

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Richard B. Ness, Special Referee

Case No. 2009-CP-38-1170

Patrick J. Williams, Frank J. Wallmeyer and
Mary B. Wallmeyer, ... Respondents,

v.

F. Carlisle Smith and First Citizens Bank and
Trust Company, ... Defendants,

Of whom F. Carlisle Smith is Appellant.

FINAL BRIEF OF THE APPELLANT,
F. CARLISLE SMITH

CALLISON TIGHE & ROBINSON, LLC
Louis H. Lang, Esq., SC Bar#03127
1812 Lincoln St., Ste. 200
PO Box 1390
Columbia SC 29202-1390
Telephone: (803) 404-6900
Facsimile: (803) 404-6902
Attorneys for Appellant, F. Carlisle Smith

August 27, 2014
Columbia, South Carolina

RECEIVED

AUG 27 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Richard B. Ness, Special Referee

Case No. 2009-CP-38-1170

Patrick J. Williams, Frank J. Wallmeyer and
Mary B. Wallmeyer, ... Respondents,

v.

F. Carlisle Smith and First Citizens Bank and
Trust Company, ... Defendants,

Of whom F. Carlisle Smith is Appellant.

FINAL BRIEF OF THE APPELLANT,
F. CARLISLE SMITH

CALLISON TIGHE & ROBINSON, LLC
Louis H. Lang, Esq., SC Bar#03127
1812 Lincoln St., Ste. 200
PO Box 1390
Columbia SC 29202-1390
Telephone: (803) 404-6900
Facsimile: (803) 404-6902
Attorneys for Appellant, F. Carlisle Smith

August 27, 2014
Columbia, South Carolina

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	i
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
ARGUMENT.....	6
I.	
The court erred in concluding the boundary between the Williams and Smith tracts was the “Stroman line” because the deeds in the chain of title to the Williams established a different line.....	
	6
II.	
The court erred in concluding the original run of Dean Swamp Creek had been deliberately altered by human efforts because there was no evidence Smith was involved in such “human efforts,” there was insufficient evidence to support this conclusion and the evidence of alteration pointed to by Williams was not even on Smith’s property.	
	9
III.	
Williams failed to carry his burden in a trespass to try title case because he failed to introduce any evidence to prove any of the four methods required to establish paramount title	
	10
CONCLUSION	11
CERTIFICATE OF COUNSEL	12
CERTIFICATE OF SERVICE	13

TABLE OF CASES, RULES AND OTHER AUTHORITIES

A. CASES.	PAGE
<i>Brownlee v. Miller</i> , 208 S.C. 252, 37 S.E.2d 658 (1946)	8
<i>Bryan v. Bryan</i> , 285 S.C. 434, 330 S.E.2d 310 (Ct. App. 1985).....	6
<i>Hayne Fed. Credit Union v. Bailey</i> , 327 S.C. 242, 489 S.E.2d 472 (1997)	6
<i>Ivester v. Fowler</i> , 109 S.C. 424, 96 S.E. 154 (1918)	6
<i>Keller v. Hutto</i> , 189 S.C. 26, 199 S.E. 909 (1938)	6
<i>Kirkland v. Gross</i> , 286 S.C. 193, 332 S.E.2d 546 (1985)	10
<i>Rhodes v. Black</i> , 170 S.C. 193, 170 S.E. 158 (1933)	7
<i>Uxbridge Co. v. Poppenheim</i> , 135 S.C. 26, 133 S.E. 461 (1926)	6
<i>Wash v. Holmes</i> , 19 S.C.L. (1 Hill) 12 (1833).....	6
<i>Watson v. Suggs</i> , 313 S.C. 291, 437 S.E.2d 172 (1993)	10
<i>Wheeler v. Wheeler</i> , 111 S.C. 87, 96 S.E. 714 (1918)	7

STATEMENT OF ISSUES ON APPEAL

I.

Did the court err in concluding the boundary between the Williams and Smith tracts was the “Stroman line” when the deeds in the chain of title to the Williams tract established a different line?

II.

Did the court err in concluding the original run of Dean Swamp Creek had been deliberately altered by human efforts when there was no evidence Smith was involved in such “human efforts,” there was insufficient evidence to support this conclusion and the evidence of alteration pointed to by Williams was not even on Smith’s property?

III.

Did Williams carry his burden in a trespass to try title case where he failed to introduce any evidence to prove any of the four methods required to establish paramount title?

