

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough – Master-in-Equity

CASE NUMBER 2016-001197

LEON CHISOLM, JAMES ROOSEVELT CHISOLM, DORIS C. FLADGER, ROBERT
CHISOLM, FLORENCE CHISOLM, ALICE C. JENKINS, SADIE Y. MCDONALD, MARTHA
PRYOR, PATRICIA MILLIAN, MARGARET E. WARREN, ANDREW K. CHISOLM, EDRINA
L. WILSON, CARL CHISOLM, LAWRENCE CHISOLM, ROOSEVELT CHISOLM, II, LOUIS
CHISOLM, EDDIE CHISOLM, LEROY CHISOLM, AND TOMMY CHISOLM,

..... Respondents

v.

MARY FRANCES S. CHISOLM, WILLIAM CHISOLM, EMILY C. CAMPBELL, DEBRA C.
MURPHY, ALLIE C. FRAZIER, CORA C. BROWN, CORDELL CHISOLM, CHARLES
CHISOLM, JR., PHILLIP CHISOLM, ANTHONY CHISOLM, DAVID CHISOLM, LEONARD
CHISOLM, AND LEVY CHISOLM,

Appellants

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

I. WAS THE JUDGE’S FAILURE TO REFER TO THE TRANSCRIPT OF THE HEARING IN MAKING A DETERMINATION UPON THE TESTIMONY OF A WITNESS REVERSIBLE ERROR?

II. IS IT REVERSIBLE ERROR TO HEAR A MATTER IN WHICH THE MASTER HAS HAD PROFESSIONAL RELATIONSHIP WITH A PARTY WHOM STATEMENTS ARE CRUCIAL TO THE DETERMINATION OF THE CASE?

IV. CAN A NON-POSSESSORY CO-TENANT’S STATEMENTS GRANT PERMISSIVE USE?

STATEMENT OF THE CASE

This is a quiet title action regarding property located in Charleston County, South Carolina, that involves conflicting interests of individuals who claimed or may have claimed rights in the subject property located on Wadmalaw Island, South Carolina. The families of John Chisolm and Tracy Chisolm brought an action to have a deed issued pursuant to an order of the then Master in Equity, the Honorable Louis Condon, in 1982. The underlying case in this matter is captioned Charles Chisolm vs. Edward Chisolm, et. al., Case No. 1981-CP-10-0739. Subsequently, after many procedural and legal huddles, the case was resolved by the present Master in Equity for Charleston County, Michael R. Scarborough. A Final Order dated September 17, 2014 awarded (R. pp. 4-23) the following persons an interest in the real estate containing Ten (10) acres, hereinafter designated as Parcel 5 in the following percentages:

John Chisolm Family (Leroy Chisolm)	50% Interest
Children of Roosevelt and Idell Chisolm	25% Interest
Roosevelt Chisolm II	25% Interest
Heirs of Louis Chisolm	(Together)
Eddie Chisolm	(Supplemental Record, hereinafter S.R. p.4)

Procedural Background

A prior quiet title and partition action, captioned, Charles Chisolm, Sr. Estate of Charles Chisolm, Case Number 1999-ES-10-0950, involving land belonging to Tracy Chisolm. The Honorable Louis E. Condon, in the prior partition action, ordered a certain parcel of land to be deeded to John Chisolm and Tracy Chisolm. (S.R. p. 2, L 5-8) The property, identified as Parcel

Five, was never deeded to those families. The order dated, September 28, 1982, also stated that other parcels were to be deeded to the other heirs of Tracy Chisolm, including a parcel to Charles Chisolm, Sr. The Defendants are the heirs of Charles Chisolm, Sr., who died on June 15, 1999. (S. R. p. 2 L. 13-18) The Estate of Charles Chisolm, Sr. was probated in Charleston County in Case Number 1999-ES-10-0950 and his spouse, Mary Frances S. Chisolm acting as Personal Representative of the estate, executed a Deed of Distribution to all of the heirs of Charles S. Chisolm, Sr., conveyed Parcel Five to the heirs of Charles Chisolm, Sr. on April 15, 2000 and recorded in the RMC Office for Charleston County in Book W351 at page 020.(S. R. p. 2, L. 19-24)

