

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-4122

MICHELE BLANK,)
Plaintiff,)

vs.)

PATRICIA TIMMONS, TRUSTEE)
OF THE GORDON H. TIMMONS)
EXEMPT FAMILY TRUST,)
Defendant.)

ORDER

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JULIE J. HENNING
CLERK OF COURT

SC Court of Appeals

Heard: April 22 through 25, 2019, at the Charleston County Courthouse
Attorney for Plaintiff: Edward A. Bertele, Esquire
Attorney for Defendant: Mark A. Mason, Esquire
Court Reporter: Karen Andersen

This case revolves around a landline dispute in a residential neighborhood. Related causes of action are raised by both sides. A previous lawsuit, brought by the current defendant (the "Trust") against the current plaintiff Michelle Blank ("Ms. Blank") asserted that Ms. Blank had constructed a residence over the common boundary line, trespassing and encroaching onto the Trust's lot.¹ That lawsuit was ended by the Trust taking a voluntarily dismissal, with prejudice. This court rules as follows.

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- (1) In the First Cause of Action, Ms. Blank seeks declaratory and injunctive relief barring the Trust from asserting any claim that the boundary line is the one shown on a plat of Andrew G. Gillette, RLS (the "Gillette plat") which delineated a disputed area.² She seeks an order invalidating this plat to prevent

¹ Timmons v Blank, 2015 CP-10-03013 was dismissed in a written Form 4 Order on June 7, 2016.

² Plat prepared by Andrew G. Gillette dated June 3, 2016, revised June 22, 2016, and recorded in the office of the RMC for Charleston County in Book S16, Page 0154 on June 24, 2016 (Pl. 17).

any transfer of property relying on it. The court is bound by res judicata to conclude that the Trust and its successors cannot challenge the location of the common boundary line asserted by Ms. Blank in the prior litigation.³ This is so, despite the court's finding that the boundary line asserted by the Trust is more compelling and that people affiliated with the Trust have made diligent and reasonable efforts to resolve the dispute. The common property line of Lots 11 and 12 is hereby established as the one designated as the "boundary based on existing monuments on 5-6-05" shown on the plat of D.E. Franklin, P.E. and L.S., Eco Engineering and Construction, dated January 6, 2016. The court finds no need to invalidate the Gillette plat, but directs the Register of Mesne Conveyances (RMC) and/or Register of Deeds (ROD) of Charleston County to note a reference to this order on the recorded Gillette and Franklin plats, as well as any other documents that are necessary to clarify the title. Counsel for Ms. Blank is to coordinate with the recording officials concerning the documents needing to have the notation, and counsel is to seek subsequent orders necessary to accomplish the notation referencing this order on the real estate records.

WPA
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- (2) The Second Cause of Action is moot. It sought removal of an alleged encroachment by a small portion of a paved driveway. Ms. Blank has abandoned this claim since the Trust removed the pavement from the contested portion.

³ At the start of the trial, the court denied plaintiff's motion in limine to decide the case before hearing evidence and ruled that it would make a decision after it heard all the evidence.

- (3) The Third Cause of Action is for contempt based on the filing of the Gillette plat by the Trust delineating the contested area after the issuance of the order of dismissing the prior case. The court finds for the defendant.
- (4) The court finds for the defendant on the Fourth Cause of Action for slander of title.
- (5) The court finds for the defendant on the Fifth Cause of Action asserting nuisance.
- (6) The First Counterclaim by the Trust is for slander of title. The court finds for the plaintiff, Ms. Blank, based on estoppel and res judicata.
- (7) As to the Second Counterclaim for abuse of process related to the filing of the lis pendens by Ms. Blank, the court finds for the plaintiff.
- (8) The Third Counterclaim is based on tortious interference with contract. The court finds for the plaintiff.
- (9) The Fourth Counterclaim seeks to determine the common property line. Based on res judicata, the line as it relates to these parties and any successors in title is the one asserted by Ms. Blank in the prior lawsuit: the "boundary based on existing monuments on 5-6-05" shown on the plat of D.E. Franklin and Eco Engineering and Construction, dated January 6, 2016.

WPA
#3

BACKGROUND

Ms. Blank is the owner of Lot 11 of Copahee View Subdivision.⁴ Her lot was designated as "No Lot" on the original 1978 subdivision plat (the "subdivision plat").⁵ The subdivision plat noted that survey markers were placed on the various properties.

Ms. Blank acquired Lot 11 in 2005 from Donald W. Horton, whom she hired to build a home on the lot. Mr. Horton hired engineer D.E. Franklin to prepare a site plan setting the proposed location of Ms. Blank's residence in order to obtain a building permit (Def. Ex. 4). Mr. Franklin prepared the preliminary site plan from the subdivision plat without performing a field survey or going to the site.

