THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS

Maité Murphy, Circuit Court Judge

Case No. 2013-002129

Kay Howell Jordan, Marion Howell Tolson, and Lewis Virgil Howell, ... Respondents,

v.

Betty L.S. Judy, ... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I.

There is no evidence that an imaginary line down the middle of the dike was considered the boundary line by anyone.

The respondents contend that the theory upon which the circuit court fixed the boundary line is acquiescence. There is no evidence that either party believed the boundary between their properties to be located in the center of the dike, or behaved as though it were. Mutual treatment of a line as a boundary is the essence of the "acquiescence" cases relied upon by the respondents. *See, e.g., Kirkland v. Gross,* 286 S.C. 193, 332 S.E.2d 546 (Ct. App. 1985); *Gardner v. Mozingo,* 293 S.C. 23, 358 S.E.2d 390 (1987); *Croft v. Sanders,* 283 S.C. 507, 323 S.E.2d 791 (1984). There is no evidence that both parties — or even one party, for that matter — treated some imaginary line down the center of the dike as the boundary.

The boundary in question was established many decades ago — probably in the nineteenth century — long before the Highway Department's contractor quarried sand from the two properties for the construction of I-95. Although the Highway Department regarded the boundary to be located as shown in the 1927 Moorer survey, there is no evidence and no reason to think that the Department's contractor intended to excavate in such a way as to leave an unexcavated strip between the two tracts, or that the boundary between the two tracts mattered at all. The Department's contractor had the authority to quarry where most convenient for construction of the highway. The Department's easement[1] allows it to quarry sand anywhere on the tract being taken. Howell and Judy did not "place" the dike or "construct" the dike, as the respondent contends. There is no evidence and no reason to think that they had any part in the contractor's decision of where to quarry the needed

[1] More properly considered a mining profit *à prendre*. *See: Ex parte Bedingfield,* 283 S.C. 561, 562, 324 S.E.2d 312 (1984).

sand. What is now called "the dike" is merely a strip of land which happens to remain between the two areas where the Highway Department's contractor chose to quarry sand.

There is no evidence that the use of the strip called the dike in years past stopped at the center line of the dike or that either owner's use was limited to "his side of the dike." Not until Howell cut off Judy's access to his tract from Old St. George Road in the south did the location of the boundary arise. When it was found that Howell had been collecting rent for a billboard located on the Judy tract, not the Howell tract, Howell was required to disgorge the rents — but only for the period beginning with the commencement of an action for that purpose.

II.

The Howells refused to consummate a proposed settlement which would have placed the line north of its true location.

The respondents speak of the fact that Mr. Judy placed flags marking a proposed settlement line on the dike, implying that this was a recognition that the true line was located there. [Respondents' Brief at 16.] On the contrary, Mr. Judy knew where the line was located, in the Howells' pond, as the circuit court implicitly though not expressly found in the earlier billboard case. The line which he and Mr. Howell jointly marked would have been part of a settlement in which the Howells were to reinstitute Judy's access to the Judy tract across the Howells' tract. The Howells successfully resisted Judy's motion to compel settlement [R. 29], and yet they now suggest or imply that this proposed settlement line had some basis in fact. This illustrates the wisdom of the rule against the use in evidence of anything said in settlement discussions.

III.

The respondents make no effort to explain the arbitrary features of the Bass survey upon which they relied at trial.

To recapitulate the evidence regarding the Bass survey done for the Howells: Mr. Bass could find only one pin from the 1867 Gavin survey which he claimed to be attempting to retrace. And yet his intent was to reach the 1927 pin set by Mr. Moorer at the southeastern corner of the Judy tract. Having reached that pin in a manner which could not possibly jibe with the 1867 Gavin survey, Mr. Bass would then contend that the 1927 Moorer pin corresponded to a point on the 1867 Gavin plat, and that the Gavin plat at that point turned north of what is now the pond on the Howell tract. None of this is founded in the Gavin plat. Mr. Bass attributed all these departures to errors in the Gavin plat, which he corrected by alterations which he could not explain or justify.

The respondents make no effort to rationalize the Bass survey. The 1927 Moorer survey — accepted by the Highway Department in the 1970's, implicitly accepted by the circuit court in the billboard case, and faithfully retraced in the 1996 Ashley survey — provides the only evidence of where this boundary line is located.

CONCLUSION

For these reasons and those set forth in the appellant's principal brief, the appellant again asks the Court to reverse and remand.

Respectfully submitted,

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June 10, 2014.

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v.

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CERTIFICATE OF COUNSEL

I certify that appellant's final reply brief complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the final reply brief of appellant by first class mail, postage prepaid, addressed to respondents' attorney at his address of record, namely:

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