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 BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from an order declaring that the location of the boundary line in question be fixed by the best effort to duplicate on the ground a drawing attached to the deed from Authority to Darby's predecessor in title.

This action was commenced by the filing of a complaint (R. pp. 15-17) on July 14, 2008. The Complaint seeks a declaration of Darby's right of access over Authority's adjoining property and a declaration by the court of the location of the common boundary of the properties of Darby and Authority. (R. pp.15-17) Attached to the complaint and incorporated by reference was a copy of a survey plat (Elliott plat) prepared by Duvalle Elliott (Elliott) (R. p. 17 and R. p. 298 – Separately Filed Ex. 1) which Darby contends accurately depicts the boundary location. The controversy arises from the difference in the location of the boundary as shown on the Elliott plat as compared to its depiction on the plat designated "South Carolina Public Service Authority Drawing 4200-A10" (4200-A10) (R. p. 287) referenced in a 1949 deed (1949 deed) (R. pp. 233-234) conveying approximately Two Thousand One Hundred acres from Authority to Darby's predecessors in title. The difference in area is approximately 22 acres.

The Defendant answered with a general denial and, in addition, asserted defenses of Statute of Limitations, Issue Preclusion, Failure to Name the Real Party in Interest; Failure to Name a Necessary Party, Presumption of Title, and SC Code § 30-5-250 (a metes and bounds deed description may be created by referencing a recorded plat). The defendant asserted that the 1949 deed only conveyed 3.8 acres, part of Authority's tract 461.(R. pp.18-24) The issue preclusion defense cited the case of Bell vs. South Carolina

Public Service Authority, 277 SC 556, 291 SE 2d 196 (1982) as the prior litigation relied upon as a bar to this action. (R. p. 20)

By consent, the action was referred to the Honorable Thomas W. Cooper, Jr. as special referee. A non-jury hearing as to the boundary issue was held on August 4, 2010. By stipulation, the parties agreed that the access issue would be held in abeyance for further consideration by the Special Referee.

Numerous Exhibits were introduced at trial. Darby, Duvalle Elliott and a soil expert, Robert Epinette, testified at trial on behalf of Darby. Authority did not present any witnesses at the hearing but submitted a number of exhibits including the survey plat prepared by surveyor, Thomas Gordon McLeod, for the US Fish and Wildlife Service (USF&W). (R. p. 296)

Judge Cooper issued his order on October 14, 2010, rejecting the Plaintiff's claim that the location of boundary line was that shown on the Elliott survey. (R. pp. 3-11) The order did not provide specifics as to the location of the boundary line in question. Darby filed a motion to alter or amend the judgment pursuant to Rules § 52(b) and § 59(e) SCRCP (R. p. 154)

On January 5, 2011, Judge Cooper issued its ruling on the Motion to Alter or Amend. The Order specified that the boundary line should be located by the best effort to duplicate the relevant portion of 4200-A10. (R. p.1)

The Notice of Intent to Appeal was served on February 2, 2011.

STATEMENT OF FACTS

The property in question was originally part of that acquired by Authority in connection with the construction of the impoundment of what is known as "Lake Marion" utilized in the production of hydroelectric power. In 1949, Authority conveyed a tract of land to Ralph Bell (Bell) and W. B. Davis, Jr., (Davis) Darby's grandfather. The deed description reads:

> All those certain pieces, parcels are tracts of land, situate, lying and being in the Taw Caw Creek area of Clarendon County, South Carolina, near the Authority's Lake Marion Reservoir, measuring and containing in the aggregate Two Thousand One Hundred Forty-one and one-tenths (2141.1)acres, more less and being composed of portions of the authorities' tracts numbers SR-472, SR–484, SR–484-A, SR–456, SR-800, SR–456-A, SR–457, SR–457-A, SR–458, SR-461, SR–459, SR–460, SR-455, SR-455-A, 409A, SR–449, SR–450, SR–584, SR–424, SR–448, SR–474, and SR–470, located above the one hundred (100) foot strip of land shown on the map hereafter referred to as lying between the lands herein conveyed and the approximate normal high water line of the Authority's Lake Marion Reservoir, said tracts being more specifically shown and designated on a plat, prepared by the Engineering Department of the Authority, entitled "Map of Lands Taw

> Caw Creek Peninsula", which drawing is designated as Drawing No. 4200-A10 (Index A-1306) a print of which is attached hereto and made a part hereof. (Deed, R. pp 233-234, Plat, R. p. 287).

