THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE KERSHAW COUNTY COURT OF COMMON PLEAS

Roderick M. Todd, Jr. Esquire, Special Referee

Case No.: 2012208007

W.H. Bundy, Jr., Appellant,

vs.

Bobby Brent Shirley, Respondent.

FINAL BRIEF OF APPELLANT

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Statement of the Case

This is an appeal from a declaratory judgment action brought pursuant to S.C. Code Ann. 15-53-10 *et seq.* On March 24, 2009, Plaintiff W.H. Bundy, Jr. ("Bundy") filed a summons and complaint pursuant to the South Carolina Declaratory Judgment Act asking the Court to declare what rights, if any, Defendant Bobby Brent Shirley (hereinafter sometimes referred to as "Shirley") had to use a logging road located on the Bundy Property as a means of access to the Shirley Property. Bundy asserted that Shirley did not have any right to use the Bundy Property. Bundy filed an Amended Complaint

substituting Shirley as the Defendant on April 20, 2009 and seeking the same declaration of rights. *See* (R. p. 30, Amended Complaint filed April 20, 2009). Shirley filed an Answer and Counterclaim on June 19, 2009 alleging as follows: (1) that the logging road on the Bundy Property was dedicated to the public; and (2) that Shirley had a prescriptive easement over the Bundy Property. On July 9, 2009, Bundy replied to the Counterclaim and denied Shirley or the public had a right to use the logging road. Bundy also asserted various affirmative defenses—including unclean hands. On April 15, 2010, Shirley filed an Amended Answer and Counterclaim. *See* (R. p. 40, Amended Answer and Counterclaim filed April 15, 2010). Bundy again replied, on April 26, 2010, to the Counterclaims. *See* (R. p. 46, Reply to Amended Counterclaim filed April 26, 2010).

On April 22, 2010, the action was referred to Special Referee Roderick M. Todd, Jr. by Order of the Honorable James R. Barber, III. A hearing without a jury was held before Special Referee Todd on August 25-26, 2010. *See* (R. p. 113, Transcript of Hearing Vol I, pp. 1-224, August 25, 2010). *See* (R. p. 339, Transcript of Hearing Vol II, pp. 226-301, August 25, 2010).

The Special Referee entered an Order on July 11, 2011. *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011). The July 11, 2011 Order found that Shirley carried his burden of proof in showing that the logging road was dedicated to the public and that Shirley met his burden of proof in showing that he had a prescriptive easement to use the logging road. The Court rejected Bundy's affirmative defenses. On July 12, 2011, Shirley's Counsel moved to be relieved as counsel. *See* (R. p. 52, Respondent's Counsel's Motion to Withdraw, dated July 12, 2011). This motion was supported by an affidavit signed by Counsel for Shirley. *See* (R. p. 53, July 25, 2011 Affidavit of John W. Wells). Bundy served a motion to Alter or Amend pursuant to Rule

59, SCRCP and a Motion to Amend the Complaint to conform to the evidence pursuant to Rule 15(b), SCRCP on July 20, 2011. *See* (R. p. 55, Appellant's Motion to Alter or Amend pursuant to Rule 59, SCRCP, dated July 20, 2011). *See* (R. p. 87, Appellant's Motion to Amend the Complaint to Conform to the Evidence pursuant to Rule 15(b), SCRCP, dated July 20, 2011). A hearing was held before the Special Referee on August 15, 2011. Counsel for Shirley withdrew his motion to be relived as counsel at the hearing. The Special Referee entered an order on February 9, 2012, granting Bundy's Motion to Amend to conform to the evidence. *See* (R . p. 29, Order on Appellant's Rule 15, SCRCP Motion, filed February 9, 2012). The Special Referee, also on February 9, 2011, entered an Order granting Bundy's motion to alter or amend in part, and denying it in part. *See* (R . p. 22, Order on Appellant's Rule 59, SCRCP Motion, filed February 9, 2012). The Special Referee amended his Order and found that the logging road was not public and it had not been dedicated to the public. The Special Referee, however, again found that Shirley had a prescriptive easement to use the logging road. Bundy served his Notice of Appeal of the July 11, 2011 Order and the February 9, 2012 Order denying his 59(e) motion on the prescriptive easement issue on February 14, 2012.

