STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master in Equity

C.A. NO. 2010-CP-23-4786

Tony Ray Green and Frances K. Pittman ..... Appellants,

vs.

Samuel D. Humphries and Veronica L. Humphries ..... Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

On June 10, 2010, the Appellants brought this action alleging waste, nuisance, trespass, and forcible entry and detainer against the Respondents. The Respondents answered on November 3, 2010 and filed a counterclaim alleging negligence, trespass, nuisance, and a declaratory judgment as to the exact location of the boundary between the Respondents' property and Appellants' property. The Appellants filed a reply on March 28, 2011 denying the allegations of the Respondents.

On April 18, 2011, the parties entered into a Consent Order referring this matter to the Master-in-Equity for final adjudication. This matter was tried before The Honorable Charles B. Simmons, Jr. on March 21, 2012, and judgment was entered on April 3, 2012.

On April 18, 2012, the Appellants filed a Motion for New Trial, or in the Alternative, to Alter or Amend the Judgment dated April 3, 2012. A hearing was conducted via telephone on May 22, 2012, and the Court entered judgment on Appellants' motion on June 6, 2012. Appellants received notice of entry of judgment on June 8, 2012. On July 9, 2012, Appellants served the Notice of Appeal on Respondents.

FACTS

Since 1945, Appellants' family has owned property in northern Greenville County along Beaver Dam Creek. (R. p. 110; R. p. 111) In 1991, Katie Emery, Appellants' grandmother, deeded a one-acre portion of property on the south side of Beaver Dam Creek to Dora Lee Hall. (R. p. 23, line 21 – p. 24, line 25; p. 38, line 2 – p. 39, line 6; R. p. 110; R. p. 111) Two years later, Hall deeded the same piece of property to Respondents. (R. p. 41, lines 8-9; p. 62, lines 13-20; R. p. 73) The deed to the Respondents contained a property description that referred back to a plat recorded in 1991. (R. p. 73) That plat has written on it the words "Beaver Dam Creek is property line." The plat also gives a metes and bounds description for the entire property, including the northern boundary that is the creek. (R. p. 38, lines 5-22; R. p. 39, line 18 – p. 20, line 10; R. p. 110)

Appellant Green is the owner of a piece of property on the north side of Beaver Dam Creek directly across from the Respondents. (R. p. 23, line 21 – p. 24, line 12) This property was deeded to him in 2000. (R. p. 118) Appellant Pittman owns a piece of real property on the southern side of Beaver Dam Creek. Her property is the next parcel downstream from the Respondents' property. (R. p. 43, lines 1-12)

Prior to the mid-2000's, Beaver Dam Creek ran in essentially a straight line from west to easR. (R. p. 25, lines 10-15) Appellant Green's property has historically been used for agriculture. (R. p. 42, lines 10-13) Some portion of the Respondents' property and Appellant Pittman's property was in the flood plain for Beaver Dam Creek. (R. p. 25, line 25 – p. 26, line 2; p, 54, lines 20-21)

In the mid-2000's, Respondents built a wall beginning at the western edge of their property for the purpose of preventing the rising creek from entering low-lying parts of their property. (R. p. 25, line 19 – p. 27, line 6; R. p. 70) The first wall eventually was removed, and Appellants built a larger wall out in the creek and filled in behind it. This wall was angled away from the water's edge. As a result, during heavy rain and flooding events, flood waters, instead of rising up onto Respondents' property, were pushed into Appellant Green's property, causing significant damage and erosion. Eventually, the course of the creek was changed to have a bend to the north from water being deflected off the diversion wall created by the Respondents. (R. p. 28, line 6 – p. 37, line 1; R. p. 73; R. p. 82; R. p. 97; R. p. 99; R. p. 109) As the water ricocheted off of Green's property, it damaged into Appellant Pittman's property before straightening back out into its natural course. (R. p. 43, line 1 – p. 45, line 3) Following the diversion of Beaver Dam Creek, a sandbar emerged downstream of the diversion wall. (R. p. 33, lines 6-15; p. 34, lines 6-10; p. 35, line 20 – p. 36, line 8; R. p. 73; R. p. 82; R. p. 97; R. p. 99; R. p. 109) The sandbar and the filling in of the space behind the wall had the effect of increasing Respondents' parcel size and decreasing Appellant Green's parcel size. (R. p. 41, line 12 – p. 42, line 5; p. 53, lines 2-15; R. p. 116)

