

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM CALHOUN COUNTY
COURT OF COMMON PLEAS

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MAR 11 2014

SC Court of Appeals

Diane Schafer Goodstein, Circuit Court Judge
Case No. 2008-CP-9-135
Appellate Case No. 2012-212463

W. Peter Buyck, Jr., Respondent,

v.

William Jackson, Appellant.

PETITION FOR REHEARING

The appellant William Jackson respectfully petitions for a rehearing on the following grounds:

1. The Court misapprehended that “[e]vidence in the record supports the circuit court’s finding that Jackson’s property is not unenclosed woodlands.” For this reason the Court found that the circuit court did not err by refusing to presume permissive use pursuant to the unenclosed woodlands rule. All the evidence is that Jackson’s property was unenclosed woodlands throughout the prescriptive period, as was the entire McAlister tract. That evidence is marshaled and reviewed extensively in appellant’s briefs, and is not challenged in any detail in the respondent’s brief. Since Jackson’s property was unenclosed woodlands throughout the prescriptive period, the Court overlooked the fact that the circuit court should have applied the presumption of permissive use pursuant to the unenclosed woodlands rule.

2. The Court found that the element of adversity in the respondent’s claim of adverse use was supplied by a presumption of adversity when the other elements of such a claim have been proved. The Court therein overlooked the fact that the

unenclosed woodlands rule, applicable here, requires a presumption of permissive use, not adverse use, which presumption was rebutted by no evidence.

3. The Court found that a claim of adverse use may be proved either by a claim of adverse use or by a claim of right, and that Mr. Buyck had proved use under a claim of right. The Court misapprehended that a claim of right is different from adverse use or excuses the failure to prove adverse use. "Adverse use" and "claim of right" are not two different things but only two ways to describe the same element of adversity. The Court overlooked the fact that there is no evidence in any form of a claim of right. Further, the Court misapprehended that a claim of right can be proved solely by the mental state of the claimant, without objective conduct evidencing hostility. A claim of prescriptive easement can never be proved solely by the subjective mental state of the claimant but must be proved by the claimant's objective conduct of adverse use.

4. The Court found that the Red Road "is necessary for Buyck's enjoyment of his property" and hence is appurtenant and not in gross. Therein the Court overlooked the fact that the test is whether the easement is "**essentially** necessary" to the enjoyment of the dominant estate. *Windham v. Riddle*, 381 S.C. 192, 201-02, 672 S.E.2d 578, 583 (2009); *Whaley v. Stevens*, 21 S.C. 221 (1883); *Kershaw v. Burns*, 91 S.C. 129, 74 S.E. 378 (1912); *Shia v. Pendergrass*, 222 S.C. 342, 72 S.E.2d 699 (1952); *Keane/Sherratt Partnership v. Hodge*, 292 S.C. 459, 357 S.E.2d 193 (Ct. App. 1987). The Court overlooked the following facts: (1) that use of the Red Road is not *essentially* necessary to the enjoyment of the Buyck tract but is only a more convenient, and not an essentially necessary, means to access a portion of the Buyck tract; (2) that the Red Road is only a few minutes closer to the northern portion of the Buyck tract than is the Blue Road (*i.e.*, the left fork); and (3) that the Red Road is a less-convenient and unsatisfactory means of access to the central and southern portions of the Buyck

tract.

5. For these reasons the appellant petitions the Court to rehear the case.

Respectfully submitted,

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March 11, 2014.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the appellant's petition for rehearing upon the respondent by first class mail, postage prepaid, addressed to respondent's attorney at his address of record, namely:

Andrew C. English, III, Esq.
Callison Tighe & Robinson
P. O. Box 1390
Columbia, SC 29202-1390

on March 11, 2014.


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March 11, 2014.

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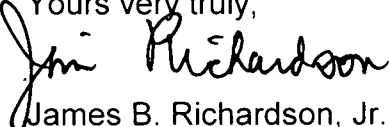
Honorable Jenny A. Kitchings
Clerk of the S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: W. Peter Buyck, Jr. v. William Jackson
Appellate Case No. 2012-212463

Dear Ms. Kitchings:

Delivered for filing is the appellant's petition for rehearing, with certificate of service.

Thanking you, I remain

Yours very truly,

James B. Richardson, Jr.

cc: Andrew C. English, III, Esq.
William E. Booth III, Esq.