THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, III Circuit Court Judge

Case No. 2017-CP-07-02110

Taylor Reuben Adams,..... Respondent

v.

Charles Willis Gardner,..... Appellant

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Respondent's Argument that the Appellant did not own the Dirt Road is addressed Appellant's Initial Brief.

The Respondent's arguments that the 1990 Decree of Quiet Title ruled that the Appellant did not own the dirt road and that the Appellant's own deed and plats showed that he did not own the dirt road, thus there could be no Trespass. These two issues are addressed in the Appellant's Initial Brief Sections II-V. A full recitation of those arguments would therefore be redundant.

II. Respondent's Attempt to introduce a deed into the record is improper as it violates Rule 210, SCACR.

As stated in the Appellant's Initial Brief, the Respondent failed to establish that he was a successor in interest to the Howard Property by failing to present any evidence showing the Respondent's ownership of the Howard Property. (App Initial Brief §I). To remedy this, the Respondent seeks now to put a deed into the record purporting to show that the Respondent is the owner of the Howard Property.

The Appellant objects to the inclusion of this deed in the Appellate record as it was not part presented to the lower court and thus violates Rule 210 of the South Carolina Appellate Court Rules, and it should not be subject to judicial notice as its inclusion would deprive the Appellant of opportunity to refute the veracity of the deed.

The Appellate Rules state, "The Record shall not, however, include matter which was not presented to the lower court or tribunal." Rule 210, SCACR. In his initial brief the Respondent concedes that no deed was presented in front of the lower court showing that the Respondent was the successor in interest to the Howard Property. (See Respondent's Initial Brief Argument III).

As there is no deed in the record to support this finding, the Respondent argues that the Trial Court had sufficient evidence to make the finding because the attorney's oral argument at the motion hearing and the statement that Respondent "recently purchased property located on Warsaw Island Road in proximity to the property of the Appellant" found in the Appellant's Complaint. Neither one of these arguments creates a record which should allow the inclusion of any deeds in the chain of title.

While statements of fact can constitute an "admission on file" and thus be entitled to consideration by the court in determining whether a genuine issue of material fact exists, factual statements of counsel, whether made during oral argument or in written briefs or memoranda, ordinarily may not be so considered. *Gilmore v. Ivey* 290 S.C. 53,58 348 S.E.2d 180 (Ct. App. 1986). Respondent's Counsel stating that Respondent is successor in interest to the Howard property should not be considered as a statement of fact.

Further, the Appellant's Complaint did not incorporate any deed into the record. The Appellate court took up this issue directly in *Masters v. Rodgers Development Group.*

In *Masters*, a plumber (Masters), worked on a property that was owned by Rodgers Development. *Masters v. Rodgers Dev. Grp.,* 321 S.E.2d 194 (S.C. Ct. App. 1984). On October 12th Rogers sold the property by deed to an individual named Stevenson. Id. This deed was recorded on October 13th. Id. Masters finished work on October 18th and filed a mechanic's lien against the property on December 15 naming Rodgers as the owner. Id.

Masters filed to foreclose on the mechanic's lien on the property naming Stevenson as the owner. *Masters* 321 S.E.2d at 196–97 (S.C. Ct. App. 1984). Stevenson argued that the Masters complaint stated that Rodgers had conveyed the property to Stevenson and therefore the contents of that deed could be considered by the court on appeal. Id. However, the Court disagreed stating,

"the deed was not incorporated into the complaint nor is it otherwise a part of the record before us. We are, of course, confined to the record in reviewing a judgment for error." *Masters* at 198 *(citing South Carolina State Highway Department v. Meredith,* 241 S.C. 306, 128 S.E.2d 179 (1962).

In *Masters*, the Court refused to enter into a record a deed directly referenced in the Complaint for a specific property subject to a foreclosure action. The Respondent is asking the court in this case to allow a deed to be entered into the record purporting ownership of a specific property based on an allegation in the Complaint describing the property as "recently purchased by Respondent located on Warsaw Island Road" The Court should decline to do so.