The central issue in this appeal is whether or not Shirley has a prescriptive easement to use a logging road on property owned by Bundy located in Kershaw County, South Carolina.

Stipulated Facts

In the present case, the parties have stipulated to the following facts:

(1) Plaintiff W.H. Bundy, Jr. is the fee owner of seven (7) tracts of contiguous property located in Kershaw County, South Carolina and more fully described in

the deed from Bowater Timber 1, LLC to W.H. Bundy, Jr., dated March 14, 2003 (the "Bundy Property").

(2) 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").

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

(4) As a result of the Lease, the Bundy Property was enrolled in the South Carolina Department of Natural Resources, Wildlife Management Area program.

(5) 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.

(6) Bowater Incorporated was the owner of all outstanding shares of Catawba Timber Company. Catawba Timber Company merged into Bowater Incorporated on December 31, 1980. At such time Bowater Incorporated was vested with all the property of Catawba Timber Company.

(7) Neither Kershaw County nor any other public entity maintains or repairs any timber roads located on Tract 2 of the Bundy Property, which is the tract at issue.

(8) 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.

See (R. p. 520, Stipulation of Facts). The parties also stipulated to the chain of title for the Bundy Property and the chain of title to the Shirley Property. *See* (R. p. 468,

Stipulation of Parties for Plaintiff Bundy's Chain of Title). *See* (R. p. 417, Stipulation of Parties for Defendant Shirley's Chain of Title).

Statement of the Facts

A. The Dispute

By way of background, Saxon Road is a dirt road in Kershaw County that runs from Swift Creek Road until it reaches a cul-de-sac or "turn around" at property owned by the Miller family. *See* (R. pp. 523-525, Plaintiff's Exhibits 1-3). *See* (R. p. 558, Plaintiff's Exhibit 26). Saxon Road is maintained by Kershaw County. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, p. 130). *See* (R. p. 520, Stipulation of Facts). *See* (R. p. 558, Plaintiff's Exhibit 26). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 61-62).

The land in dispute in this case is a dirt logging road. *See* (R. p. 558, Plaintiff's Exhibit 26). *See* (R. pp. 523-525, Plaintiff's Exhibits 1-3). The logging road is located on the Bundy Property. It terminates at a gate located on a 37 acre piece of property owned by Shirley. Lying between the terminus of Saxon Road, at the cul-de-sac or "turn around", and the logging road in dispute is the property owned by the Millers. The County does not maintain the logging road in dispute or the path over the Miller Property. The County has never maintained it. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, p. 130). *See* (R. p. 520, Stipulation of Facts). *See* (R. p. 558, Plaintiff's Exhibit 26). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 61-62). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, p. 146).

Shirley contended in the action that he has the right to use the logging road in

dispute because it is a portion of Saxon Road which he contends was dedicated to the public. *See* (R. p. 113, Transcript of Hearing Vol I, Shirley Testimony, pp. 187-188; 202-203). On this basis, he also contended at trial that he has a prescriptive easement to use the pathway in dispute because he thought it was a portion of the public road. Id. Bundy contended at trial that the logging road in dispute is a private logging road to which neither the public nor Shirley have the right to use. *See* (R. p. 113, Transcript of Hearing Vol I, Bundy Testimony, p. 87).

B. The Bennett Property/Shirley Property

On December 19, 1947, Elijah Bennett purchased a 37.14[1] acre tract of farm land. *See* (R. p. 417, Stipulation of Parties for Defendant Shirley's Chain of Title).

The deed describes the Bennett Property as being surrounded on all sides by private property. Id. Elijah Bennett's son, Edward Bennett, testified at trial that his family began to farm the property in the spring of 1948. *See* (R. p. 339, Transcript of Hearing Vol II, Testimony of Edward Bennett, pp. 239-240*)*. The Bennetts farmed the property for six or seven years until Elijah Bennett fell ill and passed away. Id. Edward Bennett testified that during that time, his family would access the Bennett Property by traveling over the Miller Property and over what would become the logging road on the Bundy Property with wagons in order to farm their property. *See* (R. p. 339, Transcript of Hearing Vol II, Testimony of Edward Bennett, pp. 232-243*)*. Edward Bennett, however, was only able to testify as to what his family did with the property from 1948 until the time he was married prior to 1960. *See* (R. p. 339, Transcript of Hearing Vol II, Testimony of Edward Bennett, pp. 241-242). Edward Bennett has no first hand

[1] At the time it was thought to be 42 acres, but a later survey corrected the inaccuracy. *See* (R. p. 417, Stipulation of Parties for Defendant Shirley's Chain of Title). This property would eventually become the Shirley Property when it was purchased by his father.

knowledge of the use of the property by his family after 1960. Id. No other evidence of the Bennett family's ownership or use of the property was put into evidence by Defendant Shirley.

