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 REPLY BRIEF OF APPELLANT

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Timeline

To assist this Court to put this case in context, and to aid the Court in following what is a rather complex chain of events and time periods, Plaintiff Bundy has drawn up a timeline that provides testimony from the record in context and in sequence. To the best of Plaintiff 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* (R. p. 417, 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* (R. p. 113, 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* (R. p. 113, Transcript of Hearing Vol II, Testimony of Edward 'Jack' Bennett, p. 240:3-14). The testimony of a second witness, Richard 'Rick' Miller, fully supports Edward Bennett's memory and testimony. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, p. 147:13-25).

4. 1957 Elijah Bennett's son, Edward, further testified that his father passed away around 1957. *See* (R. p. 113, 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 and had no further first hand knowledge of the Bennett/Shirley Property or events that may have taken place concerning the disputed logging road which is the subject of this action. *See* (R. p. 113, Transcript of Hearing Vol II, Testimony of Edward 'Jack' Bennett, pp. 241-242).

6. 1960-1964 The Record is **utterly silent** concerning a four year gap of time. There is simply no evidence whatsoever as to who, if anyone, may have either entered or used the Bennett/ Shirley, or the disputed logging road.

7. From 1964 – ????

According to the witness Richard Miller, his father started to farm the Bennett/ Shirley Property with **permission** from Bowater to use the Bowater Property, who was the former owner of the Bundy property. Richard Miller's father farmed the Bennett/Shirley property "for a few years." *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 149-150; 154:8-15).

8. 1968 - May 1985

The Record is **utterly silent** for this entire time period of **approximately 17 consecutive years as to whether or not anyone either entered or ever used the disputed logging 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 the Plaintiff's predecessor entitled Bowater Incorporated and Bowater Timber One, LLC to the South Carolina Department of Natural Resources. [And that is referred to as the Lease.]" *See* (R. p. 113, Transcript of Hearing Vol I, Second Stipulation of Fact, p. 8:14-19). 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. " *See* (R. p. 113, Transcript of Hearing Vol I, Third, Fourth, and Fifth Stipulations of Fact, pp. 8-9).

10. 1985

Defendant 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* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, p. 176).

11. May 10, 1985

Bobby Shirley and Nollie T. Shirley, Defendant Shirley's parents, purchased the Bennett/Shirley Property. *See* (R. p. 417, Stipulation of Parties for Defendant Shirley's Chain of Title). Defendant Shirley and his father were actually given keys to the cable gate at the entrance of the Bowater/Bundy Property and the disputed logging road by a game warden for SCDNR. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 132-136; 191; 208-210). The game warden received the keys from a representative of Bowater. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 221-222).

12. March 14, 2003	Plaintiff Bundy purchased the Bowater/Bundy Property from Bowater. *See* (R. p. 468, Stipulation of Parties for Plaintiff Bundy's Chain of Title).
13. December 22, 2003	Plaintiff Bundy conveyed a conservation easement on the Bowater/Bundy Property to the Congaree Land Trust. *See* (R. p. 468, Stipulation of Parties for Plaintiff Bundy's Chain of Title). This easement prevents development and subdivision of the Property in the future and allows Plaintiff Bundy to plant and grow long leaf pines. Id; *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 38-39).
14. Late 2003/Early 2004	Subsequent to Plaintiff Bundy's purchase of the Bowater/Bundy Property, Defendant Shirley requested and received permission from Plaintiff Bundy to put up a gate at the entrance to the Bowater/Bundy Property and the disputed logging road at the same location of the Bowater cable. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 72-73). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 117-121). Plaintiff Bundy gave Defendant Shirley a key to the gate. Id.
15. 2004	Notwithstanding Plaintiff Bundy's agreement to let Defendant Shirley use the disputed logging road and put up a gate, Defendant Shirley called Plaintiff Bundy and cussed him out and yelled at him. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 76-80). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 211-213).
16. 2005	As a result of the threatening phone call, Plaintiff Bundy called Defendant Shirley and asked him to take the gate down and to stop using the disputed logging road. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 76-80). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 214-217). Defendant Shirley again cussed out and yelled at Plaintiff Bundy. Id. At this time, Defendant Shirley asserted for the first time to Plaintiff Bundy that he had a right to use the disputed logging road. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, p. 81).
17. March 24, 2009	The present action was filed.

