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SC Court of Appeals

20THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Please

James O. Spence

Master in Equity

Case No. 2019-CP-32-00630
Appellate Case No. 2023-01417

James G. Sercu and Sherri A. Sercu,

Respondents,

v.

Douglas Steven Hart,

Appellant.

INITIAL BRIEF OF RESPONDENTS

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ATTORNEYS FOR THE RESPONDENTS

December 18, 2023

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STATEMENT OF THE CASE

Chain of Title

James G. Sercu and Sherri A. Sercu (hereinafter referred to as "Respondents") are the owners of that real property, contiguous to the property of the Appellant, located at 462 Woods Point Road, Gilbert, SC, in Lexington County and have been since February 5th, 2016. *(See* Respondents' Exhibit 1, Deed from Carl Anthony Thompson to Respondent James G. Sercu.). Appellant owns the property right next to the Respondents at 464 Woods Point Road since July 19th, 2011. (*See* Respondents' Exhibit 7, Deed from Arthur State Bank to Appellant Douglas Steven Hart and Terry Wise Hart). The evidence put forth established that the deed from Security Federal Bank to Carl Anthony Thompson, incorporated by reference, on the last page under Exhibit A, the plat of the property which is recorded at the Office of the RMC for Lexington County in Plat Book 13017, at page 77.)(*See* Respondents' Exhibit 2, Plat of Subdivisions)(*See* Respondents' Exhibit 3, Deed from Security Bank to Carl Anthony Thompson) The deed from Carl Anthony Thompson to the Respondents not only reference this same plat but has specific language of this easement**.** (*See* Respondents' Exhibit 1) (*See* Respondents' Exhibit 2). Finally, the deed from Arthur State Bank to the Appellant references this same plat, on the last page under Exhibit A, as recorded in Plat Book 13017, at page 77. (*See* Respondents' Exhibit 7 Deed from Arthur State Bank to Appellant Douglas Steven Hart and Terry Wise Hart) (*See* Respondents' Exhibit 2). All three deeds, including the Appellant's when he bought his property, reference Plat Book 13017, at page 77, which such plat grants a 20-foot access easement on and across for the

benefit of lot 2, the property of the Respondents located at 462 Woods Point Road. The recorded easements regarding utilities have been on record since August 28, 2002. (*See* Respondents' Exhibits 5 and 6, Easements to SCE&G from Richard Hanson)

The Respondents submitted evidence of this and the chain of titles for the properties at trial, without objection, to establish that the Respondents have an easement and the right to use utilities for their property. (*See* Respondents' Exhibit 1, Deed from Carl Anthony Thompson to Respondent James G. Sercu)(*See* Respondents' Exhibit 2, Plat of Subdivisions)(*See* Respondents' Exhibit 3, Deed from Security Bank to Carl Anthony Thompson)(*See* Respondents' Exhibit 4, Easement to Town of Lexington from Carl Thompson) (*See* Respondents' Exhibits 5 and 6, Easements to SCE&G from Richard Hanson)(*See* Respondents' Exhibit 7, Deed from Arthur State Bank to Appellant Douglas Steven Hart and Terry Wise Hart) (*See* Respondents' Exhibits 8A and 8B, Chain of Title Search Summaries of Lot 1 and Lot 2, which includes a deed from Leonard R. Wall to Richard M.B. Hanson which is the common source for Lot 1 and Lot 2 and located in Deed Book 3597 at Page 292 dated January 11, 1996).

The Plat for the Properties also references utilities of water and sewer, which services Lots 1 and 2. (*See* Respondents' Exhibit 2). The Appellant testified that he did not have any evidence that the Respondents installed any utilities on his property, that the Appellant bought the property in 2011, and it took approximately seven years for the Appellant to discover that there were utilities running across his property to service the Respondents. (*See* Trial Transcript Vol. II, p. 119:1-123:12) (*See* Respondents' Exhibit 25 – Deposition of Appellant Douglas Steven Hart p. 14:12-21). The testimony from Respondent James Sercu and Appellant Hart established that Carl Anthony Thompson, the previous owner of Lot 1, had utilities as early as 2011 and these were the

same utilities that the Respondents have on the property. (*See* Trial Transcript Vol 1. Pg 101:23-102:17) (*See* Trial Transcript Vol. II, p. 119:1-123:12).

