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.

BRIEF OF RESPONDENT

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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 ("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 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 declarations of rights. Shirley filed an Answer and Counterclaim on June 19, 2009, alleging as follows: (1) that the 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 road. Bundy also asserted various affirmative defenses - including unclean hands. On April 15, 2010, Shirley filed an Amended Answer and Counterclaim. Bundy again replied, on April 26, 2010, to the Counterclaim.

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.

The Special Referee signed an Order on July 7, 2011, filed on July 11, 2011. The July 7, 2011, Order found that Shirley carried his burden of proof in showing that the 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 road. The Court rejected

Bundy's affirmative defenses. On July 12, 2011, Shirley's Counsel moved to be relieved as counsel. This motion was supported by an affidavit signed by Counsel for Shirley. 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. 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. The Special Referee, also on February 9, 2011, filed an Order granting Bundy's motion to alter or amend in part, and denying it in part. The Special Referee amended his Order and found that the 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 road. Bundy served his Notice of Appeal on the July 7, 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 or not Shirley has a prescriptive easement to use a road on property owned by Bundy located in Kershaw County, South Carolina.

Statement of the Facts

The Respondent is the owner of a thirty-seven (37) acre tract of land that was purchased by his parents in 1985 and deeded to the Respondent in 2005 (R. p. 3, lines 1-8). The sole access to the Respondent's tract is a dirt road known as Saxon Road. On Defendant's Exhibit 6, (R. p. 564) the Respondent's tract is the triangular 37.14 acre tract in the upper left hand corner or northwestern corner shown as Tract

1. The Appellant's tract acquired from Bowater Timber, LLC, in 2003, is Tract 2 on Defendant's Exhibit 6, containing four hundred thirty-nine (439) acres. Saxon Road is shown on Defendant's Exhibit 6, (R. p. 564) as first a solid line and then a dotted line terminating at the Respondent's tract. The portion of Saxon Road depicted on the tax map, Defendant's Exhibit 6, (R. p. 564) as a solid line is county maintained. The portion of Saxon Road depicted as a dotted line is the disputed road that is the subject of this appeal. The small lots shown of Defendant's Exhibit 6, (R. p. 564) as tracts 21, 22, and 26, are residences owned by various members of a Miller Family. In about 1968, the county began maintaining Saxon Road up to the last Miller house so that the children would not have to walk out to the state highway to catch the school bus (R. p. 259, line 20-p. 260, line 7). From that time on, the portion of Saxon Road shown as a solid line on Defendant's Exhibit 6, (R. p. 564), was county maintained, and the uninhabited portion shown on Defendant's Exhibit 6, (R. p. 564) as a dotted line was not county maintained. Kershaw County did not obtain a deeded easement from the owner of the servient tract before beginning maintenance services. (Finding of Fact 10 July 7, 2011, Final Order) (R. p. 96, lines 19-20)

Although Saxon Road is the Respondent's sole access to his property, the Respondent's tract and the Appellant's tract have no common owner in their respective chains of title, and so one of the essential elements of an easement by necessity is missing. Therefore, the Respondent sought to establish and easement by prescription.

The Respondent's tract was acquired by a farmer named Elijah Bennett in December of 1947. (Shirley chain of title) (R. p. 4). Elijah Bennett and his sons, of

whom eighty-five (85) year old Edward Bennett testified at trial, began farming the Respondent's tract (hereinafter the dominant tract) and getting to it via Saxon Road on mule back. (R. p. 349, lines 8-22). The Bennett Family owned the dominant tract from 1947 through 1969. (Shirley chain of title) (R. p. 4). During their ownership of the dominant tract, Saxon Road was the only access to it used by the Bennett Family. (R. p. 357, lines 1-17)

From 1969 to 1985, the dominant tract was owned by six (6) different owners. It was acquired by the Respondent's parents in 1985 and transferred to the Respondent in 2005. (see Shirley chain of title) (R. pp. 3-4) The dominant tract was used by the Shirley Family for hunting and other outdoor recreation. (R. p. 302, lines 12-20) In about 1989, they built a pond on it for fishing, moving bulldozers over Saxon Road to construct the pond. (R. p. 297, line 19-298 line 9) As it was for the Bennett Family, Saxon Road, including the part now in dispute, was the only access to the dominant tract used by the Shirley Family. (R. p. 301, lines 2-8)

The servient tract was acquired by the Catawba Timber Company in 1960. At that time, a plat of the servient tract was prepared by R. H. Marett on September 26, 1960, and recorded with the deeds to the Catawba Timber Company. (Defendant's Exhibit 8) (R. p. 566) The Marett plat depicts all of Saxon Road as a continuous dotted line leading to the dominant tract, noted on the plat as the Bennett Estate. The Marett plat shows no other road, path or access to the dominant tract, just Saxon Road including the part now in dispute. The Marett plat was incorporated into the March 14, 2003, deed conveying the servient tract to the Appellant, (see July 7, 2011, Final Order Finding of Fact 5) (R. p. 6, lines 4-5) so the Appellant took title to the servient tract with notice of the disputed road incorporated

into the deed.

