THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Circuit Court Judge William P. Keesley

CASE No. 2016- CP-10-4122

MICHELE BLANK .....Appellant

Vs.

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

BRIEF OF APPELLANT

Edward A. Bertele
S.C. Bar No. 72521
1812 Pierce Street
Charleston, SC 29492
843-471-2082
ebertele@msn.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

South Carolina Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err by dismissing the Slander of title claim?

2. Did Appellant establish a prima facie case of slander of title?

3. Did the Trial Court err as a matter of law in finding that the boundary line was still uncertain and did its finding cause other issues to be tainted requiring reversal?

4. Did Respondent file the plats under a mistake of law?

5. Were the filing of the plats justified as a matter of law?

6. Did lack of insurability establish slander of title?

7. Did the Trial Court err in dismissing the nuisance claim as a matter of law?

8.Did the Trial Court improperly rely upon excluded evidence requiring reversal ?

9. Did the Trial court err by admitting evidence not disclosed in discovery and was Appellant prejudiced?

10. Were the Trial Court's findings of fact supported by credible evidence ?

11. Did the Trial Court err by rejecting Appellant's expert testimony as not credible?

12. Did the Trial Court err by ignoring evidence of a per se nuisance?

STATEMENT OF THE CASE

In August 2016, Appellant filed a three count Complaint to enforce a 2016 Judgment of Dismissal with Prejudice of a trespass action previously filed by Respondent. The First Count alleged that Appellant owned Lot 11, Copahee View Subdivision; that Appellant obtained a Site Plan prepared by David Franklin, P.E. & L.S. to have a dwelling constructed thereon; that a dwelling unit was constructed which was within the boundary lines contained in the Franklin Site Plan and which became the Appellant's principal residence. Complaint at Paras.1-2. The Complaint further alleged that in 2013, Respondent acquired Lot 12, and obtained a Preliminary Plat from Parker Land Surveying, LLC ("PLS") that relied upon an inaccurate methodology and incorrectly indicated that Appellant's residence encroached upon Lot 12. Id. Para. 3 & 4. The Complaint alleged that in May 2015, Respondent filed a one count Complaint for

trespass, Timmons v Blank, 2015CP10-3013, alleging that a portion of Appellant's dwelling encroached upon Respondent's property as shown on the Preliminary Plat. Appellant answered denying any encroachment and asserting that her boundary was as established by Franklin. Id. Para. 5.

The First Count further alleged that on June 2, 2016 Respondent voluntarily dismissed the earlier Complaint with Prejudice, Id. Para. 7. Further that Respondent shortly thereafter directed PLS to submit a Plat of Lot 12 (the Subject Plat) for approval to the Charleston County Planning Commission and the Subject Plat was approved and recorded by the Charleston County RMC. Id. Para. 8. The Subject Plat contained the identical boundary line between Lot 12 and Lot 11 upon which Respondent asserted the previous claim for trespass. Id. Para. 9. A portion of the area shown on the subject plat was within boundaries of Lot 11. Id. para. 10. Appellant asserted that Respondent was barred by res judicata from asserting any claim to the boundary line contained in the Subject Plat. Id. para. 11.

The Second Count alleged that Respondent constructed a concrete driveway which encroached upon a portion of Appellant's property. Complaint, Para. 17. The Third Court alleged that Respondent was in Contempt of the Judgment of Dismissal by recording a false and misleading description of Lot 12 that violated public policy. Id. Para. 24 & 25. Respondent answered denying all allegations and asserted Four Counterclaims: First- Slander of title, Second- Abuse of Process, Third -Tortious Interference with Contract and Fourth- Declaratory relief as to the boundary line location. Answer and Counterclaims, Para. 31-36. Appellant filed an Amended Complaint adding a Fourth Count for Slander of Title based upon the filing of the Subject Plat, Amended

Complaint, Para 28-30; and a Fifth Count for Nuisance because Respondent's driveway was elevated above Appellant's yard which caused rainwater to excessively pool on Appellant's property resulting in damages. Id. Para. 32-33. Respondent answered denying all claims. Answer to Amended Complaint and Counterclaims.

Following service of the Lis Pendens and Complaint, Respondent moved to cancel or amend the Lis pendens on the basis that it prevented Respondent from selling a portion of Lot 12 which was beyond the boundary which Plaintiff claimed was established by res judicata and not subject to the Lis Pendens. Defendants Motion and Affidavits. Appellant opposed the Motion due to uncertainty About the accuracy of the portrayal of Appellant's boundary. Plaintiff's Opposition to Motion, Affidavit of Edward A. Bertele. The Motion Judge granted the Motion and ordered that P-18 be used to describe the area subject to the dispute without prejudice to Appellant's slander of title claims. Order of Sept 14, 2016 at 3.

The case was tried before the Hon. William P. Keesley on April 22-24, 2019. By Order filed June 14, 2019, the Court granted Judgment for Appellant on the First Count, Declaratory Relief as to the location of the boundary line. Order at 2 .The Second Count, Trespass, was deemed to be moot since Respondent removed the portion of her driveway that had encroached. Id. The Court dismissed the Third Count, Contempt, on the basis that contempt was a discretionary power and it would not find that Respondent intended to obstruct the administration of justice. Order at 18. On the Fourth Count, Slander of title, the Court found that there was uncertainty about the boundary line location following the dismissal with prejudice. Order at 2,6,7,8,9,14, 17,18,19 and 20. The Court found that filing the Subject Plat was a recognized method for resolving a

boundary line dispute. Order at page 19. The Court held that the recording of the Subject Plat did affect the insurability of Lot 11, but that the boundary line dispute persisted following the dismissal with prejudice. Order at 18-19. "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." Order at 20.

On the Fifth Count, nuisance, the Court found that the construction of the driveway and grading on Lot 12 did not cause considerable amounts of stormwater to be cast onto Lot 11, Order at 21; that Respondent made adequate provision for drainage, Order at 22; that Appellant's studio was subject to flooding due to the manner of its construction and that the rainfall events which gave rise to the flooding were "occasional" . Order at 22. The Court dismissed all the Counterclaims based upon failure of proof or legal insufficiency. Order at 23-26.

Appellant timely filed a Motion to Amend the Findings and Alter and Amend the Judgment pursuant to R 52(a) and 59(e), S.C.R.C.P. objecting to various findings of fact and conclusions of law relating to dismissal of the Fourth and Fifth Counts. Plaintiff's Motion to Alter and Amend; Plaintiff's Reply to Opposition to Motion to Amend. By Order filed August 9, 2019, the Court denied the Motion. Order. A Notice of Appeal was served on September 4, 2019.

FACTS RELEVANT TO THE ISSUES ON APPEAL

Attorney Jennifer Smith represented Appellant in the purchase of Lot 11. Tr. at page 183, line 17-19; page 186, line 4-12. P-1. Although the subdivision Plat identified Lot 11 as "No Lot", there was a subsequent designation of it as Lot 11 so that a TMS

number to be attached and title transferred. Tr. at page 187, line 4 to page 189, line 10. Attorney Smith also represented Appellant in the earlier case brought by Respondent. Tr. at page 184, line 6-13. The Answer that she filed denying trespass was based upon an earlier survey showing that Appellant's house was correctly placed. Tr. at page 184, line 18-20, page 185, line 9-25; page189, line 22 to page 190, line 13; P-2. P-10. She filed a Motion for summary judgment because she felt the law was clear. Tr. at page 192, line 21 to page 193, line 11; P-13. The basis for the motion was the competing surveys. Tr. at page 197, line 1-15; P-13.

On the day of trial, after settlement discussions between Attorney Smith and Respondent's Attorney, Respondent's Attorney said that Respondent decided to dismiss the case. Tr. at page 198, line 22 to page 199, line 17. Attorney Smith replied that she would accept a dismissal with prejudice. Tr. at page 199, line 18-19. She would not have agreed to a dismissal if the only thing that was resolved was not having to move Appellant's house, since there were other issues involved. Tr. at page 230, line 21 to page 231, line 10. Attorney Lanning did not reserve any rights with respect to the boundary line. Tr. at page 199, line 25 to page 200 line 3. There was nothing more to do. Tr. at page 224, line 20-22.

Attorney Smith is also a title agent and authored a letter dated August 22, 2016 to provide an opinion of insurability of Lot 11 because at that point it was not insurable. Tr. at page 201, line 11-19, line 23 to page 202, line 8. In her opinion, the recording of the Plats of Lot 12, P-17 and P-18, caused the title to Lot 11 to be uninsurable because they were not consistent with the historical records. Tr. at page 202, line 9 to page 204, line 21; page 209, line 19 to page 210, line 8; P-2, P-10, P-20, P-27A. These recordings

occurred after the earlier case was dismissed. Tr. at page 202, line 12- 17; page 223, line 2-18. In order to cure this defect, Respondent would have to quitclaim the area which she was still disputing and obtain a Release from the buyers. Tr. at page 204, line 22 to page 205, line 17. This quitclaim area was identified on Exhibit P-20. Tr. at page 232, line 12 -15. Attorney Smith provided an invoice for issuing an insurability opinion. Tr. at page 205, line 21-25; P-23.

