IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2018-001372

Common Pleas Case No: 2016-CP-18-2123

Mary Greene-Mackey.....Appellant,

vs.

David Bevins.....Respondent.

INITIAL BRIEF OF RESPONDENT

Harold A. Oberman
OBERMAN & OBERMAN, LLC
60 Markfield Drive, Suite 2
Charleston, SC 29407
(843) 577-7010

Attorneys for Respondent

Other Counsel of Record:

Eduardo K. Curry, Esquire
Attorney at Law
P. O. Box 42270
N. Charleston, SC 29423

Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

I. IS THERE ANY EVIDENCE THAT REASONABLY SUPPORTS THE JUDGE'S FACTUAL FINDING THAT THE BOUNDARY LINE IS WHERE BEVINS' SURVEYOR FOUND IT TO BE?

II. DID THE TRIAL COURT COMMIT AN ERROR OF LAW BY FINDING THAT APPELLANT RECKLESSLY, WILLFULLY, OR INTENTIONALLY INVADED BEVINS' RIGHTS THUS JUSTIFYING AN AWARD OF PUNITIVE DAMAGES AND ATTORNEY'S FEES?

STATEMENT OF THE CASE

Mrs. Greene-Mackey (Appellant) sued David Bevins (Bevins) in trespass and for declaratory relief on November 3, 2016. Bevins answered and counterclaimed for a declaratory judgment (for a determination of the property line) and in trespass on January 27, 2017. Appellant replied to Bevins' Counterclaim on March 26, 2017. Prior to trial, the Honorable Diane S. Goodstein heard Bevins' Motion for Summary Judgment and denied it.

The matter was tried non-jury before Judge Goodstein on February 5, 2018, and Judge Goodstein subsequently issued an Order on May 18, 2018 (filed June 15, 2018) denying Bevins' Summary Judgment, but dismissing Appellant's causes of action and finding for Bevins on his counterclaims for a declaratory judgment and in trespass. She awarded damages to Bevins in the amount of $18,925.00. She confirmed the survey Bevins entered into evidence to be correct and binding.

Appellant appealed this Order by filing a Notice of Appeal on July 23, 2018.

FACTS

Bevins and Appellant are neighbors. Bevins bought Lot 207 in Moss Pointe Subdivision in 2003. His deed referred to a plat at Plat Book D, page 245, a plat of Phase 3 of the subdivision (Defendants Exhibit 5, Plat of E.M. Seabrook dated November 17, 1982; Defendant's Exhibit 1, Deed from Julian B. Glover dated August 28, 2003). Appellant bought Lot 208 in 2015 from her daughter. Her deed (Defendant's Exhibit 3) refers to the plat of Phase 4 (Defendant's Exhibit 6).

The surveys and plats of Phase 3 and Phase 4 each show the courses of the southeastern boundary between Lots 207 and 208 to be magnetic north at N 32°45'49" (Defendant's Exhibits 5 and 6). Bevins entered recent surveys into evidence (Defendant's Exhibits 8 and 9). The recent surveys show a very slight magnetic north deviation from the two plats of the 1980s of 3 minutes 27 seconds over the period of over 30 years. More importantly, the Bevins survey of 2015 shows the found corners of Lot 207 to be marked by steel staubs designated Found "FND" and the length of the line in question to be identical or nearly identical in length. This survey of Bevins was entered into evidence without objection (Transcript, p.48, line 4 - p.49, line 7).

Appellant had some workmen cross the fence and start cutting some branches from the trees on the property of Bevins. Bevins called the police who arrived, stopped the activities, talked to both, and advised the parties to get a survey done (Transcript, p.11,1 line 9 - p.112, line 21). On October 17, 2015, Bevins had a Magistrate give Appellant a notice of trespass (Transcript, p.79, line 21 - p. 80, line 21). He also hired a survey company who delivered the requested survey (Defendant's Exhibit 8). Mr. Bevins tried to tendered that survey to Appellant. She refused the survey and did not secure and deliver, at that time, to his knowledge, a survey for her property (Transcript, p. 112, line 22 - p.114, line 2).

By Complaint and Motion for Restraining Order (harassment and stalking) dated July 6, 2016, Appellant instituted an action against Bevins (Defendant's Exhibit 11). That matter was heard on July 19, 2016 and dismissed by the judge because of lack of evidence (Transcript, p.82, lines 2 - p.83, line 6).