The Respondents, as heirs of Tracey Chisolm and Leroy Chisolm brought an action to obtain a decree vesting title to the subject property in the heirs of Tracy Chisolm and Leroy Chisolm and a determination by the court that that they are seized with a fee simple title thereto and barring any of the Defendants from having any rights to the subject property. The court ruled in favor of the Respondents in an order dated September 17, 2014. (R. pp. 4-23) An appeal filed pro se by the Appellant, Cora Brown, was never perfected and is therefore not before this court. Appellants filed a Motion for Recusal and a concurrent Motion to set-aside order (R. pp. 24-27) pursuant to SCRCP 60(b) on January 6, 2016. The Master issued an order denying both motions on April 18, 2016.

BACKGROUND FACTS

The subject real property is located on Wadamlaw Island, Charleston County South Carolina and designated as Parcel Five and containing Ten (10) acres, more or less. The Honorable Louis E. Condon, at that time Master in Equity for Charleston County, issued a "Final Order and Decree" that partitioned the lands owned by the Chisolm family. Judge Condon

ordered Parcel Five deeded jointly to the family of John Chisolm and the family of Tracey Chisolm. (S. R. p. 2, L. 5-8)

Judge Condon never executed a Master's Deed conveying Parcel Five to the families of John Chisolm and Tracey Chisolm (henceforth, the families of John Chisolm and Tracy Chisolm and their successors may be referred to as "Appellants"). The other deeds outlined in the Order were executed as ordered, including deeds to two other parcels into Charles Chisolm, Sr. Estate of Charles Chisolm, Case Number 99-ES-10-0950. Charles Chisolm, Sr. died on June 15, 1999. Previous to the partition action, he had deeded out by quitclaim Parcel Five and had received back, previous to the partition action, a quitclaim to Parcel Five.

Mary Frances S. Chisolm, the surviving spouse of Charles Chisolm, Sr. qualified as and was appointed as the Personal Representative of her husband's estate and executed a Deed of Distribution to all of the heirs of Charles S. Chisolm, Sr., conveying, among other things, Parcel Five to the heirs of Charles Chisolm, Sr. Plaintiffs are asking the Court to declare this deed null and void, while enforcing its Order of September 28, 1982. The heirs of Tracy Chisolm, through whom Plaintiff Leon Chisolm would get his interest, were incompetent up to 2005. (S. R. p. 2, L. 19-24)

STANDARD OF REVIEW

Actions to foreclose or cancel an instrument are actions in equity. Wilder Corp. v. Wilke, 324 S.C. 570, 576, 479 S.E.2d 510, 513 (1996) (citations omitted) In an action in equity, while this Court is free to take its own view of the preponderance of the evidence, this does not require us to disregard the findings of the trial judge who saw and heard the witnesses and, accordingly, was in a better position to judge their credibility. Donnan v. Mariner, 339 S.C. 621,

ARGUMENTS

I. DID THE MASTER FAIL TO PROPERLY EVALUATE THE TESTIMONY GIVEN AT TRIAL?

The date of the trial in this matter was August 21-22, 2012 and the Final Order issued by the Master is dated September 17, 2014, more than two years after the initial testimony in this matter. (R. pp. 4-23) The court recalled the testimony of Gary Chisolm as a crucial element in making its decision however the Master did not refer to the exact testimony of Gary Chisolm as readily available by reference to the trial transcript. (S. R. p. 57, L. 7-15)

The Appellants claims of adverse possession because of "ouster" by possession against any claims or possession by the other co-tenants was a necessary factor in determining their claim to the property in question. (S. R. p. 32, L. 17-24) The court, in its decision after hearing the Appellants Motion dated, September 29, 2014, stated that in recalling the testimony of Gary Chisolm that; 1)He and his father farmed Parcel 5 and that 2) "Big John" Chisolm gave permission for them to do so.

