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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE 10th CIRCUIT COURT OF COMMON PLEAS
The Honorable G.D. Morgan, Circuit Court Judge
The Honorable Mary Frances Cole, Magistrate Court Judge

Appeal No.: 2024-001383

Melody Gant Respondent

v.

Elizabeth M. Kern AKA Elizabeth Kern-Gibson Appellant

INITIAL BRIEF OF APPELLANT

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December 6, 2024

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STATEMENT OF ISSUES ON APPEAL

- I. Did the lower Courts make errors of law, contrary to the uncontroverted facts of the case, that the tree at issue was located on Appellant's property despite Respondent failing to meet her burden of proof of the same by a preponderance of the evidence;
- II. Did the lower Courts make errors of law, contrary to the uncontroverted facts of the case, that the tree at issue was located on Appellant's property despite the uncontroverted testimony of her daughter supported by other witness testimony, photographic evidence, and survey evidence that the tree at issue was actually located on Respondent's property;
- III. Did the lower Courts make errors of law, contrary to the facts of the case, that Appellant and Respondent live in an "urban" area of Anderson County, despite their homes being in an unzoned portion of the County where every parcel on the parties' road contains five (5) **or more** acres, with one house on Paulan Road having as much as sixty-five (65) acres (Rebecca Bowen) and other parcels on Paulan Road having as much as seven hundred and thirty-six (736) acres (Hampton G. Anderson III);
- IV. Did the lower Courts make errors of law, contrary to the uncontroverted facts of the case, that the tree that fell onto Respondent's property was an "unsound or defective tree" when the facts and testimony in the case were that the tree was a "live tree with green leaves" that fell from its roots immediately following precipitation that included a combination of rain, snow, and ice which Respondent estimated to be approximately 2";
- V. Did the lower Courts make errors of law, contrary to the uncontroverted facts of the case, that the Respondent proved by a preponderance of the evidence that the

tree that fell was the same tree she mentioned in a previous letter to Appellant in light of the fact that Respondent testified she “didn’t recognize” the tree that fell across her fence in a picture taken by Appellant immediately after the incident;

- VI. Did the lower Courts make errors of law, contrary to the uncontroverted facts of the case, that the Plaintiff proved by a preponderance of the evidence that Defendant owed Plaintiff any duty of care regarding the tree that fell onto Defendant’s fence;
- VII. Did the lower Courts make errors of law, contrary to the facts of the case, that the Respondent proved by a preponderance of the evidence that Appellant was the proximate cause of Respondent’s damages of \$1,063.00; and
- VIII. Did the lower Courts make errors of law by holding that Appellant’s duties were the same those for an “invitee,” when Appellant had no business relationship with Respondent, and Respondent did not even meet the standard of a “licensee” because she testified she would *never* step foot onto the Appellant’s property because of their poor relationship.

STATEMENT OF THE CASE

This matter arises as an action for negligence by Respondent against her neighbor (Appellant) in a bench trial in the Magistrate Court for Anderson County. Respondent claimed negligence against Appellant after a tree fell on Respondent’s fence during a weather event that involved approximately 2” of mixed precipitation of rain, snow and ice on or about January 19, 2022. (Complaint; 7/10/2024 Tr., 18:3-4) Appellant answered the Respondent’s Complaint, denied the allegations therein, affirmatively defended comparative negligence, and counterclaimed for her fees and costs pursuant to Respondent’s frivolous proceedings. (**Mag. Return 48-51**).

