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UNPUBLISHED OPINION NUMBER 2013-UP-153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., Appellant,

vs.

Bobby Brent Shirley, Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 20, 2013.

QUESTIONS PRESENTED

1. Did the Court of Appeals violate the Respondents right to procedural due process of law under the Fourteenth Amendment to the United States Constitution by making its decision to deny the Respondent's Petition for Rehearing prior to the timely filing of the Respondent's Reply under Rule 240(f) S.C.A.C.R.?
2. Did the Court of Appeals err in holding that the servient landowner's grant of permission to build a gate to the Dominant landowner automatically defeats a prescriptive easement?
3. Did the Court of Appeals err in ruling that the Appellant's entitlement to judgment as a matter of law based on permission granted to the Respondent to erect a gate on the disputed road was raised in the trial court?
4. Did the Court of Appeals err by requiring the Respondent to prove a period of use that was adverse or under a claim of right in excess of twenty (20) years to establish a prescriptive easement?
5. Did the Court of Appeals err by the retroactive application of Paine Gayle Properties, LLC, v. CSX Transportation, Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012).
6. Did the Court of Appeals err by invading the province of the trial court as fact finder on the issue of permissive use of the road?

STATEMENT OF THE CASE

This is an appeal from a declaratory judgment action filed on March 24,

2009, by the Appellant, W. H. Bundy, the servient tract owner, asking the Court to declare what rights the Respondent, Bobby Brent Shirley, the dominant tract owner, had to use a road located on the Bundy property as a means of access to a thirty-seven (37) acre tract owned by the Respondent. The Respondent filed an Answer and Counterclaim on June 19, 2009, alleging that he had a prescriptive easement over the Bundy property. This case was tried without a jury before Special Referee, Roderick M. Todd, on August 25, 26, 2010. The Special Referee issued his order on July 7, 2011, ruling that the Respondent had met his burden of proof establishing a prescriptive easement to use the road. The Appellant filed and served a Motion to Alter or Amend pursuant to Rule 59 S.C.R.C.P. on July 20, 2011, which was denied as to the prescriptive easement claim by Order of the Special Referee dated February 9, 2012. The Appellant timely filed a Notice of Appeal, and the South Carolina Court of Appeals reversed issuing an Unpublished Opinion on April 10, 2013. That Opinion was revised and refiled on May 8, 2013. A timely Petition for Rehearing was denied on May 8, 2013. A subsequent Order denying rehearing was filed May 20, 2013.

The Respondent is the owner of a thirty-seven (37) acre tract of land in rural Kershaw County primarily used for hunting and fishing that is accessed by a dirt road known as Saxon Road. Saxon Road is county maintained by Kershaw County up to the point where enters the tract owned by the Appellant containing approximately Four Hundred Thirty-Nine (439) acres which is also rural property purchased by the Appellant from a timber company, in 2003. Saxon Road continues through the Appellant's property and terminates at the Respondent's tract.

The Respondent's tract was acquired by a farmer named Elijah Bennett in 1947 (R. p. 4) The Bennett Family owned the dominant tract from 1947 through 1969 (R. p. 4) During their ownership of the dominant tract, Saxon Road was the

only access to it used by the Bennett Family (R. p. 357, lines 1 - 17). The trial judge ruled that the Respondent established a Twenty (20) year period of adverse use during the Bennett ownership period from 1947 through 1969 (Finding of Fact 21 R. p. 7 - 8)

From 1969 to 1985, the dominant tract was owned by Six (6) different owners. It was acquired by the Respondent's parents in 1985 and transferred to the Respondent in 2005. (See Shirley chain of title) (R. p. 3 - 4) As to the period of ownership from 1985 until the case was filed in 2009 when the Shirley Family owned the dominant tract, the trial judge ruled "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." (R. p. 19) The trial judge went on to rule that the Respondent had established a prescriptive use period from 1985 through 2009 under his family's ownership of the dominant tract. (R. p. 19 - 20)

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. (Stipulation 8 R. p. 521) The ruling by the trial judge on permissive use of the disputed road was as follows, "as to the evidence presented by the Plaintiff of permissive use, I find that the preponderance of the evidence including that of the violent outbursts by the Defendant establishes that the use of the disputed road by the Defendant was adverse and hostile." (R. p. 20) In its April 10, 2013, Opinion the Court of Appeals misquoted Stipulation 8 by adding to it that the Respondent requested permission to build the gate. The Court of Appeals ruled that the Respondent's seeking permission to install a gate on the access road was "an implicit acknowledgment of the property owner's rights and is inconsistent with a claim of right." This was the basis for the reversal of the trial court in the April 10,