After the preliminary site plan was submitted and approved, steps were taken to construct Ms. Blank's home. Mr. Franklin went to the property to perform a field survey. He found some issues. First, Lot 11 contained extensive wetlands that were not shown on the subdivision plat, requiring the proposed location of the home to be moved. Second, Mr. Franklin stated that he found markers for all four corners of Lot 11 and determined that the measurements between the boundary markers for Lot 11 (the "No Lot") did not conform to the subdivision plat. He did a revised site plan, but never submitted it to the County for approval. The revision added approximately twenty feet to the frontage line of Lot 11 and moved the house location over toward Lot 12 (Pl. Ex. 2). The Trust's position is that Mr. Franklin inappropriately and unilaterally added to Lot 11, taking land that should belong to Lot 12, so that the Blank home could be moved out of the wetlands.⁶

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⁴ TMS 614-00-00-020.

⁵ The original plat is in Plat Book AL, Page 77, RMC Office for Charleston County [Def. Ex. 2 and see Pl. Ex. 27(a)].

⁶ This is what the Trust claimed as the basis for its trespass suit filed in 2015. In opposition to that claim, Ms. Blank submitted, among other things, Mr. Franklin's affidavit dated April 22, 2016, which clearly set out her position.

All of this came to a head following the purchase of Lot 12 by the Trust in 2013. At that time, the residence of Ms. Blank had been constructed for around seven years. Legal descriptions in both parties' deeds made reference to the same approved and recorded subdivision plat.

The decision to purchase Lot 12 and construct a home thereon was explained by the testimony of Mr. Gordon Timmons, the settlor of the Trust, who is a developer with knowledge about building projects. He was an impressive witness. A home was needed for the daughter of Mr. and Mrs. Timmons. Parker Land Surveying was hired to survey Lot 12, and it determined that improvements that were supposed to be confined to Lot 11 encroached onto Lot 12. (See Pl. Ex. 24 showing encroachment of the Blank home by 5.25 feet onto Lot 12.)

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Ms. Blank's surveyor, Mr. Franklin, was notified of this finding. He went to the property, and he testified that a corner boundary marker that he located previously had been pulled out of the ground. He reset it. Additional surveyors were hired by the Trust, and they did an extensive reconstruction of the subdivision in order to determine the boundary line between Lots 11 and 12. The surveyors aligned with the Trust and Ms. Blank's surveyor are in dispute as to the proper boundary.

A comparison of Franklin's first and second site plans shows that the front property line of Lot 11 was first stated by Franklin to be 50.5 feet based on the subdivision plat, and that became 74.03 feet based on his eventual field survey (Pl. Ex. 2). Additionally, the rear property line of Lot 11 first stated by Franklin to be 191.81 feet based on the subdivision plat (Def. Ex. 4) became 221.58 feet (Pl. Ex. 2). Franklin testified that this

substantial expansion of the width of Lot 11 (Def. Ex. 4 and 27(a)) was proper because old iron pipes were located at a distance that was twenty or more feet greater than shown on the 1978 subdivision plat. Surveyors rely upon a hierarchy of indicia of boundary lines, and in that hierarchy, monuments located on the property rank higher than distances shown on plats. Therefore, it is Ms. Blank's position and that of her experts that Mr. Franklin's June 6, 2005 site plan takes precedence over the 1978 subdivision plat based on the claim that Mr. Franklin discovered the monuments designating all four corners of Lot 11.

The Trust hired two independent survey companies that surveyed the entire street (Macoma Drive) in order to locate monuments and accurately determine the boundaries. They found that the boundaries of Lot 11 and Lot 12 matched the recorded 1978 subdivision plat, not what Mr. Franklin claims. The subdivision plat had been approved by Charleston County, and the deeds into Ms. Blank and the Trust each referred to that plat. The two independent surveyors hired by the Trust testified that they located many monuments, including original permanent concrete monuments used in the subdivision to establish the location of streets.

Since the surveyors could not agree, the Trust changed the location it had planned for the residence on Lot 12 and began construction. Due to setback requirements, the Trust believed that Ms. Blank would need a strip of Lot 12 that is 10.25 feet in width to resolve what the Trust perceived to be an encroachment. (See Plaintiff's Exhibit 24 establishing a setback five feet in width from the asserted encroachment.) An offer was made by the Trust to convey this strip to Ms. Blank. She has consistently refused what the court deems to be reasonable efforts by the Trust to resolve the dispute.

The prior lawsuit was based on trespass, filed by the Trust against Ms. Blank on May 27, 2015. In that lawsuit, the Trust asserted that Ms. Blank's home, fence, and driveway extended over the common boundary line (Pl. Ex. 9). That Complaint sought to have Ms. Blank move her home from property that the Trust claims to be its land. Ms. Blank responded by denying any encroachment and asserting a different boundary line (Pl. Ex. 10). In paragraph 19 of her Answer in the prior case, Ms. Blank averred that three separate surveys and two site plans confirmed the location of the common boundary line to be as she claimed. She attached exhibits showing the boundary line she asserted.

