THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity and Special Circuit Court Judge

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Case No. 2016-CP-07-02274

Stephanie M. McDew a/k/a Stephanie McDew Schoumacher, ……...…….. Appellant,

v.

Frieda P. McDew a/k/a Frieda McDew Shorter, ……..…….. Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case involves a property dispute between two sisters—Stephanie McDew Schoumacher ("Ms. Schoumacher" or "Appellant") and Frieda McDew Shorter ("Ms. Shorter" or "Respondent")—concerning commonly-owned real property and improvements located at 17 Bradley Beach Road, Hilton Head Island, Beaufort County, South Carolina (the "Property"). The Property consists of three lots with a beach house (the "House") located on the middle lot. On October 21, 2016, Appellant brought this case seeking access to the Property and related damages after Respondent wrongfully excluded Appellant from the parties' shared House and Property. (*See* R. pp. 17-22.) Respondent counterclaimed for adverse possession and contribution towards the Property's expenses. (R. pp. 23-26.) Before trial, Appellant filed an Amended Complaint setting out an additional claim for ouster damages. (R. pp. 30-44.) Respondent filed an Amended Answer and Counterclaim reiterating her counterclaim for adverse possession and adding a claim for *quantum meruit*. (R. pp. 45-50.)

On March 18, 2019, the Master-In-Equity held a bench trial and, thereafter, entered an Order on September 16, 2019 ("Order") denying Appellant's claim for ouster damages, denying Respondent's counterclaim for adverse possession, declaring the parties are tenants in common, and requiring Appellant to pay certain expenses related to the Property. (*See* R. pp. 5-13.) Appellant filed a Motion for New Trial and Reconsideration. (*See* R. pp. 312-330.) The Master-In-Equity, however, entered an order denying Appellant's motion on November 25, 2019. (*See* R. pp. 3-4.) Appellant then timely served her Notice of Appeal on December 18, 2019, and the Notice was filed by the Court of Appeals the same date.

STANDARD OF REVIEW

A claim for ouster is one in equity. *See Parker v. Shecut*, 359 S.C. 143, 597 S.E.2d 793 (2004) (hereinafter "*Parker II*"); *Parker v. Shecut*, 340 S.C. 460, 478, 531 S.E.2d 546, 556 (Ct. App. 2000) *rev'd on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002); *Laughon v. O'Braitis*, 360 S.C. 520, 524, 602 S.E.2d 108, 110 (Ct. App. 2004) (all three cases applying the equitable standard of review to similar claims involving ouster). In an appeal from an equitable action, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Id.* Factual findings and legal conclusions in an equitable action are reviewed de novo. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Id.*, 392 S.C. at 390, 709 S.E.2d at 654-55 (2011).

FACTS

A. Summary of Undisputed Facts

This case involves a dispute over the Property located at 17 Bradley Beach Road on Hilton Head Island, South Carolina, which consists of three lots and a House located on the middle lot. (R. p. 61, line 19 – p. 62, line 1; p. 113, lines 8-10.) Appellant and Respondent are sisters, (R. p. 60, lines 9-14; p. 113, lines 3-4), who were deeded, (R. p. 62, lines 2-5; p. 113, lines 8-10), the House and Property as tenants in common in 1979, (*Cf.* R. pp. 30-32, ¶¶ 3-5; p. 45, ¶¶ 2-3), by their parents Dr. Stephen and Mrs. Mary McDew, (R. p. 59, lines 22-23; p. 113, lines 5-6; pp. 129-132.) The Deed granted the Property to Appellant and Respondent subject to "a Life Estate" in their parents. (R. p. 130.) Dr. McDew died on October 31, 1981, (R. p. 60, lines 1-6; p. 114, lines 4-6), and Mrs. Mary McDew died on March 17, 2007, (R. p. 60, lines 1-6; p. 102, lines 6-10; p. 114, lines 7-9.) The Parties' parents took care of the House and paid the expenses of the Property

until their respective deaths. (R. p. 64, lines 2-10; p. 114, lines 10-12.) Respondent took over the expenses of the Property after the death of Mrs. McDew. (R. p. 103, lines 1-3.)

