The Supreme Court of South Carolina

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May 22, 2015

The Honorable Joyce McDonald
PO Box 1557
Camden SC 29021-1557

REMITTITUR

Re: W. H. Bundy v. Bobby Shirley
Lower Court Case No. 2009CP2800338
Appellate Case No. 2013-001263

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

Daniel E. Shearouse
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CLERK

cc: John W. Wells, Esquire
Michael Brent McDonald, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

W. H. Bundy, Jr., Respondent,

v.

Bobby Brent Shirley, Petitioner.

Appellate Case No. 2013-001263

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Kershaw County
Roderick Murchison Todd, Jr., Special Referee

Opinion No. 27520
Heard March 3, 2015 – Filed May 6, 2015

AFFIRMED AS MODIFIED

John W. Wells, of Baxley Pratt & Wells, P.A., of Lugoff, for Petitioner.

Michael Brent McDonald, of Smith Bundy Bybee & Barnett, P.C., of Mount Pleasant, for Respondent.

JUSTICE BEATTY: In this declaratory judgment action, W. H. Bundy, Jr. sought a determination of whether Bobby Brent Shirley established a prescriptive easement over a road on rural property owned by Bundy. The special referee found Shirley was entitled to the easement. The Court of Appeals reversed. *Bundy*

Shirley used a key, which was given to him and his father by a SCDNR game warden, to unlock the gate.

In early 2004, shortly after Bundy purchased his property, Shirley received permission from Bundy to erect a gate over the disputed road in an effort to limit the public from using the surrounding property to dump trash. The gate was located at the same location as the Bowater cable. Shortly thereafter, Bundy hired a company to clear a portion of his property so that he could plant pine trees. Shirley became upset when a logging truck, which was owned by the company hired by Bundy, blocked access to his property. According to Bundy, Shirley called him and threatened him with violence regarding the incident. As a result of the threat, Bundy called Shirley on September 12, 2005 and instructed him to take down the gate and told him to stop using the disputed road to access his property. In response, Shirley yelled at Bundy and threatened him again with violence. Shirley testified that he believed he had a right to use the road because he thought it was a continuation of Saxon Road.

On March 24, 2009, Bundy filed a declaratory judgment action seeking a determination of whether Shirley had a prescriptive easement over the disputed road. Alternatively, if the court ruled that Shirley was entitled to the easement, Bundy sought a determination regarding the type of easement and the rights and duties of the easement holder, including whether the easement was assignable or transferable. Shirley filed an Answer and Counterclaim in which he sought a declaration that the disputed road was public or, alternatively, that he had a private, permanent easement. In his Reply, Bundy alleged several affirmative defenses to Shirley's counterclaims, including that Shirley was barred from recovery based on the equitable doctrines of estoppel and unclean hands and that Shirley's use of the disputed road was permissive.

Following a two-day trial, the special referee ruled that Shirley was entitled to an easement, which measured eight feet in width, across Bundy's property. Based on the stipulations of the parties, the testimony presented, and the exhibits, the special referee concluded that Shirley proved by a preponderance of the evidence that the Bennett family used the disputed roadway between 1947 and 1969 "continuously" and in a "manner that was adverse to the interests of the owners at that time of the tract now owned by [Bundy]." Having concluded that Shirley established a prescriptive easement during the Bennett ownership period, the special referee found it was "unnecessary to establish a prescriptive easement during the Shirley ownership period." However, the special referee concluded, as a

special referee's conclusion was contrary to established law, which states that permission defeats a claim to a prescriptive easement because the use of the disputed property is no longer deemed adverse or under claim of right. *Id.*, slip op. at 2-3 (citing *Paine Gayle Props., L.L.C. v. CSX Transp., Inc.*, 400 S.C. 568, 585-86, 735 S.E.2d 528, 537-38 (Ct. App. 2012)).

With this principle in mind, the court noted that the parties stipulated: (1) the property Shirley now owns was transferred to Shirley's parents on May 10, 1985; and (2) in 2004, Shirley put up a gate on the disputed road with the permission of Bundy. *Id.*, slip op. at 2. Based on these stipulations, the court concluded that Bundy's grant of permission for Shirley to build the gate defeated a claim of right or adverse use of the disputed road. *Id.*, slip op. at 2-3. Additionally, the court ruled the special referee erred in finding that because Shirley established a "prescriptive easement during the Bennett ownership period, it [was] unnecessary to establish a prescriptive easement during the Shirley ownership period." *Id.*, slip op. at 3.