Appellants, representing the heirs of the Estate of Charles Chisolm, Sr., claim they possessed and continuously claimed ownership of Parcel Five. The Appellants also claimed that they continuously farmed the subject property consistent with the historical uses thereof. The Master's order in the matter specifically claims an equitable defense based on the premise that the possession by the Appellants did not amount to ouster because it was permissive. The "permission" given to the Appellant's father, Charles Chisolm, was purported to have been given by the now deceased "Big John" Chisolm. (S. R. p35, L. 6-25; p. 36, L. 1-8) The testimony by Gary Chisolm before the Court as to "Big John" Chisolm giving permission to use the property

was far from unequivocal and he repeatedly empathized that uncertainty in his testimony, The crucial element then of “ouster” was eliminated by the court’s recollection, after two years, of the testimony of this crucial witness. (S. R. p. 35, L. 9-14) Absent any ‘permission” given to the Appellant’s father by “Big John” Chisolm the Appellant’s claim of adverse possession and ouster would prevail.

A copy of the Testimony of Gary Chisolm together with a copy of the Order as a result of the hearing on the Motion for re-consideration, . The finding denying the Defendant’s Motion for Reconsideration specifically addressed the testimony of the witness, Gary Chisolm, in making its finding that confirmed title in the above-referenced persons and denied the Defendants claim for adverse possession and ouster through their father, Charles Chisolm. (R. pp. 44-50) The ruling was predicated on the finding that the Defendant’s use of Parcel 5 was permissive and therefore Defendants failed to prove adverse possession and ouster against the other co-tenants. The court opined in making its finding as follows:

I need not readdress those issues because I find that Charles Chisolm, Sr.’s possession of Parcel 5 was permissive. I specifically recall the testimony of Gary Chisolm and based upon my observation of him, I find his testimony very credible. He was a witness called by both sides with no interest in this matter. He was uncomfortable testifying because he was caught between opposing interests in the family, but I strongly believe he told the truth. He testified that “Big John” Chisolm expressly gave permission to Charles Chisolm, Sr. and Eddie (Chansom) Chisolm to farm Parcel 5. “Big John” Chisolm was an owner of Parcel 5 and knew he was an owner of Parcel 5. He was the leader of the family and he did not die until 2004. Because the use was permissive, it was not hostile. Therefore, Defendants have failed to prove adverse possession.

I further find that there was no ouster in this case. Because of this, and because of the facts and legal reasoning set forth in my Order dated September 17, 2014, I deny Defendant’s Motion for Reconsideration. (*Emphasis added*). (R. p. 3)

II. IS IT REVEALABLE ERROR TO HEAR A MATTER IN WHICH THE MASTER HAS HAD PROFESSIONAL RELATIONSHIP WITH A PARTY WHOM STATEMENTS ARE CRUCIAL TO THE DETERMINATION OF THE CASE?

The Master revealed for the first time at the motion hearing held on March 10, 2016 that he was the attorney for the Charleston County Election Commission while John Chisolm was a member of that Commission. (S. R. p. 45, L. 17-24) The court made it clear however, that John Chisolm was not a party to the present action nor was he called as appear at trial because he died in 2004. The court also determined that John Chisolm did not have an interest in the subject property. The final order of the court, dated September 17, 2014, declared that the John Chisolm family had a Fifty (50%) percent interest in the subject property and that his interest now devolved to Leroy Chisolm, Jr. (R. pp. 4-23) Appellants filed a Motion for Recusal which was denied. The Master, in his order denying Appellant's Motion for Recusal referenced Rule 501, Canon 3E of the SC Appellate Rules governing judicial conduct listing the canons as to recusal. (R. p. 39) Appellants do not know whether the Master has, as Section a) states in part, "a personal bias or prejudice against a party or has personal knowledge of disputed evidentiary facts; but Appellants assert that the Judge's impartiality might be reasonably questioned because the nondisclosure as to the relationship between himself and John Chisolm would give the appearance of impartiality, to the detriment of the Appellants.