From 1968 to 1985, the Bennett Property was owned by six (6) separate owners. *See* (R. p. 417, Stipulation of Parties for Defendant Shirley's Chain of Title).There was no evidence presented by Shirley as to any access or use of the Bennett Property during this time. There was no evidence presented by the Shirley as to any use of the disputed logging road during this time.

C. The Miller Property

Richard Miller has lived on the Miller property his entire life. The Miller family has owned their property for at least 80 years and continues to own their property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 142-144). He testified that the Bennetts used various routes to access their property and that they asked for and received permission from the Miller family to travel across the Miller property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 147-148). Moreover, after the Bennett family stopped farming the Bennett Property, due to Elijah Bennett's illness, the Bennetts did not access or use the property in any way. Indeed, the Miller family began farming the property starting in 1964 and continued farming it for a few years. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 149-150). During this time, the Miller family paid the taxes on the Bennett Property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 154-155). In 1968, the Bennett Family sold the Bennett Property. *See* (R. p. 417, Stipulation of Parties for Defendant Shirley's Chain of Title).

D. The Bowater Property/Bundy Property

In late 1960, Catawba Timber Company (n/k/a Bowater[2]) began to purchase various tracts of land located in Kershaw County, South Carolina. *See* (R. p. 468, Stipulation of Parties for Plaintiff Bundy's Chain of Title). [3] These various tracts were not subdivided by Bowater but were acquired individually and shared a common fee owner only. Id. Bowater used its property for timber purposes. At the time of purchase, the Bowater property was contiguous to various tracts of property owned by the Miller family, Elijah Bennett and others. *See* (R. pp. 523-525, Plaintiff's Exhibits 1-3). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 142-144).

E. 1985 to Present

While Bowater owned the Bundy Property, in 1985, it enrolled the property in a program established by the South Carolina Department of Natural Resources ("SCDNR") called the Wildlife Management Area ("WMA") program. *See* S.C. Code Ann. § 50-11-220; S.C. Code Ann. § 50-3-100. This program allowed SCDNR to enter into a lease with Bowater wherein the public was allowed to enter upon Bowater's property and hunt, bird watch, hike and do other outdoor activities. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 40-41).

In 1985, while hunting on the Bowater property pursuant to the public rights granted by the WMA lease, Shirley became aware of the property formerly owned by the Bennett Family. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, p. 176). On May 10, 1985, Shirley's father purchased the 37.14 acre parcel of property

[2] Bowater went through a number of iterations in their name during the time period of relevance in this case. For ease of briefing, the company will be referred to as "Bowater."
[3] The Bowater Property would eventually become the Bundy Property.

(hereinafter referred to as the "Shirley Property"). *See* (R. p. 417, Stipulation of Parties for Defendant Shirley's Chain of Title).

Shirley's father purchased the Shirley Property pursuant to a deed that expressly states that the property is surrounded on all sides by privately owned property. *See* (R. p. 417, Stipulation of Parties for Defendant Shirley's Chain of Title). The Plat referenced in the deed shows the property as landlocked. *See* (R. p. 417, Stipulation of Parties for Defendant Shirley's Chain of Title). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 205-208). No access roadways or easements are expressly included or referenced in any way in the deed. Id. Saxon Road does not appear in anyway in the deed or plat. Id. The disputed pathway does not appear in any way in the deed or on the plat. Id.

Until the early 1990s, Shirley and his father accessed the property by driving over property owned by Mr. Whit Boykin. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 144-146; 165). They would then proceed over the property of Mr. and Mrs. Driscoll (also known as the Rooster Pit) and then over the property of Baynard Boykin, which is contiguous to the Shirley Property. Id. Due to a dispute with one of the Shirleys, however, Mr. Whit Boykin eventually put up a gate to prevent Defendant Shirley from crossing over his property. Id.

