THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2016-CP-37-00344
Appellant Case No.: 2018-000984

June H White, as Operating Member of Chauga Creek Retreat

Respondent,

vs.

Marilyn S. Green,

Appellant.

June White, individually and as Owner/Operator of Mountain Rest Campground, William M. White, individually and as Owner/Operator of Hilltop Bike Park, James Edward (Ed) Walker

Respondents.

INITIAL BRIEF OF APPELLANT

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III. **The Court erred in failing to address the issues surrounding boundary line dispute.**

STATEMENT OF THE CASE

On June 7, 2016, Chauga Creek LLC filed a summons and complaint, naming Ms. Green as the Defendant and claiming tortious interference with the subject property. Moreover, Chauga Creek LLC claimed that Ms. Green would trespass upon Chauga Creek's right of way, and would obstruct the real property rights without just cause or excuse. Ms. Green was served June 20, 2016.

On February 27, 2018, this matter was heard before the Honorable Perry H. Gravely. Counsel for all parties stipulated that the trial would be bifurcated and that the initial hearing would be solely for the purpose of determining whether an easement existed on Ms. Green's property. At the conclusion of the hearing, the Court found that an easement did exist on Ms. Green's property, and Ms. Green would be prohibited from obstructing the right of way leading to Chauga Creek LLC's property. An order with these findings was entered on April 23, 2018.

On May 4, 2018, Ms. Green filed a Motion to Amend. This Motion was filed in an attempt to have the Court alter its findings in favor of Green. An Order denying Defendant's motion to amend was filed on May 21, 2018, stating that there were not adequate grounds to support an amendment to the Order previously filed.

Now, Appellant Marilyn S. Green is bringing this matter to the Court of Appeals in an attempt to have the Court reconsider the lower courts findings and/or decision. Notice of appeal was filed with the South Carolina Court of Appeals on June 1, 2018. The Court erred in finding that an easement existed on the subject property, and erred in treating the road, Nichols Lane, as one and the same as the 15 foot easement. Furthermore, the Court failed to look at the strength of

Plaintiff's claim of title, or perform any analysis as to the facts and rules governing boundary line disputes.

STATEMENT OF THE FACTS

Ms. Green's property consists of approximately 1.77 acres, ("Green Parcel") located on the corner of Highway 28 and a road originally named as Nichols Lane, ("Nichols Lane"). Ms. Green purchased this property on July 7, 2008 and has lived there ever since.

Ms. Green's deed references a plat prepared by Randall G. Miller, dated October 16, 2000, recorded in Oconee County register of deeds on October 26, 2000 in Plat Book A784, Page 1. (Def.'s Ex 18.)

The 1961 plat shows Audie Nichols is the common ancestor in title, and when he divided his land, he intended the road to be the southern boundary line of the property. This is shown by the writing and outline of the road falling on each side of the property line. In addition, the plat called for a distance of 269.6.

Another plat, labeled March 1992, was not filed until June. Immediately after the filing of this plat, a plat for May 1992 was filed. The May 1992 plat does not show the area in dispute as being part of the subject property.

On the 2000 plat, the road can be clearly identified on the plat as there is a strip of land outlined with small dotted lines, and the width is calculated to be approximately 10 feet in width. (Def.'s Ex. 18; Trial Tr. (Miller) 91:8-23.) Inside the small dotted lines, the words "NICHOLS LANE" and "GRAVEL DRIVE" appear, both of which clearly indicate that the area is meant to be a roadway. (Def.'s Ex. 18). More importantly, there are arrows

extending out of the words gravel drive with one arrow pointing to the northern edge of the small dotted line and the other arrow pointing to the southern edge of the small dotted line. (*Id.*) . Furthermore, the 2000 plat shows that the land's ancestral owner(s) enjoyed exclusive use of the property to the detriment of any alleged 15 foot easement.