Introductory Statement

Plaintiff Bundy is not going to merely repeat what he briefed and argued in his Initial Brief. It is important to once again reiterate that the Special Referee found that the disputed logging road was **not** a public road because there was not sufficient evidence to establish that the disputed logging road was a public road. *See* (R . p. 22, Order on Appellant's Rule 59, SCRCP Motion, filed February 9, 2012, p. 1). This ruling was not appealed by Defendant Shirley, though Defendant Shirley testified at trial on six (6) occasions that his claim to use the road was solely based on his contention that the disputed logging road was a public road. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 123-125, 134, 138-140, 187, 188, 202-205). This issue is **not** before this Court.

The only issue before this Court is Defendant Shirley's claim that he has established a prescriptive easement over the property of Plaintiff Bundy. Without waiving any of his prior positions or arguments disputing the existence of any prescriptive easement, Plaintiff Bundy respectfully has limited this Reply to **three principal arguments.**

First, it is fully settled as a general rule of South Carolina, and most other states as well, that neither adverse possession nor prescriptive rights runs against the State or any of its municipalities. Indeed, this principle is a universal property rule. *See* 1960 S.C. Op. Attorney General 236 (An easement may not be taken by adverse possession or prescription against State); Outlaw v. Moise, 222 S.C. 24, 71 S.E.2d 509 (S.C. 1952) (It is well established in this State that title to property dedicated to and used by the public

cannot be acquired by prescriptive or adverse possession); Ark Game & Fish Comm'n v. Lindsey, 730 S.W.2d 474 (Ark. 1987)(limitations period for presumption did not run against the State, and thus hunters and fisherman could not argue prescriptive rights to road across State land).

In 1985, when Bowater (Plaintiff Bundy's immediate predecessor in title) entered into a lease with the State of South Carolina, which all parties have stipulated lasted for 18 consecutive years, until 2003, the property was temporarily converted from purely private timber land to lands open to the public during the leasehold period. During this **entire** time period, while the property was open to the public, and the public was invited on the property, the time clock for prescriptive rights simply stopped as a matter of law. Thus, the Special Referee was clearly in error in finding that 20 consecutive years existed by including the time period from 1985–2005. Notwithstanding anything that Defendant Shirley claimed or felt or believed or even did, this period of time simply does not count because it was leased to the State. As a matter of law, therefore, this simple, uncontested, undisputed, stipulated fact, bars Defendant Shirley's claims of an unwritten prescriptive easement.

Moreover, there is no evidence in the record of any open, continued, adverse, exclusive, hostile, notorious, and uninterrupted use of the disputed logging road for twenty (20) consecutive years, either by Defendant Shirley, his parents, or any of his predecessors in title prior to 1985.

Second, an equally settled property rule is that entry by permission prevents the prescriptive time from even starting. *See* C.J.S. Easement Section 45 ("a permissive use exercised in subordination to owner's claim of ownership . . ."). Here, as a matter of

uncontested fact, even Defendant Shirley admitted that in 1985 he and his father were given keys to the Bowater cable gate at the entrance of the Bowater/Bundy Property by a DNR Game Warden. In short, the property was open to all of the public, temporarily owned by the State by virtue of an uncontested lease, and it was specifically open to Defendant Shirley and his father by permission to enter with a key from DNR. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 132-136; 191; 208-210).

However, this was not the only permission sought and the only key delivered to Defendant Shirley. Upon the transfer of ownership from Bowater to Plaintiff Bundy of the Bowater/Bundy Property, it is uncontested that Defendant Shirley again sought permission to erect a gate from Plaintiff Bundy and was given a key to use the gate and the disputed logging road. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 72-73). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 117-121). This was also permissive use. On this truly uncontested, undisputed, second ground as well - the Lower Court Order is simply in clear error. Permission is not hostile. It ever has been. It never will be. The Special Referee was in error in ruling that this permissive use was adverse or under a claim of right or under a substantial belief of right.

