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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Circuit Court Judge William P. Keesley

CASE No. 2016- CP-10-4122

MICHELE BLANK ……Appellant

Vs.

PATRICIA TIMMONS, TRUSTEE
OF THE GORDON H. TIMMONS
EXEMPT FAMILY TRUST…….Respondent

PETITION FOR REHEARING

Appellant respectfully requests Rehearing of this Court's Opinion filed November 30, 2022, affirming the Trial Court's dismissal of the Slander of Title and Nuisance claims for the reasons set forth herein.

I. The Court should grant Rehearing on the Slander of Title claim

A. Rehearing is required to consider the errors of law that were not addressed in the Court's Opinion.

In affirming the dismissal of the Slander of Title claim, this Court cited its obligation to "construe the evidence to support the [trial] court decision whenever reasonably possible". Opinion at 5. The Court stated that Appellant had not proved malice which as the Court recognized may be established on the basis of a lack of legal justification. "Wrongfully recording an unfounded claim against the property of another

generally is actionable as slander of title." Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct.App.1995).

The task of "construing the evince to reasonably support the Trial Court's decision" does not relieve the Court of its paramount duty which is to ensure that the Trial Court properly applied the law. Linda Mc Co. v. Shore, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) ("In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings."); Jordan v. Judy, 413 S.C. 341, 776 S.E.2d 96 (S.C. App. 2015); Appellant's Brief at p 23. "[A] reviewing court is free to decide questions of law with no particular deference to the trial court." Flexo rehearing is required for the Court to n v. PHC-Jasper, Inc., 413 S.C. 561,569-570, 776 S.E.2d 397 (Ct. App. 2015). As set forth in Appellant's Brief at pages 22-32, questions as to the proper application of the law to the facts arose from the Trial Court's decision including: a patent inconsistency in its findings, See Section B below; the apparent mistake of law which was the reason for the Respondent's "uncertainty" about the effect of her own actions in dismissing the prior boundary line dispute with prejudice that led to her recording a derogatory plat; See Section C; and whether there was evidence to reasonably support a good faith basis to justify a Slander of Title as a matter of law. See Section D.

The Court's Opinion did not mention any of these questions of law either to dismiss them as unfounded based on the evidence; or unnecessary to decide in resolving the appeal. Appellant contends that their resolution is necessary in resolving the Slander

of Title claim and that the Court should grant this Petition for Rehearing and reverse dismissal of the Slander of Title claim.

B. The Court failed to address the inconsistencies in the Trial Court's decision

The Trial Court held that the dismissal with prejudice established that the "common boundary line between Lot 11 and lot 12 is as set forth in the Site Plan of David Franklin . . . as between the parties and their successors in interest", Rp. 19, and that res judicata and collateral prevent the subsequent litigation of the issue. Id. Appellant contended that there was a demonstrated inconsistency in the Trial Court's finding that the boundary line was clearly established based upon the dismissal with prejudice and its finding of "uncertainty" thereafter. Appellant's Brief at p. 25. However, the Court's Opinion, while mentioning this issue, did not address the inconsistency and its failure to do so is significant. "[W]hen there are two inconsistent rulings, the conclusion of the court will be referred to that which is based upon a sound principle, and the other ruling will be disregarded as surplusage." Sandel v. State, 126 S.C. 1, 119 S.E. 776,788 (1922).

The Trial Court's holding that the established principle of res judicata and the long-standing principle that a boundary line was established in a trespass to try title case created certainty as to the location of the boundary line; and was the controlling ruling. The inconsistent holding of "uncertainty" which is not based upon any case law, Court Rule or legal principle could not control the disposition of the case. Appellant's Brief at p. 25. As is discussed below, a finding of "uncertainty" or mistaken belief based upon a lack of a detailed order is without any legal basis. Accordingly, Rehearing is requested

for the Court to address the violation of Sandel v. State, that resulted in the Trial Court's reliance on an inconsistent concept, "uncertainty", in denying the Slander of Title claim.

