

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Richard B. Ness, Special Referee

Appellate Case No. 2014-000204
Civil Action No. 2009-CP-38-01170

Patrick J. Williams, Frank J. Wallmeyer, and
Mary B. Wallmeyer, Respondents,

v.

F. Carlisle Smith and First Citizens Bank
and Trust Company, Inc., Defendants,

Of Whom F. Carlisle Smith is Appellant.

RESPONDENTS' INITIAL BRIEF

Curtis W. Dowling, S.C. Bar No. 6493
Matthew G. Gerral, S.C. Bar No. 76236
Barnes, Alford, Stork & Johnson, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, SC 29202
(803) 799-1111

June 27, 2014

Gregory G. Williams, S.C. Bar No. 11935
Gregory G. Williams, Attorney, LLC
1331 Richland Street (29201)
Post Office Box 727
Columbia, SC 29202
(803) 799-2211

Attorneys for Respondents

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. HAS THE APPELLANT CARRIED HIS BURDEN OF ESTABLISHING THAT THE SPECIAL REFEREE'S FINDINGS OF FACT ARE WITHOUT EVIDENTIARY SUPPORT?
- II. DID THE SPECIAL REFEREE PROPERLY TREAT THIS CASE AS A BOUNDARY LINE DISPUTE?

STATEMENT OF THE CASE

Respondents, Patrick J. Williams, Frank J. Wallmeyer, and Mary B. Wallmeyer (collectively, "Williams"), are satisfied with the Statement of the Case contained in the brief of Appellant F. Carlisle Smith ("Smith").

STATEMENT OF THE FACTS

In 1978, Williams purchased a 1,050-acre parcel of property in Orangeburg County. (Pl. Ex. 1; R. p. ____). Williams' deed identifies the western boundary of the property as "Dean Swamp." Id. In 1986, L.B. Till purchased an adjoining 380-acre parcel of property (the "Smith Property"). (Pl. Ex. 3; R. p. ____). Two days later, Mr. Till sold the Smith Property to Smith. (Pl. Ex. 2; R. p. ____). Smith's deed, unlike Mr. Till's deed, indicates the Smith Property contains 400 acres. Id. Both Mr. Till's deed and Smith's deed identify the eastern boundary of the Smith Property as "the run of Dean Swamp Creek." (Pl. Exs. 2-3; R. pp. ____). In 2000, Williams sold approximately 200 acres from the eastern portion of his original property. (Tr. 151:7-152:10). This left Williams with approximately 850 acres (the "Williams Property"). (Tr. 152:11-14).

None of the parties has ever had the properties surveyed. Prior to this controversy, there was no known survey or plat available precisely identifying the boundary line between the Williams Property and the Smith Property. However, there are numerous documents that indicate Dean Swamp Creek has historically been

recognized as the boundary line. For example, all prior deeds to the Williams Property identify the western boundary as “the run of Dean Swamp Creek” or “the waters of Dean Swamp Creek.” (Def. Ex. 17; R. pp. ____). Mr. Till’s deed and Smith’s deed identify the eastern boundary of the Smith Property as “the run of Dean Swamp Creek.” (Pl. Exs. 2-3; R. pp. ____). Moreover, the parties themselves recognize the original run of Dean Swamp Creek as the boundary line between their properties. See Compl. ¶ 26; Am. Answer & Counterclaim ¶ 19. Thus, the key issue in this case is the location of the original run of Dean Swamp Creek.

The Special Referee, Richard B. Ness, conducted a three-day bench trial of this action in August 2013. At trial, Williams presented testimony from ten witnesses, including four experts, and introduced 105 exhibits, while Smith presented testimony from three witnesses and introduced 17 exhibits. Following trial, the Special Referee entered an Order of Judgment on October 3, 2013 (R p. ____; the “Order”), finding, among other things, that the location of the original run of Dean Swamp Creek—and the boundary line between the Williams Property and the Smith Property—is as depicted on a plat entitled “A Plat of Disputed Proerty Line State of South Carolina County of Orangeburg Goodland Township Prepared for Patrick J. Williams.” (Pl. Ex. 103; R. p. ____). The parties have referred to the boundary line depicted on this plat as the “Stroman Line.” The Special Referee directed that a plat be recorded in the Office of the Orangeburg County Register of Deeds conclusively establishing the Stroman Line as the boundary line between the Williams Property and the Smith Property. (R. p. ____). Smith moved to alter or amend the judgment, but the Special Referee denied the motion and affirmed the Order. (R. p. ____).

