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.

FINAL BRIEF OF RESPONDENT

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1. Did the trial court err by finding the location of the common boundary line based on the parties past actions and usage of the property?

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STATEMENT OF THE CASE

By Complaint dated August 2, 2010, and filed August 12, 2010, the Respondents prosecuted this action against the Appellant. The Respondents alleged that their subject real property shares a common boundary line with the subject real property of the Appellant. The Respondents alleged that a question had arisen as to the location of the common property line and asked the Court to make a determination of same. The Respondents further alleged that the parties had, for years, comported themselves such that the property line was located in the middle of the dike road and that each party used said dike road for access to portions of their respective properties. The Complaint also alleged that should the Court find the common boundary line not to be in the middle of the dike road, it should order the party to which title is not granted as to the dike road an unfettered easement for purposes of ingress and egress over and across said dike road.

The Complaint contained causes of action for a Declaratory Judgment, Quiet Title, Easement, Estoppel, as well as Easement by Necessity.

A two part Hearing was had before The Honorable Maité Murphy on February 27, 2013, and May 8, 2013. On June 17, 2013, Judge Murphy filed an Order that found the property line to be in the middle of the dike road and both parties were granted an easement right in and to the dike road for the purposes of ingress and egress over and across the earthen dike. A Notice of

Appeal was served on the Respondents on December 23, 2013.

FACTS

In the early 1970's, Interstate 95 was constructed through Dorchester County. Wilbur Judy, Sr., and John Howell, both now deceased, whose heirs are parties to this action, owned the two subject plots of land at that time and both of these properties were adjacent to the I-95 construction area. During the construction of Interstate 95, each of these two gentlemen allowed the Department of Transportation (DOT) to remove dirt from his own property and in return was left with a pond on his respective property. Between these two ponds is a strip of land that both families refer to as the dike or as the dike road.

The attorneys for both parties stipulated as to ownership of both parcels, and represented to the Court that the only issue was the location of the common property line. (R. p. 41, line 20 – p. 42, line 12).

Roy Judy, son of Wilbur Judy, was the Attorney in Fact for his mother Betty Judy, widow of Wilbur Judy, under a power of attorney, and testified for the Appellant. This was not contested by the Respondents.

The dike area separating the two ponds can be seen on several of the Exhibits that were admitted at trial: Plaintiffs' Exhibits #1 (R. p. 247) and #5 (R. p. 251), and Defendant's Exhibits #25 (R. p. 269) and #42 (R. p. 271). None of these show both ponds in their entireties with the earthen dike separating them, but they do show the dike area where the two ponds meet.

The Judy property has no legal access from a public road. Prior to the construction of Interstate 95, they would access their property off of Highway 78 on the east side of what is now I-95. After the construction of I-95 their access was across the Howell property. With the

permission of the Howells, the Judys accessed their property after the construction of I-95 from Old St. George Road, over and across the Howell property. This can be seen if one looks at Plaintiffs' Exhibit #1 (R. p. 247). The access was from Old St. George Road at Heatherwood Drive and from the terminus of Heatherwood Drive across the Howell property with part of that access road shown in a dotted line on Plaintiffs' Exhibit #1. (R. p. 247). (R. p. 159, lines 16-24; R. p. 160, line 13 – p. 161, line 6). One can then see by looking at Plaintiffs' Exhibit #1 (R. p. 247) how one would turn off of Old St. George Road onto Heather Drive and at the end of Heatherwood Drive, continue traveling across the Howell Property eventually arriving at the pond area, which is located in the northwest area (top left) of the survey. There is no roadway clearly marked on Exhibit #1 (R. p. 247) showing a dirt road, but the testimony was that a dirt road ran along the property to the ponds, and this road was used by both the Howells and the Judys. Testimony reflects this fact:

> Mr. McCurry: And there were times in which after 95 was built that my clients had access from Old Saint George Road, what's now called Old Saint George Road; is that correct?
>
> Lew Jordan: Sure. There was a road all the way back in there. (R. p. 59, lines 19-24).

Roy Judy also testified, ". . . we used to travel a road off of Old Saint George Church Road, I think it's named, off Heather Road which came into this property, and off and on until probably 1989 or '90, I'm not sure exactly the access road that came into the back side of this property, I call it the backside. . ." (R. p. 159, lines 17-23).

There is evidence that the Judy property was also accessed on the north/northwest side by crossing property owned by Southern Railway. This can best be seen by looking at Plaintiffs' Exhibit #5 (R. p. 251) in the North part of the survey (top) and by looking at Page 6 of Plaintiffs'

Exhibit #7 (R. p. 262), said page being a drawing entitled, "Proposed Relocation of Private Grade x-ing for Mr. Wilbur Judy, dated March 3, 1978. This document shows the existing crossing and dirt road in yellow and the Proposed Grade Crossing in red.

