

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-18-2243

Kay Howell Jordan, Marion Howell Tolson, and

Betty L. S. Judy,

Lewis Virgil Howell,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: W. Grady Jordan	Attorney for : <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	<input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : There needs to be another Survey performed

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Marti Mump
Circuit Court Judge

3075
Judge Code

6/17/13
Date

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
C.A. No.: 2010-CP-18- 2243

Kay Howell Jordan, Marion Howell Tolson,
and Lewis Virgil Howell,

Plaintiffs,

VS.

Betty L.S. Judy,

Defendant.

ORDER

Charles J. Murphy
CLERK OF COURT
DORCHESTER COUNTY
2013 JUL -2 AM 9:16
CERTIFIED COPY

A two part Hearing was had before me in this matter on February 27, 2103, and May 8, 2013. The Plaintiffs were present at the hearing and represented by their attorney, W. Grady Jordan. The Defendant was not present, but her son, who is her attorney in fact under a duly executed power of attorney, was present and represented her interests without objection. The Defendant was represented by her attorney, Robert McCurry.

This case involves a dispute of the location of a common property line between the respective properties of the parties. The Parties, through arguments of their counsel, and the testimony of the parties to the Court showed that in the early 1970s during construction of Interstate 95, the Highway Department dug sand from the property of both parties. The areas from which the sand was removed became the present day ponds. There is an earthen dike which runs between the two ponds and this is the area of dispute.

There was a prior Order dated May 28, 2002, in a case between the parties, under Civil Action Number: 96-CP-18-924, issued by the Honorable Patrick Watts, Jr., finding that the location of a disputed bill board was on the property of Betty Judy but in which the Court

declined to rule upon the exact location of the common boundary line between the parties property as that issue was not before the Court. Therefore, the issue as to the common boundary line was an issue that needed resolution and hence the basis for this action.

The Parties stipulated as to each owning their respective properties with the only dispute being the location of the common property line between these two properties at the dike area.

The Plaintiffs' position was that John Howell, deceased, father of the Plaintiffs and Wilbur Judy, deceased, husband of the Defendant each owned these adjoining parcels of land and that during the construction of Highway 95 they both allowed ponds to be dug on their respective properties with the dirt used in the construction of the highway. This digging left an earthen dike between the two ponds. Their position was that the dike area is the property line but that regardless of where the Court determined the line to be that both sides should have access to the dike area as both families have used this dike to access their ponds and that to now allow same would be unfair to both sides.

The Defendant's position as set out by her counsel was that there was a property line based on the Survey of Ashley Surveying dated December 31, 1986. This survey, he was argued, was based on a 1927 plat and that based on these surveys the Plaintiffs do not have rights to the dike as it is located entirely on the Defendant's property. It should be noted that this survey shows the property line cutting into the pond that is the Howell pond. The Plaintiff's counsel did make the point in opening arguments that to use this line would place the property line partially in the pond on the Howell side of the line, which would be inconsistent with the two gentlemen, Howell and Judy, digging the ponds out years ago and using the dike area afterwards.

There was also testimony as to prior access of the Judy property over and across the Howell property from Old St. George Road and how that access, or potential access, played into discussions as to where a potential agreed upon common boundary line would be. Evidence in this case was that the Judy family was allowed access over and across the Howell property from Old St. George Road, but that a fence was eventually erected, keys were provided, but that access was then finally stopped being provided. The Judy family has accessed the property over property owned by Southern Railroad which is on the Northwestern side of their property. However, this Court has already ruled in a prior Order entitled Order Denying Motion to Compel dated May 18, 2012, that a prior settlement agreement as to the common property line and access for the Defendant over and across the lands of the Plaintiffs from Old St. George Road was unenforceable. Therefore this issue was not an issue that the Court was addressing at this hearing, other than as a sideline as to discussions on where a potential property line could be and whether or not a potential agreed upon line was contingent on the Defendant having access over and across the Judy property.

On behalf of the Plaintiffs testimony was provided by Lewis E. Jordan, Kay Howell Jordan, Marion Howell Tolson, Lewis Virgil Howell and John David Bass, a professional licensed surveyor who testified as an expert.

On behalf of the Defendant testimony was provided by Roy Judy, Ben Coker, James Benjamin Kensey, Jr., with the Department of Natural Resources, Donald Baker, and Paul Clifton Lawson, Jr, a licensed surveyor who testified as an expert. Betty Judy did not testify herself but the parties did stipulate that Roy Judy would testify on her behalf as Attorney in Fact, under a Power of Attorney. The Defendants attempted to qualify Mr. Ben Coker as an expert in the area of land surveying, but on cross-examination by Plaintiff's attorney it was shown to the

Court that Mr. Coker was not licensed as a land surveyor and had no educational experience related to land surveying. Therefore, he was only qualified as an expert in the area of field work done in order to accomplish a land survey. Mr. Coker did perform the field work for the survey performed by Mr. Lawson.