Ms. Gant testified that in or about the winter of 2021 she became concerned with a tree leaning over her fence and was concerned that the tree would fall on her chain linked fence. Assuming, apparently with no further investigation, that the offending tree was on Ms. Kern's property, she wrote Ms. Kern **one** letter on or about November 4, 2021, regarding the tree. (**Mag. Return, p. 18**) She sent the letter certified and did not hear back from Ms. Kern nor attempt any further conversation with her about the tree, despite having **numerous** conversations with numerous other neighbors and her landscaper/grass cutter who kindly offered to cut the tree for her, which she refused. (**2/9/2023 Tr. #2 21:13-23:30**)

In or about January 19, 2022, a tree fell from its roots on Ms. Gant's fence and across her property during a weather event involving a mix of precipitation that Ms. Gant estimated was approximately two inches (2") and involved a mix of rain, snow and ice. (7/10/2024 Tr., 18:3-4; Mag. Return, pp. 22, 34, 36-37, 39)

Ms. Gant admitted that she has in her possession the original of the plat she commissioned when she purchased the home in 2006 which she gave to the folks who constructed the chain link fence in or about 2016. It seems that the Magistrate, Respondent's witnesses and Respondent (who had the original of her own plat in her own possession) simply "assumed" the tree was on Appellant's land because it was on the other side of the chain link fence. (**2/9/2023 Tr. #1, 50:53-51:50; Smith 38:40-39:23; and Appellant's Exhibits 1,2,8 and 9**) However, the plat of Gant's property combined with the Appellant's photographic Exhibits clearly show Respondent owns farther than just her fence. (**2/9/2023 Tr. #2, 42:43-43:34**)

Respondent's witnesses, Ms. Fox and the landscaper, testified about where the tree was and a photo of the tree laying down was entered into evidence as Appellant's Exhibits 3 and 10 (**Mag. Return. p. 22, 34**) Ms. Fox testified the trunk of the "leaning

tree” was approximately 25 to 30 feet from Ms. Gant’s chain link fence. The landscaper testified the trunk of the leaning tree was about 40’ feet from Ms. Gant’s chain link fence. While Ms. Fox showed only the Court where she believed the tree was that fell, she indicated the tree was closer to the road than the barn. The landscaper testified the tree was about halfway between the fence and the barn that is behind the chain link fence on Ms. Gant’s property.

The court entered into evidence the GIS map and noted that the scale on the map was 1” = 166’. A plain measurement of the GIS map shows that where the landscaper claims the tree was, Ms. Gant owns 62.25’ of trees to her property line. (3/8”) Where Ms. Fox appeared to testify the leaning tree was (closer to the road), Ms. Gant owns 41.5’ of trees to her property line. (1/4”) Under either set of testimony (the only evidence put forth by Ms. Gant of where the tree actually was), the tree which fell was NOT on Appellant’s land, but, rather on Respondent’s land.

As the Plaintiff, Respondent had the sole obligation to plead and prove **all** elements of her negligence claim by a preponderance of evidence. She was required to also show it was Appellant’s tree AND Appellant’s negligence which proximately caused injury to her.

Respondent and her witnesses, all claimed that the tree remained where it fell, except for the part which was cut off her fence and “pushed” over it. **(Plaintiff 2/10/23 Tr. #1, 16:28-16:30, Fox 2/9/23 Tr. #2 29:15-30:38, Smith 2/9/23 Tr. #2 24:43-25:00)** However, she produced no pictures taken previously as to the “defective tree” (she testified her phone lost them) or even as to the location of the fallen tree trunk which laid where it fell. Further, Respondent never proved the tree that fell that remained

unmoved was even on Appellant's land. She and her witnesses merely speculated such. Conversely, Appellant's witness showed conclusively through Respondent's own witnesses' testimony, Respondent's own recorded plat, pictures and the County's GIS evidence that the tree trunk was solely on Respondent's land. **(2/10/2023 Tr. #1, 36:55-38:10; 48:10-48:53; 52:32-53:11; Mag. Return, p. 22, 32, 36)** Respondent only suggested that the Court "take a field trip out there" to determine "where the remaining portion of it is." **(2/9/2023 Tr. #2, 15:40-16:40)**

The plat in Respondent's possession and entered into evidence by the Appellant at trial is consistent and congruent with the GIS mapping and wholly *inconsistent* with the testimony of Respondent that her fence was placed "up to" her property line, as both the fire plug and the utility pole are shown on said plat to be clearly on Respondent's property, and not Appellant's. **(Mag. Return, pp. 20, 32-33).**