ARGUMENTS

I. SMITH HAS NOT CARRIED HIS BURDEN OF ESTABLISHING THAT THE SPECIAL REFEREE'S FINDINGS OF FACT ARE WITHOUT EVIDENTIARY SUPPORT.

Despite Smith's assertion to the contrary—addressed in Section II, *infra*—this is a boundary line dispute. *See, e.g.*, Compl. ¶ 1 (“More particularly, the purpose of this action is to resolve a disputed property line.”); App. Br. at 3 (“The dispute between Williams and Smith concerns the location of a boundary between their two tracts of land[.]”); *id.* at 11 (arguing it was reversible error for the Special Referee to conclude that “the Stroman Line was the boundary between the Smith and Williams tracts”). “A boundary dispute is an action at law, and the location of a disputed boundary line is a question of fact.” Danley Williams v. Moore, 400 S.C. 90, 102, 733 S.E.2d 224, 230 (Ct. App. 2012); Coker v. Cummings, 381 S.C. 45, 53, 671 S.E.2d 383, 387 (Ct. App. 2008); Bodiford v. Spanish Oak Farms, Inc., 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995). In actions at law tried by a special referee, “the conclusions of fact found by the referee . . . are binding on [the appellate courts] unless they are without evidentiary support.” Bell v. S.C. Pub. Serv. Auth., 277 S.C. 556, 558, 291 S.E.2d 196, 197 (1982). *See also* Bodiford, 317 S.C. at 544, 455 S.E.2d at 197 (“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 unless found to be without evidence which reasonably supports the judge's findings.”). The Special Referee determined, as a finding of fact, that the location of the disputed boundary line is the Stroman Line. Order at 13, ¶ 19. Thus, to prevail on appeal, Smith must demonstrate that the Stroman Line is without evidentiary support. He has failed to do so.

A. There is evidence in the record supporting the Stroman Line.

In this appeal, the burden is not on Williams to establish the Stroman Line as the boundary line between the Williams Property and the Smith Property. He already did that before the Special Referee. Rather, the burden is on Smith to establish that the Stroman Line is without evidentiary support. Nevertheless, Williams can point to ample evidence in the record supporting the Stroman Line.

- Richard L. Stroman, the expert who identified the Stroman Line, gave a thorough and detailed recitation of the exhaustive research and effort he put into preparing the Stroman Line, including multiple site visits and reviews of numerous maps, aerial photographs, and plats. (Tr. 481:22-585:22).
- A plat referred to by the parties as the “Rosa Stroman Plat” depicts Dean Swamp Creek. (Pl. Ex. 78; R. p. ____). The location of Dean Swamp Creek on the Rosa Stroman Plat is generally consistent with the Stroman Line. (Tr. 505:10-506:6).
- The Orangeburg County tax maps for the Williams Property and the Smith Property are consistent with the Stroman Line. (Pl. Exs. 59-60; R. p. ____; Tr. 210:23-211:12, 212:5-21).
- Historical aerial photographs of the Williams Property and the Smith Property show a creek running approximately along the Stroman Line. (Pl. Exs. 75, 75A, 76, 76A, 77, 77A; R. p. ____; Tr. 402:18-403:4, 409:22-410:6, 412:16-413:1, 415:20-416:5).
- A map of the Smith Property submitted to the South Carolina Department of Natural Resources (“DNR”) in conjunction with an application for an allotment of “doe tags” is consistent with the Stroman Line. (Pl. Ex. 74; R. p. ____; Tr. 324:21-325:18).
- Using the Stroman Line as the boundary line between the Williams Property and the Smith Property yields total acreages of 874 to the Williams Property and 376 to the Smith Property. (Tr. 503:5-9). This is generally consistent with the acreages described in Mr. Till’s deed, Smith’s deed, and Williams’ deed (after subtracting the approximately 200 acres sold in 2000).¹ (Pl. Exs. 1-3; R. pp. ____).

¹ Smith claims evidence establishing that the Stroman Line would yield the parties acreage approximating the acreage described in their respective deeds is irrelevant. However, that fact cannot be viewed as merely coincidental, especially in light of testimony by one of Smith’s experts that his

- Williams pays property taxes on roughly 850 acres. (Pl. Ex. 59; R. p. ____).
- Smith pays property taxes on roughly 400 acres. (Pl. Ex. 60; R. p. ____).
- Mortgage loan documents related to the Smith Property indicate that the Smith Property contains 400 acres. (Pl. Ex. 61; R. p. ____).
- In a sworn affidavit submitted in connection with his divorce, Smith indicated that the Smith Property contains 440 acres. (Tr. 871:6-9).
- The aforementioned application submitted to DNR for an allotment of “doe tags” indicated that the Smith Property contains 400 acres. (Pl. Ex. 73; R. p. ____; Tr. 316:18-25).

