THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS

Maité Murphy, Circuit Court Judge

Case No. 2010-CP-18-2243

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

v.

Betty L.S. Judy, ... Appellant.

INITIAL BRIEF OF APPELLANT

Robert F. McCurry, Jr.
Horger, Barnwell & Reid
P.O. Drawer 329
Orangeburg, South Carolina 29116
(803) 531-3000

James B. Richardson, Jr.
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 799-9412

Attorneys for Appellant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page:

QUESTIONS PRESENTED

I.

Is the location set by the circuit court for the boundary line at issue supported by any evidence?

II.

Is the only reasonable conclusion from the evidence that the boundary line at issue is located in the place identified in the 1927 Moorer survey, the 1970 Highway Department maps, and the 1996 Ashley survey?

STATEMENT OF THE CASE

This action was commenced by Kay Howell Jordan, Marion Howell Tolson, and Lewis Virgil Howell, the respondents herein, against Betty L.S. Judy, the appellant herein, by summons and complaint dated August 2, 2010 and filed August 12, 2010. This is an action to determine the boundary line between the Howell and Judy tracts, near St. George in Dorchester County.

The case was tried on February 27, 2013 and May 8, 2013 before the Honorable Maité Murphy, Presiding Judge of the Court of Common Pleas for the First Judicial Circuit. By order dated June 17, 2013, Judge Murphy gave instructions as to where the line would be located and ordered the parties to share the cost of a survey of the line as determined. It was further ordered that each party be granted an easement over a narrow strip of the other's property for the purposes described in the order.

Appellant's motion to alter or amend was denied by order dated August 14, 2013, and this appeal followed.

STATEMENT OF FACTS

The large, rural Judy and Howell tracts abut one another along the eastern side of Interstate Highway I-95 near St. George, in Dorchester County — the Judy tract on the north and the Howell tract on the south. The disputed boundary line runs generally east-west in the vicinity of what the parties call a "dike". This is a strip which separates two large ponds — one on the northern Judy tract and the other on the southern Howell tract. These ponds were created when earth was removed from each area for use in the construction of I-95.

The location of the boundary has long been in dispute and, for reasons undisclosed in this record, never authoritatively settled in a series of actions. One of those previous actions — Civil Action No. 96-CP-18-924 — resulted in a judgment, affirmed by this Court of Appeals, declaring that a billboard near the I-95 right-of-way

was situated on the Judy side of the line in question. *Judy v. Howell,* Op. No. 2004–UP–179 (S.C. Ct. App. filed 3/24/04). The circuit court did not fix the location of the line in that action, however, only finding that the billboard was north of the line, on the Judy tract. [Tr. I, p. 4.] The respondents were required to disgorge rents they had collected for this billboard since 1996 — the date of the Ashley plat described below.

In a later action the parties appeared to reach a compromise settlement in which the owners of the Howell tract were allotted a portion of the dike and Judy was granted access to her property across the Howell tract from the south. Mrs. Judy moved to compel enforcement of the settlement agreement but the circuit court denied the motion. [Tr. I, p. 3.]

The Judy tract was surveyed in 1996 by Ashley Survey. Ashley located the iron pin set in 1927 by the Moorer survey at the eastern terminus of the line in question. The western terminus was marked in 1927 by a sweet gum tree located in what is now the median of I-95, and hence destroyed. Ashley therefore used the course called for in the 1927 survey — 82 degrees west of south [Tr. II, p. 89] — to recreate the line, ending now at the I-95 right-of-way. The Highway Department also based its 1970 maps used in construction of the highway on the 1927 Moorer plat.

The 1996 Ashley survey was the one upon which the circuit court based its 2002 order in "the billboard action," finding that the billboard in question, erected by the Howells, was located on the Judy tract.

The Howells presented in evidence a survey which contradicted the Ashley survey, but they asked the court to set a line "fair to both sides". The court set a line in the middle of the dike, unsupported by either side's survey.

ARGUMENT

I.

The arbitrary line drawn by the circuit court is unsupported by any evidence.

An action to determine a boundary line is an action at law. *Pinckney v. City of Beaufort,* 296 S.C. 142, 370 S.E.2d 909 (Ct. App. 1988). The court's task is to locate the actual boundary line on the ground.

The respondents asked the circuit court to eschew this basic principle and instead to act as a court of equity, drawing a new line "fair to both parties". [Tr. I, pp. 4,5, 54, 60.] In response, the appellant asked the court to determine the *actual* location of the line. [Tr. I, p. 13.] Choosing between these alternatives, the circuit court accepted the respondents' invitation and drew a line not supported by any evidence and not sponsored by either side. The circuit court ordered that the line be set through the middle of the dike — a place where no evidence placed it.