Another area on the plat, outlined in a longer dashed lines is an area labeled "30 foot easement, 15 foot on each side of property line," ("15 foot easement"). (*Id.*) There is an arrow pointing from the descriptive words to the southern edge of the 15 foot easement and a mirror arrow that starts north of the easement and points to the northern edge of the longer dashed line. (*Id.*) There is no description for the purpose of the easement on the plat. (*Id.*)

These two strips cover most of the same area on the plat; however, each follows their own projection path and align on top of each other at certain points. In the southeast corner of Green's property, approximately a third of the 15 foot easements falls to the north of Nichols Lane. (*Id.*) In the southwest corner of Green's property the northern edge of Nichols Lane extends past the northern edge of the 15 foot easement. (*Id.*) Also along the southern line of the chain link fence shown on the plat, most of the 15 foot easement is shown falling along the fence line, except on the south west corner of that line where the 15 foot easement is south of the fence. (*Id.*)

The only other plat of Green's parcel was the initial survey created in December 1, 1961 by a Mr. Henry Earl and filed with the clerk of court on September 1, 1962 and recorded in Volume V, at Page 262, in Oconee County Register of Deeds. This plat show a road as the boundary line for southern boundary line. It should be noted that without the road, Green's parcel has no means to leave its property. This 1961 plat was made for Audie Nichols who is

the parties' common ancestor. Mr. Nichols created the plat in order to subdivide his parcel form the area that will later become Issaquena Subdivision.

The Plaintiff owns several parcels of land inside the Issaquena Ridge Subdivision, which is located to the south and to the east of Green's parcel. The Plaintiff's property has never touched or adjoined Green's parcel, and the subdivision has never included Green's parcel.

In March 1992, Mr. James Glenn Hart (Hart) was hired to survey the land that will later become Issaquena Ridge Subdivision. (Pl.'s Ex. 3.) This undivided parcel was file in Oconee County Register of Deeds on June 2, 1992 in Plat Book Vol. A136, page 2. (Pl.'s Ex. 3.) Three (3) months later, In May 1992, Hart subdivided the property in order to create Issaquena Ridge Subdivision and filed it with the Register of Deed on the same day as the earlier plat, with a Plat Book Vol. A136, page 3. (Pl.'s Ex. 2.)

ARGUMENT

STANDARD OF REVIEW

"The determination of the existence of an easement is a question of fact in a law action and subject to any evidence standard of review when tried by a judge without a jury." Hardy v. Aiken, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006) (quotation marks omitted). Moreover, "in a law case tried by the judge without a jury, [this] court reviews for errors of law and reviews factual findings only for evidence which reasonably supports the court's findings." Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998).

I. The Court erred by treating two easements as one in the same when applying its analysis to the facts at hand.

In the lower Court's analysis, the Court addressed the issue of an existence of an easement on the Defendant's property, but erred when it began its analysis by treating two (2) different easements as one, which led the misapplication of law, namely constructive knowledge.

Throughout the Order, the Court makes numerous references to a "road and/or easement," to an "easement/road," and to a "road/easement," when sharing its constructive notice analysis. The Court mentioned that the road appears in aerial photographs dating back to 1951[1] then begins to reference various plats showing either a road or a 15 foot easement. However, these easements were created at different times, by different parties, and for different purposes. Also when the court was identifying exhibits, it stated that "Plat of Ross (10/16/00) shows southern boundary as center line of "Nichols Lane" and "30' Easement-15' each side of property line". (Pl. Ex. 4). However, by reviewing the 2000 plat, it clearly does not reflect any property line traversing the small dotted area that is shown to be Nichols Lane. (Def.'s Ex. 18.) By treating these two easements as one in the same, the Court mingled details from both easements when it made its ruling, thereby leading to results that cannot be support by the facts.

II. Court erred in ruling in Plaintiff's favor by finding that Defendant Green had constructive knowledge of an easement, when the basis of the easement is founded on a claim of title, thereby requiring the Court to examine the strength of the Plaintiff's claim of title and not the weakness of Defendant's title by constructive knowledge.

When the basis of an easement is founded under color of title, then the Court should examine the strength of the Plaintiff's title and not any appearance of weakness in Defendant title. For actions that involve an issue of title, then "the [plaintiffs] must recover, if at all, on the strength of their own title; and the burden [is] upon [them] to prove just title to the land."

[1] Possible typographical error as the earliest aerial photo was created in 1959

Kirkland v. Gross, 286 S.C. 193, 196-97, 332 S.E.2d 546, 548 (Ct. App. 1985) citing Douglass v. Perry, 245 S.C. 486, 141 S.E. (2d) 348, 349 (1965). In the case at bar, the Plaintiff is required to prove its title in order to have a right to use the 15 foot easement.

