

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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W. H. Bundy, Jr.....Respondent,

v.

Bobby Brent Shirley.....Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPELLATE COURT CASE NO. 2013-001263

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APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas  
Roderick M. Todd, Jr., Esquire, Special Referee  
Case No.: 2009-CP-28-00338

**RECEIVED**

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BRIEF OF RESPONDENT

S.C. SUPREME COURT

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### **Preliminary Statement**

The Petitioner's position before this Court is a direct and unequivocal assault on the fundamental principle that permission cannot give rise to a prescriptive easement; recognizing and predicting the consequences of adopting this radically different paradigm of property law is essential.<sup>1</sup>

### **Respondent's Counter-Statement of Questions Presented**

1. If the Court of Appeals made any error (which Respondent denies happened), is there still a violation of procedural due process when any error is completely corrected and the remedy Petitioner suggests (the grant of Certiorari) has occurred making the error, at all events, a moot point?
2. Does a joint stipulation of fact of permissive use and undisputed recognition of a servient owner's rights bar a prescriptive easement as a matter of law?
3. Does a stipulated set of facts, voluntarily entered by both parties just prior to the trial's commencement, and read into the record by agreement, prevent the Petitioner from now arguing that the issue directly related to the stipulations of fact was never raised or considered below (when it was raised and argued at every level of this case without objection until Petitioner lost the appeal)?
4. Does Petitioner's own claimed use of a road properly permit him, under settled South Carolina law, to "tack" the time of a stranger's use of the road, when there is a gap of twenty-five (25) years between the alleged periods of use and no connection at all between the two alleged periods of time?
5. Is a published prior South Carolina Court of Appeals case, decided two full months before oral argument in this case, fairly mentioned in the Court of Appeals' opinion?
6. When it is clear, as a matter of law, that the evidence for prescriptive easement does not really exist, and when it is equally clear that the Special Referee made errors of law with regard to settled prior rules of prescriptive easements and in making findings of fact that contradicted Stipulation of Fact Number 8, was it an error for the Court of Appeals to reverse an incorrect decision of law below?

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<sup>1</sup> Justice Antonin Scalia recognized in his dissent in Morrison v. Olsen, 487 U.S. 654, 699, 108 S.Ct. 2597, 2623 (1988) when an issue comes as direct and unequivocal as the present issue by stating as follows: "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."

## Respondent's Counter-Statement of the Case

The Respondent does not agree with parts of the Petitioner's Statement of the Case. The disagreement includes:

**A. Petitioner's statements of the case about Saxon Road are inaccurate.**

At trial, Petitioner Shirley ("Shirley") repeatedly claimed that the entire Disputed Road (which he now erroneously calls the Saxon Road) was public. But, the Special Referee, after initially finding the road was public, reversed himself in a subsequent Order<sup>2</sup> and held the Disputed Road was not a public road. Since this subsequent finding was not appealed, it is now the law of the case that the entire Disputed Road was private and not public. Moreover, contrary to the Shirley's statement of the case, Saxon Road ends at the Miller property, and all county maintenance ends at the Miller property, not at the end of Respondent Bundy's ("Bundy") property. Even Shirley unequivocally testified that the County only maintained Saxon Road up to the Miller's Property. *See* Appendix, p. 243 lines 2-20; *see also* Appendix, p. 174 lines 7-25; p. 175 lines 1-23 (Bundy testimony). It is simply incorrect for Shirley to claim that "Saxon Road" is on the property of Bundy or that it "continues" up to the Shirley property in any way.

**B. Petitioner's statement of the case about the gap of time between the end of Bennett's use of the road and Shirley father's beginning of use is lacking.**

One of Shirley's fundamental problems is a failure to introduce evidence that he had twenty (20) consecutive years of adverse use of the Disputed Road. In his statement of the case, Shirley first cites the Special Referee<sup>3</sup> in arguing that it was unnecessary to do so.<sup>4</sup> He then notes that since the Bennetts used the Disputed Road, and that there were six different owners of the so-

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<sup>2</sup> *See* Appendix p. 23, Special Referee Order on Motion to Alter of Amend.

<sup>3</sup> *See* Brief of Petitioner, Pg. 3 (first full paragraph).

<sup>4</sup> Respondent submits and the Court of Appeals found that this was an error of law.

called dominant tract between 1969 (end of Bennett's ownership<sup>5</sup>) and 1985 (beginning of Shirley's father's ownership of the Shirley Property), he claims he could use the Bennett family's acts as his own. Petitioner fails to mention, however, that no evidence in the record exists as to whether or not any of these six intervening owners ever used the disputed road for 16 years (1969-1985). This unexplained gap of time, with no connection whatsoever between the end of Bennett's ownership (1969) and beginning of Shirley Father's alleged prescriptive use (starting in 1985), is, Respondent believes, fatal as a matter of law to his prescriptive claim because he cannot tack the time when he has no connection to a long ago user. This lack of evidence is ignored in the Petitioner's statement of the case.

**C. Petitioner's statement of the case contradicts and ignores several Stipulations of Fact.**

Although Shirley cites to the Special Referee's holding that Shirley developed a prescriptive use from 1985 through 2009 under his family's ownership of the Shirley Property, both Shirley and the Special Referee ignored (and actually even contradicted) several Stipulated Facts to make this erroneous conclusion of law. *See* Appendix pp. 4-5 (eight stipulated facts). It was specifically stipulated that Bundy's predecessors leased the disputed road to the S.C. Department of Natural Resources from 1985 through 2003. As a result of this uncontested fact, it was stipulated that a public agency of this State had a legal interest in the disputed property, including the Disputed Road, from 1985 through 2003. Accordingly, the Bundy Property and the Disputed Road, as a matter of uncontested fact, were subject to the State's legal property interest

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<sup>5</sup> As will be explained below, there is absolutely no evidence in the record of any use of the Disputed Road by the Bennetts from 1960 to 1969, though they owned the Shirley Property until 1969.

and the public itself (including Shirley) had public access to all portions to the future Bundy Property from 1985 to 2003<sup>6</sup> by permission and consent of the State of South Carolina itself.

Moreover, it was specifically stipulated that Shirley had the permission of Bundy in 2004 to erect a gate on the disputed road. *See* Appendix p. 5 (Stipulated Fact #8 or h).

**D. Petitioner’s statement of the case has badly confused the time sequence of certain events.**

In his statement of the case, Shirley attempts to prove his hostile intentions, and to prove that he was always hostile and adverse to Bundy, by pointing to his own “violent outbursts.” Brief of Petitioner, p. 3. But, the uncontested evidence is that the parties started out as neighbors and friends when Bundy initially acquired the property in 2003 and thus it was stipulated that Bundy granted Shirley permission to set up a gate on the Disputed Road between the Miller Property and Bundy’s Property in 2004, shortly after Bundy acquired the Property. Shirley’s “violent outbursts” only came later in time – after Bundy retracted his former consent and permission to Shirley to continue to use Bundy’s private road and Shirley became threatening. Those subsequent events, Bundy submits, cannot change the accurate stipulation that they initially started out their relationship as friendly new neighbors with Bundy’s permission to Shirley to put up a gate and use on Bundy’s private road. *See* Appendix p. 5 (Stipulated Fact #8 or h).

**E. Petitioner’s statement of the case is based upon speculation not found in the record.**

Bundy agrees that on May 20, 2013, the Court of Appeals issued a Supplemental Order formally stating that the Court had reviewed the Petitioner’s Reply to the Respondent’s Return but found no reason for further rehearing. (The Court had previously accepted some of Petitioner’s

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<sup>6</sup> Respondent claims, of course, that these stipulations bar any prescriptive claim during this period of time as a matter of law. As it is fully settled that during the time of public ownership and public lease neither adverse possession nor prescriptive easement can be acquired. *Davis v. Monteith*, 289 S.C. 176, 179-80, 345 S.E.2d 724, 726 (S.C. 1986) (“[A]dverse possession does not run against the [S]tate or its duly constituted political subdivisions.”).

contentions in its Petition for Reconsideration by vacating its earlier decision and replacing it with a new Unpublished Opinion on May 8, 2013). The statement of the case is based partially on speculation and is not part of the Record on Appeal.

### Timeline of Events

To assist this Court to put this case in context, and to aid the Court in following the chain of events and time periods, Bundy has drawn up a timeline that provides testimony from the record in context and in sequence. To the best of Bundy's knowledge the events found below are virtually uncontested (of course, the possible legal conclusions to be drawn from these events are very much in dispute).

1. 1947 (Dec.) A man named Elijah Bennett purchased the Bennett/Shirley Property. See (Appendix p. 420, Stipulation of Parties for Defendant Shirley's Chain of Title).
2. 1948 (Spring) Elijah Bennett's son, Edward Bennett, testified at trial that his father began farming the Bennett/Shirley Property. See (Appendix pp. 353-354, Transcript of Hearing Vol. II, Testimony of Edward 'Jack' Bennett, pp. 239:24-25; 240:1-12).
3. 1948-1955 Elijah Bennett's son, Edward, also testified that his father farmed the Bennett/Shirley Property until he became sick in 1955. See (Appendix pp. 353-354, Transcript of Hearing Vol. II, Testimony of Edward 'Jack' Bennett, p. 240:3-14).
4. 1957 Elijah Bennett's son, Edward, further testified that his father passed away around 1957. See (Appendix p. 354, Transcript of Hearing Vol. II, Testimony of Edward 'Jack' Bennett, p. 240:9-12).
5. 1960 Elijah Bennett's son, Edward, finally testified that he married and left home in 1960 and had no further first-hand knowledge of the Bennett/Shirley Property or events that may have taken place concerning the Disputed Road which is the subject of this action. See (Appendix pp. 355-356, Transcript of Hearing Vol. II, Testimony of Edward 'Jack' Bennett, pp. 241-242).
6. 1960-1964 The Record is **utterly silent** concerning this four (4) year gap of time. There is simply no evidence whatsoever as to who, if

anyone, may have either entered or used the Bennett/Shirley Property or the Disputed Road.