Appellant purchased Lot 11 from the builder and contracted with him to build a house and he provided a survey. Tr. at page 234, line 24 to page 235, line 1; page 235, line 2-22. P-2. Before the house was constructed, she went onto the lot and located the pipes that were at the property corners. Tr. at page 235, line 21 to page 236, line 5. Appellant was present during construction of her house in 2005 and has occupied it since then. Tr. at page 237, line 23-25; page 239, line 10-11. There was not a lot of fill dirt brought in on her lot, just what was needed to fill the building pad of 1000 square feet. Tr. at page 284, line 15-23. There was no roadway ditch in front of the house at that time as the basis for adding fill to the lot. Tr. at page 286, line7-13. The fill could not be added to the entire lot because of the presence of wetlands. Tr. at page 286, line 14-16.

After Respondent purchased Lot 12, Appellant received a proposal from a realtor to move her boundary line based upon what Respondent's site plan showed, which she rejected. Tr. at page 240, line 8-21; page 241, line 4-15; page 242, line 3-14; P-3.

Appellant was present at the trial of the lawsuit filed by Respondent in June 2016, when Respondent's Counsel stated that he was dismissing the case with prejudice. Tr. at page 246, line 2-8; page 247, line 25 to page 248, line 3. She understood that that case was settled in her favor as to the location of the boundary line. Tr. at page 248, line

11 to 249, line 2. After the case was over, Respondent proceeded with construction on Lot 12. Tr. at page 250, line 18-20.

Appellant observed the construction of the house on Lot 12. Tr. at page 254, line 17-20. She saw fill dirt being added to Lot 12 in December 2015 and the driveway being installed on top of the already raised elevation of the property. Tr. at page 251, line 8 -19; page 254, line 4-5. Appellant identified various photos of the site taken during construction, which depicted the higher elevation of the driveway slab above her property and water ponding. Tr. at page 251, line 8 -19; page 252, line 13-21; P-4A,B, C. She identified a photo showing the finished driveway on Lot 12 raised up about 3 1/2" to 4" above her property at her property line. Tr. at page 261, line 11-22; P-4I. She identified a photo taken before Hurricane Matthew which depicts water accumulating to depth of 6" on the left front corner of her Lot 11 adjacent to the driveway. Tr. at page 255, line 22 to page 256, line 13. P-4D. The ponding which is depicted there occurred before Hurricane Matthew and after construction of the driveway and results in mosquitos and is muddy every time it rains. Tr. at page 256, line 22 to page 257, line 11.

Appellant is a stained-glass artist who does all her work in the ground floor studio. Tr. at page 263, line 12-16. She produces custom glass pieces and takes them to art shows. Tr. at page 264, line 9-21. During the entire period from 2005 until 2016, rainfall never flooded Appellant's studio and she was able to carry out her normal business activities, even during the 1000-year storm in September 2015. Tr. at page 254, line 17 to page 255, line 3; page 326, line 4 to page 327, line 3. Since the driveway went in, her yard floods every time it rains. Tr. at page 262, line 2-13.

Appellant's entire first floor studio was flooded up to 6" during Hurricane Matthew in October 2016. Tr. at page 255, line 4-9. She saw the rainwater running off Lot 12 like a waterfall. Tr. at page 255, line 20- 23. She wasn't prepared for flooding because nothing had happened in the past. Tr. at page 255, line 10-15. She identified photos showing the waterline of 6"-7" on her foundation from flooding caused by rainwater during Hurricane Matthew and inside her studio on materials used in her business. Tr. page 257, line 12 to page 258, line 1; page 258, line 23 to page 261, line 5; P-4E, F, G, H. She produced records of custom orders which she was unable to carry out due to Hurricane Matthew. Tr. at page 269, line 13 to page 270, line 4; P-7A, B, C, D, E, F,G.

Her studio also flooded during Hurricane Irma. Tr. at page 268, line 10-15. She spent two days getting ready for Hurricane Irma by taking all her materials off the floor and lower work areas and moving her truck and trailer out to the street. Tr. at page 268, line 10-20.That storm caused her to lose work time and time to cleanup afterwards. Tr. at page 268, line 21 to page 269, line 3.

She identified photos including a recent one dated April 2019 depicting areas where flooding occurs in the front corner of her property area next to the driveway every time it rains. Tr. at page 270, line 5 to page 271 line 9; P-4K,L. Because of what happened after Hurricanes Matthew, she is on edge. Tr. at page 281, line 1-5. She has to watch the weather forecast and any time there is heavy rainfall expected of 2"-3" she has to hookup her trailer to her truck and take them both down the street to a higher elevation to avoid being mired in the mud and she must take everything off the studio floor which is " major pain". Tr. at page 262 line 2 to page 263, line 9. This has caused a

major disruption to her business. Tr. at page 263, line 10-11. She had to take these preventative measures when the rainfall was expected to exceed 2"-3", about 10-12 times in the preceding year, and about ten times in 2017. Tr. at page 279, line 16 to page 280, line 21.

Her income has been affected due to the accumulation of rainfall on her property since the construction of the driveway. Tr. at page 265, line 9-13. She estimates that she lost about $10,000.00 in materials that were damaged in the 2016 flooding and about $4000.00 in income because she was not able to complete projects. Tr. at page 271, line 15-23. She applied for relief from the Crafters Emergency Relief Fund, a private organization, due to the damages from Hurricane Matthew. Tr. at page 266, line 25 to page 267, line 29. P-6A & P-6B. She received only $1185.00. Tr. at page 268, line 5-9; P-6B. She couldn't obtain business property insurance on her stained glass in South Carolina. Tr. at page 324, line 24 to page 325, line 7. P-6A at page 10.

Appellant admitted that her studio is in a flood zone and that she had flood insurance but was denied any coverage for Hurricane Matthew on the basis that there was no "flooding" only rainwater. Tr. at page 263, line 17-20; page 264, line 2-8; page 296, line 21 to page 297, line 2; page 317, line25 to page 318, line 2. She admitted that only the building pad of her house was raised. Tr. at page 284, line 15-23. No other dirt was brought in because her property slopes in the back towards wetlands, Tr. at page 285, line 3-5, but water rarely comes into the rear right corner of the wetlands. Tr. at page 288, line 1-6. The photo showing water on the left side of the driveway does not prove that the driveway drains to the left since that area had not been filled in when the photo was taken. Tr. at page 290 line 9-22; P-4C

Appellant admitted that she had been asked by the builder to allow him to do grading between her property and the driveway and to remove the trees between the two lots and that she didn't want to allow that because of rare birds nesting there. Tr. at page 309, line 7-24. However, Franklin's proposal to remove trees in that same area would only involve a couple of trees not all of them. Tr. at page310, line 13-25.She believed that the swale should be on Respondent's property not hers. Tr. at page 321, line 12-20. She thought that the swale would only remove 2-3 trees and the rest would stay. Tr. at page 322, line 7-23.

Appellant's Counsel submitted the South Carolina Department of Natural Resources Daily Data of the Highest Precipitation for Charleston County during a 24-hour period in the years from 1893 to 2018 and a Narrative concerning the effects of Hurricane Matthew pursuant to R. 1005, S.C.R.E. Tr. at page 272, line 14 to page 273, line 23. P-8 The Court admitted them into evidence over objection following receipt of copy signed by the responsible Official pursuant R. 902, S.C.R.E. Tr. at page 449, line 4-5; page 450, line 16. P-8A & P-8B. The Daily Data indicates that there were eleven (11) days during which rainfall exceeded 2" in a 24-hour period from June 2016 to October 2018. P-8A and P-8B. The highest daily rainfall during 2015 was 9.25" and occurred on October 3, the "1000-year flood". P-8A. The highest daily rainfall in 2016 was 4.36 " and occurred on October 7, Hurricane Matthew. P-8A&B. The highest daily rainfall in 2017 was 4.53" on September 11, Hurricane Irma. P-8A. The Daily Data shows that there were twenty-three (23) days between July 2005 and May 2016 when the rainfall exceeded 2" in a 24-hour period. P-8A.

David Franklin is the owner of Eco Engineering, a full-service engineering company which provides surveying and engineering design including stormwater management services since 1979. Tr. at page 90, line 12-23. He is a licensed professional engineer and land surveyor in South Carolina and other states and holds various builder's licenses in South Carolina. Tr. at page 91, line 2-8.He has been a licensed surveyor in South Carolina since 1980 and is experienced in civil engineering including the analysis of drainage sites and the costs to remediate drainage problems. Tr. at page 91, line 14-24. In 2005, he provided site plans for building residential homes on three lots at the Copahee View Subdivision as well as layout of the residences and elevation certificates for the finished floor elevations. Tr. at page 91,line 25 to page 92, line 16. He prepared the site plan for lot 11. Tr. at page 92, line 23-24. In preparing the initial site plan for lot 11, he utilized the subdivision plat, P-27 which was unusual because it did not contain a certification for lot layout. Tr. at page 92, line 23 to 93, line 16. He prepared the site plan based only upon the subdivision plat and prior to doing any field work. Tr. at page 94, line 3-16.D-4. When he actually surveyed Lot 11 he found that there were wetlands requiring the house to be moved and significant discrepancies between the iron pipes in the field and the subdivision plat so he prepared a new site plan, dated June 6, 2005, to reflect the actual conditions in the field. Tr. at page 94, line 17 to page 95, line 15; D-5. He found all four corners for Lot 11 indicated by an iron pipe which is the best available data. Tr. at page 95, line 11 to page 96, line 8. He found similar discrepancies on the other two lots he surveyed there. Tr. at page 95, line 4-10. He also confirmed the corners of Lot 13, which shared a corner with Lot 12. Tr. at page 96, line 15 to page 97, line 11. He staked the corners of Lot 11 and knows that the house

was located within the lot lines indicated on the site plan. Tr. at page 98, line 3-9. In Franklin's opinion, it was not appropriate for a surveyor to scale off the plat to establish property corners in light of the location of existing corners. Tr. at page 99, line 6-12.

