

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
No. 2016-001102

Appeal from Newberry County
Court of Common Pleas

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

Appellate Case No. 2014-001472
South Carolina Court of Appeals Unpublished Opinion No. 2016-UP-069

John S. Frick,

Petitioner,

v.

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

Respondents.

**PETITIONER'S REPLY TO RESPONDENTS' RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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

ATTORNEYS FOR PETITIONER
JOHN S. FRICK

Newberry, S.C.
June 23, 2016

RECEIVED

JUN 29 2016

SC SUPREME COURT

OTHER COUNSEL OF RECORD

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

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

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

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

TABLE OF CONTENTS

INTRODUCTION1

ARGUMENTS.....1

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT’S FINDING THAT THE ROADWAY IN QUESTION IS NO LONGER A COUNTY ROAD DESPITE THE FACT THAT THE GOVERNMENTAL AUTHORITY TOOK NO AFFIRMATIVE STEPS TO CLOSE IT AND PART OF SAID ROAD REMAINS OPEN AND COUNTY MAINTAINED.....1

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT’S FINDING THAT LANDOWNERS SURROUNDING SAID ROADWAY WERE ENTITLED TO MAINTAIN A CLOSED AND LOCKED GATE WHEN THE EVIDENCE SHOWS THAT THERE IS NO CURRENT NEED FOR THE GATE OTHER THAN TO HINDER PETITIONER FRICK’S ACCESS.....3

CONCLUSION.....4

INTRODUCTION

Petitioner John Frick relies upon the previous filings in this case in addition to the matters set forth herein. This Reply will address only certain points in the Return not already fully set forth in Frick's Petition for Writ of Certiorari.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT THE ROADWAY IN QUESTION IS NO LONGER A COUNTY ROAD DESPITE THE FACT THAT THE GOVERNMENTAL AUTHORITY TOOK NO AFFIRMATIVE STEPS TO CLOSE IT AND PART OF SAID ROAD REMAINS OPEN AND COUNTY MAINTAINED.

Respondent is correct in his assertion that he relies solely upon common law abandonment. However, he fails to properly consider the role S.C. Code Ann. § 57-9-10 *et. seq.* plays in this matter. Respondent Fulmer misinterprets or misreads *South Carolina Dept. of Transportation v. Hinson Family Holdings, LLC*, 361 S.C. 649, 606 S.E. 2d 781 (2004) in its entirety and misapplies the facts of this case to that misreading. In *Hinson*, the road was no longer maintained by the State but it remained accessible – much like the road in question in this matter. Even after Newberry County no longer maintained the road in question, the road was clearly accessible as it connected to another public road and was utilized by boy scout troops and other landowners. Petitioner testified he drove unimpeded from Wheeland School Road to his property, prior to purchase of said property. He was, prior to the purchase, “the public.”

Hinson clearly supports the proposition that the statutory procedure created by S.C. Code §57-9-10 supersedes or overrides common law abandonment. “By creating a formal judicial procedure for terminating a public right of way over land, [Section 57-9-

10] removes the uncertainty attending the common law of dedication and abandonment. It also ameliorates the rigor of the common law rule requiring strict proof of intent to abandon a public right of way before that right can be extinguished.” *Hinson* at 654, citing *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 319, 433 S.E.2d 875, 884 (Ct.App.1992). The statute should be followed when any portion of a road remains open and publicly accessible. In this instance, the portion of the road on the opposite side of Lake Murray remains open and county maintained, while the portion at issue in this litigation remains publicly accessible.

Respondent also attempts to draw distinctions between this matter and the *City of Myrtle Beach v. Parker* case which are not supported by the evidence. Respondent states that there is no evidence the road in question was ever dedicated to public use or county maintained – even prior to the flooding of lake Murray. However, the roadway in question was shown on county road maps (R. p. 148; R. p. 151) and a portion of the roadway is still county maintained and controlled today.