In September 2010, subsequent to the filing of this lawsuit, the diversion wall was removed. However, the creek still bends to the north and causes ongoing erosion to the Appellants' properties. (R. p. 36, line 24 – p. 37, line 1; p. 47, line 15 – p. 48, line 19; R. p. 116)

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT RULING THAT THE BOUNDRY BETWEEN APPELLANT GREEN'S PROPERTY AND RESPONDANTS' PROPERTY WAS DETERMINED BY THE 1991 PLAT AND DEED.

The first issue in this case, and the one that determines the outcome of all other questions, is to determine where the boundary line between the two properties lies. Because this question essentially determines the exact boundaries of these properties and the land contained therein, the question naturally raises issues as to title and ownership, and therefore the question is legal in nature. See Van Every v. Chinquapin Hollow, Inc., 265 S.C. 474, 219 S.E.2d 909 (1975). In an appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. See Church v. McGee, 391 S.C. 334; 705 S.E.2d 481 (Ct.App. 2011).

Prior to 1991, these pieces of property were part of the same tract. (R. p. 23, line 21 – p. 24, line 25; R. p. 110; R. p. 111) In 1991, Katie Emery deeded a piece of land to Dora Lee Hall. (R. p. 38, line 2 – p. 39, line 6; R. p. 111) In the deed to Hall from Emery, the legal description uses metes and bounds to set forth all of the boundaries of the parcel. The legal description also includes the description of that boundary as running "with Beaver Dam Creek as the line," but goes on to set forth those metes and bounds for that boundary. (R. p. 39, line 18 – p. 40, line 10; R. p. 111) A plat prepared in July 1991 and recorded September 11, 1991, the same day the deed to Hall was recorded, shows the boundaries with metes and bounds. The plat uses the phrase "Beaver Dam Creek is property line" as a description as to where the property line was. (R. p. 38, lines 5-22; R. p. 110)

When Hall deeded the property to Respondents in 1993, she could not deed to them any more property than what she owned. That deed, for the legal description, only

craved reference to the deed to Hall and the plat prepared and recorded in 1991 for "a complete metes and bounds description." (R. p. 59, line 23 – p. 63, line 18; R. p. 117)

In South Carolina, when a non-tidal waterway serves as the boundary between the two properties, the property line is considered to be the centerline of the waterway. See, e.g., State v. Hardee, 259 SC 535, 193 S.E.2d 497 (1972); McCullough v. Wall, 38 S.C. L. 68, 4 Rich. 68, 53 Am. Dec. 715 (1850); State v. Head, 330 SC 79, 498 S.E.2d, 389, (Ct.App. 1997). The plat and deed giving the boundaries of the property that would become the Respondents' state that the waterway is the property line, but they go further and set forth clear metes and bounds to establish the boundaries.

Courts in South Carolina have also addressed the question of what happens when a waterway that is a boundary moves from its original location. It is well established in case law that when a waterway serves as a boundary between two properties, and the waterway moves or changes location, the boundary does not change and remains fixed in that location. See Ex Parte Keller, 189 S.C. 26, 199 S.E. 909 (1938); Ivester v. Fowler 109 S.C. 424, 96 S.C. 154 (1918).

The testimony at trial was clear that the creek had moved since the deed and plat of 1991 carved out the parcel that would become the Respondents. (R. p. 25, line 1 – p. 37, line 1) The Respondents' own surveyor testified that the creek had moved north more than six feet, which led to more property on the Respondents' side of the creek. (R. p. 65, line 24 – p. 68, line 4; p. 69, lines 7-13) Appellants' expert witness, a civil engineer, testified that the creek had moved north toward Appellant Green's property when comparing the original 1991 survey and survey performed in 2010 (and given

Respondents approximately 1500 additional square feet on their side of the creek in the process). (R. p. 46, line 11 – p. 53, line 19; R. p. 116)

The trial court ruled did not make any factual finding as to the fact that the creek had moved away from the original boundary. The trial court's only ruling with regard to any movement of the creek or increase in the size of Respondents' was that there was no natural accretion. (Order dated April 3, 2012) By deduction, if there was no accretion, there could only have been changes resulting from acts by the parties. Respondent Samuel Humphries admitted that his position is that no matter where the creek, he gets to keep all of the property on his side of the creek. (R. p. 64, lines 7-10) The only evidence presented at trial was that the creek moved between 1991 and 2010.