Franklin is familiar with the topography on Lot 11 since the " data collector" he used to perform his survey in 2005 also recorded the lot's elevation.Tr. page 100 line 22 to page 101, line 3. Based upon this data, he determined that groundwater on Lot 11 naturally flowed from the street to the back and toward Lot 12 and that Lot 12 also drained from front to back toward a drainage ditch in the rear. Tr. page 101, line 4-22.

At Counsel's request, Franklin reviewed the current drainage condition on Lot 11 and saw that there were no significant improvements since the house was built in 2005 that affected the drainage; the ground level has been enclosed but that would not have affected the drainage. Tr. at page 101, line 23 to page 102, line 16. He also observed that a new house and driveway had been constructed on Lot 12 which significantly affected the drainage from front to back. Tr. at page 102, line 17 to page 103, line 14. The drainage on Lot 12 now flowed from the house to the street and across the new driveway onto Lot 11 and whatever stormwater came off the roof of the house also flowed onto the driveway and onto Lot 11. Tr. at page 103, line 16-19. These conditions didn't exist before the construction of the improvements on Lot 12 and affected the natural drainage flow on Lot 11. Tr. at page 103, line 20-25.

In response to Appellant's complaints about flooding on Lot 11, Franklin determined that the design of the driveway and the other conditions on Lot 12 were the cause of stormwater backup on Appellant's property. Id. page 106, line 14 to page 107,

line 2. In his opinion,[1] the new driveway was an impediment to natural flow and there was significant vegetation and a higher grade at the rear causing water to pond at the side of the driveway until it gets high enough to discharge into the ditch. Tr. at page 104, line 1-6. Franklin found that the driveway and drainage on Lot 12 were not in compliance with the Charleston County Stormwater Regulations in three areas. Franklin cited to the Charleston County Stormwater Manual, page 210 that stormwater shall be controlled to predevelopment and/or natural grades, which could be controlled by some type of downstream structure to prevent peak flows from a land disturbing activity. Tr. at page 107, line 3 to page 108, line 5.The Charleston County Stormwater Regulations were marked into evidence. Tr. at page 11, line 5-22. P-27 The issues on Lot 12 could have been corrected with proper stormwater design. Tr. at page 108, line3-7. Franklin found that since the driveway was constructed very near the property line, water running off the driveway goes into a swale along the property line and causes a significant increase in the flow from what it was before the development. Tr. at page 108, line 8-15. He prepared a design to remediate the problem by installing as proper swale exiting at the drainage ditch as shown on a survey prepared by Mr. Gillette. Tr. at page 108, line 16 to page111, line 4. P-20. He estimated the costs to remove existing vegetation and create the swale was $23,250. Tr. at page 111, line 24 to page 112, line 20.

Franklin designed the foundation for the house on Lot 11 which was in an "A" flood zone; the house was elevated and it was be illegal to enclose the ground floor. Tr. at

[1] Appellant's Counsel received Franklin's report the morning of the first day of Trial and provided it to Respondent's Counsel prior to the Trial. Appellant's offered to allow a continuance due to the circumstances but Respondent's Counsel instead objected to its admissibility due to lateness and based upon hearsay. Tr. at page 104, line 7 to page 106, line 1. The Trial Court allowed Franklin to testify. Tr. at page 106, line 5-6.

page 115, line 21 to page 116, line 13. The original subdivision plat indicates that all lots were to be filled one foot above the roadway ditch in the front but that was a former Charleston County requirement and Lot 11 was graded one foot above the roadway since there was no roadway ditch in the front to grade above. Tr. at page 117, line 6 -12; page 118, line 3-11. The lot was graded, and the house constructed in accordance with the applicable codes and regulations in effect in 2005. Tr. at page 138, line 8-12. Regarding his opinion as to the location of a swale between the two lots, Franklin stated that the improvements on Lot 12 did not allow sufficient room to install a swale at the property line. Tr. at page 131, line 9-16.

Attorney Chris Lanning represented Respondent in filing a prior complaint for trespass against Appellant. Tr. at page 19, line 6-18, line 21 to page 20, line 9; P-9. The trespass claim was based upon a claim of title to the affected area, as shown on a Plat dated March 27, 2015. Tr. at page 20, line 23 to page 21, line 2; page 22, line 6-17; page 24, line 13-16; P-24. Appellant moved for summary judgment and Respondent opposed the motion based upon a dispute as to the method used in determining the boundary line location. Tr. at page 27, line 14- page 30, line 15. P- 13&14.

When the case was called for trial on June 2, 2016, Attorney Lanning was ready to call surveyors to testify how they surveyed Respondent's property and expected Appellant to do the same. Tr. at page 30, line 19 to page 31 line 9. Respondent decided to dismiss the case with prejudice after conferring with him and he did so in open Court. Tr. at page 31, line 12 – 19. He thought that the consequences of the dismissal with prejudice were that Respondent could not bring an action against Appellant and ask for the same relief because there was no testimony or findings of fact or conclusion of law.

Tr. at page 33, line 6-10; page 34, line 14 to page 35, line 8; page 37, line 18-20. A Form Four Order of Dismissal was entered which did not contain any stipulations or conditions. Tr. at page 41 line 3-16; P-16, Joint Exhibit 1.Attorney Lanning had no knowledge of the filing of any plats subsequent to the dismissal of the case. Tr. at page 37, line 1-9.

Respondent testified that she decided to settle the earlier case by a Dismissal with prejudice because she thought it was appropriate. Tr. at page 158, line 5-9. She told Andrew Gillette to file the Plats, P-17 & P-18 on her behalf. Tr. at page 159, line 16 to page 160, line 1. She said that the purpose of filing the Plat was to confirm the property boundaries that had been used in the prior case. Id. page 160, line 2-11. She believes that she didn't give up the boundaries used in the prior case based on common sense. Tr. at page 160, 18-22. She admitted that the Plat, P-17, has a quitclaim area but the land shown in it was never given to anyone else, she kept it herself. Tr. at page 162, line 11-20. The purpose of the dotted line on P-17 was to show the area in dispute. Tr. at page 163, line 4-11. She believed that by dismissing the case with prejudice she gave up nothing. Tr. page 163, line 12-18. She thought she would prefer to try to work out some other resolution than for Appellant to move her house. Tr. at page 164, line 6-10. She was not conceding that Appellant was right about the boundary because no court or judge determined where the boundary line was. Tr. at page 166, line 3-6, 19-21.Despite her claim of retaining all the disputed land, she agreed to remove a portion of the concrete driveway that Appellant contended was encroaching on her property. Tr. at page 167, line 2-18.

Gordon Timmons, Respondent's Husband testified that before filing the prior suit, he had a drawing done to depict the land that they were offering to Appellant

consisting of a five-foot setback from her house. Tr. at page 395, line 15-25; page 435, line 3 -22. P-3. P-17 shows the same dotted line that they had offered to Appellant in the earlier case. Tr. at page 435, line 5 to page 436, line 14. Mr. Timmons told Andrew Gillette to file P-17. Tr. at page 430, line 23 to page 431, line 4.

When they were positioning the house, Mr. Timmons elected to move the house to the left, close to a power line easement because there was a boundary line dispute going on; but there was still plenty of room for a large turning driveway. Tr. at page 392, line 4-18. Timmons also admitted that P-17 did not represent what was prepared in order to enable Respondent to close title with the contract buyers, Mr. & Mrs. Patrick. Tr. at page 436, line 20 to page 437, line 1. That area was a larger area not shown on P-17. Tr. at page 443, line 11 to page 444, line 5.

When Respondent's Counsel began asking Mr. Timmons about drainage on Lot 12, Appellant's Counsel objected because his testimony was beyond the scope of what was disclosed in discovery namely, knowledge of the encroachment of the Appellant's house on Lot 12. Tr. at page 401, line 24 to page 402, line 16. Respondent's Counsel argued that the encroachment was causing Appellant's damage and that Mr. Timmons had knowledge of the encroachment. Tr. at page 402, line 18-24. Appellant's Counsel contended the stormwater was a nuisance not an encroachment. Tr. at page 402, line25 to page 403, line 18.The Court characterized the casting of the stormwater on Lot 11 as a trespass and overruled the objection. Tr. at page 403, line 15-24.

