

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

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SC Court of Appeals

MICHELE BLANK Appellant

Vs.

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

RECORD ON APPEAL - VOLUME I

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CERTIFICATION

Counsel for Appellant hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 21, 2020

Edward A. Bertele

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

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

MICHELE BLANK,)
Plaintiff,)

vs.)

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

ORDER

FILED
2019 JUN 14 PM 3:13
JULIE J. ANDERSON
CLERK OF COURT

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

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

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

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

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

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

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

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

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

WPK
#3

BACKGROUND

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

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

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

⁴ TMS 614-00-00-020.

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

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

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

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

WPK
#5
Ms. Blank's surveyor, Mr. Franklin, was notified of this finding. He went to the property, and he testified that a corner boundary marker that he located previously had been pulled out of the ground. He reset it. Additional surveyors were hired by the Trust, and they did an extensive reconstruction of the subdivision in order to determine the boundary line between Lots 11 and 12. The surveyors aligned with the Trust and Ms. Blank's surveyor are in dispute as to the proper boundary.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

She claims that rainwater accumulating on the driveway flows to her side yard during any storms that produce in excess of three inches to four inches of rain, causing her studio to flood. She asserts that the concrete driveway is about four inches above the level of her yard (See Pl. Ex. 41).

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

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

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

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

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

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

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

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

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

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

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

FIRST CAUSE OF ACTION – DECLARATORY AND INJUNCTIVE RELIEF

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

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

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

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

WPK
#15

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

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

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

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

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

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

Wax
#16

THIRD CAUSE OF ACTION – CONTEMPT

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

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

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

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

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

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

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

FOURTH CAUSE OF ACTION – SLANDER OF TITLE

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

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

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

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

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

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

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

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

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

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

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

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

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

FIFTH CAUSE OF ACTION – NUISANCE

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

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

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

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

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

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

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

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

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

COUNTERCLAIMS¹³

FIRST COUNTERCLAIM – SLANDER OF TITLE

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

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

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

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

SECOND COUNTERCLAIM – ABUSE OF PROCESS

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

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

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

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

The action for abuse of process was not proven.

WPAK #25
THIRD COUNTERCLAIM – TORTIOUS INTERFERENCE WITH CONTRACT

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

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

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

FOURTH COUNTERCLAIM – DECLARATORY JUDGEMENT AS TO BOUNDARY

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

THEREFORE, IT IS ORDERED:

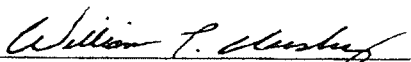
#26 1. As to the First Cause of Action and the Fourth Counterclaim, the common property line of Lots 11 and 12 is established as the one designated as the "boundary based on existing monuments on 5-6-05" shown on the plat of D.E. Franklin and L.S., Eco Engineering and Construction, dated January 6, 2016.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

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

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

AND IT IS SO ORDERED.

June 8, 2019


William P. Keesley
Presiding Circuit Court Judge

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-4122

MICHELE BLANK,
Plaintiff,

vs.

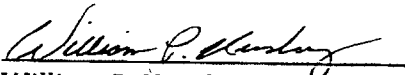
PATRICIA TIMMONS, TRUSTEE
OF THE GORDON H. TIMMONS
EXEMPT FAMILY TRUST,
Defendant.

**ORDER DENYING PLAINTIFF'S
MOTION TO
ALTER OR AMEND**

The plaintiff moved to alter or amend the order entered on June 14, 2019. Pursuant to Rule 59(f), SCRCF, the court notified the parties that the case would be decided on written submission, and both sides have filed extensive briefs and exhibits. Having reconsidered the matter, the court finds no issue of law or fact which was not addressed in the prior order, and the motion to alter or amend is denied.

AND IT IS SO ORDERED.

August 7, 2019


William P. Keesley, Presiding Judge

2019 AUG -9 PM 3:14
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

7/14/16
1:10 PM

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

MICHELE BLANK,)
)
Plaintiff,)
)
vs.)
)
PATRICIA TIMMONS, TRUSTEE)
OF THE GORDON H. TIMMONS)
EXEMPT FAMILY TRUST,)
)
Defendant.)
_____)

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

**ORDER AMENDING
LIS PENDENS**

FILED
2016 SEP 14 PM 12:52
JULIE J. ARMSTRONG
CLERK OF COURT

THIS MATTER came before me for hearing upon Defendant's Notice of Motion and Motion to Cancel or Amend *Lis Pendens*. I find as follows:

1. The real property that is the subject of the boundary dispute in this action is the property highlighted in yellow on Exhibit "A" hereto. The *lis pendens* filed in this action on August 9, 2016 is hereby amended to reflect that the property in dispute is the property highlighted in yellow on Exhibit "A" hereto, not as described in the said *lis pendens*. The legal description of the real property that is the subject of the boundary dispute in this action is described as:

All that lot, piece or parcel or lot of land shown as "Quit Claim Area 3,636.41 SF. 0.083 AC" on a plat entitled "Plat Showing Lot 12, Block E (0.440 AC), TMS #614-09-00-021, Property of Gorden H. Timmons Family Trust, Located in Copahee View Subdivision, Christ Church Parish, Charleston County, South Carolina," Dated July 18, 2016, revised August 4, 2016 by Parker Land Surveying, LLC, Andrew C. Gillette, PLS, and recorded in the RMC Office for Charleston County on August 5, 2016 in Plat Book S16, Page 0176. Reference to said plat (which is attached hereto) is hereby craved for a more complete description.

GA

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R-31

P-26

2. Defendant may proceed to sell the undisputed portion of Lot 12, Block E, T.M.S. #614-09-00-021 (the part not highlighted in yellow) to a third party free and clear of the claims raised by Plaintiff in this action.

3. Defendant shall hold the title to the disputed portion of Lot 12, Block E, T.M.S. #614-09-00-021 (the part highlighted in yellow) during the pendency of this action and it shall comply with any order issued in this case that determines the ownership of all or any part of the disputed portion of Lot 12.

THEREFORE, IT IS

ORDERED, ADJUDGED AND DECREED that the real property that is the subject of the boundary dispute in this action is the property highlighted in yellow on Exhibit "A" hereto. The *lis pendens* filed in this action on August 9, 2016 is hereby amended to reflect that the property in dispute is the property highlighted in yellow on Exhibit "A" hereto, not as described in the said *lis pendens*. The legal description of the real property that is the subject of the boundary dispute in this action is described as:

All that lot, piece or parcel or lot of land shown as "Quit Claim Area 3,636.41 SF. 0.083 AC" on a plat entitled "Plat Showing Lot 12, Block E (0.440 AC), TMS #614-09-00-021, Property of Gorden H. Timmons Family Trust, Located in Copahee View Subdivision, Christ Church Parish, Charleston County, South Carolina," Dated July 18, 2016, revised August 4, 2016 by Parker Land Surveying, LLC, Andrew C. Gillette, PLS, and recorded in the RMC Office for Charleston County on August 5, 2016 in Plat Book S16, Page 0176. Reference to said plat (which is attached hereto) is hereby craved for a more complete description.

ORDERED, ADJUDGED AND DECREED that Defendant may proceed to sell the undisputed portion of Lot 12, Block E, T.M.S. #614-09-00-021 (the part not

Q-2

highlighted in yellow) to a third party free and clear of the claims raised by Plaintiff in this action.

AND IT IS ORDERED, ADJUDGED AND DECREED that Defendant shall hold the title to the disputed portion of Lot 12, Block E, T.M.S. #614-09-00-021 (the part highlighted in yellow) during the pendency of this action and it shall comply with any order issued in this case that determines the ownership of all or any part of the disputed portion of Lot 12.

AND IT IS SO ORDERED.

Charleston, South Carolina
September 12, 2016



Judge, Ninth Judicial Circuit

THIS AMENDMENT TO HIS PENDING SHALL CREATE NO PRESUMPTION AS TO THE VALIDITY OF THE JULY 18, 2016 GILGITE PLAT, REVISED AUGUST 4, 2016, OR THE BOUNDRIES THEREON, IDENTIFIED AS EXHIBIT A TO THIS ORDER AND SHALL NOT BE RELIED ON TO IMPAIR PLAINTIFF'S CLAIMS IN THIS CASE.



Exhibit "A"

GoZ

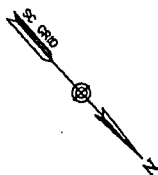
R 34

REFERENCES:

1. PLAT BOOK AL PAGE 77.
2. PLAT BOOK L14 PAGE 0509-0510.
3. DEED BOOK 0318 PAGE 741
4. DEED BOOK 0528 PAGE 458
5. PLAT SHOWING LOT 12, BLOCK E (0.440 AC.), TMS# 614-09-00-021, PROPERTY OF GORDEN H. TIMMONS EXEMPT FAMILY TRUST, LOCATED IN COPAHEE VIEW SUBDIVISION, CHRIST CHURCH PARISH, CHARLESTON COUNTY, SOUTH CAROLINA DATED JUNE 1, 2016 REVISED JUNE 12, 2016 AND RECORDED IN PLAT BOOK S16 PAGE 0154, CHARLESTON COUNTY RECORDS.

CURVE TABLE				
CURVE	RADIUS	LENGTH	DELTA	CHORD
CI	96.87'	8.32'	5:30:36"	8.31'
				S 47°45'33" E

LINE TABLE		
LINE	BEARING	DISTANCE
L1	S 47°45'33" E	16.81'



LOT 13
TMS# 614-09-00-022
TIMOTHY E. & PATRICIA M. LANCASTER
PLAT BOOK AL PAGE 77

NOTES:

1. ANYTHING SHOWN OUTSIDE THE DEFINED BOUNDARY OF THIS PLAT IS FOR DESCRIPTIVE PURPOSES ONLY.
2. AREA DETERMINED BY COORDINATE METHOD.
3. THE PUBLIC RECORDS REFERENCED ON THIS PLAT ARE ONLY THOSE USED AND NECESSARY TO THE ESTABLISHMENT OF THE BOUNDARY OF THIS PROPERTY. THEY ARE NOT AND DO NOT CONSTITUTE A TITLE SEARCH.
4. PROPERTY IS LOCATED IN FLOOD ZONE AE (ELEV. 14) AS SCALED - FROM F.L.R.M. PANEL 4501BC 0535 J REVISED NOVEMBER 17, 2004.
5. PROPERTY IS ZONED 101 RESD-MHS
FRONT SETBACK 25'
REAR SETBACK 15'
SIDE SETBACK 5'
6. PROPERTY IS ZONED 'MHS' - LOW DENSITY MANUFACTURED HOUSING SUBDIVISION DISTRICT
7. OVERALL EXISTING DENSITY OF DWELLING UNITS AS SHOWN IS 1.77 PER ACRE.

LINE TYPE AND SYMBOL LEGEND

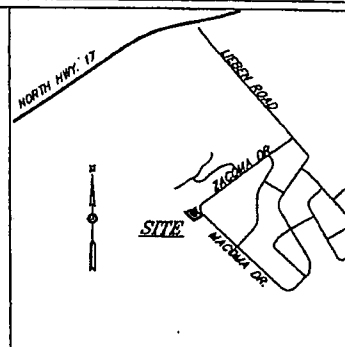
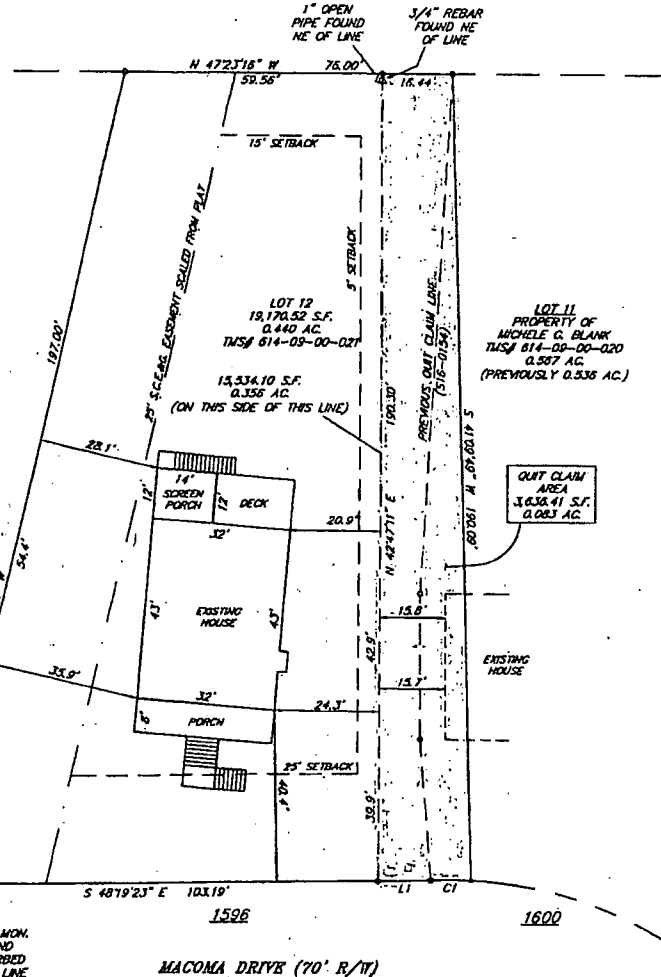
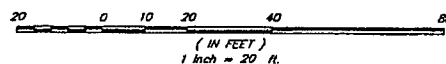
- PROPERTY LINE w/ CORNER (3/4" REBAR SET)
- PROPERTY LINE w/ CORNER FOUND AS DESCRIBED
- RIGHT-OF-WAY LINE
- SETBACK LINE
- S.E.C.A.G. EXEMPT LINE
- ADJOINING PROPERTY LINE



I HEREBY STATE TO THE BEST OF MY PROFESSIONAL KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE STANDARDS OF PRACTICE MANUAL FOR SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS A SURVEY AS SPECIFIED THEREIN. ALSO, I HAVE MADE NO VISIBLE ENCROACHMENTS OR PHYSICAL RIGHTS OTHER THAN SHOWN.

ANDREW C. GILLETTE
No. 5933
Tier B
P.L.S. 5933-B

Parker Land Surveying, LLC
5910 Griffin Street
Hawahan, SC 29410
Phone: (843) 554-7777
Fax: (843) 554-7779



LOCATION MAP
N.T.S.

RECORDED		DATE: 8/18/16		TIME: 2:11:53 PM											
Book Page	518 0176	DocType	Small Plat												
Charles L. Leland, Register, Charleston County, SC															
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Amount of Fee	Amount of Fee														
Stamp Fee	0.00														
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TOTAL	0.00														
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Location	Location														
Charleston County Planning	COPAHEE VIEW S/D														

PLANNING AND R.M.C. USE ONLY

APPROVED PLAT
S. J. Leland
Director of Planning
Charleston County Planning Commission
580-00033 07.05.16
Date

PLAT
SHOWING LOT 12, BLOCK E (0.440 AC.), TMS# 614-09-00-021, PROPERTY OF GORDEN H. TIMMONS EXEMPT FAMILY TRUST, LOCATED IN COPAHEE VIEW SUBDIVISION, CHRIST CHURCH PARISH, CHARLESTON COUNTY, SOUTH CAROLINA
DATE: JULY 18, 2016 REVISED: AUGUST 4, 2016
SCALE: 1" = 20'

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

16-CP-16-4122
CASE NUMBER

MICHELE BLANK
Plaintiff,

-versus-

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

and

JAMES PATRICK and
HOLLY PATRICK, H/W
Defendants

2016 AUG -9 PM 4:03
CLERK OF COURT

LIS PENDENS

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in the Court of Common Pleas for the County of Charleston, South Carolina upon a Complaint against the above named Defendants for the purpose of determining the interest of Plaintiff and the interest of the Defendants in the parcel of land hereinafter described and is brought under the provisions of the South Carolina Code of Laws Section 15-67-10 et seq. for the purpose of establishing that Plaintiff be declared the owner in fee simple and having good and marketable title to a portion of the property hereinafter described; that the premises to be affected by said Complaint was at the time of the filing of this Lis Pendens situated, lying and being in the County of Charleston, South Carolina and is more particularly described as follows:

See attached Plat dated June 3, 2016, revised June 22, 2016, recorded in Book S16, Page 0154 of the Recorder of Mesne Conveyances of Charleston County

Also known as TMS # 614-09-00-021

Edward A. Bertele, Esq.
SC Bar # 72521
1812 Pierce Street
Charleston, SC 29492
843-471-2082
Email: ebartele@msn.com
By: 

August 5, 2016

R-36

REFERENCES:

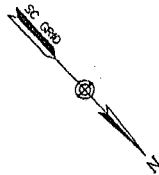
1. PLAT BOOK AL PAGE 77.
2. PLAT BOOK L14 PAGE 0509-0510.
3. DEED BOOK 0318 PAGE 741
4. DEED BOOK 0320 PAGE 456

CURVE TABLE					
CURVE	RADIUS	LENGTH	DELTA	CHORD	CHORD BEARING
C1	98.07'	2.32'	5°30'36"	2.31'	S 47°45'13" E

LINE DATA		
LINE	LENGTH	BEARING
L1	34.68'	S 42°23'31" W

NOTES:

1. ANYTHING SHOWN OUTSIDE THE DEFINED BOUNDARY OF THIS PLAT IS FOR DESCRIPTIVE PURPOSES ONLY.
2. AREA DETERMINED BY COORDINATE METHOD.
3. THE PUBLIC RECORDS REFERENCED ON THIS PLAT ARE ONLY THOSE USED AND NECESSARY TO THE ESTABLISHMENT OF THE BOUNDARY OF THIS PROPERTY. THEY ARE NOT AND DO NOT CONSTITUTE A TITLE SEARCH.
4. PROPERTY IS LOCATED IN FLOOD ZONE AE (ELEV. 14') AS SCALED FROM F.U.M. PANEL 43019C 0535 J REVISED NOVEMBER 17, 2004.
5. PROPERTY IS ZONED 101 RESID-MHS
FRONT SETBACK 25'
REAR SETBACK 15'
SIDE SETBACK 5'
6. PROPERTY IS ZONED MHS - LOW DENSITY MANUFACTURED HOUSING SUBDIVISION DISTRICT
7. OVERALL EXISTING DENSITY OF DWELLING UNITS AS SHOWN IS 1.77 PER ACRE.



LOT 13
TMS# 614-09-00-022
TIMOTHY E. & PATRICIA M. LANCASTER
PLAT BOOK AL PAGE 77

PLANNING AND R.M.C. USE ONLY

RECORDED	
DATE: 07/4/2016	TIME: 3:19:30 PM
Book-Page: 510 0164	DocType: Small Plat
Charila Lybrand, Registrar, Charleston County, SC	
Record Fee Postage TOTAL Drawn Clerk 110.00 0.00 110.00 0 0	
Paid By: CHARLESTON COUNTY PLANNING	
Location: COPAHEE VIEW S/D	

APPROVED PLAT
Director of Planning
Charleston County Planning Commission
SPF 001107 06/23/16
Appl# Date

3/8" REBAR FOUND

N 47°12'36" W

107.00'

N 48°19'23" W

115.70'

1600

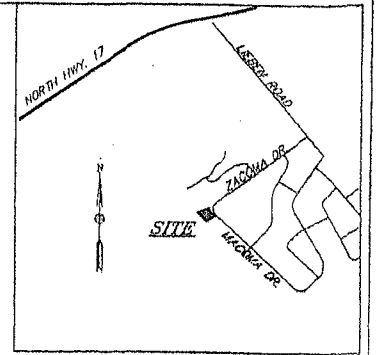
±820' TO CENTERLINE INTERSECTION OF
PANDORA DRIVE AND MACOMA DRIVE

OGVC HIGH.
FOUND
DISTURBED
NE OF LINE

MACOMA DRIVE (70' R/W)

LINE TYPE AND SYMBOL LEGEND

- PROPERTY LINE w/ CORNER (3/4" REBAR SET)
- PROPERTY LINE w/ CORNER FOUND AS DESCRIBED
- RIGHT-OF-WAY LINE
- SETBACK LINE
- S.E.C.&G. EASEMENT LINE
- ADJOINING PROPERTY LINE



LOCATION MAP
N.T.S.

PLAT

SHOWING LOT 12, BLOCK E (0.440 AC.), TMS# 614-09-00-021, PROPERTY OF GORDEN H. TIMMONS EXEMPT FAMILY TRUST, LOCATED IN COPAHEE VIEW SUBDIVISION, CHRIST CHURCH PARISH, CHARLESTON COUNTY, SOUTH CAROLINA

DATE: JUNE 3, 2016 REVISED: JUNE 22, 2016

SCALE: 1" = 20'



Parker Land Surveying, LLC
5910 Griffin Street
Hennah, SC 29410
Phone: (843) 554-7171
Fax: (843) 554-7179

I HEREBY STATE TO THE BEST OF MY PROFESSIONAL KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE STANDARDS OF PRACTICE MANUAL FOR SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS A SURVEY AS SPECIFIED THEREIN; ALSO THERE ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN.

ANDREW C. GILLETTE
No. 5933
P.L.S. 5933-B



20 0 10 20 40 80
(IN FEET)
1 inch = 20 ft.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL DISTRICT

MICHELE BLANK
Plaintiff,

-versus-

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

CASE NUMBER 2016-CP-10-

2016 AUG -9 PM 4:04
CLERK OF COURT
BY

**COMPLAINT TO
ENFORCE JUDGMENT**

Michele Blank, a resident of Charleston County, South Carolina alleges the following as her Complaint against the Defendant.

FIRST COUNT

(Declaratory and Injunctive Relief)

1. At all relevant times, Plaintiff was and is the record owner of certain real property located in Christ Church Parish, Charleston County, known as Lot 11, Copahee View Subdivision, also known as 1600 Macoma Drive, also known as TMS # 614-09-00-020.
2. In connection with her purchase of this property, Plaintiff obtained a Site Plan prepared by David Franklin, P.E. & L.S. dated August 11, 2005 for the purpose of having a dwelling constructed thereon to become her principal residence. Franklin prepared the Site Plan based upon the location of the corners marked for Lot 11 when the property was sold to Plaintiff. Thereafter a dwelling unit was constructed upon Lot 11 which was within the boundary lines contained in the Franklin Site Plan and which became the Plaintiff's principal residence.
3. On or about 2013, Defendant Patricia Timmons, Trustee of the Gordon H. Timmons Exempt Family Trust (Timmons) acquired Lot 12, Copahee View Subdivision, TMS # 614-09-00-021, adjacent to Lot 11.
4. In March 2015, Defendant Timmons obtained a Preliminary Plat of Lot 12 from Parker Land Surveying a/k/a PLS, LLC for the purpose of having a dwelling unit constructed thereon. The PLS, LLC surveyor who prepared the Plat relied upon an inaccurate methodology to establish the boundaries of Lot 12 known as "scaling" which did not consider that the actual

corners of the lot had been previously located by Franklin. As a result of reliance upon an inaccurate method and not the actual property corners, the PLS, LLC Preliminary Plat incorrectly indicated that Plaintiff's residence encroached upon the Lot 12 property boundary.

5. On or about May 2015, Defendant Timmons filed a Complaint, Timmons v Blank, 2015 CP-10-3013 against Plaintiff for trespass, alleging that a portion of Plaintiff's dwelling constructed on Lot 11 encroached upon Defendant's property as shown on the PLS, LLC Preliminary Plat. Plaintiff filed an Answer denying any encroachment.

6. In response to Discovery Demands, Defendant provided a September 29, 2015 Plot Plan prepared by PLS, LLC as representing the correct location of the common boundary line with Lot 11. Plaintiff provided a Compilation of Surveys dated January 6, 2016 prepared by Franklin, which contained the same boundary line determined by Franklin in the August 11, 2005 Site Plan in support of her contention that her house did not encroach upon Defendant's property.

7. The case was called for trial on June 2, 2016 before the Honorable Mikell Scarborough, Master in Equity for Charleston County. After a discussion of the merits of the case with Judge Scarborough by counsel for both parties, Defendant Timmons voluntarily dismissed the Complaint with prejudice and a Judgment of Dismissal with Prejudice was entered on June 7, 2016.

8. After she voluntarily agreed to dismiss the Complaint with Prejudice, Defendant requested that PLS, LLC submit a Plat of Lot 12 to the Charleston County Planning Board for approval. The Plat that PLS, LLC submitted and that was approved by the Charleston County Planning Commission was dated June 3, 2016, revised June 22, 2016. (The Subject Plat). The Subject Plat was recorded by the Recorder of Mesne Conveyances for Charleston County in Book S16, Page 0154.

9. The Subject Plat contains the identical boundary line shown in the September 29, 2015 Plot Plan prepared by PLS, LLC between Lot 12 and Lot 11, upon which Defendant Timmons asserted a claim for trespass against Plaintiff.

10. A portion of the real property shown on the Subject Plat as being within the boundary of Lot 12 is within the boundary of Lot 11 as shown on the Franklin January 6, 2016 Compilation of Surveys.

11. Defendant Timmons is barred by the Judgment of Dismissal with Prejudice and res judicata from asserting any claim to the boundary line contained in the Subject Plat. The

resolution of the location of the boundary line between Lots 11 & 12 was a necessary issue in determining Defendant's trespass claim and was adversely decided against her as matter of law because of her voluntary Dismissal with Prejudice.

12. Upon information and belief, Defendant Timmons entered into a contract of sale for Lot 12 to James Patrick and Holly Patrick, H/W based upon the boundary lines as represented in the Subject Plat.

13. The Subject Plat contains a false and misleading description of Lot 12 as the boundary line between Lot 12 and Lot 11. Because it is a matter of public record, the Subject Plat creates irreparable harm to the interests of Plaintiff and to anyone relying upon it. It should be declared to be void as matter of a public policy against the recording of false and misleading documents.

14. Plaintiff has demanded that Defendant Timmons revise the Subject Plat to locate the common boundary according to the January 6, 2016 Franklin Compilation of Surveys and submit it to the Charleston County Planning Commission for approval and recording but Defendant has willfully and persistently refused to do so despite her acceptance of the boundary line contained on it.

15. Plaintiff has and will sustain damages as a result of Defendant's willful refusal to abide by the terms of the Judgment of Dismissal with Prejudice.

SECOND COUNT
(Trespass)

16. Plaintiff repeats and realleges each and every allegation of the First Count as if more fully set forth herein.

17. After the entry of the Judgment of Dismissal with prejudice, Defendant authorized the construction of improvements including a driveway consisting of concrete or some other impermeable substance which encroached upon a portion of Plaintiff's property described in the January 6, 2016 Franklin Compilation of Surveys.

18. Plaintiff has never given permission to allow such improvements to encroach upon her property.

19. Said improvements constitute a continuing trespass upon the Plaintiff's property in violation of the Plaintiff's rights therein.

20. As a result of said continuing trespass, Plaintiff has and will continue to sustain damages including the cost for restoration of her property to its prior condition.

21. Defendant has willfully, wantonly and maliciously disregarded Plaintiff's interests by authorizing construction of said improvements which encroach upon Plaintiff's property. As a result of said willful, wanton and malicious conduct, Defendant Timmons is liable for punitive damages.

THIRD COUNT
(Contempt of Court)

22. Plaintiff repeats and realleges each and every allegation of the First and Second Count as if more fully set forth herein.

23. The Judgment of Dismissal with Prejudice entered on June 7, 2016 established that the common boundary line between Lot 12 and Lot 11 was described in the January 6, 2016 Franklin Compilation of Surveys.

24. Defendant is in Contempt of the Judgment of Dismissal by directing the recording of the Subject Plat which contains a description of Lot 12 based upon the September 29, 2015 Plot Plan prepared by PLS, LLC and not the January 6, 2016 Franklin Compilation of Surveys.

25. The September 29, 2015 Plot Plan contains a false and misleading description of Lot 12 and violates public policy against recording false and misleading documents.

26. Defendant has willfully, wantonly and recklessly disregarded the Judgment of Dismissal with Prejudice by refusing to record a corrected Plat which contains the common boundary line between Lot 12 and Lot 11 as described in the January 6, 2016 Franklin Compilation of Surveys and her conduct justifies the imposition of sanctions.

WHEREUPON, Plaintiff demands judgment as follows:

1. An Order Enforcing the Judgment of Dismissal with Prejudice entered June 7, 2016 by
 - a) declaring that the legal description of the boundary line between Lot 11 and Lot 12 as contained in Compilation of Surveys dated January 6, 2016 and Site Plan dated August 11, 2005 prepared by David Franklin, P.E. & L.S is binding on Defendant in accordance with the Judgment of Dismissal with Prejudice;
 - b) directing the Charleston County Recorder of Mesne Conveyances to cancel the Subject Plat recorded in Book S16, Page 0154;
 - c) directing Defendant to submit a corrected Plat which contains the common

boundary line between Lot 12 and Lot 11 as described in the January 6, 2016 Franklin Compilation of Surveys to the Charleston County Planning Commission for approval and to submit said corrected Plat for recording to the Charleston County Recorder of Mesne Conveyances;

d) enjoining any sale or other transfer of any interest in Lot 12 by Defendant pending compliance with paragraph c);

2. An Award of Compensatory and consequential damages against Defendant Timmons;
3. An Award of Punitive damages against Defendant Timmons ;
4. An award of Counsel fees and Costs against Defendant Timmons;
5. An order holding Defendant in Contempt of Court for willfully violating the Judgment of Dismissal with Prejudice entered June 7, 2016 and awarding Sanctions against her;
6. Such other relief as the Court may determine to be just and equitable.

Edward A. Bertele, Esq.

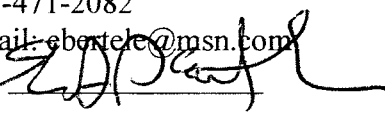
SC Bar # 72521

1812 Pierce Street

Charleston, SC 29492

843-471-2082

Email: ebertele@msn.com

By: 

August 5, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

MICHELE BLANK,)
)
Plaintiff,)
)
vs.)
)
PATRICIA TIMMONS, TRUSTEE)
OF THE GORDON H. TIMMONS)
EXEMPT FAMILY TRUST,)
)
Defendant.)
_____)

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

ANSWER AND COUNTERCLAIMS

FILED
2016 AUG 26 PM 3:00
JULIUS ARMSTRONG
CLERK OF COURT

Defendant, Patricia Timmons, Trustee of the Gorden H. Timmons Exempt Family Trust, hereby answers the Complaint of Plaintiff, and by way of Counterclaims, would show unto this Honorable Court as follows:

1. Admitted. The Charleston County tax map properly depicts the boundaries of Plaintiff's property, including the encroachment of Plaintiff's home upon Defendant's property as shown on Exhibit "A" hereto.

2. Defendant lacks information and belief as to the truth of the allegations contained in Paragraph 2 of the Complaint and therefore denies the same. Further answering the allegations contained in Paragraph 2 of the Complaint the Franklin "Site Plan" is not a survey and it is inaccurate when compared to the Plaintiff's deed, the County approved subdivision plat recorded in Plat Book AL at Page 77, the County tax maps, Charleston County GIS and multiple recent surveys that depict the proper boundaries of Lot 11 and Lot 12, Copahee View Subdivision.

3. Admitted, with the qualification that the date of purchase of Lot 12 was March 18, 2013.

4. Denied.

5. Admitted.

2
6. Denied.

7. Admitted that the case was dismissed with prejudice and without Plaintiff and Defendant having reached a settlement.

8. Denied, in an attempt to reach a settlement with Plaintiff, Defendant prepared a plat showing an area that Defendant might be willing to convey to Plaintiff if a settlement was reached, but no settlement was reached.

9. Denied.

10. Denied.

11. Denied. The only fact established by dismissal with prejudice was that the encroachment of Plaintiff's house upon the Timmons' property was not a trespass. Plaintiff did not establish her ownership of any portion of the Timmons property in the prior litigation.

13. Denied.

14. Denied.

15. Denied.

16. Defendant repeats and re-alleges the foregoing responses to the previous allegations of the Complaint as if set forth herein verbatim.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

22. Defendant repeats and re-alleges the foregoing responses to the previous allegations of the Complaint as if set forth herein verbatim.

23. Denied. The only fact established by the dismissal with prejudice was that the encroachment of Plaintiff's house upon the Timmons' property was not a trespass. Plaintiff did not establish her ownership of any portion of the Timmons property in the prior litigation.

24. Denied.

25. Denied.

26. Denied.

FURTHER ANSWERING THE COMPLAINT AND BY WAY OF AFFIRMATIVE DEFENSE, DEFENDANTS WOULD SHOW UNTO THE COURT AS FOLLOWS:

FOR A FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

27. Plaintiff's Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND AFFIRMATIVE DEFENSE
(Failure to Plead or Prove Title)

28. Plaintiff failed to plead or prove she holds title to any portion of Lot 12 by reference to her root conveyance. Her allegation that she built a house based on an unrecorded Site Plan does not establish ownership. Because Plaintiff has failed to plead facts showing ownership of Lot 12 her case should be dismissed.

FOR A THIRD AFFIRMATIVE DEFENSE
(Failure to Plead or Prove Adverse Possession)

29. Plaintiff has failed to plead or prove she holds title to any portion of Lot 12 by way of a claim to adverse possession.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Failure to Legally Identify Land in Dispute)

30. Plaintiff has failed to plead or prove the portion of the land that she claims is this litigation by way of a legal description sufficient to identify the disputed land and therefore her claim should be dismissed.

FURTHER ANSWERING THE COMPLAINT AND BY WAY OF COUNTERCLAIMS,
DEFENDANT WOULD SHOW UNTO THIS COURT:

FOR A FIRST COUNTERCLAIM
(Slander of Title)

31. Plaintiff has published, with malice, false statements that are derogatory to Defendant's title that has caused special damages to Defendant as a result of the diminished value of Defendant's property in the eyes of third parties; to wit: Plaintiff has falsely claimed to own a significant portion of Defendant's property and has related this information to multiple third parties who were purchasers or potential purchasers of the property that did not move forward with the acquisition of Defendant's property for its fair market value by reason of Plaintiff's malicious false statements.

32. While Defendant denies Plaintiff has any claim to *any portion* of Defendant's property (Lot 12) Defendant's demanded that Plaintiff identify the extent of her claim by a sufficient legal description in order that Defendant could sell the undisputed portion of Defendant's property to a third party and Plaintiff

maliciously failed, refused and neglected to identify the extent of her claim in order to diminish the value of the remainder of Defendant's property and thereby improperly prevent Defendant from selling its property.

33. Defendant is informed and believes it is entitled to a judgment against Plaintiff for special damages for slander of title.

FOR A SECOND COUNTERCLAIM
(Abuse of Process)

34. Plaintiff, for the ulterior purpose of preventing Defendant from selling Lot 12, filed a *lis pendens*, naming the potential purchasers of Defendant's property as Defendants (when they are not parties to the action) and without providing a proper legal description delineating the extent of Plaintiff's boundary claim (which claim is disputed by Defendant) and the same was a willful act in the use of the process that is not proper in the regular conduct of the proceeding. Further, Plaintiff refused to correct said error when notified about it in an effort to extort a settlement and the payment by Defendant of her attorney's fees that are not recoverable pursuant to any contract or statute in this boundary dispute litigation.

FOR A THIRD COUNTERCLAIM
(Tortious Interference with Contract)

35. Plaintiff tortiously interfered with the contract between Defendant and James and Holly Patrick in that there exists a valid contract, Plaintiff had knowledge of the contract, Plaintiff it attempting to intentionally procure its breach, without justification, causing resulting damage to Defendant.

FOR A FOURTH COUNTERCLAIM
(Declaratory Judgment)

36. Defendant is informed and believes it is entitled to a judgment declaring that Plaintiff owns no portion of Lot 12, or, if there be a dispute as to the location of the boundary, or a claim based upon adverse possession, that the Court should declare the legal rights of the parties and determine the boundary.

WHEREFORE, Defendant prays unto this Honorable Court as follows:

(A) For an emergency Order cancelling or amending the *lis pendens* so that it legally describes the extent of Plaintiff's claim in this action so that Defendant may proceed with the sale of the portion of its property that is not in dispute;

(B) For the dismissal of Plaintiff's claims against Defendant;

(C) For a judgment against Plaintiff in favor of Defendant in an amount of special damages to be determined by the trier of fact as to the First Counterclaim;

(D) For a judgment against Plaintiff in favor of Defendant in an amount of damages to be determined by the trier of fact as to the Second Counterclaim;

(E) For a judgment against Plaintiff in favor of Defendant in an amount of damages to be determined by the trier of fact as to the Third Counterclaim;

(F) For a declaratory judgment that determines Plaintiff has no interest in Lot 12, and, if she has such interest (which is denied), a judgment that determines the extent of that interest.

(G) For a trial by jury on all claims and Counterclaims so triable;

(H) For attorney's fees and the costs of this action;

(I) For such other and further relief as this Court may deem just and proper.

Respectfully submitted,


THE MASON LAW FIRM, P.A.

BY: _____

MARK A. MASON

S.C. Bar #3676

Tidewatch Centre on Shem Creek

465 W. Coleman Boulevard, Suite 302

Mount Pleasant, S.C. 29464

Telephone: (843) 884-1444

Facsimile: (843) 884-3595

E-mail: mark@masonlawfirm.com

Attorneys for the Defendant

Mount Pleasant, South Carolina
August 26, 2016

CERTIFICATE OF SERVICE

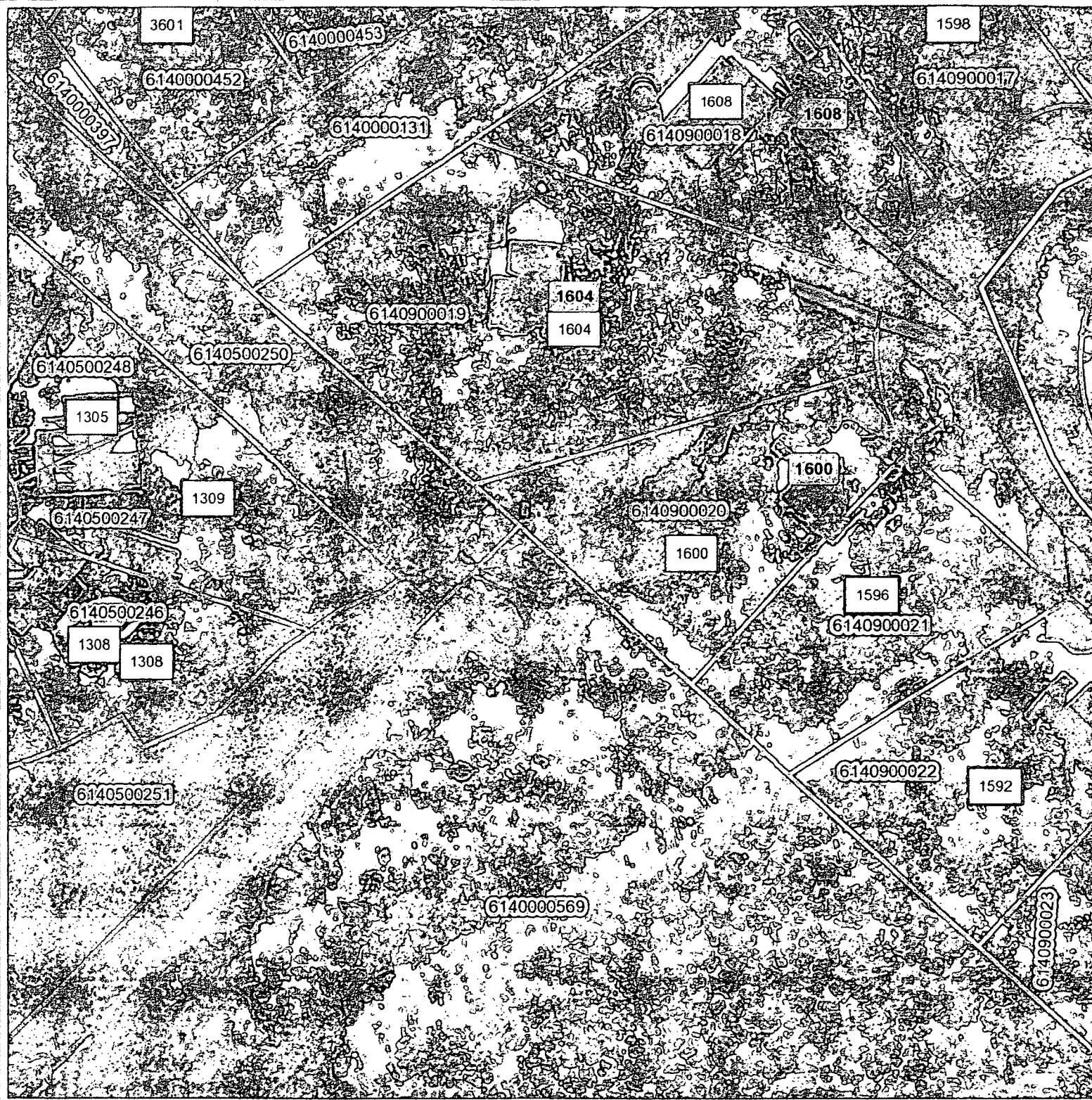
I hereby certify that I served this Answer and Counterclaims on Plaintiff's attorney by hand-delivery to the office of Edward A. Bertele located at 1812 Pierce Street, Charleston, South Carolina 29492 this 26th day of August, 2016 and that I also provided the said Plaintiff's counsel with a copy of this Motion by email to ebertele@msn.com.