C. The Court did not address why Respondent's "uncertainty" or "mistaken belief" was not the result of a mistake of law.

The Court's Opinion did not address Appellant's argument, Appellant's Brief at 26-27 that Respondent acted under a mistake of law when filing the two plats, P-17& 18 which the Trial Court found to be derogatory. Rp. 21. This omission is significant because Respondent should be precluded from any affirmative of defensive relief from the consequences of her actions. Appellant's Brief at p 23. "The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief." Minshew v. Atlantic Coast Lumber Corp., 98 S.C. 8, 81 S.E. 1027 (1914).

As Appellant asserted, Brief at page 28, the Record supports the factual basis for this finding. Christopher Lanning, Respondent's trial counsel in the prior case testified that he didn't give up his client's right to claim the disputed boundary line, Rp 269, line 10-23; and Respondent said that she didn't think she gave up her right to the disputed boundary line as a matter of "common sense." Rp 345, line 18-22. They both thought that Respondent's boundary line claim was intact, but were wrong as a matter of law, not fact. Similarly, Gordon Timmons testified that the filing of P-17, which retained their same boundary line and a proposed settlement area which was rejected a few weeks earlier was a means to settle a boundary line dispute. Appellant Brief at page 31.

Therefore, the Record is clear that Respondent's error as to the legal effect of the dismissal led to the filing of the plats which makes those actions unjustified and not a

defense to slander of title. See In re Estate of Holden v. Holden, 336 S.C. 456, 462, 520 S.E.2d 322 (Ct. App. 1999) (mistake in executing disclaimer was a mistake of law rather than a mistake of fact because decedent was fully aware of the existence of his daughter but did not realize the legal consequences of the disclaimer). Rehearing is necessary for the Court to consider whether a mistake of law controls the disposition of the Slander of Title claim.

D. There is no factual or legal basis for a good faith mistake.

The Court agreed with the Trial Court's decision that the filing of P-17&18 was not malicious because the Order of Dismissal did not require Respondent to provide a quitclaim deed or take other affirmative action and that Gordon Timmons was justified in filing P-17 as part of a dispute resolution process. R.p. 23. R. The Court's affirmance is neither legally sound nor supported by the Record to permit this Court to affirm as "reasonably possible".

The Order of Dismissal with Prejudice was the result of the Respondent's voluntary act as all of the evidence shows. See Section C. If Respondent wanted to ensure that only the issue of encroachment was decided against her, she could have done that. R. 41(a), S.C.R.C.P. allows the dismissing party to limit or reduce the effect of the dismissal but Respondent's Counsel did not do so. Without any reservation of rights, Respondent is bound by the legal consequences arising from res judicata which is a preclusion of any claims which were decided against her as a matter of law. See R.p. 18-19, which is the law of the case since not appealed. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling is law of case).

No affirmative order by the Court is required to create or describe the legal effect of the Dismissal with Prejudice; no statute, case or other authority has been found or cited by Respondent or any Court including this one. Respondent did not have to take any action only to refrain from action since she gave up her legal right to contest Franklin's boundary line that was established as a matter of law.

There is no South Carolina case involving a slander of title which remotely suggests that a lack of an order justifies a slander of title. Appellants Brief at page 26-27. Therefore, this Court should have disregarded this finding. Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015).

Further, as Appellant demonstrated, Brief at page 31, Respondent's Attorney did not attempt to justify his opinion that all he gave up was the right to sue for trespass based upon any legal analysis or theory to distinguish the earlier case from precedent. Consequently, there were no facts upon which the Trial Court could find that he was reasonable in his interpretation of the law.

Attorney Lanning stated he was not consulted about the filing of the Plat. Respondent did not state she relied upon his advice to file the plat. She stated that she dismissed the case "because it was appropriate." Appellant's Brief at page 19. The Trial Court never found that Respondent relied upon advice of counsel in filing either plat. Respondent never pleaded or proved that she relied upon advice of counsel, therefore she has waived the "advice of counsel" defense as the basis for asserting a mistake of fact as a defense to a slander of title claim. See Bloom v. Beam, 99 A.3d 263, 266 (D.C. Ct. App. 2014). Respondent acted without justification since pursuing a frivolous claim is not in good faith. See R. 11(a), S.C.R.C.P.; Helena Chem. Co. v. Allianz Underwriters

Ins. Co., 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004) (no reasonable basis to support decision for contesting a claim).

