THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge
George C. James, Jr., Circuit Court Judge

Case No. 2010171826

DAWN M. PONTIOUS,

Appellant,

v.

DIANA L WINTERS, AND JASON R. WINTERS,

Respondents.

PETITION FOR REHEARING

July 10, 2013

Lexington, SC

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The Appellant submits the following grounds as a basis for the Court of Appeals to grant Petitioner's Request for a Rehearing in this matter, and to grant her the relief requested herein. Petitioner would incorporate her Original Brief and Reply Brief to further substantiate Appellant's positions.

I. The Court of Appeals miscomprehended or misinterpreted the record in its finding that Pontious was not deprived of due process, as she was not provided any meaningful opportunity to be heard and no meaningful judicial review on Appellants' Rule 60(b) motion.

The Court of Appeals found:

> Although Pontious was not consulted before the trial court approved the survey, the subsequent hearings on her Rule 60(b) motion were sufficient to satisfy her due process rights. *See Sloan v. South Carolina Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 485, 636 S.E.2d 598, 615 (2006) ("Procedural due process requirements are not technical; no particular form of procedure is necessary."); *cf. Ross v. Med. Univ. of South Carolina*, 328 S.C. 51, 67, 492 S.E.2d 61, 71 (1997) (holding that although pre-termination procedures for a tenured professor to respond to charges of misconduct did not comply with minimum due process, the error was remediated by his full and meaningful participation in a post-termination hearing).

The Court of Appeals cited *Sloan v. South Carolina Bd. of Physical Therapy Examiners*, 636 S.E.2d 598, 370 S.C. 452 (S.C. 2006) in summarily dismissing Appellant's due process argument, but *Sloan, supra,* stated:

> The requirements of procedural due process, usually deemed to apply in a contested case or hearing which [370 S.C. 485] affects an individual's property or liberty interest, generally include adequate notice, the opportunity to be heard at a meaningful time

> and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review. *in rE vora,* 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) ; *S.C. dept. of Soc. Servs. v. Wilson,* 352 S.C. 445, 452-53, 574 S.E.2d 730, 733-34 (2002) (638 S.E.2d at 615)

In the instant matter the Appellant first had the opportunity to exercise her due process rights before Judge McMahon in a Motion to Reconsider (ROA p. 30), but McMahon summarily denied Appellant's Motion without any Hearing as evidenced by his Order of July 30, 2010. (ROA p. 12) Thus, McMahon denied Appellant an opportunity to have all of her due process rights properly considered, especially "the right to meaningful judicial review." *Sloan, supra.*

The Court of Appeals based its finding that the Appellant had due process when such issue was raised by Appellant in Appellant's Rule 60(b) Motion (ROA p. 33) Hearings, but Appellant submits the Record on Appeal does not support same.

Appellant had her due process argument in her Rule 60(b) Motion (ROA p. 33), but such due process was not addressed in the Order of Judge James dated October 28, 2010. (ROA p. 13) Appellant then attempted to obtain a proper ruling on her due process arguments in her Motion To Reconsider dated November 19, 2010. (ROA p. 89) This Motion specifically stated that Judge James' Order of October 28, 2010, did not address Appellants due process arguments. (ROA p. 13)

In ruling upon Appellant's Motion To Reconsider (ROA p. 89), Judge James, without a Hearing, refused to pass upon Judge McMahon's rulings

(specifically grounds 1, 2, 3 and 4) and ordered that, "All other grounds are summarily denied." (ROA p. 20) Appellant is not sure what Judge James's Ruling sets forth, as Item 3, of Appellant's Motion to Reconsider (ROA p. 90) includes an alleged lack of due process by Judge McMahon and Judge James's Order also refuses to address McMahon's rulings. (ROA p. 90) Then James adds the proviso that, "All other grounds are summarily denied." ROA p. 20) The ambiguity arises from the fact that there are additional references to due process in other provisions of the Motion to Reconsider. (ROA p. 89)