THE MASON LAW FIRM, P.A.

BY: _____

MARK A. MASON

Exhibit A



2012

R 51

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL DISTRICT

CASE NUMBER 2016-CP-10- 4122

MICHELE BLANK
Plaintiff,

-versus-

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

FILED
2016 SEP 27 PM 1:50
JULIE J. ARMSTRONG
CLERK OF COURT
**AMENDED COMPLAINT TO
ENFORCE JUDGMENT**

Michele Blank, a resident of Charleston County, South Carolina alleges the following as her Complaint against the Defendant.

FIRST COUNT
(Declaratory and Injunctive Relief)

1. At all relevant times, Plaintiff was and is the record owner of certain real property located in Christ Church Parish, Charleston County, known as Lot 11, Copahee View Subdivision, also known as 1600 Macoma Drive, also known as TMS # 614-09-00-020 having acquired the subject property by Deed dated February 28, 2005 and recorded in the Charleston County RMC in Book 528, page 456.
2. In connection with her purchase of this property, Plaintiff obtained a Site Plan prepared by David Franklin, P.E. & L.S. dated June 6, 2005 for the purpose of having a dwelling constructed thereon to become her principal residence. Franklin prepared the Site Plan based upon the location of the corners marked for Lot 11 when the property was sold to Plaintiff. Thereafter a dwelling unit was constructed upon Lot 11 which was within the boundary lines contained in the Franklin Site Plan and which became the Plaintiff's principal residence.
3. On or about 2013, Defendant Patricia Timmons, Trustee of the Gordon H. Timmons Exempt Family Trust (Timmons) acquired Lot 12, Copahee View Subdivision, TMS # 614-09-00-021, adjacent to Lot 11.
4. In March 2015, Defendant Timmons obtained a Preliminary Plat of Lot 12 from Parker Land Surveying a/k/a PLS, LLC for the purpose of having a dwelling unit constructed thereon.

The PLS, LLC surveyor who prepared the Plat relied upon an inaccurate methodology to establish the boundaries of Lot 12 known as "scaling" which did not consider that the actual corners of the lot had been previously located by Franklin. As a result of reliance upon an inaccurate method and not the actual property corners, the PLS, LLC Preliminary Plat incorrectly indicated that Plaintiff's residence encroached upon the Lot 12 property boundary.

5. On or about May 2015, Defendant Timmons filed a Complaint, Timmons v Blank, 2015 CP-10-3013 against Plaintiff for trespass, alleging that a portion of Plaintiff's dwelling constructed on Lot 11 encroached upon Defendant's property as shown on the PLS, LLC Preliminary Plat. Plaintiff filed an Answer denying any encroachment.

6. In response to Discovery Demands, Defendant provided a September 29, 2015 Plot Plan prepared by PLS, LLC as representing the correct location of the common boundary line with Lot 11. Plaintiff provided a Compilation of Surveys dated January 6, 2016 prepared by Franklin, which contained the same boundary line determined by Franklin in the June 6, 2005 Site Plan in support of her contention that her house did not encroach upon Defendant's property.

7. The case was called for trial on June 2, 2016 before the Honorable Mikell Scarborough, Master in Equity for Charleston County. After a discussion of the merits of the case with Judge Scarborough by counsel for both parties, Defendant Timmons voluntarily dismissed the Complaint with prejudice and a Judgment of Dismissal with Prejudice was entered on June 7, 2016.

8. After she voluntarily agreed to dismiss the Complaint with Prejudice, Defendant requested that PLS, LLC submit a Plat of Lot 12 to the Charleston County Planning Board for approval. The Plat that PLS, LLC submitted and that was approved by the Charleston County Planning Commission was dated June 3, 2016, revised June 22, 2016. (The Subject Plat). The Subject Plat was recorded by the Recorder of Mesne Conveyances for Charleston County in Book S16, Page 0154.

9. The Subject Plat contains the identical boundary line shown in the September 29, 2015 Plot Plan prepared by PLS, LLC between Lot 12 and Lot 11, upon which Defendant Timmons asserted a claim for trespass against Plaintiff.

10. A portion of the real property shown on the Subject Plat as being within the boundary of Lot 12 is within the boundary of Lot 11 as shown on the Franklin January 6, 2016 Compilation of Surveys and June 6, 2005 Site plan.

11. Defendant Timmons is barred by the Judgment of Dismissal with Prejudice and res judicata from asserting any claim to the boundary line contained in the Subject Plat. The resolution of the location of the boundary line between Lots 11 & 12 was a necessary issue in determining Defendant's trespass claim and was adversely decided against her as matter of law because of her voluntary Dismissal with Prejudice.

12. Upon information and belief, Defendant Timmons entered into a contract of sale for Lot 12 to James Patrick and Holly Patrick, H/W based upon the boundary lines as represented in the Subject Plat.

13. The Subject Plat contains a false and misleading description of Lot 12 as the boundary line between Lot 12 and Lot 11. Because it is a matter of public record, the Subject Plat creates irreparable harm to the interests of Plaintiff and to anyone relying upon it. It should be declared to be void as matter of a public policy against the recording of false and misleading documents.

14. Plaintiff has demanded that Defendant Timmons revise the Subject Plat to locate the common boundary according to the January 6, 2016 Franklin Compilation of Surveys and submit it to the Charleston County Planning Commission for approval and recording but Defendant has willfully and persistently refused to do so despite her acceptance of the boundary line contained on it.

15. Plaintiff has and will sustain damages as a result of Defendant's willful refusal to abide by the terms of the Judgment of Dismissal with Prejudice.

SECOND COUNT
(Trespass)

16. Plaintiff repeats and realleges each and every allegation of the First Count as if more fully set forth herein.

17. After the entry of the Judgment of Dismissal with Prejudice, Defendant authorized the construction of improvements including a driveway consisting of concrete or some other impermeable substance which encroached upon a portion of Plaintiff's property described in the January 6, 2016 Franklin Compilation of Surveys.

18. Plaintiff has never given permission to allow such improvements to encroach upon her property.

19. Said improvements constitute a continuing trespass upon the Plaintiff's property in violation of the Plaintiff's rights therein.

20. As a result of said continuing trespass, Plaintiff has and will continue to sustain damages including the cost for restoration of her property to its prior condition.

21. Defendant has willfully, wantonly and maliciously disregarded Plaintiff's interests by authorizing construction of said improvements which encroach upon Plaintiff's property. As a result of said willful, wanton and malicious conduct, Defendant Timmons is liable for punitive damages.

THIRD COUNT
(Contempt of Court)

22. Plaintiff repeats and realleges each and every allegation of the First and Second Count as if more fully set forth herein.

23. The Judgment of Dismissal with Prejudice entered on June 7, 2016 established that the common boundary line between Lot 12 and Lot 11 was described in the January 6, 2016 Franklin Compilation of Surveys.

24. Defendant is in Contempt of the Judgment of Dismissal by directing the recording of the Subject Plat which contains a description of Lot 12 based upon the September 29, 2015 Plot Plan prepared by PLS, LLC and not the January 6, 2016 Franklin Compilation of Surveys.

25. The September 29, 2015 Plot Plan contains a false and misleading description of Lot 12 and violates public policy against recording false and misleading documents.

26. Defendant has willfully, wantonly and recklessly disregarded the Judgment of Dismissal with Prejudice by refusing to record a corrected Plat which contains the common boundary line between Lot 12 and Lot 11 as described in the January 6, 2016 Franklin Compilation of Surveys and her conduct justifies the imposition of sanctions.

FOURTH COUNT
(Slander of title)

27. Plaintiff repeats and realleges each and every allegation of the First, Second and Third Counts as if more fully set forth herein.

28. Defendant has authorized a Plat to be prepared by PLS, LLC dated June 3, 2016, revised June 22, 2016 and recorded in the Charleston County Recorder of Mesne Conveyances in Book S16, Page 0154.

29. The Plat contains the identical boundary line shown in the September 29, 2015 Plot Plan prepared by PLS, LLC between Lot 12 and Lot 11, upon which Defendant Timmons asserted a claim for trespass against Plaintiff in the prior case, Timmons v Blank, 2015 CP-10-3013. The resolution of the location of the boundary line between Lots 11 & 12 was a necessary issue in determining Defendant's trespass claim and was adversely decided against her as matter of law because of her voluntary Dismissal with Prejudice.

30. The filing of the Plat was a false statement published by Defendant that is derogatory to Plaintiff's title with malice which has caused special damages.

FIFTH COUNT
(Private nuisance)

31. Plaintiff repeats and realleges each and every allegation of the First, Second, Third and Fourth Counts as if more fully set forth herein.

32. Defendant has constructed a driveway of an impermeable material upon which is collected a large and excessive volume of surface waters during rainstorms. The driveway was constructed so as to drain substantially all such volume of water upon Plaintiff's property.

33. Plaintiff's property floods during all heavy rainstorms and Defendant's action in constructing the driveway is a private nuisance causing damage to her property.

WHEREUPON, Plaintiff demands judgment as follows:

1. An Order Enforcing the Judgment of Dismissal with Prejudice entered June 7, 2016 by
 - a) declaring that the legal description of the boundary line between Lot 11 and Lot 12 as contained in Compilation of Surveys dated January 6, 2016 and Site Plan dated August 11, 2005 prepared by David Franklin, P.E. & L.S is binding on Defendant in accordance with the Judgment of Dismissal with Prejudice;
 - b) directing the Charleston County Recorder of Mesne Conveyances to cancel the Subject Plat recorded in Book S16, Page 0154;
 - c) directing Defendant to submit a corrected Plat which contains the common boundary line between Lot 12 and Lot 11 as described in the January 6, 2016 Franklin Compilation of Surveys to the Charleston County Planning

Commission for approval and to submit said corrected Plat for recording to the Charleston County Recorder of Mesne Conveyances;

- d) enjoining any sale or other transfer of any interest in Lot 12 by Defendant pending compliance with paragraph c);
2. An Award of Compensatory and consequential damages against Defendant Timmons;
 3. An Award of Punitive damages against Defendant Timmons ;
 4. An award of Counsel fees and Costs against Defendant Timmons;
 5. An order holding Defendant in Contempt of Court for willfully violating the Judgment of Dismissal with Prejudice entered June 7, 2016 and awarding Sanctions against her;
 6. Such other relief as the Court may determine to be just and equitable.

Edward A. Bertele, Esq.
SC Bar # 72521
1812 Pierce Street
Charleston, SC 29492
843-471-2082

Email: ebertele@msn.com

By: 

September 26, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

MICHELE BLANK,)
)
Plaintiff,)
)
vs.)
)
PATRICIA TIMMONS, TRUSTEE)
OF THE GORDON H. TIMMONS)
EXEMPT FAMILY TRUST,)
)
Defendant.)
_____)

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

**ANSWER TO AMENDED COMPLAINT
TO ENFORCE JUDGMENT AND
COUNTERCLAIMS**

FILED
2016 OCT -4 PM 3:33
JULIE J. ANDERSON
CLERK OF COURT

Defendant, Patricia Timmons, Trustee of the Gorden H. Timmons Exempt Family Trust, hereby answers the Amended Complaint to Enforce Judgment, and by way of Counterclaims, would show unto this Honorable Court as follows:

1. Admitted. The Charleston County tax map properly depicts the boundaries of Plaintiff's property, including the encroachment of Plaintiff's home upon Defendant's property as shown on Exhibit "A" hereto.

2. Defendant lacks information and belief as to the truth of the allegations contained in Paragraph 2 of the Complaint and therefore denies the same. Further answering the allegations contained in Paragraph 2 of the mended Complaint the Franklin "Site Plan" is not a survey and it is inaccurate when compared to the Plaintiff's deed, the County approved subdivision plat recorded in Plat Book AL at Page 77, the County tax maps, Charleston County GIS and multiple recent surveys that depict the proper boundaries of Lot 11 and Lot 12, Copahee View Subdivision.

3. Admitted, with the qualification that the date of purchase of Lot 12 was March 18, 2013.

4. Denied.

5. Admitted.

6. Denied.

7. Admitted that the case was dismissed with prejudice and without Plaintiff and Defendant having reached a settlement, and the remaining allegations of said Paragraph are denied.

8. Denied, in an attempt to reach a settlement with Plaintiff, Defendant prepared a plat showing an area that Defendant might be willing to convey to Plaintiff if a settlement was reached, but no settlement was reached.

9. Denied.

10. Denied.

11. Denied. The only fact established by dismissal with prejudice was that the encroachment of Plaintiff's house upon the Timmons' property was not a trespass. Plaintiff did not establish her ownership of any portion of the Timmons property in the prior litigation.

13. Denied.

14. Denied.

15. Denied.

16. Defendant repeats and re-alleges the foregoing responses to the previous allegations of the Amended Complaint as if set forth herein verbatim.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

22. Defendant repeats and re-alleges the foregoing responses to the previous allegations of the Amended Complaint as if set forth herein verbatim.

23. Denied. The only fact established by the dismissal with prejudice was that the encroachment of Plaintiff's house upon the Timmons' property was not a trespass. Plaintiff did not establish her ownership of any portion of the Timmons property in the prior litigation.

24. Denied.

25. Denied.

26. Denied.

27. Defendant repeats and re-alleges the foregoing responses to the previous allegations of the Amended Complaint as if set forth herein verbatim.

28. Admitted.

29. Denied.

30. Denied.

31. Defendant repeats and re-alleges the foregoing responses to the previous allegations of the Amended Complaint as if set forth herein verbatim.

32. Denied.

33. Denied.

FURTHER ANSWERING THE COMPLAINT AND BY WAY OF AFFIRMATIVE DEFENSE,
DEFENDANTS WOULD SHOW UNTO THE COURT AS FOLLOWS:

FOR A FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

34. Plaintiff's Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND AFFIRMATIVE DEFENSE
(Failure to Plead or Prove Title)

35. Plaintiff failed to plead or prove she holds title to any portion of Lot 12 by reference to her root conveyance. Her allegation that she built a house based on an unrecorded Site Plan does not establish ownership. Because Plaintiff has failed to plead facts showing ownership of Lot 12 her case should be dismissed.

FOR A THIRD AFFIRMATIVE DEFENSE
(Failure to Plead or Prove Adverse Possession)

36. Plaintiff has failed to plead or prove she holds title to any portion of Lot 12 by way of a claim to adverse possession.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Failure to Legally Identify Land in Dispute)

37. Plaintiff has failed to plead or prove the portion of the land that she claims is this litigation by way of a legal description sufficient to identify the disputed land and therefore her claim should be dismissed.

FURTHER ANSWERING THE COMPLAINT AND BY WAY OF COUNTERCLAIMS,
DEFENDANT WOULD SHOW UNTO THIS COURT:

FOR A FIRST COUNTERCLAIM
(Slander of Title)

38. Plaintiff has published, with malice, false statements that are derogatory to Defendant's title that has caused special damages to Defendant as a result of the diminished value of Defendant's property in the eyes of third parties; to wit: Plaintiff has falsely claimed to own a significant portion of Defendant's property and has related this information to multiple third parties who were purchasers or potential purchasers of the property that did not move forward with the acquisition of Defendant's property for its fair market value by reason of Plaintiff's malicious false statements.

39. While Defendant denies Plaintiff has any claim to *any portion* of Defendant's property (Lot 12) Defendant's demanded that Plaintiff identify the extent of her claim by a sufficient legal description in order that Defendant could sell the undisputed portion of Defendant's property to a third party and Plaintiff maliciously failed, refused and neglected to identify the extent of her claim in order to diminish the value of the remainder of Defendant's property and thereby improperly prevent Defendant from selling its property.

40. Defendant is informed and believes it is entitled to a judgment against Plaintiff for special damages for slander of title.

FOR A SECOND COUNTERCLAIM
(Abuse of Process)

41. Plaintiff, for the ulterior purpose of preventing Defendant from selling Lot 12, filed a *lis pendens*, naming the potential purchasers of Defendant's property as Defendants (when they are not parties to the action) and without providing a proper legal description delineating the extent of Plaintiff's boundary claim (which

claim is disputed by Defendant) and the same was a willful act in the use of the process that is not proper in the regular conduct of the proceeding. Further, Plaintiff refused to correct said error when notified about it in an effort to extort a settlement and the payment by Defendant of her attorney's fees that are not recoverable pursuant to any contract or statute in this boundary dispute litigation.

FOR A THIRD COUNTERCLAIM
(Tortious Interference with Contract)

42. Plaintiff tortiously interfered with the contract between Defendant and James and Holly Patrick in that there exists a valid contract, Plaintiff had knowledge of the contract, Plaintiff it attempting to intentionally procure its breach, without justification, causing resulting damage to Defendant.

FOR A FOURTH COUNTERCLAIM
(Declaratory Judgment)

43. Defendant is informed and believes it is entitled to a judgment declaring that Plaintiff owns no portion of Lot 12, or, if there be a dispute as to the location of the boundary, or a claim based upon adverse possession, that the Court should declare the legal rights of the parties and determine the boundary.

WHEREFORE, Defendant prays unto this Honorable Court as follows:

(A) For an emergency Order cancelling or amending the *lis pendens* so that it legally describes the extent of Plaintiff's claim in this action so that Defendant may proceed with the sale of the portion of its property that is not in dispute;

(B) For the dismissal of Plaintiff's claims against Defendant;

(C) For a judgment against Plaintiff in favor of Defendant in an amount of special damages to be determined by the trier of fact as to the First Counterclaim;

(D) For a judgment against Plaintiff in favor of Defendant in an amount of damages to be determined by the trier of fact as to the Second Counterclaim;

(E) For a judgment against Plaintiff in favor of Defendant in an amount of damages to be determined by the trier of fact as to the Third Counterclaim;

(F) For a declaratory judgment that determines Plaintiff has no interest in Lot 12, and, if she has such interest (which is denied), a judgment that determines the extent of that interest.

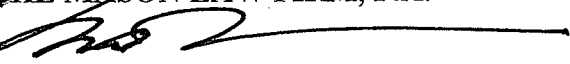
(G) For a trial by jury on all claims and Counterclaims so triable;

(H) For attorney's fees and the costs of this action;

(I) For such other and further relief as this Court may deem just and proper.

Respectfully submitted,

THE MASON LAW FIRM, P.A.

BY: 

MARK A. MASON

S.C. Bar #3676

Tidewatch Centre on Shem Creek

465 W. Coleman Boulevard, Suite 302

Mount Pleasant, S.C. 29464

Telephone: (843) 884-1444

Facsimile: (843) 884-3595

E-mail: mark@masonlawfirm.com

Attorneys for the Defendant

Mount Pleasant, South Carolina
October 4, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

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

MICHELE BLANK,)
)
Plaintiff,)

vs.)

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

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO CANCEL OR AMEND
LIS PENDENS**

FILED
2016 AUG 26 PM 3:19
JULIE A. ANTONIO
CLERK OF COURT
BY _____

TO PLAINTIFF AND HER ATTORNEY, EDWARD A. BERTELE, ESQUIRE:

PLEASE TAKE NOTICE that on the 10th day after service hereof, or as soon thereafter as counsel can be heard, Defendant, Patricia Timmons, Trustee of the Gorden H. Timmons Exempt Family Trust, will move before the Presiding Judge of the Court of Common Pleas for the Ninth Judicial Circuit, at the Charleston County Courthouse, located at 100 Broad Street, Charleston, South Carolina, in a courtroom to be assigned, pursuant to S.C. Code Ann. §15-11-10 *et seq.* (1976, as amended) for an order requiring Plaintiff, Michele Blank, to immediately provide an adequate legal description that describes the extent of her boundary claim such that Defendant can move forward on the deadline of September 12, 2016 with the sale of the undisputed portion of its property (Lot 12, Copahee View Subdivision, T.M.S. 614-09-00-021) to a third party on the grounds that Plaintiff's claim (which is expressly denied by Defendant) only pertains to a small section of Lot 12 and Defendant's third party purchaser has agreed to purchase Lot 12 without the disputed section and await the conclusion of this action to determine if the disputed

portion of Lot 12 is owned by Plaintiff or Defendant. The *lis Pendens* statute only permits a plaintiff to file a *lis pendens* against described real property that "must be at the very essence of the controversy between the litigants." See *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct.App. 2002). "Since the filing of a *lis pendens* is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required." *Id.*

The legal description of the real property in dispute in this boundary line litigation is as follows:

All that lot, piece or parcel or lot of land shown as "Quit Claim Area 3,636.41 SF. 0.083 AC" on a plat entitled "Plat Showing Lot 12, Block E (0.440 AC), TMS #614-09-00-021, Property of Gorden H. Timmons Family Trust, Located in Copahee View Subdivision, Christ Church Parish, Charleston County, South Carolina," Dated July 18, 2016, revised August 4, 2016 by Parker Land Surveying, LLC, Andrew C. Gillette, PLS, and recorded in the RMC Office for Charleston County on August 5, 2016 in Plat Book S16, Page 0176. Reference to said plat (which is attached hereto) is hereby craved for a more complete description.

This Motion is based upon the Affidavits attached hereto as "Exhibit 1" and "Exhibit 2".

CONSULTATION CERTIFICATION

I hereby certify that prior to filing this motion I consulted with Plaintiff's attorney in an effort to resolve the issues set forth herein and that we were unable to resolve said issues.

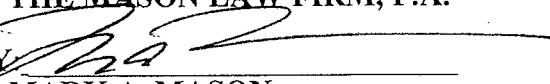
CERTIFICATE OF SERVICE

I hereby certify that I served this motion on Plaintiff's attorney by hand-delivery to the office of Edward A. Bertele located at 1812 Pierce Street, Charleston, South Carolina 29492 this 26th day of August, 2016 and that I also provided the said Plaintiff's counsel with a copy of this motion by email to ebertele@msn.com.

{Signature Page to Follow}

Respectfully submitted,

THE MASON LAW FIRM, P.A.

BY 

MARK A. MASON

S.C. Bar #3676

Tidewatch Centre on Shem Creek

465 W. Coleman Boulevard, Suite 302

Mount Pleasant, S.C. 29464

Telephone: (843) 884-1444

Facsimile: (843) 884-3595

E-mail: mark@masonlawfirm.com

Attorneys for the Defendant

Mount Pleasant, South Carolina
August 26, 2016

Exhibit 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

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

MICHELE BLANK,)
)
Plaintiff,)

vs.)

AFFIDAVIT OF ANDREW C. GILLETTE

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

FILED
2016 AUG 26 PM 3:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PERSONALLY appeared before me, Andrew C. Gillette, who after being duly sworn, deposes and says as follows:

1. I am the Vice President of Parker Land Surveying, LLC. I hold the following professional designations: PLS (Professional Land Surveyor), CET (Certified Engineering Technologist), LEED AP (Leadership in Energy and Environmental Design Accredited Professional), PMP (Project Management Professional).

2. I was the professional land surveyor in charge of the preparation of the plat showing Lot 12, T.M.S. #614-09-00-021 (Exhibit "A" hereto). The plat pertains to the said property that was conveyed to Patricia A. Timmons, Trustee of the Gordon H. Timmons Exempt Family Trust by deed dated March 18, 2013 recorded in Book 0318 at Page 741 in the R.M.C. Office for Charleston County on March 22, 2013. The said deed describes Lot 12 by reference to the Copahee View Subdivision plat recorded in Plat Book AL at Page 77 on September 12, 1978 in the R.M.C. Office for Charleston County.

3. As a licensed professional land surveyor I am required to be completely objective and truthful in all professional reports, statements or testimony.

4. Exhibit "A" is a plat showing Lot 12, Block E, T.M.S. #614-09-00-021 which I signed, sealed and submitted to the Charleston County Zoning / Planning Department for approval. The said plat was approved by Charleston County Zoning / Planning Department on August 5, 2016 as appears from Exhibit "B".

5. The said plat (Exhibit "A") shows that the "Existing House" constructed on Lot 11, property of Michele G. Blank, encroaches into Lot 12 (the property of the Gorden H. Timmons Exempt Family Trust) as shown on the said plat.

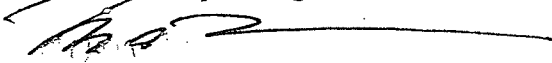
6. I hereby attest that (Exhibit "A") the plat I signed that was approved by Charleston County is accurate.

FURTHER DEPONENT SAYETH NOT.


ANDREW C. GILLETTE

SWORN TO BEFORE ME

This 25th day of August, 2016


Notary Public for South Carolina

My commission expires: 02/05/18

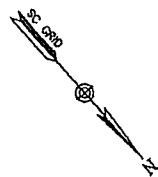
Exhibit A

REFERENCES

1. PLAT BOOK AL PAGE 77.
2. PLAT BOOK L14 PAGE 0509-0510.
3. DEED BOOK 0318 PAGE 741
4. DEED BOOK 0528 PAGE 456
5. PLAT SHOWING LOT 12, BLOCK E (0.440 AC.), TMS# 614-09-00-021, PROPERTY OF GORDEN H. TIMMONS EXEMPT FAMILY TRUST, LOCATED IN COPAHEE VIEW SUBDIVISION, CHRIST CHURCH PARISH, CHARLESTON COUNTY, SOUTH CAROLINA DATE: JULY 1, 2016 REVISED: JUNE 22, 2016 AND RECORDED IN PLAT BOOK S16 PAGE 0154, CHARLESTON COUNTY RECORDS.

CURVE TABLE					
CURVE	RADIUS	LENGTH	DELTA	CHORD	CHORD BEARING
CI	95.67'	9.32'	5°10'36"	9.31'	S 47°45'33" E

LINE TABLE		
LINE	BEARING	DISTANCE
LI	S 47°12'36" E	12.51'



LOT 13
TMS# 614-09-00-022
TIMOTHY E. & PATRICIA H. LANCASTER
PLAT BOOK AL PAGE 77

NOTES

1. ANYTHING SHOWN OUTSIDE THE DEFINED BOUNDARY OF THIS PLAT IS FOR DESCRIPTIVE PURPOSES ONLY.
2. AREA DETERMINED BY COORDINATE METHOD.
3. THE PUBLIC RECORDS REFERENCED ON THIS PLAT ARE ONLY THOSE USED AND NECESSARY TO THE ESTABLISHMENT OF THE BOUNDARY OF THIS PROPERTY. THEY ARE NOT AND DO NOT CONSTITUTE A TITLE SEARCH.
4. PROPERTY IS LOCATED IN FLOOD ZONE AE (ELEV. 14) AS SCALED - FROM F.L.R.M. PANEL 45019C 0535 J REVISED NOVEMBER 17, 2004.
5. PROPERTY IS ZONED 101 RESD-MHS
FRONT SETBACK 25'
REAR SETBACK 15'
SIDE SETBACK 5'
6. PROPERTY IS ZONED 'MHS' - LOW DENSITY MANUFACTURED HOUSING SUBDIVISION DISTRICT
7. OVERALL EXISTING DENSITY OF DWELLING UNITS AS SHOWN IS 1.77 PER ACRE.

5/8" REBAR FOUND

N 47°12'36" W

± 430' TO CENTERLINE INTERSECTION OF
PANDORA DRIVE AND MACOMA DRIVE

CONC. MON.
FOUND
DISTURBED
NE OF LINE

MACOMA DRIVE (70' R/W)

1600

LINETYPE AND SYMBOL LEGEND	
	PROPERTY LINE w/CORNER (3/4" REBAR SET)
	PROPERTY LINE w/CORNER FOUND AS DESCRIBED
	RIGHT-OF-WAY LINE
	SETBACK LINE
	S.E.C.A.G. EASEMENT LINE
	ADJOINING PROPERTY LINE



Porter Land Surveying, LLC
5910 Grifolia Street
Hanahan, SC 29410
Phone: (843) 554-7777
Fax: (843) 554-7719

I HEREBY STATE TO THE BEST OF MY PROFESSIONAL KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE STANDARDS OF PRACTICE MANUAL FOR SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS A SURVEY AS SPECIFIED THEREIN; ALSO, THERE ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN.

ANDREW C. GILLETTE
No. 5933
Title II
S.L.S. 5933-B



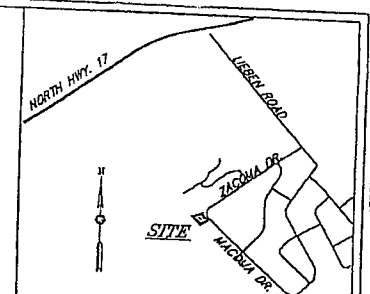
20 0 10 20 40 60
(IN FEET)
1 inch = 20 ft.

PLAT

SHOWING LOT 12, BLOCK E (0.440 AC.), TMS# 614-09-00-021, PROPERTY OF GORDEN H. TIMMONS EXEMPT FAMILY TRUST, LOCATED IN COPAHEE VIEW SUBDIVISION, CHRIST CHURCH PARISH, CHARLESTON COUNTY, SOUTH CAROLINA

DATE: JULY 18, 2016 REVISED: AUGUST 4, 2016

SCALE: 1" = 20'



LOCATION MAP
N.T.S.

DATE: 08/04/16	TIME: 2:11:23 PM
Area: 0.440 AC.	STS: 0174
Drawn by: Charlie Lybrand	Small Plot
Checked by: [Signature]	Doctype: Charleston County, SC
Recorded by: [Signature]	Location: COPAHEE VIEW S/D

PLANNING AND R.M.C. USE ONLY

APPROVED PLAT
[Signature]
Director of Planning
Charleston County Planning Commission
SEP 05 2016
Date

Exhibit B



Joel H. Evans, PLA, AICP
Zoning/Planning Department Director

843.202.7200
Fax: 843.202.7222
Lonnie Hamilton III Public Services Building
4045 Bridge View Drive, Suite A-103
North Charleston, SC 29405

August 8, 2016

Andrew Gillette
Parker Land Surveying
5910 Griffin Street
Hanahan, SC 29410

Re: Gordon Timmons
TMS # 614-09-00-021, Christ Church

Dear Mr. Gillette:

On August 5, 2016, Application # SB0-00223 was approved by the Charleston County Zoning/Planning Department. The plat was recorded in the Charleston County R.M.C. Office on August 5, 2016 in Plat Book S16, Page 0176.

If you have any further questions please contact the Planning Department or myself at 202-7200.

Sincerely,

Sally Brooks
Planner III

cc: Gordon Timmons

R 74

Exhibit 2

R 75

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2016-CP-10-4122
MICHELE BLANK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AFFIDAVIT OF PATRICIA A. TIMMONS
	)	
PATRICIA TIMMONS, TRUSTEE	)	
OF THE GORDON H. TIMMONS	)	
EXEMPT FAMILY TRUST,	)	
	)	
Defendant.	)	
_____	)	

PERSONALLY appeared before me, Patricia A. Timmons, who after being duly sworn, deposes and says as follows:

1. I am the trustee of the Gorden H. Timmons Exempt Family Trust "the trust"), the Defendant in this action.

2. On March 18, 2013, the trust purchased Lot 12, T.M.S. #614-09-00-021. The deed to the said property is recorded in Book 0318 at Page 741 in the R.M.C. Office for Charleston County on March 22, 2013. The said deed describes Lot 12 by reference to the Copahee View Subdivision plat recorded in Plat Book AL at Page 77 on September 12, 1978 in the R.M.C. Office for Charleston County.

3. I am familiar with the boundary dispute with Plaintiff.

4. Exhibit "A" is a Charleston County GIS aerial photograph that shows Plaintiff's home on Lot 11 encroaching upon the trust property, Lot 12.

5. The trust has a contract to sell Lot 12 to a third party that must close by September 12, 2016. The third party has agreed to purchase Lot 12, exclusive of the portion of Lot 12 that is the subject of the boundary dispute with Plaintiff.

6. The portion of Exhibit "B" hereto that is highlighted in yellow shows the portion of Lot 12 claimed by Plaintiff. Defendant disputes said claim. However, for the purposes of legally describing the area in dispute the area highlighted in yellow depicts the area in dispute.

7. I am informed and believe the court should order that the *lis pendens* filed by Plaintiff be amended so that it describes the area being claimed by Plaintiff and no other portion of Lot 12 so that the sale of the undisputed portion of Lot 12 can take place as scheduled on September 12, 2016. The trust will hold the title to the disputed portion subject to the amended *lis pendens* during the pendency of this action and comply with whatever order is entered in regards thereto.

FURTHER DEPONENT SAYETH NOT.


PATRICIA A. TIMMONS

SWORN TO BEFORE ME

This 25th day of August, 2016

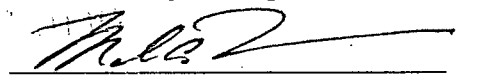
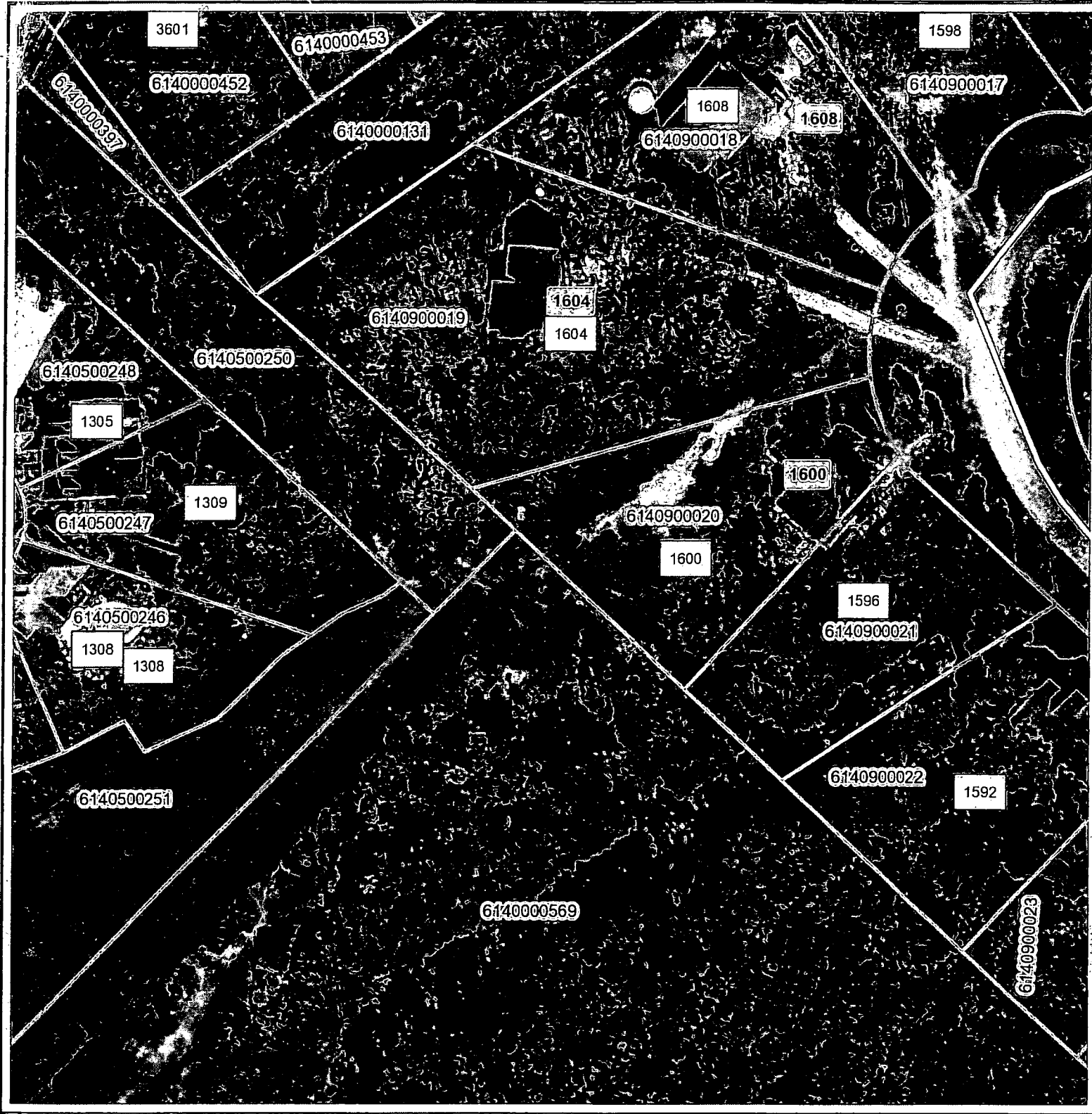

Notary Public for South Carolina
My commission expires: 02/05/18

Exhibit A

R 78



2012

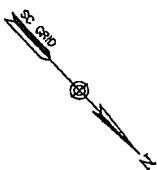
R 79

Exhibit B

1. PLAT BOOK AL PAGE 77.
2. PLAT BOOK L14 PAGE 0509-0510.
3. DEED BOOK 0318 PAGE 741
4. DEED BOOK 0528 PAGE 456

CURVE TABLE					
CURVE	RADIUS	LENGTH	DELTA	CHORD	CHORD BEARING
C1	96.87'	9.32'	5°10'36"	9.31'	S 47°45'13" E

LINE TABLE		
LINE	BEARING	DISTANCE
LI	S1470°21'E	12.51'



LOT 13
TMS# 614-09-00-022
TIMOTHY E. & PATRICIA M. LANCASTER
PLAT BOOK AL PAGE 77

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REAR SETBACK 15'
SIDE SETBACK 5'
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7. OVERALL EXISTING DENSITY OF DWELLING UNITS AS SHOWN IS 1.77 PER ACRE.



PROPERTY LINE 1/4" CORNER (3/4" REBAR SET)
PROPERTY LINE 1/4" CORNER FOUND AS DESCRIBED
RIGHT-OF-WAY LINE
SETBACK LINE
S.E.C. & G. EASEMENT LINE
ADJOINING PROPERTY LINE

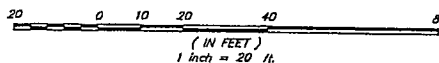


Parker Land Surveying, LLC
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Hanahan, SC 29410
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ANDREW C. GILLETTE

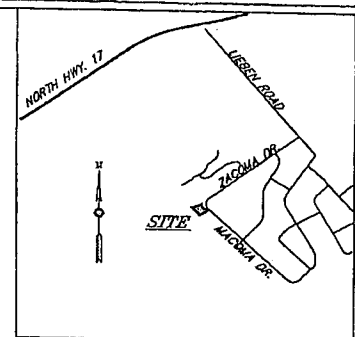
P.L.S. 5933-B



SHOWING LOT 12, BLOCK E (0.440 AC.), TMS# 614-09-00-021, PROPERTY OF GORDEN H. TIMMONS EXEMPT FAMILY TRUST, LOCATED IN COPAHEE VIEW SUBDIVISION, CHRIST CHURCH PARISH, CHARLESTON COUNTY, SOUTH CAROLINA

DATE: JULY 18, 2016 REVISED: AUGUST 4, 2016

SCALE: 1" = 20'



LOCATION MAP
N.T.S.

DATE	REC'D	RECORDED
TIME	2:18 PM	
BOOKING	SIB	078
DOWNTYPE	Small Print	
Charlie Lybrand, Register, Charleston County, SC		
FILED BY CHARLESTON COUNTY PLANNING		
APPROVED \$150.00		
EXPENSE \$150.00		
TOTAL \$150.00		
CHECKED BY		
INITIALS		
LOCATION	COPAAHEE VIEW SID	

PLANNING AND R.M.C. USE ONLY

APPROVED PLAT
[Signature]
Director of Planning
Clarkston County Planning Commission
580-03223 07.05.14

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MICHELE BLANK

Plaintiff,

-versus-

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

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER 2016-CP-10-4122

FILED
2016 SEP -6 PM 4:04
JULIE J. ARMSTRONG
CLERK OF COURT

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO CANCEL
OR AMEND THE LIS PENDENS**

Plaintiff opposes the Defendant's Motion to Cancel or Amend the Lis Pendens filed in connection with the Complaint for declaratory and injunctive relief to invalidate Defendant's recorded Plat, for trespass and related relief based upon the facts and the law as set forth herein.

FACTS RELEVANT TO THIS MOTION

Plaintiff refers this Court to her Opposition to Defendant's Motion for Summary Judgment for the Facts Relevant to this Motion and incorporates the same fully herein.