Slander of title cases typically address the legal issues as the predicate for determining whether a derogatory filing against title is legally justified. See D.R. Horton, Inc. v. Wescott Land Co., 410 S.C. 319, 764 S.E.2d 701 (2014) (filing of a lis pendens was absolutely privileged); Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct.App.2002)(judicial proceedings were privileged). These cases provide the model for deciding a slander of title action, i.e., whether the action is legally justified because a lack of legal justification constitutes malice. The Trial Court never considered whether there was a lack of legal justification as an aspect of the case. This Court accepted the Trial Court's conclusion of a "mistaken belief" as a basis for a lack of malice when the validity of the belief should have been considered but wasn't.

Appellant established that the Trial Court erred in its conclusion because the facts did not support its holding. Appellant's Brief at page 26-27. The Trial Court found that the Trust was "attempting to follow the legally required procedure to establish a boundary line . . . as per the September 14, 2016, Order Amending Lis Pendens." R.p. 22. The Record shows this finding to be without a factual basis. P-17 was recorded on June 24, 2016, this suit was filed on August 9, 2016. R.p.38. The filing of this Plat was the basis for the Complaint, R.p. 39, Para. 8, seeking Declaratory Relief and the Amended Complaint asserting a slander of title claim and special damages. R.p. 56, Para. 30. This plat was referenced in and attached to the Lis Pendens not the result of any court order. R.p. 36,37.

As Gordon Timmons admitted, P-17 did not contain both boundaries, only what Respondent claimed in the earlier case and the dotted line area which Appellant had previously rejected. As such it cannot be a bona fide effort to settle. Brown v. Hanson, 2011 S.D. 21, 798 N.W.2d 422,429 (S.D. Sup. Ct. 2011)(reasons given for filing cancellation of easement were "illusory, false, and pre-textual."). Therefore, the Court's affirmance of Timmons "good faith" efforts is not based upon evidence that is reasonably possible of sustaining the conclusion. A Rehearing is necessary for the Court to address these facts and explain why they do not control the decision that there was no legal justification due to a mistake of fact.

Based upon all of the above, the Court should grant Rehearing on the Slander of Title claim due to the lack of any analysis about the errors of law and the facts which do not permit the Court to find a reasonable basis for affirmance.

II. The Court should grant Rehearing on the Nuisance claim

This Court should grant a Rehearing because there is not a reasonable basis to sustain the Trial Court's decision dismissing the Appellant's Nuisance claim. The three "pillars" of the Trial Court's decision cannot be reasonably supported because one or more of them is based upon excluded testimony which was prejudicial; and testimony that should have been excluded because it was prejudicial; another one of them is not based upon the facts or the uncontradicted testimony of Appellant (not found to be unreliable) and because the nature of the nuisance is such that it satisfies the exceptions to the common enemy rule, not considered by the Court.

A. This Court's findings about the Strong and Timmons testimony are not supported in the Record.

This Court made two findings which affected its decision on the outcome of the case: disregarding the trial Court's reliance on the testimony of Mark Strong (which had previously been excluded) as harmless; and this Court's affirmance of the Trial Court's decision to allow Gordon Timmons' testimony which was necessary and therefore prejudicial, to support the adequacy of Respondent's alternate driveway design so that the driveway could not cast considerable flood waters on Appellant's property.

1. The Record reflects that the Strong testimony was prejudicial and not cumulative

This Court held that the Trial Court's reliance on the Strong testimony was harmless because it was cumulative. However, the Record does not support this conclusion. Part of Strong's testimony did address the proposed construction and Appellant's rejection of a swale and the driveway regrading to drain water away from Appellant's property as did Timmons. However, Strong also testified in greater detail about the construction of the concrete driveway, i.e. that the edge of the slab was brought up to try to control runoff; and that he saw rainfall coming down the driveway from the rear toward the street. Rp. 356-357. This testimony was not cumulative because it contained specific details and an eyewitness statement neither of which Timmons discussed. Since the Trial Court explicitly relied upon Strong's testimony, this Court should not have concluded it was harmless. See State v. Funderburke, 251 S.C. 536, 164 S.E.2d 309 (S.C. 1968).