On October 17, 2016, Appellant had her agents remove the Bevins' fence or a large portion of that fence and cut down three (3) of trees on the property of Bevins (Defendant's Exhibit 9; Transcript, p.112, lines 10-21; Transcript, p.77, line 1 - p.80, line 5).

At the time of the purchase of Lot 207 by Bevins in August 2003, Bevins had a chain link fence that ran along the line separating the two lots (Transcript, p.101, lines 11-22). That line was shown as almost an exact bearing on the surveys and plats of Associated Surveyors of Summerville dated December 7, 2015 and revised April 21, 2017 (Defendant's Exhibits 8 and 9). This is the fence Appellant removed.

Bevins' survey shows the line between the street point on Robert Drive is marked by a 5/8" rebar found and at the rear by a ½" rebar found and that the boundary is a straight line between the two points. The two rebar markers appeared by their condition to be the original lot stakes from 1982 and should be determinative of the property line between of Lot 207 of Bevins and Lot 208 of Appellant. It appears that Appellant commissioned a firm to locate the rebar stakes and one or two firms to survey the boundary line between Lots 207 and 208 (Transcript, p.59, line 7 - p.64, line 14; Transcript, p.103, line 5 - p.106, line 22). Appellant testified that devices were used to clear the vegetation and soil to reveal the two boundary staubs in question (Transcript, p.75, line 5 - p.76, line 20).

Evidence shows that Appellant commissioned surveys that conformed with Bevins' survey, which she never produced (Transcript, p.59, line 7 - p.62, line 19; Transcript, p.103, line 5 - p.106, line 22). Appellant also claimed her surveys to be incorrect because they were in conformance with Bevins' survey (Transcript. p.32, lines 9 - p.33, line 7). Appellant, in her brief, concedes her survey does not support the property line she claimed before the trial court (Initial Brief of Appellant, p. 3). "Each party hired their own surveyors to review and measure the metes and bounds of their respective properties. However, the new surveys failed to reflect the same metes and bounds as the original plat and deeds creating a disparity in evidence." Further, the survey commissioned by Appellant's daughter conforms with Bevins' survey (Transcript, p. 103, line 9 - p.105, line 19). These surveys of Appellant were never produced to Bevins.

Bevins testified as to his damages including the lost trees and fence (Transcript, p. 107, lines - p. 110, line 2). Bevins testified he, up to the point of trial, owed his lawyer a total of $11,000 (Transcript, p. 125, lines 7-18).

STANDARD OF REVIEW

> A boundary dispute is an action at law, Clements v. Young, 310 S.C. 73, 425 S.E.2d 63 (Ct.App.1992), and the location of a disputed boundary line is a question of fact. Saluda Land & Lumber Co. v. Fortner, 162 S.C. 246, 160 S.E. 594 (1931). In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) . . . . We therefore must affirm the decision of the trial court if there is any evidence to support his determination of the location of the boundary line.

Bodiford v. Spanish Oak Farms, Inc., 317 S.C. 539, 455 S.E.2d 194 (Ct. App. 1995)

ARGUMENT

I. THERE IS EVIDENCE THAT REASONABLY SUPPORTS THE JUDGE'S FACTUAL FINDING THAT THE BOUNDARY LINE IS WHERE BEVINS' SURVEYOR FOUND IT TO BE.

Bevins' survey was entered into evidence without objection (Transcript, p.48, line 4 - p.49, line 7). The trial judge found the boundary line to be where it was delineated on this survey (Order of May 8, 2018, p.12). This alone is sufficient to justify the trial judge's finding, but there is ample other evidence as well.

Ample evidence supports the fact that Appellant commissioned surveys that conformed with Bevins' survey, which she never produced (Transcript, p.59, line 7 - p.62, line 19; Transcript, p.103, line 5 - p.106, line 22). Appellant also claimed her own surveys to be incorrect because they were in conformance with Bevins' survey (Transcript, p.32, lines 9 - p.33, line 7). Appellant, in her brief, concedes her survey does not support the property line she claimed before the trial court (Initial Brief of Appellant, p. 3). "Each party hired their own surveyors to review and measure the metes and bounds of their respective properties. However, the new surveys failed to reflect the same metes and bounds as the original plat and deeds creating a disparity in evidence." Further, the survey commissioned by Plaintiff's daughter conforms with Bevins' survey (Transcript, p.103, line 9 - p.105, line 11)

Further evidence supports the fact that the metal stakes, staubs, and rebars of all the surveys are where the trial judge found the property line to be (Transcript, p.103, line 5 - p.106, line 22; Defendant's Exhibits 7G and 7J). The staubs were rusted (Transcript, p.106, lines 10-22). Bevins had a chain link fence within inches of the property line since he bought the property in 2003 (Transcript, p.97, line 16 - p. 98, line 24) and Appellant's daughter, the previous owner of

Appellant's property, never objected to it (Transcript, p.102, lines 5-11). When boundary lines have "been located and designated by monuments and there is a discrepancy between the calls for these monuments and courses and distances shown by a plan referred to in the conveyance, the normal rule as to the controlling effect of calls for monuments will be followed." Klapman v. Hook, 206 S.C. 51, 55, 32 S.E.2d 882, 883 (1945).