At the hearing, Shirley initially denied that he ever used or was aware of this route; however, on cross examination he eventually admitted that he was aware of the route and in fact had used it on foot while hunting the Bowater property with other members of the public. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 196-199). Shirley also denied any dispute with Whit Boykin relative to this route, but

admitted that a dispute with Whit Boykin occurred over another private road on another property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 200-202).

After Mr. Boykin erected the gate, Shirley began to access his property by driving his truck or walking up Saxon Road until it ended in the cul de sac or turnaround, where the public maintenance ended at the Miller Property. He would then drive through the yard of the Millers until he reached the Bowater property—the property that was subject to the subject to the WMA lease and open to the public. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 144-145). *See* (R. p. 524, Plaintiff's Exhibit 2). Shirley would then drive over the Bowater property to access his property. Id.

The Millers initially asked Shirley to stop driving over their property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 150-151). Eventually, subsequent to Shirley's use of the disputed pathway in the early 1990s, the Millers put up a wooden gate on their property to prevent Shirley from accessing his property by driving or walking over their property. Id; *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 185-186). Shirley pulled the gate down with a winch. Id.

In addition to the Millers' gate, Bowater also had a cable gate strung at the property line between the Miller Property and the Bowater property which eventually would become the Bundy Property. *See* (R. p., 541, Plaintiff's Exhibit 9). *See* (R. p. 541-543, Plaintiff's Exhibits 9, 10, and 11). *See* (R. p., 558, Plaintiff's Exhibit 26). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 120-122). *See* (R. p. 520, Stipulation of Facts). During this time, the public was permitted to access the entire Bowater Property and the logging roads on the property pursuant to the WMA lease. *See*

(R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 118-119). *See* (R. p. 520, Stipulation of Facts).

Shirley testified that Bowater would take the cable down during hunting season to allow public access and put it back up during non-hunting season to prevent public access. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, p. 127). He testified that he was given a key to the cable by an SCDNR game warden to access the Bowater Property and the disputed pathway in the instances in which Bowater had locked the cable. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 130-134; 208-209). The Bowater cable was erected until the time Bundy purchased the Bowater property in 2003. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 135-136).

Bowater permitted Shirley to travel over its property because it permitted the entire public to travel over their property pursuant to the WMA lease. The only people Shirley observed using the Bowater property were hunters pursuant to the WMA lease. *See* (R. p. 113, Transcript of Hearing Vol I, 2010, Testimony of Shirley, pp. 138-139). Moreover, Shirley testified that he did not have any evidence of any hunters using the disputed pathway across the Miller's property and onto the Bowater WMA property until Bowater enrolled the property in the WMA program in 1985. *See* (R. p. 113, Transcript of Hearing Vol I, 2010, Testimony of Shirley, p. 140). *See* (R. p. 520, Stipulation of Facts). Richard Miller testified that the hunters used Shirley's original route to access the Bowater property and only very rarely did he see any hunters using the disputed pathway. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 152-153).

At the hearing on this matter, Shirley testified that he believed that any individual wishing to "go on" property subject to the South Carolina Department of Natural Resources Game Management Program was required to have a permit. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 177-178). The parties stipulated that the property over which the disputed pathway traverses was subject to the South Carolina Department of Natural Resources Game Management Program from 1985 until 2003. *See* (R. p. 520, Stipulation of Facts, Stipulated Fact 5, p. 521). Shirley, however, testified that after he purchased his property, he no longer purchased a game management permit, though he testified he continued to "go on" the game management property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 183-184).

On March 14, 2003, Bundy purchased the Bowater property in order to put the property under a conservation easement for long leaf pines. *See* (R. p. 468, Stipulation of Parties for Plaintiff Bundy's Chain of Title). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 38-39). Bundy's deed from Bowater references a 1960 Plat by R.H. Marett, a registered land surveyor, which depicts a dotted line in the vicinity of the logging road. *See* (R. p. 468, Stipulation of Parties for Plaintiff Bundy's Chain of Title). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, p. 97). It also depicts other private logging roads. This plat is not in the chain of title of Shirley. *See* (R. p. 417, Stipulation of Parties for Defendant Shirley's Chain of Title).