After weighing and evaluating the conflicting evidence and the arguments of the parties over the meaning of the evidence, the Special Referee made thirty-four (34) separate findings of fact in the July 7, 2011, Final Order (R. p. 1-12). As to the proof of the facts required to establish the elements of an easement by prescription, the Special Referee's findings of fact are conclusive on those factual issues as long as they are supported by some evidence of record. The Respondent defers to the thirty-four (34) findings of fact in the July 7, 2011, Final Order as the facts in this case pertaining to the elements of an easement by prescription.

Saxon Road including the disputed portion is an ancient road predating travel by motor vehicle to the dominant tract. (R. p. 349, lines 6-22) It was included on the 1960 Marret plat of the servient tract (Defendant's Exhibit 8) (R. p. 566) and the Kershaw County tax maps. (Defendant's Exhibit 8) (R. p. 566) It is visible on aerial photographs of the area taken in 1956, 1964, 1969, 1974, 1977, and the current aerial photograph from the Kershaw County mapping department. (Defendant's Exhibits 1, 2, 3, 4, 5, and 7) (R. pp. 559 - pp.563, R. p.565) It has withstood the test of time.

STANDARD OF REVIEW

The determination of the existence of an easement is a question of fact in a law action. Jowers v. Hornsby 292 S.C. 549, 357 S.E.2d 710 (1987). In an appeal from an action at law tried by a Judge, the Judge's factual findings will not be disturbed unless found to be without evidence which reasonably supports them. Towns Associates LTD v. City of Greenville 266 S.C. 81, 221 S.E. 2d 773 (1976).

ARGUMENT

Issue I raised by the Appellant is a question of law. Issue II is a question of fact controlled by the thirty-four (34) findings of fact in the July 7, 2011, Final Order (R. p. 1-12). Evidence in the record conflicting with those findings of fact is irrelevant because the trier of fact is allowed to accept or reject testimony based upon his view of the credibility of the witness or the document being presented. Issue III raises the novel issue of whether or not a party who proves all of the elements of a prescriptive easement in an action at law can be deprived of that easement under the equitable defense of unclean hands for misconduct during the twenty (20) year period of his adverse use. Can the Court encourage adverse use, use in derogation of the rights of the servient tract owner, by requiring it as an element of a prescriptive easement, and then turn around and punish the dominant tract owner for the very conduct it required? Illegal conduct, at a bare minimum a trespass, is mandated to prove an easement by prescription. Civil, courteous and polite conduct by the dominant landowner is expressly discouraged by the requirement that he prove adverse and even hostile use of the easement. It would be a bit duplicitous to require illegal conduct on the one hand, and punish it on the other.

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 Appellant seeks to create a new rule in prescriptive easement cases requiring clear and convincing evidence as the burden of proof by citing adverse possession cases: Clark v. Hardgrave 473 S.E.2d 474; King v. Hawkins 282 S.C. 508 319 S.E.2d 361(Ct. App. 1984); 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(1986); Zinnerman v. Williams 2011 S.C. 382, 45 S.E.2d 597 (1947); Lusk v. Callahan 287 S.C. 459, 339 S.E.2d 156 (S.C. App. 1986). The reason that the Appellant's Brief cites seven (7) adverse possession cases and no prescriptive easement cases as authority for the heightened burden of proof in prescriptive easement cases is this: of all the reported prescriptive easement cases in this state over the past Two Hundred (200) years, not one mentions the clear and convincing standard as the Plaintiff's burden of proof.

The alchemy to transform the adverse possession burden of proof into the prescriptive easement burden of proof is achieved by citing 12 S.C. Jur. Easements §10 (2011). The article in South Carolina Juris Prudence notes that some of the elements of a prescriptive easement are essentially similar to the elements of adverse possession, i.e. open, notorious, continuous and uninterrupted use to prove adversity, and suggests that adverse possession cases can be used to amplify those elements that are common to both types of cases. Thus, an adverse possession case discussing the common element of open and notorious possession might be instructive on the meaning of open and notorious use of the prescriptive easement. However, the elements of adverse possession and the elements of the

prescriptive easement are not uniform, so that all of the elements of adverse possession are not held in common with the elements of the prescriptive easement, for example, the ten (10) year limitation period for adverse possession as opposed to the twenty (20) year limitation period for the prescriptive easement. The burden of proof is not and has never been a common element of adverse possession and the prescriptive easement. The South Carolina Juris Prudence article does not suggest that the elements of the two (2) causes of action are interchangeable. The reasoning in the article applies only to the common elements.

