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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.: 2012-208007

W. H. Bundy, Jr., Appellant,

vs.

Bobby Brent Shirley, Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Respondent petitions the Court of Appeals for a rehearing of the above captioned case based on the following points that were overlooked or misapprehended by the Court:

I. The Appellant's entitlement to judgment as a matter of law based on permission granted to the Respondent to erect a gate on the disputed road in 2004 was not raised to the trial court by a proper motion, objection or exception and was therefore not preserved for review.

II. The Court of Appeals misapprehended the language of Stipulation 8(R.p.521) by adding a crucial fact, the Respondent's request for permission to erect a gate in 2004, which fact does not appear in the text of Stipulation 8, or anywhere else in the Record on Appeal and which fact served as the factual basis for the Court's reversal of the trial court.

III. The Court of Appeals over looked the language in Williamson v. Abbott 107 S.C. 397, 93 S.E.2d 15 (1917) that limits the holding of that case to permission granted "in the inception" of the twenty (20) year prescriptive use period by applying Williamson v. Abbott supra. to permission granted nineteen (19) years into the use period.

IV. The Court of Appeals misapprehended the holding of Paine Gayle Properties, LLC vs. CSX Transportation, Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012) by ruling that permission to build a gate automatically defeats an easement by prescription as a matter of law.

V. The Court of Appeals impermissibly invaded the province of the trial court as fact finder in ruling that evidence in the record establishes a permissive character of the Respondent's use of the disputed road; and that the facts

of the case at bar are consistent with the facts in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. which fact finding by the Court of Appeals is directly contrary to the fact finding by the trial court.

VI. The Court of Appeals misapprehended the established twenty (20) year use period requirement to prove a prescriptive easement by ruling that the Respondent was required to offer evidence that the disputed road continued to be used under a claim of right or in an adverse manner between the Bennett Family's use and the Shirley Family's use thereby imposing upon the Respondent a requirement to prove a use period in excess of twenty (20) years.

VII. The Court of Appeals misapprehended the South Carolina common law on the retroactive application of civil decisions when it ruled that Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. can be retroactively applied to the case at bar.

STATEMENT OF THE CASE

The April 10, 2013, Opinion of the Court of Appeals reversed the judgment of the trial court granting the Respondent an easement by prescription. The Court of Appeals held that Stipulation 8 (R. p. 521) included a request for permission to build a gate in 2004 by the Respondent, and that the grant of permission to the Respondent to build the gate defeats a prescriptive easement by claim of right or adverse use of the disputed road under Paine Gayle Properties, LLC vs. CSX Transportation, Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012).

The Court of Appeals also held that the twenty (20) year use period from 1947 to 1968 of adverse use by the Bennett Family could not be used by the Respondent to establish an easement by prescription. The Court ruled that in order to use the Bennett Family's prescriptive use of the disputed road, Shirley was required to offer evidence that the disputed road continued to be used under a claim of right or in an adverse manner between the Bennett Family's use and the Shirley Family's use.

ARGUMENT

I. The Appellant's entitlement to judgment as a matter of law based on permission granted to the Respondent to erect a gate on the disputed road in 2004 was not raised to the trial court by a proper motion, objection or exception and was therefore not preserved for review.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues and thus provide us with platform for meaningful appellant review. Queens Grant II Horizontal Property Regime vs. Greenwood Development Corp. 368 S.C. 342 628 S.E.2d 902 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.

Wilder Corp v. Wilke 330 S.C. 71, 76 S.E.2d 731 (1998). "It is axiomatic that an issue cannot be raised for the first time on appeal. Imposing such a requirement on the Appellant is meant to enable the lower court to rule properly after it has considered all of the relevant facts, law, and arguments." Heron v. Century BMW 395 S.C. 461, 719 S.E.2d 640 (2011).