Appellant's Actions

In 2013 the easement was in pristine condition. (*See* Respondents' Exhibit 9A – Condition of Easement in 2013). Appellant Hart was destroying portions of the concrete until a temporary injunction was issued refraining the Appellant "from damaging or destroying any of the concrete driveway or putting up any obstacles over the driveway." (*See* Respondents' Exhibit 20 – Order Regarding Temporary Injunction and Restraining Order – Case No. 2013-CP-32-02975). The lawsuit eventually settled, but the condition of the easement was never restored.

From approximately when the Respondents moved into their house in 2016 until 2022, Appellant has continuously inferred with the Respondents use of their property and easement (*See* Trial Transcript Vol 1. Pg. 71:9-24). Over this time, the Appellant has reduced the total width of the 20-foot easement by placing in the easement area cinder blocks, debris, timber, and erecting a wooden fence. (*See* Respondents' Exhibit 9B, Photograph of Fence) (*See* Respondents' Exhibit 9C, Condition of Easement and Timber on April 24, 2016) (*See* Respondents' Exhibit 11A, Cinder blocks in Easement) (*See* Respondents' Exhibit 11B, Cinder blocks in Easement) (*See* Respondents' Exhibit 12, Condition of Easement and obstructions on September 25, 2019) (*See* Respondents' Exhibit 13, Condition of Easement and obstructions on March 16, 2020) (*See* Respondents' Exhibit 14A, Condition of Easement on October 9, 2016) (*See* Respondents' Exhibit 14B, Condition of Easement on March 16, 2020). The easement area was never maintained by the Appellant despite his testimony that he has always maintained it. (*Id*) (*See* Respondents' Exhibit 16A, Condition of Easement on May 1, 2016) (*See* Respondents' Exhibit 16B, Condition of Easement on January 24, 2019) (*See* Respondents' Exhibit 26 – Affidavit of Douglas Steven Hart pg. 1-2)(*See* Trial Vol. II Pg. 133:6 – 137:25) (*See* Appellant's Exhibit 14, Videos of Respondents

driving through Easement on September 9, 2019 and September 25, 2020). The Appellant on April 23, 2016 haphazardly stacked concrete blocks in the easement area which blocked Respondents' use. (See Respondents' Exhibit 10 – Concrete Wall) (*See* Trial Transcript Vol I. Pg.42:19-43:16). The Appellant actively destroyed the easement by taking out the brick pavers, digging potholes, and destroyed portions of the easement using his machinery. (*See* Respondents' Exhibit 15 – Video of Respondent destroy Easement) (*See* Respondents' Exhibit 16B) (*See* Respondents' Exhibit 27-Video February 5, 2017) Further, every time Respondent James Sercu attempted to maintain the property or attempt to restore any damage, Appellant would undo any restoration done with hostility. (*Id.)* (*See* Respondents' Exhibit 16C, Respondents' attempt to restore Potholes September 2, 2020) (*See* Respondents' Exhibit 16D, Appellant's action re-digging potholes September 3, 2020) (*See* Respondents' Exhibit 16E, Respondents attempt to restore brick pavers) (Exhibit 27 – Video of Appellant stealing gravel 9/24/2020) (*See* Trial Vol I. pg. 54:1-15). In one instance after the Appellant was issued a light citation, he went out in the night with his machinery to destroy the easement area closer to the Respondents' property. (*See* Respondents' Exhibit 19 – Video of Appellant destroying Easement at night) (*See* Trial Transcript Vol II. Pg. 151:12 – 154:17). The Respondents attempted to resolve the matter prior to this lawsuit, but Appellant refused. (*See* Respondents' Exhibit 17, Letter to Appellant) (*See* Trial Transcript Vol II. 170:21 – 172:18) It was only until the Respondents moved out of the property to rent to a new family did the actions of the Appellant stop. (*See* Trial Transcript, Vol. I. p. 71:9-72:3).

At trial, Appellant testified that he has always maintained the property, that the reason for ripping up the concrete was to return the property to a more natural state, the cinder blocks were for a mailbox project, and that Respondent James Sercu was illegally dumping materials on his driveway so he had every right to remove it. (*See* Trial Transcript, Vol. II pg. 133:7 – 138:8, 139:25