Discovery was conducted in the previous suit. An injunction was entered to prevent construction on the disputed strip, and a summary judgment motion was heard, with both sides submitting affidavits and deposition testimony. Surveyors offered their differing interpretations of how the common boundary line should be established (Pl. Ex. 13 & 14). Summary judgment was denied. On the day that the trial was scheduled to commence, discussions took place between the attorneys and the court, in consultation with the parties.⁷ Ultimately, the Trust agreed to dismiss its case, which was changed to a dismissal with prejudice at the insistence of Ms. Blank's counsel (Pl. Ex. 16). A rather non-specific Form 4 order of dismissal with prejudice was entered on June 7, 2016. No directives were provided as to how the property line would be established of record.

Because of the difficulties with Ms. Blank, the Trust decided to sell the residence on Lot 12. At that point, representatives of the Trust believed that the boundary line dispute had not been resolved.

⁷ Mr. Timmons testified that the Trust's representatives and witnesses appeared for the trial, but were told that the hearing officer did not have enough time set aside for the trial. He described the discussions about dropping the case in that context.

Two weeks after the dismissal of the prior suit, the Trust recorded the Gillette plat which used the same common boundary line that the Trust had asserted in the previous case, plus a dotted line to designate the proposed compromise boundary line (Pl. Ex. 24). The area that the Trust had offered to convey by quitclaim deed to Ms. Blank is designated on that plat as the "Quitclaim area." Ms. Blank contends that this plat should be invalidated and injunctive relief issued to prevent any sale or transfer of Lot 12 relying upon it. The Trust asks the court to establish the line.

Ms. Blank contends that the Trust filed the Gillette plat to mislead and to cause a title examiner and potential purchasers to believe that she had abandoned her claim to the Quitclaim area, creating a cloud on her title. Ms. Blank also asserts that the Trust insisted that the third-party purchasers of Lot 12 buy the disputed area as a condition for closing on the property (Pl. Ex. 29). The Trust presented evidence that it filed the plat not to mislead, but to do the opposite: to reveal what it understood to be the true status and reflect that the determination of the validity of title to the Quitclaim area had not been finalized, as well as to encourage resolution of the disagreement. This disputed area designation was ultimately used to allow the Trust to transfer the residence to third-party purchasers and delineate what land was being conveyed in fee simple and what was still in dispute, as explained below.

In the present lawsuit, the Trust takes the position that its representatives understood the dismissal of the prior case only to be conclusive on the issue of not requiring Ms. Blank to move her house. The Trust has consistently maintained that it will quitclaim the area to Ms. Blank at no cost, though the Trust believes that the disputed area is part of Lot 12 and owned by the Trust.

On August 9, 2016, Ms. Blank initiated the instant lawsuit against the Trust in an effort to block the sale of Lot 12 to James and Holly Patrick (Complaint paragraph 12). On September 14, 2016, days before the closing, the Trust moved to require Ms. Blank to amend or cancel her lis pendens so that her lawsuit only encumbered the area of land actually in dispute. That relief was granted by Order Amending Lis Pendens filed September 14, 2016. The Order and a plat attached thereto identified the area in dispute as "Quit Claim Area 3,636.41 SF." The Trust agreed at that time to "hold title to the disputed portion of Lot 12 (the part highlighted in yellow) during the pendency of this instant action and to comply with any order issued in this case which determines ownership of all or any part of the disputed portion of Lot 12."

In order to close the sale to the Patricks, the Trust removed the disputed area from the contract to sell, and the Trust had to reduce the purchase price by \$15,000.00, with an agreement that the Patricks will purchase the Quitclaim area, should it be determined by the court that the area is owned by the Trust.

Jennifer Smith, Esquire, a title insurance agent, testified on behalf of Ms. Blank that the recorded Gillette plat affects the insurability of Lot 11 and that steps need to be taken to cure the cloud.⁸ Ms. Blank seeks to have the court establish that the boundary line shown on the Gillette Plat is identical to the boundary line shown on the last survey of Mr. Franklin, but is misleading in showing a disputed area. Ms. Blank wants an order requiring the Trust to provide a quitclaim deed to the disputed area.

In addition to the dispute over the correct common boundary, there is a claim by Ms. Blank for damages related to surface water. Ms. Blank is an artist who creates

⁸ Title insurance is in place, but claims have been denied based on a survey exception.

stained glass pieces. She constructed a studio under her elevated home and seeks damages that she asserts to have been caused by the Trust's diversion of water onto her property and flooding of her studio. She also wants the Trust to pay for the construction of a swale.

Ms. Blank described her Lot 11 as being approximately 50% wetlands. Her home is located in an "AE flood zone, elevation 14." There is conflicting evidence from Mr. Franklin detailed below, but the court finds the more credible evidence to be that, in this flood zone, the ground floor should only be utilized for parking. The subdivision plat called for the entire "lot to be filled to a minimum of 1' above the bottom of the roadway ditch (at the right-of-way line) and graded to drain in accordance with the County road code." Her Lot 11 was not raised and has no roadside ditch as described in the subdivision plat. Since there is no ditch, she claims that those subdivision requirements regarding grading do not apply. However, the absence of a ditch and lack of creating elevation meant that surface water was left to follow its natural path off the street through Lot 11 to the wetland area. She testified that she had never had flooding prior to the construction on Lot 12, even when there was a 1000-year flood event.