After the Magistrate Court found for Respondent, it held that the tree was "several feet apart from the Plaintiff's fence line," that because Appellant "did not deny that that [sic] the tree was located on her property" that Respondent has proven it *was* on Appellant's property, and because "the property at issue in this case is located in a residential neighborhood [it] is therefore 'urban' for determining a duty of care owed by a property owner to those outside the property" (citing cases involving "invitee" standards and a Tort Claims Act case involving the "actual notice" standard).

Appellant appealed the decision of the Magistrate, but the Circuit Court upheld the findings of the Magistrate without addressing any of Appellant's arguments. Rather, the Circuit Court simply stated, "Based on a review of the file, submission of the parties,

and oral arguments, the decision from the Magistrate is hereby affirmed.” (Form 4 Order of the Honorable G.D. Morgan, Jr. dated 7/22/2024). This timely appeal followed.

ARGUMENTS

I. The lower Courts made errors of law, contrary to the uncontroverted facts of the case, that the tree at issue was located on Appellant’s property despite Respondent failing to meet her burden of proof of the same by a preponderance of the evidence

The burden of proving property ownership by a preponderance of the evidence rested solely with Respondent. *In re: R.R. Martin*, 987 S.C. 654, 655-56 (Ct. App. 2010).

Respondent was required to prove her case by a preponderance of the evidence that Appellant owned a “diseased” or “defective” tree, owed Respondent a duty to cure said “diseased” or “defective” tree, that Appellant breached that duty and, as a result, Respondent was proximately harmed by Appellant’s negligence.

Thus, the threshold issue was that Respondent was required to prove that the tree in question was the same one Respondent previously notified Appellant about and that it was situated upon Appellant’s land.

Respondent’s lengthy, self-serving testimony was absolutely devoid of any evidence that the tree in question was actually, objectively located on Appellant’s land. (2/09/2023 Tr. #1, 5:33-46:00). Respondent admittedly undertook no investigation nor made any attempt to determine whether said tree or its now stump emanated from Appellant’s land, despite having commissioned her own survey, having the same in her possession, and knowing that despite her testimony to the contrary, that Respondent’s chain link fence went far beyond Respondent’s chain link fence. Respondent failed to even bring a copy of her plat. (2/9/2023 Tr. #1, 46:53-47:01). Respondent brought no pictures of where the “stump” of the fallen tree lay now, though

claiming her previous pictures were “lost” by her phone. (2/9/2023 Tr. #2, 3:40-3:43) Instead, Respondent suggested that the parties and the Court “take a field trip out there” to determine “where the remaining portion of it is.” (2/9/2023 Tr. #2, 15:40-16:40)

Respondent and her witnesses testified that the stump laid where it fell. (Gant 2/10/2023 Tr. #1, 16:28-16:30; Fox 2/9/2023 Tr. #2, 29:15-30:38; and Smith 2/9/2023 Tr. #2, 24:43-25:00)

Contrary to any obligation to do so, Appellant’s daughter investigated the matter and was able to determine objectively and *conclusively* that the stump was on Respondent’s land and not her mother’s (Appellant’s) land. (2/10/2023 Tr. #1, 52:32-53:11) She came to this conclusion through her training and several key factual observations from the documents and the land in question, which she pointed out to the Magistrate under oath. (2/10/2023 Tr. #1, 36:55-38:10) First, she photographed the only tree stump that was lying with its roots exposed that could be seen from the road. (2/10/2023 Tr. #1, 48:10-48:53). It laid below a limb hanging in the guide wires of the electrical pole. (2/10/2023 Tr. #1, 48:54). Those guide wires are annotated on Respondent’s plat as wholly on Respondent’s land. (Id. at 49:33). To “check” herself, Appellant’s daughter even went back and measured the plat with a ruler and the guide wires (shown as “guy” on the plat) were about 3/8” from the fence and the stump was clearly below them. (Id. at 50:03-51:50). With a legend of the plat being 1”= 50’, this put the guide wire at 18.75 feet. However, the property line continued past the guide wire along the lines of the overhead power (“OTP” on the plat) (Mag. Return., pp. 32-33). Notably, Respondent did not cross examine Appellant’s daughter (2/10/2023 Tr. #1 at 53:53) nor did she put up ANY rebuttal to her testimony or Appellant’s case. (Id. at 55:03)

