

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

The Milton P. Demetre Family Limited PartnershipAppellant,

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 AtkinsonRespondents.

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

John Hughes Cooper, Esquire
John Townsend Cooper, Esquire
John Hughes Cooper, P.C.
1476 Ben Sawyer Blvd., Suite 7
Mt. Pleasant, S.C. 29464
(843) 883-9099
Attorneys for Appellant

Cain Denny, Esquire
Cain Denny, P.A.
Post Office Box 1205
Charleston, S.C. 29402
(843) 478-0692
Attorney for Appellant

RECEIVED

JUL 03 2013

SC Court of Appeals

Respondents move to compel inclusion of a 1786 Plat in the Record on Appeal. However, they do not dispute that the 1786 Plat was not presented to the lower court. Rule 210(c), SCACR, provides in pertinent part:

. . . (c) **Content.** The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 238. The Record shall not, however, include a matter which was not presented to the lower court or tribunal.

Rule 210(c), SCACR.

Thus, Rule 210(c), SCACR, precludes inclusion of the 1786 Plat because it was not presented to the lower court.

No Evidence that the Master Took Judicial Notice of the 1786 Plat

Respondents, in the “Introduction” to their Motion, assert that the lower Court (“Master”), in his Order on Remand, took judicial notice of the 1786 Plat. (Respondents’ Motion, p. 4).

However, in actually citing the Master’s Order on Remand, Respondents retreat from this assertion. Citing page 2 of the Master’s Order on Remand, Respondents, without specifying the 1786 Plat, assert merely that the Master “took Judicial Notice” as opposed to “took Judicial Notice of the 1786 Plat.” (Respondents’ Motion, p. 5).

The Master’s Order on Remand at page 2, in the part the Respondents cite, states that the Master, “takes judicial notice of both prior case law, especially those cases which have come before [the Master],” not that the Master “takes judicial notice of the 1786 Plat.” (Master’s Order on Remand, p. 2) (R. p. 880) (“The [Master] cites this authority as precedent and takes

judicial notice of both prior case law and, especially, those cases which have come before [the Master].”)

Citing page 4 of the Master’s Order on Remand, Respondents assert that it reveals a “reference to” the 1786 Plat, not that it “takes judicial notice of” the 1786 Plat.

The Master’s Order on Remand at page 4, in the part cited by Respondents, discussing a case involving the 1786 Plat, does reference the 1786 Plat but does not take judicial notice of it. (Master’s Order on Remand, p. 4) (R. p. 882) (“ . . . this court concludes, based upon Query, that the 1786 plat is the genesis for title to all marshland located on Folly Island - . . .”).

Thus, there is no evidence to support the Respondents’ assertion in the Introduction to their Motion that the Master took judicial notice of the 1786 Plat.

Appellant Distinguished Query

Respondents assert that Appellant failed to preserve any argument concerning judicial notice. In this section of Respondents’ Motion, they refer merely to “Judicial Notice” not “Judicial Note of the 1786 Plat.” There was no judicial notice of the 1786 Plat.

The Master took what he called “judicial notice” of prior cases and particularly Query v. Burgess, 371 S.C. 407, 639 S.E.2d 455 (Ct. App. 2005). However, Appellant, in his Rule 59(e) Motion, distinguished Query as a case in which the plaintiff sought to quiet title to lowland marsh below the mean high-water mark, not, as in the present case, to highland marsh above the mean high-water mark. (Plaintiff’s Rule 59(e) Motion to Alter or Amend the Order on Remand, p. 15) (R. p. 1021). (“However, the plaintiff in Query claimed title to low marsh, not, as in the present case, highland. The Court of Appeals in Query confirmed title in the State to the property only below the mean high-water mark of the Folly River.”)

Judicial Notice Pertains to Facts Not Documents

In footnote 1 to their Motion, Respondents cite Rule 201, SCRE and Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002). Both of these authorities highlight that judicial notice pertains to the finding of facts not the admission of documents into the record.

Rule 201(a), SCRE, states in pertinent part:

(a) **Scope of Rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned.

Rule 201, SCRE, does not suggest that referring to a plat in an order is a way to get the plat into evidence or into the Record on Appeal where it was not otherwise introduced into evidence.

Likewise, Bowers v. Bowers, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002), cited by Respondents, suggests that “judicial notice” pertains to facts, not documents, stating, “A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability” (internal citation omitted).