Appellant initiated this action by filing her Complaint on October 21, 2016 alleging that Respondent "denied [Appellant] the current set of keys and security code to the aforementioned House and refuses to give keys and the security code to the [Appellant]." (R. p. 19, ¶ 6.) In her Answer to that Complaint, Respondent admitted that allegation. (R. p. 23, ¶ 2.) In her counterclaims, she further stated that she "exercised exclusive control over the subject property" and that she acquired the Property through her "continuous, open, notorious, adverse and Hostile exercise of control over the subject property[.]" (R. pp. 25-26, ¶¶ 17, 18.) It was not until the lower court's October 16, 2017 Consent Order that the Respondent allowed the Appellant to access the Property. (R. p. 119, line 25 – p. 120, line 13; *see* R. pp. 14-16.) After the Consent Order was issued and as this litigation proceeded further, Appellant filed an Amended Complaint on March 13, 2019. (*See* R. pp. 30-44.) In response to the Amended Complaint, Respondent changed her answer to Paragraph 6 of the original Complaint to reflect the fact that, pursuant to the Consent Order, she was no longer excluding Appellant from the Property. (*Cf.* R. p. 23, ¶ 2; p. 45-46, ¶¶ 2, 5.) Respondent's Amended Counterclaim, however, realleged Respondent was entitled to adverse possession because she "exercised exclusive control over the subject property . . . in a manner that is continuous, open, notorious, adverse and hostile." (R. pp. 47-48, ¶¶ 19, 20.)

B. Appellant's Trial Testimony

In the spring of 2009, Appellant—intending to visit the area in June for her 40th high school reunion and to stay at the House—telephoned Respondent to inform her of her plans. (R. p. 65, line 22 – p. 66, line 24.) On that call, Respondent told Appellant she "could not stay at the house" because Respondent "had changed the code and the locks on the house" and Appellant "would not

be able to get into the house until [Respondent] was paid what she claimed [Appellant] owed her." (R. p. 66, lines 6-11.) In June 2009, while Appellant was in Savannah for her reunion, she went to the Property to see if her keys to the House (which she had received from her mother prior to her death) worked, which they did not. (R. p. 66, lines 12-19.) Appellant, having experience with difficult locks, tried her keys for long enough to conclude that Respondent had indeed changed the locks. (R. p. 72, line 10 – p. 73, line 21.) This conclusion was bolstered by the fact that Appellant had never had an issue with the locks before and, in fact, had witnessed her frail, 82-year-old mother open the lock without issue in 2006. (R. p. 73, line 22 – p. 75, line 7.) After she tried the keys and discovered they did not work, Appellant asked Respondent for a new set of keys and the security code but Respondent refused. (R. p. 71, lines 7-18.) Thus, despite having knowledge that Appellant's keys did not work, Respondent refused to provide working keys. (R. p. 71, lines 13-22.) As a result, Respondent "barred" Appellant from using the House. (R. p. 66, line 12.)

After 2009, Appellant recalls "multiple conversations over the years" where she continually informed Respondent of her desire to use the House and Property, but Respondent "remained adamant in her position that she was not going to allow [Appellant] in until [Respondent] was paid what she felt she was due." (R. p. 66, lines 20-24.) Specifically, Appellant recalls telephone conversations which occurred in 2010, 2014, and 2016 where she sought access to the House from Respondent and was denied. (R. p. 67, lines 4-14.) The 2016 request to use the House was particularly important to Appellant because she planned to come to the Property with her daughter, but Respondent again refused and told Appellant that it was no longer her house. (R. p. 67, lines 4-22.) On October 21, 2016, Appellant filed the present lawsuit seeking a declaration of ownership, access to the Property, and damages. (R. pp. 17-22.)

Even after filing a lawsuit, Appellant did not gain access to the House until the entry of the trial court's Consent Order on October 16, 2017—nearly a year after filing the lawsuit. (R. p. 77, lines 7-10; *see also* R. pp. 14-16.) Pursuant to the Consent Order, Appellant was finally provided with a working set of keys and the security code to the Property. (R. p. 77, lines 11-15.) Prior to the Consent Order, Appellant knew the security code for the House to be 1031—the date of her father's death. (R. p. 70, line 13 – p. 71, line 6.) However, the security code she was provided pursuant to the Consent Order was 1223—the date of her parents' wedding anniversary. (R. p. 77, lines 16-24.)