Therefore, there is evidence in the record supporting the Stroman Line, and the Stroman Line is not without evidentiary support.

B. Smith’s argument that the chain of title does not support the Stroman Line is unavailing.

Based on his reading of two deeds in Williams’ chain of title, Smith argues that the Stroman Line does not accurately reflect the original location of Dean Swamp Creek. The first deed, an 1888 deed granting a 765-acre tract to P.W. Farrell, described its western boundary as Dean Swamp Creek. (Def. Ex. 17; R. p. ____). The second deed, an 1889 deed conveying a separate 286-acre tract to P.W. Farrell, described its western boundary as “lands of P.W. Farrell.” (Def. Ex. 17; R. p. ____). From these facts, coupled with certain testimony of his wetlands scientist, Smith draws the conclusion that Dean Swamp Creek “must have been located far to the east of the Stroman [L]ine[.]” App. Br.

“drawing”—which he refused to sign or seal or even call a “plat”—would yield only 350 acres to the Williams Property and 1,052 acres to the Smith Property. (Tr. 772:2-14). Moreover, the South Carolina Supreme Court has previously considered such evidence to be material. See, e.g., Brunson v. Graham, 259 S.C. 298, 301, 191 S.E.2d 713, 714 (1972) (“Despite the fact that this parcel has been repeatedly conveyed as Tract No. 6, containing two acres, more or less, according to the plat thereof, appellant now claims 5.46 acres. His claim to such excess acreage is supported by nothing more than his testimony as to where he understood the western and northern boundaries to be. . . . The lower court concluded, and we agree, that . . . there [is no] other competent evidence tending to prove title in appellant to appreciably more than two acres.”).

at 7-8. Frankly, Williams cannot make heads or tails of this argument. In any event, it merely goes to the weight the Special Referee accorded the parties' evidence and testimony and does not establish that the Stroman Line is without evidentiary support.

C. Smith's argument that Williams' deed does not support the Stroman Line fails.

Smith asserts that, because the last deed in Williams' chain of title describes the western boundary of the property as "Dean Swamp" rather than "the run of Dean Swamp Creek" or "the waters of Dean Swamp Creek," the western boundary of the Williams Property must be either the new location of Dean Swamp Creek or the edge of Dean Swamp. However, as the Special Referee recognized, South Carolina law has long provided that "where a swamp is given as a boundary, unless a contrary intention is clearly disclosed, the center of the run of the creek of the swamp is the boundary line, and not the margin of the swamp area." Ex parte Keller, 189 S.C. 26, ____, 199 S.E. 909, 913 (1938). Cf. Ivester v. Fowler, 109 S.C. 424, ____, 96 S.E. 154, 156 (1918) ("[A] change in the location of a stream or way that is a boundary between adjacent owners does not change the location of the boundary[.]"). Thus, absent clear evidence of a contrary intention, the western boundary of the Williams Property is the original center run of Dean Swamp Creek.

Smith, having based his assertion on an "implication," App. Br. at 8, has all but admitted there is no clear evidence to the contrary. Moreover, and more importantly, Smith admitted in his Amended Answer and Counterclaim that the eastern boundary of the Smith Property "is the old run of Dean Swamp Creek." Am. Answer & Counterclaim ¶ 19. See also Tr. 5:18-20 ("MR. LANG: Your Honor, the question is where was the old run of the creek? That's the issue in the case."). He is bound by that admission and is

estopped to argue otherwise on appeal. See, e.g., Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001) (“It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. Any allegations, statements, or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position.”).