**7. From 1964-????**

According to the witness Richard Miller, his father farmed the Bennett/Shirley property “for a few years.” See (Appendix pp. 262-263, Transcript of Hearing Vol. I, Testimony of Richard Miller, pp. 149-150).

**8. 1969-May 1985**

The Record is **utterly silent** for this entire time period of **approximately sixteen (16) consecutive years as to whether or not anyone either entered or ever used the Disputed Road.**

**9. 1985-2003**

It was stipulated, by both parties, and entered onto the record as a Stipulated Fact that “from 1985 to 2003 the Bowater/Bundy property was leased by Bundy’s predecessor in title Bowater Incorporated and Bowater Timber One, LLC to the South Carolina Department of Natural Resources. [And that is referred to as the Lease.]” See (Appendix pp. 520-521, Stipulation of Fact #2). The Lease gave the State of South Carolina a legal interest in the Bowater/Bundy Property that allowed public access to all portions of the Bowater/Bundy Property, including the Disputed Road. See (Appendix pp. 520-521, Stipulations of Fact # 3, #4, and #5, pp. 8-9).

**10. 1985**

Shirley discovered the Bennett/Shirley Property while hunting on and using the Bowater/Bundy Property pursuant to the South Carolina Department of Natural Resources’ Lease of the Bowater/Bundy Property for the Game Management Area Program. See (Appendix p. 289, Transcript of Hearing Vol. I, Testimony of Shirley, p. 176).

**11. May 10, 1985**

Bobby Shirley and Nollie T. Shirley, Shirley’s parents, purchased the Bennett/Shirley Property. See (Appendix pp. 417-418, Stipulation of Parties for Shirley’s Chain of Title). Shirley and his father were given keys to a cable gate at the entrance of the Bowater/Bundy Property and the Disputed Road by a game warden for SCDNR. See (Appendix pp. 244-250; 321-322, Transcript of Hearing Vol. I, Testimony of Shirley, pp. 131-137; 208-209). Shirley testified that the game warden received the keys from a representative of Bowater. See (Appendix pp. 334-335, Transcript of Hearing Vol. I, Testimony of Shirley, pp. 221-222).

12. March 14, 2003 Bundy purchased the Bowater/Bundy Property from Bowater. *See* (Appendix p. 468, Stipulation of Parties for Bundy's Chain of Title).
13. December 22, 2003 Bundy conveyed a conservation easement on the Bowater/Bundy Property to the Congaree Land Trust. *See* (Appendix p. 468, Stipulation of Parties for Bundy's Chain of Title). This easement prevents development and subdivision of the property in the future and allows Bundy to plant and grow long leaf pines. *Id*; *See* (Appendix p. 151-152, Transcript of Hearing Vol. I, Testimony of Bundy, pp. 38-39).
14. Late 2003/Early 2004 Subsequent to Bundy's purchase of the Bowater/Bundy Property, the parties have stipulated and Shirley has testified that Shirley received permission from Bundy to put up a gate at the entrance to the Bowater/Bundy Property and the Disputed Road at the same location of the Bowater cable. *See* (Appendix pp. 520-521, Stipulation of Fact #8; Appendix pp. 185-186, Transcript of Hearing Vol. I, Testimony of Bundy, pp. 72-73). *See* (Appendix pp. 230-231, Transcript of Hearing Vol. I, Testimony of Shirley, pp. 117-118). Bundy gave Shirley a key to the gate. *Id*.
15. 2004 Subsequent to Bundy's permission to let Shirley use the Disputed Road and put up a gate, when Bundy was logging his property Shirley called Bundy threatened him with violence, cursed him out and yelled at him for having a logging truck on Bundy's logging road. *See* (Appendix pp. 187-194, Transcript of Hearing Vol. I, Testimony of Bundy, pp. 74-81). *See* (Appendix pp. 324-326, Transcript of Hearing Vol. I, Testimony of Shirley, pp. 211-213).
16. 2005 As a result of the threat, Bundy called Shirley and revoked his permission and told Shirley to take the gate down and to stop using the Disputed Road. *See* (Appendix pp. 187-194, Transcript of Hearing Vol I, Testimony of Bundy, pp. 74-81). *See* (Appendix pp. 327-328, Transcript of Hearing Vol. I, Testimony of Shirley, p. 214-215). Shirley again threatened him with violence, cursed out and yelled at Bundy. *Id*. **It is undisputed that Shirley asserted for the first time in 2005 to Bundy that he had ownership rights in the Disputed Road.** *See* (Appendix p. 194, Transcript of Hearing Vol. I, Testimony of Bundy, p. 81).
17. March 24, 2009 The present action was filed.

## Response to Petitioner's Arguments

### I. **In response to Petitioner's argument number 1: This argument is now moot and it has no basis in law or fact.**

In argument number one, Shirley continues to argue to this Court that the Court of Appeals violated his procedural due process rights in an "inappropriate manner" because of the timing of the Court of Appeals' Order of May 8, 2013.

Shirley ends this first argument with the following specific request, "The remedy for the due process violation is the granting of certiorari giving the Petitioner a review of the issues on appeal by the Supreme Court." Brief of Petitioner, p. 7.

Without agreeing with the substance of this argument, Bundy respectfully points out that the very remedy that Shirley has requested at the end of this argument number 1, the granting of certiorari, is an event that has happened. Thus, this first question is now moot as a matter of law because Shirley has received the very remedy he requested. (See the definition of a "moot" case in Black's Law Dictionary, Pg. 1029 (8<sup>th</sup> Ed. 2004) ("a matter in which a controversy no longer exists").

South Carolina has long recognized that an issue, during the course of litigation, can become a "moot" point. *See*, for merely two recent examples, City of Charleston v. Masi, 362 S.C. 505, 609 S.E.2d 301 (2005) (issues on appeal became moot due to the Court's intervening decision); Nemeth v. Nemeth, 325 S.C. 480, 487 n.3, 481 S.E.2d 181, 185, n.3 (Ct.App. 1997) (reversing the family court's award of alimony and declining to address whether or not the family court was actually in error in the amount of alimony awarded since following the Court's own decision to reverse the award itself, the question of the sum awarded had clearly become a moot issue).

Respectfully, under the precedent of these two cases, and because the relief requested has already been granted, and because Bundy had nothing whatsoever to do with what the Court of Appeals did or did not do to begin with, Shirley's first argument has become a moot point as a matter of law, and, as such, cannot be grounds for the reversal of the Court of Appeals.

Should this Court decide that the issue is not moot, the argument of Shirley and the facts of this case fail to rise to the level of any "procedural due process" violation. Shirley was not only afforded a meaningful hearing in front of the Court of Appeals, but when he was disappointed with the results, he was afforded every opportunity under the appellate rules to file a motion for reconsideration which in part was adopted by the Court of Appeals. The Court elected to withdraw its first opinion and file a second different opinion. Further, when Shirley wrote the Clerk of Court of the Court of Appeals a letter questioning whether his Reply Brief was considered, he was told by the Court of Appeals in another formal Order of May 20, 2013 that the Reply Brief was considered but that there were no grounds for the granting of a rehearing.

In short, Shirley's Petition for Rehearing and his Reply were considered fully (but only partially acted upon) and we have the formal signatures of all three Judges in the Court of Appeals in the May 20, 2013 Order that his Reply was fully considered. Counsel for Bundy is unaware of any case - anywhere - that calls for more than what Shirley has received.

Procedural due process is a flexible standard, not based upon technicalities, and no particular form of procedure is necessary. In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). Here, even assuming an error (and that is far from clear as it is simply uncertain whether or not the Reply brief was or was not considered prior to the issuance of the May 8, 2013 denying Rehearing) it was fully corrected, explicitly and clearly, by the May 20, 2013 Order of the Court of Appeals.

In short, there is no procedural due process violation on this record and there is no demonstrated prejudice on this record. There is no actual injury, and Shirley received, precisely and exactly, what he should have received—judicial consideration of his Petition for Rehearing in the Court of Appeals.

**II. In response to Petitioner’s argument number 2: What are the legal consequences in South Carolina of Bundy, desiring to be a good new neighbor in a new neighborhood, granting permission to a near-by neighbor, Shirley, to use Bundy’s property and erect a gate on Bundy’s private road?**

The Court of Appeals made several alternative and distinct findings of law when it came to the question of whether or not Shirley had met his burden of proof and demonstrated that he had a “continuous 20 year prescriptive easement” over the Disputed Road.

In concluding that he had failed to meet this burden of proof, the Court of Appeals, as one of several alternative legal conclusions, cited the case of Paine Gayle Properties, LLC v. CSX Transp. Inc., 400 S.C. 568, 586, 735 S.E.2d 528, 538 (S.C. App. 2012) for the longstanding legal premise that permissive use bars a party from asserting a prescriptive easement. Shirley was barred from arguing that he had proven an adverse use under a claim of right for a continuous twenty (20) years, when Shirley took the overt step, **the very first time he ever met or talked to Bundy**, the new owner of near-by property, to seek permission from Bundy to permit him to install a gate on a private road that ran through Bundy’s property. The Court of Appeals’ holding was quite simple—the granting of permission to use property defeats a prescriptive easement claim. The Court of Appeals overruled the Special Referee’s legal finding, which the Special Referee made not once but twice in both his Final Order and Order on Bundy’s Rule 52 and Rule 59, SCRCP, motion, that “permission does not defeat an easement by prescription based on a claim of right.”

*See* Appendix, p. 20; *see also* Appendix pp. 25-26(“permissive use will not necessarily defeat a prescriptive easement under a claim of right.”).

Shirley now argues to this Court, throughout his argument Number 2, that this Court should hold that the Court of Appeals misread or misinterpreted or should not discuss the Paine Gayle case and should in fact make new law that permission simply does not matter in a prescriptive easement case based upon a claim of right. All these various arguments center around the fact that Paine Gayle was a recent case unavailable when the parties filed their briefs in this case in the Court of Appeals.

Before turning to that case, and carefully reviewing what it holds and the application of that holding to the present case, Bundy believes that it may be quite helpful for this Court to review both the stipulated facts in this case and some evidence from both Bundy and Shirley so this Court can see just how closely the legal premises reiterated in the Paine Gayle case line up with the present case.