2013, Opinion. (See Appendix p. 658)

When the Respondent pointed out in his Petition for Rehearing that the Court of Appeals had misquoted the Stipulation to add the request for permission which is not in the text of the Stipulation, the Court of Appeals issued the revised Opinion filed May 8, 2013. (See Appendix p. 716) That Opinion shifted the grounds for the reversal from the seeking of permission to install a gate demonstrating an implicit acknowledgment by the dominant tract owner of the servient tract owner's rights, to a novel rule of law; permission to build a gate defeats a prescriptive easement.

A Petition for Rehearing was filed by the Respondent on April 24, 2013. The Appellant filed a Return of Appellant to Respondent's Petition for Rehearing on May 3, 2013. The Respondent timely filed his Reply five (5) days later on May 8, 2013, about the middle of the day. Respondent's counsel was surprised to receive an Order denying rehearing that was also filed May 8, 2013, (See Appendix p. 715) together with the substituted and refiled Opinion which was filed on May 8, 2013, wondering how Court of Appeals had distributed six (6) copies of the Reply that were sitting in the lobby of the Brown Building at noon on May 8, 2013, to the Judges in time for them to review the same, revise the original Opinion and issue an Order denying rehearing, all on the afternoon of May 8, 2013. The Respondent's counsel sent a letter to the Clerk of Court for the Court of Appeals dated May 14, 2013, inquiring how this had occurred. The Court of Appeals then filed a May 20, 2013, (See Appendix p. 719) Order indicating that the Reply was reviewed after the decision to deny rehearing was made on May 8, 2013, but declining to alter its decision to deny rehearing after reviewing the Reply.

ARGUMENT

1. Did the Court of Appeals violate the Respondents right to procedural due process of law under the Fourteenth Amendment to the United States Constitution by making its decision to deny the Respondent's Petition for Rehearing prior to the timely filing of the Respondent's Reply under Rule 240(f) S.C.A.C.R.?

The Court of Appeals filed its Opinion reversing the trial court's decision on April 10, 2013. The Respondent filed and served a Petition for Rehearing on May 24, 2013, under Rule 221(a) S.C.A.C.R. The Appellant filed and served a return to the Petition for Rehearing under Rule 240(e) S.C.A.C.R. on May 3, 2013. The Respondent was allowed five (5) days to serve and file a reply under Rule 240(f) S.C.A.C.R. excluding Saturday and Sunday, May 4th and 5th, 2013, under Rule 263 S.C.A.C.R., making the deadline for filing the Reply Friday, May 10, 2013. The Respondent timely filed and served his Reply by delivering the original and six (6) copies to the Court of Appeals at noon on May 8, 2013.

The revised Opinion of the Court of Appeals and the Order denying the Petition for Rehearing were both filed on May 8, 2013. The Respondent's belief that the decision to deny rehearing was made by the Court of Appeals prior to its review of the timely filed Reply was confirmed by the subsequent filing of a May 20, 2013, Order also denying rehearing but unlike the May 8, 2013, Order, (See Appendix p. 715) the May 20, 2013, Order (See Appendix p. 719) acknowledged the receipt of the Reply.

Procedural due process requires fair notice and proper standards for adjudication State v. Newman 384 S.C. 395 683 S.E. 2d 268 (2009). The proper standard for adjudication, the process due to the litigants in the Court of Appeals is defined by the South Carolina Appellate Court Rules. Rule 221(a) S.C.A.C.R. allows

for a Petition for Rehearing and refers to Rule 240 S.C.A.C.R. governing the procedure for petitions in general. Rule 240(f) S.C.A.C.R. allows a reply to be filed by the petitioning party within five (5) days of the filing of the return by the opposing party. The implication is clear that the Petition for Rehearing, the Return and the Reply will be read by the Court of Appeals before it makes a decision on Rehearing, not afterward. So anxious was the Court of Appeals in this case to reverse the lower court and deliver victory to the Appellant, that it ruled on the Petition for Rehearing before the time for filing a reply had expired and without reading the reply that was timely filed. The belated reading of the reply after the decision to deny rehearing had been made mentioned in the May 20, 2013, Order of the Court of Appeals does not cure the prejudicial effect of making the decision before the rehearing process was complete.