The burden of proof for prescriptive easement cases is discussed in Tyler v. Guerry 251 S.C. 120, 160 S.E.2d 889(1968). The Court in Tyler v. Guerry supra. had before it two (2) issues:

> "By proper exceptions the landowners raised two (2) questions for determination by this Court: First have the Plaintiffs established by the preponderance of the evidence, an easement across the Defendant's land; and Secondly, have the Plaintiffs established a dedication by the landowners of the new road?"

The Court then proceeded to rule on the first question by applying the preponderance of the evidence standard to the prescriptive easement cause of action.

> "The evidence preponderates to the effect that people living in general area had, through the tolerance of the landowners if not with acquiescence, used the old road and recreational area for more than Fifty (50) years."

The Tyler v. Guerry Court then took up the public dedication cause of action:

> "To show a dedication the law required a higher degree of proof than by the preponderance of the evidence."

In Tyler v. Guerry supra. the Court consciously applies the preponderance

of the evidence standard to the prescriptive easement cause of action, and to show that the application of the preponderance of the evidence standard was a deliberate choice, the Court then switched to the elevated "strict, cogent and convincing" standard to rule on the public dedication cause of action. The changing of the burden of proof from one cause of action to the next demonstrates that the application of the preponderance of the evidence standard in the prescriptive easement cause of action was not an inadvertent mistake by a Court not paying attention. The Appellant argues in his brief that the exceptions use the wrong standard of proof and the Court did not bother to correct it. However, a careful reading of the case leads to the conclusion that the Tyler v. Guerry supra. Court read and approved the exceptions, "By proper exceptions," and that the Court was entirely aware of the different standards of proof for different easement theories.

In summary, the preponderance of the evidence burden of proof is the default standard in civil actions. It can be elevated for a cause of action by precedent, but in the absence of precedent applying an elevated standard in the prescriptive easement cases, the preponderance of the evidence standard applies. Tyler v. Guerry supra. is the only precedent on the burden of proof in prescriptive easement cases, and it applies the preponderance of the evidence standard.

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

The determination of the existence of an easement is a question of fact in a law action. Jowers v. Hornsby supra. This question of fact is controlled by Thirty-Four (34) separate findings of fact (R. p. 1-12), most of which are annotated with references to the supporting testimony and exhibits from the Transcript in the

Special Referee's Final Order dated July 7, 2011. The Special Referee's findings of fact cover the essential elements of an easement by prescription as set forth below. The evidence from the record that conflicts with the findings of the Special Referee does not justify a reversal as long as some evidence supports the finding of fact made by the Special Referee.

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

In 2003, the Court of Appeals decided two (2) prescriptive easement cases, Hartly v. John Wesley United Methodist Church of John's Island 355 S.C. 145, 584 S.E.2d 386(S.C. App. 2003) decided in May of 2003 and Pittman v. Lowther 355 S.C. 536, 586 S.E.2d 149(S.C. App. 2003) decided in August 2003 which reinserted the word "uninterrupted" into the first element of a prescriptive easement after a ten (10) year absence in such cases as Revis v. Barrett 321 S.C. 206, 467 S.E.2d 460(Ct.App. 1996) and Morrow v. Dyches 328 S.C. 522, 492 S.E.2d 420(Ct.App. 1997). In Hartly, the Court stated that the first element of the easement by prescription is: (1) there must be a continued and uninterrupted use or enjoyment of the right for a period of twenty (20) years. Although the Court treated the terms continued and uninterrupted as different and distinct requirements, the English meaning of the two words is the same. The term "continued" is defined as "lasting or extended without interruption". [1] The term used by the Special Referee in his findings of fact is "continuous use". The term "continuous" is defined as "marked by **uninterrupted** extension in space, time of sequence."[2] Using the plain English

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[1]Merriam-Webster's Collegiate Dictionary 10th Edition Copyright 2000 Merriam-Webster's Inc.

[2] Ibid

meaning of the terms continued and uninterrupted, they are synonyms and the use of both in the first element of proof for a prescriptive easement is a redundancy rather than two (2) distinct elements that must each be proven. If the use of the easement is continued, it is without interruption by definition. If the use of the easement is found by the Special Referee to be "continuous" during the twenty (20) year period, then the Special Referee has, by definition, found the use to be uninterrupted.

