

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable Mikell Scarborough, Master in Equity

Appellate Case No. 2015-001709

Margaret Moore.

Appellant

v.

Annabel Pougner.

Respondent

APPELLANT'S INITIAL BRIEF



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I. FACTS

The instant action arises from a long-standing dispute about the boundary between two tracts of real property located in Charleston County. The facts are simple and straight-forward: Appellant Margaret Moore owns the parcel adjacent to that of Respondents. The properties were originally subdivided in 1948, and all of the deeds in both chains of title reflect the same property line. Appellant, either herself or her father, who deeded the property to her, have owned their land since 1966; Respondent's precedent in interest is deceased and they purchased their property in 2010. There is no dispute whatever about the location of the original line as set out on those deeds. Plaintiff's contention at trial, however, is that a strip delineated by a row of bushes, not along the actual property but some feet inside the property shown on the original deed as being that of Respondents now delineates an adjusted property line long acquiesced in by Respondent's predecessor-in-interest.

At some point, the precise date of which is unknown but which clearly took place during the earliest days of either Appellant's or her father's ownership of her property, a row of shrubs was planted between the two tracts. Those bushes, described at trial as being a "hedgerow," were treated as constituting the property line, without either property owner verifying where they stood in relation to the line as it appears on the plat or by survey. Appellant, and her family, cared for all of the land on their side of the hedgerow, including mowing as well as planting and tending to trees and flowers. *See*, Trial Trans., p. 42, p. 56. The undisputed testimony showed that the owners of both tracts treated the area on Appellant's side of the hedgerow as belonging to Appellant, and neither cared what was shown on the deeds.

Although the decision to accept the hedgerow as showing the property line was a decision of long standing, and acquiesced in by both Appellant and Respondent's long-time predecessor

in interest, it was never formally marked nor was there any writing to show where the owners had agreed to draw it. Nonetheless, the commonly accepted property line was clearly visible, marked by the row of bushes and the nature of the maintenance of the properties, for at least forty years prior to Respondent's purchase of their lot.

In 2012, Respondents informed Appellant of their intention to move the acquiesced-upon line back, and to begin to remove Appellant's property from that portion of her land that she had maintained over the years. Appellant promptly sought and received an injunction prohibiting Respondents from trespassing on her property, and filed the instant action seeking to formalize her ownership of the strip that had long been treated as belong to her. Following a trial, the Master in Equity of Charleston County concluded that notwithstanding her decades-long exercise of ownership over this strip of property, Respondent's predecessor-in-interest had not acquiesced in the moving of the boundary lines, and ordered that the property line be returned to that shown on the original 1948 plat. The Master relied entirely upon the lack of any new writing to establish a change in the accepted property line, and refused to allow testimony regarding the arrangements between Appellant and Respondent's predecessor.

ARGUMENT

I. The Dead Man's Statute, S.C. Code § 19-11-20, Is Inapplicable, and Evidence of Long-Standing Acquiescence in the Altered Property Boundaries Should Have Been Admitted.

The South Carolina "Dead Man's Statute, S.C. Code § 19-11-20, formed the basis for all of Respondent's objections to the testimony proffered by Appellants, and was the grounds for the Master's determination that any history of acquiescence in the amended property line was inadmissible. This statute says that

Notwithstanding the provisions of § 19-11-10, no party to an action or proceeding, no person who has a legal or equitable interest which may be affected

by the event of the action or proceeding, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and no assignor of anything in controversy in the action shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf in regard to such transaction or communication or when testimony of such deceased or insane person or lunatic in regard to such transaction or communication, however the same may have been perpetuated or made competent, shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing.

Throughout its history, the Dead Man's Statute has been used primarily to prevent the introduction of oral testimony which would contradict the express provisions of testamentary writings. Because it forms an exception to the general rules of witness competency, "it requires a restrictive reading as to which the party requesting its muzzling effect bears the burden." *Hanahan v. Simpson*, 326 S.C. 140, 151, 485 S.E.2d 903, 909 (1997). "[A]pplying the Dead Man's Statute to exclude testimony is disfavored." *Brooks v. Kay*, 339 S.C. 479, 486, 530 S.E.2d 120, 124 (2000).

The Statute has long been held to contain a number of exceptions. There are a number of situations, including when the party asserting the statute "opens the door" to testimony otherwise excludible or when the testimony is used to introduce documentary evidence, that might otherwise be encompassed but which have been judicially found to be outside the scope of the Statute. See, *Simpson, supra*, 326 S.C. at 152-53, 485 S.E.2d at 909-10. The Master relied on

the Statute in refusing to allow any testimony regarding discussions Appellant, or her predecessor in interest, might have had with the first owners of Respondent's property. His reliance on the Statute is, in this instance, misplaced, and the excluded testimony should have been admitted.