This new line, when surveyed, will in all likelihood run into the billboard, dividing its ownership in contravention of the earlier judgment, unless the new survey stops just short of the billboard and arbitrarily ducks south to avoid the billboard.

No evidence supports the finding that the boundary line divides the dike area evenly. This was the circuit court's idea of an equitable solution to the problem. It is patterned along the lines of the 2009 [Tr. II, p. 79] settlement agreement [Pl. Exh. 6] — an agreement which the circuit court declined to enforce. Mrs. Judy's assent to that agreement was in consideration of the Howells returning access to the Judy tract through the Howell property from the south[1] — access which the Howells withdrew in about 1990. [Tr. I, p. 51, and II, p.74; and *see* Tr. I, pp. 51, 61.]

In this action at law, the circuit court's task was to find where the boundary line

---

[1] Settlement Agreement, ¶ 5, Pl. Exh. 6, p. 2.

actually is located — not to engineer a new line thought by the court to be "equitable."

The court's departure from its task resulted in a judgment unsupported by any evidence, and should be reversed. The judgment is highly inequitable as well; but such considerations are immaterial in this action at law.

The question is not who ***should*** own this property but who ***does*** own it?

II.

The only reasonable inference from the evidence is that the boundary line lies where it is shown on the 1927 Moorer plat, the 1970 Highway Department maps, and the 1996 Ashley survey.

Locating an old boundary line calls for the application of rules of survey which have become, in effect, rules of law. At the top of the hierarchy are natural monuments on the earth, and second are artificial monuments. *Nelson v. Frierson,* 1 McCord (12 S.C.L.) 232 (1821). When these are reliably relocated, they supersede metes, bounds, courses, distances, and the like. Flexibility is allowed if justified.

> The rules for determining disputed boundaries are not inflexible, but are subject to modification depending upon the particular facts of each case." *Bodiford,* 317 S.C. at 543 n. 1, 455 S.E.2d at 197 n. 1 (*citing Garrett v. Locke,* 309 S.C. 94, 98, 419 S.E.2d 842, 845 (Ct. App.1992)). "When determining boundaries, resort is generally had first to natural boundaries, next to artificial monuments, then to adjacent boundaries, and last to courses and distances." *Id.* (*citing Garrett,* 309 S.C. at 98, 419 S.E.2d at 845). "This rule, however, merely indicates the weight generally given to each type of evidence of location." *Id.* (*citing Southern Realty & Investment Co. v. Keenan,* 99 S.C. 200, 207-09, 83 S.E. 39, 41-42 (1914)). "The rule does not provide an order of admissibility, such that evidence of artificial boundaries is admissible only if there is no evidence of natural boundaries." *Id.* "The facts of a case may therefore require that an inferior means of location be preferred over a higher means of location." *Id.*

Williams v. Moore, 400 S.C. 90, 103-04, 733 S.E.2d 224 (Ct. App. 2012).

The appellant, Judy, offered the survey evidence of Mr. Coker[2] and Mr. Lawson, of Ashley Surveying. The respondents Howell offered the survey evidence of Mr. Bass.

Although their evidence varied in many ways, the competing surveyors agreed that the boundary line at issue can only be found with the use of one or the other of two old plats: a 1927 Moorer plat of the Judy property, or a Gavin plat of the Howell property in 1867. The line in question is the southern boundary of the Judy tract and the northern boundary of the Howell tract.

A. The 1996 Ashley survey.

The field work for the Ashley survey by Mr. Coker and Mr. Lawson was done in the fall of 1995, but the property was last visited in 1996. Hence, the latter date is the date given the resulting Ashley plat.

HERE, INSERT A REPRODUCTION OF DEF. EXH. 25

The Ashley surveyors found that the 1927 Moorer plat provided the only reliable source for defining the boundaries of the Judy tract.[3]

HERE, INSERT A REPRODUCTION OF DEF. EXH. 2

Ashley easily found the eastern line of the Judy tract (running north-south) as shown on the 1927 Moorer plat. The northern terminus of that line is marked by a surveyor's iron pipe inside the railroad right-of-way north of the Judy tract. As the line runs in a southerly direction toward its southern terminus, the line is well-marked by standard surveyor's site marks [Tr. II, p. 79] — two chops at the base of a tree adjacent to the line, and three chops at the base of a witness tree pointing to the corner.

HERE, INSERT A REPRODUCTION OF DEF. EXH. 9 & 11

---

[2] *See Williams v. Moore,* 400 S.C. 90, 103-04, 733 S.E.2d 224 (Ct. App. 2012), where the Court of Appeals affirmed a circuit court judgment entered in reliance upon Mr. Coker's survey testimony.

