THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
William P. Keesley, Circuit Court Judge

CASE No. 2016- CP-10-4122

MICHELE BLANK.....Petitioner

Vs.

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

PETITION FOR WRIT OF CERTIORARI

Edward A. Bertele, Esq.
SC Bar No. 72521
1812 Pierce Street
Charleston, SC 29492
843-471-2082
ebertele@msn.com
Attorney for Petitioner
Michele Blank

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

QUESTIONS PRESENTED FOR REVIEW

1. Did the Trial Court err as a matter of law in dismissing the slander of title claim?
2. Is it reasonably possible to sustain dismissal of slander of title based on the evidence?
3. Was Petitioner prejudiced by the Trial Court's reliance on excluded testimony and testimony which should have been excluded resulting in dismissal of the nuisance claim?
4. Did the Trial Court unjustifiably ignore uncontradicted testimony from Petitioner and her expert witness?
5. Did the Trial Court improperly reject Petitioner's expert witness' testimony as "false in one - false in all" ?
6. Did the Trial Court err in applying the law of nuisance?
7. Is it reasonably possible to sustain the dismissal of nuisance based on the evidence?

STATEMENT OF THE CASE

In 2005, Petitioner contracted to purchase Lot 11 in the Copahee View Subdivision and have a house built. R.p. 7. David Franklin, P.E. & L.S. prepared the site plan based upon finding iron pipes for all four corners of the lot, the best available data. R.p. 298, line 16 to R.p. 299, line 8; R.p. 538. The house was located within the lot lines indicated on the site plan. R.p. 301, line 3-9. Respondent purchased Lot 12 in 2013 and hired Parker Land Surveying (PLS) to perform a survey. R.p. 8. The surveyor could not find iron pipes at all the corners and used a less reliable method to locate them. Id. R.p. 683. The PLS plat showed that Petitioner's house encroached on Respondent's lot. R.p. 8-9; R.p. 539. Respondent offered to move her boundary line to remove the encroachment but Petitioner refused the proposal because it ignored Franklin's line. R.p. 402, line 8-21; R.p. 403, line 4 to 404, line 12.

Respondent sued Petitioner in 2015 for trespass by Petitioner's house over the PLS boundary line. R.p. 10; R.p. 570-574. Petitioner denied trespass based upon the Franklin boundary line. R.p. 10;R.p. 575-591. Respondent agreed to settle the case before trial by a dismissal with prejudice because she thought it was appropriate. R.p. 343, line 5-9. She believed that she didn't give up the boundaries based on common sense. R.p. 345, line 18-22. Her Attorney Lanning thought that the dismissal with prejudice only meant that Respondent could not bring an action for the same relief because there was no testimony or findings of fact or conclusion of law. R.p. 271, line 14 to R.p. 272, line 8. He didn't reserve any rights with respect to the boundary line. Id; R.p. 371, line 25 to R.p. 372, line 3. A Form Four Order of Dismissal with prejudice was entered which did not contain any conditions. R.p. 685.

Shortly thereafter, Respondent told Andrew Gillette of PLS to file a Plat, P-17 containing the PLS boundary lines. R.p. 344, line 16 to R.p.345, line 11. R.p. 686. P-17also has the same dotted line that was offered to Petitioner before the case was filed; R.p. 516, line 5 to R.p. 517, line 14; it has a quitclaim area but that land was never given to anyone. R.p.346, line 11-20; R.p. 686. Gordon Timmons, Respondent's husband thought it was the way to settle a boundary line dispute. R.p. 512, line 25 to R.p. 513, line 23.

Petitioner then filed suit for declaratory relief that the Franklin boundary line was established by the dismissal with prejudice of the earlier case and was res judicata. R.p. 38-40. Petitioner added claims for slander of title based upon P-17 and nuisance due to construction of Respondent's driveway that caused stormwaters to damage her property. R.p. 55-56.

