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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2008–CP–9–135
Appellate Case No. 2012-212463

W. Peter Buyck, Jr., ... Respondent,

v.

William Jackson, ... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I.

The McAlister tract is unenclosed woodland.

Mr. Buyck tells the Court that he cannot acknowledge that the McAlister tract — which he has traveled all his life — is unenclosed. For this reason we must rehash the evidence on this point in more detail than before.

A. The videos.

Defendant's Exhibits 16, 17, and 22 are camcorder videos, each made from the cab of a pickup truck. These are recorded on the disc found in the pocket part inside the back cover of Volume Two of the Record on Appeal. Two of these videos — Exhibits 16 and17 — show that the McAlister tract is unfenced.

1. Defendant's Exhibit 16.

The journey shown on Exhibit 16 begins upon entering the McAlister tract.[1] At the fifty-five second ("0:55") mark of the video is the intersection of the left fork and the right fork. At this point, where the left and right forks diverge, the journey continues on the *right* fork, ending at the boundary between the McAlister tract and Mr. Buyck's 700-acre tract. (The right fork is the one upon which a prescriptive easement is claimed.) Four points on that journey are material: (1) There is no fence where the road enters the McAlister tract from the 200-acre Buyck tract. (2) At the 2:39 mark, an electric pole of Tri-County Electric Cooperative appears to the right of the road. On the Walker plat, Def. Exh. 18, filed separately, this is the second pole north of the arrow pointing to "TRI COUNTY ELECTRIC COOPERATIVE DISTRIBUTION LINE". This is the pole at the point where the electric line turns west at almost a right angle.

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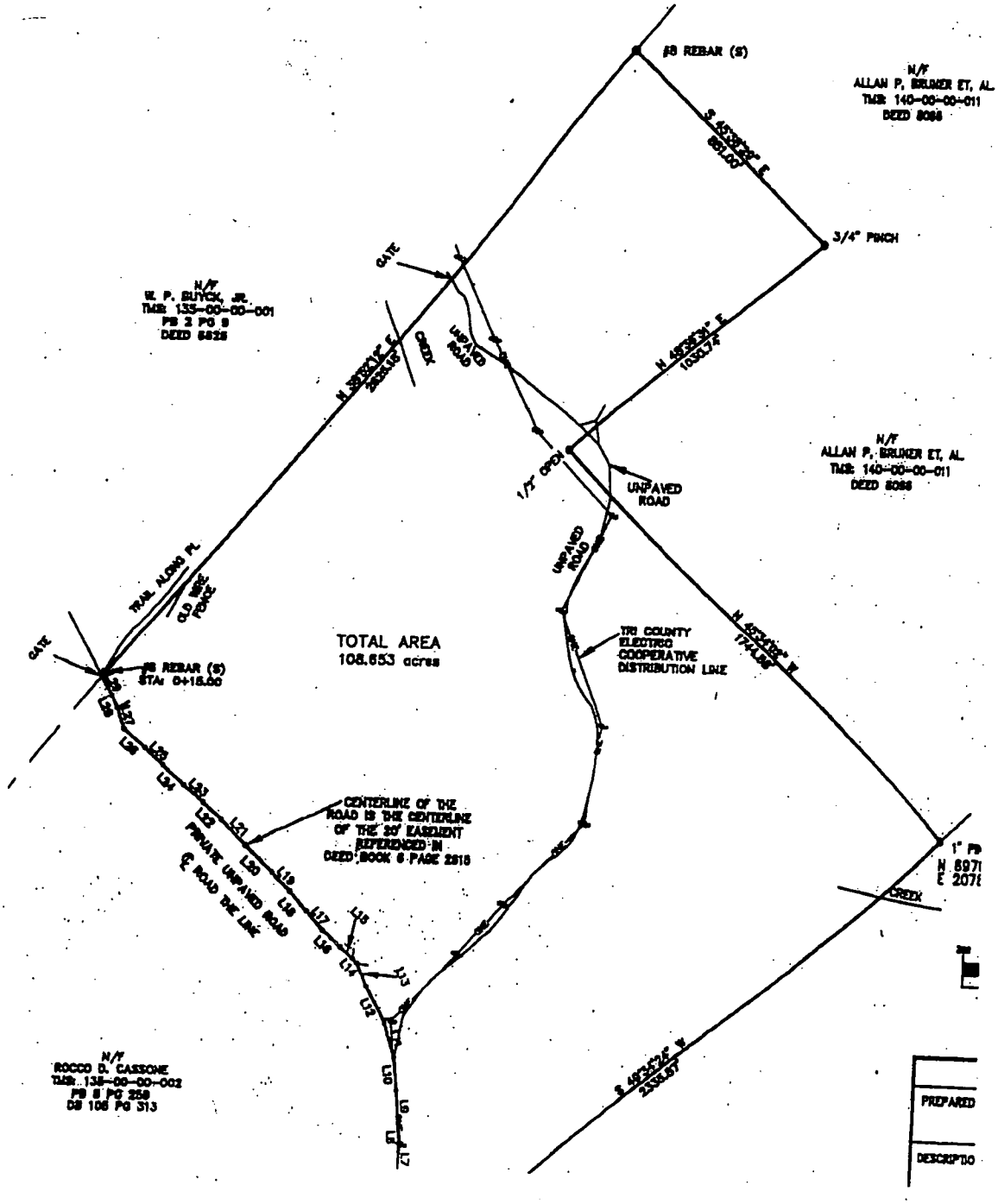
[1] The white pole to the right of the large tree on the right, seen at the start of Exhibits 16 and 17, marks the boundary between the McAlister tract and the 200-acre Buyck tract. [R. 360/14–20.]