C. Trial Testimony of Edgar Gay

Mr. Gay previously served as a financial advisor to the Parties' parents, (R. p. 92, lines 1-8), and now serves as a financial advisor to both Appellant and Respondent, (R. p. 92, lines 20-23). Through his course of dealings with the Parties' family, he is familiar with the Property, (R. p. 92, 9-11), and acted as a go-between for the Parties in an attempt to help them resolve the current dispute, (R. p. 93, lines 9-21). In that role, Mr. Gay confirmed that, in 2009, Respondent told him "I told [Appellant] if she reimbursed me for the expenses that I have incurred, she can use [the House]. If [Appellant] doesn't, I am not going to allow her to do it." (R. p. 95, lines 9-17.) Mr. Gay further explained that Respondent also stated, in 2009, "I'm going to change the locks if [Appellant] doesn't pay – you know, reimburse me for the expenses." (R. p. 97, lines 10-22.)

D. Respondent's Trial Testimony

During her testimony, Respondent remembered the telephone call in which Appellant informed her that she intended to stay at the House, (R. p. 105, lines 17-25), and testified that it was "possible" that the telephone call occurred in 2009, (R. p. 117, lines 23-25). Respondent testified that Appellant requested that Respondent let her into the House and give her the security

code. (R. p. 115, line 11 – p. 116, line 10.) Respondent confirmed she did not give Appellant a working set of keys or the security code. (R. p. 118, line 15 – p. 119, line 18.) In fact, Respondent stated she told Appellant that: "you haven't paid anything; what do you mean you're coming?" (R. 106, lines 4-6.) Moreover, Respondent admitted that "I might have said to [Appellant], I'm going to change that lock." (R. p. 106, lines 12-13.)

However, in light of Appellant's claim for ouster, Respondent claimed that she did not make good on her promise to Appellant that she would change the locks. (R. p. 104, lines 3-5.) Respondent further claimed that she did not change the security code to the house. (R. p. 149, lines 7-9.) Instead, Respondent attempted to explain Appellant's difficulties with the lock on the House by testifying that, because of the salt air, the lock rusted and had a history of being difficult to open such that her husband had to routinely spray WD-40 into the lock to get it to open. (R. p. 106, line 25 – 107, line 19; p. 122, line 17 – p. 123, line 19.) Respondent further testified that the lock became more difficult after the Parties' mother passed away in 2007 because they used the House less often. (R. p. 124, lines 16-21.) Despite this purported knowledge, Respondent did not inform Appellant that the lock was difficult during the 2009 telephone call, (R. p. 124, line 22 – p. 125, line 6), and never followed up with the Appellant to mail her a working set of keys or send her the security code, (R. p. 119, lines 12-18.)

Respondent testified that she understood Appellant brought this lawsuit in an effort to gain access to the House. (R. p. 119, line 25 – p. 120, line 3.) Nevertheless, Respondent admitted she did not provide Appellant with the keys and security code to the House prior to the trial court's Consent Order. (R. p. 120, lines 4-13.)

Finally, Respondent agreed that the amounts she has claimed for payment of property taxes should be reduced by the amount of her corresponding tax benefit from claiming the taxes as a deduction. (R. p. 122, lines 2-6.)

E. Deposition of Donald Brashears

At trial, Respondent submitted the deposition transcript of Donald Brashears as Respondent's Exhibit 4. (R. p. 127, lines 2-18.) Pertinent to this Appeal, Mr. Brashears testified[1]—from his experience in the tax preparation business—that property taxes on second homes are deductible on individual income tax returns. (R. p. 204, line 25 – p. 205, line 8.) He also explained that if someone had income in the 15% tax bracket, they would receive a tax benefit of 15% of any property tax deductions claimed. (R. p. 205, lines 9-17.)

F. Stipulations

The Parties stipulated at trial that Respondent's income fell within the 15% federal income tax bracket from 2007 until the time of trial and that Respondent either claimed—or could have claimed—the taxes paid on the Property as deductions on her federal income taxes. (R. p. 109, line 22 – p. 110, line 20.)

