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.

REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

The Respondent replies to the Appellant's Return of Appellant to Respondent's Petition for Rehearing as to each of the points raised in the Petition for Rehearing as follows:

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.

To give the trial court the opportunity to rule on whether or not Stipulation 8[1] entitled the Appellant to judgment as a matter of law, the Appellant would have made a motion for summary judgment on that issue, motion for directed verdict on that issue, or a post trial motion on that issue. One would expect the Appellant's response to the Petition for Rehearing to simply point to the page number and the line number in the Record on Appeal where such a motion was made, and the page and line number of the trial judge's order ruling on that issue. That would settle the matter. This the Appellant cannot do because the issue was not raised below.

The Appellant points to general references in the record to his contention that the Respondent's use of the disputed road was with his permission, but he cannot point to a directed verdict motion on the more specific issue cited by the Court of Appeals in it's April 10, 2013, Opinion that permission to build a gate defeats an easement by prescription. The Appellant's references to permissive use being raised in it's Final Brief on Appeal are not helpful. "It is 'axiomatic that an issue cannot be raised for the first time on appeal.' Imposing such a requirement on the

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[1] (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)

Appellant 'is meant to enable the lower Court to rule properly after it has considered all relevant facts, law and arguments.'" Herron v. Century BMV 395 S.C. 461, 719 S.E. 2d 640 (2011) "As this Court observed, issue preservation rules prevent a party from keeping an ace card up his sleeve-intentionally or by chance - in the hope that an Appellate Court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Herron v. Century BMV Supra. If the directed verdict motion had been made below, it would be cited in the Appellant's Response. The issue was not preserved.

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 text of Stipulation 8 speaks for itself. It does not say that Shirley requested permission to build a gate. The April 10, 2013, Opinion of the Court speaks for itself. It says "The parties also stipulated **Shirley asked Bundy for permission** to build a gate on the disputed road in 2004." (emphasis added) This statement of fact by the Court of Appeals is inaccurate, and it is clearly important because the request for permission was mentioned three (3) times by the Court of Appeals in a two (2) page Opinion.

The reversal of the trial court was based on a fact invented by the Court of Appeals, i.e. the Respondent's request for permission to erect a gate.

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.

The limitation of the holding of Williamson v. Abbott to permission to use the right of way granted "in the inception" of the use rather than nineteen (19) years later was not addressed by the Appellant in his response.

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 Appellant misreads Paine Gayle Properties, LLC vs. CSX Transportation, Inc. 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012) in the same manner as the Court of Appeals did in the April 10, 2013, Opinion. The Appellant states, "In the present case, however, it was stipulated that Shirley had permission to erect the gate in 2004. Stipulation 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 stipulation." Like the Court of Appeals, the Appellant reads Paine Gayle Properties, LLC supra. to hold that permission to build a gate, no matter how obtained, defeats a prescriptive easement. This is the same simplistic and superficial analysis of Paine Gayle Properties, LLC supra. of which the Respondent complained in the Petition for Rehearing. The language in the case clearly indicates that the focus of the Court in Paine Gayle Properties, LLC supra. was not on the permission to erect the gate but on permission to use the right of way. "**This permissive character of landowner's use of the right of way** is confirmed by Payne's affidavit." (emphasis added) "In sum, **Railroad gave permission to landowner to use it's right of way**" Paine Gayle Properties, LLC vs. CXS Transportation, Inc., supra. See also

Williamson v. Abbott supra. "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 a favor."

As demonstrated in the Petition for Rehearing, the permission to build a gate was one fact to be considered by the trier of fact to determine whether or not permission was given to use the right of way. Permission to erect a gate and permission to use the right of way are not interchangeable facts that can be freely substituted each for the other. They are separate and distinct facts and should be treated as such.

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.

In his response to this point, the Appellant states, "In applying the stipulated fact to the law, the Court correctly found that Shirley could not legally establish a claim for a prescriptive easement." If that is true, then the Appellant would have been entitled to a directed verdict on that basis. The Appellant failed to make a motion for a directed verdict on that basis and therefore failed to preserve that issue for appeal.