"If adjoining landowners occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in for a long period of time, they are precluded from claiming the boundary line thus recognized and acquiesced in is not the true one." Gardner v. Mozingo, 293 S.C. 23, 26, 358 S.E.2d 390, 392 (1987). As an additional sustaining ground, Appellant's daughter acquiesced to the boundary line at the fence.

Just as the surveyors, the trial judge was not required to ignore all the above evidence and rely solely on the a subdivision plat. It was not error for the trial judge to consider the stakes, the surveys, and other evidence, especially since Bevins' surveyor specifically uses the subdivision plats as reference plats in preparing his survey. Bevins' survey states, " This property was surveyed by reference plats and field information" (Defendants Exhibits 8 and 9).

Additionally, there is not sufficient evidence to show that the property line on the original subdivision plat varies in a meaningful way from Bevins' survey (Transcript, p.27, line 13 - p. 30, line 13). Appellants's testimony is unclear to exactly where they are claiming the property line lies.

Appellant relies on exhibits not in evidence and not made subject to an proffer of evidence or an offer of proof. Her survey of September 6, 2017, is not in evidence and not proffered.

II. THE TRIAL COURT DID NOT COMMIT AN ERROR OF LAW BY FINDING THAT APPELLANT RECKLESSLY, WILLFULLY, OR INTENTIONALLY INVADED BEVINS' RIGHTS THUS JUSTIFYING AN AWARD OF PUNITIVE DAMAGES AND ATTORNEY'S FEES.

Appellant does not dispute the actual damages for the removal and replacement of the trees and the replacement of the fence (Appellant's Initial Brief, pp. 1 and 11).

Appellant also concedes "Punitive damages and attorney fees may be awarded for trespass when a defendant's acts have been willful, wanton or in reckless disregard of the rights of others" (Appellant's Initial Brief, p. 11). Plaintiff states attorney's fees may be awarded for trespass. Appellant is deemed to have abandoned an issue which is not argued in the brief. First Sav. Bank v. McLean, 314 S.C 361, 363, 444 S.E.2d 513,514 (1994) (Appellant was deemed to have abandoned issue when he failed to provide argument or supporting authority for alleged error). Appellant has abandoned the issue as to whether the court may award attorneys fees in a trespass case.

Appellant, however, does argue that the court failed to adequately consider the 6 attorney fee factors outlined in Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 647 S.E.2d. 488 (Ct.App. 2007) (Appellant's Initial Brief, p. 13).

The factors a trial court should consider in determining reasonable attorney's fees are: (1) nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 230, 647 S.E.2d 488 (Ct.App. 2007)

"[A]bsent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact."Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216,230, 647 S.E.2d 488 (Ct.App. 2007).

Bevins testified at to the total amounts paid his attorneys (Transcript, p.125, lines 7-18) and the Court took judicial notice of the reputation and professional standing of council in its order (Order, pp.8-9 and fn.1). The trial itself and the pleadings in the case spoke to the nature of the legal services rendered. The beneficial result at trial speaks for itself. The trial judge made these specific findings (Order, pp.8-9 and fn.1) and they are amply supported by the record.

Attorneys fees may also be an element of punitive damages in trespass action. R & S Dev., Inc. v. Wilson, 534 So. 2d 1008, 1013 (Miss. 1988). The trial judge felt punitive damages were justified as outlined below. Thus the trial court did not err in awarding these attorney's fees. See also, Townsend v. Singleton 257 S.C. 1, 12-13, 183 S.E.2d 893 (1971) (Under proper circumstances, an award of attorneys fees can be considered an award of punitive damages).

The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future. Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). 'Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party.' *Id.* at 378-79, 539, S.E.2d at 533.