Third, and finally, there are some extremely important **public policy** implications lingering just beneath the surface in this case. They are very important and very fundamental to all property inside of South Carolina. The first highly important public policy is to encourage private landowners, such as Bowater and many others, to lease their lands to the State for public purposes. A ruling for Defendant Shirley, notwithstanding a public lease and a permissive key received directly from DNR to enter to property, turns the law upside down and inside out. If private owners are put on notice

that their generosity may turn into a nightmare of complex prescriptive, unwritten easements, criss-crossing their property at the end of long leasehold, it is very clear that there will be severe public consequences. The WMA lease program itself may be in jeopardy.

The second highly important public policy stems from equity cases, but is equally applicable in the appropriate legal setting. There is something fundamentally wrong with Defendant Shirley's conduct as reflected on this Record. To make it very clear, it is not hostile use, or prescriptive easements per se, or adverse possession that is the problem, it is conduct that goes so far beyond the norm and outside societal boundaries that it should give this Court great pause to ever affirmatively grant Defendant Shirley any kind of rights when he threatened to physically harm Plaintiff Bundy and his family. *See* Whitlock v. Creswell, 2 S.E.2d 838 (S.C. 1939)[1](standing for the legal premise that a Defendant 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.); *se also* Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889). The Record has to be carefully looked at in this area.

Argument

I. While the Property Was Being Actively Leased to the State of South Carolina DNR State Agency, from 1985 to 2003, the Prescriptive Easement Clock was Stayed, Turned Off, Abandoned, and Interrupted As A Matter of Law.

It is settled law that no one can adverse possess lands owned by the State. Similarly, it is equally settled law of South Carolina, and almost every other State, that

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[1] Whitlock was authored by the late famous United States Senator Strom Thurmond when he was a South Carolina Circuit Court Judge. The Supreme Court thought so highly of the opinion they reported his lower court opinion and adopted it verbatim as their own.

the doctrine of prescriptive easement does not run against State lands. Nonetheless, the Special Referee apparently ignored this settled rule of law and ignored the parties own stipulation of fact.

In the Special Referee's Final Order, bottom of Pg. 4, the Special Referee purported to recognize in its 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 (R. 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,[2] 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

[2] Of course, 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 (8th Cir. 1956).

Game Management permit would be use without permission and adverse to the interests of the owner." *See* (R. 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[3] 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 (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 20).

Finally, and again in error and in disregard of the stipulated facts, in response to Plaintiff Bundy's Rule 59(e), SCRCP 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* (R . p. 22, Order on Appellant's Rule 59, SCRCP 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

[3] An additional error of law, or so Plaintiff Bundy genuinely believes, 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 Appellant's Initial Brief on Appeal to this Court at Pages 13-15, Appellant believes the proper standard of proof for a prescriptive easement and adverse possession claim is the clear and convincing standard.

a State agency. How can real property, validly leased to a State Agency for **17 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,[4] 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 17 consecutive years, temporarily became state land, and there could not possibly be hostile and adverse possession on the part of 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 Game 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, 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

[4] 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.).

this Record.[5] 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 Lower Court Order is clearly wrong, wrong as a matter of law, and even more wrong as a matter of public policy.

Moreover, even ignoring public policy, simply as a matter of established prior law, it is crystal clear that any prescriptive claims that Mr. Shirley may have had in 1985, were totally interrupted, stayed, and utterly abandoned for 17 consecutive years. It goes without saying that not a single case cited by the Special Referee to support its unusual and unprecedented findings of fact or conclusions of law even remotely mirror the facts of the present case where it is undisputed that the State had control, the State had possession, and the State had a leasehold interest for 17 straight and continuous years.

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[5] 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, Defendant 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. Defendant 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* (R. p. 113, 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. Defendant 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.

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 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 bar Defendant Shirley from any and all of these activities on the Bowater/Bundy Property for 17 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 Defendant 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.

Defendant Shirley, in short, was granted as a matter of law access and permission to use the Property 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 Defendant 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 road on the property.