The plat referenced in the 1949 deed, 4200-A10, was prepared by Edward Durant, an employee of the Authority's engineering department. (R. pp. 183-189) The property line is shown to be 100 feet inland of the normal high water mark line as called for in the deed. The line designating the "normal high water mark" is a tracing of the line designated as the 76.8 foot elevation contour line shown on the Authority's acquisition map (Harza map) prepared by Harza Engineering. (R. pp. 262-263; Map, R. p. 180) Neither the property line nor contour line was delineated by courses and distances on 4200-A10. (R. p. 115, L 8-19)

In 1956 Davis and Bell partitioned the property. (R. pp. 235-236) The deed incorporated by reference a sketch prepared by W. B. Sykes. (R. p. 301, Separately Filed Ex. 3) the lines of this sketch, were taken from 4200-A10. The property allotted to Davis includes the property in question and appears on the sketch with a general configuration matching that of 4200-A10.

In 1974 Attorney John C. Land, III corresponded with Authority on behalf of Davis regarding the location of the boundary line. By letter from the general manager of the Authority, Mr. Land was informed that it would be necessary to determine the contour line before a lease could be signed with the USFW. (R. p. 182)

In 1975 an action was commenced by Bell against Authority to resolve a dispute as to the boundary line of the property conveyed by the 1949 deed. This litigation

involved the meaning and location of the "normal high water" mentioned in the 1949 deed and 4200-A10 from which the boundary could be located by measuring therefrom one hundred feet. Authority took the position that the normal high water mark corresponds to the 76.8 foot elevation contour line as shown on the Harza map and the tracing thereof shown on the Drawing 4200-A10. (R. pp. 268-269)

At or about the time of trial of the Bell case, a survey plat was prepared by Piedmont Aerial Surveys, Inc. bearing a date of photography of March, 1977. Reference to this survey does not appear in the Bell case. (R. pp 41 L25- 43 L7) This survey was commissioned by the Authority and the plats resulting from this survey are referred to as "C maps" by the Authority. The C maps show the 76.8 foot contour line, elevations at various points inland of that contour line and a line 100 foot inland from the 76.8 contour line. The line 100 feet inland of the 76.8 contour line is marked with survey monuments and shows the courses and distances, relative to the monuments. (R. p. 302 –Separately Filed Ex. 4) This line appears at a different location from what appears on the 4200-A10. This marked line is the basis for the Elliott survey.(R. pp 101 L 77-102L 12) It is Darby's position that this is the correct property line

In 1979, judgment of the trial court in the Bell case was issued. (R. pp. 190-192), (R. p. 265) It was the judgment of the court that the boundary line of the property conveyed by the 1949 deed was a line 100 feet inland of the normal high water mark and that the normal high watermark was a line corresponding to the 76.8 foot elevation contour. The judgment was sustained on appeal. (R. pp. 268-269)

Davis died and pursuant to the terms of his will, by deed dated February, 1983, the property was deeded to William Bell Davis, as Trustee. The subject property is listed

as number 3 of a number of tracts. The deed describes it as a four acre tract designated as Parcel R-5-11 on the Clarendon County Tax Map, bounded on the North by Nelson and on all other sides by Authority. (R. pp. 198-202)

In 1999 Marjorie Bell Davis, the widow of Davis died. A deed of distribution from her estate to her children includes, as tract 8, the subject property referred to therein as 4 acres, "Point Property", TMS # 072-00-00-002-00. (R. pp. 237-242) This tax map shows the parcel property as a four acre tract with a configuration similar to that shown on the Sykes map and Drawing 4200-A10. (R. p. 285)

In 2002 Robert Hepburn Davis, son of Davis and Marjorie Bell Davis, acquired a deed from his brothers and sisters. This deed describes the property by reference to the tax map parcel (R. pp. 243-247).

For Twelve Thousand Dollars Darby acquired a deed from his uncle, Robert Hepburn Davis, dated June 29, 2007. This deed describes the property as four acres and references the same tax map parcel number. (R. pp.226-229)

Darby hired Elliott to survey the property. In connection with the preparation of the survey, he and Elliott visited Authority's engineering department.(R. pp 105 L 14-109 L 5) Elliott prepared his plat which conforms to the C map.

