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.

RETURN OF APPELLANT TO RESPONDENT'S PETITION FOR REHEARING

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Argument in Reply

I.

Respondent's New Argument, First Made In His Petition For Rehearing, That A Stipulation of Fact Was Never Raised Or Argued Below, And Therefore Was Not Properly Preserved For Appellate Consideration, Is Clearly Erroneous As A Matter of Law.

In Bundy v. Shirley, this Court reversed the Special Referee. As Appellant Bundy ("Bundy") reads the Court's recent decision, this reversal was based on two independent reasons:

1. Respondent Shirley did not establish on the record that his use of the Disputed Road was adverse or under a claim of right for twenty years, in part, based upon a Stipulation of Fact made by the parties themselves in this Record. *See* Stipulation #8 ("In 2004, Shirley put up a gate located on the property line between the Bundy Property and the property owned by the Miller Family with the **permission** of Bundy") Emphasis supplied.

2. The Special Referee made an error of law in finding that if Respondent Shirley established "a prescriptive easement during the Bennett ownership period of time, it [was] unnecessary to establish a prescriptive easement during the Shirley ownership period" because Shirley was unable to "tack" the period of prior owners to satisfy the 20 year prescriptive easement time period to his own time period due to his failure to put in any evidence of the use of the disputed road from 1968 to 1985.

3. In light of the first two conclusions, this Court further concluded it was simply unnecessary to address Bundy's remaining arguments on appeal.

Respondent Shirley ("Shirley"), in his Petition for Reconsideration, now argues for the very first time, that the question of the permissive use, and the stipulation of facts, particularly Stipulation Number 8, was neither raised nor argued below to the Special Referee and was not preserved for review by this Honorable Court.

There are several responses to this brand new argument. The first is for this Court to simply review Bundy's brief on appeal to this Court. In that document, Bundy repeatedly argued,

among many other matters, that Shirley's use with permission and consent defeated his adverse possession claims and that this was based upon the Stipulation of Fact:

1. See Page 13 of the Bundy Brief on Appeal (Squarely arguing permission comes directly from Stipulation of Facts);

2. See Page 20 of the Bundy Brief on Appeal (Again, squarely arguing permission came directly from Shirley's request to put up a gate and constituted an "interruption" of any adverse use);

3. See Page 26 of the Bundy Brief on Appeal (Again, squarely arguing permission came from both testimony of Bundy and Shirley and from a stipulated fact: "Finally, Bundy and Shirley both testified that Shirley put a gate with the 'permission' of the Bundy. **This is also a stipulated fact.**" (emphasis supplied).

Therefore, Bundy repeatedly argued the significance of the stipulated fact as establishing permission as a matter of law. It is also interesting to look carefully at Shirley's Brief on appeal.

In Shirley's brief in this Court, in direct response to Bundy's brief, it is telling (and highly significant in Appellant's opinion) that Shirley **never raised any concern** that a stipulated fact was being argued for the first time on appeal. He never argued that this was an issue that he was surprised or shocked about, or that it was a matter that Shirley had never heard of previously, or that the stipulated facts had not been properly put into the case, or that (somehow) this argument was now being raised for the very first time. Not a single word concerning preservation of issues or surprise or failure to preserve was even mentioned by Shirley in his Appellate brief. In fact, all of these arguments only showed up, for the very first time ever in this case in Shirley's Petition for Rehearing. In short, on the ground that Shirley has never even argued this question previously, this brand new argument is unavailing.

Second, and perhaps even more fundamentally significant and totally independent of the fact that this issue of error preservation was never previously discussed in Shirley's Brief on Appeal, it is a truly uncontested fact that Bundy raised these issues repeatedly at every stage of this action.