– 140:17, 143:6-146:1, 168:1-15). Appellant testified that the primary reason was to exercise his property rights, that he has "always been a good neighbor" and this is at his foundation as a person. (*See* Trial Transcript, Vol. II., p. 141:18 – 142:21). At trial it was also brought out that the Appellant has given multiple versions in order to justify his actions. First, Appellant testified in his deposition and in the video that the Respondents do have an easement, but for ingress and egress only and that they have no right to dump or maintain the easement. (*See* Respondents' Exhibit 25 – Deposition of Douglas Hart 15:16 – 16:19) (*See* Trial Transcript Vol. II. Pg. 115:10 – 118:22) (See Respondents' Exhibit 27 – Video of Appellant stealing gravel, 0:37-52). Then the Appellant attempted to argue that the Respondents have no easement at all in his affidavit to oppose summary judgment, which Respondents argued it amounted to a sham affidavit under *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004), based upon his review of the chain of title. (*See* Respondents' Exhibit 26 – Affidavit of Douglas Steven Hart). Finally, Appellant at trial testified that another plat exists, (hereinafter as "the phantom plat") which is the true plat, not Respondents' Exhibit 2 of the Plat of the properties, but failed to bring any evidence of the existence of the phantom plat to trial. (*See* Trial Transcript Vol. II, 106:12 – 111:18; 128:16 – 129:21, 203:14 – 203:9; 204:21 – 205:8). Respondent at trial also held the position that he has never at any point admitted that the Appellants owned an easement across his property despite his testimony in his deposition. (*See* Trial Transcript Vol. II. Pg. 115:10 – 118:22). The only evidence put forth by the Appellant to rebut the Respondents presumption of an easement and access to utilities was his own testimony.

After the conclusion of the trial, the Honorable Judge Spence issued an order on July 27, 2023 ruling in favor of the Respondents in that (1) they do have a valid 20-foot easement as depicted on the Plat of the Properties with a right to maintain it, (2) that Appellant is permanently enjoined from interfering, obstructing and/or damaging the easement, (3) that the Respondents

have rights regarding the utilities that are located in the 20-foot easement, (4) Appellants counterclaim for trespass is dismissed with prejudiced, and (5) Respondents are entitled to actual damages for $50,000.00 and punitive damages for $100,000.00. This appeal follows.

STANDARD OF REVIEW

The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." *Slear v. Hanna*, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). In an appeal of an equitable action tried before a master authorized to enter final judgment, an appellate court must review the entire record and make its own findings of fact according to its view of the preponderance of the evidence. *Judy v. Kennedy*, 398 S.C. 471, 474, 728 S.E.2d 484, 485 (Ct. App. 2012) The determination of the extent of a grant of an easement is an action in equity. *Tupper v. Dorchester County*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). *Sheppard v. Justin Enters*., 373 S.C. 518, 521, 646 S.E.2d 177, 178 (Ct. App. 2007).

ARGUMENTS

I. APPELLANT FAILED TO PRESERVE ISSUES FOR APPELLATE REVIEW

a. Law

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp*., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." *Id.* Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). If the losing party has raised an issue in the lower court, but

the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *Id.*

b. Analysis

Appellant has raised issues in his initial brief that were never addressed, raised, or ruled upon in the Trial Court Order. Those issues are therefore not properly before this Court and should not be considered. Additionally, Appellant never filed a Motion to Reconsider or Alter Judgment under SCRCP Rule 59(e). Appellant cannot now attempt to argue those issues when they were not properly preserved, never addressed, or ruled upon. Those issues are as follows:

1. Appellant's argument that there was no intention by any owner of Lot 1 to create an easement over Lot 1 for the benefit of Lot 2. (*See* Appellant's Brief Pg. 8).
2. Appellant's argument that there is evidence of a specific, contrary intention by the grantor of no easement. (*See* Appellant's Brief Pg. 9).
3. The Owner's Certification on the Subdivision Plat was fraudulently certified and the Plat itself is unenforceable. (*See* Appellant's Brief Pg. 9-10; *See* Respondent's Exhibit 2).
4. Appellant's argument that Respondents never claimed in the Pleadings or at trial that they have implied easement rights. (*See* Appellant's Brief Pg. 11)
5. Appellant's argument that no evidence was introduced at trial pertaining to the existence or validity of the easement. (*See* Appellant's Brief Pg. 11).
6. Appellant's argument that the record is devoid of any evidence that an owner of Lot 2 has any right to utilities. (*See* Appellant's Brief Pg. 12).
7. Appellant's argument that the statute of limitations has not run since Appellant being aware that utilities are being serviced to the Respondents' house is not the

same as being aware that the Respondents utilities are running through Appellant's property. (*See* Appellant's Brief pg. 14).

