

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2014-001588

Carl Eugene Berry, Respondent,

v.

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

FINAL BRIEF OF APPELLANTS

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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 PUNITIVE DAMAGES?

STATEMENT OF THE FACTS

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 the 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.

STATEMENT OF THE FACTS (Cont.)

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.

Babb v. Lee County Landfill SC, LLC, 747 S.E.2d 468, (S.C. 2013)

ARGUMENT AS TO ISSUES ON APPEAL

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 SC, LLC*, 747 S.E.2d 468, (S.C. 2013), 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. 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" (*R. p. 35 Lines 4-23*) 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, (*R. p. 47 Lines 13-16*). *

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, (*R. p. 43 Lines 16-19*). The Transcript appears incomplete on page 20 (*R. p. 43*), line 17. However, the Court Recorder confirms her record correctly matches the testimony for this point.

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, (*R. p. 66 Lines 7-15*). 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, (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, (*R. p. 36 Line 18 - R. p. 39 Line 4*).

Attorney Rauton testified that she assisted Respondent after the trees were cut. (*R. p. 46 Lines 24-25*) Attorney Rauton testified as to the presence of a plat showing "record notice" of the disputed boundary, (*R. p. 39 Lines 17-19*). Attorney Rauton admitted that "record notice" of the boundary would not necessarily identify the location of the boundary depicted by a 1934 Plat, (*R. p. 39 Lines 9-25*). 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, (*R. p. 38 Lines 1-8*). 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, (*R. p. 47 Lines 13-18*). Respondent's own testimony illustrates that he could not accurately describe the boundary, i.e., "the creek did not cross the creek", (*R. p. 47 Line 19*).

Attorney Rauton testified as to the presence of a plat showing "Record Notice" of the disputed boundary, (*R. p. 39 Lines 17-19*). "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., 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., 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, (S.C. Ct. of 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 (*R. p. 29 Lines 9-25*). 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, (*R. p. 50 Lines 9-10*). 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, *R. p. 71 Lines 8-17*).

In the 2004 Case, Wimberly v. Barr, 597 S.E.2d 853 (S.C. App. 2004) 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

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) cannot 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, *R. p. 67 Lines 18-19*). 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, *(R. p. 50 Lines 7-8)*. The Appellants requested the opportunity to cross-examine, *(R. p. 50 Line 21)*. 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, *(R. p. 72 Line 6 to R. p. 74 Line 1)*. The Court's position was that due to the default judgment, no evidence could be presented, *(R. p. 74 Lines 2-7)*.

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, (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, (*R. p. 35 Lines 4-11*). 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, (*R. p. 61 Lines 3-17*). 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, (*R. p. 58 Line 17 to R. p. 59 Line 6*). 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, (*R. p. 43 Lines 16-19*).

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, (*R. p. 61 Lines 3-17*).

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 PUNITIVE 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, (*R. p. 74 Lines 2-7*). 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., 594 S.E.2d 867 (S.C. App. 2004) 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.

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, (*R. p. 46 Lines 13-23*). 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, (*R. p. 46 Lines 23-24*).

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, *(R. p. 59 Lines 18-24)*.

At the Damages Hearing, the Court accepted filed documents into evidence, *(R. p. 55 Line 16 to R. p. 56 Line 22)*. 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, *(R. p. 51 Lines 19-23)*. Although not accepting "Tab 12" into evidence, the Court stated that all the supporting facts have been entered through testimony, *(R. p. 52 Lines 5-17)*.

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

1. Respondent's 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. Respondent's 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.

ARGUMENTS TO RESPONDENT'S BRIEF

1. THE STATEMENT OF FACTS ON PAGE 2 OF THE RESPONDENT'S STATEMENT OF FACTS DOES NOT COMPLY WITH SCAC RULE 208 (B)(2), WHICH REQUIRES CONFORMANCE WITH RULE 208 (b)(1)(C).