Appellant’s Actions were Required by Rule 210

Respondents argue that Appellant’s actions in omitting the 1786 Plat from the Record on Appeal were self-serving; however, they were required by Rule 210(c), which states in pertinent part, “The Record shall not, however, include matter which was not presented to the lower court

or tribunal.” Respondents’ assertion that they properly designated the 1786 Plat conflicts with this provision.

Respondents argue that the omission of the 1786 Plat from the record supports Appellant’s argument that the Master relied on evidence not presented at trial or in the record. Appellant agrees.

The Master Made the Same Error with All Three Plats

Respondents argue that the Master’s reliance on the 1786 plat although that plat was not in the record was not prejudicial because he relied on two other plats for the same finding.

However, Respondents do not see how an argument about the merits of the case is relevant to a determination of whether Rule 210, SCACR, requires inclusion or exclusion of the 1786 Plat.

Regardless, to address Respondents’ argument, as fully discussed in Appellant’s briefs, the Master made the same error with all three plats, relying on plats that do not show the location of the mean high-water mark to find that the subject property was below the mean high-water mark.

CONCLUSION

For the foregoing reasons, Respondents’ Motion to Compel Inclusion of Material Omitted from Record on Appeal should be denied.

July 1, 2013

John Hughes Cooper, Esquire
John Townsend Cooper, Esquire
John Hughes Cooper, P.C.
1476 Ben Sawyer Blvd., Suite 7
Mt. Pleasant, S.C. 29464
(843) 883-9099
Attorneys for Appellant

Cain Denny, P.A.

By: Cain Denny
Cain Denny, Esquire
Post Office Box 1205
Charleston, S.C. 29402
(843) 478-0692
Attorney for Appellant

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

RECEIVED

JUL 03 2013

SC Court of Appeals

The Milton P. Demetre Family Limited PartnershipAppellant,

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 AtkinsonRespondents.

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Return to Respondents' Motion to Compel Inclusion of Material Omitted from Record on Appeal on Harry Beckmann, III, Patricia P. Beckmann, Annie Ruth Hilton Crowley, Raymond Moody Crowley, Donald William Crowley, Harris L. Crowley, Jr., and Annie Ruth Crowley Atkinson by depositing a copy of it in the United States Mail, postage prepaid, on July 1, 2013, addressed to their attorneys of record, Jefferson D. Griffith, III, Esquire, and Richard L. Witt, Esquire, Austin & Rogers, P.A., Post Office Box 11716, Columbia, South Carolina 29211.

July 1, 2013

John Hughes Cooper, Esquire
John Townsend Cooper, Esquire
John Hughes Cooper, P.C.
1476 Ben Sawyer Blvd., Suite 7
Mt. Pleasant, S.C. 29464
(843) 883-9099
Attorneys for Appellant

Cain Denny, P.A.

By: Cain Denny
Cain Denny, Esquire
Post Office Box 1205
Charleston, S.C. 29402
(843) 478-0692
Attorney for Appellant

Other Counsel of Record:

Jefferson D. Griffith, III, Esquire
Richard L. Whitt, Esquire
Austin & Rogers, P.A.
P.O. Box 11716
Columbia, S.C. 29211
Attorneys for Respondents

CAIN DENNY
CAIN DENNY, P.A.
Post Office Box 1205
Charleston, S.C. 29402
cain.denny@gmail.com
Phone (843) 478-0692
Fax (843) 353-2530
cain.denny@gmail.com

July 1, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

JUL 03 2013

SC Court of Appeals

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

Dear Ms. Kitchings:

Enclosed please find:

- The original and seven (7) copies of Appellant's Return to Respondents' Motion to Compel Inclusion of Material Omitted from Record on Appeal and the original and one (1) copy of its Proof of Service;
- The original and one (1) copy of Certification of Appellant that the Final Brief of Appellant and the Final Reply Brief of Appellant comply with Rule 211(b), SCACR and the original and one (1) copy of its Proof of Service.

Please return stamped copies in the envelope provided.

Best wishes.

Very truly yours,

Cain Denny

Cain Denny

c.c. Jefferson D. Griffith, III, Esquire (with enclosures)
Richard L. Whitt, Esquire (with enclosures)
John Hughes Cooper, Esquire (with enclosures)
Mr. Milton P. Demetre (with enclosures)