STATEMENT OF THE CASE

The complaint was filed July 17, 2009. (Complaint, ROA 35). Appellant, F. Carlisle Smith (Smith), filed his amended answer and counterclaim October 5, 2009. (Amended Answer and Counterclaim, ROA 41). By order entered July 18, 2011, the case was referred to Richard B. Ness, Special Referee for Orangeburg County, with authority to issue a final order, any appeal to be to the South Carolina Court of Appeals. (Order Referring Case, ROA 7).

On October 15, 2012, Plaintiffs, Patrick J. Williams, Frank J. Wallmeyer and Mary B. Wallmeyer (collectively Williams), moved for a temporary restraining order, *ex parte*, (Motion for a Temporary Restraining Order, ROA 48). Their motion was granted the same day (Motion to Dissolve Temporary Restraining Order, ROA 53). Smith moved to dissolve the temporary restraining order on October 23, 2012. (Motion to Dissolve Temporary Restraining Order, ROA 53). The Special Referee dissolved the temporary restraining order on November 15, 2012. (Order on Motions of Smith, ROA 11).

The matter was tried from August 26 through August 28, 2013. On October 3, 2013, the court issued its order granting the relief requested by Williams. (Final Order, ROA 13). Notice of entry of this order was received by counsel for Smith on October 12, 2013, and on October 16, 2013, Smith moved under SCRCF, Rule 59(e), to alter or amend the final order. (Motion to Alter or Amend, ROA 58). By order entered December 26, 2013, Smith's motion to alter or amend was denied. (Order, ROA 33).

This appeal followed.

STATEMENT OF FACTS

The dispute between Williams and Smith concerns the location of a boundary between their two tracts of land, the western boundary of the Williams tract and the eastern boundary of the Smith tract. This boundary is described in the chains of title of both tracts as the run of Dean Swamp Creek, the waters of Dean Swamp Creek and Dean Swamp. Williams claimed and the court found the disputed boundary to be as shown on a survey done by a surveyor hired by Williams referred to as the “Stroman line.” (Stroman survey, Williams exhibit 103, ROA 800 and final order, ROA 13).

The evidence showed Williams’ property was originally two tracts, one containing approximately 765 acres and a second containing approximately 286 acres. The 765 acre tract was located to the east of the 286 acre tract and the tracts were combined by two conveyances, the first in 1888 and the second in 1889.

The oldest deed in the Williams’ chain of title introduced is dated January 13, 1888 and is recorded in the Office of the ROD for Orangeburg County at deed book 22, page 284. (Smith exhibit 17, ROA 696). The grantee of this deed is P.W. Farrell, the grantor Walter C. Jumper. The property conveyed is described the 765 acre tract bounded on the north by lands of Joe Milligan and Ephraim Carmichael; on the east by lands of W.A. Rice and Ann C. Porter; on the south by lands of Ann C. Porter and the waters of the South Edisto River; and on the west by the waters of Dean Swamp Creek.

The next deed in Williams’ chain is dated January 28, 1889 and is recorded in the Office of the ROD for Orangeburg County at deed book 22, page 536. (Smith exhibit 17, ROA 697). This deed from Ann Porter to P. W. Farrell describes the 286 acre tract bounded on the north by lands of

P.W. Farrell and E. M. Gantt and “brother;” on the east by lands of Mrs. Loyd Morgan; on the south by waters of South Edisto River; and on the west, not by Dean Swamp Creek, but rather by lands of P.W. Farrell – the 765 acre tract.

Every deed in Williams’ chain following these two deeds describes the property conveyed as containing 1050 or 1051 acres (765 acres plus 286 acres) and locates the property by reference to adjoining property. Each subsequent deed, except for the deed into Williams, describes the western boundary of the property as the waters or run of Dean Swamp Creek.

By deed dated March 1, 1895 recorded in deed book 33, page 385, the 1051 acre tract was conveyed by P.W. Farrell to M. L. O’Dowds Sons & Co. (Smith exhibit 17, ROA 699). By deed dated August 22, 1902, recorded in deed book 39, page 670, the 1051 acre tract was conveyed by M. L. O’Dowds Sons & Co. to A.F. Green. (Smith exhibit 17, ROA 700). By deed dated March 29, 1910 recorded at deed book 50, page 352, the 1051 acre tract was conveyed by A.F. Green to E. J. Boland and J. D. Bean. (Smith exhibit 17, ROA 702). By deed dated March 4, 1935 recorded in deed book 93, page 80, B. H. Moss, County Judge, acting as Special Referee and under a judgment, conveyed the Williams property to Blanche Gleaton. (Smith exhibit 17, ROA 704). By deed dated April 19, 1935, Blanche Gleaton conveyed the Williams property to Florrie G. Clark. By deed dated December 30, 1935 recorded at deed book 98, page 218, Florrie G. Clark conveyed the Williams property to E. J. Boland (Smith exhibit 17, ROA 706) and by deed dated April 13, 1978, recorded in deed book 443, page 135, Elizabeth Boland and Marie B. Timmons, devisees under the will of E. J. Boland, conveyed the property to Williams (Smith exhibit 17, ROA 708). This deed describes the western boundary of the property as “Dean Swamp,” rather than as the waters or run of Dean Swamp Creek.