According to the minimum surveying standards under Section 49-460 A (1)(3)(n), a property line is identified on a plat by defining the bearings and horizontal distances. In the Subdivision plat from May 1992, the property line does not reflect any ownership of the property in question using the identifiers required by the minimum surveying standards.

Since the subdivision's plat does not reflect any claim of ownership, Plaintiff cannot claim a right to the easement under that plat. Furthermore, an examination of the area in dispute does not reflect any easement in the area. The reasons set forth above why a constructive notice analysis cannot apply to these parties.

STANDARD OF REVIEW

(BOUNDARY DISPUTE)

"A boundary dispute is an action at law, and the location of a disputed boundary line is a question of fact." Bodiford v. Spanish Oak Farms, Inc., 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995) (citing Clements v. Young, 310 S.C. 73, 74, 425 S.E.2d 63, 64 (Ct. App. 1992); Saluda Land & Lumber Co. v. Fortner, 162 S.C. 246, 247-50, 160 S.E. 594, 594-95 (1931)). "On appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law." Madren v. Bradford, 378 S.C. 187, 191, 661 S.E.2d 390, 393 (Ct. App. 2008) (citing Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). "The judge's findings are equivalent to a jury's findings in a law action." Id. (citing King v. PYA/Monarch, Inc., 317 S.C. 385, 389, 453 S.E.2d 885, 888 (1995)).

III. The Court erred in failing to address the issues surrounding boundary line dispute.

In order to uphold the rights of the parties involved, the Court should have addressed the boundary line dispute in its ruling. While the Court's ruling does not specifically address the boundary line, its ruling has the same effect as if the boundary line was ruled in the Plaintiff's favor. Without such an analysis, Defendant is of the belief that the ruling was based upon the opinion of the surveyor, James Glen Hart, who testified that the road, which was the boundary line in 1961, moved. (Trial Tr. (Hart) 55:1 – 8.) However, the basis of such a belief is not supported by any evidence, or law, and Hart willfully omitted a key fact that would undermine his opinion.

A. The road is a call for the boundary line on the 1961 plat.

On the 1961 plat, the southern boundary line indicates that it is located along the road, and it should be respected as any other call of the plat.

"Where a deed to land calls for a road as a boundary, such as a public highway or a railroad right of way, such conveyance of land includes the soil to the center of the way, provided the grantor owned to the center when the deed was executed, and provided there are no words of specific description to show contrary intent." Boney v. Cornwell, 117 S.C. 426, 435, 109 S.E. 271, 274 (1921).

"Mere distance is never regarded when it conflicts with either the actual marks made by the surveyor or the well-ascertained marks called for on the plat. The trees that the surveyor marked; the rocks that he set up; the fixed and permanent objects which he calls for, are more certain indications of intention than distances or even courses." Klapman v. Hook, 206 S.C. 51, 54-55, 32 S.E.2d 882, 883 (1945) citing Sturgeon v. Floyd, 3 Rich. 80.

Therefore the Court should have treated the road shown on the 1961 plat as a boundary call when examining the issues as it relates to the boundary line.

B. At a minimum, the Court should have stopped the 15 foot easement from extending past the middle of the road as it applies to the southwestern corner.

The Plaintiff's expert, Mr. Hart, who also subdivided the Plaintiff's subdivision property, testified that he altered the distance for the western boundary line, thereby causing the western line to be shorter than what appeared on the 1961 plat, which in turn prevented that property corner from reaching the road as shown on the 1961 plat.

The minimum standards for surveying have set out certain requirements for all surveys as seen in 3 S.C. Code Ann. Regs. 49-460 A (1)(3)(p) (Supp. 2017) "The Land Surveyor shall **retrace** the boundaries of the property being surveyed..." (Emphasis added) and "Control corners, monuments or property corners, on adjoining properties, used in the establishment or verification of property corners, shall be identified, located and defined, by course and distance, to an accuracy consistent with the class of survey." In other words, the boundaries of the property being surveyed should be retraced as opposed to being altered or modified.

At first, Hart claimed that he found the pins on the ground surrounding the Green's parcel and they matched the old (1961) plat. (Trial Tr. (Hart) 20: 15-17; 23:10 – 11.) Yet when questioned about individual boundary lines, Hart admits that he did not retrace the western boundary as shown on the 1961 plat. (Trial Tr. (Hart) 35:20 - 36:18.)