Moreover, in addition to the permission given to Defendant Shirley by the WMA lease, Defendant Shirley also sought and received permission from Bowater by receiving and using the Bowater key and Defendant Shirley sought and received permission from Plaintiff Bundy by receiving and using the Bundy key.

Here, the manifest indications all over this record are that Defendant Shirley regularly sought permission to use the disputed road – again and again and again - and only in 2006 did it become that he was actually hostile. Permissive use cannot arise into a prescriptive easement. Moreover, if the 1985-2003 time period does not count (and Appellant believes it cannot count as a matter of law) no argument, creative, actual, or fictional, can be used to give the Respondent a prescriptive right on this road.

The Special Referee's finding that Defendant Shirley's use was not permissive[6] and the finding of a prescriptive easement based upon the years 1985-2003 is in error and in disregard to the stipulated facts, South Carolina law and public policy.

II. The Special Referee Made Three, Interconnected Errors of Law Regarding The Issue of Permissive Use and Continuous Hostile Use for 20 Years.

A. First, As A Matter of Law There Was No Evidence of Continuous Use from 1947-1968 by the Bennett Family Over The Disputed Road. Thus, They Really did Not Have a Prescriptive Easement.

B. Second, Even Assuming the Bennetts had a Prescriptive Use, The 16 Year Gap of Time Between 1969 - 1985 After Bennetts and Before Shirley Coupled With Shirley's Use of a Permissive Key to Gain Access in 1985, Bars Shirley from Using Bennett's Claims of Prescriptive Use From 1947 -1969 As A Matter of Law

C. Third, Shirley's Undisputed Request For Permissive Use From The Brand New Owner Bundy, In 2004, Clearly Defeats All of His Alleged Prescriptive Time

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[6] Defendant Shirley argued and the Special Referee found that mere permissive use does not necessarily 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 recognizes a very limited and special exception to the long standing general South Carolina rule, that permissive use does bar a prescriptive right. 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 Plaintiff Bundy or any predecessor in title - that Defendant 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, Defendant 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 Plaintiff 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 seventeen (17) straight years in Reavis v. Barrett.

Periods, Whether The First (1947-1969) or the Second (1985-2005) Period of Time Is Considered

Introduction to Argument No. 2

Plaintiff Bundy believes that the Special Referee committed three interrelated errors of law, even beyond **the inappropriate conclusions made about the State lease.** Again, even using what Plaintiff Bundy believes was the incorrect and erroneous standard of proof, the mere preponderance of evidence standard, as compared to clear and convincing standard, the first error of law was the Special Referee's Conclusion of Law that there was a prescriptive easement established by the Elijah Bennett Family between 1947 and 1969 over the disputed road.[7] *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 16).

Although the chain of title to the property is quite complex, it is relatively clear that one J. C. Gillis transferred what is now the Shirley Property to Elijah Bennett on December 19, 1947. Thereafter, English Bennett (Elijah's son) on May 6, 1968, approximately 20 years and five months later, in turn, transferred his interests from his deceased father, in what is now known as the Shirley Property, to W. M. Andrews. Shirley did not own the land until 1985. As Plaintiff Bundy sees this chain of distant events, they raise three different, interrelated, **questions of law:**

[7] The Special Referee's Final Order is not always numbered on each page. But, there is a number on Page 15 and the very next page contains the Conclusion of Law under the Caption Prescriptive Easement. After citing Horry County v. Laychur in the first paragraph under Prescriptive Easement the Special Referee's Final Order contains the following "I find by a preponderance of the evidence that the Elijah Bennett Family, including Elijah Bennett and his children established a 20 year period of use of the disputed roadway between 1947 and 1969." The Special Referee went on to hold in his Order on the Plaintiff's Rule 59(e) Motion that the establishment of the prescriptive easement was done by evidence of the Bennett Family's use of the disputed logging road for more than 20 years. *See* (R . p. 22, Order on Appellant's Rule 59, SCRCP Motion, filed February 9, 2012, p. 2).

First, does the Record reflect that the logging road to what is now the Shirley property was used by the Bennett Family in a continuous, adverse and hostile manner from 1947 to 1968?