In order to utilize the Bennett family's prescriptive use of the disputed road, the court found Shirley was required to offer evidence that the disputed road continued to be used under a claim of right or in an adverse manner during the time period between the Bennett family's use and the Shirley family's use. *Id.* The court determined Shirley failed to present evidence that the use of the disputed road was adverse or under claim of right between 1968[2] and 1985, the time period between the Bennett family's ownership and the Shirley family's ownership. *Id.* Consequently, the court concluded that even if the special referee was correct that the Bennett family had a prescriptive easement over the disputed road, Shirley was unable able to tack the Bennett family's use to establish his prescriptive easement claim. *Id.* Accordingly, the court found the special referee erred by granting Shirley a prescriptive easement. *Id.* Finding this ruling dispositive of the appeal, the court declined to address Bundy's remaining arguments. *Id.*

Following the filing of the court's opinion on April 10, 2013, Shirley timely filed a petition for rehearing and a reply to Bundy's return to the petition for rehearing. Before reviewing Shirley's reply that was filed the afternoon of May 8, 2013, the court denied the petition for rehearing, withdrew the original opinion, and filed a substituted opinion on May 8, 2013. However, in an order dated May 20, 2013, the court stated that it had reviewed Shirley's reply but declined to alter

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[2] The record reflects the Bennett family owned their property from 1947 to 1969.

We find this issue is moot as Shirley received the requested relief when this Court granted his petition for a writ of certiorari. *See Curtis v. State,* 345 S.C. 557, 549 S.E.2d 591 (2001) (stating that a case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy); *Waters v. S. C. Land Res. Conservation Comm'n,* 321 S.C. 219, 467 S.E.2d 913 (1996) (recognizing that a justiciable controversy is a real and substantial controversy that is ripe and appropriate for judicial determination, as opposed to a dispute or difference of contingent, hypothetical or abstract character). However, even assuming the issue is proper for the Court's consideration, we find it is without merit.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Id.* "Due process is flexible and calls for such procedural protections as the particular situation demands." *S. C. Dep't of Soc. Servs. v. Wilson,* 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Before reviewing Shirley's reply that was filed the afternoon of May 8, 2013, the Court of Appeals denied the petition for rehearing, withdrew the original opinion, and filed a substituted opinion on May 8, 2013. After recognizing the error, the court reviewed Shirley's reply and issued an order on May 20, 2013 stating that it had reviewed Shirley's reply but declined to alter its decision denying the petition for rehearing and substituting the opinion. We find that Shirley's right to due process was not violated because he was afforded an opportunity to be heard and received judicial review of his reply.

B. Prescriptive Easement

As to the merits of the Court of Appeals' decision, Shirley contends the court erred in reversing the special referee's grant of a prescriptive easement. Specifically, Shirley claims the Court of Appeals erred in ruling as a matter of law that Bundy's grant of permission to build a gate on the disputed road defeated his claim for a prescriptive easement. Additionally, Shirley avers the Court of Appeals erred by requiring him to prove a period of use that was adverse or under

are measured and defined *by the use* made of the land giving rise to the easement." *Id.* (emphasis added).

Moreover, other state jurisdictions are divided as to whether the standard of proving a prescriptive easement is by clear and convincing evidence or a preponderance of the evidence. *See* Daniel J. Smith, *Establishment of Private Prescriptive Easement*, 2 Am. Jur. *Proof of Facts* 3d 125 § 3 (1988 & Supp. 2015) (recognizing that majority of jurisdictions hold that the burden of proving an easement is on the party claiming such right and must be established by clear and convincing proof); James W. Ely, Jr. and Jon W. Bruce, *The Law of Easements and Licenses in Land* § 5:3 (Westlaw/Next 2015) ("Courts often stress the need for clear and convincing evidence. In some states, however, a claimant need only establish a prescriptive easement by a preponderance of the evidence." (footnotes omitted)).

While the Court of Appeals found it unnecessary to address this issue, we believe this case presents us with an opportunity to resolve the nebulous and conflicting authority. Our case law, albeit scant, provides some guidance. Notably, this Court in 1917 alluded to the heightened standard of proof when it stated, "a private way is an easement in favor of another, *in derogation of the rights of the owner*; and hence is not to arise without *clear, unequivocal proof of such facts* as will give the right from the owner to the claimant." *Williamson v. Abbott*, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917) (emphasis added) (citation omitted).