Up until the time Bundy purchased the Bundy Property, the property was subject to the WMA lease, and it had public access via that lease. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 135-136). *See* (R. p. 520, Stipulation of Facts). Upon conveyance, the WMA lease was extinguished and the public no longer had a right

to access the property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 204-205). In an effort to accommodate a neighbor, Bundy initially gave Shirley permission to continue to use the disputed pathway over that portion of the Bundy property despite the fact the property was no longer WMA property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 72-73). Shirley also asked Bundy if he could put up a gate on Bundy's property at the location of the previous Bowater cable in order to now keep people out. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 72-75). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 117-118; 127-130; 211). *See* (R. p. 540, Plaintiff's Exhibit 8). Bundy gave Shirley permission to erect the gate. Id. *See* (R. p. 520, Stipulation of Facts). At this time, Shirley did not assert any right to use the disputed pathway. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, p. 74). Shirley did not assert that the disputed pathway was a public road. Id. In fact, the erection of a gate is contrary to that position.

Shortly after the erection of the gate, as Bundy testified, Shirley called him in a fit of rage regarding Bundy's timber operations on the Bundy property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 75-80). Shirley admits to this conversation and admits to "losing his cool" and "cussing him out." *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 190; 212-214). Shirley testified that the reason he lost his temper and cussed out Bundy was because a tree had fallen on the disputed pathway and his wife could not get out to his young son who was camping out for the first time by

himself with some young friends on the Shirley property.[4] Id. Bundy testified that Defendant Shirley not only cussed him out but that he threatened to kill him if anything like this ever happened again. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 75-80).

In the summer of 2005, as a result of the 2004 incident, Bundy called Shirley and demanded that he remove the gate and informed him that he no longer had permission to use his property to access the Shirley property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 80-84). It was during this 2005 telephone conversation that Shirley first asserted to Bundy that he had some type of ownership rights in the disputed pathway and some type of right to maintain a gate on Bundy's property. Id. Shirley again threatened to kill Bundy. Id. Shirley, however, refused to take the gate down and stop using Bundy's property to access the Shirley property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 84-85).

In an exchange of letters dating from September 12, 2005 to March 23, 2006, Bundy demanded that the gate be taken down and expressly informed Shirley that he no longer could travel across the Bundy property to access his property. *See* (R. pp. 526-527, Plaintiff's Exhibits 4 and 5). Shirley eventually removed the gate. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 86-87).

[4] Shirley's testimony was inconsistent on the issue of his son. Shirley testified that the first confrontational incident occurred in 2004 when his only son was only 13 or 14 years old. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, p. 211). He also testified that his son was 28 years old at the August 2010 hearing. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, p. 189). Therefore, in 2004 his son would have been 21 or 22 years old rather than a young boy.

Standard of Review

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (S.C. 1991).

The determination of the existence of an easement is an action at law and establishing the existence of the alleged easement is a question of fact in the law action. Pittman v. Lowther, 355 S.C. 536, 540, 586 S.E.2d 149, 151 (Ct.App. 2003). However, the question of the extent of a grant of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (S.C. 1997); *see also* Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001) (scope of easement is equitable matter in which reviewing court may take its own view of preponderance of evidence).

Argument

I. The Special Referee erred in failing to require Shirley to establish any right to an easement by prescription by the standard of proof of clear and convincing evidence.

The Special Referee failed to rule that Shirley was required to establish the elements of a prescriptive easement by clear and convincing evidence. The burden is on the party asserting the right to an easement to prove the existence of the easement. Mack v. Edens, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct.App. 1995); *see also* Clark v. Hargrave, 323 S.C. 84, 473 S.E.2d 474 (Ct. App. 1996).

The party asserting the prescriptive right must prove the existence of the easement by clear and convincing evidence. Clark v. Hargrave, 473 S.E.2d 474; King v. Hawkins, 282 S.C. 508, 319 S.E.2d 361 (Ct. App. 1984); 12 S.C. Jur. Easements § 10 (2011) ("A prescriptive easement is analogous to adverse possession...and cases concerning adverse