By letter dated May 24, 1978, G.S. Baron, Superintendent of Southern Railway System, sent a " . . . proposed agreement between Southern Railway Company and Wilbur Judy, concerning construction, maintenance nad [sic] use of a private road 16 feet wide, upon and across, at grade, the right of way or property and tracks(s) of Railroad running between Branchville and Charleston at Badha [sic], South Carolina, (Milepost SC-49.6) to attorney Thomas O. Berry, Jr., in St. George, South Carolina, asking that he handle the execution of the agreement. (R. p. 257). There is no evidence that the document was ever executed, but it does evidence that Southern Railway Company drafted and presented to Wilbur Judy a document giving him legal access to his property by crossing over the Southern Railway property. It also evidences that he was already crossing their property to access his property and the Railway Company was aware of same as they annotated on Page 6 of Plaintiffs' Exhibit #7 the existing crossing and dirt road. (R. p. 262).

Roy Judy testified that he did not know why his father did not sign the agreement, and that he had no knowledge of an agreement with the railroad (R. p. 193, lines 3-15), but he also emphasized in later testimony that at the time, his family had access coming from Old Saint George Road. (R. p. 183, lines 4-9).

Mr. Judy testified that prior to the construction of Interstate 95, they accessed their property by coming off of Highway 78 on the east side of I-95. After the construction of I-95, Mr. Judy testified that his family had access off of Old Saint George Road, across the Howell

property. (R. p. 160, line 13 – p. 161, line 10). He also testified that after his father died they no longer had access across the Howell property.

Roy Judy testified that his father, Wilbur Judy, and John Howell both ended up with ponds with the dirt being dug out for construction of the interstate. He further testified that between the two ponds was a dike and to the best of his knowledge neither his father nor Mr. Howell ever fussed about the dike. (R. p. 177, line 18 – p. 178, line 19). Mr. Judy also had no knowledge of his father or Mr. Howell ever erecting a fence. (R. p. 178, line 20 – p. 179, line 3). Mr. Judy was asked on cross-examination if he had any reason why his father and Mr. Howell would have had the dike placed anywhere but where they thought the property line was and he could not answer the question. He could not give the Court a reason why his father and John Howell would have put the dike anywhere other than where they thought the property line was. (R. p. 184, lines 3-13). He testified that he did not know where the property line was and he had no knowledge that his mother knew where the line was. (R. p. 186, lines 9-24). There is no evidence that any party, the DOT or anyone else, forced Wilbur Judy and John Howell to place the dike anywhere other than where the line was believed to be. Roy Judy would not speak for his father, but he could give no explanation of his own for why the dike would have been constructed anywhere but where the property line lay. He refused to speculate about what his father and John Howell did. (R. p. 184, lines 8-13).

The dike, wide enough to drive over, provided access to the end of each man's pond. After the ponds and the dike were constructed, the families used the dike in harmony for many years. Each family helped maintain its own side of the dike and, according to testimony, there were never any arguments or even discussions about where the line was or who owned the dike.

Both families acted as if the property line were located down the middle of the dike. The specific testimony in this regard is set out further below with specific references to the transcript.

Testimony reflected neither family ever tried to prevent the other from using the dike. Roy Judy testified that the Judys never erected a fence on the dike. Roy Judy would not testify that the Howells had never erected a fence on the dike, but he did testify that he had no knowledge that the Howells had ever erected a fence on the dike. (R. p. 178, line 20 – p. 179, line 3).

Testimony also reflects that both families maintained the dike, as is cited hereinbelow. Roy Judy would not testify that the Howells maintained the dike: he testified that he did not know if they did or not. (R. p. 187, lines 10-19).

There were no problems with either family using the dike until December 1995 when Roy Judy constructed posts and a fence across a portion of the southeast end of the dike, blocking vehicle access by the Howell family to the dike. Prior to this time, the Howells and the Judys used the dike and even Roy Judy knew of no confrontation with anybody in that regard. (R. p. 185, lines 10-15).

So what was the reason for the construction of this fence? Roy Judy testified that sometime in 1995 the Judys no longer were able to access their property by crossing over the Howell property. Roy began to look at DOT maps to review access roads. While reviewing these DOT maps, a question arose in Roy's mind as to whether the dike was indeed the property line. (R. p. 161, line 20 – p. 162, line 6). It appeared to him that the property line was more towards Walterboro off of the Dike. He said he discussed it with his attorney who then hired a surveyor. (R. p. 161, line 20 – p. 162, line 6). If the line was more towards Walterboro, in a generally southerly direction, it would put the line out into the Howell pond. This can be seen on

the survey done by Ashley Surveying, Inc., dated January 31, 1996. It is the line that is S 82'00'00" W 766.09. (R. p. 251, p. 269). Although this survey is not dated until January 31, 1996, Roy Judy apparently based his decision to erect a fence across a portion of the southeast end of the dike in December of 1995 upon an early copy of this survey. (R. p. 166, lines 13-20).