A portion of Defendant's Exhibit 18
Mr. Walker's Plat (revised 9/08)

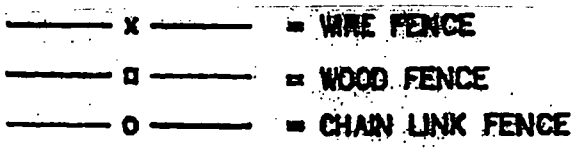
About fifty feet north of that pole is the first boundary between the McAlister tract and the Bruner tract. Judging by the speed of the vehicle filming the journey, this boundary would be reached roughly two seconds after the pole is passed. There is no fence along this boundary between the McAlister tract and the Bruner tract. (3) A further 160 feet roughly is the second boundary between the two tracts. [R. 469/19–22.] This is reached about six seconds later. There is no fence along this boundary. (4) The ride nears its end as the right fork descends steeply and ends at Mr. Buyck's gate on his 700-acre tract. On the boundary there is no fence between the McAlister tract and the 700-acre tract — only Mr. Buyck's gate across the road where it enters his property on its way to the duck pond.

2. Defendant's Exhibit 17.

The journey shown on Exhibit 17 begins, as does Exhibit 16, upon entering the McAlister tract [R. 360/10–15], where there is no fence. At the point where the left and right forks diverge, the journey continues on the *left* fork, ending at the boundary between the McAlister tract and Mr. Buyck's 700-acre tract (near the hayfield). On the boundary there is no fence — only Mr. Buyck's gate across the road where it enters his property.

B. The Walker plat.

Defendant's Exhibit 18 is a comprehensive survey of the northern half of the McAlister tract — Mr. Jackson's half. This is the revised 2000 edition of Mr. Walker's plat. The surveyor's legend shows how wire fences, wood fences, and chain link fences are depicted:



No boundary fences of any kind are shown on this meticulous survey. The legend on the plat must be Mr. Walker's standard legend, for there is no need to depict the markings for

fences when there are no fences.[2]

C. The aerial photographs.

The aerial photographs in evidence — Defendant's Exhibits 6 and 20(A), R. 586 & 617 — show that all this is timberland. These tracts share the one major economic use, and that is timber production. The cost of fencing 200 acres of timberland would be enormous, as a simple Internet search (judicially noticeable) would show.[3] There is no earthly reason to spend such a sum to fence a remote timberland tract surrounded by other unfenced timberland tracts. The Court notices facts within the common knowledge of South Carolinians, *e.g., Abernathy v. City of Columbia,* 213 S.C. 68, 48 S.E.2d 585 (1948), and this is such a fact.