**A. The key facts about Bundy granting permission to Shirley to install a gate in 2004.**

Bundy acquired a tract of land in Kershaw County in March of 2003. *See* (Appendix p. 468, Stipulation of Parties for Bundy’s Chain of Title). In 2004, Bundy was approached by Shirley and his father, **and at the very first meeting** was immediately asked if Bundy would grant Shirley permission to erect a gate, and to use a private road that runs through Bundy’s property, for Shirley’s own access to Shirley’s near-by property and to exclude everyone else from trespassing. *See* Appendix pp. 520-521, Transcript of Hearing Vol. I, Stipulation of Fact #8; Appendix pp. 185-186, Transcript of Hearing Vol. I, Testimony of Bundy, pp. 72 73; *see also* Appendix pp. 230-231, Transcript of Hearing Vol. I, Testimony of Shirley, pp. 117 118.

Bundy, intent on cementing good relationships with a new near-by neighbor:

**(1) without any negotiation between the parties**

**(2) without any exchange of money between the parties**

**(3) and, without any type of formal writing of any kind**

immediately granted his verbal permission to Shirley to use the Disputed Road and install a gate on it. We suggest that the timing of this request and the fact that Bundy immediately consented to it is merely proof that Bundy was trying to be (and we submit he actually was) a “good neighbor” in a new neighborhood to a near-by neighbor.

In fact, during the period of time when the two parties were still quite friendly, Bundy has testified, and Shirley has very substantially corroborated, as to the precise events leading up to a gate being placed by Shirley, on Bundy’s private road, that runs right through Bundy’s property.

Q: Mr. Bundy, just a few more questions. With regard to this Lawsuit, what is your position as to whether there is some type of Public Roadway going through your property to Mr. Shirley’s Property, the disputed Pathway?

A. What is my position?

Q: Yes, sir.

A: It’s not public. By no stretch of the imagination is it public. One, you don’t put up a gate on a public road. Mr. Shirley asked me if he could put up a gate. I gave him **permission** to put up a Gate so he could close that road to everybody but himself and me. And, I gave him **permission** to cross my land to cross the that road.

Appendix p. 205 lines 14-25 through p. 206 lines 1-3 (emphasis supplied).

In substantial part, Shirley does not deny but actually fully agrees with Bundy’s testimony. The Court’s attention is directed first to a Stipulation of Fact entered into by both Shirley and Bundy that states: “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.**” Appendix p. 521 (Stipulation No. 8)(emphasis supplied).

Bundy’s grant of permission took place **the very first time he ever talked to Shirley face to face**, and within a short time following Bundy’s own initial acquisition of the property, and while the parties were still friendly neighbors and on good terms.

At trial, Shirley admitted to the initial friendly conversations about putting up a gate with Bundy’s permission, and further admitted he actually obtained that permission in 2004. Appendix pp. 302-303; p. 324; p. 521 (Stipulation No. 8). As will be argued subsequently in the legal analysis of this stipulated fact, Shirley’s request for permission is a formal acknowledgement that he lacked control over the Disputed Road itself, and that he knew he needed Bundy’s permission and approval to install a gate, and he was not using the Disputed Road itself in an adverse matter to Bundy’s rights.

This stipulation is, of course, utterly contrary to Shirley’s later claim of right to use the Disputed Road as he saw fit. Specifically, in the conversations that both sides admit took place, Shirley does not argue that he installed the gate on his own, or that he had previously acquired as a matter of right – rights over the Disputed Road, or that he had used the Disputed Road adversely for years and years, instead **he actually asked for Bundy’s permission!**

It is, we submit, telling testimony when your opponent admits:

By Mr. Babcock (Bundy’s Trial Counsel)

Q. Okay. All Right. Mr. Shirley you had a conversation with Mr. Bundy about putting up the gate?

A. Yes, sir.

Q. And you ultimately put up the gate. And Mr. Bundy bought his property in 2003. So it might have been like late in 2003, maybe early 2004, sometime in there?

A. Yes.

Appendix, p. 324.

Later on in time, of course, after the gate was installed with Bundy's initial permission, the relationship between the parties became sharply different. The Special Referee (who was reversed on appeal) and Shirley in his brief to this Court continuously cite to that part of the Shirley testimony when the relationship between the two parties had already turned toxic and all the conduct by Shirley was threatening and offensive. Again, importantly, this was after the permission was given by Bundy to Shirley. Shirley argues that this testimony, and only this testimony, should be considered and it is sufficient evidence of a claim of right to establish a prescriptive easement.

But, that is not at all how the relationship between the parties initially established itself. Only when Shirley started to threaten and accost Bundy did the conduct that Shirley points to as "hostile" begin to occur.<sup>7</sup> In fact, **the parties all agree that they had three separate and distinct conversations.**

The first conversation was as cordial as it could possibly be, because Shirley was seeking Bundy's permission and consent to use the Disputed Road on Bundy's property, and install a private gate with a lock that both he and Bundy would share to exclude everyone else.

The second conversation, occurring nearly a year later, was in reference to an incident where Shirley discovered (with the gate already installed) that the Disputed Road was blocked by logging equipment. Shirley having admitted at trial that he has a "short fuse" and that he "he has a temper" took this occasion dealing with the logging equipment to call Bundy and cuss him out

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<sup>7</sup> One of the fundamental problems with the legal conclusions of the Special Referee and Shirley is equating "hostile" and "violent" conduct with "hostility" as that term is used as a legal term of art in an adverse possession or prescriptive easement case.

and threaten him. The Court's attention is specifically directed to the following cross-examination of Shirley concerning this incident:

Q. So you were mad. You lost your temper?

A. Yes.

Q. You cursed him out. Said all kinds of things to him. You agree with all of that?

A. Yes.

Q. But you say you didn't say you would kill him?

A. **No, not kill nobody<sup>8</sup>.**

Q. But, you cursed him out, and you lost your temper, didn't you?

A. Yes, sir.

Appendix p. 326 lines 19-25 through p. 327 lines 1-4.

Just a moment or two later on the stand, Shirley even admitted in open court that he had a "short fuse," that he had lost his temper before with other people, and that what he had done, in his very own words was wrong.

Q. . . . Not everyone calls up somebody and curses them out.

A. Yes, sir.

Q. Not everybody does that.

A. **That is wrong. That is wrong<sup>9</sup>.**

Q. All right. So you've got that kind of temper, don't you?

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<sup>8</sup> Contrary to this denial by Shirley himself, Shirley's own counsel, in sharp contrast, in the most recent Brief of Petitioner filed in this Court, candidly admits that **Shirley did threaten Bundy's life**. Indeed, the Brief of Petitioner dramatically ends with final paragraph on page 23 with an unqualified statement that Shirley made a "death threat." Remarkably, rather than an apology for this extraordinary statement, this death threat is used affirmatively as the ultimate argument that there was adverse use of the road under a claim of right.

<sup>9</sup> The significance of the admission "that is wrong, that is wrong," is also telling and is discussed shortly with regard to Shirley's claim of use as a matter of right.

A.. Yes, sir.

Q. Short fuse some people call it. That is right, isn't it?  
Isn't it?

A. Probably.

Appendix p. 327.

Finally, the parties had their third and last conversation where Bundy, retracted his permission to Shirley to use the road and told Shirley to remove the gate. As one might anticipate, in light of Shirley's past conduct,<sup>10</sup> and Shirley's known temperament, Shirley reacted to Bundy's withdrawal of his permission and became (again) extremely violent, angry and ugly. *See* Appendix p. 327 lines 21-25 through p. 328 lines 1-13.

#### **B. The applicable legal analysis**

With this factual background, the legal issue before this Court, where both parties have admitted that one asked, and the other granted his permission, without negotiation, without compensation, and without even a writing, to permit a neighbor to install a gate on a road, and to use the road, within the very first year of acquiring ownership, does not present a novel question in South Carolina.

The law of South Carolina has long been settled (and Paine Gayle case was merely the latest in a long line of decisions) that permissive use is simply the antithesis of a claim of adverse use under claim of right. The Court in Paine Gayle relied on two long standing legal principals governing a claim for a prescriptive easement in South Carolina. The first principal is that permission is a bar to a prescriptive easement claim. 735 S.E.2d at 536-538. The second is that a prescriptive easement claim based on a claim of right must be based on a claim of the right of use

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<sup>10</sup> Merely to give the Court some further idea of Shirley's character, one need only focus on his own admissions throughout this trial. For example, he has been arrested and convicted 8 to 10 times for trespassing. Appendix p. 329.

“without recognition of the rights of the owner of the servient estate.” *Id.* The Paine Gayle Court held that acquiring permission was in fact a recognition of the rights of the owner of the servient estate, and, as such, no claim of right could be established.

The Paine Gayle Court did not make new law, it applied long standing law. The Special Referee and Shirley each erroneously took a contrary position to the well-established law in Paine Gayle case. They took the position that permission was not a defense to a claim for a prescriptive easement pursuant to a claim of right. As noted in the Court of Appeals’ Order, this position is an error of law and was based upon a misreading of the facts and holding in the Reavis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct.App. 1996)<sup>11</sup> case. This does not, however, mean that the Paine Gayle Court established new law that was contrary to the previous law of this State.