D. There is evidence in the record that the original run of Dean Swamp Creek has been altered by human efforts.

Smith argues it was error for the Special Referee to find that the original run of Dean Swamp Creek has been altered by human efforts and points to testimony and exhibits he believes supports his position. However, this merely goes to the weight the Special Referee gave the parties’ evidence and testimony and does not show that the Special Referee’s findings were without evidentiary support. Indeed, the record is replete with evidence that the flow of Dean Swamp Creek has been diverted. Williams submitted a number of photographs showing that streams have been blocked, dirt has been moved, concrete and metal barriers installed, and trees have been cut. (Pl. Exs. 6-47; R. pp. ____). Some of the photographs show heavy equipment at the scene of these activities, equipment that Smith admitted belongs to him. (Pl. Ex. 36; R. p. ____; Tr. 894:7-12). Moreover, the testimony of Williams’ witnesses supports the conclusion that the run of Dean Swamp Creek has been altered by human efforts. Tr. 382:7-23, 389:8-390:2, 392:25-393:19, 396:4-397:5. Thus, “while [Smith] may disagree with the weight the [Special Referee] accorded the [parties’] exhibits and witnesses’ testimony, . . . there is reasonable evidence to support the [Special Referee’s] findings.” Danley Williams, 400 S.C. at 104, 733 S.E.2d at 231.

Even if it was indeed error for the Special Referee to find that the original run of Dean Swamp Creek has been altered by human efforts, that error was harmless. The determinative issue in this case is the creek's original location. As set forth above, the Special Referee, having heard three full days of testimony from 13 witnesses and reviewed over 100 exhibits, weighed the evidence and determined the Stroman Line accurately reflects the boundary line between the Williams Property and the Smith Property. That finding does not turn on whether Smith or anyone else deliberately diverted the original run of Dean Swamp Creek. See, e.g., McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (“Appellate courts recognize—or at least they should recognize—an overriding rule of civil procedure which says: whatever doesn’t make any difference, doesn’t matter.”).

II. THE SPECIAL REFEREE PROPERLY TREATED THIS CASE AS A BOUNDARY LINE DISPUTE.

Smith incorrectly asserts that this is a trespass to try title case, citing only Watson v. Suggs, 313 S.C. 291, 437 S.E.2d 172 (Ct. App. 1993), in support of that proposition. However, Watson is inapposite because, in that case, the plaintiff’s purpose in bringing suit “was to determine title to [a] disputed nineteen acre tract of land,” and “the boundary line question was ‘incident to’ the action to try title.” Id. at 293, 437 S.E.2d at 173. Williams brought this case, however, for the sole purpose of establishing the location of a boundary line, and that was the primary issue tried by the parties. See, e.g., Compl. ¶ 1 (“More particularly, the purpose of this action is to resolve a disputed property line.”); App. Br. at 3 (“The dispute between Williams and Smith concerns the location of a boundary between their two tracts of land[.]”).

This Court has previously recognized that there are multiple ways to posture an

action for the resolution of a disputed boundary line, including, as in this case, quiet title. For example, in Knox v. Bogan, 322 S.C. 64, 472 S.E.2d 43 (Ct. App. 1996), the Court wrote:

Generally speaking, there are several ways a disputed boundary line may be judicially determined. It may be determined incidentally by an action in ejectment where the plaintiff is out of possession of property, or in trespass to try title where the plaintiff is in possession and believes the defendant has trespassed on his property. *Additionally, disputed boundary lines may either be directly or indirectly judicially settled in actions to quiet title, actions for injunctions and declaratory judgment actions.*

Id. at 66-67, 472 S.E.2d at 45 (emphasis added).

This Court has also previously rejected the argument that Watson compels the resolution of boundary line disputes as trespass to try title actions.


[The defendant] next argues, under Watson v. Suggs, 313 S.C. 291, 437 S.E.2d 172 (Ct.App.1993), [the plaintiff] failed to meet his burden of proof in this case. We disagree. Not every action involving disputed property is in the nature of a trespass to try title. Watson was tried by the parties as a trespass to try title; this action, however, was treated by both parties and the court as a boundary dispute. It was not until after the hearing that [the defendant] first attempted to characterize [the plaintiff's] action as a trespass to try title. The central issue in this action was the location of the boundary line between the properties of [the plaintiff] and [the defendant]. Accordingly, the trial court properly treated the action as a boundary dispute rather than trespass to try title.

Bodiford, 317 S.C. at 544, 455 S.E.2d at 197.

In this case, as in Bodiford, the parties tried the matter as a boundary line dispute. Indeed, the phrase “trespass to try title” does not even appear in the trial transcript. Not until he moved to alter or amend the Order did Smith suggest that this is a trespass to try title case. (R. p. ____). The central issue in this case is the location of the boundary line between the parties’ properties. Thus, the Special Referee properly treated this case as a boundary line dispute.

