

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master-In-Equity

The Honorable Mikell Scarborough

Appellate Case No. 2022-185

Larry Gregg, Appellant,

v.

Herman Smalls, III, Izetta Shaw a/k/a Syvetta Smalls, John Doe and Jane Does, as fictitious names for a class of unknown persons being incompetents, minors, person in military service to the United States of America, imprisoned, and/or under any other form of legal disability, including but not limited to unknown heirs, devisees, distributees, administrators, or personal representatives of deceased persons Herman Smalls, Jr. and Lamont Green and all other persons known or appear of record to have some right , title and interest in or lien upon the real estate described in the complaint herein, Defendants.

Of whom Herman Smalls, III, and Izetta Shaw aka Syvetta Smalls are Respondents.

APPELLANT'S INITIAL BRIEF

Dated: June 6, 2022

s/Karen M. DeJong
Karen M. DeJong, Esq.
Bar No. 70699
DeJong Law Firm, LLC
222 West Coleman Blvd., Ste. 110
Mt. Pleasant, SC 29464
Tel. No. 843-216-6161
karen@dejonglawfirm.com
Attorney for Appellant Larry Gregg

Other Counsel of Record
J. Chris Lanning, Esq.
Brush Law Firm, P.A.
12-A Carriage Lane
Charleston, SC 29407
Tel. No. 843-766-5576
clanning@brushlawfirm.com
Attorney for Respondents Herman
Smalls, III and Izetta Shaw a/k/a
Syvetta Smalls

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STATEMENT OF ISSUES ON APPEAL

- I. **Did the Lower Court err in granting Respondents' Motion for Summary Judgment because there was evidence to support Appellant's position that Herman Smalls, Jr. and Respondents were not the legal owners of Lot 4B during the years that Appellant occupied it, therefore, Herman Smalls, Jr. and Respondents could not give legal permission for Appellant to live there?**

- II. **Did the Lower Court err in granting Respondent's Motion for Summary Judgment because there was evidence to support Appellant's Adverse Possession claim?**

STATEMENT OF THE CASE

For over 37 years, Appellant has resided continuously on and has been in possession of heirs' property known as Lot 4B, 2229 David Green Road, Mount Pleasant, Charleston County, South Carolina. (Complaint, p. 1, 2)(Amended Complaint, p. 1, 2)

Appellant was invited upon the land by Herman Smalls, Jr., his uncle, in 1986. (Exhibit 1 & 2-Affidavit of Larry Gregg and Affidavit of Charles Gadsen of Plaintiff's Memorandum in Support of Plaintiff's Motion for SJ). Herman Smalls, Jr. had a mobile home on Lot 4B at that time though he did not reside there. (Exhibit 1 & 2, P's Memo in Support of Motion for SJ). Appellant was the son of Joseph Smalls and Appellant is the cousin of Respondents. (Hearing Transcript, P. 8).

In 1986, Appellant moved his trailer onto Lot 4B and constructed significant improvements upon the property from 1986. (Exhibit 1-subexhibits A & C (Photos) and Exhibit 2 of P's Memo in Support of Motion of SJ). Appellant's improvements included re-constructing his home after Hurricane Hugo in 1989, framing an addition to the house, adding three rooms and a roof. (Exhibit 1-subexhibit C (Photos) & Exhibit 2 of P's Memo in Support of Motion for SJ). After Herman Smalls, Jr.'s death in 2005, Appellant continued to improve the property by building a front porch deck, back porch deck, fireplace with chimney, separate garage and shed. (Exhibit 1, subexhibit D (Photos) and Exhibit 2 of P's Memo in Support of Motion for SJ).

At no time did Herman Smalls, Jr. or Respondents help pay or assist in the construction and installation of the improvements made by Appellant upon Lot 4B. (Exhibit 1 of P's Memo in Support of Motion for SJ).

Herman Smalls, Jr. resided in New York all of his life and approximately twice a year, Herman Smalls, Jr. would come down to visit and stay for a week at his mobile home on Lot 4B.

(Exhibit 1 of P's Memo in Support of Motion for SJ)(Hearing Transcript, P. 9). In 1989, Herman Smalls, Jr.'s mobile home was destroyed by Hurricane Hugo and Herman Smalls, Jr. did not repair the mobile home and never returned to the property. (Exhibit 1 & 2 of P's Memo in Support of Motion for SJ).