As part of the construction on the Trust's property, efforts were made to have a swale graded along the area on or near the common boundary to guide surface water from Lots 11 and 12 to the back of those lots, into the wetlands of Lot 11 and the 70-foot-wide drainage easement at the rear of the subdivision. Ms. Blank would not agree to allow the swale to be built. She objected to the removal of the small amount of vegetation and trees necessary to construct the swale, claimed that the property over which the swale would run is hers, and did not want trees removed because of birds nesting in them.

A short concrete driveway was built from the street to the residence on Lot 12, and it runs very close to the disputed boundary line. Because Ms. Blank would not allow the proposed swale to be built, Mr. Timmons testified that steps were taken to divert water away from Lot 11 across and to the other side of Lot 12 by sloping the driveway and grading the front lawn to carry the water around the opposite side of Lot 12 and to the lower elevation.

Ms. Blank and her expert witness, Mr. Franklin, testified that the concrete driveway diverts water onto Lot 11. She also entered photos, taken during construction before finish grading was done, showing puddles and standing water. She testified and submitted photos showing water marks on her home and the wooden studs in her studio that she claims to have been caused by the water diverted from the Trust's property.

She claims that rainwater accumulating on the driveway flows to her side yard during any storms that produce in excess of three inches to four inches of rain, causing her studio to flood. She asserts that the concrete driveway is about four inches above the level of her yard (See Pl. Ex. 4I).

Ms. Blank testified that her studio became flooded by rainwater flowing off the driveway in the fall of 2016. Significantly, her testimony about water intrusion was almost exclusively related to catastrophic events such as Hurricane Matthew. She indicated that she was unable to obtain compensation from her flood insurance policy because the damages were not caused by flooding. She said that she has been inconvenienced by having to store all of her supplies and materials off the floor to keep them from being damaged. She claims this interferes with her normal work procedures. Records from the

National Weather Service/South Carolina Department of Natural Resources were entered into evidence to show the rainfall amounts and the impact of hurricanes.

David Franklin, the surveyor who prepared the site plans, is a civil engineer and has experience in drainage projects. He testified that he recorded elevations at the property in 2005. Based upon that data, Mr. Franklin stated that the natural drainage of Lots 11 and 12 prior to any construction was toward the drainage ditch in the rear. He prepared the house foundation plans for Lot 11 and stated that the house was required to be elevated in order to be built in a flood zone. The house is up on pillars similar to the construction of beach houses along the coast. He said that construction of Ms. Blank's house did not interfere with the natural flow of drainage to the rear. He maintains that she was permitted to enclose the area underneath her home on the concrete pad based upon the current Flood Zone designation.

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Mr. Franklin stated that the driveway on Lot 12 is an impediment to the natural flow of storm water. He testified that rainwater now flows across the driveway onto Lot 11, which significantly alters the natural flow of storm water to the rear. In addition, he believes that new vegetation and a higher grade in the rear of Lot 12 are causing water to pond until it rises enough to discharge into the rear ditch. (See Pl. Ex. 20.)

In Mr. Franklin's opinion, the design for storm water management for Lot 12 is deficient under the Charleston County storm water management standards in three areas: the impact on downstream structures, the runoff not being controlled to predevelopment levels and or natural grades, and detention structures are not in use to prevent adverse downstream effects (Pl. Ex. 25, Charleston County Permitting Standards and Procedures Manual at 2-10, 3-2 and 3-11). What he indicated that he found on Lot 12 was that the

driveway was constructed very near the property line so that water running off the driveway onto Lot 11 causes a significant increase in flow which did not exist before the driveway's construction.

Mr. Franklin's proposed solution to remediate the flooding from Lot 12 is to construct a swale along the common property line, shown as a red dotted line on the August 17, 2016 plat prepared by Andrew Gillette (Pl. Ex. 20). The swale would run from the street to the back ditch at a .5 percent slope and be lined with sod to prevent erosion. Mr. Franklin estimates the cost to construct the swale and remove barriers to proper drainage at \$23,250.

WAC #13
Mark Strong, a contractor involved in construction for the Trust stated that he did not see any drainage problems. While he was pouring the driveway, he proposed to construct a swale and open the flow of water by removing trees in the rear. Ms. Blank would not agree and told him not to touch the trees. Mr. Timmons testified in line with Mr. Strong that Ms. Blank is the reason that no swale was constructed, so they had to address the water flow by sloping the driveway and grading to carry water to the opposite side of Lot 12. Ms. Blank testified that she was consulted by the contractor during the grading of the site, but doesn't remember anyone saying anything about a swale having to be constructed. She did insist that the trees in the rear be preserved due to her concern about certain birds which inhabited them.