D. The presumption of no fence.

The only evidence is that the McAlister tract is unenclosed today. The inference is that it was unfenced during the prescriptive period.

We know that what became the McAlister tract was unfenced when British settlers first came to Calhoun County[4] in the early 1700's since fences were unknown to the native inhabitants. Because "a condition proven to exist is presumed as a fact to so continue until another condition is proven to exist," *Cave v. Cave,* 101 S.C. 40, 85 S.E. 244, 246 (1915), the presumption is that the tract remained unfenced until proven otherwise. Here, as everywhere in this case, the burden would rest upon the respondent to prove so improbable a thing — that the tract was fenced and then unfenced.

The only reasonable inference from the evidence is that the McAlister tract was

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[2] Mr. Walker found an "OLD WIRE FENCE" about fifty feet in length, roughly 200 feet north of the gate where the left fork meets the 700-acre tract. This is not a boundary fence. It could be the remnant of an ancient hog pen or the like.

[3] Simple geometry and arithmetic show that the perimeter of a rectangular 200-acre tract is roughly 3,000 feet. Thus, it would take more than half a mile of fence to enclose the McAlister tract.

[4] *See* http://www.calhouncountymuseumandculturalcenter.org/index_011.htm

unenclosed woodland throughout the prescriptive period.

II.

The presumption of permissive use of ways across unenclosed woodland has been the law of South Carolina from the start and remains the law today.

The respondent suggests that the presumption of permissive use of woodland ways has outlived its time, despite the fact that the leading case recognizing the presumption was cited by the Supreme Court as recently as 2006, *Boyd v. BellSouth Tel. & Tel. Co.,* 369 S.C. 410, 633 S.E.2d 136, 141 (2006), and by this Court of Appeals as recently as 2003, *Hartley v. John Wesley United Methodist Church,* 355 S.C. 145, 584 S.E.2d 386, 388 (Ct. App. 2003).

Without a doubt the old roads and paths of Calhoun County timberland look the same and are used the same today as they were a very long time ago. If the case at bar were mooted a century ago, the evidence very probably would have been much the same.

Respondent has done an admirable job of attempting to distinguish nearly two centuries of caselaw which place South Carolina squarely in the majority on this issue, but there is no doubt of the presumption that the use of a way across unenclosed woodland is presumed permissive at its inception. Respondent's able counsel know that this Court of Appeals lacks constitutional authority to overrule this line of cases.[5] Should this case reach the Supreme Court, then of course the respondent will be free to persuade that

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[5] S.C. CONST. art V § 9:

Jurisdiction of Court of Appeals; binding effect of Supreme Court decisions.

> The Court of Appeals shall have such jurisdiction as the General Assembly shall prescribe by general law. The decisions of the Supreme Court shall bind the Court of Appeals as precedents.

See: Daniels v. City of Goose Creek, 314 S.C. 494, 431 S.E.2d 256 (Ct. App. 1993).

Court to review its ancient rule. For now, however, the law on this subject is settled and clear:

The use of a way across unenclosed, unimproved woodland is presumed *permissive* until the opposite is proved.

III.

There is no evidence to show that a use presumed permissive at its inception turned hostile.

The respondent says that his licensee, Mr. Medlan, maintained the right fork. Cited in support is a two-word answer to a leading question. Specifically, what Mr. Medlan explained was that "I mean, we still have to cut limbs off, you know, to keep from scratching up vehicles and stuff like that." [R. 421/24 – 422/9.] As the cases cited in our principal brief show, cutting some limbs is not the sort of maintenance which evidences adverse use.