8. Appellant's argument that Respondents are not entitled to actual or punitive damages because there was no evidence to warrant either and Respondents did not try to unsuccessfully rent their house. (*See* Appellant's Brief pg. 14-17).

Appellant's failure to file a Motion to Reconsider under SCRCP Rule 59(e) to bring to the Trial Court's attention these issues amount to a failure to properly preserve these issues for appeal. Additionally, Appellant's failure to bring to the Trial Court's attention through a Motion to Reconsider any error regarding evidence in the record has not been properly preserved for appeal. Appellant's appeal should be dismissed for these reasons.

II. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE RESPONDENTS HAVE AN ACCESS EASEMENT ACROSS APPELLANT'S PROPERTY

a. Law

"Generally, when a deed references a plat that contains an easement, an implied easement arises even though the deed itself is silent. Stated differently, a presumption of an implied easement arises unless rebutted by a specific, contrary intention by the grantor. Absent evidence of the seller's intent to the contrary, a conveyance of land that references a map depicting streets conveys to the purchaser, as a matter of law, a private easement by implication with respect to those streets, whether or not there is a dedication to public use. Furthermore, according to the great weight of judicial opinion, the lot purchaser is entitled to the use of all the streets and ways, near or remote, as laid down on the plat by which he purchases*." Gooldy v. Storage Center-Platt Springs, LLC*, 422 S.C. 332, 338-39, 811 S.E.2d 779, 782 (2018). "This presumption is entrenched in South Carolina property law… The Court agreed with the realty company under the general rule 'that where a deed describes land as is shown on a certain plat, such plat becomes a part of the deed.'

This Court has since repeated the rule from *Blue Ridge* on numerous occasions." *Gooldy*, 422 S.C. at 339, 811 S.E.2d at 782.

Even if an easement for access for ingress and egress is established, a party must still establish that he has good title for easement. The way to determine good title is to establish the chain-of-title for Plaintiffs' and Defendant's properties. One way to establish chain-of-title is to track the title back to a common source. *Haithcock v. Haithcock*, 123 S.C. 61, 115 S.E. 727, 729 (1923). If one party has shown good title through a proper chain-of-title, the burden is on the other party to disprove good title. *Lynch v. Lynch*¸ 236 S.C. 612, 619, S.E.2d 301, 304 (1960).

b. **Analysis**

The Trial Court correctly concluded that the Respondents have a valid easement as shown in the Plat of the Properties. (*See* Respondents' Exhibit 2). When examining the Plat of the Properties, the cross-stitched area clearly states, "20' ACCESS ESM'T ON & ACROSS LOT 1 FOR THE BENEFIT OF LOT 2". The intent was clearly to give Lot 2, the Respondents' property, an access easement as the property would be land locked otherwise. The Plat of the Properties was also approved by the Lexington County Planning Commission on July 8, 2008 and no evidence indicating problems otherwise.

Goodley states that if a deed references a plat that contains an easement, then there is a presumption of an implied easement and it is on the Appellant to rebut this with specific, contrary intention by the grantor. The deeds from both the Appellant and Respondents in their chain of titles reference the Plat of the properties which is recorded at the Office of the RMC for Lexington County in Plat Book 13017, at page 77. The Appellants have carried their burden in showing an easement exists, as shown on the Plat of the Properties, that they have good title by establishing the title back to a common source with Lenoard R. Wall to Richard M.B. Hanson under *Haithcock* and *Lynch*, and the burden thus shifts to the Appellant. (See Exhibit 1, 2, 7, 8A and 8B).

Appellant's argument at trial was that the "phantom plat" is the true plat and not the recorded Plat of the Properties as seen in Exhibit 2 despite Appellant's failure to produce any tangible evidence of its existence. (*See* Trial Vol. II, 106:12 – 111:18; 128:16 – 129:21, 203:14 – 203:9; 204:21 – 205:8). As the Trial Court correctly noted and as argued by the Respondents, the totality of the evidence and reasonable inferences dictate the language which contains a possible, partial reference to the "phantom plat" must simply be treated as a scrivener's error. (*See* Trial Court Order page 11).