From this point forward, Roy Judy has disputed the location of the property line and the use of the dike. The Howell family witnesses all testified that they never tried to impede the Judy's usage of the dike and never considered the property line to be anywhere other than the middle of the dike. The specific testimonial references are set out in the argument below. This conduct has continued throughout this litigation with Mr. Roy Judy wanting a property line that would cut off access to the Howells on the southeast end of the dike and the Howells testifying that they wanted nothing other than for everyone to use the dike as they had for years.

By all accounts, the two men and their families both had access to, used, and maintained the dike for years without problems. There is no evidence of any dispute regarding the dike until 1995 when Roy Judy began to question the location of a line that had been accepted as legitimate for over twenty years.

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR BY FINDING THE LOCATION OF THE COMMON BOUNDARY LINE BASED ON THE PARTIES' PAST ACTIONS AND USAGE OF THE PROPERTY

STANDARD OF REVIEW

"A boundary dispute is an action at law and the location of a disputed boundary line is a question of fact." Williams v. Moore, 400 S.C. 90, 102, 733 S.E. 2d 224, 230 (citing Bodiford v. Spanish Oak Farms, Inc., 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995), Coker v. Cummings, 381 S.C. 45, 671 S.E. 2d 383 (S.C. App. 2008). It is well established law in this state that, "In actions at law tried without a jury, the findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably support them." Knox v. Bogan, 332 S.C. 64, 66, 472 S.E. 2d 43, 45 (S.C. App. 1996). "The appellate court will not disturb the trial court's findings of fact as long as they are reasonably supported by the evidence." Moore, at 400 S.C. at 102, 733 S.E.2d at 230, (citing Madren v. Bradford, 378 S.C. 187, 192, 661 S.E. 2d 390, 393 (Ct. App. 2008). *See also* Epworth Children's Home v. Beasley, 365 S.C. 147, 164, 616 S.E. 2d 710, 714 (2005). "On appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law." Moore, 400 S.C. at 102, 733 S.E. 2d at 230, (citing Madren, 378 S.C. at 191, 661 S.E. 2d at 393). "Questions regarding credibility and weight of evidence are exclusively for the trial judge." Madren, 378 S.C. at 191, 661 S.E. 2d at 393.

The appellate court has no power to weigh conflicting evidence in a law case. Hibernian Soc'y v. Thomas, 282 S.C. 465, 319 S.E. 2d 339 (Ct. App. 1984).

ARGUMENT I.

"It is well settled that if adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for a long period of time - usually the time prescribed by the statute of limitations – they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one." Knox v. Bogan, 322 S.C. 64, 71-72, 472 S.E.2d 43, 48 (Ct. App. 1996). "If adjoining landowners occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in for a long period of time, they are precluded from claiming the boundary line thus recognized and acquiesced in is not the true one." Coker v. Cummings, 381 S.C. 45, 54, 671 S.E. 2d 383, 388 (2008), citing Gardner v. Mozingo, 293 S.C. 23, 26, 358 S.E. 2d 390, 392 (1987). "In other words, such recognition of, and acquiescence in, a line as the true boundary line, if continued for a sufficient length of time, will afford a conclusive presumption that the line thus acquiesced in is the true boundary line." Coker, 381 S.C. at 54, 671 S.E. 2d at 383, *citing* Knox v. Bogan, 332 S.C. 64, 72, 472 S.E. 2d 43, 48 (Ct. App. 1996) "The length of time is usually that prescribed by the statute of limitations. However, acquiescence can be established even if the period of time is very short; acquiescence need not continue for the period necessary to establish adverse possession." Coker, 381 at 54, 671 at 388, (citing McClintic v. Davis, 228 S.C. 364, 384, 90 S.E. 2d 364, 366 (1955)).

In McClintic, our Supreme Court reminded us that in an acquiescence case the length of time required is not that usually prescribed by the Statute of Limitations. Instead, in McClintic, the Court referred to its decision in Southern Ry. Co. v. Day, 140 S.C. 388, 138 S.E. 870 (1926), for the proposition that it is not necessary that such acquiescence continue for the period necessary to establish adverse possession. "The estoppel may arise, even though the period of

acquiescence is very short." Southern Ry. Co. v. Day, 140 S.C. 388, 138 S.E. 870, 875 (1926), (citing Champ v. Nicholas County Court, 72 W. Va. 475, 78 S.E. 361 (1913)).

