

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2005-CP-10-4101

Appellate Case No.: 2012-212136

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JUN 20 2013

SC Court of Appeals

The Milton P. Demetre Family Limited Partnership.....Appellant,

v.

Harry Beckmann, III, Patricia P. Beckmann, Annie Ruth Hilton Crowley,
Raymond Moody Crowley, Donald William Crowley, Harris L. Crowley, Jr.,
and Annie Ruth Crowley Akinson.....Respondents.

**RESPONDENTS' MOTION
TO COMPEL INCLUSION OF
MATERIAL OMITTED FROM RECORD ON APPEAL**

Jefferson D. Griffith, III
Richard L. Whitt
Austin & Rogers, P.A.
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Attorneys for Respondents

ORIGINAL

OTHER COUNSEL OF RECORD:

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Attorney for Appellant

TABLE OF AUTHORITIES

Rule 59(e), South Carolina Rules of Civil Procedure.....4, 5, 6

Rule 201, South Carolina Rules of Evidence.....5

Rule 210(c), South Carolina Appellate Court Rules.....4

INTRODUCTION

When Appellant served the Record on Appeal in this matter, on May 29, 2013, Appellant improperly omitted a document designated by Respondents to be included in the Record on Appeal, (*Designation of Matter, Item "16", attached as, Exhibit "A"*). Appellant claimed that it omitted the document because the document was not in the Record below, although the lower Court's Order under Appeal, clearly indicated that the lower Court was taking Judicial Notice of the omitted document, (*Correspondence from Appellant's Counsel attached as, Exhibit "B"*) (*Order on Remand, R. p. 880*). Additionally, any complaint about the lower Court taking Judicial Notice is not properly before this Court, because that argument was not raised by Appellant before the lower Court, by a Rule 59(e), SCRCP Motion. Instead, the Appellant improperly raised this argument for the first time, in Appellant's Appeal. The grounds for this Motion follow:

MOTION

Respondents' Designation of Matter.

Respondent filed their Designation of Matter to be Included in the Record on Appeal on December 14, 2012, which included a reference to "1786 Grant and Plat", as item "16", (*Designation of Matter attached as, Exhibit "A"*).

Appellant's Counsel Acted Without Permission of This Court.

Without seeking guidance or approval from this Court, Appellant's counsel simply omitted the item referenced above, which was designated into the Record by Respondents' counsel, (*Designation of Matter, Item "16", attached as, Exhibit "A"*). Counsel for the Appellant made the unilateral decision to not include the item designated by Respondents' counsel with the stated reason being, "...the 1786 Plat was not in the record below so, per Rule 210(c), I did not include it in the Record on Appeal.", (*Correspondence from Appellant's counsel attached as, Exhibit "B"*).

Lower Court Took Judicial Notice.

Appellant ignores the fact that the lower Court's, "Order on Remand" filed on January 13, 2012, reveals that:

(a) The lower Court properly took Judicial Notice¹, as follows:

"Accordingly, [the lower] court must look to the chain of title submitted as well as prior case law for guidance. The [lower] court cites this authority as precedent and **takes judicial notice of both prior case law and, especially, those cases which have come before [the lower court]**. In particular, the Court of Appeals Order on Remand cited to [the lower] court's prior decision in Query v. Burgess, 371 SC 407, 639 SE 2d 455 (Ct. App. 2006)." (emphasis supplied), (*Order on Remand p. 2, Record p. 880*); and

(b) A reference in the lower Court's Order to the "1786 Plat", which reads,

"Accordingly, while the oldest diagram submitted to the court in this litigation was an 1895 engineer's 'Map of Folly Island,' this court concludes, based upon Query, that the 1786 plat is the genesis for title to all marshland located on Folly Island – this issue has previously been decided by Query and is adverse to the position taken by either party in this litigation. At a minimum, the parties should present the full history of title to the court for a complete hearing." (*Order on Remand p. 4, Record p. 882*).

Appellant Failed to Preserve Argument Concerning Judicial Notice.

Any complaint about the lower Court taking Judicial Notice is not properly before this Court, because that argument was not raised by Appellant before the lower Court by a Rule 59(e), SCRPC Motion. Instead, the Appellant improperly raised this argument for the first time, in Appellant's Appeal.