During construction on Respondent's lot, Petitioner saw fill being added to raise Respondent's lot and that the driveway was built on top of that. R.p. 410, line 8 -19; R.p. 413, line 4-5, 17-20. The finished driveway is 3 ½" - 4" higher that Petitioner's lot R.p. 420, line 11-

22; R.p. 548. Photos taken during construction show the driveway's elevation and water ponding. R.p. 410, line 8 -19; R.p. 411, line 13-21; R.p. 540-542.

From 2005 until 2016, when the Respondent's house and driveway were completed, Petitioner's studio never flooded. R.p. 413, line 17 to R.p. 414, line 3. The South Carolina Department of Natural Resources records indicate that single day rainfall events of 3" or greater occurred in 2005, 2008-2010, 2012 and 2015 (when there was 9.25 inches of rainfall, the 1000-year flood). Rp. 565. Her studio stayed dry during the 1000 year flood. R.p.414, line 1-3. During Hurricane Matthew in 2016, the water level inside her studio rose to 6"-7" from rainwater; R.p. 416, line 12 to R.p. 417, line 1; R.p. 417, line 23 to R.p. 420, line 5; R.p. 544-547. R.p. 544-548; and she saw rainwater running off the driveway on Respondent's lot like a waterfall. R.p.414, line 20- 23. She wasn't prepared for flooding because nothing had happened in the past. R.p. 414, line 10-15. Her studio also flooded during Hurricane Irma. R.p. 427, line 10-15. That storm caused her to lose work time and time to cleanup afterwards. R.p. 427, line 21 to R.p. 428, line 3. Department of Natural Resources records indicate that single day rainfall during those two hurricanes was 4.36" and 4.53" respectively.

Photos taken in April 2019 show flooding occurs in the front corner of her property next to the driveway every time it rains. R.p. 421, line 2-13, R.p. 429, line 5 to R.p. 430 line 9; R.p. 549,550. Since Hurricanes Matthew and Irma, whenever heavy rainfall is predicted as 2"-3", she has to move her trailer and take everything off the studio floor, R.p. 421, line 2 to R.p. 422, line 9, causing major disruption to her business. R.p.422, line 10-11. She did this 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.

David Franklin's survey instrument recorded the topography on Petitioner's and Respondent's lots as part of his survey work in 2005. R.p. 303, line 22 to R.p. 304, line 22.

Franklin is a civil engineer experienced in drainage problems. R.p. 294, line 14-24. 295, line 23 to R.p. 296, line 16 . According to his field data, both lots drained from the front to the back. Id. Currently, the drainage flow on Petitioner's lot was not affected after her house was built. R.p.304, line 23 to R.p. 305, line 16. However, on Respondent's lot, the construction of the house and driveway altered the drainage flow direction; it now ran from back to front, across the new driveway onto Petitioner's lot. R.p.305, line 17 to R.p. 306, line 25. In Franklin's opinion the driveway design and other conditions on Respondent's lot caused stormwater to back up on Petitioner's property. R.p. 309, line 14 to page 107, line 2. The driveway impeded natural flow and the higher grade at the rear caused water to pond alongside the driveway until it got high enough to flow into the ditch. R.p. 307, line 1-6. This violated the Charleston County Stormwater Regulations. R.p. 310, line 3 to R.p. 311, line 5; R.p. 692-696.

Franklin designed the foundation for Petitioner's house which was in an "A" flood zone; the house was elevated and it was not illegal to enclose the ground floor. R.p. 318, line 21 to R.p. 319, line 13. The subdivision plat required that all lots be filled one foot above the roadway ditch but that was an earlier Charleston County requirement. R.p.320, line 6 -12. The lot was graded one foot above the roadway since there was no ditch and the house built according to the applicable codes and regulations in 2005. R.p. 321, line 8-11;R.p. 333, line 8-12.