After the commencement of this litigation, a quitclaim deed to Darby was signed by the devisees of Davis, and William B. Davis as Trustee. This deed describes the property by reference to the Elliott plat. (R. pp. 196-197)

When Darby was unable to acquire a quitclaim deed from Authority, this litigation was commenced to have the boundary determined by judicial decree. (R. p. 75 L 11-16)

ARGUMENT

I BY COLLATERAL ESTOPPEL AUTHORITY IS BOUND BY THE LOCATION OF THE BOUNDARY LINE AT A DISTANCE OF 100 FEET FROM THE 76.8 FOOT ELEVATION CONTOUR LINE.

As alleged in the answer to the complaint, the issue of the boundary line location of the property conveyed by the 1949 deed was litigated in the Bell case. In that case, Authority contended and the trial and appellate courts agreed that the boundary line was 100 feet inland of the high water mark which was further defined as the 76.8 foot elevation contour line. The following is an excerpt from the referee's report in that case:

> I find as to ISSUE NO. 1 that the dividing line between the property of the Plaintiff and the Defendant are along Lake Marion referred to in Plaintiff's Exhibit 1 and delineated as a heavy line on Plaintiff's Exhibit 2 to be 100 feet above an elevation of 76.8 feet above sea level.(R. p. 265)

While true that the subject property was not owned by Bell when that litigation took place, the property description, including 4200-A10, construed by that litigation, applied to all of the property conveyed by the 1949 deed.

Collateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Carolina Renewal, Inc. v. South Carolina Dept. of Transp. 385 S.C. 550, 554, 684 S.E.2d 779, 782 (S.C. App., 2009) It is the issue as opposed to the claim which is important. The answer of authority alleges that the issues involved in this litigation were in fact litigated in that former action. (R. p. 20)

There was no indication in the Bell Case that the acreage calculation or the configuration of the property as drawn on 4200-A10, as opposed to the actual high water mark, was the basis for locating the boundaries.

II THE BOUNDARY LINE IN QUESTION SHOULD BE LOCATED BY REFERENCE TO THE ACTUAL HIGH WATER MARK RATHER THAN AN INACCURATE GRAPHIC REPRESENTATION THEREOF

The trial court orders the location of the boundary by replicating, on the ground, the graphic representation thereof shown on 4200-A10 without regard to what that representation purports to depict. (R. p. 1)

The purpose of the legal description in a deed, including any plat referenced in the description, is to identify the property conveyed. The 4200-A10 shows the property bounded on all sides, other than the boundary of the Nelson property, by the One Hundred foot strip lying immediately above the 76.8 foot elevation contour line. (R. p. 287) The trial court order disregards the reference to the high water mark in favor of the image drawn on the plat. The evidence does not support a finding that the parties to the 1949 deed intended such a drastic departure from the idea that the drawing is intended to reflect something on the ground as opposed to locating, on the ground, a line with no reference other than the lines on the paper.

This case represents the classic case where the Rules of Relative Weight of Conflicting Elements for locating boundaries (Rules of Relative Weight) are to be applied to ascertain the location of the line on the ground. "In locating land, resort is had first to natural boundaries, next to artificial monuments, then to adjacent boundaries, and last to courses and distances. It is the actual boundary and not the representation of it on the plat

that must control. Acreage occupies the lowest of the priorities." Garrett v. Locke 309 S.C. 94, 98-99, 419 S.E.2d 842, 845 (S.C. App., 1992)

III THE BOUNDARY SHOULD BE LOCATED BY REFERENCE TO THE NORMAL HIGH WATER MARK MENTIONED IN THE DEED DESCRIPTION

"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). Kirkland v. Gross 286 S.C. 193, 197, 332 S.E.2d 546, 548 (S.C.App.,1985)

The trial court correctly states that the Rules of Relative Weight are not inflexible (R. p.8); however, they are rules and if "inflexible" means they may be ignored without sufficient reason they would not be rules at all. (R. p.8) True, in this case, the result is that Mr. Darby owns significantly more property than he thought was being conveyed to him, but that fact does not warrant abandonment of the rules anymore than the fact that, if the trial court order stands, Authority retains an equal amount of high ground when the 1949 deed description indicated it intended to convey its property beyond 100 feet of the normal high water mark. It seems that one of the purposes of the rules is to resolve this very conflict by their application as opposed to giving the most weight to that element which results in the smallest change, if any, in the quantity stated.

