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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM CLARENDON COUNTY

Court of Common Pleas

G. Wells Dickson, Jr., Special Referee

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Appellate Case No. 2025-000064

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Gina M. Derry and Catherine M. Stone, Appellants

v.

Ray A. Zuber and Ellen R. Zuber, Respondents.

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**RESPONDENTS' BRIEF**

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## **STATEMENT OF ISSUES ON APPEAL**

1. DID THE TRIAL COURT ERR IN DETERMINING THAT EQUITY SHOULD NOT REWARD THE APPELLANTS BUY ALLOWING THEM TO INCREASE THE SIZE OF THEIR LOT TO THE DETRIMENT OF RESPONDENT, WHO WITHDREW FROM OCCUPATION OF PROPERTY SHE MISTAKENLY BELIEVED TO BE HERS?
  
2. WILL EQUITY REWARD PROPERTY OWNER WHO PLACES IMPROVEMENTS ON PROPERTY OF ADJOINING OWNER DESPITE THE EXISTENCE OF A PLAT THAT CLEARLY DELINEATES THE CORRECT BOUNDARY?

## **SUMMARY OF THE ARGUMENT**

The trial court's ruling should be affirmed. Appellants have failed to establish a boundary by acquiescence because South Carolina law requires clear, mutual recognition of a boundary line that differs from the deeded boundary, which is clearly absent here. Appellants' equitable estoppel claim also fails because Respondents made no false representations and Appellants' reliance was not reasonable given the recorded plat and surveys. The trial court's factual findings are supported by ample evidence and are entitled to deference. Appellants' additional arguments—including their theories regarding subdivision plats and procedural matters—lack any legal merit.

In light of the above, the trial court's ruling should be upheld in its entirety. South Carolina law requires clear mutual recognition to establish a boundary line by acquiescence. The evidence here, consisting of neighborly interactions and seemingly passive conduct, falls short of that standard. The equitable estoppel claim similarly fails because no misrepresentation or concealment by Respondents induced Appellants to act to their detriment.

The trial court's findings are well supported by both testimonial and documentary evidence, and its credibility determinations are entitled to substantial deference. Appellants' arguments regarding subdivision plats and procedural matters misstate the law and present no grounds for reversal.

## STATEMENT OF FACTS

This appeal arises from a boundary dispute between adjoining property owners in the Quail Ridge Shores Subdivision, Clarendon County, South Carolina. The Respondent, Ellen Zuber, owns Lot 64.<sup>1</sup> The Appellants, Gina Derry and Catherine Stone, own Lot 65. A 2016 survey performed by Steven Muldrow revealed that the longstanding physical markers separating the lots were incorrect and that multiple neighboring lot owners had constructed improvements inconsistent with the legal boundary lines. (See Tr. 16:8-25; Defs.’ Ex. 1; Pls.’ Ex.2).

Following discovery of the discrepancy, all affected neighbors—except the Appellants—took corrective action. Roberta Jordan, who owned Lot 66 to the left of the Appellants, removed a fence encroaching onto Lot 65 and began maintaining their property in accordance with the corrected boundary. (See Order Denying Motion to Reconsider at 2, *Derry v. Zuber*, No. 2017-CP-14-00113 (S.C. Ct. Com. Pl. Dec. 9, 2023) [hereinafter “Reconsideration Order”]). The Zubers likewise relocated a storage shed that had encroached onto their other neighbor’s lot. *Id.* The only parties who refused to move improvements or adjust usage were the Appellants, who instead sought legal title to the disputed area—a strip approximately 9.97 feet wide at its broadest point. (See Hearing Tr. at 10:10–22, *Derry v. Zuber* (Mar. 5, 2020)).

At trial, the Appellants confirmed they paid for a survey at closing in 2005. That survey—prepared by DuValle Elliott—depicted the property boundaries and referenced an encroachment from the Jordans on the opposite side of Lot 65. (See Pl. Ex. 3). Appellants testified that they were not shown the plat until years later, but the Special Referee found they had at least constructive notice of the true boundary. (See Order on Final Hearing at 3-4, *Derry v. Zuber*, No. 2017-CP-14-00113 (S.C. Ct. Com. Pl. May 15, 2023) [hereinafter “Final Order”]).

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<sup>1</sup> Ray Zuber passed away on July 29, 2024. The property was deeded to Ray and Ellen Zuber jointly with the right of survivorship. Accordingly, the Zuber lot is now solely owned by Ellen Zuber.