The case on point is South Carolina DSS v. Beeks 325 S.C.243, 481 S.E.2d 703 (1997) where the trial judge issued a final order prior to concluding the trial. "The fundamental requirement of due process is the opportunity to be heard **at a meaningful time and in a meaningful manner**." (emphasis added) The South Carolina DSS v. Beeks, supra. As one might expect, the Supreme Court Ruled that issuing a final order before completing the trial violated procedural due process in Beeks. Likewise, making the decision to deny rehearing before the unambiguous timelines for arguing the issues in the Petition for Rehearing set forth in the Court Rules had expired violates the Respondent's right to procedural due process. The attempt to unring the bell by reading the Reply after the decision to deny rehearing had been made does not satisfy the "meaningful time" requirement of procedural due process set forth above.

Certiorari must be granted in this case to cure the procedural due process violation by the Court of Appeals.

2. Did the Court of Appeals err in holding that the servient landowner's grant of permission to build a gate to the Dominant landowner automatically defeats a prescriptive easement?

The Court of Appeals reversed the trial courts' finding of fact "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 was adverse and hostile." (R. p. 20), substituting its own view of the evidence that the use was permissive. The Court of Appeals based its ruling on Stipulation 8 which reads, "In 2004, Shirley put up a gate located on the property line between the Bundy property and the property of the Miller family with the permission of Bundy." (R. p. 521) Stipulation 8 does not say that Shirley went to Bundy seeking permission to build the gate. In fact, the text of Stipulation 8 does not say that the gate was on the disputed road.

The Court of Appeals ruled, "Based on the parties' stipulations, Bundy's grant of permission for Shirley to build the gate defeats a claim of right or adverse use of the disputed road because the use of the disputed road was permissive." (Unpublished opinion 2013 U.P-153 as refiled May 8, 2013.)

The case relied upon by the Court of Appeals to reverse the trial court is Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. filed on November 14, 2012, after the Final Briefs had been filed on this appeal, and which case was not mentioned in the oral arguments on January 9, 2013. The trial court had no opportunity to rule on any matters of law arising from Paine Gayle Properties, LLC as discussed above. The Respondent had no opportunity to brief that case or even respond to it in oral argument as it was not mentioned. The ruling of the Court of Appeals is that permission to build a gate automatically defeats a prescriptive easement which is contrary to the existing law in South Carolina at the time of the

filing of this case, and is contrary to the holding in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra.

Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra came to the Court of Appeals as an appeal from a grant of Summary Judgment to the servient tract owner based on the facts set out in testimony and various affidavits which form the record in that case.

The Court of Appeals in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. did not confuse permission to erect a gate with permission to use the road in dispute. The Court of Appeals treated permission to erect the gate as one fact tending to shed light on the relationship between the dominant tract owner and servient tract owner. It considered the dominant tract owners' intent in seeking permission to build the gate together with the rest of the testimony and affidavits, some of which admitted that the railroad had given tacit permission to cross the right of way. The Court of Appeals affirmed the trial court's determination that "the overall tenor of the affidavit (discussing the gate) is that the landowner's use was with the railroad's permission and in recognition of the railroad's rights." In Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra., the Court of Appeals focused on the permission to use the road, not permission to erect the gate which is a correct application of South Carolina law.

Contrast the "overall tenor" of Gayle's affidavit in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. with the "overall tenor" of the following testimony from the Appellant, Bundy, about Shirley's attitude concerning the gate in the case at bar:

> A. Well, yeah, but the property right he was asserting was a little different the second time. The second time he was asserting that I had no right to have him remove his property from my property. That

once I had given him permission — as near as I can reconstruct it, is that once I had given him permission to put a gate on my property, that from that point forward the gate could not be moved. That it was his gate. And it was — to the extent that it was there, I had no dominion or control over what was on my property.

Q. Was it in that conversation or the first one that he said, "That is my damn road," or something to that effect?

A. That isn't what he said, but that is close enough. He took – yeah. He took the position that it was his road, his gate. And essentially, you know, I had no rights in and about that road. It was not only his right, but the fact that I had none. He was going to tell me what to do, how to use my property, when I could use my property, and for what use I could make of my property. That is pretty –

(R. p. 213 lines 6 - p. 214 line 3)

The "overall tenor" of the evidence in Paine Gayle Properties when the Court of Appeals analyzed all of the evidence was that the dominant tract owners showed great deference and submissiveness toward the railroad in using the right of way. The conversation surrounding the erection of the gate was but one piece of evidence shedding light on that relationship. The "overall tenor" of the evidence in the case at bar, according to the Appellant, is that the Respondent showed no respect for the Appellant's rights in using the road or in the gate itself. The deference and submissiveness demonstrated in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. is altogether absent in this case. The cases are factually distinguishable.