The Respondent's Statement of the Facts equates to the "Statement of the Case" of Rule 208. Rule 208 includes the requirement that the statement is not to contain contested matters.

In the first three paragraphs of Page 2 of the Respondent's Brief, the Respondent states the Appellants trespassed, cut timber, erected a fence, and received notice of the boundary line. The Appellants' argument of Issue 1 lists numerous deficiencies in the Respondent's evidence of trespass, timber cutting, fence erection, and boundary line location. The first three paragraphs of Respondent's Statement of

Facts certainly contains contested matters, as further discussed in the below Issue relating to Respondent's Brief pg. 5.

2. THE FIRST PARAGRAPH ON PAGE 3 OF THE RESPONDENT'S STATEMENT OF FACTS IS NOT SUPPORTED BY CASE EVIDENCE AND CONTAINS CONTESTED MATTER.

The said paragraph refers to a Consent Order filed August 5, 2013. The contents of the Consent Order do not support statements by the Respondent, and Appellants' denial of the contested matter follows:

- A) Judge Russo did not indicate that he was issuing a "Rule to Vacate or Show Cause". The Respondent applied for the Rule, and the Court held a status conference. (Consent Order pg. 1).
- B) The August 5, 2013 Consent Order does not refer to "Respondent's Property". Instead, the terminology of the Court throughout the Consent Order is "Property claimed by the Plaintiff". In Finding #4 of the Consent Order, the Court distinguishes between "Property claimed by the Plaintiff" and "Property owned by the Plaintiff". (Consent Order Pg. 1).
- C) The Appellants were not ordered to "remove the fence". The only factual applicable statement of the Consent Order is that the Appellants agreed to remove the fence. There were a number of issues discussed at the July 2, 2013 Hearing and the Court did not order fence removal. (Consent Order pg. 1).

3. THE DESCRIPTION OF ATTORNEY RAUTON'S AFFIDAVIT ON PAGE 4 OF THE RESPONDENT'S STATEMENT OF FACTS CONTAINS CONTESTED MATTER.

A reading of the Respondent's description gives the impression that the Court ruled the Appellants were on proper Record Notice of the location of the disputed boundary between the land of the Appellants and the Respondent. If the Respondent wishes to include a reference to Attorney Rauton's Affidavit in the Statement of the Facts, the following facts, concerning the Affidavit, were also required:

- A) Attorney Rauton did not conduct a title search on Appellant Jess T. Reichardt's property. Neither a plat nor a deed of the said Appellant's property is in evidence (Affidavit of Kathryn Rauton, pg. 1).
- B) Attorney Rauton's Affidavit is directed to a Motion for Summary Judgment which is not in evidence. (Affidavit of Attorney Kathryn Rauton, pg. 1).
- C) Attorney Rauton's Affidavit contains Exhibits "B" through "E"; these four Exhibits only relate to land owned by the Respondent. (Affidavit of Attorney Kathryn Rauton, pgs. 3-6).
- D) During her testimony, Attorney Rauton admitted she would not be able to physically locate the disputed boundary, (*R. p. 38 Lines 7-19*).
- E) During her testimony, Attorney Rauton admitted the disputed boundary is a creek that may have moved since the 1934 plat was drafted, (*R. p. 38 Line 19 – p. 39 Line 4*).

4. RESPONDENT'S ARGUMENT DIRECTED TO ALL APPELLANT ISSUES IS NOT VALID.

The Respondent states that Appellants can not argue matters which are deemed admitted by Appellants' default (Respondent's Reply Brief, pg. 5). Respondent bases this position upon a wrongly, limited interpretation of the Court in Austin v. Specialty Transp. Services, Inc., 594 SE2d 867 (S.C. Ct. of App. 2004) as follows: "It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability." Roche v. Young Bros. Inc., 504 S.E.2d 311, 314 (1998).