Smith, his surveyor and an expert witness testified in Smith's case-in-chief. (Trial transcript, p. 784, line 9 – 851, line 9 [Smith direct], p. 748, line 23 – 760, line 16 [Smith's surveyor direct] and p. 665, line 15 – 695, line 18 [Smith's expert witness], ROA 579 – 641; 510 – 542; and 544 - 556). Smith's expert witness, a wetlands scientist, testified he could not confirm what he observed in the aerial photographs introduced by Williams to be a creek bed. (Trial transcript, p. 710, line 23 – 711, line 2, ROA 552 - 553). Smith's wetlands scientist said he did not observe an old creek bed along the Stroman Line but found what he described as the current "run" of Dean Swamp Creek running well to the east of the Stroman Line. (Trial transcript, p. 678, line 18 – 681, line 22 and Smith Exhibit 6, ROA 523 - 526 and 694). Smith's wetlands scientist also testified the structures which several Williams' witnesses testified diverted the creek on the Stroman Plat from its natural course, could not divert a creek of the size he found running well to the east of the Stroman Line. (Trial transcript, p. 688, line 1 – 690, line 6., ROA 533 - 535).

Smith and his surveyor testified they observed an old creek bed further to the east and north of what Smith's wetlands scientist described as the current run of Dean Swamp Creek around the area which all witnesses testified to be a natural boundary between the low lying swampy area and the higher ground utilized, in part, by Williams for his farming operations. (Trial transcript, p. 756, line 18 – 759, line 2, ROA 552 - 555). The higher ground is denominated as "up-lands" on a survey prepared by Smith's surveyor, referred to as the Steadman Survey. (Williams exhibit 9, ROA 734). The area described by Smith and his surveyor as being an old creek bed is in the area of what is shown on the Steadman Survey as "lighter knot stump." (Trial transcript p. 756, line 18 – 758, line 2, ROA 552 - 554).

Finally, Smith and his wetland's scientist testified they observed remnants of a still or stills in and around the old creek bed in the area of the "lighter knot stump." (Trial transcript, p. 690, line 7 – 691, line 24 and p. 840, line 15 – 847, line 12, ROA 535 – 536 and 635 – 642.

ARGUMENT

I.

The court erred in concluding the boundary between the Williams and Smith tracts was the "Stroman line" because the deeds in the chain of title to the Williams tract established a different line.

Assuming without agreeing this case is a boundary line dispute rather than a trespass to try title case, boundary line disputes sound in equity. *Uxbridge Co. v. Poppenheim*, 135 S.C. 26, 30, 133 S.E. 461 (1926) (boundary disputes sound in equity) and *Bryan v. Bryan*, 285 S.C. 434, 437, 330 S.E.2d 310, 312 (Ct. App. 1985) (quiet title actions sound in equity). In an appeal of an action sounding in equity, the reviewing court may determine facts in accordance with its own view of the preponderance of evidence. *Hayne Fed. Credit Union v. Bailey*, 237 S.C. 242, 247, 489 S.E.2d 472, 475 (1997).

In ascertaining a boundary, it has long been established the court "resort(s), 1st to natural boundaries, such as rocks, mountains, rivers, and creeks; 2nd, to artificial marks, such as corners of trees and stations; 3rd, to adjacent boundaries; 4th, to course and distance; and 5th the shape of the plat." *Wash v. Holmes*, 19 S.C. L. (1 Hill) 12, 15 (Ct. App. 1833). When a boundary is described referring to a stream or other natural monument a change in the location of that stream or other natural monument does not change the boundary. *Ivester v. Fowler*, 109 S.C. 424, 96 S.E. 154 (1918) and *Keller v. Hutto, et al.*, 189 S.C. 26, 36, 199 S.E. 909, 914 (1938) (all grants and conveyances are presumed to be made with reference to an actual view of the premises by the

parties to the grant). “The paramount and cardinal rule of construction of a deed is to ascertain the intention of the grantor” *Rhodes v. Black*, 170 S.C. 193, 200, 170 S.E. 158, 159 (1933). When swamp or stream is given in a deed as the boundary of property, the grantor will be presumed to have intended the middle of the stream or in the case of a swamp, the middle of the stream in the swamp, *absent evidence of a contrary intention*. *Wheeler v. Wheeler*, 111 S.C. 87, 96 S.E. 714 (1918). Emphasis added.

