

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2014-001588

Carl Eugene Berry, Respondent,

v.

Jess T. Reichardt and Thomas H. Reichardt, Appellants.

INITIAL BRIEF OF APPELLANTS

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SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE COURT ERR IN HOLDING THAT THE APPELLANTS INTENTIONALLY TRESPASSED AT THE TIME THE TREES WERE CUT?
2. DID THE COURT ERR IN GIVING EVIDENTIAL MERIT TO RESPONDENT'S CLAIM OF "RECORD NOTICE"?
3. DID THE RESPONDENT PRESENT SUFFICIENT EVIDENCE TO SUPPORT HIS ACTUAL DAMAGE CLAIM FOR THE APPELLANTS' TREE CUTTING?
4. DID THE COURT ERR BY AWARDING ACTUAL DAMAGES OF \$4,193.90 TO THE RESPONDENT?
5. DID THE COURT ERR IN ITS CALCULATION OF PUNATIVE DAMAGES?

STATEMENT OF THE CASE

This case involves two appellants who purchased a parcel of land without the advantage of a full survey and title search. The Respondent in this case owns property adjacent to the land of one of the appellants. The Plaintiff/Respondent initiated this case to terminate certain acts of the Defendants/Appellants and to receive payment of his claims. Much of the Respondents' evidence is based upon a default judgment. The Defendants/Appellants have appealed magnitude of the award of actual and punitive damages to the Plaintiff/Respondent; their defense rests upon the type of trespass involved and the application of statute and case law.

This case originated in the County of Saluda, in the Circuit Court for the 11th Judicial Circuit. The Summons and Complaint are dated May 13, 2013 and were served on that date. Plaintiff served an Application For a Rule to Vacate or Show Cause on May 29, 2013. The case received Civil Action No.: 2013-CP-41-91. The Application for a Rule was served on June 13, 2013.

The Defendants' Answer, Motions and Counterclaims were filed and served on June 11, 2013. Plaintiff's Reply was dated and served on June 24, 2013. Plaintiff's Amended Complaint was served June 26, 2013. July 2, 2013 in a Hearing before Judge Russo, the circumstance of the fence erected by Defendant, Jess Reichardt was the subject of testimony by the parties and agreement was reached for a Consent Order whereby the fence would be removed by Defendant, Jess Reichardt. The resulting Consent Order, dated August 12, 2013, was filed August 13, 2013.

On August 14, 2013 the Plaintiff filed a Notice of Motion, followed by an Affidavit of Default dated August 13, 2013 based upon lack of an answer to the Amended Complaint. The Defendants answered the first Amended Complaint by their Answer served on August 26, 2013. On August 26, 2013 the Plaintiff served his Notice of Motion and Motion to Compel replies to interrogatories and requests for production. The Defendants provided responses at a Lexington Hearing on September 4, 2013. On September 10, 2013 the Plaintiff moved for dismissal of Defendants' Counterclaims. The Default Order was confirmed and dated November 19, 2013. The Defendants served a Motion to Amend dated October 10, 2013. This Motion contained the testimony of Appellant, Jess Reichardt explaining his reasons for erection of the fence and the September 17, 2013 meeting of the expert surveyor, Mark Mills, with the Plaintiff and Defendants. On November 12, 2013 the Defendants presented their default set aside Motion before the Court in Saluda.

The Damages Hearing was held at the Saluda County Court House on June 16, 2014, the Honorable Letitia H. Verdin, Judge presiding.

The Order For Judgment was signed on June 18, 2014. The Appellants issued a Notice of Motion for Judgment Alteration on June 27, 2014. The Order Denying the Motion for Judgment Alteration, dated July 8, 2014, was filed on July 11, 2014. The Appellants' "Notice of Appeal" was dated July 18, 2014.

The Order For Judgment contains an award of \$4,194.00 to be paid to the Respondent for direct damages and an award of \$20,969.00 for punitive damages. The Appellants request the case be remanded for a recalculation of direct damages and punitive damages.

