THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2008-CP-9-135

W. Peter Buyck, Jr., ... Respondent,

v.

William C. Jackson, ... Appellant.

RETURN TO PETITION FOR REHEARING

The Respondent, W. Peter Buyck, Jr. ("Buyck") respectfully submits the following in response to the Petition for Rehearing filed by Appellant William Jackson ("Jackson").

1. The Court properly held Jackson's Property is not unenclosed, unimproved woodlands.

Jackson asserts again in his Petition for Rehearing that the Jackson Property should have been considered unenclosed and unimproved woodlands, so as to fall within the unenclosed woodlands line of cases applying a presumption of permissive use as opposed to adverse use. In support of this argument Jackson asserts that "all the evidence is that Jackson's property was unenclosed woodlands throughout the prescriptive period . . ." Petition for Rehearing, ¶ 1. Jackson further asserts that this purported evidence was not challenged in Buyck's Brief. In actuality, the only evidence Jackson points to in

not challenged in Buyck's Brief. In actuality, the only evidence Jackson points to in support of his assertion that the Jackson Property constitutes unenclosed, unimproved woodlands is some video footage of the Jackson Property which does not show a fence located thereon. It is clear that the mere existence or non-existence of a fence around the subject property is not determinative of whether property is considered unenclosed, unimproved woodlands for purposes of adverse possession claims.[1] See Rowland v. Wolfe, 17 S.C.L. (1 Bail.) 56 (1828) (in determining whether property constitutes "unenclosed woodlands . . . we must look to the situation of the country"). Moreover, as discussed at length in Buyck's Brief, the Jackson Property is simply not the sort of wild, unenclosed and unimproved woodlands that existed in the 1800s, over which "every person may, of common right, pass over them, hunt upon them, etc." Lawton v. Rivers, 2 McCord (13 S.C.L.) 445, 452 (1823) (referring to unenclosed woodlands as an "open thoroughfare, through which every one [sic] passed through without consent or molestation.").

Judge Goodstein, after hearing the testimony *and viewing* all of the evidence presented at trial, specifically found that Jackson's Property does not constitute unenclosed, unimproved woodlands. (R. p. 28). This Court appropriately agreed. See Crossmann Cmtys. Of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 46-47, 717 S.E.2d 589, 592 (2011) ("In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them."). There is simply no evidence in the record to support Jackson's

[1] To hold otherwise would result in different standards being applied to neighbors within a subdivision based upon whether one's yard was fenced in or not.

allegation that the Jackson Property constitutes, or at any time during the prescriptive period constituted, unenclosed, unimproved woodlands.

2. The Court did not apply any presumption of adverse use, but instead found adverse use was established through the evidence presented at trial.

Jackson asserts the Court found the requirement of adversity was satisfied through application of the *presumption* of adversity. This is simply not the case. Although there *is* a presumption of adversity in this case since the unenclosed woodlands rule does not apply, the Court, *in addition to and without reliance on this presumption*, "specifically" held that "evidence supports a finding that Buyck's use was adverse because it was open, notorious, continuous and uninterrupted." (Opinion, ¶ 2). This Court, just like the circuit court below, specifically and correctly found and held that Buyck had, through the evidence presented at trial *and not through the application of any presumption*, established that his use was adverse. See, Order, p. 12. Accordingly, adversity was not established through use of a presumption as claimed by Jackson in his Petition for Rehearing. It only follows that even if the presumption applied in this case had been one of permissive use, as urged by Jackson, this would not alter the outcome of the case. Adversity has been proven which would overcome any presumption of permission.

3. Buyck has established a prescriptive easement in the Red Road through use under a claim of right.

Jackson next seems to dispute the long settled rule that a prescriptive easement can be established by use under a claim of right. It is well settled that use under a claim of right is the equivalent of, and constitutes, adverse use.[2] Buyck has cited extensive case

[2]The claim of right analysis herein is not necessary to a determination of this case since Buyck has also established that his use of the red road was adverse. This Court in its Opinion, as well as the lower court in

law on this issue in his Brief, and there are numerous cases on point where prescriptive easement rights have been upheld in cases where "[p]laintiffs have established that theirs has always been a belief that they have had a right to use the subject roadway . . . ." Matthews v. Dennis, 365 S.C. 245, 250, 616 S.E.2d 437, 440 (Ct. App. 2005); see also Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005) (upholding a prescriptive easement based on fact that the dominant owner and her family always believed they had the right to use the access way).

