

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2014-001472

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

RECEIVED

OCT 16 2014

SC Court of Appeals

John S. Frick,

Appellant,

v.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin Chadwick, Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

APPELLANT'S INITIAL REPLY BRIEF

W. Chad Jenkins, Esquire
POPE AND HUDGENS, P.A.
1508 College Street
Post Office Box 190
Newberry, SC 29108
Tel: (803) 276-2532
Fax: (803) 276-8684
SC Bar: 16694
cjenkins@popeandhudgens.com

ATTORNEYS FOR APPELLANT

Newberry, S.C.
October 16, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENTS.....	1
I. CONTRARY TO RESPONDENT FULMER’S CONTENTIONS IN HIS INITIAL BRIEF, THE ROAD IN QUESTION HAS NOT BEEN CLOSED PURSUANT TO STATUTORY PROCEDURES OR VIA WAY OF ABANDONMENT.....	1
II. THERE IS NO EVIDENCE TO SUPPORT RESPONDENT FULMER’S CONTENTIONS THAT THE GATE ACROSS THE ROADWAY IS NECESSARY AND THE GATE IS AN UNDUE BURDEN UPON APPELLANT AND ANY SUCCESSOR LANDOWNERS.....	2
CONCLUSION.....	3

TABLE OF AUTHORITIES

CASES

Carolina Land Company v. Bland,
265 S.C. 98, 217 S.E.2d 16 (1975).....1

Judy v. Kennedy,
398 S.C. 471, 728 S.E.2d 484 (2012).....2

K & A Acquisition Group v. Island Pointe, LLC,
383 S.C. 563, 682 S.E.2d 252 (2009).....2

Wilson v. Greenville County,
110 S.C. 321, 96 S.E. 301 (1918).....1

STATUTES

S.C. Code Ann. §57-9-10 *et seq.* (Supp. 2012)1,2

ARGUMENT

I. **CONTRARY TO RESPONDENT FULMER'S CONTENTIONS IN HIS INITIAL BRIEF, THE ROAD IN QUESTION HAS NOT BEEN CLOSED PURSUANT TO STATUTORY PROCEDURES OR VIA WAY OR ABANDONMENT**

In his Initial Brief, Respondent Fulmer basically concedes that Newberry County, nor any other governmental agency, followed any of the statutory procedures for the closing of a road as presented in South Carolina Code §57-9-10 *et seq.* Therefore, the questions left to determine are whether or not a prior alleged abandonment of the road would negate the requirements of South Carolina Code §57-9-10 *et seq.* and, if so, had the road been previously abandoned? The answer to both questions is no.

When Appellant Frick purchased this land to which the roadway travels, the road was unimpeded and easily traveled. (Tr. p. 13, l. 2 – p. 14, l. 15). The road has historically been shown on general highway maps and continues to be shown on more recent road maps, including a 2006 road atlas. (Pl. Ex. 1, 2, & 3). The road has been utilized by boy scouts, land owners and others to access the lake and homes which were previously located along the roadway. (Tr. p. 21, l. 25 – p. 23, l. 8). Furthermore, Newberry County still maintains a portion of this road, now named Seibert Road. (Tr. p. 94, l. 1 – p. 95, l. 20; Pl. Ex. 9). It is clear that the roadway has not been abandoned to this very day.

The discontinuance of a road does not equal abandonment. *Wilson v. Greenville County*, 110 S.C. 321, 96 S.E. 301 (1918). Abandonment must be shown by clear and unequivocal evidence. *Carolina Land Company v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975).

Respondent argues that *K & A Acquisition Group v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252 (2009) supports their position. However, a close reading of this case indicates that the South Carolina Supreme Court found an old road was abandoned only after the Department of Transportation had built a new replacement road and actually deeded portions of the road to private landowners. In this case, the roadway was the only access to at least two homes that were formerly located along the roadway and continues to be the only vehicle access to game management lands, the Appellant's property, and any future potential landowners along the roadway. Furthermore, the road still exists in part and there has been no affirmative action taken by the South Carolina Department of Transportation, Newberry County, or any other governmental entity to close any portion of this road.

The roadway has not been abandoned. Even assuming *arguendo* that it was abandoned pursuant to common law, the county must still follow the statutory procedure as outlined in South Carolina Code §57-9-10 *et seq.* Whether the roadway is open or closed, the fact that it was a county road requires the statutory procedures to be followed.

II. THERE IS NO EVIDENCE TO SUPPORT RESPONDENT FULMER'S CONTENTIONS THAT THE GATE ACROSS THE ROADWAY IS NECESSARY AND THE GATE IS AN UNDUE BURDEN UPON APPELLANT AND ANY SUCCESSOR LANDOWNERS

Respondent Fulmer is correct in his assertion that whether or not a locked gate across a roadway is reasonable or justified must be determined by the particular facts and circumstances of each case. *Judy v. Kennedy*, 398 S.C. 471, 728 S.E.2d 484 (2012).