Additionally, the Court of Appeals did not misapprehend or misapply the holding in Paine Gayle. Shirley argues that the Court of Appeals failed to compare and contrast the “overall tenor” of the affidavits submitted by the parties in Paine Gayle with the testimony in the present record on appeal. In the present case, however, it was stipulated that Shirley had permission to erect the gate in 2004. Appendix p. 5, Stipulation Number 8 or h. There is no reason to compare and

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<sup>11</sup> Defendant Shirley argued and the Special Referee found that mere permissive use does not bar a claim for a prescriptive easement, *citing* Reavis v. Barrett, 321 S.C. 467 S.E.2d 460 (S.C. 1996). But, for several reasons, that case is clearly distinguishable on its very facts from the facts found on this record. Reavis does not deal with permission, it deals with the express recognition of a right to use the property of another. *See* State v. Murphy, 124 S.C. 274, 117 S.E. 529 (1923) (long ago recognizing the general South Carolina rule that even long use of property by permission does not turn into prescriptive right). First, in Reavis, there was a written letter where one side acknowledged to the other that he “recognizes [referring to the disputed road in that case] to be a joint and common right of way.” This was not permission to use the disputed road. It was the recognition of a right to use the disputed road. In contrast, in this case, there is absolutely no written statement - anywhere at any time - by Bundy or any predecessor in title - that Shirley or his parents had a “joint and common right of way.” Second, there was substantial independent evidence to support the Master’s finding that Reavis had a valid belief about her right to use the road flowing from a “claim of right.” By contrast, Shirley and his father used the road in 1985 - the very year they purchased the property - by asking for and receiving a key from D.N.R. They sought and obtained permission. And, when Bundy became the new owner, in 2004, they again sought and obtained permission to put a gate. Finally, and perhaps most importantly, there was no state public lease inviting the entire public to use the road for eighteen (18) straight years in Reavis v. Barrett.

contrast facts that were in dispute in Paine Gayle with the stipulated fact in the present case because the fact of permission was conclusively established by the stipulation itself.

Moreover, notwithstanding the stipulation, Shirley seeks to use other portions of the record in an attempt to change the stipulated fact. This is improper for two reasons. First, as stated by the Court of Appeals in its Order, “stipulations are binding on the parties as well as the court.” Therefore, neither the finder of fact in this non-jury case nor the parties can change the stipulated fact. Second, Bundy’s testimony (cited by Shirley in his Brief at pages 9-10) is seriously taken out of context. In the testimony cited by Shirley, Bundy is testifying about conversations that occurred only after 2004—the date of the stipulated fact regarding permission. As of 2004, the Court of Appeals held, based on the stipulation, that Shirley did not have a prescriptive easement. Shirley’s conduct after that date, when the parties disagreed emphatically about Shirley’s rights to use another person’s road, is truly irrelevant to the stipulated fact. Bundy started the relationship with Shirley by granting him permission to use the road in order to be a “good neighbor.” Only when Bundy told Shirley he could no longer use the road, and revoked his prior permission, did Shirley physically threaten Bundy. It was at this time that Bundy testified Shirley threatened to kill him. It is only at this time that Shirley states in his Brief that he “threatened to kill Bundy” and made the “death threat.” *See* Brief of Petitioner, p. 23. It was at this time that the Special Referee held that Shirley had “violent outbursts” and engaged in “illegal acts.” This conduct, though reprehensible, is irrelevant to the fact that Shirley’s use was permissive prior to his threats and violent outbursts.

It is settled S.C. law that to establish an easement by prescription, a party must normally show all of the following:

- (1) The continued and uninterrupted use or enjoyment of a right for a full period of twenty years;

- (2) The identity of the things enjoyed;
- (3) That the use or enjoyment was adverse or under a claim of right;
- (4) Additionally, a party claiming a prescriptive easement under a claim of right must show a substantial belief that he had the right to use the property based on the totality of circumstances surrounding his use. **This claim of right must be “without recognition of the rights of the owner of the servient estate”** (Quoting 25 Am.Jur.2d Easements & Licenses, Section 57 (2004). **Emphasis Added.**

In the Paine Gayle case, quoting directly from the much earlier South Carolina case of Williamson v. Abbott,<sup>12</sup>107 S.C. 397, 400-01, 93 S.E.15, 16 (1917), the Court of Appeals expressly noted, quoting and relying upon the earlier Williamson case:

The asking and obtaining of permission, whether from the tenant or owner of the servient estate, stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription.

Id. at 735 S.E.2d 537.

In sum, based upon Paine Gayle and based upon the parties own stipulation of facts and based upon the Williamson decision, Bundy respectfully asks this Court to uphold the decision of the Court of Appeals and conclude that there is no valid claim of a prescriptive easement. To hold otherwise is to turn a party's good faith efforts to be a good new neighbor into a snare and a trap that is totally wrong and unfair. Indeed, if Shirley really did have a bona fide claim of right to use the road, why would he seek permission to do anything?

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<sup>12</sup> Williamson v. Abbott is particularly significant because it was discussed by Bundy to the trial court at the end of the trial, prior to the Paine Gayle case itself. And, since Paine Gayle so heavily cites and relies upon the Williamson case, it should come as no surprise at all to Shirley that the permission argument would be made. *See* Appendix p. 55, Motion for Reconsideration (No. 33).

**III. In response to Petitioner’s argument number 3: Is the Petitioner accurate in any way in arguing that the question of permissive use was not properly raised below, and ruled on by the Lower Court, and thus properly preserved for appellate consideration in the Court of Appeals and this Court?**

With all due respect, the question of permissive use and the stipulated facts concerning such use (*See* Appendix p. 521) has been at the forefront of this case from the very beginning of the case.<sup>13</sup> It is fully settled as a matter of law that the very process of stipulating in open court to eight specific factual points – brings these matters into the case, and as a matter of law, they are deemed to have been properly raised and argued both at the trial and appellate level based upon the very act of stipulation. See Thompson v. Steel Erectors, 632 S.E.2d 874 (S.C. App. 2006); Kirkland v. Allcraft Steel Co., Inc, 329 S.C. 389, 392, 496 S.E.2d 626 (1998). Thus, on the uncontested ground that Respondent and Petitioner both knowingly, willingly and in open court below, authorized the question of the gate being put up with Bundy’s permission to be “stipulated as a fact,” Stipulation No. 8 was properly preserved for argument on appeal. It seems quite odd to suggest this matter was not properly preserved when Shirley himself agreed to its admissibility for all purposes below.

The test for preservation is well-known. In Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54-55 (S.C. App. 2006), the Court held that to preserve an issue for appellate review, when a party has lost a case, the issue must have been raised to and ruled upon by the trial court) (“Therefore, when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRC, motion, the issue is not preserved for appellate review.”)

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<sup>13</sup> Amazingly, notwithstanding argument number 3, Petitioner starts out his argument number 2 with the following sentence: “At trial, Bundy raised the defense of permissive use to defeat the prescriptive easement sought by Shirley.”

Bundy's pleadings put the Petitioner and the Special Referee on clear notice that the issue of Shirley's permissive use of the road was an important question from the very beginning of the case. *See* Appendix p. 31 Paragraphs 11 and 12.

Next, in the actual trial itself, testimony about this issue was central to the cross-examination of Shirley and the direct examination of Bundy. At the end of the trial, Bundy moved for both a directed verdict and closing arguments which (by formal consent of all parties and the Special Referee) were all treated as a single matter. Specifically, the Record reflects the following exchange:

**Mr. Babcock:** The Plaintiff has no Reply, Your Honor. What we would request at this point, it's always --- you are always unsure in a non-jury setting about motions at the conclusion of all the evidence, but rather than having directed verdict motions separate from closing arguments, if we could have the directed verdict motion and the closing argument as one?

**The Court:** I have no objection to that.

**Mr. Wells:** As long as we are protected on the record.

**The Court:** I want to make sure for the record that we are going to do the arguments and motions in this non-jury setting together to the degree that each party shall be protected on the record by making the appropriate motions which I will listen to as part of the final argument and rule on those motions after the argument is had.

**Mr. Babcock:** Thank you, Your Honor.

**The Court:** Okay.

Appendix p. 360 lines 18-25; p. 361 lines 1-13.

In Bundy's directed verdict/closing argument, the conversations between Bundy and Shirley about "putting up a gate" were very specifically discussed as follows:

We've also cited some cases, Your Honor, when you've

got situations with gates and keys. **There is an indication that this is a permissive use. And we've cited cases for that proposition in our brief.** So when you look at all of these facts and apply it to the law, and the standard required, the prescriptive easement fails and fails miserably.

Appendix p. 375 lines 12-18 (emphasis supplied).

The Special Referee certainly understood that one side was arguing that there was permissive use and the other side emphatically disagreed with that assertion. This issue was raised in the pleadings, argued in the trial itself, repeatedly presented to and argued to the Special Referee and (as we will see very shortly) ruled upon below (not merely once but twice!)

The Special Referee specifically rejected the argument made by Bundy that permission prevented adverse use under a claim of right. See Appendix p. 20 (“**Permission does not defeat an easement by prescription under a claim of right.**”)(emphasis supplied).

As Bundy was of the belief then (and now) that this is an error of law, a Rule 52 and Rule 59 SCRC motion to alter or amend the Special Referee’s Order of July 11, 2011 was filed. As part of that motion, Bundy again raised the issue of permissive use in **three** different and separate ways: First, he stated at the very beginning of the motion that the questions of law found in a prior proposed order of injunction barring the Shirley from continuing to use the road should all be reconsidered by the Special Referee. *See* Appendix p. 55. The proposed order was attached as Exhibit A to the motion. *See* Appendix pp. 62-85 (specifically pp. 79-81). As part of the motion, Bundy specifically requested that the Court revisit its decision that the Stipulated Facts were not to become part of the final decision in this case as all eight Stipulated Facts were included within the very first several pages of the proposed Order of Injunction. In short, the Stipulated Facts were part of the case, they were not given their due weight and after that decision was made by the

Special Referee, Bundy formally requested a reconsideration. This issue was very much ruled upon and raised below. In addition, Bundy again requested the Special Referee to find as follows:

(33) The Court erred as a matter of law in ruling that **permissive use** does not defeat a claim of prescriptive easement based on a claim of right as permissive use can never give rise to a prescriptive easement claim. Williamson v. Abbott, 93 S.E. 1917. (Emphasis Added).

The Special Referee considered this question but ultimately elected to reject (again) this issue and ruled (again) that permissive use in this case did not bar a claim of right of right or Shirley prevailing at trial. *See* Appendix pp. 25-26 (“Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (1996) stands for the proposition that permissive use will not necessarily defeat a prescriptive easement under a claim of right.”).