Respondents resided in New York State all of their lives. (Hearing Transcript, P. 9). Respondents did not make a claim for ownership for Lot 4B until the parties' kin, Jonnie Mae Robinson, filed a Quiet Title Action in the Charleston County Court of Common Pleas in 2016. Robinson, et al. vs. Ketchen, et al., Case No. 2016-CP-10-6964. (Exhibit A-Robinson Order, Amended Complaint).

After Hurricane Hugo destroyed Herman Smalls, Jr.'s mobile home in 1989, Appellant has had sole possession of Lot 4B (Exhibits 1 & 2, P's Memo in Support of Motion for SJ) (Hearing Transcript, P. 9). Herman Smalls, Jr. passed away in 2005 in New York State (Exhibit 1, P's Memo in Support of Motion for SJ).

Lot 4B was heirs' property because it was part of a parent lot that was purchased by his ancestor, David Green, in 1926. (Exhibit A, Amended Complaint) David Green's Deed was recorded at the Charleston County ROD Office in Book D-35, Page 143. (Exhibit A, Amended Complaint). David Green died intestate in 1951 and was survived by five (5) adult children, but his case was not submitted to probate. (Exhibit A, Amended Complaint). The property was subsequently divided and deeded by and to various family members (Exhibit A, Amended Complaint).

On December 30, 2016, Jonnie Mae Robinson, a descendant of David Green, filed a Quiet Title Action in the Charleston County Court of Common Pleas, Robinson, et al vs. Ketchen, et al. Case No. 2016-CP-10-6964, in order to quiet title, determine the true heirs and

resolve the division of the heirs' property. (Exhibit A, Amended Complaint). The division of the parent lot included Lot 4B. (Exhibit A, Amended Complaint).

On March 4, 2019, the trial court issued an Order Quieting Title. With regard to Lot 4B. the Court ruled that:

“The heirs of Herman Smalls, Jr. are the owners of Lot 4B as described in Exhibit “A” and fee simple title is quieted and confirmed in their names; subject however to the claims, if any, of Larry Gregg with it being the obligation of the Herman Smalls, Jr. Heirs and Larry Gregg to undertake such processes as required by law to determine their respective interests and claims to Lot4B, and further, subject, however, to the rights of any mortgagee or lien holder of public record having obtained such encumbrances by such owner's consent or due process of law”.

(Exhibit A, P. 11, Amended Complaint).

Despite the fact that the March 4, 2019 Court Order did not set forth the names of Respondents as the legal heirs of Herman Smalls, Jr., the Respondents served an eviction letter upon Appellant on or about April 24, 2019. (Exhibit C, Defendant's Memorandum in Support of SJ).

Appellant filed an Adverse Possession Complaint on May 7, 2019 with regard to his claim of ownership of Lot 4B. (Complaint). Upon being told that one of Herman Smalls, Jr.'s children had passed away in New York by the name of Lamont Green, Appellant filed an Amended Complaint to Quiet Title and for Adverse Possession. (Amended Complaint).

In Appellant's Amended Complaint, Appellant claimed ownership of Lot 4B, 2229 David Green Road, Mt. Pleasant, SC based upon adverse possession. (Amended Complaint)

Respondents filed an Answer and Counterclaim wherein they:

- 1) Admitted that Appellant/Plaintiff resided at 2229 David Green Road, Mt. Pleasant, South Carolina but denied that Plaintiff was in possession of the property;
- 2) Admitted that the fee simple title to the Property should be quieted and confirmed in

- the name of Herman Smalls, III, Izetta Shaw a/k/a Syvetta Smalls and Lamont Green;
- 3) Denied that Appellant had an adverse possession claim to the Property;
 - 4) Admitted that the Property was conveyed to the heirs of Herman Smalls, Jr. by an Order of the Court filed in Charleston County Case No. 2016-CP-10-6964; and
 - 5) Sought to remove Appellant from the Property. (Answer & Counterclaim).

Appellant filed a Reply to Counterclaim in which he denied Respondents' allegations regarding possession and removal. Appellant sought a decree declaring that Appellant owned absolutely and was entitled to a quiet and peaceful possession of the Property as against Respondents and that Respondents had no estate, right, title, lien or interest in or to the Property or any part of it and that title to the Property be quieted in Appellant against all claims by Respondents and all persons claiming under Respondents. Appellant also sought the issuance of a Deed vesting fee simple title into Appellant. (Reply to Counterclaim).