The Court of Appeals ruled, "Based on the parties stipulations, Bundy's grant of permission for Shirley to build the gate defeats a claim of right or adverse use of the Disputed Road." This would have entitled the Appellant to a directed verdict based on Stipulation 8 (R. p. 521). That motion was not made below. In his final argument, the Appellant stated "we've also cited some cases, your Honor when you've got situations with gates and keys. There is an indication that that is permissive use. We've cited cases for that proposition in our brief. When you look at all of those facts and apply it to the law and the standard required the prescriptive easement fails and fails miserably." (R. p. 375, lines 12-18)

The reference to the cases cited in the trial brief all have to do with the Respondent obtaining a key to use an earlier gate erected by an owner prior to the Appellant, and not to the 2004 gate erected by the Respondent. The Appellant's argument cited above is that gate facts should be reviewed in the context of the applicable standard of proof required to determine whether or not the use was permissive which, as the Respondent will show below, is the correct law of South Carolina. The Appellant never asserted that the erection of a gate by the Respondent with permission from the Appellant entitles the Appellant to judgment as a matter of law which is the holding of the Court of Appeals.

If the Appellant did raise his entitlement to a judgment as a matter of law based on Stipulation 8, the trial judge did not realize it, and failed to rule on it in his extensive twenty-one (21) page Final Order. The trial judge understood the

Appellant's argument to pertain to the Bowater gate as explained above. See Findings of Fact 30 and 31 (R. p. 10-11).

If the issue had been raised by the Appellant, and the trial judge merely forgot to rule on it, the Appellant could have raised the issue with the thirty-seven (37) other exceptions taken to the trial judge's Final Order in the Appellant's Motion to Alter or Amend pursuant to Rule 59 S.C.R.C.P(R.p.55-61) The Appellant raised thirty-seven (37) exceptions to the ruling of the trial judge in his Motion to Alter or Amend, but the issue of the Appellant's entitlement to judgment as a matter of law based on Stipulation 8 was not among the thirty-seven (37) exceptions.

The case cited by the Court of Appeals as authority for the ruling that permission to erect a gate automatically defeats a prescriptive easement, Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. was not decided or published until after the Final Briefs had been filed in this appeal. The Appellant did not raise the issue below because he did not know to do so. This is the difficulty inherent in retroactively applying cases decided after a case has been tried. If the Respondent is to suffer the consequences of retroactive application of a case he could not know would affect his trial strategy, then the Appellant must also suffer the consequences of his failure to see the future and raise the issue at trial.

The issue of whether permission to build a gate automatically defeats an easement by prescription was never litigated in this case, nor was it even mentioned in oral argument on January 9, 2013. The Respondent was given no opportunity to argue against the proposition cited by the Court of Appeals as it's grounds for reversal. As to this issue, the Petition for Rehearing is actually a petition to have this matter heard for the first time. The decision of the Court of Appeals is grossly unfair to the Respondent and amounts to a denial of his right to procedural due process including the right to be heard on this issue.

II. The Court of Appeals misapprehended the language of Stipulation 8 (R. p. 521) by adding a crucial fact, the Respondent's request for permission to erect a gate in 2004, which fact does not appear in the text of Stipulation 8, or anywhere else in the Record on Appeal and which fact served as the factual basis for the Court's reversal of the trial court.

The April 10, 2013, Opinion of the Court of Appeals is based on one essential fact, that the Respondent sought the Appellant's permission to erect a gate and received that permission, erecting the gate in 2004. The opinion states, "The parties also stipulated that Shirley asked Bundy for permission to build a gate on the disputed road in 2004" It further states, "Assuming Shirley's use of the disputed road was permissive from 1985 until Shirley asked permission to build the gate in 2004...". The Court's reference to the Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. case as the legal authority for the reversal, makes reference to the party seeking permission to install a gate on the access road. It is clear from these statements that the Court of Appeals read into Stipulation 8 a request by the Respondent for permission to build a gate.

The actual text of Stipulation 8 is as follows:

(8) In 2004, Shirley put up a gate located on the property line between the Bundy property and the property of the Miller Family with the permission of Bundy. (R. p. 521)

Stipulation 8 does not say that Shirley asked Bundy for permission. When Shirley was asked about the erection of the gate in his deposition on September 17, 2009, the Respondent testified that the gate was Bundy's idea as follows:

Q. Okay. Did you put a gate up out there at any point?

A. Me and Mr. Bundy both agreed to put the gate up.

Q. Okay.

A. He was the one that wanted me to put the gate up.

Q. Mr. Bundy wanted you to put the gate up?

A. Yes, sir. He said listen, I said well I got a gate and we'll both put it up.

(R. p. 230 lines 14-23)

Q. Did you bring the posts to help him put the gate up?

A. Yes, I did.

Q. Why did you put the gate up?

A. Why did I put the gate up? Because Mr. Bundy wanted a gate up. That would serve for both of us.

Q. Why would it serve for both of you?

A. It would keep people from taking trash out and dumping it in the roads that we had to clean up, and keep night riders out.