The Roche Court cites, Howard v. Holiday Inns, Inc., 246 S.E.2d 880, (S.C. 1978) which states: "Since the account sued upon was an unliquidated demand and an itemized statement thereof duly verified was not (271 S.C. 241) served upon the defendant, plaintiff was required to introduce testimony in proof of the account in order to obtain a valid default judgment. Such was not done and the judgment was improperly entered on the pleadings alone. The order awarding damages is hereby vacated".

Thus, even though the Appellants are deemed to have admitted the truth of the Respondent's allegations, there must be some evidence presented by the Respondent that supports the allegations. On page 246 S.E.2d 882, the Howard v. Holiday Inn, Court decided the following approach was proper and approved for use in South Carolina Courts in cases wherein a defaulting defendant seeks the right to participate in proceedings relative to the question of assessing damages: "(3) allow damages to be ascertained with defense counsel's participation limited to cross-examination and objection to plaintiffs evidence."

Thus, the Respondent's attempt to prevent Appellants' argument concerning the validity of evidence being presented by the Respondent is not valid.

Finally, the Respondent's broad statement that numerous statements of the Appellants are *ipse dixit* statements, should be restricted to specific examples in the Appellants' Initial Brief – of which no such examples are provided.

5. THE RESPONDENT WRONGLY ARGUES THAT THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE APPELLANTS INTENTIONALLY TRESPASSED AT THE TIME THE TREES WERE CUT, BECAUSE APPELLANTS WERE IN DEFAULT.

The Respondent's entire argument against the Appellants' position of an unintentional trespass is based upon deemed admissions by the Appellants (Reply Brief pages 5-7). The Initial Brief of the Appellants describes the importance of the Plaintiff in a Trespass Case being able to prove the entry of the Defendant was "knowing and willful".

The Appellants, in pages 4 and 5 of their Initial Brief, prove the absence of evidence that the Appellants were knowledgeable as to the actual boundary location between their land and land owned by the Respondent. Attorney Rauton's testimony does not rise to the status of actual evidence of an established boundary that can be known to a non-surveyor in the field, (*R. p. 37 Lines 4-7*).

The Appellants' Initial Brief on page 5 points out the error of the Order of Judgment in stating that the Appellants cut timber, after receiving notice of the boundary lines via a meeting with the Respondent. The Respondent has not been able to place documents into evidence to show actual notice, so the presumed meeting could not have presented actual boundary notice. However, the main difficulty of the

lower Court's finding is that the meeting occurred prior to the cutting of trees. The Respondent testified otherwise (*R. p. 43 Lines 16-19*).

6. THE RESPONDENT WRONGLY ARGUES THAT THE TRIAL JUDGE DID NOT ERR IN GIVING EVIDENTIAL MERIT TO RESPONDENT'S CLAIM OF "RECORD NOTICE" BECAUSE OF THE EVIDENCE PROVIDED BY RESPONDENT AND RESPONDENT'S WITNESS' TESTIMONY.

Although the Respondent believes that there is confusion between "Actual Notice" and "Record Notice" on the part of the Appellants, the actual situation is that whereas the Respondent's witness, Attorney Rauton, attempted, unsuccessfully, to prove "Record Notice", it is "Actual Notice" that would provide the criteria for deciding if either Appellant actually knew the true, actual location of the disputed boundary at the time trees were cut.

The Respondent's use of *Gowdy v. Gibson*, 706 S.E.2d 495, 501 (2011) on page 8 of Respondent's Reply Brief is not proper. Whether or not the lower court arrived at a finding of Record Notice, even if Record Notice did exist, that is not evidence that either Appellant was aware of the actual boundary.

The Respondent's reference to *Gowdy v. Gibson*, does not revise any arguments of the Appellants. The case is a drug case with no or little relation to the current trespass case. The "Standard of Review" set out in *Gowdy v. Gibson* is "The Circuit Judge's findings of fact will only be disturbed on appeal if the findings are wholly unsupported by the evidence", this adds nothing new to this case. The Appellants' arguments provide numerous examples of unsupported findings.

