easement claim.

Paine Gayle was decided on November 14, 2012, nearly two months prior to oral argument in this matter. Petitioner could have raised this case in a motion to supplement his brief if he so desired. He did not do so. Moreover, and even more fundamentally, the Court in Paine Gayle relied on two long standing legal principals governing a claim for a prescriptive easement in South Carolina. The first principal is that permission is a bar to a prescriptive easement claim. 735 S.E.2d at 536-538. The second is that a prescriptive easement claim based on a claim of right must be based on a claim of the right of use "without recognition of the rights of the owner of the servient estate." Id. The Paine Gayle Court held that acquiring permission was in fact a recognition of the rights of the owner of the servient estate, and, as such, no claim of right could be established.

[6] *See*, in general, Seabrook v. Knox, 369 S.C. 191, 631 S.E.2d 907 (2006) (recognizing that sometimes a due process claim can become moot because the practical legal effect is that relief has already been granted and the question has now, at best, become an academic question) A violation of due process typically results in a court order instructing that the party be afforded the process he was denied. Since that has already happened with the May 20, 2013 Order, even ruling on this question would have no practical effect whatsoever.

The Paine Gayle Court did not make new law, it applied long standing law. The Special Referee and Shirley each erroneously took a contrary position to the well-established law in Paine Gayle case. They took the position that permission was not a defense to a claim for a prescriptive easement pursuant to a claim of right. As noted in the Court of Appeals' Order, this position is an error of law and was based upon a misreading of the facts and holding in the Reavis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct.App. 1996) case. This does not, however, mean that the Paine Gayle Court established new law that was contrary to the previous law of this State.

Additionally, the Court of Appeals did not misapprehend or misapply the holding in Paine Gayle. Shirley argues that the Court of Appeals failed to compare and contrast the "overall tenor" of the affidavits submitted by the parties in Paine Gayle with the testimony in the present record on appeal. In the present case, however, it was stipulated that Shirley had permission to erect the gate in 2004. Appendix p. 5, Stipulation Number 8. There is no reason to compare and contrast facts that were in dispute in Paine Gayle with the stipulated fact in the present case because the fact of permission was conclusively established by the stipulation itself.

Moreover, notwithstanding the stipulation, Shirley seeks to use other portions of the record in an attempt to change the stipulated fact. This is improper for two reasons. First, as stated by the Court of Appeals in its Order, "stipulations are binding on the parties as well as the court." Therefore, neither the finder of fact in this non-jury case nor the parties can change the stipulated fact.

Second, Bundy's testimony (cited by Shirley in his Amended Petition at pages 8-9) is seriously taken out of context. In the testimony cited by Shirley, Bundy is testifying about

conversations that occurred only **after** 2004—the date of the stipulated fact regarding permission. As of 2004, the Court of Appeals held, based on the stipulation, that Shirley did not have a prescriptive easement. Shirley's conduct after that date, when the parties disagreed emphatically about Shirley's rights to use another person's road, is truly irrelevant to the stipulated fact. Bundy started the relationship with Shirley by granting him permission to use the road in order to be a "good neighbor." Only when Bundy told Shirley he could no longer use the road, and revoked his prior permission, did Shirley physically threaten Bundy. It was at this time that Bundy testified Shirley threatened to kill him. It was at this time that the Special Referee held that Shirley had "violent outbursts" and engaged in "illegal acts." This conduct, though reprehensible, is irrelevant to the fact that Shirley's use was permissive prior to his threats and violent outbursts.

In sum, the Paine Gayle Court not only applied the current and correct South Carolina law, the Court of Appeals very properly cited to the case in this case in holding that permissive use and the recognition of the other parties' property rights prevents, as a matter of law, a claim for a prescriptive easement.

Response to Argument III

Shirley next argues that Stipulation of Fact No. 8 was never raised or argued below and thus should never have been considered by the Court of Appeals in its opinion. This argument is in error and wrong for at least three reasons. First, Stipulation of Fact No. 8 was properly preserved at the very beginning of the trial below. Second, it was raised and argued below and on appeal. Third, only when Shirley lost in the Court of Appeals did he then—for the very first time—raise the question of preservation of an argument. Each of these points is briefly discussed

below.

First, Stipulation of Fact No. 8 was properly preserved at the very beginning of the trial below. *See* Appendix, pp. 520-521; *see also* testimony at the very beginning of the trial itself, Appendix, p. 122, lines 18-25 through p. 123, lines 1-12.

Mr. Babcock:

> [All 8 Stipulations were read into the Record, including No. 8]
> In 2004, Mr. Shirley put 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 Court:

> I will file these stipulations which I will note for the record have been executed by Mr. Babcock [trial counsel for Bundy] and Mr. Well [trial and appellate counsel for Shirley] on behalf of their respective clients. There is no issue as to any of these — anything in the chain of title, plats. All of that comes in. No clerk, no other stuff therein.