(R. p. 235 lines 7-17)

Q. So you thought if you had Mr. Bundy's permission to put a gate up–

A. No, he wanted to put it up.

Q. Okay, But you put the gate up, that much is clear?

A. Yeah, I guess. I put the gate up.

Q. And you put the gate up because you thought you had Mr. Bundy's permission?

A. Mr. Bundy wanted to do that.

Q. Okay.

A. And I said hey, that's just right, that's just right for both pieces of property.

Q. Okay. Is that a yes?

A. Yes, sir. That's just what I said. He wanted to do it. That was just right

for me. I said that's just right. Keep people out.

(R. p. 241 lines 2-17)

So the Respondent testified clearly that the gate was the Appellant's idea.

The Appellant testified about the gate, he testified as follows:

> And I was out in front of my house. I may have had a mail box then. I may not have. I may have been out there walking. I don't know what I was doing. I can't remember. Mr. Shirley said that I was jogging. That may well be true. At any rate, his – he and his father pulled over to the side of the road, and we had a discussion. And the notion of a gate came up at – where I showed you when we saw the video that Mr. Shirley and I had a discussion about a gate. And I gave him permission to put a gate up and permission to cross my land. And my recollection is at some point in time he may have delivered a key to me, but I never used it. That was not an access or a route that I used. So I never – I doubt I ever used that key.

(R. p. 185 lines 8-23)

The Appellant also testified as follows:

A. Well, yeah, but the property right he was asserting was a little different the second time. The second time he was asserting that I had no right to have him remove his property from my property. That once I had given him permission — as near as I can reconstruct it, is that once I had given him permission to put a gate on my property, that from that point forward the gate could not be moved. That it was his gate. And it was — to the extent that it was there, I had no dominion or control over what was on my property.

Q. Was it in that conversation or the first one that he said, "That is my damn road," or something to that effect?

A. That isn't what he said, but that is close enough. He took – yeah. He took the position that it was his road, his gate. And essentially, you know, I had no rights in and about that road. It was not only his right, but the fact that I had none. He was going to tell me what to do, how to use my property, when I could use my property, and for what use

I could make of my property. That is pretty –

(R. p. 213 lines 6 - p. 214 line 3)

The Respondent testified that the Appellant's grant of permission was spontaneous without a request for permission or seeking permission from the Respondent. The Appellant's testimony does not contradict spontaneous grant of permission. The assumption by the Court of Appeals that the Respondent sought permission to erect the gate is wholly absent from the record. The repeated references to the request for permission in the Court's opinion and the reference to the party asserting a prescriptive easement seeking permission to install a gate after the citation of Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. clearly establishes that the Court of Appeals based its ruling on the Respondent's request for permission to erect the gate which in turn, made Paine Gayle Properties, LLC vs. CSX Transportation, Inc. applicable. Without the request for permission, Paine Gayle Properties, LLC, becomes factually distinguishable from this case, and the legal authority for the ruling of the Court of Appeals collapses.

III. The Court of Appeals over looked the language in Williamson v. Abbott 107 S.C. 397, 93 S.E.2d 15 (1917) that limits the holding of that case to permission granted "in the inception" of the use of the easement by applying Abbott to permission granted nineteen (19) years into the use period.

Williamson v. Abbott supra. Involves a logical fact situation where permission to use the right of way to maintain a ditch was sought by the dominant tract owner at the outset, before the ditch was dug. Williamson v. Abbott held, "if permissive **in it's inception** such permissive character will continue of the same nature and no adverse user can arise until there is a distinct and positive assurance of right hostile to the owner and brought home to him."

The facts in this case relied upon by the Court of Appeals in its ruling are that the Respondent requested permission to use the road nineteen (19) years after his family acquired title to the dominant tract. This fact situation has no precedent in the common law because it has probably never happened that an adverse user decides to seek permission for the use after nineteen (19) years of adverse use. Williamson v. Abbott supra. does not apply because its language limits its holding to permission at the inception of the easement. There is no case in South Carolina common law holding that the adverse/claim of right use period can be cutoff by the spontaneous grant of permission by the servient landowner. The South Carolina permissive use cases all go back to Williamson v. Abbott supra. which requires permission in the inception of the use period.