At trial the Appellant produced no evidence or testimony (1) from the surveyor who allegedly prepared this plat, (2) from the owner of the property who requested plat preparation, (3) attorney office who prepared this deed, (4) other deeds or instruments in the chain of title referencing this plat, and (5) any copy or version of the actual plat. (*See also* Trial Court Order page 7). As stated in *Goodly*, this presumption that there is an easement can only be rebutted "by a specific, contrary intention by the grantor*"* and the only evidence put forth at trial was Appellant's own testimony regarding his speculative theory of the phantom plat. Additionally in Appellant's Initial Brief, they have provided no argument or legal authority as to why this should not be simply considered a scrivener's error and, as such, have failed to preserve this issue for appeal. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Finally, Richard Hanson deeded Lot 2 to Hall Builders LLC on September 3, 2008 with it specifically referencing the Plat of the Properties under Exhibit "A", Plat Book 13017, at page 77. Appellant's argument regarding Cliff Hall is clearly misplaced as Hall Builders owned Lot 2, as it is also noted on the Plat of the Properties, "OWNER/CONTACT: HALL BUILDERS", and an individual would have to sign off on the Owner's Certification, Cliff Hall, before it would have been approved by the Lexington County Planning Commission. Appellant provided no evidence

that Cliff Hall's signature was improper despite the deed to Hall Builders, which incorporated the Plat of the Properties, being duly recorded. The Trial Court reached the same conclusion as the Respondents that Cliff Hall's signature was permissible. Further, in support of the Trial Court's ruling, this Court should take judicial notice that Cliff Hall was the registered agent on file for Hall Builders, LLC, under the records located in the South Carolina Secretary of State Business Entities Online. (*Cf.* Exhibit 28 – Entity Profile – Business Entities Online – S.C. Secretary of State). Such information is of public knowledge and is indisputable. (*See generally Masters v. Rodgers Dev. Group,* 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) ([W]e hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable).

c. Conclusion

The Trial Court correctly concluded that under *Goodly*, Respondents have a 20-foot access easement as depicted on the Plat of the Properties, that Appellant has failed to produce any tangible evidence of the "phantom plat" and that he has failed to rebut the presumption with evidence of a "specific, contrary intention by the grantor". Appellant has failed to argue or even address the Trial Court's ruling that it was at most a scrivener's error and has failed to preserve the issue for appeal. Finally, Appellant's argument regarding Cliff Hall is misplaced since no evidence that Cliff Hall, as the registered agent for Hall Builders as shown in the South Carolina Secretary of State records, could not sign off before it was approved by the Lexington County Planning Commission.

III. THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S COUNTERCLAIM.

a. Law

"[A] trespass is any interference with one's right to exclusive, peaceable possession of his property." *Ravan v. Greenville County*, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993). In South Carolina, there is a three-year statute of limitations regarding a trespass upon or damage

to real property. *See* S.C. Code Ann. §15-3-530(3). The equitable doctrine of laches applies for a person's "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have been done." *Jones v. Leagan*,384 S.C. 1, 19-20, 681 S.E.2d 6, 16 (Ct. App. 2009).

b. Analysis

a. **Respondent's Affirmative Defenses**

Appellant's trespass claim for the Respondent's utilities is clearly barred by the three-year statute of limitations. At trial, the Appellant was unable to provide any evidence as to when the trespass would have occurred or any evidence that the Appellant's installed any utilities onto his property. (*See* Trial Transcript Vol. II, p. 119:1-123:12) (*See* Respondents' Exhibit 25 – Deposition of Appellant Douglas Steven Hart p. 14:12-21). The Appellant was also well aware when he purchased his property in 2013 that the Respondent's property, prior to the Respondents purchasing it in 2016, had utilities. (*Id*.) Thus, it took the Appellant approximately seven years after purchasing his property, equipped with this knowledge, to commence a trespass action for the utilities.

The Appellant's argument that the statute of limitations does not bar his claim is flawed. Appellant provides no date as to when the trespass would have occurred for purposes of a three-year statute of limitations. Appellant makes a vague reference to the filing of this suit, February 11, 2019, and since Appellant discovered the utilities shortly after the commencement of Respondents' action that his claim is not barred by the statute of limitations. The filing of this suit has no legal relevance as to when the alleged trespass would have occurred for purposes of the statute of limitations. The focus regarding the statute of limitations is when did the alleged trespass occur and did the Appellant commence an action within three years of the alleged trespass. Appellant was aware for approximately seven years that the Respondent's property had utilities

and it makes no difference if the Appellant did not consider whether the utilities were running through the easement or not. Appellant has failed to make any substantive legal analysis as to why his ignorance of the location of the utilities and waiting almost seven years to bring an action for trespass is an exception to the three-year statute of limitations. Appellant argument at best amounts to only legal conclusions that the trial court's ruling was erroneous without explanation, caselaw or legal authority.