possession may amplify and further define the elements of a prescriptive easement."); 25 AmJur.2d Easements and Licenses § 39 (2011) ("To establish an easement by prescription, the claimant must ordinarily prove by clear and convincing evidence a use of the subject property which is characterized as open and notorious, continuous and uninterrupted, adverse and under a claim of right, with the actual or imputed knowledge of the owner of the servient tenement."); Jones v. Leagan, 384 S.C. 1; 681 S.E.2d 6 (Ct.App. 2009); Davis v. Monteith, 289 S.C. 176, 345 S.E.2d 724 (S.C. 1986); Thomas v. Dempsey, 53 S.C. 216, 31 S.E. 231 (S.C. 1898). *See also,* Zinnerman v. Williams, 211 S.C. 382, 386, 45 S.E.2d 597, 599 (S.C. 1947) ("The Thomas-Dempsey case establishes the principle that a party, in order to acquire title to real estate by adverse possession, must show such possession by clear and convincing evidence."); Lusk v. Callahan, 287 S.C. 459, 461, 339 S.E.2d 156, 157 (Ct.App.1986) (The party making the claim "ha[s] the burden of proving adverse possession by clear and convincing evidence."). Therefore, the required standard proof in an adverse possession case or a prescriptive easement case is the clear and convincing standard. The reason behind this heightened standard of proof is that the party claiming property rights pursuant to either of the two theories is seeking something for nothing. They are claiming property rights for which they have not given any consideration.

The special referee cited to the case of Tyler v. Guerry, 251 S.C. 120, 160 S.E.2d 889 (S.C. 1968) in support of its holding that the standard of proof required to establish a prescriptive easement is less than that to establish a claim of adverse possession. Tyler v. Guerry, however, did not directly deal with the establishment of a standard of proof. Instead Tyler v. Guerry merely noted that it was the exception on appeal of the Appellant that the party asserting an easement across the Defendant's land failed to do so even by

the preponderance of the evidence.[5] Moreover, Tyler v. Guerry does not evaluate the establishment of a prescriptive easement pursuant to the current three-part test adopted in South Carolina. *See* Horry County v. Laychur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (S.C. 1993) ("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."). The current test requires the establishment of "adverse" rights. It would be wholly inconsistent to apply two separate standards of proof for a prescriptive easement and adverse possession.

Therefore, the Special Referee erred in failing to find that Shirley was required to establish his claim for a prescriptive easement by clear and convincing evidence.

II. The Special Referee erred in finding that Shirley established a prescriptive easement over the Bundy Property.

The Special Referee found that Shirley established a private prescriptive easement to use an eight foot wide portion of the logging road over the Bundy Property.[6] This was in error.

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). "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

[5] The Court found that they did not establish a prescriptive claim.

[6] As stated above, the Special Referee used the wrong standard of proof in evaluating the establishment of a prescriptive easement. For the purposes of this section, however, it is contended that Shirley failed to meet his burden of proof under any standard of proof as he failed to put in evidence establishing the required elements.

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...."). More recently, in Kelley v. Snyder, S.C. Court of Appeals Order dated January 25, 2012 (Shearouse Adv. Sheet No. 3), the Court of Appeals reiterated that erection of barriers and verbal conveyances by the servient estate owner refusing to acquiesce in the use of the easement or demanding the cessation of the use of the easement constitute an interruption.

In the present case, Defendant Shirley failed to establish all the elements.

A. Shirley failed to establish uninterrupted use for 20 years.

Shirley did not use the disputed pathway uninterrupted for the full 20 years. Edward Bennett's testimony did not establish a prescriptive easement under which Shirley could claim rights. Bennett testified that his family only farmed the property and used the path for 6 or 7 years. He also testified that his knowledge of the Bennett/Shirley property was only up to 1960. The Bennett's purchased the Bennett/Shirley property in 1948. Therefore, Edward Bennett's testimony is limited to only a 12 year period. This is insufficient to reach the 20 year requirement for a prescriptive easement. Moreover, Richard Miller testified that his family leased the property from 1964 until the Bennetts

sold it in 1968 and that the Bennetts did not use or access the property during that time. Therefore, since the Bennett Family only owned the property for 20 years, any interruption or non-use prevents a claim to a prescriptive easement allegedly established by the Bennett Family.

Shirley also introduced various aerial photographs from 1956 to 1974, with each purporting to show the disputed pathway. These aerials, however, are insufficient to establish the use of the disputed pathway by anyone in particular other than Bowater Timber Company. Indeed, the aerial photographs depict other logging roads on the timber property. The photographs fail to show the use of the disputed pathway by the Defendant or his predecessors in interest.