Specifically, the Court is asked to take note of the following:

1. The very first thing that happened in the lower court was the following, "The Court is informed that there exists certain stipulations of evidentiary matters which might simplify the process going forward. **See R. at p. 117, lines 14-16.**

2. Appellant's counsel then read into the record a number of matters, specifically including - at the very start of the case - Stipulated Fact No. 8. **See R. at p. 122, lines 18-21. Stipulated Fact No. 8 was explicitly raised and submitted to the Lower Court without objection of any kind whatsoever.**

3. In short, this matter was fully raised and put into the case for all purposes below, at the very start of the lower court proceeding, with the Lower Court itself noting: **"I will file these stipulations** which I will note for the record have been executed by Mr. Babcock and by Mr. Wells on behalf of their respective clients. **See R. at p. 122, lines 22-25.**

4. The Lower Court added the following in admitted the Stipulations of Fact into the case, "There is no issue as to any of these – anything in the chain of title, plats. **All of that comes in.** No clerk, no other stuff therein?"

   Mr. Babcock: "That's correct, Your Honor."

   The Court: Very well. All right. **R. at p. 123, lines 1-7.**

Shirley's current argument misconstrues the legal significance and effect of a stipulated fact. As a general rule of law, in South Carolina and everywhere else as best as Appellant can determine, it is settled that "A stipulation admitting or agreeing on the existence of designated facts for the purpose of the trial is binding on the parties and the court." C.J.S. Stipulations, Section 78 (Effect of Stipulation to Facts). C.J.S. expressly further notes:

> Parties routinely stipulate to easily proven facts and courts encourage such stipulations to narrow issues and to promote judicial economy. Whenever the enforceability of a stipulation among parties in a civil case is put in issue, the trial court must begin its analysis with the recognition that **fashioning of stipulations has long been favored and encouraged** as a means of expediting and simplifying the resolution of disputes.

C.J.S. Stipulations, Section 78 (Emphasis supplied). Naturally, a stipulated fact is hardly the ultimate legal conclusion, as it is very clear that courts are still required to reach their own conclusions of law. Still, it has also been long settled, to quote C.J.S. Section 78 one more time:

> A plaintiff may even stipulate so as to vitiate their claim entirely, where the party admits facts that conclusively bar a right to recovery. On the other hand, a defendant may, by stipulation, admit every fact essential to a valid cause of action against him or her, or become foreclosed from relying on a particular ground of defense[1].

Id. Indeed, under South Carolina law (as well as elsewhere), where neither party has even asked to be relieved from the terms of the stipulation the parties remain bound by their agreement to admit facts stated in the agreement. See American Sur. Co. v. Hamrick Mills, 194 S.C. 221, 9 S.E.2d 433 (1940).

Of course, merely because there was a stipulation of facts in this case, it hardly means that this Court did not very properly review whether the trial court properly applied the law to those facts. In such cases, the Appellate Court is not required to defer to the trial court's own legal conclusions.[2] It turns settled law concerning Stipulations of Fact truly upside down and inside out, to insist, as Shirley argues now in his Petition for Rehearing, that a matter he voluntarily, willingly, and knowingly stipulated to – was never even raised or argued below at trial.

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[1] Citing for authority cases from Ohio, Utah, Tex, Tenn, Idaho, Kan, Idaho, Okla, and a number of federal decisions, including 2nd Circuit cases and Court of Claims cases.

[2] See for a fairly recent example, then Chief Judge of the Court of Appeals, the Honorable Judge Hearn, in the Allstate Insurance Co. v. Estate of Hancock, 345 S.C. 81, 545 S.E. 845 (S.C. App. 2001) (drawing this very distinction)

The very process of stipulating in open court to eight specific factual points – brings these matters into the case, and as a matter of law, they are deemed to have been properly raised and argued both at the trial and appellate level based upon the very act of stipulation. It goes without saying that stipulations are binding upon those who make them. See Thompson v. Steel Erectors, 632 S.E.2d 874 (S.C. App. 2006); Kirkland v. Allcraft Steel Co., Inc, 329 S.C. 389, 392, 496 S.E.2d 626 (1998). Thus, on the ground that Respondent and Appellant both knowingly, willingly and in open court below, authorized the question of the gate being put up with Bundy's permission to be "stipulated as a fact," Stipulation No. 8 was properly preserved for argument on appeal. It seems quite odd to suggest this matter was not properly preserved when Shirley himself agreed to its admissibility below.