Appellant's trespass claim is also barred by the equitable doctrine of laches. The Trial Court correctly noted that there was no reasonable justification for the Appellant to wait approximately seven years to bring an action for trespass if he truly believed his property rights were infringed upon. (*See* Trial Court Order pg. 17). Moreover, Appellant had actual and constructive notice of the utilities as they are referenced in the chain of title to Appellant's property as ignorance is not an excuse. Finally, Appellant failed to make any argument that the equitable doctrine of laches does not apply to his trespass claim and, therefore, has failed to preserve the issue for appeal. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Therefore, Appellants trespass claim is barred by the statute of limitations and the equitable doctrine of laches. Appellant has known about the utilities for approximately seven years and fails to explain why Appellant's circumstances amount to an exception to the statute of limitations. Finally. Appellant's failure to raise any argument as to why the equitable doctrine of laches does not apply amounts to a failure to preserve the issue for appeal for this Court to consider.

b. **Respondents have a right to utilities**

In addition to above affirmative defenses raised by the Respondents, the chain of title introduced at trial clearly indicate that the Respondents have a right to utilities. The easements regarding utilities that have been on record since August 28, 2002. (*See* Respondents' Exhibit 5 and 6). Additionally, the Plate of the Properties references utilities of water and sewer, which

services Lots 1 and 2. (*See* Respondents' Exhibit 2). Appellant would have had constructive notice that the Town of Lexington, SCE&G, and Gilbert Summit Rural Water District were servicing utilities. The testimony from both the Appellant and Respondent James Sercu indicates that Carl Anthony Thompson, the previous owner of Lot 1, had utilities as early as 2011 and these were the same utilities that the Respondents have on the property.

d. Conclusion

The Trial Court correctly ruled that the Respondents' affirmative defenses bar Appellant's trespass claim. Appellant has failed to argue or even address the Trial Court's ruling that the doctrine of laches applies and has failed to preserve the issue for appeal. Finally, the Trial Court correctly ruled that the Respondents have proven they have utility rights pursuant to the chain of title submitted.

IV. THE TRIAL COURT DID NOT ERR IN AWARDING ACTUAL DAMAGES.

a. Law regarding Actual Damages

"In South Carolina, a property owner is ordinarily competent to offer testimony as to value of his property." *Cooper v. Cooper*, 289 S.C. 377, 379, 346 S.E.2d 326, 327 (Ct. App. 1986). In calculating damages for private nuisance South Carolina law allows the diminution of the rental value to be considered. See *Babb v. Lee County Landfill SC, LLC*¸ 405 S.C. 129, 141-42, 747 S.E.2d 468, 474-75 (2013). ("The damages recoverable for trespass and nuisance being strictly limited to damages to one's property interests, the only proper measure of them is the value of the property. A well-known principle of property law is that property consists of a bundle of rights. The value of a piece of property is the value of all of the rights one obtains through ownership of the property. Thus, included in the value of property are the rights of exclusive possession and use and enjoyment protected by the trespass and nuisance causes of action respectively. To the extent those interests are harmed by a temporary trespass or nuisance, the harm would be reflected in the

lost rental value of the property. In measuring the damages for a nuisance, the diminution in the value of the use of the property necessarily includes annoyance and discomfort, which directly affect the value of the use. It is not, therefore, proper to permit a recovery both for the diminution in the value of the use and for annoyance and discomfort, which necessarily enter into and constitute a part of the diminution of such value. To do so is to allow a double recovery. Lost rental value includes the annoyance and discomfort experienced as the result of a temporary trespass or nuisance. The lost rental value of the property is the difference between the rental value absent the trespass or nuisance and the rental value with the trespass or nuisance. The rental value with the trespass or nuisance present would be less, in part, because a hypothetical renter would have to suffer the annoyance and discomfort of the nuisance or trespass. Thus, the lost rental value measures the monetary value of the harm to the property interest. Furthermore, because lost rental value includes damages caused by annoyance or discomfort, to permit a plaintiff to recover both the lost rental value plus an additional sum for annoyance and discomfort would be to permit a double recovery. The Supreme Court of South Carolina has already recognized the lost rental value of property as the measure of and limit on damages for a temporary harm to property.")

b. <u>Analysis</u>

Appellant's argument is that Respondents produced no evidence that would support a finding for actual damages is misplaced. (*See* Appellant's Brief page 15). The record is ripe with evidence that would support that the Appellant's actions had substantially and unreasonably interfered with the Respondents' use and enjoyment of their property. (*See* STATEMENT OF THE CASE – Appellant's Actions) Thus, there is substantial evidence to support a finding in favor of the Respondents regarding their negligence and private nuisance cause of action.