"The determination of the question concerning what constitutes recognition and acquiescence depends upon the particular facts of the case. 11 C.J.S. *Boundaries* Section 79 at 652 (1938). Generally the question turns on 'the acts or declarations of the parties . . . , on inferences or presumptions from their conduct, or on their silence.'" Croft v. Sanders, 283 S.C. 507, 509, 510, 323 S.E. 2d 791, 792, 793 (1984). In Croft, the Court did not find that a fence between adjoining properties was sufficient to establish a boundary by recognition and acquiescence as the fence was built between the landowners for purposes that had nothing to do with fixing a boundary. Croft erected his fence to secure a farm loan, and he intentionally placed it well inside his property line. The Court could not find any evidence that he intended for the fence to mark the boundary between the adjoining properties.

"A disputed boundary line can be established by acquiescence of the parties." Kirkland v. Gross, 286 S.C. 193, 197, 332, S.E.2d 546, 548-49 (Ct.App.1985), *receded from on other grounds by* Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct.App. 1988). "However, acquiescence is a question of fact determined by the intent of the parties." Kirkland, 286 S.C. at 198, 332 S.E.2d at 549.

The testimony in this case established that both parties used the dike without problems arising between them for over twenty years. First of all, John Howell and Wilbur Judy each acquiesced to the placement of the ponds and the dike when they were constructed in the early 70's. (R. p. 177, line 13 – p. 178, line 19). Secondly, the families both used and maintained the dike[1] (see testimony below). Thirdly, neither family attempted to prevent the other from using

[1] To be perfectly transparent, Roy Judy did not testify that both families maintained the dike, but he did testify that he couldn't say that they didn't help maintain the dike because he didn't stay there all the time (R. p. 187, lines10 -

the dike until Roy Judy placed a fence on the dike in 1995 (see testimony below).

At the time of the construction of the ponds, the property line was considered to be where the dike now sits. We have undisputed evidence that John Howell (deceased) and Wilbur Judy, Sr. (deceased), two gentlemen who, according to all the evidence, seemed to get along and to agree as to their respective property lines, both agreed to ponds being dug on their respective properties with the dirt being used in the construction of I-95. There is no evidence that these gentlemen would have placed the dike between their two respective ponds anywhere but where they thought their common property line to be.

Unfortunately, we do not have either of these men to testify as that would likely provide a quick resolution of this issue. We do have their survivors, however, who provide evidence that both families used and treated the dike area as the property line until Roy Judy began to question it in late 1995. It is clear, even from Roy Judy's testimony, that although the ponds were dug in the early 1970's, he did not question that the dike was the property line or erect the fence until December of 1995. Roy Judy testified:

Mr. Jordan:	But you didn't know where your line even was until you had that survey done?
Mr. Judy:	That's correct.
Mr. Jordan:	And you're testifying here for your mother today, here on her behalf?
Mr. Judy:	Yes.
Mr. Jordan:	You don't have any knowledge that your mama knew where the line was before this survey?
Mr. Judy:	No. I don't.
Mr. Jordan:	So before the '96 survey y'all didn't know where the line was?
Mr. Judy:	Until the later part of '95.
Mr. Jordan:	When they put the stakes up for the survey?
Mr. Judy:	That's right.
Mr. Jordan:	But before that everybody used the dike, the Howells and the Judys?
Mr. Judy:	I never had any confrontation with anybody if they did; I'll put it like that. (R. p. 186, line 9 – p. 187, line 3).

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19).

Inherent in this testimony, though Roy Judy will not admit it, is that up until the later part of 1995, the dike was treated as the property line. For he also testified:

> Mr. Judy: The DOT maps back then, I saw an access road that came into the property, came on the property, one that I had used since I was a kid; I saw that. It also appeared to me that the dike at that time, the property line was way back, well, actually more towards Walterboro off of the dike as indicated on the drawing. I did the measuring as best I could from the railroad side to kind of verify what I was seeing and it looked pretty close to me so I discussed it with my attorney and my attorney then hired a surveyor. And that's how this came about. (R. p. 161, line 20 – p. 162, line 6).

He goes on to state:

> Mr. Judy: Ashley Surveying, when they completed the survey, that's where the lines were determined. . . It was *after* the survey was done and I was sure, based on our plat, our survey, that was the line so I erected the fence up.[2] (R. p. 166, lines 10-20). (emphasis added)

So Roy Judy admits that even he never questioned the dike being the property line until he looked at the DOT map in 1995; it had never occurred to him that the line was anywhere other than on the dike. Then after the Ashley Survey was accomplished, he had a line that he could reference the property line to be.

Roy Judy's construction of the fence was also an act of spite.

> Q: Can you tell the Court what prompted you to put these posts up. . . ?
> A: After the survey was done and it was determined the line was where it showed on this map, that entire dam shows on our property and those posts were put up to limit access coming from the other end the same way ours was limited further down.[3] That access was cut off so I determined this was our property here based on the survey; that access was also shut off. (R. p. 165, lines 15-25).