This Court's Opinion relied upon its earlier decision in Turner v. Med. Univ. of S.C., 430 S.C. 569, 846 S.E.2d 1 (S.C. App. 2020) for the proposition that the evidence was cumulative, but the testimony in Turner was essentially the same; here it was not and

unlike Turner, Appellant objected to the other testimony which was supposedly cumulative and has challenged it on appeal. Turner v. Med. Univ. of S.C., 430 S.C. 569,591, 846 S.E.2d 1 (S.C. App. 2020). Accordingly, Turner does not support this Court's Opinion.

"Cumulative evidence has repeatedly been defined to be additional evidence of the same kind to the same point. McCabe v. Sloan, 184 S.C. 158, 191 S.E. 905, 909 (1937); Johnston v. Belk- McKnight Co. of Newberry, 188 S.C. 149, 198 S.E. 395, 399 (1938). Timmons testified in generalities, Strong in specifics. "Nor is evidence cumulative in the legal sense which, while tending to establish the same general result, does it by proof of a new and distinct fact. To render evidence subject to the objection that it is cumulative, in the legal sense, it must be cumulative, not with respect to the main issue between the parties, but on some collateral or subordinate fact bearing on that issue." Johnston v. Belk-McKnight Co. of Newberry, S. C., Inc. 188 S.C. 149, 198 S.E. 395 (1938).

No Supreme Court case has extended this definition of "cumulative evidence" to include evidence that is different in nature such as an alleged eyewitness statement to the very condition which is in dispute and of a greater specificity than otherwise described. Thus, this Court should not have regarded Strong's testimony as cumulative; and since the Trial Court explicitly relied upon it, it must be prejudicial and constitute reversible error. State v. Brockmeyer, 406 S.C. 324, 356, 751 S.E.2d 645, 662 (2013); State v. Garner, 389 S.C. 61, 67- 68, 697 S.E.2d 615, 618 (Ct. App. 2010).

2. The Timmons testimony was prejudicial and should have been excluded

Appellant contended that the Trial Court abused its discretion in allowing Gordon Timmons to testify over objection that he was not identified as having knowledge on anything other than the alleged encroachment of Appellant's house on Respondent's property, because she was prejudiced. Appellant's Brief at page 38-40. Respondent had a continuing duty to provide a full disclosure about the identity and substance of each witness' testimony. R. 33(b) SCRCP; Bensch v. Davidson, 354 S.C. 173, 182, 580 S.E.2d 128, 132 (2003). This requirement of disclosure of information before trial is established to avoid surprise and to promote decisions on the merits after a full and fair hearing. Id. at 182, 580 S.E.2d at 132-33. When a violation of Rule 33 occurs, the trial court has discretion to impose a sanction upon the violating party, such as the exclusion of a witness, if warranted. Id. Although exclusion of a witness should not be lightly invoked, Jumper v. Hawkins, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001), Appellant demonstrated it was merited in this case.

Respondent's Answers to Interrogatories did not disclose any witness as to any other issue in the case other than the "encroachment "which Counsel reasonably understood referred to the boundary line claim which Respondent had asserted as a Counterclaim. Appellant's Brief at page 20; Rp. 48, 490. Despite the Appellant's Slander of Title and Nuisance claims being in the case from the early stages, Respondent did not address these issues as is evident from her failure to disclose the name of Mark Strong who also was offered as a witness on the same subject as drainage but later excluded. Appellant's Counsel had no knowledge or indication that Gordon Timmons had

experience in construction or was familiar with the drainage design of the house on Lot 12. Appellant's Brief at page 39; Rp. 490-491.

