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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Richard B. Ness, Special Referee

Case No. 2009-CP-38-1170
Appellate Case No. 2014-000204
2014-UP-431

RECEIVED
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SC Court of Appeals

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

v.

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

Of whom F. Carlisle Smith is Appellant.

PETITION FOR REHEARING

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September 3, 2015
Columbia, South Carolina

In Unpublished Opinion No. 431 (“Opinion”), filed August 19, 2015, the Court affirmed the circuit court’s judgment establishing the boundaries of the adjacent property owned by Appellant, F. Carlisle Smith (Smith) and Respondents, Patrick J. Williams, Frank J. Wallmeyer and Mary B. Wallmeyer (Williams).

Smith respectfully submits the Court misapprehended or overlooked Williams claims against Smith, the nature of those claims and the standard of review to apply to those claims. As a result, the Court failed to adequately review the proof submitted in the court below.

ARGUMENT

I.

The Court misapprehended or overlooked that this was a trespass to try title case, and Williams failed to carry his burden case because he introduced no evidence to prove any of the four ways to establish paramount title.

Although the complaint is cast as a “quiet title/property line dispute,” this is a trespass to try title case. “An action brought for the primary purpose of determining title to disputed land is in the nature of a trespass action (sic) to try title, which is an action at law.” *Watson v. Suggs*, 313 S.C. 291, 293, 437 S.E.2d 172, 173 (Ct. App. 1993). In a trespass to try title case, the burden is on the plaintiff to prove title by a preponderance of the evidence. *Kirkland v. Gross*, 286 S.C. 193, 332 S.E.2d 546 (Ct. App. 1985).

Williams’ burden was to show title by one or a combination of four methods. *Watson*, 313 S.C. at 294, 437 S.E.2d at 173. Those methods are: (1) showing a grant from the state to someone and successive deeds to the plaintiff (perfect legal paper title method), (2) tracing his title to a common source from whom both he and the defendant claim through separate chains of title, (3) plaintiff showing he and those under whom he claims, have been in actual, hostile, exclusive,

and continuous possession of the land adversely to the defendant for twenty years, or (4) plaintiff showing he alone or with those from whom he has inherited have been in actual, hostile, exclusive, and continuous possession of the land adversely to the defendant for ten years. *Watson. Id.*

Williams' numerous witnesses and exhibits focused exclusively on Williams' assertion the Stroman Line is the eastern boundary between Williams' and Smith's tracts, and the assertion Smith or person or persons unknown somehow diverted or blocked the run of what had been Dean Swamp Creek. None of these assertions, even if correct, relate to Williams' burden in a trespass to try title case.

The record is devoid of evidence of one or a combination of the four methods South Carolina recognizes to establish title in a trespass to try title case. The court erred in concluding the boundary line between the Smith and Williams tract is the Stroman line, and its order should be reversed and the case remanded.

The Court overlooked or misapprehended the nature of Williams case and, therefore, Smith respectfully submits the Court's decision should be reconsidered, the trial court's decision reversed and the case remanded to the circuit court for retrial.

II.

The Court overlooked or misapprehended the standard of proof in a boundary line case and overlooked or misapprehended the proof submitted in concluding the boundary between the Williams and Smith tracts was the "Stroman line" because the deeds in the chain of title to the Williams tract established a different line.

Assuming without agreeing this case is a boundary line dispute rather than a trespass to try title case, boundary line disputes sound in equity. *Uxbridge Co. v. Poppenheim*, 135 S.C. 26, 30, 133 S.E. 461 (1926) (boundary disputes sound in equity) and *Bryan v. Bryan*, 285 S.C. 434, 437,

330 S.E.2d 310, 312 (Ct. App. 1985) (quiet title actions sound in equity). In an appeal of an action sounding in equity, the reviewing court may determine facts under its own view of the preponderance of evidence. *Hayne Fed. Credit Union v. Bailey*, 237 S.C. 242, 247, 489 S.E.2d 472, 475 (1997).

In ascertaining a boundary, it has long been established the court “resort(s), 1st to natural boundaries, such as rocks, mountains, rivers, and creeks; 2nd, to artificial marks, such as corners of trees and stations; 3rd, to adjacent boundaries; 4th, to course and distance; and 5th the shape of the plat.” *Wash v. Holmes*, 19 S.C. L. (1 Hill) 12, 15 (Ct. App. 1833). When a boundary is described referring to a stream or other natural monument a change in the location of that stream or other natural monument does not change the boundary. *Ivester v. Fowler*, 109 S.C. 424, 96 S.E. 154 (1918) and *Keller v. Hutto, et al.*, 189 S.C. 26, 36, 199 S.E. 909, 914 (1938) (all grants and conveyances are presumed to be made regarding an actual view of the premises by the parties to the grant). “The paramount and cardinal rule of construction of a deed is to ascertain the intention of the grantor” *Rhodes v. Black*, 170 S.C. 193, 200, 170 S.E. 158, 159 (1933). When swamp or stream is given in a deed as the boundary of property, the grantor will be presumed to have intended the middle of the stream or with a swamp, the middle of the stream in the swamp, *absent evidence of a contrary intention*. *Wheeler v. Wheeler*, 111 S.C. 87, 96 S.E. 714 (1918). Emphasis added.