LEGAL ARGUMENT

**I. THERE IS NO STATUTORY BASIS TO
CANCEL OR AMEND THE LIS PENDENS**

Plaintiff contends that Defendant's Motion to Cancel the Lis Pendens should be summarily denied. Defendant contends that the Lis Pendens should be cancelled because the prior case did not resolve the boundary line issue so that there is no basis for a lis pendens. Motion at page 1. Plaintiff has already addressed this issue in her Opposition to Defendant's Motion for Summary Judgment which is incorporated fully herein by reference. Briefly stated, Plaintiff's contention is that the law is clear that a dismissal with prejudice results in an adjudication on the merits of all issues that were necessarily decided in the earlier case. The prior

trespass action necessarily required the determination of the boundary line between Lots 11 & 12. Therefore, Defendant was precluded by the prior dismissal with prejudice from recording a Plat that used the same boundary line showing that Plaintiff's house encroached on Lot 12. Because Defendant recorded a Plat containing the same boundary line it used in the litigation (the subject Plat), Plaintiff was entitled to seek declaratory relief to invalidate the subject Plat and a Lis Pendens to put potential purchasers of Lot 12 on notice of Plaintiff's claim that the subject Plat containing such a boundary line was invalid. Therefore, there is no legal basis to cancel the Lis Pendens because Defendant has created an issue over her boundary line by recording an invalid Plat. See Plaintiff's Opposition at pages 3-5.

Second, if as Defendant claims the prior action did not determine the location of the common boundary Plaintiff asserts that the location of the boundary line between Lot 11 & 12 as shown on the subject Plat is erroneous; thus the filing of Lis Pendens was appropriate. See Plaintiff's Opposition at pages 6-7.

Third, the Second Count of the Complaint asserts that Defendant's driveway encroaches upon her property. The subject Plat does not show the location of Defendant's driveway and thus the location of the boundary line between Lot 11 and 12 is in issue and the Lis Pendens was appropriately filed. See Plaintiff's Opposition at pages 7-8.

In summary, the filing of the Lis Pendens in connection with the relief sought in the Complaint was completely justified under the statute, S.C. Code Ann. Sect. 15-11-10, since the Complaint affects an interest in real property. Therefore, there is no legal basis to cancel the Lis Pendens.

Defendant's Motion to amend the Lis Pendens is also without merit. S.C. Code Ann. Sect. 15-11-10 provides that the Lis Pendens shall contain: "the description of the property in that

county affected thereby. . . .” The Lis Pendens refers to the subject Plat which Defendant recorded showing the boundary line claimed by Defendant and thus it satisfies the statute. The case cited by Defendant, Pond Place Partners, Inc. v. Poole, 351 S.C.1, 567 S.E.2d 881 (Ct. App. 2002) did not interpret the Lis Pendens statute to require that the property be described with any more exactness or define the particular area in dispute and Defendant’s assertion in her Motion at page 2 is incorrect. The Court did say that “strict compliance with the statutory provisions is required” with respect to the requirement that the complaint be filed twenty days after the filing of the lis pendens. 351 S.C. at 17. In view of Defendant’s action in recording the subject Plat containing the same boundary line it used in the litigation, Plaintiff was entitled to file a Complaint to invalidate that Plat and a Lis Pendens to put potential purchasers of Lot 12 on notice of Plaintiff’s claim that the subject Plat containing such a boundary line was invalid.

Defendant proposes that the Court order Plaintiff to accept a legal description based upon another Plat recorded after the subject Plat. Motion at page 2. However, in his Affidavit, Andrew Gillette who prepared the newly recorded Plat, does not say that he used the same boundary line for Lot 11 that appears in the Site Plan and Compilation of Surveys prepared by Franklin. See Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment, Exhibits B & G. By ordering the amending of the Lis Pendens to adopt Defendant’s legal description, the Court is accepting the validity of that boundary line, which is not an appropriate use of the Lis Pendens statute: “The lis pendens mechanism is not designed to aid either side in a dispute between private parties. Rather, lis pendens is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, *i.e.*, the fact of a suit involving property.” Pond Place Partners, Inc. v. Poole, 351 S.C.1,17, 567 S.E.2d 881 (Ct. App. 2002). By adopting Defendant’s newly recorded Plat and boundary line

description, the Court will enable Defendant to convey property which the Lis Pendens statute intends to remain subject to the determination of the litigation. See Pond Place Partners, Inc. v. Poole, 351 S.C. at 29.

Defendant's Motion asserts the need to amend the Lis Pendens in order for closing of a sale of Lot 12 to occur. Motion at page 1, Affidavit of Patricia Timmons at Para. 5. This is a problem of her own making because Defendant disregarded the effect of her own consent to dismiss the earlier case with prejudice by recording the subject Plat which contained the same boundary line that was asserted in the dismissed case. She can't have it both ways, i.e. agree to dismiss a trespass case with prejudice and then assert by way of the subject Plat that she is still entitled to claim a boundary line that would result in Plaintiff's house encroaching on her lot.

Plaintiff asserts that the Franklin June 6, 2005 Site Plan and January 6, 2016 Compilation of Surveys contains the appropriate location of the Plaintiff's boundary line. See Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibits B & G. The sale of Lot 12 can be facilitated by using the legal description shown on these as representing the common boundary. That remedy has always been available to the Defendant because the Franklin Site Plan and Compilation of Surveys were part of the earlier litigation and were included in Plaintiff's Motion for Summary Judgment. See Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit H. Defendant refused to take advantage of an existing legal description which Plaintiff has already acknowledged as valid and instead brings a problem of her own making before this Court for relief and demands that her description of the Plaintiff's boundary line be accepted without any explanation. The Motion to Amend was merely an excuse for Defendant to introduce her own version of Plaintiff's boundary line when

another solution was readily available. The Motion is disrespectful of the Court's and Counsel's time. Therefore for all of these reasons the Motion to Amend the Lis Pendens should be denied.

CONCLUSION

For the reasons expressed herein, Plaintiff respectfully urges this Court to deny Defendant's Motion to Cancel or to Amend the Lis Pendens to the dimensions shown on the newly recorded Plat.

Respectfully submitted,

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Dated: September 6, 2016
Charleston, SC

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER 2016-CP-10-4122

**PLAINTIFF'S MOTION TO
AMEND FINDINGS AND
ALTER AND AMEND JUDGMENT**

PLEASE TAKE NOTICE that on the tenth day following service of the within NOTICE of MOTION or as soon thereafter as counsel may be heard, Plaintiff Michele Blank, by her attorney, Edward A. Bertele, Esq. shall move before the Court of Common Pleas for the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, SC 29401, for the following relief: 1) an Order pursuant to S.C.R.C.P. 52(b) amending the Findings of the Court in its Order dated June 14, 2019; and 2) an Order pursuant to S.C.R.C.P. 59 (e) Altering and Amending the Order dated June 14, 2019 with respect to the dismissal of the Fourth and Fifth Counts of the Complaint. Plaintiff relies upon the pleadings and documents filed heretofore, the Record of the Trial, and the Memorandum of Law and Exhibits set forth herein.

PRELIMINARY STATEMENT

Plaintiff respectfully asks this Court to review its Order entered on June 14, 2019 containing Findings of Fact relating to the dismissal of the Fourth and Fifth Counts of the Complaint. Plaintiff submits that these Findings are not supported by the Record and were relied

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upon by the Court to justify the conclusions of law which this Court has adjudicated. Plaintiff further asks this Court to reconsider its Decision dismissing the Fourth and Fifth Counts, based upon these Amended Findings and the applicable law for the reasons set forth below.

**I. THE COURT MUST AMEND ITS FINDINGS
OF FACT TO BE CONSISTENT WITH THE RECORD**

The Court has provided a comprehensive statement of facts which are the basis for its Decision. Plaintiff's Motion to Amend is directed toward correcting the Court's Findings which, Plaintiff believes, do not accurately reflect the testimony and evidence contained in the Record. The trial court's findings must be properly supported by competent evidence. Mathis v Brown of S.C. Inc., 389 S.C. 289,307, 698 S.E. 2d 773,777 (2010). The specific factual findings and the basis for seeking such amendments are set forth below.

A. The Court must amend its findings that the boundary line dispute remained unresolved

Plaintiff respectfully urges this Court to amend its Findings to remove all references to " the boundary line dispute being unresolved following the dismissal with prejudice". These appear at pages 2, 6,7,8,9,14,17,18, 19 and 20. Plaintiff seeks this amendment for two reasons. First, the conclusion that the boundary line dispute was not resolved in the prior litigation is contrary to the Court's own ruling that it was established as a matter of law in the first case and was therefore res judicata.

Defendant has repeatedly made unsupported legal arguments about the lack of findings, the use of a Form 4 Order to question the conclusiveness of the dismissal with prejudice on the location of the boundary line. The Court has accepted the overwhelming weight of authority that dismissal with prejudice means what it says: the loser loses his boundary line. However, by recognizing an uncertainty in the aftermath of the dismissal the Court is undercutting its own conclusion, not to mention justifying behavior which itself is actionable. See Point II below.

There was no uncertainty because the issue was resolved as a matter of law. Defendant chose to remain ignorant of the actual result by not asking their lawyer and went on their own path by filing a Plat they had no right to do.

This conclusion of “uncertainty” has unduly influenced the Court’s holding in dismissing the claim for Slander Title, as is evidenced by the great number of times it is mentioned in the Order, is highly prejudicial and not supported In the Record because it is clear that Defendant’s representatives were acting under a “mistake of law”. See Section B. Therefore, Plaintiff respectfully urges this Court to remove this finding.

B. The Court should amend its Findings as to Defendant’s “mistaken belief”.

In its Findings, Order at page 7, 8 and elsewhere, the Court states that Defendant’s representatives were operating under a “mistaken belief”. Plaintiff respectfully urges the Court to amend its Findings to contain the more precise and legally significant description of their condition as “operating under a mistake of law”. The reason for this amendment is that it reflects the facts shown in the record and allows the p[roper analysis of the Slander of Title claim. See Point II.

Plaintiff contends that Defendants were acting under mistake of law and all the evidence supports this conclusion. The facts are clear. Defendants left the Court on June 2 and almost immediately commissioned surveyor Gillette to prepare a plat (it was dated June 3, 2016, later revised) and record it. The Plat containing the identical boundary line which had been invalidated as a result of their own dismissal with prejudice. Defendant’s intention in recording the Plat was to preserve the same boundary line her claim and not concede that any part of that area, See P-17, even in the real estate Contract that defendant required its purchaser to sign. P-29. Defendant’s representatives also testified about retaining the right to sue Plaintiff for some

future instances of trespass. They were obviously acting under a mistake of law, as to the effect of the dismissal with prejudice, which has different legal consequences than a "mistaken belief" which applies to the state of the facts.

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). Moreover, this mistake of law was of their own making since there was no testimony that they relied upon advice of counsel to record the plat, a fact which might support a lack of willfulness.

As outlined in the Court's Findings on the First Count, the boundary line was established as a matter of law by Defendant's dismissal with prejudice of its trespass claim. If Defendant's representatives had any misunderstanding of what happened, it could only be that they didn't know and didn't ask their attorney about its effect. There are no facts about which they could have been mistaken, only the law, hence they operated under mistake of law. The Court should amend its Findings accordingly.

C. The Court should amend its Findings as to the facts relating to slander of title.

Plaintiff contends that the Court misconstrued critical evidence relating to its decision to dismiss the Slander of title claim. Order at p. 18-21. In particular, the Court found that the testimony of Jennifer Smith, Esq. who opined that the Gillette plat affected the insurability of Lot 11, undermined Plaintiff's Slander of Title claim. Opinion at 18. The Court also found in dismissing the Fourth Count 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. As more fully discussed below, the evidence is not consistent with or supportive of those interpretations and the Court should amend its Findings of Fact to reflect the testimony on the Record; and to reconsider its Order dismissing the Fourth Count. See Point II below.

1. A title claim arose due to the filing of the plat.

Jennifer Smith, Esq testified that she was the attorney who closed title on Lot 11 and issued a title insurance policy to Plaintiff and represented Plaintiff in the earlier case. She testified on cross examination that Plaintiff’s attempt to file a title claim when Defendant filed the trespass action was unsuccessful. Plaintiff explained that when she wrote to the carrier, they responded that the house was not built when the policy was issued so its location was not insured. See D-9, Exhibit C p. 8, lines 6-23.

Ms. Smith also opined that the filing of the Gillette plat, P-17, created a title issue that would affect a future sale. She described what was needed to cure the problem which included confirming that the boundary line shown on Franklin’s site plan, P-2, was identical to the line shown on another Gillette Plat, later recorded in August 2016, P-18. Confirmation came only after Plaintiff’s counsel asked Mr. Gillette to do that at trial and Defense Counsel produced an Affidavit to that effect. P-26.

The evidence clearly established that by filing the initial Gillette plat, Defendant caused a title issue. The cure was for Defendant to deed the area between the Franklin boundary line and the PLS boundary line to Plaintiff which this Court has ordered be done. The curing of this defect does not in any conceivable way demonstrate that the boundary was unclear. The Defendant created a title issue where none existed because of the res judicata effect of the earlier

dismissal with prejudice. By holding that the title issue undercuts Plaintiff's slander of title claim, the Court is rewarding the Defendant for creating a cloud on title.

2. Filing of a Plat was not legal recourse.

The second part of the Court's Findings, that Defendant was following a legally required procedure to establish a boundary line, is not supported in the Record. Again, the Court ignores the effect of the prior dismissal with prejudice by claiming that the boundary line was unresolved, a further example that supports Plaintiff's request to delete all such references in the Order as unsubstantiated and prejudicial. See Section IA above. Defendant's representative, Gordon Timmons testified that he thought this was the way to resolve a boundary line dispute but that is a lay opinion and of no consequence as far as any legal standard to rely upon. See S.C. Evid. R 701.

Further, the initial Gillette Plat contained the same "Quitclaim" area that the Plaintiff had rejected before the judgment of dismissal with prejudice was entered, not the Franklin boundary line that Plaintiff relied upon the trespass case. See P-2, P-3, P-21. Defendant's representatives claimed that they thought only the trespass claim had been dismissed. In effect, the Defendants offered the Plaintiff what they believed she had already won as a "settlement". The Defendant's filing of a plat with a failed settlement proposal is not a bona fide settlement effort, as the Defendant claims it was making. It was a pretext to continue to assert a claim to the larger lot created by their surveyors "scaling" in light of a failed litigation. The pretextual nature of this filing is evident after the current case was filed: Defendant filed another plat with Plaintiff's boundary line on it, offering to transfer title after the damage is done. This too is pretextual since that was never done until ordered by this Court.

The Court should recognize the inherent inconsistencies in Defendant's position and cease to automatically credit everything they did with good faith. The facts don't support any such presumption. Defendant's representatives gave up on the eve of trial because, they claim, the Court couldn't hear their case right away they. They were in a hurry to sell Lot 12 to a third party. They filed a plat without advice of counsel as to the legal liability under the dismissed case. They persisted in their conduct until this case was filed and then only after the Lis Pendens became an issue to their closing did they identify the Plaintiff's boundary line on their plat. They prolonged this matter by refusing to concede on the issue of res judicata even though the law is absolutely clear. The Record does not support any conclusion which the Court has made about Defendant following a legally required procedure to establish a boundary line. That was established in the trespass case. What followed resulted in a title claim. See Point II below. For these reasons, Plaintiff respectfully requests that the Court amend the Findings as asserted herein.

D. The Court should amend its Findings that Plaintiff's studio was not permitted on the ground floor based upon flood elevations standards

Plaintiff respectfully requests that the Court amend its Findings to remove all references to the Plaintiff's studio not being permitted on the ground floor due to flood elevation standards. These references appear at pages 10 & 14. Plaintiff contends that there is no evidence in the Trial Record to support these statements; and it appears from the Order that these references influenced the Court's denial of the Fifth Count-Nuisance claim.

On page 10 of the Order the Court stated: " [Ms. Blank's] home is located in an "AE flood zone, elevation 14." There is conflicting evidence from Mr. Franklin detailed below, but the court finds the more credible evidence to be that, in this flood zone, the ground floor should only be utilized for parking." However, Plaintiff's drainage expert, David Franklin, a civil

engineer, testified that it was permissible to enclose the ground floor of a house in an "A" flood zone. Exhibit A, at p. 28, line 7-13. Defendant did not offer any contradictory evidence of what was permitted in an "A" flood zone and the Court did not cite to any, later in its Order.

Further, Defendants did not introduce any County or local zoning or planning regulations which established that parking was the only permitted use on the ground floor of a raised house in a residential zone. Therefore, the Court is requested to eliminate the finding quoted above. because there was no credible evidence to support the Court's finding 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)

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 transcript does not contain any testimony or evidence that a FEMA claim was denied because of a flood elevation zone violation. Plaintiff testified that: "I couldn't get paid by the [federal government] insurance company. They wouldn't cover it because it was rainwater, not flood water". Exhibit C, p. 17, lines 4-10. Plaintiff denied that it was "illegal" for her to use the ground floor for a studio; and she repeated that the cause of the damage was rainwater not flooding. Id. page 38, lines 3-9, 15-21. There is no contrary evidence. Therefore, the Court cannot make a contrary finding without any basis in the record regarding any FEMA claim. See Jordan v Judy, 413 S.C. 341, 347-348, 776 S.E. 2d 96, 100 (Ct. App. 2015)

Plaintiff testified that she applied for financial assistance from a private crafters fund, known as CERF after Hurricane Matthew. Defense Counsel asked her about her statement in the application about not having coverage for "your glass in SC or the studio ". Exhibit C, page 43, lines 23-25. She stated that the coverage was not available in South Carolina, she would have to

go to Florida. Id. page 44, lines 4-16. The Application question to which Defense Counsel referred and to which Plaintiff responded asks about "Business Insurance Coverage". See P-6(a) at page 10. Therefore, there is nothing in the transcript which can support any finding relating to any FEMA standards or lack of insurability which could create any inference that Plaintiff'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.

The Court's Findings identified above are not supported by the testimony or documents admitted into evidence and therefore should be deleted. By not correcting the Order the Court leaves the impression that it relied upon them in deciding the Fifth Count-Nuisance claim.

E. The Court should amend its Findings that lot 11 was not correctly graded.

The Court referenced testimony regarding the subdivision plat requiring the lot to be filled to a minimum above the bottom of the roadway ditch and graded in accordance with the county road code. Order at 10. When asked about this Franklin stated: "that's the former Charleston County requirement. Its now actually two feet above the flood zone". Exhibit A, p. 29, line 9-11. Defense Counsel acknowledged that this was the requirement at the time of the Plat, Id. at p. 29, line 25 to 26, line 2. Franklin testified that the house foundation was graded a foot above the roadway ditch even though there was no ditch, Id. at p. 30, line 9-11, and graded and built in accordance with applicable code in 2005. Id. at p. 50, line 8-12. Defendant offered no contradictory testimony. The Record must disclose a basis for the Court to disregard the testimony as incredible. See State v Mercer, 381 S.C. 149, 672 S.E. 2d 556 (2009). Therefore, Plaintiff respectfully requests that the Court amend its findings and state that there was no evidence that Lot 11 was not properly graded.

F. The Court should amend its findings regarding credibility.

Plaintiff respectfully requests that the Court reconsider and amend its findings as to the credibility of Plaintiff's expert witness, David Franklin. Plaintiff understands 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). Nonetheless , Plaintiff asks the Court to reconsider such a finding for two reasons. First, it reflects adversely upon Franklin's professional reputation with consequences beyond the case. Second, the issue on which the court made its comment lacks sufficient clarity upon which to make so definitive a judgment. Therefore, the adverse consequences are completely unjustified based upon the facts presented.

1. The witness was eminently qualified

Mr. 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. Exhibit A, Franklin Transcript at p. 2, line12 to p. 3 line 8. None of the Defense witnesses had his breadth of experience and technical training. The Court relied upon Mr. Franklin's work in preparing the site plan which was in issue in the earlier case to suggest that he had an interest in the favorable resolution of the boundary line dispute that affected his testimony. Order at 22.

2. The consequences are far reaching.

The implication from the Court's questioning his credibility is that Franklin prepared a fraudulent Site Plan which indicated that iron pipes existed where there were none or not all in the positions shown on the Site Plan. Franklin testified that he found all four property corners.

Exh. A at p. 7, line 11-15. In his view, scaling was not appropriate when there are existing pipes in the field. Id. at p. 11, line 6-17. Defense 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. See, e.g. Exhibit A at p. 25, line 7 to 26, line 17. After repeatedly being asked about moving the property line and objections being raised to the repetitive nature of the questioning, see, e.g. Exhibit A, pages 26,36,48, Franklin understandably bristled at this suggestion, which Defense Counsel was quick to exploit 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.

Franklin's surveying work was done in 2005. He was asked to perform only three site plans on three lots which were in close proximity. Exhibit A, page 4, line 9-16. When he made a site visit and found that the initial house location was too close to wetlands, he located the actual corners and made a new Site Plan. Id, page 26 line 25 to page 27, line 17. P-2. Plaintiff herself saw these later when she inspected the property boundaries. Exh. C at p. 24, line 7-10. It is difficult to accept the implication from the Court's finding that the head of an engineering company would alter a property line for a \$250.00 survey fee, Exhibit A at page 38, line 4, just so D.R. Horton could build a single family house on Lot 11. The Court must consider whether it is reasonable to believe that Franklin would subject himself to the possibility of severe sanctions and the likely loss of his many licenses and subject all his past work to questioning just for that? That implication is not a credible conclusion.

3. The facts allowed for differing opinions.

Questioning Franklin's professional ethics is an extreme result for what is in reality a dispute in which different conditions produced results. The Court's finding that the surveyors

working in 2015 did not find all the same monuments, Order at 22, does not support a finding of a lack of credibility for reasons based upon their own testimony. Mr. Gillette found that the corners on a number of lots had been reset with rebar or changed. He had to prepare a re-created Plat of Macoma and Zacoma Drive. See D-4. Significantly, it showed discrepancies between the Plat and field conditions in the vicinity of the subject property. Mr. Arrington did a similar re-creation. D-10. Both re-creations showed numerous locations where rebar was found at or near what was supposedly the property corners. See D-4 & 10. Both surveyors admitted to numerous instances where the dimensions on the Plat did not correspond to the dimensions found by scaling such as they performed to locate the front left corner of Lot 12 (front left corner of Lot 11). Even though the original Plat, P-27A, called for iron pipes to represent the corners, these two surveyors were willing to agree that rebar instead was used for their location.

Franklin testified that when he returned to the site after the earlier lawsuit was brought, he found the left front corner of Lot 11 lying on the ground, so he reset it. Exhibit A, page 50, line 13-20. The Defendant's surveyors claimed that this was rebar but were unwilling to consider that it was a reset corner, like they had found down on both Macoma and Zacoma because they didn't know where it went. Therefore, it was inappropriate for the Court to regard the Defendant's surveyors as any more credible than Franklin because they couldn't find the same conditions that existed in 2005 which they themselves admitted had changed.

Lastly, the Court should recall that Gordon Timmons boasted of the amount of money, thousands he said, to get the result he wanted. Are his surveyors any less credible because they used lots of their well-heeled client's money to re-create a Plat of the entire street only to rely upon the least reliable method, scaling, to find a property corner.

The Court should recognize that time changes all things. The 2005 conditions at Lot 11 were not the same as the 2015 conditions. Rebar had been installed and a property corner removed. Franklin followed protocol by relying on pipes he found at locations consistent with the Plat. Gillette and Arrington followed protocol by relying upon the Plat due to the existence of rebar. The Plat was not entirely reliable according to all of the testimony because it did not always agree with field conditions. The issue is not really one of credibility but of the application of rules of evidence, namely the priority of the location of found corners over distances from scaling the Plat and the reasons for departing from that priority.

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; and this, because they are seldom or never entirely relied upon, and are of all others the most subject to misconception and error, and only serve as a guide in the absence of all other." Douglass v. Fernandis, 2 Bailey 78. "Mere distance is never regarded when it conflicts with either the actual marks made by the surveyor or the well-ascertained marks called for on the plat. * * * The trees that the surveyor marked; the rocks that he set up; the fixed and permanent objects which he calls for, are more certain indications of intention than distances or even courses." 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).

Like all rules, there are exceptions and these general rules “are not inflexible, but may be modified by the circumstances of the case.” Holden v. Cantrell, 100 S.C. 265, 84 S.E. 826,829 (1915). It was not disputed that Defendant’s surveyors are not using the superior evidence of boundary location, i.e. iron pipes, in establishing the right front corner of Lot 12, but are relying on inferior evidence, courses and distances and when these courses and distances are not shown on the Plat itself, Defendant’s surveyors determined them by scaling from the Plat, an even more inferior form of evidence. The iron pipes found by Franklin in 2005 are superior evidence of the front and rear property corners of Lot 11 & 12 than the methodology used by Defendant’s surveyors which was to scale the Plat to establish the location of the common front and rear corners between Lots 11 & 12. 332, 75 S.E.2d 871 (1953) The deviation of about 18 feet does not justify ignoring evidence of the grantor’s intent which the iron pipes were supposed to represent according to the Plat. See Little v. Little, 223 S.C. 332, 75 S.E.2d 871 (1953) “[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). The undisputed fact that the iron pipe or its replacement rebar was lying on the ground was according to Franklin “unusual” and was never explained.

The divergent views about the common boundary can be explained by the change in the site conditions, not requiring any question about the credibility of a professional’s conduct. Plaintiff respectfully urges this Court to Amend its Findings with respect to Franklin’s credibility because a professional reputation should not be tarnished absent compelling reasons, which are not present here.

II. THE COURT SHOULD ALTER ITS DISMISSAL OF THE FOURTH COUNT

Plaintiff respectfully requests that the Court alter its Conclusion of Law dismissing the Fourth Count – Slander of title. Plaintiff relies upon the earlier request, see Point IC, to Amend its Findings concerning its interpretation of the testimony of Jennifer Smith, Esq. Plaintiff contends that because the Court misconstrued this evidence, it improperly dismissed the Fourth Count. In particular, the Court found that the testimony of Jennifer Smith, Esq. who opined that the Gillette plat affected the insurability of Lot 11, undermined Plaintiff's slander of title claim. Opinion at 18. The 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. As is fully discussed above, see IC, the evidence does not support either of these Findings.

Plaintiff has also requested that the Court Amend its Findings that the boundary line issue remained unresolved after the dismissal with prejudice and that Defendant's representatives had a "mistaken belief". See I A & B. Plaintiff relies upon all these arguments in support of her request for the Court to reconsider and Alter its dismissal of the Fourth Count- Slander of title based upon these Amended Findings and the entire Record.

The Record shows that Defendant was represented by Counsel throughout the prior proceedings up to and including the dismissal with prejudice. The effect of a dismissal with prejudice in a trespass to try title case was well established in the law. Defendant's Counsel did not attempt to limit or reduce the res judicata effect of the dismissal with prejudice. Therefore, Defendant is bound by the acts of her attorney, Clark v. Clark, 271 S.C. 21,23, 244 S.E.2d

743,744 (1978), and cannot justify any action which contradicts the plain meaning of what she agreed to.

The evidence establishes that the recording of the Plat , P-17, was willful and based upon a mistake of law. Gordon Timmons' explanation that the recording of the Plat was intended to invite a settlement because it contained a dotted line denoting a quitclaim area is no justification. At best this was a secondary reason and not an effort to promote a "settlement" according to his explanation, given that Plaintiff had rejected the same dotted line shown on the Plat over a year earlier and then again on the day of trial. P-3. The obvious motivation was that Defendant had decided to sell the house to a third party and wanted to assert the same property line to maximize the value of the property, which she did by requiring the purchaser to agree to buy the disputed land. See P-29. The Plat is not even justified under the Defendant's claim that there was a limited effect to the dismissal because both Timmons admitted that they could later sue for trespass in the affected area. These reasons are pretextual and not the legal effect of the recording of a Plat. See 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 pretextual."). Therefore, the recording of the Plat was done in willful disregard of the plaintiff's rights, which indicates malice.

"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). Huff, 319 S.C. at 149, 459 S.E.2d at 891. "[M]alice merely means a lack of legal justification and is to be presumed if the disparagement is false, if it caused damage, and if it is not privileged." Home Invs. Fund v. Robertson, 10 Ill.App.3d 840, 295 N.E.2d 85, 87 (1973) (citing Gates v. Utsey, 177 So.2d 486, 488 (Fla.Dist.Ct.App.1965)). In Huff, the court found that

a jury could reasonably conclude the defendant published a false statement when she filed a lien she knew or should have known was invalid. Huff v. Jennings, supra, 319 S.C. at 149–50, 459 S.E.2d at 891. The Court of Appeals concluded that defendant was liable for slander of title because the lien that had been filed encumbered the entire property even though the lienor intended that it only attach to a co-owners interest in order to be satisfied, a mistake of law. “While it may be true that, had the lien been foreclosed and the property sold, the lien could have been satisfied only through the [ex-w]ife's interest in the property, the lien nonetheless attached to the property as whole and affected the value of the property as a whole.” Id.

Plaintiff contends that Huff is controlling law on the issue here since the Timmons acted under a mistake of law as to their continued ownership of the entire area denoted by their survey. P-17. They filed a Plat which did not distinguish between what they claimed their boundary line to be and what Plaintiff claimed her boundary line to be. That came later after Plaintiff had filed a Complaint and Lis Pendens. P- 18. Further, Defendant dragged its feet by neglecting to establish that the boundary line which Gillete established on the revised Plat was identical to the Franklin boundary line, P-2, until Gillete was asked about this during the trial. Defendant's conduct is inconsistent with the Timmons claim that they were always willing to give Plaintiff the disputed area.

As set forth in her Trial Brief, Plaintiff further requests that the Court award damages for Slander of Title consisting of legal fees in an amount based upon an Affidavit of Services. “In malicious prosecution, wrongful attachment, and slander of title, the defendants actually know their conduct forces the plaintiff to litigate. In addition, similar to malicious prosecution and wrongful attachment, actual damages are difficult to establish and often times are minimal in slander of title. Fairness requires the plaintiff to have some recourse against the intentional

malicious acts of the defendant.” Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012); Huff v. Jennings, *supra*, 319 S.C. at 150–51, 459 S.E.2d at 892 (quoting 50 Am.Jur.2d Libel & Slander § 560; citing Restatement (Second) of Torts § 633).

Because Defendant acted under a mistake of law, the Court should find that its actions were unjustified and willful, therefore, malicious. Therefore, Plaintiff respectfully requests that the Court reconsider its dismissal of the Fourth Count and award Plaintiff damages that resulted directly and immediately from its disparagement of Plaintiff’s title. Huff v. Jennings, *supra*.

III. THE COURT SHOULD ALTER ITS DISMISSAL OF THE FIFTH COUNT

Plaintiff requests that the Court reconsider and Alter its holding on the Fifth Count because it is not supported by the totality of evidence on the Record. The Court’s decision is based upon three findings: that the Defendant Trust did not cause any water to pool or pond on Lot 11; that the Trust took adequate steps to divert water to the opposite of Lot 12 and that Plaintiff’s studio was subject to flooding during large amounts of rain. These findings must be all must be supported by credible evidence. Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015).

Plaintiff requested that the Court Amend its Findings with respect to the FEMA standards prohibiting ground floor use, see ID, and whether Lot 11 was properly graded, see I E, both of which are directly relevant to the Court’s Findings dismissing the Fifth Count. Therefore, these arguments are incorporated herein in further support of this request to reconsider and Alter this dismissal.

A. Pooling and ponding were supported by credible evidence.

The finding that the Defendant did not cause considerable amounts of water to pool or pond, Order at 21, is not supported by credible evidence. Plaintiff testified that she lived in the house since 2005 and that there was no flooding in her studio from any of the rain events during that time, even during the major event in 2015, before the house on Lot 12 was built. Exhibit B at page 22, line 6- 17. Plaintiff testified that she saw rain coming off the Defendant's driveway like a waterfall whenever it rains after the house was finished on Lot 12. Id. at p. 23, line 5-12, p. 38, line 18-23. Plaintiff testified that water never ponded in the front of her property before the driveway was installed but afterward, ponded in the front of her property and accumulates there every time it rains, causing mosquitos to breed. Id. at p. 24, line 18-25; P-4D. The uncontradicted evidence showed that Defendant's concrete driveway was raised about 4" above Plaintiff's side yard. Id. at p. 28, line 20 to p. 29, line 8; P-4H. Plaintiff also identified a recent photo of ponding on Lot 11. Id. at p. 37, line 19 to p. 38, line 7. P-4K (labelled April 2019). On cross examination, Plaintiff repeated that rainwater from Lot 12 during Matthew came into the studio. Exhibit C at p. 38 line 6-9. She contrasted the earlier photos of the driveway during construction before fill and landscaping had been added which showed water on the opposite side of the driveway with the condition afterwards. Id. at p. 41, line 2-6.

Plaintiff's drainage expert, David Franklin testified that when he did his initial survey in 2005, his data recorder also collected elevation information. Exhibit A at p. 13, line 2 - 3. Based upon the elevations collected, the natural drainage was toward lot 12 and to the back of the lot. Id. at page 13, line 4-9. When he made a recent visit, he observed that "The drainage on Lot 12 now flowed from the house to the street, across the new driveway onto Lot 11, as well as whatever comes off the house onto the driveway now flows onto Lot 11." Id. at p. 15, lines 16-

19. Franklin also stated that the improvements on Lot 12 affected the natural drainage flow on Lot 11 because “ the driveway [was] an impediment” and “at the end of the driveway, there is significant vegetation and higher grade to where [rainwater] basically ponds on the side of the driveway until it gets to an elevation to where it can discharge back to the ditch.” Id. at p. 15, line 23-25 to p. 16, line 2-6.

The Court found that Defendant’s representative Gordon Timmons and Mark Strong gave contradictory testimony that the driveway was sloped away from Lot 11. Order at 23. However, the Court had stricken Strong’s testimony as not disclosed in discover, Exhibit D at p. 10, line 22 to p. 11, line 10, and the Court apparently overlooked its ruling and relied upon it. Gordon Timmons addressed the water ponding on Lot 12 during construction, P-4 (e) & (j) and said the fill was sloped inward but didn’t discuss the slope of the driveway or the conditions in the rear about which Franklin testified. Therefore, the testimony about the sloping of the driveway and the ponding on Plaintiff’s property is not contradicted by any testimony offered by Defendant.

The Court’s statement that the credible evidence is that the driveway does not cause considerable rainfall to be cast on Lot 11, Order at 21, has insufficient 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). Photos of the driveway from different perspectives show that it is long and wide, not small. P-4(a),(c), (k) & (l). In view of the exclusion of the testimony of Mark Strong and the limited testimony from Gordon Timmons, the Court must reconsider its Finding about ponding and provide a basis for its conclusion contrary to Plaintiff’s witnesses and photo evidence. 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). Plaintiff contends that the weight of credible evidence does not support this conclusion and the Court must reconsider it.

B. 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. As stated above, Gordon Timmons only testified that the fill dirt in the front yard alongside the driveway was sloped away from Lot 11. The testimony of Plaintiff and David Franklin that the runoff from the house flows across the driveway onto Lot 11 is uncontradicted. Therefore, the Court must reconsider its decision about the effectiveness of an alternative drainage system and provide a basis for its conclusion to adopt a conclusion contrary to Plaintiff's witnesses and photo evidence. 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).

Further, the Court 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. Exh. A at p. 18, line 20-19, line 12. 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. Id. at p. 19 line 13 to p. 20, line 9. P-25, Charleston County Permitting Standards and Procedures Manual 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 causes a significant increase in flow which didn't exist before. Id. at p. 20, line 10-15.

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. Plaintiff does not contend that Defendant's failure to comply with the regulations cited by Franklin is determinative of the nuisance issue, rather that is evidential of causation. Plaintiff contends that Defendant'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 . . . prescribes how landowners may deal with the surface water on their lands. 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 are entirely relevant to the nuisance issue. Therefore, the Court should reconsider its dismissal of the Fifth Count based upon the lack of any reference to these regulations in its Order.

C. Plaintiff's house was elevated to allow adequate drainage.

Third, the Court cited the common enemy rule and suggested that Plaintiff had failed to deal with the surface waters which were the cause of the flooding of her studio. Order at 22. David Franklin testified that the natural drainage flow was to the rear, where a drainage ditch

was located. Exh. A, at p. 13, line 4-9. The Court referenced testimony regarding the subdivision plat requiring the lot to be filled to a minimum above the bottom of the roadway ditch and graded in accordance with the county road code. Order at 10. When asked about this Franklin stated: "that's the former Charleston County requirement. Its now actually two feet above the flood zone". Id. at p. 29, line 9-11. Defense Counsel acknowledged that this was the requirement at the time of the Plat, Id. at p. 29, line 25 to 26, line 2. Franklin testified that the house foundation was graded a foot above the roadway ditch even though there was no ditch, Id. at p. 30, line 9-11, and graded and built in accordance with applicable code in 2005. Id. at p. 50, line 8-12. Plaintiff testified that she was present during construction and saw fill dirt being brought in to raise the house foundation. Exh. C at p. 4, line 22 to p. 5, line 4. Defendant offered no contradictory testimony.

The Court had earlier 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 p. 10. But the Court's finding does not support its conclusion that the Plaintiff's studio was subject to flooding as a result. In addition to Plaintiff's and Franklin's testimony that the house foundation was at least one foot above the roadway, Plaintiff testified that the rear of the property couldn't be filled in because it was wetlands. Exh C at p. 6, line 14 to p. 7, line 15. The Court referenced Plaintiff's testimony that studio never flooded until after the construction of the house and driveway on Lot 12. Order at 10. Now that the driveway was constructed, there is flooding every time it rains. Exh. B at p37, line 19-21 , although she is only concerned when it exceeds 3-4 ". Id. p. 47, line 5-16. The National Weather Service reported rainfall for the Charleston area exceeded 3" ten (10) times in the years prior to the construction of the Defendant's house in 2016 and four (4) times since then. See P- 8A (Highest Monthly

precipitation). Plaintiff did acknowledge that during the 1000-year flood in September 2015, water came into the back area of wetlands but never under the house. Exhibit C at p. 22, line 10-17. The Court did not give any reason why Plaintiff's testimony was not worthy of belief. See Order at 22. The Court's finding that the studio was subject to flooding due to its design is not supported by competent evidence. Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773,777 (2010).

The Court also appeared to consider the flooding as "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).

Since the Court erred by considering testimony that had been excluded and questioned credibility of Plaintiff's expert without any basis and considered that occasional flooding was not a sufficient basis for a nuisance claim, despite caselaw recognizing it as a form of per se nuisance, Plaintiff respectfully urges the Court to Alter and Amend its Order dismissing the Fifth Count and grant the Plaintiff the relief she requested: damages for the loss of personal property (\$8000.00) and income (\$5000.00), which the Court already agreed was allowable. Order at 14, n. 9.

Because Defendant 's Counsel made several references to Plaintiff's refusal to allow a swale to be built, Plaintiff is compelled to address the issues of waiver and estoppel since the Court could consider these as an alternative basis to deny relief. Plaintiff contends that the evidence does not allow Defendant to assert either waiver or estoppel to defeat Plaintiff's claim for the cost of a swale to remediate the nuisance, issues not reached by the Court.

D. No evidence of a voluntary and knowing relinquishment of a right.

Gordon Timmons never testified as to any conversation with Plaintiff that a swale was necessary to avoid flooding and damage to her property. Timmons did not testify that Plaintiff's statement about saving the trees occurred after she suffered damage to her property which was first set forth in the Amended Complaint. "A waiver is a voluntary and intentional abandonment or relinquishment of a known right. . . . Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-388 (1992). There was no evidence that Plaintiff knew about potential flooding to her property if no swale was constructed. She had no prior flooding problems before the driveway construction. She was not in the construction business and there was no evidence she understood the effects of the construction on Lot 12 to groundwater flow or the appropriate methods for preventing flooding. Lacking such knowledge of the consequences, Plaintiff could not be held to have waived her right to remediation thereafter and the Court should so find.

E. No evidence of concealment or reliance.

There is also no basis to relieve Defendant from liability based upon estoppel. "Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." Regions Bank v.

Schmauch, 354 S.C. 648, 674-75, 582 S.E.2d 432, 446 (Ct. App. 2003) (quotation omitted)

There is no evidence of any misrepresentation by Plaintiff. There is no reason to believe that Plaintiff would have knowingly refused to allow a drainage solution which would have saved her property from stormwater damage. "Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 20, 532 S.E.2d 876, 878 (2000). Defendant alone was chargeable with knowledge of the requirements for construction of a house in conformity with the Charleston County Permitting Standards and Procedures Manual. Charleston. Defendant's failure to complete a swale when one was called for was not reasonable. "[R]eliance by the party seeking to assert estoppel must be reasonable." Southern Development Land & Golf Co. v. S.C. Public Serv. Auth., 311 S.C. 29, 34, 426 S.E.2d 748, 751 (1993). Based upon all the evidence, the Court should find that Plaintiff is not now estopped from asserting damages for the cost of a swale to remediate the nuisance.