Based on the binding and long established case law of this State, the use of the Red Road by Buyck and his predecessors under a claim of right as established at trial is sufficient to establish a prescriptive easement over the Red Road, as held by this Court in its Opinion. Any contention of Jackson to the contrary must fail as a matter of law.

4. Buyck's prescriptive easement over the Red Road is "essentially necessary" to his enjoyment of the Buyck Property and therefore appurtenant to the Buyck Property.

Jackson next contends the Red Road is not "essentially necessary" to Buyck's use of the Buyck Property and so should not constitute an easement appurtenant to the Buyck Property. As the main access way serving the Buyck Property, the only access way to the Buyck Property that is suitable for everyday vehicles and in all seasons and weather, and in fact the *only* access way known to many people who access the Buyck Property, it is hard to imagine that the Red Road would not be "essentially necessary" to Buyck's enjoyment of the his Property. See R. p. 192, l. 18-23, p. 196, l. 24 – p. 197, l. 7, p. 227, l. 24 – p. 228, l. 5, p. 229, ll. 14-19, p. 264, l. 8-11, p. 419, l. 16 – p. 420, l. 11. In fact, this Court has held under a fact pattern very similar to the one before us that an access

its Order, specifically found that "Buyck's use was adverse because it was open, notorious, continuous and uninterrupted." Order, p. 12; Opinion, ¶ 2.

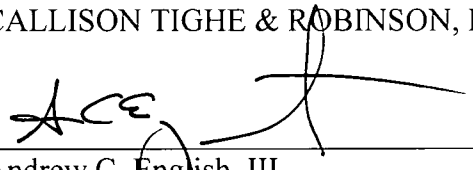
way claimed appurtenant *was* essentially necessary to the use of the dominant estate when the dominant estate had alternate access but the alternate access was "swampy" and otherwise unsuitable for acceptable passage. Proctor v. Steedley, 398 S.C. 561, 575, 730 S.E.2d 357, 365 (Ct. App. 2012).

The trial court heard all of the testimony and viewed all of the evidence in this case, including video footage of a trip down the alternate access way (referred to as the Blue Road), and specifically found Buyck's prescriptive easement over the Red Road to be appurtenant to the Buyck Property. Order, p. 13. This Court has properly affirmed.

For the reasons set forth above, Jackson's Petition for Rehearing should be denied.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC



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March 21, 2014

ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

I, Laura F. Hood, an employee of Callison Tighe & Robinson LLC, Attorneys for the Respondent, do hereby certify that, on this date, I caused to be served a copy of the foregoing **Return to Petition for Rehearing** upon Appellant's counsel, by depositing a copy of the same in the United States mail, with proper first-class postage affixed thereon, addressed as follows:

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Laura F. Hood

March 21, 2014

CALLISON TIGHE

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March 21, 2014

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1015 Sumter St.
Columbia SC 29211

Re: W. Peter Buyck, Jr. v. William C. Jackson
Case No: 2008-CP-09-135
Appellate Case No: 2012-212463

Dear Ms. Kitchings:

Enclosed herewith please find an original and seven (7) copies of the Return to Petition for Rehearing along with the original and one (1) copy of the Certificate of Service in the above referenced matter. Kindly file the same and return clocked-in copies of each to the courier.

By copy of this letter, the enclosed Return to Petition for Rehearing and Certificate of Service are being served upon Appellant's counsel.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC

Mary Dameron Milliken

MDM\lfh
Enclosures

cc: William E. Booth, III, Esquire (w/ encls)
James B. Richardson, Jr., Esquire (w/ encls.)