The Plaintiffs witnesses testified that their father (and father-in-law) John Howell (deceased) and Wilbur Judy (deceased), husband of Betty Judy, used the subject earthen dike without interfering with the other and that both Plaintiffs and Betty Judy continued, after Mr. Howell and Mr. Judy passed away, to use the dike area and treated it as the boundary between the respective properties, until the erection of the fence by Roy Judy as referenced in several instances hereinbelow. They provided testimony that the Howell family used the dike area for walking, driving, and fishing and that they would clean it and do whatever needed to be done. Lewis Jordan said that both parties had done a good job as far as trying to keep the dike area clean. He said there were never any problems in the past with the dike staying clean. He said he thought the Judy family had done a good job as well as far as that when the Howell family was not around. Lewis Jordan also testified that after the erection of the fence by Roy Judy, that he and Roy Judy had met at the property and placed flags down the dike in an attempt to mark a property line so that a surveyor could then accomplish a survey for them. He showed the Court, using Defendant's exhibit #25, that there was a fence on the Southeast corner of the dike, which prevents driving from the Howell property onto the dike. He said before the fence erected relatively recently there was never an interference with usage of the dike. He also testified that his family had not placed any fence in the dike area to prevent the usage of or access to it.

Kay Howell Jordan testified that she agreed with her husband's testimony that both the Judy family, a lot of it Roy Judy, and her family kept the dike clean and usable. She said this

was never a problem. She further testified that her family never tried to keep Ms. Judy or her family from using the dike area. She also stated that there would not be any reason for her to not want the Judy's to use the dike area. She further testified that no one ever prevented her family from using their pond. She also testified that her husband, Lewis Jordan, was the point man for the family trying to resolve the boundary issue and that she was present at times when attempts were made to resolve it.

Lewis Howell testified and his testimony was consistent with his sister Kay that both parties would keep the dike clean and maintained, his family never interfered with the Judy families ability to use their pond or the dike and that the Howell's had access to ride vehicles on the dike. He further testified that he was asking that both parties have access to the dike area and that he has no reason to interfere with the Defendant's use of the dike or her pond.

Marion Howell Tolson testified that her family had used their pond for years without interference as well as the dike area, including riding vehicles on it and walking across it. She testified that her family and Roy Judy would keep the dike maintained and clean. She did testify that interference with the dike access did begin with the construction of the fence at the southeastern corner of the dike. She was also present when the flags were put out trying to mark a common border line on the dike for a surveyor to then mark a line for the parties. She testified that she wanted the Court to find that The Defendant as well as the Plaintiffs have access to the dike area and that the Court find a common boundary line fair to both sides. She further testified that she had no reason to prevent the Defendant from using the dike.

The Plaintiffs presented a survey prepared by John David Bass dated October 30, 1998, [Plaintiff's Exhibit #1] showing a potential property line. In his testimony, Mr. Bass explained to the Court that the survey was based on prior surveys including an 1865 survey. The 1865

survey was the beginning point of his new survey. Mr. Bass also visited the property to find what markers he could in order to survey the property of the Plaintiffs. Mr. Bass readily admitted that the techniques and equipment used at that time upon which they relied on, were not as accurate as modern tools available today. He also readily admitted that he could not find every marker that was used in the 1865 survey. There was testimony that at least one marker would have been in the area that is now Interstate 95 and other markers could have been in the areas that are now ponds.

Roy Judy testified that to the best of his knowledge the dirt was dug from both the Howell property and the Judy property for the construction of Highway 95 and the present day ponds resulted from the removal of this dirt. The earthen dike which runs between the two ponds is the area of dispute. He does not recall either his father or Mr. Howell ever fussing about the dike and he never helped his father erect a fence and to his knowledge Mr. Howell never erected a fence to keep Mr. Judy off of the property. Mr. Judy did agree that as far as he could remember there was never any confrontation between the parties as to access to the ponds. As both parties referenced at various times in the hearings, a dispute did result regarding access from Old St. George Road to the subject disputed area, but the usage of the dike was not in question until litigation began until the early 1990's and continued after the death of Mr. Wilbur Judy in 1993.

In 1995, Mr. Judy was reviewing the Highway Department maps and a question in his mind arose as to the common property line. Field work by Ashley Surveying was completed in late 1995 and the resulting 1996 survey, Defendant's Exhibit 25, shows that the dike was almost wholly on the land of the Judys. With the field work results, Roy Judy with the help of Mr. Baker, erected posts and a fence in December 1995 on the southeast corner of the Judy property

along the dike between the property of the parties to keep both the Plaintiffs and unknown trespassers from accessing the property. He did testify that prior to his erecting the fence at the edge of the dike area he knew of no confrontation between the Howells and the Judy's in relation to use of the dike area. Because of the existence of the fence which Mr. Roy Judy erected in late 1995, there were several meetings on the dike issue that occurred.

After the death of Mr. Wilbur Judy and Mr. John Howell, there were several meetings between the parties during the years without any resolution as to the dike issue and access to the ponds.

