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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
James B. Jackson, Jr., Master in Equity

Case No.: 2020-CP-38-00699

Appellate Case No. 2023-000436

Timothy J. Judy and Dana A. Judy.....Respondents,

v.

Alice Soto, Joseph B. Rodriguez, Matthew Rodriguez, Gwen Rodriguez and Stephanie B. Wells
.....Appellants.

APPELLANTS' PETITION FOR REHEARING

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July 31, 2024

Appellants hereby petition for rehearing as to this Court's Unpublished Opinion No. 2024-UP-257, filed July 17, 2024 (the "***Opinion***"). As set forth below, the Appellants respectfully submit that the Opinion misapprehends the order and conclusions of the Orangeburg County Master in Equity (the "***Master***") and further overlooks legal errors in the order. The Opinion should be withdrawn and the Master's order reversed.

1. **The Court misapprehended the testimony of Kevin Edwards and overlooks a key legal error in the order, which fails to cite any evidence of the original grantor of Lot 1's intent in 1951.**

Where, as here, there is a dispute as to the boundary between two parcels, the "vital question is the intent of the grantor at the time the deed is executed." *Garrett v. Locke*, 309 S.C. 94, 98, 419 S.E.2d 842, 845 (Ct. App. 1992) *citing Klapman v. Hook*, 206 S.C. 51, 32 S.E.2d 882 (1945). It is undisputed that Lot 1 and Lot 14 were once part of a larger tract of property owned by Lawrence Stroman. It is also undisputed that the relevant deed that would have established the property line between Lot 1 and Lot 14 was the first deed out of the larger parcel- the conveyance of Lot 1 from Lawrence Stroman to Dewey Edwards on August 11, 1951. (R. p. 2) (R. p. 160). It is Mr. Stroman's intent, at this time, that trial court was charged with determining.

In the Opinion, the Court noted that the lower court could not ascertain Mr. Stroman's intent, and therefore looked to natural boundaries, artificial monuments, adjacent boundaries and courses and distances to determine that intent. Opinion at 7; *citing Danley William v. Moore*, 400 S.C. 90, 103-104, 733 S.E.2d 224, 231 (Ct. App. 2012). The Court opined that the natural boundary to which the trial court looked was the "old ditch line," now covered up, between Lot 1 and Lot 14. Opinion at 7-8. However, in order to establish that the old ditch line was the historical boundary between Lot 1 and Lot 14, two things must be proven: (A) the ditch had to have been in existence at the time of the 1951 deed, and (2) the survey which established the line had to follow the old ditch line.

The problem with the Master's reasoning, and the misapprehension of the ruling and evidence by this Court, is that there is no factual support for the proposition that any survey in the record establishes the natural boundary – in this case, the old ditch line – at the time Lawrence Stroman deeded Lot 1 to Dewey Edwards in 1951. This problem was clearly laid bare in the Master's opinion when he acknowledged that he could not ascertain Lawrence Stroman's intent, and instead looked to the intent of Dewey and Betty Edwards in deeding Lot 1 to Champion Mortgage Company in May of 2016, over 60 years later:

> I find that because Betty Edwards conveyed Lot 14 to the Plaintiffs, which included the disputed area, this showed that she and her husband Dewey Edwards did not intend to include the disputed area in the deed they gave to Champion Mortgage Company.

(R. p.p. 5-6) (R. pp. 151-157). In other words, the Master relied on the existence of an old ditch line that may or may not have been existence in 1951 to determine that subsequent owners (Dewey and Betty Edwards) did not intend to deed the disputed property to Champion Mortgage Company (Appellant's predecessor in title) in 2016. That is a plain error of law, as it ascertained the intent of a later grantor and not Mr. Stroman.

Even if the Master's reliance on the intent of Betty Edwards in 2016 was not an error of law, there was no evidence to show the ditch line was in existence in 1951 or that any survey in evidence followed the old ditch line. The Opinion reads like a wish list of what the Court hoped the evidence would show, but it does not. The Opinion provides that "Kevin [Edwards] testified [Respondent's surveyor] followed the culvert along the old ditch line separating the home property – Lot 1 – from the pasture property – Lot 14 – in finding the property line." Opinion at 5. He did not.[1] The Opinion also provides that "Kevin identified the line on [Respondent's

[1] Respondent's counsel testified as such in a leading question at record page 77. *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E.2d 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered"); *Bowers v.*

survey] as the old ditch line separating the two properties." Opinion at 5. He did not. The Court also noted the 2017 aerial photo as evidence of the property line. Opinion at 4. This 2017 aerial was flown in 2017, the year after the Appellant purchased Lot 1. (R. p. 150) (R. pp. 158-159). As a matter of law, it cannot be evidence of the boundary line.

The actual evidence in the record is set forth below. It was misapprehended and requires reversal.

A. There is no evidence that the old ditch line was in existence in 1951.

It is axiomatic that natural boundary must be in existence at the time of conveyance in order to serve as evidence of a grantor's intent with regard to the boundary line. The Master relied exclusively on the testimony of Kevin Edwards regarding the existence and location of the old ditch line. The Opinion echoes that sole reliance. Opinion at 5. However, there is nothing in the record to indicate that the ditch was in existence in 1951. Mr. Edwards states that he grew up on the property, but does not state his age or that he has recollection of the property in 1951. Therefore, there is no evidence to support this claim.