K&A Acquisition Group, LLC v. Island Pointe, LLC is also misinterpreted by the Respondent. Mere discontinuance of use does not equal abandonment when a road has been established and dedicated to public use. *K&A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252 (2009). Once a road is established as public roadway, “the public right of way continued until it was affirmatively abandoned by the SCDOT.” *Id.* at 258. While the Court held the roadway in that case was abandoned, it was only abandoned when the SCDOT affirmatively abandoned it by deeding it to adjoining landowners. Seibert Road, on both sides of Lake Murray, appeared on numerous county road maps, serviced numerous homes and was at one time, a connector

road between two public roads that are still in use today. It was, and is, a public roadway that can only be abandoned by affirmative action on the part of Newberry County.

While Petitioner feels the roadway was never abandoned under common law theories, the most important assertion is that once a roadway is public, it cannot be simply abandoned under said common law theories. The statutes and case law all support the contention that the governmental entity must take affirmative action in compliance with the statutes to effectively abandon such a roadway.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT LANDOWNERS SURROUNDING SAID ROADWAY WERE ENTITLED TO MAINTAIN A CLOSED AND LOCKED GATE WHEN THE EVIDENCE SHOWS THAT THERE IS NO CURRENT NEED FOR THE GATE OTHER THAN TO HINDER PETITIONER FRICK'S ACCESS.

Petitioner feels it necessary to point out that the Respondent's Return ignores his own testimony regarding the gate. Respondent Fulmer testified that the only two instances of trespassing and/or vandalism were a thing of the past. (R. p. 133, lines 4-18). Furthermore, Petitioner was able to travel, without interruption by a gate, from Wheeland School Road to his property via the road in question. (R. p. 51, line 2 – p. 52, line 15). This, coupled with the fact that the gate was opened when this case was filed in 2009 and left open for over 4 years without incident of vandalism or trespassing shows that the gate is not needed for the preservation of the defendants' properties. (R. p. 132, line 25 – p. 133, line 18). If the gate or blockade is not necessary, it is not proper. *Brown v. Gaskins*, 284 S.C. 30, 324 S.E.2d 639 (Ct. App. 1984). Testimony regarding incidents

of trespassing in the distant past and gates that mostly remained open or gates located on other lands simply do not necessitate the burden placed upon Petitioner Frick.

CONCLUSION

The Petitioner relies upon his initial Petition for Writ of Certiorari as well as all other briefs and filings in this matter. The Unpublished Opinion is in error in affirming the trial court's erroneous rulings in this matter. The Court of Appeals failed to properly consider the statutory factors regarding the abandonment of a public road and this issue is unique given the facts of this case. The Court of Appeals further erroneously affirmed the trial court's findings regarding the necessity and reasonableness of the locked gate and the width of the road. For the reasons set forth herein, this Court should grant the Petition for Writ of Certiorari to review and correct those errors.

Respectfully Submitted

POPE AND HUDGENS, P.A.

By:



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

Newberry, S.C.
June 23, 2016

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
No. 2016-001102

Appeal from Newberry County
Court of Common Pleas

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

Appellate Case No. 2014-001472
South Carolina Court of Appeals Unpublished Opinion No. 2016-UP-069

John S. Frick,

Petitioner,

v.

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

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the below stated pleadings on the below listed counsel of record and named Respondents in this matter by depositing a copy of same in the United States Mail, First Class, postage prepaid, on this the 23rd day of June, 2016:

COUNSEL AND PARTIES SERVED:

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

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

RECEIVED
JUN 29 2016
SC SUPREME COURT

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

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

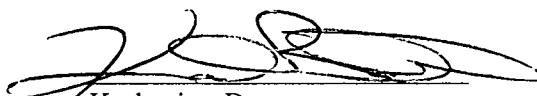
Mr. Joseph R. Childers
1630 Wheeland School Rd
Little Mountain, SC 29075-9269

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

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

PLEADING SERVED:

PETITIONER'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR
WRIT OF CERTIORARI



Katherine Barnett
Paralegal to W. Chad Jenkins