On November 20, 2019, Appellant filed a Notice of Intent to Refer this Quiet Title/Adverse Possession case to the Charleston County Master-In-Equity (Notice of Intent), a Notice Nisi (Nisi), a Motion to Appoint Guardian Ad Litem (GAL Motion) and an Affidavit of Publication. (Affidavit of Publication).

On November 21, 2019, the Court filed an Order appointing Kelley Y. Woody, Esq. as the Guardian Ad Litem (GAL Order) and an Order for Publication. (Publication Order).

On May 8, 2020, the Court filed an Order of Reference that the action be referred to Mikell R. Scarborough, the Charleston County Master-In-Equity, for the purpose of taking testimony and making findings of fact and conclusions of law and to render a final decree with direct appeal to the South Carolina Court of Appeals. (Order of Reference)

On May 12, 2020, the Guardian Ad Litem filed an Answer to the Amended

Complaint and Consent to Reference for John Doe and Jane Doe. (GAL Answer to Amended Complaint).

On June 22, 2020, Appellant filed the Affidavit of Publication by The Post and Courier. (Post & Courier Affidavit of Publication).

On December 7, 2020, a Consent Order of Reference was filed and on February 11, 2021, the Master-In-Equity filed a Scheduling Order. (Consent Order of Reference, Scheduling Order).

On April 19, 2021, Respondent was deposed via Zoom videoconference. Respondent testified under oath that Appellant was living on Lot 4B prior to Herman Smalls, Jr.'s death in 2005, that she believed he had permission to live on Lot 4B from Herman Smalls, Jr. and that after her father's death, Appellant continued to live on the property and that "Respondent didn't see a need to do anything, including giving Appellant permission to live on Lot 4B, until the 2016 lawsuit came up. (Exhibit 3 of P's Memo in Support of Motion for SJ).

Respondent has never testified or offered any proof that Respondents gave Appellant permission to live on Lot 4B at any time from 1986 to 2022. (Exhibit 3 of P's Memo in Support of Motion for SJ) (Exhibit B of D's Memo in Support of Motion for SJ).

On April 19, 2021, Appellant was deposed via Zoom videoconference. Appellant testified under oath that he moved on the property between 1985-1986, that he has lived there continuously since then, that Hurricane Hugo demolished Herman Smalls, Jr.'s trailer and that Appellant did not have permission from Respondents to stay on the property. (Exhibit 4 of P's Memo in Support of Plaintiff's Motion for SJ).

On April 22, 2021, Appellant filed a Motion for Summary Judgment in which the Appellant sought to have the Court award Lot 4B to Appellant by way of adverse possession.

Appellant sought to have Respondents' claims against him dismissed because the Respondents could not meet their burden of proof and were unable to present any evidence that proved Appellant was not entitled to the Property by means of adverse possession. (P's Motion for SJ).

On April 23, 2021, the GAL filed an Affidavit of Attorney for Unknown Defendants in the Military Service and Guardian Ad Litem for Unknown Defendants Who are Minors or Under Legal Disability Including All Unknown Heirs and Assigns of Herman Smalls, Jr. and Lamont Green. (GAL Affidavit for Unknown Heirs).

On April 27, 2021, Respondent Syvetta Smalls filed a Motion for Summary Judgment upon the grounds that there existed no genuine issue as to any material fact and that Respondents were entitled to judgment as a matter of law. (D's Motion for SJ).

On June 15, 2021, Appellant filed a Memorandum in Support of his Motion for Summary Judgment with the following Exhibits:

Exhibit 1- Affidavit of Appellant/Plaintiff Larry Gregg in Support of His Motion for Summary Judgment

Sub-Exhibit A to Affidavit of Larry Gregg- Photos of My Home the Day after Hurricane Hugo

Sub-Exhibit B to Affidavit of Larry Gregg- Photos of Vacant Land where Herman Smalls, Jr.'s Mobile Home Used to be Located

Sub-Exhibit C to Affidavit of Larry Gregg-Photos of Improvements before 2005

Sub-Exhibit D to Affidavit of Larry Gregg- Photos of Improvements after 2005

Exhibit 2- Affidavit of Charles Gadsen in Support of Plaintiff's Motion for Summary Judgment

Exhibit 3- Defendant Syvetta Smalls's Deposition Transcript dated April 19, 2021, Pages 1, 2, 15, and 19

Exhibit 4- Plaintiff Larry Gregg's Deposition Transcript dated April 19, 2021, Pages 1, 2, 17, 18, and 19

(P's Memo in Support of Motion for SJ).