It seems that everyone, including the Respondent who had in her possession the original survey of her own land, simply “assumed” the tree was on Appellant’s land because it was on the other side of the chain link fence, despite *knowing* her property line went beyond her fence. **(Gant 2/9/2023 Tr. #1, 50:53-51:50; Smith 2/9/2023 Tr. #1, 38:40-39:23; Mag. Return, pp. 20-21, 32-33)** Despite Respondent’s self-serving testimony, the Magistrate should have reviewed the filed plat combined with the Appellant’s photographs and conclusively determined that Respondent clearly owned more than just “several feet” beyond her fence line. **(2/9/2023 Tr. #2, 42:43-43:34)**. Further, on review, the Circuit Court should have also reviewed the same evidence and overruled the Magistrate.

Thus, the lower Courts made errors of law, contrary to the uncontroverted facts of the case, that the tree at issue was located on Respondent’s property as a result of the uncontroverted testimony of Appellant’s daughter, supported by other witness testimony, photographic evidence, GIS and survey evidence.

II. The lower Courts made errors of law, contrary to the uncontroverted facts of the case, that the tree at issue was located on Appellant’s property despite the uncontroverted testimony of her daughter supported by other witness testimony, photographic evidence, and survey evidence that the tree which actually fell on Respondent’s fence was located solely on Respondent’s property

See *supra*, Argument I, which is fully incorporated herein.

III. The lower Courts made errors of law, contrary to the facts of the case, that Appellant and Respondent live in an “urban” area of Anderson County, despite their homes being in an unzoned portion of the County where every parcel on the parties’ road, and the road behind it, contains five (5) or more acres, with one house on the parties’ road (Paulan Road) having as much as sixty-five (65) acres (Rebecca Bowen) and another parcel at the opposite end of Paulan Road having as much as seven hundred and thirty-six (736) acres (Hampton G. Anderson III)

Respondent readily admitted everyone in the parties' neighborhood has at least 5 acres, and some, like the person on the other side of her, has about 9 acres. (2/9/2023 Tr. #1, 8:40-8:46) Ms. Fox testified she owns about 14 acres (2/9/2023 Tr. #2, 35:24-36:00)

When asked if she thought she lived in an "urban" or "rural" area, Respondent would only admit that she lived in a "residential neighborhood." Houses and residences BOTH occur in rural AND urban areas. Appellant's daughter testified, she lives about 2.5 miles away from her mother across the highway behind a golf course neighborhood (called Brookstone Meadows) (2/10/2023 Tr. #1, 33:18-34:10). Where Appellant's daughter lives has 25 acres of land zoned "Rural Residential" by Anderson County. Conversely, the parties' land on Paulan Road is completely unzoned. (2/10/2023 Tr. #1, 32:00-33:10)

Clearly, unzoned areas DO NOT occur in an "urban" part of a County that has adopted a Comprehensive Land Use Plan. Anderson County adopted its Comprehensive Land Use Plan in 2000. (2/10/2023 Tr. #1, 32:30-33:10; Mag. Return pp. 23, 29-30) Respondent admitted if the two choices were only Urban or Rural, that she was NOT "urban," but also, "didn't live out in the sticks." (2/9/2023 Tr. #2, 12:00-12:24.) Respondent also attested that there were not 50,000 people living within a mile of her. (Id. at 12:25-12:29)

Unfortunately, the Magistrate and the Circuit Court both conflated "Residential" to be the equivalent to "Urban." As such, the differences between the obligations of rural property owners like those that live on Paulan Road and have 5, 10, 15, 25, 48, 103 or even 737 acres (Mag. Return, p. 23), would become meaningless.