ARGUMENT

The Master-In-Equity's Order should be reversed for several reasons. First, the facts and evidence in this case established Appellant's ouster claim as a matter of law. Second, the Master-In-Equity's Order erred in its calculation of the Respondent's damages by failing to account for the tax benefit from the possible property tax deduction and failing to limit the Respondent's damages to those enforceable as liens against the Property, both errors of law.

[1] Although not qualified as an expert, Mr. Brashears also testified as to his opinion of the rental value of the Property. At trial, Appellant offered similar testimony concerning the reasonable rental value of the Property through its qualified expert witness, Mr. Henri Kirsten. However, the trial court, in denying Appellant's ouster claim, did not reach the issue of rental value and, so, that issue and the testimony regarding the same are not before this Court.

I. The Master-In-Equity Erred in Denying Appellant's Claim of Ouster.

"Ouster" is the actual turning out or keeping excluded a party entitled to possession of any real property. *Parker v. Shecut*, 349 S.C. 226, 230, 562 S.E.2d 620, 622 (2002) (hereinafter "*Parker I*"). "By actual ouster is not meant a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits." *Id.* Where one co-tenant has ousted the other co-tenant, he may be liable as a trespasser for the rental value of the property beyond his ownership share. *Id.* at 230, 562 S.E.2d at 622-23 (citing *Jones v. Massey*, 14 S.C. 292, 307-08 (1880)).

A. By asserting her claim for adverse possession, Respondent conclusively admitted she ousted the Appellant.

An adverse possession claim requires continuous ouster of cotenants for the statutorily prescribed period. Indeed, South Carolina case law indicates, quite clearly, that "ouster is a prerequisite to a cotenant claiming title by adverse possession". *Fender v. Heirs at Law of Smashum*, 354 S.C. 504, 513, 581 S.E.2d 853, 858 (Ct. App. 2003). On the other hand, ouster which fails to ripen into adverse possession renders the ousting cotenant "liable as a trespasser for the rental value of the property beyond his ownership share." *Parker I*, 349 S.C. at 230, 562 S.E.2d at 623 (citing *Jones*, 14 S.C. at 307-08). Thus, it necessarily follows that a cotenant claiming title by adverse possession is "chargeable with knowledge that, if their claim to exclusive title [is] not sustained, they [will] be accountable to their cotenants for their proportionate shares of the rents and profits." *Youmans v. Youmans*, 128 S.C. 31, 121 S.E. 674, 676 (1924). In other words, an unsuccessful adverse possession claim by a cotenant establishes—via admission—a competing claim for ouster damages by the other cotenant as a matter of law. This is *precisely* the situation presented in this case.

Throughout this litigation, Respondent has maintained a counterclaim for adverse possession affirmatively alleging that:

> Since [May 14, 1979] Defendant Frieda McDew Shorter has exercised exclusive control over the subject property . . . in a manner that is continuous, open, notorious, adverse and hostile.

(*See* R. p. 25, ¶ 17; pp. 47-48, ¶ 19.) In furtherance of her adverse possession claim, Respondent admitted in her initial pleadings that:

> Defendant has denied Plaintiff the current set of keys and the security code to the aforementioned House and refuses to give keys and the security code to the Plaintiff.

(*Cf.* R. p. 19, ¶ 6; p. 23, ¶ 2.) Respondent only amended this admission after the lower court ordered her to provide a working set of keys and the security code. (*See* R. pp. 45-46, ¶¶ 2, 5.)

The admissions and allegations contained in Respondent's pleadings are judicially binding and conclusive against the Respondent. *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015); *Elrod v. All,* 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) ("The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible."). Respondent's allegations in support of her adverse possession claim—that she maintained exclusive, continuous, open, notorious, adverse, and hostile possession of the Property—are the very definition of ouster and are prerequisites to a cotenant claiming title by adverse possession. *Fender*, 354 S.C. at 513, 581 S.E.2d at 858. Consequently, Respondent conclusively admitted to ousting Appellant from the Property since May 14, 1979.