ARGUMENT

1. DID THE COURT ERR IN HOLDING THAT THE APPELLANTS INTENTIONALLY TRESPASSED AT THE TIME THE TREES WERE CUT?

The Court in Babb v. Lee County Landfill, stated: "While trespass may mean any unlawful act committed against the person or property of another," and in that sense is the mother of all common law tort liability, we use it here in the form in which it is now generally used to mean an action to recover for an unlawful entry by another onto one's real property. Babb v. Lee County Landfill SC, LLC, 747 S.E.2d 468, 405 S.C. 129 (S.C. 2013) South Carolina Code contains several specific examples of an "unlawful entry. For example, South Carolina Code §16-11-640 addresses an enclosed place. South Carolina Code §16-11-580 addresses "Cutting, removing, or transporting forest products without consent of landowner", and in relevant part, requires knowledge and willful action for a trespass to be "unlawful". The applicable section of the Code reads as follows:

" South Carolina Code §16-11-580. Cutting, removing, or transporting forest products without consent of landowner;

(A) It is unlawful for a person to knowingly and willfully:

(1) cut, destroy, or remove forest products without the consent of the landowner;

(2) aid, hire, or counsel another person to cut, destroy, or remove forest products without the consent of the landowner;"

To be unlawful, the Appellants' entry upon land in the area of the cut trees must be "knowing and willful". As described in Issue 3. below, an experienced real estate

attorney testified that by use of the 1934 plat of Respondent, she would not be able to verify the on-site boundary location. Similarly, the Appellants, lacking an accurate survey, could not know the "on-the-ground" actual boundary, and thus could not be accused of intentional trespass. Attorney Rauton testimony of "Record Notice" (TP 12, L4-L23) does not provide evidence that the Appellants' trespass was intentional, and the Appellants' estimate of the boundary location could have been based upon a tax map that differed from the 1934 Plat. (TP 24, L13-L16) *

In the full paragraph of page 2 of the Order of Judgment, the Court states: "After the meeting, which served to put the Defendants on actual notice of the boundary lines, the Defendants trespassed onto the Plaintiff's property and cut timber, in violation of South Carolina Code Subsection §16-11-580(A)(1) (Supp. 2013)." This statement is not consistent with the Respondent's testimony.

The Respondent testified that his meeting with the Appellants occurred after the trees were cut. (TP 20, L16-L19). The Transcript appears incomplete on page 20, line 17. However, the Court Recorder confirms her record correctly matches the testimony for this point.

*The format for references to the Transcript of Record is as follows: "TP" = Transcript page, the following number is the page number, "L" = the line of the given page.

The second full sentence on page 2 of the Order For Judgment states: "The Plaintiff testified that both Defendants intentionally trespassed onto his land on several occasions, apparently believing Defendant, Jess T. Reichardt owned close to 10 acres instead of the 1.8 acres he actually purchased." The transcript of the Damages Hearing does not contain this testimony that could apply to the tree cutting trespass. The Order For Judgment does not clearly distinguish between the two trespass events of this case, i.e., the tree cutting and the fence erection. However, to properly measure damages, the Court should have considered the two trespass events separately.

The above statement of the Court demonstrates the Respondent's difficulty in defining an unlawful trespass. If the Appellants believed they owned a 10 acre parcel, the trespass was not intentional. The Respondent also testified that he had no fences in place to mark the boundary of his property. (TP 43, L7-L15). This is additional evidence that the Appellants lacked actual, in-field guidance of the boundary location.

The Respondent has not presented evidence that the Appellants should have known the boundary of their land. Therefore, the trespass that occurred when the trees were cut could not have been intentional. The Court's belief that the Appellants had a meeting with the Respondent, which placed the Appellants on notice prior to the cutting of the trees, is not supported by the testimony of the Respondent. Also, it should be noted that in the first sentence of the full paragraph on page 2 of the Order for Judgment, the Court stated: "After the first trespass, the parties met to discuss the property lines,". There is no evidence in the transcript to indicate the first trespass is anything other than the cutting of the trees. Therefore, at this time, the Court is agreeing that there was no meeting of the parties prior to the tree cutting. The Appellants had no actual notice of the boundary location at the time the trees were cut.

Therefore, the Court erred in holding that the tree cutting was an intentional trespass.

2. DID THE COURT ERR IN GIVING EVIDENTIAL MERIT TO RESPONDENT'S CLAIM OF "RECORD NOTICE"?

The Court, in the last sentence of page 2 of the Order For Judgment, stated: "The Defendants had actual, record notice of the boundary line." The use of the term "record notice" in a real estate transaction was discussed by the Court in Spence v. Spence, 628 S.E.2d 869, 368 S.C. 106 (S.C. 2006): "However, constructive or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world. In the current case, the recorded document providing notice is a 1934 Plat that states there is a boundary, but does not clearly identify the location of the boundary. (TP 13, L18-TP 16, L4).