The Court of Appeals stated, "[t]he subsequent hearings on her Rule 60(b) motion were sufficient to satisfy her due process rights." (Paragraph 1 of Order) The only Hearing on the Appellant's Rule 60(b) Motion was one that commenced on July 30, 2010, which was reconvened on August 26, 2010, for further oral argument of counsel." (ROA p. 13) While the Appellant had partial due process notice: the opportunity to be heard at a meaningful time and in a meaningful way, and Appellant had the right to make some due process arguments at the 60(b) Order; no meaningful judicial review was undertaken. The Order of Judge James establishes the 60(b) Hearing was commenced July 30, 2010, and reconvened August 26, 2010. (ROA p. 13) The due process other aspects of *Sloan. supra*, were not mentioned in the James's October 28, 2010 Order. (ROA p. 13) When Pontious requested that Judge James fully rule upon all of Pontious's' due process rights and other issues in in Pontious's Motion to Reconsider (ROA p. 89); Judge James refused to Rule upon what

Judge McMahon had ruled on, and summarily, without any hearing, denied Pontious any relief on any issue. (ROA p. 20)

Among other due process rights denied, Pontious was clearly denied the right to a meaningful judicial review. See: *Sloan*, *supra*, (638 S.E.2d at 615)

Thus, this case should be remanded to allow the Appellant Pontious an opportunity to set forth her due process arguments as set forth in *Sloan, supra,* and obtain a meaningful judicial review.

II. The Court of Appeals miscomprehended or misinterpreted the Order of Judge McMahon dated December 9, 2009. (ROA p. 8)

The Court of Appeals found:

> We find no merit in Pontious's argument that the orders of December 9, 2009, and October 28, 2010, should be reversed because they contain "factual conclusions" that were "without evidentiary support." Contrary to what Pontious argues in her brief, the order of December 9, 2009, did not include a finding that the survey approved by the court was consistent with the order issued after the partition action was heard. Rather, the court found: "The survey is deemed by this Court to be an accurate reflection of the property ownership in this case." As evident from the surveyor's deposition testimony, the court was informed about the discrepancy between its earlier finding that a ditch was on the road frontage and the surveyor's observation that there was no ditch at that location. Nevertheless, despite the requirement that the survey be consistent with a prior order and the realization that fulfillment of this condition may not be possible, the trial court opted to approve the survey based on a determination that it accurately reflected "the property ownership."

To understand what was ordered, reference to the initial Order in this matter is necessary, that being the Order of Judge James dated November 25, 2008. (ROA 1). Judge James' Order stated the jointly owned property of Jason and Dawn should be partitioned in kind, and that the kite-shaped property on Bachman Avenue should be divided as per a survey as follows:

> [t]he center dividing line to begin at the iron pin located at the southernmost corner of the property, running in a northwesterly direction and ending at a point on Bachman Avenue at a point midway between the easternmost edge of the aforesaid ditch and

iron pin at the easternmost point/corner of Bachman Avenue, all as shown on the Plat admitted as Plaintiff's Exhibit 1" (ROA Ex 1, p. 4)

The ditch was referenced by Judge James as follows:

> According to the testimony, the road frontage includes a ditch that begins at the northernmost boundary. That ditch runs along Bachman Avenue in a southeasterly direction for an unknown distance. This consequently leaves an as yet undetermined amount of road frontage from the end of the ditch to the iron pin located at the southeasternmost point of Bachman Avenue. (ROA p. 3, paragraph 16)

Judge James' 2008 order continues:

> If Jason and Dawn were granted an equal amount of road frontage, Jason would receive an inequitable result, as the aforesaid ditch would take up most of that road frontage. (ROA p. 3, paragraph 17)

The issue about a ditch was before Judge McMahon, and the Respondent Jason, while claiming a ditch, introduced Jason's plat dated August 12, 2009, (ROA p. 27) in which Jason's surveyor could not locate any ditch. The marking on this plat indicating a ditch were admittedly added by the Respondent's attorney after the survey was made. (ROA p. 55, lines 8 – 21, p. 57, lines 1-22)

As noted by the Court of Appeals, McMahon found in his Order of December 9, 2009, "The survey is deemed by this Court to be an accurate reflection of the property ownership in this case." (ROA p. 8) Clearly this finding is clarified and limited by the preceding sentences in which Judge McMahon stated, "After considering arguments from counsel, the proffers, the file, and the pleadings before it, the Court declined to approve the plat and issue deeds and appointed James F. Draft of Drafts Surveying,

Inc., to prepare a plat consistent with the order of Judge James. Mr. Drafts completed the survey and presented it to the Court." (Emphasis added) (ROA p. 8)

Appellant's reading of the entire preceding paragraph leads to the sole conclusion that Judge McMahon's Order of December 9, 2009, approved Drafts's plat as being a plat prepared by Drafts in accordance with Judge James' Order of November 25, 2008. (ROA p. 1) Nowhere in his Order of December 9, 2009, did Judge McMahon state that he made an independent investigation and/or that he had consulted with Surveyor Drafts as the James' Order could not be complied with. (ROA. p. 8) And, even if Judge McMahon had done such without notice to the parties, going outside of the record then existing should not be condoned as Judges are limited to the record before them.

