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 Atkinson.....Respondents.

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

Jefferson D. Griffith, III
Richard L. Whitt
Austin & Rogers, P.A.
508 Hampton Street, Suite 300
Columbia, South Carolina 29211
Attorneys for Respondents

OTHER COUNSEL OF RECORD:

John Hughes Cooper, Esquire
John Hughes Cooper, P.C.
1476 Ben Sawyer Blvd., Suite 7
Mt. Pleasant, South Carolina 29464
Attorney for Appellant

Cain Denny, Esquire
Cain Denny, P.A.
Post Office Box 1205
Charleston, South Carolina 29402
Attorney for Appellant

TABLE OF AUTHORITIES

INTRODUCTION

When Appellant's counsel served the Record on Appeal in this matter, on May 29, 2013, Appellant's counsel intentionally and improperly omitted a document designated by Respondents to be included in the Record on Appeal. Respondents filed "Respondents' Motion to Compel Inclusion of Material Omitted from Record on Appeal", (hereinafter referred to as, "Motion to Compel"), with this Court on June 20, 2013. Appellant's counsel thereafter filed a Return to Respondents' Motion, dated July 1, 2013, and received by Respondents' counsel on July 3, 2013. Respondents' Reply to Appellant's Return follows:

REPLY

Respondents' hereby reply to Appellant's arguments in its Return.

I. The Scope of Judicial Notice.

Appellant narrowly argues in its Return to Respondents' Motion to Compel that, "...judicial notice pertains to facts, not documents...", *(Appellant's Return to Motion to Compel, p. 4)*. Actually, as the Lower Court did in the instant case, and under both State and Federal law, "...**a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records**." South Carolina Department of Social Services v. Janice C., 678 SE 2d 463, (S.C. Ct. of App. 2009), (emphasis supplied), (FEDERAL-Anderson v. Federal Deposit Ins. Corp., 918 F. 2d 1139 Court of Appeals, 4th Circuit 1990).

Judicial notice takes the place of proof. Masters v. Rodgers Development Group, 283 S.C. 251, 321 SE 2d 194, (S.C. Ct. of App. 1984). (Internal citations omitted) (Internal footnote omitted).

The Judge, ("Master") in the Lower Court in the instant case, was the same Judge in the Query case, which was cited in the Lower Court's Order on Remand, wherein the Lower Court took Judicial Notice[1] of,

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

[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).

Therefore, the Lower Court properly took judicial notice of the Query decision and the facts established in the Lower Court's records from Query, which included the 1786 Plat. The Order on Remand shows the Lower Court's reliance thereon that, "...the 1786 plat is the genesis for title to all marshland located on Folly Island –this issue has previously been decided by Query...", (*Order on Remand, R. p. 882*).

Additionally the Lower Court relied on "prior case law for guidance" which "the court [lower court] took as precedent..." *(Order on Remand, R. p. 882)* "No rule is more deeply imbedded in Anglo-American decisional law than *stare decisis*... Meaning literally 'to stand by decisions' it has for its object the salutary effect of certainty and stability in law." McCall v Batson, 285 S.C. 243, 255-256, 329 S.E.2d 74, (1985). The Lower Court relied on facts that had originally been presented to it and of which, the Trial Judge properly took judicial notice.There was legal, precedential authority cited by the Appellate Court in Query, in which that Court relied on specific facts from the the Lower Court's Order. Because the Court of Appeals has relied on factual determinations in Query *(supra)* in a subsequent case, Grant v. State 395 S.C. 225, 236, 717 S.E.2d 96 (2011), in which the Court of Appeals found "...this court [Court of Appeals] has previously determined a copy of the 1786 ... grant and plat at issue in this case ... In Query v. Burgess, Query brought suit against his neighbor Burgess and the State to determine title to tidelands adjacent to his property and Query's property on Folly Beach." Query *supra* at, 409-410. In Query, the Lower Court examined and relied upon, a copy of the 1786 Grant and Plat at issue in the instant case. Id. at 412, 639 S.E.2d at 457. Query appealed. Id. at 410, 639 S.E.2d at 456. On review, this Court examined the applicability of the 1786 Plat and Grant and affirmed the Lower Court's finding. Based on the foregoing, it was proper for the Trial Judge to rely on the previous decisions that this Court found determinative. The Trial Judge's Judicial Notice reliance (*Order on Remand, R. p. 880*) must be fairly read in harmony with the Lower Court's entire Order on Remand, (*Order on Remand, R. pp. 879-884*).

II. Appellant Failed to Preserve Appellant's Argument.

Any complaint about the lower Court taking Judicial Notice in its Order on Remand, 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. "Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier." (Internal citation omitted). "Issues which could have been presented to the court for consideration previously, but which were not, are not proper subject of Rule 59 (e) relief; the issues are waived." (Internal citation omitted). Hickman v. Hickman, 301 S.C. 455, 457, 392 SE 2d 481 (S.C. Ct. of App. 1990).