Attorney Rauton testified that she assisted Respondent after the trees were cut. (TP 17 L24 & L25) Attorney Rauton testified as to the presence of a plat showing "record notice" of the disputed boundary. (TP 16, L17-19) Attorney Rauton admitted that "record notice" of the boundary would not necessarily identify the location of the boundary depicted by a 1934 Plat. (TP 16, L9-L25) Attorney Rauton provided no evidence that the Appellants, could have known the on-site actual location of the boundary at the time of the single meeting between the Appellants and Respondent.

Attorney Rauton did not consider that the Saluda County Tax Maps would provide a different description of the boundary. (TP 15, L1-L8). At the Damages Hearing, the Respondent testified that the Appellants were using a tax map during the

single boundary discussion among the Appellants and the Respondent. The discussion involving a tax map and a 1934 Plat illustrates that at that time, the Appellants had an opinion on the boundary location that differed from that of the Respondent. (TP 24, L13-L18) Respondent's own testimony illustrates that he could not accurately describe the boundary, i.e., "the creek did not cross the creek" (TP 24, L19).

Attorney Rauton testified as to the presence of a plat showing "Record Notice" of the disputed boundary. (TP 16, L17-19) "Record Notice" does not apply to the existence of an intentional action in the current case. In lines 3 through 5 at the top of Page 2 of the Order For Judgment, the Court agrees that Appellant, Jess T. Reichardt purchased his land without a title search or a survey; he did not intentionally ignore the record notice. Since the Appellants did not intentionally avoid all the information that a title search could provide, the contents of the Record Notice do not prove the tree cutting trespass was intentional.

3. DID THE RESPONDENT PRESENT SUFFICIENT EVIDENCE TO SUPPORT HIS ACTUAL DAMAGE CLAIM FOR THE APPELLANTS' TREE CUTTING?

As a result of the Default Judgment, the Appellants have admitted that they trespassed onto the Respondent's land. However, the Appellants have not admitted the amount of the resultant damages that should be awarded to the Respondent. The Court in Solley supports this position: " A defendant in default admits liability but not the damages as set forth in the prayer for relief. Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct.App.1988) (" A judgment for money

damages must be warranted by the proof of the party in whose favor it is rendered.)" Solley v. Navy Federal Credit Union, Inc., 723 S.E.2d 597, 397 S.C. 192 (S.C.App. 2012)

Attorney Rauton admitted that "record notice" of the boundary would not necessarily identify the location of the boundary depicted by a 1934 Plat. (TP 16, L9-L25) Attorney Rauton provided no evidence that the Appellants could have known the on-site actual location of the boundary that existed at time of the single meeting between the Appellants and Respondent. As set forth in Issue #2 above, even if the "actual, record notice" referred to in the last 2 lines of page 2 of the Order For Judgment, had been accurate, (which it was not), the Appellants had a valid basis for their right to cut the trees. The trespass associated with the tree cutting was not intentional.

As set forth in Issue 1 above, the tree cutting was not an "intentional trespass", therefore, South Carolina Code §16-11-580 does not apply. The Respondent stated the tripled value of the cut trees was \$750.90. (TP 27, L9 & L10) This statement indicates the Respondent is utilizing South Carolina Code §16-11-615 in this case. This position was confirmed by Respondent's Counsel, who alleged the Appellants violated the statute. (TP 48, L8-L17)

In the 2004 Case, Wimberly v. Barr, the Court stated that if the owner of removed timber proceeds, under the statute his damages are capped at three times the value of the timber: "We find the statute does not create the exclusive remedy for all damages associated with the removal of timber. Section 16-11-615 reads:

In all criminal prosecutions for violation of the provisions of 16-11-520, 16-11-580, and 16-11-10, relating to cutting or destroying timber, the defendant may plead the payment of not to exceed exactly three times the fair market value of the timber as determined by a registered forester and upon the plea being legally established and the

payment of all costs accrued at the time of the plea he must be discharged from further penalty. If it is necessary to institute civil action to recover the fair market value of the timber, the State, in case of state lands, and the owner, in case of private lands, shall receive damages of not to exceed exactly three times the fair market value of the timber established by a registered forester if judgment is in favor of the State or the owner. S.C. Code Ann. §16-11-615 (2003)." Wimberly v. Barr, 359 S.C. 414, 597 S.E.2d 853 (S.C.App.2004)

The Wimberly Court went on to hold: " Further, Wimberly specifically waived his action under the timber statute before the trial began and proceeded only on a claim for trespass. As in Stroud, the timber statute was not charged to the jury. Because we find the Legislature did not express an intent to make the timber statute the exclusive remedy to recover all types of damages associated with the loss of timber, we also find that we cannot bind a party to restrictions found therein if the case did not proceed under the statute."