In summary, Plaintiff has provided numerous transcript references to aid the Court in its reconsideration of dismissal of the Fifth Count. These establish that Plaintiff made a prima facie case of nuisance per se and the existence of an impediment to the natural flow of drainage from her property causing ponding and damage on a frequent basis. The Record does not contain evidence which effectively rebuts the evidence and there is no basis for the Court to disregard the Plaintiff's witnesses. For these reasons, Plaintiff respectfully requests the Court to Alter and Amend its Order and grant Plaintiff damages as presented at trial.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court grant the within Motion and enter an Order granting relief as to the Fourth and Fifth Counts of the Complaint.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. Bertele', with a long horizontal flourish extending to the right.

Edward A. Bertele, Esq.

S.C. Bar # 72521

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Charleston, SC 29492

(843) 471-2082

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Attorney for Plaintiff, Michele Blank

EXHIBIT A

R114

1 STATE OF SOUTH CAROLINA)
2) Court of Common Pleas
3 COUNTY OF CHARLESTON) Case No. 2016-CP-10-04122
4)
5 MICHELE BLANK,)
6)
7 Plaintiff,)
8)
9 vs.) Transcript of Trial Testimony
10) of
11 PATRICIA TIMMONS,) David Earl Franklin
12)
13 Defendant.) DATE: April 22, 2019
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

B E F O R E:

THE HONORABLE WILLIAM P. KEESLEY

A P P E A R A N C E:

EDWARD A. BERTELE
Attorney for the Plaintiff

MARK A. MASON
Attorney for the Defendant

ORIGINAL TRANSCRIPT ORDERED BY:
EDWARD A. BERTELE, ESQ.

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

1 DAVID EARL FRANKLIN,

2 having been duly sworn, testifies as follows:

3 THE CLERK: State your full name and spell your last
4 name for the record.

5 THE WITNESS: My name is David Earl Franklin,
6 F-r-a-n-k-l-i-n.

7 DIRECT EXAMINATION

8 BY MR. BERTELE:

9 Q. Good afternoon, Mr. Franklin. By whom are you
10 employed?

11 A. I'm sorry. I didn't understand the question.

12 Q. By whom are you employed?

13 A. I'm self-employed. Name of my company is Eco
14 Engineering and Construction.

15 Q. What's the business of Eco Engineering?

16 A. It's a full-service engineering design company. We
17 provide surveying. We provide mechanical, electrical,
18 structural design and stormwater management, pretty much soup
19 to nuts except for architecture.

20 Q. How long have you been in business as Eco
21 Engineering?

22 A. Eco Engineering was formerly called Engineering
23 Services, Inc. And it was formed in 1979.

24 Q. Now, what's your educational background, sir?

25 A. I have a Bachelor of Science degree in engineering

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1 science from University of Tennessee.

2 Q. And do you have all the professional licenses?

3 A. Yes, many licenses, of course, engineering in the
4 states of Tennessee, South Carolina, Georgia, California.
5 And land surveying in South Carolina. I'm a residential home
6 builder, licensed. I'm also a commercial -- hold commercial
7 licenses for both general contracting as well as mechanical
8 contracting.

9 Q. As well as mechanical?

10 A. Yes.

11 Q. And since you are licensed to engage in land
12 surveying in South Carolina, have you done so in the past?

13 A. What was the question again?

14 Q. I was asking about your activities in land surveying
15 in South Carolina.

16 A. Yes. I've been land surveying in South Carolina
17 since around 1980.

18 Q. And are you familiar with -- oh, excuse me. Does
19 your work in civil engineering -- you do work in civil
20 engineering, correct?

21 A. Yes.

22 Q. Does that include analysis of drainage sites and
23 costs to remediate drainage problems?

24 A. Yes, it does.

25 Q. Now, in connection with this case involving the

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1 Copahee View subdivision, are you familiar with this
2 subdivision?

3 A. Yes.

4 Q. And what work did you do at Copahee?

5 A. In 2005 time frame, for Mr. Horton, a contractor, I
6 provided site plans for building residential houses, as well
7 as field layout of the residence and elevation certificates
8 for the finished floor elevations.

9 Q. And how many lots at the Copahee View subdivision
10 did you do this work on?

11 A. Well, we did three. But in order to do those three,
12 we had to do the ones between them, so ...

13 Q. In order to do what?

14 A. In order to do the three lots we did, there were
15 lots between those lots that, obviously, I had to locate
16 corners.

17 Q. So it was more than three?

18 A. It was three, plus the ones that I had to do in
19 order to get those.

20 Q. And are you familiar with Lot 11 at the Copahee View
21 Subdivision purchased by Ms. Blank, the plaintiff here?

22 A. Yes, I am.

23 Q. Did you prepare a site plan in connection with her
24 purchase of that lot?

25 A. Yes, I did, from Mr. Horton.

1 Q. From Mr. Horton? He was the owner?

2 A. He was the contractor I was working for.

3 Q. Okay. Let me show you P-27. It's the full-size
4 subdivision plat. Are you familiar with this document?

5 A. I am.

6 Q. Is this the reference material that you utilized to
7 prepare the site plan for Lot 11 and the other lots that you
8 worked on?

9 A. That's correct.

10 Q. How did this plat compare with others that you have
11 utilized in the past to do surveying work?

12 A. This was an unusual plat in that it was not
13 certified to be the layout for the lots. It is certified for
14 road right-of-ways and other right-of-ways, drainage
15 right-of-ways, but it was not a plat actually certifying lot
16 layout.

17 Q. Okay. And when you did -- did you do field work in
18 connection with this surveying of the other lots --

19 A. Yes, I did.

20 Q. -- which you worked on?

21 A. Yes.

22 Q. And what were the results of that field work with
23 respect to what was shown on the plat marked P-27?

24 A. Well, the first thing that you generally do for --
25 to get a permit for your building is, you present a site plan

1 and you use the best information that's available, in that
2 case, it was this plat, to create your initial site plan.

3 Q. All right. Let me show you what's been marked as
4 Defendant's Exhibit 4. Do you recognize that?

5 A. Yes, I do.

6 Q. It's not a great copy.

7 A. Yeah. It's an old one.

8 Q. What is -- you prepared D-4, didn't you?

9 A. I prepared this plat.

10 Q. And at what stage of the process did you prepare
11 that?

12 A. That was prior to doing any field work. It's based
13 upon the information on this plat, on the previous survey
14 plat that you provided.

15 Q. P-27?

16 A. Yes.

17 Q. Okay. And subsequent to the preparation of D-4, did
18 you prepare another site plan?

19 A. Yes. One of the things I was contracted to do was
20 to lay the building out on the lot. So in order to do that,
21 I had to survey the lot. And upon the surveying of the lot,
22 there were significant discrepancies between the iron pipes
23 in the field and the plat. So, therefore, I prepared a new
24 plat and a new site plan to reflect the corners found in the
25 field.

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1 Q. Okay. Let me show you what's been marked as
2 Defendant's Exhibit 5. It's dated June 6th, 2005.

3 A. That is the new plat.

4 Q. All right. And what does it indicate with respect
5 to property corners that you found in the field?

6 A. There were significant differences between what was
7 found in the field and what was -- what the plat showed. And
8 this was not unusual, because this was at least the second
9 particular lot that I had worked on. And the previous lot
10 had similar discrepancies.

11 Q. I see. And what property corners did you find when
12 you went out in the field to survey Lot 11?

13 A. I found all the corners.

14 Q. All the corners of Lot 11?

15 A. All four corners.

16 Q. What's the significance to you in terms of a
17 surveyor preparing a survey or site plan for a client?

18 A. Again, when you are preparing the site plan, you are
19 generally working on the best available data. And this was
20 the only plat available for this, for us to reference. Once
21 you go out and do your field work and you determine where the
22 actual corners are, then you base everything, obviously, on
23 what's actually out in the field.

24 Q. Okay. And each of the points on D-5 corresponded to
25 what, an iron pipe found in the ground?

1 A. Iron pipe found in the field, which lined up with
2 everything that you would think was set by a surveyor,
3 because everything kind of lined up.

4 Q. Okay. And that included the front lines of Lot 11?

5 A. Where the right-of-way is and approximately where
6 the property lines are, and I looked at the lots on either
7 side to confirm that they lined up with, you know, roughly
8 what the plat called for.

9 Q. Well, did you find the other corner -- did you find
10 the other --

11 A. I found --

12 Q. Withdrawn. Let me stop you for a second. I want to
13 reframe the question so it's clear.

14 A. Okay.

15 Q. As part of your work in confirming the location of
16 the pipes and the corners, did you locate a pipe or a corner
17 representing the other side of the Lot 12? In other words,
18 the westerly corner of Lot 11 would be the easterly corner of
19 Lot 12, correct?

20 A. Yeah --

21 Q. Let me finish the question. Did you find the
22 westerly corner of Lot 12?

23 A. Yes.

24 Q. Okay.

25 A. I found lot corners for -- between 12 and 13. I

R 122

1 think I may have found -- maybe it was just a fence line for
2 13.

3 Q. All right. Was Lot 13 one of the lots which you had
4 been engaged to survey or prepare a site plan?

5 A. Yes, yes, 13 was.

6 Q. So the westerly corner of Lot 12 would be the
7 easterly corner of Lot 13?

8 A. That's correct.

9 Q. Okay. So you were actually confirming the location
10 of Lot 13 at the same time?

11 A. That's correct.

12 Q. So you were out in the field in 2005 looking at this
13 land?

14 A. Yes. When we got into this, there was other things
15 going on before I went back out there. But the next time I
16 actually went out to look, the front left corner of Lot 11
17 was not in the ground.

18 Q. Well, excuse me. I think you are anticipating. I
19 don't mean to interrupt, but I was asking in connection with
20 your layout of Lot 11.

21 A. Yes.

22 Q. Your layout of Lot 11, all right? You were in the
23 field to look at Lot 11 in 2005?

24 A. That's correct.

25 Q. Okay. And you were also called upon to perform some

Q 123

1 other services for Mr. Horton?

2 A. Yes.

3 Q. Did that involve staking the corners of the
4 property?

5 A. Involved staking the corners of the house.

6 Q. And of the house. Okay. And so, to your knowledge,
7 was the house located within the lot lines that you indicated
8 on that site plan?

9 A. That's correct, yes.

10 Q. Tell me, please, what's the substantial difference,
11 if any, between the site plan that you did and a survey?

12 A. The big difference was the front --

13 Q. No, I'm speaking in general now between what's
14 contained on a site plan and what's contained on a survey.

15 A. Again, the big discrepancy between the data that I
16 had and what I found in the field was the location of the
17 front property corner. However, when you went into the
18 field, it lined up perpendicular to the lot we found in the
19 back corner. So that told me that was the correct corner
20 from the front corner, but that was the big discrepancy.

21 Q. I see. Could you record your site plan as a plat in
22 the Charleston County planning office?

23 A. It's a format issue when you get to record a plat,
24 but it doesn't require any additional field information.
25 It's just substantially more information to get it in the

1 format in order to record.

2 Q. Based upon your experience with Lot 13 and Lot 11 --
3 and what was the other lot that you had been asked to do work
4 on?

5 A. 9.

6 Q. Lot 9? Based upon your experience with 11, 9 and
7 13, in your professional opinion, would it have been
8 appropriate for a surveyor to scale off of the plat to
9 establish the property corners?

10 A. Not if you find monuments in the field. If the
11 existing pipes are there, there's no reason to be scaling
12 anything on that plat.

13 Q. Why is that, sir?

14 A. Because it's not an accurate -- like the plat says,
15 that it's not based for layout of lots. It's for the layout
16 of right-of-ways and easements, does not certify lot land.
17 So it's kind of like a preliminary plat for the lots.

18 Q. I see. And what distance did you use for the front
19 line of Lot 11, based upon your experience with the other
20 lots and the information that you found in the field?

21 A. Total front distance as shown on my revised site
22 plan was that the front distance should be a chord distance
23 on a radius, chord distance would be 74.03 feet.

24 Q. And total front property line is what?

25 A. That is the front property line.

1 Q. Of Lot 11?

2 A. Of Lot 11.

3 Q. I'm sorry. Thank you, Lot 11. I apologize. And
4 that's based upon what you found in the field?

5 A. That's correct.

6 Q. Did the front property line -- withdrawn. You said
7 that you also had occasion to establish the two corners of
8 Lot 12 as part of your work, since one of them was also the
9 corner of Lot 13?

10 A. Yes.

11 Q. And what was that front property line dimension, if
12 you recall?

13 A. 103.56.

14 Q. That's between existing pipes?

15 A. Yes. Next existing pipe, or whatever, for Lot 13
16 was 107. Okay. There's two dimensions on this particular
17 plat. And distance between the old pipes were actually 103.2
18 feet, as opposed to -- 103.2 as opposed to 103.56.

19 Q. And the 103.2 represents what, what's shown on the
20 plat?

21 A. Yes, from my survey, yes.

22 Q. Thank you. Now, do you recall the topography that
23 existed on Lot 11 at the time that you did your original work
24 in 2005?

25 A. The topography?

1 Q. Yes, sir.

2 A. Yes, when I do my data collector, it records not
3 only location, but it records elevation.

4 Q. Okay. What was the natural flow of drainage and
5 stormwater on Lot 11?

6 A. From the street, there's a ditch along the back
7 property line. So it's from -- for Lot 11, the drainage was
8 actually flowing toward Lot 12 and also to the back of the
9 lot.

10 Q. What is this drainage ditch you are talking about?
11 Is it just a hole in the ground, or has it been formalized in
12 some way?

13 A. What's that?

14 Q. What is the function of this ditch in the back that
15 you've testified about?

16 A. I don't understand the question.

17 Q. All right. What about Lot 12, from your
18 observations then, how did Lot 12 drain?

19 A. Basically, from front to back.

20 Q. So from the street to this drainage ditch in the
21 back?

22 A. That's correct.

23 Q. And at my request, you reviewed the current
24 improvements on Lot 12 recently, did you not? Lot 12, I was
25 asking about whether you looked at the improvements on Lot

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1 12?

2 A. Yes, I did.

3 Q. And you are familiar with the improvements on Lot 11
4 since 2005, are you not?

5 A. There's no significance improvements on Lot 11.

6 Q. Meaning what?

7 A. It doesn't look like the residence has been
8 expanded. The only significant improvement would be the
9 enclosure of the grounds.

10 Q. The enclosure of what?

11 A. Enclosure of the ground-level garage, parking and
12 the garage.

13 Q. Does there appear to be anything which would affect
14 the drainage of the lot from front to back as you said it
15 existed before?

16 A. Not on Lot 11.

17 Q. I see. Did you look at the drainage as it existed
18 at the time of a recent visit?

19 A. Yes.

20 Q. On Lot 12?

21 A. Yes. Lot 12 now had been improved with a very nice
22 house and driveway and --

23 THE COURT REPORTER: And what? You trailed off
24 there.

25 THE WITNESS: Lot 12 has a new residence and

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1 driveway.

2 THE COURT REPORTER: Okay. We'll leave it there. I
3 didn't hear the last few words.

4 THE COURT: Can you angle that microphone a little
5 more toward you. I am also having trouble hearing you.

6 Mr. BERTELE: Should I ask the question again,
7 Judge, so we can all hear it?

8 THE COURT: I think he stopped. He said very nice
9 house and driveway.

10 BY MR. BERTELE:

11 Q. Was there anything built on Lot 12 which, in your
12 opinion, affected the drainage of the property from front to
13 back?

14 A. Significantly.

15 Q. And what was that?

16 A. The drainage on Lot 12 now flowed from the house to
17 the street, across the new driveway onto Lot 11, as well as
18 whatever comes off of the house onto the driveway now flows
19 onto Lot 11.

20 Q. And this condition didn't exist before those
21 improvements were installed, to your knowledge?

22 A. Obviously not, yes.

23 Q. And did these improvements on Lot 12 affect, in your
24 opinion, the natural drainage flow on Lot 11?

25 A. Absolutely.

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1 Q. In what way, sir?

2 A. In addition to the driveway being an impediment, at
3 ~~the end of the driveway, there is~~ significant vegetation and
4 higher grade to where it basically ponds on the side of the
5 driveway until it gets to an elevation to where it can
6 discharge back to the ditch.

7 Q. At my request, you prepared a report about this?

8 A. I did.

9 Q. And do you have a copy with you?

10 A. I do.

11 Q. Will you please refer to it, sir?

12 MR. BERTELE: And could I have it marked as
13 Defendant's 25?

14 MR. MASON: We object. It wasn't provided to us
15 until this morning. And it's dated this morning. This
16 litigation has been pending for some time and this witness
17 was deposed. And it wasn't provided in his deposition. So
18 we think it's too late to use as evidence.

19 THE COURT: You wish to be heard?

20 MR. BERTELE: Yes, Judge. Mr. Franklin was deposed
21 about two years ago in the earlier case that involved the
22 boundary line dispute. Since that time, we filed this case
23 with a claim of nuisance as a result of the creation of the
24 driveway impediment entitlement. And Mr. Mason never sent me
25 any demand for discovery with respect to that. And I

1 MR. MASON: No, Your Honor.

2 THE COURT: Anything else?

3 MR. BERTELE: No.

4 THE COURT: My experience has been that you don't
5 introduce the written report. The witness may testify
6 concerning the report. Do you have one? Mark it for
7 identification purposes only.

8 MR. BERTELE: Judge, I have an extra.

9 THE COURT: It's marked for identification purposes
10 only.

11 (Plaintiff's Exh. 25, Mr. Franklin's report, was
12 marked for identification.)

13 BY MR. BERTELE:

14 Q. What was the purpose for which you were asked to
15 prepare a report?

16 A. The purpose of the report is based upon observations
17 by the customer, Mrs. Blank, about stormwater backing up onto
18 her property. And the report is to determine what may be
19 causing such backups.

20 Q. Did you determine the cause of the issue that Ms.
21 Blank was complaining about?

22 A. Yes. Some I have already previously mentioned.

23 Q. Yes.

24 A. But in my opinion, what happened on this particular
25 case is there was not significant planning and/or design of

1 the stormwater on her lot and how it may affect Mrs. Blank's
2 property.

3 Q. What's the basis of your opinion that there wasn't
4 sufficient design?

5 A. Charleston County has a stormwater management
6 program permitting procedure process. And for a
7 single-family residential lot less than one acre, there is a
8 form that's generally required to be certified to. And that
9 form indicates that it will be in substantial compliance with
10 the stormwater regulations. And I have identified three
11 areas in the stormwater management manual that would be
12 noncompliant.

13 Q. And what are those three areas that you have
14 identified as noncompliant?

15 A. Well, on page 210 of the stormwater manual, the
16 narrative requires the flooding issues and potential impacts.
17 Quality of downstream structures must be considered. And on
18 page 2 of 3, the stormwater runoff generated shall be
19 controlled to pre-development and/or natural grades and the
20 stormwater discharge to special protection areas with
21 sensitive resources or have existing flooding or water
22 quality issues.

23 And on page 3 of 11, there should be acceptable
24 quality controls, even detention structures that may be used
25 to protect against adverse downstream impacts that are

1 related to the increase in peak flow rates and flow volumes
2 from a land-disturbing activity.

3 Q. Are those the sections of the Charleston County
4 Stormwater Management Program permitting standards you were
5 reading from?

6 A. Yes. Those could have been corrected with proper
7 stormwater design for the lot.

8 Q. But you found that what existed on the site was
9 deficient with respect to those three areas?

10 A. In those three areas. And, basically, since the
11 driveway was constructed very near the property line,
12 whenever the water runs off of the driveway, it's going into
13 a swale on the property line. And that's a significant
14 increase in flow which really didn't exist before the lot was
15 developed.

16 Q. Based upon what exists there now, do you have a
17 proposed solution to prevent stormwater from overflowing Ms.
18 Blank's property?

19 A. I do.

20 Q. What is that solution?

21 A. I have taken one of the exhibits of the lot layout
22 for Lot 12 and basically recommended that the necessary trees
23 or vegetation be removed along that property line in order to
24 construct a proper drainage swale that goes basically from
25 the road back to the ditch in the back of the property.

1 problem on Lot 11?

2 A. Well, actually, I prepared a proposal using my
3 company that I have my general contracting license with, Eco
4 Harbor, Inc. In that proposal, I have records survey, tree
5 survey, 2,000; drainage plan, 2,500; permits, 500; mobilized
6 equipment, 1,000; remove trees and grind stumps, 3,000.

7 Q. Why is that necessary, sir?

8 A. There are several trees that had to be removed. And
9 they need to be ground up, as opposed to dug out. If you dig
10 them out, they make a big mess. Then you need to haul away
11 dirt and debris, 1,500 for that. Separation of the swale,
12 1,000; cut the swale, couple thousand; and sod the disturbed
13 areas, six pallets at 4,000. That's labor into it. And
14 clean up and demobilize, 750. Total construction cost
15 \$18,250; overhead and profit, 5,000; contract price,
16 \$23,250.

17 Q. Does the \$23,250 represent your best estimate of the
18 cost to install a swale and make other modifications to Ms.
19 Blank's property to alleviate the flooding problem?

20 A. That's my proposal to her.

21 MR. BERTELE: Thank you. I have no further
22 questions.

23 MR. MASON: May it please the Court, Your Honor.

24 THE COURT: Yes.

25 CROSS-EXAMINATION

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1 BY MR. MASON:

2 Q. Mr. Franklin, you were the professional who was
3 responsible to make sure that Ms. Blank's house was located
4 in the right place on Lot 11; isn't that correct? That was
5 your job?

6 A. Yes.

7 Q. All right. And you did it without going out to the
8 field; isn't that correct? You first drew the site plan
9 without going out in the field at all? Isn't that right?

10 A. Which is a standard industry practice, right.

11 Q. And when you went out to the field, you determined
12 that her property was located on wetlands and that the house
13 could not be built where you had drawn it on the plan; isn't
14 that correct?

15 A. That is correct.

16 Q. And it couldn't be built in accordance with the plan
17 that you submitted to Charleston County to get the building
18 permit; isn't that correct?

19 A. That's correct.

20 Q. You had to move the house; isn't that correct?

21 A. Absolutely.

22 Q. And you moved the house without telling Charleston
23 County and without filing a revised site plan; isn't that
24 correct?

25 A. That could be correct, yes.

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1 Q. Well, it is correct, isn't it?

2 A. That's correct.

3 Q. And what should have been done is, you should have
4 stopped at that point in time and gone back to Charleston
5 County and filed a revised site plan; isn't that correct?

6 MR. BERTELE: Objection. This has nothing to do
7 with the issues here, Judge. The house had been built. They
8 could have challenged it back in 2015. They didn't bring any
9 claim about the house not being built according to whatever
10 was submitted originally. And we are past that now, Judge.
11 The house is there. The issue is the boundary line and the
12 damage done by the construction on Lot 12.

13 THE COURT: You wish to be heard?

14 MR. MASON: I think it's very relevant, Your Honor.
15 It's why she encroaches on the lot next-door, is because she
16 couldn't build it on her lot. So it's part and parcel of
17 this whole case and why we are here today.

18 THE COURT: Anything else?

19 MR. MASON: No, Your Honor.

20 THE COURT: Anything else?

21 MR. BERTELE: No, Judge.

22 THE COURT: This is not a ruling on the res judicata
23 issue. ~~It goes to bias~~. It's admissible. Go ahead.

24 BY MR. MASON:

25 Q. Thank you. And the work you did for the contractor

1 was a good client of yours; isn't that correct?

2 A. Yes.

3 Q. So did he call you and say, hey, Mr. Franklin, we
4 can't build this house where you've shown it on the site
5 plan, come out here and have a look?

6 A. No, that was not necessary.

7 Q. Why?

8 A. Because I made the change myself.

9 Q. You went out there and saw there was a problem and
10 you went out there to survey it?

11 A. And I changed it myself. The client did not have to
12 ask me.

13 Q. You could tell it was wrong when you went out there?

14 A. I notified the client that it would be necessary to
15 relocate the house for the reasons stated. And it is also
16 very common that an engineer or a surveyor can make changes
17 to his plans without necessarily notifying Charleston County.

18 Q. Well, you also designed the foundation for this
19 home; isn't that correct?

20 A. I did. Yes, I did.

21 Q. Did you design the home itself or just the
22 foundation? Did you design the home itself or just the
23 foundation?

24 A. He already had plans for the house. So, basically,
25 the only thing he required was the foundation plan.

1 Q. And what flood elevation was this property in? Let
2 me just ask you. Was this a house that had to be elevated?

3 A. Yes, it was in a flood zone, and we did elevate the
4 house.

5 Q. Like a drive-under type house foundation?

6 A. Parking underneath, yes.

7 Q. And, in fact, it would be illegal to enclose the
8 ground floor area of the house, isn't that correct, from an
9 engineering standpoint?

10 A. Not in this flood zone.

11 THE COURT: I didn't understand. What did he say?

12 THE WITNESS: It's in an A flood zone. You can
13 enclose in an A flood zone.

14 BY MR. MASON:

15 Q. Were you involved in getting any kind of permit to
16 enclose the downstairs area of this house?

17 A. No.

18 Q. It wasn't part of your foundation design; isn't that
19 correct?

20 A. It wasn't part of my scope of work.

21 Q. But your foundation plan showed it open underneath?

22 A. It did.

23 Q. So if there was a 1,000-year flood event or
24 whatever, water could pass under your foundation; is that
25 right?

1 A. Absolutely.

2 Q. And some point after you were involved, Ms. Blank
3 closed it in. And you don't know whether that was done with
4 a permit or not; isn't that correct?

5 A. That's correct, I don't know.

6 Q. All right. Now, did you see on the subdivision plan
7 where it says all lots have to be raised one foot above the
8 elevation of the road?

9 A. That is a -- that's a former Charleston County
10 requirement. It's now actually two feet above the flood
11 zone. But ~~that is not anywhere~~ on any documents that I know
12 of.

13 Q. Do you have the full-size one? I think it's 27. Is
14 it your testimony that you -- can I see? You might have it
15 up here.

16 MR. MASON: May I approach the witness to see if
17 he's got the exhibit?

18 BY MR. MASON:

19 Q. Exhibit 27, do you see where it says at No. 2, all
20 lots are to be filled in a minimum of one foot above the
21 bottom of the roadway ditch at the right-of-way line and
22 graded to drain in accordance with the county road code?
23 Have I read correctly from Exhibit 27, sir?

24 A. Yes.

25 Q. So that was the drainage requirement at the time

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1 this subdivision was platted; isn't that correct?

2 A. That's correct.

3 Q. And isn't it correct that Ms. Blank's lot, the lot
4 you call Lot 11, is not graded to that standard as we speak
5 right now?

6 A. I am not so sure about that. Because I think the
7 elevation at her house is higher than the road.

8 Q. It says the lot, isn't that what it says?

9 A. Yes, says the lot. But the lot is already graded a
10 foot above the ditch, and in this particular case, there's
11 not a ditch on the front.

12 Q. Is it fair to say you didn't do anything to check to
13 see whether that lot meets the elevation requirement of the
14 plat?

15 A. I don't think it applies because there's not a ditch
16 in the front.

17 Q. So what happened, Mr. Franklin, is when you got out
18 to the field, you realized the house couldn't be built in the
19 wetlands where you had originally cited it, so you moved it
20 closer to Lot 12; is that correct?

21 A. Absolutely.

22 Q. How much further did you move it over to get it out
23 of the wetlands?

24 A. I will look. Appears to be about -- well, really
25 not that much.

1 Q. Did you move it over about 20 feet?

2 A. No. Well, let's see. Okay. Yeah, the -- about the
3 same distance off the lot line. It was the lot line that
4 moved 20 feet. It wasn't the location of the house relative
5 to the lot line.

6 Q. So did you move the house 20 feet and the lot line
7 20 feet?

8 A. I didn't move the lot line.

9 Q. Well, you moved it from what you originally -- you
10 originally scaled out the property when you laid out the
11 house, you had one set of dimensions. Then when you went out
12 there and had the wetlands problems, you did another plan
13 that had another totally different set of dimensions; is that
14 correct?

15 A. That's correct.

16 Q. My question is, if you look at the original site
17 plan you did, you showed the front by the road at about 55
18 feet. But then when you went out there and saw you had a
19 problem, it's now 74 feet. So my question is, that 20-foot
20 differential, is that how much you slid the house over?

21 A. Approximately. But we did not have a problem
22 because we moved it to where the property line is, as opposed
23 to where the plat called for it. That's not a problem.

24 Q. So by moving the property line, you solved your
25 problem; isn't that correct?

1 A. I did not move the property line. I determined the
2 property line.

3 Q. And you determined the property line was 20 feet
4 more than it was when you did the site plan; isn't that
5 correct?

6 A. The plat was -- the plat that I prepared, the site
7 plan was wrong. It was incorrect, invalid. No discussion.
8 I put the lot where the property line is because of the
9 existing corners. There was no moving the property line.
10 That is an irrelevant argument.

11 Q. Well, you did move it?

12 A. I did not move the property line.

13 Q. You went out there and claimed you found some things
14 in the field; isn't that correct?

15 A. I did not claim to find anything. I found the
16 corners.

17 Q. And that solved your problem, right?

18 A. There was no problem.

19 Q. Do you have the -- let me see the exhibits you've
20 got in front of you there, please, sir. I'm going to put
21 them up on the screen real quick. I show you what's been
22 marked Exhibit 4. You prepared that; is that correct?

23 A. That's correct.

24 Q. You submitted that to Charleston County. The red is
25 from the prior use of Elmo. You prepared Exhibit 4; is that

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1 Q. So he found some markers. And did he properly use
2 those markers to locate other points on the surveys?

3 A. Well, he used the -- he showed right-of-way markers
4 on his plat. But that doesn't necessarily mean that a survey
5 marker is a property line.

6 Q. So you disagree with how he used some of the
7 concrete monuments; isn't that correct?

8 A. I don't know how he used the concrete monuments.

9 Q. Can we looking at Exhibit 4? If I read correctly,
10 on Macoma Drive, you put down that the front distance was 55
11 feet, 55.57 feet. And you wrote the word "plat". And then
12 in the back, you wrote that it's 195.81. And you wrote the
13 word "plat".

14 Then you went out there and found the problem about
15 not being able to build a house in the wetlands. You
16 prepared Exhibit 5. And now you have the front distance at
17 74.03 in the field. And you had the back distance at 221.58
18 in the field; isn't that correct?

19 A. That's correct.

20 Q. So as I stated, the lot grew in the front and grew
21 in the back by a little more than 20 feet once you found the
22 problem?

23 MR. BERTELE: Objection. We've been through this
24 many times. It's repetitive.

25 THE WITNESS: The lot did not grow --

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1 THE COURT: Hold on a second.

2 THE WITNESS: The reference plat was wrong.

3 THE COURT: Hold on one second.

4 You want to be heard?

5 MR. MASON: No, Your Honor.

6 THE COURT: Objection is asked and answered.

7 MR. BERTELE: Yes.

8 THE COURT: Overruled. He's given his answer.

9 BY MR. MASON:

10 Q. So, Mr. Franklin, when you first drew the plat, you
11 did that in May of 2006, is that correct, the one you
12 submitted to the County?

13 MR. MASON: May I approach, Your Honor?

14 THE COURT: Yes.

15 THE WITNESS: I think you have my reference there.

16 BY MR. MASON:

17 Q. Well, do you have your invoice with you? Did you
18 invoice for that work on or about May 23rd, 2005?

19 A. Invoice is dated June 6th, 2005.

20 Q. For which survey, for the site plan?

21 A. That is for the revised site plan.

22 Q. The revised site plan you invoiced on June 6th,
23 2005?

24 A. Yes.

25 Q. Can I see that document? So you charged \$750 to

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1 survey Lot 11, do a building layout on Lot 11, and revise the
2 site plan for Lot 11. You charged a total of \$750; is that
3 correct?

4 A. Survey, 250; building layout, 250; revised site
5 plan, 250 for Lot 11.

6 Q. So are you the one who physically located the house
7 where it sits right now?

8 A. Yes.

9 Q. Okay. And you've used a couple words during your
10 testimony where you referred to the driveway constructed by
11 Lot 12 on their property. It's not your opinion, is it, that
12 Lot 12 encroaches on Lot 11, is it?

13 MR. BERTELE: Objection.

14 THE WITNESS: I don't understand the question.

15 MR. BERTELE: I don't understand the form of the
16 question. There's no -- I'm sorry. I don't understand the
17 form of the question.

18 THE COURT: It's not your opinion what?

19 MR. MASON: In testifying about the drainage of --

20 THE COURT: I don't need an explanation. What's
21 your question?

22 MR. MASON: Is whether your work indicated that the
23 driveway on Lot 12 encroaches in any way on the Lot 11?

24 THE COURT: You may answer the question if you can
25 answer.

1 THE WITNESS: Based on the plat that I drew the
2 sketch on, it does not appear to encroach on Lot 11.

3 BY MR. MASON:

4 Q. In other words, it's your opinion that all of Lot
5 12's improvements are physically on Lot 12; isn't that
6 correct?

7 A. That's what I understand, yes.

8 Q. Okay. And have you seen any drawings that show that
9 the building that's on Lot 11, Mrs. Blank's house, encroaches
10 on Lot 12?

11 A. Repeat the question.

12 Q. Yeah. Have you seen any surveys that show that the
13 building on Lot 11 encroaches on Lot 12, Ms. Blank's house?

14 A. Yeah. I saw some preliminary discussion about when
15 you use the erroneous survey subdivision plat, that you could
16 get that.

17 Q. Well, two other surveyors have reviewed your work
18 and gone out in the field, and you have disagreements with
19 those gentlemen; isn't that correct?

20 A. I don't have a disagreement. I only know that I
21 located a lot based upon monuments in the field and not
22 scaling plats.

23 Q. Okay. And so is it your testimony that whoever
24 reviewed what happened, what the lay of the land is out
25 there, should have been looking for monuments and based their

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1 work on monuments?

2 A. Yes. If there's monuments in the field, definitely
3 use them.

4 Q. And the monuments you found were three-quarter inch
5 rebar; is that correct?

6 A. I couldn't certify that right now because I don't
7 remember.

8 Q. You don't remember, but it's really important,
9 right? Isn't it?

10 A. They were survey-standard pipes in the ground that
11 were located where a property line may be located.

12 Q. Well, but that's not my question. The type of the
13 monument is important, isn't it correct, because the plat
14 tells you --

15 A. That's correct. The type of the pipe in the ground
16 is correct.

17 Q. Because you could have surveys where people are just
18 putting in three-quarter-inch rebars --

19 A. I have seen corners with four or five pipes in the
20 ground within six inches of each other.

21 Q. You have to then make a determination if they are
22 old or if they are new; isn't that correct?

23 A. That's correct. You have to determine which one you
24 like.

25 Q. And you do that by going back to the plat to see

1 way you handled it; isn't that correct?

2 A. I don't know how to answer that.

3 Q. Is Mr. Horton still in business?

4 A. What's that?

5 Q. Your builder client that you worked for at Copahee
6 Subdivision, is he still in business?

7 A. I have no idea.

8 Q. When was the last time you worked for him?

9 A. ~~These three~~ lots are the only projects that I've
10 worked with him.

11 Q. Now, when we use the word that -- did you notice
12 that on the subdivision plat by which Mrs. Blank took title,
13 that the lot isn't called Lot 11, it's called "no lot"? Have
14 you noticed that?

15 A. That was pointed out to me at some time, but I
16 didn't know notice it at the time.

17 Q. And have you seen the "no lot" back in that time in
18 the '90s used to designate a lot that was unsuitable to build
19 on to for wetlands issues or otherwise?

20 A. The client came to me and said he wanted to build a
21 house on it. So what is actually on the plat and how it's
22 represented is irrelevant.

23 Q. Irrelevant to you?

24 A. Irrelevant, period.

25 Q. So you didn't point out to anybody, hey, this isn't

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1 even a numbered lot, it says "no lot"? That raises some red
2 flags about why is it called "no lot". You didn't -- that
3 didn't ring in your mind?

4 A. Nope.

5 Q. Now, when you took some pictures of the driveway, I
6 noticed you didn't use any kind of a level when you took the
7 photos; is that correct?

8 A. No, I just took photos.

9 Q. So if these properties were properly separated, in
10 other words, if both the houses on Lot 11 and Lot 12 each
11 have the legally required setback, would there be enough land
12 in between them to create a swale?

13 A. I'm not sure how to answer the question, because
14 improvements on Lot 12 being at or near the property line do
15 not allow sufficient room to build a swale at the property
16 line.

17 Q. Well, I guess it depends on where the property line
18 is.

19 A. There's no discussion about where the property line
20 is. That's solved. That's a closed issue. There is no
21 discussion about where the property line is. That is an
22 erroneous argument.

23 Q. The reason you are yelling at me, sir, is because
24 you are emotionally connected to that argument because it
25 reflects on the quality of work you did; isn't that correct?

1 A. No, because I think it's stupid.

2 Q. So you think that the work that surveyors Gillette
3 did and Arrington did is stupid? Isn't it part of your
4 ethical duty as a surveyor to confer with your colleagues and
5 try to reach some understanding or agreement based on where
6 boundaries are located based on the rules you use in your
7 profession? Isn't that something you are supposed to do?

8 A. It depends.

9 Q. Depends on?

10 A. Whether or not there's any discussion about it.
11 There should be no discussion about this.

12 Q. So if surveyors have questions, there's no
13 discussion? Is that what you are telling me? So you don't
14 call up somebody who did a plat or did some work in front of
15 you if you have a question? You don't do that?

16 A. If it's appropriate.

17 Q. And it often is, right? Look what I found here,
18 what do you think --

19 A. Rarely is it.

20 Q. So I want to be real clear for the record what it is
21 you claim to have found when you went out there on Exhibit 5.
22 I am going to put it up here in the four corners. So what is
23 it you claim to have found at this corner of -- at the south
24 corner of Macoma Road? What is it you claim to have found
25 where my finger is?

1 Q. That's how it ended up where it ended up?

2 A. That's how it is where it is.

3 MR. MASON: Nothing further, Your Honor.

4 THE COURT: Do you have anything else?

5 MR. BERTELE: Yes, a few questions, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. BERTELE:

8 Q. In your opinion, was the lot and the construction of
9 the house on Lot 11 graded and built in accordance with
10 applicable codes and ordinances in effect at the time of the
11 construction in 2005?

12 A. Yes.

13 Q. And you've told us that your original site visit
14 in '05 was when you found those iron pipes. Now, you
15 returned to the site when this initial -- when the first
16 lawsuit was brought, did you not?

17 A. That's correct.

18 Q. And did you find those same iron pipes there?

19 A. No. The front left corner was laying on the ground,
20 and so I reset it.

21 Q. Meaning had been removed?

22 A. It was just on the ground. I don't know how it got
23 taken out.

24 Q. The last time you saw it, it was in the ground,
25 right?

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1 A. Last time I saw it, it was in the ground.

2 Q. And the left front corner, that was the corner with
3 Lot 12?

4 A. That's correct.

5 Q. What about any other pipes?

6 A. The other pipes were in.

7 Q. That means the rear --

8 A. Rear property corner was in.

9 Q. Rear property --

10 A. Okay. And the right --

11 Q. Excuse me, sir. Just let me get the question out.

12 Okay? The rear property corner between 11 and 12 was
13 there?

14 A. That's correct.

15 Q. And what about 12 and 13, the rear corners?

16 A. Yes, it was there.

17 Q. And what about the front corner between 13 and 12?

18 A. Yes, it was there.

19 Q. So the one that had been removed was the one that
20 involved setting the front distance of Lot 12, correct?

21 A. That's correct.

22 Q. When was your site visit in connection with the
23 previous case; do you recall?

24 A. Repeat the question.

25 Q. Yes. I was asking you, when did you visit the site

1 in connection with this previous case involving Ms. Blank and
2 Ms. Timmons?

3 A. I don't remember a date.

4 Q. Was it at or about the time the lawsuit that Ms.
5 Timmons brought?

6 A. Yes, it was when we were evaluating --

7 Q. This lawsuit was filed in -- if the complaint bears
8 a date stamp of May 27th, 2015, it would have been after
9 that. My question is, if the complaint was filed on May 27th
10 of 2015, your site visit would have been after that?