Appellant's contention that she was prejudiced by the allowance of Gordon Timmons testimony over objection is supported in the Record. First, the Trial Court found him to be an "impressive witness", R.p. 8, and relied upon his testimony together with Strong's to find that the driveway design was adequate. R.p. 26. Second, Timmons testified in generalities about the driveway design and drainage which this Court found was circumstantial evidence of the adequacy of the drainage system. Opinion at page 7, fn 1. Timmons' testimony cannot be both "non prejudicial" and the very evidence that the Court relied upon to affirm the Trial Court's finding of an adequate drainage design. Opinion at page 7. "'Error is harmless where it could not have reasonably affected the result of the trial." Judy v. Judy, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009). Since the Strong testimony is clearly prejudicial and not cumulative, only Timmons' testimony supports the Trial Court's finding of adequacy of the drainage design.

As Appellant asserted, Appellant's Brief at page 39, the Trial Court's decision was dependent on both Strong and Timmons. R.p. 26. The Trial Court's decision clearly supports only one conclusion that allowing the Timmons' testimony was also prejudicial, and that a reversal is the only solution. State v. Brockmeyer, 406 S.C. 324, 356, 751 S.E.2d 645, 662 (2013); State v. Garner, 389 S.C. 61, 67- 68, 697 S.E.2d 615, 618 (Ct. App. 2010). "The admission and rejection of testimony is largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion." Elledge v. Richland/ Lexington Sch. Dist. Five, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002). However, an abuse of discretion is a conclusion with no

reasonable factual support. State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000); State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct.App.2007).

Without Gordon Timmons, Appellant's testimony was undisputed. If the design was inadequate, then it would not be unreasonable to conclude that flooding resulted from the driveway. Therefore, this Court must reconsider its ruling on the Timmons testimony and grant a Rehearing.

B. The Trial Court's rejection of Appellant's uncontradicted testimony lacked any Justification and its finding is not supported as reasonably possible

This Court affirmed the Trial Court's finding that the "studio was constructed in a manner that subjected it to occasional flooding during large amounts of rain". Opinion at page 9. Appellant did testify that her studio flooded after Hurricane Matthew and Hurricane Irma, both of which occurred after Respondent built her house; but that no flooding occurred during the years since 2005 that she lived there. Appellant's Brief at page 11. These years included single day heavy rainfall events in 2008 when there were 5.25 inches of rainfall and 2015 when there was 9.25 inches of rainfall, the 1000-year flood. Rp. 565. Appellant also stated that water rarely comes into the wetlands to the rear of her house. Appellant's Brief at page 13.

Also of significance, Appellant testified that whenever 2-3 inches of rain was predicted she had to move her materials and equipment to avoid flooding and that ponding in the front yard results every time it rains. Appellant's Brief at page 12-13. Photographic evidence established that the driveway was raised about 4" above Appellant's side yard. R.p. 548. Appellant never saw water ponding in the front of her property previously, until the driveway was installed; now it accumulates there every time it rains, causing mosquitos to breed as shown in a recent photographic exhibit taken

in April 2019. Appellant's Brief at page 11; R.p. 549. The Trial Court did not give any reason why Appellant's testimony was not worthy of belief, R.p. 25, and its decision is arbitrary. State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009) (basis required for trial court's finding of lack of credibility); Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860, (1983); Okatie River v. Southeastern Site Prep, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003).

While this Court is obligated to "construe the evidence to support the [trial] court decision whenever reasonably possible", the Court cannot ignore the overwhelming evidence to support the Nuisance claim that ponding occurred due to construction of Respondent's driveway, which was not rebutted or addressed by the Trial Court as lacking in credibility. Appellant Brief at page 36. "The court does not always have to accept uncontradicted evidence as establishing the truth; however, it should be accepted unless there is reason for disbelief." Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860, (1983); Okatie River v. Southeastern Site Prep, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003). See State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009) (basis required for trial court's finding of lack of credibility).

Other undisputed evidence further supports Appellant's testimony. The driveway parking area to the rear is at a higher elevation that Appellant's property since the driveway was raised to reverse the normal drainage flow from back to front. The driveway changes direction to the right at the point of Appellant's trailer adjacent to her studio, where the flooding was first identified. R.p. 542,549,550.