Despite receiving the corrected Muldrow plat in 2016, the Appellants left their fence, carport, and concrete improvements in place, knowingly encroaching on Lot 64. (See Def. Exs. photos of encroaching fence and structure). Their improvements also violated the Clarendon County zoning code, which requires a minimum six-foot side setback. (See Final Order at 4–5). The Appellants’ refusal to correct their encroachment contrasted sharply with the actions of the Jordans and the Zubers, who had adjusted their property usage in response to the same survey.

The Special Referee found that permitting the Appellants to retain the disputed strip would constitute unjust enrichment, as it would leave them with a larger-than-standard lot in the subdivision and reduce the Zubers’ lot to a non-conforming size under zoning regulations. (See Reconsideration Order at 2–3). The Referee expressly rejected Appellants’ argument that the fence reflected a mutually agreed boundary line, finding no evidence that the parties intended to fix the property line by its placement. *Id.*; Hearing Tr. at 82:12–18 (testimony of Catherine Stone that fence was installed as a barrier, not a marker).

In sum, the record shows that Appellants had constructive notice of the legal boundary, refused to adjust their encroachment, and now seek to claim land to which they have no legal entitlement—despite the corrective actions taken by all other affected neighbors.

#### **STANDARD OF REVIEW**

An action to quiet title resides in equity. *Osterneck v. Osterneck*, 374 S.C. 573, 577, 649 S.E.2d 127, 129 (Ct. App. 2007). When reviewing an equitable action heard first by a master-in-equity and appealed directly to an appellate court, the court should review the facts in accordance with its own view of the preponderance of evidence in the record. *Id.* An appellate court’s “scope of review for a case heard by a Master-in-Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury. *Tiger, Inc. v. Fisher Agro, Inc.*, 301

S.C. 229, 391 S.E.2d 538 (1990) (citing *Wingfall v. Fobbs*, 295 S.C. 59, 60-61, 367 S.E.2d 156, 157 (1988)). In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge' findings. *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

In reviewing equitable matters, this court may review based on its own view of the preponderance of the evidence. *Williams v. Wilson*, 349 S.C. 336, 339-40, 563 S.E.2d 320, 322 (2002). However, we should not disregard the findings of the special referee, who was in a better position to weigh the credibility of witnesses. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229 at 237 (affording deference to the master in an equitable action). Questions regarding credibility and the weight of the evidence are exclusively for the trial court. *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). "We may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible." *Id.* "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." *Id.*

## ARGUMENT

In order for the Appellants to prevail, the Court must judicially move the boundary separating the properties from the location described in the deeds to the parties. Where a deed describes land as is shown on a certain plat, such plat becomes a part of the deed. *Klapman v. Hook et al.*, 206 S.C. 51, 32 S.E.2d 882 (1945); *Holly Hill Lumber Co., Inc. v. Grooms et al.*, 198 S.C. 118, 16 S.E.2d 816 (1941). In their complaint (Complaint, p, 6), Appellants claimed that the

theory of adverse possession should be the basis of the judicial movement of the property line. Before this court, they rely upon the theory of acquiescence.

### **I. The Trial Court Properly Found No Boundary by Acquiescence.**

Under South Carolina law, to establish a boundary by acquiescence, there must be mutual recognition and acceptance of a dividing line that differs from the recorded boundary. *Kirkland v. Gross*, 286 S.C. 193, 332 S.E.2d 546 (Ct. App. 1985). [A]cquiescence is a question of fact determined by the intent of the parties. *Id.* at 198, 332 S.E.2d at 549. A boundary by acquiescence requires clear and convincing evidence that both adjoining landowners mutually recognized and accepted a particular line as the true boundary for a substantial period. *Croft v. Sanders*, 283 S.C. 507, 509–10, 323 S.E.2d 791, 792–93 (Ct. App. 1984). The doctrine is not satisfied merely by the presence of a fence or structures near a property line, nor by a lack of dispute for several years. Casual acts of cooperation, such as mowing near a fence or neighborly silence do not suffice. There must be actual, mutual agreement or conduct clearly establishing such acceptance.

