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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Case No. 2018-CP-26-00120

Appellate Case No. 2021-000078

East Cherry Grove Realty Co., LLC and Ray & Nixon, LLC. Respondents

vs.

State of South Carolina; South Carolina Department of Health
and Environmental Control; and Matt Leonhard, Defendants

Of Whom:

The State of South Carolina is the..... Appellant

RESPONDENTS' PETITION FOR REHEARING

The Respondent, pursuant to Rule 221, SCACR, petitions this Court for a rehearing of its Opinion No. 6068 filed July 3, 2024 and having been received by Respondents' attorney on July 3, 2024. The Court granted Respondent's request to file its petition by August 2, 2024. The basis of Respondents' request for rehearing is set forth in the attached Memorandum.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.



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August 2, 2024
Surfside Beach, South Carolina

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RESPONDENTS' MEMORANDUM OF LAW IN
SUPPORT OF PETITION FOR REHEARING

On July 3, 2024, this Court issued its Opinion No. 6068 affirming as modified in part and reversed in part the Amended Final Order of the Circuit Court filed December 21, 2020. The Respondents, in response to this Court's Opinion, respectfully offers the following points this Court overlooked or misapprehended in issuing its Opinion.

I. THE COURT'S OPINION IS NOT CONSISTENT WITH THE STANDARD OF REVIEW.

It is well settled in South Carolina that the standard of review on an appeal in a case tried by a judge without a jury provides the appellate court "will affirm the master's factual findings if there

is any evidence in the record that reasonably supports them.” (quoting *Low Country Open Land Tr. v. State*, 347 S.C. 96, 101-02, 552 S.E.2d 778, 770, 781 (Ct. App. 2001)). It is a time honored rule that an appellate court must affirm if the evidence reasonably supports the trial court.

Respondent urges the Court to reconsider its opinion and affirm the trial judge in all aspects since the any evidence rule supports the circuit court’s ruling. Specifically, Respondent takes issue with that portion of this Court’s opinion in which it held that there was no evidence showing East Cherry Grove Realty owned the area described as the “pig’s ears” and the “dome of the pig’s head.” The basis of Respondent’s contention is the evidence presented at trial clearly shows that the “pig’s ears” and the “dome of the pig’s head” are within a Kings Grant.

East Cherry Grove offers the following as a brief summary of the facts which support its claim:

A. Testimony of William DesChamps supports the “any evidence” standard.

Contrary to this Court’s opinion, William DesChamps, an expert in real estate and tidelands real estate claims, testified succinctly that there were Kings Grants over the East Cherry Grove and Ray & Nixon property (R. p. 106, lines 24-25); that Plaintiff’s Exhibit 4 (R. p. 246) is a map of Floyd, Powers and Culler, the three surveyors who got together and reviewed the Kings Grants (R. p. 107, lines 11-12); that there is no doubt Ray & Nixon and East Cherry Grove Realty own property which are subject to Kings Grants (R. p. 107, lines 16-21); that it is clear to me (R. p. 108, lines 1-7); that it’s amazing that they are very close and is what the three surveyors were talking about in their investigation (R. p. 108, lines 22-24); that the surveys of East Cherry Grove Realty’s experts are over the subject property (R. p. 105, lines 15-17); and that the Circuit Court Order certifying the title in the *Teague* case has significance (R. p. 116, lines 18-19). This Court does not address this testimony of DesChamps which clearly supports affirming the trial court under the any evidence standard.

B. Testimony of Joel Floyd supports the “any evidence” rule.

Joel Floyd, a surveyor with thirty-two years of experience also testified. (R. p. 118, line 15-16). Floyd testified that he determined Kings Grants existed over the Plaintiff’s property (R. p. 121, line 4); that Plaintiff’s Exhibit 1 (R. p. 236) is an accurate survey of all four Kings Grants together (R. p. 124, lines 5-7); that the plat described as reverse Oklahoma and the Ray & Nixon, LLC property are well within the Kings Grants. (R. p. 124, lines 11-12).

Floyd, on cross examination, when asked about the pig’s ears stated they fall under another Kings Grant (R. p. 130, lines 22-23); that Exhibit 7 (R. pp. 250-251 shows specific mathematical reference of 36 degrees south 6 degrees and 30 minutes and that the pig’s ears which are described by the Attorney General’s argument is actually part of the *Teague* case (R. p. 134, lines 10-20). This testimony supports affirmance under the any evidence standard.

C. The Court’s comments on the evidence support affirmance under the “any evidence” standard.

During the trial, the court commented that the Teague’s property, which was the subject of an Order Circuit Judge Hyman filed June 25, 2015 was significant. The trial court commented while hearing the evidence that the Teague property is actually at the base of the pig’s ears. (R. p. 135, lines 3-4). The trial court was referring to *East Cherry Grove Realty Co., LLC v. State of South Carolina and South Carolina Department of Health and Environmental Control*, 2014-CP-26-1412) (Ex. 18) (R. 466). In that Order decided by Judge Hyman he held that the base of the pig’s ears was an area that was subject to a Kings Grant. Despite this testimony from Floyd and DesChamps and the observations of the trial judge, this Court failed to address that evidence in its opinion. This Court misses the point – the “pig’s ears” and “dome of the pig’s ears” are clearly covered by the unappealed ruling in *Teague* which the trial judge recognized at trial.