The other evidence relied upon by respondent to show that his use was or became hostile is in two categories: First, Mr. Buyck thought that he had a right to use the right fork. Second, others thought so as well. Evidence in both these categories relates to what people thought, not what Mr. Buyck did.

Recent cases of this Court of Appeals relied upon by the respondent do recite the claimant's belief in his or her right to the use. Indeed, such a belief is essential to a claim of adverse use. But no length of permissive use can ever generate a prescriptive easement. The claimant must bring home to the owner the fact that use presumed permissive has turned hostile. The cases relied upon by respondent all featured evidence of adverse *use* as well as the necessary element of belief. If the Court were to hold that a use which began permissively could turn hostile by what is happening in the mind of the

claimant, we would have another "unique" in South Carolina law.[6] Your appellant does not believe that the Court has ever intended such a result.

As for the evidence that others believed that Mr. Buyck had a right, these witnesses without exception recited their mistaken belief that old roads cannot be closed. Mr. Conrad added to this the fact that he believed — in error — that Mr. Buyck's 1984 express easement from Mrs. McAlister applied to the right fork as well as the left. Mr. Buyck thought so, too. [R. 176/2–14.] It does not.

Mr. Buyck relies upon the fact that no owner of the McAlister tract ever told him not to use the right fork. Mr. Buyck failed to offer any evidence of who owned the McAlister tract during the prescriptive period, much less that he demonstrated to these absentee owners that his use had turned hostile. Neither did the owners of the Pedings tract, the Stuck tract, or the Bruner tract tell him to stop using their segments of the road. This does not evidence acquiescence in hostile use. It evidences traditional neighborliness — the rule not the exception in rural South Carolina.

Fifty years or five hundred years of permissive use does not result in an easement.

IV.

The right fork is not essentially necessary for anything.

Astonishingly, the respondent tells this Court that the left fork (variously called at trial the Blue Road, Road 1, or the Hayfield Road) is little more than a trail and will not accommodate "any vehicle other than an all-terrain vehicle and not by a car or truck without four-wheel drive." [Brief at 32.] The videotape and photographs utterly refute that claim. *See* Defendant's Exhibit 17. The left fork is wide and level, and reaches the 700-acre tract in two minutes less time than the right fork. Mr. Buyck testified that the left fork

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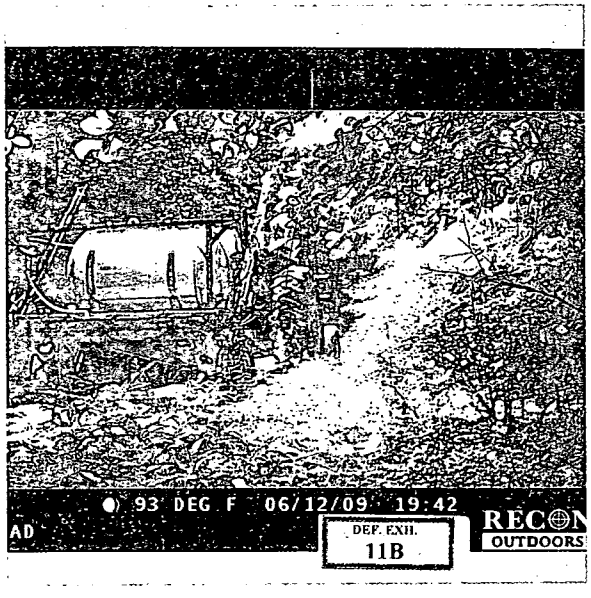
[6] *See* Judge Lanneau D. Lide, "Some 'Uniques' in South Carolina Law," 1 S.C.L.REV. 209 (1949).

is "very narrow. You cannot get equipment through."[7] [Tr. 88.] *The very opposite is true.* The left fork accommodates all manner of heavy equipment. *See, e.g.,* Def. Exh. 11B,[8]

[7] The respondent testified that the left fork is in worse shape than the right fork and is in "terrible condition". [R. 123/5–6.] Mr. Buyck refused to identify his own pickup truck traveling the left fork. [R. 156/21–23. *See* R. 346/7–14; Def. Exh. 7(A), R. 587.]