Ms. Blank testified that she lost \$8,000.00 in materials and \$5,000.00 in income because she couldn't complete commissioned works of art due to flooding. The Trust objected to the introduction of this evidence based on the failure to plead special

damages. The ruling was taken under advisement, and the court now rules that the evidence should be considered and is admissible.⁹

She made a claim for an artist's relief grant, for which she sought \$8,000.00 and received some compensation. FEMA denied Ms. Blank's flood claim because the area involved is on the ground floor in violation of the AE-14 flood zone. The weather data admitted as evidence established that Hurricane Matthew was a 100-year rainfall event (Pl. Ex. 8).

FIRST CAUSE OF ACTION – DECLARATORY AND INJUNCTIVE RELIEF

Ms. Blank contends that principles of res judicata and collateral estoppel, which prevent re-litigation and preserve the finality of judicial decisions, are dispositive of the First Count. This Court agrees. "A dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. . . . [.] Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein." Nunnery v Brantly Construction Co., 289 S.C. 205, 209, 345 S.E. 2d 740, 743 (Ct. App. 1986) (citation omitted). When the Trust dismissed its Complaint for trespass, with prejudice, the location of the common boundary line was clearly in dispute. The Trust became barred from claiming that the common boundary line is different than what Ms. Blank

⁹ Aspects of the damages claimed, particularly those to real and personal property, appear to qualify to be considered as general damages under this nuisance claim. Further, the court finds that it should allow amendment under Rule 15(b), SCRPC, to conform to the evidence and enable the plaintiff to seek these damages as the issue does not appear to be a surprise, there has not been a sufficient showing of prejudice to the Trust, which did not seek through discovery to more clearly define the damages sought, and the presentation of evidence and the cause of action appear to be "subverted" thereby.

claimed in that action. [See Bagwell v. Hinton, 205 S.C. 377, 400, 32 S.E.2d 147, 156 (1944)] (“ to establish res judicata: (1) The parties must be the same or their privies; (2) the subject matter must be the same; and (3) while generally the precise point must be ruled, yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but of what might have been decided.”)] All of these elements are present here.

The Trust's position is too restrictive in maintaining that the only issue established in the prior case was that Ms. Blank's house did not encroach on the Trust's property. The principle of res judicata applies to all issues necessary to a disposition. Laughon v. O'Braitis, 360 S.C. 520, 527, 602 S.E.2d 108 (Ct. App. 2004) (stipulation of dismissal with prejudice in probate action bars relitigation of issues necessary to determine earlier action). Issues that are necessary to an adjudication on the merits in the first action are also res judicata in the second action, even if the new claim is based upon a different claim (46 Am. Jur. 2d Judgments § 539 (1994)).

When a trespass claim is based upon a claim of ownership, the location of the boundary line is in issue. “An action of ‘trespass to try title’ puts the title in issue and a finding determines not only the issue of trespass, but also of title.” Miller v. Leaird, 307 S.C. 56,61 ,413 S.E.2d 841,843 (1989). While the Trust contends that it did not make title an issue in the first action, Ms. Blank's Answer asserted contrary title and the evidence developed defined her claim in submissions to the court prior to dismissal. Title was in and is in issue. [See Little v. Little, 223 S.C. 332,337, 75 S.E.2d 871, 874 (1953).]

The boundary line location was necessary to a determination of the trespass issue. By relying upon ownership (not possession) of the property within the Trust's asserted

boundary line, the Trust is now bound. Bell v. Bennett, 307 S.C. 286, 292, 414 S.E.2d 786, 790 (Ct. App. 1991) (applying res judicata when the broad issue in the prior case was the boundary line between the identical parcels of property at issue in the present case); Parker v. Legett, 13 Rich. 171, 173 (1861) (title to an entire tract which was established in a prior litigation involving an alleged trespass on only a small portion of the tract was conclusive against the same party in a subsequent litigation over the entire tract).

Finally, even if trespass is no longer an issue, collateral estoppel prevents a party from re-litigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action based upon a different cause of action. See Dunlap v. Travelers Ins. Co., 223 S.C. 150, 157, 74 S.E.2d 828, 831 (1953). See also Jinks v. Richland County, 585 S.E.2d 281, 285 (2003); Am. Jur.2d Judgments § 482 at 645 (1969); Am. Jur.2d Judgments § 222 (1994) (a consent judgment has substantially the same effect as any other judgment rendered in the ordinary course).

The court is compelled to rule that the common boundary line between Lot 11 and Lot 12 is as set forth in the Site Plan of David Franklin referenced above, as between these parties and any successors in interest.¹⁰ This is despite the court's view that the greater weight of evidence supports the property line being where the Trust claims it to be.

¹⁰ The previous denial of the plaintiff's Motion for summary judgment in this case does not preclude this Court from considering the same legal issues previously raised therein since that decision is not appealable and does not become the law of the case. Olson v Faculty House of Carolina, Inc., 354 S.C. 161, 168, 580 S.E. 2d 440, 44, (2003).