Second, irrespective of what the Bennett Family did or did not do for access, during their time of ownership, is Defendant Shirley—who did not even purchase the property until 1985 - as a matter of law—permitted to ignore the gap from 1969 -1985?

Third, as late as 2004, it is uncontested that Defendant Shirley sought the new owner's, Plaintiff Bundy, permission to put up a gate. Does this uncontested act of seeking access by permission with a new owner end all his prior claims of prescriptive use as a matter of law?

A. First, as a matter of law there was no evidence of continuous use from 1947-1968 by the Bennett Family over the disputed road.

Defendant Shirley claims that he should be permitted to gain the benefit of the Bennett Family's alleged prescriptive use of the disputed logging road when the Bennetts owned what his now Shirley's property way back from 1947 through 1969. The Special Referee found that the Bennett's had a 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.[8] *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, Conclusions of Law Section, p. 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* (R. p. 113, Transcript of Hearing Vol II, Testimony of Edward 'Jack' Bennett, p. 240:3-14). His son also testified, again in a very clear and uncontested

[8] Although there are only a few pages that are actually numbered, one such page is 15. The following page, referred here as 16, contains in the middle of the page, as a distinctive heading, Prescriptive Easement. And the next page, referred to here as 17, contains Defendant's argument and the Special Referee's argument that the road was in existence in aerial photographs in 1956, 1964, and 1969.

manner, that Elijah died in 1957. *See* (R. p. 113, Transcript of Hearing Vol II, Testimony of Edward 'Jack' Bennett, pp. 241-242). 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 20 year period of time, even though the **only testimony** is that Edward 'Jack' Bennett has no knowledge of the property or disputed logging road after he married and moved way prior to 1960 and Richard Miller[9]'s testimony that his "father started to [lease] the farm" in 1964 "for a few years" with permission from Bowater. *See* (R. p. 113, Transcript of Hearing Vol II, Testimony of Edward 'Jack' Bennett, pp. 241-242). *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 154:8-15).

The question of law is simple enough: 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, and with the further **uncontested evidence** that the Millers started in 1964 to lease the property "for a few years" add up to "continuous use for 20 years?"

Plaintiff Bundy respectfully submits to this Court that even adopting every piece of evidence in the record in favor of Shirley, and ignoring all the evidence with regard to Plaintiff Bundy, and fully recognizing that the Special Referee's factual findings are entitled to be and should be given deference on appeal, **unless there is no evidence that reasonably supports the findings,** there are simply too many time gaps in the Record of the time from 1957, the death of Elijah Bennett, until the 1960s (probably 1964) when

[9] Rick Miller was 55 at the time of the lower court hearing in 2010. He would have thus been 9 years old when his father first entered into the lease and since the lease lasted "for a few years" he would have perhaps been 10, 11, 12, or a little more – depending upon when the lease ended.

the lease started to factually support the conclusion that the Bennett Family prescriptively used the road continuously from 1947 through 1969.

From 1957 until 1960, there is no evidence of any use of the disputed road by the Bennett family or anyone else. From 1957 until 1964, there is no evidence of any use of the disputed road by the Bennett family or anyone else. From 1964, but only for a "few years", the Miller family began to lease the Bennett/Shirley property and did use the disputed road. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Richard Miller, pp. 149-150, 154:8-15).

Collectively, this evidence simply does not add up to 20 years of continuous use. The mere existence of the road is not enough. There are simply too many gaps of time unaccounted for in any way. And, the testimony of only "for a few years" is way too indefinite to claim to be five full years from 1964 through 1969[10].

In short, there is, quite literally, no evidence of uninterrupted, continuous use of the road by the Bennett family or the Miller family during the critical 1947 - 1969 time period. Accordingly, Plaintiff Bundy asserts that it was an error of law to make a critical factual finding that lacks any evidentiary support. 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

[10] Moreover, even assuming it was a full complete five year period of time – which is almost certainly more than "for a few years" - it still nowhere near comes close to 20 years. From 1947 - 1957 the death of Elijah Bennett is only 10 years. And, from 1964 through 1969, at best, and giving Shirley every possible benefit of the doubt is only 5 more years. It quite simply – does not add up to 20 years.

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).