The findings of fact by the Special Referee in the July 7, 2011, Final Order are set out below:

20. That Elijah Bennett and his family used Saxon Road including the disputed road portion, as their sole access to the Defendant's property from 1947 until 1969, a period of over twenty (20) years. (July 7, 2011, Final Order p. 7)

21. That the testimony of Edward Bennett, the eighty-five (85) year old son of Elijah Bennett is clear and unequivocal that Saxon Road was the only road to the Defendant's property during the twenty-one (21) year ownership by the Bennett family. (Transcript page 243 l.4,5,l. 13-14) (July 7, 2011, Final Order p. 7) (R. p. 7, lines 18-24)

24. I find that the use of Saxon Road, including the disputed portion, to access the property now owned by the Defendant between December 19, 1947, and April 29, 1969, was continuous. After the farming operations ceased, the Bennetts used the road to cut firewood (Transcript page 236 l.22-page 237 l.3) and they kept the field plowed (Transcript page 237 l. 14-18).
The Miller family rented the property from the Bennetts during the 1960s, paying the taxes as rent and used the disputed road to access it (Transcript page 155 l. 1-17). It appears that the disputed road was in use in 1960 when R. H. Marett decided to depict it on his plat. The USDA aerial photographs from 1957, 1964, and 1969, introduced as Defendant's exhibits 1, 2, and 3, show the disputed road as clear of vegetation during the period from 1957 to 1969, indicating that it was being used frequently enough to resist the over growth of the surrounding forest and underbrush. I find the testimony of Edward Bennett, the aerial photographs and the R. H. Marett plat that the disputed road was in continuous use from 1948 until 1969 by the Bennett family and their tenant, Rick Miller' father. (July 7, 2011, Final

Order p. 8-9) (R. p. 8, line 13-p.9, line 3)

27. I find that the Defendant's parents who acquired the thirty-seven (37) acre tract on May 10, 1985, and the Defendant who acquired the property on February 21, 2005, used the disputed road continuously from 1985 until 2009 when the lawsuit was filed. The Defendant testified that the disputed road is the only way to get to his property. (Transcript page 175 l.19 - page 176 l.2) Rick Miller, just as he had for the Bennett family, testified that the alternate blue line route was used for a period of time just long enough to cut down the use period to under twenty (20) years. However, the use of an alternate route does not mean that the Shirley's never used the disputed road. Second, Rick Miller stated that he wanted to stop the Defendant from using the disputed road that runs through the Miller houses (Transcript page 152 l. 10-13) giving him an interest in the outcome of this case. Finally, the credibility of Rick Miller as to the use of the blue line route is already badly compromised by his testimony concerning what would have to have been his prenatal observations of Elijah Bennett's use of the blue line route. Therefore, I find by a preponderance of the evidence that the Shirleys used the disputed road continuously for the required twenty (20) year period. (July 7, 2011, Final Order p. 9-10) (R. p. 9 line 15- p. 10 line 6)

Even if evidence of an interruption appears in the record as argued by the Appellant, the evidence of an interruption cannot serve as a basis for reversal because the trier of fact in the lower Court has already evaluated that evidence and the found the use to be "continuous" i.e. "uninterrupted". Under the applicable standard of review, the findings of facts set forth above are dispositive on the issue of uninterrupted use as long as they are supported by some evidence.

Assuming that continued and uninterrupted are two (2) distinct requirements, there was no evidence of any action by the servient tract owner during the twenty (20) year ownership of the dominant tract by the Bennett family from 1947 to 1969 that might constitute an interruption. The Special Referee cites the testimony upon which he relied in making finding of fact 24, that the use during the Bennett period of ownership was continuous. As to the period during which the Shirley family

owned the dominant tract from 1985 until the filing of the lawsuit, the Appellant points to testimony of alternate routes used by the Respondent to access property, which testimony was rejected by the Special Referee in finding of fact 27 (R. p. 9, line 15-p. 10, line 6).

The Appellant points to a gate erected by Bowater during its ownership of the servient tract. The interruption by gate case is Pittman v. Lowther supra. In that case, the Court of Appeals reversed the lower Court based on an interruption in the use of the road because the interruption, the breaking down of more than Two Thousand and 00/100 ($2,000.00) dollars worth of barriers costing approximately Two Hundred and 00/100 ($200.00) dollars each, (10 separate barriers by simple math) was a finding of fact by the trial court. The Appellant Court did not rewrite the findings of fact by the Special Referee. It reversed the trial court because the ruling of continued use was inconsistent with the findings of fact contained in the Order regarding the erection of multiple barriers by the servient tract owner. The holding of Pittman v. Lowther supra. is that repeated attempts by the servient tract owner to prevent the dominant tract owner from using the easement can defeat the prescriptive easement. However, the Court in Pittman v. Lowther supra. stated as follows:

> "though the mere erection of gates by the servient landowner for the greater convenience of his operations, and not as a barrier to passage, will not defeat a claim to a prescriptive easement, a passage, an easement of way cannot arise by prescription if the owner of the servient estate has habitually broken or interrupted its use at will by the maintenance of gates." Pittman v. Lowther supra.

The Bowater gate cited by the Appellant in it's brief was the classic gate erected by the servient landowner for the greater convenience of his operations.

