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

REPLY BRIEF OF APPELLANT

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

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REPLY TO STATEMENT OF THE CASE

Appellant objects to Respondent's Statement of the Case because it lacks citations to the pleadings, orders or decisions, or Trial testimony being relied upon throughout in violation of R. 208(b)(4), S.C.A.C.R.("In the Initial Brief. . . the brief shall contain references to the page and line number of the transcript . . . or by the page of the material to be referenced."). See e.g. Respondent's Brief at pages 1,2,4-9. The Statement of the Case also contains argument, see Respondent's Brief at pages 7-11, in violation of R. 208(c), S.C.A.C.R.

REPLY TO STANDARD OF REVIEW

Respondent unnecessarily refers to the standard of review in a boundary line dispute. Respondent's Brief at page 11.The Trial Court ruled against Respondent on the First Count of the Complaint, res judicata, R.p. 5, and Respondent never cross appealed so that issue is the law of the case. First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"). Accordingly, this Court should disregard this reference in this appeal.

Respondent cites Sheek v. Crimestoppers Alarm Systems, Div. of Glen Curt Consultants, 297 S.C. 375,376, 377 S.E.2d 132,133 (Ct. App. 1988)(credibility is the province of the trial judge), Respondent's Brief at 12, but does not deny that the applicable standard of review concerning credibility is as Appellant has asserted. Appellant's Brief at pages 36 & 37. Under State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009) and Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015), this Court is required to examine the basis for the Trial Court's determination of

credibility to insure it is based on credible evidence. That was also the standard applied by this Court in Sheek, supra . Therefore, this Court is obliged to consider the bases for all the Trial Court's findings of credibility to determine whether they justify its dismissal of the Fourth and Fifth Counts.

REPLY ARGUMENT

I. DISMISSAL OF THE FOURTH COUNT WAS BASED UPON ERRORS OF LAW AND UNSUPPORTED BY CREDIBLE EVIDENCE

Respondent has not rebutted Appellant's contentions, Appellant's Brief at pages 24-27, that Trial Court's Order dismissing the Fourth Count was based upon errors of law. See Respondent's Brief at pages 12-15. As Appellant contended, and Respondent has not refuted, the Trial Court's finding that there was an " uncertainty as to the status of title" must be disregarded because it is inconsistent with its decision applying res judicata. Appellant's Brief at 24-26. Therefore, the Trial Court's finding that " uncertainty of title" was legal justification for Respondent's slander of title (by filing two false plats) is another error of law because it is based upon a finding that is void. Id.

Furthermore, as Appellant has contended, and Respondent has not refuted, Respondent and her husband were acting under a mistake of law in recording both plats, P-17 & P-18, Id. at 26-27. Therefore, the Trial Court's finding that Respondent was initiating a boundary resolution process which justified Respondent's slander of title was another error of law.

Respondent's failure to cite any contrary authority or factual argument to these legal conclusions, see Respondent's Brief at pages 11-14, results in a waiver of its right to contest those issues. See Oien Family Investments, LLC v. Piedmont Mun. Power

Agency, 424 S.C. 168, 184, 817 S.E.2d 647, 656 (Ct. App. 2018)(failure to assert legal position with particularity and supported by legal authority pursuant to R. 208(b)(1) results in abandonment of issue on appeal). Respondent's Brief, see pages 12-14, lacks any citations to the Trial Transcript for any of its assertions of fact in violation of R.208(b)(4), S.C.A.C.R. Id. Consequently, this Court should not give any consideration to those allegations or arguments based thereon in Respondent's Brief. See State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc., 414 S.C. 33,73, 777 S.E.2d 176, 197 (2015) (violation of Rule 208(b)(4) constitutes abandonment of issue on appeal). Notwithstanding these objections, Appellant makes these further arguments.

Respondent relies upon the Trial Court's finding that " a reasonable person examining the public records . . . would conclude that the location of the boundary line had yet to be clearly defined" as the justification for the recording of P17&18. Respondent's Brief at page 14. However, Respondent fails to provide any factual basis for this finding and therefore has waived the argument that it has any evidential support. State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc., 414 S.C. 33,73, 777 S.E.2d 176, 197(2015) (violation of Rule 208(b)(4) constitutes abandonment of issue on appeal).

Respondent does not dispute that the only evidence about the public records came from Jennifer Smith, Esq. who opined that the recording of these plats, after dismissal of the Complaint with prejudice, made Appellant's title uninsurable, a conclusion with which the Trial Court agreed. R.p. 21-22; Appellant's Brief at page 32. Respondent has waived her right to contest that issue. Oien Family Investments, LLC v. Piedmont Mun. Power Agency, 424 S.C. 168, 184, 817 S.E.2d 647, 656 (Ct. App. 2018).