11 A. It would have been after that.

12 Q. Was it after the time that the firm of -- Parker
13 Land Surveying firm was out doing its field work?

14 A. Yes.

15 Q. Did you ask him about the pipe being taken out of
16 the ground?

17 A. I haven't talked to him about it.

18 Q. Is that unusual to find a corner taken out of the
19 ground?

20 A. Yes.

21 Q. You obviously feel very strongly about your opinion,
22 sir. Is that because it's pretty straightforward?

23 MR. MASON: Objection.

24 THE WITNESS: I don't see the discussion. I do not
25 see the discussion.

EXHIBIT B

R 154

1 STATE OF SOUTH CAROLINA)
2) Court of Common Pleas
3) Case No. 2016-CP-10-04122
4)
5 MICHELE BLANK,)
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Plaintiff,
vs.
PATRICIA TIMMONS,
Defendant.

TRANSCRIPT OF DIRECT EXAMINATION
OF
MICHELE BLANK
DATE: April 23, 2019

B E F O R E:

THE HONORABLE WILLIAM P. KEESLEY

A P P E A R A N C E:

EDWARD A. BERTELE
Attorney for the Plaintiff

MARK A. MASON
Attorney for the Defendant

ORIGINAL TRANSCRIPT ORDERED BY:
EDWARD A. BERTELE, ESQ.

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

1 believed.

2 Q. Did you ever receive that proposal?

3 A. I laughed in her face. No, sir, I didn't.

4 Q. Now, at the time that you acquired Lot 11 --
5 withdrawn. There's been previous testimony and questioning
6 here about the fact that the property that you owned and
7 lived on is identified as "no lot"?

8 A. Yes, sir.

9 Q. You've heard that?

10 A. Yes, sir.

11 Q. Do you know when that issue was resolved?

12 A. At the closing on the property, it was resolved,
13 because at first that plat was used, the one that you've been
14 displaying, was used at the property closing. And because it
15 said "no lot", Ms. Smith went to the Charleston County
16 planning, or wherever one goes for this, and got an updated
17 revised version of the plat, subdivision, that clearly showed
18 it was Lot 11 and it had an MS number, or whatever the number
19 is.

20 Q. Thank you. Now, when you rejected the Timmons's
21 proposal to modify your property line, what happened after
22 that with respect to this issue?

23 A. They began clearing the property. And they were
24 encroaching on my property in doing so, to the best of my
25 knowledge.

1 overruled. Go ahead.

2 MR. BERTELE: Thank you, Judge. So that relates to
3 all of the prior testimony?

4 THE COURT: Yes.

5 MR. BERTELE: Thank you, Your Honor.

6 BY MR. BERTELE:

7 Q. Now, after June 2, did Ms. Timmons proceed with
8 construction on Lot 12?

9 A. Yes, sir, she did.

10 Q. All right. And, to your recollection, what was
11 being done on Lot 12 as it related to the property line
12 issue?

13 A. They knocked down all of the woods, all of the
14 trees, and they were filling. They put a lot of fill dirt in
15 there and they were bulldozing it. And, like I said, they
16 were encroaching on my property while doing so. Their
17 equipment was on my property. They built it up so high that,
18 I mean, the dirt was everywhere. And as I stated before, the
19 surveyors were out there in the middle of my driveway
20 sticking rebar posts down in the driveway itself. So, as I
21 said, I couldn't access my driveway with my vehicle.

22 Q. Let me show you what's been marked as P-4A and P-4B.
23 Take a look at them both. P-4A is what, ma'am?

24 A. P-4A is a picture showing the slab that they put in
25 for the driveway and all of the concrete and the mud from it.

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1 And it's also a picture of me wearing my mud boots because
2 all the water was running off on to my property.

3 Q. And what's the other photograph?

4 A. The other photograph is again my boots in there.
5 And you could see the height of the slab that they built on
6 top of the already high fill dirt. And you can see where all
7 the dirt is rushing down into my property. It's just washing
8 into my property.

9 Q. And is there a no-trespassing sign in the property?

10 A. Yes, sir.

11 Q. Is that yours?

12 A. Yes, it is.

13 Q. All right. Thank you.

14 MR. BERTELE: P-4A and B in evidence, please.

15 THE COURT: Any objection?

16 MR. MASON: No, Your Honor.

17 THE COURT: Mark them in evidence, please.

18 (Plaintiff's Exh. 4A, Photograph, is received in
19 evidence.)

20 (Plaintiff's Exh. 4B, Photograph, is received in
21 evidence.)

22 BY MR. BERTELE:

23 Q. Do you recall when they were taken?

24 A. I believe they are dated.

25 Q. Do you remember when they were taken?

1 A. Not exactly.

2 Q. Were they taken about the time of the construction
3 of the driveway?

4 A. Oh, absolutely, yes.

5 Q. And let me show you what's been marked as P-4C.

6 A. Yes, sir.

7 Q. What does that show?

8 A. That shows their driveway being built on my
9 driveway. And it shows some of the mud and the water
10 standing, because it was flooding.

11 MR. BERTELE: All right. Any objection?

12 MR. MASON: No.

13 THE COURT: Mark it in evidence, please.

14 (Plaintiff's Exh. 4C, Photograph, is received in
15 evidence.)

16 Q. At the time these photographs were taken, did you
17 have the opportunity to look at the concrete driveway that
18 had been poured and determine whether it was within the
19 bounds of your property?

20 A. Yes. And it was encroaching on my property.

21 Q. And was a complaint made about that?

22 A. Yes, sir, it was.

23 Q. And what happened, if anything?

24 A. The current homeowner, I believe -- I don't know who
25 it was that actually removed a portion of the driveway, the

1 portion that I complained about.

2 Q. So whatever complaint you had about the concrete
3 slab being on your side of the line was taken care of?

4 A. Yes, sir, it was.

5 MR. BERTELE: Thank you. May I have a minute,
6 Judge. I'm just trying to get my notes in order.

7 THE COURT: Yes.

8 MR. BERTELE: Thank you.

9 BY MR. BERTELE:

10 Q. All right. So after the driveway was completed, do
11 you recall when the house next-door was finished and people
12 moved in?

13 A. If I can refer to my timeline, my little note.

14 Q. You have some notes?

15 A. I do, just the dates because I can't remember
16 dates.

17 Q. Go ahead, please.

18 A. Let's see. They poured the concrete in June of
19 2016. They put the fill dirt in. And I have the photos as
20 you already had it entered into evidence on December of 2015.

21 Q. Which year?

22 A. 2015.

23 Q. '15?

24 A. That's what I have. Let's see. Yeah. Fill dirt
25 went in in December of 2015, yes.

1 Q. Okay. Thank you. As a result of that concrete
2 being installed, did you notice any effect that resulted from
3 that concrete impoundment?

4 A. Absolutely. The runoff of that was flooding my yard
5 on that side. And let's see --

6 Q. Let me take you back a second, if I could. So you
7 lived in this house from 2005 until the Timmons purchased it
8 and started construction, correct?

9 A. That's correct.

10 Q. And you were there during all of the periods of rain
11 and storms of such that occurred over that period of time?

12 A. Yes, sir. In September of 2015, we had a flood
13 warning, and water came up in back of my yard, because it's
14 wetlands, but it didn't encroach on any of my structures.

15 And then in October of 2015 we had the thousand-year
16 flood. There was no water. House stayed dry. Everything
17 downstairs stayed dry. Didn't come into the front. But
18 after the fill dirt went in, we had Hurricane Matthew in
19 October of 2016. And I got flooded. My whole studio got
20 flooded over six inches in some areas. And it was obviously
21 from rain, because I could see the water running off from
22 their property. It flooded from the front, not from the
23 rear.

24 Q. Well, let's talk about that. So you've lived there
25 over this period of time. And so you had no -- according to

R 161

1 what you've just said, you had no concern about flooding up
2 until the improvements went into Lot 12?

3 A. That's correct. So I wasn't prepared for any
4 flooding.

5 Q. Now, did you observe groundwater flowing from the
6 property next-door on to your land?

7 A. Yes, sir, I did.

8 Q. Over what period of time?

9 A. During the hurricane when the rain was real heavy --
10 any rain at all and I got a little bit of flooding. But that
11 particular time, there was a lot of rain. And it just
12 flowed. It looked like a waterfall.

13 Q. Let me show you some photographs. All right. Let
14 me show you P-4D. That's a photograph of you?

15 A. Yes, sir, it is.

16 Q. And when was that taken?

17 A. That was taken before they removed that section of
18 the driveway, I believe, but it was taken definitely after
19 the rain.

20 Q. Well, you are standing where on your property?

21 A. I'm standing on my property line. And the water is
22 flooded over the top of my mud boots.

23 Q. How deep was the water then?

24 A. That must have been at least six inches, I would
25 say.

R 162

1 Q. And this was in the front part of your property?

2 A. In the front on the left-hand side of my property.

3 Q. And had you experienced that kind of flooding --

4 MR. MASON: Your Honor, I object to lack of
5 foundation. We don't have the date. And it looks like she's
6 trying to blame my client for a thousand-year flood or
7 something. I think we need to know when these pictures were
8 taken. If they are taking right around Hurricane Matthew,
9 that's pertinent.

10 BY MR. BERTELE:

11 Q. Hurricane Matthew occurred when, ma'am, to your
12 recollection?

13 A. Hurricane Matthew occurred October 4th, 2016.

14 Q. Were these pictures taken during Hurricane Matthew?

15 A. No, sir.

16 Q. Were they taken before or after Hurricane Matthew?

17 A. I believe they were taken before.

18 Q. Okay. Thank you. The condition that is shown of
19 you in that picture of you standing in standing water, had
20 that occurred prior to the construction of that driveway?

21 A. No, sir, never had.

22 Q. And what's the effect of that water sitting there?
23 Does it accumulate there?

24 A. It accumulates there every time it rains. And I get
25 mosquitoes. And it's a muddy -- it's a mess.

Q 163

1 Q. All right. Let me show you what's been marked as
2 P-4E. Can you identify that?

3 A. Oh, yes, sir. That shows the waterline from the
4 flooding after Matthew. You see how high the water came on
5 my walls.

6 Q. What does the picture show?

7 A. It shows a rain gutter. It shows part of a gas tank
8 or oil can. And it shows my car port and the concrete block
9 that's holding up my house.

10 Q. Part of the foundation?

11 A. Yeah, part of the foundation. That shows a
12 waterline, how my water came up.

13 Q. All right. And that occurred during what period of
14 time?

15 A. Matthew, Hurricane Matthew.

16 MR. BERTELE: P-4E in evidence?

17 THE COURT: Any objection?

18 MR. MASON: No, Your Honor.

19 THE COURT: Marked in evidence.

20 (Plaintiff's Exh. 4E, Photograph, is received in
21 evidence.)

22 MR. BERTELE: If I haven't proffered P-4D, I believe
23 counsel had no objections to that and objected on the basis
24 of knowing that the time. Correct, Mr. Mason, you have no
25 objection to P-4D?

R 164

1 MR. MASON: if it's authenticated as to the time,
2 Your Honor. I object to lack of foundation without a date.

3 THE COURT: You said it was before Hurricane
4 Matthew, she thinks?

5 MR. BERTELE: Well, was it -- D, yes, I'm sorry.
6 Thank you, Judge.

7 THE COURT: Do you have an objection?

8 MR. MASON: No, not if she's identified the date.

9 THE COURT: Mark it in evidence.

10 (Plaintiff's Exh. 4D, Photograph, is received in
11 evidence.)

12 Q. Let me show you what we marked as P-4F. And this is
13 a photograph taken where?

14 A. This is inside the studio. It shows an empty litter
15 box full of scrap glass. And it shows the waterline inside
16 the studio, which is approximately 6 or 7 inches off the
17 floor.

18 Q. There's a scale showing that, correct?

19 A. Yes, I have a yardstick next to it.

20 MR. MASON: Your Honor, I believe that's a Hurricane
21 Matthew photo that she hasn't identified by the date.

22 Q. Yes, ma'am. Is this the waterline that occurred as
23 a result of Hurricane Matthew?

24 A. Yes, sir. It occurred due to rain water flooding
25 during Hurricane Matthew. So this is just after Matthew.

R 165

1 That's October of, let's see, October of 2016.

2 MR. BERTELE: Thank you. P-4F in evidence?

3 THE COURT: Mark it in evidence.

4 (Plaintiff's Exh. 4F, Photograph, is received in
5 evidence.)

6 Q. Let me show you what we've marked as P-4G.

7 A. Again, there's a yardstick in there showing the
8 height of the water that came in during Hurricane Matthew.
9 So this was taken just after Hurricane Matthew in October of
10 2016. It shows a box in which I keep my zinc came, which is
11 used around my glass pictures, pretty much ruined for little
12 over 10, maybe 11 inches.

13 Q. So is that waterline, do you believe, the result of
14 the hurricane?

15 A. Result of the rain water --

16 MR. MASON: Objection, Your Honor, lack of
17 foundation. She's not any kind of a water movement expert or
18 anything. So whether we have a hurricane with 1,000-year
19 flood and she wants to render an opinion as to where the
20 water came from, we don't think there's a foundation for
21 that.

22 MR. BERTELE: Well, I think that we don't need an
23 expert to say that a water level reached a certain height.
24 And so if she associates it with one event or another, the
25 height of the water intrusion is still the same.

12166

1 THE COURT: Objection is overruled. Mark it in
2 evidence.

3 (Plaintiff's Exh. 4G, Photograph, is received in
4 evidence.)

5 Q. How high did that come up?

6 A. 12 inches, according to the yardstick in the picture

7 Q. Let me show you what we marked as P-4H. Can you
8 identify that for us?

9 A. Yes. That's also some materials I had in the
10 studio, another box of the zinc came and box of brass came.

11 Q. So these are materials you utilized in your
12 business?

13 A. Yes, I do. And I lost quite a bit to the water
14 damage.

15 Q. Okay. And the other photographs, they also identify
16 or show materials that you used in your business?

17 A. Yes, sir, all the PVC tubing is containing other
18 framing material and material that I use in my stained glass
19 business.

20 Q. Thank you. P-4H?

21 MR. MASON: No objection.

22 THE COURT: Mark it in evidence.

23 (Plaintiff's Exh. 4H, Photograph, is received in
24 evidence.)

25 Q. And next, let me show you what we've marked as P-4I.

1 And please tell us what that depicts.

2 A. This was a picture I took with another yardstick.
3 And it shows how high off of my property line or the level of
4 my property the concrete driveway next to me was raised up.

5 Q. And how high is it according to the picture?

6 A. About four inches.

7 Q. Four inches?

8 A. Three and a half, four inches.

9 Q. When was this photo taken?

10 A. That was taken when they finished their driveway.

11 Q. Okay.

12 MR. MASON: No objection.

13 THE COURT: Mark it in evidence.

14 (Plaintiff's Exh. 4I, Photograph, is received in
15 evidence.)

16 Q. So since that concrete driveway went in, how often
17 does your property flood?

18 A. Every time it rains.

19 Q. Has there been, to your recollection, major rain
20 events in the last couple of years?

21 A. Oh, yes, sir, there were. Hurricane Matthew, and
22 then hurricane Irma in October, the end of October or early
23 November -- I mean, early September Of 2017, where I got
24 flooded again. I had water in the studio again, not just
25 outside. And then every time we've had a rain event,

1 Q. So tell us how you make a living.

2 A. I'm a stained glass artist. I travel to fine art
3 shows up and down the East Coast.

4 Q. And do you have a studio?

5 A. Yes, I do. That's under the house.

6 Q. Under the house? Okay. And is your understanding
7 that that studio is in a flood zone?

8 A. Absolutely. We know the house is basically in a
9 flood zone. And when I built the house, I put in -- I
10 thought it was in a different flood zone and actually put in
11 break-away walls. And where I'm at is not that serious of a
12 flood zone. I didn't have to do that. All I had to do was
13 put in the water flow vents, which I have in there. That's
14 all in place. So, you know, that's all I needed to do for
15 the flood zone area I'm in.

16 Q. Well, do you have flood insurance?

17 A. I do.

18 Q. And did you apply for flood insurance after Matthew?

19 A. I did. It didn't cover rain water.

20 Q. Okay. So you were denied your flood insurance claim
21 because it was not flooding but rain water?

22 A. Yes.

23 Q. So tell us, how -- you say you have a studio in your
24 basement?

25 A. Uh-huh.

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1 A. Yes.

2 Q. Thank you. Let me show you what we marked as P-7A,
3 B, C, D, E, F and G.

4 MR. MASON: Your Honor, continued objection, same
5 items.

6 THE COURT: Yes, sir.

7 MR. BERTELE: Understood.

8 BY MR. BERTELE:

9 Q. Can you identify these various pages, ma'am, and
10 tell us what they represent?

11 A. Okay. The first one --

12 Q. Well, in general, what are they?

13 A. Oh, they are orders. They are custom orders.

14 Q. Okay. And these all refer to what point in time?

15 A. To October of 2016.

16 Q. Okay. And are these documents that pertain to your
17 claim to the trade association for assistance?

18 A. Yes.

19 Q. Thank you. All right. Ma'am, is it your testimony
20 that these flooding problems persist until today?

21 A. Yes, sir, every time it rains.

22 Q. Let me show you what's been marked as P-4K.

23 A. Yes, sir. That shows some of the ponding. And you
24 can see where the driveway is high. And even that driveway
25 gets flooded, one section that's low, and that's where all

R 170

1 the water ponds.

2 Q. Is that a recent photograph?

3 A. Yes. Yes, it is. Shows the house completed.

4 MR. BERTELE: I offer P-4K.

5 MR. MASON: No objection, Your Honor.

6 THE COURT: Mark that in evidence, please.

7 (Plaintiff's Exh. 4k, Photograph, is received in
8 evidence.)

9 BY MR. BERTELE:

10 Q. Let me show you what we marked as P-4L.

11 A. Yes, sir.

12 Q. Can you tell us when this picture was taken?

13 A. After the concrete driveway had been poured before
14 the house was completed.

15 Q. And do you see to the left of the driveway there?

16 A. Yes, sir. There's a bunch of ponding there. They
17 have since filled that in.

18 Q. Now, in your observations, how does the water flow
19 off of Lot 12 on to your property?

20 A. Off the driveway. It goes right into that section
21 where, in the last picture, where it was showing ponding. It
22 just pours right off of it like a waterfall. And it's really
23 heavy.

24 MR. BERTELE: P-4L.

25 MR. MASON: No objection, Your Honor.

12 171

1 witness? Did you mark that?

2 MR. BERTELE: Yes, it's marked. It's provisional,
3 yes.

4 BY MR. BERTELE:

5 Q. All right. Ms. Blank, you told us earlier that you
6 have to take certain precautions and preventative measures
7 when the rainfall is predicted to be a certain amount. Now,
8 can you tell us, going back to the hurricane in 2016, which
9 was the first time that you had this experience, how many of
10 these events did you have to -- how many times over this
11 period from Matthew until today did you have to take these
12 preventative measurements?

13 A. Every time.

14 Q. Actions, excuse me, preventative actions.

15 A. For every hurricane I did and every time that the
16 rain fall was expected to exceed about two or three inches.

17 Q. Can you tell me how many that was altogether?

18 A. Not really.

19 Q. Can you give us an estimate how many per year, how
20 many per month?

21 A. I would say probably about 10 or 12 times in the
22 last year.

23 Q. In preceding year?

24 A. Yeah.

25 Q. That would be 2018?

R 172

1 A. Uh-huh.

2 Q. What about 2017?

3 THE COURT: She's saying 2 or 3 inches in a day?

4 THE WITNESS: Uh-huh.

5 MR. BERTELE: Yes.

6 THE WITNESS: Yes, sir.

7 THE COURT: Go ahead.

8 Q. How about in 2017?

9 A. I really can't remember a specific number. I guess
10 probably about 10 times. You would have to look at the
11 record of what the rainfall estimates were for -- not always
12 did we get that much rain.

13 Q. Okay. So in 2016, you had Matthew. And did you
14 have other rainfall events in 2016?

15 A. Oh, yeah. We had Matthew. And then we had Irma
16 came in 2017. But after Matthew, I was really on edge. So
17 every time we got an estimated rainfall total coming in of a
18 heavy rain, then I prepared the studio and the truck and
19 trailer.

20 Q. All right.

21 MR. BERTELE: No more questions.

22 (Whereupon, the direct examination is concluded.)

23

24

25

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EXHIBIT C

R 174

1 STATE OF SOUTH CAROLINA)
) Court of Common Pleas
2 COUNTY OF CHARLESTON) Case No. 2016-CP-10-04122
)
3 _____
4 MICHELE BLANK,)
)
5 Plaintiff,)
)
6 vs.) TRANSCRIPT OF CROSS-EXAMINATION
) OF
7 PATRICIA TIMMONS,) MICHELE BLANK
)
8 Defendant.) DATE: April 23, 2019
)
9 _____

10 B E F O R E:

11 THE HONORABLE WILLIAM P. KEESLEY
12

13 A P P E A R A N C E:

14 EDWARD A. BERTELE
15 Attorney for the Plaintiff

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18
19 ORIGINAL TRANSCRIPT ORDERED BY:
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21 Karen V. Andersen, RMR, CRR
22 Circuit Court Reporter
23
24
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1 Q. Mr. Horton is the person you bought the property
2 from; is that correct?

3 A. That's correct.

4 Q. And he's the gentleman you said you had an
5 unpleasant dealing with; isn't that correct?

6 A. That is correct.

7 Q. Can you clarify what unpleasant dealings you had
8 with Mr. Horton?

9 A. Mr. Horton just kept trying to change the house plan
10 as he built it.

11 Q. So did you believe that Mr. Horton wasn't following
12 through on the construction contract that you had with him?

13 A. On certain parts of it, yes, sir.

14 Q. Did he sue you or did you sue him before the project
15 was over?

16 A. Not that I recall.

17 Q. Were there any claims that arose from your
18 relationship with Mr. Horton?

19 A. No, sir.

20 Q. But he sold you this lot?

21 A. Yes, sir.

22 Q. And then after you bought it, do you recall whether
23 fill dirt was brought in or not?

24 A. Yes, sir.

25 Q. Was there considerable fill dirt brought in?

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1 A. No, because it was just one small area. The house
2 is only 1,000 square feet.

3 Q. So the only area you recall being filled would be
4 what I call the building pad; is that correct?

5 A. That's right.

6 Q. There was no filling done in any areas that you
7 recall other than the building pad area; is that correct?

8 A. There was some fill put in the front for the
9 driveway, I believe.

10 Q. But other than that and the building pad, there was
11 no other fill; is that correct?

12 A: No, sir, because it slopes down into the wetlands.

13 Q. The back of your property slopes down into the
14 wetlands?

15 A. Uh-huh.

16 Q. How much of your property is wetlands?

17 A. That's rough to say. It's changed since I bought
18 the land. I would say roughly probably about half is
19 wetlands.

20 Q. So half of the entire square feet area of your
21 property is wetlands?

22 A. Yes.

23 Q. By that, do you mean that on super high spring tides
24 or something, you will get actual tidal water that will come
25 on to your property?

1 A. There has been times where I had that happened.
2 Since they built the new subdivision in the back, it doesn't
3 happen anymore.

4 Q. Okay. All right. And so you had no experience with
5 wetlands previously?

6 A. No, sir.

7 Q. All right. And you didn't -- you've talked about
8 moving your trailer when you think it's going to rain a
9 significant amount. You move it out to the road; isn't that
10 correct?

11 A. That's correct.

12 Q. Is that because the road is higher than your lot?

13 A. On the cul-de-sac, it is.

14 Q. So where this subdivision plat says that all lots
15 are to be filled to a minimum of one foot above the bottom of
16 the roadway ditch at the right-of-way line and graded to
17 drain in accordance with the county road code, you have no
18 knowledge of filling the lot one foot above the bottom of the
19 roadway ditch, the whole lot; is that correct?

20 A. No, no, sir. There was no roadway ditch.

21 Q. There was no ditch in the front, but you didn't fill
22 the whole lot one foot; isn't that correct?

23 A. We weren't permitted to because it's wetlands.

24 Q. Okay. So you would have filled more of your lot had
25 you been allowed to; isn't that correct?

1 A. No, sir.

2 Q. So did you try to fill more than you did and were
3 denied because it was wetlands?

4 A. No, sir.

5 Q. Did someone just tell you you couldn't bring any
6 more fill?

7 A. No, sir.

8 Q. All right. Well, why did you just make that
9 testimony?

10 A. What?

11 Q. Why did you just give that testimony about not being
12 able to fill more because it was wetlands? How did you gain
13 that information?

14 A. I looked up the wetlands. I looked up the rules of
15 the wetlands after I found out that it was wetlands.

16 Q. So you determined on your own, while you were in the
17 process of building this house, that because the property you
18 bought was wetlands, you were limited as to the amount you
19 could fill? And you did that through your own research as
20 you've described; is that correct?

21 A. No, sir. No, that's not correct.

22 Q. Well, I thought that's what you've just told me,
23 that you did some research and that's how you found out.

24 A. I enjoyed the wetlands. I wanted to keep it wet.

25 Q. You wanted your lot to be wet? And why do you enjoy

1 the wetlands?

2 A.. I used to like watching the tide come up and all the
3 creatures and the birds out there. I loved watching all the
4 herrings and deer up there..

5 Q. The tide actually comes up into your yard. And
6 you've described about half of your yard as being wetlands;
7 isn't that correct?

8 A. The back, the back right corner is wetlands. And it
9 used to come up into the back right corner of my yard. But
10 it no longer does that, at least very, very rarely. It has
11 to be a full moon and a high tide and certain conditions in
12 order for the water to come up, because they built a
13 subdivision back there.

14 Q. All right. And on Defendant's Exhibit 4, which is
15 the site plan that was submitted to the building department,
16 is the wetlands in this corner of Lot 11 that's closer to Lot
17 10?

18 A. This is the wet area here. This area was determined
19 wetlands due to the vegetation growing there.

20 MR. BERTELE: Your Honor, excuse me for
21 interrupting. If we could have a verbal identification, it
22 would be helpful.

23 MR. MASON: Your Honor, I will just go over to the
24 Elmo so he can see what she's referring to. Your Honor, I'm
25 displaying Defendant's Exhibit 4 on the Elmo.

1 building permit. And it shows 55 feet out by the road; isn't
2 that correct?

3 A. I can't read that. It's upsidedown and I can't see
4 that well.

5 Q. All right. And then the one you submitted to the
6 Court as the Franklin survey you are relying on shows 74 feet
7 at the front of the road; isn't that correct?

8 A. That is correct.

9 Q. And then again, the building site plan that was
10 provided to the County shows 198.8 feet at the rear. And the
11 one you said is the correct survey of your land shows 221.58
12 feet; isn't that correct?

13 A. That's relatively correct. I went out with
14 measuring devices and measured from the existing iron pipes
15 that were on the corners and came up with those numbers as
16 well.

17 Q. Now, you've gone over some exhibits that you say
18 show standing water. I'm going to show you what you entered
19 as Plaintiff's Exhibit 4C. Do you see this picture?

20 A. That's upside down, and I can't see the whole thing.
21 Uh-huh.

22 Q. Okay. Now, your house is over here; is that
23 correct?

24 A. That's correct.

25 Q. And the water that you showed the puddle is on the

1 opposite side of the driveway; is that correct?

2 A. That is correct.

3 Q. And that's because the driveway slopes towards Lot
4 12, not towards your lot; isn't that correct?

5 A. No, sir. They hadn't been filled yet.

6 Q. Now, with regard to the trees that are on the other
7 side of the driveway at the end of the driveway, do you see
8 at the top of the photograph towards the back of your house?

9 A. Yes, sir, uh-huh.

10 Q. Those trees, are those the trees that Mr. Timmons
11 claims are his trees and you claim they are your trees?

12 A. I didn't know that he was claiming them as his
13 trees, but they are my trees.

14 Q. Well, when construction was ongoing, do you recall a
15 silt fence being put up?

16 A. Yes.

17 Q. And was that silt fence put up at a location that
18 was satisfactory to you?

19 A. I don't believe so.

20 Q. Did it serve its purpose of preventing silt from
21 moving passed the fence?

22 A. Not very well.

23 Q. I would like to mark this for identification as the
24 next Defendant's Exhibit.

25 (Defendant's Exh. 8, Photograph, was marked for

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1 testifying about your flood -- you testified your property
2 was in a flood zone. And let me see if I can go back in my
3 notes and find the exact words you used to see if it
4 refreshes your recollection.

5 A. Oh, I understand. I made the call to overkill on
6 the breakaway walls, thinking that that would be better than
7 just doing the water vents. But I was told that I didn't
8 need to do that, just to go with the water vents, so I did.

9 Q. I thought you used the word there was a mistake made
10 about your flood elevation?

11 A. No, sir, I don't remember saying that.

12 Q. So is the flood elevation of your property in A
13 zone, A-12?

14 A. I thought it was a V zone requirement to do the
15 breakaway walls, which is a heavier flood area. Mine is
16 actually lighter than that. That's why it doesn't require
17 breakaway walls.

18 Q. Mr. Franklin designed your foundation; is that
19 correct?

20 A. I'm not sure.

21 Q. So was your foundation designed to the right flood
22 zone or not?

23 A. Oh, yeah, absolutely.

24 Q. Okay. And then you came and you enclosed the
25 downstairs area; is that correct?

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1 specifically state you don't have insurance on the ground
2 level; isn't that correct?

3 A. I don't believe that's true.

4 Q. When you made the claim after Hurricane Matthew to
5 collect some money from, I guess, the federal government, one
6 of the questions was, do you have insurance? Isn't that
7 correct? And you wrote, no, I couldn't get insurance; is
8 that right?

9 A. I couldn't get paid by the insurance company. They
10 wouldn't cover it because it was rain water, not flood water.

11 Q. And do you recall Ms. Smith telling you to get a
12 survey so that you could get title insurance?

13 A. The survey was already in existence. And I got
14 title insurance.

15 Q. You thought the survey that was in existence was the
16 one that Mr. Franklin did after he couldn't locate the house
17 where it should have been, right?

18 A. I would say that a little differently, but it is the
19 Franklin survey.

20 Q. And Mr. Franklin, you were in here when he
21 testified; is that correct?

22 A. That's correct.

23 Q. You asked him to document everything best he could
24 as a surveyor, isn't that what you instructed him to do?

25 A. I didn't instruct him to do anything.

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1 came and the building began and all that. I'm really bad at
2 dates.

3 Q. Who is Jennifer?

4 A. Jennifer Smith.

5 Q. So you wrote on here that on 10/15/2015, there was
6 1,000-year flood and it stayed dry?

7 A. That's correct.

8 Q. And when you applied for your grant, you said that
9 the damage was caused entirely by the hurricanes; isn't that
10 correct?

11 A. I said it was caused by flooding.

12 Q. All right. Flooding from the hurricanes; isn't that
13 correct?

14 A. I don't think I was specific about flooding from the
15 hurricanes.

16 MR. BERTELE: Excuse me, Mr. Mason. Are you --

17 MR. MASON: I'm looking for the exhibit. Do you
18 have it? No problem. I'm just looking for it. I appreciate
19 the help.

20 BY MR. MASON:

21 Q. I'm referring to P-6A. In your confidential
22 application for assistance, you wrote: Hurricane Matthew
23 flooded my entire studio, all boxes, paper goods, lauan
24 birch, plywood racks, electronic flip switches, packaging
25 materials from flooring, et cetera, being pulled out and

1 either thrown away, out, or if salvageable, clean and dry.

2 A. That's correct.

3 Q. Is that correct?

4 A. Yes, sir.

5 Q. Was that a truthful statement when you made it?

6 A. Yes, sir.

7 Q. Now, when you claimed to have found property corners
8 out there, can you tell me what type of pipes or whatever or
9 rebar, what it was you found?

10 A. Yes, it was open pipes.

11 Q. Open pipes?

12 A. Uh-huh. Well, the center was open. It wasn't a
13 solid stake.

14 Q. And you found all four of them, is that your
15 testimony?

16 A. Yes, sir.

17 Q. And that was before you started building the house
18 or as you were building it or --

19 A. Several times, from before to during. I went out
20 and showed other people where they were at just for fun.
21 It's fun spotting around out there.

22 Q. And whatever happens in this case, you want the
23 right decision to be made about where the property boundaries
24 are; isn't that correct?

25 A. Well, we know what the right decision should be

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1 Mr. Franklin had been recorded?

2 A. I wouldn't know, actually. That's what attorneys
3 are for.

4 Q. And did you make a title insurance claim?

5 A. I did.

6 Q. Okay. And was it denied?

7 A. Yes, it was.

8 Q. And did you get a letter denying your claim?

9 A. Yes, I did.

10 Q. And did it say that you didn't have coverage because
11 you failed to get a current survey when you bought the
12 property?

13 A. No, sir.

14 Q. Why did it say you didn't have coverage?

15 A. I believe they said they didn't cover the rain
16 water. I think that's what the reason was.

17 Q. I'm talking about title insurance, about the
18 boundaries.

19 A. Oh, no, I had title insurance. I got title
20 insurance in 2005 when I built the house. And then the claim
21 wasn't ~~made~~ until 2016, I believe, when this whole thing
22 started with this boundary thing.

23 Q. And you made a claim. And has the claim been
24 decided yet by the insurance company, the title insurance
25 company?

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1 A. Yes, it was. I'm sure you have a copy.

2 Q. What happened?

3 A. It was denied because -- I can't remember. But I
4 have a copy if you need a copy.

5 Q. You brought it with you?

6 A. Uh-huh.

7 Q. Yeah, I would like to see it so I don't waste a lot
8 of time asking you a bunch of questions that may not be
9 pertinent. Is it over there in the stack of papers?

10 A. Can I get up and get it?

11 Q. If the Court gives you permission.

12 THE COURT: You may.

13 THE WITNESS: Thank you, Your Honor.

14 MR. MASON: Please mark this as the next defendant's
15 exhibit.

16 (Defendant's Exh. 9, Title Insurance
17 communication, was marked for identification.)

18 BY MR. MASON:

19 Q. I show you what's been marked as D-9. Is this the
20 title insurance communication you were just referring to?

21 A. Yes, it is. Oh, yes, now I remember.

22 Q. Do you need to take any more time to look at it?

23 Then I will look at it. Thank you. And did you write the
24 title insurance company that you believed they had overlooked
25 the fact that it is your property line that is in question,

1 not just the location of the house, that they are claiming
2 I'm trespassing 15 feet over what my surveyor has established
3 to be the property line. This claim very likely would have
4 come up eventually regardless of the house being built.
5 Please reconsider my claim. Did you write that?

6 A. Yes, I did. Because they gave me bunch of mumbo
7 jumbo about when the house was built.

8 Q. And the letter that you got, you actually submitted
9 the claim through Jennifer Smith; isn't that correct?

10 A. That's probably correct.

11 Q. And so the title insurance company wrote her back
12 and then she gave you the copy, right?

13 A. If that's what it says.

14 Q. And I'm paraphrasing, but it says, you represent the
15 insured in litigation pertaining to the encroachment of the
16 insured's house on the neighboring land. On behalf of the
17 insured, you have inquired whether the policy provides
18 coverage for the alleged encroachment. First American has
19 reviewed the documentation provided. And for the reasons set
20 forth below, the policy does not afford coverage.

21 So it alleges that you erected the home after the
22 policy came in effect. And for that reason, they weren't
23 covering it; is that correct?

24 A. It was -- like I said, it was a bunch of mumbo jumbo
25 to me. She understood it. I couldn't make head or tail out

1 of it. But, obviously, the title insurance was when I bought
2 the property, from when I bought the property. So that's why
3 I'm not sure what they were talking about in that. I never
4 did understand that mumbo jumbo.

5 MR. MASON: Your Honor, the witness has identified
6 Defendant's Exhibit 9. I move to admit it.

7 THE COURT: Any objection to this?

8 MR. BERTELE: Judge, if I might just look at it for
9 a couple of second. Thank you, Judge.

10 No objection.

11 THE COURT: Mark that in evidence, please.

12 (Defendant's Exh. 9 was received into evidence.)

13 BY MR. MASON:

14 Q. Now, is it a fair statement that you were asked if
15 the builder could do any grading between the driveway and
16 your property right around the time the driveway was being
17 finished, and they were going to take out some trees, and you
18 didn't want that done? Is that accurate?

19 A. Can you say that again, please.

20 Q. Yes, around the time the driveway was being
21 finished --

22 A. Their driveway?

23 Q. Their Lot 12 driveway, yes. Were you asked whether
24 they could do some grading and remove some trees between the
25 two lots, and did you indicate you didn't want that done or

1 didn't want the trees removed, or something to that effect?

2 A. Probably, yes.

3 Q. And did you say you didn't want the trees in the
4 rear removed because there were some birds that nested in
5 there that you enjoyed looking at?

6 A. That is correct. And we were actually going to the
7 wildlife people because there was a very rare bird nesting
8 back there.

9 Q. So did you actually go to the wildlife people to try
10 to prevent the builder from removing the trees?

11 A. Yes -- no, not to prevent -- this was a different
12 occasion. We wanted to save the trees because the rare bird
13 was there. And the day that we were supposed to go into the
14 courtroom with them was the day that the government shut
15 down.

16 Q. All right. Well, let me ask you this. Are the
17 trees that Mr. Franklin has proposed to remove the same trees
18 that you were concerned about the birds?

19 A. Proposed to remove?

20 Q. Yeah. You were here, weren't you, when Mr. Franklin
21 said he had to remove some trees in order so that they
22 wouldn't be blocking the water flow at the rear of the
23 driveway?

24 A. That is correct.

25 Q. And are those the same trees that you wanted to

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1 protect because of the bird nesting?

2 A. A small section of them.

3 Q. So Mr. Timmons's group asked to remove those, and
4 you told them no. And now Mr. Franklin says they need to be
5 removed so that water can flow to the back of the property;
6 is that correct?

7 A. Just a couple of them.

8 Q. But however many it is, the issue is that the trees
9 are there, right?

10 A. Just a small section of the trees.

11 Q. Okay. And do you have reason to believe that the
12 builder of Lot 12 would have removed those trees and graded
13 back there if you had given permission at the time?

14 A. Probably.

15 Q. Now, did you ever consider suing Mr. Franklin or the
16 builder for locating your house in the wrong place?

17 MR. BERTELE: Objection. I think he's asking the
18 witness for legal advice. I don't think she's competent to
19 testify about whether there's a basis for a suit.

20 MR. MASON: I'm asking her if she made any claims
21 that would be inconsistent with the claims she made in this
22 lawsuit on cross, Your Honor.

23 THE COURT: Objection is overruled. You may answer
24 if you know.

25 THE WITNESS: No.

1 disputed area, you also wanted some money; isn't that
2 correct?

3 A. The Timmons never offered to give me the disputed
4 area.

5 Q. So you didn't see the lawsuit where it says in the
6 very first couple paragraphs that, plaintiff has attempted to
7 resolve this matter without the Court's assistance by
8 offering to move the property line and give the defendant
9 additional land so that defendant's house would not be
10 encroaching on to the plaintiff's property? Plaintiff did
11 not seek any monetary compensation or concession from the
12 defendant with this offer?

13 In other words, you didn't read that and see they
14 were offering to give you that property for free?

15 A. They were offering to give me my own property and
16 only part of it. They weren't giving me the whole boundary
17 line that I was under the assumption that, having found the
18 property corners, belonged to me already. They offered to
19 give me my own land.

20 Q. I understand.

21 A. And only part of it.

22 Q. You are under the assumption that that's your land.
23 But they were trying to -- whoever was right didn't matter.
24 They just wanted to solve the boundary dispute by agreeing on
25 where the line was; isn't that correct?

1 A. I disagree with that.

2 Q. But you weren't -- even though you got served with a
3 lawsuit that said that plaintiffs wanted to give you certain
4 land to solve the problem, you didn't --

5 A. Again, they were giving me my land and only part of
6 it so, of course not.

7 Q. But that was going to be without you paying anything
8 for it; isn't that correct?

9 A. I already owned it.

10 Q. Well, that's the question, right?

11 A. That's your question, yes.

12 Q. But you are positive. And you are not a surveyor,
13 you have no survey training. And this is the only -- is this
14 the only piece of real estate you ever owned in your entire
15 life?

16 A. Yes -- no, it's not.

17 Q. You owned another parcel of land?

18 A. Yes, I owned a home.

19 Q. And just so I'm clear, you are blaming the Timmons
20 for Hurricane Matthew; is that correct?

21 A. No, sir.

22 Q. You are not blaming the Timmons for anything that
23 happened to you during Hurricane Matthew?

24 A. That's a whole different statement there.

25 Q. Are you blaming the Timmons for anything that

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1 happened to you during Hurricane Matthew?

2 A. Yes, sir.

3 Q. And your claim, as I understand it, is that the
4 driveway is what caused Hurricane Matthew to come into your
5 illegal underground storage?

6 A. No, sir. A, it's not illegal. And second of all,
7 Matthew didn't come into my studio. The rain water from the
8 roof and from their driveway drained into my property and my
9 studio. I tasted the water. It was freshwater.