B. There is no evidence that any survey in evidence reflects the location of the old ditch line.

The Master improperly opined that the old ditch line served as the boundary between Lot 1 and Lot 14 and concluded that the old ditch line was "determined and shown by both surveyors as the line bearing S 26 degrees 00 minutes 27 seconds E a distance of 288.04 feet and correspondingly N 26 degree 00 minutes 27 seconds W 288.06 feet as the boundary line." (R. p. 7) (R. p. 149) (R. p. 166). There is no evidence that this is the old ditch line. The Respondent's survey does not show the ditch. (R. p. 149). The Appellants' survey shows a portion of a ditch,

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Bowers, 304 S.C. 65, 403 S.E.2d 127, 129 (Ct. App.1991)("Arguments of counsel are ...not evidence"). However, as noted below, Kevin Edwards testified that the line was placed on the Respondent's survey "to be good for everybody" and to reflect what he thought the Appellant wanted. (R. p.p. 64-65).

but it is not located along the designated boundary line. (R. p. 166). Further, the culvert relied upon in the Opinion is not shown in either survey. (R. p. 149) (R. p. 166). In fact, the Respondent's survey explicitly provides, in CAPS:

> **ALL BUILDINGS AND SURFACE AND SUBSURFACE IMPROVEMENTS ON AND ADJACENT TO THE SITE ARE NOT NECESSARILY SHOWN HEREON. THE LOCATION AND/OR EXISTENCE OR UTILITY SERVICE LINES TO THE PROPERTY SURVEYED ARE UNKNOWN AND ARE NOT SHOWN.**

(R. p. 149) (emphasis added).

Given that the Master relied exclusively on the testimony of Kevin Edwards, his actual testimony is critical, and any misapprehension of it in the Opinion requires reversal. Kevin Edwards never testified that either survey reflects the location of the old ditch line. Instead, on direct examination, he testified that he asked Donald Smith (Respondent's surveyor) to survey Lot 14 to "be good for everybody", and said nothing about following a now-invisible ditch line:

> Q. I'm gonna refer you back to Plaintiffs' Exhibit No. 2, and I'm gonna show -- it's the northeast line between the 1.32 acres and now and formally Alice Soto. Is that line -- how was that line determined or how was it run by Don Smith?
>
> A. When I talked to Ms. Soto and she, you know, wanted it done the way the tax map showed it and everything. So when I went to Don and told him what I was in the process of doing, we needed a survey. I told Don that, you know, she's supposed to get an acre of property with the house, and we need to get it surveyed and she wants to make it look like the tax map. So I said try to get it surveyed and look like the tax map, which is what Ms. Soto wanted at the time. So he went in and did that. And it ended up being a little bit more than 1 acre. But that put it to where I thought that would be good for everybody. You know, that was as close as we could get to the tax map like it was supposed to be.
>
> Q. And did that establish the line between the old home place and the 1.32 acres your mother still owned?
>
> A. Yes. Because I don't think there was ever an actual survey done since they owned everything around it.
>
> Q. Okay. And is that similar to or comport with Exhibit No. 3, the tax map and aerial flown in 2017?

A. Yes, sir.

Q. And in your conversation with Ms. Soto, is that the way she wanted it?

A. Yes. This is what I thought she wanted.

(R. pp. 64-65). On cross examination Mr. Edwards testified that he was not a part of the negotiations to mortgage Lot 1 to Champion Mortgage and **did not know** the extent of the property his mother pledged as collateral for the loan. (R. p. 70). He further admitted that he did not walk the property lines with Respondent's surveyor and, more importantly did not show him the property lines. (R. p. 71). On re-direct, there was no testimony concerning whether or under what circumstances either surveyor followed the now-covered old ditch line in completing their survey. Therefore, the only evidence in the record is that Kevin Edwards asked the surveyor to survey Lot 14 "to be good for everybody" nearly 70 years after Lot was conveyed by Mr. Stroman.

The Opinion clearly misapprehended and/or overlooked Kevin Edwards' actual testimony. He never testified that the old ditch line was in existence in 1951 or that either survey actually followed the old ditch line. He only testified that he asked Respondent's surveyor to place the line where it would be "good for everybody." That is not evidence of Lawrence Stroman's intent and cannot fairly serve as the basis for affirmance of the Master's order.

2. The Opinion overlooked the significance of the old tax maps and 2007 aerial as the only evidence of the boundary before the Master.

Given that Kevin Edwards testified only that he asked Respondent's surveyor to place the boundary line where it would be "good for everybody" and not over the old ditch line, that testimony is not evidence of Mr. Stroman's intent. The only evidence of the actual line that predates the deed to the Appellant include the tax maps from the 1960s and 1977 and the 2007 aerial. (R. pp. 164-165) (R. pp. 177-179). Each of these documents depicts Lot 14 as a pure

triangle, just like the Appellant's survey. (R. p. 166). The Opinion rejects these documents as evidence of the boundary line, but the simple fact is that these documents are all of the evidence there is regarding the boundary line before the Appellant took title to Lot 1. The Opinion overlooks that key point. Therefore, the Court must reverse the Master's order.

CONCLUSION

The Appellants request that this Court reconsider its Opinion, which misapprehends the Master's improper legal application of the intent of owners other than Lawrence Stroman and further misapprehends and misquotes the only testimony on which the Master's order relies. Respectfully, the Appellants ask that this Court to correct its errors and reverse the Master's ruling.

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PROOF OF SERVICE

I certify that on July 31, 2024, I have served Appellants' Petition for Rehearing on Respondents by sending the same to their attorney of record, Michael P. Horger, at the email addresses of record with the AIS.

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