[3] The Highway Department similarly used the 1927 Moorer plat in its early 1970s engineering of the I-95 right-of-way. [Def. Exh. 39 and 40.]

The line was well-marked and witnessed. At the southern terminus of a line of more than 1,200 feet, the Ashley crew found a three-foot tall pipe, leaning slightly [Tr. II, p. 87], within thirteen feet [Tr. II, p. 84] of the distance (19 chains) called for on the 1927 plat.

HERE, INSERT A REPRODUCTION OF DEF. EXH. 14

Thus, the 1927 plat is accurate as to distance within six-tenths of one percent — remarkable for the day in which actual *chains* were the distance-measuring tools. The *course* for this line called for in the 1927 Moorer plat — 15 degrees west of south — leads *precisely* to the three-foot iron, 1,241 feet away. The Ashley survey of 1996 found the iron on an exact course of 15°00'00" from the northeastern corner — an extraordinary level of accuracy in the 1927 survey.

These two pipes were the only ones remaining, sixty-eight years after the 1927 survey. [Tr. II, p. 89.] The southern boundary line of the Judy tract (running east-west) — the line at issue — began at the three-foot pipe at the line's eastern terminus and ended at a sweet gum tree 14.5 chains away at its western terminus. The sweet gum would have been in the median of what is now Highway I-95 and hence is gone. [Tr. II, p. 104.] In the absence of the monument, to relocate the line the surveyor employs the course called for in the senior plat — 82 degrees west of south. [Tr. II, p. 89.] *Gethsemane Baptist Church v. Nut & Bolt House, Inc.,* 259 S.C. 92, 190 S.E.2d 748, 751 (1972). Where a line on this course reaches the right-of-way of I-95, the Ashley crew placed a marker, thus recreating the line depicted by Mr. Moorer in 1927.

The 1996 Ashley survey, duplicating the 1927 Moorer survey, places the dike area entirely north of the disputed southern boundary of the Judy tract. [Tr. II, p. 109.] It also places the billboard on the Judy tract, as the circuit court found in an earlier action, affirmed by the Court of Appeals (Op. No. 2004–UP–199 filed March 24, 2004). Although the circuit court in that action was not asked to and did not fix the boundary

line, its finding that the billboard lay on the Judy tract was based upon this same 1996 Ashley survey of Mr. Coker and Mr. Lawson.

B. The 1998 Bass survey.

Mr. Bass testified for the respondents Howell. Mr. Bass testified that he used an 1867 Gavin plat of the Howell property to locate the line between Howell and Judy. This was his sole source. He testified at first that he attempted to retrace the lines found on the 1867 plat, but later acknowledged that his survey was an attempt to correct errors on the 1867 plat.

As demonstrated below, following the 1867 plat, the northeastern-most boundary point of the Howell tract is markedly to the southwest of the three-foot iron of 1927 which marks the southeastern corner of the Judy tract. But Mr. Bass was determined to reach this three-foot iron and to stretch the 1867 plat to get there. He did so by departing from the 1867 survey arbitrarily, in the following ways.

HERE, INSERT REPRODUCTIONS OF DEF. EXH. 42 and PL. EXH. 3

First, Mr. Bass testified that he found only a single monument depicted on the 1867 plat. [Tr. II, p. 97.] This was described as a "channel iron". Starting at the 1867 channel iron, the 1867 survey calls for traveling 429 feet (6.5 chains) on a line 20 degrees east of north. Mr. Bass instead went a total distance of 448.57 feet on three line segments — not one line, as did Gavin in 1867. Instead of a course of 20 degrees east of north, as called for in 1867, the courses used by Mr. Bass for his three segments were approximately 43.5 degrees, 42.5 degrees, and 32.5 degrees, respectively. These courses bent the line far south of its 1867 position. This brought Mr. Bass to a point where naturally no monument was found. Mr. Bass set a pipe there. He could not remember the reason. [Tr. II, p. 100.]

Next, the 1867 plat calls for a distance of 508.2 feet (7.7 chains) on a line 37 degrees west of north. This course and distance leads nowhere close to the three-foot

iron which all surveyors agreed — *Mr. Bass included* — marks the southeastern corner of the Judy tract. In order to reach that 1927 iron at the southeastern corner of the Judy tract, Mr. Bass proceeded not 508.2 feet as called for in his 1867 reference plat but 588.62 feet, and not along the course of 37 degrees west of north but 30.72 degrees west of north. This is a 6.28-degree course change — a large one. Over the distance of a tenth of a mile, this deviation makes an enormous error. By this means Mr. Bass stretched and bent the 1867 plat beyond recognition in order to get to the 1927 southeastern corner of the Judy tract. The point called for in the 1867 plat as the northeastern-most corner of the Howell property is far southwest of Mr. Moorer's three-foot iron of 1927, yet Mr. Bass placed the 1867 point there. This is an arbitrary departure from the 1867 plat. Mr. Bass could offer no explanation other than that today's surveying instruments are more accurate. On the contrary, the only reasonable inference is that the corresponding point depicted on the 1867 plat is nowhere near the three-foot pipe inserted in the ground by Mr. Moorer, sixty years later.

