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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 6068 (S.C. Ct. App. Filed July 3, 2024)

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

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..... Respondent

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certify that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on September 16, 2024.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in failing to apply the proper standard of review?

STATEMENT OF THE CASE

East Cherry Grove Realty brought this action to quiet title that two parcels of real estate in North Myrtle Beach are owned by it subject to a Kings Grant. The case arose when Matt Leonhard applied to the South Carolina Department of Health and Environmental Control (hereinafter DHEC) for a permit to build a dock over two parcels which East Cherry Grove Realty and Ray & Nixon own. DHEC notified East Cherry Grove Realty of the proposed dock by Leonhard and East Cherry Grove Realty timely brought this lawsuit pursuant to S.C. Code § 48-39-220(a) (Sup. 2020) requesting the circuit court hold that all the parcels of real estate in question were owned by East Cherry Grove Realty and Ray & Nixon.

The circuit court held a bench trial remotely via Webex and found that East Cherry Grove Realty's property was subject to Kings Grants and that East Cherry Grove Realty and Ray & Nixon owned the respective tidelands to the low water mark and all that navigable creeks and below the low water mark and all non-navigable creeks. The circuit court on reconsideration clarified its ruling to hold that East Cherry Grove and Ray & Nixon did not own the bottoms of any navigable waters.

The Court of Appeals on appeal affirmed the circuit court that East Cherry Grove and Ray & Nixon were the owners of all the subject property except an area described as the "pig's ears" and "dome of the pig's head" and an adjacent strip outside the boundaries of the 200-acre Morrall Grant.

The sole issue on appeal is whether the circuit court erred by concluding East Cherry Grove Realty failed to present sufficient evidence to rebut the State's presumptive title to the area described as the "pig's ears" and "dome of the pig's head."

REASONS FOR GRANTING CERTIORARI

Petitioners are aware of South Carolina Appellate Rule 242(b) which states: "A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242, SCACR then lists five reasons for consideration for certiorari. Petitioners believe that Rule 242(3), SCACR is applicable and that the decision of the Court of Appeals in this case is in conflict with prior decisions of this Court. Specifically, Petitioners assert the decision of the Court of Appeals is in conflict with *Estate of Tenney v. S.C. Dep't of Health & Env'tl. Control*, 393 S.C. 100, 105, 712 S.E.2d 395, 397 (2011) and a long line of cases prior to *Tenney* which require the appellate courts to affirm the trial court if there is "any evidence" in the record to support its findings.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN NOT APPLYING THE APPROPRIATE STANDARD OF REVIEW.

It is well settled in this state that the standard of review on 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).

This Court has held that the review by an appellate court of a circuit court order is the same standard as a case heard by the master in equity. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1990). See also *Estate of Tenney v. S.C. Dep't of Health & Env'tl. Control*, 393

S.C. 100, 105, 712 S.E.2d 395, 397 (2011) (Appellate court “will affirm the MIE’s factual findings if there is any evidence in the record which reasonably supports them.”).

In this case, the Court of Appeals did not apply the appropriate standard of review and should have affirmed the trial court in all aspects based on the “any evidence” rule. Specifically, Petitioners take issue with that portion of the Court of Appeals’ 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 Petitioners’ contention is that under the any evidence standard, ample evidence was presented to the trial court which clearly shows that the “pig’s ears” and the “dome of the pig’s head” are within a Kings Grant.

The circuit court addressed the evidence it considered in a detailed order. This petition highlights the evidence using the “any evidence” rule articulated in *Estate of Tenney v. S.C. Dep’t of Health & Envtl. Control*, 393 S.C. 100, 105, 712 S.E.2d 395, 397 (2011).

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

Contrary to the Court of Appeals’ 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). The Court of Appeals on rehearing

did not address the testimony of DesChamps which clearly supports affirming the trial court under the “any evidence” standard. See *Estate of Tenney v. S.C. Dep’t of Health & Envtl. Control*, 393 S.C. 100, 712 S.E.2d 395, (2011).

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 a 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). The testimony of Floyd is clearly sufficient for the circuit court to have found that the disputed property known as the “dome of the pig’s head” and the “pig’s ears” are within a Kings Grant.

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 unappealed 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. The Order of Judge Hyman was not appealed.

Despite this testimony from Floyd and DesChamps and the observations of the trial judge, the Court of Appeals failed to address that evidence in its opinion or on rehearing. The Court of Appeals misses the point – the pig’s ears and the dome of the pig’s head are clearly covered by the unappealed ruling in *Teague* which the trial judge recognized at the trial of this case.

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 testified 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). Courtney also testified that he was seventy percent certain that the pig’s ears were part of a Kings Grant. Courtney’s testimony more than meets the “any evidence” rule.

Each of the witnesses -- DesChamps, Courtney and Floyd -- all testified that the pig’s ears were part of a Kings Grant. The icing on the cake is even 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 all this testimony from all the witnesses, along with the extensive exhibits, the Court of Appeals failed to address this evidence in its opinion or on rehearing. The Court of Appeals’ 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 all the evidence presented. The testimony of the State’s expert, Russ Courtney, proved by a preponderance of the evidence that the dome of the

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.

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 the Court of Appeals in light of the State's expert witness testimony on this issue.

Further, Petitioners more than met their burden of proof by 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. Courtney's expert testimony at trial was that he was seventy percent certain and is far greater than the 50.1 percent which is required to prove a case by the preponderance of the evidence. The trial court was well within its providence to accept Courtney's testimony. Courtney did not have to be one hundred percent sure that the subject property, i.e., the property known as the "pig's ears" and the "dome of the pig's head" fell within a Kings Grant. Seventy percent was more than sufficient especially in light of the testimony from Petitioners' expert that he was one hundred percent certain that the disputed property fell under a King's Grant. The testimony of both Petitioners' expert and the State's expert met the reasonable degree of certainty standard and was more than enough to satisfy the "any evidence" in the record rule laid down by this Court in *Estate of Tenney, supra*.

In sum, the Court of Appeals erred as its role was to only review the record to determine whether any evidence existed and not to weigh the evidence. The Court of Appeals improperly weighed the evidence based on the experts presented instead of deferring to the trial court because there was evidence in the record. This was error and is contra to the decisions of this Court.

Thus, the Court of Appeals erred as a matter of law in finding 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 in this case. All the expert testimony of both parties at trial showed otherwise by a preponderance of the evidence.

CONCLUSION

It is respectfully argued that this Court should grant a writ of certiorari to review this case to reaffirm this Court's prior rulings that the "any evidence" standard of review is the only standard of review when the circuit court and master in equity without a jury is hearing a case. The appropriate standard of review requires that the trial court's factual findings will never be disturbed unless a review of the record discloses 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 sum, there was ample evidence from DesChamps, Floyd, Courtney and Fairey that the real property of East Cherry Grove Realty including the area described as the "pig's ears" and "dome of the pig's head" a part of a King's Grant. Thus, this Court should grant certiorari and reverse the Court of Appeals ruling in this case on this issue only and affirm the Court of Appeals on its other rulings.

Respectfully submitted,

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