Furthermore, "[A] resurveyor's 'duty is to relocate . . . the courses and lines at the same place where originally located by the first surveyor . . . not to dispute the correctness of . . . the original survey.'" Kirkland v. Gross, 286 S.C. 193, 197, 332 S.E.2d 546, 548 (Ct. App. 1985) citing 12 Am. Jur. (2d) Boundaries § 61 (1964).

In this case Hart stated that he varied the western boundary line from 296.6 feet to 265.86 feet as a result of problem with closing the corner for the King property, which is to the north of Green's parcel. (Trial Tr. (Hart) 35:20 - 36:18.) Most importantly, Hart and Miller both concede that had they retraced that boundary line as shown in the 1961 plat, then the corner would have fallen inside the road. (Trial Tr. (Hart) 47:10-19; and (Miller) 81:3-5.)

"In locating lands, the following rules are resorted to, and generally in the order stated. (1.) Natural boundaries; (2.) Artificial marks: (3.) Adjacent boundaries; (4.) Course and distance. Neither rule, however, occupies an inflexible position, for when it is plain that there is a mistake, an inferior means of location may control a higher." Smith v. Du Rant, 236 S.C. 80, 92, 113 S.E.2d 349, 356 (1960) citing Fulwood v. Graham, 30 S.C. L. 491, 1 Rich. 491

Had Hart retraced the boundary line called for in the plat, then the southwest corner would have fallen inside the road, which was intended by the common grantor of the parties. Therefore the Court should have alter the boundary line or just removed any burden from 15 foot easement that occurred north of the intended boundary line.

Also, the fact that one pin was buried and the other pin was above ground indicates that the unburied pin may have been serving as a witness monument, since it would fall within the definition set forth by the minimum surveying standards. Thus, if the southeast corner pin was indeed a witness monument then it would have been placed on top of the boundary line, describe the courses and/or distance for that pin and the surveyor needed to give reference as to the intended corner, all of which matches what the 1961 plat and evidence on the ground show.

Furthermore, the minimum standards of surveying would set a witness monument and measure the distances pin to pin. Likewise, this is the formula Hart used in order to determine the

southwest corner. Additionally, neither Hart nor Miller cited any physical evidence to support that the road was where the fence was once located. Defendant Green stated that the road moving was impossible and cited topographical evidence, whereas Hart and Miller were unable to provide such evidence.

Ultimately, in consideration of the totality of circumstances, it is unreasonable to discard or fail to analyze the intent of the grantor in the matter at hand. Therefore, the Court erred in failing to correctly examine the boundary line dispute.

C. All the evidence support that the southeast corner pin is a witness monument.

According to Hart, the 1961 plat no longer reflect the actual boundary line between Green's parcel and the subdivision. (Trial Tr. (Hart) 29:10 – 23.) When Hart was asked what was the evidence he found disclosing the underlying facts supporting his opinion.

> *A. "Today it's not in the middle of the road. It's a fence color, there is a fence there. Somebody else put up a fence, as they call it."*
>
> *Q. "What made you make that determination?"*
>
> *A. "Well, we have plats that were usually used and when you come across it and it says 133.6 feet from this pin to pin -- and I usually get that on my plat. I'm usually off as much as an inch or so but I came out exactly with what he had and I was honoring his plat."* (Trial Tr. (Hart) 52:14 - 25.)
>
> and
>
> *Q. "What was the field of evidence that you saw that led you to believe the road moved?"*
>
> *A. Because the road is not where the pin is. I'm saying that if the pin was in the center of the road that it had to be that the road has moved, because the pin is still there."* (Trial Tr. (Hart) 55:1 – 8.)

When Hart testified, he omitted a critical and material fact from the court that could have completely undermined his opinion that the road was once located on the fence line. As part of their rules of professional conduct, surveyors are required to be completely objective and truthful when testifying, and he "[S]hall include all relevant and pertinent information in such reports, statements, or testimony. 3 S.C. Ann. Regs. 49-303 A. (Supp. 2017.)