It is important to note that Respondent Veronica L. Humphries did not testify at the trial of this case. It is well established under South Carolina case law that the failure of a party to testify raises an inference that her testimony, had it been submitted, would have been unfavorable to her position. See Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc., 374 S.C. 171, 648 S.E.2d 585 (2007); McGowan v. Southerland, 253 S.C. 9, 168 S.E.2d 573 (1969); Crocker v. Weathers, 240 S.C. 412, 126 S.E.2d 335 (1962). Therefore, an inference is created by Respondent Veronica Humphries failure to testify that she would have testified in a manner supporting the Appellants' contention with regard to the location of the boundary.

The trial court erred in fits findings of fact by failing to make a finding with regard to whether the creek had moved. The trial court erred in its application of the law by failing to follow the case law of South Carolina as set forth above with regard to the location of the boundary and the fact that the boundary does not change if the waterway

does. Therefore, the order of the trial court should be overturned, and this Court should set as the boundary between Appellant Green's property and Respondents' property the metes and bounds line set forth in the 1991 deed to Hall and the 1991 plat.

II. THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS DID NOT MEET THEIR BURDEN OF PROOF AS TO DAMAGES

The trial court erred in finding that the Plaintiffs had not met their burden of proof with regard to damages.

The Appellants pled multiple causes of action giving rise to damages. First and foremost, Appellants pled trespass. In order to have actionable trespass, a party must prove an affirmative act, an intentional invasion of the land, and harm caused by the direct result of that invasion. See Snow v. Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct.App. 1991).

In Snow, the act of trespass was the discharge of water from a leaking pipe. That court determined the act was unintentional and pointed out that the defendant was unaware of the alleged trespass until the plaintiff brought the matter to the defendant's attention.

In the current case, the discharge of water off of the angled diversion wall onto Appellants' properties, first Green's and then Pittman's, is an affirmative act. Furthermore, said diversion was not unintentional or unknown by Respondents. Respondent Samuel Humphries even admitted that it was built at an angle (R. p. 57, line 18 – p. 58, line 8; R. p. 82) Respondents created the wall and reinforced it, and as set forth in many photographs introduced at trial, the effect on the Appellants' properties was clear. (R. p. 25, line 1 – p. 37, line 1; p. 52, line 10 – p. 53, line 1; p. 56, line 17 – p. 57, line 6; R. p. 73; R. p. 82; R. p. 97; R. p. 99; R. p. 109).

The final matter is that of harm. The Appellants both testified to damages as to their properties. Green testified to the erosion of the creek bank on his side of the creek every time high water would deflect off the diversion wall. (R. p. 25, line 1 – p. 37, line 1; p. 41, lines 12-22) Pittman testified to erosion and loss of at least one tree from water that deflected off of Green's property onto her parcel downstream of the Respondents. (R. p. 43, line 1 – p. 45, line 3) The Appellants' expert witness testified that, in his opinion, the damage resulted from water deflecting off of the diversion wall created by the Respondents. (R. p. 52, line 10 – p. 53, line 1) He also testified as to the value of those damages and what it would cost to make repairs. (R. p. 53, line 20 – p. 55, line 25; R. p. 112; R. p. 115) The Appellants clearly met their burden of proof.

The Appellants also pled a cause of action for nuisance. A private nuisance is a class of wrongs that arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property that works hurt, inconvenience, or damages to another's property. See Clark v. Greenville County, 313 S.C. 205, 437 S.E.2d 117 (1993); Neal v. Darby, 282 S.C. 277, 318 S.E.2d 18 (Ct.App. 1984). Respondents' creation of a wall diverting water off of his land and onto the land of the Appellants was unreasonable and caused damage to the Appellants' properties. The Appellants, through the testimony of their expert witness, had a clear measure of damages based on the cost to repair the injury caused by the Respondents.