There was copious testimony indicating that both families used and maintained the dike and there was never any confrontation between them. Lew Jordan, son-in-law of John Howell,

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[2] However, this fence did not prevent access to the dike except by vehicle so that the Howells were still able to and did access the dike. (R. p. 45, lines 2-9).

[3] Roy Judy refers to the access across the Howell property that had been granted with permission by the Howell family for a number of years before this action. There was never any claim by the Judy family that the land by which they accessed their property belonged to them, and the Judys never used that land as if they owned it.

Sr., and husband of Kay Howell Jordan, testified that the Howell family had used the dike area, walking, driving, or fishing on it, cleaning it or doing whatever needed to be done without interference until Roy Judy erected the fence in 1995. (R. p. 42, line 14 – p. 44, line 22). He also testified that both families had maintained the dike:

Q: Who has maintained or cleaned the dike?
A: I think both sides have done well with that.
Q: The Howells and Judys?
A: Yes.
Q: What portions of the dike have the Howells maintained?
A: Whatever needed to be done anywhere along there. And if there was a dea[d] limb you do away with it.
Q: So far as the maintenance of the dike was there ever any problems with it staying clean or useable?
A: No. I think they did a good job with some of that when we weren't around. (R. p. 55, lines 12-25).

Lou Jordan testified that the Howells had never constructed a fence to try to keep Ms. Judy from using the dike. (R. p. 45, lines 14-16). Kay Jordan, daughter of John Howell, Sr., testified that she had no knowledge that any member of her family had ever tried to keep Mrs. Judy or her family from using the dike or the pond. She also testified that both the families kept the dike clean and useable. (R. p. 66, lines 7-17) (R. p. 68, lines 4-23).

Lewis Howell, son of John Howell, Sr., testified that he had no knowledge that his family had ever interfered with the Judy's use of the dike. (R. p. 78, line 7 – p. 79, line 17). He also testified that both parties would keep the dike clean and maintained and had access to use vehicles on the dike. (R. p. 79, lines 18-25). He also testified that before the fence that Roy Judy erected, there was never any interference with usage of the dike. (R. p. 44, lines 16-22).

Marion Howell Tolson, daughter of John Howell, Sr., testified that her family had used the dike without problems until the fence was erected and that both families had maintained the dike. (R. p. 83, line 14 – p. 84, line 16).

Q: And have you and your family used the dike area without any interference other than this fence that was constructed at some point?
A: Yes.
Q: And did you ride vehicles across it?
A: Yes.
Q: And walk across it?
A: Yes.
Q: And did your family and Roy to your knowledge keep the dike maintained and clean and use it?
A: Yes.
Q: Do you have any reason to interfere with Ms. Judy or her family's use of the dike?
A: No. (R. p. 83, line 25 – p. 84, line 16).

Even Roy Judy testified that in the early years, both families used the dike harmoniously.

Mr. Jordan: And your daddy and Mr. Howell, to the best of your knowledge, never fussed about the dike?
Mr. Judy: To my knowledge.
Mr. Jordan: Your daddy never erected a fence, did he?
Mr. Judy: If he did I didn't help him.
Mr. Jordan: And Mr. Howell never erected a fence to keep your daddy off the property, did he?
Mr. Judy: I can't answer that. If he did, I didn't see it. I don't have any knowledge of it. (R. p. 178, line 16 – p. 179, line 3).

Mr. Jordan: All right. There was no problems using the dike, was there Roy, until you started putting a fence up; is that correct; as far as the Judy's and the Howell's both using the dike?
Mr. Judy: Well, I didn't have a problem. In those times it was no problem if I went on their property anytime I wanted to back in the days.
Mr. Jordan: They didn't cause you any trouble.
Mr. Judy: Nobody caused anybody any trouble. (R. p. 184, line 14 – p. 185, line 1).

Mr. Jordan: But prior to you putting the fence up the Howell's didn't bother the Judy's and the Judy's didn't bother the Howell's and they both used the dike?
Mr. Judy: To my knowledge. I don't know of any confrontation. (R. p. 185, lines 10-15).

Roy Judy even grudgingly testified as to the maintenance of the dike as follows:

Mr. Jordan: And Lou Jordan and others, they did help maintain the dike, didn't they, Roy?
Mr. Judy: Don't remember that.
Mr. Jordan: You don't remember that?
Mr. Judy: No. I don't.

Mr. Jordan: You can't say they didn't, can you?
Mr. Judy: I just said I didn't stay there all the time but whenever I was there I never saw him. I didn't stay there all the time. (R. p. 187, lines 10-19).