Despite this pronouncement, *Williamson* has been rarely cited by our appellate courts. Yet, the Court's statement encapsulates the fundamental reason for applying a heightened standard of proof. Essentially, by claiming a prescriptive easement, a claimant seeks for a property owner to forfeit rights to the subject property. *See* Daniel J. Smith, *Establishment of Private Prescriptive Easement*, 2 Am. Jur. *Proof of Facts* 3d 125 § 3 (1988 & Supp. 2015) ("This stricter standard of proof may be a result of the general opinion expressed by courts and commentators that prescriptive rights are not favored in the law since they result in corresponding losses or forfeitures of rights of other persons."). Given that a prescriptive easement results in diminished rights of the property owner, we find that a claimant seeking a prescriptive easement must be held to a strict standard of proof. Accordingly, we join the majority of state jurisdictions and hold that a party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence. We find this conclusion comports with prior case law and public policy.

Next, Shirley argues the Court of Appeals erred in citing *Paine Gayle Props., L.L.C. v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012) for the proposition that permission defeats a claim to a prescriptive easement. *Bundy*, slip op. at 3. Shirley contends *Paine*, which was decided after the parties filed their briefs with Court of Appeals, should not have been applied retroactively by the Court of Appeals because it creates a "new affirmative defense" and a "new substantive right." Shirley explains that "permission to erect a gate, by itself, has never been held to defeat a prescriptive easement before in South Carolina common law."

In *Paine*, a landowner brought an action against a railroad company seeking an order establishing an easement across a right-of-way held by the railroad. *Paine*, 400 S.C. at 573, 735 S.E.2d at 531. The parties filed cross-motions for summary judgment, and the circuit court granted summary judgment to the railroad company. *Id.* The landowner appealed the decision to the Court of Appeals. *Id.*

The Court of Appeals affirmed, finding the circuit court properly granted summary judgment to the railroad company on the issues of easement by equitable estoppel, prescription, laches, and necessity. *Id.* at 575-93, 735 S.E.2d at 532-41. With respect to the landowner's prescriptive easement claim, the court found the landowner failed to present evidence creating a genuine factual issue as to whether the use of the right-of-way was "adverse" or under "claim of right" for the requisite twenty years. *Id.* at 583-87, 735 S.E.2d at 536-38.

In so ruling, the court extensively quoted *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15 (1917) for the proposition that permissive use of property cannot ripen into an easement by prescription. *Paine,* 400 S.C. at 584, 735 S.E.2d at 537. Based on this authority, the Court of Appeals in *Paine* found the evidence established the permissive character of the landowner's use of the right-of-way and, as a result, did not show that the landowner's use was adverse or under claim of right. *Id.* at 587, 735 S.E.2d 538. Additionally, the court noted that by seeking permission from the railroad company to install a gate on the access road, the landowner implicitly acknowledged the railroad company's rights, which was inconsistent with the landowner's claim of right. *Id.* at 586, 735 S.E.2d at 538.

Ultimately, the court concluded the railroad company gave permission to the landowner to use its right-of-way. *Id.* Because there was no probative evidence showing that, after the railroad company granted this permission, the landowner made any distinct and positive assertion of a right hostile to the railroad company, the landowner's use could not be adverse or under a claim of right. *Id.*

> 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.
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> 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.

Williamson v. Abbott, 107 S.C. 397, 400-01, 93 S.E. 15, 16 (1917) (citation omitted) (emphasis added). *Williamson* stands for the general proposition that permissive use defeats the acquisition of a prescriptive easement. If the permissive use begins at inception or the time of purchase and continues, this permissive use can never ripen into a prescriptive easement. However, permissive use may not always begin at the inception of the claimant's ownership. Thus, *Williamson* also provides that permissive use, which is granted during the claimed twenty-year period, will defeat the establishment of a prescriptive easement, i.e., once permission is granted by the landowner there is no longer adverse use or use under a claim of right. Accordingly, we find the Court of Appeals correctly cited *Williamson* as supporting authority for its decision.