7. THE RESPONDENT DID NOT PROVIDE SUFFICIENT EVIDENCE TO SUPPORT HIS ACTUAL DAMAGE CLAIM FOR THE APPELLANTS' TREE CUTTING BY HIS TESTIMONY IN COURT AND HIS EXHIBITS.

The Respondent, on Page 8 of his Reply, provides three extracts from the Respondent's testimony to provide documentary evidence of damages. However, the testimony does not apply to the damage caused by the tree cutting for the following reasons:

- A) *(R. p. 43 Lines 17-19)* Here the Respondent states the tree cutting caused him to expend large sums of money for legal fees, which is not an allowed claim. Also, the tree cutting was said to cause soil erosion; no evidence of erosion was presented and there was no evidence of the cost, even if erosion did occur.
- B) *(R. p. 46 Line 13 – p. 47 Line 1)* Here the Respondent suggests some of the cut trees were nut bearing, there was no evidence of the cost of the loss of the nuts. The Respondent claims an unspecified loss caused by an effect on a club that pays no dues. No evidence was presented as to the actual resultant cost of the tree cutting. The referenced testimony passage mentioned fencing delaying planting, which has no proven connection to tree cutting.
- C) *(R. p. 50 Lines 15-17)* Here, the Respondent claims a cost of \$1,200.00 to replace 12 white oak trees. An Exhibit F was supposed to support this expenditure, but does not seem to be in the evidence. Under cross examination, the Respondent stated that 12 trees are purchased, but not in place. No written evidence of the tree purchase was given. However, of greater importance, there is no evidence that the purchase of \$100.00 trees is standard practice. *(Tr.p.44 LL.1-22)* The South Carolina

Forestry report mentioned in the above transcript passage gives a value of \$250.30 for the cut trees. (Report of Thomas E. Mills, Investigator (S.C. Forestry Commission) dated May 11, 2012) No special recognition is given to nut bearing trees and the Forester Report is presented as the entire cost of all cut trees.

Based upon the Respondent's testimony, which is refuted by the Appellants in 7.(A), (B), and (C) above, the Respondent cannot conclude that SC Code 16-11-615 does apply.

On page 9 of the Respondent's Reply, the Respondent lists 5 allegations from the Respondent's First Amended Complaint that are deemed to be admitted due to the default. The Appellants demonstrated, in the first full paragraph of page 4 above, that the Respondent must present some evidence to support the deemed admissions. The lack of sufficient evidence of the 5 admissions is shown as follows:

- A) Concerning the statements that the 2 Appellants "knowingly and willfully cut forest products on Respondent's Property", the Respondent has not been able to prove the aspect of a knowing and willful cutting. The Respondent is unable to prove the location of the Respondent's Property is known; the 1934 plat does not come close to accurately describing the actual boundary between the property owned by the Appellants and the Respondent's Property in the vicinity of the cut timber (*R. p. 37 Lines 4-7*).

(B) Concerning the statement that the Appellants did “intentionally come onto and trespass upon the Property of the Respondent”, this deemed admission is not supported by the evidence. The Respondent is unable to prove that either Appellant knew the location of the disputed boundary, therefore, there is no evidence of intent. Pages 4 and 5 of the Appellant’s Initial Brief prove that intent is an essential aspect of a trespass action. Neither of the Appellants possessed the necessary knowledge of the exact location of the disputed boundary. Therefore, an intentional trespass is not proven by the evidence of this Case.

C) Concerning the 2 statements that the 2 Appellants’ actions damaged Respondent and he is “entitled to recover damages of three times the market value of the forest products”, these deemed admissions must be supported by evidence. The evidence the Respondent attempts to present is contained in pages 10 and 11 of the Respondent’s Reply. The Appellants’ rejection of the Respondent’s said attempt to evidence entitlement to three times market value is set forth next.

