

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

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

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Case No. 2010171826

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DAWN M. PONTIOUS,

Appellant,

v.

DIANA L WINTERS, AND  
JASON R. WINTERS,

Respondents.

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RECORD ON APPEAL

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**RECEIVED**

JUN 12 2012

**SC Court of Appeals**

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## INDEX -- RECORD ON APPEAL

| ITEM                                                                                                    | PAGE NUMBER |
|---------------------------------------------------------------------------------------------------------|-------------|
| Index .....                                                                                             | i           |
| Orders                                                                                                  |             |
| Judge James, order of November 25, 2008 (Filed 11-26-08) .....                                          | 1           |
| Judge James, Order dated June 17, 2009 (Filed 6-18-2009) .....                                          | 6           |
| Judge McMahon, Order of October 2, 2009 .....                                                           | 7           |
| Judge McMahon, Order of December 9, 2009 .....                                                          | 8           |
| Judge McMahon's Order of July 30, 2010 .....                                                            | 12          |
| Judge James, Order of October 28, 2010 .....                                                            | 13          |
| Judge James, Order of November 29, 2010 .....                                                           | 20          |
| Appellant's Motion To Approve Plat and Issue Deeds,<br>dated July 10, 2009 .....                        | 21          |
| Other Materials Or Documents                                                                            |             |
| Respondents' Return, dated August 21, 2009.....                                                         | 23          |
| Appellant's Motion dated December 10, 2009 .....                                                        | 28          |
| Motion to Reconsider, Alter or Amend, or Alternatively for a<br>New Trial dated December 14, 2009 ..... | 30          |
| Appellant's Motion for Relief from Order or Judgment,<br>dated June 25, 2010 .....                      | 33          |
| Respondents' Return, dated July 27, 2010 .....                                                          | 36          |
| Appellant's Memorandum dated August 11, 2010 .....                                                      | 42          |
| Transcript of Record, (Motion) September 22, 2009 .....                                                 | 49          |
| James Drafts, Surveyor, Deposition April 20, 2010 .....                                                 | 62          |

## Exhibits

|                                                                          |    |
|--------------------------------------------------------------------------|----|
| Appellant - Greene Plat dated July, 1968 .....                           | 87 |
| Appellant's Proposed Plat dated March 18, 2009 .....                     | 22 |
| Respondents proposed plat dated August 12, 2009 .....                    | 27 |
| Draft's Survey of November 4, 2009 - McMahon Order of December 9, 2009.. | 9  |
| Certification .....                                                      | 88 |

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

Dawn M. Pontious,

Plaintiff,

vs.

Diana L. Winters and,  
Jason R. Winters,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 06-CP-32-0848

**ORDER**

FILED  
NOV 26 PM 3:11  
CLERK OF COURT

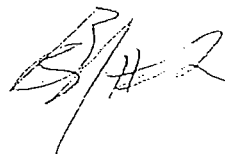
This case was tried on November 3, 2008 during a non-jury term in Lexington County. The plaintiff was present and represented by John E. Cheatham. The defendants were both present and represented by C. Cantzon Foster, II. The plaintiff seeks relief based upon theories of quiet title, partition, and conspiracy. Defendant Diana Winters counterclaimed for collection of a debt. Jason Winters counterclaimed for partition. Based upon the Court's view of the evidence and applicable law, the Court makes the following findings of fact and conclusions of law:

1. The subject property was purchased, as evidenced by a deed dated November 20, 1995 and recorded on November 27, 1995 in the Office of the Register of Mesne Conveyances for Lexington County.
2. The subject property was conveyed to Jason R. Winters ("Jason"), Diana L. Winters ("Diana"), and Dawn M. Pontious ("Dawn") as tenants in common for fifteen thousand dollars (\$15,000.00).
3. The purchase price for this 3.1 acre parcel was paid with twelve thousand five-hundred dollars (\$12,500.00) in funds borrowed by Dawn and Jason from BB&T and with eight

*[Handwritten signature]*

thousand five-hundred dollars (\$8,500.00) borrowed by Diana from BB&T. Two-thousand five-hundred dollars (\$2,500.00) borrowed by Diana went toward the purchase price, and the remaining portion went toward "improvements."

4. Dawn and Jason agreed to equally divide the monthly payment on their BB&T loan.
5. Jason has paid his half of the loan. As of November 3, 2008, Dawn still owed eight-hundred eighty-nine dollars and sixty-one cents (\$889.61) on her half.
6. Jason and Dawn admit they agreed to repay Diana's BB& T loan, and it was paid in full in March of 2003.
7. The three parties orally agreed at the time the property was purchased that when Diana's BB&T loan had been paid in full, Diana would deed her interest in equal shares to Jason and Dawn.
8. When Diana's BB&T loan had been paid in full in March 2003, no deed was ever prepared to consummate this agreement.
9. From May 2003 through August 23, 2003, Diana allowed Dawn to make certain purchases using Diana's credit card, those purchases totaling \$1,669.49. Dawn has not repaid that sum to date. Diana is entitled to judgment against Dawn for that debt.
10. The subject property is basically "kite" or "diamond" shaped. (See plat admitted as Plaintiff's Ex. 1). The northeastern boundary is 329.8 feet in length. Approximately 100 feet fronts on Bachman Avenue, as shown on the plat.
11. Since the date of purchase, the property has been unofficially divided into two halves, the line beginning at an iron pin located at the southernmost corner of the property, and running in a northwesterly direction to a point somewhere on the Bachman Drive road frontage.



After Diana's BB&T loan was paid, Jason was to have title to the western half, and Dawn the eastern half.

12. Diana has demanded payment of the aforesaid sum of one-thousand six-hundred sixty-nine dollars and forty-nine cents (\$1,669.49) from Dawn, but Dawn has not repaid the debt.

Diana has refused to convey her one-third interest for two reasons: first, because Dawn has not paid her the credit card debt, and second, because Dawn does not agree to Jason and Diana's contention as to the Bachman Avenue terminus of the boundary line referenced in paragraph 11 above.

13. By repaying Diana's BB&T loan, Jason and Dawn performed their part of the agreement.

This part performance takes the agreement outside the Statute of Frauds, S.C. Code §32-3-10. (See Wright v. Trask, 329 S.C. 170, 495 S.E.2d 222 (1997).

14. There was no agreement between Jason and Dawn as to the exact physical division of the property, specifically insofar as the terminus of the dividing line on Bachman Avenue was concerned.

15. Jason would suffer substantial hardship if the property were partitioned by sale, in that he has placed his residence on his "half" of the property.

16. 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.

17. 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.

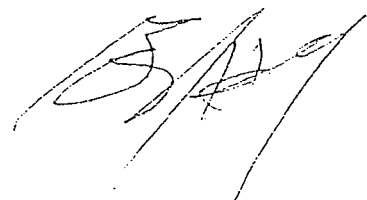
18. There is currently a shared driveway to the subject property of some sort situated along Bachman avenue. However, the testimony was unclear as to the width of the shared driveway and as to its exact location. Jason maintains it would be unfair to grant Dawn road frontage that would include all of the shared driveway.
19. Jason and Dawn markedly differ on the market value of the subject property. No appraisal nor expert testimony as to market value was presented at trial. No survey other than the 1968 survey admitted as Plaintiff's Exhibit 1 was provided to the court. This survey does not reflect the location of the aforesaid ditch or driveway.
20. Dawn has established her right to a partition of the property in kind. She has not established by the greater weight of the evidence that Jason and Diana engaged in a conspiracy.
21. The most equitable manner of dividing the property is for the 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 the iron pin at the easternmost point/corner of Bachman Avenue, all as shown on the plat admitted as Plaintiff's Exhibit 1.

The court acknowledges that it will likely be necessary for a new survey to be obtained, and Jason and Dawn shall bear the cost of the survey in equal shares.

22. No party has established entitlement to an award of attorney's fees. All sides shall bear their own costs and fees.

Based on the foregoing, it is hereby ORDERED THAT:

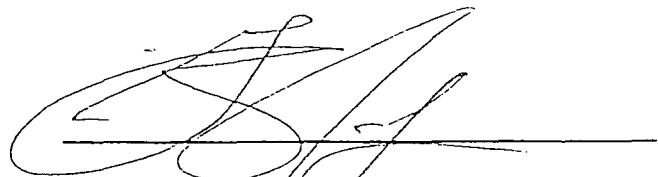
1. Diana Winters shall have judgment against Dawn Pontious in the amount of one-thousand six-hundred sixty-nine dollars and forty-nine cents (\$1,669.49) together

A handwritten signature in black ink, appearing to be "BAJ" or similar, with a long, sweeping horizontal stroke extending to the right.

with prejudgment interest at the rate of 8.75% per annum from January 1, 2006 for total judgment of \$1,960.02.

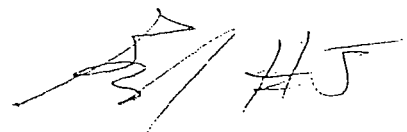
2. Diana Winters shall, upon demand of either Jason R. Winters or Dawn M. Pontious, execute and deliver a general warranty deed conveying all of her right, title and interest in the subject property to Jason R. Winters and Dawn M. Pontious, in equal shares. The three parties shall equally bear the cost of deed preparation and all recording costs.
3. The subject property shall be partitioned in the manner set forth above between Jason R. Winters and Dawn M. Pontious. Both shall execute a deed accomplishing the ordered partition. They shall equally bear the cost of preparation and recording of any deed and survey.
4. On the plaintiff's conspiracy cause of action, judgment is entered for the defendants.
5. All parties shall bear their own costs and attorney's fees.

**IT IS SO ORDERED.**



George C. James, Jr.  
Judge of the Court of Common Pleas,  
Eleventh Judicial Circuit

This 25 day of November, 2008



FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIV

CASE NO. 2007-CP-32-0848

DAWN M. PONTIUS

DIANA L. WINTERS and JASON R. WINTERS

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other  
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)  
☒ Statement of Judgment by the Court:

After careful review of the relevant issues in the case, the plaintiff's Motion for Reconsideration is DENIED.

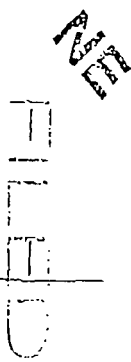
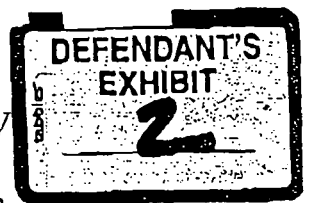
Dated at SUMTER, South Carolina, this 17 day of JUNE, 2009.

This judgment was entered on the N/A day of N/A 2009, and a copy mailed first class this 20 day of June 2009 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

Beth A. Carrigg  
CLERK OF COURT



2009 JUN 18 2:44

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

PRESIDING JUDGE

ORIGINAL

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF LEXINGTON ) FOR THE ELEVENTH JUDICIAL CIRCUIT  
Dawn M. Pontious, )  
Plaintiff, ) Civil Action No: 2006-CP-32-0848  
v. )  
Jason R. Winters, et. al. )  
Defendant. )

ORDER

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

2009 OCT -5 P 4:04

FILED

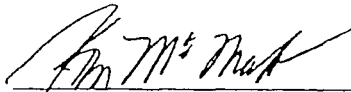
This matter originally came before the Court on Tuesday, September 22, 2009, for hearing on Plaintiff's Motion to Approve Plat and Issue Deeds. John E. Cheatham, Esquire, appeared on behalf of the Plaintiff. Bryan Caskey, Esquire appeared on behalf of the Defendant.

After considering arguments from counsel, the proffers, reviewing the file in this matter, and from the pleadings before it, the Court declines to approve the plat and issue deeds at this time but finds that a survey is needed.

**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 G. James in preparing this survey.

**IT IS FURTHER ORDERED** that this survey is to be completed within thirty (30) days of this Order and that the cost of this survey shall be borne equally by both parties to this action.

**AND IT IS SO ORDERED.**

  
R. Knox McMahon  
Presiding Judge,  
Eleventh Judicial Circuit

Lexington, South Carolina  
October 2nd, 2009

# COPY

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF LEXINGTON ) FOR THE ELEVENTH JUDICIAL CIRCUIT  
Dawn M. Pontious, )  
Plaintiff, ) Civil Action No: 2006-CP-32-0848  
v. )  
Diana L. Winters and Jason R. Winters, )  
Defendants. )

ORDER

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

2009 DEC - 9 P 3:35

FILED

This matter originally came before the Court on Tuesday, September 22, 2009, for hearing on Plaintiff's Motion to Approve Plat and Issue Deeds. John E. Cheatham, Esquire, appeared on behalf of the Plaintiff. Bryan Caskey, Esquire appeared on behalf of the Defendants.