Were this case a situation in which Appellant relied upon a claim that she, or anyone on her behalf, had actual conversations with Respondent's predecessor discussing the ownership of the disputed property, use of the Dead Man's Statute to exclude those conversations might be justified. This is not a case involving an outright transfer of land, claimed to have been made orally. Appellant's claim is that Respondent's predecessor acquiesced in her exercise of ownership, not that he made her a gift of this land. Acquiescence is shown by action, not by words. Although the reasons for those actions might be explained, or buttressed, by the testimony of the deceased, in this instance that testimony is little more than evidence used to introduce the physical evidence, consisting of what the parties actually did over an extended period of time.

Appellant sought to show the Court that Respondent's predecessor in interest, no deceased, had agreed to permit Appellant to treat the disputed land as entirely her own, and as a part of her parcel rather than of his. This acquiescence is physically demonstrated by the visible condition of the respective properties: the row of shrubs planted inside the land shown on the 1948 plat as belong to Respondent's predecessor – a row of shrubs that is planted in such a way as to create an obvious demarcation line – as well as by the maintenance of the land and the landscaping thereon. Actual discussions between Respondent's predecessor and Appellant are purely secondary in nature. They provide a background for the actions of the parties, but nothing more. Testimony that is otherwise violative of the Dead Man's Statute, but which is in fact

cumulative to other properly admitted testimony or evidence is harmless and has long been permitted. See *McBeth v. Bishop*, 28 S.C. 443, 298 S.E.2d 441 (1982). Given that there was extensive testimony regarding the existence of the hedgerow and the long-standing practice of the neighbors with respect to the maintenance of their properties up to that line, the testimony regarding their discussions about the line were no more than cumulative.

Furthermore, in this particular instance the exclusion pursuant to the Dead Man's Statute of any evidence regarding the intent of the parties with respect to the boundary line between their properties created by the hedgerow effectively permits Respondents to introduce testimony to the contrary. The purpose of the Dead Man's statute is to keep out testimony that cannot be contradicted. Here, however, because Appellant was unable to introduce evidence to show that Respondent's predecessor had acquiesced in the new property line, Respondent was instead free to testify that no acquiescence had occurred.

The net result of allowing Respondents to talk about, and their attorney to argue, that no acquiescence occurred, while simultaneously prohibiting Appellant from testifying that it did, resulted in an inequitable decision. Under these circumstances, the decision of the Trial Court should be reversed, and a new trial at which Appellant is free to testify about the history between herself and her late neighbor should be held.

II. The Evidence Clearly Demonstrated the Existence of Acquiescence in a New Property Line.

Even without the improperly excluded testimony about the history of the relationship between Appellant and Respondent's predecessor, there was more than sufficient evidence of acquiescence to a property line other than that reflected on the original plat. Respondents themselves, who had only recently purchased their land, had no actual knowledge of where the line had been drawn for years. Merely looking at the state of the two lots is, however, enough to

show where the line between them was situated, and where it had been situated for years prior to Respondent's purchase of their home.

Few South Carolina cases have discussed the concept of title by acquiescence, as opposed to title via adverse possession. However, the South Carolina Supreme Court has made it clear that the requirements of title by acquiescence are essentially identical to those of adverse possession, and that they do not include any overt indications of acquiescence, but merely the act of recognizing over a period of time that the property at issue is in the control of another. As the Court noted:

It is well established 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. 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.

Klapman v. Hook, 206 S.C. 51, 57, 32 S.E.2d 882, 884 (1945); *see also Knox v. Bogan*, 322 S.C. 64, 472 S.E.2d 43 (Ct. App. 1996).

There is no question in the instant case but that the statutory period of twenty years has been met and surpassed. The only issue at which the Court looked at trial was whether or not Respondent's predecessor in title had actually overtly agreed in the decision to treat that portion of the property on Appellant's side of the hedgerow as belonging to Appellant. Clearly, this was error, as the Supreme Court has definitively stated that there is no need to demonstrate the intention of the parties; all that is required is a showing that the alternative line is treated as being the property line on both sides.

The testimony of the witnesses at trial, including the testimony of Appellant and her husband, make it apparent that the hedgerow was considered to be the dividing line between the

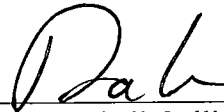
two properties for a number of years. Appellant maintained the property on her side of the hedgerow, mowed the grass and planted flowers and trees. Respondent's predecessor took no responsibility for this area. He did not take any measures to deny Appellant full use of and control over the contested strip of land. Whether or not he said so explicitly, he acquiesced in its becoming a part of Appellant's property.

The Master in Equity erred in concluding that there was no showing of acquiescence in this case. In order to reach this conclusion, he relied on the fact that there was no testimony regarding the intent of Respondent's predecessor – testimony that he had already erroneously excluded based upon his reading of the Dead Man's statute. In fact, no such testimony was necessary. The evidence, without any testimony regarding the reasoning of any of the parties, was sufficient in and of itself to demonstrate acquiescence. The property was demonstrably shown to belong to Appellant.

CONCLUSION

For the reasons set forth above, Appellant would respectfully request that the decision of the Master in Equity of Charleston County be reversed, and that title to the disputed strip of land in issue in this action be vested in her.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Appellants' Initial Brief and Designation of Matter for Record on Appeal were served on the 16 day of May, 2016, via United States Mail or hand delivery, upon

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