The trial judge in the case at bar considered Stipulation 8 regarding the gate erected by the Respondent in context with all of the other evidence of record just as

the Court of Appeals did in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. reaching the opposite conclusion that in this case, the "overall tenor" of the Respondent's use was adverse and under a claim of right. In reversing the trial court, the Court of Appeals took Stipulation 8 out of context ignoring the balance of the evidence introduced over a two (2) day trial.

Again, permission to erect a gate or any other ancillary device about the easement is not fatal to the prescriptive easement. It is only relevant in so far as the discussions surrounding the grant of permission to erect the gate shed light on the character of the use of the road. Permissive use of the road from its inception is fatal; permission to erect a gate may be a relevant fact, but it is not automatically fatal under Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. Permission to build a gate is to be considered with other evidence by the trier of fact following the model analysis in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. in order to reach a correct result on the real issue which is permission to use the road itself.

3. Did the Court of Appeals err in ruling that the Appellant's entitlement to judgment as a matter of law based on permission granted to the Respondent to erect a gate on the disputed road was raised in the trial court?

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues and thus provide us with platform for meaningful appellant review. Queens Grant II Horizontal Property Regime vs. Greenwood Development Corp. 368 S.C. 342 628 S.E.2d 902 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Wilder Corp v. Wilke 330 S.C. 71, 76 S.E.2d 731 (1998). "It is axiomatic that an issue cannot be raised for the first time on appeal. Imposing such a requirement on the Appellant is meant to enable the lower court to rule properly after it has considered all of the relevant facts, law, and arguments." Heron v. Century BMW 395 S.C. 461, 719 S.E.2d 640 (2011).

The Court of Appeals ruled, "Based on the parties stipulations, Bundy's grant of permission for Shirley to build the gate defeats a claim of right or adverse use of the Disputed Road." This would have entitled the Appellant to a directed verdict based on Stipulation 8 (R. p. 521). That motion was not made below.

If the Appellant did raise his entitlement to a judgment as a matter of law based on Stipulation 8, the trial judge did not realize it, and failed to rule on it in his extensive twenty-one (21) page Final Order.

If the issue had been raised by the Appellant, and the trial judge merely forgot to rule on it, the Appellant could have raised the issue with the thirty-seven (37) other exceptions taken to the trial judge's Final Order in the Appellant's Motion to Alter or Amend pursuant to Rule 59 S.C.R.C.P(R.p.55-61) The Appellant raised thirty-seven (37) exceptions to the ruling of the trial judge in his Motion to Alter or Amend, but the issue of the Appellant's entitlement to judgment as a matter of law

based on Stipulation 8 was not among the thirty-seven (37) exceptions.

The case cited by the Court of Appeals as authority for the ruling that permission to erect a gate automatically defeats a prescriptive easement, Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. was not decided or published until after the Final Briefs had been filed in this appeal. The Appellant did not raise the issue below because he did not know to do so. This is the difficulty inherent in retroactively applying cases decided after a case has been tried. If the Respondent is to suffer the consequences of retroactive application of a case he could not know would affect his trial strategy, then the Appellant must also suffer the consequences of his failure to see the future and raise the issue at trial.

The issue of whether permission to build a gate automatically defeats an easement by prescription was never litigated in this case, nor was it even mentioned in oral argument on January 9, 2013. The Respondent was given no opportunity to argue against the proposition cited by the Court of Appeals as it's grounds for reversal. As to this issue, the Petition for Rehearing is actually a petition to have this matter heard for the first time. The decision of the Court of Appeals is grossly unfair to the Respondent and amounts to a denial of his right to procedural due process including the right to be heard on this issue.

4. Did the Court of Appeals err by requiring the Respondent to prove a period of use that was adverse or under a claim of right in excess of twenty (20) years to establish a prescriptive easement?

The Court of Appeals' refiled Opinion states: "Furthermore, we also find the Special Referee erred by determining that because Shirley established "a prescriptive easement during the Bennett ownership period, it is unnecessary to establish a prescriptive easement during the Shirley ownership period." On this point of law, the Special Referee was correct and the Court of Appeals was in error.