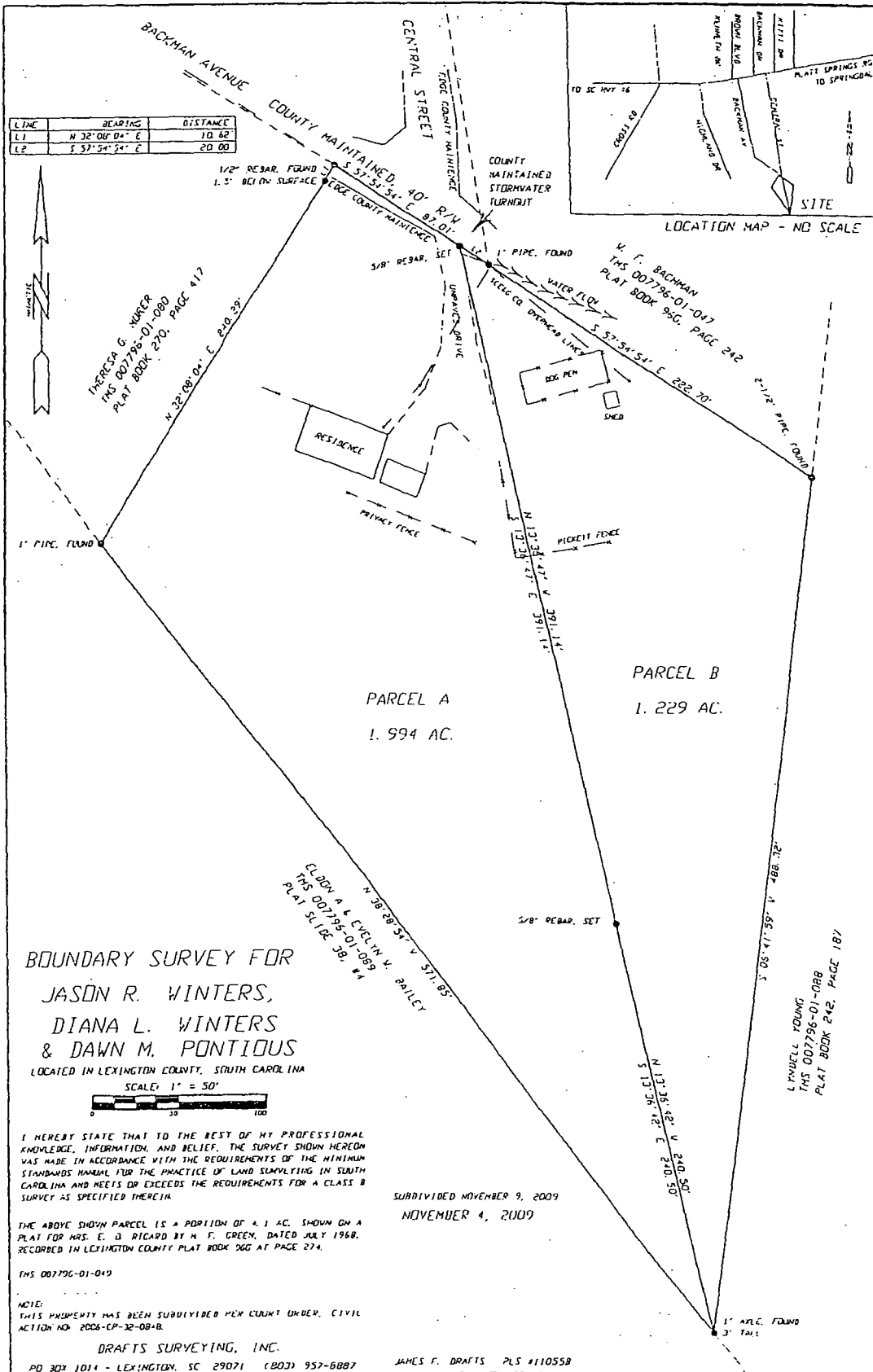
After considering arguments from counsel, the proffers, the file, and the pleadings before it, the Court declined to approve the plat and issue deeds and appointed James F. Drafts of Drafts Surveying, Inc. to prepare a survey consistent with the Order of Judge James.<sup>1</sup> Mr. Drafts completed the survey and presented it to the Court.<sup>2</sup> The survey is deemed by this Court to be an accurate reflection of the property ownership in this case.

**IT IS THEREFORE ORDERED** that Counsel for Defendants shall use Mr. Draft's survey to prepare the deeds in this case.

**IT IS FURTHER ORDERED** that the cost of this survey shall be paid to Mr. Drafts by both parties equally and in accordance with the invoice attached as Page 3 of this Order. Payment shall be made within ten (10) days of receipt of this Order.

<sup>1</sup> Judge James sat in non-jury on November 25, 2008 and ordered the parties to split the cost on a plat and have deeds prepared.

<sup>2</sup> The survey is attached to this Order as Page 2.



James F. Drafts

P.O. Box 1014

Lexington, SC 29071 (803)957-8887

## Invoice

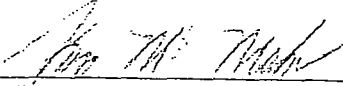
| DATE      | INVOICE NO. |
|-----------|-------------|
| 12/1/2009 | 10475       |

| BILL TO                                                  |
|----------------------------------------------------------|
| Jason R. Winters<br>Diana L. Winters<br>Dawn M. Pontious |

| JOB NUMBER |
|------------|
| 08709      |

| DATE       | DESCRIPTION                                                   | AMOUNT     |
|------------|---------------------------------------------------------------|------------|
| 11/4/2009  | 3.223 acre boundary survey, Backlund Avenue                   | 975.00     |
| 11/30/2009 | Set division corner and mark division line. 3.223 acre parcel | 600.00     |
| Total      |                                                               | \$1,575.00 |

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
R. Knox McMahon  
Presiding Judge,  
Eleventh Judicial Circuit

Lexington, South Carolina  
December 9<sup>th</sup>, 2009

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON  
IN THE COURT OF COMMON PLEAS

Dawn M Fontious  
(John E. Cheatham)

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. 06 07 -CP- 32 - 0848

Diana L. Winters &  
Jason R. Winters,  
(Bryan D. Caskey &  
Charles C. Foster, II

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other \_\_\_\_\_

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Plaintiff's Motion To Reconsider is Denied.

Dated at Lexington, South Carolina, this 30th day of JULY, 20 10.

John M. M. M.  
PRESIDING JUDGE

This judgment was entered on the N/A day of N/A, 20 —, and a copy mailed first class this 5th day of August, 20 10 to attorneys of record or to parties (when appearing pro se) as follows:

John Cheatham  
P.O. Box 1345  
Lexington, SC 29071

ATTORNEY(S) FOR THE PLAINTIFF(S)

Bryan D. Caskey  
3100 Devine Street  
Columbia, SC 29205

ATTORNEY(S) FOR THE DEFENDANT(S)

ORIGINAL

PPE

SCANNED

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

) IN THE COURT OF COMMON PLEAS  
) FOR THE ELEVENTH JUDICIAL CIRCUIT  
)

Dawn M. Pontious,

) Docket No.: 06-CP-32-0848  
)

Plaintiff,

vs.

Diana L. Winters and Jason R. Winters,

Defendants.  
\_\_\_\_\_

2011-1-11 11:20  
LEXINGTON, SC  
FILED

**ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT  
PURSUANT TO RULE 60(b), SCRCP**

This matter comes before the Court on Plaintiff's motion, seeking to set aside the December 9, 2009, order of this Court (the "Approving Order") pursuant to Rule 60(b), SCRCP. A hearing was initially held on July 30, 2010, and was reconvened on August 26, 2010, for further oral argument of counsel. John E. Cheatham, Esquire appeared on behalf of the Plaintiff, and Bryan D. Caskey, Esquire appeared on behalf of the Defendants. After reviewing Plaintiff's motion and memorandum in support, Defendants' memorandum in opposition, and after considering the oral argument of counsel, and all applicable law, the Court denies Plaintiff's motion for the reasons set forth below.

**BACKGROUND/PROCEDURAL HISTORY**

Plaintiff commenced this action on March 7, 2006, seeking a partition in kind of certain real property in Lexington County, South Carolina and other ancillary relief. Defendant Diana L. Winters counterclaimed for a collection of a debt, and Defendant Jason R. Winters counterclaimed for a partition in kind of the same property.

After a bench trial on November 3, 2008, the Court issued an order partitioning the property in kind (the "Original Order"), which was entered on November 26, 2008.

Email all attys.

B/A 1 ✓

On December 3, 2008, Plaintiff filed a Notice of Motion and Motion to Reconsider, Alter or Amend Order, or alternatively for a New Trial, which was denied by this Court's Order of June 18, 2009. Thereafter, the requisite time within which to appeal any aspect of the Original Order expired, with neither party filing any appeal.

On July 10, 2009, following the parties' dispute over which survey to use to give effect to the holding of the Original Order, Plaintiff filed a Motion to Approve Plat and Issue Deeds. In an Order filed October 5, 2009, the Court denied Plaintiff's motion and, with consent from all parties, ordered that an independent surveyor conduct a survey of the property in question for purposes of issuing deeds pursuant to the Original Order.

After the survey was completed and returned to the Court, the Court issued the Approving Order, filed December 9, 2009, which approved the survey and ordered that deeds be prepared accordingly. On December 15, 2009, Plaintiff filed a Motion to Reconsider the Approving Order, which was denied on July 30, 2010. Plaintiff then filed a Motion for Relief from Judgment pursuant to Rule 60(b), SCRPC, which is the current motion before the Court.

### LAW/ANALYSIS

#### I. Introduction

As an initial observation, the Court notes the procedural posture of this case to be out of the ordinary. Almost two (2) years after the original trial of this case, *from which no appeal followed*, Plaintiff now moves the Court to essentially overturn a finding of fact contained in the Original Order by attempting to attack a post trial order (the Approving Order), which was entered over one (1) year after the Original Order was entered.

The Court further observes that this entire dispute might have been avoided had the parties heeded the admonition of the trial court to provide a survey at the original trial of this case. For reasons unknown to the Court, the parties chose not to introduce a survey at trial, did not have a

surveyor testify at trial, and did not appeal the Original Order after the denial of Plaintiff's Rule 59(e) motion on June 18, 2009.

Therefore, as a threshold issue, this Court finds that as a matter of law, the Original Order, entered on November 26, 2008, is now the settled law of the case. *See, Normandy Corp. v. South Carolina Dept. of Transp.*, 386 S.C. 393, 418, 688 S.E.2d 136, 149 (Ct. App. 2009) (citing *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (holding that an unappealed ruling, right or wrong, is the law of the case)).

Further, although Plaintiff's motion nominally seeks to set aside the Approving Order, issued on December 9, 2009, Plaintiff's motion fundamentally attempts to revisit and overturn specific findings of fact contained in the Original Order; specifically, whether a ditch exists along the road frontage of the property in question. As the Original Order contains a finding of fact that a "ditch" exists, the Court must view Plaintiff's motion to be directed against the Original Order. As a result, the Court specifically finds that if the Plaintiff is to be granted any genuine relief, the Original Order itself must be set aside, not the Approving Order.

## II. Rule 60(b)(2), SCRCP.

Plaintiff asserts that she is entitled to relief based upon Rule 60(b)(2), SCRCP, which provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

-Rule 60(b)(2), SCRCP.

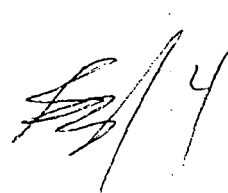
Specifically, Plaintiff asserts that she is entitled to relief based upon "newly discovered evidence" under Rule 60(b)(2) because of the April 2010 deposition testimony by the court-appointed surveyor that no ditch exists along the road frontage of the subject property. There is no question that the presence or absence of a ditch along the road fronting the subject property was a very important issue, as this court, in part, based its conclusions as to the division of the property

upon a finding that a ditch existed along the road frontage. There were no photographs of the property introduced during the November 3, 2008 trial and the scene was not offered into evidence.

However, Rule 60(b)(2) allows a court to grant relief only if newly discovered evidence could not have been discovered by due diligence prior to trial. *Black's Law Dictionary* defines "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Black's Law Dictionary* at 468 (7th ed. 1999). Additionally, in interpreting Rule 60(b)(2), the South Carolina Court of Appeals has held that "Rule 60(b)(2) allows the court to grant a new trial **only** if the newly discovered evidence could not have been discovered by due diligence prior to trial. *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456, 460 (Ct. App. 2005) (emphasis added).

Plaintiff's proffered "newly discovered evidence" is the deposition of a surveyor, taken on April 20, 2010. This Court has no reason to doubt the testimony of the surveyor that there was no ditch fronting the property. If this had been made known to the Court during the November 3, 2008 trial, the method of physically dividing the property would, in all likelihood, have been different, specifically so as to provide Plaintiff with more road frontage. However, the Court finds that not only could a deposition of this surveyor have been taken prior to the November 3, 2008 trial, but also either party could have produced this or any other surveyor to testify at this trial; indeed, the trial court specifically suggested on multiple occasions prior to the conclusion of the November 3, 2008 trial that a survey be procured. However, the parties declined to do so.

At the conclusion of the August 26, 2010 hearing of the instant motion, the parties offered the scene, and the Court visited the property. Obviously, this was two years after the November 3, 2008 trial, but it bears mentioning that **there was no ditch** bordering the property. This, however, does not change the fact that this clear and indisputable evidence could have easily been provided to the Court during the 2008 trial.



Applying the holding of *Lanier* to Plaintiff's motion, it is clear that the April 20, 2010, deposition is not "newly discovered evidence" as contemplated by our Court of Appeals in interpreting Rule 60(b)(2). Without question, as the parties were specifically admonished at trial, Plaintiff had the ability to allow one or multiple surveyors conduct surveys of the property, and then have these surveyors provide testimony to the trial court in November of 2008. Photos of the scene and the scene itself could have been offered into evidence, but they were not. Therefore, the Court finds that Plaintiff is not entitled to relief under Rule 60(b)(2) as Plaintiff fails to satisfy the "due diligence" requirement of this subsection.<sup>1</sup>

### III. Rule 60(b)(5), SCRCP.

Additionally, Plaintiff argues that even if the Court finds that there is no "newly discovered evidence" under Rule 60(b)(2), Plaintiff is still entitled to relief under Rule 60(b)(5), SCRCP.

This rule provides that judgments may be set aside if "the judgment has been satisfied, released, discharged, or a prior judgment upon which it has been based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Rule 60(b)(5) is based upon the historical power of a court of equity to modify its decree "in light of subsequent conditions." *Mr. G v. Mrs. G*, 320 S.C. 305, 311, 465 S.E.2d 101, 107 (Ct. App. 1995). Plaintiff asserts the instant case fits under the "prospective application" language of the Rule and relies upon this subsection for relief.

While this Court desires to render an equitable decision based upon the evidence presented, and while this Court should revise or grant relief from judgments when equity compels it to do so, this Court is mindful of the fact that it may do so only within the confines of the applicable rule of law. Accordingly, while the Court is sympathetic to Plaintiff's argument that the division was unfair

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<sup>1</sup> As the Court finds that Plaintiff is not entitled to any relief for failure to satisfy the "due diligence" requirement of Rule 60(b)(2), the Court does not need to reach the issue of whether Plaintiff is time-barred from receipt of any relief under this subsection.



on the ground that there is no ditch (because it is now obvious there is not a ditch), the Court finds that it is constrained by controlling precedent.

In *Perry v. Heirs at Law*, the Court of Appeals affirmed a trial court's denial of a Rule 60(b)(5) motion in a partition case, where a litigant relied upon Rule 60(b)(5) to have a partition order set aside. In affirming the trial court's denial of the Rule 60(b)(5) motion, the Court of Appeals held:

"...a ruling that a partition order has prospective application would be inappropriate and an affront to the commonly understood meaning of the term 'prospective application.' The test typically applied to determine whether an order has prospective application is 'whether it is executory or involves the supervision of change conduct or conditions by the court' *Saro Inves. v. Ocean Holiday P'ship*, 314 S.C. 116, 120, 441 S.E. 2d 835, 838 n. 3 (Ct. App. 1994). For example, injunctions ordinarily have prospective application. *See, e.g. Binkley v. Rabon Creek Watershed Conservation Dist. Of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001). Partition orders on the other hand, are executed orders because they mandate a one-time change in the ownership of property. As a consequence, Gadsden's motion fails for being wholly outside the scope of Rule 60(b)(5).