A. Williams’ chain of title does not support the Stroman line as the western boundary of the Williams property.

The first deed in Williams’ chain, describes the property conveyed as comprising 765 acres, with P.W. Farrell being the grantee. This 1888 deed says the western boundary of the 765 acre tract conveyed was Dean Swamp Creek.

The next deed in the Williams chain describes the property conveyed as comprising 286 acres. This 1889 deed describes the property conveyed as being bounded on the west by the “lands of P. W. Farrell.” Thus the western boundary of the 286 acre tract is not Dean Swamp Creek, but rather the 765 acre tract conveyed to P.W. Farrell the year before in the 1888 deed. Each subsequent deed in the Williams chain describes the property conveyed as containing as containing 1050 or 1051 acres (765 acres plus 286 acres).

Smith’s wetland’s scientist estimated the acreage in the uplands area shown on the Steadman plat as approximately 680 acres. (Trial transcript p. 742, line 22 – 743, line 23, ROA 543A-543B, and Smith exhibit 6, ROA 694). This acreage estimate comports with the 765 acre tract conveyed to Williams’ predecessor-in-interest in 1888. The deed conveying the 765 acre tract described its western boundary as Dean Swamp Creek which, therefore, must have been located far to the east of the Stroman line, in the area described by both Smith and his surveyor as

being an old stream bed running along a ridge line separating the low lying swamp land from higher ground used as farm land. (Trail transcript p. 756, line 21 – 758, line 21, ROA 552 - 554, trail transcript p. 834, line 18 – 838, line 13, ROA 629 - 633 and Steadman survey, Smith exhibit 9, ROA 695).

B. Williams deed does not support the Stroman line as the western boundary of his property.

Every deed following the 1889 deed, except for the deed into Williams, describes the western boundary of the property as the waters or run of Dean Swamp Creek. However, the last deed in Williams chain, the deed into Williams, does not describe the western boundary as the “run” or “waters” of Dean Swamp Creek, but rather as “Dean Swamp.”

For nearly 100 years the western boundary of the Williams tract was described as the “run” or “waters” of Dean Swamp Creek. The last deed in the chain, however, describes the western boundary as “Dean Swamp.” The implication of this change is clear. Either it was in recognition of the changed location of Dean Swamp Creek, or the grantor intended Dean Swamp to be the western boundary, the only evidence of the location of Dean Swamp being as shown on the Steadman Survey as “edge of swamp.”¹

Therefore, based on Williams own chain of title, the western boundary of his tract is not the Stroman Line, but must be in the area of the old creek bed described by Smith and his surveyor and run along the line denominated on the Steadman Survey as “edge of swamp.” The court erred in concluding otherwise and its order should be reversed.

¹ Williams argued extensively the acreage recited in his deed should control. “[B]oundaries govern acreage and inaccuracies relating to the area of a tract are generally immaterial.” *Brownlee v. Miller*, 204 S.C. 252, 260, 37 S.E. 2d 658, 660 (1946).

II.

The court erred in concluding the original run of Dean Swamp Creek had been deliberately altered by human efforts because there was no evidence Smith was involved in such “human efforts,” there was insufficient evidence to support this conclusion and the evidence of alteration pointed to by Williams was not even on Smith’s property

The Order concludes the “original run of Dean Swamp Creek has been deliberately altered by human efforts.”

Plaintiffs original position was Smith altered the “original run.” The evidence adduced however, showed plaintiffs theory to be incorrect. There was no dispute the evidence showed the location of the Bird or Tree House, below which is located what the Order calls “a sizeable barrier, dam or dike built across the creek” is on property formerly owned by E.B. Atkins and was constructed by E.B. Atkins during the time he owned the adjacent tract.

There is no credible evidence the structure to which the Order refers is a “dam” or “dike” or “barrier” “diverted” or “altered” the “original run” of Dean Swamp Creek.

A survey done by Williams’ surveyor’s company showing property lying to the north of the line Williams claim and which was formerly owned by E.B. Atkins does not show a change in the course of the creek. (Compare Williams’ exhibit 84 – Adkins plat – with Williams’s exhibit 103 –Stroman plat).