Appellant asserted that Appellant owned Lot 4B, 2229 David Green Road through his continuous, hostile, open, actual, notorious, and exclusive possession in excess of ten (10) years. (P's Memo, P. 3) and cited supporting case law and Affidavits. (P. 3, 4, 5, Exh. 1, 2, 3 & 4 of P's Memo in Support of Motion for SJ).

On June 17, 2021, Respondent filed a Memorandum in Support of her Motion for Summary Judgment. (D's Memo in Support of Motion for SJ). In Respondent's Memorandum, Respondent admitted that Herman Smalls, Jr. nor his heirs had good title to the Property until the Final Order after Hearing on a Quiet Title Action, Case No. 2016-CP-10-06964, Robinson v. Ketchen, et al. was filed on March 4, 2019. (D's Memo in Support of Motion for SJ, P. 2).

Respondent agreed that Appellant had moved his mobile home onto Lot 4B in 1986 and that Appellant had received permission from Herman Smalls, Jr. to place his mobile home on the property. (D's Memo in Support of Motion for SJ, P. 2).

Respondent also agreed that after Appellant had moved his trailer onto the property, Appellant made improvements to his mobile home over several years by adding a carport and three rooms. (D's Memo in Support of Motion for SJ, Page 2-3).

Respondent confirmed that Herman Smalls, Jr. died in 2005 and that his estate had not been probated. (D. Memo in Support of Motion for SJ, Page 3).

Respondent's only argument as to why Appellant had not proven adverse possession was that Appellant did not satisfy the hostility element, that the possession must be without the consent of owner. (D. Memo in Support of Motion for SJ, Page 6-8).

A hearing was held before Hon. Mikell R. Scarborough, Charleston County Master-In-Equity on June 22, 2021 with regard to Plaintiff's and Defendants' Motions for Summary

Judgment.

At the hearing, Appellant's counsel confirmed that Respondent had agreed that Appellant had proven all of the elements of adverse possession except for the hostile element. (Hearing Transcript, P. 5). On the hostility element, Appellant argued that Appellant had lived on Lot 4B since 1986 and that Appellant had made significant improvements up until now. (H. Transcript, P. 6).

Despite the fact that there was no proof filed with the Court, Respondents' counsel stated that Respondents had given permission to Appellant to live on Lot 4B. (Hearing Transcript, P. 11-13). Respondent's counsel argued that Respondent Izetta Shaw gave tacit permission after her father's death in 2005 for Appellant to live on the property. (H. Transcript, P. 6). Appellant's counsel stated that she couldn't see how Respondent could give permission for Appellant to live on the property if Respondent did not own the property at that time; that it was a worthless permission. (H. Transcript, P. 6).

At the hearing, Appellant's counsel further contended that at Appellant's deposition, Appellant testified that he did not have permission to live on the property. (H. Transcript, P. 6, 7). Appellant's counsel explained that even if Appellant had the permission of Herman Smalls, Jr. to live upon the land, both Appellant and Respondents agreed that Herman Smalls, Jr. did not have good title to the property at that time. (H. Transcript, P. 8). In other words, Herman Smalls, Jr. was a squatter just like Appellant. (H. Transcript, Page 9). Herman Smalls, Jr. was not a titled landowner that could give legal permission to Appellant to live on the property. In fact, Herman Smalls, Jr. was not legally declared the property owner until March 4, 2019 when the Court in Robinson v. Ketchen found that Herman Smalls, Jr.'s his heirs owned Lot 4B, subject to Appellant's claim. (H. Transcript, P. 9)(Amended Complaint, Exhibit A, Page 11).