Further substantiating Appellant's position is the record of the Hearing before Judge McMahon on September 22, 2009. (ROA pp. 50-61) Contained herein are indications that McMahon intended to follow Judge James's Order of November 25, 2008 (ROA p. 1) and include the following references: (ROA p. 53 lines p. 7-11, ROA p. 54, lines 7-11; ROA p. 58, lines 2-19; ROA p. 59, lines 9-17) Even the Respondent's attorney agreed by stating, "As long as whoever we will appoint will follow Judge James' order, I have no objection to having that survey, but that is just kind of where I am." (ROA p. 59)

To reach the result set forth by the Court of Appeals, one would have to assume that Judge McMahon independently investigated the facts in this case and went outside of the record that was before him on December 9, 2009.

The Court of Appeals's conclusion that McMahon intended to divide the property differently from Judge James's Order of November 25, 2008 (ROA p. 1) would have to be based upon the testimony that surveyor Drafts gave, when Appellant took Drafts's deposition on April 20, 2010. (RO App. 62-87)

Drafts's deposition was an attachment to Appellant's Rule 60(b) Motion. (ROA p. 35) There Drafts testified he could not follow the James' Order of 2008 (ROA p. 1) because of its ambiguities (ROA p. 77, line 15-17) and could not follow the sketch also provided (ROA p. 87; ROA p. 70, lines 1-6), although Drafts interpreted the sketch as being some idea of what Judge James wanted the division to be. (ROA: p. 72, lines 7-10; p. 71, lines 21-25; p. 72, lines 1-10; p. 79, lines 11-24)

Clearly it was not Judge McMahon's intention to go outside of his previous Order of October 2, 2009 (ROA p. 7), as he stated therein:

> THEREFORE IT IS ORDERED that James F. Drafts of Drafts Surveying, Inc., be appointed Surveyor of the property in question and shall adhere to the Order of Judge James in preparing this survey. (emphasis added)

In Judge McMahon's Order of December 9, 2009, he stated:

> After considering arguments from counsel, the proffers, the file, and the pleadings before it, the Court declined to approve the plat and issue deeds and appointed James F. Draft of Drafts Surveying, Inc., to prepare a plat consistent with the order of Judge James. Mr. Drafts completed the survey and presented it to the Court. This survey is deemed by this Court to be an accurate reflection of the property ownership in this case. (ROA p. 8) (emphasis added)

Additionally, the Court of Appeals apparently relied upon the deposition of the Surveyor Drafts taken April 20, 2010, (ROA pp. 62-87) for the proposition, "The

surveyor further stated he discussed his proposed survey with the trial Court while it was in progress and proceeded with the Court's approval."

Appellant alternatively asserts that there was no evidence to support the finding by the Court of Appeals that Judge McMahon independently approved an alternative survey at the time it was issued on December 9, 2009, and submits that the Order indicates McMahon believed he was following Judge James's Order of November 25, 2008. (ROA p. 8).

Further, the surveyor Drafts stated that he could not create a survey according to Judge James's Order as it was ambiguous. (ROA p. 77, lines 15-19; p. 70 lines 4-6) Then the surveyor assumed that a hand-drawn line on a sketch (ROA p. 87) forwarded to him by Judge McMahon indicated Judge James wanted a survey that followed the hand-drawn line. (ROA p. 72, lines 7-10; p. 8; for sketch p. 87) The surveyor then proceeded to follow this ambiguous sketch (ROA pp. 71, lines 21-25; p. 72, lines 1-10; p. 75 lines ; p. 17-25; p. 76, 1-3), (which provided the minimum 20 feet of frontage to Appellant as required to record the plat). (ROA p. 74, lines 5-8; ROA p. 80, lines 21-15; ROA p. 81, lines 1-4) The surveyor Drafts said he sent a sketch to Judge McMahon and asked him what to do, (ROA p. 76, lines 2-3) or he sent it to the judge for his approval. (ROA p. 70, lines 18 – 21) Admittedly, the Surveyor Drafts could not remember all the conversations with Judge McMahon and/or his office, but stated he had a conversation with someone at the Judge's Office about the ambiguity with the new division corner on Bachman Avenue. (ROA p. 78, lines 12-20)