Absent any contrary testimony or evidence, Attorney Smith's testimony should be accepted. 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).

Furthermore, Respondent failed to provide any legal authority to support the Trial Court's use of a "reasonable person" standard as to the status of title in a slander of title case and has waived that argument. See Oien Family Investments, LLC v. Piedmont Mun. Power Agency, 424 S.C. 168, 184, 817 S.E.2d 647, 656 (Ct. App. 2018). This is merely another version of the " uncertainty of title" argument which has been previously refuted as a matter of law. Appellant's Brief at pages 24-31. The pertinent elements of a slander of title claim are a derogatory publication and malice. Huff v. Jennings, 319 S.C. 142, 149150, 459 S.E.2d 886, 891 (Ct.App.1995). The Trial Court's findings about what a "reasonable person" would conclude is not supported by the record, which establishes that the Timmons were acting under a mistake of law in recording two plats that were clearly derogatory to Appellant's title. See Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015). By referring to a hypothetical " reasonable person", the Trial Court was simply speculating and not evaluating the evidence under the correct legal standard.

Respondent has not cited any legal authority to rebut Appellant's argument that filing either P-17 or P-18 was a frivolous claim because the law of res judicata was well settled and therefore either plat was a frivolous claim, not justified by any alleged intent to resolve a " boundary line dispute". Appellant's Brief at 29-30. Therefore, Respondent has waived its right to contest that these filings were frivolous. See Oien Family

Investments, LLC v. Piedmont Mun. Power Agency, 424 S.C. 168, 184, 817 S.E.2d 647, 656 (Ct. App. 2018).

In summary, the Trial Court's Finding of "uncertainty" must be disregarded because it is inconsistent with its ruling on res judicata, the filings of the two plats were frivolous and the "reasonable man" theory lacks any legal basis or credible evidence to support it. Therefore, there is no legal or credible factual basis for a finding of justification. The undisputed fact is that Respondent filed a defamatory statement concerning Appellant's interest in Lot 11 which should have resulted in a finding of slander of title.

Finally, Respondent alleges that Appellant failed to establish any special damages, Respondent's Brief at 14-15. Respondent does not dispute that Appellant asserted a claim for legal fees at the start of the trial supported by this Court's decision in Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192,206, 723 S.E.2d 597 (Ct. App. 2012); or that Appellant presented evidence of the cost of Attorney Smith's insurability opinion, P-23. Appellant's Brief at page 33. The Court's Order, R.p. 18, states: "Having failed to establish her slander of title cause of action, the claim for damages, including attorney's fees and litigation expenses, is denied". Therefore, in the plain language of the Order, the Trial Court did not rule against those as special damages but only that the dismissal prevented any award of them.

Respondent does not cite any case which requires submission of proof of attorney fees before the Trial Court has determined whether to award them. In fact, the customary practice is that an Affidavit of Services be submitted following the Court's determination to make such an award. See, e.g. Global Protection Corp. v. Halbersberg,

332 S.C. 149,154, 503 S.E.2d 483 (Ct. App. 1998). Based upon the foregoing, this Court should reverse the Trial Court's dismissal of the Fourth Count-slander of title and remand for an award of Attorney's fees and costs.

II. DISMISSAL OF THE NUISANCE CLAIM WAS NOT SUPPORTED BY CREDIBLE EVIDENCE AND WAS BASED UPON A MISTAKE OF LAW

Respondent has not rebutted Appellant's contentions, Appellant's Brief at pages 35-49, that Trial Court's Order dismissing the Fifth Count was not based upon credible evidence but errors of law. Respondent's Statement of the Case and Argument in support of the Trial Court's dismissal of the nuisance count, Respondent's Brief at pages 10-11, 15-17, lacks any citations to the Trial Transcript for any of its assertions of fact in violation of R.208(b)(4), S.C.A.C.R. Consequently, this Court should not give any consideration to those allegations or arguments based thereon in Respondent's Brief. See State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc., 414 S.C. 33,73, 777 S.E.2d 176, 197 (2015) (violation of Rule 208(b)(4) constitutes abandonment of issue on appeal).