Utterly contrary to Shirley’s argument number 3, which suggests the Special Referee never did understand the nature of Bundy’s claim about permissive use, it is clear the Special Referee clearly understood, but simply rejected this issue of law, upon which Bundy based some of his most important legal arguments.

In brief summary, the question of permissive use could not have been more timely, or repeatedly, raised and ruled on below, to wit:

- It was raised in the pleadings;
- It was raised in both the testimony and cross-examination at the trial itself;
- It was ruled upon (but rejected) by the Special Referee;
- It was raised not once but three separate and distinct times in the motion for reconsideration;
- Finally, it was specifically rejected (yet one more time) by the Special Referee;

There was no lack of notice, no constitutional problem of surprise, no unfairness, and, most certainly, the question of whether or not a permissive use barred a claim of prescriptive easement was raised in every possible way below. Permissive use is clearly available for appellate consideration in this Court because it was preserved for appropriate appellate review, and Shirley's argument number 3 is without merit.

**IV. In response to Petitioner's argument number 4: The Court of Appeals simply did not require Shirley to prove a period of use that was in excess of the required twenty (20) years. The Court of Appeals actually found that Shirley did not prove his use to be continuous, adverse or under a claim of right for the required twenty (20) years.**

Although this case looks complicated and confusing, there really are some very straight forward, simple, and long settled and fundamental property principles that are at issue here.

Shirley and his family started their contested use of the Disputed Road, at the earliest in 1985. Appendix pp. 417-418, Stipulation of Parties for Shirley's Chain of Title. Shirley himself testified that his father "bought some property" in 1985 and "from that day on" it is his testimony that he used the Disputed Road. Appendix p. 288. Of course, Shirley has a set of huge problems with his family's alleged private use of the Disputed Road from 1985 through 2004 when he received permission to erect the gate and use the road from Bundy.

First, as a matter of simple arithmetic: the time period comes up short – as a matter of law – in proving the twenty (20) years necessary for a prescriptive easement. Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (S.C. 1993). "Laychur,..., emphasized as to the first prerequisite not only that there must be a continued use for twenty years, there must be 'continued and **uninterrupted** use or enjoyment of the right for a period of 20 years.'" Pittman v. Lowther, 355 S.C. 536, 540, 586 S.E.2d 149, 151 (Ct.App 2003) *citing* (emphasis in original) Horry County v. Laychur, 315 S.C. at 368, 434 S.E.2d at 261. Moreover, in Pittman v. Lowther, Lowther was

the servient owner and his “repeated attempts to prevent Pittman, [the party seeking the prescriptive easement], from crossing Lowther's land constitute[d] interruptions, however brief, in Pittman's use and enjoyment of that portion of Wellington Road.” 355 S.C. at 541, 586 S.E.2d at 152 *citing* 25 Am.Jur.2d Easements § 69 (1996) (“Any unambiguous act of the owner of the land which evinces his intention to exclude others from the uninterrupted use of the right claimed breaks its continuity so as to prevent the acquisition of an easement therein by prescription....”).

Second, Stipulations of Fact numbers 2, 3, 4, and 5 prove that the Bundy property was leased to the S.C Department of Natural Resources and was enrolled in the Department’s Wildlife Management Area Program from 1985 until 2003. It was stipulated by the parties that the State of South Carolina through its Department of Natural Resources had a “legal interest” in the Bundy property during that time. The public was, therefore, allowed access the property from 1985 to 2003. Shirley, again as a matter of law, could not possibly have established a prescriptive easement in the property. *See* Outlaw v. Moise, 222 S.C. 24, 71 S.E.2d 509 (1952) (recognizing that property used by the public cannot be acquired by prescription or adverse possession against the State.); *see also* Davis v. Monteith, 289 S.C. 176, 179-80, 345 S.E.2d 724, 726 (S.C. 1986) (“[A]dverse possession does not run against the [S]tate or its duly constituted political subdivisions.”). This will be discussed as an additional sustaining ground of the Court of Appeals’ Order more fully below.

Third, even if this Court were to ignore that Shirley engaged in permissive use in 2004 and ignore that the Bundy property was leased land to the State and that it was available to the public at large, and not merely Shirley, and ignore that Shirley could not possibly have obtained any prescriptive use of any kind for the requisite twenty (20) years, Shirley has a huge problem because even the Bennett use was not prescriptive for the requisite twenty (20) years as the uncontested

evidence, or lack thereof, in this case demonstrates. The Court of Appeals ruled that “Shirley is unable to tack the Bennett family’s use to establish his prescriptive easement claim.” Appendix p. 718, Court of Appeals May 8, 2013 Order (emphasis supplied). This is clearly a correct and proper statement of longstanding South Carolina law. The Bennett family owned the property Shirley now owns from 1947-1969. Shirley’s father acquired the property in 1985 and Shirley acquired it from him in 2005. Shirley nor his father acquired their property from Bennett, however.

There was no evidence presented by Shirley of any adverse or prescriptive use at all of the Disputed Road for the periods between 1960 and 1985. The critical question of law is whether or not this 25 year gap of time, after Bennett and before Shirley, defeats any connection or privity or tacking to link the Bennett use<sup>14</sup> to the Shirley use to allow Shirley to establish a prescriptive easement.

Shirley claims that he should be permitted to gain the benefit of the Bennett family’s alleged prescriptive use of the Disputed Road when the Bennetts owned what is now Shirley’s property from 1947 through 1969. The Special Referee found that the Bennett’s engaged in prescriptive use from 1947 through 1969. In part, the Special Referee extensively relied upon evidence of various aerial photographs, which the Special Referee ruled proved the existence of the road in 1956, and 1964, and 1969. *See* Appendix p. 1, Order of the Special Referee, pp. 16-17. However, the Record is crystal clear that Elijah Bennett’s own son, Edward, testified that his Dad stopped all farming in 1955, when he became sick. *See* Appendix pp. 354-356, Transcript of Hearing Vol II, Testimony of Edward ‘Jack’ Bennett, pp. 240-242. Edward also testified, again

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<sup>14</sup> As a very practical matter, there is no evidence in the record that the Bennett use met the elements of a prescriptive easement. In fact, there is no evidence at all of any use of the disputed road by the Bennett family from 1960 to 1969. **The reason for this is that the evidence was in fact offered at trial to prove the disputed road was a public road.** The Special Referee ruled it was not a public road and this issue is not on appeal.

in a very clear and uncontested manner, that Elijah died in 1957. *See* Appendix p. 354, Transcript of Hearing Vol II, Testimony of Edward ‘Jack’ Bennett, p. 240). Without any specific citation to anything in the actual Record, the Special Referee simply concluded that the Bennetts must have continuously used the road throughout a twenty (20) year period of time, even though the only testimony is that Edward ‘Jack’ Bennett has no knowledge of the property or Disputed Road after he married and moved way prior to 1960. *See* Appendix pp. 354-356, Transcript of Hearing Vol II, Testimony of Edward ‘Jack’ Bennett, pp. 240-242.

The question of law is: Does the mere existence of the road in aerial photographs in 1956, 1964, and 1969, coupled with uncontested evidence that Elijah Bennett died in 1957, and the uncontested evidence that his son moved away from the area and had nothing further to do with the property after 1960, add up to <sup>15</sup>continuous use for 20 years? The answer, based upon simple arithmetic, is No it does not. Just because the Special Referee wrote it in his order, does not make it so. *See Townes Associates Ltd v. City of Greenville*, 266 S.C 81, 221 S.E.2d 773 (S.C. 1976) (recognizing the general rule that for factual findings below to stand there must be some evidence in the record to support them); *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (S.C. 2005) (finding Special Referee’s determination of valid service of process was unsupported by the evidence. Since there was no evidence to support a legal relationship between Blair & Southern Finance, service was improper and default judgment was void); *see also Watford v. S.C. State Highway Department*, 269 S.C. 130, 236 S.E.2d 588 (S.C. 1977) (finding the trial judge’s explanation of an accident was based on factual analysis which had no evidentiary support).

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<sup>15</sup> Again, this evidence was offered at trial for the purposes of attempting to establish a public road not a prescriptive easement. Now the Petitioner attempts to use it to establish a prescriptive easement; however, this evidence is insufficient to establish a public road, as found by the Special Referee, and it is wholly inadequate to establish a prescriptive easement. The fact that a private logging road exists is not in dispute.

The Court of Appeals correctly found that the gap of time between the Bennett use and the Shirley use prevents Shirley from “tacking” any of the Bennett use to establish his claim. First, in order to “tack,” the parties must be in privity with one another. *See Morrow v. Dyches*, 328 S.C. 522, 492 S.E.2d 420 (1997). Shirley’s father did not purchase from the Bennett family. The privity requirement is also necessary as any use must be “continuous.” Shirley did not present any evidence of continuous use by a prior owner because he did not put in any evidence of at least 25 years prior to his ownership. Therefore, he cannot “tack,” though he was required to do so in order to meet the twenty (20) year requirement of a prescriptive easement. In short, as a matter of settled law, the Court of Appeals properly found that the Shirley failed to prove the required elements to claim a prescriptive easement—including the “continuous and uninterrupted use” for a full twenty (20) years. Even if this Court were to add the time of Bennett use for which there is any evidence<sup>16</sup> (12/19/1947-1960) and the time the Bundy property was no longer in the WMA program (3/14/2003-3/24/2009), any use still does not reach the twenty year requirement prior to the filing of this action, even if continuity was ignored.

In the Brief of Petitioner, Shirley elected to cite, Cuthbert v. Lawton, 3 McCord 194, 14 S.C.L. 194 (Ct.App. 1825) which was not found previously in his brief to the Court of Appeals and was only cited in his Petition for Rehearing for the first time. *See* Appendix p. 680, Petition for Rehearing and compare that with his Table of Cases in Shirley’s Brief, Appendix p. 605. Shirley now argues that Cuthbert is legal justification for the 25 year period of delay between the first period of use and the second period of claimed adverse use.