Rooted in *Williamson*, the law is well-established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse or under a claim of right. *See Paine*, 400 S.C. at 586, 735 S.E.2d at 538 (quoting *Williamson* and recognizing that a claimant's permissive use of landowner's property cannot begin to ripen into a prescriptive easement until the claimant makes a distinct and positive assertion of right hostile to the landowner); *Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993) (holding evidence, which established that use of property was permissive, showed use of property was not adverse); *Williamson*, 107 S.C. at 401, 93 S.E. at 16 (stating that permissive use of property "stamps the character of the use as not having been adverse, or under claim of right"); *see also* 12 S.C. Jur. *Easements* § 10 (Supp. 2015) ("Use with the permission of the owner is not

Therefore, we find the Court of Appeals correctly held that Shirley's permissive use of the property defeated his acquisition of a prescriptive easement.

c. Requisite Twenty-Year Period

Alternatively, even if his personal use was not adverse or under claim of right for a continuous twenty-year period, Shirley argues the requisite time period was established because his predecessor-in-title, the Bennett family, used the disputed road adversely and continuously from 1947 to 1969. As a result, Shirley claims the Court of Appeals erred in requiring him to prove a period of use beyond the Bennett family ownership and, in turn, in excess of twenty years.

Shirley maintains that such a decision violates the principle that once an easement has been "perfected" it applies to all future owners of the dominant estate unless the owner of the servient estate shows some adverse act to obstruct the road that would defeat the easement. For this principle, Shirley relies on the language in *Cuthbert v. Lawton*, 14 S.C.L. (3 McCord) 194 (1825), which states "after twenty years of uninterrupted use, [the easement by prescription] could only be defeated by an adverse and continued obstruction for five years." As a result, Shirley asserts Bundy had the burden of showing some adverse act to obstruct the disputed road between 1969, the end of the Bennett family's ownership, and 1985, the beginning of the Shirley family's ownership.

We question the propriety of *Cuthbert* because the case inexplicably requires a five-year period of adverse and continued obstruction to defeat an established prescriptive easement. In the 190 years since the *Cuthbert* decision was issued, our case law regarding prescriptive easements has evolved and now refers to and requires "continual use" for the easement to remain viable to subsequent claimants. *See Jones v. Daley*, 363 S.C. 310, 318, 609 S.E.2d 597, 600-01 (Ct. App. 2005) ("[U]nder long established principles of South Carolina law, once a right of way by prescription has been established by twenty years of continuous use, a later diminishment in the frequency of that use does not necessarily nullify the established right by prescription. Furthermore, in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant." (citing *Cuthbert*)).

Moreover, *Cuthbert* is also factually distinguishable from the instant case. *Cuthbert* concerned an easement used by the former owners of the defendant's dominant estate for thirty-one uninterrupted years up until the defendant's ownership. *Cuthbert,* 14 S.C.L at 194. The court found that an easement by

James W. Ely, Jr., and Jon W. Bruce, *The Law of Easements and Licenses in Land*, § 5:19 (Westlaw/Next 2015) (footnotes omitted) (emphasis added).

Applying the foregoing to the facts of the instant case, we initially question whether Shirley presented clear and convincing evidence that the Bennett family had a prescriptive easement. Other than the twenty-two-year period of ownership, there is limited evidence that the Bennetts' use met the elements of a prescriptive easement. In particular, Edward Bennett, who testified on behalf of Shirley, had no knowledge regarding the use of the property or the disputed road after he moved away from home in 1960.

But, even assuming the Bennett family acquired a prescriptive easement, there is no evidence as to whether the intervening predecessors-in-title actually used the disputed road. *Cf. Jones v. Daley*, 363 S.C. 310, 318, 609 S.E.2d 597, 601 (Ct. App. 2005) (stating that "in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and deeds of the claimant"). Furthermore, Shirley did not establish that the previous owners' use of the disputed road continued to be adverse or under a claim of right between 1969 and 1985. *See Morrow*, 328 S.C. at 528, 492 S.E.2d at 424 ("[I]f tacking is used, 'the use by the previous owners must also meet the requirements of a prescriptive easement'" (quoting 25 Am. Jur. 2d *Easements and Licenses* § 70, at 640 (1996))); *Kelley*, 396 S.C. at 575, 722 S.E.2d at 819 ("If tacking is used, the use by the previous owners must have also been adverse or under a claim of right."). Accordingly, we hold the Court of Appeals correctly found that Shirley could not tack the Bennett family's use to establish his prescriptive easement claim.

IV. Conclusion

In conclusion, we find the Court of Appeals correctly reversed the special referee's grant of a prescriptive easement to Shirley. We modify the decision to the extent we hold that a party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

W.H. Bundy, Jr., Appellant,

v.