Appellant's counsel concluded with the fact that in Robinson v. Ketchen, et al., Respondents never told the Court by testimony or amended Answer that Appellant lived on Lot 4B and thus, was an interested party to the lawsuit. (H. Transcript, P. 13, 14, 15). The 2016 lawsuit was filed because it was heirs' property and that the Respondents represented to the Court that Joseph Smalls (Appellant's father) had passed away with no children (H. Transcript, P. 14). By failing to correct the record and let the Court know that Appellant was the surviving child of Joseph Smalls and lived on Lot 4B since 1986, Respondents' intent was prevent Appellant from making a claim to Lot 4B, thus confirming that Respondents did not give permission for Appellant to live on Lot 4B. (H. Transcript, P. 14). Fortunately, Appellant found out about the final hearing, attended and gave testimony which resulted in the Court ruling that Appellant could file a claim for Lot 4B. (Exhibit A, Amended Complaint, P. 11).

On January 27, 2022, the Court filed an Order Granting Respondent's Motion for Summary Judgment. (Jan. Order, P. 1-10). Respondent's attorney drafted the Order and the Court signed the Order. The Court found that Respondents, Syvetta Smalls and Herman Smalls, III, were the legal heirs of Herman Smalls, Jr.. (Jan. Order, P. 7). The Court held that Appellant had satisfied all of the elements of adverse possession except for the hostility element. (Jan. Order. P. 7). The Court's finding of facts are as follows:

The South Carolina case law is clear that in order to prove hostility in an adverse possession claim, the claimant's possession must be *without the consent* of the owner. It is undisputed that Herman Smalls, Jr. consented to and gave Plaintiff permission to place his mobile home on the Property and live on the Property. It is also undisputed that after the death of Herman Smalls, Jr., his heirs, Syvetta Smalls and Herman Smalls, III, gave Plaintiff permission to stay and live on the Property. (Order, P. 7).

South Carolina case law is very specific regarding hostility and states that claimant's conscious intention must be to possess the property against the owners' intentions. Plaintiff cannot prove he had a conscious intention to possess the property against the intention of Herman Smalls, Jr. or his heirs because he stated in his deposition that he never meant to take the Property away from Herman Smalls, Jr. and his heirs. Because

Plaintiff had permission from Herman Smalls, Jr. and his heirs to live on the Property, he lacked the conscious intention to possess the Property without the consent of the owners. (Order, P. 7)

Therefore, the Court ruled that Plaintiff was unable to prove the element of hostility for adverse possession regarding the subject property. Plaintiff had permission to live on the property and that his possession was with the consent of the owners. No genuine issues of material fact exists, the appropriate action is summary judgment. (Order, P. 8).

The Court did not discuss, address, or rule on any facts, evidence and legal arguments presented by Plaintiff in his Motion for Summary Judgment and supporting Memorandum with Exhibits 1-4.

On February 3, 2022, Appellant filed a Motion for Reconsideration pursuant to Rule 59(a) and Rule 59(e). (P's Motion for Recon.)

On February 11, 2022, the Court filed a Form 4 Order Denying Appellant's Motion. (Form 4).

On February 18, 2022, Appellant/Plaintiff Larry Gregg filed a Notice of Appeal with the S.C. Court of Appeals. (Notice).

STANDARD OF REVIEW

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”, Rule 56(c), SCRPC.

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party”. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

An appellate court reviews a grant for summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC, Lanham v. Blue Cross & Blue Shield of South Carolina, 349 S.C. 356, 563 S.E.2d 331, 333 (2002).

ARGUMENT

- I. **The Lower Court erred in granting Respondents' Motion for Summary Judgment because there was evidence to support Appellant's position that Herman Smalls, Jr. and Respondents were not the legal owners of Lot 4B during the years that Appellant occupied it, therefore, Herman Smalls, Jr. and Respondents could not give legal permission for Appellant to live there.**

In the Charleston County Master-In-Equity's Order of January 27, 2022, the Court erred in finding that Appellant did not satisfy the hostility element because Herman Smalls, Jr. and then Respondents gave Appellant permission to reside on Lot 4B. (Jan. Order, P. 7, 8).

While Appellant and Respondents agreed that Herman Smalls, Jr. gave permission for Appellant to move onto Lot 4B in 1986, the Court completely disregarded that fact that both parties agreed that Herman Smalls, Jr. did not have legal ownership of Lot 4B in 1986. (Amended Complaint)(Answer & Counterclaim)(P's Memo in Support of Motion for SJ)(D's Memo in Support of Motion for SJ, p. 2)(Hearing Transcript, p. 8).