10 Q. And Matthew was a 1,000-year flood And you got paid
11 for what you could get paid for by the federal assistance
12 claim you made; isn't that correct?

13 A. A, it's not a federal assistance claim. It's
14 private entity to service crafters in an emergency. It has
15 nothing to do with the government. And the Hurricane
16 Matthew, I didn't claim that it was -- the flooding was by
17 Hurricane Matthew. It was during Hurricane Matthew. And it
18 was the rain water that caused the flooding. Because it
19 rained -- if you look at the rain gauges and the rain amount
20 for that particular couple of days, it was something like 12
21 inches or 14 inches or something like that.

22 Q. But you felt like you were eligible for certain
23 flooding assistance, and you claimed it; isn't that right?

24 A. I felt I was justified in asking a private crafters
25 emergency foundation for some money to buy new materials to

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1 A. Which? Can you be specific about which pictures you
2 are talking about?

3 Q. Let me just show you this one. And it's P-4K.

4 A. Can you turn it upside down? That's natural growing
5 grass.

6 Q. Says at the bottom, April 2019.

7 A. Uh-huh. That's showing the water ponding in the
8 grassy area.

9 Q. Right next to those trees, right?

10 A. Yes, uh-huh. That's just after a light rainfall.

11 Q. But that grass is more depictive of the condition of
12 your front yard and side yard area than the whole pictures
13 you showed with the dirt in it, correct?

14 A. The pictures with the dirt in it were the Patricks's
15 yard.

16 Q. Right. The ones that showed the water running off
17 and the dirt, showed the water going onto the Lot 12, right?

18 A. The dirt -- well, show me which picture you are
19 talking about, please.

20 Q. Sure. This picture with the dirt and the puddle,
21 shows the water running off the driveway on to Lot 12, not on
22 to your property; is that correct?

23 A. That is correct. That's prior --

24 MR. BERTELE: Excuse me. I hate to keep
25 interrupting. If you could just identify the exhibit,

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1 Counsel, please.

2 MR. MASON: P-4E.

3 A. Again, that's water running off the driveway to that
4 side prior to them putting in the fill dirt and the sod.
5 It's now higher on that side of the driveway than it is on my
6 side of the driveway.

7 Q. Now what you are saying is, it doesn't really stand
8 that much even on the Patrick side anymore?

9 A. It doesn't stand at all in the Patrick side, just in
10 the middle of their driveway a little bit where it dams over
11 into mine.

12 Q. Let me ask you. The water shown running on to the
13 Patrick's's property, does it continue on across their yard
14 and go down the other property line to get to the back?

15 A. No, sir, not that I'm aware of. I wouldn't know
16 that. I never looked. But if you look over on the
17 right-hand side, the top corner of that picture, you can see
18 where the water is on my side too.

19 Q. And that's where you refuse to allow those trees to
20 be removed and the swale to be put in; isn't that correct?

21 A. That's not correct.

22 Q. Well, did you allow those trees to be removed and
23 the swale to be put in?

24 A. No. They are on my property. Wouldn't the swale
25 have to go on the Timmons's property?

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1 Q. That's property you claim to be yours.

2 A. That's correct.

3 Q. That's part of the property in dispute, right?

4 THE COURT: Did you want to answer that?

5 THE WITNESS: I'm sorry. Can you ask the question
6 again?

7 THE COURT: You asked two questions at the same
8 time.

9 Q. The area where the swale was proposed by the owners
10 of Lot 12 is property they claim to own. And it's also
11 property you claim to own; isn't that --

12 A. I don't know about the swale that they proposed. I
13 don't remember that.

14 Q. You do remember talk about removing the trees at the
15 back where the birds were so as not to block the flow of the
16 water. You remember that discussion, right?

17 A. Yes, I do.

18 Q. And could it be that at the same time that
19 discussion was held, you were generally discussing how water
20 was going to get to the back of the lot?

21 A. What they had -- I think what they had recommended
22 was just a little ditch, not a proper swale, first of all.
23 They did not -- they were talking about just running a little
24 line down there, nothing proper. And it wouldn't have done
25 the job anyway.

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1 But, like I said, you only have to remove, what, a
2 foot, a foot width of trees in order to do the swale
3 properly, from my understanding. That would be, like, two
4 trees, three trees. That's it. And the rest of them would
5 be staying the same. That's what --

6 Q. So you are an engineer now?

7 A. I just listen to them.

8 Q. Well, but the bottom line is that the owners of Lot
9 12 discussed these issues with you, however you want to say
10 they were discussed, because there was concern about it at
11 the time; isn't that correct?

12 A. There was concern about it on my part, sure.

13 Q. And they were concerned as well, right?

14 A. I wouldn't know that.

15 Q. Well, you discussed it with them, right?

16 A. Not directly.

17 MR. MASON: Court's indulgence just a minute.

18 THE COURT: Yes, sir.

19 BY MR. MASON:

20 Q. Have you made any property insurance claims of any
21 kind since you've owned the property?

22 A. Property insurance claims?

23 Q. Like, where you claimed you had damage from
24 something that was covered under an insurance policy?

25 A. Flood damage.

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1 Q. So did you make it for both Matthew and -- well,
2 Matthew, you didn't have any coverage, right?

3 A. The title insurance people, is that what you are
4 talking about?

5 Q. I'm talking about the flood insurance.

6 A. Flood insurance, I attempted to get flood insurance
7 after Matthew.

8 Q. I thought your testimony was that you did get it.

9 A. Oh, no, I didn't get any flood insurance. I mean, I
10 have the insurance, but I didn't get paid anything from the
11 flood insurance company.

12 Q. So when you made this crafters public assistance
13 claim, you indicate on here on Exhibit P-6A that, if you ever
14 received any other assistance in the past? You wrote, a year
15 ago, after 1,000-year flood.

16 So am I to understand you made two separate claims
17 to this crafters fund?

18 A. It's possible. I don't recall. I don't recall
19 another one. I think I was referring to that I attempted to
20 get my flood insurance paid. 1,000-year flood, I did not get
21 flooded. That was prior to the construction of the Timmons's
22 home.

23 Q. Did you certify to this group that you were trying
24 to get this assistance from that you can't get coverage for
25 your glass in SC or the studio?

R 200

1 A. I don't need coverage for the glass.

2 Q. But you wrote, you can't get coverage for the
3 studio; isn't that correct?

4 A. That's correct. I couldn't get paid by the coverage
5 for the studio.

6 Q. But you wrote -- the words you wrote on Exhibit 6A
7 were, "Can't get coverage for my glass or studio?"

8 A. In South Carolina.

9 Q. Okay. It wasn't that you couldn't get paid. It was
10 that you couldn't get coverage?

11 A. Not for the glass itself, no, sir.

12 Q. Or the studio, right?

13 A. I was trying to get for finished work that was
14 damaged. And they won't insure that in South Carolina. They
15 wouldn't insure my artwork. If I travel to Florida, I could
16 get Florida insurance down there.

17 Q. So the money you got was for "clean up from the
18 flood"; isn't that correct?

19 A. That's correct.

20 MR. MASON: No further questions, Your Honor.

21 (Whereupon, the cross-examination is concluded.)
22
23
24
25

Q 201

EXHIBIT D

P 202

1 STATE OF SOUTH CAROLINA)

) Court of Common Pleas

2 COUNTY OF CHARLESTON)

) Case No. 2016-CP-10-04122

3 _____)
MICHELE BLANK,)

4 Plaintiff,)

5 vs.)

) TRANSCRIPT OF TRIAL TESTIMONY
) OF

6 PATRICIA TIMMONS,)

) MARK STRONG

7 Defendant.)

) DATE: April 22, 2019

9
10 B E F O R E:

11 THE HONORABLE WILLIAM P. KEESLEY

12
13 A P P E A R A N C E:

14 EDWARD A. BERTELE

15 Attorney for the Plaintiff

16 MARK A. MASON

17 Attorney for the Defendant

18
19 ORIGINAL TRANSCRIPT ORDERED BY:
20 EDWARD A. BERTELE, ESQ.

21 Karen V. Andersen, RMR, CRR
22 Circuit Court Reporter
23
24
25

1 her house --

2 Q. Was just sitting there?

3 A. Just sitting there, yes.

4 Q. So she didn't have positive slope away from her
5 house?

6 A. Not that I could tell. Obviously, I couldn't go on
7 to her property to check grade any more than they could come
8 on to ours when Mr. Franklin did his report.

9 Q. I understand. Were the police ever called on you?

10 A. Yes.

11 Q. What was that incident?

12 A. They were called that we were trespassing.

13 Q. On what property?

14 A. On her property.

15 Q. What was -- do you know what incident or situation
16 gave rise to that?

17 A. No, only that they showed up in the cul-de-sac and
18 said they had a report. And I told them who I was and what I
19 was doing. And nothing else was done.

20 MR. MASON: Please answer any questions the
21 plaintiff's attorney would have.

22 MR. BERTELE: Well, I object based upon what the
23 witness has said, because his testimony goes to the whole
24 question of the drainage of the property, which was the
25 essence of our claim, the nuisance claim that we have in the

Q 204

1 complaint. And, again, I wasn't provided with this witness's
2 name or the substance of his testimony. And so I am not
3 totally prepared to cross-examine him, nor should I have to
4 under the circumstances.

5 So I've withheld any objection to any individual
6 questions, because I believe Your Honor indicated that this
7 was all in the nature of a proffer. And now that we know
8 what he's expected to say, I object to it all.

9 THE COURT: I understand. Witness was not
10 disclosed, therefore, the objection is sustained.

11 Mr. Strong, thank you, sir. You can step down.

12 THE COURT: Court's in recess until 9:30 a.m.

13 MR. BERTELE: Thank you.

14 (Whereupon, a recess transpired.)
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21
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25

R 205

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

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

MICHELE BLANK,)
)
Plaintiff,)

vs.)

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

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION TO AMEND
JUDGMENT**

2019 JUL 31 PM 2:48
JUL 31 AM 11:00
CLERK OF COURT

FILED

Defendant Gorden H. Timmons Exempt Family Trust opposes in all aspects Plaintiff's motion to amend findings and alter and amend the carefully considered judgment entered by the court on June 14, 2019, following a weeklong bench trial.

A. The Court correctly concluded that the boundary line remained uncertain after the dismissal with prejudice of the prior action, as the dismissal of the prior action did not require either party to perform any affirmative act to take future steps to adjust the boundary line as a matter of the public land records, and an examination of the title after the prior action would not have clarified the issue in the eyes of third parties. The dismissal of the prior action with prejudice, but without any settlement agreement, and without any specific findings of fact or conclusions of law, left the boundary line in question, as a matter of title, and on the public record. Following the dismissal of the prior action, Defendant Timmons took proper voluntary steps to try and correct the public record which efforts were thwarted by Plaintiff Blank, who conditioned Timmons's post judgment correction of the record boundary, upon the payment to her of monetary damages and attorneys fees, which the court properly concluded were not supported by law or fact.

B. The Court correctly concluded that Defendant Timmons actions in having the Gillette plat approved by the County for recording was a good faith attempt to follow a legally required procedure to establish a boundary line as per the September 14, 2016 Order Amending Lis Pendens.

C. The Court correctly concluded that no slander of title claim arose from the filing of the Gillette plat, or any other action or inaction of Defendant Timmons. There was no testimony that Plaintiff attempted to sell her property to a third party, or that she attempted to obtain a loan upon her property, or that she attempted to make any use of her property, that was actually prevented due to any title issue allegedly caused by Defendant Timmons.

1. Plaintiff Blank was unable to collect on her title insurance policy because her house was not built at the time the company insured her then vacant lot and therefore the company did not insure the location of the subsequently constructed home upon her lot.

The slander of title claims fails due to there being no proof of liability, no proof of malice, and no proof of proof of any damage.

2. The court correctly concluded that the approval and filing of a plat by the County is a proper manner in which to adjust a boundary line in an established subdivision as testified to by the Director of the Charleston County Planning Department, Joel Evans.

D. The Court correctly concluded Plaintiff Blanks property was located in a flood zone where the only legal use allowed on the ground floor was for parking, Furthermore, in any event, the proximate cause of the flooding about which Ms. Blank complains was the result of a 1000-year natural disaster and not due to Defendant Timmons's installation of a driveway or any other act on his property. Ms. Blank's testimony that her flooding was caused by runoff from Timmons driveway was simply not credible.

E. Regardless of the legality or illegality of Plaintiff Blanks use of her ground floor as a studio for her stained glass art business, or Plaintiff Blank's grading of her lot, Defendant Timmons did not create a nuisance that caused the flood about which Plaintiff Blank complains.

The Court correctly concluded Blank's lot was not properly graded. Ms. Blank testified over 50% of her lot was wetlands when she purchased it and this is why her property was referred to on the subdivision plan as a "No Lot." Again, the flooding about which Ms. Blank complains was caused by a 1000-year natural disaster, not by any action or inaction of Defendant Timmons.

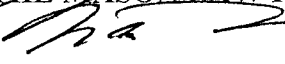
F. The court correctly questioned the credibility of witness David Franklin, due to Mr. Franklin's very inappropriate outburst during his cross examination and due to his obvious biased interest in the matter by reason of his having prepared the disputed plat used to move the location of the Plaintiff's home in the field after it was originally sited, and by reason of the prior survey work Mr. Franklin did for the builder who sold the "No Lot" to Plaintiff Blank. Also, his testimony that Timmons driveway caused the flooding and not the massive rainfall from the hurricane, was simply not credible.

CONCLUSION

The Court's findings are supported by the record or reasonable inferences therefrom, all within the discretion of the trial judge, in his role as finder of fact. Further, none of the findings being attacked are outcome determinative. The Court should affirm in all respects its order entered January 14, 2019.

Respectfully submitted,

~~THE MASON LAW FIRM, P.A.~~

BY: 

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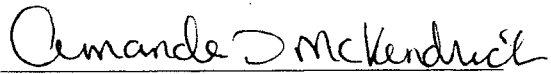
Mount Pleasant, South Carolina

July 31, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the pleading or paper to which this certificate is affixed was served upon the party(ies) to this action by hand, or by depositing a copy of the same in the U.S. Mail, first class postage pre-paid and addressed to the proper attorney(s) of record for such other party(ies) on this, the 31st day of July, 2019, in Mount Pleasant, South Carolina.

THE MASON LAW FIRM, P.A.

BY: 

12208

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER 2016-CP-10-4122

MICHELE BLANK)
Plaintiff,)

-versus-)

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

**PLAINTIFF'S REPLY TO
DEFENDANTS' OPPOSITION TO
MOTION TO AMEND FINDINGS AND
ALTER AND AMEND JUDGMENT**

Plaintiff submits the following Reply to Defendant's Opposition to her R 56(a) and 59(e) Motions. Defendant has not submitted any Opposition to Plaintiff's Motion to Reconsider the denial of Plaintiff's request for Counsel fees in connection with Defendant's Motion to Dismiss that was denied by this Court. Defendant has not submitted any legal citation or transcript references to support her argument that the Court should not grant Plaintiff's Motions. The Court should therefore conclude that Defendant does not contest the legal authorities Plaintiff has submitted or the transcript references as representative of the testimony elicited and not contradicted elsewhere in the Record. As set forth below, Defendant's arguments are unsupported in the Record.

A. Defendant's "uncertainty" is based upon a mistake of law.

Defendant argues in Point A that the Court correctly found that there was "uncertainty" following the dismissal with prejudice. This Point together with Points B and C is highly relevant and crucial to the Court's denial of the Slander of Title claim (Fourth Count). Plaintiff has established in her Motion, at pages 2-3, 15-16, that the Defendant's alleged "uncertainty" following the dismissal with prejudice was based upon a mistake of law. It is not disputed that Defendant and her husband were in court on June 2, 2016 and thus fully aware that the case had been dismissed with prejudice. There is no evidence that they asked their lawyer what this meant. Therefore, they were unaware of the legal consequences. Accordingly, they were acting

under a mistake of law. See, e.g., 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).

The preponderance of the evidence supports the conclusion that all their subsequent “uncertainty” was due to a mistake of law. Defendant testified specifically that she thought all she had given up was the right to sue Plaintiff for trespass of her house. When Defendant was asked about future trespass claims on what Defendant asserted was her property, she answered that she would be “reasonable” about doing that, meaning she thought she could sue for other violations of what she thought was still “her” boundary line. Gordon Timmons testified that the filing of a plat, P-17 was a way to induce a “settlement”. Obviously, he too thought that the boundary line was not resolved. Therefore, testimony by Defendant Patricia Timmons and her husband Gordon Timmons was consistent that all they gave up by the dismissal with prejudice was the claim to have Plaintiff move her house.

Defendant alleges that Gordon Timmons filed the plat, P-17, “to correct the public record”. Plaintiff and Gordon Timmons both testified that the legal description in their Deeds referred to the 1978 Plat and that neither party had a survey recorded at the time of purchase. Since there was no prior recorded Plat showing Lot 11 or 12 except the 1978 Plat, there was nothing else to correct. P-17, the first plat Defendant recorded still contained the boundary line Defendant claimed in the earlier case. See P-13 & 14. Defendant asserts that Defendant’s efforts to “correct the record” were thwarted by Plaintiff who insisted on legal fees and damages. Plaintiff had objected to Timmons’ testimony on the basis that it referred to settlement discussions and was inadmissible under S.C.R.E. 408, but the Court allowed it as being the answer to the question. However, if the question was “why didn’t you (Gordon Timmons) record a plat with the correct boundary line”, and his answer was related to some unspecified settlement discussion, this indicates that Timmons believed that the boundary line was not settled, and is another example of a mistake of law. Similarly, P-18, the second Plat Defendant recorded contained both boundary lines asserted in the earlier case and is a further example of a mistake of law. Therefore, Plaintiff asserts that the preponderance of evidence supports the conclusion that the Defendant and her husband were operating under a mistake of law not “uncertainty” and the Court should so amend its Order.

Defendant has not submitted any case citation or other authority to support a legal argument that “good faith” is a valid defense to a slander of title claim. Defendant’s motivation is not an issue here, only her intent to do the act which resulted in the slander. “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). What Gordon Timmons did was wrong when he did it because the dismissal with prejudice was effective as of the time the order was entered on June 7, 2016. As of that date Defendant had no claim to the disputed area and the filing of a Plat afterward which had the same boundary line that had been dismissed as a matter of law, was a slander of title.

Moreover, as asserted in Plaintiff’s Motion to Amend, at page 4, there is no evidence that Defendant or her husband attempted to obtain legal advice about the effect of the dismissal with prejudice at any time before filing the first or second Plat. Defendant continued to deny that the dismissal with prejudice was res judicata as to the boundary line throughout this case. Since the law on trespass to try title cases is exceptionally clear, Defendant’s conduct as cited above is the opposite of good faith and evidences only that Defendant obstinately refusal to accept that she lost her boundary line by agreeing to a dismissal with prejudice. Good faith is inconsistent with a refusal to acknowledge the truth.

This Court has apparently applied a “subjective” test of good faith, which is not supported by any caselaw. There is no South Carolina slander of title case in which the meaning of good faith has been provided. An “objective” standard is typically applied where good faith is an issue. See, e.g., Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004) (“[A]n insurer acts in bad faith when there is no reasonable basis to support the insurer’s decision [for contesting a claim].”); State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012) (“[T]he court of appeals found that Mother had a good faith and objectively reasonable basis for believing the recording was necessary and in the victim’s best interest.”); 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); 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 for its conclusion.”). In the absence of any judicial guidance, this Court should follow the traditional meaning of good faith, that it must have a reasonable basis.

By following the law, the Court must then conclude that the Defendant and her husband did not act in good faith.

Plaintiff acknowledges this Court's role as the decider of the facts but its role is not without limits. "[T]he findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." American Federal Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439, 441 (1995). A finding that there was uncertainty after the entry of the dismissal with prejudice would not be reasonable based on the evidence.

Finally, this Court would be committing an error of law and contradicting its own finding of res judicata, which is unquestionably correct, if it did not amend its findings to delete all references to any "uncertainty" in its Order; or added that the Defendant if "uncertain" was nonetheless operating under a mistake of law. This finding is more than an interpretation of the facts, it is a legal conclusion, subject to review on appeal. See e.g., Brownlee v. D.H.E.C., 382 S.C. 129, 676 S.E.2d 116, 122-123 (2009).

B. Filing the Plat was not justified as pursuant to any Court Order

Defendant attempts to justify the filing of the Plat by asserting that P-17 was filed in order to establish a boundary line pursuant to a September 14, 2016 Court Order. The Record shows this assertion to be false. 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.

After the Complaint was filed, Defendant brought a Motion to Amend Lis Pendens to reference a later Plat P-18, dated July 18, 2016, recorded August 4, 2016 that still asserted the Defendant's dismissed boundary line but included Plaintiff's boundary line established in the prior case. See Exhibit C, Affidavit of Patricia Timmons, Para. 6 & Exhibit B. Judge Cooper referenced that Plat and granted the Motion to enable Defendant to sell the undisputed area of Lot 12. Order Filed Sept. 14, 2016 at page 1, 2. The 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 at page 3. Therefore, P-17 was filed wrongfully without any justification and certainly not pursuant to any Court Order.

Defendant also asserts that the filing of the Plat was a proper method to adjust a boundary line as testified to by Joel Evans, Director of Charleston County Planning Department. Defendant did not attach any transcript reference and this assertion is contrary to the evidence. Joel Evans testified that the Charleston County Planning Commission did not determine whether any Plat was legally correct before accepting it for approval and recording. Therefore, the Court should reject this argument as well.

C. Plaintiff has established damages.

Defendant contends that Plaintiff did not prove any damages. The Record is clear that Plaintiff alleged special damages, Complaint Para. 30, Trial Brief at page 6 and there was testimony as to the costs for legal fees and a title opinion to establish how to clear the title of Lot 11 which was caused by Defendant’s filing of the Plat. The law is also clear that legal fees are an element of damages in a slander of title case. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012).

Defendant also contends that there was no damage because Plaintiff was unsuccessful in asserting a title claim she filed in connection with the earlier case. That evidence is not relevant or material. The title claim is a matter of contract. The title policy covers conditions that existed at the time of the policy issuance, in this case the closing of title in 2005. Since the house was not built until later, its location could not be covered under the policy as Plaintiff explained. Exhibit A, Transcript of Cross Examination Michele Blank at page 27, line 22 to page 28, line 7. The title claim was not based upon the filing of the Plat, P-17 but the filing of Defendant’s earlier suit for trespass. D-9; Exhibit A at page 27, line 19 to 29, line 4. Therefore, this assertion is without any factual or legal basis. The Fourth Count Slander of title is based upon later unjustified conduct as discussed above.

In summary, Plaintiff has established that the preponderance of evidence supports the legal conclusion that Defendant acted under a mistake of law and is thus liable for intentionally filing a slanderous plat containing a false boundary line. The Record is also clear that Defendant did not act under any legal justification nor did she act in good faith under a reasonable belief, even if that were to be regarded as a defense to a slander of title claim. Accordingly, the Court

should alter and amend its findings as set forth herein and enter judgment on the Fourth Count and award reasonable legal fees upon submission of a Certification of Services.

D. Evidence of causation in fact was credible

This Point together with Points E and F addresses the Court's denial of the Nuisance claim (Fifth Count). Defendant contends that the damage occurred during a 1000-year flood and not the result of any condition created by Defendant, which is factually incorrect. As the Court found, Order at page 11 & 22, Plaintiff stated that the 1000 year flood was in 2015 before the Defendant installed any improvements; and that when Hurricane Matthew occurred in October 2016 after the improvements were installed, she saw water running down the Defendant's driveway onto her property. Exhibit B, Transcript of Direct Examination of Michele Blank, page 22, line 15-23. The flooding came from the front of the property, not from the rear wetland area as Defendant has argued. Id. at line 22-23. Plaintiff's Motion at pages 18-20, addressed the other direct evidence of the flooding, photos of the elevated driveway, the ponding that had occurred shortly before the trial started, and the effects of the damage to her studio. Therefore, this direct evidence supports the inference that heavy rainfall did not cause any flooding prior to the installation of the driveway; and that the installation of the driveway was the cause in fact of the flooding. "Proximate cause requires proof of both causation in fact, and legal cause. Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Oliver v. S.C. Dep't of Highways and Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992)

Defendant asserts that this evidence was not credible. "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). There is no reason to disbelieve the Plaintiff. She lived in the house since 2005 and during many heavy rainfall events: 10 times in which the daily rainfall exceeded 3" from 2005 to 2016. See Plaintiff's Motion at page 23. The same grading existed then, the wetlands existed then and no flooding of her studio occurred. In the 4 times that daily rainfall exceeded 3" since then, Plaintiff's Motion at 23, she had substantial property damage the first time which was when Hurricane Matthew struck, and subsequently avoided property damage by altering her work processes to raise her materials off the floor. Therefore, the circumstantial evidence as well as

the direct evidence supports the same conclusion: that the driveway was the cause in fact of the flooding.

The alternate explanations for flooding were not supported in the Record. Defendant asserts that Lot 11 was not properly graded. The only testimony relating to the grading of Lot 11 was during the cross examination of David Franklin. Plaintiff's Motion provided transcript references from Franklin's testimony to establish that the lot was graded in accordance with 2005 requirements, not those in effect when the 1978 Plat was prepared. Motion at 22-23. There was no contradictory testimony offered or any evidence that the 2005 grading standards were not complied with. Franklin also testified that the foundation of the house was elevated. Id at 23. This testimony would negate any claim about the lot not being graded properly because the house foundation was itself higher than grade.

Defendant's assertion that Lot 11 contained wetlands does not per se create any inference that it is subject to flooding. Plaintiff testified that at no time did the wetlands portion of her property in the rear flood or cause any damage to the front portion of her property. Moreover, Franklin's testimony that the natural drainage of the property went to the rear was not contradicted. As asserted in Plaintiff's Motion, at pages 22-23, a finding that site conditions on Lot 11, not the driveway on Lot 12 were the cause of flooding must be reasonable based on the evidence. See American Federal Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169,467 S.E.2d 439,441 (1995). The Record does not support such findings and the Order should be amended accordingly.

Lastly, the Court must recognize that even if Defendant attempted to divert water away from Plaintiff's property, she still can be liable for nuisance since the issue is causation in fact. The Court cited the "common enemy rule", Order at page 22, in finding that the driveway did not substantially enhance surface water intrusion. However, the testimony and photo evidence rebut Defendant's assertions. The concrete driveway is higher than the plaintiff's property. It constitutes a physical barrier against rainwater entering the soil on Lot 12 and directs rainwater on Lot 11 toward the higher elevation to the rear of Lot 12. This was the essence of Franklin's testimony. As asserted in Plaintiff's Motion, at page 22, "[t]he 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). The preponderance of the evidence establishes that the driveway obstructed and diverted rainwater

causing it to flow toward the rear and become entrapped in the higher elevation there and back up onto the front causing flooding.

E. Evidence of legal causation was not controverted

Defendant asserts that she did not create a nuisance. As Plaintiff has established, see Motion at page 24, ponding or occasional flooding in heavy rains can be considered a per se nuisance when caused by improvement of neighboring property. Defendant has not provided any caselaw to address the situation presented here. Accordingly, the Court should conclude that Plaintiff's statement of the law is correct and apply it to the facts as established at trial.

Plaintiff testified that every time it rains her property floods. Exhibit B at page 29, lines 16-18. During heavy rainfall such as Hurricanes Matthew and Irma, her studio floods. Id. at page 29, line 19 to page 30, line 2. When rain rains are expected, she must take all the supplies off the floor and move her truck and trailer to the roadway to avoid getting stuck in the yard. Id. page 36, line 1-9. This caused her to lose work time. Id. page 36, line 10-17. As a result of her experiences with Hurricane Matthew and Irma, she must take precautionary measures whenever the rainfall is expected to be 2 or more inches. Id. page 47, line 5 to page 48, line 12.

There is no reason not to believe that Plaintiff experienced such effects from heavy rainfall as she described and her testimony should be accepted as credible. Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983). Plaintiff contends that such effects constitute a per se nuisance in accordance with the caselaw previously cited. Therefore, since the causation in fact and legal causation are both established, the Court should amend its Order to grant relief under the Fifth Count.

F. Franklin's testimony was not contradicted

As Plaintiff has previously asserted, the Court should recognize the consequences of its earlier Order on Franklin's credibility and consider that the different circumstances that existed in 2005 and 2015 produced different results. Motion at pages 11-13. Under these circumstances the Court can and should find that there was an honest disagreement between professionals and not disregard Franklin's testimony about the boundary line location as incredible. 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.”). Like the surveyor in Elwood, Franklin is well qualified and his methods are commonly used. Therefore, there is no reason to find him to be incredible.

Despite what the Court found concerning the boundary line, the Court can and must consider the credibility of Franklin’s testimony on the drainage on lots 11&12, separately as bearing on the nuisance claim. The Court may not find him to be “false in all” without a basis for his unreliability. See State v Littlejohn, 33 S.C. 699, 11 S.E. 638 (1890) Franklin testified about the natural drainage of Lot 11 and the changes to the topography due to the construction of improvements on lot 12, including the higher rear elevation. This was never contradicted. Franklin testified that the improvements on Lot 12 violated three provisions of the Charleston County Stormwater Management Regulations. There was no contrary testimony. Defendant rests her entire argument about Franklin’s credibility on the single instance in the Courtroom (an “inappropriate outburst”) that the Court itself considered to be “sincere”. Order at page 22. Franklin’s testimony bolsters the Plaintiff’s case which is nonetheless based primarily on Plaintiff’s testimony. “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). Therefore, this Court should revise its earlier finding and consider that the testimony by Franklin about drainage to be credible and a basis to support a finding of liability under the Fifth Count.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant her Motions to Amend and Alter Order and grant relief as to the Fourth and Fifth Counts of the Complaint. Plaintiff further requests that the Court reconsider its Order denying legal fees in conjunction with Defendant’s Motion to Dismiss for the reasons previously presented .

Respectfully submitted,



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Attorney for Plaintiff Michele Blank

EXHIBIT A

R 218

1 STATE OF SOUTH CAROLINA)
2) Court of Common Pleas
COUNTY OF CHARLESTON) Case No. 2016-CP-10-04122
3)
MICHELE BLANK,)
4)
Plaintiff,)
5)
vs.) TRANSCRIPT OF CROSS-EXAMINATION
6) OF
PATRICIA TIMMONS,) MICHELE BLANK
7)
Defendant.) DATE: April 23, 2019
8)
9)
10)
11)
12)
13)
14)
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B E F O R E:

THE HONORABLE WILLIAM P. KEESLEY

A P P E A R A N C E:

EDWARD A. BERTELE
Attorney for the Plaintiff

MARK A. MASON
Attorney for the Defendant

ORIGINAL TRANSCRIPT ORDERED BY:
EDWARD A. BERTELE, ESQ.

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

1 A. Yes, it was. I'm sure you have a copy.

2 Q. What happened?

3 A. It was denied because -- I can't remember. But I
4 have a copy if you need a copy.

5 Q. You brought it with you?

6 A. Uh-huh.

7 Q. Yeah, I would like to see it so I don't waste a lot
8 of time asking you a bunch of questions that may not be
9 pertinent. Is it over there in the stack of papers?

10 A. Can I get up and get it?

11 Q. If the Court gives you permission.

12 THE COURT: You may.

13 THE WITNESS: Thank you, Your Honor.

14 MR. MASON: Please mark this as the next defendant's
15 exhibit.

16 (Defendant's Exh. 9, Title Insurance
17 communication, was marked for identification.)

18 BY MR. MASON:

19 Q. I show you what's been marked as D-9. Is this the
20 title insurance communication you were just referring to?

21 A. Yes, it is. Oh, yes, now I remember.

22 Q. Do you need to take any more time to look at it?

23 Then I will look at it. Thank you. And did you write the
24 title insurance company that you believed they had overlooked
25 the fact that it is your property line that is in question,

1 not just the location of the house, that they are claiming
2 I'm trespassing 15 feet over what my surveyor has established
3 to be the property line. This claim very likely would have
4 come up eventually regardless of the house being built.
5 Please reconsider my claim. Did you write that?

6 A. Yes, I did. Because they gave me bunch of mumbo
7 jumbo about when the house was built.

8 Q. And the letter that you got, you actually submitted
9 the claim through Jennifer Smith; isn't that correct?

10 A. That's probably correct.

11 Q. And so the title insurance company wrote her back
12 and then she gave you the copy, right?

13 A. If that's what it says.

14 Q. And I'm paraphrasing, but it says, you represent the
15 insured in litigation pertaining to the encroachment of the
16 insured's house on the neighboring land. On behalf of the
17 insured, you have inquired whether the policy provides
18 coverage for the alleged encroachment. First American has
19 reviewed the documentation provided. And for the reasons set
20 forth below, the policy does not afford coverage.

21 So it alleges that you erected the home after the
22 policy came in effect. And for that reason, they weren't
23 covering it; is that correct?

24 A. It was -- like I said, it was a bunch of mumbo jumbo
25 to me. She understood it. I couldn't make head or tail out

R 221

1 of it. But, obviously, the title insurance was when I bought
2 the property, from when I bought the property. So that's why
3 I'm not sure what they were talking about in that. I never
4 did understand that mumbo jumbo.

5 MR. MASON: Your Honor, the witness has identified
6 Defendant's Exhibit 9. I move to admit it.

7 THE COURT: Any objection to this?

8 MR. BERTELE: Judge, if I might just look at it for
9 a couple of second. Thank you, Judge.

10 No objection.

11 THE COURT: Mark that in evidence, please.

12 (Defendant's Exh. 9 was received into evidence.)

13 BY MR. MASON:

14 Q. Now, is it a fair statement that you were asked if
15 the builder could do any grading between the driveway and
16 your property right around the time the driveway was being
17 finished, and they were going to take out some trees, and you
18 didn't want that done? Is that accurate?

19 A. Can you say that again, please.

20 Q. Yes, around the time the driveway was being
21 finished --

22 A. Their driveway?

23 Q. Their Lot 12 driveway, yes. Were you asked whether
24 they could do some grading and remove some trees between the
25 two lots, and did you indicate you didn't want that done or

1 A. I disagree with that.

2 Q. But you weren't -- even though you got served with a
3 lawsuit that said that plaintiffs wanted to give you certain
4 land to solve the problem, you didn't --

5 A. Again, they were giving me my land and only part of
6 it so, of course not.

7 Q. But that was going to be without you paying anything
8 for it; isn't that correct?

9 A. I already owned it.

10 Q. Well, that's the question, right?

11 A. That's your question, yes.

12 Q. But you are positive. And you are not a surveyor,
13 you have no survey training. And this is the only -- is this
14 the only piece of real estate you ever owned in your entire
15 life?

16 A. Yes -- no, it's not.

17 Q. You owned another parcel of land?

18 A. Yes, I owned a home.

19 Q. And just so I'm clear, you are blaming the Timmons
20 for Hurricane Matthew; is that correct?

21 A. No, sir.

22 Q. You are not blaming the Timmons for anything that
23 happened to you during Hurricane Matthew?

24 A. That's a whole different statement there.

25 Q. Are you blaming the Timmons for anything that

1 happened to you during Hurricane Matthew?

2 A. Yes, sir.

3 Q. And your claim, as I understand it, is that the
4 driveway is what caused Hurricane Matthew to come into your
5 illegal underground storage?

6 A. No, sir. A, it's not illegal. And second of all,
7 Matthew didn't come into my studio. The rain water from the
8 roof and from their driveway drained into my property and my
9 studio. I tasted the water. It was freshwater.

10 Q. And Matthew was a 1,000-year flood And you got paid
11 for what you could get paid for by the federal assistance
12 claim you made; isn't that correct?

13 A. A, it's not a federal assistance claim. It's
14 private entity to service crafters in an emergency. It has
15 nothing to do with the government. And the Hurricane
16 Matthew, I didn't claim that it was -- the flooding was by
17 Hurricane Matthew. It was during Hurricane Matthew. And it
18 was the rain water that caused the flooding. Because it
19 rained -- if you look at the rain gauges and the rain amount
20 for that particular couple of days, it was something like 12
21 inches or 14 inches or something like that.

22 Q. But you felt like you were eligible for certain
23 flooding assistance, and you claimed it; isn't that right?

24 A. I felt I was justified in asking a private crafters
25 emergency foundation for some money to buy new materials to

EXHIBIT B

R225

1 STATE OF SOUTH CAROLINA)
) Court of Common Pleas
 2 COUNTY OF CHARLESTON) Case No. 2016-CP-10-04122
)
 3 _____)
 MICHELE BLANK,)
 4)
 Plaintiff,)
 5)
 vs.) TRANSCRIPT OF DIRECT EXAMINATION
 6) OF
 PATRICIA TIMMONS,) MICHELE BLANK
 7)
 Defendant.) DATE: April 23, 2019
 8 _____)
 9)

10
 11 B E F O R E:

12 THE HONORABLE WILLIAM P. KEESLEY

13
 14 A P P E A R A N C E:

15 EDWARD A. BERTELE
 Attorney for the Plaintiff

16 MARK A. MASON
 Attorney for the Defendant

17
 18
 19 ORIGINAL TRANSCRIPT ORDERED BY:
 EDWARD A. BERTELE, ESQ.

20
 21 Karen V. Andersen, RMR, CRR
 Circuit Court Reporter
 22
 23
 24
 25

1 believed.

2 Q. Did you ever receive that proposal?

3 A. I laughed in her face. No, sir, I didn't.

4 Q. Now, at the time that you acquired Lot 11 --
5 withdrawn. There's been previous testimony and questioning
6 here about the fact that the property that you owned and
7 lived on is identified as "no lot"?

8 A. Yes, sir.

9 Q. You've heard that?

10 A. Yes, sir.

11 Q. Do you know when that issue was resolved?

12 A. At the closing on the property, it was resolved,
13 because at first that plat was used, the one that you've been
14 displaying, was used at the property closing. And because it
15 said "no lot", Ms. Smith went to the Charleston County
16 planning, or wherever one goes for this, and got an updated
17 revised version of the plat, subdivision, that clearly showed
18 it was Lot 11 and it had an MS number, or whatever the number
19 is.

20 Q. Thank you. Now, when you rejected the Timmons's
21 proposal to modify your property line, what happened after
22 that with respect to this issue?

23 A. They began clearing the property. And they were
24 encroaching on my property in doing so, to the best of my
25 knowledge.

1 Q. Okay. Thank you. As a result of that concrete
2 being installed, did you notice any effect that resulted from
3 that concrete impoundment?

4 A. Absolutely. The runoff of that was flooding my yard
5 on that side. And let's see --

6 Q. Let me take you back a second, if I could. So you
7 lived in this house from 2005 until the Timmons purchased it
8 and started construction, correct?

9 A. That's correct.

10 Q. And you were there during all of the periods of rain
11 and storms of such that occurred over that period of time?

12 A. Yes, sir. In September of 2015, we had a flood
13 warning, and water came up in back of my yard, because it's
14 wetlands, but it didn't encroach on any of my structures.

15 And then in October of 2015 we had the thousand-year
16 flood. There was no water. House stayed dry. Everything
17 downstairs stayed dry. Didn't come into the front. But
18 after the fill dirt went in, we had Hurricane Matthew in
19 October of 2016. And I got flooded. My whole studio got
20 flooded over six inches in some areas. And it was obviously
21 from rain, because I could see the water running off from
22 their property. It flooded from the front, not from the
23 rear.

24 Q. Well, let's talk about that. So you've lived there
25 over this period of time. And so you had no -- according to

1 And please tell us what that depicts.

2 A. This was a picture I took with another yardstick.
3 And it shows how high off of my property line or the level of
4 my property the concrete driveway next to me was raised up.

5 Q. And how high is it according to the picture?

6 A. About four inches.

7 Q. Four inches?

8 A. Three and a half, four inches.

9 Q. When was this photo taken?

10 A. That was taken when they finished their driveway.

11 Q. Okay.

12 MR. MASON: No objection.

13 THE COURT: Mark it in evidence.

14 (Plaintiff's Exh. 4I, Photograph, is received in
15 evidence.)

16 Q. So since that concrete driveway went in, how often
17 does your property flood?

18 A. Every time it rains.

19 Q. Has there been, to your recollection, major rain
20 events in the last couple of years?

21 A. Oh, yes, sir, there were. Hurricane Matthew, and
22 then hurricane Irma in October, the end of October or early
23 November -- I mean, early September Of 2017, where I got
24 flooded again. I had water in the studio again, not just
25 outside. And then every time we've had a rain event,

1 basically, the yard floods. But Irma got the water inside
2 the studio again.