Mr. Timmons testified that as shown on P-4J, the land slopes away from Appellant's house toward Lot 12 and that instead of going toward her house, water on Appellant's side yard should drain through a "little slough" to the woods behind. Tr. at

page 404, line 24 to page 405, line 13; P-4J. He said that as shown on P-4E, the driveway is sloping toward Lot 12. Tr. at page at page 405, line 14-19. He said that typically, a swale is installed next to the driveway which would go down their property line where the property drops off significantly. Tr. at page 406, line 8 – 16; P-4K. Mark Strong, the builder was not able to obtain Appellant's permission to take down trees to install the swale on their property which Appellant said was her property, so they tried to alleviate the problem by bringing the stormwater into the front yard. Tr. at page 405, line 20 to page 406, line 24. Mr. Timmons that the driveway next to the garage is further inside Lot 12 than the Appellant's house. Tr. at page 407, line 20 to page 408, line 5.

Respondent called Mark Strong, the contractor for the house built on Lot 12. Tr. at page 173, line 8. Appellant's Counsel objected to Mr. Strong's testimony because his name had not been provided in discovery and Respondent's Counsel agreed. Tr. at page 173, line 9 -22. Respondent's Counsel claimed that his testimony was to rebut Franklin's expert testimony about drainage design deficiencies. Tr. at page 174, line 5-9. Appellant's Counsel contended that the nuisance/flooding claim had been in the case from the beginning and Respondent never asked for any discovery about Appellant's expert report, so Respondent should have anticipated testimony on drainage and provided the name of a witness who would respond. Tr. at page 174, line 10-17. Mr. Strong was not being offered as an expert witness. Tr at page174, line 21-23.The Court allowed Respondent to proffer the witness's testimony subject to the objection. Tr. at page 174, line 24-25.

Mr. Strong learned that there was a problem with the right property line and couldn't locate the house where it was shown on the site plan and had to move it

eastward away from Lot 11. Tr. at page 176 , line 8-22. He did not intend to position the house that way and they had to bring dirt in and raised the house pad about one- and one-half feet above grade to ensure that it was sloped away from the house. Tr. at page 176, line 25 to page 177, line 10. He met with Appellant when they were getting ready to pour the driveway in order to establish a swale. Appellant told him that water was being trapped in an area of trees at the property line and he suggested a solution, but Appellant wouldn't allow it because she didn't want any of the trees touched because of the birds. Tr. at page 178, line 9 -19. He didn't go into that area except to pull out a dead tree that had fallen on what was their property line. Tr. at page 178, line 19-21. He sloped the concrete driveway six inches (6") down and away from the garage and house to meet code and then flattened out and "brought the edge up to try to control water runoff so that it would be redirected toward the road." Tr. at page 178, line 23 to page 179, line 5. The driveway was not sloped toward their own property because the street was above the existing grade of both houses. Tr. at page 179, line 6-17. He was there when it was raining and saw water flowing toward the street. Tr. at page 179, line 6-13. At the conclusion of his direct testimony, the Court sustained the objection and excluded it. Tr. at page 182, line 11-12.

ARGUMENT

I. THE COURT ERRED AS A MATTER OF LAW IN DISMISSING THE SLANDER OF TITLE CLAIM

Appellant contends that the Trial Court erred as a matter law by dismissing the Fourth Count, slander of title. Appellant made a prima facie case of Slander of Title and Respondent failed to establish a defense of justification. See Section A & D. The Court correctly held that Respondent was barred by res judicata from asserting the boundary

line she had advocated in Timmons v Blank, and Appellant's title to that area was established as a matter of law. Respondent has not cross appealed. Appellant contends that the Trial Court erred as a matter of law (and ignored its own ruling) by finding that there was " uncertainty" after Respondent agreed to a Dismissal with Prejudice. See Section B. Appellant further contends that the Trial Court erred as a matter of law by finding that Respondent was justified in filing a plat as a legally required procedure for a settling a boundary dispute, a "mistaken belief" when instead they were acting under a " mistake of law". See Section C. The Court found that filing P-17 and P-18 caused a title defect that required that Respondent quitclaim the "yellow shaded area" shown on the Amended Lis Pendens which that negated the slander of title claim. This finding is contrary to the legal effect of its res judicata ruling and wrong as a matter of law. See Section D.

The standard of review of the Trial Court's legal conclusions and the application of law to the facts is a "de novo review". " This court reviews questions of law de novo . . . [A] reviewing court is free to decide questions of law with no particular deference to the trial court." Flexon v. PHC-Jasper, Inc., 413 S.C. 561,569-570, 776 S.E.2d 397 (Ct. Ap. 2015)(citation omitted). As set forth below, the Trial Court erroneously dismissed the Fourth Count due to errors of law.

A. Respondent filed a false and derogatory claim against Lot 11.

Appellant contends that by filing P-17 and P-18, Respondent published a false statement derogatory to Appellant's title that caused special damages in the eyes of third parties. "Wrongfully recording an unfounded claim against the property of another generally is actionable as slander of title." Huff v. Jennings, 319 S.C. 142, 149, 459

S.E.2d 886, 891 (Ct.App.1995). In Huff, a Husband sued his Wife's divorce attorney for filing a lien for Wife's attorney's fees against property that Husband had elected to buy from his Wife under their divorce decree. Court found that the statutory lien was improper and held that the "[w]rongfully recording an unfounded claim against the property of another generally is actionable as slander of title." Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App.1995). The malice requirement is satisfied by showing the publication was made without legal justification. Id.

Respondent filed an unfounded claim against Respondent's title to Lot 11 by submitting P-17 and P-18 to the Charleston County Planning Commission for approval and recording in the RMC records. P-17 contains the same boundary line for Lot 12 which Respondent asserted in the earlier case which she abandoned by dismissing the case with prejudice. P-17 does not contain the boundary line which was res judicata but instead a smaller quitclaim area which Respondent was willing to convey if Appellant settled with her. Therefore P-17 it a totally unfounded claim against Lot 11. P-18 is another unfounded claim against Lot 11 since it also contains the invalid boundary line. Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct.App.1995).

The Trial Court agreed that the filing of these Plats was a derogatory claim against Lot 11, Order at 18, but found that it was justified. Order at 19-21.Appellant contends that the Trial Court erred as a matter of Law. See Section C& D.

B. There was no uncertainty about the Lot 11 boundary line as a matter of law.

The Trial Court correctly held that the Dismissal with Prejudice resolved the Lot 11 boundary line in favor of the Appellant's surveyor's determination, based upon long standing precedent. Decision at 14-16. See Parker v. Legett, 13 Rich. 171, 173 (1861)

("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."); Bell v. Bennett, 307 S.C. 286, 292, 414 S.E.2d 786, 790 (Ct. App. 1991); Nunnery v Brantly Construction Co., 289 S.C. 205, 209 345 S.E. 2d 740, 743 (Ct. App. 1986)("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.")(citation omitted); Laughon v. O'Braitis, 360 S.C. 520, 527, 602 S.E.2d 108 (Ct. App. 2004)(an order of dismissal with prejudice to which the parties consented is res judicata acts as an adjudication on the merits). Based upon its conclusions of law, the Trial Court ordered that Respondent convey a quitclaim deed to Appellant to clear any adverse title claim against Lot 11 that had arisen as a result of the filing of the Plat, P-17. Order at 26.

Despite its conclusion of law, the Trial Court made repeated references in its Order about " the boundary line dispute being unresolved following the dismissal with prejudice". Order at pages 2, 6,7,8,9,14,17,18, 19 and 20.Respondent and her Attorney Lanning contended that there were no findings, the dismissal order contained no direction as to the filing of any plat so there was no res judicata. The Trial Court rejected that evidence as a defense to res judicata, therefore, it could not rely upon that same evidence to find a contrary conclusion since res judicata established the boundary line location. The Trial Court's finding of "uncertainty of the boundary line location" is inconsistent with its finding as to the effect of res judicata and this Court need not give it any deference. "[W]hen there are two inconsistent rulings, the conclusion of the court will be referred to that which is based upon a sound principle, and the other ruling will be disregarded as surplusage." Sandel v. State, 126 S.C. 1, 119 S.E. 776,788 (1922). The

finding of res judicata is predicated upon a sound principle and therefore the finding as to an uncertainty must be discarded.

Appellant contends that this finding unduly influenced the Court's dismissal of the claim for Slander Title, as is evidenced by the many times it is mentioned in the Order and as the basis for its other findings. See Sections C and D. Appellant urges this Court to reverse and remand on that basis alone. Even if no outright reversal is granted, this Court must review de novo all the Trial Court's findings which are predicated on this erroneous state of "uncertainty about the boundary line". See Sections C&D.

C. Respondent filed the plats under a mistake of law.

Appellant contends that the Trial Court erred as a matter of law by finding that Respondent acted under a mistake of fact, the "uncertainty of the boundary line" instead of a mistake of law. This erroneous finding has important legal consequences. A party can be relieved when he acts under a mistake of fact, but not when he acts under a mistake of law. Cunningham v. Cunningham, 20 S. C. 317, 333 (1884). " The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief." Minshew v. Atl. Coast Lumber Corp., 98 S.C. 8, 81 S.E. 1027 (1914). Accordingly, this Court should conduct a de novo review of the Trial Court's finding of mistake of fact without any deference to the Trial Court's finding. Flexon v. PHC-Jasper, Inc., 413 S.C. 561,569-570, 776 S.E.2d 397 (Ct. Ap. 2015)

The Trial Court considered the filing of the Plats to be a mistake of fact on the basis that the Order of dismissal did not require Respondent to provide a quitclaim deed or take other affirmative action. Order at 20. Respondent did not have to take any action

only to refrain from action since she gave up her legal right to contest Franklin's boundary line. Appellant's boundary line was established as a matter of law.