The guidance issuing from the Wimberly Court is clear. The triple value code (South Carolina Code §16-11-615) can not be used by the tree cutter to limit damages. However, on the other hand, if the tree owner elects to use the triple value code, the total damages are capped. The total damages include the sum of both actual and punitive damages.

The Respondent has elected to proceed under South Carolina Code §16-11-615. However, the Respondent has presented no evidence of the Appellants' violation of any criminal code. As the Appellants have presented in Issue #1 above, there is no applicable criminal code violation by the Appellants. Under the default judgment, the Appellants admit that cutting of the trees was a trespass. However, the Respondent was unable to

present any evidence that would extend the liability of the Appellants to a criminal code violation.

Another difficulty presented by the Respondent's decision to proceed under South Carolina Code §16-11-615, is that the Code is based upon the cut trees being sold. At the time of the Damages Hearing, the disputed trees had been cut, but not sold. (TP 44, L18 and L19). The Court gave no consideration to the option of the Respondent to mitigate his damage by selling the 30 cut trees, instead of just letting the trees lay and perhaps be an enhanced wild life environment. By relying on a statute that does not apply, the Respondent is left with a trespass that does not have damages in evidence.

4. DID THE COURT ERR BY AWARDING ACTUAL DAMAGES OF \$4,193.90 TO THE RESPONDENT?

The \$4,193.90 actual damages claim by the Respondent is comprised of seven components. The seven components were presented as a list by the Respondent, and the Respondent was instructed by his counsel to refrain from providing any explanation for the charges. (TP 27, L7 & L8) The Appellants requested the opportunity to cross-examine. (TP 27, L21) However, the Court allowed the statement of damages without further applicable proceedings.

After the closing by counsel for the Respondent, the Appellants' Counsel attempted to present objections and to place discrepancies of the Respondent's evidence on record. (TP 51, L6 to P53, L1) The Court's position was that due to the default judgment, no evidence could be presented. (TP 53, L2-L7)

In the, Limehouse v. Hulsey Case, the Court stated: " Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered. (citations omitted). Moreover, trial judges and appellate courts conduct a review of the award to ensure the verdict is not excessive and is supported by the evidence." Limehouse v. Hulsey, 744 S.E.2d 566, 404 S.C. 93 (S.C. 2013)

Following are comments on Respondent's individual claim components, which prove a lack of adequate submitted evidence:

I) \$750.90 - Trebled value of timber cut.

As discussed in Issue 3 above, the Respondent trebled an evaluation of the cut trees' market value. There is no consideration of the Respondent not actually marketing the cut trees. Lacking a statute violation, there is no basis for treble value.

II) \$263.00 - Title Search by Attorney Rauton.

This is a legal fee expended by the Respondent in preparation for his trial. There is no justification in evidence to allow legal fees to be claimed.

III) \$150.00 - Cost of Filing Fee.

This is a legal expense of the lawsuit filed by the Respondent. There is no justification in evidence to allow legal costs to be claimed.

IV) \$10.00 - Payment for a Plat.

Respondent should have had his own copies of Plats. There is no justification in evidence for a Plat expense.

V) \$1,750.00 - Preparation of a new survey. The record shows that an attorney, hired by the Respondent, informed the Respondent that the deed and plat on record provided

the correct description of the disputed boundary. (TP 12, L4-L11) The Respondent testified that his reason for commissioning a new survey was to re-establish the boundary and measure the acreage of the cut trees and of the area enclosed by the Appellants' fence. (TP 38, L3-L17) The most likely reason for the new survey was to prepare evidence for use in this case. There was no evidence presented to justify the cost of preparing for litigation. There was no evidence presented by the Respondent to indicate when the survey was prepared. The new survey could have been prepared either before or after the fence had been removed. (TP 35, L17 to TP36, L6) The cut tree acreage was not used, the claim was based upon the number of trees cut. The fence claim was not based upon a survey, and an additional survey was not placed into evidence. The Respondent considered his documents were adequate when he first met with the Appellants. (TP 20, L16-L19)

The reasons presented by the Respondent for a new survey are all lacking a valid base. There is no justification in evidence for the new survey to be prepared. (TP 38,L3-L17)

VI) \$1,200.00 - Cost of Reforestation

The Respondent has chosen to proceed under South Carolina Code §16-11-615. There is no justification in evidence to now add an expense of planting new trees. The forester's report on the cut trees does not indicate white oak trees or chestnut trees were cut. The evidence does not provide any support for the type or cost of trees selected.

