

THE STATE OF SOUTH CAROLINA
IN THE 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UNPUBLISHED OPINION NUMBER 2013-UP-153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.,

vs.

Respondent,

Bobby Brent Shirley,

Petitioner.

Supreme Court Case No. 2013-001263

REPLY

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S.C. Supreme Court

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ARGUMENT AS TO THE PRELIMINARY MATTERS RAISED IN THE RESPONDENT'S RETURN

Preliminary Matter A

Realizing that the Petitioner could prove that the disputed road had served as the sole access for the Petitioner and the former owners of the dominant estate for a period of over sixty (60) years, the Respondent did in fact use the shotgun approach, raising a multitude of technical issues to try to defeat the prescriptive easement, hoping that at least one would hit the mark. The unlikely winner was the issue selected by the Court of Appeals in its May 8, 2013, Revised Opinion that permission to erect a gate defeats a prescriptive easement as a matter of law. That is the issue before the Supreme Court on the Petition for a Writ of Certiorari, and the other issues mentioned by the Respondent in his return have nothing to do with this discussion.

PRELIMINARY MATTER B

This case does present a novel issue of law, to wit: whether permission given by a servient tract owner to build a gate defeats a prescriptive easement as a matter of law. This is a question that is likely to be repeated in the future because rural property owners frequently erect gates for their mutual protection from trespassers on shared rights of way in the woodlands of South Carolina under a myriad of different arrangements. If the new rule announced by the Court of Appeals in its May 8, 2013, Unpublished Opinion, that permission to build a gate defeats a prescriptive easement, is going to be applied to all gates erected in the future, then the would be gate builders in rural South Carolina need to know that the rule. The Petitioner did not know that rule because it had not been mentioned in any South Carolina prescriptive easement case before he consulted with the Respondent about erecting a gate for their mutual benefit in 2004.

The unfairness and injustice of applying the gate rule to the Petitioner is exacerbated by the hiding of the gate rule in an Unpublished Opinion of the Court of Appeals and thus creating a trap for the unwary.

If South Carolina is going to adopt a rule of law that permission to build a gate defeats a prescriptive easement, then the Supreme Court owes the rural landowners of this state the duty of accepting certiorari in this case, and publishing the new rule in an opinion that will warn all dominant tract owners against discussing gates with the servient tract owners in the future.

ARGUMENT ISSUE I

On October 16, 1587, the Commissioners appointed Judge Mary Stuart, Queen of Scots, began to arrive for the second day of her trial for treason at Fotheringhay Castle attired in their riding-dress in anticipation of the long ride back to London. They gave the queen her opportunity to speak in her defense, her due process so to speak, but their boots and spurs told the story. Well knowing the expectations of the Queen of England, they had made the unanimous decision to condemn the Queen of Scots before the day had begun.¹

The decision by the Court of Appeals to deny rehearing in this case was made on May 8, 2013, before the Petitioner's Reply was reviewed. The Reply was timely filed on May 8, 2013, and apparently reviewed sometime between May 8, 2013, and May 20, 2013, after the decision to deny rehearing had already been made. The Respondent states in his return that the cases cited by the Petitioner to support the due process violation are not on point. The Petitioner does not need to cite any case law to support the proposition that the Court of Appeals must follow the South Carolina Appellate Court Rules including Rule 240(f) S.C.A.C.R. when ruling on a Petition for Rehearing. The rules themselves require compliance. When

¹Mary Queen of Scots by Antonia Fraser Delacort Press 1969

the Court of Appeals ignored its own rules on May 8, 2013, by denying rehearing prior to reviewing the timely filed Reply of the Petitioner, the due process violation was axiomatic.

The May 20, 2013, Order denying rehearing did not cure the due process violation because reviewing the Reply after all the judges had committed to a decision to deny rehearing is not the same as reviewing the Reply before that commitment was made. The May 20, 2013, Order acknowledging the review of the Petitioner's Reply twelve (12) days after the commitment to deny rehearing had been made is not due process but a parody of due process which should not be mistaken for the genuine article.