Additionally, it is quite significant that long before Stipulation No. 8 was ever agreed to between the parties, and long prior to the actual court hearing below being held, Shirley was fully aware of Paragraph 11 of the Bundy's Amended Complaint. In the Amended Complaint, the special Referee and Shirley were fully appraised that one of Bundy's primary theories in this case was that Shirley's use had always been based upon permission from Bundy himself (as well as Bundy's predecessors).

Specifically, Bundy's Amended Complaint reads:

> 11. After becoming aware of the revocable license or **permission** given by his predecessor in title to the Defendant and / or Defendant's parents, the Plaintiff extended the same courtesies and **granted the Defendant permission** to travel over his property. *See* R. at p. 33 (Amended Complaint of Appellant) (Emphasis supplied).

As stated in C.J.S. Section 84 (Effect of Admission of Fact on Pleading), it is settled law that "a stipulation as to facts incorporates into the pleadings all the facts agreed on, and may cure a defect in the pleadings." In fact, C.J.S. Section 84 further notes that, "if the parties stipulate or

admit facts into the record, it is unnecessary to plead them at all." In this case, Shirley was on full notice that Bundy was claiming permissive use from the outset of the case, as one of many legal defenses to Shirley various claims of a prescriptive easement pursuant to a claim of right. Stipulation No. 8 was entered onto the record because Shirley and Bundy both fully agreed that this fact is totally accurate and was truly uncontested. *See* Bundy Brief on Appeal, Pg. 13 (citing testimony from both Bundy and Shirley that everyone agreed that Shirley asked Bundy if he could put up a gate on Bundy's property). Upon the admission of this fact, it was then only up to the Special Referee at trial, and ultimately this Court on appeal, to determine the proper legal conclusions to be drawn from this agreed upon fact. On this ground as well, and particularly in light of the Amended Complaint, it is untenable to even argue that the question of permissive use was not properly raised and argued and properly preserved[3].

In sum, permissive use was properly pled by Bundy and directly raised to the trial court. Shirley was on notice that Bundy intended to raise this as a defense. Prior to trial, permissive use was knowingly stipulated to in open court. *See* Stipulation No. 8. Permissive use was also addressed in the closing argument and directed verdict motions as well as post trial motions. It was repeatedly and vigorously relied upon and argued in Bundy's brief on appeal. In short, at every level, and based on overwhelmingly clear law, it is wrong as a matter of law to argue that this issue is not in this case and not properly preserved.

[3] Permissive use was even mentioned in the Appellant's closing argument which also served as the appropriate directed verdict motions. R. at pp. 360-361. *See* R. at p. 375, lines 12-15. (We've also cited some cases, Your Honor, when you've got situations with gates and keys. There is an indication that that is a permissive use). The Court's failure to rule that Bundy gave Shirley express permission was also raised in Bundy's Rule 59(e) motion to alter or amend. *See* R. at p. 58.

II.

The Court of Appeals Applied the Express Language of Stipulation Number 8 to the Existing Law in South Carolina and Did Not "Misapprehend" the Meaning of Stipulation Number 8.

Shirley stipulated that "In 2004, Shirley put up a gate at the property line between the Bundy property and the property of the Miller Family **with the permission of Bundy.**" Stipulation Number 8 (emphasis supplied). This is a stipulated fact. Now, in the Petition for Reconsideration, Shirley is attempting to qualify, and in part, contradict the parties own stipulation. This is not proper. The general rule of law is quite simple:

> In the absence of grounds sufficient to authorize a party to withdraw from or rescind the stipulation, or the court to set it aside, an agreed statement of facts on which the parties submit the case for trial is binding and conclusive on them. **Thus, the parties will not be permitted to deny the truth of the facts stated, or the truth, admissibility or sufficiency of any factual statement in the agreement. The parties cannot maintain a contention that is contrary to the agreed statement, or allege that the facts were other than as stipulated, or that any material fact was omitted.**

See C.J.S. Stipulations, Section 86 (Emphasis supplied).