This testimony is key in showing that even Roy Judy could not provide the Court with any information that his father or Mr. Howell or their heirs ever contested the dike area until he erected a fence in 1995. So, two ponds were dug in the early 1970's and an earthen dike was made between them which both landowners, their families, and their heirs used harmoniously with no confrontation until Roy Judy erected a fence in late 1995. All of these facts come from the testimony of Roy Judy. (R. p. 178, line 16 – p. 179, line 3); (R. p. 185, lines 10-15).

The digging of the ponds and the location of the dike between the ponds and the parties thereafter using each their respective ponds, as well as their common usage and maintenance of the dike, as found by the trial court, is compelling evidence. The only reasonable inference from the evidence is that the property line is down the middle of the dike, as the parties behaved as if the line were there for over twenty years before Roy Judy questioned the boundary.

Even one of the questions of Defendant's counsel posed to John Lewis Howell, Jr., is telling in that as asked, it supports the Plaintiffs' position. That question and answer was as follows:

> Mr. McCurry: "Well, the January, 1996 plat . . . indicates that the dam if you will, or the dike is wholly on the Judy's side. It's on the Judy property; is that correct? . . . *And until 1995 there was not a realization that there may have been an issue*, until the field work was done in '95 for this plat; is that correct?"
>
> Lewis Howell: "I suppose so." (R. p. 81, line 21 – p. 82, line 6).

Counsel had it right: there was not any realization of any issue until a plat was done, as both sides acted as though the dike were the property line. Again, there is no evidence that would support that Mr. Wilbur Judy (deceased) and Mr. John Howell, Sr., (deceased) would have put the dike anywhere but where they thought the common property line to be. The

families respected each other's use of the dike area and used their respective ponds until Roy Judy erected a fence in late 1995. There is overwhelming evidence of the parties using this dike as the property line.

Furthermore, the evidence presented to the lower court was that Lewis Jordan and Roy Judy had numerous meetings and finally came up with a line as shown on Plaintiff's Exhibit #2 (R. p. 248) that runs from point A over to little "D" and then to little "E" as an attempt to devise a line the parties could agree to. He testified that they met at the property and flagged the line prior to having it surveyed. (R. p. 248, Sketch showing a proposed property line change between Betty S. Judy and heirs of Mirian [sic] S. Howell). This line runs along the dike though, not in the center. (R. p. 48, line 1 – p. 54, line 2). But, it shows that even in trying to work out a resolution, the property line was going to be on the dike.

Respondents argue that there is more than sufficient evidence under the standard of review in this case to support the lower court's ruling. The lower court's ruling as to the conduct of the parties could be based solely on the placement of the dike between the two ponds. When Wilbur Judy and John Howell had dirt dug from their respective properties for the construction of I-95, their location of the dike separating their respective ponds is very strong evidence of where they considered the common property line to be. That line was the dike road. But, more than that, after it was constructed, the parties continued to use the dike without interference from the other for years, until in 1995, Roy Judy erected a fence.

"Generally the question turns on 'the acts or declarations of the parties . . . , on inferences or presumptions from their conduct, or on their silence.'" Croft v. Sanders, 283 S.C. 507, 509, 510, 323 S.E. 2d 791, 792, 793 (1984). In Croft, the Court did not find that a fence between adjoining properties was sufficient to establish a boundary by recognition and acquiescence as

the fence was built between the landowners for purposes that had nothing to do with fixing a boundary. Croft erected his fence to secure a farm loan, and he intentionally placed it well inside his property line. The Court could not find any evidence that he intended for the fence to mark the boundary between the adjoining properties. However, in the case at hand we have the construction of a dike between two ponds, with the dike being used by both adjoining property owners for years without dispute. There can be no inference but that it was placed there to mark the property line between the two respective ponds. Otherwise, one would have to believe that Mr. Wilbur Judy and Mr. John Howell had their ponds dug and the earthen dike erected such that a part of Mr. Judy's property was actually in Mr. Howell's pond. This scenario does not comport with the manner in which the families conducted themselves for years.

Assuming for the purposes of argument that the survey of Ashley Surveying is correct, which would also mean the Moorer Survey is correct, we would still be left with Mr. Wilbur Judy and Mr. John Howell changing the line with the placement of the dike. Roy Judy can't just change it back.

The trial court did not treat the claims in this action as ones of adverse possession, but rather as ones of acquiescence based on what the trial court called, "past actions and usages of the parties." (R. p. 2). This was based on testimony cited in the order that the parties had conducted themselves for years as though the dike was the dividing line between their respective ponds. (R. p. 2). This is supported by the case law already cited and does not require any requirement of hostility as our Supreme Court discusses in Perry v. Heirs at Law and Distributees of Gadsden, 316 S.C. 224, 449 S.E. 2d 250 (1994), as the trial court did not base its findings on adverse possession.