With regard to Shirley's attempted establishment of the uninterrupted use of the disputed pathway for 20 years, his father acquired the property on May 10, 1985.[7] Until the early 1990s, the evidence shows that the Shirleys accessed their property from another direction—over the property of Mr. Whit Boykin and others. These years do not count toward the 20 years because that route is not the same as the disputed pathway. Therefore, even if this court were to assume the Shirleys began to use the disputed pathway in 1990, this action was commenced in 2009 and the Defendant is unable to prove use for the requisite 20 years.

Bowater erected a gate either prior to his purchase or shortly thereafter. This constitutes an interruption in the 20 years. Moreover, in the early 1990s, the Millers constructed a wooden gate in an attempt to stop Shirley from crossing over their property which is a portion of the disputed pathway and necessary to show the identity of the thing

[7] Shirley acquired the property from his father in 2005.

enjoyed. Though Shirley ripped the gate down with his winch, this gate would constitute a legal interruption under Lowther as explained previously.

In 2004, Shirley sought and Bundy gave permission to erect a gate on the Bundy Property to keep people out as the land was no longer used a WMA. Shirley also sought permission to travel over the Bundy Property. This is another interruption. Unlike the facts of the Kelley v. Snyder case, Shirley put up the gate with Bundy's permission. This permissive use also constitutes an interruption of any adverse use.

B. Shirley failed to prove the identity of the thing enjoyed.

A party seeking to establish a prescriptive easement must prove the second element of a prescriptive easement which is that the identity of the thing enjoyed must remain uninterrupted for the full period. Pittman v. Lowther, *supra.* Said another way, the nature, location and character of the easement sought by prescription must remain consistent and not subject to change or alteration.

Shirley has failed to satisfy the second element. The evidence shows that the location of the easement sought by Shirley has changed over time. Moreover, the particular rights asserted by Shirley have also changed over time. For example, Shirley now argues that the disputed pathway is a public road and his right to use it based solely on the premise that the public has a right to use the disputed pathway. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 127-129; 202-203). However, as set forth above, Shirley put a gate up on the disputed pathway to prevent the public from using it. Whatever rights he asserted in 2004 to establish the identity of that which he sought to use or enjoy are different from the rights he now asserts which are rooted in public rights. Therefore, Shirley failed to establish the second element of a prescriptive easement.

C. Shirley failed to establish his use was "adverse" or under "claim of right."

As to third element necessary to establish a prescriptive easement, 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."

1. 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 pathway because it was public. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, p. 187). This is insufficient. 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."

Moreover, Shirley sought a key and erected a gate on the disputed pathway. 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.

2. 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.[8] 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 a logging road over the unenclosed woodland property of a timber company that the timber company 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 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

[8] This also applies to the Bennett Family's use of the logging road as there is no evidence of continuous and uninterrupted use for the full 20 year period by the Bennett Family.

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 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 for the full 20 year period.

Shirley's claim of that his use was hostile also fails. 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 logging road with permission from Bowater and then Bundy. It was not until 2005, that Shirley first stated he had a right to use the logging road without permission. Therefore, Shirley cannot show the hostility element for the full 20 year period.

3. 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 the letter from the adverse party rather than any permission.

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 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."

Bowater, in short, granted permission through the State program and the State Game Wardens to authorize and permit people on their property. This Court should not seek to and the law does not allow the transformation of this good faith, highly valuable public service into a program that could give rise to secret claims that individuals are actually on the land to claim an adverse prescriptive easement.

The testimony reflects that Shirley was on the logging road by permission and that the state program of open access was the reason he was on the property. His testimony is also clear that he had to have a key to use the property, and that he obtained the key from the State Game Warden. These facts prevent his current argument that he was using the disputed pathway 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.

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* (R. p. 113, 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.

4. 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* (R. p. 22, Order on Appellant's Rule 50, SCRCP 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 by clear and convincing evidence the necessary elements of an easement by prescription over the property of Bundy. The Order of the Special Referee should be reversed.

III. The Special Referee erred in failing to rule that the inequitable conduct of Shirley barred any relief sought by him in this action due to the doctrine of unclean hands and the doctrine that a party cannot profit from his own wrongs.

The Special Referee erred in ruling that the inequitable conduct of Shirley was not a bar to his recovery.

At the hearing on this matter, Bundy testified that the Shirley threatened to kill him on at least two occasions relative to the dispute over the pathway which is the subject of this action. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 129; 75-84). Shirley testified and admitted to "losing his cool" and "cussing him out." *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 190; 212-214). Shirley also testified that he ripped down a gate put up by the Miller family in order to access the pathway which is the subject of this action. ." *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 185-186). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 150-151; 166-167).