In the absence of 1867 monuments on the ground, Mr. Bass was *bound* to respect the courses and distances of the senior plat. *Gethsemane Baptist Church v. Nut & Bolt House, Inc.*, 259 S.C. 92, 190 S.E.2d 748, 751 (1972). This he concededly failed to do.

Having reached the three-foot iron east of the dike, Mr. Bass then turned west a distance of 257.93 feet along a course of 71.45 degrees west of north — not 313.5 feet (4.75 chains) along a course of 81 degrees west of north as called for in the 1867 plat. This arbitrary and massive 9.55 degree alteration in course places the next point of the 1867 survey *north* of the dike, while the course called for in the 1867 survey would place it at the southern edge of the dike, placing little or none of the dike in the Howell tract. Even this generous placement of that point depends upon the erroneous claim that the 1927 three-foot iron marked a point on the 1867 plat, which it could not have

done. Mr. Bass could not account for this change of course and distance.

Finally, to reach what is now the western edge of I-95, Mr. Bass rejected the 1867 plat's call for a course of 74 degrees west of south. Instead, he used a course of 88.63 degrees west of south — nearly due west — to the I-95 right-of-way. This 13.37 degree northward shift of the angle of the final line segment on the 1867 plat moved the ending point of that line scores of feet north of the point called for in the 1867 plat. Mr. Bass offered no rational explanation for his rejection of the course called for in the 1867 survey.

To reach the disputed boundary line using the channel iron of the 1867 survey as a starting point, Mr. Bass testified that he intentionally rejected the courses and distances called for on the 1867 plat. [Tr. II, p. 110.] He acknowledged that when the monuments are gone, the surveyor is obliged to honor the angles and bearings called for in the senior plat. [Tr. II, p. 127.]

> Erroneous calls for courses and distances to the stone monuments referred to in the deeds would yield, of course, to the actual position of the monuments on the ground. *Nelson v. Frierson,* 1 McCord (12 S.C.L.) 232 (1821). This undisputed rule has no application, however, where, as here, the monument itself has disappeared and its original location on the ground is not established by competent evidence. In the absence of any other evidence as to its original location on the ground, a corner without an identifiable monument must be reestablished by reference to the descriptive calls of the senior conveyance which established the corner . . . .

Gethsemane Baptist Church v. Nut & Bolt House, Inc., 259 S.C. 92, 190 S.E.2d 748, 751 (1972). Nevertheless, Mr. Bass testified that he failed to honor the 1867 plat because the 1867 plat is in error. It does not "close" — *i.e.,* it contains errors. [Tr. II, p. 88.] With only one surviving monument, it is impossible to know where these errors lie. Using a computer to chart the courses and distances called for in the 1867 plat, a cumulative error of 57 feet is found. [Tr. II, p. 131.] That is to say, if one starts at the channel iron of the 1867 survey and follows the lines shown as the boundaries of the

Howell tract in a circular manner, one does not arrive back at the channel iron, as should be the case, but at a point 57 feet away. This is a very small discrepancy in an old survey of a large rural tract. Mr. Bass altered the 1867 plat to make it close by changing its courses and distances — altering that survey by far more than 57 feet. He did this by attributing *all* of the cumulative error in the 1867 plat to the northern lines of the plat — a minor part of the whole plat — and by changing them so as to move those lines north. He referred to this technique as "throwing the error into I-95". [Tr. II, pp. 89, 90, 96, 99, 112, 113, 122.] He could have pushed the errors anywhere. [Tr. II, pp. 96, 109, 110.] He rationalized his method by saying that "no one would get hurt" if the entire error of the 1867 plat were corrected in this way — and coincidentally placing the lion's share of the dike on the Howell side.

By this means the Howell-Judy boundary line is placed by Mr. Bass far north of where it would be if the courses and distances called for in the 1867 Gavin plat were honored starting at the channel iron — the only surviving monument on that plat — as required. [Tr. II, p. 97.]