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THIRD CAUSE OF ACTION – CONTEMPT

Ms. Blank maintains that the Trust's filing of the Gillette plat after dismissal of the prior lawsuit amounts to the recordation of a false and misleading description of the common boundary and is in contempt of the Order of Dismissal.¹¹ The court disagrees. The delineation of the disputed area appeared to be designed to aid in resolving a confusing status of the title, since the parties utilized a non-specific Form 4 order and did not follow up on the dismissal with a more specific order or transfer documents.

The Trust's representatives were operating under a mistaken belief about the impact of the dismissal with prejudice of the prior lawsuit, which is understandable because the matter was far from clear. The Trust made a reasonable decision to try to sell the property, and the property records in existence were imprecise as to what could be conveyed in fee simple. There is no proof of improper intent by the Trust in designating the "Quitclaim area" on the Gillette plat or in filing that document. Ultimately, this court believes that the Gillette plat has proven helpful to the public, the purchasers, and to these parties.

This court finds it a stretch to assert that anyone seeking to determine the lines or the status of title to these parcels would believe that Ms. Blank had abandoned any claim to the land within the Quitclaim area based on the filing of the plat. No quitclaim deed is on record. No evidence has been presented that the filing of the Gillette plat affected any

¹¹ S.C. Code Ann. Section 14-5-320 states: "The circuit court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same." "A party seeking a contempt finding for violation of a court order must show the order's existence and facts establishing the other party did not comply with the order." Abate v. Abate, 377 S.C. 548, 553, 660 S.E.2d 515, 518 (Ct. App. 2008). "Contempt results from the willful disobedience of an order of the court, and before a person may be held in contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based." Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982).

tax valuation or assessment. The greater weight of the evidence is that the dismissal of the prior action left a situation where the question of title, including the common boundary line, would be subject to an exception by a title examiner, as Ms. Blank's own expert, Ms. Smith, basically confirmed as discussed below.

This record does not demonstrate willful disobedience of the court's prior order. Contempt is a discretionary power, and this court declines to hold the Trust in contempt. There has been no showing that the Trust filed the plat to obstruct, degrade, and undermine the administration of justice. Brandt v. Gooding, 368 S.C. 61, 630 S.E. 2d 259 (2006).

Compensatory contempt is money awarded to a party who is injured by a contemnor's action to restore the party to his original position. Curlee v. Howle, 277 S.C. 377, 386, 287 S.E.2d 915, 920 (1982). There being no finding of contempt, the claim by Ms. Blank for legal fees and costs associated with this action is denied.

FOURTH CAUSE OF ACTION – SLANDER OF TITLE

Ms. Blank alleges that the Trust committed a slander of title by the filing the Gillette plat after dismissal of the lawsuit. The court disagrees.

Jennifer Smith, Esquire, a title agent, who was also the attorney for Ms. Blank in the former action, testified that the recorded plat affected the insurability of Lot 11 and that certain steps need to be taken to cure the problem. The steps include establishing that the boundary line shown on the Gillette Plat is identical to the Franklin boundary line and having the Trust provide a quitclaim deed to the disputed area. Taking this position of the need for additional steps which were not referenced in the Form 4 dismissal or ever required of the Trust by Ms. Blank, undermines her slander of title claim. In practical

terms, the boundary dispute persisted following the dismissal with prejudice of the 2015 Timmons v. Blank action.

Slander of title requires evidence of malice and special damages. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 22, 567 S.E.2d 881 (Ct. App. 2002). "Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights." Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). "[M]alice merely means a lack of legal justification and is to be presumed if the disparagement is false, if it caused damage, and if it is not privileged." Home Invs. Fund v. Robertson, 10 Ill.App.3d 840, 295 N.E.2d 85, 87 (1973).

The court disagrees with Ms. Blank's claims that recording the Gillette plat denoting the Quitclaim area was malicious, unreasonable, or unjustified. She points out that she had rejected the same dotted line shown on the plat over a year earlier and then again on the day scheduled for trial of the first lawsuit, but that does not establish in any way that recording the plat was done in willful disregard of Ms. Blank's rights.

The evidence supports the conclusion that the Trust was attempting to follow the legally required procedure to establish a boundary line of record and have the County approve and record a plat that separated out the disputed area as per the September 14, 2016 Order Amending Lis Pendens. The Trust determined how much of Lot 12 would need to be given to Ms. Blank in order for the existing Blank home to meet setbacks, if the Lot 11 boundary were expanded. At the Trust's expense and effort, it isolated the disputed area and referred to it as the Quit claim area in the plat which was approved. This was done so that Lot 12 could be sold without the conveyance including any of the

property involved in the boundary dispute. The Trust was willing to and intended to convey the disputed area to Ms. Blank for free.

The order of dismissal with prejudice did not include any requirement that the Trust perform any affirmative act to solve the boundary dispute. Gordon Timmons took it upon himself to initiate a boundary dispute resolution process, which the court accepts as being done in good faith and to attempt to avoid litigation such as this action.