In the first full paragraph on page 10 of the Respondent’s Reply Brief, the Respondent states that SC Code 16-11-615 does apply. The only arguments that have been presented “above” to evidence application of SC Code 16-11-615 are insufficient. The majority of Respondent’s evidence of application is deemed admissions, the Appellants have shown that deemed admissions cannot stand without the support of some actual evidence. Pages 6 and 7 of the Appellants’ Reply above shows that the Respondent’s testimony does not relate to SC Code 16-11-615. The

final component of “above” proof of application, is the Respondent’s mention of the Austin v. Specialty Transp. Services, Inc., case at the bottom of page 8 of the Respondent’s Reply Brief. The Austin Case centers on a transportation accident, with no mention of timber cutting.

Therefore, the Respondent is left with his disagreement with the Appellants’ reliance on Wimberly v. Barr, 597 S.E.2d 853, (S.C. App. 2004) on pages “7”, “9”, and “10” of the Appellants’ Initial Brief.

The Respondent, in the second paragraph of page 10 of his Reply Brief, considers the Appellants’ argument, relying upon Wimberly v. Barr to be inapposite. The Respondent is not reading Wimberly v. Barr correctly, and the Appellants’ reliance on Wimberly v. Barr is right on point. The facts of Wimberly v. Barr include \$4,163.63 in the fair market value of lumber and \$35,299.00 in other costs. The Court agreed the damage claim was \$49,000.00 and was not capped at 3 times \$4,163.63. The Plaintiff, Wimberly, specifically decided not to proceed under SC Code 16-11-615, and he did not multiply \$4,163.63 by “3” to arrive at his total actual damages.

Unlike the Case of Wimberly v. Barr, in the current Case, the Respondent has decided to use SC Code 16-11-615. When listing his damages, the Respondent replied; “The value, the triple value of the timber cut is \$750.90” (*R. p. 49 Lines 9-10*.)”

In the last paragraph of page 10 of the Respondent’s Reply Brief, the Respondent states that Wimberly v. Barr does not support the position of the Appellants, i.e., “if the tree owner elects to use the triple value code, the total

damages are capped.” The Respondent has ignored the following statement of the Court in *Wimberly v. Barr*: “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 Appellants argue that the above statement is equivalent to the Court saying they could bind a party to the restrictions of the timber code, if the case did proceed under that statute. The Appellants disagree with the Respondent’s statement in the second paragraph of page 11 of the Respondent’s Reply, (that is, the statement that “*Wimberly v. Barr*, is on point and fully supports the Respondent’s position, in this matter.”). The Appellants state that yes, *Wimberly v. Barr* is on point; however, the Case fully supports the Appellants, not the Respondent.

8) THE TRIAL JUDGE DID ERR BY AWARDING ACTUAL DAMAGES OF \$4,193.90 TO THE RESPONDENT, BASED ON THE EVIDENCE AND TESTIMONY BEFORE HER.

In the final partial paragraph of page 11 of the Respondent’s Reply Brief, the Respondent refers to the cross-examination conducted by the Appellants’ Counsel as set out in 15 pages of the Hearing Transcript. The attempt by the Appellants’ Counsel to examine the Respondent’s damage was severely limited by the lower Court’s instruction that if a fact appears in the Respondent’s Complaint it is admitted (*R. p. 57 Lines 21-23*). As set forth in page 12 of the Appellants’ Initial Brief,

Limehouse v. Hulsey, 744 S.E.2d 566, (S.C. 2013) is clear that, at a damage hearing a defaulting party has the right to cross-examine, so as to determine the sufficiency of the evidence supporting each damage claim.

The final partial paragraph, referenced above, states the Respondent's damages include a tripled value of cut timber. As set forth in Issue #7 above, if the Respondent triples the timber value, then the Respondent is not allowed to add all the additional claimed damages.