However, because the 1979 Deed (R. pp. 129-132) created a life estate for the Parties' parents in the Property, the statutory period for Respondent's adverse possession claim did not commence until after the death of the last life tenant of the Property—Mary McDew—on March 17, 2007. *Phipps v. Hardwick*, 273 S.C. 17, 25, 253 S.E.2d 506, 510 (1979); *Curtis v. DesChamps*, 290 S.C. 315, 325, 350 S.E.2d 201, 207 (Ct. App. 1986). Appellant instituted her case for possession on October 21, 2016 and, thus, Respondent did not satisfy the statutory period for her adverse possession claim, as the Master-In-Equity correctly ruled. *See* S.C. Code § 15-67-210 (prescribing ten-year period of exclusive possession for asserting adverse possession claim). Consequently, as a matter of law, Respondent conclusively admitted she ousted Appellant from the Property since 1979 but did not meet the time requirement for adverse possession. As a result, Respondent's adverse possession claim failed, but her conclusive admission of ouster remains. Accordingly, Respondent *must be* liable to Appellant for ouster damages as a matter of law. *Youmans*, 128 S.C. 31, 121 S.E. at 676 (holding ousting cotenants "chargeable with knowledge that, if their claim to exclusive title was not sustained, they would be accountable to their cotenants for their proportionate shares of the rents and profits"). This alone demonstrates the Master-In-Equity erred in denying Appellant's ouster claim and in failing to award her damages for such claim.

B. Respondent refused to provide Appellant a working set of keys and the security code, thus, ousting Appellant from the Property.

In addition to Respondent's binding admissions and allegations, the facts introduced at trial also established that the Master-In-Equity should have granted Appellant's ouster claim as a matter of law.

In its Order, the court concluded as a matter of fact that "the defendant never changed the locks on the residence." (R. p. 8.) Based on the court's Order, it appears the court considered this

single fact determinative of the issue of ouster. The weight afforded by the court to whether the Respondent changed the locks is disproportionate to both its logical and legal significance. While it is correct that changing the locks can evince intent to accomplish ouster, *see Parker I*, 349 S.C. at 230-31, 562 S.E.2d at 622, changing the locks is not *necessary* to show ouster. Indeed, a "physical eviction" from the premises is not necessary and there are many other circumstances which can "evince a claim of exclusive right and title" and a denial of the rights of one's cotenants. *See id.* All that is necessary to show ouster is "an exclusion of the other tenants from possession". *Wells v. Coursey*, 197 S.C. 483, 15 S.E.2d 752, 755 (1941).

Here, even assuming Respondent did not actually change the locks or the code, Respondent's argument that ouster did not occur because the locks were not changed contravenes both reason and equity. Respondent, by her words and actions, intentionally led Appellant to believe that the locks and code had been changed and Respondent never took any steps to correct that assumption. Plenty of other evidence at trial indicated that Respondent—by her own admission—excluded Appellant from the Property.

Respondent testified that when Appellant called her in 2009 asking to be let into the Property, she did not let Appellant in nor did she give Appellant the keys or security code:

> Q: So you didn't give her the keys at that time?
> A: I didn't go over there. I did not give her the keys.
> . . .
> Q: You didn't give her the code, either?
> A: . . . If I didn't give her the keys, I didn't give her the code.
> Q: And you didn't tell her over the telephone what the code was or that it was still the same as all those years?
> . . .
> A: No.
> Q: You didn't follow up with her and mail her the keys or send her a letter with the code?
> A: No.

(R. p. 118, line 23 – p. 119, line 14.) Furthermore, Respondent admitted at trial that she did not provide keys or the security code to the Property to Appellant until after the entry of the Consent Order:

> Q: And after she brought this lawsuit, there was a consent order issued by the Court whereby you gave your attorney the keys to the house and the security code, which he then saw to it that Stephanie got. Is that right?
> A: Yes.

(R. p. 180, lines 4-9.)

Appellant's request to be let into the Property necessarily evinces that, regardless of the reason, she did not have access to the Property. Respondent admitted as much when she testified that she understood Appellant brought this case to gain access to the Property:

> Q: And your sister Stephanie has brought this lawsuit seeking access to the house; is that your understanding?
> A: Yes.