The court rejects Ms. Blank's assertion that this was done to maximize the value of the property of Lot 12 or require the purchaser to agree to buy the disputed land. It has not been proven how delineating an area of disputed title made potential purchasers think that Lot 12 was more valuable than just leaving the existing plats in place. Isolation of the disputed area did not financially benefit the Trust, except that it allowed a means by which the newly-constructed residence could be sold. Indeed, the Trust had to reduce the sales price of Lot 12 by \$15,000.00 in order to isolate the disputed area from the land being conveyed to the Patricks.

When the Trust sought to sell the home constructed on Lot 12, it sought an order to amend the lis pendens to prevent selling any part of the disputed area. Transferring the Trust's interests, if any, in the disputed area would have only further complicated matters. The actions of the Trust in filing the Gillette plat do not constitute malicious acts intended to cloud Ms. Blank's title to Lot 11.

In the court's view, any reasonable person examining the records related to these properties after the dismissal would conclude that the location of the boundary line had yet to be clearly defined. It has taken years of litigation, days of testimony, a court's

interpretation, and the yet-to-be accomplished following of this court's directives to reach this point regarding establishing the boundary line.

Having failed to establish her slander of title cause of action, the claim for damages, including attorney's fees and litigation expenses, is denied.

FIFTH CAUSE OF ACTION – NUISANCE

Ms. Blank claims a nuisance caused by construction of a concrete driveway on Lot 12 and other grading and landscaping, which is asserted to cause frequent flooding and be a substantial and unreasonable interference with the use and enjoyment of her land. She also seeks the cost of constructing a swale. As previously discussed, she and her expert, Mr. Franklin, testified that the concrete driveway increases the amount of rainfall that accumulates on her property, impedes the natural drainage, and causes water to be cast onto her property due to the higher elevations on Lot 12.

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"The traditional concept of a nuisance requires a landowner to demonstrate that the defendant unreasonably interfered with his ownership or possession of the land." Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct.App.2001). Nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of [her] land. Id. "Nuisance law is based on the premise that [e]very citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property." Clark v. Greenville County, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993)

The nuisance claim has not been proven. First, the more credible evidence is that the driveway, grading, and landscaping on Lot 12 do not cause considerable amounts of storm water to be cast onto Lot 11. The driveway is small, and it is simply not credible

that such a structure (or anything else the Trust has done) causes water to pool, pond, or be cast upon Lot 11 in amounts constituting a nuisance.

Second, the greater weight of evidence supports the determination that, when Ms. Blank rejected the proposal to construct the exact type of swale that she now asserts to be needed, the Trust took adequate steps to route surface water to the other side of Lot 12, away from Lot 11.

Third, surface water is a common enemy. The plaintiff has the burden of proof as to her nuisance claim. Almost all of the testimony from Ms. Blank about water intrusion concerned a catastrophic hurricane or periods of massive rainfall. The court acknowledges that she said there was no water intrusion before the driveway was constructed, even during a 1000-year flood. But, her lot is 50% percent wetlands, by her estimation, with a wide drainage easement behind her lot. The house is constructed in a flood plain zone, and while there is conflicting evidence about whether she was permitted to construct her studio on the ground floor, the evidence shows that it is equally or more likely that she constructed the studio in a manner that subjected it to occasional flooding during large amount of rain. It has not been proven that construction on Lot 12 did anything to substantially enhance the frequency of surface water intrusion.

As to her expert's opinion about the cause of the water intrusion, a fact finder is allowed to accept or reject the opinions of an expert witness, in whole or in part. The court may also consider any interest or bias of a witness. Mr. Franklin was combative and dismissive at times during his testimony, though the court does not question the sincerity of his opinions. He was the one who prepared the site plans that are at issue here, the second being an unapproved amended site plan which moved the location of the

proposed house away from wetlands by making dramatic changes to the property dimensions. There are equally qualified surveyors who disputed the testimony of Mr. Franklin concerning where monuments were present. An experienced developer, Mr. Timmons, and the contractor, Mr. Strong, disputed his testimony about water flow, stating that the driveway was sloped away from Lot 11 and that grading was done to carry surface water away to the opposite side of Lot 12.

Having determined that Ms. Blank has not met her burden of proof as to nuisance, she is not entitled to damages. It is not necessary to address the defenses of waiver and estoppel related to the nuisance claim. Her claim to require the Trust to pay for construction of a swale fails. The greater weight of the evidence supports the conclusion that the Trust properly handled the drainage of Lot 12. The provisions for surface water drainage were constructed entirely on Lot 12¹² and were completed and inspected pursuant to a permit issued by Charleston County.

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COUNTERCLAIMS¹³

FIRST COUNTERCLAIM – SLANDER OF TITLE

This counterclaim is based on the assertion that Ms. Blank falsely claimed to own a significant portion of the Trust's property. Ms. Blank had reason to believe that

¹² If there is a claim of trespass, the evidence does not support it. Mr. Franklin testified that no part of the improvements constructed by Timmons on Lot 12 encroached upon Lot 11. Therefore, Ms. Blank's claim for trespass against Timmons must fail as trespass is an invasion of the interest in the exclusive possession of land as by entry upon it. *Babb v. Lee County Landfill, SC LLC*, 405 S.C. 129, 147 S.E.2d 468 (2013).