Page 12 of the Appellants' Initial Brief, in the paragraph labeled "(I) \$750.90 – Trebled value of timber cut" points out an additional problem with the Respondent's use of the Forester's estimate of a \$250.30 market value, that is, the cut trees were not removed. The cut trees are still in place and available for either party to sell.

A reading of the costs accepted by the lower Court Judge shows the list of claims contained numerous instances where the Respondent only listed a payment he made, but never proved that his payment was a result of an action of an Appellant. The errors committed by accepting all claims presented by the Respondent are set forth in the Appellants' Initial Brief, pages 12 and 13.

In the first full paragraph on page 12 of the Respondent's Reply Brief, the Respondent feels that a "fair reading of the Trial Judge's Order" shows careful consideration of the issues related to Actual Damages. This careful consideration is not obvious, a more likely outcome of a reading is that the Judge simply accepted every claim presented by the Respondent without modification or question. The Respondent uses a sentence from page 32 of Kuznik v. Bees Ferry Assoc., 538 S.E. 2d 15, 32 (S.C. Ct. of App. 2000), to prove the Trial Judge has considerable discretion

when awarding Actual Damages. The same Court on page 20 stated, “the findings of fact of the Judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the Judge’s findings. “Kuznik v. Bees Ferry Assoc. is a Case of partnership law, with little similarity to the current Case. However, the need for supporting evidence has not been satisfied by the Respondent. The presentation of evidence, as described by page 12 of the Respondent’s Reply Brief is essentially a list of expenses that were paid by the Respondent with no evidence that the listed expenses were actually related to actions of either Appellant.

The Respondent utilizes an allowance for the Appellant to make a closing argument as proof of “great latitude” and “appropriate participation” allowed the Appellants’ legal counsel (first paragraph of page 13 of the Respondent’s Reply Brief). Reading through the Order for Judgment, filed June 19, 2014, there is not a single indication that the points reiterated by the Appellants’ Legal Counsel (*R. p. 72 Line 12 – p. 73 Line 18*) found their way into the Order for Judgment.

9. THE TRIAL JUDGE DID ERR IN HER CALCULATION OF PUNITIVE DAMAGES, BASED ON THE EVIDENCE AND TESTIMONY BEFORE HER.

On page 13 of the Respondent’s Reply Brief, the Respondent’s testimony contained in the Transcript, (*R. p. 36 – p. 52*), is primarily a history of the Respondent’s history and his presumption of the Appellants’ action. Facts that are supported by actual evidence are absent.

In the last paragraph of page 13 of the Respondent’s Reply Brief, the Respondent again states he is proceeding under SC Code 16-11-615, yet he improperly adds extra costs to the statutory trebled timber market value. As presented by the Appellants above, there was no evidence to support a statutory

violation. The continued argument of statutory violation in the first paragraph of page 14 of the Respondent's Reply Brief is not correct, because the Respondent was unable to present evidence of an unlawful trespass associated with the cutting of timber.

In the second paragraph of page 14 of the Respondent's Reply Brief, the Respondent again argues the Appellants should not be allowed to present evidence due to their default status. This point has been shown to be incorrect by the Appellants' arguments above.

Pages 14-19 of the Appellants' Initial Brief provide extensive legal argument for the presentation, by the Respondent, of evidence, set forth in *Austin v. Specialty*, directed toward 10 specific factors.

The Respondent, in the 3 last full paragraphs of his Reply Brief told how the Respondent considered the Appellants' action to be reprehensible, however, the factors such as physical harm, disregard for health or safety, financial vulnerability repeated action and intentional malice were not in evidence. For example, there is no evidence of a fire hazard, nor excessive runoff. The stress and mental anguish reported in "Factor (ii)" on page 16 of the Respondent's Reply Brief has no medical authority support – only statements by the Respondent.