A reading of the quote from Herman on Estoppel and Res Judicata, vol. 2 §1061, as cited

in Southern Ry. Co. v. Day, 140 S.C. 388, 138 S.E. 870, 874 (1926), goes to the heart of this case and puts it in perspective as to the applicable law. This quote is set out hereinbelow as it was quoted in Southern Railway and then below that with the insertion of the facts of this case.

"Acquiescence in a transaction may bar a party of his relief in a very short period. Thus, if one has knowledge of an act, or it is done with his full approbation, he cannot afterwards have relief. He is estopped by his acquiescence, and cannot undo that which has been done. So, if a party stands by, and sees another dealing with his property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence and it estops him." Id at 874.

Now with our facts:

Acquiescence in the digging of a pond and in the placement of a dike between one's pond and that of his neighbor may bar a party of his relief in a very short period. Thus, if one had knowledge of the digging of the ponds and the placement of the dike between them, or same is done with his full approbation as in this case, he cannot afterwards have relief. He is estopped by acquiescence, and cannot undo that which has been done, i.e., later change the boundary. So, if a party stands by, and sees another using his respective pond and using the dike as though it is the common boundary between the ponds and therefore the properties, and he makes no objection, in fact, he conducts himself in the same manner in using his pond, and in using the dike, he cannot afterwards have relief. His silence, and in this case his affirmative actions, encourage his adjoining landowner to part with his money in maintaining the dike area, and he cannot complain that his interests are affected. His silence and affirmative actions are acquiescence and they estop him.

Respondents argue that the decision of the lower court should not be disturbed as the trial court's findings of fact are reasonably supported by the evidence. Knox v. Bogan, 332 S.C. 64, 472 S.E. 2d 43 (Ct. App. 1996); Williams v. Moore, 400 S.C. 90, 733 S.C. 2d 224 (Ct. App. 2012); Madren v. Bradford, 378 S.C. 187, 661 S.E. 2d 390 (Ct. App. 2008); Epworth Children's Home v. Beasley, 365 S.C. 147, 616 S.E. 2d 710 (2005). There are no errors of law in this case to be corrected and the credibility and weight of the evidence are exclusive for the trial judge. Madren v. Bradford, 378 S.C. 187, 661 S.E. 2d 390 (Ct. App. 2008)

II. THE TRIAL COURT DID NOT ERR BY NOT CHOOSING BETWEEN TWO COMPETING SURVEYS TO DETERMINE THE PROPERTY LINE.

Two surveyors testified in this case, one for each side. Both came to different conclusions based on their field work and research of old surveys. Mr. John David Bass, hired by the Respondents relied on a survey done in the 1800's (R. p. 270) and his field work to complete his survey dated October 30, 1998, (R. p. 247) showing where he thought the common boundary line to be. (R. p. 195, line 19 – p. 197, line 22; p. 202, lines 22-25). Mr. Bass graduated from Clemson University with a degree in Civil Engineering in 1983 and is a professional licensed surveyor. (R. p. 194, lines 12-25). He opined that if the 1800's Survey (R. p. 270) was correct, then his survey was correct. And further that it depended on which of the old surveys you use, i.e., the 1800's survey he used or the 1927 Moorer plat, to base the current survey on as to which current survey is correct. (R. p. 202, lines 4-25).

The Defendant hired Ashley Surveying Inc., to accomplish a survey. (R. p. 248) . (R. p. 101, line 22 – p. 102, line 16). The field work and the survey were both prepared by Mr. Ben Coker of Ashley Surveying, Inc. (R. p. 89, line 3 – p. 91, line 17). He relied in part on a 1927

survey done by F.A. Moorer (R. p. 264). After he plotted the survey, he released the document to his clients prior to making it a survey. He said he sat down with Mr. Lawson and explained to him the survey and the lack of corners on the adjoining property and Mr. Lawson reviewed it and stamped it and signed it. Mr. Lawson made no changes to the survey. (R. p. 127, line 2 – p. 130, line 11). Even Mr. Coker admitted that he could not match up the 1800 survey (R. p. 270) with the Moorer plat (R. p. 264). He was asked if one of these prior surveys was wrong and he testified, "One of them is wrong." (R. p. 124, line 17 – p. 127, line 1). Although Mr. Coker did the field work for the Ashley Survey, Inc., survey, he testified that he does not have a Bachelor's degree, but instead an Associate's degree in Forestry Technology, is not a licensed surveyor, and holds no professional licenses. He also testified that he cannot sign or stamp a survey. (R. p. 92, line 7 – p. 94, line 20). He took the land surveyor examination in 1981 and did not pass it and he never did go back and take it again. (R. p. 100, lines 9-17). (The trial court would not allow him to testify as an expert in land surveying, but she did allow him to testify regarding his experience as far as the field work that he had done.) (R. p. 99, lines 3-10; p. 101, lines 16-20). Ashley Surveying, Inc., also did some overlays of the surveys to try and see how they matched up against one another. But again, the surveyor, Mr. Lawson, did not develop these drawings: Mr. Coker did. Mr. Lawson testified that since Mr. Coker had prepared the drawings, he "might can answer more questions about them than I could." (R. p. 152, line 18 – p. 154, line 2). Clearly, the work done by Ashley Surveying, Inc., was being done by an unlicensed surveyor and received only a cursory review by Mr. Lawson. In his testimony Mr. Lawson was asked if the angle iron that Mr. Bass used as his base point was established in his mind as a starting point for a survey. He responded, "I did not survey this property so I don't honestly know. I can't say. . ." (R. p. 244, lines 5-11). His admission is telling: he did not survey this property. Therefore, he could