¹ Rule 201, SCRE, which governs the taking of Judicial Notice of adjudicative facts, provides: "(c)...A court may take Judicial Notice, whether requested or not." and "(f)...Judicial Notice may be taken at any stage of the proceeding." Bowers v. Bowers, 349 S.C. 85, 561 SE 2d 610 (S.C. Ct. of App. 2002).

Appellant's Actions Were Self-Serving.

Appellant's counsel actions were self-serving. Appellant's counsel omits the 1786 Plat, which was properly designated by the Respondents into the Record, as described in more detail hereinabove, to support Appellant's counsel's argument on page 24, in argument "11" of Appellant's Initial Brief that, "The 1786 Plat the Master cites was not presented at trial, is not in the record, and the Master erred by considering evidence not presented at trial or in the record."

Lower Court Relied on the 1786, 1895 and 1920 Plats.

The lower Court's, "Order Denying Plaintiff's Rule 59(e) Motion for Relief" filed on April 19, 2012, shows that the lower Court relied on more than the 1786 Grant and Plat, (*Order, R. p. 885*).

The lower Court's Order indicates that the lower Court relied on the 1786 Grant and Plat, the 1895 Tartus Plat, (*R. p. 1067*) and the 1920 Cummings and McCrady Plat, (*R. p. 1068*). The lower Court's Order reads as follows:

"While the 2005 Kennerty plat shows some of the property in question to lie above the mean high water mark, this property clearly appears as Marsh Land in the **1786 Grant and plat**, the **1895 Engineer Tartus' survey** (upon which [Appellants] rely) and the **1920 Cummings and McCrady plat**." (emphasis supplied), (*Order Denying Rule 59(e) Motion, Record p. 885*).

CONCLUSION

Based on the foregoing, this Court should compel Appellant to include the document designated by Respondent in their Designation of Matter to be Included in the Record, item "16", therein, by the issuance of an Appendix to the Record on Appeal, and allow the Respondents to thereafter, revise Respondents' Final Brief to include the references to item "16" previously set forth in Respondents' Initial Brief.

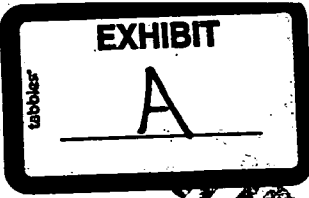
Respectfully Submitted,
AUSTIN & ROGERS, P.A.

By:



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Richard L. Whitt, S.C. Bar No.: 62895
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June 20, 2013
Columbia, South Carolina



COPY

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2005-CP-10-4101

Appellate Case No.: 2012-212136

The Milton P. Demetre Family Limited Partnership.....Appellant,

v.

Harry Beckmann, III, Patricia P. Beckmann, Annie Ruth Hilton Crowley,
Raymond Moody Crowley, Donald William Crowley, Harris L. Crowley, Jr.,
and Annie Ruth Crowley Akinson.....Respondents.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondents propose the following be included in the Record on Appeal:

1. Appellant's Rule 59(e) Motion to Alter or Amend the Order on Remand, filed February 2, 2012;
2. The Honorable Mikell R. Scarborough's Order on Remand, filed January 13, 2012;
3. The Honorable Mikell R. Scarborough's Order Denying Plaintiff's Rule 59(e) Motion for Relief, filed April 19, 2012;
4. Unpublished Opinion No. 2009-UP-029, Re-filed April 21, 2009;
5. Appellant's Notice of Appeal dated May 31, 2012;
6. Correspondence from counsel for Appellant, dated September 11, 2012;
7. Correspondence from Court of Appeals, dated September 13, 2012;

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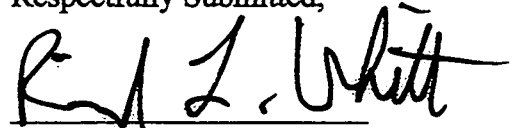
SC COURT OF APPEALS