Any permission given by Herman Smalls, Jr. to Appellant to move onto the land in 1986 would have been as a courtesy to his nephew, Appellant, and not legally binding upon Appellant in an adverse possession claim. It was not until March 4, 2019, that the Court issued a Final Order to Quiet Title in Robinson v. Ketchen. (Exhibit A, Amended Complaint). The Court ruled that Herman Smalls, Jr.'s heirs owned Lot 4B, subject to Appellant Larry Gregg's claim. (Exhibit A, P. 11 of Amended Complaint). The Final Order to Quiet Title was not made

retroactive and ownership of Lot 4B, subject to Appellant's claim, began on March 4, 2019. (Exhibit A, Amended Complaint).

The Court also ignored the fact that both parties agreed that after Herman Smalls, Jr.'s death in 2005, Respondents did not probate their father, Herman Smalls, Jr.'s, estate and that there was no legal determination of who his heirs were until the January 27, 2022 Order. (Exhibit A, Amended Complaint)(D's Memo in Support of Motion for SJ)(Jan. Order).

There was no final, legal determination of who the owner(s) were of Lot 4B until January 27, 2022 when the Court rejected Appellant's adverse possession claim and awarded Lot 4B ownership to Respondents. (Jan. Order). It was impossible for Syvetta Smalls and Herman Smalls, III to give legal permission, as heirs, for Appellant to live on Lot 4B from Herman Smalls, Jr.'s death in 2005 to 2022.

II. The Lower Court erred in granting Respondent's Motion for Summary Judgment because there was evidence to support Appellant's adverse possession claim.

The Court erred when it ruled that Appellant could not prove the hostility requirement of Appellant's adverse possession claim because 1) Appellant had the permission/consent of Respondents to live on Lot 4B and that 2) Appellant could not prove conscious intention to possess the property against the intentions of Herman Smalls, Jr. or his heirs because "he stated in his deposition that he never meant to take the Property away without the consent of owners" (Jan. Order).

The parties agreed that Appellant need only prove the hostile element in order for Appellant's adverse possession claim to succeed. (D's Memo in Support of Motion for SJ, p. 6-8).

A. With regard to Hostile Element and Owner's Consent

Appellant has already argued that Respondents were not the titled/legal owners of Lot 4B until the January 27, 2022 Order, therefore, they could not consent to Appellant living on Lot 4B since 1986.

Another argument that Appellant would like to present to this Court is as follows:

In Jones v. Leagan, the S.C. Court of Appeals ruled in favor of the adverse possessors because the adverse possessors had proven continuous, hostile, open, actual, notorious, and exclusive possession of the property for a ten year period by clear and convincing evidence (citing Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986)). The Court reasoned that while the legal owner need not have actual knowledge the claimant is claiming property adversely, the **hostile possession** should be so notorious that the legal owner by ordinary diligence should have known of it. Jones at 14. The court defined hostile possession as being notorious where the claimant bushhogged land regularly, a driveway and wire fence were installed, timber was cut down, business supplies, timber and a trailer were stored on the property. All of these acts presumably resulted in physical changes that would be visible to a landowner exercising ordinary due diligence in the ownership of his property. Jones at 14.

In this case, Appellant testified that Appellant had made substantial improvements upon Lot 4B, i.e. re-constructing his home after Hurricane Hugo to include framing an addition to the house, adding three rooms and a roof. (Exhibit 1-subexhibit C (Photos) & Exhibit 2 of Plaintiff's Memo in Support of Motion for SJ). After Herman Smalls, Jr.'s death in 2005, Appellant continued to improve the property by building a front porch deck, back porch deck, fireplace with chimney, separate garage and shed. (Exhibit 1, subexhibit D (Photos) and Exhibit 2 of Plaintiff's Memo in Support of Motion for SJ).

Respondents confirmed that they knew that after Appellant had moved his trailer onto the property, Appellant made improvements to his mobile home over several years by adding a carport and three rooms. (D's Memo, Page 2-3).

Therefore, Appellant has proved the hostile element of adverse possession by clear and convincing evidence. Appellant made significant improvements on Lot 4B and the Respondents knew that he was doing so and that therefore, Appellant was in hostile possession of Lot 4B.

In Taylor v. Heirs of William Taylor, 419 S.C. 639, 799 S.E.2d 919 (Ct. App. 2017), the Court ruled in favor of the adverse possessors because the adverse possessors had met their burden of showing the elements of adverse possession by clear and convincing evidence.