[8]



Def. Exh. 11B,[8] 11H,[9] 11J,[10] 11L,[11] and 11M,[12] R. 592, 598, 600, 602 & 603,

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which are photographs of the hayfield lessee's heavy equipment moving to and fro on the

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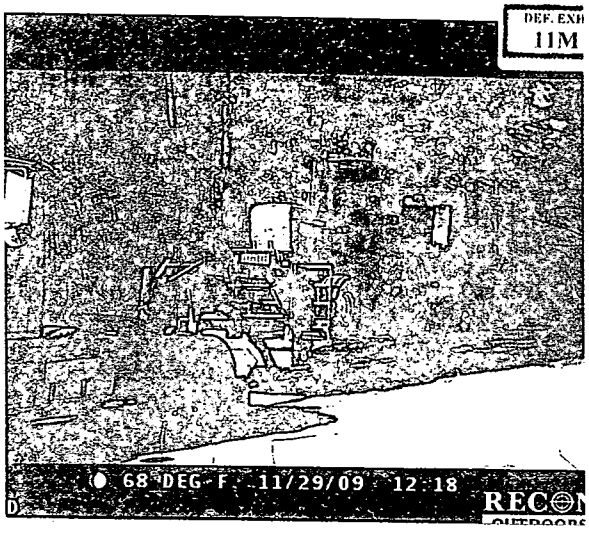

left fork. The left fork is the best of the roads in question. By contrast, it would be difficult for any of this equipment to negotiate the final segment of the *right* fork. *See* the last ninety seconds of Defendant's Exhibit 16, a videotape of the right fork.[13]

Most of the testimony cited by respondent about the condition of roads regarded not the left fork but what was called Road 3 — a road entirely on Mr. Buyck's own property. Road 3 leads from the end of the hayfield, about 200 yards inside Mr. Buyck's 700-acre tract [R. 423/13–20], to the area of the duck pond. This road was cut in the 1980s by Mr. Medlan, who called it a trail. [R. 419/13–19; R. 420/16–20.] The hunt club members spent July 31, 2010 working on this road with heavy equipment. [R. 169/4–24; R. 406/11-14; R. 407/3 – 408/22.] Defendant's Exhibit 22, a video of Mr. Mill's ride upon Road 3 soon before trial [R. 437–38], shows that it is driveable, as Mr. Buyck acknowledged. [R. 170/6 – 171/6.] Of course it is Mr. Buyck's choice to maintain his own roads in whatever condition he pleases.

The respondent does not dispute the fact that the question of whether an easement — if one exists — is appurtenant or in gross goes to the ***scope*** of the easement, and therefore rests on the equity side of the Court. (Respondent characterizes the Court's scope of review in equity as "somewhat broad"! [Brief at 33.]) Of course the sound policy of the Court normally is to defer to the trial court on questions of credibility, even when, as here, the Court has full authority to find the facts. That policy has no application, however, where testimony is so clearly demonstrated to be unworthy of credit.

Taking the left fork and then its continuation on the 700-acre tract via Road 3 adds

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[13] In any case, the condition of the left fork is immaterial. Mr. Buyck enjoys an express easement to use that fork to reach his property. It is his right and his responsibility to maintain it in whatever condition suits his needs. *Khalil v. Motwani,* 376 N.J.Super. 496, 506, 871 A.2d 96, 102 (2005), *citing* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.13(2) (2000); *DeHaven v. Hall,* 753 N.W.2d 429, 437 (S.D. 2008) ("The owner of a servient estate has no duty to maintain the easement. The duty of maintaining the easement rests with the easement owner (*i.e.,* dominant estate) . . . .").

five minutes to the journey to the duck pond. [R. 339/1–5.] If Mr. Buyck chooses not to maintain his own road on his own property to a higher standard, that is no basis to claim that another route over his neighbor's property is essentially necessary to the enjoyment of his property.