The law in South Carolina is quite clear, that in general, permission is a bar to a claim for a prescriptive easement. *See* Williamson v. Abbott, 107 S.C. 397, 401, 93 S.E.2d 15, 16 (1917). Shirley denies that this is an accurate statement of law. But, no matter how it is read, and no matter what "spin" Shirley wants to now put on Stipulation of Fact Number 8, indisputably Stipulation No. 8 does conclusively establish Bundy's permission to Shirley. As this Court noted in McCrea v. City of Georgetown, 681 S.E.2d 918 (S.C.App. 2009)

> A stipulation is an agreement, admission, or concession made in judicial proceedings by the parties or their attorneys and is binding

> upon those who made them. [citation omitted] The Court must accept stipulations as binding upon the parties. Id. at 681 S.E. 2d 921.

Shirley now argues that this stipulated fact does not say that Shirley "asked for" permission. Petition for Rehearing of Respondent, p. 6. Accordingly, Shirley argues that the permission was actually "spontaneous" and without a "request" for the permission, and, so the argument goes, this means that there was actually no permission at all[4]. Petition for Rehearing of Respondent, p. 9. This argument is untenable for at least three reasons. First, Shirley's argument seeks to negate the very fact established by the stipulation (i.e. that Shirley acted "with the permission of Bundy"). Permission in a prescriptive easement case is a term of art. Second, his argument ignores the plain language of the stipulation and attempts to insert the word "spontaneous" before the word "permission" into the text of the stipulation. Though the Appellant is unaware of any factual or legal distinction between spontaneous permission and permission, even if there were a distinction, the stipulation did not state that the permission was spontaneous. The stipulation stated that it was with permission. Third, the argument ignores the actual holding of the Court. In its opinion, the Court holds as follows:

> "Based upon the parties stipulation of the parties, Bundy's grant of permission for Shirley to build the gate defeats a claim of right or adverse use of the Disputed Road."

Order, p. 2. The Court held, based on the stipulation of the parties that permission was granted. Shirley does not argue that this holding was incorrect and does not address the holding at all in his Petition.

[4] In support of his argument that the grant of permission was spontaneous, Shirley cites his own deposition testimony read at the hearing. The deposition, however, was taken prior to the stipulation being entered, and as stated by the Court in its Order "stipulations are binding on the **parties** as well as the Court." Order pp. 2-3 (Emphasis supplied).

In sum, Stipulation Number 8 states that the erection of the gate was done with the permission of Bundy. The argument put forth by Shirley attempts to change the stipulation by adding words that do not exist in the stipulation and that seek to change the very fact stipulated.

III.

This Court Neither Misread nor Misapplied Williamson v. Abbott, 107 S.C. 397, 93 S.E. 15 (1917).

Almost 100 years ago, in Williamson v. Abbott, 107 S.C. 397, 93 S.E. 15 (1917) the South Carolina Supreme Court held that a ditch which one party claimed the prescriptive right to drainage over another person's land was not a prescriptive right, in part, because the permission to drain the water was a full defense to claims of prescriptive easement based upon the following general principle, quoting directly from that case:

> The asking and obtaining of permission, whether from the tenant or ownership of the servient estate, stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription. The question is not whether Mrs. Marco was bound by the permission given by her tenant, but it is whether the use of the ditch on her land was claimed and enjoyed as a right or as a favor[5]. Id at 93 S.E. 16.