To receive an award of punitive damages, the [party claiming punitive damages] has the burden of proving by clear and convincing evidence the [trespassing party's] misconduct was willful, wanton, or in reckless disregard of the [owner's] rights. Austin v. Specialty Transp. Servs, Inc. 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct.App. 2004). 'A conscious failure to exercise due care

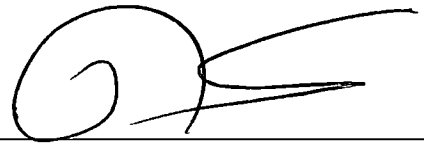
constitutes willfulness.' McCourt ex rel. McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E. 2d 603, 607 (1995). The issue of punitive damages before the finders of fact if more than one reasonable inference can be drawn from the evidence as to whether the [trespasser's] behavior was reckless, willful, or wanton. Graham v. Whitaker, 282 S.C. 393, 398, 321 S.E. 2d 40, 43 (1984). Solanki v. Wal-Mart, 410 S.C. 229, 236, 763 S.E.2d 615, 618 (Ct. App. 2014).

Appellants acts were willful, wanton, and in reckless disregard for Bevins' rights. Appellant ignored her own surveys. (Transcript, p.59, line 7 - p.62, line 19; Transcript, p.103, line 5 - p.106, line 22; Transcript, p.32, lines 9 - p.33, line 7; Initial Brief of Appellant, p. 3) She ignored the surveys after she was told by the police and a judge to get a survey or evidence (Transcript, p. 111, line 9 - p.112, line 21). She went on Bevins' land, cut down his trees, and destroyed his fence. (Defendant's Exhibit 9; Transcript, p. 112, lines 10-21; Transcript, p.77, line 1 - p.80, line 5). This is, at the very least, a conscious failure to exercise due care. The award of punitive damages, including attorneys fees, by the trial court is justified, supported by clear and convincing evidence, and should be affirmed.

CONCLUSION

There is ample evidence that the boundary line is where Bevins' surveyor found it to be. Appellant ignored this survey and her surveys, came on to Bevins' land, cut down his trees and destroyed his fence. Her acts were willful, wanton and reckless. Because of this, the trial court should be affirmed.

Respectfully submitted,



March 1, 2019

Harold A. Oberman
OBERMAN & OBERMAN, LLC
60 Markfield Drive, Suite 2
Charleston, SC 29407
(843) 577-7010

Attorneys for the Respondent

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PROOF OF DELIVERY

I certify that I have served the Initial Brief of Respondent by depositing one copy of it in the United States Mail, postage prepaid, on March 1, 2019, addressed to her attorney of record, Eduardo K. Curry, P. O. Box 42270, N. Charleston, SC 29423.

March 1, 2019

Harold A. Oberman
OBERMAN & OBERMAN, LLC
60 Markfield Drive, Suite 2
Charleston, SC 29407
(843) 577-7010
Attorneys for Respondent

OBERMAN & OBERMAN, LLC
ATTORNEYS AND COUNSELORS AT LAW
60 MARKFIELD DRIVE, SUITE 2
CHARLESTON, SOUTH CAROLINA 29407

MARVIN I. OBERMAN
HAROLD A. OBERMAN

TELEPHONE (843) 577-7010
FACSIMILE (843) 722-7359
EMAIL: obermanlaw@bellsouth.net

March 1, 2019

Honorable V. Claire Allen
Deputy Clerk
South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Mary Greene Mackey v. David Bevins
Case No. 2016-CP-18-2123
Appellant Case No. 2018-001372

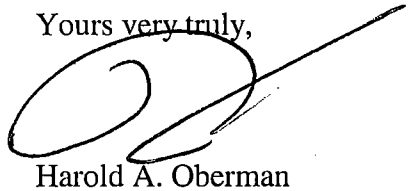
Dear Ms. Allen:

I enclose the original and one (1) copy of the Initial Brief of Respondent and Designation of Matter To Be Included in the Record on Appeal, along with the Proofs of Service, with regard to the above-captioned matter.

Upon filing, please return a clocked-in copy of each to our office in the enclosed self-addressed, stamped envelope.

With warmest personal regards, I remain

Yours very truly,



Harold A. Oberman

HAO/shb
Enclosures

cc: Eduardo K. Curry, Esquire (w/enclosures)

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OBERMA

ATTORNEYS AND COUNSELLORS AT LAW
60 MARKFIELD DRIVE, SUITE 2
CHARLESTON, SOUTH CAROLINA 29407

CHARLESTON SC 294
FRI 01 MAR 2019 AM

Honorable V. Claire Allen
Deputy Clerk
South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211