Mr. Babcock:

> That's correct, Your Honor.

The Court:

> Very well. All right. Gentlemen, are we ready to proceed?

Mr. Babcock:

> Yes, Your Honor. If we could have brief opening statements?

The Court:

> Yes, sir.

Mr. Wells:

> Your Honor, I believe that were more stipulations that we have agreed to.

Id.

Stipulations of Fact, of course, are fully binding upon the parties for all purposes. Indeed, it is fully settled as a matter of law that the very process of stipulating in open court to eight specific factual points – brings these matters into the case, and as a matter of law, they are

deemed to have been properly raised and argued both at the trial and appellate level based upon the very act of stipulation. See Thompson v. Steel Erectors, 632 S.E.2d 874 (S.C. App. 2006); Kirkland v. Allcraft Steel Co., Inc, 329 S.C. 389, 392, 496 S.E.2d 626 (1998). Thus, on the uncontested ground that Respondent and Petitioner both knowingly, willingly and in open court below, authorized the question of the gate being put up with Bundy's permission to be "stipulated as a fact," Stipulation No. 8 was properly preserved for argument on appeal. It seems quite odd to suggest this matter was not properly preserved when Shirley himself agreed to its admissibility for all purposes below.

Second, it is also very clear that this matter was argued below, without any objection of any kind that it was not "preserved." Merely as one of many examples, look at the Bundy brief below which used the Stipulation of Fact to argue that Shirley had used the road with his permission and thus was not adverse, specifically citing Stipulation No. 8 that "Bundy gave Shirley permission to erect the gate" Appendix p. 583, Bundy Final Brief. In Response, there was absolutely no argument by Shirley that this Stipulation was not in the case, or that it was not properly preserved, or that it was, so to speak, "out of bounds." To the contrary, Shirley argued that his use was adverse despite permissive use. (*See* Appendix pp. 622-624, Shirley's Brief in the Court of Appeals[7]). Shirley also directly argued that his use was not permissive. (*See* Appendix pp. 624-627 Shirley's Brief in the Court of Appeals).

It bears this Court noting that only when he lost in the Court of Appeals, did Shirley – for

[7] Repeatedly, Shirley argues that after Bundy revoked his permission to use his property he became very angry. In fact, originally both parties were on the best of terms – with Bundy saying "sure put a gate" and Shirley doing so in 2004. Only when Bundy revoked his permission to continue to use the road and Shirley became enraged and threatened to kill him did Shirley begin to assert rights in the disputed road. Permission and its revocation have been at issue in this entire case.

the very first time ever in this entire case – suddenly raise the question of preservation of the argument about consent and permission. Candidly, as discussed above, the issue of permissive use has been in this case throughout and from the very beginning of the trial, if not before. The uncontested position of Bundy and Shirley that the nature of Shirley's use was permissive as of 2004 led directly to the Stipulation No. 8. Again, the position of the Petitioner and the Special Referee was that permissive use was not a defense to a prescriptive easement alleged pursuant to a claim of right. The position of the Petitioner and the Special Referee was found by the Court of Appeals to be incorrect as a mater of law.

In sum, permissive use was properly pled by Bundy and directly raised to the trial court. Shirley was on notice that Bundy intended to raise this as a defense. Prior to trial, permissive use was knowingly stipulated to in open court by both parties. *See* Stipulation No. 8. Permissive use was also addressed in the closing argument, directed verdict motions, and post trial motions.[8] It was repeatedly and vigorously relied upon and argued in Bundy's brief on appeal. At every level, and based on overwhelmingly clear law, it is wrong as a matter of law to argue that this issue is not in this case and not properly preserved.

Response to Argument IV

The Court of Appeals ruled that "Shirley is unable to tack the Bennett family's use to establish **his** prescriptive easement claim." Appendix p. 718, Court of Appeals May 8, 2013 Order (emphasis supplied). This is clearly a correct and proper statement of longstanding South

[8] Permissive use was argued in Bundy's closing argument which also served as the appropriate directed verdict motions. Appendix pp. 360-361. *See* Appendix at p. 375, lines 12-15. (We've also cited some cases, Your Honor, when you've got situations with gates and keys. There is an indication that that is a permissive use). The Court's failure to rule that Bundy gave Shirley express permission was also raised in Bundy's Rule 59(e) motion to alter or amend. *See* Appendix at p. 58.

Carolina law. The Bennett family owned the property Shirley now owns from 1947-1969. Shirley's father acquired the property in 1985 and Shirley acquired it from him in 2005. Shirley nor his father acquired their property from Bennett, however.