When a surveyor purports to retrace an earlier survey but departs therefrom in fundamental ways, he must be able to offer an explanation other than that today's instruments are better [Tr. II,pp. 96, 101], or that he cannot remember why he reached a particular point, or that he fixed the errors in the earlier plat in an arbitrary manner. The only reasonable conclusion from the testimony of Mr. Bass is that his survey is nothing like his sole source — the 1867 plat — which he purported to correct, not to retrace. The opinion of an expert witness is no better than the underlying facts upon which it is based. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 463, 242 S.E.2d 671, 675 (1978). The plat of Mr. Bass does not constitute a scintilla of evidence of where the disputed boundary lies.

All the evidence is that the three-foot pipe found in 1995 and referenced in the

1996 Ashley plat — almost exactly where the 1927 Moorer plat and the 1970 Highway Department drawings call for it to be — marks the eastern terminus of the line in question. Since the sweet gum tree at the other terminus of that straight line is gone, the only proper way to reconstruct the line toward where that tree was located is to proceed on the course called for in the 1927 survey. *Gethsemane, supra.* (The 1927 plat's call for the course of the eastern line of the Judy tract led precisely to the terminus after more than 1,200 feet.) In the earlier action, affirmed by the Court of Appeals, the circuit court entered a judgment implicitly finding that this is the boundary line, even though the court was not asked to and did not locate the line explicitly.

The only reasonable conclusion to be drawn from the evidence is that the line at issue is located where the 1927 Moorer plat, the 1970 Highway Department maps, and the 1996 Ashley survey all found it to be, as the circuit court implicitly found in the earlier litigation.

CONCLUSION

One survey is not as good as another. As with any expert evidence, its probative value rests upon the manner in which it was done. The 1927 Moorer survey, the 1970 Highway Department maps, and the 1996 Ashley survey all fix the line at issue where the circuit court in the earlier litigation implicitly, though not expressly, found it to be. The contrary Bass survey purports to correct the 1867 Gavin survey but concededly departs from that survey at all the key points, for no legitimate reason.

The only reasonable conclusion is that the line is located where everyone but Mr. Bass has found it to be.

For these reasons the judgment should be reversed and the case remanded to set the line in the location found by the Ashley survey. In the alternative, at the very least, the arbitrary location fixed by the circuit court should be reversed and the case remanded, if need be, to find the line as required in this action at law.

Respectfully submitted,

Robert F. McCurry, Jr.
Horger, Barnwell & Reid
P.O. Drawer 329
Orangeburg, South Carolina 29116
(803) 531-3000

James B. Richardson, Jr.
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 799-9412

by: James B. Richardson Jr.
Attorneys for Appellant.

December 23, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS

Maité Murphy, Circuit Court Judge

Case No. 2010-CP-18-2243

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

v.

Betty L.S. Judy, ... Appellant.

APPELLANT'S DESIGNATION OF MATTER

Appellant designates the following material for inclusion in the Record on Appeal:

I. Orders:

1. The order dated June 17, 2013.
2. The form order dated August 14, 2013.

II. Pleadings:

1. Complaint
2. Answer

III. Transcripts

1. February 27, 2013 transcript pages:
    1. 3
    2. 3 – 89
    3. 103, lines 18–25
    4. 104 – 135

2. May 8, 2013 transcript pages:
   1. 1
   2. 7 – 13
   3. 46 – 135

3. Portions of examination of Mr. Lawson, apparently lost by court reporting service, if these portions are found before the Record on Appeal must be filed.

IV. All exhibits, providing, however, that after the exhibits have been released to the appellant, the appellant will propose to the respondent that exhibits found to be immaterial to the appeal be eliminated, subject to respondent's concurrence.

CERTIFICATE

I certify that this designation contains no matter which is irrelevant to this appeal.

Robert F. McCurry, Jr.
Horger, Barnwell & Reid
P.O. Drawer 329
Orangeburg, South Carolina 29116
(803) 531-3000

James B. Richardson, Jr.
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 799-9412

by: James B. Richardson, Jr.
Attorneys for Appellant.

December 23, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS

Maité Murphy, Circuit Court Judge

Case No. 2010-CP-18-2243

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

v.

Betty L.S. Judy, ... Appellant.

CERTIFICATE OF SERVICE

I certify that I served a copy of appellant's initial brief and designation by first class mail, postage prepaid, addressed to respondents' attorney at his address of record, namely:

W. Grady Jordan, Esq.
Smith, Jordan, Lavery & Lee
P.O. Box 1207
Easley, SC 29641

on December 23, 2013.

James B. Richardson, Jr.
S.C. Bar No. 4718
1229 Lincoln Street
Columbia, SC 29201
(803) 799-9412

Attorney for Appellant.

December 23, 2013.