Mark Strong, the contractor who built Respondent's house was called by Respondent to testify at trial to rebut Franklin.R.p. 353, line 2-3. Petitioner's Counsel objected because his name had not been provided in discovery. R.p. 352, line 8 -22. Strong was allowed to testify subject to the objection. R. p. 353, line 24-25. Strong said after he learned about a boundary line dispute , he moved the house eastward and raised the pad 1-1 1/2 feet above grade to ensure that it was sloped away from the house. R.p.354, line 8 to 355, line 10. He sloped the concrete

driveway six inches down and away from the garage to meet code and then flattened out and brought the edge up to try to control runoff toward the road." R.p. 356, line 23 to R.p. 357, line 5. He was there when it was raining and saw water flowing toward the street. R.p. 357, line 6-13. After his direct testimony, the Court sustained the objection and excluded it. R.p.358, line 11-12.

Gordon Timmons, Respondent's husband testified that when the house was moved to the left there was plenty of room for a large turning driveway. R.p.481, line 4-18. Timmons also admitted that P-17 did not show the disputed area, which was larger than shown and identified later so Respondent could close title with the contract buyers, R.p.517, line 20 to R.p. 518, line 1, R.p. 524, line 11 to R.p. 525, line 5.When Respondent's Counsel asked him about drainage on Lot 12, Petitioner's Counsel objected because his testimony was beyond what was disclosed in discovery: " encroachment of Petitioner's house on Respondent's lot". R.p. 489, line 24 to R.p. 490, line 16. The Court said the casting of the stormwater on Petitioner's lot was a trespass and overruled the objection. R.p. 491, line 15-24.Timmons said that the land slopes away from Petitioner's house toward Respondent's lot as shown on Petitioner's exhibits and that water on Petitioner's side yard should drain to the woods behind and away from Petitioner's house. R.p. 492, line 24 to R.p. 493, line 13.He said that the driveway is sloping toward Lot 12 and the street . R.p. 493, line 18 to R.p. 494, line 6. Timmons said that the driveway next to the garage is further back on the lot than the Petitioner's house. R.p.495, line 20 to R.p. 496, line 5.

The Trial Court granted Petitioner declaratory relief that Franklin's boundary line was established in the earlier case by the dismissal with prejudice and was res judicata. R.p.17-19. However, the Court found that there was " uncertainty" as to resolution of the boundary line following the dismissal with prejudice R.p. 5,9-12,17, 20-23. The Court found that the Form Four Order didn't request Respondent to take any affirmative action or grant any relief ; and that

filing P-17 was a recognized method for resolving a boundary line dispute and thereby dismissed the slander of title claim. R.p. 23-24.

As to the nuisance claim, the Trial Court found that the driveway and grading on Lot 12 did not cause considerable amounts of stormwater to flow onto Petitioner's lot, R.p. 24; that Respondent made adequate provision for drainage, R.p.25; that Appellant's studio was subject to flooding due to the manner of its construction and that rainfall which gave rise to the flooding was "occasional". R.p. 25. The Trial Court expressly relied upon the testimony of Mark Strong which it had excluded, and Gordon Timmons, who it found to be an "impressive witness," because of his experience as a builder and knowledge of building projects. R.p. 8, 26.

The Court of Appeals affirmed dismissal of the slander of title based upon a lack of malice and construing the evidence to support the Trial Court's decision whenever reasonably possible. Decision at 5. Petitioner requested Rehearing based upon errors of law including inconsistency of findings, that a mistake of law precluded any defense of a mistake of fact and the lack of factual and legal bases for the finding of no malice. Petition at 1-8.

The Court of Appeals affirmed dismissal of the Nuisance claim because the Trial Court's reliance on excluded testimony was cumulative and harmless error; that Gordon Timmons testimony was to be expected and not prejudicial and the Court had considered all of the facts and correctly found no nuisance. Opinion at 6-9. Petitioner sought rehearing because the Strong testimony was not cumulative, the Timmons testimony was prejudicial and should have been excluded for a discovery violation; that Petitioner's and Franklin's uncontradicted testimony was ignored without justification; that the Court failed to follow the law on the effects of occasional flooding as nuisance; and that it wasn't reasonably possible to sustain the decision based upon the evidence. Petition at 8.