Bundy submits that the old South Carolina case of Cuthbert v. Lawton, 3 McCord 194, 14 S.C.L. 194 (S.C. Ct. App. 1825) actually supports Bundy’s arguments. First, in Cuthbert, the Court

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<sup>16</sup> Though there is no evidence of any adverse use or use under claim of right by the Bennetts.

found that a prescriptive easement had been proven by use from 1769 to 1800. This period meets the twenty (20) year time requirement. In the present case, Shirley cannot meet the twenty (20) year use requirement during the Bennett ownership. Second, in Cuthbert, while after 1800 the property had not been used as much by the prescriptive easement holder, it was **continued** to be used and that the mere diminished intensity use - after the prescriptive easement had been fully established - did not call for the jury verdict in that case to be overturned as contrary to law. The Court of Appeals, added however, in highly significant language for this case that had there been “adverse and continued obstruction for five years” after the prescriptive easement had first been established (which was not proven in that old case) then the result would have been quite different.

In this case, there was no evidence at all of any continued prescriptive use of the disputed road for the 25 years prior to Shirley’s father acquiring the land. Therefore, as stated above, there is no evidence of continuous use by a prior owner upon which Shirley is able to tack. Indeed, even if this Court were to disregard those uncontested facts, there is also undisputed evidence that Bowater—the owner of the Bundy Property from at least 1985 until 2003—erected their own gate on the Disputed Road as an express and longstanding obstruction. Appendix pp. 233-234; pp. 245-247; pp. 334-335. Therefore, Bowater obstructed the Disputed Road, subject to the Wildlife Management Program, for at least 18 years.

In light of the absence of any evidence of adverse use from 1960- 1985, and in the presence of the “legal roadblocks” found in the four Stipulations of Fact and Shirley’s own testimony related to the years 1985-2003, it is clear **as a matter of law**, that any years of Bennett prescriptive use, even if they existed, were blocked, obstructed, and ended, from 1960 until 2005 (45 years in total, nine times as long as the dictum found in Cuthbert that five years would end the prior

prescriptive easement as a matter of law).<sup>17</sup> In sum, this Court was correct when it held that Shirley failed to present any evidence sufficient to allow him to “tack” to establish his prescriptive easement claim because he could not establish the continuous and uninterrupted and adverse use for the requisite twenty (20) years.

**V. In response to Petitioner’s argument number 5, the Court of Appeals simply applied a longstanding principle of law—permission is the antithesis of a prescriptive easement—to undisputed facts.**

Shirley argues that the Court of Appeals retroactively applied the decision of Paine Gayle Properties, LLC v. CSX Transportation, Inc., 735 S.E.2d 528 to the present case. The Court, however, did not improperly cite the Paine Gayle case in its Order.

First, as stated above, Paine Gayle did not establish new law but merely reasserted long standing law. The case was the most current statement of two fundamental legal principles regarding prescriptive easements—(1) permission is a bar to establishing a prescriptive easement; and (2) recognition of the servient owner’s rights is a bar to establishing a prescriptive easement as a claim of right. Second, a decision of an appellate court is, as a general rule, retroactively applied. The only instances where a decision may not be applied retroactively is when it either creates “new substantive rights” or when it “liability is created where formerly none existed.” Toth v. Square D Co., 298 S.C. 6, 377 S.C. 584 (1989). The Paine Gayle case did not establish new substantive rights nor did it create new liabilities. In this case, Shirley asserted he had a prescriptive easement over the property of Bundy. The Paine Gayle case did not change the elements of a prescriptive easement in any way. It did not establish permissive use or recognition of the servient owner’s rights as a bar to a prescriptive easement. It certainly did not subject Shirley to any new liabilities where none previously existed. In this case, Shirley simply could not and

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<sup>17</sup> It bears noting again that there is simply no evidence in the record of any Bennett use from 1960 to 1969.

did not prove all the elements of a prescriptive easement. Most notably, it was stipulated that permission was granted by Bundy to Shirley in 2004 for the erection of a gate and use of the Disputed Road.

In sum, the Court of Appeals properly cited to and relied on Paine Gayle Properties, LLC v. CSX Transportation, Inc., 735 S.E.2d 528 as a statement of current and longstanding South Carolina law.

**VI. In response to Petitioner's argument number 6, the Court of Appeals ruled on issues of law and applied the law to undisputed facts.**

Shirley argues that the Court of Appeals impermissibly invaded the province of the trial court in ruling that evidence in the record establishes the permissive character of Shirley's use of the road. The Court of Appeals, however, did no such thing. The Court of Appeals applied the stipulated facts to the law. The Court simply found that the Special Referee could not make findings of fact contrary to the stipulated fact. In applying the stipulated facts to the law, the Court correctly found that Shirley could not legally establish a claim for a prescriptive easement. The Court of Appeals is free to correct errors of law (it was error for the Special Referee to hold that permissive use is not a bar to a claim for a prescriptive easement). The Court of Appeals, just as the Special Referee should have been, was bound by the stipulated facts. It is not an invasion of the province of the finder of fact for the Court of Appeals to recognize and be bound by stipulated facts. *See* 83 C.J.S. Stipulations Section 789 (2012) ("the jury or the court cannot find contrary to the stipulated admissions of the parties"). It is not an invasion of the province of the trial court for the Court of Appeals to reject a finding of the trial court that is based upon no evidence or insufficient evidence in the record. Townes Associates Ltd v. City of Greenville, 221 S.E.2d 773;

Roberson v. Southern Finance of South Carolina, Inc., 615 S.E.2d 112; Watford v. S.C. State Highway Department, 236 S.E.2d 588.

**VII. In response to Petitioner’s arguments in his “conclusion” section: The Petitioner or any citizen or entity before this Honorable Court should not be permitted to gain any legal advantage or be rewarded in any way by relying on “death threats” and violent conduct.**

The Petitioner concludes his Brief by stating as follows:

**“[T]he trial judge discharged his duty to weigh the Stipulation 8 permission to erect a gate **against the death threat and other words and actions of Shirley that demonstrated his contempt for any man who would deny him his right to use the disputed road...**”**

Brief of Petitioner, p. 23. This shockingly violent behavior, even though it occurred after the withdrawal of permission, simply should never be rewarded in law or equity by the highest Court in the State of South Carolina. Essentially, as concluded by the Petitioner in his brief, the Petitioner takes the position that “death threats” trump the long standing legal premise in South Carolina that permission bars a prescriptive easement. The Petitioner seeks to have this Court rule that so long as a death threat is made—even if made after the granting and revocation of permission by a landowner—the party making the death threat has the legal right to successfully assert a claim to a prescriptive easement. This is not and should not be the law.

**Conclusion of Response to Petitioner’s arguments**

For the reasons stated herein, the Order of the Court of Appeals should be affirmed. The parties stipulated to facts that conclusively show that permission was at the very heart of Shirley’s use of the Disputed Road while Bowater owned the property and when Bundy first owned the property. It is Shirley’s temper and conduct that have put him in the position he is in now. He and his family purchased their property with full knowledge that they did not have legal access over

the Disputed Road.<sup>18</sup> Shirley used the Wildlife Management Area Program and the permission of Bowater to use the Disputed Road to access his property from 1985 to 2003. Upon Bundy purchasing the property, the first thing Shirley did was request and receive permission from Bundy to use the Disputed Road. It was only after Shirley's own loss of his temper and his first death threats did Shirley exhaust the neighborly permission that he once enjoyed. He now is before this Court seeking to have this Court declare that notwithstanding the permission of Bowater and Bundy, but solely because of his violent conduct after the revocation of permission that he should be granted a free easement over the Disputed Road. The facts, including the stipulated facts, do not support this outrageous position, nor does the law. The Court of Appeals applied the undisputed law to the undisputed facts. The Court of Appeal's Order should be affirmed.

#### **Additional sustaining grounds for the Order of the Court of Appeals**

The Court of Appeals reversed the Special Referee based upon only one of Bundy's arguments on appeal. As such, the Court of Appeals did not address each of Bundy's arguments.<sup>19</sup> To the extent this Court is inclined to find disfavor with the Order of the Court of Appeals, Bundy submits the following additional arguments that were raised to the Special Referee and the Court of Appeals. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); Rule 220(c), SCACR.

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<sup>18</sup> Contrary to Shirley's assertion in his Brief that the Disputed Road is his "only" access to his property (*See* Brief of Petitioner, p. 2), Bundy is aware that Shirley continues to access his property over the lands of another. This fact is not in the Record on Appeal, nor could it have been, as Shirley's use of this point of access began after the Court of Appeals issued its Order. It should be clearly noted that in the trial court, Shirley did not claim an "easement by necessity."

<sup>19</sup> As this Court is well aware, the Court of Appeals simply noted in its final paragraph that "As to Bundy's remaining arguments on appeal, we decline to address these issues because the above findings are dispositive of the appeal. *See Young v. Charleston Cnty. Sch. Dist.*, 397 S.C. 303, 311, 725 S.E.2d 107, 111 (2012) (declining to address additional remaining issues when the disposition of a prior issue was dispositive of the appeal)."

**I. Shirley failed to establish his use was “adverse” or under “claim of right.”**

To establish a prescriptive easement, the party asserting the right must show: (1) continued and uninterrupted use and enjoyment for the full period of 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under a claim of right. *Horry County v. Laychur*, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (S.C. 1993).

In addition to the fact, as presented above, that Shirley failed to establish the continued and uninterrupted use requirement for the full twenty (20) years, and likewise, as presented above, Shirley’s use was pursuant to permission obtained from Bundy, Shirley failed to establish that his use was adverse or under a claim of right at any point prior to 2005, when Bundy’s permission was revoked and for the first time ever Shirley asserted a claim of right by threatening to kill Bundy.

The third element necessary to establish a prescriptive easement is that the claimant must establish that the use was open, hostile, notorious, continuous, and uninterrupted in order to have shown the use to have been adverse. *Poole v. Edwards*, 197 S.C. 280, 283, 15 S.E.2d 349, 350 (S.C. 1941). The claimant may also prove the third element by establishing that the use was under a “claim of right.”