To establish an easement by prescription one must show: (1) continued and uninterrupted use for twenty (20) years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or other a claim of right. Horry County v. Laychur 315 S.C. 364, 434 S.E.2d 259 (1993). The common law does not require that the use period be the most recent twenty (20) years. The common law does not require that the use period include the ownership period of the parties seeking to prove the easement. Neither of these requirements has ever made an appearance in a South Carolina prescriptive easement case. To require either is to add requirements to the proof of a prescriptive easement without any authority or precedent; reading into the cases a requirement that is not there. The requirement is a twenty (20) year use period, and it has been repeated over and over again without any reference to the most recent twenty (20) year period or a twenty (20) year period including the party's ownership of the dominant tract.

The law of South Carolina is that once the twenty (20) year prescriptive use requirement has been met, the road is established, and no further use must be proved. The case on point cited by the Respondent in the Petition for Rehearing is Cuthbert v. Lawton 3 McCord 194, 14 S.C. L 194 (Ct. App. 1825). In that case the Plaintiff attempting to establish the easement proved thirty-one (31) years of

adverse use from 1769 to 1800 under a former owner. The Court stated:

> "In considering the general right of way, I was of the opinion that this had been fully established by evidence of Mrs. Rivers, W. Royal, Gen. Cuthbert and Wm Lawton, who proved that **it had been enjoyed by the former owners of the land now held by the plaintiff** as an ancient and uninterrupted right from the year 1769 to 1800. It appeared indeed, that since that period the road had not been much used; that it had been obstructed three or four times in different years, and that there had been some wide deviations from it's original course; but I thought that these would not affect the right, if it had been before perfected by twenty (20) years uninterrupted enjoyment. If it had only began to accrue since the year 1800, the obstruction of one (1) year only in twenty (20) would prevent its legal consummation; but **after twenty (20) years of uninterrupted use, it could only be defeated by an adverse and continued obstruction** of five (5) years which was not proven in this case." Cuthbert v. Lawton supra. (emphasis added)

According to Cuthbert v. Lawton, supra., once a road has been used for the required twenty (20) year period, the prescriptive easement is "perfected". Interruptions and deviations in the road's course that would have defeated the prescriptive easement during the twenty (20) year use period do not affect the right of way after it has been "perfected" by uninterrupted use for twenty (20) years. After the twenty (20) year use period is established, the servient tract owner must do some adverse act to close the road, such as a five year obstruction.

The trial judge found that the Bennett Family had used the disputed road adversely and continuously from 1947 to 1968. As to the seventeen (17) year period between 1968 and 1985, the Appellant has the burden of showing some adverse act to obstruct the road after 1968 under Cuthbert v. Lawton supra. in order to defeat the "perfected" prescriptive easement. That obstruction was not proved by the Appellant. The absence of evidence as to what occurred during the seventeen (17) year period works against the Appellant rather than the Respondent. The holding of the Court of Appeals on this issue is in error and should be corrected by

granting certiorari. Once an easement, always an easement is the law of South Carolina. See Cuthbert v. Lawton, supra. Because the Bennett ownership period spans a full twenty (20) year period, it need not be "tacked" to periods of ownership by other former owners because it meets the twenty (20) year adverse use requirement standing alone. The rules of "tacking" do not apply in this case.

5. Did the Court of Appeals err by the retroactive application of Paine Gayle Properties, LLC, v. CSX Transportation, Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012).

The general rule regarding retroactive application of civil decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. Toth vs. Square D Company 298 S.C. 6, 377 S.E. 2d 584 (1989). Prospective application is required when liability is created where formerly none existed Marcum vs. Bowden 372 S.C. 452, 643 S.E.2d 85(2007).

The rules on retroactive application of cases are most often set forth in situations where the newly decided case is decided after the facts of the case on appeal arose, but before the trial of the case on appeal so the issue of retroactivity can be raised to the trial court. The rules on retroactive application do not abrogate the rules on issue preservation or relieve the party to benefit from the newly decided case from the duty to raise the issue to the trial judge. In the case at bar, Payne Gayle Properties, LLC vs. CXS Transportation, Inc. supra. was decided after the trial so that the gate permission rule was not, and could not have been ruled on by the trial court.