8. Appellant's Motion to Accept Designation of Matter and Initial Brief Out of Time, dated September 21, 2012;
9. Court of Appeals Order filed November 15, 2012;
10. Respondents' Motion for Extension of Time, filed November 19, 2012;
11. 1920 Cummings and McCrady Plat;
12. 1920 Jefferson Construction Plat;
13. 2005 Kennerty Topographic Plat; Oversized Document;
14. 1965 Plat, tracing the 1920 Plat;
15. 1968 Plat, Oversized Copy, Redrawn;
16. 1786 Grant and Plat;
17. 1895 Tartus' Plat;
18. 1943 Master's Deed;
19. Appellant's 2004 Deed from Seabrook, Jr.;
20. December 12, 2006, Hearing, Plaintiff's Exhibit "K";
21. Transcript of Proceedings from Hearing held on December 12, 2006: p. 5; p. 6; p. 10; p. 35; p. 136; p. 139; p. 140; p. 298, p. 299; p. 300; p. 301; p. 302; p. 303; p. 304; p. 305; p. 306; p. 307; p. 308; p. 309; p. 310; p. 311; p. 312; p. 313; p. 314; p. 315; p. 316; p. 317; p. 346; p. 347;
22. Transcript of Proceedings from Hearing held on October 21, 2011: p. 6; p. 7; p. 8; p. 10.

[Signature Page Follows]

I certify that this Designation of Matter to be Included in the Record on Appeal, contains no matter which is irrelevant to this appeal.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Richard L. Whitt". The signature is written in a cursive style with a horizontal line underneath the name.

Richard L. Whitt

Jefferson D. Griffith, III

Austin & Rogers, PA

508 Hampton Street, Suite 300

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(803) 251-7442

Attorneys for the Respondents

December 14, 2012

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May 29, 2013

Jefferson D. Griffith, III, Esquire
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P.O. Box 11716
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Attorneys for Respondents

Re: The Milton P. Demetre Family Limited Partnership vs.
Harry Beckmann, III et al
Case No. 2005-CP-10-4101
Appellate Case No.: 2012-212136

Dear Gentlemen:

As far as I know, the 1786 Plat was not in the record below, so, per Rule 210(c), I did not include it in the Record on Appeal. Please advise if this is incorrect.

Best wishes.

Very truly yours,

Cain Denny

Cain Denny

c.c. John Hughes Cooper, Esquire
Mr. Milton P. Demetre

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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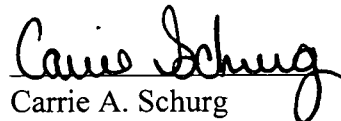
Harry Beckmann, III, Patricia P. Beckmann, Annie Ruth Hilton Crowley,
Raymond Moody Crowley, Donald William Crowley, Harris L. Crowley, Jr.,
and Annie Ruth Crowley Akinson.....Respondents.

PROOF OF SERVICE

I, Carrie A. Schurg, an employee of Austin & Rogers, P.A., certify that I have caused a copy of Respondents' Motion to Compel Inclusion of Material Omitted from Record on Appeal and this Proof of Service to be served, via U.S. Mail on June 20, 2013 as addressed below.

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Carrie A. Schurg

June 20, 2013

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Austin & Rogers, P.A.

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* ALSO ADMITTED IN N.C.

June 20, 2013

VIA, HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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SC Court of Appeals

- Re: • The Milton P. Demetre Family Limited Partnership vs. Harry Beckmann, III, *et al.*
• Appellate Case No.: 2012-212136
• **Respondents' Motion to Compel Inclusion of Material Omitted From Record on Appeal**

Dear Ms. Kitchings:

Enclosed for filing, please find the original and the required six copies of Respondents' Motion to Compel Inclusion of Material Omitted from Record on Appeal and this Proof of Service in the above-referenced matter. Also enclosed, please find a check in the amount of \$25.00, for the required filing fee.

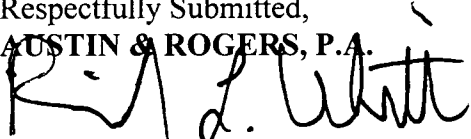
Please accept these documents for filing and acknowledge receipt of the same by file-stamping the copies enclosed and returning them to me, via our courier.

Please don't hesitate to contact the undersigned if you have any questions or concerns.

With best regards, we are,

RLW/cas
Enclosures

Respectfully Submitted,
AUSTIN & ROGERS, P.A.


Jefferson D. Griffith, III
Richard L. Whitt

cc: John Hughes Cooper, Esquire
Cain Denny, Esquire