ARGUMENT IN SUPPORT OF THE PETITION

I. DISMISSAL OF THE SLANDER OF TITLE CLAIM MUST BE REVERSED DUE TO ERRORS OF LAW

Petitioner asserts that dismissal of the slander of title claim was erroneous as a matter of law and must be reversed. Appellant's Brief at 22-33. The Trial Court's decision contained inconsistent rulings and lacked a legal justification .Id. at 26-32. The Court of Appeals did not address these arguments and sustained the Trial Court's Decision as "construing the evidence to reasonably support the Trial Court's decision." Opinion at 5; Petition for Rehearing at 3-4.

A. Res Judicata barred the filing of a derogatory claim.

The Trial Court held 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 estoppel prevent the subsequent litigation of the issue. Id. However, the Court held that there was "uncertainty" following the dismissal which created a legal justification for the filing of a derogatory plat. R.p. 5, 9-12,17, 20-23. "[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 correctly ruled that in trespass to try title cases, the boundary line was at issue and by dismissal with prejudice, Respondent abandoned the PLS boundary line. R.p. 17-19; Appellant's Brief at 24-25. See Nunnery v. Brantly Construction Co., 289 S.C. 205, 209, 345 S.E. 2d 740, 743 (Ct. App. 1986)("A dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication."). The law of the case is that dismissal with prejudice resolved the boundary line dispute in favor of Petitioner's surveyor, Franklin. In re

Morrison, 321 SC 370,468 S.E. 2d 651 (1996)(an unappealed ruling is the law of the case). It is the controlling ruling. Id. Under Sandel v State, supra, a contrary holding of "uncertainty" about the boundary line must be rejected as it is not based upon any case law, Court Rule or legal principle, has no weight of authority or " legal justification" and cannot control the disposition of the case. Appellant's Brief at p. 25: Petition for Rehearing at 3-4. See Point B below. Because res judicata barred the filing of a plat using the same abandoned boundary line, no uncertainty could occur and slander of title was established as a matter of law. Id.

B. Uncertainty due to a mistake of law is not 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). Even if res judicata does not bar Respondent from filing P-17, there must be legal justification for doing so. "[M]alice merely means a lack of legal justification and is to be presumed if the disparagement is false, if it caused damage, and if it is not privileged." Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012).

Petitioner asserted that Respondent, her attorney and her husband acted under a mistake of law about the effect of her dismissal with prejudice. Appellant's Brief at 26-27. All three testified that by dismissal with prejudice, Respondent didn't give up the PLS boundary line. Id. Respondent was present before the start of trial and aware of all the facts when she agreed to the dismissal with prejudice. Since she was unaware of the legal consequences, she acted under a mistake of law. 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 facts but did not realize the legal consequences)

By not recognizing this fundamental principle, the Court erred in in allowing "uncertainty" as a defense to slander of title.. " 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). Therefore "uncertainty" when it results from of a mistake of law cannot provide a defense to slander of title.

The Trial Court accepted Respondent's contention that the Form Four Order did not provide Petitioner with any affirmative relief and therefore the boundary line was still unresolved, justifying Respondent's filing of P- 17 as a settlement device. R.p. 22-23.The entry of a dismissal order has legal consequences. If a litigant wishes to vary them, the litigant is obligated to do so. 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, such as to the PLS boundary, Respondent is bound by the consequences of res judicata which barred any adverse boundary line claims. See R.p. 18- 19.

Because Respondent failed to limit the dismissal with prejudice in the Order of Dismissal, the Franklin boundary line was established as a matter of law as if a trial had occurred with surveyors testifying. Nunnery v. Brantly Construction Co., 289 S.C. 205, 209 345 S.E. 2d 740, 743 (Ct. App. 1986). No South Carolina case, statute or Court Rule supports Respondent's argument that an affirmative order designating the boundary line must be entered. That too is a mistake of law. Therefore, the Trial Court's finding that the need for an affirmative order justified P-17 must be disregarded and the decision reversed. Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015). Appellants Brief at page 26-27.