That gate was not erected as a barrier to the Respondent's use. The cable was down most of the time, and the Respondent had a key to the gate. (R. p. 249, line 6-14) There is no evidence that the Bowater gate ever interrupted the Respondent's use of the prescriptive easement.

The Appellant also raises a gate erected by the Miller family on their property which was torn down the next day. (R. p. 298, line 10-p. 299, p. 17) The Miller gate is not an interruption that would defeat the prescriptive easement for the following reasons: (1) the Miller gate was not erected by the servient landowner nor was it on the servient estate. It was erected on property not the subject of this lawsuit. (2) The Miller gate was erected and destroyed the next day. It was not the "repeated attempts" to block the Respondent's use required by Pittman v. Lowther supra.

The final gate was erected by the Respondent himself in 2004. (R. p. 302, line 21-p. 303, line 3) The gate demonstrates more than anything else the Respondent's belief that he had a right to control the use of the disputed road. The gate erected by the Respondent and controlled by him was not erected by the servient landowner to interrupt the use by the dominant landowner. The Respondent's gate is like the gate erected by the dominant tract owner in Kelly v. Snyder 2012 W.L.243316 (S.C. App. 2012)

There is no evidence in the record tending to show Pittman v. Lowther supra. repeated attempts to interrupt the Respondent's use of the easement. Therefore, the findings of fact by the Special Referee that the first element of the prescriptive easement was proven should be affirmed.

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

As to this factual issue, the Special Referee made the following findings of

fact:

25. That the disputed roadway was identifiable between December 19, 1947, and April 29, 1969, based on the aerial photographs, Defendant's exhibit 1, 2, 3, and the R. H. Marett plat that identified its location. (July 7, 2011, Final Order p. 9) (R. p. 9, lines 4-6)

34. That the disputed road is the upper portion of Saxon Road which has been in existence for at least sixty (60) years, that the disputed road is the primary access to the thirty-seven (37) acre tract owned by the Defendant, if not the only access, and that the disputed road has been the primary access to the Defendant's property for over sixty (60) years. To the extent that owners have needed to access to the Defendant's tract over the past sixty (60) years they have used the disputed road continuously. Looking at the tax maps, plats, sketches, and aerial photographs of the area, the disputed road prominently appears while no other access way consistently appears. (July 7, 2011, Final Order p. 12) (R. p. 12, lines 6-14)

The Special Referee's findings of fact that the road was identifiable are supported by Defendant's Exhibit 8 which is the Marett plat from September 26, 1960, (R. p. 566) which clearly shows Saxon Road included the disputed portion. The Special Referee's finding is supported by Defendant's Exhibit 6, the 1994 Mylar Tax Map of Kershaw County (R. p. 564) which shows the disputed road in the same location as the 1960 Marett plat. The Special Referee's findings are further supported by the current aerial photo tax map of Kershaw County, Defendant's Exhibit 5, (R. p. 563) showing the disputed road in the same location as the 1994 tax map and the 1960 plat. In addition, the 1956 aerial photo (Defendant's Exhibit 1) (R. p. 559) the 1964 aerial photo (Defendant's Exhibit 2) (R. p. 560), 1969 aerial photo (Defendant's Exhibit 3) (R. p. 561) and the 1974 aerial photo (Defendant's Exhibit 4) (R. p. 562) all show the disputed road in the same location. The Respondent submits that the Special Referee's findings of fact are supported by evidence in the record.

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

The Appellant's challenge to the third element of proof for a prescriptive easement is a challenge to the findings of fact by the Special Referee.

1. Shirley did not establish a valid claim of right.

The Special Referee's finding of fact on the issue of a claim of right is finding of fact number 32 in the Final Order dated July 7, 2011, which stated as follows:

> 32. I find that the Defendant used the disputed road under the belief that he had a right to use the road from 1985 until 2009. This finding is based on the following testimony:
>
> a. The Defendant stated that he believed that he had the rights to use the road. (Transcript page 187 . 7-14)
>
> b. When the Millers blocked the disputed road with a gate on their property, the Defendant took it down the next day after he visited Judge Hardin(sic). (Transcript page 185 l. 10-page 186 l. 17)
>
> c. When the Plaintiff's timber operation blocked the disputed road in 2004, the Defendant told the Plaintiff that the disputed road was his road. (Transcript page 100 l. 17-25) (July 7, 2011, Final Order p. 11) (R. p. 11-p. 12, line 1)

In order to establish that the use was under a claim of right, the party asserting the easement must show a belief that he has a right to use the road based on reasons for that belief. Revis v. Barrett 321 S.C. 206, 457 S. E.2d 460 (S.C. App. 1996) In Revis v. Barrett supra. the belief of the right to use the road derived from the fact that the Plaintiff and her parents had always used the road to access the dominant tract, as in the case at bar (R. p. 288, line1-p.289, line 2); and in Revis v. Barrett supra. the road in question was a former state highway that had been abandoned when the highway changed course. In this case the disputed road is the

continuation of a county maintained dirt road, Saxon Road, and that fact gave the Respondent the belief that he had the right to use the road. (R. p. 301, line 2-8). The Respondent had reasons for his belief that he had the right to use the road which are set out in finding of fact number 32.