(R. p. 119, line 25 – p. 120, line 3.) Whether her lack of access is attributable to the Respondent changing the locks, the Parties' mother changing the locks, the locks being difficult because of salt-air corrosion, or some other reason, is immaterial because the effect is the same: Appellant no longer had access to the Property as early as 2009 and Respondent's refusal to provide a set of keys and the security code maintained Appellant's exclusion from the Property until the entry of the Consent Order.[2] Indeed, it was Respondent's stated intention, as expressed to Appellant, (R. p. 66, lines 2-11, 20-24), and Mr. Gay, (R. p. 94, line 25 – p. 95, line 17; p. 97, lines 10-22), to

[2] Respondent's counsel suggested at trial that Appellant should have broken into the Property or resorted to some other means of gaining access to the Property other than through this lawsuit. Such argument is unavailing as the Supreme Court in *Parker I* condemned the use of self-help by a cotenant to protect property rights. *Parker I*, 349 S.C. at 231 n. 3, 562 S.E.2d at 623, n. 3 (noting that cotenants should seek redress through the courts instead of resorting to self-help and taking the law into their own hands).

block Appellant from using the House and Property until Respondent received payment for the claimed expenses.

Nevertheless, given Respondent's admissions at trial, proof that Respondent changed the locks to the Property was not necessary to prove Appellant's ouster claim. Regardless of the reason for Appellant's lack of a working key to the Property in 2009, Respondent's admitted refusal to provide working keys to Appellant when requested accomplished Respondent's stated intention of excluding Appellant from the Property. Appellant would not have been excluded if Respondent changed the locks but also provided a set of working keys to the Appellant. However, Respondent's refusal to provide a working set of keys would have worked to exclude Appellant if Appellant had simply misplaced her keys or never had working keys from the start. Thus, whether Respondent changed the locks has no causal connection to Appellant's exclusion from the Property. The sole cause of her exclusion was Respondent's refusal, when requested, to provide working keys to the Property or, under Respondent's theory, an explanation of how to successfully operate the corroded and difficult lock. The Master-In Equity improperly relied on the lack of Respondent changing the locks as preemptive of Appellant's ouster claim.

The South Carolina Supreme Court's decision in *Parker I* presents a nearly identical scenario. In *Parker I*, just as in this case, it was the defendant sibling's refusal to give the plaintiff a working key until ordered to do so by the master—and not the changing of the locks—that brought about the ouster. The only difference in this case is that Respondent has testified that she did not change the locks whereas the defendant in *Parker I* admitted he changed the locks. As explained above, however, this difference is not determinative because in *Parker I* the Supreme Court specifically recognized that it was the defendant's "refus[al] to provide [the cotenant] with a key" which accomplished the ouster. *Parker I*, 349 S.C. at 231, 562 S.E.2d at 623. Just as the

defendant did in *Parker I*, Respondent admitted she refused to provide her cotenant sibling working keys and the security code to the property until ordered to do so by the trial court. Thus, under *Parker I*, the Master-In-Equity should have found that Respondent excluded Appellant by refusing to provide Appellant with working keys and the security code to the Property and that this exclusion constitutes ouster as a matter of law.

Finally, the Master-In-Equity's decision is incongruent with the procedural posture of the case. If Respondent did not exclude Appellant from the property (as the Master-In Equity concluded) neither this lawsuit nor the ensuing Consent Order would have been necessary to protect Appellant's property rights. However, it was only after bringing the underlying lawsuit and after the entry of the Consent Order, that Respondent provided Appellant with access to the Property. Following the same logic, Respondent's counterclaim for adverse possession—based on affirmative allegations by the Respondent that she had excluded Appellant from the property—would have been frivolous and in violation of Rule 11, SCRCP. The absurdity of these conclusions—that Appellant would bring an unnecessary lawsuit and that Respondent would knowingly bring a frivolous counterclaim for adverse possession—demonstrates that the only reasonable and logically consistent interpretation of the evidence presented at trial was that Respondent excluded, and thus ousted, the Appellant from the property.