The surveyor further admitted he took the rough line on ROA p. 87, and:

> I roughly drew that line up there and I told the judge's law clerk, I said, 20 feet of frontage is the minimum the county's going to let

you have, and there is no ditch, here's a suggestion. What do you want to do? Or, you know, here's what it's going to look like if we do it like this, what do you want to do? And they called back and said go ahead. (ROA p. 84, lines 24-25; 85, lines 1-6) (Emphasis added)

After emailing the proposed division based upon the ambiguous sketch (ROA: p. 77, line 25; p. 78, lines 1-11) Drafts received approval from Judge McMahon or his law clerk, and proceeded to finalize a plat based upon approval of Drafts's proposal. (ROA p. 78 p. 7-11)

The survey was not one supervised by Judge McMahon's office as it had no input into what was created. Judge McMahon's Order (ROA p. 8) indicated he believed the survey was one that complied with Judge James' Order and the bottom line is that Drafts admits the survey did not even attempt to comply with Judge James' order. (See ROA designations in preceding paragraphs)

This Court should have followed the case of *Clements v. Young,* 310 S.C. 73, 425 S.E.2d 63 (S.C. App. 1992) in which the Court of Appeals inferred that the boundary between the two properties is not some artificial line created by the surveyor, basically as a matter of convenience, in order to complete the partition. It further stated, citing *Atkinson v. Anderson*, 3 McCord 223 (1825), "It is the actual boundary and not the false representation of it on the plat which must govern." (Emphasis added)

When Judge McMahon signed the December 9, 2009, Order (ROA p. 8) Appellant submits McMahon was approving the Drafts's plat which complied with Judge James Order of November 25, 2008. (ROA p. 8, and citation in the preceding paragraphs, including the citations to Drafts's deposition), which was not taken until after the Order of December 9, 2009, (ROA p. 8) There was no evidence and no finding

in McMahon's Order of December 9, 2009, that the Order of Judge James was not followed or why it could not be followed. (ROA p. 8) At that point in time there was no reason to believe that such property division did not follow the Order of Judge James of November 25, 2008 (ROA p. 1) as the Order of Judge McMahon of October 2, 2009. Stated such. (ROA p. 7)

Granted there were unknown communications between Drafts and the Judge McMahon or his office, but the exact communications are unknown by Drafts (ROA p. 78), but Drafts acknowledged there was an, "ambiguity of the order and the placement of the new division corner on Bachman, yes, but I don't recall all exactly what was said." (ROA P. 25)

When Judge McMahon signed the December 9, 2009, order with the property division determined by a third party (Drafts), it is clear from the entire December 9, 2009, Order (ROA p. 8) and his previous Order (ROA p. 7) and from the Hearing (ROA 49-87), and from McMahon's Order of December 9, 2009, that McMahon believed that Drafts's plat followed Judge James's Order of November 25, 2008. (ROA p. 8)

III. **The Court of Appeals miscomprehended or misinterpreted the factual conclusions concerning Appellant's due diligence requirement for relief and other relief requested under Rule 60(b) as to Judge McMahon's Order of December 9, 2009.**

Pontious's Rule 60(b) motion was seeking relief from Judge McMahon's Order of December 9, 2009, as not complying with Judge James's Order of November 25, 2008. (ROA p. 1) Pontious's 60(b) Motion (ROA p. 89) predominately addressed the ruling of Judge McMahon, of December 9, 2009, in which he approved the Drafts's plat as complying with the Order of Judge James of November 25, 2008. (ROA. P. 1)

The Court of Appeals addressed the matter as Judge James addressed it (ROA p. 13) as if Appellant's Motion to Reconsider (ROA p. 89) was attempting to reverse the Order of Judge James of November 25, 2008. (ROA p. 1)

Admittedly, as stated by the Court of Appeals, "Pontious had the burden of presenting evidence proving the facts essential to entitle her to relief under Rule 60(b). *BB&T v.* Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) (citing *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991))."