CONCLUSION

The transcript of testimony of Gary Chisolm from the prior hearing was not available nor referenced at that time to challenge the Court's recollection of the witness' testimony to the actual recorded transcript of the testimony of Gary Chisolm. (R. p. 48, L. 18-25; p. 50, L 3-13)

The transcript of the testimony of Gary Chisolm on August 21, 2012 contains this interchange between Plaintiff's counsel Barry Baker and the witness. (R. p. 57, L. 11-13)

The transcript also notes that the contact Gary Chisolm had with his cousin "Big John" Chisolm and the property was sporadic at best and his answers, although candid and truthful it was certainly not definitive in revealing any agreement between "Big John" Chisolm and Charles Chisolm as to the disposition of any property interest in Parcel 5. (R. p. 50, L. 6-9)

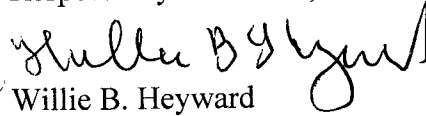
Indeed, the testimony of Gary Chisolm is anything but conclusive in expressing that fact that "Big John" Chisolm expressly gave permission to Charles Chisolm, Sr. and brother, Eddie (Chansom) Chisolm to farm Parcel 5. Conversely his testimony indicates that he lived out of state for an extended period of time was a minor at the time of this purported exchange and by his own admission the elders never confided their business affairs with him. (R. p. 50, L. 6-9)

The prior, undisclosed relationship between the Master and the interest of the John Chisolm gives the appearance of impropriety and or bias toward the Respondent's claims. Defendants have paid substantial property taxes for Parcel 5 and ask that the court determine whether they are entitled to be reimbursed for the taxes paid on behalf of the other co-tenants should they fail in this appeal.

Appellants therefore ask that the conclusions of law be consistent with the testimony at trial and the they given an opportunity to present this matter to a different trier of the fact given the prior relationship between the Master In Equity and John Chisolm, the now deceased. For the reasons stated above Appellants ask that a new trier of the fact be given the authority to hear this matter.

January 29, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Willie B. Heyward". The signature is written in a cursive style with a large, looping initial "W".

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-in-Equity

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Case No. 06-CP-10-1772

Leon Chisolm, James Roosevelt Chisolm, Doris G. Fladger, Robert Chisolm, Florence Chisolm, Alice C. Jenkins, Sadie Y. McDonald, Martha Pryor, Patricia Millian, Margaret E. Warren, Andrew K. Chisolm, Edrina L. Wilson, Carl Chisolm, Lawrence Chisolm, Roosevelt Chisolm, II, Louis Chisolm, Eddie Chisolm, Leroy Chisolm, and Tommy Chisolm, Plaintiffs,

Of Whom Leon Chisolm, James Roosevelt Chisolm, Robert Chisolm, Florence Chisolm, Alice C. Jenkins, Sadie Y. McDonald Martha Pryor, Patricia Millian, Margaret E. Warren, Andrew K. Chisolm, Edrina L. Wilson, Carl Chisolm, Lawrence Chisolm, Roosevelt Chisolm, II, Louis Chisolm, and Tommy Chisolm are..... Appellants

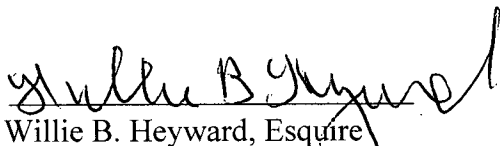
v.

Mary Frances S. Chisolm, William Chisolm, Emily C. Campbell, Debra C. Mujrphy, Alice C. Frazier, Cora C. Brown, Cordell Chisolm, Charles Chisolm, Jr., Phillip Chisolm, Anthony Chisolm, David Chisolm, Leonard Chisolm, and Levy Chisolm.....Respondents

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellants Final Brief complies with Rule 211(b) SCACR.

January 29, 2017


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