Deviation from the rule, so as to have quantity control over natural monuments, would seemingly require evidence over and above a statement of acreage in the deed. Here, we have at most a notation on 4200-A10 (R. p. 287) as to quantity. It is appears that

this notation is intended to reflect the estimated acreage of Authority's tract 461 located above the one hundred foot strip above the high water mark. The overlays of the various plats and drawing show that portions of tracts other than 461 are above the property line as it is drawn on 4200-A10, including tract 460. (R. p. 294) The acreage calculation shown on 4200-A10 shows that 17.2 acres of tract 460 are included in the calculation. (R. p. 287) The only evidence (or lack thereof) as to the significance of the 3.8 acre notation is the testimony from the Bell case that 4200-A10 was prepared by Mr. DuRant by tracing relevant portions of the Harza Map.(R. pp. 183-192; R. pp. 262-263) It follows that the quantity was most likely estimated by reference to the graphic as it appeared on the tracing for the purpose of inclusion in the tabulation of acreage shown in 2400-A10, since there is no evidence that it appears any place else.(R. p. 287) There is no contention and certainly no evidence that 4200-A10 was drawn so as to accommodate a specific quantity of land. Nor is there any evidence to suggest that the boundary location should be dependent upon the quantity as opposed to the quantity dependent upon the location of the specified boundary.

The proceedings in the Bell case do not suggest that the quantity of land conveyed was a factor in establishing the boundary. The reasonable inference is the opposite. The acreage was most likely estimated with reference to where the boundary line appeared on the drawing. It should be remembered that the 1949 conveyance was in excess of Two Thousand One Hundred Acres. (R. pp. 233-234) The variation in acreage noted on 4200-A10 and that resulting from the C- Maps, and the Elliott and McLeod surveys is less than 2% of the total acreage conveyed.

The trial court order suggests that the decision was influenced by the difference in acreage which would result from the location of the boundary if located in relation to the high water mark and what Darby thought he was acquiring, four acres. (R. p.1) The fact that he thought he was acquiring less acreage, could not be reflective of the intent of the parties to the 1949 deed and should not have any bearing upon the Application of the Rules of Relative Weight. The case of Nelson v Frierson touches on this issue:

> The decision of this case must depend upon the application of a well established rule of surveying that the lines must always be extended to the bounds called for where no evidence of a higher nature intervenes to control them. ..... This rule, to be sure, sometimes leads to consequences which are apparently extravagant and unreasonable. But its great value is in its certainty, because in certainty, we find security. The motion therefore must be discharged.

Nelson v. Frierson 12 S.C.L. (1 McCord) 232.(1821)

The case of Fullwood v Graham 30 S.C.L. (1 Rich. 491), (1845) points to the insignificance of the variance in quantity as a result of the application of the Rules and the requirement that they be utilized in the absence of some compelling reason to deviate:

> From the facts stated in the reports, it is as plain as any thing can be made by description, that the plaintiff's grant covers the portions now in dispute of the immense territory on which it is located.

It is no objection that the quantity is more than four times the amount stated in the grant, or that the lines are prolonged greatly beyond the distances. So, too, it is no objection that course is sometimes disregarded. It is never so done, unless some countervailing matter compels it to yield.

The defendant's counsel is wrong in supposing that there is any difference in the rules of location, as laid down and enforced in the older or more recent cases.

They all maintain that in locating lands, we are to resort, 1st. To natural boundaries, 2d. To artificial marks, 3d. To adjacent boundaries, 4th. To course and distance; but it has never been said, that each of these occupied an inflexible position. It sometimes might occur that an inferior means of location might control a higher; when it was plain there was a mistake. As where a tract of land is represented as lying on one great stream, and the artificial marks or other circumstances shew that it lies upon another. All that is meant is, that the evidences of location which I have mentioned, are resorted to in their order, unless it appears that the representation in the plat depending upon them, is a mistake. In that event, the mistake is to be corrected. The cases referred to by the defendants' counsel are decidedly

> against his inference. Take, for example, *Bradford vs. Pitts*, 2 Con. Rep. by Mill, 115. It maintains, what I have admitted always, that when a stream is laid down as running through a tract of land, and artificial marks show that the surveyor laid it down erroneously, the artificial marks are to be followed, and the precise location of the stream disregarded.