The Magistrate's finding, and the Circuit Court affirming without further comment, results in a duty that a 79 year old, disabled resident like Appellant has to regularly inspect all of the trees on her 5 acre parcel of land and make them all safe. If that is the new

jurisprudence in South Carolina, rural landowners now have the equivalent of a strict liability standard for any tree falling from their land.

As such, these findings are a misapplication of the law by these lower courts and are inapposite to our state's *stare decisis*, especially considering the fact that Appellant's (and Respondent's) lands, and the lands surrounding them, are totally unzoned (**2/10/2023 Tr #1, 32:30-33:10; Mag. Return pp. 23, 29-30**). It also fails to recognize that the area's residents have numerous livestock (**Mag. Return, pp. 24-28**) and the community also has large parcels for farming and grazing of livestock on the same roads (Paulan and Philwood)(**Mag. Return, p. 23; Fox 2/9/2023 Tr. #2, 36:30-37:38; Smith 2/9/2023 Tr. #2, 42:20-43:00**)

The lower Courts made errors of law, contrary to the facts of the case, that the parties live in an "urban" area of Anderson County, despite their homes being in an unzoned portion of the County where every parcel on the parties' road contains five (5) or more acres, with one house having as much as sixty-five (65) acres (Rebecca Bowen) and other parcels at the other end of the road having as much as seven hundred and thirty-six (736) acres (Hampton G. Anderson III). (**Mag. Return, p. 23**)

IV. The lower Courts made errors of law, contrary to the uncontroverted facts of the case, that the tree that fell onto Respondent's fence was an "unsound or defective tree" when the facts and testimony in the case were that the tree was a "live tree with green leaves" that fell over from its roots immediately following a winter precipitation of 2" (according to Respondent's own testimony) that was a combination of rain, snow, and ice.

See Arguments I-III *supra*, which are fully incorporated herein.

While citing to *Ford v. South Carolina Dept. of Transportation*, 328 S.C. 481(Ct. App. 1997), the Magistrate erred by cherry-picking concepts that didn't even apply in the case at bar. For instance, while citing that landowners in a "residential" or "urban" neighborhood seemingly both have a duty to prevent an unreasonable risk of harm arising

from “defective or unsound trees on the premises” (Mag. Return, p. 3), she failed to note how the tree was “defective,” “diseased” or “unsound” when *Ford* also clearly states, “a leaning tree with no other signs of abnormalities would not necessarily give rise to a suspicion that the tree is unstable” *Ford v. South Carolina Dept. of Transp.*, 328 S.C. 481, 487 (S.C. Ct. App. 1997). In the case at bar, the “leaning” was all Respondent ever complained about. (**Mag. Return, p. 13**) Further, when the tree did fall during the 2” of rain, snow and ice on January 19, 2022, it still had green leaves on it several days later and fell over from its live roots. (**Mag. Return, p. 34**)

In addition to Defendant’s Exhibits 3 and 10, both Appellant’s and Respondent’s witnesses stated that the reason the tree fell was not because it was “defective,” but, rather, because the power company’s contractor “scalped” several trees and this tree came down thereafter due to the weight of snow and it’s scalping, rather than it being “defective” or “unsound.” (**Vickery 2/10/2023 Tr. #1, 12:00-13:19; Thomason 2/9/2023 Tr. #2, 15:25-20:58**). Again, this assumes *arguendo*, that the tree was actually on Appellant’s land or that she had an obligation to even mitigate it.

Thus, the Magistrate made errors of law, contrary to the uncontroverted facts of the case, that the tree that fell onto Plaintiff’s property was an “unsound or defective tree” when the facts and testimony in the case were that the tree was a “live tree with green leaves” that fell from its roots immediately following a precipitation that included 2” of rain, snow and ice.