3 Q. So that happened in Matthew and in Irma?

4 A. Yes, sir.

5 Q. Well, what happens if the water doesn't reach the
6 studio? How do you protect your property?

7 A. Right now I am not protecting it. I have to go take
8 the -- if it's going to rain really heavy, I prepare by
9 hooking up my trailer, taking my truck and trailer up to the
10 level of the street, on the street, on the cul-de-sac, so
11 that it doesn't get flooded in there, so I don't get mired in
12 mud.

13 Q. When do you have to do this to prevent any damage?

14 A. Any time that we are expecting a heavy rain.

15 Q. Meaning what?

16 A. I watch the weather forecast, and if they are
17 expecting more than two or three inches, then I move the
18 truck and the trailer. And I get everything off the floor in
19 the studio now, which is a major pain. I've now taken those
20 same PVC tubes shown in that picture, when I replaced all the
21 material I lost and the cardboard boxes, they are now sitting
22 inside five-gallon buckets to help prevent them from getting
23 flooded if it does rain again.

24 Q. So has this caused a disruption in your business?

25 A. Absolutely.

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1 Q. Thank you. As a result of Hurricane Matthew, how
2 much money in terms of relief did you ask from this
3 organization? Excuse me. Let me withdraw that question.
4 What's the date of your application?

5 A. 10/13/2016.

6 Q. And to your recollection, is this subsequent to
7 Hurricane Matthew?

8 A. Yes, it was due to the damages of Hurricane Matthew
9 that I was requesting assistance.

10 Q. And how much is the amount of assistance that you
11 were asking for?

12 A. I asked for an emergency grant of \$6,000. And
13 equipment and supplies would have been 3,000. Loss of the
14 order -- I wasn't able to complete some custom orders that I
15 had deposits on and that I had already had approved to the
16 tune of 5,000. Loss of work time and clean up from the
17 flooding, I had requested 5,000. So I think I didn't have
18 right, but should have been 13,000 in that.

19 Q. So you were asking for 13,000 relief as a result of
20 Hurricane Matthew?

21 A. Yes.

22 Q. And how much did you get?

23 A. \$1,185.

24 Q. Thank you. And following, were there other storms
25 subsequent to Matthew that affected your business?

12231

1 A. Yes, sir. Hurricane Irma came along at the end of
2 August 2017. I spent two days getting ready for that to be
3 flooded. And I got everything off the floor, but it cut into
4 my work time. I did get flooded. Again, I had to hook up my
5 trailer and truck and I had to manually move all the
6 equipment and materials, everything off the floor and off the
7 lower areas of my work tables. And I had to move the truck
8 and the trailer out to the street again. And I got flooded
9 again.

10 Q. Did that storm have any effect upon your income or
11 the commissions that you earned from customers?

12 A. Loss of work time. And it did not -- I did not lose
13 any equipment, per se. There's water stains on some of my
14 glass because I have huge sheets of glass in the back. But,
15 no, I was prepared for that one. But it did cause me to lose
16 time on work and time to clean up afterwards and dry
17 everything out.

18 Q. Can you estimate for us how much lost income was
19 associated with that storm?

20 A. I would say maybe couple thousand.

21 Q. A few thousand dollars?

22 A. Yeah, because I was prepared that time.

23 Q. Well, you didn't lose money in terms of materials?

24 A. Right.

25 Q. But you did lose income from commission work?

1 A. Yes.

2 Q. Thank you. Let me show you what we marked as P-7A,
3 B, C, D, E, F and G.

4 MR. MASON: Your Honor, continued objection, same
5 items.

6 THE COURT: Yes, sir.

7 MR. BERTELE: Understood.

8 BY MR. BERTELE:

9 Q. Can you identify these various pages, ma'am, and
10 tell us what they represent?

11 A. Okay. The first one --

12 Q. Well, in general, what are they?

13 A. Oh, they are orders. They are custom orders.

14 Q. Okay. And these all refer to what point in time?

15 A. To October of 2016.

16 Q. Okay. And are these documents that pertain to your
17 claim to the trade association for assistance?

18 A. Yes.

19 Q. Thank you. All right. Ma'am, is it your testimony
20 that these flooding problems persist until today?

21 A. Yes, sir, every time it rains.

22 Q. Let me show you what's been marked as P-4K.

23 A. Yes, sir. That shows some of the ponding. And you
24 can see where the driveway is high. And even that driveway
25 gets flooded, one section that's low, and that's where all

1 witness? Did you mark that?

2 MR. BERTELE: Yes, it's marked. It's provisional,
3 yes.

4 BY MR. BERTELE:

5 Q. All right. Ms. Blank, you told us earlier that you
6 have to take certain precautions and preventative measures
7 when the rainfall is predicted to be a certain amount. Now,
8 can you tell us, going back to the hurricane in 2016, which
9 was the first time that you had this experience, how many of
10 these events did you have to -- how many times over this
11 period from Matthew until today did you have to take these
12 preventative measurements?

13 A. Every time.

14 Q. Actions, excuse me, preventative actions.

15 A. For every hurricane I did and every time that the
16 rain fall was expected to exceed about two or three inches.

17 Q. Can you tell me how many that was altogether?

18 A. Not really.

19 Q. Can you give us an estimate how many per year, how
20 many per month?

21 A. I would say probably about 10 or 12 times in the
22 last year.

23 Q. In preceding year?

24 A. Yeah.

25 Q. That would be 2018?

12 234

1 A. Uh-huh.

2 Q. What about 2017?

3 THE COURT: She's saying 2 or 3 inches in a day?

4 THE WITNESS: Uh-huh.

5 MR. BERTELE: Yes.

6 THE WITNESS: Yes, sir.

7 THE COURT: Go ahead.

8 Q. How about in 2017?

9 A. I really can't remember a specific number. I guess
10 probably about 10 times. You would have to look at the
11 record of what the rainfall estimates were for -- not always
12 did we get that much rain.

13 Q. Okay. So in 2016, you had Matthew. And did you
14 have other rainfall events in 2016?

15 A. Oh, yeah. We had Matthew. And then we had Irma
16 came in 2017. But after Matthew, I was really on edge. So
17 every time we got an estimated rainfall total coming in of a
18 heavy rain, then I prepared the studio and the truck and
19 trailer.

20 Q. All right.

21 MR. BERTELE: No more questions.

22 (Whereupon, the direct examination is concluded.)

23

24

25

12 235

EXHIBIT C

R 236

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

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

MICHELE BLANK,)
Plaintiff,)

vs.)

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

AFFIDAVIT OF PATRICIA A. TIMMONS

FILED
2016 AUG 26 PM 3:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PERSONALLY appeared before me, Patricia A. Timmons, who after being duly sworn, deposes and says as follows:

1. I am the trustee of the Gorden H. Timmons Exempt Family Trust "the trust"), the Defendant in this action.

2. On March 18, 2013, the trust purchased Lot 12, T.M.S. #614-09-00-021. The deed to the said property is recorded in Book 0318 at Page 741 in the R.M.C. Office for Charleston County on March 22, 2013. The said deed describes Lot 12 by reference to the Copahee View Subdivision plat recorded in Plat Book AL at Page 77 on September 12, 1978 in the R.M.C. Office for Charleston County.

3. I am familiar with the boundary dispute with Plaintiff.

4. Exhibit "A" is a Charleston County GIS aerial photograph that shows Plaintiff's home on Lot 11 encroaching upon the trust property, Lot 12.

5. The trust has a contract to sell Lot 12 to a third party that must close by September 12, 2016. The third party has agreed to purchase Lot 12, exclusive of the portion of Lot 12 that is the subject of the boundary dispute with Plaintiff.

6. The portion of Exhibit "B" hereto that is highlighted in yellow shows the portion of Lot 12 claimed by Plaintiff. Defendant disputes said claim. However, for the purposes of legally describing the area in dispute the area highlighted in yellow depicts the area in dispute.

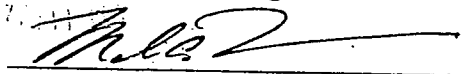
7. I am informed and believe the court should order that the *lis pendens* filed by Plaintiff be amended so that it describes the area being claimed by Plaintiff and no other portion of Lot 12 so that the sale of the undisputed portion of Lot 12 can take place as scheduled on September 12, 2016. The trust will hold the title to the disputed portion subject to the amended *lis pendens* during the pendency of this action and comply with whatever order is entered in regards thereto.

FURTHER DEPONENT SAYETH NOT.


PATRICIA A. TIMMONS

SWORN TO BEFORE ME

This 25th day of August, 2016

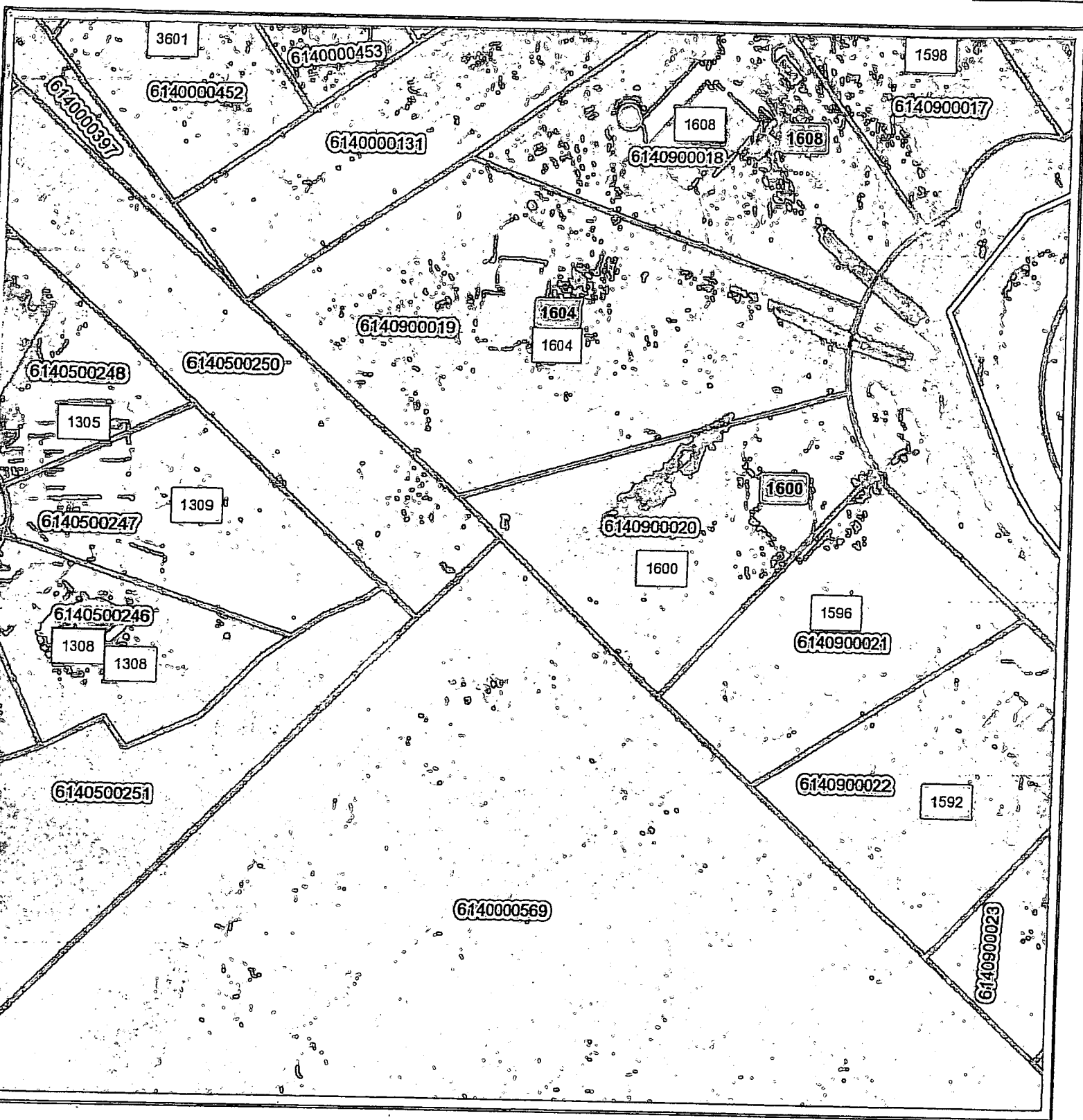


Notary Public for South Carolina

My commission expires: 02/05/18

Exhibit A

R 239



2012

R 240

Exhibit B

R 241

1. PLAT BOOK AL PAGE 77.
2. PLAT BOOK L14 PAGE 0509-0510.
3. DEED BOOK 0318 PAGE 741
4. DEED BOOK 0528 PAGE 455

CURVE TABLE					
CURVE	RADIUS	LENGTH	DELTA	CHORD	CHORD BEARING
CT	96.87'	9.32'	53°0'36"	9.31'	S 47°45'33" E

LINE TABLE		
LINE	BEARING	DISTANCE
L1	S107°23'E	12.51'

3. PLAT SHOWING LOT 12, BLOCK E (0.440 AC.), TRACT 614-09-00-021, PROPERTY OF GORDEN H. THIMONS' EXEMPT FAMILY TRUST, LOCATED IN COPANEE VIEW SUBDIVISION, CHRIST CHURCH PARISH, CHARLESTON COUNTY, SOUTH CAROLINA DATE: JUNE 3, 2016 REVISED: JUNE 23, 2016 AND RECORDED IN PLAT BOOK S16 PAGE 0134, CHARLESTON COUNTY RECORDS.

LOT 13
TMS# 614-09-00-022
TIMOTHY E. & PATRICIA M. LANCASTER
PLAT BOOK AL PAGE 77

1. ANYTHING SHOWN OUTSIDE THE DEFINED BOUNDARY OF THIS PLAT IS FOR DESCRIPTIVE PURPOSES ONLY.

2. AREA DETERMINED BY COORDINATE METHOD.

3. THE PUBLIC RECORDS REFERENCED ON THIS PLAT ARE ONLY THOSE USED AND NECESSARY TO THE ESTABLISHMENT OF THE BOUNDARY OF THIS PROPERTY. THEY ARE NOT AND DO NOT CONSTITUTE A TITLE OF RECORD.

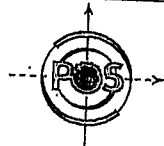
4. PROPERTY IS LOCATED IN FLOOD ZONE AE (ELEV. 14) AS SCALED -
FROM F.I.R.M. PANEL 45019C 0535 J REWSED NOVEMBER 17, 2004.

PROPERTY IS ZONED 101 RESD-MHS
FRONT SETBACK 25'
REAR SETBACK 15'
SIDE SETBACK 5'

6. PROPERTY IS ZONED 'MHS' - LOW DENSITY MANUFACTURED HOUSING SUBDIVISION DISTRICT

7. OVERALL EXISTING DENSITY OF DWELLING UNITS AS SHOWN IS 1.77 PER ACRE.

PROPERTY LINE W/CORNER (3/4" REBAR, SET)
PROPERTY LINE W/CORNER FOUND AS DESCRIBED
RIGHT-OF-WAY LINE
SETBACK LINE
SEC.&G. EASEMENT LINE
ADJOINING PROPERTY LINE



Parker Land Surveying, LLC
5910 Griffin Street
Hanahan, SC 29410
Phone: (843) 554-7777
Fax: (843) 554-7779

I HEREBY STATE TO THE BEST OF MY PROFESSIONAL KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE STANDARDS OF PRACTICE MANUAL FOR SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR CLASS A SURVEY AS SPECIFIED THEREIN; ALSO THERE ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN.

ANDREW C. GILLETTE

No. 5933
Tier B
L.S. 5933-B



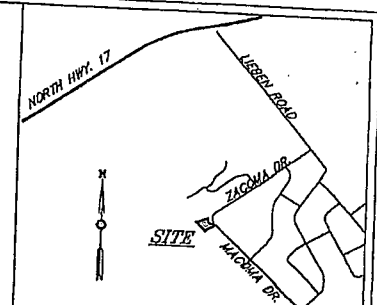
(IN FEET)
1 inch = 20 ft.

PLAT

SHOWING LOT 12, BLOCK E (0.440 AC.), TMS#
614-09-00-021, PROPERTY OF GORDEN H.
TIMMONS EXEMPT FAMILY TRUST, LOCATED IN
COPAHEE VIEW SUBDIVISION, CHRIST CHURCH
PARISH, CHARLESTON COUNTY, SOUTH CAROLINA

...DATE: JULY 18, 2016 REVISED: AUGUST 4, 2016

SCALE: 1" = 20'



LOCATION MAP
N.T.S.

[illegible]

PLANNING AND R.M.C. USE ONLY

APPROVED PLAT
[Signature] School 510m:

Director of Planning
Charleston County Planning Commission

30 00233 07 0514

2514

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER 2016-CP-10-4122

MICHELE BLANK)
Plaintiff,)

-versus-)

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

FILED
2019 JUL 26 AM 10:18
JULIE J. ARMSTRONG
CLERK OF COURT

PLAINTIFF'S TRIAL BRIEF

Plaintiff respectfully submits the following authorities in support of the Claims set forth in the Amended Complaint and in her Answer to the Counterclaims asserted by the Defendant.

First Count – Declaratory relief as to the res judicata effect of the dismissal of earlier case.

The evidence will show that Defendant voluntarily agreed to dismiss a trespass claim with prejudice in an earlier case, Timmons v Blank, 2015 CP10-3013, involving a common boundary line between their two lots in the Copahee View Subdivision. In that case, Defendant asserted that Plaintiff's house encroached over the common boundary line. The parties claimed different boundary lines based upon different methods of surveying.

Plaintiff relied upon a Site Plan prepared in 2005 by a licensed Surveyor David Franklin in connection with the construction of Plaintiff's home. Franklin utilized the Subdivision Plat referenced in Plaintiff's Deed to determine the general location of the lot and then found monuments to locate the property corners. The Site Plan contains a legal description of the property sides and is suitable for recording after certain references are annotated on it.

Defendant relied upon an unrecorded Plat prepared in 2015 by Maurice Wilder, a licensed surveyor, who relied upon the same Subdivision Plat as Franklin but then used a different method known as scaling to locate the property corners which were different than what Franklin found in 2005.

The evidence will show that the case was dismissed with prejudice by Defendant's attorney on the day of trial. A few weeks later, another surveyor hired by Defendant, Andrew Gillette filed a plat with the Charleston County Planning and Zoning Commission claiming the

same boundary line which Defendant asserted in the dismissed case. The Plat was subsequently approved and recorded. Plaintiff contends that by dismissing the trespass case with prejudice, Defendant is barred by res judicata from recording a plat with that identical boundary line.

“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.” Nunnery v Brantly Construction Co., 289 S.C. 205, 209 345 S.E. 2d 740, 743 (Ct. App. 1986)(citation omitted). “Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein.” Id. In Laughon v. O'Braitis, 360 S.C. 520, 527, 602 S.E.2d 108 (Ct. App. 2004), the Court of Appeals held that “The probate court dismissed the action with prejudice **pursuant to an order of dismissal to which the parties consented**. A dismissal with prejudice acts as an adjudication on the merits and therefore precludes subsequent litigation just as if the action had been tried to a final adjudication. In a subsequent action involving the same subject matter, the dismissal finally settles all matters litigated in the earlier proceedings, and all matters which might have been litigated therein.” (Citations omitted)(emphasis added). The Court continued: “ It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form that the issue may take in the subsequent action.” Id. (quoting 46 Am. Jur. 2d Judgments § 539 (1994). See Am. Jur.2d Judgments § 482 at 645 (1969). Therefore, under Laughon, Defendant is barred by res judicata from asserting the same boundary in a subsequent action because the determination of her property boundary was an essential element of her trespass claim.

Defendant has asserted in her Answer at Paragraph 11, that the only thing which was established in the prior case was that Plaintiff's house did not trespass on Defendant's property. However, Defendant put ownership at issue in the case in her Complaint by asserting title to the disputed boundary location. “An action of "trespass to try title" puts the title in issue and a finding determines not only the issue of trespass, but also of title.” Miller v. Leaird, 307 S.C. 56,61 ,413 S.E.2d 841,843 (1989). Similarly, in Bell v. Bennett, 307 S.C. 286, 292, 414 S.E.2d

786, 790 (Ct. App., 1991), the Court of Appeals applied res judicata to a boundary line dispute: "While the order of the Judge Bristow does not specifically state it is a determination of the ownership of the property to the west of the concrete pipe easement, the broad issue in that case was the boundary line between the identical parcels of property at issue in this case. A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." See Parker v. Legett, 13 Rich. 171, 173 (1861)(title to an entire tract which was established in a prior litigation involving an alleged trespass on only a small portion of the tract was conclusive against the same party in a subsequent litigation over the entire tract). Therefore, the overwhelming weight of authority, based upon Miller v. Leaird, 307 S.C. 56, 61, 413 S.E.2d 841, 843 (1989), Bell v. Bennett, 307 S.C. 286, 292, 414 S.E.2d 786, 790 (Ct. App., 1991) and Parker v. Legett, 13 Rich. 171, 173 (1861) support the Plaintiff's position that the dismissal with prejudice in the prior case is res judicata as to the location of the boundary line in any subsequent action where the boundary line is in issue. See 46 Am. Jur. 2d Judgments § 539 (1994). See also Nunnery v Brantly Construction Co., 289 S.C. 205, 209 345 S.E. 2d 740, 743 (Ct. App. 1986).

The First Count requests declaratory relief and an order invalidating the boundary line contained in the recorded plat filed by Defendant which is identical to the boundary line asserted in the prior case. In Plum Creek Development v. Conway, 334 S.C. 30, 36, 512 S.E. 2d 106 (1999), the Supreme Court held that the type of remedy sought did not alter the application of res judicata: "Where those underlying facts or subject matter of the... proceeding and a subsequent proceeding are identical, and the other two elements exist, res judicata applies. Accordingly, the ... remedy ... is irrelevant for res judicata purposes." See 50 C.J.S. *Judgment* § .749 (1997) (for purposes of res judicata, "cause of action" is not the form of action in which a claim is asserted but, rather the "cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon."). Under Plum Creek, res judicata applies to the request for declaratory relief and the invalidation of the Recorded Plat.

Even if Plaintiff's request for declaratory relief were to be considered a different claim, Plaintiff is still entitled to the preclusive effect of the prior judgment under collateral estoppel since the boundary line issue was litigated, as previously argued. Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and

determined against it in a prior action even though the second action was brought on a different claim or demand. Dunlap v. Travelers Ins. Co., 223 S.C. 150, 157, 74 S.E.2d 828, 831 (1953).

The estoppel of a judgment extends to matters not expressly adjudicated where they are necessary and inevitable inferences in the sense that the judgment could not have been rendered without deciding them. Carman v. South Carolina Alcoholic Beverage Control Comm'n, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994). Defendant's trespass claim was based upon her claim of title, therefore the voluntary dismissal of the trespass necessarily meant that Defendant's claim of title to the disputed area between the two different boundary lines was also dismissed against her.

Defendant also asserts that Plaintiff did not establish ownership of any part of her property, but the evidence is to the contrary. Plaintiff's surveyor prepared a Site Plan containing the location of her property boundaries based upon the Subdivision Plat which was referenced in her Deed. The Site Plan would qualify as a Plat for recording with the addition of certain details. Moreover, by abandoning her claim of trespass, Defendant necessarily abandoned her claim of ownership to the disputed area. Miller v Leaird, supra, 307 S.C. at 61,413 S.E.2d at 843.

Therefore, by the application of res judicata to the prior Dismissal with Prejudice, this Court should issue a declaratory judgment that the boundary was established as matter of law and the recorded plat is contrary to the established boundary and must be declared invalid.

Second Count- Trespass

The Second Count alleges that a driveway on Defendant's property partially encroaches upon her property without permission. The evidence will show that after the dismissal with prejudice was entered, Defendant constructed a driveway that encroached on a portion of Plaintiff's side yard. The evidence will further show that it was removed after Plaintiff complained to Defendant's attorney. Although Defendant's actions eliminated the trespass, judgment should be entered against her on the Second Count.

Third Count-Contempt of Court

The Third Count alleges that the Defendant directed the filing of a plat which contains a false and misleading description of the common boundary with her property and is in contempt of the Order of Dismissal. S.C. Code Ann. Section 14-5-320 states: "The circuit court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same." In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice.

Brandt v. Gooding, 368 S.C. 61, 630 S.E. 2d 259 (2006). An award for civil contempt is appropriate when a party has caused unnecessary litigious activity as a result of the contemptuous behavior. Curlee v. Howle, 277 S.C. 377, 386, 287 S.E.2d 915, 920 (1982). In Brandt v. Gooding, 368 S.C. 61, 630 S.E. 2d 259 (2006) plaintiff presented a fraudulent document which unnecessarily prolonged the case. The Supreme Court held that "the award of fees and costs is an appropriate award because of the unnecessary litigation directly related to the introduction of the letter." Id.

Plaintiff urges this Court to find that Defendant and her attorneys are in contempt for filing a Plat containing the abandoned property line. Such an action obstructed justice and caused unnecessary litigious activity and they should be liable for attorneys fees and costs associated with this action.

Fourth Count -Slander of title

The Fourth Count alleges that the Defendant directed the filing of a plat which contains a false and misleading description of the common boundary with her property with malice, which was published and is derogatory to the Plaintiff's title. "[T]o maintain an action for slander of title in South Carolina, the plaintiff must establish: "(1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 22, 567 S.E.2d 881 (Ct. App. 2002). See Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886,891 (Ct. App. 1995)("[w]rongfully recording an unfounded claim against the property of another generally is actionable as slander of title .") "A publication is derogatory to the plaintiff's title if the publication disparages or diminishes the quality, condition, or value of the property." Id. at 150, 459 S.E.2d at 891.

"Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights." Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). "[M]alice merely means a lack of legal justification and is to be presumed if the disparagement is false, if it caused damage, and if it is not privileged." Home Invs. Fund v. Robertson, 10 Ill.App.3d 840, 295 N.E.2d 85, 87 (1973) (citing Gates v. Utsey, 177 So.2d 486, 488 (Fla.Dist.Ct.App.1965)). See Carolina Civil Procedure 93-94 (2nd ed. 1996)).

"Special damages recoverable in a slander of title action are the pecuniary losses that result 'directly and immediately from the effect of the conduct of third persons, including impairment

of vendibility or value caused by disparagement, and the expense of measures reasonably necessary to counteract the publication, including litigation.’ ” Huff v. Jennings, 319 S.C. at 150–51, 459 S.E.2d at 892 (quoting 50 Am.Jur.2d Libel & Slander § 560; citing Restatement (Second) of Torts § 633. “ [S]pecial damages in the context of a slander of title claim can take at least two forms. For instance, if a slanderous statement forces a party to sell land at a reduced price, the reduction in value is a realized loss that can form the basis of a damages award. Alternatively, a landowner may take legal action to remedy the effects of the slanderous statement. To the extent that this legal action is reasonably necessary to remove clouds from the party's title, the party may recover those attorney fees.” Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192,206, 723 S.E.2d 597 (Ct. App. 2012); Huff v. Jennings, supra; TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870, 879 (1992)(“the clear majority rule is that attorneys' fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title); Restatement (Second) of Torts, § 633 (1977) (attorney fees may be recoverable as special damages if incurred to clear title or to undo any harm created by whatever slander of title).

The evidence will show that Defendant acted without any privilege and in disregard to the Plaintiff's rights established in the prior action and filed a Plat containing the property boundary which she had abandoned in the prior case by virtue of her consent to a dismissal with prejudice. Plaintiff incurred the cost of legal fees and a title opinion to determine the effect of the filed Plat upon her title and how to clear it. Therefore, Plaintiff requests a finding of slander of title, nominal damages and attorneys' fees and costs. Counsel will submit an Affidavit of fees and costs at the conclusion of the case.

Fifth Count – Nuisance

The Fifth Count alleges that an impermeable driveway constructed by Defendant causes flooding of Plaintiff's property and is a nuisance. The evidence will show that after the dismissal of the prior case, Defendant installed a concrete driveway adjacent to plaintiff's property at an elevation higher than that of plaintiff's property. The evidence will show that after the construction of this driveway, Plaintiff's property regularly flooded during the hurricanes and rainstorms which impacted the Charleston area.

The evidence will show that Plaintiff is a stain glass artist and uses the ground floor of her home as a studio where she fabricates custom stain glass works of art for sale. Since the fall

of 2016, Plaintiff's studio was repeatedly flooded, preventing her from completing commissioned works of art, causing her to lose income and incur expenses for lost supplies and materials used in her work. Plaintiff must now remove all her supplies and materials from the floor and take other preventative measures whenever there is a heavy rain (above 3"-4") forecast.

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

"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. Second, except by contractual or prescriptive right, 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, 598 S.E.2d 712 (2004).

Plaintiff contends that both exceptions apply. The evidence will show that the concrete driveway causes frequent flooding that is substantial and unreasonable interference with the Plaintiff's use and enjoyment of her land. The nuisance exception applies even though the adjacent owner did not intend to alter the flow of surface water. Lucas v. Rawl Family Ltd. Partnership, 359 S.C. at 511. The evidence will also show that the concrete driveway is a nuisance per se because it has become dangerous at all times and under all circumstances to life, health, or property. Suddeth v. Knight, 280 S.C. 540, 545, 314 S.E.2d 11, 14 (Ct. App. 1984). The evidence will show that the concrete driveway creates an impoundment that concentrates the flow of water upon the Plaintiff's property.

Plaintiff's drainage expert has determined the best means to alleviate future flooding is to create a drainage swale which will carry surface waters to the rear of the property where they can enter an existing canal.

Therefore, Plaintiff requests an award of damages for her lost income, the cost of supplies damaged by the flooding and the cost to remediate the flooding by installing a swale or drainage system to prevent the accumulation of surface waters caused by the impoundment effect of the driveway.

COUNTERCLAIMS

Plaintiff contends and Defendant's counsel acknowledges that the Counterclaims all fail if the Court finds that the Plaintiff's claims of res judicata and collateral estoppel in the First Count are sustained. Nonetheless, Plaintiff further contends that the Counterclaims all fail also because they cannot be sustained as a matter of law and because Defendant has not produced any evidence in discovery to support them. With respect to the legal issues raised in the Counterclaims, Plaintiff submits the following.

First Count of Counterclaim- slander of title

Defendant alleges that the Plaintiff has falsely claimed to own a significant portion of Defendant's property. Plaintiff's claim of title is based upon the res judicata effect of the earlier dismissal with prejudice as asserted in the present case. Plaintiff's claim of title is privileged and cannot be the basis of a slander of title claim. See Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) (finding judicial proceedings are privileged and cannot form the basis of a claim for slander of title). Therefore, the first Count should be dismissed as a matter of law.

Further, an essential element of the tort of slander of title is the falsity of the Claim. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 22., 567 S.E.2d 881 (Ct. App. 2002); Huff v. Jennings, 319 S.C. 142,149, 459 S.E.2d 886, 891(Ct. App. 1995). As stated previously, Plaintiff's claim of title to the disputed area on the Defendant's recorded plat is based upon the determination in the prior case. Plaintiff's property line was established as a matter of res judicata based upon the Franklin survey of 2005. Therefore, Plaintiff's claim of title is true, and no slander can arise. Furthermore, if the statement is true, there is no slander of title even if there was an intent to injure. Am. Jur. 2d, Libel & Slander, Section 525 at p. 929.

Defendant's claim of slander of title also fails because she cannot establish any facts to show that there was a publication to third parties which was made in a reckless or wanton disregard of her rights and without legal justification. Huff v. Jennings, 319 S.C. 142,150, 459

S.E.2d 886,891 (Ct. App. 1995); Solley v. Navy Federal Credit Union, Inc., 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012); Am. Jur. 2d, Libel & Slander, Section 520.

In addition, Plaintiff was privileged to rely upon the claim as to the validity of her boundary which was asserted in the prior litigation in subsequent discussions with third parties, Grasz v. Discover Bank, 315 P. 406; Am Jur. 2d Section 520 at p 921, or after the instant litigation has begun. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) finding judicial proceedings are privileged and cannot form the basis for a claim of slander of title).

Finally, Plaintiff contends that Defendant cannot produce any evidence that Plaintiff claimed title to a portion of Lot 12 in the recorded Plat other than that part to which she had been awarded in the prior litigation. Therefore, the First Counterclaim should be dismissed.

Second Count of Counterclaim- Abuse of Process

Defendant alleges that the naming of third-party purchasers in the Lis Pendens (not the complaint) and not limiting the description in the Lis pendens was an abuse of process. The essential elements of an abuse of process claim are an ulterior purpose and a willful act in the abuse of process not proper in the conduct of the proceeding. Huggins v Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693(1967) Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required. There is not liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. See Sierra v. Skelton, 307 S.C. 217, 414 S.E. 2d 169 (Ct. App., 1992); Rycroft v Gaddy, 281 S.C. 119, 314 S.E. 2d 39 (Ct. App. 1984)

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

“There is no abuse of process . . . when the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior purpose. . . . Liability exists not because a party merely seeks to gain a collateral advantage by using some legal process, but because the collateral objective was its sole or paramount reason for acting.” Food Lion, Inc. v. United food & Commercial workers Int’l Union, 351 S.C. 65, 75, 567 S.E. 2d 251,255 (Ct. App. 2002). See D.R. Horton, Inc. v. Wescott Land Co., 398 S.C. 528,553,730 S,E, 2d 340,353 (Ct. App. 2012)(alleged use of Lis Pendens to force better sale terms not an ulterior motive for purposes of abuse of process claim)

Both the ulterior motive and the willful act not in furtherance of the process must be present. Southern Glass & Plastics Co. V. Duke, 367 S.C. 421, 430-431, 626 S.E. 2d 19, 24 (Ct. App. 2005). A failure to act cannot be the basis for an abuse of process. Huggins v Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693(1967).

Plaintiff asserts that none of the elements needed to establish a prima facie case of abuse of process can be proven and the Court should dismiss this Count as a matter of law.

Third Count of Counterclaim- tortious interference with contract

Proof of tortious interference with contract requires in addition to the existence of a valid contract and knowledge thereof an intentional procurement of a breach and a lack of justification. Eldeco, Inc. v. Charleston County School Dist., 372 S.C. 470, 642 S.E. 2d 726 (2007). The alleged interference must be willful and unjustified. Keels v Powell, 207 S.C. 97, 34 S.E.2d 482(1945). Any alleged comments to third party purchasers about the prior litigation and the location of the boundary line that was established in that case were privileged. See First Count of Counterclaim above. Plaintiff alleges that Defendant cannot produce any facts to support her allegation that Plaintiff willfully and without justification interfered with the alleged contract of sale. In the absence of such facts, this Court should dismiss the Third Count. Hansen v. DHL Laboratories, Inc., 319 S.C. 79, 80, 459 S.E.2d 850,851 (1995); SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 497,392 S.E. 2d 789,792 (1990).

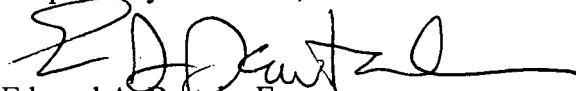
Fourth Count- Declaratory relief as to the boundary line location

The Fourth Count of the Counterclaim requests that the Court issue a declaration determining the boundary line between the parties. Plaintiff has established, see First Count

above, that the prior case determined the boundary line as a matter of res judicata. In Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999), the Supreme Court stated; “Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” Id. at 34, 512 S.E.2d at 109 (citations omitted).

By seeking a different remedy in the second lawsuit for the same cause of action, Defendant does not negate the identical nature of the subjects of the two actions. Plum Creek Dev. Co., 334 S.C. at 35 n.4, 512 S.E.2d at 109 n.4. “A claim for damages is a claim for relief rather than an assertion of a different cause of action for purposes of determining the applicability of res judicata.” Id. at 35, 512 S.E.2d at 109. (Citation omitted). “[F]or purposes of res judicata, ‘cause of action’ is not the form of action in which a claim is asserted but, rather the ‘cause for action’, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.” Id. at 36, 512 S.E.2d at 110 (Citation omitted). Under Plum Creek, the fact that Defendant sought damages for trespass in the prior action and now in the Counterclaim seeks a declaration of the boundary line location does not affect the applicability of res judicata. Therefore, the Fourth Count should be dismissed as moot based upon the res judicata effect of the prior Judgment of Dismissal with Prejudice.

Respectfully submitted,



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Dated: April 19, 2019
Charleston, SC

1 STATE OF SOUTH CAROLINA)
2) Court of Common Pleas
COUNTY OF CHARLESTON) Case No. 2016-CP-10-04122
3)
MICHELE BLANK,)
4)
Plaintiff,)
5)
vs.) Transcript
6) of
PATRICIA TIMMONS,) Proceedings
7)
Defendant.) DATE: April 22-24, 2019
8)
9

10 B E F O R E:

11 THE HONORABLE WILLIAM P. KEESLEY
12

13 A P P E A R A N C E:

14 EDWARD A. BERTELE
15 Attorney for the Plaintiff

16 MARK A. MASON
17 Attorney for the Defendant
18

19 ORIGINAL TRANSCRIPT ORDERED BY:
20 EDWARD A. BERTELE, ESQ.

21 Karen V. Andersen, RMR, CRR
22 Circuit Court Reporter
23
24
25

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1 THE CLERK: State your full name and spell your last
2 name for the record.

3 THE WITNESS: Chris Lanning, L-a-n-n-i-n-g.

4 DIRECT EXAMINATION

5 BY MR. BERTELE:

6 Q. Good morning, Mr. Lanning. You are an attorney at
7 law office in South Carolina?

8 A. Yes, sir.

9 Q. And how long have you been in practice?

10 A. Since 2005.

11 Q. And this case involves a boundary line between
12 properties of Ms. Blank, the plaintiff here, and Patricia
13 Timmons, as the trustee in their -- at their respective lots
14 in the Copahee View subdivision. Now, are you familiar with
15 a 2015 case involving those same parties?

16 A. Yes.

17 Q. And did you represent Ms. Timmons in that case?

18 A. Yes.

19 MR. BERTELE: May I approach, Judge?

20 THE COURT: Sure.

21 Q. Mr. Lanning, can you identify that as the complaint
22 you filed in the case of Timmons vs. Blank?

23 A. Yes, that's correct.

24 MR. BERTELE: May I have that admitted, Your Honor?

25 MR. MASON: No objection.

1 THE COURT: Mark that in evidence, please, ma'am.

2 (Plaintiff's Exh. 9, Complaint, was received in
3 evidence.)

4 THE COURT: Do you have a copy in front of you?

5 THE WITNESS: Yes, sir.

6 BY MR. BERTELE:

7 Q. Now, this case was a trespass-to-try-title type of
8 case, wasn't it, sir?

9 A. A trespass, yes.

10 Q. Okay. Well, you were asking the Court to find that
11 Ms. Blank's house encroached upon your client's property
12 based upon Exhibit A, which is a legal description and it
13 references a plat of Mr. Wilder, correct?

14 A. That is correct, yes.

15 Q. Okay. And that subdivision -- excuse me, that plat
16 that Mr. Wilder prepared, that was based upon the deed that
17 Ms. Blank -- excuse me, Ms. Timmons received for this
18 property, wasn't it?

19 A. I believe it was, yes.

20 Q. Okay. And we don't have a copy of the deed attached
21 to this complaint, do we?

22 A. No.

23 Q. Okay. But you were asserting, based upon the title
24 of this property, that that house of Ms. Blank's encroached
25 upon your client's property, weren't you?

1 A. Yeah, just that the property was -- that Ms. Blank's
2 house was on my client's property.

3 Q. Okay. And at the time that you filed this
4 complaint, Ms. Blank's house had been there for a number of
5 years, hadn't it?

6 A. I believe so, yes.

7 Q. Did she also have a driveway to her house?

8 A. I believe so. I don't remember.

9 Q. Okay. And but this complaint applied only to the
10 house?

11 A. I don't remember if it was her house or driveway
12 also. I believe there were some issues of the house. There
13 may have been driveway. I don't remember.

14 Q. Well, would you have not included all the things
15 that you alleged trespassed your client's property in this
16 complaint?

17 A. I would have done a short plain statement of the
18 facts, what a complaint requires.

19 Q. Okay. So are you telling us that you didn't intend
20 that the driveway to be included because it's not mentioned?

21 A. I didn't say that.

22 Q. Okay. But it would have been included, wouldn't it,
23 in your mind?

24 A. No, just what I would have alleged in my
25 complaint.

1 Q. Well, if you went to trial, you would have alleged
2 everything on Mr. Blank's property that came across that
3 alleged boundary line was in violation of the deed, wouldn't
4 you?

5 A. At the trial, I would have, yes.

6 Q. Let me show you another document. It's entitled
7 March 27th, 2015, plat showing property line adjustment.

8 MR. BERTELE: May I approach, Judge?

9 THE COURT: Sure.

10 BY MR. BERTELE:

11 Q. Does that appear to be the plat that you are
12 referring to in the complaint that's the basis of your
13 assertion of a property line and a trespass?