There is also simply no evidence that the use of the logging road by Elijah Bennett was ever adverse, hostile, notorious or under a claim of right. There is no evidence of any use between 1960 and 1964. There is no evidence that any use of the disputed logging road by the Miller family was done in an adverse, hostile, or notorious manner or under a claim of right.

The existence of a road on a photograph does not prove use or type of use. It certainly does not prove hostile use, adverse use, use under a claim of right, notorious use, or continuous use. *See* Frazier v. Smallseed, 384 S.C. 56, 682 S.E.2d 8 (S.C. App. 2009)(holding no prescriptive easement simply because the 20 years had not been proven).

B. The gap of time between 1969-1985 and the use of a permissive key to gain access in 1985, received from the S.C.D.N.R., bars Defendant Shirley from using the Bennett's claims of prescriptive use from 1947-1969 as a matter of settled law.

Even if we assume merely for sake of academic argument only, that the Bennett's did establish prescriptive use over the road, from 1947 through 1969, what in the world are we to make of the sixteen (16) year gap of time that everyone agrees Defendant Shirley did not own any property in the area and everyone agrees there is no evidence of any adverse or prescriptive use of the disputed logging road? What is to be made of the fact that, in 1985, Defendant Shirley sought a permissive key from Bowater to use the

disputed logging road? The Special Referee dealt with these inconvenient, but undisputed facts, in two different ways. First, he erroneously concluded that he did not have to go beyond the Bennett prescriptive use period. *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 19). Second, the Special Referee ruled that "the Defendant adamantly testified that the disputed road was the only way to access to his property and his testimony on this point is supported by the maps, plats, and photographs in the record." The Special Referee also ruled that "the testimony as a whole strongly indicates the Defendant was going to use the disputed road with or without a key..." *See* (R. p. 1, Order of the Special Referee Roderick M. Todd, Jr. filed July 11, 2011, p. 11).

With regard to the first finding, Shirley only claims that he purchased the land he now owns in 1985. In short, there are sixteen (16) years where even taking Defendant Shirley's side of the case, the Bennetts stopped any use and Defendant Shirley did not yet start. This gap of time is deadly to his prescriptive easement. There is no evidence that Defendant Shirley was aware prior to this action of any use by the Bennett Family. He is not, as a matter of law, in privity of title with the Bennett Family. He cannot, as a matter of law "tack" onto the Bennett Family's use or time of use. *See* Marrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (1997).[11] Defendant Shirley has not, as a matter of law, shown any direct legal connection by deed, or grant, or implied use, or any other theory, between him and the Bennett Family. Therefore, even assuming the Bennett Family established prescriptive use for a period of twenty (20) years, which is disputed above,

[11] The Special Referee expressly found that "tacking" was unnecessary to his ruling that Defendant Shirley had a prescriptive easement. *See* (R . p. 22, Order on Appellant's Rule 59, SCRCP Motion, filed February 9, 2012, p. 2). This is in conflict with his finding that the Bennett Family established a prescriptive easement for Defendant Shirley.

the Bennett Family's use is legally irrelevant to Defendant Shirley's prescriptive easement claim.

With regard to the second finding, when Defendant Shirley did show up in 1985, even he admits that he asked for and used a key by permission from the Department of Natural Resources. Defendant Shirley's first use of the disputed logging road was done with permission. The permissive use is not consistent with any of his own alleged prescriptive use or any prescriptive use by the Bennett Family. The law is crystal clear. Permission at the very start of his use in 1985, after he did acquire the property, stops all claims of prescriptive right.

The Special Referee's conclusion that Defendant Shirley established a prescriptive easement based upon use by the Bennett Family and in the face of the permissive nature of his own use was in error.

C. Third, Defendant Shirley's undisputed request for permissive use from the brand new owner, Plaintiff Bundy, in 2004, defeats all of his alleged prescriptive time periods, whether the first (1947-1969) or the second (1985-2005) period of time is considered.