The Appellant's reliance on Morrow v. Dyches supra. for the proposition that 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. The witness in Morrow v. Dyches supra. was unable to give any reasons to support the belief he had a claim of right. In this case, the Respondent's reasons for the belief that he had the right to use the road derived from longtime use of the road by himself and his parents, the fact that part of the road was publicly maintained, and as set forth in finding of fact number 32, he consulted a local magistrate, Judge Hardis, when the Miller family blocked a portion of the road on their property, and as a result of that meeting with the Judge, his belief that he had a right to use the road was strong enough for him to take down the barrier. Unlike the Plaintiff in Morrow v. Dyches supra., the Respondent was able to articulate reasons for his belief that he had a right to use the road. These reasons satisfied the trier of fact, and finding of fact number 32 is now controlling on this issue.

2. Shirley did not establish that his use was adverse.

As to adverse use during the period when the Bennett family owned the dominant tract from 1947 to 1969, this issue was controlled by finding of fact number 26 of the Special Referee's July 7, 2011, Final Order set out below with references to the supporting testimony in the Transcript:

26. That the use of the disputed road was adverse from December 19, 1947, until April 29, 1969. Edward Bennett stated that their use of the road was open obvious and without permission. (Transcript page 236 l. 1-14) Rick Miller testified that the Bennetts used the road only with permission from his grandmother. However, Rick Miller's grandmother could not give permission to use the disputed portion of the road because she is not in the Plaintiff's chain of title. Therefore, the grandmother's permission, even if given, does not defeat the adverse use of the disputed portion of the road because it was not on her property. (July 7, 2011, Final Order p. 9) (R. p. 9, line 7-14)

As to the adverse use during the period from 1985 until 2009 when the Shirley family owned the dominant tract, finding of fact 28 of the Special Referee's July 7, 2011, Final Order together with the reference to the supporting testimony in the Transcript controls this issue.

28. 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". (Transcript page 99 l. 18-19) (July 7, 2011, Final Order p. 10) (R. p. 10, line 7-9)

The Special Referee's finding that the use by the Respondent and his family was adverse is further supported by the Respondent's testimony that they transported bulldozers over the road to build a pond on the dominant tract (R. p. 298, line 2-9). The Respondent submits that the transportation of a bulldozer is an open and notorious exercise. The pond built with bulldozers is apparent on the dominant tract on Defendant's Exhibit 5 (R. p. 563).

The Appellant contends that South Carolina law does not permit a prescriptive easement through unenclosed woodlands citing Cleland v. Westvaco 314 S.C. 511, 431 S.E.2d 266 (S.C. App. 1993). Cleland is one of the river landing cases where the prescriptive easement Plaintiff is not the owner of the dominant tract but a member of the public who seeks to establish a prescriptive easement so that the Plaintiff and the public can continue to use the river landing or swimming

hole as the case may be. Tyler v. Guerry supra. is another river landing case. Those cases can be distinguished from the case at bar because they lack a dominant tract and a dominant tract owner Plaintiff. In Cleland, the Plaintiff failed to establish a prescriptive easement because he could not establish that his use was exclusive and was different from the right that could be asserted by members of the general public, i.e. he did not own the land at the far end of the easement. The Court stated, "long term us **by the public** of a road through unenclosed and unimproved woodlands does not give rise to an easement by prescription." (emphasis added) In this case, the Respondent did not rely on use by the public. Respondent's use was exclusive and different from the right that could be asserted by the general public because his family owned the dominant tract at the end of the disputed road over which he claimed the prescriptive easement.

As to adverse use, the Special Referee made a specific finding of fact supported by evidence in the record. Therefore, the Appellant's challenge on the issue of adverse use must fail.

3. Permissive use defeats any claim or adverse use or use under a claim or right.

The Appellant cites the case Williamson v. Abbott 93 S.E. 15 (S.C. 1917) for the proposition that permissive use cannot ripen into adverse use or use under a claim of right. In Williamson the dominant landowner's predecessor in title asked permission of the tenant of the servient estate to dig a drainage ditch across the servient estate before creating the ditch. Permission was given and the ditch was created by permission. The ditch was used for a period of twenty (20) years, but the Court reasoned that the act of requesting permission by the dominant landowner

was contrary to any claim of right by him or claim of hostile, adverse use. In Williamson, the ditch was created by permission. In the case at bar, the road was in existence for decades before any alleged permissive use occurred. In the case at bar, the Respondent never asked for permission to use the road because he believed that he had the right to use it. He did ask the Appellant for permission to obstruct the road by erecting a gate on the servient tract (R. p. 185, line 8-23) but permission to obstruct the road and permission to use the road for ingress and egress are very different.