Based on Respondents' argument in "I." hereinabove, it is obvious that the Lower Court's Order on Remand properly took Judicial Notice. Additionally, any complaint by Appellant's counsel, as to the Lower Court taking Judicial Notice, is waived because Appellant's counsel failed to properly preserve any complaint by filing a timely Rule 59(e), SCRCP Motion before the Lower Court, (factually, Appellant's counsel filed a Rule 59(e) Motion on other grounds), *("Plaintiff's Rule 59(e) Motion to Alter or Amend the Order on Remand", R. pp. 1011-1030).*

III. Appellant's Counsel Acted Without Permission of This Court.

Without seeking guidance or approval from this Court and acting in derogation of this Court's Rules Appellant's counsel simply omitted the matter referenced as item "16" in Respondents' Designation of Matter to be Included in the Record on Appeal, which was designated into the Record by Respondents' counsel, *(Respondents' Designation of Matter, attached to Respondents' Motion to Compel as, Exhibit "A").*

Appellant's counsel was bound by Rule 210(c), SCACR, "The Record on Appeal shall include all matter designated to be included by any party under Rule 209…", (emphasis not in Rule). Note the mandatory "shall", there is no precatory language concerning the requirement to, "…include all matter designated to be included by any party..."

The further statement in the Rules that the Record on Appeal shall not include matter not presented to the Lower Court, is to be enforced by this Court and not unilaterally by Appellant's counsel, upon his unilateral and self-serving[2], determination that matter designated by Respondents' counsel should have been, or should not have been, included in the Record on Appeal.

That requirement is also further enforced by Rule 210(g), SCACR, and binding on Appellant's counsel by that Rule, which requires a Certification by Appellant's counsel that the Record on Appeal contains all material proposed to be included by any of the parties. Appellant's counsel filed a Certification with this Court on May 29, 2013, *(Certification, R. p. 1072)* although Appellant's counsel's transmittal correspondence to Respondents' counsel indicated, "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**." (emphasis supplied), *(Appellant's Counsel's correspondence, attached to Respondents' Motion to Compel, as Exhibit "B")*. Therefore, Appellant's Counsel's Certification to this Court was inconsistent with the Appellant's compilation and submission of the Record on Appeal to this Court, *(Certification, R. p. 1072)*.

[2]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."

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

As argued above, the 1786 Plat was properly designated into the Record on Appeal, by the Respondents.

Additionally, 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 further 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 previously designated by Respondents in their Designation of Matter to be Included in the Record on Appeal (item "16", therein), by the Appellant's counsel's 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, filed with this Court on December 14, 2012.

Respectfully Submitted,
AUSTIN & ROGERS, P.A.

By: 

Richard L. Whitt, S.C. Bar No.: 62895
Jefferson D. Griffith, III, S.C. Bar No.: 2299
508 Hampton Street, Suite 300
P.O. Box 15907
Columbia, South Carolina 29211
Phone: (803) 256-4000
Fax: (803) 252-3679
Attorneys for Respondents

July 8, 2013
Columbia, South Carolina

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 Atkinson.....Respondents.

PROOF OF SERVICE

I, Carrie A. Schurg, an employee of Austin & Rogers, P.A., certify that I have caused to a copy of the Reply to Appellant's Return to Respondents' Motion to Compel Inclusion of Material Omitted from the Record on Appeal and this Proof of Service to be served, via U.S. Mail on July 8, 2013, as addressed below.

John Hughes Cooper, Esquire
John Hughes Cooper, P.C.
1476 Ben Sawyer Blvd., Suite 7
Mt. Pleasant, South Carolina 29482

Cain Denny, Esquire
Cain Denny, P.A.
Post Office Box 1205
Charleston, South Carolina 29402

Carrie A. Schurg

July 8, 2013

ORIGINAL

Austin & Rogers, P.A.

ATTORNEYS AND COUNSELORS AT LAW

C.C. HARNESS, III
(1949-2010)

WILLIAM FREDERICK AUSTIN
TIMOTHY F. ROGERS
RAYMON E. LARK, JR.
RICHARD L. WHITT

COLUMBIA OFFICE:
CONGAREE BUILDING
508 HAMPTON STREET, SUITE 300
POST OFFICE BOX 11716
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 256-4000
FACSIMILE: (803) 252-3679
WWW.AUSTINROGERSPA.COM

JEFFERSON D. GRIFFITH, III*
EDWARD L. EUBANKS
W. MICHAEL DUNCAN

* ALSO ADMITTED IN N.C.

July 8, 2013

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

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

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the Reply to Appellant's Return to Respondents' Motion to Compel Inclusion of Material Omitted from the Record on Appeal, the required six copies of the Reply and Proof of Service.

Please accept these documents for filing and acknowledge receipt of the same by file-stamping the extra 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, I am,

Respectfully,
AUSTIN & ROGERS, P.A.

Richard L. Whitt
Jefferson D. Griffith, III

Enclosures
cc: John Hughes Cooper, Esquire
Cain Denny, Esquire