

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Special Referee

CASE NO.: 2008-CP-14-354

Daniel Darby,Appellant,

vs.

South Carolina Public Service Authority,Respondent.

~~FINAL REPLY BRIEF~~ **RECEIVED**
~~OF APPELLANT~~

SEP 30 2011

SC Court of Appeals

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ARGUMENTS

I. THE FINDINGS AND CONCLUSIONS OF THE TRIAL COURT ARE NOT SUPPORTED BY THE EVIDENCE AND ARE CONTROLLED BY ERRORS OF LAW

The Authority in its brief maintains that the standard of review is limited to a determination of findings of fact are reasonably supported by the evidence. We submit that the more appropriate declaration of the standard of review is that in an action at law the findings of the lower court are binding on appeal unless they are wholly unsupported by evidence or are manifestly influenced or controlled by error of law. Marsh Plywood Corp. v. Graham 240 S.C. 486, 493, 126 S.E.2d 510, 513 (S.C.1962)

The construction of an unambiguous deed is a question of law for the court, based on the intent of the parties as expressed within the four corners of the instrument. State v. Brazos River Harbor Nav. Dist. 831 S.W.2d 539, 542 (Tex.App.–Corpus Christi,1992) What the boundary is is a matter of law. Where it is located on the ground is a question of fact. Bost Estate v. R.L. Wallace Const. Co., Inc. 199 N.C.App. 522, 681 S.E.2d 553 (2009)

The relative weight to be given to evidence of location is a matter of law, and they rank in this order: (1) natural boundaries; (2) artificial marks, and (3) course and distance. Southern Realty and Investment Co. v. Keenan, 99 S.C. 200, 83 S.E. 39, 41-42 (1914). Rules of construction require the disregard of the reference to acreage in a deed and effect given to the area description established by clear boundaries. Yarbrough v. Collins 290 S.C. 76, 84, 348 S.E.2d 194, 199 (S.C.App.,1986)

Authority cites in support of its position the case of Wigfall vs. Fobbs, 259 SC 59, 367 S.E.

2d 156. That case, however, did not involve a disputed boundary line but a question of title based on adverse possession.

In addition to Wigfall, Respondent cites the case of Bodiford vs. Spanish Oaks Farms, Inc. 317 SC 359 et al, 455 S.E. 2d 194, (SCCT App. 1995). In Bodiford, the question was the location, on the ground, of a boundary line identified as the high-water mark of a mill pond which had been abandoned and that location was determined by the court appointing a surveyor to locate the high-water mark.

Though Darby submits that the findings and rulings of the court are not reasonably supported by a fair preponderance of the evidence, the ruling by the lower court that the boundary line in question should be located on the ground by attempting to replicate thereon the outline of the drawing referenced in the 1949 deed is controlled by an error of law in that it disregards long recognized rules governing the location of boundaries as set forth and argued in the appellant's brief.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE BOUNDARY LINE IS LOCATED BY THE BEST ATTEMPT AT REPLICATING ON THE GROUND THE DRAWING REFERENCED IN THE DEED TO DARBY'S PREDECESSOR IN TITLE.

The lower court ruled that the Darby has a right to have his boundary line located. The Respondent takes no exception to that ruling. The only evidence as to where the property line is located on the ground is that of the C-Map which was confirmed by the Elliott and McLeod surveys.

The court did not find that the depiction of the approximate normal high-water mark on the drawing referenced in the 1949 deed was accurate as to, or approximated, its location on the ground. In fact, the reasonable inference to be drawn from the wording of the ruling is that the location of the

high-water mark didn't matter. The order expressly states that the court is opting to locate the boundary based on the drawing and acreage stated rather than the actual high-water mark plus one hundred feet. (R. p. 1)

The Respondent concedes that the boundary line in question is defined by the Bell case. While that decision defines the boundary as a line corresponding to the 76.8 foot elevation contour at a distance of 100 feet inland, it does not locate that line on the terrain. In recognition of that fact, the referee in that case included in its recommendation the following:

I find from Plaintiff's exhibit #3 that the Defendant did on May 26, 1975, enter into a lease agreement with the United States Fish and Wildlife Service which included the marginal land lying between Plaintiff's property and Lake Marion for the operation and administration as part of the Santee National Wildlife Refuge. Both parties conceded that the property line between the Plaintiff's property and Defendant's property along Lake Marion is completely unidentifiable upon the ground and I so find. The lease from the Defendant to the United States Fish and Wildlife Service specifically states that the property would be used as refuge, resting, nesting, breeding and feeding grounds for migratory birds and other wildlife. This use carries with it the power of the federal government to incarcerate and prosecute acts of trespass upon said lands. With the line undefined upon the ground, the Plaintiff, his guests, invitees and licensees would be subject to such incarceration and prosecution

should they trespass upon or engage in other restrictive activity within such refuge.

I find that the Plaintiff is entitled to be furnished by the Defendant a survey with visible markers upon the ground of the line between the Plaintiff's property and the property of the Defendant leased by it to the United States Fish and Wildlife Service. (R. pp. 267)

The circuit court judge, in adopting the recommendation made by the referee states with reference to the normal high-water mark referenced on the plat accompanying the 1949 deed:

It is therefore, Ordered, Adjudged and Decreed that the report of the Referee in this matter dated March 22, 1979, is hereby confirmed and made the Order of this Court in all particulars not inconsistent with the balance of this Decree; and it is

Further Ordered, Adjudged and Decreed that the Complaint be dismissed with prejudice, and that the Defendant furnish the Plaintiff, as soon as practicable, with a survey with visible markings upon the ground of the line between Plaintiff's property and the property that the Defendant leased by it to the United States Fish and Wildlife Service; (R. pp. 191-192).

The C-maps, which show the contour line with the markers delineating a line at a distance 100 feet inland, were prepared at or about the time of the Bell litigation. At the hearing in the lower court the following exchange between the Judge Cooper and Ms. Warner took place relative to the C-maps:

THE COURT: Okay. Ms. Warner, the C-map does, of course, indicate certain concrete -- or certain marked points by the surveyor at the time for the Authority and they are indicated by "P" numbers, specifically the map that I'm looking at and the area that I'm looking at is "P"—well they start at P-9 -- P-209 and going through "P"-219.

THE COURT: Mr. Elliott, when he did his survey, of course, located those and indicated on his survey that those were old Santee Cooper monuments and he designated that as SCM, or something to that effect, as I recall, SCMF, Santee Cooper Monuments that he found.

Tell me, if, - - the significance, if any, of the fact that Santee Cooper had set those boundaries there at some time in the past and what they were intended to delineate.

MS. WARNER: Your Honor, from the record from the Bell vs. South Carolina Public Service Authority trial...

THE COURT: Uh-huh.

MS. WARNER: ...it appears that a number of monuments were put out on the site during that time period...

THE COURT: Uh-huh.

MS. WARNER: ...and I can't really tell you which were put out there during that time period and which may have existed previously, but it does appear that the predominate amount of the

monuments were put out a long time ago but not back to 1949.

They were put out as a part of the work that was done with regard to the '77 survey which was taking place at a -- at or about the time of that trial. It actually appears during that trial.

(R. pp. 41 L 25-43 L 8)

By letter dated September 23, 1974, in response to Senator John C. Land's inquiry regarding the boundary on behalf of Darby's grandfather, the general manager of the Authority writes: "Before a lease is signed with the US Fish and Wildlife Service it will be necessary to determine the contour line to be used in the lease for the Pine Island area and to make a survey accordingly. We will keep you advised of any developments regarding this matter." (R. p. 182).