On page 2 of the Opinion, the following sentence appears, "Assuming Shirley's use of the Disputed Road was permissive from 1985 until Shirley asked permission to build the gate in 2004, the nineteen (19) year time period is insufficient to establish a prescriptive easement." The Respondent cannot tell whether the Court meant to say assuming Shirley's use the Disputed Road was adverse from 1985 until Shirley asked permission to build the gate in 2004 the nineteen (19) year time period is insufficient, or whether the Court is actually applying an assumption relating the perceived 2004 request for permission back to 1985 under some sort of retroactive application. If this statement is an assumption written backwards, it is indicative of the inattention to detail that pervades the entire opinion (note that even the date of oral argument in the caption is wrong). If this sentence is an attempt to relate 2004 permission back to 1985 in order to equate the 2004 permission with permission in the inception in 1985, no authority is cited by the Court for the retroactive application of permission, so it appears to have no basis in law or fact. Either way, the sentence beginning, "Assuming Shirley's use of

the Disputed Road was permissive from 1985," is unintelligible and is reason, in and of itself, to grant a Rehearing in this case so the Court can explain what that sentence meant.

Williamson v. Abbott supra. applies to permission given in the inception of the use period, not to spontaneous permission granted nineteen (19) years later. There is no authority for a nineteen (19) year retroactive application of permission as assumed by the Court of Appeals.

IV. The Court of Appeals misapprehended the holding of Paine Gayle Properties, LLC vs. CSX Transportation, Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012) by ruling that permission to build a gate automatically defeats an easement by prescription as a matter of law.

The case relied upon by the Court of Appeals to reverse the trial court is Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. filed on November 14, 2012, after the Final Briefs had been filed on this appeal, and which case was not mentioned in the oral arguments on January 9, 2013. The trial court had no opportunity to rule on any matters of law arising from Paine Gayle Properties, LLC as discussed above. The Respondent had no opportunity to brief that case or even respond to it in oral argument as it was not mentioned. The ruling of the Court of Appeals is that permission to build a gate automatically defeats a prescriptive easement which is contrary to the existing law in South Carolina at the time of the filing of this case, and is contrary to the holding in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra.

Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra came to the Court of Appeals as an appeal from a grant of Summary Judgment to the servient tract owner based on the facts set out in testimony and various affidavits which form the record in that case. The Court of Appeals cites Williamson v. Abbott supra. as

its authority on permissive use which applies only to the use of the right of way itself. Williamson v. Abbott supra. does not involve a gate or any other ancillary structure on or about the right of way. Its discussion of permission applies only to the use of the right of way itself. In order to make the leap from permission to erect a gate to permission to use the right of way the Court must find some authority other than Williamson v. Abbott supra. because it does not involve a gate.

The Court of Appeals in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. did not confuse permission to erect a gate with permission to use the road in dispute. The Court of Appeals treated permission to erect the gate as one fact tending to shed light on the relationship between the dominant tract owner and servient tract owner. It considered the dominant tract owners' intent in seeking permission to build the gate together with the rest of the testimony and affidavits, some of which admitted that the railroad had given tacit permission to cross the right of way. The Court of Appeals affirmed the trial court's determination that "the overall tenor of the affidavit (discussing the gate) is that the landowner's use was with the railroad's permission and in recognition of the railroad's rights." In Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra., the Court of Appeals focused on the permission to use the road, not permission to erect the gate which is a correct application of South Carolina law.

Contrast the "overall tenor" of Gayle's affidavit in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. with the "overall tenor" of the following testimony from the Appellant, Bundy, about Shirley's attitude concerning the gate in the case at bar:

> A. Well, yeah, but the property right he was asserting was a little different the second time. The second time he was asserting that I had no right to have him remove his property from my property. That

once I had given him permission — as near as I can reconstruct it, is that once I had given him permission to put a gate on my property, that from that point forward the gate could not be moved. That it was his gate. And it was — to the extent that it was there, I had no dominion or control over what was on my property.