C. There is no alternate legal justification and no basis reasonable to sustain the decision.

Petitioner asserted that the Trial Court erred in its conclusion about a dispute resolution mechanism 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, R.p. 686; P-18 was filed on July 5, R.p. 687; this suit was filed on August 9, 2016. R.p.38. The filing of P-17 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. P-17 was referenced in and attached to the Lis Pendens not the result of any court order. R.p. 36,37. The Court's finding lacked a factual basis.

As Gordon Timmons admitted, P-17, R.p. 686, did not contain Petitioner's boundary line, only the PLS boundary and the dotted line area which Petitioner 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."). The dispute had already been resolved, therefore 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).

There was no legal justification for a derogatory filing against Petitioner's title which was slanderous, absent some privilege . See e.g. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct.App.2002)(judicial proceedings were privileged). P-17 was not filed in

connection with a pending proceeding but after it had been finally resolved, therefore it was not privileged, nor legally justified and thus slanderous. Id.

The Court of Appeals accepted the Trial Court's conclusion of a "mistaken belief" as a basis for a lack of malice but the validity of the belief was not considered . Opinion at 5. A party can be relieved when he acts under a mistake of fact, but not when he acts under a mistake of law. Cunningham v. Cunningham, 20 S. C. 317, 333 (1884). 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. Therefore, the Court of Appeals' affirmance of Timmons "good faith" efforts is not based upon evidence that is reasonably possible of sustaining the conclusion.

The Court of Appeals cited its obligation to "construe the evidence to support the [trial] court decision whenever reasonably possible". Opinion at 5. However, this obligation does not relieve the Court of Appeals 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. . . "); Jordan v. Judy, 413 S.C. 341, 776 S.E.2d 96 (Ct. 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." Flexon v. PHC-Jasper, Inc., 413 S.C. 561,569-570, 776 S.E.2d 397 (Ct. App. 2015). The Court of Appeals failed to consider the predominance of legal errors that affected the decision and its decision must be reversed. Petition for Rehearing at 1-8.

II. THE TRIAL COURT RELIED UPON PREJUDICIAL EXCLUDED AND IMPROPERLY ADMITTED EVIDENCE IN DISMISSING THE NUISANCE CLAIM

Petitioner contended that the Trial Court erred in dismissing her Nuisance claim by improperly relying upon excluded evidence and evidence that should have been excluded, all of which was prejudicial and that its Decision should be reversed. Appellant's Brief at p. 35-40. The excluded evidence consisted of the testimony of Mark Strong, the builder who the Trial Court excluded as a witness because he was not named in discovery. Appellants Brief at 35-36. The testimony of Gordon Timmons, Respondent's husband, also a builder, whose name was disclosed in discovery only as to the issue of " encroachment of Petitioner's house" was allowed to testify over objection. Their testimony concerned the construction of the driveway abutting Petitioner's property and the drainage method that was used to divert stormwater allegedly away from Petitioner's property. Id.; R.p.11,13. The Trial Court relied upon both witnesses, despite having previously excluded the testimony of Strong, in finding that the driveway could not cause any water to pool or pond on Petitioner's Lot 11 and that Respondent took adequate steps to divert water to the opposite end of Lot 12.Id; R.p. 24-26. Without this testimony, the Trial Court's finding that the driveway didn't cause flooding was not sustainable. Petitioner's evidence of periodic flooding affecting her stain glass business and causing frequent ponding and mosquitos which unreasonably interfered with her use of the property was uncontradicted. See Point III.

The Court of Appeals found that the Strong testimony was "cumulative" and therefore harmless, Opinion at 7, but the Record does not support this conclusion. Strong testified in greater detail than Timmons 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 he provided specific details and an eyewitness account of rain falling, neither of which Timmons discussed. "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); "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). Strong's testimony was not cumulative and the Trial Court explicitly relied upon it; therefore 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).; See State v. Funderburke, 251 S.C. 536, 164 S.E.2d 309 (1968).