In *Croft*, the court rejected a similar claim of boundary by acquiescence where the only evidence was the existence of a fence and the absence of objection over time. The court emphasized that “the mere existence of a fence...is insufficient to establish a boundary by acquiescence” unless the adjoining owners clearly intended it to represent the true boundary. *Id.*

Similarly, in this case, Appellants rely primarily on the presence of a fence, incidental landscaping, and neighborly interactions as evidence of acquiescence. However, as in *Croft*, there is no credible evidence whatsoever that Respondents expressly or implicitly agreed to treat these features as the legal property line. Respondents neither made representations to that effect nor engaged in conduct that would reasonably create a belief that they had surrendered part of their deeded land. The trial court correctly found no mutual agreement. The parties’ interactions were

typical of neighboring landowners but did not rise to the level of establishing a new legal boundary, and the court properly rejected Appellants' expansive reading of the doctrine. Any perceived mutuality was destroyed when the neighbors to either side of the Appellants discovered that the previous markers had been placed incorrectly. The neighbors to either side of the Appellants demonstrated their intent to rely upon the legal boundaries established by deed and plat. The trial court found, based on testimonial and documentary evidence, that there was no mutual recognition of a new boundary. That finding is well-supported by law and fact and should not be disturbed on appeal.

## **II. The Trial Court Correctly Applied Equitable Estoppel Principles**

To prevail on a claim of equitable estoppel, a party must demonstrate (1) a representation or concealment of a material fact, (2) made with the intent that it be acted upon, (3) which is relied upon by the other party who lacks knowledge or means of knowledge of the truth, (4) and who changes their position to their detriment in reliance upon the misrepresentation. *McClintic v. Davis*, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955). This doctrine is intended to prevent one party from misleading another and then benefitting from that deception. However, it must be proven by clear and convincing evidence *Strickland v. Strickland*, 375 S.C. 76, 87, 650 S.E.2d 465, 470 (Ct. App. 2007).

### **A. No Misrepresentation or Concealment Occurred**

The record lacks evidence that Respondents made false representations regarding the boundary. Appellants cite alleged silence, landscaping practices, and failure to object to construction as purported misrepresentations. (See Hearing Tr. at 82:12–18 (testimony describing Respondents' conduct and Appellants' assumption of boundary); Pl. Ex. 3). However, South Carolina courts have consistently held that mere silence does not constitute a misrepresentation

unless there is a legal duty to speak. *Croft v. Sanders*, 283 S.C. 507, 510. There is no evidence that Respondents ever misrepresented the location of the boundary line, or that they acted in a manner intended to induce Appellants to detrimentally rely on any such representation. Any reliance on informal conversations and routine yardwork was unreasonable in light of the recorded plat and subsequent survey.

**B. There Was No Reasonable Reliance by Appellants**

Equitable estoppel cannot apply where the party claiming estoppel had access to the truth. *Carolina Land Co. v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975). Appellants' deed referenced a recorded subdivision plat which accurately depicted the true boundary. Despite this, Appellants failed to confirm the property line before placing permanent structures. This failure of diligence precludes reliance as a matter of law. Further Appellants, a time they closed upon the purchase of their property, paid for a plat that accurately depicted the boundary. With that information in hand, reliance landscaping was not reasonable.

**C. There Was No Detrimental Change in Position Caused by Respondents**

Appellants argue that they constructed improvements in reliance on Respondents' silence. However, estoppel requires a detrimental change in position that was proximately caused by the misrepresentation. *J.K. Const., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 519 S.E.2d 561 (1999). Here, Appellants made unilateral assumptions without confirming the legal boundary, and Respondents never made representations that induced or encouraged that assumption. For instance, Appellant's action in the construction of a boat ramp without reference to a plat prepared for the very purpose of disclosing property boundaries can not operate to the detriment of the Respondent. Any change in position was caused by the Appellants' negligence in failing to review the plat that had been prepared at their request.

The equitable estoppel doctrine is not designed to excuse speculative or careless property improvements made without legal certainty. Appellants' reliance was not only unreasonable but also self-created. The equities in this case favor the party who retained record title, not the party who failed to perform due diligence.

Accordingly, the trial court properly rejected the equitable estoppel claim, finding that Appellants failed to prove misrepresentation, reasonable reliance, or detriment. That decision is consistent with controlling precedent and should be affirmed.

### **III. The Trial Court's Findings Were Supported by the Record**

The trial court made detailed factual findings after hearing testimony and reviewing evidence. These findings, including that Appellants' structures encroached upon Respondents' lot and that no mutual boundary agreement existed, are well supported and should be affirmed. In equity cases, while the appellate court may take its own view of the preponderance of the evidence, it must afford great deference to the factual findings and credibility determinations made by the trial court. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1990)

The trial court found that the Respondents never agreed to a modified boundary line and did not engage in any conduct that would reasonably support Appellants' claims of acquiescence or equitable estoppel. These findings are supported by substantial evidence, including the 2016 survey that confirmed the boundary line as depicted in the original recorded plat.