Shirley acknowledged that he believed that any individual wishing to "go on" property subject to the South Carolina Department of Natural Resources Game Management Program was required to have a permit. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 177-178). The parties stipulated that the property over which the disputed pathway traverses was subject to the South Carolina Department of Natural Resources Game Management Program from 1985 until 2003. *See* (R. p. 520, Stipulation of Facts, Stipulated Fact 5, p. 521) Shirley, however, testified

that after he purchased his property, he no longer purchased a game management permit, though he testified he continued to "go on" the game management property. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 183-184). Shirley based his claim asserting a prescriptive easement over the Bundy Property based upon evidence that he broke game management laws.

The Special Referee found as a matter of fact and/or law in the July 11, 2011 Order as follows:

> a. "That the Shirley Family's use of the disputed road was adverse. As the Plaintiff put it, 'It was hostile. There was a death threat. Yes. It was as hostile as you can get.'" *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 10).
>
> b. "Using the disputed road over the Bowater property without a Game Management permit would be use without permission and adverse to the interest of the owner, Bowater." *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 10).
>
> c. "When Rick Miller's mother erected a gate without giving the Defendant a key, the Defendant pulled the gate down with his truck." *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 11).
>
> d. "He [the Defendant] reacted very badly to any interference with his right to use the road and control the use of the road by others." *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 19).
>
> e. "As to the Defendant's claim that the use was adverse, the Plaintiff himself testified that the Defendant's use was 'about as hostile as it gets.'" *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 20).
>
> f. "As to the Game Management Program, 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." *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 20).

g. "As to the evidence presented by the Plaintiff of permissive use, I find that the preponderance of the evidence including that of the violent outburst by the Defendant establishes that the use of the disputed road by the Defendant was adverse and hostile." *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 20).

The Special Referee based his legal and equitable conclusion on the illegal, violent, criminal, wrongful, inequitable and improper acts found a prescriptive easement in Shirley's favor. The Special Referee found in his Order on Bundy's Motion to alter or amend as follows:

"The hostile or even illegal acts Plaintiff complains of on the part of the Defendant do not, in the Court's opinion, destroy or pollute his prescriptive easement theory. I would suggest that the acts do show the adversity and notorious and hostile nature of the character and use of the road."

See (R. p. 22, Order on Appellant's Rule 50, SCRCP Motion filed February 9, 2012, p. 3). Shirley, however, cannot be permitted to profit from his own wrongs or to take advantage of his own wrongs or to found any claim upon his own inequity or to acquire property by his own crime. Whitlock v. Creswell, 2 S.E.2d 838 (S.C. 1939); Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889). Any relief sought by Shirley should be denied on this independent ground. *See* Wachovia v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct.App. 2010) (holding that the doctrine of unclean hands bars equitable relief and further holding that no person should profit from their own wrongdoing or rest a cause of action on their own unlawful acts); *see also* Buckley v. Shealy, 635 S.E.2d 76 (S.C. 2006) (holding that a party by their own misdeeds can be found by the South Carolina Supreme Court of not be deserving of equitable relief).

Conclusion

For all the foregoing reasons, the ruling of the Special Referee finding that Shirley has a prescriptive easement over the Bundy Property should be reversed.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE KERSHAW COUNTY COURT OF COMMON PLEAS

Roderick M. Todd, Jr. Esquire, Special Referee

Case No.: 2012208007

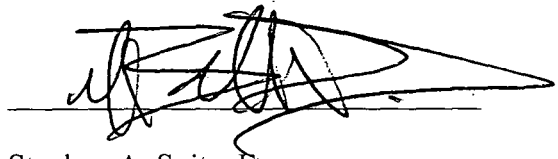
W.H. Bundy, Jr., Appellant,

vs.

Bobby Brent Shirley, Respondent.

CERTIFICATE OF COUNSEL

I certify that this final brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I served the Final Brief of Appellant on Respondent by depositing a copy of said documents in the United States Mail, postage prepaid, on June 25, 2012, addressed to his attorney of record, John W. Wells, Esquire, Baxley, Pratt & Wells, PA, PO Box 10, Lugoff, South Carolina 29078.

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