Fulwood v. Graham 30 S.C.L. (1 Rich.) 491, (1845)

The trial court cites the case of Smith v. DuRant 236 S.C. 80, 92-93, 113 S.E.2d 349, 356 (S.C.1960) for the position that the Rules of Relative weight are not inflexible and must give way to the intent of the parties.(R. p. 8) No doubt the Rules are not inflexible and, of course, the intent of the parties trumps the rules. In the case cited, the evidence, by way of testimony of the grantor and others, and other extrinsic evidence, indicated that the parties intended that the conveyance include only the lots with the dimensions shown on the plat, not all property between the grantor and the adjoining property owner. It was obvious that the surveyor had made a mistake by noting the adjoining property owner rather than other property of the grantor as the property adjoining that conveyed. Had the Rules of Relative Weight been strictly applied, the designation of the adjoining property owner would have taken priority over the courses and distances of the lots as designated on the plat, but the evidence overwhelmingly indicated that the parties intended to convey only the property with the dimensions shown on the plat.

Logic suggests that the existence of a conflict between the competing elements alone cannot provide a basis for disregarding the rules since such a conflict is the reason we have the rules. Deviation from the rules under those circumstances would mean the absence thereof. As stated in Klapman v. Hook 206 S.C.51, 32 S.E.2d 882, (S.C. 1945): "The vital question is the intent of the grantor at the time the deed is executed. But the rules for locating boundaries heretofore adverted to represent those methods of reasoning which experience has taught are best calculated to effectuate such intention. In this case, no good reason appears why we should not follow these general rules".

The trial court order mentions the testimony of Darby that he thought he was only acquiring four acres and the deeds in his chain of title describing the property as four acres with reference to the tax map as indication of the intent of the parties as to what was conveyed by the 1949 deed. (R. p. 1). How this is evidence of the intent of the parties to the 1949 deed is unclear. Darby had not been born at that time. (R. p. 90 L15-18) It is obvious that the tax map simply perpetuated the unknown error of 4200-A10.

It would seem that the evidence necessary to warrant deviation from the Rules of Relative Weight as well as the rule as to the control of the actual boundary as opposed to its erroneous depiction on a plat would, at a minimum, necessarily consist of more than that which gives rise to the need for their application.

The only evidence of circumstances surrounding of the 1949 deed is the testimony of Mr. DuRant as to the tracing of the Harza Map. (R. pp. 183-189). There is no evidence of intent which would justify disregarding the rules.

Notwithstanding the actual boundary specified, a different location may result from acquiescence. Though this theory has not been advanced by Authority, nor

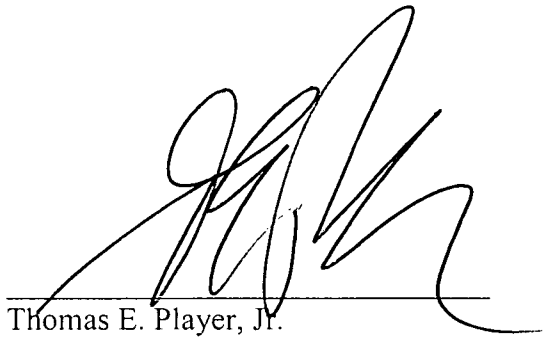
mentioned by name in the trial court order, the order suggests that it was influenced by the apparently long-held notion that the property in question conformed generally as to and quantity and configuration to that shown on the 4200-A10.(R. p. 1) Regardless of whether and to what degree that assumption may have existed, the elements for establishment of a boundary by acquiescence are not present in this case, since there is no evidence that either party ever recognized a boundary located on the ground consistent with the drawing of 4200-A10. In fact, the evidence which might be relevant on a theory of acquiescence, would point to Authority's recognition of the C-maps as the boundary.

Darby testified that the Authority considered the line shown on the C maps to be the boundary. (R. pp. 74 L1-75 L14) The C maps are monumented by Authority's monuments. (R. pp. 41 L 25-43-L7). The Authority's property was leased to USF&W. The Signs designating the USF&W boundary are located along the boundary shown on the C maps.(R. p. 181), (R. pp. 76 L18-78 L17) In the USF&W publication, the area leased appears to conform to that shown on the C map rather than the drawing 4200-A10.(R. pp. 194-195) For a new boundary to be established by acquiescence, both parties must recognize that a particular line constituted the true property line. See Croft v Sanders. 283 S.C. 507, 510, 323 S.E .2d. 791, 793 (Ct. App. 1984) While there is evidence that Authority recognized the boundary shown on the C maps as the property line, Darby concedes that no evidence was presented that he or his predecessors recognized it as such prior to 2007.

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.

September 29, 2011



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APPEAL FROM SUMTER COUNTY
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Thomas W. Cooper, Jr., Circuit Court Judge

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vs.

South Carolina Public Service Authority, ...Respondent.

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

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

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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 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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