Respondent has not denied Appellant's assertions that the Trial Court explicitly and improperly relied upon the excluded testimony of Mark Strong to dismiss the nuisance claim. Appellants Brief at page 35-40. Respondent has waived her rights to dispute this issue. Oien Family Investments, LLC v. Piedmont Mun. Power Agency, 424 S.C. 168, 184, 817 S.E.2d 647, 656 (Ct. App. 2018). Respondent does not deny Appellant's assertion that she was prejudiced by inclusion of this testimony, Appellants Brief at page 35-36, and has waived her right to contest this issue as well. Oien Family Investments, LLC, supra.

Respondent relies upon the language of the Trial Court's Order to assert that the driveway does not cause ponding because it was "small" and does not give any Transcript citations to the driveway being identified as small by any witness. Respondent's Brief at 15-16. In addition to violating R.208(b)(4), S.C.A.C.R., see above, Respondent's argument is not supported by the credible evidence. Appellant submitted photos showing the size and location of the Respondent's concrete driveway, P- 4A,C,D & K, which show that it extends well past Appellant's house and that ponding occurred during construction in 2016 and as recently as April 2019. Appellant's Brief at page 11-12. By calling the driveway " small", the Trial Court was apparently suggesting that it could not collect enough rainwater to cause it to pond on Lot 11. However, neither the Trial Court nor Respondent referred to any basis in the Trial Record on which such a conclusion can be reached; it was merely speculation by the Trial Court, was not based upon competent evidence and should be rejected. 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).

Respondent did not provided any Transcript citations or legal authority to rebut Appellant's contentions that ponding was supported by credible evidence, i.e., Appellant's testimony about rain coming off the driveway like a waterfall, that there was no flooding prior to construction of the driveway, or David Franklin's testimony that natural drainage and higher grade causing ponding, Appellant's Brief at pages 36-38. Respondent does not dispute that the Trial Court did not give any reason why Appellant's testimony was not worthy of belief. Id at 37. "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). Respondent has waived her rights to dispute this issue. Oien Family Investments, LLC v. Piedmont Mun. Power Agency, 424 S.C. 168, 184, 817 S.E.2d 647, 656 (Ct. App. 2018).

Respondent has not provided any facts or legal authorities to rebut Appellant's contentions that the Trial Court erred in allowing Gordon Timmons to testify about drainage constructed on Lot 12 and that she was thereby prejudiced. Appellant's Brief at page 38-40. Respondent has waived her rights to dispute this issue. Oien Family Investments, LLC v. Piedmont Mun. Power Agency, 424 S.C. 168, 184, 817 S.E.2d 647, 656 (Ct. App. 2018).

Respondent has not provided any facts or legal authorities to rebut Appellant's contentions that the Trial Court erred in relying upon Mark Strong or Gordon Timmons' testimony about the alternate drainage solution being adequate to prevent ponding. Appellant's Brief at page 39-40. Respondent has waived her rights to dispute this issue. Oien Family Investments, LLC v. Piedmont Mun. Power Agency, 424 S.C. 168, 184, 817 S.E.2d 647, 656 (Ct. App. 2018). Without their testimony, the Trial Court's decision is not based upon any credible evidence and cannot be sustained. Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015).

Relying upon the Trial Court's opinion, Respondent asserts that Appellant's flooding was the result of a lack of proper drainage of Lot 11. Respondent's Brief at page 16. Respondent quotes from the Trial Court's Order that " there was conflicting evidence about whether Appellant was permitted to construct her studio on the ground floor. Id. As previously asserted, Appellant testified that she filed a flood insurance claim but as

denied coverage because the damage was due to rainwater. Appellant's Brief at page 43. As previously asserted, Appellant's civil engineer, Franklin testified that Appellant's house was in an "A" flood zone and it was permissible to enclose the ground floor of the house in that flood zone. Appellant's Brief at page 43. R.p. 319, line 7-13. Respondent did not cite to any contradictory evidence in the Trial Record of what was permitted in an "A" flood zone and the Trial Court did not cite to any in its Order. Since there is no credible evidence to support the Trial Court's finding that Appellant's studio was not permitted in an "A" flood zone, it cannot be sustained. Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015).

Furthermore, neither the Trial Court nor Respondent cited to any credible evidence to disregard Franklin's testimony about the use of the ground floor in a flood zone, or that the lot was properly graded in accordance with current (2005) Charleston County requirements so that the Trial Court's finding that Appellant did not provide for adequate drainage must be disregarded for this additional reason. 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).