not have properly assessed and stamped a survey as to being an accurate and true representation of where he thought the common boundary line to be.

Both sides presented testimony that less reliable methods were used for surveying during the periods of the 1800 survey and the 1927 Moorer survey. This is more reason not to try to construct modern surveys based on old plats to draw a common boundary line when we have other competent evidence. Mr. Coker testified that even his line lengths did not match the old survey due to what he blamed on the old measurement of distance through the use of chains. (R. p. 110, line 7 – p. 111, line 6). In describing their use of chains in olden times, he stated, "By very crude measurements compared to our measurements now." (R. p. 111, lines 3-9). Mr. Bass testified that when you have old surveys, you did not get a perfect line because old compasses were used and it's to the nearest degree. In the 1800's they did not read to the nearest minutes and second. (R. p. 199, lines 8-11). He also testified that the bearings and distances in his survey would not be exactly the same as in the 1800 plat as they were done by an old compass. (R. p. 207, lines 2-15).

Both surveyors admitted to not finding all of the markers on the ground to confirm all of the points of the surveys. Mr. Coker had to set a pipe that no longer existed on the ground and rely on "witness" trees. (R. p. 106, line 23 – p. 109, line 21). In fact, he testified that in the area between the two ponds, he tried to use the 1800's survey to locate some of its points in this area, but was unable to locate them. "Not having the convenience of being able to tie to those points I did the next thing that was available to me in surveying law. And that was to utilize the FA Moorer plat." (R. p. 116, lines 1-9). He went on to state that "We attempted to find other corners on this side of the property line, but they were not available." (R. p. 116, lines 14-16). Mr. Bass also acknowledged difficulties in surveying due to relying on an old plat and lack of

monumentation as well. (R. p. 216, line 1 – p. 217, line 5).

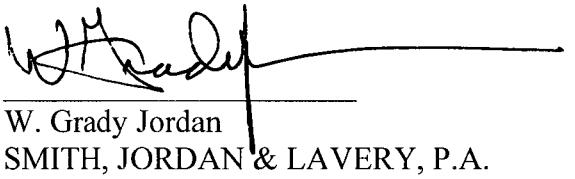
The trial court did not decide the issue of the location of the boundary line based on these surveys, but instead based its decision on the conduct of the parties, which has already been addressed in Argument I *supra*. The Appellant is now asking this Court to meticulously dig through the evidence and agree with it that the survey of Mr. Lawson is a correct determination of the boundary line. In doing so this Court would have to review both surveys and the evidence used in their making and weigh the evidence to determine which one is correct. Respondent would argue this would not be appropriate as the appellate court has no power to weigh conflicting evidence in a law case. Hibernian Soc'y v. Thomas, 282 S.C. 465, 319 S.E. 2d 339 (Ct. App. 1984).

CONCLUSION

The evidence that exists in this case more than supports the affirmation of the ruling of the trial court. This Court should not disturb the ruling of the trial court as it is reasonably supported by the evidence. It is not often that strong evidence such as the placement of a dam between two ponds is available to a fact finder to use as evidence of the location of a common boundary line. Although the Appellant makes arguments about this decision being based on "fairness" and "equity," the trial court's Order makes no such mention.

The trial court made the correct decision in basing the location of the common property line on the conduct of the parties, i.e., acquiescence, and not on surveys that experts on both sides stated were accomplished as best they could from old surveys that used cruder measuring techniques and with some of the necessary markers on the ground missing.

Respectfully submitted,



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June 10, 2014

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 COMPLIANCE

The undersigned certifies that this Final Brief complies with Rule 211 (b), SCACR.

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June 11, 2014

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PROOF OF SERVICE

I certify that I have served the Final Brief of the Respondents on the Appellant, by depositing a copy of it in the United States Mail, postage prepaid, on June 11, 2014, addressed to her attorneys of record:

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