Appellant further argues that Respondents are not entitled to actual damages because they did not ever try to, unsuccessful, rent their home and, therefore, did not suffer any damages. (*See*

Appellant's Brief page 16-17). Appellant's argument is misplaced as South Carolina Jurisprudence does not state one must attempt, unsuccessfully, to rent their property before damages are to be awarded. As the Supreme Court stated in *Babb*, damages are awarded based upon the diminution in the value of the use of the property and this lost rent value includes the annoyance and discomfort experienced as the result of a temporary trespass or nuisance. *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 141-42, 747 S.E.2d 468, 474-75 (2013). Moreover, since a landowner is competent to testify as to the value of their property under *Cooper*, Respondent James Sercu's testimony regarding the diminution of value based upon Appellant's actions was admissible. Respondent James Sercu testified that the rent for the property was $2,100 since 2014, that it has increased since, and that 20-25% of that rental value would be his damages. (*See* Trail Transcript, Vol. I., pp. 75:1-23). Respondent James Sercu also testified that he had to spend money on crush and run and estimated he would spend approximately $13,000 to replace concrete dug up by the Appellant. (*See* Trail Transcript Vol I. pg. 54:1-55:19) This action was filed February 11, 2019 which means in calculating damages based on the rental value the appropriate time period would be from February 2016 to October 17, 2022 when Respondent James Sercu said it all stopped. (*See* Trial Transcript, Vol. I. p. 71:14-24). With 25% of $2,100.00 being $525.00, multiplying this by 81 months, the total amount in actual damages comes to $42,525.00. There is ample evidence and testimony to support a finding of $50,000.00 in actual damages.

Respondents also offered expert Ronnie Wingard to testify regarding his opinion as to the value of the Respondent's property. Appellant argues that Mr. Wingard should not be admitted as an expert since Mr. Wingard himself admitted that "he was not an expert". However, the voir dire and qualifications of Mr. Wingard clearly show that Mr. Wingard is more than qualified to testify on the valuations of property in Lexington County with his 52 years of experience in the real estate

business and 49 years as a real estate broker. (*See* Trial Transcript, Vol. II., pp. 6:14-8:24.) Pursuant to Rule 702 of the South Carolina Rules of Evidence, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." As the Trial Court correctly noted, there appeared to be some confusion as to how exactly "expert" was to be defined to the witness as Mr. Wingard's specialized knowledge, skill, experience, and training in this field does assist the trier of fact in the issue of damages for the Respondents. (*See* Trial Court Order pg. 20-21) Appellant's argument is not that Mr. Wingard does not have specialized knowledge, skill, experience, or training in order to be qualified as an expert, but simply based on the confusion that occurred during the voir dire. Appellant has failed to address this in his argument and has subsequently failed to preserve the issue for appeal. Therefore, it was not error for the Trial Court to recognize Mr. Wingard as an expert in evaluating and appraising property in Lexington County.

Mr. Wingard's testimony is that starting in 2016, the rental basis would be $2,100 with it increasing each year by 8-10%. Using the same diminution provided by Respondent Sercu of 25%, the Trial Court broke down the following damages for each year:

February 2016 - $2,100 x .25 = $525 x 11 months = $5,775

2017 - $2,310 x .25 = $577.50 x 12 months = $6,930

2018 - $2,541 x .25 = $635.25 x 12 months = $7,623

2019 - $2,795.10 x .25 = $698.76 x 12 months = $8,385.12

2020 - $3,074.61 x .25 = $768.65 x 12 months = $9,223.83

2021 - $3,382.07 x .25 = $845.52 x 12 months = $10,146.21

2022 - $3,720.28 x .25 = $930.07 x 10 months = $9,300.70

Total: $63,200.00

The Trial Court's award of $50,000 in actual damages when considering the testimony of both Respondent James Sercu and Mr. Wingard was reasonable and not in error.

c. Conclusion

The Trial Court did not err in awarding actual damages to the Respondents as (1) there was ample evidence in the record that the Appellant had substantially and unreasonably interfered with the Respondents use of their property, (2) Respondent James Sercu may testify as to the lost value to his property under *Cooper* and *Babb*, and (3) Mr. Wingard's expert testimony was admissible.