Stipulation of Fact Number 8 (and there was no such stipulation of permission in Williamson as found in this case) suggests precisely the same legal result. When the gate was put up with Bundy's permission on the property line – it is obvious that use of the road was claimed not as a matter of right but enjoyed as a favor and with permission.

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[5] It is true that in a much earlier part of the opinion in Williamson v. Abbott, there is indeed some discussion by the Court about the permission coming at the inception of the use. But, that language is not found in the concluding part of the opinion, quoted verbatim in this Return, and it is clear the Court was summing up its reasoning near the very end of the opinion itself (that is in the language quoted above when it explained the principle upon which it was relying).

IV.

The Court of Appeals Correctly Applied the Long Established Law of the State of South Carolina Regarding Permission as a Bar to a Prescriptive Easement Claim and Did Not "Misapprehend" the Holding in Paine Gayle Properties, LLC v. CSX Transportation, Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012).

Shirley next argues that the Court improperly cited Paine Gayle Properties, LLC v. CSX Transportation, Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012) and "misapprehended" its holding.

Paine Gayle was decided on November 14, 2012, nearly two months prior to oral argument in this matter. The Court in Paine Gayle relied on two long standing legal principals governing a claim for a prescriptive easement in South Carolina. The first principal is that permission is a bar to a prescriptive easement claim. 735 S.E.2d at 536-538. The second is that a prescriptive easement claim based on a claim of right must be based on a claim of the right to use "without recognition of the rights of the owner of the servient estate." Id. The Paine Gayle Court held that the acquisition of permission was in fact a recognition of the rights of the owner of the servient estate, and, as such, no claim of right could be established.

The Paine Gayle Court did not make new law, it applied long standing law. The Special Referee and Shirley each indeed took a contrary position to the stated law in Paine Gayle in this case. They took the position that permission was not a defense to a claim for a prescriptive easement pursuant to a claim of right. As noted in the Court of Appeals' Order, this position is an error of law and was based upon a misreading of the facts and holding in the Reavis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct.App. 1996) case. This does not, however, mean that the Paine Gayle Court established new law.

Additionally, the Court of Appeals did not "misapprehend" the holding in Paine Gayle. Shirley argues that the Court failed to compare and contrast the "overall tenor" of the affidavits

submitted by the parties in Paine Gayle with the testimony in the present record on appeal. In the present case, however, it was stipulated that Shirley had permission to erect the gate in 2004. Stipulation Number 8. There is no reason to compare and contrast facts that were argued to be at issue in Paine Gayle with the stipulated fact in the present case because the fact was conclusively established by the stipulation. Moreover, notwithstanding the stipulation, Shirley seeks to use other portions of the record to attempt to change the stipulated fact. This is improper for two reasons. First, as stated by the Court in its Order, "stipulations are binding on the parties as well as the court." Therefore, neither the finder of fact in this non-jury case nor the parties can change the stipulated fact. Second, the testimony of the Appellant cited by Shirley is taken out of context. In the testimony cited, Bundy is testifying about conversations that occurred **after** 2004—the date of the stipulated fact regarding permission. As of 2004, the Court held, based on the stipulation, that Shirley did not have a prescriptive easement. Shirley's conduct after that date, regardless of hostility, is irrelevant to the stipulated fact.

In sum, the Paine Gayle court applied the current and correct law and this Court properly cited to the case as apposite to the present set of facts.

V.

The Court of Appeals correctly found that the Special Referee was bound by the stipulated fact regarding permission.

Shirley argues that the Court of Appeals impermissibly invaded the province of the trial court in ruling that evidence in the record establishes a permissive character of Shirley's use of the road. The Court of Appeals, however, did no such thing. The Court applied the stipulated fact to the law. The Court simply found that the Special Referee could not make findings of fact contrary to the stipulated fact. In applying the stipulated fact to the law, the Court correctly found

that Shirley could not legally establish a claim for a prescriptive easement. The Court of Appeals is free to correct errors of law which is what was done in the present case.

VI.

