

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

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APR 30 2012

The Honorable O. Davie Burgdorf, Master-in-Equity

S.C. Supreme Court

Opinion No. 4929 (S.C. Ct. App. filed January 25, 2012)

Thelease Kelley,

Petitioner,

-vs-

Lee Dewayne Snyder and
Harry L. Snyder,

Respondents

PETITION FOR WRIT OF CERTIORARI

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Attorneys for Appellant

Other counsel of record:

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INDEX

Certificate of Counsel	1
Questions Presented	1
Statement of the Case	1
Arguments	
1. Whether the findings of the Master-in-Equity were supported by reasonably supported by the evidence.	2
2. Was the reliance on Boyd vs BellSouth Tel. Tel. Co., 369 S.C. 410, 633 S.E.2d 136 (S.C. 2006) appropriate when Kelly did rebut the presumption that the use was adverse for more than a period of twenty (20) years?	3
3. Was the use of the doctrine of tacking appropriate when there was no proof the prior use was adverse?	4
Conclusion	5

CERTIFICATION

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on the Court of Appeals on March 29, 2012.

QUESTIONS PRESENTED

1. Whether the findings of the Master-in-Equity were supported by reasonably supported by the evidence.
2. Was the reliance on Boyd vs BellSouth Tel. Tel. Co., 369 S.C. 410, 633 S.E.2d 136 (S.C. 2006) appropriate when Kelly did rebut the presumption that the use was adverse for more than a period of twenty (20) years?
3. Was the use of the doctrine of tacking appropriate when there was no proof the prior use was adverse?

STATEMENT OF THE CASE

The Petitioner initiated this lawsuit by filing a Summons and Complaint alleging that he owned a parcel of real estate and that the respondent had created a private roadway over his property without his permission. The petitioner alleged he had no adequate remedy at law and sought an injunction to restrain the respondent from using the property and trespassing on the property. {R, pp 10-12}. The respondent filed an Answer and Counterclaim and alleged that he had obtained a prescriptive easement over the road in question. [R, pp 13-15]. The matter was referred to the master in equity and was tried on April 29, 2009. The master ruled that the respondent had acquired the property by deed and the deed contained an easement for a twenty (20) foot easement. [R, 1-7]. The court ruled that the road had been in use for longer than 20 years and that the use had been continuous, open and notorious and had been hostile since the erection of the gate. [R, pp 5-6]. The court concluded the respondent had acquired an easement by prescription for ingress and egress, but

required the respondent to remove the gate. [R, pp 1-7].

The Petitioner filed a motion to alter or amend judgment and the court denied this motion. An appeal to the South Carolina Court of Appeals followed. The opinion of the Court of Appeals affirming the result of the lower court was filed on January 25, 2012 as Opinion No. 4929. A Petition for Rehearing was filed on February 9, 2012 and the order denying the petition for rehearing was entered on March 29, 2012. This Petition for a Writ of Certiorari now follows.

ARGUMENTS

1. Whether the findings of the Master-in-Equity were supported by reasonably supported by the evidence. The Court of Appeals acknowledged in footnote 3 of its Opinion No. 4929 there was no a proper history of any deeded easement to the Respondents in the records of Orangeburg County.¹ There is no record of any grant of an easement by the holder of the property belonging to Thelease Kelly. Therefore, the deed to the Respondents does not reasonably support any of the findings of the Master regarding a claim of right. [R, pp 82-83]. The Court's reliance upon Hartley vs John Wesley United Methodist Church, 355 SC 145, 584 SE2d 386 (Ct App. 2003) is misplaced as there were other factors involved in Hartley which lead to that holding, including the fact that the County had maintained the road. In this instance, the Petitioner testified that he and his brother had used the road as a "wagon road" and he knew nothing of any adverse use until the Respondents began to maintain the road and put up a fence. [R, p 26, 1.6- p 27, 1.7, R, p 30]. Additionally, in Hartley, the easement was the only ingress and egress to the property. In this case, the Respondents admit that they have other access roads to their property. [R, pp 58-59]. This case is more like Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (S.C.App. 2009), and the deed to the Respondents should

¹ This was acknowledged by the lower court in its Order as well. [R, pp 4].

be read as being ambiguous at best. There is no evidence the grantor to the Respondents in this case had the right to make any grant of an easement and it should not have been relied upon by the Master or by the Court of Appeals. There is no mention of the granting of any easement in the Deed to the Petitioner and this is the chain of title that is relevant with regard to the granting of the easement across the Respondent's real estate. [R, pp 76-77].

To establish a prescriptive easement, there must be continued and uninterrupted use or enjoyment of the right for a period of 20 years, the identity of the thing enjoyed must be proven, and use must be adverse are under claim of right. In this case, the respondents attempted to establish a claim of right pursuant to the deed. Horry County v Laychur, 315 SC 364, 434 SE2d 259 (1993). As set forth above, the deed does not grant a claim of right as there is no proof the easement was ever granted by someone owning the property of the petitioner. [R, pp 82-83]. Further there is no evidence supporting there was a claim of right for more than twenty (20) years as the Deed to the Respondents was granted less than twenty (20) years prior to this law suit. [R, pp 1-7, pp 19-20, p 20, p 22-25]. Thus, there is no evidence supporting the finding of an easement by prescription and the findings of both the trial court and the Court of Appeals are not supported by evidence of record.