In accordance with minimum survey standards 3 S.C. Ann. Regs. 49-430 C. (26) (Supp. 2017) a witness monument is defined as "Any monument that does not occupy the same defined position as the corner itself, but whose relationship to the corner is established." Also the same standards regulates how to make an area with an inaccessible point. "In the event a corner cannot be marked or monumental, one or more witness monuments or metal stakes shall be placed on the boundary line and described by bearings and/or distances so that the inaccessible point may be located accurately on the ground." 3 S.C. Ann. Regs. 49-470 E. (Supp. 2017.) Meaning if the original surveyor treated the southeast corner as an inaccessible point, then he would have placed a pin along the boundary line and measured the distance to the pin while referencing the intended location. The southeast pin is located on the property line, and the plat reflects the intended corner. Thus, this surveying regulation undermines Hart's theory because it give a reasonable and valid basis as to why a pin may not have been found in the middle of the road while maintaining its original distance listed on a plat.

"It is the actual boundary and not the representation of it on the plat that must control." Garrett v. Locke, 309 S.C. 94, 98-99, 419 S.E.2d 842, 845 (Ct. App. 1992) citing Atkinson v. Anderson, 14 S.C.L. (3 McCord) 223 (1825).

That particular corner pin has been above ground for 55 years, and has not moved an inch in its distance, even though Hart theorizes that the pin was located in the middle of the orad. Supra. The 1961 plat shows that corner to fall in the middle of two diverging roads. (Pl's Ex.'s 7.) It would be highly doubtful that any pin could stay above ground for that long in the middle of the road and not get dislodged.

However, the Court must look at the totality of the evidence. First, the southeast corner pin was above ground, and had not moved, even though it was allege to be in the middle of a road for a period of time between 9 to 18 years, (which is the period of time from when the parcel was first subdivided and then to a time period between 1970 and 1979 aerial photos.) (Def.'s Ex. 12 & 13.) Second, why would a surveyor bury only one of the two pin along that road unless the second pin was not actually I the road. Finally, no one could identify any physical evidence to show that the road was in the middle of the fence. (Trial Tr. (Miller) 74:3-4; 75: 5-7; 76: 7-8, 14, and 25; 77: 20-25; 78: 4-13, 78: 23-25). Including any sign of a roadbed (Trial Tr. (Miller) 78:4-7.) Green also testified how the topography on the inside of the fence could not support traffic since the slope on the north side of the fence would cause her four wheel drive vehicle to get stuck on its undercarriage. (Trial Tr. (Green) 106: 6 – 110-24.) Finally Hart admits he designed it (the plats) so that the road would not be on the parcel currently owned by Green. (Trial Tr. (Hart) 30: 20 – 31: 1.)

CONCLUSION

The Court erred by treating the two easements as one in its rule; for failing to examine the issue upon the strength of the Plaintiff's claim of title than just constructive notice on the Defendant's part; and for failing to examine the boundary line in detail and making some form of findings.

So when an expert has an affirmative duty to disclose all pertinent and relevant facts, but fails to disclose a fact that would have undermined the only basis of his theory, and no other fact tends to support that theory then a reversal of the ruling or a new trial is needed to resolve this matter.

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Seneca, South Carolina

October 25, 2018

PROOF OF SERVICE OF
APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTERS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
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Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's initial Brief and Designation of Matters on the as well as the other Pro se respondents in this matter by depositing a copy of it in the United States Mail, postage prepaid, on October 25, 2018, addressed to the last known address as listed on the following page:

June H. White, as operating member of Chuga Creek Retreat, June White, individually,
and as Owner/Operator of Mountain Rest Camp Ground
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William M. White, individually and as Owner/Operator of Hilltop Bike Park,
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James Edward (Ed) Walker
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October 25, 2018

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October 25, 2018

VIA FIRST CLASS MAIL and FACSIMILE:
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211
Attn: Jenny Kitchings

RE: June White v. Marilyn Green
Appellate Case No. 2018-000984

Dear Ms. Kitchings:

Enclosed please find an Original and one (1) copy of the Appellant's Initial Brief and Designation Matter, along with Proof of Service to the Respondents Rule 208, SCACR and Rule 262, SCACR. These are the same documents that I sent to you on today's date via facsimile.

I have also enclosed a self-address envelope with the postage paid and ask that you return the copy by U.S. Mail. Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact our office.

Sincerely,

Roberta Barton SC Bar No. 81110
Roberta Barton Law Ltd. Co.
Attorney for the Appellant, Marilyn Green

enc.
cc: Ms. June White
Mr. James Edward (Ed) Walker
Mr. William M. White

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