- *Perry v. Heirs at Law*, 590 S.E.2d 502, 505-506 (Ct. App. 2003)

The instant action is a partition action, and it was resolved with a trial court order requiring a partition in-kind between the parties mandating a one-time change of ownership of the subject property from which Plaintiff now seeks relief equitable relief under Rule 60(b)(5). The Court finds no distinction between *Perry* and the instant action. Consequently, as the Court finds *Perry* to be binding precedent, the Court finds that Plaintiff's reliance on Rule 60(b)(5) is misplaced, as Plaintiff's motion is wholly outside the scope of Rule 60(b)(5).

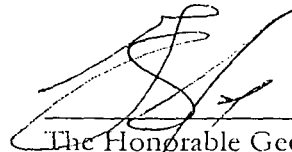
It would seem that the fairest result to be reached would be for the parties to put their differences aside and reach an agreement as to the division of the property based on reality and common sense. However, this court has no power in this particular instance to change an arguably unjust result and certainly has no power to compel the parties to resolve their differences.



ORDER OF THE COURT

IT IS THEREFORE ORDERED that Plaintiff's Motion for Relief from Judgment Pursuant to Rule 60(b), SCRCP is hereby denied.

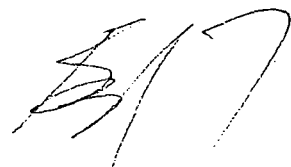
AND IT IS SO ORDERED.



The Honorable George C. James, Jr.  
Eleventh Judicial Circuit

12/28, 2010

Sumter, South Carolina



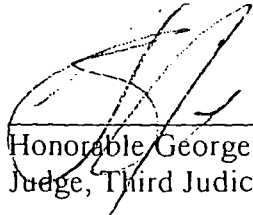
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|-------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS |
|                               | ) | <del>07</del> -CP-32-0848    |
| COUNTY OF LEXINGTON           | ) | DL                           |
| Dawn M. Pontious,             | ) |                              |
| Plaintiff,                    | ) |                              |
| vs                            | ) | <b>ORDER</b>                 |
| Diana L. Winters and Jason R. | ) |                              |
| Winters,                      | ) |                              |
| Defendants.                   | ) |                              |

---

The Court has considered the issues raised by the plaintiff in her Motion to Reconsider dated November 19, 2010. The motion is denied.

With specific regard to grounds 2, 3, and 4, this court will not pass upon the propriety of Judge McMahon's rulings on any issue with regard to ground 1, this issue was ruled upon by Judge McMahon, and for the foregoing reason, this court will not pass upon Judge McMahon's ruling. All other grounds are summarily denied.

**AND IT IS SO ORDERED.**

  
 Honorable George C. James, Jr.  
 Judge, Third Judicial Circuit

Sumter, South Carolina

November 29, 2010

FILED  
 2010 NOV 30 P 2:35  
 CLERK OF COURT  
 LEXINGTON SC

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

FILED  
2009 JUL 10 PM 2:00  
2007 CP 32 - 0848

DAWN M. PONTIOUS, )  
Plaintiff, )  
v. )  
DIANA L WINTERS, AND )  
JASON R. WINTERS, )  
Defendants. )

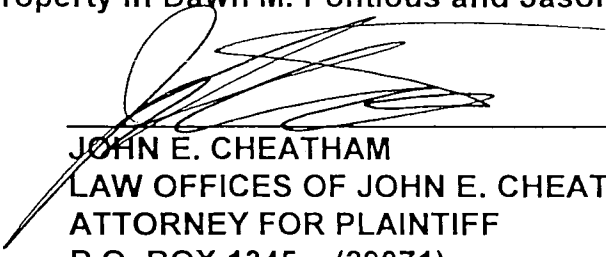
NOTICE OF MOTION AND  
MOTION TO APPROVE PLAT,  
AND ISSUE DEEDS

TO THE DEFENDANTS NAMED ABOVE AND THEIR ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through the undersigned attorney, respectfully moves, pursuant the South Carolina Rules of Civil Procedure (SCRCP) as may be applicable, at such time and place as may be set by the Court for hearing same, or as soon thereafter as counsel may be heard, for an Order approving the attached plat as being in compliance with the Court's prior Order dividing the property and that such be entered and that this Court issue deeds vesting such property in Dawn M. Pontious and Jason R. Winters.

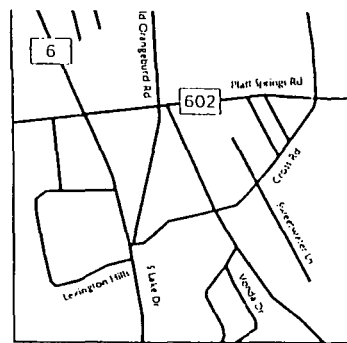
July 10, 2009

Lexington, South Carolina

  
\_\_\_\_\_  
JOHN E. CHEATHAM  
LAW OFFICES OF JOHN E. CHEATHAM, P.A.  
ATTORNEY FOR PLAINTIFF  
P.O. BOX 1345 (29071)  
102 HARMON STREET (29072)  
LEXINGTON, S.C.  
PHONE: 803-359-2828

N/F  
Theresa C. Moorer  
TMS #007796-01-080

N/F  
W.F. Bachman  
TMS #007796-01-047



LOCATION MAP ( N.T.S. )

1.61 ACRES  
Portion of Tms #007796-01-049

1.61 ACRES  
Portion of Tms #007796-01-049

N/F  
Eldon A. & Evelyn W. Bailey  
TMS #007796-01-089

N/F  
Lyndell Lewis & Lewis Young  
TMS #007796-01-088

References:

1. Tax map #007796-01-049
2. Plat prepared for Mrs. E.O. Ricard, dated July 1968, recorded in the Lexington County R.M.C. in plat book 96G page 274.
3. Plat prepared for Pamela R. Hamilton, dated January 3, 1990, recorded in the Lexington County R.M.C. in plat book 270 page 417.
4. Court of Common Pleas, Case No. 06-CP-32-0848, dated November 26, 2008.

Special Note:

Acres and layout of property is approximate and is intended as a graphical representation only.  
A ground survey is needed for a final division of property.

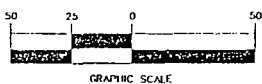


EXHIBIT PREPARED FOR  
DAWN M. PONTIOUS  
LEXINGTON COUNTY, SOUTH CAROLINA  
MARCH 18, 2009

PROJECT MANAGER  
RSC  
DRAWN BY  
MID  
FIELD WORK BY  
MID  
FILE NAME  
09111.DWG



**SURVEY ONE, LLC**  
601 NORTHWOOD ROAD, SUITE C  
LEXINGTON, SOUTH CAROLINA 29072  
PHONE (803) 808-2300 CELL (803) 413-9847  
SURVEYONE@WINDSTREAM.NET

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

IN THE COURT OF COMMON PLEAS  
FOR THE ELEVENTH JUDICIAL CIRCUIT

Dawn M. Pontious, )

CASE NO: 06-CP-32-0848

Plaintiff, )

vs. )

Jason R. Winters; and )

Diana L. Winters, )

Defendants. )

**DEFENDANTS' RETURN TO PLAINTIFF'S**  
**MOTION TO APPROVE PLAT**  
**AND ISSUE DEEDS**

**TO: PLAINTIFF AND HER COUNSEL, JOHN E. CHEATHAM, ESQUIRE:**

Defendants Jason R. Winters and Diana L. Winters ("Defendants") respectfully submit this Return to Plaintiff's Motion to Approve Plat and Issue Deeds in connection with this matter based upon such evidence, testimony, and argument of counsel as may be heard at a hearing of this matter and on the following grounds:

**GROUND**

Following the trial of this case on November 3, 2008, this Court issued an Order (which is attached hereto and incorporated herein by reference as Exhibit A) requiring Defendant Diana Winters, upon demand, to execute a general warranty deed conveying all of her right, title, and interest in the subject property to Defendant Jason R. Winters and Plaintiff Dawn M. Pontious, in equal shares, with all three parties to share the cost of deed preparation and recording.

Following the Court's specific instructions as to the location of the dividing line for the property partition, both Plaintiff Dawn M. Pontious and Defendant Jason R. Winters have obtained plats to effectuate the partition. The proposed plat of Defendant Jason R. Winters is attached hereto and incorporated by reference as Exhibit B.



The plat obtained by Defendant Jason R. Winters specifically follows the Order of the Court in its partition of the subject property. Specifically, the Order of the Court found that:

“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 [Jason’s] frontage.” (*See*, Order ¶ 17, p. 3).

Accordingly, in order to equitably partition the subject property, the Court required that the partition point on the road frontage be:

“...at a point midway between the easternmost edge of the aforesaid ditch and the iron pin at the easternmost point/corner of Bachman Avenue...” (*See*, Order ¶ 21, p. 4).

The plat proposed by Plaintiff Dawn M. Pontious does not follow the Court’s Order because it does not partition the road frontage midway between the ditch and the iron pin at the eastern corner of Bachman Avenue. Instead of using the easternmost edge of the ditch, Plaintiff’s proposed plat simply uses the northeastern corner of the property, which is in direct contravention of the Order, and creates an inequitable result for Defendant Jason R. Winters.

The plat proposed by Defendant Jason R. Winters properly uses the easternmost edge of the ditch in determining where the partition point along Bachman Avenue should be placed. Specifically, the entire road frontage from the northernmost corner of the property to the iron pin consists of one hundred and seven (107) feet. The ditch runs along Bachman Avenue from the northernmost point of the property for a distance of forty-seven (47) feet, leaving sixty (60) total feet of remaining frontage. Accordingly, the plat proposed by Defendant Jason R. Winters places the midway point yielding thirty (30) feet of frontage along Bachman Avenue to both Defendant Jason R. Winters and Plaintiff Dawn M. Pontious. Accordingly, Defendant Jason R. Winters is informed and believes that his proposed plat complies with the Order from this Court in

partitioning the property in kind and that it should be approved by this Court, and that deeds be issued based upon the same.

Further, Plaintiff Dawn M. Pontious has not paid any of the judgment owed to Defendant Diana Winters, and accordingly comes before this Court with unclean hands. When a court is sitting in equity, it is to consider the equities of both sides, balancing the two to determine what, if any, relief to give. *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005). "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). Specifically, "'He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.'" *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). "The decision to grant equitable relief is in the discretion of the trial judge." *Soden*, 333 S.C. at 568, 511 S.E.2d at 379.

Accordingly, Plaintiff Dawn M. Pontious is asking the Court to provide her with an equitable remedy despite the fact that she is tainted by the failure to properly discharge the debt she owes that is associated with this same property. Before a Court orders an equitable remedy to a party, the party requesting such equity must first come before the Court with clean hands. The failure to attempt to repay any of the debt associated with the subject property as required by this Court leaves Plaintiff Dawn M. Pontious with unclean hands. Therefore, Defendant Diana Winters is informed and believes that it is within the equitable power of this Court to make the repayment



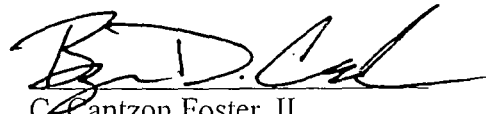
of such debt a condition precedent to Plaintiff Dawn M. Pontious being granted title to any newly partitioned property.

**PRAYER FOR RELIEF**

For the foregoing reasons, Plaintiff's proposed plat should be rejected; the plat proposed by Defendant Jason R. Winters should be approved; with deeds to be issued to accordingly, with the condition precedent for a deed to be issued to Plaintiff Dawn M. Pontious that she satisfy her debt associated with the subject property in full before obtaining such newly issued deed, and for such other and further relief in favor of Defendants as this Court deems just and proper.

Respectfully Submitted,

**FOSTER LAW OFFICES, L.L.C.**

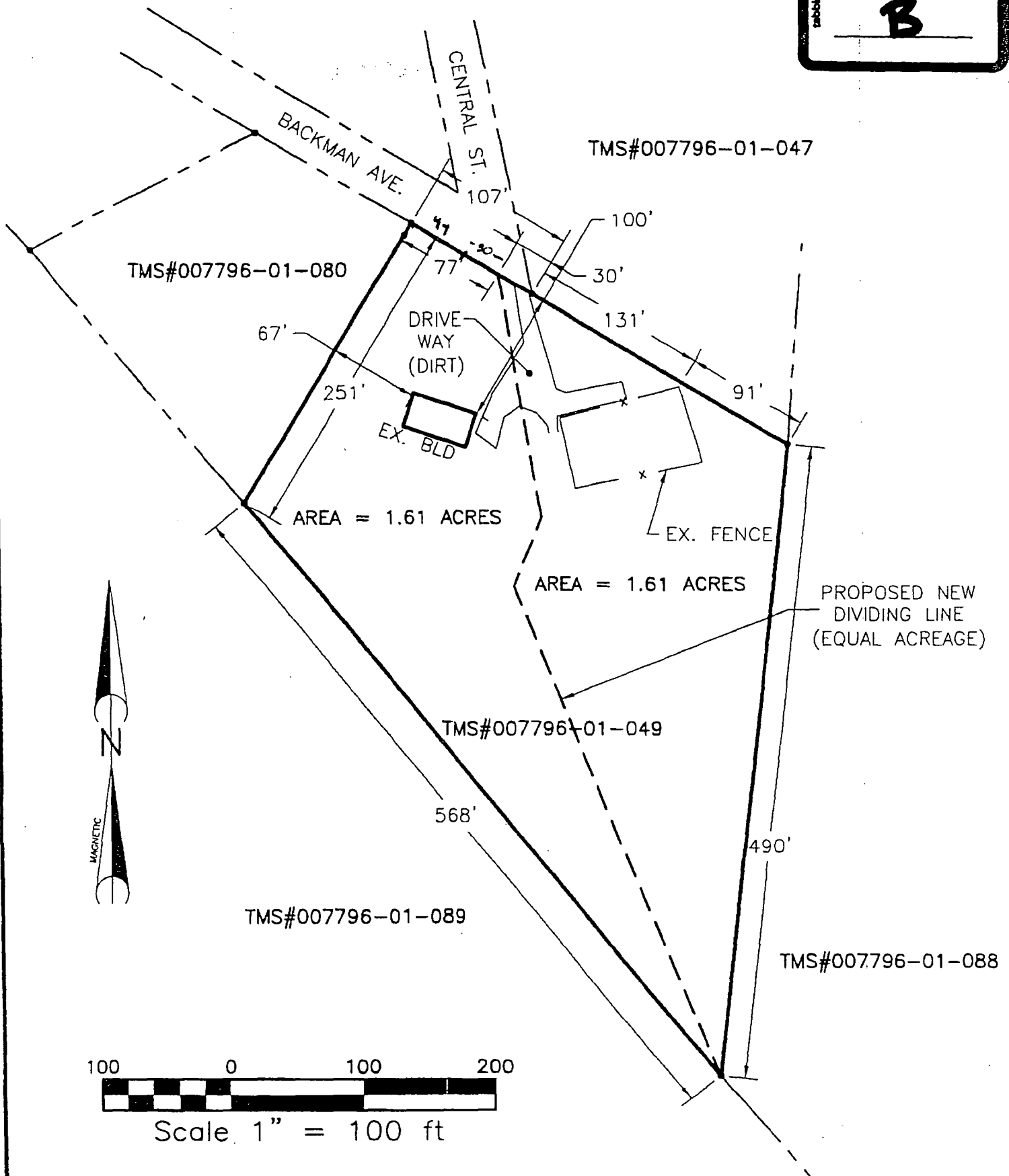


C. Cantzon Foster, II  
Bryan D. Caskey  
FOSTER LAW OFFICES, L.L.C.  
3100 Devine Street  
Columbia, South Carolina 29205  
(803) 400-1921  
(803) 400-1951 Facsimile  
***COUNSEL FOR DEFENDANTS***