There was no evidence presented by Shirley of any use at all for the period of time between 1969 and 1985. The critical question of law is whether or not this 16 year gap of time, after Bennett and before Shirley, defeats any connection or privity or tacking to link the Bennett use[9] to the Shirley use to allow Shirley to establish a prescriptive easement. The Court of Appeals correctly found that this gap prevents Shirley from "tacking" any of the Bennett use to establish his claim. First, in order to "tack," the parties must be in privity with one another. *See* Marrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (1997). Shirley's father did not purchase from the Bennett family. The privity requirement is also necessary as any use must be "continuous." Shirley did not present any evidence of continuous use by a prior owner because he did not put in any evidence of at least 17 years prior to his ownership. Therefore, he cannot "tack," though he was required to do so in order to meet the elements of a prescriptive easement. In short, as a matter of settled law, the Court of Appeals properly found that the Shirley failed to prove the required elements to claim a prescriptive easement.

Additionally, in Shirley's Petition, Shirley's counsel elected to cite, Cuthbert v. Lawton, 3 McCord 194, 14 S.C.L. 194 (Ct.App. 1825) which was not found previously in his brief to the Court of Appeals and was only cited in his Petition for Rehearing for the first time. (*See*

[9] As a very practical matter, there is no evidence in the record that the Bennett use met the elements of a prescriptive easement. In fact there is no evidence at all of any use of the disputed road by the Bennett family from 1960 to 1969. The reason for this is that the evidence was in fact offered at trial to prove the disputed road was a public road. The Special Referee ruled it was not a public road and this issue is not on appeal.

Appendix p. 680, Petition for Rehearing and compare that with his Table of Cases in Shirley's Brief, Appendix p. 605). Shirley now argues that Cuthbert is legal justification for the 16 year period of delay between the first period of use and the second period of claimed adverse use.

Bundy submits that the old South Carolina case of Cuthbert v. Lawton, 3 McCord 194, 14 S.C.L. 194 (S.C. Ct. App. 1825) actually supports Bundy's arguments. In Cuthbert, the Court found that a prescriptive easement had been proven by use from 1769 to 1800, and that while after 1800 the property had not been used as much by the prescriptive easement holder, it was **continued** to be used and that the mere diminished intensity use - after the prescriptive easement had been fully established - did not call for the jury verdict in that case to be overturned as contrary to law. The Court of Appeals, added however, in highly significant language for this case that had there been "adverse and continued obstruction for five years" after the prescriptive easement had first been established (which was not proven in that old case) then the result would have been quite different.

In this case, there was no evidence at all of any continued prescriptive use of the disputed road for the 16 years prior to Shirley's father acquiring the land. Therefore, as stated above, there is no evidence of continuous use by a prior owner upon which Shirley is able to tack.

Moreover, Shirley again totally overlooks the legal significance that between 1985-2003, there are four different relevant Stipulations of Fact dealing with this period of time. *See* Appendix pp. 520-521 (Stipulation of Fact No. 2 (during the entire period of time from 1985 - 2003, the future Bundy property was leased by the then owner of that land to the State of South Carolina); Stipulation of Fact No. 3 (the State's agent, the South Carolina Department of Natural Resources, had a legal interest in the property now owned by Bundy from 1985 - 2003);

Stipulation of Fact No. 4 (The now Bundy property, during the 1985 -2003 period of time, was enrolled in the State Wildlife Management Area Program[10]) Stipulation of Fact No. 5 (Public Access to all portions of the Bundy property existed from 1985 to 2003)).

In light of the absence of any evidence of adverse use from 1969 - 1985, and in the presence of the "legal roadblocks" found in the Four Stipulations of Fact that existed between 1985-2003, it is clear **as a matter of law**, that any years of Bennett prescriptive use, even if they existed, were blocked, obstructed, and ended, from 1969 until 2003 (34 years in total, almost seven times as long as the dictum found in Cuthbert that five years would end the prior prescriptive easement as a matter of law).[11] In sum, this Court was correct when it held that Shirley failed to present any evidence sufficient to allow him to "tack" to establish his prescriptive easement claim.

Response to Argument V

Shirley argues that the Court of Appeals retroactively applied the decision of Paine Gayle Properties, LLC v. CSX Transportation, Inc., 735 S.E.2d 528 to the present case. The Court, however, did not improperly cite the Paine Gayle case to the present case.