The Court of Appeals rejected Petitioner's argument, Appellant's Brief at page 38-40, that Gordon Timmons should not have been allowed to testify: " [W]e find his testimony about surface water was not so surprising or prejudicial as to warrant exclusion". Opinion at 6-7. The Record and the Court of Appeals own findings do not a support this conclusion. Gordon Timmons' name was identified as a witness solely on the issue of encroachment of Petitioner's house. R.p. 490. 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), Petitioner demonstrated it was merited in this case. Petition for Rehearing at 11-13.

Respondent failed to provide any discovery about the nuisance issue. She failed to disclose Mark Strong's name or amend her Answers to Interrogatories to indicate that Gordon Timmons would testify about drainage . Petitioner's Counsel had no knowledge or indication that Gordon Timmons had any 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. The Trial Court found Gordon Timmons to be an "impressive witness," because of his experience as a developer, R.p. 8 and relied upon his testimony together with Strong's to find that the driveway design was adequate. R.p. 26. These circumstances clearly warrant exclusion of the witness because the unexpected nature of what he testified about and the cumulative effect of his experience which gave additional credibility to his testimony as well. Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974)(Court must consider the type of witness involved, the content of the evidence, reason for the failure to name the witness, the importance of the witness' testimony, and the degree of surprise to the other party). By allowing Gordon Timmons to testify, the Trial Court clearly abused its discretion. 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).

In response to Petitioner's argument that Gordon Timmons' testimony did not support the adequacy of the drainage system, Appellant's Brief at 37-38, the Court of Appeals found it provided circumstantial evidence of the adequacy of the drainage system. Opinion at 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. Id. "'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). The Trial Court's decision clearly supports the conclusion that Timmons' testimony was also prejudicial, and that a reversal is required.. 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).

III. THE TRIAL COURT'S REJECTION OF UNCONTRADICTED EVIDENCE AS TO THE CAUSE OF FLOODING WAS WITHOUT JUSTIFICATON

Petitioner asserts that even if allowed, the minimal weight of Gordon Timmons' testimony about the adequacy of the driveway design is outweighed by the uncontradicted evidence about the drainage and flooding on Petitioner's lot that supports the nuisance claim. However, the Trial Court rejected it unjustifiably. Appellant's Brief at 42-48. The Trial Court found that Petitioner's "studio was constructed in a manner that subjected it to occasional flooding during large amounts of rain". R.p. 25. Petitioner asserted that this finding entirely ignored all of Petitioner's testimony and that of her drainage expert, David Franklin which was almost entirely uncontradicted, without justification. Appellant's Brief at 42-45."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).

The Trial Court's finding about a construction defect lacks any factual support. The Trial Court found that Petitioner's studio was in a flood zone and there was conflicting evidence whether a studio was permitted on the first floor. R.p. 15, R.p. 25 Franklin said that it was permitted and Respondent never provided any contrary evidence. Furthermore, the Trial Court mischaracterized Petitioner's testimony about a FEMA claim as the basis for its finding: "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. Petitioner's testimony did not support this finding.

Petitioner 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, line 25 to R.p. 453, line 2. As to the presences of wetlands as a source of flooding, Petitioner stated that water rarely comes into the wetlands to the rear of her house. Appellants' Brief at 13. Franklin testified that the lot was graded one foot above the roadway house according to current standards; Respondent never contradicted this. Gordon Timmons stated that the drainage flow was away from Petitioner's house. R.p. 492, line 24 to R.p. 493, line 13.Therefore, no testimony supports this finding.

The Court's finding of a construction defect is contradicted by the unrebutted evidence of flooding after the driveway construction and none before. Department of Natural Resources records indicate that there were six single day rainfall events of 3" or greater between 2005 and 2015 when there was 9.25 inches of rainfall, the 1000-year flood, during which Petitioner's studio stayed dry. In 2016 and 2017, Hurricanes Matthew and Irma each produced 4" of rainfall and her studio flooded from both. Appellant's Brief at page 14. The Trial Court never addressed this inconsistency and therefore unjustifiably ignored Petitioner's testimony.