As Appellant pointed out, Appellant's Brief at page 42-43, the Trial Court stated: "FEMA denied Ms. Blank's flood claim because the area involved is on the ground floor

in violation of the AE-14 flood zone." R.p. 17, but there was no evidence on the Record to support this finding. Appellant admitted that her studio is in a flood zone and that she had flood insurance but asserted she was denied any coverage for Hurricane Matthew on the basis that there was no "flooding" only rainwater. R.p. 422, line 17-20; R.p. 423, line 2-8; R.p. 446, line 21 to R.p. 447, line 2; R.p. 452, line25 to R.p. 453, line 2. Therefore, the Trial Court did not have a valid basis to conclude that the Appellant's house was susceptible to flooding because of some design flaw since none was cited and flooding did not occur prior to the Respondent's home construction.

In summary, the Record does not allow this Court to "construe the evidence to reasonably support the Trial Court's decision" that Appellant's studio was susceptible to flooding only during heavy rainstorms. To do so, the Court would have to ignore the Appellant's uncontradicted testimony: that there was no flooding before the driveway was completed; that flooding after the driveway was completed was significant during heavy rains, and less significant but nonetheless disruptive in 2-3 inches of rain but always a factor after every rainstorm. The facts relied upon by the Court, wetlands to the rear and grading do not establish any propensity to flooding from extreme rainfall and are contradicted by Appellant's testimony which the Court did not find to be incredible as it must in order to disregard it. State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009) Accordingly, the Petition for Rehearing should be granted.

C. The Court excluded Franklin's expert testimony about drainage without justification.

The Court affirmed the Trial Court's wholesale exclusion of David Franklin's testimony including his opinion as to the cause of the flooding on Appellant's property. Opinion at page 7-8. As Appellant demonstrated, Appellant's Brief at page 37, Franklin

opined that the driveway prevented the natural drainage flow on Lot 11 from front to back because it impeded the natural flow to the rear; and that significant vegetation and higher grade caused rainwater to pond on the side of the driveway until it overflows into the rear ditch. These conditions violated the County Stormwater Regulations. Id. Respondent did not offer any contradictory evidence. This testimony addressed the second exception to the common enemy rule that "an upper landowner may not, by means of a ditch, impoundment or other artificial structure, collect surface water on his own land and cast it in a concentrated form upon lower adjoining land." Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505, 511, 598 S.E.2d 712 (2004).

The Trial Court failed to consider this part of Franklin's testimony but gave no specific reason why it was not credible. See State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009)(basis required for trial court's finding of lack of credibility). "The court does not always have to accept uncontradicted evidence as establishing the truth; however, it should be accepted unless there is reason for disbelief." Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860, (1983); Okatie River v. Southeastern Site Prep, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003).

The Record established that David Franklin had a strong technical background, being a licensed Engineer in the states of South Carolina, Georgia, Tennessee and California and Land Surveyor in South Carolina, a licensed residential builder and commercial licensee for general contracting and mechanical contracting. He owns a full-service engineering company for mechanical, electrical structural and stormwater management design, which has been operating since 1979. Appellant's Brief at pages 15-16. No other witness had his breadth of experience and technical training.

The Trial Court discounted all of Franklin's testimony based upon alleged interest and bias because Franklin was the surveyor whose survey was used to determine Appellant's boundary line and who prepared the foundation plan. However, this disqualification did not apply to Franklin's opinion on the drainage from Respondent Lot 12 with which no such bias or interest pertained; or to the technical regulations which were entered into evidence. R.p. 492-496. Franklin was a licensed Engineer subject to professional Standards of Conduct and experienced in drainage design. R.p. 14-15. Therefore, the Trial Court's rejection of this testimony without an independent basis to reject it is improper. See State v Littlejohn, 33 S.C. 699, 11 S.E. 638 (1890) (Court may not find witness to be "false in all" without a basis for his unreliability).