It is undisputed in this case that upon Plaintiff Bundy's purchase of the Bowater/Bundy Property, Defendant Shirley sought and received permission to erect a gate on the disputed logging road from Plaintiff Bundy, the new owner. This completely uncontested fact is mutually exclusive from a claim for a prescriptive easement[12] by Defendant Shirley. Just as he sought permission from Bowater, Defendant Shirley sought permission from the new owner. Therefore, regardless of whether or not the Bennett Family established anything, Defendant Shirley used the disputed logging road with

[12] This fact is also mutually exclusive from Defendant Shirley's claim in this action that he believed the road was a public road.

permission from the beginning. He re-affirmed this permissive use again in 2004. This defeats any claim by Defendant Shirley for a prescriptive easement.

III. Defendant Shirley is the author of his own dilemma and this Court should not grant him rights due and owing to his inequitable conduct to solve the dilemma he created.

Defendant Shirley's father purchased a piece of property that according to his own testimony is landlocked without the use of the disputed logging road.[13] The property did not have any structures on it and does not have any structures on it today. The plat referenced in the deed shows the property is landlocked. Defendant Shirley admitted this key fact. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Shirley, pp. 205-206). As such, Defendant Shirley does not claim an easement by necessity. He does not claim that the property was landlocked by Plaintiff Bundy's predecessor in title. There is no unity of title between Plaintiff Bundy and Defendant Shirley. This case is about an individual whose father acquired a piece of landlocked property. Defendant Shirley's father did not attempt to acquire an easement to access the property. He and Defendant Shirley chose to access the property pursuant to the permission from the State and Bowater in 1985 and then from Plaintiff Bundy in 2004. They simply chose not to acquire a legal easement as individuals in South Carolina do every day. In fact, others in the area, including Plaintiff Bundy, have sought and purchased necessary easements. *See* (R. p. 113, Transcript of Hearing Vol I, Testimony of Bundy, pp. 51, 59). *See* (R. p. 528, Plaintiff's Exhibits 6). *See* (R. p. 533, Plaintiff's Exhibits 7). In 2005, once Defendant Shirley received title to the Property from his parents he began to behave in such a manner that those who had extended permission to use their property no longer wished to

[13] The Plaintiff put evidence into the record of other ways to access the Shirley Property; however, these means of access would also require the purchase of an easement from others.

have Defendant Shirley on their property. He has created his own dilemma at every turn. Incredibly, it is this behavior that Defendant Shirley now seeks to use to establish a right to use his neighbors' property to access his landlocked property. He still does not seek to legally and justly acquire an easement. His claim of a prescriptive easement should not stand. Defendant Shirley cannot and should not benefit from his bad and secretive behavior, especially in light of the fact that he is the author of his own dilemma.

Conclusion

For the reasons stated herein and the reasons stated in the Initial Brief of the Appellant, the Orders of the Special Referee should be **REVERSED** as there is insufficient evidence in the Record to establish a prescriptive easement on behalf of Defendant Shirley over the property of Plaintiff Bundy.

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

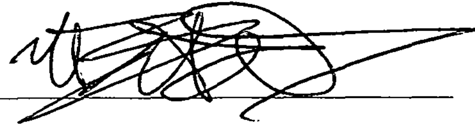
Roderick M. Todd, Jr. Esquire, Special Referee

Case No.: 2012208007

W.H. Bundy, Jr.,		Appellant,
	vs.	
Bobby Brent Shirley,		Respondent.

CERTIFICATE OF COUNSEL

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



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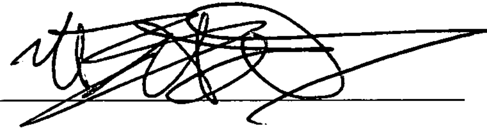

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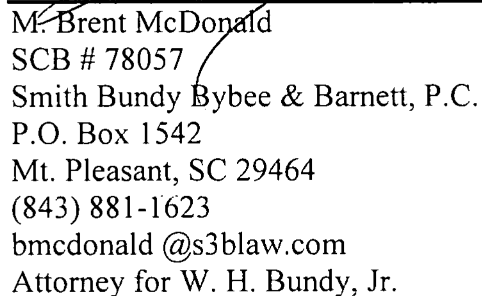
PROOF OF SERVICE

I certify that I served the Final Reply 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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