As previously set forth in this brief, because Respondent Veronica Humphries failed to testify at the trial, the presumption is that her testimony would be adverse to her interests. Therefore, in connection to damages, the presumption is that her testimony would support the award of damages to the Appellants in this case.

The trial court erred by not awarding damages to the Appellants, and this Court should overturn the trial court and award damages in the amount present at trial as well as nominal damages for the trespass and nuisance.

III. IF THE TRIAL COURT RULED CORRECTLY BY THAT ESTABLISHING THE BOUNDARY WAS A MATTER OF EQUITY, THAN THE TRIAL COURT ERRED BY NOT ACTING IN EQUITY AS TO THE APPELLANTS IN ESTABLISHING THE BOUNDARY.

In the event that the trial ruled correctly in, as a matter of equity, setting a new boundary between the Respondents' and Appellant Green's properties, then the trial court erred because the boundary determined by the trial court was not equitable to the Appellants.

Normally, an action to determine a property line is at action at law. See Coker v. Cummings, 381 S.C. 45, 671 S.E.2d 383 (Ct. App. 2008). However, a court may act in equity to settle and fix a boundary line between adjoining landowners when there is an inadequate remedy of law and when there is confusion or alteration alleged with regard to the boundary line. See Little v. Little 223, S.C. 332, 75 S.E.2d. 871 (1953); Knotts v. Knotts, 191 S.C. 253, 1 S.E.2d 809 (1939).

The trial court determined that the centerline of the creek in its positions as of the date of the trial, March 21, 2012, should be the boundary and ordered that a surveyor serving the court survey the line and create a plat that could be recorded. (Order dated April 3, 2012) However, as established by the testimony presented at trial, the creek on that date still had a curve into Appellant Green's property and was continuing to cause damage and erosion with during high water events. (R. p. 36, line 24 – p. 37, line 1; p. 47, line 15 – p. 48, line 19; R. p. 116) That curve was created by the acts of the Respondents in the creation of the diversion wall. (R. p. 52, line 10 – p. 53, line 1) The

Respondents now have more property as a result of land building up behind the diversion wall and land downstream from the wall being uncovered as the course of the creek is pushed north. (R. p. 53, lines 2-19; R. p. 82; R. p. 97; R. p. 99; R. p. 109) By allowing the creek to remain in its current state, the Respondents are benefitting from their own inequitable acts.

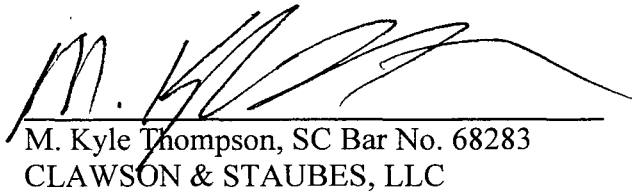
The trial court appears to have attempted to take the path of least resistance in this ruling. After three hours of testimony and evidence, the trial court refused to give counsel the opportunity to make final arguments, which should have been allowed under Rule 43, SCRCP, and immediately made its ruling. In so doing, however, the court ignored the ongoing harm to the Appellants.

If the trial court was correct in ruling that the determination of the boundary was a matter of equity, then the trial court erred in fixing the boundary between the properties as the centerline of the creek as of the date of the trial. Should this Court not find for the Appellants with regard to the location of the boundary as a matter of law, then this Court should overrule the decision of the trial court and remand this matter for an equitable determination as to the location of the boundary.

CONCLUSION

For the foregoing reasons, Appellants pray that the decision of the trial court be reversed and that the Court set the boundary as per the 1991 deed and plat and that the Appellants be awarded damages as proven as trial. If the trial court correctly ruled that the determination of the boundary was a matter of equity, then the Appellants pray that the trial court's ruling as to the location of the boundary be overturned and that the case be remanded for a determination of a boundary consistent with the ruling of this Court.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

Counsel certifies that Final Brief of Appellants complies with Rule 211(b), S.C.A.C.R.

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