The trial court carefully weighed the testimony of the parties and their witnesses. It concluded that Respondents' actions—such as occasional landscaping or silence—did not constitute recognition of a new boundary line or any form of misrepresentation. These credibility-based findings are entitled to the highest level of deference and should not be disturbed. *Id.*

The order of the Special Referee thoroughly analyzed both the factual record and the applicable legal standards, applying them appropriately to reject Appellants' claims. Accordingly, the trial court's findings should be affirmed.

#### **IV. The Special Referee's Findings Were Proper and Well Supported**

The Special Referee correctly concluded that Appellants possessed constructive knowledge of the actual boundary line at the time of their purchase, and that their continued use of the disputed strip constituted unjust enrichment. These findings are consistent with South Carolina precedent and supported by the record.

Constructive notice arises where a party has access to information that should have prompted inquiry or diligence. *Carolina Land Co. v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975). The Appellants' own settlement statement reflected payment for a survey, and the Elliott plat clearly showed boundary discrepancies. (Pl. Ex. 3; Tr. p. 10:6–25). Additionally, the Referee's findings are supported by comparison with neighboring conduct. Both the Jordans and the Zubers made adjustments to correct encroachments based on the Muldrow survey. (Tr. p. 15:13–25; Tr. p. 16:7–21). The Appellants, uniquely among the affected neighbors, refused to comply and sought instead to claim the disputed land.<sup>2</sup> This conduct justified the Referee's finding that their actions were inequitable and would result in unjust enrichment. This Court should not aid a party in retaining benefits obtained through a mistaken assumption of right, particularly where corrective action was refused.

The Referee also rejected Appellants' assertion that the fence marked a mutually accepted boundary. The evidence showed no intent by the parties to establish the fence as a boundary line—

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<sup>2</sup> Appellants also assert that their fence and improvements predated certain survey activity. However, date-stamped photographs in the record directly contradict those claims, showing the fence was not in place when Appellants suggest. (See Defs.' Exs. 8–9). The Special Referee was not required to credit Appellants' self-serving timeline over objective photographic evidence.

merely that it was constructed as a driveway barrier. (Tr. pp. 82:12–18). As the court reaffirmed in *Croft v. Sanders*, acquiescence is a question of fact determined by the intent of the parties. Mere existence of fence between adjoining properties is not of itself sufficient to establish boundary by recognition and acquiescence. *Croft v. Sanders*, 283 S.C. 507, 323 S.E.2d 791 (Ct. App. 1984).

Finally, equity is not a tool to manufacture windfalls. Estoppel and waiver are defensive doctrines, not offensive weapons to gain property that does not belong to a party. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992).

Accordingly, the Referee’s factual and equitable conclusions were both legally sound and grounded in the preponderance of credible evidence. They should be affirmed.

#### **VI. Appellants’ Remaining Arguments Lack Merit**

Appellants assert a range of additional arguments that fall outside the core issues of boundary by acquiescence and equitable estoppel. These include contentions that Respondents should have been required to alert Appellants earlier, that the equities of the case demand an alternative result, and that the trial court did not give appropriate weight to neighborhood patterns or historical conduct.

None of these arguments are supported by South Carolina law. First, Respondents had no duty to inform Appellants that they were encroaching, particularly where the boundary line was evident from the recorded plat and could have been confirmed by survey at any time. *See Carolina Land Co. v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975).

Second, equity does not override clear title or excuse self-created reliance. South Carolina courts consistently hold that equity follows the law and does not grant relief to those who have acted without diligence. Appellants failed to conduct a survey before building permanent improvements. Their error cannot now serve as the basis for divesting Respondents of title.

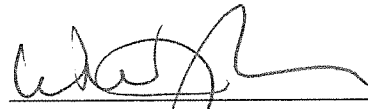
Third, neighborhood practices and informal customs have no legal force absent mutual agreement between the parties to alter a recorded boundary. The plat and deed descriptions control. *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 252 S.E.2d 133 (1979).

Finally, Appellants' reliance on Rule 59(e), SCRCP, to challenge the Special Referee's factual findings and legal conclusions was properly denied. The motion merely reargued issues already decided and failed to present new evidence or identify clear legal error. Accordingly, Appellants' remaining arguments fail to establish any basis for reversal and should be rejected.

### CONCLUSION

The trial court's Orders were correct in all respects and should be affirmed. The court properly applied the law of acquiescence, equitable estoppel, and property boundaries, and its factual findings are supported by the record.

Respectfully Submitted,



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