Q. Was it in that conversation or the first one that he said, "That is my damn road," or something to that effect?

A. That isn't what he said, but that is close enough. He took – yeah. He took the position that it was his road, his gate. And essentially, you know, I had no rights in and about that road. It was not only his right, but the fact that I had none. He was going to tell me what to do, how to use my property, when I could use my property, and for what use I could make of my property. That is pretty –

(R. p. 213 lines 6 - p. 214 line 3)

The "overall tenor" of the evidence in Paine Gayle Properties when the Court of Appeals analyzed all of the evidence was that the dominant tract owners showed great deference and submissiveness toward the railroad in using the right of way. The conversation surrounding the erection of the gate was but one piece of evidence shedding light on that relationship. The "overall tenor" of the evidence in the case at bar, according to the Appellant, is that the Respondent showed no respect for the Appellant's rights in using the road or in the gate itself. The deference and submissiveness demonstrated in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. is altogether absent in this case. The cases are factually distinguishable.

The trial judge in the case at bar considered Stipulation 8 regarding the gate erected by the Respondent in context with all of the other evidence of record just as

the Court of Appeals did in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. reaching the opposite conclusion that in this case, the "overall tenor" of the Respondent's use was adverse and under a claim of right. In reversing the trial court, the Court of Appeals took Stipulation 8 out of context and even altered its language, ignoring the balance of the evidence introduced over a two (2) day trial.

Again, permission to erect a gate or any other ancillary device about the easement is not fatal to the prescriptive easement. It is only relevant in so far as the discussions surrounding the grant of permission to erect the gate shed light on the character of the use of the road. Permissive use of the road from its inception is fatal; permission to erect a gate may be a relevant fact, but it is not automatically fatal under Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra or Williamson vs. Abbott, supra. Permission to build a gate is to be considered with other evidence by the trier of fact following the model analysis in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. in order to reach a correct result on the real issue which is permission to use the road itself.

V. The Court of Appeals impermissibly invaded the province of the trial court as fact finder in ruling that evidence in the record establishes a permissive character of the Respondent's use of the disputed road; and that the facts of the case at bar are consistent with the facts in Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. which fact finding by the Court of Appeals is directly contrary to the fact finding by the trial court.

The determination of the existence of an easement is a question of fact in a law action Jowers vs. Hornsby 292 S.C. 549, 357 S.E.2d 710 (1987). In an appeal from an action at law tried by a judge, the judges factual findings will not be disturbed unless found to be without evidence which reasonable supports them.

Towns Associates, LTD, vs. City of Greenville 266 S.C. 81, 221 S.E. 2d 773 (1976).

As demonstrated above, the issue used by the Court of Appeals to reverse the trial court was never raised below, i.e. the permission to erect a gate from Stipulation 8 automatically entitled the Appellant to judgment as a matter of law. However, the trial judge did consider and rule on the correct issue which is whether the road itself was used by the Respondent with permission. The ruling of the trial court is stated on page 20 of the Final Order dated July 7, 2011, as follows, "As to the evidence presented by the Plaintiff of permissive use, I find that the propondernce of the evidence including that of the violent outburst by the Defendant establishes that the use of the disputed road by the Defendant was adverse and hostile." (R. p. 20)

In its April 10, 2013, Opinion, the Court of Appeals substituted its finding of fact of permissive use for the clear finding of fact by the trial court on that issue. Even if the Court of Appeals were to go back and correctly analyze the permission to erect the gate in context with the other evidence, the issue of permissive use of the road is still controlled by the factual finding of the trial court concisely stated above. Prescriptive easement cases are controlled by their facts, and where a trial judge meticulously rules on the factual issues in a twenty-one (21) page order as was done in this case, then a reversal of the trial court under the law of South Carolina is nearly impossible. In this case, the Court of Appeals either ruled that permission to erect a gate automatically defeats a prescriptive easement which issue was not raised to the trial court, or it performed an analysis of the evidence of record and substituted its finding of permission use for the finding of fact by the trial court which is not permitted under the standard of review. Either way, the trial court should have been affirmed and Rehearing is warranted.

VI. The Court of Appeals misapprehended the established twenty (20) year

use period requirement to prove a prescriptive easement by ruling that the Respondent was required to offer evidence that the disputed road continued to be used under a claim of right or in an adverse manner between the Bennett Family's use and the Shirley Family's use thereby imposing upon the Respondent a requirement to prove a use period in excess of twenty (20) years.