In its Unpublished Opinion Number 2013-UP-153, the Court of Appeals has ruled that Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra creates a new substantive right for the servient landowners in prescriptive easement cases, that being the right to judgment as a matter of law where permission to erect a gate, as opposed to permission to use the right of way, is granted to the dominant tract owner. The case, as interpreted by the Court of Appeals in its Opinion, creates a new affirmative defense in prescriptive easement cases. The Court of Appeals stated, "Based on the parties stipulations, Bundy's grant of permission for Shirley

to build the gate defeats the claim or right or adverse use of the disputed road." Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra is cited as the authority for this new affirmative defense in prescriptive easement cases. As demonstrated above, permission to erect a gate, by itself, has never been held to defeat a prescriptive easement before in South Carolina common law. A decision creating a new affirmative defense creates a new substantive right just as surely as a decision creating a new cause of action.

The injustice of applying a case decided after the appeal briefs were filed is manifest. The Court of Appeals has decided this case on an issue that was never litigated by the parties or addressed to the trial judge. On this basis alone, certiorari should be granted.

6. Did the Court of Appeals err by invading the province of the trial court as fact finder on the issue of permissive use of the road?

The determination of the existence of an easement is a question of fact in a law action Jowers vs. Hornsby 292 S.C. 549, 357 S.E.2d 710 (1987). In an appeal from an action at law tried by a judge, the judges factual findings will not be disturbed unless found to be without evidence which reasonable supports them. Towns Associates, LTD, vs. City of Greenville 266 S.C. 81, 221 S.E. 2d 773 (1976).

As demonstrated above, the issue used by the Court of Appeals to reverse the trial court was never raised below, i.e. the permission to erect a gate from Stipulation 8 automatically entitled the Appellant to judgment as a matter of law. However, the trial judge did consider and rule on the correct issue which is whether the road itself was used by the Respondent with permission. The ruling of the trial court is stated on page 20 of the Final Order dated July 7, 2011, as follows, "As to the evidence presented by the Plaintiff of permissive use, I find that the propondernce 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." (R. p. 20)

In its Unpublished Opinion Number 2013-UP-153, the Court of Appeals substituted its finding of fact of permissive use for the clear finding of fact by the trial court on that issue. Even if the Court of Appeals were to go back and correctly analyze the permission to erect the gate in context with the other evidence, the issue of permissive use of the road is still controlled by the factual finding of the trial court concisely stated above. Prescriptive easement cases are controlled by their facts, and where a trial judge meticulously rules on the factual issues in a twenty-one (21) page order as was done in this case, then a reversal of the trial court under the law of South Carolina is nearly impossible. In this case, the Court of Appeals

either ruled that permission to erect a gate automatically defeats a prescriptive easement which issue was not raised to the trial court, or it performed an analysis of the evidence of record and substituted its finding of permission use for the finding of fact by the trial court which is not permitted under the standard of review. Either way, the trial court should have been affirmed and certiorari is warranted.

CONCLUSION

The Court of Appeals committed error when it ruled that permission to build a gate defects a prescriptive easement. This ruling has no precedent in South Carolina law.

The Court of Appeals committed error by requiring that the twenty (20) year adverse use period must include the most recent twenty (20) years or it must connect to the most recent twenty (20) years by tacking. This requirement has no precedent in South Carolina common law, and is contrary to the holding in Cuthbert v. Lawton, supra that once the twenty (20) year requirement has been met, as it was in this case during the Bennett period from 1948 -1969, the easement is "perfected" and affirmative actions must be taken by the servient tract owner to close it. That is the law of South Carolina as to a twenty (20) year prescriptive use period under a former owner as supported by the precedent cited above. Finally, it is clear that the Court of Appeals violated the Respondent's right to due procedural due process when it decided to deny rehearing on or before May 8, 2013, before the process for litigating the Petition for Rehearing outlined the South Carolina Appellate Court Rules had been completed. The remedy for this violation offered by the Court of Appeals in its May 20, 2013, Order was to complete the process after it had made it's decision to deny rehearing. That remedy is inadequate and meaningless. The only meaningful remedy at this point is to grant a Writ of Certiorari to address the substantive and procedural errors made by the Court of Appeals in the litigation of

this appeal.

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June 6, 2013

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

Case No.: 2012208007

W. H. Bundy, Jr., Appellant,

vs.

Bobby Brent Shirley, Respondent.

PROOF OF SERVICE

I certify that I served the Respondent's Petition for a Writ of Certiorari by depositing a copy of said documents in the United States Mail, postage prepaid, on June 7, 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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