The principal *economic* use of the 700-acre tract is harvesting timber. A glance at any of the aerial photographs shows that the left fork, not the right fork, is the obvious route for removing timber from most of the tract.[14] Mr. Buyck cuts some timber every five or ten years. [R. 119/8–18.] In the 2003 harvest, the contractor, Mr. Martin, set up his chipper near the right fork [R. 241–44] since his work was limited to chipping small trees near the river — not removing logs. [R. 241/3–4.] Mr. Martin used the right fork to take out the 2003 harvest. When he cut timber on the 700-acre tract forty years earlier, Mr. Martin "used other roads also on the Fort Motte side." [R. 244/16 – 245/1.] The only other road he could have used on the Fort Motte side was the left fork.

None of these owners ever objected to a neighbor's timber contractor using any convenient road to remove timber. "[W]e never had a problem getting to the timber, I mean, on either side. They always — everybody seemed to be in pretty good with their neighbors. They got along real good. And so, that's why we didn't have a problem, I guess."[15] [R. 244/25 – 245/4.] This exemplifies the permissive, neighborly use of all these roads which has been the hallmark throughout — until the gate key given by Mr. Jackson to his neighbor Mr. Buyck was widely duplicated [R. 417/1–8] and someone later cut the lock. [R. 318/2 – 319/2.]

Testimony cited by respondent to the effect that some of his witnesses did not even

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[14] *See, e.g.*, Defendant's Exhibit 20(A), where the left fork is seen, leading to the hayfield. (The hayfield is the white field, shaped like a reverse image of Indiana.) Please note that the left fork is mis-identified on Def. Exh. 20(B), 20(D), and 20(E).

[15] For example, Mr. Jackson had no objection to Mr. Martin's use of the right fork to remove chips from Mr. Buyck's tract in the 2003 harvest.

know of the *existence* of the left fork has no probative value, and can only be attributed to the poor memory of someone who has not been to the 700-acre tract in a long time. As Defendant's Exhibits 16 and 17 show, about 900 feet after entering the McAlister tract is the fork. The two forks appear in photographs from the 1930s [R. 497/20–24] and in all likelihood are much older than that. The road leading to the fork is the only path to the 700-acre tract from the Fort Motte side. At the fork, one must choose to go left or right. Anyone awake in the car cannot fail to see the left fork.

The respondent's claim of essential necessity boils down to his wish to save five minutes' time when he goes to the vicinity of the duck pond, coupled with his reluctance to maintain his own Road 3 in better condition. A finding that this constitutes essential necessity would turn a new page in the law of easements in gross.

The right fork is essentially necessary for nothing.

CONCLUSION

For these reasons and those given earlier, appellant again urges the Court to reverse.

Respectfully submitted,

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July 10, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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COURT OF COMMON PLEAS

Diane Schafer Goodstein, Circuit Court Judge
Case No. 2008–CP–9–135
2012-212463

W. Peter Buyck, Jr., ... Respondent,

v.

William Jackson, ... Appellant.

CERTIFICATE OF COUNSEL

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

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July 12, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CALHOUN COUNTY
COURT OF COMMON PLEAS

Diane Schafer Goodstein, Circuit Court Judge
Case No. 2008–CP–9–135
2012-212463

W. Peter Buyck, Jr., ... Respondent,

v.

William Jackson, ... Appellant.

CERTIFICATE OF SERVICE

I certify that I served a copy of the appellant's final principal brief and final reply brief upon the respondent by first class mail, postage prepaid, addressed to respondent's attorneys at their address of record, namely:

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