August 21, 2009  
Columbia, South Carolina

DEFENDANT'S  
EXHIBIT

**B**



AMERICAN ENGINEERING CONSULTANTS, INC.  
1300 12th Street • P.O. Box 2299 • Cayce, SC 29171  
Phone: (803) 791-1400 • Fax: (803) 791-8110  
Internet: [www.aec-sc.com](http://www.aec-sc.com) • Email: [info@aec-sc.com](mailto:info@aec-sc.com)

**PROPERTY SKETCH**  
PREPARED FOR  
**JASON R. WINTERS**

DATE 8/12/2009  
SCALE 1"=100'  
DRAWN CRE  
JOB NO. 09-525  
CAD FILE 09-525

FILED

STATE OF SOUTH CAROLINA )

COUNTY OF LEXINGTON )

DAWN M. PONTIOUS, )

Plaintiff, )

v. )

DIANA L WINTERS, AND )

JASON R. WINTERS, )

Defendants. )

IN THE COURT OF COMMON PLEAS

*2006*  
2007 CP 32 - 0848

2009 DEC 11 P 1:03

BETH A. CARRIGG  
CLERK OF COURT  
INDIAN LAKES SC

NOTICE OF MOTION AND  
MOTION TO DISAPPROVE PLAT,  
AS NOT COMPLYING WITH COURT ORDER  
AND FOR NEW SURVEY

TO THE DEFENDANTS NAMED ABOVE AND THEIR ATTORNEY:

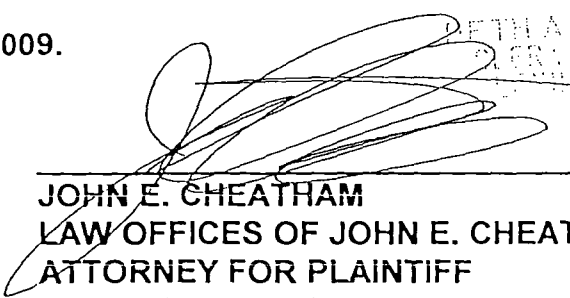
YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through the undersigned attorney, respectfully moves, pursuant the South Carolina Rules of Civil Procedure (SCRCPP) as may be applicable, at such time and place as may be set by the Court for hearing same, or as soon thereafter as counsel may be heard, for an Order disapproving the attached plat as the Surveyor, James F. Drafts of Drafts Surveying, Inc., (see attachment) did not adhere to the Order of Judge G. James (dated November 25, 2009), in preparing said survey; and thus did not ~~comply with the Order of R. Knox McMahon, dated October 2, 2009, directing~~ same.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through the undersigned attorney, respectfully moves, pursuant the South Carolina Rules of Civil Procedure (SCRCPP) as may be applicable, at such time and place as may be

set by the Court for hearing same, or as soon thereafter as counsel may be heard,  
for an Order directing that a survey be conducted adhering to the Order of Judge  
G. James (dated November 25, 2009) and also adhering to the Order of R. Knox  
McMahon, dated October 2, 2009.

December 10<sup>10</sup>, 2009

Lexington, South Carolina

  
JOHN E. CHEATHAM  
LAW OFFICES OF JOHN E. CHEATHAM, P.A.  
ATTORNEY FOR PLAINTIFF  
P.O. BOX 1345 (29071)  
102 HARMON STREET (29072)  
LEXINGTON, S.C.  
PHONE: 803-359-2828

FILED

2009 DEC 11 P 1:03

DETHA CARRIGG  
CLERK OF COURT  
LEXINGTON SC

FILED

2009 DEC 15 P 1:16

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON SC

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON ) IN THE COURT OF COMMON PLEAS  
2007 CP 32 - 0848  
DAWN M. PONTIOUS, )  
Plaintiff, ) NOTICE OF MOTION AND  
v. ) MOTION TO RECONSIDER,  
DIANA L WINTERS, AND ) ALTER OR AMEND ORDER, OR  
JASON R. WINTERS, ) ALTERNATIVELY, FOR A NEW TRIAL  
Defendants. )  
\_\_\_\_\_ )

TO THE DEFENDANTS NAMED ABOVE AND THEIR ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through the undersigned attorney, respectfully moves, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure (SCRCP), and such other Rules of the SCRCP (including Rule 60), as may be applicable, at such time and place as may be set by the Court for hearing same, or as soon thereafter as counsel may be heard, for an Order altering and/or amending the Order of the Court dated December 9<sup>th</sup>, 2009, received by the undersigned December 14, 2009, a copy of which is attached and is incorporated herein by such reference thereto, and/or relief in the alternative for a new trial, based upon the following:

1. That the Court erred approving the plat as complying with the order of Judge James dated November 25, 2008, the error being that the plat does not comply with the order of Judge James dated November 25, 2008.

2. That the Court erred in approving the plat as the partition ordered by Judge James, the error being that the plat does not delineate any ditch as required by Judge James order.

3. That the Court erred in approving the plat as the partition ordered by Judge James, the error being the surveyor apparently drew the plat according to the instructions of the Defendants.

4. That the Court erred partitioning the property in kind and allowing a surveyor to determine what road frontage each party will receive, the error being that such finding must be found and approved by the Court.

5. The Court erred in approving said plat without considering what the surveyor was informed and the basis for his creating the plat in the fashion he did.

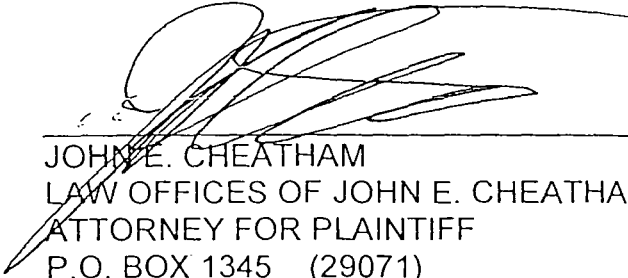
6. The Court erred in ruling that the plat complied with the Court's prior Order, the error being that such was done without giving the Plaintiff an opportunity to be heard in this matter.

7. The Court violated the Plaintiff's rights to due process by accepting the plat as prepared, the error being that Plaintiff was not given an opportunity to be heard in this matter.

8. That the Court erred in approving the plat as the partition ordered by Judge James, the error being that the plat does illustrate how nor comply with the frontage determination as required by Judge James' order.

December 14, 2009

Lexington, South Carolina



---

JOHN E. CHEATHAM  
LAW OFFICES OF JOHN E. CHEATHAM, P.A.  
ATTORNEY FOR PLAINTIFF  
P.O. BOX 1345 (29071)  
102 HARMON STREET (29072)  
LEXINGTON, S.C.  
PHONE: 803-359-2828

COPY

FILED

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON ) IN THE COURT OF COMMON PLEAS

2010 JUN 25 P 3: 51

2007 CP 32 - 0848

DEBRA A. GARRICK  
CLERK OF COURT  
LEXINGTON SC

DAWN M. PONTIOUS, )  
Plaintiff, )  
v. )  
DIANA L WINTERS, AND )  
JASON R. WINTERS, )  
Defendants. )

NOTICE OF MOTION AND  
MOTION FOR RELIEF FROM  
ORDER OR JUDGMENT,

TO THE DEFENDANTS NAMED ABOVE AND THEIR ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through the undersigned attorney, reserving her right to have her Motion to Reconsider heard, respectfully moves, pursuant to Rule 60, and such other SCRCP as may be applicable, at such time and place as may be set by the Court for hearing same, or as soon thereafter as counsel may be heard, for relief from the Order of the Court dated December 9<sup>th</sup>, 2009, a copy of which is attached and is incorporated herein by such reference thereto, based upon the following: newly discovered evidence, surprise, excusable neglect, mistake and the other elements of Rule 60 (b):

1. That the Court erred in approving the plat as the partition ordered by Judge James, the error being the surveyor admitted on April 20, 2010 that he did not follow the Order of Judge James in drawing the plat.

2. The Court erred approving the plat as complying with the order of Judge James dated November 25, 2008, the error being that the surveyor admitted the plat

does not comply with the order of Judge James dated November 25, 2008, in said deposition.

3. The Court erred in approving the plat as the partition ordered by Judge James, the error being that the plat does not delineate any ditch as required by Judge James order as established by the deposition of Drafts.

4. That the Court erred in approving the plat as the partition ordered by Judge James, the error being the surveyor admitted on April 20, 2010 that he did not follow the order but followed a sketch that was sent to him.

5. That the Court erred in approving the plat as the partition ordered by Judge James, the error being the surveyor admitted on April 20, 2010, that he did not follow the order but followed a sketch that was sent to him.

6. That the Court erred in approving the plat as the partition ordered by Judge James, the error being the surveyor admitted on April 20, 2010, that all he did was allow the Plaintiff 20 feet of frontage which is the minimum allowable to be able to record a plat.

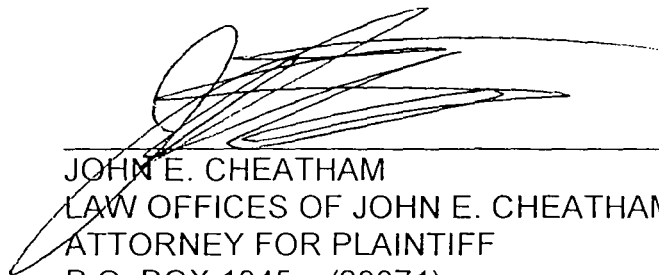
7. That the Court erred in approving the plat as the partition ordered by Judge James, the error being the surveyor admitted on April 20, 2010, that he did not find any ditch on the road frontage and thus there was no end of a ditch that he could measure from to divide the remaining frontage as ordered by Judge James.

8. The Court violated the Plaintiff's rights to due process by accepting the erroneous plat as prepared, the error being that Plaintiff was not given an opportunity to be heard before the Court Ruled upon the matter.

9. That based upon said Deposition by James Drafts, a copy of which is attached hereto, the Plaintiff has a meritorious defense as to the plat as it admittedly does not accomplish what this Court Ordered on October 2, 2009 (a copy of said Order being attached hereto and incorporated herein by reference thereto). That said Order directed that James F. Drafts was to survey the property in question, "and shall adhere to the Order of Judge G. James in preparing this survey." In that James F. Drafts admitted on April 20, 2010, that he did not follow the Order of G. James, Plaintiff is entitled to relief from the Order of Judge R. Knox McMahon, dated December 9, 2009 (see attachment).

June 25, 2010

Lexington, South Carolina



---

JOHN E. CHEATHAM  
LAW OFFICES OF JOHN E. CHEATHAM, P.A.  
ATTORNEY FOR PLAINTIFF  
P.O. BOX 1345 (29071)  
102 HARMON STREET (29072)  
LEXINGTON, S.C.  
PHONE: 803-359-2828

/r

# COPY

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS  
FOR THE ELEVENTH JUDICIAL CIRCUIT

Dawn M. Pontious,

Docket No.: 06-CP-32-0848

Plaintiff,

vs.

Diana L. Winters and Jason R. Winters,

Defendants.

PPB

DEFENDANTS' RETURN AND MEMORANDUM IN OPPOSITION TO PLAINTIFF'S  
NOTICE OF MOTION AND MOTION FOR RELIEF FROM ORDER OR JUDGMENT

TO: PLAINTIFF AND HER COUNSEL, JOHN E. CHEATHAM, ESQUIRE:

Defendants Diana L. Winters and Jason R. Winters, by and through their undersigned counsel, offer the following Defendants' Return and Memorandum in Opposition to Plaintiff's Notice of Motion and Motion for Relief from Order or Judgment.

PROCEDURAL POSTURE

This matter was commenced on March 7, 2006, with Plaintiff's filing of a Summons and Complaint seeking a partition in kind of certain real property in Lexington County, South Carolina and other ancillary relief. Defendant Diana L. Winters counterclaimed for a collection of a debt, and Defendant Jason R. Winters counterclaimed for a partition in kind of the same property.

The case was tried on November 3, 2008, by Judge James during a non-jury term. Following trial, Judge James issued the Order of the Court (the "Original Order"), filed on November 26, 2008. (See Exhibit "1").

Plaintiff subsequently filed a Notice of Motion and Motion to Reconsider, Alter or Amend Order, or Alternatively for a New Trial, which was denied in an Order of the Court, filed on June 18, 2009, and served upon all parties on June 23, 2009. (See Exhibit "2"). Thereafter, the requisite time within which to appeal any aspect of the Original Order expired with neither party appealing, and the Original Order became the settled law of the case.

On July 10, 2009, following the parties' dispute over which survey to use to give effect to the holding of the Original Order, Plaintiff filed a Notice of Motion and Motion to Approve Plat and Issue Deeds. After hearing argument from counsel as to which plat should be approved, Judge McMahon ordered that an independent surveyor conduct a survey and prepare a plat following the Original Order. (See Exhibit "3"). After the survey was completed, Judge McMahon issued a follow-up administrative order (the "Approving Order"), which ordered that deeds be prepared according to the survey. The Approving Order was filed and served on about December 9, 2009. (See Exhibit "4").

On December 15, 2009, Plaintiff filed a Motion to Reconsider the Approving Order. A hearing on this motion was held before Judge McMahon on March 15, 2010. The Court issued an order continuing Plaintiff's Motion to Reconsider while also granting Plaintiff leave to depose the Court-appointed surveyor.

The hearing on Plaintiff's Motion to Reconsider reconvened on June 15, 2010, before Judge Newman who declined to hear Plaintiff's Motion to Reconsider, based upon his holding that only Judge McMahon could reconsider the Approving Order. To date, Plaintiff's Motion to Reconsider has not been disposed of.