**A. Shirley did not establish a valid claim of right.**

South Carolina courts have held that a party may establish a prescriptive easement under a claim of right if “he demonstrate[s] a substantial belief that he had the right to use the parcel or road **based upon the totality of circumstances surrounding his use**” and in a manner consistent with the alleged easement. *Hartley v. John Wesley United Methodist Church of Johns Island*, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct.App. 2003) (emphasis added); *see also* 25 Am.Jur.2d Easements and Licenses, § 57, at 552 (2004) (stating “an intent to claim adversely may be inferred

from the acts and conduct of the dominant users” and defining “claim of right” as “without recognition of the rights of the owner of the servient estate”).

In the present case, Shirley attempted to present evidence to show that he used the disputed pathway under a claim of right. The asserted claim of right was that he thought he had a right to use the Disputed Road because it was public, though he never made such a claim until after permission to use the road was revoked. *See* Appendix p. 300, Transcript of Hearing Vol I, Testimony of Shirley, p. 187). This is insufficient as a matter of law.<sup>20</sup> In Morrow v. Dyches, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App.1997), the South Carolina Court of Appeals specifically rejected an argument of a party seeking to establish a prescriptive easement under a claim of right merely because he “thought” he had a right to use the road. An example of a “claim of right” actually based in fact is found in the case of Revis v. Barrett, 321 S.C. 206; 467 S.E.2d 460 (Ct.App. 1996). In Revis, the road in question was in fact formerly a public road that was abandoned and the claimant, Revis, had a letter from the adverse party that specifically recognized her rights in the road. This letter served as the basis for the dismissal of a previous lawsuit over the right to use the road brought by Revis’ parents. In Revis, therefore, the claim of right had some basis in evidence other than what Revis “thought.” Here, as explained below, there is no such evidence in which to base any “substantial belief” of a claim of right.

Moreover, Shirley sought a key, both from Bowater through DNR and from Bundy and erected a gate on the Disputed Road. Therefore, based upon the totality of the circumstances, Shirley is unable to now argue that his easement by prescription was established under a claim of right when in the past he has acknowledged he had no absolute right.

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<sup>20</sup> It is also contrary, once again, to Stipulated Fact Number 8, because Shirley admits to erecting a gate on the Disputed Road with the permission of Bundy. Shirley cannot in the face of a stipulated fact that he sought to erect a gate on a private road with the permission of Bundy simultaneously argue that it was a public road.

**B. Shirley did not establish that his use was adverse.**

Shirley failed to show that his use was open, hostile, notorious, continuous, and uninterrupted. See Poole v. Edwards, 15 S.E.2d 349, 350. The failure of the continuous and uninterrupted elements is addressed above.<sup>21</sup> Shirley's use also failed to be open and notorious. Shirley is attempting in this case to establish a prescriptive easement by submitting evidence that he periodically used the Disputed Road over the unenclosed woodland property of a timber company that allowed the general public to enter upon for the benefit of the general public. He argues and the Special Referee erroneously agreed that this use is open and notorious in such a way as to put the owner<sup>22</sup> on notice that Shirley was seeking to exercise rights both different and distinct from the public and detrimental to the rights of the timber company. In South Carolina, however, "[t]he long-term use by the public of a road through unenclosed and unimproved woodland does not give rise to a right-of-way by prescription." Cleland v. Westvaco, 314 S.C. 508, 511, 431 S.E.2d 264, 267 (Ct.App. 1994). The use must be exclusive and different from any rights asserted by the general public in order to establish a private right of prescription. Cleland v. Westvaco, 314 S.C. at 511, 431 S.E.2d at 266. Shirley's claim to a prescriptive easement, to be

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<sup>21</sup> This also applies to the Bennett Family's use of the Disputed Road as there is no evidence of continuous and uninterrupted use for the full 20 year period by the Bennett Family. This too is discussed above.

<sup>22</sup> Fundamental to a claim for a prescriptive easement or adverse possession, the party asserting the claim must show, in addition to other elements, that his use was open, exclusive, notorious, and hostile. The central point of the showing of these elements is to provide notice to the record owner of the property. 3 Am.Jur.2d Adverse Possession § 65 ("It is the legal owners knowledge, either actual or imputable, of another's possession of lands that is required for adverse possession\*\*\* The true owner is generally chargeable with knowledge of what is openly done, and therefore calculated to attract attention, on the owner's land."). Here, Shirley did not present any evidence that Bowater had any notice of his use of the property. Indeed, as stated herein, his use was consistent with the use the general public made or could have made of the Bowater/Bundy Property and the disputed road pursuant to the WMA program. Shirley testified six (6) separate times that his use was consistent only with the use the public made of the logging road because it was public while it was enrolled in the WMA Program. See (Appendix pp. 236-238; 247; 251-253; 300-301; 315-318, Transcript of Hearing Vol I, Testimony of Shirley, pp. 123-125; 134; 138-140; 187-188; 202-205). The Special Referee found the disputed road was not a public road. Shirley's use does not arise to a prescriptive easement. There was no way for the landowner, Bowater, to prevent or uncover this type of secret use while the property is leased into the WMA program because everyone in the general public was allowed to use the logging road. Indeed, in Cleland v. Westvaco, 314 S.C. 508, 431 S.E.2d 264 (Ct.App. 1994), the South Carolina Court of Appeals has already recognized, even in the absence of a WMA lease, that large unenclosed timber property is different and, therefore, prescriptive rights cannot arise because of notice problems to the owner.

valid, must be based upon notice to the real owner that someone is truly entering the property and that their entry is different than the public using the property. Shirley must have had an independent claim of right that he was entitled to be on the property. However, the testimony of Shirley is clear that he has no “independent right,” but was merely present on the property along with the other members of the public – all of whom were invited on the land by Bowater. Shirley cannot show that his use was open and notorious.

Shirley’s claim that his use was hostile also fails as a matter of law . The Special Referee’s reliance on the death threats and verbal assaults of Shirley to establish the hostility element of a prescriptive easement is unfounded in both equity and law. The element of hostility is meant to require the claimant of a prescriptive easement to establish that his conduct was such as to put the owner of the servient estate on actual or constructive notice that the claimant was seeking to establish a property right that will in fact detract from the property rights the servient estate possessed prior to the establishment of the easement. In the present case, Shirley cannot show hostility because he used the Disputed Road with permission from Bowater and then Bundy. It was not until 2005 that Shirley first stated he had a right to use the Disputed Road without permission. Therefore, Shirley cannot show the hostility element.

**C. Permissive use defeats any claim of adverse use or use under a claim of right.**

Permissive use is fatal to both a claim of right assertion and an adverse possession theory. “It is the well settled rule that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since user as of right, as distinguished from permissive user, is lacking, if permissive in its inception, such permissive character will continue of the same nature, and no adverse user can arise, until there is a distinct and positive assertion of a right hostile to the owner, and brought home to him.” Williamson v. Abbott, 107 SC

397, 93 S.E. 15 (S.C. 1917). The Special Referee expressly found and based his ruling on the legal conclusion that permissive use does not apply to a claim for a prescriptive easement under a claim of right pursuant to Revis v. Barrett, *supra*. This is clear error. Revis specifically recognizes that a prescriptive easement based on a claim of right is subject to the defense of permission. The facts of Revis, however, showed that Revis believed that her right to use the road was based on a letter from the adverse party that actually recognized legal rights rather than granted any permission. Here, there is no such evidence of any basis for any claim of right. There is no letter, deed, or writing of any kind upon which Shirley can base his alleged claim of right.

Additionally, from 1985 to 2003 the Bundy property was subject to the WMA lease wherein the public could enter upon the lands of Bowater and use the roads located on the property or simply walk the entirety of the property, including the disputed pathway. These years do not count toward the twenty (20) year period because the use, if any, was permissive. Shirley testified that he was aware of the public's WMA access over the land during this period and he was aware of that right prior to purchase of the Shirley property. The law is clearly set forth in Williamson v. Abbott, 93 S.E. 15 (S.C. 1917) where the South Carolina Supreme Court held that use that begins as permissive "cannot ripen into an easement by prescription."

In the Special Referee's Order, the Special Referee recognized in his Findings of Fact Section of that Order "that the parties entered into the following stipulation of facts prior to the trial of this case." The Special Referee then went on to discuss some of those stipulations as follows:

**b. From 1985 to 2003, the Bundy Property was leased by the Plaintiff's predecessors in title Bowater Incorporated and Bowater Timber 1, LLC, to the South Carolina Department of Natural Resources (the "Lease")**

**c. Between 1985 to 2003, the South Carolina Department of Natural Resources had a legal interest in the Bundy Property.**

**d. As a result of the Lease, the Bundy Property was enrolled in the South Carolina Department of Natural Resources Wildlife Management Area Program.**

**e. The Lease and the Wildlife Management Area program allowed public access to all portions of the Bundy Property from 1985 to 2003 subject to the rules and regulations of the Wildlife Management Area program.**

See Appendix p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 5.

However, contrary to settled law and the parties own stipulations of fact,<sup>23</sup> quoted above, the Special Referee inexplicably ignored his own Findings of Fact a few pages later by first holding that “using the disputed road over the Bowater property without a Game Management permit would be use without permission and adverse to the interests of the owner.” See Appendix p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 10. Then, repeating this error, the Special Referee further held as follows:

As to the Game Management Program that allowed public hunting on the Plaintiff’s property, it was never established that the Defendant complied with the Department of Natural Resources rules and regulations for entering the Game Management lands, specifically, the need to obtain a permit. As to the evidence presented by the Plaintiff of permissive use, I find that the preponderance<sup>24</sup> of evidence including that the violent outburst by the Defendant establishes that the use of the disputed road by the Defendant was adverse and hostile.

See Appendix p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 20.

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<sup>23</sup> It is settled everywhere “the jury or the court cannot find contrary to the stipulated admissions of the parties” 83 C.J.S. Stipulations Section 789 (2012). Or, as stated by one Court, “valid stipulations are controlling and conclusive” Burstein v. United States, 232 F.2d 19 (8<sup>th</sup> Cir. 1956).

<sup>24</sup> An additional error of law is the Special Referee’s continued insistence that the proper standard of proof for adverse possession and prescriptive easement claims is a mere preponderance of the evidence. As argued below and in Bundy’s Brief on Appeal to the Court of Appeals, at Pages 13-15, the proper standard of proof for a prescriptive easement and adverse possession claim is the clear and convincing standard.