V. The lower Courts made errors of law, contrary to the uncontroverted facts of the case, that the Respondent proved by a preponderance of the evidence that the tree that fell was the same tree she mentioned in a previous letter to Appellant in light of the fact that Respondent testified she “didn’t [even] recognize” the tree that fell across her fence in a picture taken by Appellant immediately after the incident

Respondent could not have proven by a preponderance of evidence that the tree that fell was the same tree she mentioned in a previous letter to Appellant when Respondent testified she “didn’t [even] recognize” the tree that fell across her fence in a picture taken immediately after the incident. **(2/10/2023 Tr. #1, 2:53-3:00)**.

At the trial, Gant went around and around when asked about this picture of the tree with live green leaves on one side of it, laying atop her fence. She testified that the same could’ve been “anyone’s tree” and “anyone’s fence” after identifying HER house in the picture and HER barn. **(2/9/2023 Tr. #2, 0:00-2:00)** Finally, the Defendant entered the same Exhibit 3 (and later Exhibit 10) during his client’s cross and her daughter’s direct where his client was able to lay a foundation for the picture **(Mag. Return, pp. 22, 34)**. The colloquy between the undersigned, Respondent and the Magistrate makes clear that Defendant’s Exhibit Three is the same exhibit that Counsel for Defendant was asking her about in 2/9/2023 Tr #2, 0:00-2:00 that she couldn’t or wouldn’t identify because it didn’t “have a name tag.” **(Id.)** She finally admitted, “that’s my yard, but I really can’t tell you if that’s the same tree.” **(2/9/2023 Tr. #2, at 2:00-2:23)**. Thus, the ONLY pictures of any tree that fell on Respondent’s fence were put into evidence by Appellant and were UNABLE to be identified by Respondent as the tree she previously wrote Appellant about in her letter of November 4, 2021 **(Mag. Return, p. 13)**.

Further, both the Magistrate and Respondent’s attempts to shift proof to Appellant as owning the tree(s) in question because Appellant “never denied it” is a burden-shifting unallowed in American jurisprudence. Rather, it was solely Respondent’s burden to plead and prove liability, and she failed wholly to do so. Appellant had no obligation to prove or deny anything.

At the appeal hearing at the Circuit Court, Respondent tried to spin her inability to identify the tree as follows:

1 Kern about. The photo Mr. Sutter showed me could have been
 2 of any tree anywhere on any fence. There was nothing that
 3 identified it as the tree on my fence, no glimpse of my
 4 house or barn in the photo, nothing showing where the photo
 5 was taken. I couldn't swear, under oath, that it was the
 6 tree on my fence. There was nothing to identify the fence
 7 or where it was located.

However, the pictures of the tree lying across the fence (like the plats, the GIS, the other pictures, and Appellant's daughter's testimony regarding the same) show a different story – Respondent's fence, red barn, back fence AND the left side of her house are CLEARLY in the pictures entered as Appellant's Exhibits 3 and 10. (**Mag Return, pp. 22, 34**). Rather than curing her prior testimony of not being able to identify the tree that fell or prove it was the same one she previously wrote Appellant about, Respondent simply engaged in further dissembling to the Circuit Judge at the appeal.

As such, the lower Courts made errors of law, contrary to the uncontroverted facts of the case, that the Respondent proved by a preponderance of the evidence that the tree that fell was the same tree she mentioned in a previous letter to Appellant in light of the fact that Respondent testified she "didn't [even] recognize" the tree that fell across her fence in a picture taken by Appellant immediately after the incident

VI. The lower Courts made errors of law, contrary to the uncontroverted facts of the case, that the Respondent proved by a preponderance of the evidence that Appellant owed Respondent any duty of care regarding the tree that fell onto Respondent's fence

See *supra* Arguments I-V, which are incorporated fully herein.