The Appellant contends that the Respondent's use of the disputed road while the servient tract was owned by Bowater and under a Game Management Program from 1985 until 2003, was permissive because the Game Management Plan allowed the public access to the servient tract for hunting and other wildlife activities. However, the Game Management Program required participants to obtain a permit, separate and distinct from a hunting license in order to enter upon the Game Management leased property. (R. p. 290, line 5-p. 291, line 21) The Respondent testified that he bought the Game Management permits in order to hunt on the servient tract up until his parents bought the dominant tract in 1985, and then he stopped obtaining the Game Management permits. (R. p. 297, line 8-18) Without the required permit, the Respondent was without permission to access the servient tract under the terms of the Game Management Program, and the Special Referee so found (July 7, 2011, Final Order, Finding of Fact 29 p. 10) (R. p. 10, line 10-20). The Special Referee as the trier of fact considered the Appellant's argument that the Respondent received permission from the Department of Natural Resources or Bowater to use the disputed road and rejected the Appellant's argument based on

the lack of evidence of permissive use as a matter of fact. (July 7, 2011, Final Order, Finding of Fact 31 p. 11) (R. p. 11, lines 7-15)

The Appellant argues that testimony to the affect that the Respondent was given a key to a gate or cable on the disputed road during the Bowater ownership of the servient tract proves permissive use. The Special Referee addressed the issue of the key in Finding of Fact 30 which is set out as follows:

> 30. The Plaintiff introduced testimony from the Defendant's deposition to the effect that a game warden who was a friend of the Defendant gave the Defendant a key to a lock on a cable across the disputed road. (Transcript page 119 l. 15-18, page 133 l. 18-20) Chuck Thompson did not testify as to the reason for giving the Defendant the key or whether he had the authority of the owner to give out the key. But the testimony as a whole strongly indicates the Defendant was going to use the disputed road with or without a key by going over the cable when it was down. (Transcript page 131 l. 7-10) When Rick Miller's mother erected a gate without giving the Defendant a key, the Defendant pulled the gate down with his truck. (Transcript page 166 l. 4-18). (July 7, 2011 Final Order, p. 10-11) (R. p. 10, line 21-p. 11, line 6)

The Special Referee as the trier of fact considered the Appellant's argument and rejected it because there was conflicting evidence as to when and whether the cable was actually used to block the road (R. p. 244, line 7-10), and the person who gave the Respondent a key did not testify as to why or under what authority he gave the Respondent a key. (July 7, 2011, Final Order, Finding of Fact 30 page 10) (R. p. 10, line 21-p. 11, line 6) The Bowater or Game Management cable, the record does not clarify who erected it, is like the gate erected by the servient owner for the greater convenience of his operations, not as a barrier to passage mentioned in Pittman v. Lowther supra. which does not defeat an easement by prescription.

The Special Referee ruled against the Appellant on the factual issue of permissive use as a trier of fact because the evidence of permissive use was so

weak, vague and open to more than one interruption. (July 7, 2011, Final Order, Finding of Fact 31, page 10) (R. p. 11, line 7-15) The record contains no evidence where the Respondent ever requested permission to use the road from any party. The Special Referee also cited Revis v. Barrett supra. for the proposition that even the letter from the servient estate's attorney granting the dominant estate's owner written permission to use the road was insufficient to defeat a prescriptive easement based on a claim of right. Under a claim of right theory, proof of adverse use is not required. Finally, the issue of permissive use does not defeat the twenty (20) year adverse use during the years 1947 through 1969 when the Bennett family owned the dominant tract. As to the use during the period from 1985 through 2009 when the Shirley family owned the dominant tract, permissive use is a factual issue that was decided against the Appellant by the trier of fact and is not grounds for reversal.

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

To support this argument, the Appellant cites no cases from South Carolina or any other jurisdiction involving Game Management leases. To support this argument, the Appellant cites no cases from South Carolina or any other jurisdiction involving lands leased by a state or its subdivisions, or any other temporary arrangement terminable at will by the landowner. The Appellant cites an adverse possession case, Davis v. Monteith 289 S.C. 176, 345 S.E.2d 724 (S.C. 1986) involving land owned in fee simple by a school district. The Appellant also cites Kempner v. Aetna Hose, Hook & Ladder Co., 394 A.2d 238 (Del. 1978) involving land owned in fee simple by the City of Newark, Delaware and used by the city for public purposes. That case held:

> "**Title to realty held in fee** by the state or any of its political subdivisions for a public use cannot be acquired by adverse possession." Kempner Supra
>
> "In our opinion there is no reason for not applying the same rule to property which is dedicated or reserved to public use, **when title is held** by the municipality, as is applicable when **it is held by the state**. The same principles which prevent an adverse possession from ripening into a title when the **title belongs to the public**, and is held for public use, apply in the one case as in the other." Kempner supra. emphasis added.