R. 41(a), S.C.R.C.P. allows the dismissing party to limit or reduce the effect of the dismissal but Respondent's Counsel did not do so. Without any reservation of rights, Respondent is bound by the legal consequences arising from res judicata which is a preclusion of any claims which were decided against her as a matter of law. See Section A. There is no legal basis to impose any obligation of the prevailing party to create a further enforcement mechanism in a Dismissal with Prejudice. This is no caselaw or Rule of Court upon which the Trial Court relied; therefore this should disregard this finding. Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015) .

The evidence supports only one conclusion: that Respondent acted under a mistake of law. Respondent was present in the Courtroom when the case was dismissed with prejudice. There is no possible mistake of fact about what happened but there was a mistake of law as to the consequences of what happened. See In re Estate of Holden v. Holden, 336 S.C. 456, 462, 520 S.E.2d 322 (Ct. App. 1999)(mistake in executing disclaimer was a mistake of law rather than a mistake of fact because decedent was fully aware of the existence of his daughter, but did not realize the legal consequences of the disclaimer). Therefore, this Court should conclude that the Trial Court's finding of a mistake of fact about the uncertainty of the boundary is wrong as a matter of law.

D. Filing of either Plat was not justified.

The Trial Court also found that the Trust was "attempting to follow the legally required procedure to establish a boundary line . . as per the September 14, 2016 Order Amending Lis Pendens." Order at page 19. The Court's Findings must be supported by

credible evidence. See Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015). Appellant contends that there is no factual basis for this Finding as to either P-17 or P-18, and further that it is inconsistent with the Court's Findings as to the effects of res judicata and should be rejected as a matter of law. See Section A&B.

The Record shows this finding to be without a factual basis. P-17 was recorded on June 24, 2016, this suit was filed on August 9, 2016. The filing of this Plat was the basis for the Complaint, Para. 8, seeking Declaratory Relief and the Amended Complaint asserting a slander of title claim, Para. 22 and special damages. Para. 30. This plat was referenced in and attached to the Lis Pendens not the result of any court order. Lis Pendens. Gordon Timmons admitted that he told Andrew Gillette to file P-17. Gordon Timmons identified the curved line in P-17 as a portion of their property that they would give to Appellant as a settlement so "her house would no longer be encroaching". Tr, at page 431, line 25 to page 432, line 23. Timmons admitted that P-17 contained the same "Quitclaim" area that the Appellant had rejected in the prior case before the judgment of dismissal with prejudice was entered. Tr. at page 435, line 20-25; P-2, P-3, P-21. Mr. Timmons admitted that it was arbitrarily picked. Tr. at page 433, line 25 to page 434, line 9. Timmons also admitted that P-17 did not represent what was prepared in order to enable Respondent to close title with the contract buyers, Mr. & Mrs. Patrick. Tr. at page 436, line 20 to page 437, line 1. That area was a larger area not shown on P-17. Tr. at page 443, line 11 to page 444, line 5.

P-17 was not a bona fide effort to settle since it did not contain both boundaries, only what Respondent claimed in the earlier case and the dotted line area which Appellant had previously rejected. Therefore, it was not reasonable for Respondent to

file a Plat with the same proposal a few weeks after the Complaint had been dismissed without Appellant's boundary line included. Brown v. Hanson, 2011 S.D. 21, 798 N.W.2d 422,429 (S.D. Sup. Ct. 2011))(reasons given for filing cancellation of easement were "illusory, false, and pre-textual."). See Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004) (no reasonable basis to support decision for contesting a claim);

The Trial Court found that this was not in disregard of Appellant's property rights. Order at 19. However, Gordon Timmons intentionally omitted Appellant's boundary line and indicated only what Respondent as willing to offer. P-17 has only one interpretation and that is exactly what Gordon Timmons intended, i.e., as a compromise to what he believed was the Trust's boundary line. It is false because it does not accurately reflect the effect of the dismissal with prejudice and is derogatory to third parties. P-17 is a matter of public record. The Order of Dismissal with Prejudice, P-16, is public notice that Respondent had no claim to the area on which Appellant's house was located based upon her title. See S.C. Code Ann. Section 15-35-520 (Clerk to maintain Abstract of Judgment with names of parties and result). Those are the facts upon which Attorney Smith found there to be a defect in title because the judgment of dismissal would have indicated a contrary result to what was shown on P-17 and P-18. Therefore, there is no evidence to support a finding that P-17 was justified as a reasonable attempt to settle a boundary dispute or not in disregard of Appellant's rights. Mathis v Brown of S.C. Inc., 389 S.C. 289,307, 698 S.E. 2d 773,777 (2010).

P-18 was also unjustified. The Trial Court referred to the use of P-18 to separate out the disputed area. Order at 19. The Trial Court found that by filing it,

Gordon Timmons was acting in "good faith " to avoid litigation. Order at 20. However, litigation had already started because Timmons filed P-17, which was not in good faith for the reasons expressed above. At that point Respondent had notice of Appellant's claim to the Franklin boundary based upon res judicata. Respondent refused to acknowledge that she had abandoned the boundary she asserted in the prior case as matter of law. See Answer. By continuing to assert the same boundary in the face of established law and filing P-18, Respondent acted without justification since pursuing a frivolous claim is not in good faith. See R. 11(a); S.C.R.C.P.; Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004) (no reasonable basis to support decision for contesting a claim).); Moore v. Postal Tel.-Cable Co, 202 S.C. 225, 24 S.E.2d 361 (1943) ("[T]he action. . . must be in good faith, not arbitrary, and there must be some reasonable basis"). Respondent even delayed in responding to the need to validate the accuracy of Appellant's boundary until the day of trial. See P-26. Therefore, the Trial Court abused its discretion is finding that there was still a dispute to be resolved. See Section A, B and C.

Respondent filed P-18 in order to convey title to the contract buyers of the remainder of Lot 12 not in dispute. See Defendant's Motion to Cancel or Amend Lis Pendens at page 2 and Patricia Timmons Affidavit; Lis Pendens, P-18. The Motion Court specifically ruled that: "This Amendment to Lis Pendens shall create no presumption as to the validity of the July 18, 2016 Gillette Plat or the boundaries thereon. . . and shall not be relied upon to impair Plaintiff's claims in this case." Order Filed Sept. 14, 2016 at 3. Therefore, P-18 was a strategic weapon to enable Respondent to exclude the area which she unjustifiably claimed was not abandoned in the prior case in order to take

advantage of her pending sale but still retain its potential value by requiring the Buyer, Mr. & Mrs. Patrick to buy it as a condition of the purchase of the remainder. P-29. Given the long-standing application of res judicata to boundary line disputes, there was no basis for the Trial Court to find that there still was a dispute that needed resolving. See Sections A& B above.

Furthermore, the filing of P-17 or P-18 are not justified by any other facts. Respondent's Attorney did not attempt to justify his opinion that all he gave up was the right to sue for trespass based upon any legal analysis or theory to distinguish the earlier case from the prevailing law. Consequently, there were no facts upon which the Trial Court could find that he was reasonable in his interpretation of the law. See Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013) (forbearance in pursuing a claim known to be frivolous or without foundation is not in good faith).

Attorney Lanning stated he was not consulted about the filing of the Plat. Respondent did not state she relied upon his advice to file the plat. She stated that she dismissed the case " because it was appropriate." The Trial Court never found that Respondent relied upon advice of counsel in filing either plat. Respondent never pleaded or proved that she relied upon advice of counsel, therefore she has waived the " advice of counsel" defense as the basis for asserting a mistake of fact as a defense to a slander of title claim. See Bloom v. Beam, 99 A.3d 263, 266 (D.C. Ct. App. 2014).

Moreover, there is no South Carolina precedent for this Court to find that a false and derogatory claim can be justified based upon erroneous advice of counsel. Such a conclusion would be contrary to established law that a party is bound by the acts of her counsel, rightly or wrongly. Clark v. Clark, 271 S.C. 21,23, 244 S.E.2d 743,744 (1978);

Greenville Income Partners v Holman, 308 S.C. 105,107, 417 S.E. 2d 117,118(Ct. App. 1992). Given the lack of facts to support the Trial Court's findings as to justification for Respondent's actions, that finding must be rejected. Mathis v Brown of S.C. Inc., 389 S.C. 299,307, 698 S.E. 2d 773,777 (2010)(trial court's findings must be supported by competent evidence). In summary, the Trial Court's findings of justifications are not supported by the facts or the applicable law and must be rejected.

E. Lack of Insurability supports the slander of title claim

The Trial Court relied upon Attorney Smith's expert opinion that Lot 11 was uninsurable as a result of the filing of P-17 to further justify its conclusion that the status of the boundary line was undecided after the dismissal with prejudice. Order at 18. The facts do not support that conclusion.

Attorney Smith testified that based upon the status of the public record, the recorded plat, the deeds and the Judgment of Dismissal with Prejudice, the title to Lot 11 was uninsurable due to the filing of P-17 and P-18. There was no contrary evidence or impeachment testimony related to that opinion. The Trial Court misconstrued her testimony as negating the slander of title claim when it supported it. The Trial Court persisted in basing its analysis on the erroneous conclusion that the boundary line was unresolved after the dismissal with prejudice. Order at 18-19. As Appellant asserted above, this error has pervaded the Court's findings and should be a basis for a reversal of its dismissal of the Fourth Count alone. See Section B.