A US Fish and Wildlife publication showing the boundaries of the property leased from the Authority was introduced at trial. The configuration of the Pine Island area shown in this publication conforms to the boundary shown on the C-Maps and Elliott and McLeod surveys. (R. pp. 83 L 1-84, L 4; R. pp. 194-195)

US Fish and Wildlife signs designating its boundary are located along the boundary shown on the C-maps (R. pp. 76 L 22-80 L 18; R. p.181: R. p. 295).

Darby first became aware of the existence of the C-maps in the summer of 2007 in a meeting with the Survey Department and Property Department at the offices of Authority. Although the Authority's representatives expressed a desire to investigate further, he was informed that the boundary line was that represented on the C-Maps. (R. pp. 72 L 24-75 L10)

Respondent's Statement of Facts, includes: "SCPSA sold off parcels it determined were not required for the Hydro-electric and Navigation project. Included in these conveyances was a

large transfer to W.B. Davis, Jr. and Ralph Bell” (Respondent’s Brief P4). As stated, the purpose of the 1949 conveyance was to sell parcels it determined were not required for the Hydro-electric and Navigation project. These properties were described by the deed as those inland of and at a distance beyond 100 feet from the normal high-water mark which was later defined in the Bell case as the 76.8 foot elevation contour line. The Authority presented no evidence at trial suggesting that special treatment was to be given to the portion of the property now owned by Darby.

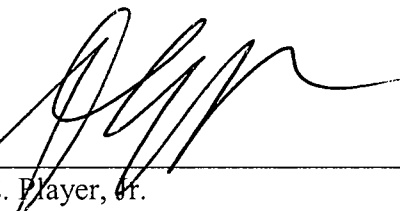
The trial court’s interpretation of the 1949 deed suggests the reference on the drawing to (and the judicial determination in the Bell case of the meaning of) the “high-water mark” is meaningless and that as to each parcel listed in the tabulation of acreage on the drawing, the acreage stated and the graphic representation control the boundary location. This interpretation disregards the settled rules of law for the construction of deeds and location of boundaries.

Authority in its brief questions the methodology of Mr. Elliott in the preparation of his survey, but points to no evidence that it does not reflect the boundary with reference to the one hundred foot relationship to the 76.8 foot elevation contour line as monumented in accordance with the C-Maps. The evidence in this regard is that Mr. Elliott prepared his survey after meeting with Authority’s survey department and confirmation by that department of the accuracy of the C-Maps. (R. pp. 105 L 14-109 L 5)

CONCLUSION

For the foregoing reasons Darby requests that this court reverse the trial order and direct the entry of judgment declaring the boundary line to be located with reference to the 76.8 foot contour line reflected on the C map and confirmed by the Elliott and McLeod plats.

Sept 29, 2011



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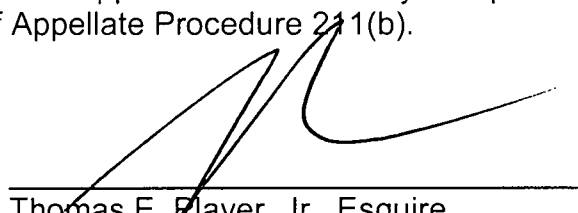
Daniel Darby,Appellant,

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**CERTIFICATE THAT APPELLANT DANIEL DARBY'S FINAL REPLY BRIEF
COMPLIES WITH RULE 211 (b)**

I certify that the Final Reply Brief of Appellant Daniel Darby complies with the requirements of South Carolina Rules of Appellate Procedure 211(b).



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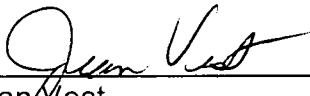
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PROOF OF MAILING

I, the undersigned employee of Player & McMillan, LLC, attorneys for the Appellant, hereby certify that I have this 29th day of September, 2011, served the **FINAL REPLY BRIEF OF APPELLANT** in the above captioned matter, on South Carolina Public Service Authority by causing a copy of the same to be personally deposited in a United States Postal Service mail box, postage prepaid, with the return address clearly visible, addressed to its attorney of record:

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