Most recently, on June 25, 2010, Plaintiff filed a Motion for Relief from Order or Judgment against the Approving Order seeking almost exactly the same relief sought in Plaintiff's pending Motion to Reconsider. Having addressed Plaintiff's Motion to Reconsider in a previously filed Memorandum of Law, Defendants now address Plaintiff's Motion for Relief from Order or Judgment ("Plaintiff's Motion") hereinbelow.

## ARGUMENT

### Introduction.

The Original Order, for good or for ill, is the settled law of this case, as it is the final and unappealed from Order of this Court following a day-long bench trial on the merits. However, Plaintiff is dissatisfied with the Original Order and is now attempting to collaterally attack it through a challenge

to the more recently issued Approving Order despite the fact that the Approving Order merely applies the Original Order's ruling in an administrative manner.

In this collateral attack, Plaintiff's Motion seeks relief under Rule 60(b), SCRPC from the Approving Order, issued by Judge McMahon on December 9, 2009. Although a reading of Plaintiff's Motion reveals that Plaintiff does not request any specific relief, the relief typically contemplated by a successful Rule 60(b) challenge is a new trial. This is significant, as it is a tacit admission by Plaintiff that the Approving Order is not the actual target of Plaintiff's Motion.

Fundamentally, the true target of Plaintiff's Motion is the Original Order. In seeking to have this court now make a finding of fact in direct contravention to the Original Order, it is clear that Plaintiff is attempting to obtain another "bite at the apple" almost two (2) years after receiving the Original Order, which she chose not to appeal. Ultimately, in seeking to modify the Original Order, Plaintiff's Motion seeks to cross a bridge too far due to both the procedural time limit of Rule 60 and the substantive merits of Plaintiff's Motion. Accordingly, this Court should DENY Plaintiff's Motion.

I. Plaintiff's Motion truly seeks relief from the Original Order and accordingly, must be denied as untimely.

The Original Order, issued on November 26, 2008, was not appealed from, and is now the settled law of the case. See *Normandy Corp. v. South Carolina Dept. of Transp.*, 386 S.C. 393, 418, 688 S.E.2d 136, 149 (Ct. App. 2009) (citing *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (holding that an unappealed ruling, right or wrong, is the law of the case)).

It is important to understand the relationship between the Original Order and the Approving Order as Plaintiff's Motion is only nominally directed at the Approving Order. The Original Order sets forth findings of fact as how to partition the property. The Approving Order merely requires that deeds be prepared pursuant to the independent surveyor's plat as directed by the Original Order. Distilling Plaintiff's Motion down to the true dispute, Plaintiff's Motion seeks to have this court make a finding of fact that no "ditch" exists along the northwestern boundary of the property. However, Paragraphs

17 – 21 of the Original Order clearly state that a ditch exists along the northwestern boundary of the property and the essential logic of the Original Order is based upon the existence of this ditch.

Essentially, Plaintiff's Motion seeks to have a finding of fact made in direct contradiction of the settled law of the case. Accordingly, it is impossible to view Plaintiff's Motion as anything other than an attack on the findings of fact and rationale of the Original Order. Therefore, the court must view Plaintiff's Motion in terms of seeking relief from the Original Order, not the Approving Order. Once Plaintiff's Motion is properly related with the Original Order it seeks to modify, the defect in Plaintiff's Motion becomes patently obvious: Plaintiff's Motion must be denied due to the one year, non-discretionary time limit imposed by Rule 60.

A Rule 60(b) motion "shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, or order or proceeding was entered or taken". *Coleman v. Dunlap*, 306 S.C. 491, 413 S.E.2d 15 (1992) (interpreting Rule 60(b), SRCP) (emphasis added). Accordingly, it is clear that there is a non-discretionary, absolute time limit within which to file in a motion based upon Rule 60(b) for "mistake, inadvertence, surprise, excusable neglect, newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial, fraud, misrepresentation, or other misconduct" in relation to an order or judgment. (See Rule 60(b), SRCP). Plaintiff does not allege (nor is it the case) that the Original Order is void, has been satisfied, released, or discharged, so we may appropriately confine our analysis to subsections (1-3) of Rule 60(b).

In this case, it is without dispute that Plaintiff is well outside the one year time limit for attempting to seek relief against the Original Order. By Plaintiff's own admission, Plaintiff received notice of entry of the Original Order no later than December 19, 2008<sup>1</sup>. Even giving Plaintiff the benefit of the doubt and accepting the latest possible date that Plaintiff could have received notice of entry of judgment of the Original Order, Plaintiff's Motion is more than six months past of the one

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<sup>1</sup> Plaintiff's Motion to Reconsider the Original Order was dated December 19, 2008. Therefore, this is the absolute latest date Plaintiff could have received notice of entry of the Original Order.

year limit. Consequently, to the extent Plaintiff's Motion applies to the Original Order, Plaintiff's Motion is untimely and must be denied.

II. Even if the Court declines to relate Plaintiff's Motion to the Original Order and deny it as untimely, Plaintiff's Motion should still be denied on the merits against the Approving Order.

Even if Plaintiff had timely filed, Plaintiff's Motion would still fail on the merits. Rule 60(b)(2) allows the court to grant relief based upon newly discovered evidence only if the newly discovered evidence could not have been discovered by due diligence prior to trial. (See Rule 60(b)(2), SCRCP). *Black's Law Dictionary* defines "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation" *Id* at 468 (7th ed. 1999). Additionally, in interpreting Rule 60(b)(2), our Court of Appeals has held, "Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence could not have been discovered by due diligence prior to trial. *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456, 460 (Ct. App. 2005) (emphasis added).

Plaintiff's "newly discovered evidence" is the deposition of a surveyor who took a survey of the property in October of 2009. However, the focus of this court's inquiry should be whether the Plaintiff's Motion is supported by newly discovered evidence that could not have been discovered in time to move for a new trial.

Applying the holding of *Lanier* to Plaintiff's Motion, it is clear that the deposition supporting Plaintiff's Motion is not newly discovered evidence as contemplated by our Court of Appeals in interpreting Rule 60(b)(2). Without question, Plaintiff had the ability to allow one or multiple surveyors conduct surveys of the property, and then have these surveyors provide testimony to Judge James in November of 2008. Moreover, if Plaintiff had chosen to, nothing prevented Plaintiff from having *this specific surveyor* testify at the original trial to allow the Judge James to consider this testimony in November of 2008. Accordingly, the deposition supporting Plaintiff's Motion obviously fails to fall under the definition of "newly discovered evidence" as set forth by our Court of Appeals in *Lanier*.

Furthermore, even assuming that this deposition constitutes newly discovered evidence, this deposition would not have necessarily changed the result at trial; it could have been discovered before trial by due diligence; and would merely be cumulative evidence for the trial court to have considered. All of these factors, as set forth in *Lanier*, warrant a denial of Plaintiff's Motion to the extent Plaintiff relies upon the deposition as "newly discovered evidence". To the extent Plaintiff's Motion may attempt to rely on any other part of Rule 60(b), Plaintiff's Motion has not been made within a reasonable amount of time, nor has there been any inadvertence, surprise, mistake, or excusable neglect on Plaintiff's part that would merit relief.

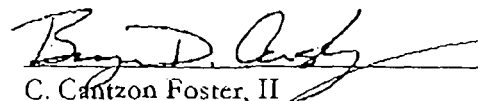
Quite simply, Plaintiff has had her day in court on this matter and has had the ability to call any witnesses she desired and introduce any and all evidence she desired. Plaintiff chose to try her case according to her own deliberate strategy and subsequently chose not to appeal. Consequently, this Court should not act as an appellate court for Plaintiff, and Plaintiff's Motion should be denied.

#### PRAYER FOR RELIEF

Based on the foregoing, Defendants are informed and believe that this Court should DENY Plaintiff's Notice of Motion and Motion for Relief from Order or Judgment and compel the parties to execute deeds in accordance with the independent Court-appointed surveyor's plat.

Respectfully Submitted,

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**PPB**

CLERK OF COURT  
JUL 28 2010  
COLUMBIA, SC

JUL 28 2:00 PM

July 27, 2010  
Columbia, South Carolina

COPY

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STATE OF SOUTH CAROLINA )

) IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON )

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2007 CP 32 - 0848

DAWN M. PONTIOUS, )

Plaintiff, )

v. )

DIANA L WINTERS, AND )

JASON R. WINTERS, )

Defendants. )

MEMORANDUM IN SUPPORT OF  
MOTION FOR RELIEF FROM  
ORDER OR JUDGMENT,

Plaintiff's Motion in this matter is as follows:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through the undersigned attorney, reserving her right to have her Motion to Reconsider heard, respectfully moves, pursuant to Rule 60, and such other SCRPC as may be applicable, at such time and place as may be set by the Court for hearing same, or as soon thereafter as counsel may be heard, for relief from the Order of the Court dated December 9<sup>th</sup>, 2009, a copy of which is attached and is incorporated herein by such reference thereto, based upon the following: newly discovered evidence, surprise, excusable neglect, mistake and the other elements of Rule 60 (b):

Initially, Rule 60 (b) provides: Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms, as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(5) states: "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."

Initially, the deposition of Surveyor James Drafts was taken on April 20, 2010, clearly more than ten days after the Order of Judge McMahan was issued on December 9, 2009.

Plaintiff requested that the Court hear Draft's testimony at the Motion to Reconsider hearing, the first of which was cancelled at the request of the Defendants' attorney who was sick.

Plaintiff rescheduled to have Drafts testimony taken when the Motion to Reconsider was scheduled, but was not taken due to Defendants' attorney objecting to Drafts testifying before the Court, claiming it had to be taken by deposition.

At his deposition on April 20, 2010, Drafts admitted that he did not follow the Order of Judge James in drawing the plat. (See pages of Drafts deposition cited and attached)

Thus, based upon said Deposition by James Drafts, a copy of which is attached hereto, the Plaintiff has a meritorious defense as to the ruling that the plat complies with Judge James' Order, as the plat admittedly does not accomplish what this Court Ordered on October 2, 2009 (a copy of said Order being attached hereto and incorporated herein by reference thereto). That said Order directed that James F. Drafts was to survey the property in question, "and shall adhere to the Order of Judge G. James in preparing this survey."

In that James F. Drafts admitted on April 20, 2010, that he did not follow the Order of G. James, Plaintiff is entitled to relief from the Order of Judge R. Knox McMahon, dated December 9, 2009 (see attachment).

To say that the testimony was or could have been available on the date of the hearing is in error, as even if Plaintiff requested Drafts to do a survey and draw a plat it would not have been a plat "ordered by the Court and relied upon by the Court," and it would be beyond speculation to state what the Court would have done with the plat.

Plaintiff's current charge of error is as to Judge McMahon's Order of December 9, 2009, which said that the Draft's plat complied with Judge James' order; that is it went to the ditch on the upper end of the proper on Bachman Road, and then divided the remaining road frontage equally between the parties.

The surveyor said he could not comply with the plat and that he simply gave the Plaintiff the minimum amount of road frontage, which he interpreted as being in compliance with the hand drawn line on the original plat submitted to him. (See attachment from Draft's deposition) The surveyor said that he interpreted a hand drawn line as being what the Court had determined was to be the dividing line.

Additionally, relief from an inequitable ruling is provided for in Rule 60 (b)(5) states: "the judgment is no longer equitable that the judgment should have prospective application."

Whether to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial judge. *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992).

In that it has now developed that the ruling by Judge McMahon is inequitable as it was based upon a mistakenly drawn plat, the Court should rectify the matter and make an equitable division of the property, which it has the authority to do.

Further, the Plaintiff was certainly surprised by the Order of Judge McMahon of December 9, 2010, as it was issued without notice to the Plaintiff. Further there were mistakes in the plat as admitted by the surveyor who stated that he did not comply with the order of Judge James. Plaintiff has excusable neglect as Plaintiff had no notice until receipt of the order.

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That based upon said Deposition by James Drafts, a copy of which is attached to Plaintiff's Motion, the Plaintiff has a meritorious defense as to the plat as it admittedly does not accomplish what Judge McMahon Ordered on October 2, 2009. That said Order directed that James F. Drafts was to survey the property in question, and shall adhere to the Order of Judge G. James in preparing this survey." In that James F. Drafts admitted on April 20, 2010, that he did not follow the Order of G. James, Plaintiff is entitled to relief from the Order of Judge R. Knox McMahon, dated December 9, 2009

The Court violated the Plaintiff's rights to due process by accepting the erroneous plat as prepared, the error being that Plaintiff was not given an opportunity to be heard before the Court Ruled upon the matter.

Clearly an abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *State v. Douglas*, 367 S.C. 498 (507), 626 S.E.2d 59 (64) (Ct. App. 2006)

Clearly Judge McMahon's conclusion that the plat was drawn according to the Order of Judge James is a mistake as there is no evidence in the record to support such a finding, and Plaintiff is entitled to relief from same.

Thus the finding/conclusion is without any evidentiary support which clearly makes it a mistake by Judge McMahon, and the Plaintiff is entitled to relief.

Additionally, all of the after discovered evidence concerning same clearly establishes that the plat did not comply with the Order of Judge James. Any evidence could have been created before the hearing, but the fact that the Court order a specific survey was not addressed until McMahon's order of October 2, 2009. Certainly this was

more than ten days after the June 17, 2009, Order of Judge James in which he affirmed his ruling of November 25, 2008.

A survey ordered by the Court cannot be discovered until the survey is done and the plat completed, which occurred on November 4, 2009, with the division being made November 10, 2009; and which was filed with the Court by Order dated and filed December 9, 2009.

To argue that the Plaintiff should have known about the Draft's survey and plat before it was created is impossible, and have known of the plat's non-compliance with the Court's Order of October 9, 2009, approved December 9, 2009, which was not confirmed until Drafts' deposition on July 20, 2010.

See specifically the following from James Drafts' Deposition:

Page 6, Line 3 through 17

Page 7, Line 9 through 16

Page 12, Line 7 through page 13 line 9

Page 15, Line 21 through page 17 line 13

Page 20 line 17 through 21.