2. Was the reliance on Boyd vs BellSouth Tel. Tel. Co., 369 S.C. 410, 633 S.E.2d 136 (S.C. 2006) appropriate when Kelly did rebut the presumption that the use was adverse for more than a period of twenty (20) years? As demonstrated on the Record of this case, Kelly testified that the road in question was used by his permission by his brother and other persons farming his land with his permission. He had no notice of any adverse use to access a third party's property until the gate was put up by the Respondents. He undertook measures he believed were reasonable to have them stop using the road, and when they refused, he brought this action within twenty (20) years. [R,

pp19-25, 26, 27, p 33, p 59, p 61, p 75]. The primary case law relied upon by the Court of Appeals to justify its decision that the use by the Respondents was adverse was Boyd vs BellSouth Tel. Tel. Co., 369 S.C. 410, 633 S.E.2d 136 (S.C. 2006). Boyd involved a case where Bell South was the common owner of the two properties and it had used the easement for a number of years. The type of easement discussed in Boyd is an easement by necessity. In this case, there is no easement by necessity and the Court's reliance on Boyd is misplaced. Further, the holding of the Court ignores the evidence by which Kelley did rebut the claim the use was adverse for more than twenty years. The evidence also showed that he acted to protect his rights within the allowable time period.

3. Was the use of the doctrine of tacking appropriate when there was no proof the prior use was adverse? There is no evidence in the record of any use of this road in a manner that was adverse to the Petitioner prior to the time the road was improved by the Respondents. The Petitioner lives in New York and did not grant permission to use his land to the Respondents. [R, pp 19-27, p 75]. To the best of his knowledge only he and his brother and those renting his land to farm the property had used the road to access the Plaintiff's property only. [R, pp 26-27]. Neither the road improvements or gate were put in until at least 1989 and that was less than twenty (20) years before the law suit was initiated. [R, pp 59-61]. Pittman vs Lowther, ___ SC ___, 610 SE2d 479 (SC 2005); Horry County vs Laychur, *supra*. Therefore, the Court's characterization that the Appellant did not rebut the implication it was adverse is not supported by the evidence of record. The Appellant presented testimony that he did not know anyone was using the road other than the use by his brother and others with his permission until the Respondents improved the road. He had no knowledge of any claimed use prior to this time and there was no evidence he was aware of this use. He established through his testimony sufficient evidence to rebut the presumption and the Court should reconsider

its holding in the opinion.

CONCLUSION

In conclusion, the Petitioner argues that the Respondents failed to prove their case as a matter of law, the Court of Appeals and Trial Court relied upon findings of fact which are not supported by the record and that the reliance on certain case law is an error of law. Therefore, the Petitioner requests that this Court review the relevant materials and grant the Petition for a Writ of Certiorari to review the decision of the Court of Appeals in this case.

Respectfully submitted, this the 20th day of April, 2012, at Orangeburg, South Carolina.



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Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
COURT OF COMMON PLEAS

The Honorable O. Davie Burgdorf, Master-in-Equity

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Thelease Kelley,

Petitioner,

-vs-

Lee Dewayne Snyder and
Harry L. Snyder,

Respondents

CERTIFICATE OF SERVICE

On this the 21st day of April, 2012, the undersigned hereby served a copy of the Appellant's Petition for Writ of Certiorari and Appendix on counsel for the Respondents by placing a copy in the United States Mail, postage fully paid and addressed to their attorney at the following address:

James B. Jackson, Jr.
PO Drawer 349
Santee, SC 29142

Glenn Walters, Attorney at Law, PA



R. Bentz Kirby
Attorney for the Appellants

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S.C. Supreme Court

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Glenn Walters, Sr.
R. Bentz Kirby, of Counsel

April 30, 2012

Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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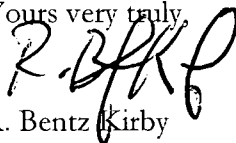
Re: Thelease Kelley vs Lee Snyder
Petition for Writ of Certiorari to Court of Appeals
Appeal from Orangeburg County

Dear Mr Shearouse:

Enclosed you will please find the original and a six (6) copies of the Petitioner's Petition for a Writ of Certiorari together with two copies of the Appendix and the Certificate of Service. Please file the original and return the copy, stamped with the date and time of filing, in the self-addressed stamped envelope provided for your convenience. By copy of this letter, we are serving the Clerk of the Court of Appeals and the attorney for the respondents.

With kind personal regards, I am

Yours very truly,


R. Bentz Kirby

Check # 3085
\$100.⁰⁰

cc: Jenny Abbott Kitchings, Clerk
James B. Jackson, Jr.

**GLENN WALTERS
ATTORNEY AT LAW, P. A.**

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Glenn Walters, Sr.
R. Bentz Kirby, of Counsel

April 30, 2012

Jenny Abbott Kitchings, Clerk of Court
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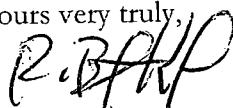
Re: Thelease Kelley vs Lee Snyder
Appeal from Orangeburg County

Dear Ms Kitchings:

Enclosed you will please find the a copy of the Writ of Certiorari and the Certificate of Service, which we are filing with the Supreme Court today. It is filed with your office to comply with Rule 242.

With kind personal regards, I am

Yours very truly,


R. Bentz Kirby

cc: Daniel E. Shearouse, Clerk
James B. Jackson, Jr.

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S.C. Supreme Court



The Supreme Court of South Carolina

R. Bentz Kirby

05/02/2012

RECEIPT #64048

Fee Type:	Case Initiation Fee
Amount:	\$100.00
Payment Type:	Check
Reference No:	3085
Check/Money Order Date:	04/30/2012
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