ARGUMENT ISSUE II

In its response to Argument II, the Respondent merges the permission to build a gate with the permission to use the road as being one and the same thing. ("The first principal is that permission is a bar to a prescriptive easement claim." Respondent's Return to the Amended Petition for a Writ of Certiorari p. 11) Not permission to use the road, but permission to do anything under the sun is a bar to a prescriptive easement according to the Respondent. That is not the law of South Carolina or the law of Paine Gayle Properties vs. CSX Transportation 400 S.C. 568, 735 S.E.2d 528 (Ct.App. 2012).

This is the issue before the Court in this petition: was the Court of Appeals correct in merging the permission to build a gate with permission to use the road, treating them as interchangeable concepts, resulting in a new rule of law, to wit: permission to build a gate regardless of how obtained, defeats a prescriptive easement? Paine Gayle Properties, supra. did not treat them as interchangeable concepts. It treated permission to build a gate as one piece of evidence to be considered on the issue of permission to use the road, as did the trial court in this

case. Only the Court of Appeals in this case merged permission to build a gate with permission to use the road. "Based on the parties' stipulations, Bundy's grant of permission for Shirley to build the gate defeats the claim of right or adverse use of the disputed road because the use of the disputed road was permissive." (See May 8, 2013, Revised Opinion Appendix pp. 717-718)

The merger of permission to build a gate with permission to use the road was error unsupported by any case law or statute in South Carolina Jurisprudence.

ARGUMENT ISSUE III

The Court of Appeals ruled in this case that one fact, Bundy's grant of permission for Shirley to build a gate, entitled the Respondent to a judgment in his favor. In order to preserve this issue for appeal, the trial record should contain a motion by the Respondent for a directed verdict based on the stipulated fact that Bundy granted permission to Shirley to build a gate. It does not.

The trial court's Final Order (Appendix pp. 1 - 21) should contain a clear ruling that permission to build a gate does or does not require a judgment for the Respondent. It does not.

Even if the Respondent's closing argument counts as a directed verdict motion as he urges in his return, the Final Order does not contain an explicit ruling on that issue. In the absence of a clear ruling by the trial court on the Respondent's entitlement to judgment based on the permission to build a gate, that issue had to be raised in the Respondent's Rule 59(e) Motion to Alter or Amend. Jackson v. Speed 326 S.C. 289, 486 S.E.2d 750 (1997), Noisette v. Ismail 304 S.C. 56, 403 S.E.2d 122 (1991) It was not.

The Respondent's entitlement to judgment based on the permission to erect a gate was not raised to the lower the court or ruled upon by the lower court. Therefore, this issue was not preserved for review on appeal.

ARGUMENT ISSUE IV

The Respondent's reading of Cuthbert v. Lawton 3 McCord 194, 14 S.C. L. 194 (1825) is deeply flawed. That case held that a prescriptive easement is "perfected" by twenty (20) years of uninterrupted enjoyment. After the twenty (20) year period of use, facts that would defeat a prescriptive easement during the twenty (20) year period such as lack of use, obstructions, three or four times in different years, and wide deviations from its original course, would not affect the right if it had been perfected by twenty (20) years of uninterrupted enjoyment. Once the prescriptive easement is perfected, the servient landowner must put up some type of obstruction, a road block, for a continuous period of five (5) years to defeat the easement.

The "legal road blocks" cited by the Respondent in his Return that occurred after the Bennett period ended in 1969, like the interruptions and deviations from the original course in Cuthbert supra., have no effect on the Petitioner's right to use easement after the twenty (20) adverse use period was established during the Bennett ownership of the dominant estate.

ARGUMENT ISSUE V

The Court of Appeals cited the case of Paine Gayle Properties v. CSX Transportation supra. as authority for the proposition that permission to erect a gate defeats a prescriptive easement. If the Court of Appeals is correct and Paine Gayle Properties, LLC, vs. CSX Transportation supra. actually held that permission to erect a gate defeats a prescriptive easement, then Paine Galye Properties, LLC, v. CSX Transportation supra. created a new substantive right for servient landowners, a new defense or cause of action depending on whether the servient landowner is the Plaintiff or Defendant. In that case, Paine Gayle Properties, LLC, v. CSX

Transportation supra. cannot be applied retroactively because it creates a new substantive right for the servient landowner. If the Court of Appeals is wrong, and Paine Gayle Properties, LLC, v. CSX Transportation supra. applied the existing law that permission to build a gate is one piece of evidence to be weighed by the trial court on the issue of permissive use of the road itself, then certiorari should be granted to correct this error of law in the opinion. Either way, certiorari should be granted.