The Court of Appeals found no evidence of due diligence on Pontious's part, but it, like Judge James's Order of October 28, 2010, referenced the initial Order of Judge James's of November 25, 2008. (ROA p. 1) Appellant's main argument was concerning the Order of Judge McMahon of December 9, 2009 (ROA p. 8) which did not comply with the 2008 Order of Judge James (ROA p. 89) or the October 9, 2009, Order of Judge McMahon (ROA p. 8) (See Appellant's Motion ROA p. 33 and Appellant's Memorandum (ROA p. 42)

The Court of Appeals found that the plat approved by Judge McMahon did not comply with the Order of Judge James as there was no attempt by Judge McMahon to comply with Judge James Order, and it in essence found an independent survey was approved by Judge McMahon when McMahon stated: "The survey is deemed by this Court to be an accurate reflection of the property ownership in this case." (ROA p. 8)

The Court of Appeals found McMahon apparently conducted an independent investigation with Surveyor Drafts, which resulted in a division of ownership of the property based on McMahon's order of December 9, 2009, which did not comply with Judge James's Order (ROA p. 1) of 2008) (ROA p. 8).

While McMahon's Order contains a finding, " The survey is deemed by this Court to be an accurate reflection of the property ownership in this case." (ROA p. 8) This same Order contains two preceding findings, which apply to and control the interpretation of the sentence, which are, ""After considering arguments from counsel, the proffers, the file, and the pleadings before it, the Court declined to approve the plat and issue deeds and appointed James F. Draft of Drafts Surveying, Inc., to prepare a plat consistent with the order of Judge James. Mr. Drafts completed the survey and presented it to the Court." (Emphasis added) (ROA p. 8)

It would seem to be contradictory for the Court of Appeals to hold that the Appellant is bound by the original Order of Judge James issued November 25, 2008, setting forth a boundary line which could only be determined by locating a ditch which could not be located (ROA p. 1) and yet bind Appellant the Appellant to such, while approving a plat that does not follow such survey but allows the Court of Appeals to determine that Appellant is bound by a plat resulting from an independent investigation

which included apparent miscommunication between Judge McMahon and the Surveyor Drafts. (See Dratfs's deposition ROA p. 63 -87, and specific references thereto set forth herein).

Thus the lower Courts were to follow Judge James's Order of November 25, 2008 (ROA p. 1) until such was not followed by Judge McMahon when he allegedly approved a plat that did not comply with Judge James's order (ROA p. 8)

Appellant also argued there was no evidence in the record to support McMahon's Order of December 9, 2009, yet the Court of Appeals supported same by referencing the Drafts's deposition in which hearsay was used to support same. ROA p. 63-87)

Thus, notwithstanding McMahon's Orders (ROA p. 7, and ROA p. 8) the Court of Appeals agreed with Appellant's argument that Judge McMahon did not follow Judge James's Order of November 25, 2008; yet it proceeded to reach its own conclusion which no one had argued, that Judge McMahon's Order was an independent investigation which resolved unknown ambiguities and thus was under the supervision of Judge McMahon that McMahon did not intend to follow Judge James's Order of November 25, 2008 (ROA 1)

The complete findings in Judge McMahon's order of December 9, 2009, are:

> After considering arguments from counsel, the proffers, the file, and the pleadings before it, the Court declined to approve the plat and issue deeds and appointed James F. Draft of Drafts Surveying, Inc., to prepare a plat consistent with the order of Judge James. Mr. Drafts completed the survey and presented it to the Court. This survey is deemed by this Court to be an accurate reflection of the property ownership in this case.

Appellant submits the Court of Appeals erred removing the prior two modifying sentences and only emphasizing the last sentence, "This survey is deemed by this Court to be an accurate reflection of the property ownership in this case." In so doing, the Court of Appeals found that Judge McMahon intended to make and in fact made an independent investigation with the assistance of surveyor Drafts, without notice to either party, and thus the division on the plat is binding on both parties.

IV. The Court of Appeals miscomprehended or misinterpreted Pontious's request that the Court of Appeals make its own findings of fact in this equitable matter as such is clearly justified by the findings and rulings made by Judge McMahon (ROA p. 7, 8); and Judge James (ROA p. 1, 13).

The Court of Appeals stated:

> Pontious further requests that we make our own findings of fact in this equitable matter; however, we decline to disturb the trial court's rulings. See Oskin v. Johnson, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012) (acknowledging "the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence," but further stating the court "is not required to disregard the findings of fact by the trial court nor ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses"). Here, we cannot fault either of the two circuit court judges who presided during this litigation for declining to entertain Pontious's belated challenge to the finding that a ditch ran along the road frontage. As noted earlier, Pontious did not appeal the first order in which the trial court made this finding, and we see no reason to disturb the trial court's refusal to alter or amend its rulings based on this alleged error. See Collins v. Sigmon, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989) (applying the maxim that "equity aids the vigilant and diligent").