In summary, Appellant established a prima facie case of slander of title under Huff v. Jennings, 319 S.C. 142, 459 S.E.2d 886 (Ct. App.1995). The Trial Court correctly applied the law of res judicata to confirm that Appellant was entitled to the boundary line

established in the prior case; but its inconsistent finding that the boundary line was still unresolved after the entry of a Dismissal with Prejudice must be disregarded under applicable law. Further, this error of law affected its reasoning and decisions throughout the balance of its Order, which justifies reversal on that basis alone.

The Trial Court's findings of justification were also erroneous both as a matter of law, i.e. there was no mistake of fact but a mistake of law; and not supported in the Record. Plat P-17 which contained a false and misleading description of the extent of Lot 11 was unjustified as was the filing of P-18 and not supported in the Record. Accordingly, the Court should reverse the Trial Court's dismissal of the Fourth Count and remand for a determination of damages.

Appellant requested legal fees for the filing of the slander of title claim as special damages at the start of the trial. Trial Brief at 6. The Court ordered the Respondent to deliver a deed of the quitclaim area to Appellant. Order at 26. Special damages include legal fees necessary to remediate the slander, even if there is no other pecuniary loss. See Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192,206, 723 S.E.2d 597 (Ct. App. 2012)(wrongful recording of mortgage required legal action to cure). Appellant also established that she suffered special damages the cost of the title opinion, P-23. Therefore, Appellant respectfully requests that this Court reverse and remand this matter for the award of damages in accordance with the foregoing.

II. THE COURT ERRED IN DISMISSING THE NUISANCE CLAIM

Appellant contends that a nuisance was created by Respondent's construction of a driveway on Lot 12 which caused rainwater to accumulate on Lot 11 resulting in

frequent ponding, mosquitos breeding, disruption of Appellant's work activities, damage to materials she used in her stain glass business and loss of income. Appellant contends that the Trial Court erred in dismissing her nuisance claim by improperly relying upon excluded evidence and evidence that should have been excluded , not basing its findings on evidence in the Record and not correctly applying the law of nuisance to the facts.

Nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his land. Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct.App.2001). " 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) "South Carolina follows the common enemy rule with respect to the diversion of surface waters naturally flowing across land. . . There are, however, two exceptions. First, the common enemy rule is subject to the law of nuisance and an individual may not obstruct or alter the flow of water to create a nuisance per se." Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505, 511, 598 S.E.2d 712 (2004). The nuisance exception applies even though the adjacent owner did not intend to alter the flow of surface water. Id. The traditional test for determining what is a nuisance per se is that the nuisance has become dangerous at all times, and under all circumstances, to life, health or property. Deason v. Southern Railroad Co., 142 S.C. 328, 140 S.E. 575 (1927); Suddeth v. Knight, 280 S.C. 540, 545, 314 S.E.2d 11, 14 (Ct. App. 1984) The second exception to the common enemy rule is that "an upper landowner may not, by means of a ditch, impoundment or other artificial structure, collect surface water on his own land and cast it in a concentrated form upon

lower adjoining land." Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505, 511, 598 S.E.2d 712 (2004). Because the Trial Court misapplied the law of nuisance, this Court should apply a de novo standard of review. Flexon v. PHC-Jasper, Inc., 413 S.C. 561,569-570, 776 S.E.2d 397 (Ct. Ap. 2015)

The Trial Court's decision is based upon three findings: that the driveway was small and it could not credibly cause any water to pool or pond on Lot 11; that Respondent took adequate steps to divert water to the opposite end of Lot 12; and that Appellant's studio was constructed in such a way as to be susceptible to occasional flooding during large amounts of rain. Order at 21- 22. Appellant contends that none of these is supported by credible evidence and the dismissal of the nuisance claim should be reversed. McMillan v. Gold Kist, Inc., 353 S.C. 353, 577 S.E.2d 482 (Ct. App. 2003).

A. The Court improperly relied upon excluded evidence.

The finding that the driveway could not cause water to pond on Lot 11, is based on excluded evidence. Appellant testified that after the driveway was built, she saw rainwater running off the driveway " like a waterfall" onto her property. David Franklin testified that he observed how the driveway would gather all the rainfall coming off the house and what was landing on the driveway to concentrate it on Appellant's side yard. Franklin also said that Respondent's driveway was built very close to the property line and Lot 12 had a higher grade than Lot 11 in the rear and there were trees which together prevented rainwater flowing onto Appellant's yard from draining into the rear ditch and caused ponding.

The only contrary testimony about rainfall accumulating was by Mark Strong, the contractor who built the house. Strong testified that he observed how the driveway

handled rainwater. Tr. at page 179, line 6-13. But after he testified, the Trial Court excluded his testimony entirely because his name had not been provided in discovery, Tr. at page 182, line 11-12. However, the Trial Court relied upon Strong's testimony in dismissing the nuisance claim. Order at 23. Gordon Timmons, Respondent's Husband testified about the design of the driveway but did not observe how the driveway drained water during actual rainfall. The Court's findings must be based upon credible evidence. Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015).There is a lack of credible evidence to support this finding absent reliance on excluded testimony; since there was reliance, prejudice is established and constitutes reversible error. State v. Brockmeyer, 406 S.C. 324, 356, 751 S.E.2d 645, 662 (2013); State v. Garner, 389 S.C. 61, 67- 68, 697 S.E.2d 615, 618 (Ct. App. 2010).

B. Ponding was established by credible evidence.

The credible evidence supports a finding that the driveway causes ponding. Appellant lived in the house since 2005 and never experienced any flooding in her studio from any rain event even during the 1000-year flood in 2015, which SCDNR reported as having 9" of rainfall, until the driveway on Lot 12 was built. P-8A. Thereafter, during Hurricane Matthew, Appellant saw rain coming off the driveway like a waterfall. Photographic evidence established that the driveway was raised about 4" above Appellant's side yard. P-4H. Appellant never saw water ponding in the front of her property previously, until the driveway was installed; now it accumulates there every time it rains, causing mosquitos to breed as shown in a recent photographic exhibit taken in April 2019. P-4K. The Trial Court did not give any reason why Appellant's testimony was not worthy of belief. See Order at 22. "The court does not always have to accept

uncontradicted evidence as establishing the truth; however, it should be accepted unless there is reason for disbelief." Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860, (1983); Okatie River v. Southeastern Site Prep, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003).

Franklin testified that the driveway affected the natural drainage flow on Lot 11 from front to back because the driveway was an impediment to the natural flow to the rear; and that significant vegetation and higher grade caused rainwater to pond on the side of the driveway until it gets so high that it can discharge into the rear ditch. The Trial Court failed to consider Franklin's testimony but gave no specific reason why it was not credible. See State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009)(basis required for trial court's finding of lack of credibility). The Trial Court apparently discounted all of Franklin's testimony due to alleged interest and bias, which is discussed below. See Section E.

Gordon Timmons said he saw water ponding on Lot 11 and 12 during construction but didn't discuss the driveway sloping away from the house or the conditions in the rear as Franklin did. Mr. Timmons described the driveway as being farther back in the lot than Appellant's house. Tr. at page 407, line 20 to page 408, line 5. This supports Franklin's conclusion that the driveway impedes the natural flow of surface water from the front to the rear. There is no dispute that natural drainage is to the rear. Gordon Timmons testified that they wanted to install a swale to the rear, but Appellant wouldn't permit it. Therefore, Gordon Timmons testimony did not contradict Franklin's testimony on key issues and couldn't provide the basis for the Court's finding that ponding did not occur. Photos of the driveway from different perspectives show that it is long and wide, not small. See P-4(A),(C), (K) & (L). The Court's finding that the driveway does not cause

considerable rainfall to be cast on Lot 11 has no factual support in the Record and is conclusory. See Jordan v Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015). In view of the exclusion of the testimony of Mark Strong and the limited testimony from Gordon Timmons, this Court must reject the Trial Court's finding that there was no ponding. Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015)

C. The Court abused its discretion by allowing Gordon Timmons to testify about drainage on Lot 12

If this Court agrees that the Trial Court's conclusion about no ponding is supported by Gordon Timmons' testimony, then Appellant contends there is another reason to reject that finding. The Trial Court allowed Gordon Timmons to testify about the driveway design and drainage on Lot 12 over Appellant's Counsel's objection based upon a failure to disclose his name in discovery . "The admission and rejection of testimony is largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion." Elledge v. Richland/ Lexington Sch. Dist. Five, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002). However, an abuse of discretion is a conclusion with no reasonable factual support. State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000); State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct.App.2007).