ARGUMENT ISSUE VI

From its brief, two (2) page opinion, it is difficult to tell exactly what the Court of Appeals did. It either merged permission to build a gate with permission to use the road to create a new rule of the common law, i.e. permission to build a gate defeats a prescriptive easement, or it applied the existing law that permission to use the road defeats a prescriptive easement and engaged in the evidence weighing process of the trial court and determine that Stipulation 8, the grant of permission of Bundy to Shirley to build a gate, outweighed all of the evidence of adverse use and use by a claim of right, thereby establishing permissive use of the road.

If the Court of Appeals did the former, then the new rule of law, permission to build a gate defeats a prescriptive easement, is without any authoritative precedent in South Carolina. If the Court of Appeals did the latter, then it invaded the province of the trial court as fact finder. Either way certiorari must be granted to correct the error.

CONCLUSION

Contrary to the assertions of the Respondent, this case does present a novel question of law, whether or not permission to erect a gate merges with permission to use the road so that permission to erect a gate equals permission to use the road under all circumstances and defeats a prescriptive easement. This new rule is more

insidious because the opinion of the Court of Appeals is unpublished leaving the landowners of South Carolina without notice of the gate rule that will be applied to them in the future. It is a trap for the unwary dominant tract owner trying to protect his property from trespassers by use of a gate.

Unpublished Opinion No. 2013-up-153 is in conflict with prior decisions of the Supreme Court holding that permission to use the road itself not permission to build a gate, is fatal to a prescriptive easement. It is in conflict with the case of Cuthbert v. Lawton supra. which held that once the twenty (20) year adverse use period is established, the easement is perfected and continuing proof of the elements of the prescriptive easement past the twenty (20) year period is not required.

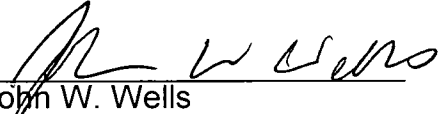
A substantial constitutional issue is involved in this case, the denial of procedural due process, where the Court of Appeals violated Rule 240 S.C.A.C.R. cutting short the process for litigating a Petition for Rehearing.

However, even if the Court finds that none of the considerations set out in Rule 242(b) S.C.A.C.R. apply to this case, there still remains the matter of the high calling of each member of the judiciary who dons the robe to do justice. If the Court of Appeals was wrong to apply the gate rule to the Petitioner without any precedent mentioning the rule when the gate was erected, if the Court of Appeals was wrong to violate its own rules and cut off the Petition for Rehearing process, prematurely, then injustice to the Petitioner is the result. Allowing injustice to prevail in any case, however insignificant the case may be, can be rationalized by the heavy caseload of the court and legally justified under Rule 242 S.C.A.C.R., but it is still a failure of

the jurist to rise to the high calling.

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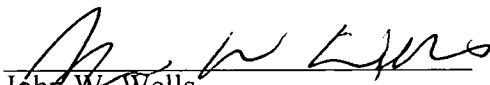
Case No.: 2012208007

W. H. Bundy, Jr., Respondent,
vs.
Bobby Brent Shirley, Petitioner.

Supreme Court Case No. 2013-001263

PROOF OF SERVICE

I certify that I served the Petitioner's Reply by depositing a copy of said documents in the United States Mail, postage prepaid, on July 11, 2013, addressed to his attorney of record, M. Brent McDonald, Esquire, Smith Bundy Bybee & Barnett, P.C., PO Box 1542, Mt. Pleasant, South Carolina 29464 and Stephen A. Spitz, Esquire, 1134 Clearsprings Drive Charleston, S.C. 29412.


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