The Taylor Court addressed the element of **hostile possession** in its' ruling:

To show the possession was hostile, the adverse claimant is required to show only that his possession was actual, exclusive, open, notorious, and without the consent of the title owner. Knox v. Bogan, 322 S.C. 64, 70, 472 S.E.2d 43, 47 (Ct. App. 1996). The mistaken belief rule, which requires the possessor to be aware that he does not have title and intend to dispossess the true owner, is not applicable in disputes over entire tracts of land... Thus, for the possession to be hostile when a tract of land is at issue, the adverse claimant need not show a conscious intent to dispossess the true owner... The claimant may establish hostile possession by showing he occupied the property without the title owner's consent even if he occupied the property under the mistaken belief that it belonged to him..."

Taylor, 419 S.C. at 652, 799 S.E.2d at 925.

At deposition, Appellant testified under oath that he moved on the property between 1985-1986, that he has lived there continuously since then, that Hurricane Hugo demolished Herman Smalls, Jr.'s trailer and that after Herbert Smalls, Jr.'s death, Appellant did not have the consent/permission from Respondents to stay on the property. (Exhibit 4 of Plaintiff's Memo in Support of Plaintiff's Motion for SJ).

At deposition, Respondent testified under oath that she knew that Appellant was living on

Lot 4B prior to Herman Smalls, Jr.'s death in 2005, that she believed he had permission to live on Lot 4B from Herman Smalls, Jr. and that after her father's death, Appellant continued to live on the property and that Respondent didn't see a need to do anything, including giving Appellant permission to live on Lot 4B, until the 2016 lawsuit "came up". (Exhibit 3 of Plaintiff's Memo in Support of Motion for SJ).

Therefore, Appellant did not have consent to live on Lot 4B. Respondent has submitted no evidence that she gave express consent to Appellant that he could live on Lot 4B. Appellant is at a loss as to how the Court determined that Respondents did give permission to Appellant with no evidence to support this finding of fact.

B. With regard to Conscious Intention to Possess Property Against the Intentions of Herman Smalls, Jr. and his Heirs

The Court relied upon McDaniel v. Kendrick, 386 S.C. 437 at 442, 688 S.E.2d 852 (S.C.Ct.of Appeals 2009) in deciding that Appellant did not prove a conscious intention to take property from the intentions of Herman Smalls, Jr. or his heirs. However, the lower court misinterpreted the McDaniel ruling when it applied it to this case.

In McDaniel, the titled owner (stepdaughter) filed an action requesting that her stepmother vacate property that her father had conveyed to the stepdaughter. The stepmother answered and alleged ownership in the property by adverse possession and constructive trust. The stepmother had resided on the property for many years .

The McDaniel Court did not hold that the stepmother had to prove a "conscious intention" to take the property away from her stepdaughter. Instead, the McDaniel Court looked to see if the stepmother had permission from the titled owner to live on the land. Finding that the stepmother did have permission to live on the land from the owners, the McDaniel Court decided that the stepmother was unable to prove the hostile element of adverse possession and ruled

against her.

Based upon the above analysis, Appellant does not have to prove conscious intention to take property but instead to prove that Appellant lived on Lot 4B without the permission of Respondents. Appellant has shown that Respondents did not own the land from 1986 until 2022. Further, Appellant testified at his deposition that he did not have permission to live on the land (Exhibit 1, P's Memo in Support of Motion for SJ). Respondent testified at her deposition that she did not do anything after her father died in 2005 with regard to Appellant living on Lot 4B until Respondent was notified of the quiet title action in 2016. (Exhibit 4, P's Memo in Support of Motion for SJ).

CONCLUSION

In the light most favorable to Appellant, there is evidence that Herman Smalls, Jr. and Respondents did not own Lot 4B from 1986 to 2019, 2022 respectively.

In the light most favorable to Appellant, there is evidence that Appellant did prove the hostile element in his adverse possession claim.

Appellant respectfully requests that this Court reverse the lower court's Order of January 27, 2022.

Dated: June 6, 2022

s/Karen M. DeJong
Karen M. DeJong, Esq.
Bar No. 70699
DeJong Law Firm, LLC
222 West Coleman Blvd., Ste. 110
Mt. Pleasant, SC 29464
Tel. No. 843-216-6161
karen@dejonglawfirm.com
Attorney for Appellant Larry Gregg