Appellant contends that the Trial Court had no reasonable basis to allow the testimony over Appellant's objection. The Trial Court had previously excluded the testimony of Mark Strong concerning the construction of the driveway and the drainage design because his name had not been disclosed as a witness in discovery. See Section A. above. Appellant's Counsel also objected to Gordon Timmons' testimony for the

same reason, as not being disclosed except as to encroachment. The Trial Court indicated that his testimony was pertinent to the encroachment issue but the encroaching portion of the driveway which existed when the Complaint was filed had since been removed, which the Appellant acknowledged in her testimony. The Court clearly understood that fact since it held that the Second Count, trespass, was moot. By allowing Gordon Timmons to testify about the driveway design and drainage, the Court ignored Appellant's right to discovery of Gordon Timmons' knowledge relating to a completely different subject, about which Counsel had no basis to know Gordon Timmons was knowledgeable. Counsel should not be faced with the task of cross examining a witness without any idea as to what the witness will try to add to his direct testimony. Timmons was the last witness and a continuance was not likely to be granted. Appellant's Counsel had requested one to recall David Franklin in response to an unexpected expert opinion provided by one of Respondent's surveyors, Robert Arrington but the Trial Court denied it. Tr. at page 451, line 7 to page 454, line 7.

Appellant was prejudiced by allowing Gordon Timmons to testify about the driveway design and drainage because the Trial Court stated that it relied upon his testimony and Mark Strong's instead of David Franklin. Order at 23. The Trial Court found that Gordon Timmons was an " impressive witness". Order at 5. The Trial Court's decision is not justifiable and resulted in prejudice; therefore, it is an abuse of discretion. State v Corey D, 339 S.C. 107, 529 S.E.2d 20 (2000); State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct.App.2007).

If this Court determines that contrary to Appellant's argument above in Section A, that Gordon Timmons testimony did provide a basis for a finding that the driveway

did not cause ponding on Lot 11, then it must exclude Timmons' testimony because it was prejudicial and supports Appellant's claim of an abuse of discretion. If this Court decides that Gordon Timmons testimony did not support that finding, then the finding has no factual support and must be reversed. State v. Brockmeyer, 406 S.C. 324, 356, 751 S.E.2d 645, 662 (2013). Therefore, Appellant contends that the Court should find that the Trial Court's finding, as well as the others on which the Court relied upon Strong and Gordon Timmons for facts should be disregarded. See Section D & E below.

D. The Alternative solution did not eliminate the runoff.

The second part of the Court's ruling, that the installation of an alternative drainage solution for Lot 12 routed surface water away from Lot 11, is also not supported by credible evidence. It is not disputed that Respondent installed a driveway which did not have a swale along the common boundary line, a solution which was needed to prevent flooding according to Franklin and Timmons (as well as Strong whose testimony was excluded). The Trial Court obviously relied upon the excluded Strong testimony that the driveway edge was turned up to prevent rainwater from running over the top, although Appellant testified that she saw it doing this. Strong testified about the reason for the alternate design of the driveway, i.e. directing the water down the driveway instead of into a swale and the Trial Court identified it as the alternative design. Order at 22. Gordon Timmons' testimony which, as addressed in Section C above, should have been excluded. For the same reasons expressed in Section B above, this Court should find that the Trial Court did not have a factual basis for this Finding.

Appellant further contends that there is another reason to reject the Trial Court's finding on driveway design, that it never addressed the uncontradicted testimony from

David Franklin that in addition to the grading issues, the design for stormwater management for Lot 12 was deficient under the Charleston County Stormwater Management Standards. P-27. Franklin identified three deficiencies: the impact on downstream structures must be considered, the runoff must be controlled to predevelopment levels and or natural grades, and detention structures should be used to prevent adverse downstream effects. P-27 at 2-10, 3-2 and 3-11. What 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 caused a significant increase in flow which didn't exist before. This was entirely relevant to Appellant's nuisance claim. An adjacent owner may be liable for due to the discharge of surface water in concentrated form upon his neighbor's land. Glenn v. School Dist. No. Five of Anderson County, 294 S.C. 530,533, 366 S.E.2d 47,49 (Ct. App. 1988); Irwin v. Michelin Tire Corp., 288 S.C. 221, 341 S.E.2d 783, 785 (1986). By ignoring relevant evidence, the Trial Court did not correctly apply the common enemy rule by considering how the additional development impacted downstream owners. See Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505, 511, 598 S.E.2d 712 (2004).

The Stormwater Management and Sediment Reduction Act, S.C. Code Ann. Section 48-14-10 et seq. requires that all persons proposing land disturbing activities submit a stormwater management and sediment control plan to the appropriate implementing agency and obtain a permit to proceed; and certify that all land disturbing activities will be done according to the approved plan. S.C. Code Ann. Section 48-14-30. Appellant contends that Respondent's failure to comply with the regulations is evidential of causation. Appellant contends that Respondent's failure to maintain

predevelopment levels of runoff or natural grades supports her position that rainwater levels above 3-4" will always be a threat to the use and enjoyment her property, a nuisance per se.

Also, the elevation of the driveway several inches above Plaintiff's yard created an impediment to the natural drainage flow to the rear, which existed pre-construction. "The common enemy rule addresses potential tort liability for obstructing and diverting the flow of surface water." M and M Corp. of South Carolina v. Auto-Owners Ins. Co., 390 S.C. 255, 260, n.1, 701 S.E.2d 33 (2010)(Citation omitted). Since the Stormwater Regulations are intended to prevent runoff from exceeding preconstruction levels, they support the Appellant's contention that there was no factual support for the finding that the driveway design was an adequate alternative to a swale and created a nuisance.

Therefore, this Court should disregard the Trial Court's findings about the adequacy of the driveway design to prevent flooding as contrary to the facts which are not materially disputed: that the driveway borders the property line, that it is elevated by 4" above Lot 11, that the rear of Lot 12 is elevated and bounded by trees which restrict the travel of stormwater; and that these conditions are in violation of the Charleston County Stormwater Regulations cited by Franklin. Under these facts, the Trial Court should have found that the driveway design did not preclude the ponding upon Appellant's property. Even if this Court concludes that Gordon Timmons' testimony should be admitted, he did not contradict any of these critical facts.

E. Grading of Appellant's house was not the cause of the flooding.

In support of the third reason for denying a nuisance claim, the Trial Court cited the common enemy rule and said that Appellant had failed to deal with the surface waters

which were the cause of the flooding of her studio. Order at 22. However, the Trial Court almost entirely ignored the testimony of Appellant and her drainage expert, David Franklin in its findings on this issue. The Trial Court did mention Appellant's testimony that studio never flooded until after the construction of the house and driveway on Lot 12. Order at 10. But the Trial Court ignored Appellant's testimony that every time it rains the front yard floods, although every time it rained above 2"- 3", she had to be prepared for more serious flooding. These were evidence of a persistent condition and a per se nuisance which the Trial Court neglected to address. See Section G.

In support of this part of its decision, the Trial Court found that Appellant constructed the studio in a flood zone that subjected it to occasional flooding during large amounts or rain. Order at 22. The Court also stated: "FEMA denied Ms. Blank's flood claim because the area involved is on the ground floor in violation of the AE-14 flood zone." Order at 14. The Trial Court referred to "conflicting evidence" , Order at 22, but there was no conflicting evidence on the Record to support this finding.

Appellant admitted that her studio is in a flood zone and that she had flood insurance but asserted she was denied any coverage for Hurricane Matthew on the basis that there was no "flooding" only rainwater. Tr. at page 263, line 17-20; page 264, line 2-8; page 296, line 21 to page 297, line 2; page 317, line25 to page 318, line 2. David Franklin, a civil engineer, testified that Appellant's house was in an "A" flood zone and it was permissible to enclose the ground floor of the house in that flood zone. Respondent did not offer any contradictory evidence of what was permitted in an "A" flood zone and the Trial Court did not cite to any in its Order. Appellant acknowledged that she couldn't obtain business property insurance on her stained glass in South

Carolina but that had nothing to do with the flood zone. Tr. at page 324, line 24 to page 325, line 7. P-6A at page 10.

The Trial Court did not give any reason why Appellant's testimony was not worthy of belief. See Order at 22. "The court does not always have to accept uncontradicted evidence as establishing the truth; however, it should be accepted unless there is reason for disbelief." Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860, (1983); Okatie River v. Southeastern Site Prep, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003). If there is any evidence reasonably supporting the findings the circuit court's factual findings will not be reversed on appeal McMillan v. Gold Kist, Inc., 353 S.C. 353, 577 S.E.2d 482 (Ct. App. 2003). However, there is nothing in the record which can support any finding relating to any FEMA standards or lack of insurability which could create any inference that Appellant's use of the ground floor for a studio was in violation of any code, ordinance, standard which affected her claim for damages due to nuisance.

Furthermore, this Court should also reject this finding because there was no credible evidence to support the Trial Court's reason to disregard the Franklin testimony about the use of the ground floor in a flood zone. See State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009)(basis required for trial court's finding of lack of credibility).

In addition, the Trial Court referenced Franklin's testimony that the subdivision plat required the lot to be filled to a minimum one foot above the bottom of the roadway ditch and graded in accordance with the county road code. Order at 10. However, when asked about this on cross examination, Franklin stated: "that's the former Charleston County requirement." Furthermore, Franklin testified that the house foundation was graded a foot above the roadway since there was no ditch and graded and built in

accordance with applicable code in 2005. Respondent offered no contradictory testimony. Respondent never offered any contradictory evidence that this 1976 plat requirement applied at the time of the house construction in 2005 or that the then current standards for house construction required different grading than by raising the foundation. Despite the lack of evidence to contradict Franklin's testimony, the Trial Court found that " the absence of a ditch and lack of creating elevation meant that surface water was left to its natural path off the street through Lot 11 to the wetland area." Order at 10. "The court does not always have to accept uncontradicted evidence as establishing the truth; however, it should be accepted unless there is reason for disbelief." Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860, (1983); Okatie River v. Southeastern Site Prep, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003). The record shows that the Court disregarded Franklin's testimony despite the fact that it was largely uncontradicted or was consistent with other witnesses. Appellant contends that the record does not contain any reasons for a wholesale rejection of relevant evidence from an experienced professional such as Franklin.