The credibility of witnesses was not before the lower Court in any of the issues raised by Appellant.

The only resolution of allegedly disputed facts was the interpretation of the order of Judge McMahon by the Court of Appeals. (ROA p. 8)

Pontious alleges fault with Judge James as to his findings in ruling upon Appellant's Rule 60(b) hearing which resulted in James's Order of October 28, 2010. (ROA p. 13) The Court of Appeals adopted such references and also concluded that

Appellant had the burden of proof in establishing facts essential to entitle her to relief from the 2008 Order. (ORDER paragraph 2)

The Court of Appeals, referencing Judge James's 2010 speculation about the 2008 Order, stated that Appellant was attempting to obtain relief for the 2008 Order (ROA p. 1) and did not prove facts essential to entitle her to relief.

The Court of Appeals found such, although all Appellant was attempting to do in Appellants 60(b) motion was to obtain relief from Judge McMahon's Order of December 9, 2009, as such did not comply with Judge James's Order of 2008.

The Court of Appeals referenced Judge James's speculation as what occurred at the 2008 hearing in the October 28, 2010, Order, although it has no evidentiary support in the record.

Thus to reach its conclusion the Court of Appeals faults the Appellant for failing to prove something she never attempted to prove. In the lower Court Pontious's Motion (ROA p. 89) was not to challenge the finding that a ditch ran along the road frontage, her challenge is that Judge McMahon's Order of December 9, 2009, made no reference to a ditch (ROA p. 8), and thus did not follow Judge James's Order of November 25, 2008 (ROA p. 89), or McMahon's own order of October 2, 2009. (ROA 7)

The Court of Appeals agreed that Judge McMahon's Order of December 9, 2009, did not follow Judge James's Order of November 25, 2008, but rather than grant Appellant relief on such findings, proceeded to find an independent improperly supported result, through ignoring two modifying sentences prior to the sentence it adopted.

Rather than addressing Appellant's issue, the Court of Appeals made its own interpretation or finding that Judge McMahon intended to make an independent investigation and thus intended to make a division of the property that did not comply with Judge James's Order. (Paragraph 2 of Court of Appeals Order)

Appellant submits such findings are made by the Court of Appeals taking out of context McMahon's single finding, "The survey is deemed by this Court to be an accurate reflection of the property ownership in this case." Such is because, the Court of Appeals declined to reference the prior two sentences which state, "After considering arguments from counsel, the proffers, the file, and the pleadings before it, the Court declined to approve the plat and issue deeds and appointed James F. Draft of Drafts Surveying, Inc., to prepare a plat consistent with the order of Judge James. Mr. Drafts completed the survey and presented it to the Court." (Emphasis added) (ROA p. 8)

Pontious's contention is that the survey that did not follow Judge James's Order of November 25, 2008) did not occur until Drafts created it on November 4, 2009, and thus does not understand how the lower Court or the Court of Appeals could state that in November of 2008, that she should have appealed that ruling because she should have contemplated a future ruling that did not comply with Judge James' Order of 2008 (ROA p. 1) would leave her with 20 feet of road frontage out of 107 feet, and 1.229 acres out of 3.223 acres.

When the error occurred in the December 9, 2009, Pontious was vigilant and diligent in bringing that issue before the Court, and thus complied with the requirements of *Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989) (applying the maxim that "equity aids the vigilant and diligent").

Appellant submits the 2008 Order of Judge James should not be used to deprive Appellant of her rights under the guise of refusing to disturb Judge James's ruling, (ROA p. 1) while not following Judge James's ruling in the final determination of how the property division should be made. If the Court had relied upon a ditch and deprived the Appellant of some property frontage and acreage, then Appellant could understand that ruling being upheld. The binding of Pontious to a ruling made November 25, 2008, which references a ditch determination must be made before the remaining frontage is divided (ROA p. 1); and to an October 2, 2009, Order in which McMahon directs survey be made by Drafts that complies with Judge James's Order of November 25, 2008. (ROA p. 7); and to the December 9, 2009, ruling that references Judge James's' Order as being the basis of the survey, but justifies not following James Order of 2008, is inequitable and should not be approved by the Court of Appeals.