D. Testimony of Russ Courtney supports the “any evidence” rule.

The Defendant’s expert was Russ Courtney, a surveyor, who had also looked at the Kings Grants in this case. Courtney stated during the trial that he was seventy percent sure that the East Cherry Grove Realty property is in the Kings Grant.¹ (R. p. 151, lines 10-12). He further stated he was one hundred percent sure that the property within the red lines as shown on his map is within the Kings Grant. (R. p. 151, line 23). His opinions were based on the grants in question and found as Exhibit 25 in the record. (R. p. 233) (R. p. 152, line 17). Significantly, his opinion as an expert was seventy percent certain based on a review of the old deeds in regard to the pig’s ears. (R. p. 165, lines 4-5).

Each of the witnesses -- DesChamps, Courtney and Floyd -- all testified that the pig’s ears were part of a Kings Grant. In fact, Defendant’s expert, Courtney, stated he had an opinion to a reasonable degree of certainty – seventy percent to be correct -- that the East Cherry Grove property was part of a Kings Grant.

In spite of this testimony from all the witnesses, along with the extensive exhibits, this Court failed to address this evidence in its opinion. This Court’s holding that the circuit court erred by concluding East Cherry Realty presented insufficient evidence to rebut the State’s presumptive title is erroneous based on the evidence presented. All of the evidence including the testimony of the State’s expert, Russ Courtney, proved by a preponderance of the evidence that the dome of the pig’s head and the pig’s ears were definitely part of a Kings Grant. There was no other conclusion possible by the trial court or by this Court in light of the State’s expert witness testimony on this issue.

Further, Plaintiff more than met its burden of a preponderance of the evidence. The burden of proof for a preponderance of the evidence means a slight tipping of the scales, i.e., 50.1 percent.

¹ Courtney’s expert testimony (70%) is far greater than the 50.1% which is required to prove a case by the preponderance of the evidence.

In this case, the State's own expert said he was seventy percent sure and East Cherry Grove's Realty's expert said he was one hundred percent sure that the property fell under a Kings Grant. This testimony alone which met the reasonable degree of certainty standard was more than enough to satisfy the any evidence rule. In sum, under the preponderance of the evidence standard, this Court's role is to simply find whether any evidence existed, not to weigh the evidence. Thus, this Court must defer to the trial court if there is evidence in the record.

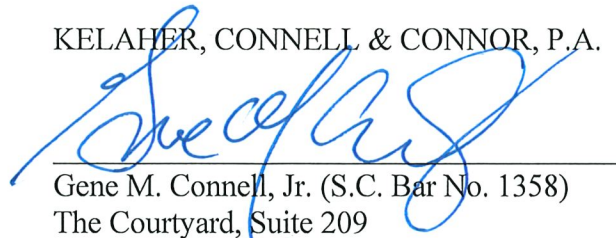
As a result, this Court should not have held as a matter of law that East Cherry Grove Realty had not proven that the real property known as the pig's ears and dome of the pig's ears were not part of the Kings Grants. All the expert testimony of both parties at trial showed otherwise.

CONCLUSION

It is respectfully argued that this Court erred in failing to apply the any evidence standard of review in deciding this case. The standard of review requires that a trial court's factual findings will never be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the court's findings. *Barnacle Broad, Inc. v. Baker Broad, Inc.*, 343 S.C. 140, 538 S.E. 2d 672, 675 (Ct. App. 2000). In this case there was ample evidence from DesChamps, Floyd, Courtney and Fairey that the property of East Cherry Grove Realty, including the area described as the pig's ears and dome of the pig's head, were clearly subject to a Kings Grant. This Court should reconsider its opinion and affirm the trial court's ruling.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.



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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of the **Respondents' Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** on the Appellant on the 2nd day of August, 2024, by depositing a copy of same in the United States Mail, postage prepaid, to:

J. Emory Smith, Jr., Deputy Solicitor General
Alan Wilson, Attorney General
Robert D. Cook, Solicitor General
Post Office Box 11549
Columbia, SC 29211

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 2nd day of August, 2024.

Sarah K. Smith
Notary Public for South Carolina
My Commission Expires: 1-24-34

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August 2, 2024

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Re: Appellate Case No. 2021-000078
East Cherry Grove Realty Co., LLC; and Ray & Nixon, LLC v. State of South Carolina;
South Carolina Department of Health and Environmental Control; and Matt Leonhard
C/A No. 2018-CP-26-00120
Our File No. 2017-0321C

Dear Ms. Kitchings:

Enclosed please find Respondents' Petition for Rehearing, Memorandum of Law in Support of Petition for Rehearing and Proof of Service of same in the above-captioned matter. Our check for the \$50.00 filing fee is being mailed this date.

By copy of this letter, we hereby serve the above-stated documents on Respondent through counsel of record.

With best regards, I am

Sincerely yours,


Gene M. Connell, Jr.

GMCJr:sm
Enclosures

cc w/enc.: J. Emory Smith, Jr., Esquire
Alan M. Wilson, Esquire
Robert D. Cook, Esquire