The Court of Appeals Properly Ruled that Shirley Could Not as a Matter of Law "Tack" any Years From The Bennett Ownership Period to Establish His Claim to a Prescriptive Easement.

This Court ruled that "Shirley is unable to tack the Bennett family's use to establish **his** prescriptive easement claim." Order, p. 3 (Emphasis supplied). This is a correct statement of law. Shirley argues in his Petition for Rehearing that he was not required to tack because he owned the property for 20 plus years. This argument ignores the first portion of this Court's Order that found Shirley did not establish the requisite elements of a prescriptive easement for the full 20 years as a result of the Stipulation of Fact.

Moreover, the Bennett family owned the property Shirley now owns from 1947-1968. Shirley's father acquired the property in 1985. He did not acquire it from Bennett, however. There was no evidence presented by Shirley of any use at all for the period of time between 1968 and 1985. The critical question of law is whether or not this 17 year gap of time, after Bennett and before Shirley, defeats any connection or privity or tacking to link the Bennett use[6] to the Shirley use to allow Shirley to establish a prescriptive easement. This Court correctly found that this gap prevents Shirley from "tacking" any of the Bennett use to establish his claim. First, in order to "tack," the parties must be in privity with one another. Shirley's father did not purchase from the Bennett family. The privity requirement is also necessary as any use must be "continuous." Shirley did not present any evidence of continuous use by a prior owner because

[6] As a very practical matter, there is no evidence in the record that the Bennett use met the elements of a prescriptive easement. The reason for this is that the evidence was in fact offered at trial to prove the disputed road was public. The Special Referee ruled it was not a public road and this issue is not on appeal.

he did not put in any evidence of at least 17 years prior to his ownership. Therefore, he cannot "tack," though he was required to do so in order to meet the elements of a prescriptive easement.

In Shirley's Petition for Reconsideration, Shirley's counsel has elected to cite, Cuthbert v. Lawton, 3 McCord 194, 14 S.C.L. 194 (Ct.App. 1825) which was not found previously in his Respondent's brief to this Court. (See his Petition for Rehearing, Pg. 17 and compare that with his Table of Cases in his Respondent's Brief, Pg. ii.). Shirley now argues for the first time that Cuthbert is legal justification for the 17 year period of delay between the first period of use and the second period of claimed adverse use.

Bundy submits that the old South Carolina case of Cuthbert v. Lawton, 3 McCord 194, 14 S.C.L. 194 (S.C. Ct. App. 1825) actually supports Bundy's arguments. In Cuthbert, the Court found that a prescriptive easement had been proven by use from 1769 to 1800, and that while after 1800 the property had not been used as much by the prescriptive easement holder, it was continued to be used and that the mere diminished intensity use - after the prescriptive easement had been fully established - did not call for the jury verdict in that case to be overturned as contrary to law. The Court of Appeals, added however, in highly significant language for this case that had there been "adverse and continued obstruction for five years" after the prescriptive easement had first been established (which was not proven in that old case) then the result would have been quite different[7].

In this case, there was no evidence at all of any continued prescriptive use of the disputed road for the 17 years prior to his father acquiring the land. Therefore, as stated above, there is no evidence of continuous use by a prior owner upon which Shirley is able to tack.

[7] Jones v. Daley is merely a modern version of the old Cuthbert case. The use diminished over time but did continue - even after the prescriptive easement period had been established and this Court held that mere diminished use - especially when there was common community knowledge that the prescriptive use continued - was no reason to end the easement altogether. By contrast, none of the unique factorsexist here (no evidence of prescriptive use to the Shirley property could possibly have existed as there was no ownership until 1985).