VII) \$70.00 - Fescue Grass Seed.

As in the above Cost VI for reforestation, the evidence provides no support for the cost of grass seed. Also, there is nothing in evidence to explain why the cutting of trees requires grass seeding.

With the lack of supporting evidence described above, either the claimed actual damages should be rejected or this case should be remanded for a new hearing of damages. All of the damages claimed by the Respondent relate to the tree cutting. The submitted evidence does not contain a component that quantifies damages that relate to the fence

5. DID THE COURT ERR IN ITS CALCULATION OF PUNATIVE DAMAGES?

The last two lines of page 3 of the Order For Judgment proceeding through the first six lines of page 6 list ten factors that are to be considered by the Damages Hearing trier of fact. Not all of the factors require a finding of fact. However, many of the factors require some evidence that could be best presented by the Defendants in this case if such evidence exists. At the Damages Hearing, the Court took the position that the Defendants could not present evidence that related to Punitive Damages, because the Defendants were in default. (TP 53 L2-L7) That position is not supported by case law.

The ten factors the Order For Judgment lists; as set forth in Austin v. Specialty Transp. Services, Inc. are:

- (1) the character of the defendant's acts;
- (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause;
- (3) defendant's degree of culpability;
- (4) the punishment that should be imposed
- (5) duration of the conduct;
- (6) defendant's awareness or concealment;
- (7) the existence of similar past conduct;
- (8) likelihood the award will deter the defendant or others from like conduct;

(9) whether the award is reasonably related to the harm likely to result from such conduct, and;

(10) defendant's wealth or ability to pay. Austin v. Specialty Transp. Services Inc.
358 S.C. 298, 594 S.E.2d 867 (S.C. App. 2004)

The Order For Judgment is fatally flawed in that it makes no distinction between the damages that resulted from the 2 trespass actions, i.e. the tree cutting and the fence. Making the necessary division of damages, resulting from the 2 separate events, demonstrates the faulty determination of Punitive Damages:

I. Starting at Line 89 of page 4 of the Order For Judgment, the following statement only applies to the fence, as shown above, there was no actual and record in existence when the trees were cut:

"In this case, the evidence and testimony presented show the Defendants continued to trespass onto the Plaintiff's land after they were put on actual and record notice by the Plaintiff of the boundary line between the 1.8 acres of land rightfully owned by Defendant, Jess T. Reichardt and the Plaintiff's land."

The evidence only shows one trespass after notice, and there is no evidence presented to show the duration of the fence construction/dismantling, nor to show similar past conduct.

II. The following sentence, starting in Line 11 of page 4 of the Order For Judgment, also applies only to the fence construction/dismantling:

"The Defendants were aware they were trespassing onto the Plaintiff's land."

The fence was 1-1/2 to 2 miles from the Respondent's home, he could not see the fence from his home, so the purpose of the fence was not to cause discomfort to the

Respondent nor to otherwise cause harm. There is no apparent relationship between the Appellants' awareness and Punitive Damages.

III. The following sentence, starting in Line 12 of page 4 of the Order For Judgment, contains another mixture of tree cutting and fence evidence:

"The evidence and testimony presented show the Plaintiff was unable to use and enjoy certain parts of his land because of the Defendants' actions, and the Plaintiff suffered economic losses as a result."

The Respondent provided very little quantitative evidence of his damages that resulted from the 2 trespass events. One brief statement only applies to the tree cutting and the evidence presented was that the tree cutting interfered with a group of hunters, who did not pay dues. (TP 23, L13-L23) There was no evidence of suffering from economic losses.

A bit of evidence, that related to the fence, mentioned a delay in planting one of the 20 food plots, but no estimate of cost was given. (TP 23, L23 & L24)

IV. In the 7th line from the bottom of page 4 of the Order For Judgment, the Court stated:

"The Defendants cut timber on the Plaintiff's land in violation of South Carolina Code subsection §16-11-580(A)(1)(Supp. 2013).