The cases on this issue apply to property owned by the state or it's subdivisions, not to private lands under Game Management. The Special Referee correctly ruled that the WMA program does not rise to the level of fee simple ownership by the state required to defeat a prescriptive easement claim. (February 9, 2012, Order p. 3) (R. p. 24, line 11-19)

Again, this argument does not apply to the prescriptive easement period from 1947 to 1969 when the dominant tract was owned by the Bennett family. The nature of the interest of the State of South Carolina in the servient tract during the WMA period was a question of fact that was considered by the trier of fact. The ruling of the Special Referee on this issue should be affirmed.

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 Appellant argues in Section II c (2) above that the Respondent failed to prove that his use of the easement was adverse. The Appellant argues here that the Respondent's conduct was too adverse, too open, too notorious and too much in derogation of the rights of the owner of the servient tract, and that the Respondent's claim to a prescriptive easement should have been denied under the equitable defense of unclean hands even though this action is one at law. The Appellant is

asking the Court to put the party asserting a prescriptive easement in a box where he can never win. If the evidence of adverse use is too weak, he loses for failing to prove adverse use. If the evidence of adverse use is too strong, he loses because he acted badly and has unclean hands. Like the soup in the story of the three bears, the dominant tract owner must prove adverse use that is not too hot; not too cold; it has to be "just right". To agree with the Appellant on this issue is essentially abolish the prescriptive easement by inventing contradictory obstacles to the proof required of the dominant landowner so that he cannot win. If the Court wishes to abolish the prescriptive easement, it should do so by overruling the prescriptive easement cases rather than by pretending to keep it but requiring proof that sets up every case as a failure in advance.

In this case, there is no evidence that the Respondent assaulted anyone. He did not vandalize any property on the servient estate. He did tear down the gate on the Miller property adjacent to the servient estate, but only after consulting with the local magistrate. (R. p. 298, line 10-p. 299, line 17) His illegal activity was limited to trespassing, which is required to establish a prescriptive easement, and unkind words to the Appellant on the telephone. Considering the circumstances that the Respondent was defending the sole access to his property, his less than exemplary conduct which was mostly verbal, was not that bad.

The judgment as to the level of the Respondent's bad acts was in the province of the trier of fact. The Special Referee heard all of the evidence and the arguments from both sides. He ruled in the February 9, 2012, Order that "the hostile or even illegal acts the Plaintiff complains of on the part of the Defendant do not, in

the Court's opinion, destroy or pollute his prescriptive easement theory." (February 9, 2012, Order p. 3) (R. p. 24, line 6-10) The question of whether the Respondent's conduct was so bad as to bar the relief he sought was one of fact which was decided against the Appellant by the trial Court. The Order of the Special Referee should be affirmed.

CONCLUSION

Prescriptive easement cases are, by nature, fact intensive. The two legal issues raised in this appeal are whether to create a heightened burden of proof in prescriptive easement cases, and whether to apply the equitable doctrine of unclean hands as a bar to recovery in this case. All other issues raised by the Appellant are issues of fact that were decided by the trial judge. Though not perfect, the two Orders from the lower Court herein demonstrate that the trier of fact was aware of the factual disputes raised by the Appellant on appeal and made conscious and deliberate rulings on them based on the evidence in the record. Those rulings on matters of fact should not be disturbed here.

As to the legal issue of the burden of proof, prescriptive easement precedent support the preponderance of the evidence standard applied by the Special Referee. As to the equitable defense of unclean hands, no precedent can be found for its application in a prescriptive easement case. For the reasons outlined above, the application of the doctrine of unclean hands will throw prescriptive easement law into utter confusion as to the standard for adverse use. Finally, the factual issue of the Respondent's conduct as it relates to the defense of unclean hands was considered by the trial Court. The trial Court found that the Respondent's conduct

was not so outrageous as to trigger a bar to relief under the doctrine of unclean hands.

The judgment of the trial Court that the Respondent has established an easement by prescription over the servient tract should be affirmed.

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Dated: June 22, 2012

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

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I served the Respondent's Final Brief by depositing a copy of said documents in the United States Mail, postage prepaid, on June 25, 2012, addressed to his attorney of record, M. Brent McDonald, Esquire, Smith Bundy Bybee & Barnett, P.C., PO Box 1542, Mt. Pleasant, South Carolina 29464 and Stephen A. Spitz, Esquire, 1134 Clearsprings Drive Charleston, S.C. 29412.

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