Bobby Brent Shirley, Respondent.

Appellate Case No. 2012-208007

Appeal From Kershaw County
Roderick M. Todd, Jr., Special Referee

Unpublished Opinion No. 2013-UP-153
Heard January 9, 2013 – Filed April 10, 2013
Withdrawn, Substituted and Refiled May 8, 2013

REVERSED

M. Brent McDonald, of Smith Bundy Bybee & Barnett, P.C., of Mount Pleasant, and Stephen A. Spitz, of Charleston, for Appellant.

John W. Wells, of Baxley, Pratt & Wells, P.A., of Lugoff, for Respondent.

PER CURIAM: This appeal arises out of a declaratory judgment action seeking a determination as to whether Respondent Bobby Brent Shirley has a prescriptive

easement over a road (the Disputed Road) on rural property owned by Appellant W.H. Bundy, Jr. The special referee found that Shirley established a right to use the Disputed Road. On appeal, Bundy argues the special referee erred by: (1) failing to require Shirley establish a right to a prescriptive easement by clear and convincing evidence; (2) finding that Shirley established a prescriptive easement over the Disputed Road; and (3) failing to rule that Shirley's inequitable conduct barred any relief sought by him in this action due to the doctrine of unclean hands. We reverse.

1. As to Bundy's argument that the special referee erred by finding that Shirley established a prescriptive easement over the Disputed Road, we agree because Shirley did not establish his use of the Disputed Road was adverse or under a claim of right for twenty years. *See S.C. Dep't of Transp. v. Horry Cnty.*, 391 S.C. 76, 82, 705 S.E.2d 21, 24 (2011) (stating an appellate court "will not overturn a trial court's finding that an easement exists unless that conclusion is controlled by an error of law or without evidentiary support"); *Jones v. Daley*, 363 S.C. 310, 316, 609 S.E.2d 597, 599-600 (Ct. App. 2005) ("In order to establish an easement by prescription, a party must only show: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right."). Relying on *Revis v. Barrett*, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996), the special referee found that permission "does not defeat an easement by prescription based on a claim of right." We find this to be an error of law. *See Williamson v. Abbott*, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917) ("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."). Here, the parties stipulated the property Shirley now owns was transferred to Shirley's parents on May 10, 1985. The parties also stipulated: "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." Assuming Shirley's use of the Disputed Road was not permissive from 1985 until Bundy gave Shirley permission to build the gate in 2004, the nineteen-year time period is insufficient to establish a prescriptive easement. In *Revis*, the landowner did not give the party asserting a prescriptive easement permission to use the disputed road; rather, the landowner recognized the right of the party to use the road. *See Revis*, 321 S.C. at 210, 467 S.E.2d at 462 (finding evidence supported the master's finding that Revis' right to use the disputed road flowed from a "claim of right" and not from a grant of permission). Based on the parties' stipulations, Bundy's grant of permission for Shirley to build the gate defeats a

claim of right or adverse use of the Disputed Road because the use of the Disputed Road was permissive. *See McCrea v. City of Georgetown*, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (Ct. App. 2009) (noting stipulations are binding on the parties as well as the court); *Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 585-86, 735 S.E.2d 528, 537-38 (Ct. App. 2012) (discussing permissive use of the disputed property and finding the granting of permission to use the property defeats a prescriptive easement claim). Furthermore, we also find the special referee erred by determining that because Shirley established "a prescriptive easement during the Bennett ownership period, it is unnecessary to establish a prescriptive easement during the Shirley ownership period." The Bennett family owned the property Shirley now owns from 1947-1968. In order to use the Bennett family's prescriptive use of the Disputed Road, Shirley was required to offer evidence that the Disputed Road continued to be used under a claim of right or in an adverse manner between the Bennett family's use and the Shirley family's use. However, Shirley presented no evidence that the use of the Disputed Road between 1968 and 1985 was adverse or under a claim of right. *See Kelley v. Snyder*, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct. App. 2012) (noting parties may "tack" the period of prior owners to satisfy the twenty-year prescriptive easement period if the prior owners are in privity and the prior owners' use was adverse or under a claim of right). Therefore, even if the special referee was correct that the Bennett family had a prescriptive easement over the Disputed Road, Shirley is unable to tack the Bennett family's use to establish his prescriptive easement claim. For the foregoing reasons, we find the special referee erred by finding Shirley established a prescriptive easement.

2. 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).

REVERSED.

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.