Finally, and again in error and in disregard of the stipulated facts, in response to Bundy's Rule 52 and Rule 59, SCRCF, motion to reconsider the Special Referee found as follows:

The Court is simply of the opinion that the enrolling of the Bundy property into the game management program, and the use of the road presumably by public third parties, does not affect any rights of Shirley in and to the prescriptive use of the road. **Furthermore, the state of South Carolina never owned the Bundy parcel so therefore I find that any enrollment as a game management land does not rise to the level of a legal interest in the property.**

(emphasis supplied) *See* Appendix. p. 22, Order on Appellant's Rule 59, SCRCF Motion, filed February 9, 2012, p. 3.

On almost any level of analysis, these conclusions of law are plainly in error. First, directly based upon the Stipulations of Fact, the entire property was under lease to a State agency. How can real property, validly leased to a State Agency for 18 years, and thus temporarily converted as a matter of law to state leased WMA property, ever create a prescriptive, hostile easement? The entire property was wide open to the public to use during this period. Anyone, and everyone, for years and years on end, could travel across it and use its roads. *See Ark Game & Fish Comm'n v. Lindsey*, 730 S.W.2d 474 (Ark. 1987), which squarely following South Carolina law,<sup>25</sup> held that hunters and fisherman could not argue prescriptive rights to roads across State land.

For all practical, and certainly for legal purposes, this land, under the Department of Natural Resources legal control and sovereign dominion by virtue of the valid lawful leasehold granted the State of South Carolina, over the entire property, for 18 consecutive years, temporarily became state land, and there could not possibly be hostile and adverse possession on the part of

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<sup>25</sup> *Outlaw v. Moise*, 222 S.C. 24, 71 S.E.2d 509 (1952)(recognizing that property used by the public cannot be acquired by prescription or adverse possession against the State.).

anyone. Any other rule, would be so contrary to public policy, and would intimidate real property owners in the future from ever again participating in anything like the State Management Program. It is almost unthinkable that a real property owner's kindness and gracious acts in favor of the public can be cruelly turned into a loss of title and use. One of the primary reasons for both adverse possession and prescriptive easements is to punish a real owner, who is so indifferent to his or her own property rights in that they do not bother to even check on who is using their property for what purposes for long, long periods of time. Not a single part of that reason is found on this Record. To the contrary, here a private owner has voluntarily elected to lease what was once private property to a State Agency for the good of the public and to actually invite the public onto what was formerly private land. To turn this policy, which is a wise and good one, into a snare and a trap is contrary to all reason and directly contrary to the policy underpinnings of the reasons for adverse possession and prescriptive use to begin with. On this ground alone, the Special Referee's Order is clearly wrong, wrong as a matter of law, and even more wrong as a matter of public policy.

Defendant Shirley's sole attempt at trial to circumvent this inconvenient fact of state control of state leased land in a state program, was to assert that he stopped buying or holding a valid WMA permit. The response, of course, is: who cares? As a matter of law, the lease was governed by State regulations—even the Stipulation of Facts recognized that the lease was governed by rules and regulations of DNR—and those Regulations make it crystal clear that the "Department land is made **available to the general public for reasonable uses** not prohibited by statute or regulation" S.C. Code Ann. Regs. Section 123-202. The general public was always allowed on the land. Indeed, the general public was invited and encouraged to be on the land and

to engage in countless activities—even without acquiring any permit or hunting license. For example, the general public could:

- (1) hike anywhere on the property;
- (2) operate a motorized vehicle;
- (3) swim;
- (4) camp for less than four nights;
- (5) horse ride;
- (6) boat;

No one, not the record owner, not a D.N.R. game warden, not a policeman, not even the Governor of this State, could have barred Shirley from any and all of these activities on the Bowater/Bundy Property for 18 years. *See* S.C. Code of Ann. Regs. Section 123-203 (C) (D) (E) (F) (G) (H). Nor, does even this specific list, exhaust the uses that anyone, including Shirley, might lawfully be permitted to do on the property while it was leased to the State. In light of S.C. Code Ann. Regs. Section 123-203 (A), quoted earlier, where property leased to the State becomes public lands during the lease and where the public is invited to make “reasonable uses” of the property, certainly bird watching, photography, walking, running, mountain biking, sporting, and picnicking are further uses that could and were lawful, valid uses.

Shirley, in short, was granted as a matter of law access and permission to use the property, including the Disputed Road pursuant solely to the Lease. Although the Special Referee notes that Shirley claims he stopped purchasing permits to hunt, and even assuming for purposes of this appeal that this statement is true, there is no evidence that Shirley actually hunted on the Bundy/Bowater property from 1985 to 2003, and he claims a prescriptive right to use a road on the property, not to hunt. There was no permit required to use the Disputed Road on the property.

The testimony reflects that Shirley was on the Disputed Road by permission and that the state program of open access was the reason he was on the property. These facts prevent his current argument that he was using the Disputed Road under his own independent claim of right because the road was public. The State itself was only on the property and managing the premises by express permission and consent of the owner—Bowater.

Additional evidence of permissive use is the key itself, which Shirley admits he obtained from the State Game Warden, and which he testified “he had to use,” is clear evidence that he was on the Bowater land by permission and not adversely. See Tomlin Enterprises, Inc. v. Althoff, 103 P.3d 1069 (Mont. 2004) (adjacent property owner’s use of strip of land on property owned by company, which strip of land was owned by company, and which strip provided access to road, was permissive based on neighborly accommodation, and thus adjacent owner’s use of strip was not adverse when the adjacent property had a key to the gate); Vandervoort v. McKenzie, 412 S.E.2d 696 (N.C. App. 1992) (key was evidence of permissive use). Douglas v. Knox, 502 S.E.2d 490 (Ga. App. 1998) (where a record owner has placed a locked gate across an access way, but has provided the adverse claimant with a key or other means of entry, such conduct may be taken as “strong evidence” of a mere license to use the road).

Finally, Bundy and Shirley both testified that Shirley put up a gate with the “permission” of Bundy. This is also a stipulated fact. It is undisputed. Shirley testified that he took the gate down when Bundy told him to take it down. See (Appendix p. 242; pp. 236-237, Transcript of Hearing Vol I, Testimony of Shirley, pp. 129; 123-124). Shirley’s use has been permissive ever since his father purchased the Shirley Property.

**II. Shirley cannot adversely acquire a prescriptive easement over property in which the State of South Carolina has a legal interest.**

One cannot adversely acquire a prescriptive easement over property in which the State of South Carolina or its political subdivisions has a legal property interest. See Davis v. Monteith, 289 S.C. 176, 179-80, 345 S.E.2d 724, 726 (S.C. 1986) (“[A]dverse possession does not run against the [S]tate or its duly constituted political subdivisions.”). That period of time wherein the government has a legal interest in the property may not be used to satisfy any portion of the prescriptive period. See e.g. Kempner v. Aetna Hose, Hook & Ladder Co., 394 A.2d 238 (Del. 1978).

The State of South Carolina had a legal interest in the property from 1985 to 2003 due to its lease and the property’s enrollment in the WMA program. These are stipulated facts. The Special Referee erred in finding that “South Carolina” did not have a “legal interest in the [Bundy] property.” See Appendix p. 22, Order on Appellant’s Rule 50, SCRC Motion filed February 9, 2012, p. 3. This finding is in direct conflict with Stipulation No. 3. During this time, no rights of prescription could be gained by Shirley. It would be bad public policy, contrary to South Carolina law, and spell the end of the WMA program if private individuals could quietly gain private rights in the property that was enrolled in the WMA program.

Pursuant to the foregoing, Shirley failed to establish the necessary elements of an easement by prescription over the property of Bundy.

**Conclusion for Additional Sustaining Grounds Section**

For the aforementioned reasons, the Order of the Court of Appeals should be affirmed. The facts of this record, including the stipulated facts, do not give rise to a prescriptive easement in favor of Shirley. There are insufficient facts to establish a prescriptive easement. There is no testimony or evidence describing any use of the Disputed Road by anyone from 1960 until 1985.

Any use by Shirley from 1985 to at least 2005 was done with the permission of the owners of the Disputed Road. Indeed, much of that period of claimed use by Shirley was done which the parties stipulated that the State of South Carolina, Department of Natural Resources had a “legal interest” in the property—including the Disputed Road. The Special Referee misinterpreted the law, ignored stipulated facts and made findings of fact for which there was no evidentiary support. The plain facts are that acquisition of property by adverse possession or prescription is an extraordinary manner of acquiring property because it gives the property to the claimant for free. The established law and the facts in this record did not support a public road as originally contended and do not support a prescriptive easement as now alleged. The Court of Appeals should be affirmed.



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November 25, 2014

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

W. H. Bundy, Jr.....Respondent,

v.

Bobby Brent Shirley.....Petitioner.

APPELLATE COURT CASE NO. 2013-001263

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APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas  
Roderick M. Todd, Jr., Esquire, Special Referee  
Case No.: 2009-CP-28-00338

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PROOF OF SERVICE

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I certify that I served the Brief of Respondent on Bobby Brent Shirley by depositing a copy of it in the United States Mail, postage prepaid, on November 25, 2014, addressed to his attorney of record, John W. Wells, Esquire, Baxley, Pratt & Wells, PA, Three The Common at Lugoff, PO Box 10, Lugoff, South Carolina 29078.



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**S.C. SUPREME COURT**

VIA FEDEX

Daniel E. Shearouse, Clerk of Court  
Brenda F. Shealy, Chief Deputy Clerk of Court  
The Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

Re: W.H. Bundy, Jr. v. Bobby Brent Shirley  
Appellate Case No.: 2013-001263

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**S.C. SUPREME COURT**

Dear Clerk of Court:

Please find enclosed for filing one original (unbound) and fifteen bound copies of the Respondent's Brief in the above referenced matter, along with the original Proof of Service of the same.

With kindest regards, I remain

Sincerely yours,



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