There was uncontradicted testimony and evidence about Respondent's driveway's construction as the cause of flooding. Petitioner saw fill being added to raise Respondent's lot above the existing grade and that the driveway was built on top of that.(confirmed by Strong). Photographic evidence established that Respondent's driveway was raised about 4" above Petitioner's side yard. R.p. 548. Franklin testified that the driveway parking area to the rear is at a higher elevation than Appellant's property since the driveway was raised to reverse the normal drainage flow from back to front (confirmed by Strong) . The photographs confirm that the driveway, which Gordon Timmons said had a large turning area , was wide enough to hold a boat and large vehicle: that it changes direction to the right at the point of Petitioner's trailer adjacent to her studio, where the flooding was first identified. R.p. 542, 549,550. The fact that the Respondent's house and driveway is to the rear of Petitioner's doesn't remove it as the cause. According to the evidence, all stormwater from the house draining on the driveway will flow down toward the street past Petitioner's house where it must make a right turn to follow the path of the driveway. This is where Petitioner saw the waterfall. The Trial Court, without regard to the evidence, said the driveway couldn't cause flooding because it was "small". R.p. 24.

The Trial Court disregarded the evidence of regular flooding elsewhere. Petitioner stated that water ponds in the front of her property every time it rains, causing mosquitos to breed as shown in a April 2019 photo. Appellant's Brief at page 11; R.p. 549. As a further consequence, Petitioner has to move her trailer, materials and equipment to avoid flooding whenever 2-3 inches of rain was predicted which happened about a dozen times in each of the last two years. Appellant's Brief at 12-13.

In summary, the Trial Court's findings ignored the overwhelming evidence to support the nuisance claim that ponding occurred due to construction of Respondent's driveway, not

Petitioner's studio; none of it was rebutted or addressed by the Trial Court as lacking in credibility. The Court gave no give reason to disregard Petitioner's testimony so that its decision is arbitrary and requires reversal. State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009); 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); Appellant Brief at page 36.

IV. FRANKLIN'S ENTIRE TESTIMONY WAS IMPROPERLY DISREGARDED

Petitioner contends that the Trial Court improperly disregarded all of Franklin's testimony based upon an alleged interest and bias (Franklin was the surveyor who determined Petitioner's boundary line) that did not affect his credibility on drainage. R.p. 25-26. The Court applied this disqualification both as to Franklin's testimony about the boundary line determination and the drainage issues, R.p. 25-26. However, both Mark Strong, the builder, and Gordon Timmons (whom the Court found to be " impressive") had the same bias and interest. The Record establishes that Franklin was well qualified and his testimony on drainage and the technical regulations he cited R.p. 492-496, were fully worthy of consideration. "Dubious and archaic as the saying ["false in one, false in all"] may be, we are not aware of any instance where it has been used to disregard not just a party's testimony but their entire array of proof." Clark v. Philips Electronics/Shakespeare, 433 S.C. 186,194 857 S.E.2d 378, 382 (Ct. App. 2021).

Franklin's company Eco Engineering provides engineering, surveying and stormwater management services since 1979. R.p. 293, line 12-23. He is a licensed professional engineer and land surveyor in South Carolina (since 1980) and other states and holds various builder's licenses in South Carolina. R.p. 294, line 2-8. The Trial Court found Franklin to be "combative and dismissive." R.p. 25. This conclusion was undoubtedly based upon what occurred during

cross examination on his testimony that he found all four property corners in surveying Petitioner'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; Petitioner's counsel objected to the repetitive nature of the questioning. 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. Franklin finally bristled at this accusation, at which point, Respondent's Counsel accused Franklin of yelling at him. R.p. 329, line 23-25. Franklin's reaction is understandable and not indicative that he was lying about his site work. It cannot 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 and find nothing which justifies disregarding the testimony of . . . the surveyor. He appears to be fully qualified and his method . . . is well known to be one commonly used by surveyors.").