Page 21, line 17 through 22

Page 24, line 11 through 19

Page 30, line 1 Page 31 line 8

Page 47, line 1 through 4 and line 17 through 21

Page 48, line 18 through 22

Page 52, line 19 through 21

Page 53, line 16 through line 23

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Page 58, line 21 page 59, line 2

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Page 60, line 7-8

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In *Campbell v. Jordan*, 382 S.C. 445, 675 S.E.2d 801 (S.C. App. 2009) the Court of appeals stated:

The partition procedure must be fair and equitable to all parties of the action. *Pruitt v. Pruitt*, 298 S.C. 411, 414, 380 S.E.2d 862, 864 (Ct. App. 1989). This Court has previously stated that partition in kind is favored when it can be fairly made without injury to the parties. *Anderson v. Anderson*, 299 S.C. 110, 114, 382 S.E.2d 897, 899 (1989). Furthermore, equitable considerations such as the length of ownership and sentimental attachment to property may be considered in a partition action, but the pecuniary interests of all of the parties is the determining factor in deciding whether to require a judicial sale or to allow a partition by allotment. *Zimmerman*, 365 S.C. at 388, 618 S.E.2d at 901. (675 S.E.2d at page 804)

Rule 60(b)(5) is based on the historical power of a court of equity to modify its decree "in light of subsequent conditions." *Mr. G v. Mrs. G*, 320 S.C. 305, 311, 465 S.E.2d 101, 107 (Ct. App. 1995). See also: 1) *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 590 S.E.2d 502 (S.C. App. 2003) ... equity to modify its decree "in light of subsequent conditions." 2) *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (S.C. App. 1994) ...equity to modify its decrees in light of subsequent conditions that make it inequitable 3) *Evans v. Gunter*, 294 S.C. 525, 366 S.E.2d 44 (S.C. App. 1988) ...equity to modify its decree in light of subsequent conditions.

The Defendants in this case do not seek to enforce the original ruling by the Court as to divide the property as being the law of the case, the Defendants are seeking to have the Court affirm an erroneous and inequitable ruling by Judge McMahon of December 9th, 2009, wherein he found the plat conforms to the Order of Judge James

dated November 25, 2008, when in fact it does not. The Defendants want this plat approved because it gives them 87.01 feet of frontage and 1.994 acres and gives the Plaintiff 20 feet of road frontage and 1.229 acres. Clearly an unfair and inequitable ruling.

Conclusion

The erroneous plat, McMahon's erroneous ruling that the plat complied with Judge James' Order, failure to follow due process in giving Plaintiff notice of approval of the plat, and the other items cited above require that the Plaintiff be given relief under Rule 60 (b).

Further, subsequent conditions make the initial ruling inequitable; and the Plaintiff should be granted relief from the Judgment 60 (b) (5).

Thus a fair and equitable division should be ordered by the Court.

Respectfully submitted

August 11, 2010

Lexington, South Carolina



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**INDEX**

|                                   |    |
|-----------------------------------|----|
| Motion Hearing 09/22/09 . . . . . | 3  |
| Ruling of the Court . . . . .     | 12 |
| Certificate . . . . .             | 13 |

**INDEX OF WITNESSES**

(Court Reporter's Note: There was no direct or cross examination of any witnesses).

**INDEX OF EXHIBITS**

(Court Reporter's Note: No exhibits were marked or received into evidence).

1 (The following proceedings are reported on  
2 September 22, 2009).

3 THE COURT: This is 06-CP-32-848, Pontious  
4 versus Winters and Winters. It's a motion to approve a  
5 plat and issue a deed; is that correct?

6 MR. CHEATHAM: Yes, sir, Your Honor.

7 THE COURT: It's your motion, Mr. Cheatham?

8 MR. CHEATHAM: I think we filed one, and I  
9 think they filed one.

10 MR. CASKEY: We filed a return to the  
11 Plaintiff's motion.

12 THE COURT: I have a notice of motion and  
13 motion to approve plat and issue deed, and then I have a  
14 Defendant's return to Plaintiff's motion.

15 MR. CHEATHAM: The only reason -- they had  
16 presented, I think, a plat also.

17 THE COURT: I would be glad to hear from you,  
18 Mr. Cheatham.

19 MR. CHEATHAM: Your Honor, the question arises  
20 and I propose to hand up an affidavit to the Court.

21 (Hands to Court).

22 THE COURT: All right.

23 MR. CHEATHAM: The question arises as to the  
24 judge's order in this case, which indicates an  
25 impossibility. The plat cannot be drawn in accordance

1 with his directions, first of all. Second of all, he  
2 references a ditch as being the starting point of the  
3 survey basically.

4 THE COURT: Did anyone file a motion to  
5 reconsider Judge James' order?

6 MR. CHEATHAM: We have done that, Your Honor.

7 MR. CASKEY: The Plaintiffs filed a motion.

8 THE COURT: Did he then deny the motion to  
9 reconsider?

10 MR. CASKEY: It was denied, Your Honor.

11 THE COURT: Did anyone then appeal?

12 MR. CASKEY: It has not been appealed from,  
13 Your Honor.

14 THE COURT: Is that not then the law of the  
15 case? If the judge says a ditch exists, a ditch exists  
16 it seems like to me.

17 MR. CHEATHAM: May I approach?

18 THE COURT: Yes, sir.

19 MR. CHEATHAM: Your Honor, even if the judge  
20 found that a ditch exists, he did not find the length of  
21 that ditch.

22 THE COURT: Didn't I read something about  
23 47 feet and 30 feet and the southeastern corner and an  
24 iron stake?

25 MR. CHEATHAM: He is talking about starting at

1 the bottom of this plat and drawing a line to the road,  
2 and even his drawing you can't do on a plat. If you  
3 will notice their plat has a zigzag in it --

4 THE COURT: Let me stop you a minute. Here is  
5 my point. Judge James tried this case.

6 MR. CHEATHAM: Yes, sir.

7 THE COURT: There is an order that I read this  
8 morning, enthusiastically I might add, where he set  
9 nonjury and made specific findings of fact and ordered  
10 the parties to, I think, split the costs on a plat and  
11 then have deeds prepared.

12 MR. CHEATHAM: He never referenced the length  
13 of the ditch, Your Honor.

14 THE COURT: Well, I don't know if it is the  
15 judge's job to reference the length of the ditch when  
16 there was trial lawyers in front of him trying the case.  
17 What are y'all asking me to do to as far as Judge James'  
18 order is concerned? When was this order signed?

19 MR. CASKEY: Your Honor, this order was dated  
20 November 25th of '08, filed the 26th.

21 THE COURT: What are you asking me to do,  
22 Mr. Cheatham?

23 MR. CHEATHAM: Your Honor, these are some  
24 pictures of the area. The only thing they show is a  
25 slight mound to control water flow on the road.

1 MR. CASKEY: Your Honor, I object to this. We  
2 have been over this ground before in trial last year. I  
3 have got pictures I can introduce. We can call  
4 witnesses. We call the surveyor and we can retry this  
5 case if you would like to today, but I don't think  
6 that's what we are here to do today.

7 THE COURT: That's not what I'm here to do  
8 today. I am here to rule on the motion. That's what I  
9 am here to do today, and I assume that I was approving  
10 plats and deeds that were consistent with Judge James'  
11 order.

12 MR. CHEATHAM: Without any directions on the  
13 length of the ditch and there being a controversy of the  
14 ditch, I don't know how any surveyor can go out there  
15 and determine it.

16 I don't think they have had a surveyor run any  
17 lines to determine the length of the ditch, and ours  
18 couldn't because obviously he found no ditch. As a  
19 proposal, we could try to agree on a mutual surveyor to  
20 go out there and survey the property.

21 THE COURT: Thank you, Mr. Cheatham.  
22 Mr. Caskey.

23 MR. CASKEY: Your Honor, may it please the  
24 Court. Our Exhibit B., if I can just try to briefly  
25 illustrate what we have got here, we are trying to

1 figure out the mid point, the dividing line of where we  
2 are going to draw the property line on this northeastern  
3 section.

4 I think we all agree that the total from pin  
5 to pin on the northeast corner to the lower pin is  
6 107 feet total. I think we both agree on that. I think  
7 both of our surveys showed that.

8 However, Judge James, after we had a day of  
9 trial, he didn't say: Draw the line exactly between the  
10 pins. He said, there is a ditch that comes out here,  
11 and it would be inequitable to draw the line midway  
12 between the pins. We've got to use the edge of the  
13 ditch as one of the end points, not the pins.

14 The ditch comes out 47 feet. Through my  
15 not-so-great math skills, I deduced that 47 feet leaves  
16 60 feet total of the 107. Sixty divided by two is  
17 30 feet.

18 I propose we draw a line 30 feet from the  
19 southern pin, given 30 feet total, 47 feet, the balance  
20 is the ditch. Clearly the plat they have proposed does  
21 not take into account the ditch whatsoever.

22 They simply propose to draw a line midway  
23 between the two, ignoring the fact that there is any  
24 ditch whatsoever as referenced in Judge James' finding  
25 of fact.

1           There may be a dispute as to the length of  
2 the ditch, but there cannot be a dispute that there is  
3 one.

4           THE COURT: What are you asking me to do then,  
5 Mr. Caskey?

6           MR. CASKEY: What I would respectfully submit  
7 to the Court is that the plat that we have proposed here  
8 as Exhibit B., with the 47 feet taken into account for  
9 the ditch, be approved and the dividing line be 30 feet  
10 from the pin.

11          MR. CHEATHAM: Your Honor, I would just  
12 profess that they have 47 feet, but it's not indicated  
13 on the plat as to who actually put those numbers on  
14 there, whether the surveyor said that was the ditch or  
15 not.

16          To me it looks like the numbers are not  
17 consistent with the other numbers on there. So I don't  
18 know whether they measured the 49 feet, the surveyor  
19 measured the 49 feet --

20          THE COURT: Forty-seven feet?

21          MR. CHEATHAM: Forty-seven. And what the  
22 surveyor based his 47 feet on, if in fact there was a  
23 surveyor. So if they are saying that the surveyor did  
24 it, then the only thing we would like to do is talk with  
25 the surveyor, and that may resolve it.

1           MR. CASKEY: Your Honor, the numbers are mine.  
2 I did it through mathematical calculations. The  
3 surveyor said 77 feet from the pin to the midpoint. I  
4 think we agree the total distance is 107 feet.

5           If we take 30 from the southern pin to the  
6 midpoint, 30 again, is 60, which leaves 47 feet. I  
7 believe you can derive the length of the ditch from the  
8 survey here.

9           They may dispute the survey. That's certainly  
10 up to them to do so. However, I think it is absolutely  
11 conclusively wrong to take their survey, which just  
12 divides the midpoint and takes no count of the fact that  
13 we tried this case, and Judge James said it would be  
14 inequitable to simply do that. This is directly in  
15 contravention of Judge James' order.

16          THE COURT: Mr. Cheatham, as I understand it,  
17 you want to talk with whoever prepared the survey with  
18 American Engineering Consulting, Inc.?

19          MR. CHEATHAM: The way I understand it, didn't  
20 you put the 47 feet on there?

21          MR. CASKEY: That's correct. The 47 is my  
22 number.

23          MR. CHEATHAM: Their surveyor didn't put the  
24 ditch on there.

25          MR. CASKEY: I deduced that from his

1 mathematics.

2 THE COURT: It's clear from Judge James'  
3 order. He states in paragraph 21: The most equitable  
4 manner of dividing the property is for the center  
5 dividing line to begin at the iron pin located at the  
6 southernmost corner of the property, running in a  
7 northwesterly direction and ending at a point on Bachman  
8 Avenue at a point midway between the easternmost edge of  
9 the aforesaid ditch and the iron pin at the easternmost  
10 point slash corner of Bachman Avenue, all as shown on  
11 the plat admitted as Plaintiff's Exhibit Number 1.

12 The Court acknowledges that it would be  
13 likely -- the Court acknowledges it will likely be  
14 necessary for a new survey to be obtained, and Jason and  
15 Dawn -- Jason being Mr. Winters and Dawn being  
16 Ms. Pontious -- shall bear the cost of the survey in  
17 equal shares.

18 Has that been done or has there been  
19 separate --

20 MR. CHEATHAM: Separate plats.

21 THE COURT: -- surveys?

22 MR. CASKEY: Separate surveys, Your Honor.

23 MR. CHEATHAM: But on our survey, there is no  
24 indication of a plat -- I mean, a ditch -- and on their  
25 survey, the surveyor did not indicate a ditch.

1 THE COURT: Do y'all want me to appoint  
2 someone to survey the property? Your clients will bear  
3 the cost of that, of course.

4 MR. CHEATHAM: That would be fine.

5 MR. CASKEY: I think whoever we appoint to  
6 draw the survey, I would really object to them saying, I  
7 don't see a ditch here, and then just totally obviating  
8 the fact that we had a trial.

9 THE COURT: They will have to look at the  
10 judge's order. I agree with you there, Mr. Caskey. I  
11 am trying to -- it appears that Judge James indicated  
12 that a survey would be necessary, he felt like.

13 To be consistent with his order -- and I  
14 assume the surveyor could read this. He even says in  
15 his order that the survey, Plaintiff's Exhibit Number 1,  
16 did not reflect the location of the ditch or the  
17 driveway.

18 MR. CASKEY: As long as whoever we will  
19 appoint will follow Judge James' order, I have no  
20 objection to having that survey, but that is just kind  
21 of where I am.

22 THE COURT: I will put it to y'all like this.  
23 You are probably better off with a surveyor than you are  
24 with me in determining where the ditch is because I am  
25 not going to go out on Bachman Avenue today. I don't

1 have the ability to do that. You will have to have a  
2 surveyor. Do y'all want to talk among yourselves to  
3 agree on a surveyor?

4 MR. CASKEY: I would be fine to let the Court  
5 appoint one.

6 MR. CHEATHAM: That's no problem.

7 THE COURT: I will appoint a surveyor. Y'all  
8 would each bear the cost 50/50 in that regard.

9 MR. CHEATHAM: Yes, sir.

10 THE COURT: All right. I will do that. Thank  
11 you very much. Here are your photographs and plat,  
12 Mr. Cheatham.

13 MR. CHEATHAM: Your Honor, can we put in the  
14 order that if at all possible, the survey be  
15 accomplished within 30 days?

16 THE COURT: I will certainly put that in  
17 there.

18 MR. CASKEY: I have no objection to that, Your  
19 Honor.

20 THE COURT: Thank you very much.

21 MR. CHEATHAM: Are you going to do a form  
22 order or do you want us to prepare one?

23 THE COURT: I will prepare an order.

24 \*\*\* END OF REQUESTED TRANSCRIPT OF RECORD \*\*\*

25

## C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal, in the Civil Court for Lexington County, South Carolina on the 22nd day of September, 2009.

I do further certify that I am neither of kin counsel nor interest to any party hereto.