The Trial Court found Franklin to be "combative and dismissive". R.p. 25. This was based upon what occurred during cross examination on his testimony that he found all four property corners in surveying Appellant's property. Respondent's Counsel repeatedly suggested that Franklin moved the entire left side boundary line in order to avoid the wetlands and fit Plaintiff's house on Lot 11. R.p. 316, line 15-21; R.p. 321, line 7-25; R.p. 322, line 6-8, line 16 to R.p. 323, line 2; R.p. 323, line 11-12; R.p. 326, line 9-19, line 23-24. After repeatedly being asked about moving the property line and objections being raised to the repetitive nature of the questioning Franklin understandably bristled at this suggestion as to where the property line was, at which point, Respondent's Counsel was quick to exploit his reaction by accusing Franklin of yelling at him. R.p. 329, line 23-25. This reaction is certainly understandable and not suspect or indicative that Franklin was lying about what he found when he did the site work. This can hardly be considered as a reasonable basis to discredit an otherwise experienced professional.

See Elwood Construction Co. v. Richards, 265 S.C. 228,234, 217 S.E.2d 769, 771-772 (1975) ("We have searched the record in this case and find nothing which justifies disregarding the testimony of Mr. Gaillard, the surveyor. He appears to be fully qualified and his method . . . is well known to be one commonly used by surveyors."). Appellant urges this Court to reconsider its affirmance of the Trial Court's findings on Franklin's credibility, which exclude any consideration of Franklin's testimony on drainage, as lacking in a factual basis. Jordan v Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015).

Therefore, Appellant respectfully requests a Rehearing to enable this Court to consider whether the Trial Court violated the Littlejohn case by using an overbroad reason to reject testimony that was not applicable to the basis for the finding on credibility.

D. The per se exception to the Common enemy rule was not correctly applied

Appellant asserted that there was a per se nuisance. See Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505,512, 598 S.E.2d 712 (2004)(flooding in heavy rains may be nuisance per se); Suddeth v. Knight, 280 S.C. 540, 544- 545, 314 S.E.2d 11, 14 (Ct. App. 1984)(ponding due to heavy rains may be nuisance per se). Appellant testified that she sustained damages during hurricanes Mathew and Irma of $14,000.00 but that she had to disrupt her work every time the weather forecast called for 2-3 inches of rainfall. This has caused a major disruption to her business. R.p.422, line 10-11. She had to take these preventative measures when the rainfall was expected to exceed 2"-3", about 10-12 times in the preceding year, and about ten times in 2017. R.p. 433, line 16 to R.p. 434, line 21. Also, there was ponding and mosquitos breeding in her front yard every time it

rained. By characterizing the flooding only as occasional contrary to Appellant's testimony which was not deemed unreliable, see Section C, the Trial Court failed to consider all the evidence and correctly apply the law.

This Court affirmed the Trial Court's decision, but the evidence does not reasonably support that conclusion. The Trial Court's decision does not address the number or extent of the disruptions or the mosquitos and find them not to constitute a basis for a nuisance per se. Deason v. Southern Railroad Co., 142 S.C. 328, 140 S.E. 575 (1927); Suddeth v. Knight, 280 S.C. 540, 545, 314 S.E.2d 11, 14 (Ct. App. 1984).Its decision is incomplete as a matter of law and therefore cannot be sustained. Therefore, this Court should grant a rehearing.

CONCLUSION

For all the reasons set forth above**,** Appellant urges the Court to grant her Petition for Rehearing to correct errors that have no legal or factual basis.

Respectfully submitted,
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Dated: December 14, 2022

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December 14, 2022

Ms. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter St.
PO Box 11629
Columbia, SC 29211

Re: Blank v Timmons
Case No. 2019-001555

Dear Ms. Kitchings:

I am enclosing for filing the original and six copies of Appellant's Petition for Rehearing of the Decision and Order dated November 30, 2022, the Certification of Service and my check for the filing fee of $50.00. If you have any questions, please do not hesitate to call. Thank you for your kind assistance.

Very truly yours

Edward A. Bertele

Encl:
CC: Mark Mason, Esq.