A. Williams’ chain of title does not support the Stroman line as the western boundary of the Williams property.

The first deed in Williams’ chain, describes the property conveyed as comprising 765 acres, with P.W. Farrell being the grantee. This 1888 deed says the western boundary of the 765 acre tract conveyed was Dean Swamp Creek.

The next deed in the Williams' chain describes the property conveyed as comprising 286 acres. This 1889 deed describes the property conveyed as being bounded on the west by the "lands of P. W. Farrell." The western boundary of the 286 acre tract is not Dean Swamp Creek, but the 765 acre tract conveyed to P.W. Farrell the year before in the 1888 deed. Each subsequent deed in the Williams' chain describes the property conveyed as containing as containing 1050 or 1051 acres (765 acres plus 286 acres).

Smith's wetland's scientist estimated the acreage in the uplands area on the Steadman plat as approximately 680 acres. This acreage estimate comports with the 765 acre tract conveyed to Williams' predecessor-in-interest in 1888. The deed conveying the 765 acre tract described its western boundary as Dean Swamp Creek which, therefore, must have been located far to the east of the Stroman line, described by both Smith and his surveyor as being an old stream bed running along a ridge line separating the low lying swamp land from higher ground used as farm land.

B. Williams' deed does not support the Stroman line as the western boundary of his property.

Every deed following the 1889 deed, except for the deed into Williams, describes the western boundary of the property as the waters or run of Dean Swamp Creek. However, the last deed in Williams' chain, the deed into Williams, does not describe the western boundary as the "run" or "waters" of Dean Swamp Creek, but rather as "Dean Swamp."

For nearly 100 years the western boundary of the Williams tract was described as the "run" or "waters" of Dean Swamp Creek. The last deed in the chain, however, describes the western boundary as "Dean Swamp." The implication of this change is clear. Either it was in recognition of the changed location of Dean Swamp Creek, or the grantor intended Dean Swamp to be the western boundary, the only evidence of the location of Dean Swamp being as shown on

the Steadman Survey as "edge of swamp."

Therefore, based on Williams own chain of title, the western boundary of his tract is not the Stroman Line, but must be in the area of the old creek bed described by Smith and his surveyor and run along the line denominated on the Steadman Survey as "edge of swamp."

The Court misapprehended or overlooked the proof submitted in the court below concluding otherwise.

III.

The Court misapprehended or overlooked the proof submitted in concluding the original run of Dean Swamp Creek had been deliberately altered by human efforts because there was no evidence Smith was involved in such "human efforts," there was insufficient evidence to support this conclusion and the evidence of alteration pointed to by Williams was not even on Smith's property

The affirmed order on appeal concludes the "original run of Dean Swamp Creek has been deliberately altered by human efforts."

Respondents' original position was Smith altered the "original run." The evidence adduced, however, showed Respondents' theory to be incorrect. There was no dispute the evidence showed the location of the Bird or Tree House, below which is located what the Order calls "a sizeable barrier, dam or dike built across the creek" is on property formerly owned by E.B. Atkins and was constructed by E.B. Atkins during the time he owned the adjacent tract.

There is no credible evidence the structure to which the Order refers is a "dam" or "dike" or "barrier," "diverted" or "altered" the "original run" of Dean Swamp Creek.

A survey done by Williams' surveyor's company showing property lying to the north of the line Williams claim and which was formerly owned by E.B. Atkins shows no change in the

course of the creek.

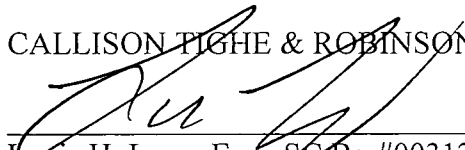
The Adkins plat, signed by Williams' surveyor and dated September 17, 2004 shows no "diversion" of Dean Swamp Creek. The Stroman plat, on which Williams relied and the court accepted, dated May 28, 2009, however, shows not only a diversion, but puts the location of what Williams' claims to be the former stream bed of Dean Swamp Creek either 145.56 feet or 146.98 feet to the west of where the Adkins plat locates Dean Swamp Creek. Further, Williams asserted the "diversion" resulted from a retaining wall and corrugated metal barrier placed at the location of the Bird House. However, the line on the Stroman plat marked "diverted stream flow" begins well to the south and east of the location of either the Bird House or the structures Williams asserted and the court determined "diverted" Dean Creek Swamp.

The Court overlooked or misapprehended the proof submitted at trial, affirming the lower court's conclusion Dean Swamp Creek was "diverted."

CONCLUSION

Smith respectfully requests his Petition for Rehearing be granted, the Court vacate the Opinion, reverse the court below and remand this case for retrial.

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CERTIFICATE OF SERVICE

I, Crystal Smith, an employee of Callison Tighe & Robinson LLC, Attorneys for the Appellant, certify I have served a copy of the **Petition for Rehearing of Appellant, F. Carlisle Smith**, by mailing it to them at their last known addresses, by depositing it in the United States Mail, postage prepaid, addressed to counsel of record at the following addresses:

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