Moreover, between 1985-2003, there are four different relevant Stipulations of Fact dealing with this period of time. See Stipulation of Fact No. 2 (during the entire period of time from 1985 - 2003, the Bundy property was leased to the State of South Carolina); Stipulation of Fact No. 3 (the State's agent, the South Carolina Department of Natural Resources, had a legal interest in the property now owned by Bundy from 1985 - 2003); Stipulation of Fact No. 4 (The now Bundy property, during the 1985 -2003 period of time, was enrolled in the State Wildlife Management Area Program) Stipulation of Fact No. 5 (Public Access to all portions of the Bundy property existed from 1985 to 2003).

In light of the absence of any evidence of adverse use from 1969 - 1985, and in the presence of the "legal roadblocks" found in the Four Stipulations of Fact that existed between 1985-2003, it is clear as a matter of law, that the Bennett prescriptive easement, even if it existed, was blocked, obstructed, and ended, from 1968 until 2003 (34 years in total, almost seven times as long as the dictum found in Cuthbert that five years would end the prior prescriptive easement as a matter of law).

In sum, this Court was correct when it held that Shirley failed to present any evidence sufficient to allow him to "tack" to establish his prescriptive easement.

VII.

The Court of Appeals properly cited to Paine Gayle Properties, LLC v. CSX Transportation, Inc., 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012) in its Order in the present case.

Shirley argues that the Court of Appeals misapprehended the common law and retroactively applied the decision of Paine Gayle Properties, LLC v. CSX Transportation, Inc.,

735 S.E.2d 528 to the present case. The Court, however, did not improperly cite the Paine Gayle case to the present case.[8]

First, as stated above, Paine Gayle did not establish new law but merely reasserted long standing law. The case was the most current statement of two fundamental legal principles regarding prescriptive easements—(1) permission is a bar to establishing a prescriptive easement; and (2) recognition of the servient owner's rights is a bar to establishing a prescriptive easement as a claim of right. Second, a decision of an appellate court is, as a general rule, retroactively applied. The only instances where a decision may not be applied retroactively is when it either creates "new substantive rights" or when it "liability is created where formerly none existed." Toth v. Square D Co., 298 S.C. 6, 377 S.C. 584 (1989). The Paine Gayle case did not establish new substantive rights nor did it create new liabilities. In this case, Shirley asserted he had a prescriptive easement over the property of Bundy. The Paine Gayle case did not change the elements of a prescriptive easement in any way. It did not establish permissive use as a bar to a prescriptive easement. It certainly did not subject Shirley to any new liabilities where none previously existed. In this case, Shirley simply could not and did not prove all the elements of a prescriptive easement.

In sum, the Court of Appeals properly cited to and relied on Paine Gayle Properties, LLC v. CSX Transportation, Inc., 735 S.E.2d 528 as a statement of current and longstanding South Carolina law.

[8] The Paine Gayle case was entered nearly two months prior to oral argument.

VIII

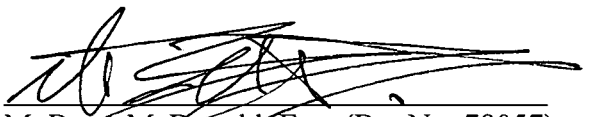
The Court Never Found It Necessary to Reach A Number of Bundy's Arguments.

Bundy truly believes the Court's decision is a sound one, following the law of this State. But if the Court does see fit to have a Rehearing in this case, Bundy respectfully requests that he permitted to continue to argue the other issues he previously had raised and that any rehearing not be limited solely to the matters requested by Shirley.

Conclusion

For all the aforementioned reasons and for all the reasons stated in the Appellant's Final Brief and Reply Brief, the Respondent's Petition for Rehearing should be **DENIED**.

Respectfully submitted,



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May 3, 2013
Mt. Pleasant, South Carolina

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.

PROOF OF SERVICE

I certify that I served the Return of Appellant to Respondent's Petition for Rehearing on Respondent by depositing a copy of said document in the United States Mail, postage prepaid, on May 3, 2013, addressed to his attorney of record, John W. Wells, Esquire, Baxley, Pratt & Wells, PA, PO Box 10, Lugoff, South Carolina 29078.

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