This survey which partitions the disputed property without reference to a ditch and which is loosely based upon an ambiguous sketch (ROA p. 72, lines 7-10) and an ambiguous Order (ROA p. 70, lines 1-9), that the surveyor assumed Judge James wanted to give Pontious 20 feet of frontage (ROA p. 30, lines 1-25) and he intended to make a suggestion to the Court giving the Appellant 20 feet of frontage. (ROA p. 84, lines 24, 25; p. 85, lines 1-1-18) Appellant submits that such a plat should not be approved due to the admitted basis for such a plat resting solely on erroneous assumptions by the surveyor; and the Court of Appeals should so find and disregard the plat.

This result is clearly inequitable, violates Pontious's due process as herein set forth, and Appellant submits the Court of Appeals should make its own findings that

Pontious was diligent in raising the inequitable result found by the lower courts, and follow Judge James' order as was originally intended. (ROA p. 1) The Court of Appeals should find the lack of a ditch makes Judge James' Order impossible to follow, but also takes away his reasoning that Jason should have more road frontage, and to follow James's order inference that since there was a ditch, would be to unfair to equally divide the road frontage, and thus find and conclude that without such a ditch, the Court of Appeals should follow Judge James's order and equally divide the road frontage between Jason and Dawn. (ROA p. 3, paragraph 17)

The Court should thus review the Record On Appeal and make its finding in light of the established facts or alternatively follow the provision in Judge James's Order, that would grant each an equal amount of road frontage as the unequal frontage was because of the ditch, and Judge James specifically stated, "If Jason and Dawn were granted an equal amount of road frontage, Jason would receive an inequitable result, as the aforesaid ditch would take up most of that frontage." (ROA p. 3, paragraph 17) The inference being and the finding the Court of Appeals should make is that there is no reason for Jason to receive any more frontage than Dawn, and order a survey with the dividing corner being the a point that equally divides the road frontage on Bachman Avenue.

Thus, the Court of Appeals should rehear the matter and make its own finding that the Drafts's survey should not be substantiated for the reasons herein set forth, and make an equitable method for dividing the property

The Court of Appeals should find that the plat approved by Judge McMahon did not comply with the Order of Judge James even though Judge McMahon intended to

comply, and find the survey of Drafts should not be approved, and should find that the matter should be remanded for a more equitable result.

The Court of Appeals should find that the issue of determining an independent investigated surveyor by McMahon and Drafts was not established with proper evidence and thus no division of ownership of the property based on McMahon's order of December 9, 2009, can be used in this matter.

The Court of Appeals should find that the Appellant is bound by the original Order of Judge James issued November 25, 2008, setting forth a boundary line which could only be determined by locating a ditch (ROA p. 1) which could not be located and thus the approving Order is invalid.

The Court of Appeals should find there is no evidence in the record to support McMahon's Order of December 9, 2009, and thus such should be reversed.

The Court of Appeals should find the complete findings in Judge McMahon's order of December 9, 2009, are:

> After considering arguments from counsel, the proffers, the file, and the pleadings before it, the Court declined to approve the plat and issue deeds and appointed James F. Draft of Drafts Surveying, Inc., to prepare a plat consistent with the order of Judge James. Mr. Drafts completed the survey and presented it to the Court. This survey is deemed by this Court to be an accurate reflection of the property ownership in this case.

The Court of Appeals should find the prior two modifying sentences indicate that Judge McMahon attempted to approve a plat that followed Judge James's Order of November 25, 2008, but it did not.

The Court should then either remand the matter to the trail Court for it to reach a more equitable division of the property, or alternatively find that Judge James's Order indicated in paragraph 17, that the only reason for the unequal division is the ditch on Jason' portion of the property, and with such a ditch the reason for the inequitable division of road frontage disappears and the Court should order a division based on equal frontage to each party as apparently Judge James would have order such without the ditch. (ROA p. 3)

CONCLUSION

Petitioner respectfully requests that the matter be reheard, and that Appellant be given the relief herein requested and that this Court make its own findings that support Appellant's grounds and order that the frontage be equally divided, or divided in a more equitable manner.

July 10, 2013

Lexington, SC

s/ John E. Cheatham
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FAX MEMORANDUM/COVER SHEET

DATE: 7-10-13

TO: B. Casbey - C. Foster, II # 803-400-1951

FROM: John E. Cheatham, Esq. - Fax (803) 359-0642

RE: Portions Petition for Rehearing

TOTAL NUMBER OF PAGES 22 (Including Cover Page)

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- Bryan Caskey

Best regards,

John E. Cheatham