THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

RECEIVED
JUL 22 2013
SC Court of Appeals

Case No.: 2005-CP-10-4101

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.

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

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SUPPLEMENTAL RETURN OF APPELLANT

I. Judicial Notice is Not a Vehicle to Place Documents in the Record

In their Reply, Respondents continue to assert that judicial notice is a vehicle to include a document in the Record on Appeal where that document was not presented below.

However, first, Respondents make no reply to Appellant's point that their assertion conflicts with the plain language of Rule 210(c), SCACR. (" . . . The Record shall not, however, include a matter which was not presented to the lower court or tribunal.")

Second, the cases Respondents cite do not support their assertion that judicial review pertains to admission of documents, as opposed to facts, into the record. In the first two cases the Respondents cite (Reply p. 5), the subject documents were already in the record, not placed in the record through judicial notice. South Carolina Department of Social Services v. Janice C., 383 S.C. 221, 678 S.E.2d 463, 467 (Ct. App. 2009) ("These documents were filed with the family court; therefore, they were part of the record."); Anderson v. Federal Deposit Ins. Corp., 918 F.2d 1139, 1144, n. 1 (4th Cir. 1990) ("Moreover, the Bankruptcy Court is considered 'a unit of the district court' under 28 U.S.C. Sec. 151, and we believe the district court should properly take judicial notice of its own records, as the court below implicitly did . . .").

In the third case Respondents cite (Reply p. 5), judicial notice was declined for a publicly recorded deed. Masters v. Rogers Development Group, 283 S.C. 251, 321 S.E.2d 194, 197 (Ct. App. 1984) (Notice of facts for the first time on appeal may violate the general principle that appellate review should be limited to the record). Also, the legal principle for which Respondents cite this case, "[j]udicial notice takes the place of proof," does not support their assertion that judicial notice can place a document into the record.

In the fourth case cited by Respondents, the legal principle for which Respondents cite that case does not bear on the issue at hand. McCall v. Batson, 285 S.C. 243, 329 S.E.2d 74 (1985). Respondents cite this case for the principle, "No rule is more deeply imbedded in Anglo-American decisional law than *stare decisis* . . ." Here, Appellant does not seek to overturn *stare decisis*.

Third, Respondents argue that, in the present case, it was proper for the trial court to rely on Query v. Burgess, 371 S.C. 407, 639 S.E.2d 455 (Ct. App. 2006), as precedent. Appellant disagrees. Query, unlike the present case, was a claim to low marsh. Accordingly, there was a legal presumption in Query that the State owned the property and that the plaintiff bore a burden to prove title back to its origin from the State.

However, the present case, on the other hand, is a claim to high marsh. There is no presumption of State ownership. Further, Respondents stipulated to Plaintiff's record title. Moreover, on remand, the Master had already been reversed on his original findings that the property was below the mean high-water mark and that the State was a necessary party.

Regardless, even where a case is proper precedent, that does not make the evidence in that case part of the record.

II. Trial Court Did Not Put the Document Into the Record

Respondents argue in their Reply at page 7:

> 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 Appellant improperly raised this argument for the first time in Appellant's Appeal.

However, first, Respondents' argument presumes that the trial Court did place the subject document in the record, which, as discussed above, it did not. Second, Respondents are incorrect that Appellant has asserted on appeal that the trial Court did so. Rather, Appellant has argued that the document is not in the record.

III. Appellant Acted as Required

Respondents, quoting part of of Rule 210(c), SCACR, argue that Appellant violated that rule. However, Rule 210(c), more fully quoted, requires the following:

> 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.

Respondents assert that Appellant's Counsel filed a Rule 210(g) certification on May 29, 2013 with this Court. However, that is incorrect. As provided by Rule 210(a), Appellant first served one copy of the Record on Appeal on Respondents, not the Court. Appellant did so on May 29, 2013. With that copy, Appellant's Counsel sent the letter dated May 29, 2013, attached to Respondents' Motion. (Exhibit "A," Cover Letter, Proof of Service, May 29, 2013 Letter). The May 29, 2013 letter states:

> 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.

Respondents did not respond. Twenty days later, having received no objection from Respondents or indication that, in light of Rule 210(c), they continued to propose the subject document for inclusion in the Record on Appeal, and given the requirement of 210(c) that the record not include a matter which was not presented to the lower court, on the deadline to file, June 18, 2013, Appellant's below-signed counsel filed the Record on Appeal, the Rule 210(g) certification, and other documents with the Court and served copies on Respondents. (Exhibit "B," Cover Letter, Proof of Service).

Two days later, having raised no objection previously, Respondents filed their pending Motion to Compel Inclusion of Material Omitted from Record on Appeal.

IV. The Master Made the Same Mistake with All Three Plats

Respondents argue that the 1786 Plat was properly designated, but, nonetheless, the Master relied on two other plats for the same finding. However, the merits of the case are not relevant to a determination of whether the plat should be included in the Record on Appeal.

Nonetheless, to address Respondent's argument, the Master made the same mistake with all three plats, relying on them to find that the subject property was below the mean high-water mark when those plats did not show the location of 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 18, 2013

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May 29, 2013

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

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:

- Proof of Service to Respondents of one copy of the Record on Appeal;
- Appellant's Motion to Supplement the Record and Proof of Service; and
- Motion fee check for $25.

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)

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May 29, 2013

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

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Cain Denny

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

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PROOF OF SERVICE

I certify that I have served one copy of the 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 May 29, 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.

May 29, 2013

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June 18, 2013

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

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 Ms. Kitchings:

Accompanying this letter please find:

- Record on Appeal (15 bound copies and 1 unbound copy);
- Final Brief of Appellant (15 bound copies and 1 unbound copy);
- Final Reply Brief of Appellant (15 bound copies and 1 unbound copy);
- Oversized exhibits (16 copies of each);
- Proofs of Service for the foregoing (original and copy).

Please return stamped copies.

Very truly yours,

Cain Denny

Cain Denny

c.c. Richard D. Whitt, Esquire
Jefferson D. Griffith, Esquire
John Hughes Cooper, Esquire
Mr. Milton P. Demetre

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PROOF OF SERVICE

I certify that I have served the Record on Appeal, Final Brief of Appellant, and Final Reply Brief of Appellant 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 each in the United States Mail, postage prepaid, on June 18, 2013, addressed to their attorneys of record, Richard L. Whitt, Esquire, and Jefferson D. Griffith, Esquire, Austin & Rogers, P.A., P.O. Box 11716, Columbia, South Carolina 29211.

June 18, 2013

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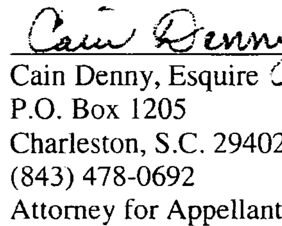
By: 

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and Annie Ruth Crowley Atkinson ....Respondents.

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Motion to File and Serve Supplemental Return of Appellants to Respondents' Motion to Compel Inclusion of Material Omitted from Record on Appeal and Supplemental Return of Appellant 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 18, 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 18, 2013

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