To establish an easement by prescription one must show: (1) continued and uninterrupted use for twenty (20) years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or other a claim of right. Horry County v. Laychur 315 S.C. 364, 434 S.E.2d 259 (1993). The common law does not require that the use period be the most recent twenty (20) years. The common law does not require that the use period include the ownership period of the parties seeking to prove the easement. Neither of these requirements have ever made an appearance in a South Carolina prescriptive easement case. To require either is to add requirements to the proof of a prescriptive easement without any authority or precedent; reading into the cases a requirement that is not there. The requirement is a twenty (20) year use period, and it has been repeated over and over again without any reference to the most recent twenty (20) year period or a twenty (20) year period including the party's ownership of the dominant tract.

A party may "tack" the period of use of prior owners in order to satisfy the twenty (20) year requirement period Morrow v. Dyches 328 S.C. 522, 492 S.E. 2d 420 (1997). This means that a party with an ownership period of less than twenty (20) years may combine, tack, his sub twenty (20) year period with a prior owner or owners until the combined ownership periods add up to twenty (20) years .

Tacking is not an issue in the case at bar because the Shirley family owned the dominant tract for twenty (20) years, and the Bennett family owned the dominant

tract for twenty (20) plus years. Neither the Shirley period nor the Bennett period had to be supplemented by another ownership period by employing the doctrine of "tacking".

Following the common law as it is written and repeated verbatim in every prescriptive easement case, the trial court's ruling that the Bennett family met the prescriptive easement requirements as a matter of fact from 1948 until 1969 establishes a prescriptive easement without resort to tacking. "Once a right of way by prescription has been established by twenty (20) years on continuous use, a later diminishment in the frequency of that use does not necessarily nullify the established right by prescription." Cuthbert vs. Lawton 3 McCord 194, 14 S.C.L. 194 (Ct. App. 1825); Jones vs. Daley 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005). The common law requires one twenty (20) year period, not twenty (20) years and one (1) day, not twenty (20) plus the time between 1969 and 1985, just twenty (20) years. To require more is to add elements of proof to the prescriptive easement that are not there. Once again, the trial court accurately followed South Carolina common law on prescriptive easements as it written and should be affirmed as to the establishment of a prescriptive easement during the Bennett period. Again, this is an issue of fact which should not be disturbed on appeal where there is any basis for the findings of fact made by the trial judge.

VII. The Court of Appeals misapprehended the South Carolina common law on the retroactive application of civil decisions when it ruled that Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. can be retroactively applied to the case at bar.

The general rule regarding retroactive application of civil decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied

retrospectively. Toth vs. Square D Company 298 S.C. 6, 377 S.E. 2d 584 (1989). Prospective application is required when liability is created where formerly none existed Marcum vs. Bowden 372 S.C. 452, 643 S.E.2d 85(2007).

The rules on retroactive application of cases are most often set forth in situations where the newly decided case is decided after the facts of the case on appeal arose, but before the trial of the case on appeal so the issue of retroactivity can be raised to the trial court. The rules on retroactive application do not abrogate the rules on issue preservation or relieve the party to benefit from the newly decided case from the duty to raise the issue to the trial judge. In the case at bar, Payne Gayle Properties, LLC vs. CXS Transportation, Inc. supra. was decided after the trial so that the gate permission rule was not, and could not have been ruled on by the trial court.

In its April 10, 2013, Opinion, the Court of Appeals has ruled that Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra creates a new substantive right for the servient landowners in prescriptive easement cases, that being the right to judgment as a matter of law where permission to erect a gate, as opposed to permission to use the right of way, is granted to the dominant tract owner. The case, as interpreted by the Court of Appeals in its April 10, 2013, Opinion, creates a new affirmative defense in prescriptive easement cases. The Court of Appeals stated, "Based on the parties stipulations, Bundy's grant of permission for Shirley to build the gate defeats the claim or right or adverse use of the disputed road." Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra is cited as the authority for this new affirmative defense in prescriptive easement cases. As demonstrated above, permission to erect a gate, by itself, has never been held to defeat a prescriptive easement before in South Carolina common law. A decision creating a new affirmative defense creates a new substantive right just as surely as a decision

creating a new cause of action.

The injustice of applying a case decided after the appeal briefs were filed is manifest. The Court of Appeals has decided this case on an issue that was never litigated by the parties or addressed to the trial judge. On this basis alone, rehearing should be granted.

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PROOF OF SERVICE

I certify that I served the Respondent's Petition for Rehearing by depositing a copy of said documents in the United States Mail, postage prepaid, on April 24, 2013, 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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