Franklin's testimony that the ground floor could be used for Petitioner's studio was uncontradicted. What he said about 2005 drainage was d based on automatic recording by his survey equipment. Also uncontradicted were current flow directions on Lot 11 and 12 which changed from back to front; that the driveway was elevated, higher in the back causing water to run toward the street; it was close to the property line and turned at the point where flooding was experienced. 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; 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. Franklin's opinion was supported by these facts. Respondent did not offer any contradictory evidence. Franklin's

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's disregard of Franklin's credibility, including any consideration of his largely uncontradicted testimony on drainage, is lacking in a factual basis. Jordan v Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015).Appellant's Brief at page 44. This reason for discrediting him is patently arbitrary and an abuse of discretion. 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)(an abuse of discretion is a conclusion with no reasonable factual support).The Court of Appeals affirmed the Trial Court's wholesale exclusion of David Franklin's testimony based upon the alleged bias. Opinion at page 7-8.

V. THE TRIAL COURT ERRED IN APPLYING THE LAW OF NUISANCE TO THE FACTS

Appellant asserted the Trial Court did not correctly apply the law of per se nuisance regarding " occasional flooding. 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's Brief at 49. Although the Trial Court recognized occasional flooding as an exception to the "common enemy rule", it apparently found that these were not enough of a nuisance and dismissed the claim.

Petitioner asserts that the Trial Court erroneously limited its consideration of the evidence to the instances of major flooding and did not the recognize the collateral effects of the major flooding and the persistent regular flooding which altogether created an unreasonable

interference with use and enjoyment.. Although Appellant sustained monetary damages during Hurricanes Mathew and Irma , Appellant's Brief at 12-13,t she had to disrupt her work every time the weather forecast called for 2-3 inches of rainfall, which disrupted her business. R.p.422, line 10-11. She had to do this10-12 times in 2018, and about ten times in 2017. R.p. 433, line 16 to R.p. 434, line 21. Any amount of rainfall caused ponding in the front and mosquitos breeding. Id. The Trial Court's decision leads to the conclusion that it ignored Petitioner's testimony about these conditions or disregarded them in evaluating her nuisance claim. In either case the Trial Court erred by not correctly apply the law. See 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)."The liability and probability of the ponds overflowing at every rain, and of drying up and creating mosquitoes during every dry spell, might, or might not, make the place a source of perpetual danger to life, health, and property." Its decision must be reversed.

VI. IT IS NOT REASONABLY POSSIBLE TO SUSTAIN THE DISMISSAL OF NUISANCE

Petitioner asserts that because of the cumulative effect of the Trial Court's errors, its dismissal of nuisance cannot be sustained as reasonably possible. Strong's testimony was prejudicial and reversible error. See Point II. Timmons testimony although " circumstantial" was prejudicial and thus reversible error. Id. The photographic evidence of the driveway height and configuration turning down toward Petitioner's yard and testimony of periodic flooding after its installation cannot reasonably be disregarded. The alleged defect in the studio design is not supported by any evidence, see Point III, Franklin's testimony was improperly disregarded, see Point IV. Finally, the Court deemed the flooding to be" occasional" without regard to the effects to flooding which are also pertinent. See Point V.

Therefore, without reliance on inadmissible evidence, the Record did not permit the Court of Appeals to "construe the evidence to reasonably support the Trial Court's decision". Petition for Rehearing at 8.

CONCLUSION

For all the reasons set forth above, Petitioner urges the Court to grant her Petition for Writ of Certiorari in order to correct errors of law and factual conclusions not supported by the evidence that resulted in dismissal of the slander of title and nuisance claims.

Respectfully submitted,

/s/ *Edward A. Bertele*
Edward A. Bertele
S.C. Bar No. 72521
1812 Pierce Street
Charleston, SC 29492
843-471-2082
ebertele@msn.com
Attorney for Petitioner Michele Blank

CERTIFICATION OF COUNSEL

I hereby certify that the Petitioner has filed a Petition for Rehearing and the Court of Appeals has denied rehearing by Order dated January 3, 2023.

Edward A. Bertele

February 2, 2023