Obviously, if the Respondent failed to prove by a preponderance of evidence that the tree that fell actually emanated from Appellant's property, that the tree that fell was the

same one Respondent had previously written Appellant about, or that the tree that fell was actually “diseased” or “defective,” then Respondent failed to prove by a preponderance of the evidence that Appellant owed Respondent ANY duty of care regarding the tree that fell onto Respondent’s fence.

As such, the lower Courts made errors of law, contrary to the uncontroverted facts of the case, that the Respondent proved by a preponderance of the evidence that Appellant owed her any duty of care regarding the tree that fell on Respondent’s fence.

VII. The lower Courts made errors of law, contrary to the facts of the case, that the Respondent proved by a preponderance of the evidence that Appellant was the proximate cause of Respondent’s damages of \$1,063.00 (Mag. Return, p. 4 ¶8).

See Arguments I-VI *supra*, which are fully incorporated herein.

Given that Respondent never established that the tree in question was on land owned by Appellant, that the tree that fell was “defective” or “unsound,” nor that Appellant owed ANY duty of care to Respondent regarding the tree that fell, Appellant could not have proximately caused any damage to Respondent.

Further, Respondent could have fully mitigated her own damages by simply letting her landscaper take care of the tree before or after it fell, as he generously offered. However, she refused. (2/9/2023 Tr #2, 21:13-23:30)

Assuming arguendo that Appellant actually caused Respondent the damages suffered, Respondent had the duty to mitigate/minimize the damages caused by the incidents Respondent alleges were caused by Appellant. The test for mitigation is whether the Respondent did what an ordinarily prudent person would have done under like circumstances. *Tri-Continental Leasing Corp. v. Stevens, Stevens, & Thomas, P.A.*, 287 S.C. 338, 338 S.E.2d 343 (Ct. App. 1985).

Given that Respondent failed to undertake ANY investigation at all to determine if the leaning tree and/or the one that fell emanated from Appellant's property and that she refused her regular landscaper's two generous offers (once before January 19th, 2022 and once after the tree fell in during the 2" rain, snow and ice storm on January 19, 2022) to remove the trees for her, Respondent wholly failed in any meaningful way to mitigate her damages in a manner that an ordinarily prudent person would have under like circumstances. Thus, Respondent wholly failed to mitigate her own damages and is solely responsible for the results of the same.

Thus, the lower Courts made errors of law, contrary to the facts of the case, that the Respondent proved by a preponderance of the evidence that Appellant was the proximate cause of Respondent's damages of \$1,063.00 (Mag. Return, p. 4 ¶8).

VIII. The lower Courts made errors of law by holding that Appellant's duties were the same those for an "invitee" (Mag. Return, p. 4, ¶9) when Defendant had no business relationship with Plaintiff, and Plaintiff did not even meet the standard of a "licensee" because she testified she would *never* step foot onto the Defendant's property because of their poor relationship.

See Arguments I-VII *supra*, which are fully incorporated herein. There was NO testimony whatsoever that these parties were anything more than neighbors in a rural residential, unzoned neighborhood.

Again, the lower Court lifted inapplicable sections from case law that was not appropriate to this case. *Isreal v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282 (1987), involved an "invitee" standard of care. Specifically, the case held that "Whether a landowner engaged in a business inviting customers to his property is chargeable with negligence if he fails to take steps to make his property safe against injury to his invitees from a tree on adjoining property is a question novel to this state. But assuming that the landowner is liable, such liability has to be premised upon the breach of duty to anticipate a danger which the landowner knew or should have known

of in the exercise of reasonable care.” Even with such a heightened standard of care, the case still found no liability for Carolina Bar-B-Que to Isreal.

As such, the lower Courts erred in relying on *Isreal v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282 (1987), to create an alleged duty of care by Appellant when relying on an “invitee” standard of care, for facts totally inapplicable in this case.

CONCLUSION

For these reasons and others, Appellant appeals the lower Courts’ ruling and prays this Court finds the errors as listed above and overturns the lower court rulings in this matter.

I SO PRAY.

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