January 30, 2011

L. Coconut Pantsari

Court Reporter

1 STATE OF SOUTH CAROLINA

2 COUNTY OF LEXINGTON

COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

3  
4 DAWN PONTIOUS,

5 Plaintiff,

6 vs

Case No.: 06 CP 32-00848

7 DIANA L. WINTERS AND JASON WINTERS,

8 Defendants.

9  
10 D E P O S I T I O N

11 WITNESS: JAMES F. DRAFTS

12 DATE: Tuesday, April 20, 2010

13 TIME: 10:07 a.m.

14 LOCATION: Law Offices of  
15 John E. Cheatham, P.A.  
102 Harmon Street  
Lexington, South Carolina

16 TAKEN BY: Attorneys for the Plaintiff

17 REPORTED BY: GINA M. SMITH  
18 Certified Shorthand Reporter  
Registered Professional Reporter

19  
20 -----  
21  
22  
23 Gina M. Smith, CSR, RPR  
24 117 Harmon Creek Court  
Lexington, SC 29072  
25 803-359-5705

1 APPEARANCES:

2 ATTORNEYS FOR PLAINTIFF  
3 DAWN PONTIOUS:

4 LAW OFFICES OF JOHN E. CHEATHAM, P.A.  
5 BY: JOHN E. CHEATHAM, ESQ.  
6 102 Harmon Street  
7 P.O. Box 1345  
8 Lexington, SC 29071

9 ATTORNEYS FOR DEFENDANT  
10 DIANA L. WINTERS AND JASON WINTERS:

11 FOSTER LAW OFFICE, LLC  
12 BY: BRYAN D. CASKEY, ESQ.  
13 3100 Devine Street  
14 Columbia, SC 29205

15 ALSO PRESENT:

16 DAWN PONTIOUS  
17 DIANA WINTERS  
18 JASON WINTERS

19 (INDEX AT REAR OF TRANSCRIPT)

20  
21  
22  
23  
24  
25

1                   STIPULATION: It is stipulated by  
2 and between Counsel that this deposition is being  
3 taken in accordance with the South Carolina Rules  
4 of Civil Procedure, and that the deponent waives  
5 the right to read and sign the deposition  
6 transcript.

7                   - - - - -

8                   JAMES F. DRAFTS, being first duly  
9 sworn, testified as follows:

10 EXAMINATION

11 BY MR. CHEATHAM:

12               Q. Mr. Drafts, give us your full name.

13               A. James F. Drafts.

14               Q. And where do you live or reside?

15               A. 463 Highway 378 West, Lexington, South  
16 Carolina.

17               Q. What is your educational background?

18               A. High school and an associate's degree from  
19 Midlands Tech.

20               Q. What was the associate's degree in?

21               A. Civil engineering, surveying.

22               Q. And when did you graduate?

23               A. 1974.

24               Q. Since that time, have you continuously  
25 been involved in surveying?

1 property?

2 A. There's a -- what I would call a water  
3 turnout on the adjoining property.

4 Q. But my question was: You said there was  
5 no ditch --

6 A. No.

7 Q. -- on the property that you surveyed?

8 A. Well, not in the area they described a  
9 ditch to be. There were other ditches on the  
10 property, of course.

11 Q. I'm talking about along the frontage road?

12 A. No, sir, not --

13 Q. There were no ditches?

14 A. Not on the property itself. Immediately  
15 on the adjoining property, there was a ditch or  
16 what I'd call a water turnout. It's a  
17 county-maintained thing.

18 Q. I don't know all the surveying terms, but  
19 somebody told me that was referred to as a berm?

20 A. A berm?

21 Q. Yeah.

22 A. A berm is a bank of dirt like a dam.

23 Q. Would this be a small berm then?

24 A. No.

25 Q. No?

1           A. Well, when the copy of the plat comes  
2 back, I'll show you. It's a place that the motor  
3 grader operator that maintains the road for the  
4 county just kind of swoops his blade out into the  
5 woods for the water to flow.

6           Q. I was under the impression that it was  
7 sort of like a little hump of dirt that sort of  
8 channelled that water down?

9           A. I guess it's a hump on the back side of  
10 the blade where he, you know -- it's a hump on the  
11 edge of the road and it just kind of swoops around  
12 in there, but all of that's off of the property.

13          Q. Right. I understand that.

14          A. It's in front of it. Actually, it's on  
15 somebody else's property altogether. It's not even  
16 in the road right-of-way.

17          Q. Now, the original plat -- and we'll get to  
18 that in a second, but they're copying it -- you  
19 resurveyed the original plat?

20          A. I resurveyed the remainder of the original  
21 plat, yes.

22          Q. I understand that there was nine -- .97  
23 acres transferred off?

24          A. Right.

25          Q. But you surveyed the remaining?

1 MR. CHEATHAM: Break.

2 (A recess transpired.)

3 BY MR. CHEATHAM:

4 Q. Before we leave, Mr. Drafts, make sure  
5 that we don't have any of your original documents  
6 because they can get messed up and mixed in, and  
7 I'll try to be very careful not to do that.

8 A. That is indeed the document that came from  
9 the judge's office.

10 Q. So that's a copy of what the judge sent  
11 you?

12 A. That's correct.

13 Q. Now, when the judge sent you that, did he  
14 send you anything else?

15 A. Some instructions were involved in the  
16 order regarding the survey.

17 Q. Now, is that the letter that accompanied  
18 it?

19 A. That is the letter, October 2nd.

20 Q. Yes, sir.

21 A. That's it.

22 MR. CHEATHAM: Mark that, if you would,  
23 please.

24 (DEPO. EXH. 3, October 2nd Letter, was  
25 marked for identification.)

1 BY MR. CHEATHAM:

2 Q. Sir, what we've marked as Number 3 is the  
3 letter that the judge sent you?

4 A. All right.

5 (DEPO. EXH. 4, 11/25/08 Order, was marked  
6 for identification.)

7 BY MR. CHEATHAM:

8 Q. I'm going to show you what is an order in  
9 this case and ask you if that was sent to you also?

10 MR. CASKEY: Which order are we doing  
11 here, the one-page order --

12 MR. CHEATHAM: No, this is the one -- the  
13 original order that Judge -- is it James or John?

14 MR. CASKEY: I believe it's Judge James.  
15 So you handed him the one that is five pages long  
16 dated November 25, 2008?

17 MR. CHEATHAM: That should be correct.

18 THE WITNESS: That is it.

19 BY MR. CHEATHAM:

20 Q. Now, that's been marked as Number 4.

21 A. Four.

22 Q. Now, in that same package --

23 (DEPO. EXH. 5, 10/2/09 Order, was marked  
24 for identification.)

25 BY MR. CHEATHAM:

1 Q. -- did you receive this one-page order  
2 from Judge McMahon dated it looks like October the  
3 2nd of 2009?

4 A. I don't know that I received it in that  
5 package, but I did receive it at some point in  
6 time.

7 Q. Now, would you agree with me, then, that  
8 it says you shall be appointed surveyor of the  
9 property in question and shall adhere to the order  
10 of Judge G. James in preparing this survey?

11 A. Yes, sir.

12 Q. Did you do that?

13 A. Yes, sir.

14 Q. How did you do that?

15 A. I went out and surveyed the perimeter of  
16 the property, located the road, the water turnout,  
17 a few improvements, driveways, et cetera, power  
18 lines. I put a proposal together and e-mailed it  
19 to the judge's law clerk for his approval.

20 Q. And the e-mail that you sent to the  
21 judge's law clerk for his approval was based upon  
22 the sketch that you received?

23 A. Yes.

24 Q. So --

25 A. And the order.

1 Q. Now, let's go in here, then, and see. Was  
2 it based more on the sketch or more on the order or  
3 equal?

4 A. Well, since the sketch and the order are  
5 both quite ambiguous, that is why I sent it to the  
6 judge for his approval.

7 Q. But you would agree that both of them were  
8 quite ambiguous?

9 A. Yes.

10 Q. Now, if you would -- if you look at  
11 paragraph 11 --

12 (DEPO. EXH. 6, Plat Draft, was marked for  
13 identification.)

14 BY MR. CHEATHAM:

15 Q. I'm going to show you what's been marked  
16 as Exhibit 6, and is that in fact the plat that you  
17 prepared?

18 A. This is the draft that I e-mailed to the  
19 judge. The final plat would have the names under  
20 where it says boundary survey. This is what I  
21 would have e-mailed to the judge.

22 (DEPO. EXH. 7, Survey, was marked for  
23 identification.)

24 BY MR. CHEATHAM:

25 Q. Let me show you what's been marked

1 Q. But as far as the measurements --

2 A. Yes, sir.

3 Q. -- are concerned --

4 A. Yes, sir.

5 Q. -- are they all consistent?

6 A. Yes, sir.

7 Q. Now --

8 A. Well, there is another corner along the  
9 division line that was set at the time of the  
10 survey back in the woods, but it's on the property  
11 line.

12 Q. But I'm just still -- all the measurements  
13 are the same?

14 A. Yes, sir.

15 Q. You may have put in another pin or  
16 something of this nature?

17 A. Right.

18 Q. But all the measurements are still the  
19 same?

20 A. That's correct.

21 Q. And these measurements were as close as  
22 you could get them to that original sketch that you  
23 received?

24 A. The original sketch didn't have any  
25 measurements on it. It's just a line on it.

1 Q. I understand that. But you were  
2 attempting to do this --

3 A. Right.

4 Q. -- as close to that original sketch as you  
5 could?

6 A. Right.

7 Q. Because you assumed that the original  
8 sketch was some idea of what Judge James wanted to  
9 do?

10 A. That's correct.

11 Q. Now, as far as there's a ditch, we've  
12 established that there is no ditch on the road  
13 frontage coming down Bachman Avenue which is  
14 county-maintained road?

15 A. No, sir. I mean, it's the edge of a road,  
16 but if you drove your car across it, you wouldn't  
17 fall in a ditch or anything.

18 Q. Right.

19 And what would you call what the county  
20 has put there?

21 A. I would call it a water turnout, a storm  
22 water turnout. It's a common thing on a dirt road  
23 where they just kind of drive the motor grader over  
24 in the woods and cock it to one side to make a  
25 place for the water to run off the road.

1 Q. But it wouldn't interfere with anybody  
2 getting to their property?

3 A. Well, I mean, no, not -- no. It would if  
4 you had to drive straight across it, you know.

5 Q. But if you just angled it --

6 A. Yeah.

7 Q. But the berm goes -- I call it a berm.  
8 Strike that.

9 The water turnout?

10 A. Right.

11 Q. Goes all down the front of the property  
12 and actually goes past the frontage of the property  
13 on Bachman Avenue?

14 A. It goes from the edge of where Bachman and  
15 Central -- where the motor grader scrapes the edge  
16 of his line. See where it says edge of county  
17 maintenance? That's the edge of the motor grader  
18 scrape. And he takes a left turn and just pushes  
19 out into the woods, and that's -- and just lets the  
20 water go there.

21 Q. So you're saying the edge of the county  
22 maintenance is on part of the property?

23 A. No, sir. Oh, it is, yes. It is up on the  
24 upper part, yes, sir. The edge of the blade cut is  
25 on part of the property.

1 turnout, and all they do is just turn their motor  
2 grader down in there, and water -- this is coming  
3 downhill, that's coming downhill, and the water  
4 collects and just runs off out into the woods.

5 Q. Now, 20 feet is the minimum feet that you  
6 can have on a piece of property on a road to be  
7 able to record it?

8 A. On a county road.

9 Q. And this is a county road?

10 A. Yes. And on a parcel that would be under  
11 two acres.

12 Q. So --

13 A. But in this instance, yes.

14 Q. And basically parcel B ended up with 20  
15 feet and parcel A ended up with 87.01 feet?

16 A. That's right.

17 Q. Now, that's not an equal division of land?

18 A. It's not an equal division of frontage.

19 Q. But it's not an equal division of land  
20 either, is it?

21 A. No. Acreagewise, no, sir.

22 Q. And do you know frontage affects the value  
23 of the property?

24 A. It could, I guess. I'm not an appraiser.

25 Q. But if you were going to have one of these

1 two, which one would you rather have?

2 MR. CASKEY: Objection.

3 THE WITNESS: Well, this -- the one on the  
4 western side is obviously the uphill tract of land.

5 BY MR. CHEATHAM:

6 Q. And uphill does make it more valuable?

7 A. Right. There's an old pond or something  
8 back in here. It's real swampy and wet back in the  
9 back.

10 Q. You say back in the back, and you referred  
11 to -- at least what I thought you referred to is  
12 there is a rebar set coming up the -- from the back  
13 of the line?

14 A. Right.

15 Q. Is from there down pretty much all swampy?

16 A. Pretty much.

17 Q. Now, the -- if you look at paragraph 16 of  
18 this order of Judge James, it says, according to  
19 the testimony, the road frontage includes a ditch  
20 that begins at the northern-most boundary.

21 And there's no ditch there?

22 A. That's correct.

23 Q. So if you were going to divide the  
24 property road frontage in half starting at the  
25 ditch and there is no ditch, then what would you do

1 as a surveyor?

2 A. Draw up a sketch and send it to the judge  
3 and ask him what to do.

4 Q. But if it says the reason you can't divide  
5 the road frontage in half is because there is a  
6 ditch and there's no ditch, then the cause of  
7 dividing unequally disappears, doesn't it?

8 A. If in fact you're supposed to divide the  
9 road frontage equally.

10 Q. Well, it says -- on 16, it says, according  
11 to the testimony, the road frontage includes a  
12 ditch that begins on the northern-most boundary.  
13 That ditch runs along Bachman Avenue in a  
14 southeasterly direction for an unknown distance.  
15 This consequence it leaves a yet undetermined  
16 amount of road frontage from the end of the ditch  
17 to the iron pin.

18 And Number 21 says, the most equitable  
19 manner of dividing the property is for the center  
20 dividing line to begin at the iron pin at the  
21 southern most corner of the property.

22 And this is sort of kite shaped so you're  
23 going to the bottom of the kite?

24 A. That is correct.

25 Q. Running in a northwesterly direction and

1 17 --

2 A. Right.

3 Q. -- it says, if Jason and Dawn were granted  
4 an equal amount of road frontage, Jason would  
5 receive an equitable result as the aforesaid ditch  
6 would take up most of that frontage?

7 A. Yes.

8 Q. You didn't find any ditch that took up  
9 most of that aforesaid frontage?

10 A. No, sir.

11 Q. So as far as following the Court order,  
12 you didn't follow it?

13 A. I followed it to the best of my ability  
14 given the ambiguities of the order.

15 Q. I know. But the ambiguities of the order  
16 make it impossible to follow, doesn't it?

17 A. I'll agree.

18 Q. You what?

19 A. I'll agree with that statement.

20 Q. So what you did was you basically took  
21 this -- what's been marked as --

22 A. The original?

23 Q. The one that has the little line.

24 A. I think that was two.

25 Q. So you basically took Number 2 and assumed

1       that this was an indication of what the judge  
2       wanted?