The Respondent did not establish a record or evidence which can be used to support the inclusion of any deed in the appellate record that was not before the trial court.

III. The Court should not take judicial notice of a deed not entered into the record at the lower court.

As the Respondent did not establish a record that a deed exists purporting to transfer the Howard Property to the Respondent, it seeks for this Court to take judicial notice of a deed to establish that fact.

The Court should not take judicial notice of any deed outside of the record because the Trial court did not do so and doing so at the appellate level would involve adjudicating facts that are in dispute.

The issue here is not whether or not a Trial Court has the right to acknowledge the existence of recorded deeds within its jurisdiction, but whether the Trial Court did in this case.

The Trial Court simply did not take judicial notice of any deed in this case. The Trial Court explicitly stated what it relied on to make its findings of fact and it did not consider nor rely upon any deed establishing ownership in any property in the Respondents. (Order Grant Partial Summ.

J. to Resp't, Findings of Fact, pp. 1 and See Mot. Hr'g Tr., pp. 12,13). The Respondent provides no factual basis to show that the Trial Court took judicial notice of the deed.

The Respondent failed to meet its burden of presenting evidence into the record supporting the finding of fact that he was the successor in interest to the Howard Property. The lower court made a factual finding based on no evidence. The Respondent is asking the Appellate Court to take judicial notice of a deed it did not submit and did not allow the Appellant an opportunity to contradict.

Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. *Masters* 321 S.E.2d at 196–97 (S.C. Ct. App. 1984) Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Id. Original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable. Id.

In *Masters* the court found that the recitals in a deed stating whether or not a party paid valuable consideration did not constitute "indisputable matter" subject to judicial notice in the Appellate Court. *Masters* 321 S.E.2d at 196–97 (S.C. Ct. App. 1984). If a court were to take judicial notice of a recital of consideration in the deed, it would also be obliged to give Masters the opportunity to contradict it. Id.

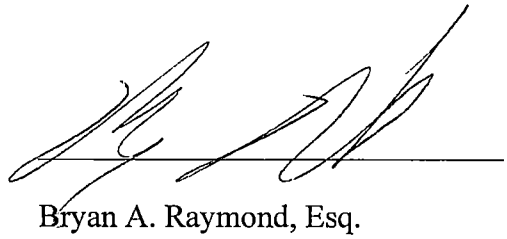
The only relevance of any deed purporting to convey ownership of a piece of property to the Respondent is to provide evidence to support the Trial Court's finding of fact that the Respondent is the successor in interest to the Howard Property. The Respondent is not asking the Appellate Court to take judicial notice of the existence of the deed. It is asking the Appellate Court to take judicial notice that the deed conveys the Howard Property to the Respondent, that the entire

chain of title is free from defects, and that the metes and bounds of the deed include the Road and Boat Landing. The Appellant should have an opportunity to dispute the veracity of this evidence. Therefore, judicial notice of the deed should be denied and the deed should not be included within the record.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

May 9, 2019



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v.

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PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief on Taylor Reuben Adams by email and by depositing a copy of it in the United States Mail, postage prepaid, on May 9th, 2019, addressed to his attorney of record, Terry Finger, Post Office Box 24005, Hilton Head Island, South Carolina 29925.

May 9. 2019

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May 10, 2019

Sent Via USPS First Class Mail
The Honorable Jenny Abbot Kitchings
Post Office Box 11629
Columbia, South Carolina 29211

RE: Taylor Reuben Adams v Charles Willis Gardner
Appellate Case No. 2018-001635

Dear Ms. Kitchings:

I hope this letter finds you well. Enclosed for filing, please find a Proof of Service certifying that Taylor Reuben Adams was served through Terry Finger with the Appellant's Reply Brief on or about May 9, 2019.

Should you have any questions or concerns, please do not hesitate to contact me using the information in this heading.

Sincerely,

Bryan A. Raymond, Esq.
for Cobb Dill & Hammett, LLC

Enclosures: Proof of Service and Filing Fee

cc: Mr. Terry Finger, Esq.
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