First, as stated above, Paine Gayle did not establish new law but merely reasserted long standing law. The case was the most current statement of two fundamental legal principles regarding prescriptive easements—(1) permission is a bar to establishing a prescriptive easement; and (2) recognition of the servient owner's rights is a bar to establishing a prescriptive

[10] Of course, it is fully settled, as pointed out in the Bundy's final Brief to the Court of Appeals, that during the time the State of South Carolina, or its various political subdivisions, such as the Department of Natural Resources owns or holds a lease on the property, no prescriptive rights or adverse possession is possible as a matter of law. *See* Appendix p. 596, Bundy Final Brief (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).

easement as a claim of right.[11] Second, a decision of an appellate court is, as a general rule, retroactively applied. The only instances where a decision may not be applied retroactively is when it either creates "new substantive rights" or when it "liability is created where formerly none existed." Toth v. Square D Co., 298 S.C. 6, 377 S.C. 584 (1989). The Paine Gayle case did not establish new substantive rights nor did it create new liabilities. In this case, Shirley asserted he had a prescriptive easement over the property of Bundy. The Paine Gayle case did not change the elements of a prescriptive easement in any way. It did not establish permissive use as a bar to a prescriptive easement. It certainly did not subject Shirley to any new liabilities where none previously existed. In this case, Shirley simply could not and did not prove all the elements of a prescriptive easement.

In sum, the Court of Appeals properly cited to and relied on Paine Gayle Properties, LLC v. CSX Transportation, Inc., 735 S.E.2d 528 as a statement of current and longstanding South Carolina law.

Reply to Argument VI

Shirley argues that the Court of Appeals impermissibly invaded the province of the trial court in ruling that evidence in the record establishes a permissive character of Shirley's use of the road. The Court of Appeals, however, did no such thing. The Court of Appeals applied the stipulated facts to the law. The Court simply found that the Special Referee could not make findings of fact contrary to the stipulated fact. In applying the stipulated facts to the law, the Court correctly found that Shirley could not legally establish a claim for a prescriptive easement.

[11] It bears noting again that there is simply no evidence in the record of any Bennett use from 1960 to 1969.

The Court of Appeals is free to correct errors of law which is precisely what it did in the present case.

Conclusion

Of course, as this Court is well-aware, the general rules in considering a Petition for Certiorari are stated in Appellate Rule 242. The Rule states that a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. While the following five grounds are neither controlling nor fully measure this Court's discretion, the Court often takes a long look at the following:

(1) Novel questions of law

(2) Where there was a dissent in the decision of the Court of Appeals

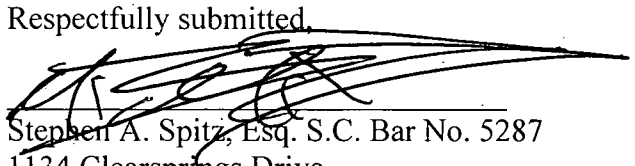
(3) Where the Court of Appeals is in conflict with a prior decision of the Supreme Court itself

(4) Where substantial constitutional issues are directly involved

(5) Where there is a federal question in the case and the Court of Appeals decision conflicts with a decision of the United States Supreme Court.

As argued previously herein, Respondent truly believes that none of these five grounds remotely applies to this case. There was no dissent. There is no conflict with prior case law. There is no federal question. There is novel issue. There is no real substantial constitutional issue involved (and even assuming an error below by the Court of Appeals it was fully corrected). This is merely an unreported opinion that properly concludes, based upon the uncontradicted evidence and Stipulations of Fact, that Shirley failed to prove his claim of a prescriptive easement.

Respectfully submitted,



Stephen A. Spitz, Esq. S.C. Bar No. 5287
1134 Clearsprings Drive
Charleston, South Carolina 29412
843-377-2154 (p)
Sc.spitz@prodigy.net

M. Brent McDonald, Esq. S.C. Bar No. 78057
Smith, Bundy, Bybee, & Barnett, PC
Post Office Box 1542
Mount Pleasant, SC 29465-1542
843-881-1623 (p)
bmcdonald@s3blaw.com

Attorneys for Respondent Bundy

July 2, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM 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,

v.

Bobby Brent Shirley.....Petitioner.

Supreme Court Case No. 2013-001263

PROOF OF SERVICE

I certify that I served the Respondent's Return to the Amended Petition for Writ of Certiorari on Bobby Brent Shirley by depositing a copy of it in the United States Mail, postage prepaid, on July 2, 2013, addressed to his attorney of record, John W. Wells, Esquire, Baxley, Pratt & Wells, PA, Three The Common at Lugoff, PO Box 10, Lugoff, South Carolina 29078.

Stephen A. Spitz, Esq.
S.C. Bar No. 5287
1134 Clearsprings Drive
Charleston, South Carolina 29412
843-377-2154 (p)
843-853-2519 (f)
Sc.spitz@prodigy.net

M. Brent McDonald, Esquire,
S.C. Bar No. 78057
Smith Bundy Bybee & Barnett, P.C.
P.O. Box 1542
Mt. Pleasant, SC 29464
(843) 881-1623
Attorneys for Respondent

July 2, 2013