However, in this instance there is no evidence that the gate was needed given Respondent Fulmer's clear assertions that any incidents or trespassing or littering were "a thing of the

past” (Tr. p. 165, l. 25 – p. 166, l. 18). Testimony that trespassing and vandalism may occur on other SCE&G properties is simply irrelevant. Van Hoffman even testified the gate was always open. (Tr. p. 114, ll. 11-16). Furthermore, Appellant Frick and Van Hoffman both testified about difficulties which have arisen with the gate and any locking mechanism which has been utilized. The most telling point is that at the beginning of this litigation, in 2009, the gate was opened and remained opened through the time of the trial in 2013. For four years, there were no incidences of trespassing or vandalism. (Tr. p. 165, l. 25 – p.166, l. 18). There is simply no need for the gate and it is an undue burden upon the Appellant.

CONCLUSION

This Court should reverse the Circuit Court’s Order and find that the roadway in question was and remains a County road. Furthermore, any impediments, including any gates, should be removed from the roadway in question. Appellant relies upon and incorporates all arguments contained in his Initial Brief on these issues and all other issues.

Respectfully Submitted

POPE AND HUDGENS, P.A.

By:



W. Chad Jenkins
1508 College Street
Post Office Box 190
Newberry, South Carolina 29108
(803) 276-2532
cjenkins@popeandhudgens.com
Attorneys for Appellant

Newberry, S.C.
October 16, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2014-001472

RECEIVED

OCT 16 2014

SC Court of Appeals

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

John S. Frick,

Appellant,

v.

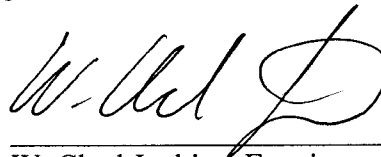
Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin Chadwick, Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

RULE 209(c) CERTIFICATION

In accordance with the SCRAP, Rule 209(c), the undersigned does hereby certify that the additional material Appellant has designated for inclusion in the record on appeal contains no matter that is irrelevant to the appeal.

By:



W. Chad Jenkins, Esquire
POPE AND HUDGENS, P.A.
Post Office Box 190
Newberry, SC 29108
Tel: (803) 276-2532
Fax: (803) 276-8684
SC Bar: 16694
cjenkins@popeandhudgens.com

Newberry, S.C.

October 16, 2014

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

RECEIVED

OCT 16 2014

SC Court of Appeals

John S. Frick,

Appellant,

v.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin & Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Reply Brief, Appellant's Designation of Additional Matter For Inclusion in the Record and Appellant's Rule 209(c) Certification on all Respondents by depositing a copy of same in the United States Mail, postage prepaid, on October 16, 2014, addressed to their attorneys of record, or them personally as follows:

COUNSEL AND PARTIES SERVED:

William H. Edwards, Esquire
Moore, Taylor & Thomas, P.A.
PO Box 5709
West Columbia, SC 29171
Attorney for Defendant Keith Fulmer

Rudolph C. Barnes, Jr., Esquire
156 Barnes Trail
Little Mountain, SC 29075
Attorney for Keith Fulmer

Austin J. Tothacer, Jr., Esquire
Newberry County Attorney
Courthouse Annex
1309 College St.
Newberry, SC 29108
Attorney for Newberry County

Jay Evan Bressler, Esquire
SCANA Legal Department
220 Operation Way, M.C.-C222
Cayce, SC 29033
Attorney for SCE&G

Mr. Joseph R. Childers
1630 Wheeland School Rd
Little Mountain, SC 29075-9269

Justin & Victoria Chadwick
1622 Wheeland School Road
Little Mountain, SC 29075

Benny & Eleanor Bush
1714 Nursery Rd
Little Mountain, SC 29075-9464

A handwritten signature in black ink, appearing to read 'Katherine Barnett', written over a horizontal line.

Katherine Barnett
Paralegal to W. Chad Jenkins

THOMAS H. POPE III
W. CHAD JENKINS
KYLE B. PARKER

**DOPE
&
HUDGENS**
ATTORNEYS, P.A.

JOSEPH W. HUDGENS
Of Counsel
THOMAS H. POPE
(1913-1999)

1508 COLLEGE STREET-P.O. BOX 190
NEWBERRY, SOUTH CAROLINA 29108
PHONE (803) 276-2532 FAX (803) 276-8684
WWW.POPEANDHUDGENS.COM

October 16, 2014

RECEIVED

OCT 16 2014

SC Court of Appeals

Via Hand Delivery

V. Claire Allen, Deputy Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211-1629

RE: John Frick, Appellant v. Keith Fulmer, et al., Respondents
Case Tracking No. 2014-001472
Civil Action No. 2009-CP-36-415

Dear Ms. Allen:

Enclosed herewith for filing please find Appellant's Initial Reply Brief, Appellant's Designation of Additional Matter For Inclusion in the Record and Appellant's Rule 209(c) Certification, as well as my Proof of Service of same.

Also enclosed is a copy of these documents which I would appreciate your having clocked-in. Thank you for your assistance in this matter.

With kind regards.

Sincerely,

POPE AND HUDGENS, P.A.



W. Chad Jenkins

WCJ:kb

Enclosures

cc: Will Edwards, Esq. w/enc.
Rudy Barnes, Esq. w/enc.
Jay Tothacer, Jr., Esq. w/enc.
Jay Bressler, Esq. w/enc.
Defendants Bush w/enc.
Defendants Chadwick w/enc.
Defendant Childers w/enc.