¹³ The parties each submitted proposed orders. The Trust's proposed orders did not address its counterclaims for affirmative relief except to the extent of overlap with the Complaint's requests for relief, but each is briefly discussed here.

the common boundary could not be re-litigated based on res judicata. The elements of slander of title cited above have not been proven.

SECOND COUNTERCLAIM – ABUSE OF PROCESS

Abuse of process is asserted by the Trust based on Ms. Blank naming of third-party purchasers in the lis pendens, (Def. Ex. 11), but not the Complaint, and by her not limiting the description in the lis pendens to only the disputed area. Abuse of process requires an ulterior purpose and a willful act in abusing legal process that is not proper in the conduct of the proceeding. Huggins v Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693(1967) Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required. There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. See Sierra v. Skelton, 307 S.C. 217, 414 S.E. 2d 169 (Ct. App., 1992); Rycroft v Gaddy, 281 S.C. 119, 314 S.E. 2d 39 (Ct. App. 1984)

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“The purpose of a notice of pendency of an action is to inform a purchaser or encumbrancer that a particular piece of real property is subject to litigation. A properly filed Lis Pendens binds subsequent purchasers or encumbrancers to all proceedings evolving from the litigation. Generally, the filing of a Lis Pendens places a cloud on title which prevents the owner from freely disposing of the property before litigation is resolved.” Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 16-17, 567 S.E.2d 881,889 (Ct. App. 2002). The Patricks were the intended purchasers of Lot 12. Therefore, the filing of the lis pendens was a proper use of the process and the naming of the Patricks in the lis pendens was not an abuse of process, but legitimately put them on notice.

The initial lis pendens referenced the plat that the Trust had recorded claiming the earlier boundary line (Pl. Ex. 17, Def. Ex. 11). The failure of Ms. Blank to narrow the description was not an abusive use of a lis pendens. [See S.C. Code Ann. Sect 15-11-10]. Consent was withheld consent to amend the lis pendens until Mr. Gillette confirmed that the boundary line established by Mr. Franklin was the same as the line shown on the Gillette Plat. [See Plaintiff's Opposition to Defendant's Motion to Cancel or Amend Lis Pendens at 3.]

No evidence was presented of an ulterior motive or willful act not in furtherance of the process. See Southern Glass & Plastics Co. V. Duke, 367 S.C. 421, 430-431, 626 S.E. 2d 19, 24 (Ct. App. 2005). A failure to act cannot be the basis for an abuse of process. Huggins v Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693(1967).

The action for abuse of process was not proven.

THIRD COUNTERCLAIM – TORTIOUS INTERFERENCE WITH CONTRACT

Tortious interference with contract requires knowledge of a valid contract and an intentional procurement of a breach and a lack of justification. Eldeco, Inc. v. Charleston County School Dist., 372 S.C. 470, 642 S.E. 2d 726 (2007). The alleged interference must be willful and unjustified. Keels v Powell, 207 S.C. 97, 34 S.E.2d 482(1945).

Here, any discussions with third-party purchasers for Lot 12 that Ms. Blank may have had or filings she made related to the boundary line and the results of earlier litigation were privileged and authorized because there was an existing dispute over the property line. There is not sufficient evidence of any facts to support the allegation that Ms. Blank willfully and without justification interfered with the alleged contract of sale. In the absence of such facts, this Court must dismiss this counterclaim. Hansen v. DHL

Laboratories, Inc., 319 S.C. 79, 80, 459 S.E.2d 850,851 (1995); SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 497,392 S.E. 2d 789,792 (1990).

FOURTH COUNTERCLAIM – DECLARATORY JUDGEMENT AS TO BOUNDARY

The Trust, like Ms. Blank, seeks a declaration determining the boundary line between the parties. The plaintiff has established that the prior case determined the boundary line as a matter of res judicata, and the court's previously stated finding as to the common boundary is adopted on this counterclaim.

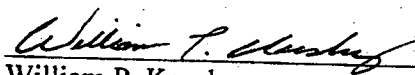
THEREFORE, IT IS ORDERED:

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1. As to the First Cause of Action and the Fourth Counterclaim, the common property line of Lots 11 and 12 is established as the one designated as the "boundary based on existing monuments on 5-6-05" shown on the plat of D.E. Franklin and L.S., Eco Engineering and Construction, dated January 6, 2016. The Trust is directed to deliver a quitclaim deed of the disputed area to Ms. Blank within 45 days of the mailing of a copy of this order to the Trust's attorney by the Clerk of Court. The attorney for Ms. Blank is to coordinate referencing this order on any recorded plat or deeds deemed necessary to clarify the title, as directed in this order.

2. The Second Cause of Action in the Complaint is dismissed as moot.

3. Relief is denied on all other causes of action and counterclaims.

AND IT IS SO ORDERED.


William P. Keesley
Presiding Circuit Court Judge

June 8, 2019