Respondent has not rebutted Appellant's argument, Appellant's Brief at page 45-49, that Trial Court abused its discretion in completely ignoring Franklin's testimony about the drainage issue and by trying to discredit it unjustifiability. Respondent does not deny that Franklin was well qualified to give an opinion. There was substantial evidence that Respondent's husband Gordon Timmons had a direct involvement and interest in the construction of Lot 12. Appellant's Brief at pages 19-21. However, the Trial Court only gave credence to Respondent's claim of "bias" about Franklin even though he only

designed the foundation. Appellant contends that without more, there was no basis to disbelieve Franklin and believe Timmons due to " bias" and thus the Trial Court's finding was speculative. See State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495,500 (Ct. App. 2013). Cf. Green v. Clarendon County Sch. Dist. Three, 923 F. Supp. 829, 846 (D.S.C. 1996) ("It is Plaintiff's burden to show the existence of bias, rather than its mere possibility, and Plaintiff 'must overcome a presumption of honesty and integrity in those serving as adjudicators. '")(citation omitted)

It is undisputed that the Trial Court had no reason to rule on the boundary line after it found that res judicata applied but relied upon the testimony of Gillette and Arrington to question Franklin's conclusion about the boundary line which was not relevant to the drainage issue. It is not disputed that the validity of Franklin's survey and boundary line was based upon settled legal principles. Appellant's Brief at page 47-49. Accordingly, Respondent has waived her right to contest that the Trial Court abused its discretion in totally rejecting Franklin's testimony. Oien Family Investments, LLC v. Piedmont Mun. Power Agency, 424 S.C. 168, 184, 817 S.E.2d 647, 656 (Ct. App. 2018).

Finally, Appellant as argued that the Trial Court recognized that Appellant suffered occasional flooding but did not regard this as a nuisance, an error of law. Appellant's Brief at page 49. Respondent has not provided any legal argument or citation to rebut this contention and has waived her right to contest whether the Trial Court committed an error of law. Oien Family Investments, LLC v. Piedmont Mun. Power Agency, 424 S.C. 168, 184, 817 S.E.2d 647, 656 (Ct. App. 2018).

In summary, the Trial Court improperly relied upon excluded testimony to dismiss the Fifth Count, abused its discretion in relying upon testimony that should not

have been admitted, ignored credible evidence and made a mistake of law in overlooking what it had admittedly found to be credible. Accordingly, this Court should find that the Trial Court's dismissal of the nuisance claim must be reversed.

III. THERE ARE NO ADDITIONAL GROUNDS FOR SUSTAINING THE TRIAL COURT'S ORDER

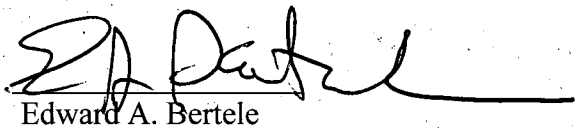
Respondent requests that this Court sustain the Trial Court's Order for any other reasons appearing in the Record, pursuant to R 220(c), S.C.A.C.R. Respondent's Brief at page 17. " [A] respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant , 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "Under present rules, the appellant receives notice of the respondent's additional sustaining grounds through the respondent's brief. The appellant may address those additional grounds in a reply brief. " Id., 338 S.C. at 418, n. 6. However, Respondent did not assert any additional grounds to sustain the Trial Court's Order but relied solely upon the words of the order and accordingly has abandoned its right to argue any. " Of course, a respondent may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—by failing to raise it in the appellate brief." Id. 338 S.C.at 420 (citing Maxey v. R.L. Bryan Co., 295 S.C. 334, 336 n. 2, 368 S.E.2d 466, 467 n. 2 (Ct.App.1988); May v. Hopkinson, 289 S.C. 549, 558, 347 S.E.2d 508, 513 (Ct.App.1986).

Respondent's Brief does not contain any transcript citation or legal argument to support any alternate ground for relief. This Court should not be expected to search the

Record on Appeal independently for the purpose of considering alternate grounds which Respondent has failed to identify. Furthermore, it would be unfair to Appellant for this Court to consider alternative grounds because the Respondent has conspicuously avoided making any legal arguments or citing transcript references, i.e. has provided nothing to expand the Record on Appeal. See Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church, 421 S.C. 211, 243, 806 S.E.2d 82 (2017)(Hearn, J. concurring). Therefore, Appellant respectfully requests that the Court refuse to find additional grounds to sustain the Trial Court's Order.

CONCLUSION

Appellant respectfully requests that this Court reverse the Circuit Court Order dismissing the Fourth and Fifth Counts for the reasons set forth herein and remand for further proceedings including the amount of damages.



Edward A. Bertele
Attorney for Appellant, Michele Blank

August 25, 2020

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CERTIFICATION OF COMPLIANCE

I hereby certify that Appellant's final Brief and Reply Brief comply with

R. 211(b), S.C.A.C.R.

Edward A. Bertele

September 8, 2020