The Defendant presented numerous photos showing the existence of pipes and blazed trees resulting in the 1996 survey performed by Ashley Surveying [Defendant's Exhibit #25] Based on testimony, the field work for this survey began in the fall of 1995. Mr. Coker testified that he performed the field work for this survey and explained that he used the 1927 survey done by F.A. Moorer, marked as Exhibit #3, and SC Highway Department maps of U.S. Highway I-95 to accomplish the 1996 Ashley Surveying Survey that was signed by Mr. Lawson. Earlier plats prepared prior to 1927 were used for comparison but they relied on the 1927 plat and SCDOT US Highway I-95 maps to conform and make their new plat in 1996 because of monumentation and railroad monumentation. The 1996 plat prepared by Ashley Surveying shows the dike road to be wholly within Mrs. Judy's property.

Mr. Lawson testified that his survey was correct and accurate based on the 1927 survey and on the field markings found on the site. He questioned the accuracy of Mr. Bass' survey as he did not think it properly concurred with the 1896 survey or other surveys. He also questioned Mr. Bass' survey based on Mr. Bass only finding, according to Mr. Lawson, one established pin on which he relied as a point of reference on the ground.

This case involves two professional surveyors who disagree as to where the property line is located based on the information available to them in the form of prior surveys and based on their field work in accomplishing their respective surveys. Clearly, the survey methods of the 1800's were not as exact as those of today and both parties provided testimony as to their respective positions as to the correct property lines through their respective surveyors. However, I find that the parties past actions and usage of the property are compelling evidence in my determination.

Based on all the evidence I find that the property line is located in the middle of the dike road. I further find that both parties are granted an easement right in and to the dike road for the purposes of ingress and egress over and across the earthen dike. The parties are to maintain their respective side of the road so as not to interfere with normal usage of the easement. The parties are estopped from erecting any fencing or other impediments to block each other's access to the dike area and the easement over and across it, which includes the right to access the dike with motor vehicles. Should the parties wish to maintain any current fencing to keep out potential trespassers they can, however, each side is to be granted a key or way to access the property accordingly.

I further find that in order for this Order to be fully complied with the parties are going to have to have a survey done in order to mark the property line down the middle of the dike. If the parties cannot agree on a surveyor the Court will appoint one. Further, once this survey is accomplished it is to be presented to the Court for a ruling that it does in fact comply with this Order.

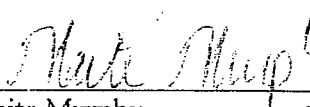
Any language in this order as to an easement in the dike area relates only to an easement over and across the dike area. Nothing in this order should be construed to grant any access to

the Defendant over and across the land of the Plaintiffs to the dike area. As no such easement is being granted and that issue was previously ruled on by this court.

The undersigned, by consent of the Parties through their respective counsels whose signatures are affixed hereto solely for this portion of the Order and not as to consenting to the rulings themselves, does retain jurisdiction of this case for purposes of ensuring that the Court's order is complied with in regards to a new survey and that survey being approved by the Court.

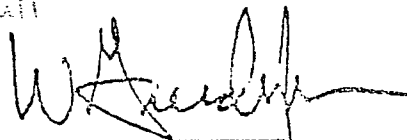
IT IS SO ORDERED.

DONE AND ORDERED this 17 day of June, 2013 in St. George, South Carolina.

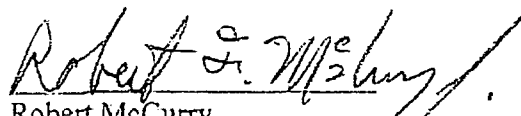


Maite Murphy
PRESIDING JUDGE-
THE COURT OF COMMON PLEAS

WE CONSENT TO THAT PORTION OF THIS ORDER WHICH ALLOWS JUDGE MAITE MURPHY TO RETAIN JURISDICTION OF THIS MATTER ONCE SHE BECOMES A CIRCUIT COURT JUDGE. ^{Maite}



W. Grady Jordan
Attorney for Plaintiffs



Robert McCurry
Attorney for Defendants

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IT IS SO ORDERED.

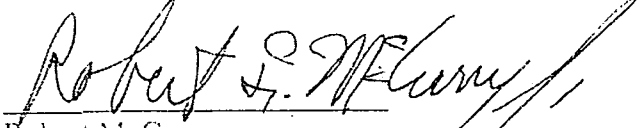
DONE AND ORDERED this _____ day of _____, 2013 in St. George, South Carolina.

Maite Murphy
PRESIDING JUDGE-
THE COURT OF COMMON PLEAS

WE CONSENT TO THAT PORTION OF THIS ORDER WHICH ALLOWS JUDGE MAITY MURPHY TO RETAIN JURISDICTION OF THIS MATTER ONCE SHE BECOMES A CIRCIUT COURT JUDGE.



W. Grady Jordan
Attorney for Plaintiffs



Robert McCurry
Attorney for Defendants