V. THE TRIAL COURT DID NOT ERR IN AWARDING PUNITIVE DAMAGES.

a. Law regarding Punitive Damages

The ten factors that are relevant in considering punitive damages are as follows: (1) the character of the defendant's acts: (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause; (3) defendant's degree of culpability; (4) the punishment that should be imposed; (5) duration of the conduct; (6) defendant's awareness or concealment; (7) the existence of similar past conduct; (8) likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) defendant's wealth or ability to pay. *Austin v. Specialty Transp. Services, Inc*., 358 S.C. 298, 313- 314, 594 S.E.2d 867, 875 (Ct. App. 2004); S.C. Code § 15-32-520. The burden of proof is also governed by S.C. Code § 15-33-135 stating that, "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." "To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless

disregard of the plaintiff's rights." *Solanki v. Wal-Mart*, 410 S.C. 229, 236, 763 S.E.2d 615, 618 (Ct. App. 2014).

b. Analysis

The Trial Court correctly noted that punitive damages were warranted based upon the Appellant's actions and reviewing the factors. (*See* Trail Court Order pg. 21). Appellant's testimony was that he has always maintained the property, the reason for ripping up the concrete was to return the property to a more natural state, the cinder blocks were for a mailbox project, and that the Respondent was illegally dumping materials on his driveway so he had every right to remove it. The Trial Court was not persuaded by the Appellant's testimony as the objective evidence presented by the Respondents made it quite clear that the Respondent did not maintain the property and actively sought to damage and interfere with its use to harm the Respondents. (*See* Respondents' Exhibits 15 and 17). It was a continuous deliberate act by the Appellant and this is the second time this matter has been addressed in Lexington County as the Appellant argued before the Honorable Judge Keesley that he may do what he pleases with his property if he does not interfere with the owner's right of access. (*See* Respondents' Exhibit 20 pg. 6) (*See* Respondents' Exhibit. 20). The Keesley Order states, "It appears that Mr. Hart is removing every other section of the concrete along the expansion joints. All of these removed sections are within the old 20-foot-wide easement. No one has contested that the plaintiff has an easement over that section for ingress and egress." (*See* Respondents' Exhibit pg. 5). The Order also pointed out that the Appellant was unilaterally deciding what interferes with the owner's right of access and was ultimately enjoined from destroying the easement. (*See* Respondents' Exhibit 20, p. 6, 10-11). *See also Poole v. Edwards*, 15 S.E.2d 349, 352 (1941) (South Carolina allows award for punitive damages for a willful obstruction of a right of way or easement).

Further, the Trial Court also noted that the Appellant's testimony was not credible as he has testified to many different versions in order to justify his actions. (*See* Trail Court Order pg. 23) Appellant first testified that the Respondents do have an easement, much like he did in front of Judge Keesley, but they only have the right to ingress and egress only, not to maintain it. Appellant then changed his position at summary judgment with the affidavit and then finally at trial by raising the phantom plat theory. The actions of the Appellant were done with intentional malice, rather than a mere accident or directed against an unknown trespasser, and the evidence, photographs, and videos submitted by the Respondents clearly show this. The trial court was correct in its analysis in that the Respondents have proven by clear and convincing evidence that punitive damages are warranted for the Appellant's willful, wanton, and reckless misconduct in plain disregard for the Respondents' property rights. The ratio awarded was 2:1 and does not come close to violating any due process right of the Appellant. *See generally State Farm v. Campbell*, 538 U.S. 408, 425 (2002)("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.")

Additionally, Appellant has failed to address the issue of whether or not Respondents have met their burden of clear and convincing evidence and only argued that Appellant has committed no action or offence to justify an award of punitive damages. (*See* Appellant's Brief pg. 15) Appellant also fails to address why the punitive damage factors do not apply or how the ratio violates any due process of the Appellant. As such, such issues are not properly preserved.

c. <u>Conclusion</u>

The Trial Court correctly concluded that the Appellants have met their burden of clear and convincing evidence that the Appellant's willful, wanton, and reckless misconduct was done in plain disregard for the Respondents' property rights, and that the punitive damage factors support

a ruling in favor of punitive damages. Finally, Appellant's failure to address either the burden or the factors amount to a failure to preserve the issue for appeal.

CONCLUSION

For the above stated reasons, this Court should affirm the Trial Court's Order and dismiss the appeal.

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December 18, 2023