F. The Court's findings about credibility are without any basis in fact.

Appellant acknowledges that it is the province of the trial judge to determine credibility, Jordan v Judy, 413 S.C. 341,348, 776 S.E. 2d 96,100 (Ct App. 2015). But this Court has the obligation to ensure that the Trial Court's duty is correctly carried out. See State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009)(basis required for trial court's finding of lack of credibility). Given the Trial Court's reliance on excluded testimony and admission of testimony that should have been excluded, the Trial Court's

wholesale rejection of Franklin's testimony deserves particular scrutiny. See State v Littlejohn, 33 S.C. 699, 11 S.E. 638 (1890)(Court may not find witness to be " false in all" without a basis for his unreliability).

First, the record established that David Franklin had a strong technical background, being a licensed Engineer in the states of South Carolina, Georgia, Tennessee and California and Land Surveyor in South Carolina, a licensed residential builder and commercial licensee for general contracting and mechanical contracting. He owns a full-service engineering company for mechanical, electrical structural and stormwater management design, which has been operating since 1979. Neither of Respondent's witnesses had his breadth of experience and technical training.

The Trial Court made reference to "interest and bias" as the apparent reasons why Franklin's testimony was not to be accepted. Order at 22-23. Franklin was the surveyor whose survey was used to determine Appellant's boundary line and also prepared the foundation plan. Both the other witnesses who testified about drainage issues, Gordon Timmons and Mark Strong had the same bias and interest. Gordon Timmons was the grantor of the Respondent. Mark Strong built the house and driveway. The Trial Court's relied upon a reason that all the witnesses could be potentially discredited for and applied it only to Franklin. This reason for discrediting him is patently arbitrary and an abuse of discretion. State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000); State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct.App.2007) (an abuse of discretion is a conclusion with no reasonable factual support)

The Trial Court also found that the Respondent's surveyors disagreed with Franklin about the location of monuments. Order at 23. This reference is irrelevant to his

testimony about drainage. It is a make weight argument because the Trial Court found that Appellant's boundary line was established as a matter of law and did not need to consider how the Respondent's surveyors determined their boundary line. Nonetheless, the Trial Court did make an unnecessary decision that the "respondent's boundary line is "more compelling". Order at 2. This second reason to discredit Franklin is based upon irrelevant evidence which the Trial Court had no reason to rule on. Furthermore, the Trial Court's findings that the evidence is " more compelling" did not address the pertinent legal standard.

Franklin's testimony about locating the corners of Lot 11, 12 and 13 was determinative of the boundaries under establish surveying law. The location of boundaries is a question of evidence and there are rules as to the priority of the evidence: first natural boundaries, then monuments, adjacent boundaries and finally courses and distances. Holden v. Cantrell, 100 S.C. 265, 84 S.E. 826,829 (1915). "Course and distance are less to be confided in than any other evidence of boundary" Douglass v. Fernandis, 2 Bailey 78. "Mere distance is never regarded when it conflicts with either the actual marks". Sturgeon v. Floyd, 3 Rich. 8. The established corners and marked lines represent the survey as actually made and are the best evidence of the true location. South Carolina Jurisprudence, Boundaries, Section 1 at page 6. "[T]he quantity of land in the deed is 'ordinarily one of the lowest in the scale of importance.' Little v. Little, 223 S.C. 332, 75 S.E.2d 871 (1953)(Citation omitted)(plaintiff's plat contained 70.9 acres, defendant's map 40.5 acres). "[W]here the lines have in fact been located and designated by monuments and there is a discrepancy between the calls for these monuments and courses and distances shown by a plan referred to in the conveyance, the normal rule as

to the controlling effect of calls for monuments will be followed." Klapman v. Hook, 206 S.C. 51, 32 S.E.2d 882 (1945).

Franklin testified that he found all four property corners. In Franklin's opinion, it was not appropriate for a surveyor to scale off the plat to establish property corners in light of the location of existing corners. Tr. at page 99, line 6-12. Respondent's Counsel repeatedly suggested that Franklin moved the entire left side boundary line in order to avoid the wetlands and fit Plaintiff's house on Lot 11. Tr. at page 113, line 15-21; page 118, line 7-25;page 119, line 6-8, line 16 to page 120, line 2; line 120, line 11-12; page 124, line , line 9-19, line 23-24. After repeatedly being asked about moving the property line and objections being raised to the repetitive nature of the questioning Franklin understandably bristled at this suggestion as to where the property line was, Tr. at page line 132, line 17 to page 133, line 11 at which point, respondent's Counsel was quick to exploit his reaction by accusing Franklin of yelling at him. Exhibit A, page 43, line 23. This reaction is certainly understandable and not suspect or indicative that Franklin was lying about what he found when he did the site work. The Trial Court found Franklin to be " combative and dismissive". Order at 22. Given Franklin's knowledge of the relevant legal standards for establishing boundaries, the Trial Court's finding that he was combative when asked to defend his work which was supported by those standards is inappropriate . This can hardly be considered as a reasonable basis to discredit an otherwise experienced professional. See Elwood Construction Co. v. Richards, 265 S.C. 228,234, 217 S.E.2d 769, 771-772 (1975)("We have searched the record in this case and find nothing which justifies disregarding the testimony of Mr. Gaillard, the surveyor. He appears to be fully qualified and his method . . . is well known to be one commonly used

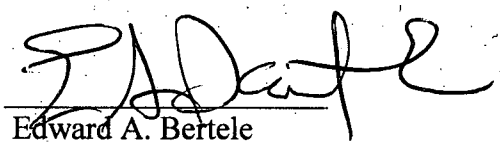
by surveyors.") . Therefore, Appellant urges this Court to reject the Trial Court's findings which exclude any consideration of Franklin's testimony as lacking in a factual basis. Jordan v Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015).

G. The Trial Court ignored evidence of a per se nuisance.

The Court also rejected the nuisance claim because it found that the flooding was "occasional", Order at 22, and unworthy of a nuisance claim. However, the case law recognizes occasional flooding as a nuisance per se. See Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505,512, 598 S.E.2d 712 (2004)(flooding in heavy rains may be nuisance per se); Suddeth v. Knight, 280 S.C. 540, 544- 545, 314 S.E.2d 11, 14 (Ct. App. 1984)(ponding due to heavy rains may be nuisance per se). Appellant testified that she sustained damages during hurricanes Mathew and Irma of $14,000.00 but that she had to disrupt her work every time the weather forecast called for 2"-3"of rainfall. Also, there was ponding and mosquitos breeding in her front yard every time it rained. By characterizing the flooding as occasional, the Trial Court failed to consider all the evidence and correctly apply the law. Therefore, this Court should reverse because the Trial Court did not correctly apply the law.

CONCLUSION

Appellant respectfully requests that this Court reverse the Circuit Court Order dismissing the Fourth and Fifth Counts for the reasons set forth herein and remand for further proceedings including the amount of damages.



Edward A. Bertele
Attorney for Appellant

November 12, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Circuit Court Judge William P. Keesley

CASE No. 2016- CP-10-4122

MICHELE BLANK .....Appellant

Vs.

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

CERTIFICATION OF SERVICE

I hereby certify that a true copy of Appellant's Initial Brief and Designation of Matter to be included in the Record on Appeal was served upon Respondent's Attorney, Mark Mason, Esq. by regular mail to his last known mailing address shown below.

Edward A. Bertele

November 12, 2019

To: Mark Mason, Esq.
THE MASON LAW FIRM, P.A.
465 West Coleman Boulevard, Suite 302
Mount Pleasant, SC 29464

EDWARD A. BERTELE
ATTORNEY AT LAW
1812 PIERCE STREET
CHARLESTON, SC 29492
Email: ebertele@msn.com

Member: SC, NJ & NY bars

Ph: (843) 471-2082
Fax: (843) 471-2082

November 12, 2019

Ms. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate St.
PO Box 11629
Columbia, SC 29211

Re: Blank v. Timmons
Appellate Case No. 2019-001555

Dear Ms. Kitchings:

Enclosed please find Appellant's Initial Brief and Designation of Matter to be included in the Record of Appeal and a Certification of Service. Thank you for your kind assistance in this matter.

Very truly yours

Edward A. Bertele

CC: Mark Mason, Esq.
Encl:

Edward Bertele
1812 Pierce St.
Daniel Island, SC 29492

FIRST-CLASS

PITNEY BOWES

US POSTAGE

02 1P $ 002.50⁰
0002108357 NOV 12 2019
MAILED FROM ZIP CODE 29492

Ms. Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
1220 Senate St
P.O Box 11629
Columbia SC 29211

RECEIVED
NOV 15 2019
SC Court of Appeals