This code subsection states it is unlawful for a person to knowingly and willfully cut forest products without the consent of landowner."

As set forth in Issue 1 above, South Carolina Code subsection §16-11-580 (A)(1) does not apply to the tree cutting event. The action by the Appellants was not "knowing and willful". The Respondent testified that he asked the Sheriff of Saluda County to visit the site of the cut trees. The Sheriff arrived and filed a report, (that is not in evidence)

and that is the end of the Sheriff's involvement; there were no arrests or other indications of the violation of South Carolina Codes. (TP 36, L18-L24)

At the Damages Hearing, the Court accepted filed documents into evidence. (TP 32, L16 to AP33, L22) One such document is the Defendants' Notice of Motion and Motion to Amend. In this document Defendant, Jess Reichardt explains the difficulties presented by the Plaintiff's 1934, his reasons for erection of the fence, and expert opinion on the boundary location received from Surveyor, Mark Mills, on September 17, 2013. Although the Court refused to allow Defendant, Jess Reichardt from testifying at the Damages Hearing. The evidence in the October 10, 2013 Motion provides the basis for the erection of the fence and explains why punitive damages should not be levied because of the erection of the fence.

The Plaintiff admitted his need to address the ten factors of Punitive Damages listed on page 3 and 4 of the Order For Judgment. (TP 28, L19 to L23) Although not accepting "Tab 12" into evidence, the Court stated that all the supporting facts have been entered through testimony. (TP 29, L5-L17).

Comments showing the lack of evidence presented by the Respondent follows:

1. Respondents Tab 12 describes the Defendants' acts as outrageous by listing true comparisons of Defendants' small acreage to Plaintiffs' 470 acres. Until the Plaintiff commissioned a survey in May 2014, he had no clear evidence of the boundary location. The new plat has not been entered into evidence.
2. Respondents Tab 12 describes the nature and extent of harm by reference to Exhibit A. Exhibit A is simply a personal opinion of the harm caused by cutting 30 trees. Respondent provides no evidence that he has special expertise forestry. Exhibit A also proves the Appellants' meeting with the Respondent occurred after the trees were cut.

Exhibit A mentions the Appellants lack of a title search. Not a good practice, but not a contributor to punitive damages. The Respondent describes Appellant actions that caused stress due to close proximity to the disputed boundary. As described earlier, the Respondent lives almost 2 miles from the boundary. Lastly, the Respondent admits that he experienced serious medical conditions in 2010, it is unlikely the attempts of the Appellants to verify the boundary location added to that already poor medical condition of the Respondent.

3. Concerning culpability there is no question that legally only the Appellants are involved. The decision to keep the logging company out of the case was made by the Appellants. However, there is no evidence of serious culpability that was caused by the Appellants. Austin, referenced above, holds that violation of a statute causes a presumption of Punitive Damages. However, there is no evidence of statute violation.

4. The Respondent simply states the punitive damage award should be "substantial". This single statement is not evidence, it is a personal opinion.

5. May 2012 is not the proper start date of the conduct. The trees were cut in May 2012 - a time when the Appellants had no actual notice of the boundary location. The only trespass event that is of concern is the fence erection in the July 2013 time frame. One event occurring in a maximum 2 month period is not valid evidence of the need for Punitive Damages.

6. This Tab 12 description of awareness is internally inconsistent. First the evidence says the Respondent met with the Appellants prior to their "invasion" (i.e. tree cutting). Then in the next sentence the first meeting of the 2 parties is described as after the trees were cut. The later meeting date is correct and demonstrates that the Appellants did not know the tree cutting was not on their land. Earlier Issues raised herein prove the

meeting followed the tree cutting. Therefore, there is no evidence of awareness or concealment associated with the tree cutting. Erection of a fence requires many days of daylight work; the work is done in the open, no concealment is possible. The evidence shows that the Appellant was still trying to determine the boundary location when he hired the surveyor in September 2013 - well after the fence project was dismantled. Until that time the evidence shows the Appellants had no reason for concealment. The fence construction was an attempt by the Appellants to mask a boundary - no concealment was involved.

7. No evidence was presented that the Appellants had a history of the conduct the Respondent complains of.

8. To provide evidence that Punitive Damages will deter trespass events, it would first be necessary for the Respondent to offer some evidence that boundary disputes occur in the rural area of this case. No such evidence was presented. Therefore, there is no need for an award to deter an issue that does not exist.