C. New evidence discovered after trial confirms the fact that Respondent changed the locks to the Property as alleged by Appellant.

After the trial of this case, on June 23, 2019, Appellant went to the Property and attempted to enter the house using the keys provided to her by the Respondent pursuant to the lower court's Consent Order. (*See* R. pp. 327-330.) Upon arrival, however, she discovered that neither of the keys would open the bottom lock on the beach house door. *Id.* Subsequently, Respondent's attorney provided another set of keys to the Property. *Id.* Upon inspection, one key in each set

matches identically, but, the two remaining keys are materially different. *Id.* As expected, the subsequent set of keys opened both locks on the beach house door without issue. *Id.*

This is *prima facie* evidence that the Respondent changed the locks to the beach house. This evidence, which was not and could not have been discovered until after trial, directly contradicts Respondent's testimony at trial that she never changed the locks. (*See* R. p. 104, lines 3-5.) Moreover, it reveals the lower court's finding of fact that "defendant never changed the locks on the residence" was erroneous. Importantly, the court's denial of Plaintiff's claim for ouster materially relied on the assumption (which we now know is incorrect) that Respondent did not change the locks to the beach house.[3] This new evidence that Respondent did, in fact, change the locks further shows Respondent's intent to accomplish ouster. The trial court considered and rejected this new evidence in denying Appellant's motion for a new trial. However, this Court, with its ability to find facts in accordance with its own view of the preponderance of the evidence[4], should find that the Respondent changed the locks, which gives further credence to a finding in favor of Appellant's claim for ouster damages.

For these reasons, this Court should reverse the Master-In-Equity and find Respondent ousted Appellant from the Property from June 2009 until October 16, 2017. The Court should remand this case to the trial court for a determination of Appellant's ouster damages constituting the rental value of the Property beyond Respondent's ownership share for the period of ouster.

II. The Lower Court Erred in its Calculation of the Respondent's Damages

[3] Appellant does not concede that changing the locks is necessary for a showing of ouster; however, changing the locks is evidence of an intent to accomplish ouster.

[4] Under this standard, to the extent this Court finds any disputed fact material to its determination of this Appeal, the Court should determine that fact in favor of Appellant.

A. Respondent's sole remedy for expenses should be a set off against Appellant's ouster damages.

As discussed above, the Appellant's claim for ouster should have been granted and Appellant should have been awarded damages accordingly. As such, Respondent's allowable expenses for the Property would be entirely accounted for, and set off by, Appellant's ouster damages. This set off against ouster damages is Defendant's sole remedy. *See Parker II*, 359 S.C. at 150, 597 S.E.2d at 797; *see also* 6 S.C. Jur. *Cotenancies* § 27 ("[W]here one cotenant is in sole possession of the property and receives all the profits from the property . . . the cotenant in possession is deemed to have undertaken the obligation to pay all the expenses relating to the property to the extent of the rents and profits he receives.").

B. The Master-In-Equity's Order incorrectly calculates the tax benefit from the possible property tax deduction.

This Master-In Equity's Order awards Appellant a set-off for a portion of the tax-benefit realized by Respondent from claiming the taxes for the Property as an itemized exemption on her income tax return. Regardless of whether Appellant is entitled to ouster damages, this Court should recalculate the amount of tax benefit set-off awarded to the Appellant following the language of the Parties' stipulation on this issue and related trial testimony.

Regarding the property tax deduction, the Parties stipulated as follows at trial:

> MR. CONNOR: . . . Mr. Finn and I have agreed to stipulate that during the relevant time period in this case . . . Ms. Shorter has—her income has been in the 15 percent tax bracket and either has taken the deduction or could have taken the deduction at that 15 percent benefit level.
> . . .
> . . . Your Honor, if she takes the property tax deduction, she gets a corresponding benefit to her income tax . . . She gets a 15 percent deduction benefit through her tax deduction.
> . . .
> THE COURT: . . . All right. So that's a stipulation as well; is that correct, Mr. Finn?

MR. FINN: Yes, Your Honor.