There is a reference to an opinion of a surveyor dated September 17, 2013 as being actual notice related to actions of the Appellants months before September 2013. The statement of Mark Mills is discussed on page 16 of the Respondent's Reply Brief under "Factor (iii)". The Mark Mills' letter is perhaps evidence of the

continuing search by the Appellant, Jess T. Reichardt, for evidence of the true boundary location; however, the letter has no relation to earlier events.

The examples of repeated actions given by the Respondent in page 16 of his Initial Brief under “Factor (iv)” are not correct. The timber cutting, fence construction and gate installation only occurred once. There was no evidence of sign installation. Repeated trespasses that were intentional and unlawful were not supported by the evidence.

The actions of the Appellants that the Respondent labels as “intentional, malicious, and deceitful” under “Factor (v)” on page 17 of the Respondent’s Initial Brief, are labeled incorrectly. Neither Appellant knew the exact location of the disputed boundary. The Respondent presented no evidence to prove that either Appellant acted with intent, malice or deceit.

In his discussion of the amount of Punitive Damages on page 17 of his Initial Brief, the Respondent cites Jenkins v. Few, 705 S.E.2d 457 (S.C. Ct. of App. 2010). This Case involved the obvious sabotage of a truck by pouring sugar into the gasoline tank of the truck. The Court required a de novo review of the Punitive damage award and used a 3.6 to 1 ratio of punitive to actual damage. In the present Case, the Court awarded \$20,969.00 in punitive damages based upon actual damages of \$4,193.90, a ratio of 5. Considering that there was no evidence of similar post conduct, no proof of any likelihood of future like conduct, no proof of the harm that actually resulted from the action of either Appellant, and no consideration by the Court of the Appellants’ ability to pay, the ratio of 5 is excessive.

The Respondent cites the case, Collins Entertainment v. Coats, 584 S.E. 2d 120 (S.C. Ct. of App. 2003) as an example of a punitive to actual ratio of 9.9 to 1. The case is a slot machine case, very different from the current case. The Court in Collins Entertainment v. Coats, stated “The second factor is the ratio of punitive damages to actual damages. ABG contends a ratio of 10 to 1 is excessive. We disagree. In his order, the master stated the award was ‘in part based upon [his] firm conviction that American Bingo and others must not be allowed to profit from misconduct of the type established in this case.’” The current case does not involve the possibility that others will profit from actions similar to those of the Appellants. The Appellants did not profit from the tree cutting, nor the fence construction.

The Appellants devoted pages 14-19 of their Initial Brief to demonstration of the Courts’ errors in calculating punitive damages. The Respondent did not directly refute any punitive related statements of the Appellants. Instead, the Respondent chose to present his own support of the punitive damage calculation – a presentation the Appellants have shown to be incorrect.

10. THE RESPONDENT’S CONCLUSION IS INCORRECT.

The conclusion on page 18 of the Respondent’s Initial Brief is primarily an emphasis on use of deemed admissions and neglect of the requirement for supporting evidence. The Appellants’ Initial Brief provides numerous examples of the absence of needed support in the Respondent’s Case. The Respondent’s position that “Appellants’ admissions are not subject to further argument” is shown to be erroneous by the Appellant’s Initial Brief. The Respondent provided no examples of an Appellant argument that could be classified as “*ipse dixit*”.

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.

The Trial Court's calculation of both actual and punitive damages is flawed and this Case should be remanded for a proper Hearing of Damages.



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December 9, 2014
Aiken, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2014-001588

Carl Eugene Berry, Respondent,

v.

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

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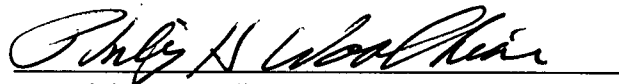
DEC 10 2014

SC Court of Appeals

CERTIFICATE OF COMPLIANCE

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I, Philip H. Woolhiser, hereby certify that the Appellants' Final Brief complies with Rule 211 (b), of the South Carolina Appellate Court Rules.



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