9. The Respondent gives no reason for the award to be related to the harm. The answer presented here is only a personal opinion with no support for that opinion existing in the evidence.

10. The evidence of a sheep operation in the hostile, hot environment of South Carolina is not evidence of wealth. The Damage Hearing improperly prevented the Appellants to describe their ability to pay. (TP 53, L2-L7) The Court has an obligation to receive evidence of financial condition prior to deciding the amount of Punitive Damages.

CONCLUSION

In May 2012, when the 30 trees were cut, the Appellants did not know the location of the disputed boundary. The only applicable plat (drafted in 1943) was not clear. Therefore, the cutting of Respondents' trees was an act of trespass, but not an intentional trespass. The 1934 plat had been recorded, and thus constitutes "record notice". However, the record notice available to the Appellants at the time the trees were cut was insufficient to prove the cutting of the trees was an intentional trespass.

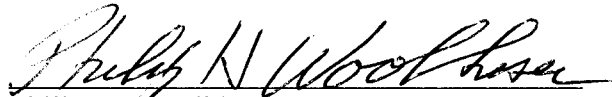
Lacking proof that the cutting of the trees was an intentional trespass, the evidence does not contain evidence of a statute violation associated with the act of cutting the trees. Lacking evidence of a statute violation, the code provision of treble damages for cut timber does not apply. Because the trees were available for sale at the time of the Damage Hearing and no evidence was presented to quantify the actual damages that resulted from the tree cutting, the claim for actual damages, as a result of the tree cutting, must be rejected.

The fence, installed by the Appellants, after being told by the Respondent of the boundary's disputed location, was an intentional trespass. However, the evidence of the actual damages resulting from the fence is negligible. Respondents' list of damages were either unsupported personal opinions or were related to the tree cutting. Due to the Court error in disallowing the Appellant to present any evidence of damages and the lack of a separation of damages into tree/fence categories, the case should be remanded for a proper Damage Hearing.

The Respondent did not satisfy his obligation to provide conclusive evidence of satisfying the 10 factors that apply to Punitive Damages. Also, the Trial Court for the damages determination wrongly prevented the Appellant from presenting any evidence

that would demonstrate that certain of the 10 factors of Punitive Damages could have been decided in favor of the Appellants. This is an additional reason for this case to be remanded for a Hearing of Damages that is in accordance with the guidelines set forth herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Philip H. Woolhiser". The signature is written in a cursive style and is positioned above the printed name.

Philip H. Woolhiser
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112 Trafalgar St. SW
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SC Bar #12466

September 5, 2014
Aiken, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF SALUDA)
)
Carl Eugene Berry, Jr.,)
)
Respondent,)
vs.)
)
Jess T. Reichardt and Thomas H. Reichardt,)
Appellants.)

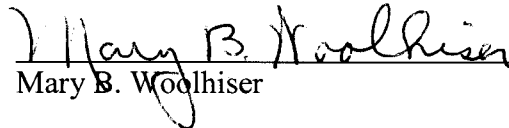
IN THE COURT OF APPEALS

APPELLATE CASE NO: 2014-001588

CERTIFICATE OF SERVICE

I, Mary B. Woolhiser, Secretary for Attorney Philip H. Woolhiser, certify that I have caused Appellants' Initial Brief and this Certificate of Service, in the above-referenced matter to be served, via U.S. Mail, September 5, 2014, to Respondent's Counsel as addressed below:

Austin & Rogers, P.A.
Attn: Richard L. Whitt, Esquire
PO Box 11716
Columbia, SC 29211


Mary B. Woolhiser

Aiken, South Carolina
September 5, 2014

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SEP 08 2014

SC Court of Appeals

Philip H. Woolhiser, Attorney at Law

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Aiken, SC 29801-3744**

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September 5, 2014

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211-1629

Subject: Carl Eugene Berry, Jr., vs. Jess T. Reichardt and Thomas H. Reichardt
Case No.: 2014-001588

Dear Ms. Kitchings,

A copy of the Initial Brief of the Appellants and the original Proof of Service are enclosed, in compliance with Rule 208 (a)(1).

An extra copy of the Brief's Cover Page is enclosed. Please stamp the extra copy "received" and return the stamped copy in the SASE.

Sincerely yours,



Philip H. Woolhiser

Enclosures
PW/mw

cc: Austin & Rogers, P.A.
Attn: Richard L. Whitt, Esquire

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SEP 08 2014
SC Court of Appeals