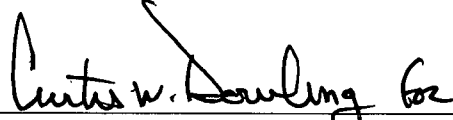
CONCLUSION

For the reasons explained herein, the Special Referee committed no error in issuing the Order. Accordingly, Respondents respectfully request that this Court affirm the Order.



Curtis W. Dowling, S.C. Bar No. 6493
Matthew G. Gerrald, S.C. Bar No. 76236
Barnes, Alford, Stork & Johnson, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, SC 29202
(803) 799-1111

June 27, 2014



Gregory G. Williams, S.C. Bar No. 11935
Gregory G. Williams, Attorney, LLC
1331 Richland Street (29201)
Post Office Box 727
Columbia, SC 29202
(803) 799-2211

Attorneys for Respondents

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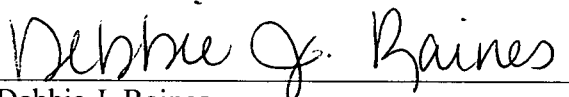
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Of Whom F. Carlisle Smith is Appellant.

PROOF OF SERVICE

I, the undersigned attorney with Barnes, Alford, Stork & Johnson, LLP, do hereby state that I have on June 27, 2014, served a copy of the **RESPONDENTS' INITIAL BRIEF** and **RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** upon all other parties, through their attorney(s) of record, by depositing copies of the documents in the United States Mail, first class, sufficient postage prepaid, with the return address(es) clearly noted, addressed as follows:

Louis H. Lang, Esquire
Callison Tighe & Robinson, LLC
18212 Lincoln Street, Suite 200 (29201)
Post Office Box 1390
Columbia, SC 29202
Attorneys for Appellant


Debbie J. Raines
Barnes, Alford, Stork & Johnson, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, SC 29202
(803) 799-1111

WELDON R. JOHNSON *
DAVID G. WOLFF
KAY GAFFNEY CROWE *
ALAN J. REYNER †
RICHARD C. THOMAS
ROBERT T. STRICKLAND
CURTIS W. DOWLING
MATTHEW G. GERRALD
BRIAN E. SOPP
EMILY COLLINS BROWN
CATHERINE AVA KOPIEC
JENNIFER I. WAXMAN



BARNES ALFORD

Barnes Alford Stork & Johnson L.L.P.

ATTORNEYS AT LAW

OF COUNSEL
WILLIAM C. STORK
ROGER A. WAY, JR. †

* CERTIFIED CIVIL
COURT MEDIATOR
† CERTIFIED SPECIALIST
IN TAXATION

RUDOLPH C. BARNES
(1917-1995)
JAMES W. ALFORD
(1930-2008)

June 27, 2014

HAND DELIVERED

Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Post Office Box 11629
Columbia, SC 29211

Re: Patrick J. Williams, Frank J. Wallmeyer and Mary B. Wallmeyer v. F.
Carlisle Smith (Appeal)
Appellate Case No. 2014-000204
Civil Action No. 2009-CP-38-01170
BASJ File No. 515.19964

Dear Ms. Kitchings:

Enclosed please find the original and one copy of each of the following documents pertaining to the above-referenced matter.

1. Initial Brief of Respondents Patrick J. Williams, Frank J. Wallmeyer, and Mary B. Wallmeyer;
2. Respondents Patrick J. Williams, Frank J. Wallmeyer, and Mary B. Wallmeyer's Designation of Matter to Be Included in the Record on Appeal; and
3. Proof of Service.

Please file the original documents and return the clocked copies with our courier. By copy of this letter, I am serving counsel of record.

POST OFFICE BOX 8448
OFFICE: 803.799.1111

CURTIS W. DOWLING
1613 MAIN STREET (29201)
FAX: 803.254.1335
WWW.BARNESALFORD.COM

COLUMBIA, SC 29202
CURTIS@BASJLAW.COM

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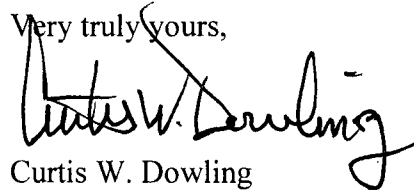
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BARNES ALFORD STORK & JOHNSON L.L.P.
Jenny Abbott Kitchings
June 27, 2014
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With best regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Curtis W. Dowling". The signature is written in a cursive style with a large, sweeping initial "C".

Curtis W. Dowling

CWD/djr
Enclosures

cc: Louis H. Lang, Esquire (w/encl.)
Gregory G. Williams, Esquire (w/encl.)