(R. p. 109, line 22 – p. 110, line 20.) This stipulation is consistent with Mr. Brashears' submitted deposition testimony—from his experience in the tax preparation business—that if someone had income in the 15% tax bracket, they would receive a tax benefit of 15% of any property tax deductions claimed. (R. p. 205, lines 9-17.)

At trial, Respondent agreed that the amounts she is claiming for payment of property taxes should be reduced by the amount of her corresponding tax benefit from claiming the taxes as a deduction. (R. p. 189, lines 2-6.) Even if Respondent only claimed the tax deductions for the Property for tax year 2017, she stipulated that she *could have* claimed the deduction in current and prior years. Indeed, she had a duty to take the deduction to mitigate her damages. *See Du Bose v. Bultman*, 215 S.C. 468, 56 S.E.2d 95 (1949) (holding that a party suffering damages has a duty to exercise reasonable care and diligence to minimize its damages). Thus, Respondent could have—and should have—taken advantage of her available 15% tax benefit by claiming the property tax deduction as summarized in the following table:

Year:	Amount of Property Tax Claimed:	15% Tax Benefit:
2007	$5,140.38	$771
2008	$5,383.41	$808
2009	$5,550.28	$833
2010	$5,701.93	$855
2011	$5,774.82	$866
2012	$5,830.47	$875
2013	$3,873.64	$581
2014	$4,012.08	$602
2015	$4,070.58	$611
2016	$4,131.90	$620
2017	$4,471.84	$671
2018	$4,471.86	$671
Total:	$58,413.19	$8,764

As a result, the tax benefit available to Respondent was $8,764. The Master-In-Equity's Order miscalculates this tax deduction benefit by only considering, contrary to the stipulations and testimony at trial, tax year 2017.

Regardless of Appellant's ouster claim, Appellant was entitled to a set off equal to half of Respondent's potential tax benefit—$4,382—because Respondent failed to mitigate her damages by claiming this tax benefit for all possible years. Thus, in the alternative to granting Appellant's ouster claim and finding Respondent unable to recover her claimed expenses, this Court should reduce the judgment amount to $63,003.22. This figure represents Respondent's claimed carrying costs amount of $134,770.45, divided in half, and subtracting half the amount of Respondent's possible stipulated tax benefit. However, for reasons cited above, Appellant believes a finding of ouster is proper, which would render the $63,003.22 judgment amount merely a set-off for Respondent against the ouster damages awardable to Appellant.

C. If there was no ouster, the types of expenses Respondent is entitled to are limited to those enforceable as liens against the Property.

Payment of property expenses by a cotenant entitles her to proportionate contributions from the other cotenant or cotenants. *Watson v. Little*, 224 S.C. 359, 359 79 S.E.2d 384, 384 (1953). However, to be compensable when there is no ouster, "a debt or lien paid by a cotenant must have been a common obligation, the payment of which is a common benefit to the property." 6 S.C. Jur. *Cotenancies* § 27. Thus, "[i]f the payment by the cotenant was not a debt or obligation enforceable against the common property, there can be no contribution since there was no common benefit." *Id.* As a result, when there is no ouster, a cotenant is only entitled to contribution for debts enforceable against the property as liens (e.g., property taxes, mortgages, homeowners' association dues, and mechanic's liens) and is not entitled to contribution for other types of expenses (e.g., utilities and insurance). *See id.* Here, there is no evidence in the record that Respondent paid any

sums against a mortgage, association dues, or mechanic's liens on the Property. The only sums Respondent claimed to have paid which could have been enforceable against the Property were the taxes for the Property. Thus, in the alternative, this Court should limit the amount of expenses awarded to the Respondent to only the amount of the Property taxes reduced by Respondent's claimable tax benefit.

CONCLUSION

For the reasons stated above Appellant respectfully requests that this Court reverse the Master-In-Equity's Order denying Appellant's claim for ouster and remand for a determination of Appellant's damages and a proper calculation of Respondent's damages, if any.

Respectfully submitted,

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May 6, 2020

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity and Special Circuit Court Judge

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Case No. 2016-CP-07-02274

Stephanie M. McDew a/k/a Stephanie McDew Schoumacher, ……...…… Appellant,

v.

Frieda P. McDew a/k/a Frieda McDew Shorter, …..…… Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant and the Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

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