3             A.    Yes, sir.

4             Q.    And you went by that to draw the plat?

5             A.    Yes, sir, and the judge's input on the  
6       division line.

7             Q.    What judge's input?

8             A.    Judge McMahon.

9             Q.    And what did he say?

10            A.    He said go ahead or his law clerk said go  
11       ahead after I e-mailed him the proposal.

12            Q.    But they didn't go in and talk with you  
13       about what you did or how you did it, they just  
14       said if you drew it according to the order, then go  
15       ahead?

16            A.    We had -- I don't recall at all, but we  
17       had some conversation about the ambiguity of the  
18       order and the placement of the new division corner  
19       on Bachman, yes, but I don't recall all exactly  
20       what was said.

21            Q.    Now, Number 15 says, Jason would suffer  
22       substantial hardship if the property were  
23       partitioned by sale and that he has placed his  
24       residence on his half of the property.

25                    Would that indicate to you that each was

1 supposed to receive equal acreage or either  
2 one-half of the property?

3 A. The copy I have, half is in parentheses,  
4 and I would say that just means his portion or her  
5 portion, but it does say half, yes, sir.

6 Q. Why would wouldn't they just put his  
7 portion or her portion?

8 A. I don't know. I didn't write the order.

9 Q. So it could mean either one?

10 A. It did to me.

11 Q. So would it be a fair summary, then, to  
12 say that you couldn't follow the order exactly  
13 because there was no ditch, et cetera, so you took  
14 what was Plaintiff's 2, I believe it was, and  
15 followed that as closely as you could?

16 A. Yes, sir.

17 Q. Because you understood that's what the  
18 judge had indicated?

19 A. Yes, sir. I mean, but that's ambiguous in  
20 itself.

21 Q. I understand that.

22 A. Yeah.

23 Q. But that's just what you roughly went by?

24 A. Right.

25 Q. Now, have you understood all the questions

1 (DEPO. EXH. 9, Property Plat of W.F.

2 Bachman, was marked for identification.)

3 BY MR. CHEATHAM:

4 Q. Now, the -- this one has some scribbling  
5 on it. Did you do that?

6 A. That's my scribbling.

7 Q. Can you tell me what it says?

8 A. The scribbling?

9 Q. Yeah.

10 A. I have to have one to see.

11 Q. Okay.

12 A. It used to say does not close, but I wrote  
13 it on the wrong plat. Either that or I figured it  
14 out later. But I would normally as a course of  
15 checking these things out put them in the computer  
16 and make sure they're a mathematical figure.

17 Q. I understand.

18 Any other plat that referenced the  
19 frontage on Bachman?

20 A. No, sir.

21 Q. Now, the 20 feet, that just came from  
22 the --

23 A. County subdivision --

24 Q. From the drawing?

25 A. Oh, my 20 feet?

1 Q. The 20 feet that you put on parcel B, how  
2 did you come up with that 20 feet?

3 A. That was the minimum amount of frontage  
4 that the county would allow, and since the order  
5 said go to midway in the ditch, there's no ditch to  
6 go to, so I put it west of the ditch.

7 Q. There is no ditch there. How could you  
8 put it west of a ditch?

9 A. There's a ditch along the northeastern  
10 edge of the property, but not along Bachman Avenue,  
11 but there is in fact a ditch.

12 Q. But the order says ditch along Bachman  
13 Avenue?

14 A. Right. I mean, it starts at the corner of  
15 Bachman Avenue.

16 Q. It says it runs along Bachman Avenue?

17 A. Right, it does say that.

18 Q. There's no ditch that runs along Bachman  
19 Avenue?

20 A. No.

21 Q. So I'm assuming, then, that you  
22 arbitrarily chose -- I won't say arbitrarily. You  
23 chose the 20 feet based upon that original  
24 hand-drawn line that you assumed that that's what  
25 Judge James wanted?

1           A. Right. And I sent it to Judge McMahon to  
2 say do you think I'm thinking right on this, and  
3 they kept it about a week and called me back.

4           Q. But if you were going to go by Judge  
5 James' order, you said you can't do that?

6           A. I mean, it's not -- the only definitive  
7 place on Judge James' order is the point you  
8 referred to as the bottom of the kite.

9           Q. And so -- but where you draw it on Bachman  
10 Avenue does affect the road frontage of the amount  
11 of acreage each person receives?

12          A. That's correct.

13          Q. So the further west you went with the  
14 line, the more you would tend to equalize the  
15 acreage?

16          A. That's correct.

17          Q. And if you were to zigzag it or something,  
18 then you could alter the acreage to make it equal  
19 or whatever?

20          A. That's correct.

21                 MR. CHEATHAM: That's all I have.

22 EXAMINATION

23 BY MR. CASKEY:

24          Q. I just have a few questions.

25          A. Go ahead.

1       order said it was a ditch.

2           Q.   Did you find a ditch at all?

3           A.   Yes.

4           Q.   And where was that?

5           A.   Below the storm water turnout.

6           Q.   Indicated by these kind of V little arrows  
7       here?

8           A.   Yeah.   And it's not a shaped channel, it's  
9       natural flow, but it's formed a ditch as you said a  
10      while ago.

11          Q.   Because it could be a naturally-forming  
12      ditch?

13          A.   Right.

14          Q.   So you dispute this order?

15          A.   No.

16          Q.   Do you dispute the fact that the judge  
17      says there is a ditch, the road frontage includes a  
18      ditch?

19          A.   The road frontage on Bachman didn't  
20      include a ditch that I saw, not what I would term a  
21      ditch.

22          Q.   But it's possible that the judge's  
23      definition is different than yours?

24               MR. CHEATHAM:   Object.   Pure speculation.

25               BY MR. CASKEY:

1 Q. Do you know what the judge's definition of  
2 a ditch was?

3 A. No, sir.

4 Q. Do you know what the legal definition of a  
5 ditch is?

6 A. I didn't know there was one.

7 Q. So you don't even know if there is a legal  
8 definition?

9 A. No, sir.

10 Q. Did you try to draw that plat to give  
11 equal property value to the parties?

12 A. No, sir.

13 Q. Did you try to draw the plat to give equal  
14 road frontage to the parties?

15 A. No, sir.

16 Q. Did you have any overarching principle in  
17 drawing that plat?

18 A. The rough line on the original exhibit and  
19 just some language in here about the drive, it said  
20 to put it halfway up the ditch. Well, the ditch is  
21 entirely off the property. So that took the  
22 definition of where the line should go kind of out  
23 of the equation.

24 I just roughly drew that line up there and  
25 I told the judge's law clerk, I said, 20 foot of

1 frontage is the minimum the county's going to let  
2 you have, and there's no ditch there, here's a  
3 suggestion. What do you want to do? Or, you know,  
4 here's what it's going to look like if we do it  
5 like this, what do you want to do? And they called  
6 back and said go ahead.

7 Q. It was your intention to follow the pencil  
8 line in drawing your line?

9 A. Roughly, but not exactly.

10 Q. I think we're all just trying to figure  
11 out why did you decide to put the point here?

12 A. I didn't decide to put the point there. I  
13 said -- I told the judge, this is the minimum that  
14 we can do to divide the property. What do you want  
15 to do?

16 Q. So you would say that the final decision  
17 on where this was came from the direction of Judge  
18 McMahon?

19 A. I would say that.

20 Q. Would you be able to pull your e-mails  
21 from any kind of e-mail server that you both sent  
22 to him and received from him and his law clerk?

23 A. I can.

24 Q. Would you provide that to us?

25 A. I can. I can tell you right now the

1 MR. CASKEY: Objection. Again, he can't  
2 speculate onto whether it's --

3 MR. CHEATHAM: Well, he can answer subject  
4 to your objection.

5 THE WITNESS: I can't say that either one  
6 of the properties is more valuable than the other  
7 one, but I can say that the ditch was not along  
8 Bachman Avenue or Bachman Drive.

9 BY MR. CHEATHAM:

10 Q. But again, you have the same ingress and  
11 egress over every foot of A on Bachman Drive as you  
12 do on B on Bachman Drive, don't you?

13 A. Well, there is a defined drive.

14 Q. I know.

15 A. Yeah, I mean --

16 Q. But as far as the undefined drive, though,  
17 getting in and out is no problem?

18 A. Well, you'd have to make a driveway. Once  
19 you get up in there, you'd be -- you wouldn't --

20 Q. I know, but I'm just talking about at the  
21 edge of the road --

22 A. You could make a new driveway.

23 Q. I'm just talking about at the edge of the  
24 road, it's all about the same?

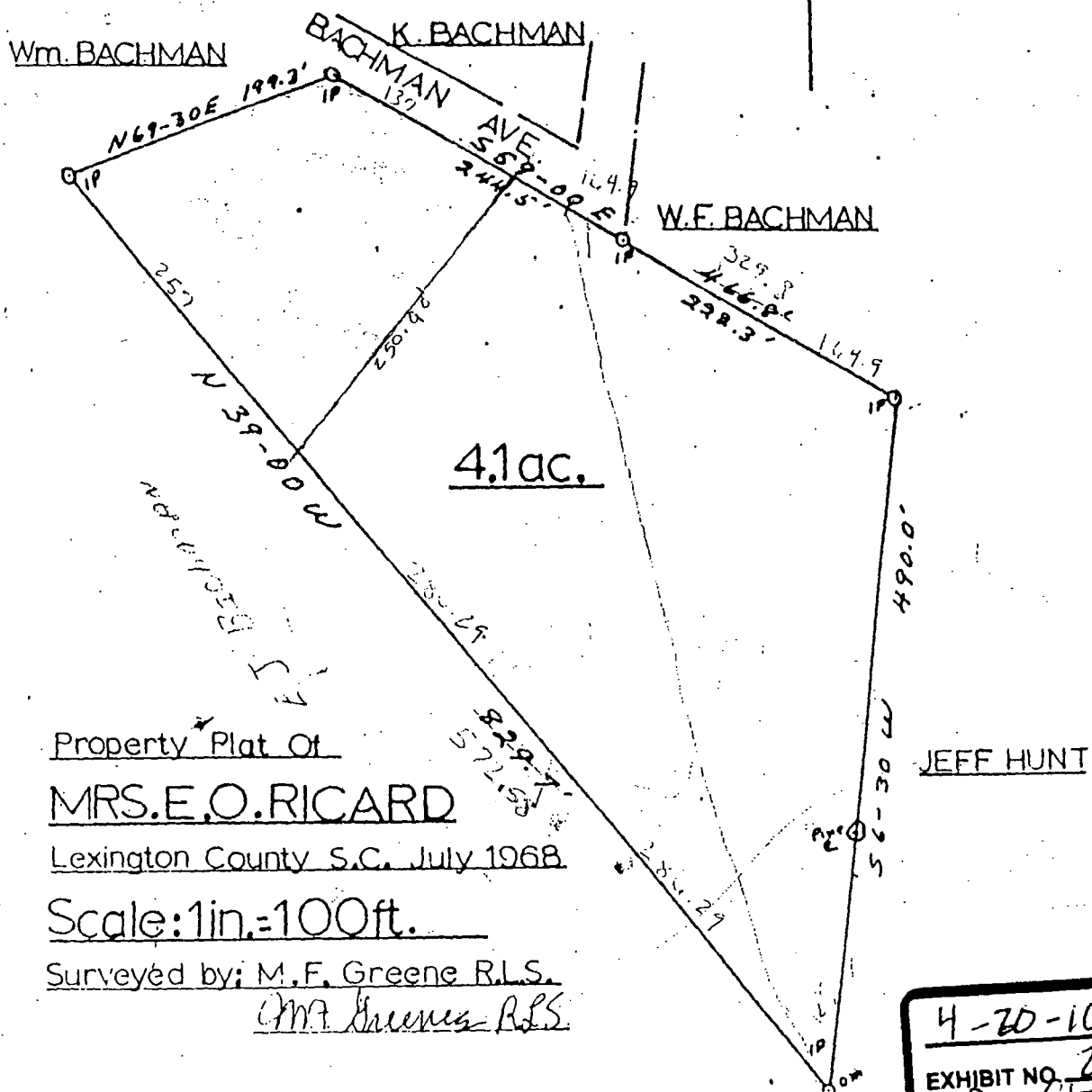
25 A. Roughly.

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CLERK OF COURT  
LEXINGTON, S. C.

2744

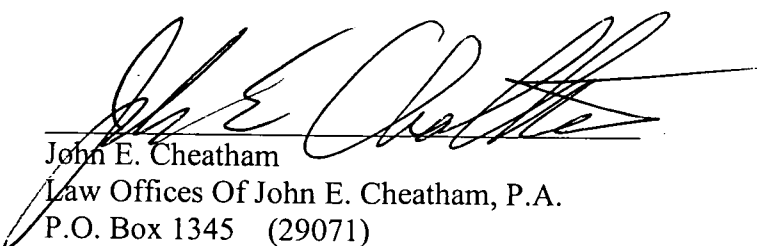


4-20-10  
EXHIBIT NO. 2  
Draft  
G. Smith

Certificate of Counsel

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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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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.

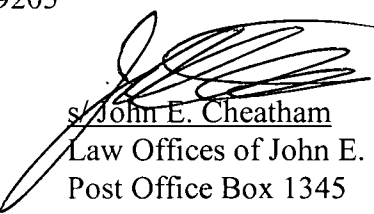
DIANA L WINTERS, AND  
JASON R. WINTERS,

Respondents.

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**SC Court of Appeals**

CERTIFICATE OF SERVICE

I certify that I have served the Record on Appeal on Respondents, by depositing a copy of same in the United States Mail, postage prepaid, on June 8, 2012, addressed to their attorney of record, Bryan D. Caskey and Charles Cantzon Foster, II, Foster Law Office, LLC, 3100 Devine St., Columbia, SC 29205

  
s/ John E. Cheatham

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**June 8, 2012**

The Honorable V. Claire Allen  
Deputy Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

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**SC Court of Appeals**

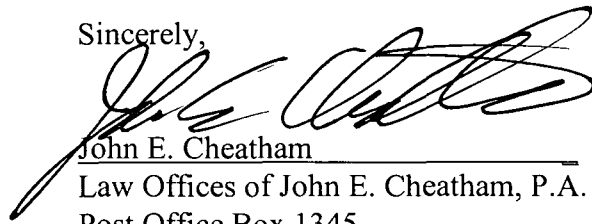
RE: Pontious v. Winters  
Case Tracking # 2010171826; Case No. 2006 CP 32 - 0848

Dear Deputy Clerk Allen:

I am enclosing fifteen copies, with one being unbound, of the Record on Appeal, and Proof of Service in this matter.

I am by copy of this letter notifying and serving Respondents' attorneys a copy of such.

Sincerely,



John E. Cheatham

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