Stipulation 8 did one of two things. It either entitled the Appellant to a directed verdict which motion was not made and not preserved, or it was a fact favorable to the Appellant to be considered by the trier of fact along with other evidence in the record on the relevant issue of permission to use the right of way.

In the latter case, the Court of Appeals is now imposing its view of the facts, i.e. that Stipulation 8 trumps all of the other evidence in the record on this issue of permissive use of the right of way by reversing the trial court. Either way, the trial court's order should be affirmed.

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.

As set forth in the Petition for Rehearing, the law of South Carolina is that once the twenty (20) year prescriptive use requirement has been met, the road is established, and no further use must be proved. The case on point cited by the Respondent in the Petition for Rehearing is Cuthbert v. Lawton 3 McCord 194, 14 S.C. L 194 (Ct. App. 1825). In that case the Plaintiff attempting to establish the easement proved thirty-one (31) years of adverse use from 1769 to 1800 under a former owner. The Court stated:

> "In considering the general right of way, I was of the opinion that this had been fully established by evidence of Mrs. Rivers, W. Royal, Gen. Cuthbert and Wm Lawton, who proved that **it had been enjoyed by the former owners of the land now held by the plaintiff** as an ancient and uninterrupted right from the year 1769 to 1800. It appeared indeed, that since that period the road had not been much used; that it had been obstructed three or four times in different years, and that there had been some wide deviations from it's original course; but I thought that these would not affect the right, if it had been before perfected by twenty (20) years uninterrupted enjoyment. If it had only began to accrue since the year 1800, the obstruction of one (1) year only in twenty (20) would prevent its legal consummation; but **after twenty (20) years of uninterrupted use, it could**

> **only be defeated by an adverse and continued obstruction** of five (5) years which was not proven in this case." Cuthbert v. Lawton supra. (emphasis added)

According to Cuthbert v. Lawton, supra., once a road has been used for the required twenty (20) year period, the prescriptive easement is "fully established". Interruptions and deviations in the road's course that would have defeated the prescriptive easement during the twenty (20) year use period do not affect the right of way after it has been "perfected" by uninterrupted use for twenty (20) years. After the twenty (20) year use period is established, the servient tract owner must do some adverse act to close the road, such as a five year obstruction.

The trial judge found that the Bennett Family had used the disputed road adversely and continuously from 1947 to 1968. As to the seventeen (17) year period between 1968 and 1985, the Appellant has the burden of showing some adverse act to obstruct the road after 1968 under Cuthbert v. Lawton supra. in order to defeat the "perfected" prescriptive easement. That obstruction was not proved by the Appellant. The absence of evidence as to what occurred during the seventeen (17) year period works against the Appellant rather than the Respondent. The holding of the Court of Appeals on this issue is in error and should be corrected on rehearing. Once a road, always a road is the law of South Carolina. See Cuthbert v. Lawton, supra. The rules of "tacking" do not apply in this case.

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 Respondent agrees with the Appellant that Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. did not establish permissive use of the right of way as a bar to a prescriptive easement. However, the interpretation of the case by

the Court of Appeals in it's April 10, 2013, Opinion, that permission to erect a gate defeats a prescriptive easement, does create a new substantive right for servient tract owners. The new rule announced by the Court of Appeals in it's April 10, 2013, Opinion to wit, permission to erect a gate automatically defeats a prescriptive easement, based on the Court's reading of Paine Gayle Properties, LLC vs. CSX Transportation, Inc. supra. is a new rule in South Carolina prescriptive easement law and should not be applied retroactively. This is particularly true where the retroactively applied case was decided after the present case was tried giving the trial judge no opportunity to rule on any legal issues arising from it.

CONCLUSION

The Petition for Rehearing should be granted in order to consider Stipulation 8, as it is written, in context with the other evidence of record on the issue of permissive use of the Disputed Road. Rehearing should be granted to review the existing precedent in South Carolina common law regarding the "perfected" status of a prescriptive easement after the twenty (20) year use period runs. If the Bennett period from 1947 to 1968 "perfected" a prescriptive easement to use the Disputed Road, then the permissive use issue arising in 2004 would not affect the "perfected" prescriptive easement.

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PROOF OF SERVICE

I certify that I served the Respondent's Reply by depositing a copy of said documents in the United States Mail, postage prepaid, on May 8, 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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