The Adkins plat, signed by Williams’ surveyor and dated September 17, 2004 shows no “diversion” of Dean Swamp Creek. The Stroman plat, on which Williams relied and the court accepted, dated May 28, 2009, however, shows not only a diversion, but puts the location of what Williams’ claims to be the former stream bed of Dean Swamp Creek either 145.56 feet or 146.98 feet to the west of where the Adkins plat locates Dean Swamp Creek. Further, Williams asserted

the “diversion” resulted from a retaining wall and corrugated metal barrier placed at the location of the Bird House. (Trial transcript, page 233, ll. 2 – 13 and 243, ll. 13 - 16 ROA 243 and 252). However, the line on the Stroman plat marked “diverted stream flow” begins well to the south and east of the location of either the Bird House or the structures Williams asserted and the court determined “diverted” Dean Creek Swamp.

The court erred in its conclusion Dean Swamp Creek was “diverted” and its order should be reversed.

III.

Williams failed to carry his burden in a trespass to try title case because he failed to introduce any evidence to prove any of the four ways to establish paramount title.

Although the complaint is cast as a “quiet title/property line dispute” (Complaint, ROA 35), this is a trespass to try title case. “An action brought for the primary purpose of determining title to disputed land is in the nature of a trespass action (sic) to try title, which is an action at law.” *Watson v. Suggs*, 313 S.C. 291, 293, 437 S.E.2d 172, 173 (Ct. App. 1993). In a trespass to try title case, the burden is on the plaintiff to prove title by a preponderance of the evidence. *Kirkland v. Gross*, 286 S.C. 193, 332 S.E.2d 546 (Ct. App. 1985).

Williams’ burden was to show title by one or a combination of four methods. *Watson*, 313 S.C. at 294, 437 S.E.2d at 173. Those methods are: (1) showing a grant from the state to someone and successive deeds to the plaintiff (perfect legal paper title method), (2) tracing his title to a common source from whom both he and the defendant claim through separate chains of title, (3) plaintiff showing he and those under whom he claims, have been in actual, hostile, exclusive, and continuous possession of the land adversely to the defendant for twenty years, or (4) plaintiff

showing he alone or with those from whom he has inherited have been in actual, hostile, exclusive, and continuous possession of the land adversely to the defendant for ten years. *Watson. Id.*

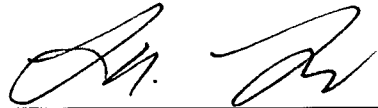
Williams' numerous witnesses and exhibits focused exclusively on Williams' assertion the Stroman Line is the eastern boundary between Williams' and Smith's tracts and the assertion Smith or person or persons unknown somehow diverted or blocked the run of what had been Dean Swamp Creek. None of these assertions, even if correct, are relevant to Williams' burden in a trespass to try title case.

The record is devoid of evidence of one or a combination of the four methods South Carolina recognizes to establish title in a trespass to try title case. The court erred in concluding the boundary line between the Smith and Williams tract is the Stroman line and its order should be reversed and the case remanded.

CONCLUSION

The court erred in concluding the Stroman line was the boundary between the Smith and Williams tracts. That decision should be reversed and the case remanded to the circuit court for retrial.

CALLISON TIGHE & ROBINSON, LLC



Louis H. Lang, Esq., SC Bar#003127
1812 Lincoln St., Ste. 200
PO Box 1390
Columbia SC 29202-1390
Telephone: (803) 404-6900
Facsimile: (803) 404-6902

Attorneys for Appellant, F. Carlisle Smith

August 27, 2014
Columbia, South Carolina

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas**

Richard B. Ness, Special Referee

Case No. 2009-CP-38-1170

Patrick J. Williams, Frank J. Wallmeyer and
Mary B. Wallmeyer, ... Respondents,

v.

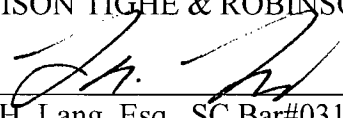
F. Carlisle Smith and First Citizens Bank and
Trust Company, ... Defendants,

Of whom F. Carlisle Smith is Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies the Final Brief of Appellant complies with Rule 211(b), SCACR.

CALLISON TIGHE & ROBINSON, LLC



Louis H. Lang, Esq., SC Bar#03127
1812 Lincoln St., Ste. 200
PO Box 1390
Columbia SC 29202-1390
Telephone: (803) 404-6900
Facsimile: (803) 404-6902

Attorneys for Appellant, F. Carlisle Smith

August 27, 2014
Columbia, South Carolina

RECEIVED

AUG 27 2014