14 A. I believe this is the one signed by Mr. Wilder.

15 Q. Okay. So P-24 is what you intended or referenced in
16 your complaint?

17 A. That's what was represented in the complaint.

18 MR. BERTELE: May I have that admitted?

19 THE COURT: Any objection?

20 MR. MASON: No, Your Honor.

21 THE COURT: Mark it in evidence, please.

22 (Plaintiff's Exh. 24, Plat, was received in
23 evidence.)

24 BY MR. BERTELE:

25 Q. Referring to P-24, Mr. Lanning, it contains a series

R 262

1 with corner.

2 MR. BERTELE: May I approach again, Judge? I want
3 to be sure we are talking about the same thing.

4 THE COURT: Yes.

5 BY MR. BERTELE:

6 Q. Mr. Lanning, what is this line here that I'm
7 pointing to? It's a solid line.

8 A. With a circle around it on part of the line, right?

9 Q. Yes, correct.

10 A. According to this surveyor, that's a property line
11 with corner. And then has three-fourth rebar set.

12 Q. Okay. Thank you.

13 As I understand your complaint, you are alleging
14 that a trespass occurred over that line based upon
15 Mr. Wilder's March 25th plat, correct?

16 A. That's what the complaint said.

17 Q. This case was litigated, was it not?

18 A. I don't know what you mean by litigated.

19 Q. Well, there was discovery. There was a trial
20 scheduled?

21 A. Yes, there was discovery. There was a trial
22 scheduled, yes, sir.

23 Q. Okay. And there was summary judgment motions filed?

24 A. There was a summary judgment motion that had been
25 filed and ruled upon.

Q 263

1 A. That's what the complaint says, yes, sir.

2 Q. Well, does that represent a fact? Was there, in
3 fact, an offer to move the property line?

4 A. I believe so. I wouldn't have put it in there if I
5 didn't think it was true.

6 Q. So it was based upon some fact?

7 A. I believe that they made an offer to do that. I'm
8 not sure. I don't remember, but I wouldn't have put it in
9 here if I didn't think it was true.

10 Q. It's based upon facts? You might not remember the
11 details, but as far as you know, it was a true statement when
12 you made it?

13 A. Correct.

14 Q. Now, in the course of the litigation, there was a
15 summary judgment motion filed. I believe I asked you about
16 that earlier.

17 A. Yes, sir.

18 Q. Do you remember the details of that motion?

19 A. I do not.

20 Q. All right. Let me show you what I have marked as
21 P-13, which is Defendant's Motion for Summary Judgment. Does
22 that look familiar to you?

23 A. Yeah, I believe that's what was filed. Ms. Smith
24 filed that.

25 Q. And what I've marked as P-14, memorandum in

1 opposition of Defendant's Motion for Summary Judgment --

2 A. Correct.

3 Q. -- is that what you filed on behalf of Ms. Timmons?

4 A. Yes, and on behalf of Ms. Timmons's for support for
5 the motion for summary judgment.

6 Q. In opposition?

7 A. In opposition.

8 Q. Understood. Okay. And so that the essence of your
9 opposition to Ms. Blank's motion for summary judgment was
10 what?

11 A. I would have to go through and look through this. I
12 don't remember. Whatever was in my memorandum.

13 Q. Okay. Did it, to your understanding and
14 recollection, refer to the survey that had been prepared by
15 Mr. Wilder and the methodology for the preparation of that
16 survey?

17 A. I don't remember that. I would have to go through
18 and look at the memorandum. I would be more than happy to
19 read it for you.

20 Q. Well, the exhibits attach -- they contain reference
21 to various depositions and documents, correct?

22 A. Correct.

23 Q. And did you not make a legal argument, if you refer
24 to your memorandum, sir.

25 A. Okay.

12 265

1 Q. And look at the last page. And three lines from the
2 top, what did you say there?

3 A. On my signature page?

4 Q. Yes, top of the last page. It's not numbered, but
5 it's the last page of your memorandum.

6 A. Correct.

7 Q. Third line down.

8 A. Third line down?

9 Q. Yes, sir.

10 A. Says, in the instant case, the circumstances are
11 such that the general rules for locating land should not be
12 followed.

13 Q. All right. So you were asking Judge Scarborough to
14 not follow the regular methodology for creating boundaries on
15 property, correct?

16 A. If that's what my memorandum says, yes. Probably
17 just in opposition to what was being said in the summary
18 judgment motion.

19 Q. Okay. So you were essentially arguing that there
20 was a disagreement over how the property had been surveyed by
21 Ms. Blank's surveyor and by Ms. Timmons's surveyor, weren't
22 you?

23 A. I believe the testimony is -- I'm sure they are here
24 today -- there is a dispute --

25 MR. MASON: Your Honor, I would object to this line

1 of questioning on the grounds of relevance. Arguments made
2 in a denied motion for summary judgment in another case are
3 not relevant.

4 MR. BERTELE: Respectfully, Your Honor, the prior
5 case is the issue here.

6 THE COURT: Overruled.

7 BY MR. BERTELE:

8 Q. I'm sorry. Question hear the end of your answer.

9 A. What was the question again?

10 Q. It was concerning the dispute between the
11 methodology for surveying as represented by Ms. Blank's
12 surveyor versus Ms. Timmons's surveyor?

13 A. I believe just through the depositions, there was
14 some questions of the line and how it was determined. So,
15 yes, I believe there's a question about that.

16 Q. And that was going to be what was submitted to Judge
17 Scarborough at the trial on June 2nd, wasn't it?

18 A. I am not going to go into that.

19 Q. Well, sir, you were in the courtroom, in Judge
20 Scarborough's courtroom on June 2nd of 2016, were you not?

21 A. Correct.

22 Q. You were ready to proceed to trial?

23 A. Correct.

24 Q. And you were going to call witnesses?

25 A. Correct.

1 Q. And you were going to call surveyors?

2 A. Correct.

3 Q. And those surveyors were going to discuss how they
4 surveyed Ms. Timmons's property?

5 A. Yes.

6 Q. And you expected that Ms. Blank would call a
7 surveyor, Mr. Franklin, and he would explain how he surveyed
8 her property?

9 A. Yes.

10 Q. Okay. And that testimony never happened, did it?

11 A. No.

12 Q. Okay. And the reason was that you dismissed the
13 case with prejudice?

14 A. Ms. Timmons dismissed the case with prejudice.

15 Q. I apologize. On behalf of Ms. Timmons, you
16 dismissed the case with prejudice?

17 A. Yes.

18 Q. That was after conferring with her?

19 A. Yes.

20 MR. MASON: Objection, Your Honor. Attorney-client
21 privilege.

22 MR. BERTELE: Whether he conferred her or not. I
23 didn't ask what he told her, but whether he did it.

24 THE COURT: He says already said that she made the
25 decision. What is it you want me to hear?

1 MR. BERTELE: I will move on, Judge. I will move
2 on.

3 BY MR. BERTELE:

4 Q. So it was her decision to dismiss this case?

5 A. Yes.

6 Q. Okay. And so what, in your view, was the
7 consequence of the dismissal of the trespass claim with
8 prejudice?

9 A. Repeat your question. I don't think I understand.

10 Q. I was asking you to tell us your view of the
11 dismissal of the trespass claim with prejudice?

12 A. Well, that the relief that was being sought did
13 not -- would not be able to be relitigated or re-asked,
14 resought again, which was the moving of the house.

15 Q. Well, the moving of the house was the remedy. But
16 you were asserting a claim of trespass based upon title,
17 correct?

18 A. Trespass, yes.

19 Q. Okay. So Ms. -- you are telling us that Ms. Blank's
20 house could remain there without issue?

21 A. Just that -- I am not saying that it could stay
22 there or not. Just saying that's what we were asking for in
23 the complaint.

24 Q. Well, does that mean that you could bring another
25 trespass claim in the future on the basis that the house was

1 there?

2 A. I don't know if I could make that call or not. I am
3 not a judge.

4 Q. But you are a lawyer, sir, aren't you?

5 A. Right.

6 Q. And I'm asking you what the consequences in your
7 mind of that dismissal with prejudice were?

8 A. Were that Ms. Timmons could not bring an action for
9 trespass and seek the same relief that was being sought in
10 the complaint that was dismissed.

11 Q. But different relief -- complaint for different
12 relief could be brought against Ms. Blank based upon the same
13 circumstances?

14 A. I guess it depends on what the circumstances are. I
15 don't know.

16 Q. Well, the house was there, sir. We are talking
17 about the house being there. So you are saying that she
18 could be sued later for some other different legal theory
19 based upon the location of her house?

20 A. I don't know.

21 Q. You don't know?

22 A. No.

23 Q. Well, we are here now, aren't we?

24 A. Yes, sir.

25 Q. And so what does -- isn't trespass a claim based

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1 upon ownership of land? Isn't that what you said in the
2 complaint, that the house is trespassing on our land?

3 A. Correct. That is one part of trespass, is you have
4 to own the land someone is trespassing over.

5 Q. Well, you don't have to own land for somebody to be
6 trespassing. You could have a lease or an easement or some
7 other legal right, couldn't you?

8 A. I don't think with a lease you can sue someone for
9 trespass. You don't have an ownership in the property.

10 Q. Well, okay, I will leave that answer stand. So, but
11 you decided that this case, in order to be proven, requires
12 establishment of ownership, correct?

13 A. That's what the complaint says, yes, sir.

14 Q. Okay. So you are telling us that the trespass
15 claim, which is based upon a claim of ownership, wasn't
16 decided at the time that that case was dismissed with
17 prejudice?

18 A. I don't believe anybody's ownership was decided in
19 that case. There were no boundaries lines that were
20 decided.

21 Q. We were talking about Ms. Timmons's ownership
22 interest. Okay? Because you are the Plaintiff -- you
23 represented the Plaintiff in that case. You took a dismissal
24 with prejudice. And I'm asking you whether or not that
25 ownership interest was -- which is the necessary element for

1 your claim, was not decided against Ms. Timmons also then?

2 A. I don't believe that it was.

3 Q. Why not?

4 A. Because there was no testimony. There was no
5 findings of facts. There was no conclusions of law made by
6 the judge at that time. So there was no determination of
7 what the boundary line was and who had possession of what
8 property.

9 Q. Well, we know what the boundary lines were going to
10 be, don't we? It would either be your client's, Ms.
11 Timmons's, or Ms. Blank's, isn't that true? There was no
12 other outcome to that case, correct?

13 A. I don't know, because there wasn't -- I've been in
14 front of Judge Scarborough many times. And he comes up with
15 a ruling that could be either way. So I don't know. I have
16 no idea.

17 Q. Well, I am not asking you to predict what Judge
18 Scarborough would do, only to tell us what you believe was an
19 issue when you sat in that courtroom in June 2nd, 2016.

20 A. Correct.

21 Q. So your testimony, as I understand it, is that
22 nothing was finalized by that dismissal with prejudice? You
23 told us that the boundary line wasn't finalized. And you
24 told us that Ms. Timmons could bring some other legal theory
25 against Ms. Blank for her house, right?

R 272

1 A. I don't know that she could bring another claim, but
2 I know there was nothing decided at that -- through that
3 case. There was no boundary line decided.

4 Q. In your opinion, the dismissal with prejudice meant
5 nothing?

6 A. Other than the fact that Ms. Timmons could never
7 bring an action against Ms. Blank because it was dismissed
8 with prejudice.

9 Q. To move her house, that's what you said before?

10 A. Right, correct.

11 Q. But you said she could bring a claim for some other
12 legal theory based upon the house, didn't you?

13 A. I don't think I did.

14 Q. All right. So you are telling me that you don't
15 believe, based upon what happened on June 2nd, that the
16 trespass,-- that the house issue could be relitigated again?

17 A. I don't think that could be relitigated again, no.

18 Q. Because of what?

19 A. Because it was dismissed with prejudice.

20 Q. Well, there was no hearing. Nothing happened before
21 Judge Scarborough. You just got up and said, Your Honor, I
22 would like this dismissed with prejudice, right?

23 A. Right.

24 Q. He didn't take any testimony on that, did he?

25 A. Nope.

1 Q. Are you familiar with this filing of a plat some
2 time afterwards concerning the Timmons's property?

3 A. No, sir.

4 Q. You have no personal knowledge of what happened
5 after you represented Ms. --

6 A. No, sir.

7 Q. Let me finish. I'm sorry. My question was about
8 any subsequent filing of plats.

9 A. No, sir. I do not know.

10 Q. Okay. Thank you. So, again, you are telling us
11 that the trespass claim, which is predicated upon ownership,
12 is dismissed, but the significance of that is nothing other
13 than Ms. Blank's house can't be moved?

14 A. Correct.

15 Q. It doesn't have to be moved -- excuse me. Her house
16 doesn't have to be moved?

17 A. Correct.

18 Q. So all that you gave up in that case was that
19 limited remedy?

20 A. That's my opinion.

21 Q. Okay. And any other claims related to Ms. Blank's
22 home at the time, which you should have joined in that case,
23 would also have been given up, wouldn't they?

24 A. I don't believe so. Just dismissing the complaint.

25 Q. And that doesn't have any consequence with respect

Q 274

1 A. 24.

2 Q. 24. Had Mr. Timmons made an effort to essentially
3 give Ms. Blank part of his property in order to solve the
4 trespass problem?

5 A. Yes.

6 Q. And does this plat show what he was trying to do?

7 A. Yes.

8 Q. Was he trying to give her enough land out of his lot
9 where her house would not encroach on his lot and would also
10 meet a five-foot setback?

11 A. Yes.

12 MR. BERTELE: Objection. Counsel is leading the
13 witness.

14 MR. MASON: It's cross-examination, Your Honor.

15 THE COURT: Overruled.

16 BY MR. MASON:

17 Q. So is that what Exhibit 24 shows, Mr. Lanning?

18 A. Yes, sir, it does.

19 MR. MASON: Do you want me to mark this as a defense
20 exhibit? I've got an exhibit to use with this witness. And
21 he's on cross. So I don't know how you want to handle
22 that.

23 THE COURT: If you are going to tender an exhibit,
24 it would be a defense exhibit, yes.

25 (Dft. Exh. 1, Joint Form 4, was marked for

1 MR. MASON: That's all I have, Your Honor. Thank
2 you.

3 THE COURT: Redirect.

4 MR. BERTELE: I had pre-marked that same order as
5 Plaintiff, 16. So I will ask that it be also considered.

6 MR. MASON: No objection, Your Honor.

7 (Plaintiff's Exh. 16, Form 4, was received in
8 evidence.)

9 MR. BERTELE: No further questions.

10 THE COURT: Court's in recess for ten minutes.

11 (Whereupon, a recess transpired.)

12 THE COURT: Call your next witness, please.

13 MR. BERTELE: Thank you, Your Honor.

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1 ANDREW GILLETTE,
2 having been duly sworn, testifies as follows:

3 THE CLERK: State your full name and spell your last
4 name for the record.

5 THE WITNESS: Andrew Cleveland Gillette,
6 G-i-l-l-e-t-t-e.

7 DIRECT EXAMINATION

8 BY MR. BERTELE:

9 Q. You are here pursuant to a subpoena. Did you bring
10 your files with you?

11 A. Yes, they are in the back.

12 Q. If you need to refer to them, please let us know.

13 A. Okay.

14 Q. Let me first show you what we have marked as P-17
15 and P-18. P-17 is a plat dated June 3rd, revised June 22nd.
16 And P-18 is a plat dated July 18th, revised August 4th. And
17 can you identify those as containing your seal?

18 A. Yes.

19 Q. As to both?

20 A. As to both.

21 Q. Now, by whom were you directed to prepare this plat,
22 both P-17 and P-18?

23 A. Mr. Timmons.

24 Q. Mr. Timmons? And let me go back a second. I kind
25 of skipped ahead. By whom are you employed, sir?

1 A. Parker Land Surveying.

2 Q. And what's your occupation?

3 A. Professional surveyor.

4 Q. You are licensed in the state of South Carolina?

5 A. Yes.

6 Q. Did you discuss the reasons for preparing P-17 with
7 Mr. Timmons?

8 A. Can I see P-17?

9 Q. Of course.

10 A. Yes.

11 Q. And what did he tell you?

12 A. This is -- is this the one before? I'm sorry. Can
13 I see the other one?

14 Q. Of course, P-18, yes. If you need to refer to your
15 files to answer my questions --

16 A. No, I can look at this. Just a second. We prepared
17 several plats. Okay. P-17 is the one you asked about?

18 Q. Yes, sir.

19 A. P-17 was a -- on this property, at some point,
20 Mr. Timmons asked that we prepare a plat for a quitclaim
21 area, is what this plat shows, adjusted property line showing
22 a quitclaim area that moves the property line six feet off of
23 the existing house by Ms. Blank.

24 Q. How is that quitclaim area shown on that plat?

25 A. It is shown as a solid line. It's a property line

1 that comes through the existing home that we established.
2 And quitclaim area is a dashed line that shows 0.567 acres.

3 Q. And did you determine that line?

4 A. We determined what they requested, that we move the
5 property line --

6 Q. No. My question was, did you determine that line?

7 A. Yes.

8 Q. Okay. And how did you determine it?

9 A. We had the location of the house. And we brought
10 the property line off of the house so it wouldn't create a
11 setback issue, and then from each corner of the house, then
12 we went to the front, to the back, and we brought it back
13 down to the front.

14 Q. And P-18 is what, sir?

15 A. P-18 is when we actually established a -- it still
16 shows quitclaim area, but it actually shows a property line
17 over from the existing property line.

18 Q. All right. And who directed you prepared that?

19 A. Mr. Timmons.

20 Q. And how did you determine that additional property
21 line that you've described?

22 A. Based on the conversation with Mr. Timmons, that
23 would determine the line.

24 Q. Thank you. And these plats were submitted to the
25 Charleston County Department of Zoning and Planning for

Q 279

1 boundary line, which you depicted on P-18 as referencing the
2 area which was in dispute, whether that westerly boundary
3 was, in fact, the same boundary as Mr. Franklin showed on his
4 site plan?

5 A. And it's not.

6 Q. Why not?

7 A. Because we established a boundary using our methods.
8 And we were instructed, if you noticed, that often existing
9 house were 15.6 and 15.7 feet over. And Mr. Franklin on his
10 site plan actually showed 18 feet and 19 feet. But then he
11 also provided a survey that showed that it was 15 feet.

12 Q. What are you referring to, sir?

13 A. Mr. Franklin --

14 Q. Okay. Can I see the document?

15 A. Yes, sir.

16 Q. This is a site plan dated June 6th of 2005?

17 A. That's correct, sir.

18 Q. And that's the line that you used in preparing P-18,
19 correct?

20 A. Not exactly, but close.

21 Q. Well, is it within a margin of error that would be
22 acceptable to a surveyor?

23 A. Yes, because his property line is different than our
24 property line. So we shifted it over, yes.

25 Q. But it's within the margin of error of a surveyor,

1 correct?

2 A. Yes.

3 Q. So for all practical purposes, you are agreeing that
4 what's shown on P-18 is representative of Ms. Blank's
5 property line as depicted by Mr. Franklin?

6 A. As depicted by Mr. Franklin, not Parker Land
7 Surveying.

8 Q. That's what I'm asking. Okay. Thank you. And let
9 me show you what counsel has provided me with. It's an
10 affidavit dated February 12th. Is that your signature?

11 A. That's my signature.

12 Q. Thank you. I would like to mark Mr. Gillette's
13 February 12th, 2019, affidavit as P-26.

14 THE COURT: Any objection?

15 MR. MASON: No, Your Honor.

16 (Plaintiff's Exh. 26, 2/12/19 Affidavit of Mr.
17 Gillette, was received in evidence.)

18 MR. BERTELE: I have a few more questions, if I
19 might.

20 I have no more questions for Mr. Gillette.

21 THE COURT: Any questions of this witness?

22 MR. MASON: Yes. May it please the Court, Your
23 Honor.

24 THE COURT: Yes.

25 CROSS-EXAMINATION

1 BY MR. MASON:

2 Q. How many surveys have you done or been responsible
3 for for your company over the years?

4 MR. BERTELE: Objection. It's outside the scope of
5 direct examination.

6 THE COURT: That's not a proper objection.

7 THE WITNESS: Thousands. I've been licensed for 43
8 years.

9 BY MR. MASON:

10 Q. And are there certain rules that surveyors use when
11 there's boundaries disputes involved?

12 A. Yes.

13 Q. Can you just generally describe what that process
14 is?

15 A. Very basically, through several well-renowned
16 authors of boundary books, there's five criteria that we go
17 by in establishing boundaries. Number one is a natural
18 boundary, whether that be a river or creek or a stump or
19 national monument.

20 Number two are monuments such as concrete monuments
21 or old actual posts or blazed trees.

22 Number three would be monuments that are set in
23 subdivisions. And then you would use distances variance.

24 And the very last we ever consider is an acreage.

25 Q. Can you describe what you did to determine the

1 boundaries for this Copahee View subdivision, the lots that
2 we are talking about?

3 A. When we started this process --

4 MR. BERTELE: Judge, I'm going to object because,
5 again, we are getting into issue of the original survey that
6 was done. I didn't question this witness regarding any of
7 that. I asked him about the plats that he prepared that were
8 recorded.

9 THE COURT: You can't limit his cross-examination
10 about what you asked. I don't understand your objection.
11 I'm sorry. He can ask him anything that's relevant to the
12 lawsuit. Go ahead.

13 THE WITNESS: Yes. This subdivision was completed
14 and platted in the '70s. And on the subdivision plat, it
15 noted concrete monuments in certain areas, typically,
16 intersections and points of curvature, that type of thing,
17 and also, there was open pipes on the other corners. When we
18 first went out there on this lot, we didn't find other
19 corners. So we went down to the nearest intersection and
20 came down approximately 10 to 12 lots, located property
21 corners so we could establish the property corners correctly
22 for this lot No. 12.

23 Q. When you were trying to determine the boundaries of
24 Ms. Blank's lot, did you start with the subdivision plat?

25 A. Yes, the recorded subdivision plat.

1 and had a full opportunity to examine him on that in his
2 deposition. So I've given full notice of what we are going
3 into, that being that Ms. Blank home encroaches on Lot 12.

4 THE COURT: Do you have anything else?

5 MR. BERTELE: Other than the limitation contained in
6 the interrogatory answer, no.

7 THE COURT: This is a witness who was called by the
8 Plaintiff and asked questions about surveys. He was
9 identified as a surveyor in the discovery process.
10 Apparently, he was deposed. The interrogatory response has
11 been read to me. If he is tendered as an expert -- I guess
12 what I really mean is, you may tender him as an expert.

13 Now, the second part of what I heard him say is, he
14 doesn't object that he's qualified as an expert.

15 MR. BERTELE: Correct.

16 THE COURT: Okay. So I think where we are is that
17 this witness is qualified to testify as an expert in the
18 field of land surveying, which means you can give opinions.

19 Anything else y'all need me to rule on?

20 MR. MASON: No. Thank you, Your Honor.

21 THE COURT: What's your question?

22 BY MR. MASON:

23 Q. Question is, based on the surveying and field work
24 you did and your review of the subdivision plat and anything
25 else you looked at, did you form an opinion to a reasonable

1 degree of certainty, more probable than not, as to whether.
2 Ms. Blank's home encroaches on Lot 12?

3 A. Yes, we did.

4 Q. And what is that opinion?

5 A. We determined that it encroached on Lot 12.

6 Q. Now, did you review the site plan that Ms. Blank
7 submitted to Charleston County to get her building permit?

8 MR. MASON: Defendant's 4 is the same as Plaintiff's
9 2. It's another duplicative mark. However the Court wants
10 to handle that.

11 THE COURT: Any objection?

12 MR. MASON: Actually, it's not. Never mind, it's
13 not the same as P-2. It's its own exhibit.

14 THE COURT: Any objection to this exhibit?

15 MR. MASON: No, Your Honor.

16 THE COURT: Mark it in evidence, please.

17 (Defendant's Exh. 4, Site Plan of Engineering
18 Services, is received in evidence.)

19 Q. Mr. Gillette, you have in front of you Defense
20 Exhibit No. 4?

21 A. Yes.

22 Q. Okay. And do you believe this to be a copy of the
23 site plan that Ms. Blank submitted to Charleston County to
24 get permission to build her home on the lot that's designated
25 as "no lot" next to Lot 12?

1 A. Yes. We actually got a copy from Charleston
2 County.

3 Q. And does this site plan have the dimensions of all
4 of the property lines written on it?

5 A. Yes, it does.

6 Q. Can you tell from the document who prepared it?

7 A. Engineering services.

8 Q. And what is the distance of the rear property line?

9 A. It's kind of hard to read, but it looks like as
10 though it's 195.81.

11 Q. What about the front property line on Macoma Drive?

12 A. I think that's 55.50.

13 Q. And what about the property line that divides Lot 11
14 and Lot 12?

15 A. 192. I can't read beyond that, but 192.

16 Q. And what about the line that divides Lot 10 from Lot
17 11?

18 A. 262.92.

19 Q. And do you know if those dimensions were taken by
20 way of scaling off of the original subdivision plat?

21 A. I can't tell what Mr. Stevens did, but the original
22 subdivision plat actually doesn't show the distances on the
23 front and the back. And his note says "plat" on the front
24 and the back distances.

25 Q. Okay.

1 A. And, typically, that would mean you would get those
2 distances from the plat, not from the field.

3 Q. Do you believe that Defendant's Exhibit 4 correctly
4 states the distances that surround Lot 11?

5 A. I can't say whether it does or not.

6 Q. Can you tell me what distances you came up with from
7 Defendant's Exhibit 2?

8 A. We don't show the distance on this particular
9 exhibit.

10 Q. Do you have another exhibit with you that you made
11 notes on what the distances were?

12 A. Just a second. I do have an exhibit showing this.

13 Q. Please tell me what the distances are from the "no
14 lot" Lot 11.

15 A. On the back property line, we show 180 feet. On the
16 property line between Lot 11 and 10, we show 241.50. Okay?
17 On the front of the lot, there are actually two distances C1
18 and C2. C1 is 4.66. C2 is -- excuse me. I'm sorry. C1 is
19 9.32. And C2 is 54.80, which is 65.12.

20 Q. All right. Did you use that field work to render
21 your opinion that Ms. Blank's home encroaches on Lot 12?

22 A. Yes. Yes. And the exhibit that you showed for the
23 building permit is not the same as the -- another site plan
24 that was presented on that same lot.

25 Q. Can you show me what you are talking about?

1 A. (Indicating.)

2 Q. The document you just handed me, what is this?

3 A. This is a document from Mr. Franklin. Actually,
4 it's a site plan dated 6/6/05 that shows the distances --
5 different from what's shown on what was presented originally.
6 The front of the lot shows 55.50 on the plan that's submitted
7 to the County. On the plan that was submitted or dated 6/6
8 actually shows 74.03, almost 23 across the front. Back went
9 195 to 221.58.

10 Q. So the lot got bigger?

11 A. Yes.

12 Q. In other words, the plan they gave to Charleston
13 County showed certain distances that the house sit on, and
14 then after the house was built, there was another plan done?

15 A. I don't know if it was after. I think it was before
16 the house was built. But there's two -- the original plan
17 that was submitted to the county was -- the site plan, again,
18 is different dated 6/6/05, quite a bit different.

19 Q. You were just referring to a site plan prepared by
20 Franklin. Is that now marked Defendant's Exhibit 5?

21 A. Yes, sir.

22 Q. You were testifying about Defendant's Exhibit 5,
23 that that was -- you said it was dated what date?

24 A. 6/6/2005.

25 Q. Was that around the time Ms. Blank's home was built?

1 A. I am not exactly sure. I can't say.

2 Q. But it shows certain dimensions for her property.

3 Is this the one that was submitted to the county?

4 A. I can't say that. We didn't get this from the
5 county.

6 Q. What's the difference between Exhibit 4 and Exhibit
7 5?

8 A. On Exhibit 4, the front distance, again, I think
9 it's 55.50. And on Exhibit 5, it's actually expanded to
10 70.03, 18 1/2 feet longer. Across the back, Exhibit 4
11 showed, I think it's 195.81. And on the Exhibit 5, it's
12 actually 221.58.

13 Q. So does it appear to you that Engineering Services
14 prepared two plans that have different dimensions at the
15 front and the rear of the Ms. Blank's property?

16 A. Correct, which also would change the distances on
17 both sides.

18 Q. Okay. And which of Exhibit 4 or 5 did you find was
19 more in keeping with the subdivision plat?

20 A. Exhibit 4. On the -- well, on the previous exhibit,
21 we actually -- we showed the difference, on the overall
22 subdivision plat.

23 Q. Okay. That's Exhibit 2? Is Exhibit 2 the one that
24 you showed --

25 A. If you can bring that down a little bit, if you can

1 see, if you look at the "no lot", the red lines are based on
2 the subdivision plat as recorded. The green lines are
3 actually based on Exhibit No. 5 with the lot that was
4 expanding.

5 Q. As a surveyor, were you taking what Ms. Blank's
6 surveyor said and putting it on your drawings so you could
7 see where everything agreed or disagreed?

8 A. Correct.

9 Q. So the green lines on your -- on Exhibit Number 2
10 represent lines identified by Mr. Franklin, who is Ms.
11 Blank's surveyor, correct?

12 A. Correct, on the latest site plan he had.

13 Q. And then your lines that you identified by your
14 field work are in red?

15 A. Correct.

16 Q. Have there been other surveyors besides yourself and
17 Mr. Franklin that have looked at this issue?

18 A. Yes, sir, Mr. Arrington has looked at this.

19 Q. Okay. And did Mr. Timmons ask you to do anything
20 other than determine what the legal and correct property
21 lines were?

22 A. No. Our engagement with him was to determine the
23 property lines for Lot 12 so that we could stakeout his
24 house.

25 Q. Now, you've heard some testimony about a hatched

1 area or a shaded area. Were you at one point asked to
2 isolate the area in dispute in case Mr. Timmons just wanted
3 to give that land to Ms. Blank to solve her problem?

4 A. Yes. That was the first thing he asked us to do,
5 was identify that area.

6 Q. The area in dispute?

7 A. Yes, sir.

8 Q. Did you then get a plat approved with Charleston
9 County that took out the area in dispute so that Mr. Timmons
10 wasn't selling that to someone else?

11 A. Yes.

12 Q. Did you get that plat approved by Charleston County?

13 A. Yes.

14 Q. Can you describe for me the process that occurs in
15 order for the county to approve a plat? Do they actually
16 check the boundary lines that are on the documents you submit
17 to them?

18 MR. BERTELE: Objection. I think that the witness
19 can only testify to what he did, not what the County did.

20 THE COURT: You are asking him the process to get
21 the plot approved?

22 MR. MASON: Get the plot approved.

23 THE COURT: Overruled. You can answer it.

24 THE WITNESS: We submit to the Charleston County
25 Planning Department. And they review the plats to make any

1 comments or changes they would like us to make. And once we
2 make those changes, or if there are no changes, they stamp
3 the plat and we can take it to the RMC office and record it.

4 Q. Did that happen?

5 A. Yes, it did.

6 Q. There's a plat that had the highlighting on it that
7 was going to be an additional copy provided to the judge.

8 Did the highlighted area depict the area in dispute?

9 A. Yes, sir.

10 Q. And was the purpose of that just to try to work out
11 a settlement of this boundary line dispute?

12 MR. BERTELE: Objection.

13 A. That's what I understood. We were asking
14 Mr. Timmons to do that so that he could show exactly what
15 area very clearly.

16 MR. BERTELE: Judge, I think the witness answered
17 over my objection. And I think he understood the question.
18 I will withdraw my objection.

19 THE COURT: Okay. Thank you.

20 BY MR. MASON:

21 Q. Mr. Gillette, do your rules of professional conduct
22 call for you to try to help solve boundary line disputes if
23 that's something you can do as a surveyor?

24 A. We can show the evidence of fact, what's out there.
25 And then also we can suggest alternatives as to help resolve

1 DAVID EARL FRANKLIN,

2 having been duly sworn, testifies as follows:

3 THE CLERK: State your full name and spell your last
4 name for the record.

5 THE WITNESS: My name is David Earl Franklin,
6 F-r-a-n-k-l-i-n.

7 DIRECT EXAMINATION

8 BY MR. BERTELE:

9 Q. Good afternoon, Mr. Franklin. By whom are you
10 employed?

11 A. I'm sorry. I didn't understand the question.

12 Q. By whom are you employed?

13 A. I'm self-employed. Name of my company is Eco
14 Engineering and Construction.

15 Q. What's the business of Eco Engineering?

16 A. It's a full-service engineering design company. We
17 provide surveying. We provide mechanical, electrical,
18 structural design and stormwater management, pretty much soup
19 to nuts except for architecture.

20 Q. How long have you been in business as Eco
21 Engineering?

22 A. Eco Engineering was formerly called Engineering
23 Services, Inc. And it was formed in 1979.

24 Q. Now, what's your educational background, sir?

25 A. I have a Bachelor of Science degree in engineering

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1 science from University of Tennessee.

2 Q. And do you have all the professional licenses?

3 A. Yes, many licenses, of course, engineering in the
4 states of Tennessee, South Carolina, Georgia, California.
5 And land surveying in South Carolina. I'm a residential home
6 builder, licensed. I'm also a commercial -- hold commercial
7 licenses for both general contracting as well as mechanical
8 contracting.

9 Q. As well as mechanical?

10 A. Yes.

11 Q. And since you are licensed to engage in land
12 surveying in South Carolina, have you done so in the past?

13 A. What was the question again?

14 Q. I was asking about your activities in land surveying
15 in South Carolina.

16 A. Yes. I've been land surveying in South Carolina
17 since around 1980.

18 Q. And are you familiar with -- oh, excuse me. Does
19 your work in civil engineering -- you do work in civil
20 engineering, correct?

21 A. Yes.

22 Q. Does that include analysis of drainage sites and
23 costs to remediate drainage problems?

24 A. Yes, it does.

25 Q. Now, in connection with this case involving the

1 Copahee View subdivision, are you familiar with this
2 subdivision?

3 A. Yes.

4 Q. And what work did you do at Copahee?

5 A. In 2005 time frame, for Mr. Horton, a contractor, I
6 provided site plans for building residential houses, as well
7 as field layout of the residence and elevation certificates
8 for the finished floor elevations.

9 Q. And how many lots at the Copahee View subdivision
10 did you do this work on?

11 A. Well, we did three. But in order to do those three,
12 we had to do the ones between them, so ...

13 Q. In order to do what?

14 A. In order to do the three lots we did, there were
15 lots between those lots that, obviously, I had to locate
16 corners.

17 Q. So it was more than three?

18 A. It was three, plus the ones that I had to do in
19 order to get those.

20 Q. And are you familiar with Lot 11 at the Copahee View
21 Subdivision purchased by Ms. Blank, the Plaintiff here?

22 A. Yes, I am.

23 Q. Did you prepare a site plan in connection with her
24 purchase of that lot?

25 A. Yes, I did, from Mr. Horton.

1 Q. From Mr. Horton? He was the owner?

2 A. He was the contractor I was working for.

3 Q. Okay. Let me show you P-27. It's the full-size
4 subdivision plat. Are you familiar with this document?

5 A. I am.

6 Q. Is this the reference material that you utilized to
7 prepare the site plan for Lot 11 and the other lots that you
8 worked on?

9 A. That's correct.

10 Q. How did this plat compare with others that you have
11 utilized in the past to do surveying work?

12 A. This was an unusual plat in that it was not
13 certified to be the layout for the lots. It is certified for
14 road right-of-ways and other right-of-ways, drainage
15 right-of-ways, but it was not a plat actually certifying lot
16 layout.

17 Q. Okay. And when you did -- did you do field work in
18 connection with this surveying of the other lots --

19 A. Yes, I did.

20 Q. -- which you worked on?

21 A. Yes.

22 Q. And what were the results of that field work with
23 respect to what was shown on the plat marked P-27?

24 A. Well, the first thing that you generally do for --
25 to get a permit for your building is, you present a site plan

1 and you use the best information that's available, in that
2 case, it was this plat, to create your initial site plan.

3 Q. All right. Let me show you what's been marked as
4 Defendant's Exhibit 4. Do you recognize that?

5 A. Yes, I do.

6 Q. It's not a great copy.

7 A. Yeah. It's an old one.

8 Q. What is -- you prepared D-4, didn't you?

9 A. I prepared this plat.

10 Q. And at what stage of the process did you prepare
11 that?

12 A. That was prior to doing any field work. It's based
13 upon the information on this plat, on the previous survey
14 plat that you provided.

15 Q. P-27?

16 A. Yes.

17 Q. Okay. And subsequent to the preparation of D-4, did
18 you prepare another site plan?

19 A. Yes. One of the things I was contracted to do was
20 to lay the building out on the lot. So in order to do that,
21 I had to survey the lot. And upon the surveying of the lot,
22 there were significant discrepancies between the iron pipes
23 in the field and the plat. So, therefore, I prepared a new
24 plat and a new site plan to reflect the corners found in the
25 field.

1 Q. Okay. Let me show you what's been marked as
2 Defendant's Exhibit 5. It's dated June 6th, 2005.

3 A. That is the new plat.

4 Q. All right. And what does it indicate with respect
5 to property corners that you found in the field?

6 A. There were significant differences between what was
7 found in the field and what was -- what the plat showed. And
8 this was not unusual, because this was at least the second
9 particular lot that I had worked on. And the previous lot
10 had similar discrepancies.

11 Q. I see. And what property corners did you find when
12 you went out in the field to survey Lot 11?

13 A. I found all the corners.

14 Q. All the corners of Lot 11?

15 A. All four corners.

16 Q. What's the significance to you in terms of a
17 surveyor preparing a survey or site plan for a client?

18 A. Again, when you are preparing the site plan, you are
19 generally working on the best available data. And this was
20 the only plat available for this, for us to reference. Once
21 you go out and do your field work and you determine where the
22 actual corners are, then you base everything, obviously, on
23 what's actually out in the field.

24 Q. Okay. And each of the points on D-5 corresponded to
25 what, an iron pipe found in the ground?

1 A. Iron pipe found in the field, which lined up with
2 everything that you would think was set by a surveyor,
3 because everything kind of lined up.

4 Q. Okay. And that included the front lines of Lot 11?

5 A. Where the right-of-way is and approximately where
6 the property lines are, and I looked at the lots on either
7 side to confirm that they lined up with, you know, roughly
8 what the plat called for.

9 Q. Well, did you find the other corner -- did you find
10 the other --

11 A. I found --

12 Q. Withdrawn. Let me stop you for a second. I want to
13 reframe the question so it's clear.

14 A. Okay.

15 Q. As part of your work in confirming the location of
16 the pipes and the corners, did you locate a pipe or a corner
17 representing the other side of the Lot 12? In other words,
18 the westerly corner of Lot 11 would be the easterly corner of
19 Lot 12, correct?

20 A. Yeah --

21 Q. Let me finish the question. Did you find the
22 westerly corner of Lot 12?

23 A. Yes.

24 Q. Okay.

25 A. I found lot corners for -- between 12 and 13. I

1 think I may have found -- maybe it was just a fence line for
2 13.

3 Q. All right. Was Lot 13 one of the lots which you had
4 been engaged to survey or prepare a site plan?

5 A. Yes, yes, 13 was.

6 Q. So the westerly corner of Lot 12 would be the
7 easterly corner of Lot 13?

8 A. That's correct.

9 Q. Okay. So you were actually confirming the location
10 of Lot 13 at the same time?

11 A. That's correct.

12 Q. So you were out in the field in 2005 looking at this
13 land?

14 A. Yes. When we got into this, there was other things
15 going on before I went back out there. But the next time I
16 actually went out to look, the front left corner of Lot 11
17 was not in the ground.

18 Q. Well, excuse me. I think you are anticipating. I
19 don't mean to interrupt, but I was asking in connection with
20 your layout of Lot 11.

21 A. Yes.

22 Q. Your layout of Lot 11, all right? You were in the
23 field to look at Lot 11 in 2005?

24 A. That's correct.

25 Q. Okay. And you were also called upon to perform some

1 other services for Mr. Horton?

2 A. Yes.

3 Q. Did that involve staking the corners of the
4 property?

5 A. Involved staking the corners of the house.

6 Q. And of the house. Okay. And so, to your knowledge,
7 was the house located within the lot lines that you indicated
8 on that site plan?

9 A. That's correct, yes.

10 Q. Tell me, please, what's the substantial difference,
11 if any, between the site plan that you did and a survey?

12 A. The big difference was the front --

13 Q. No, I'm speaking in general now between what's
14 contained on a site plan and what's contained on a survey.

15 A. Again, the big discrepancy between the data that I
16 had and what I found in the field was the location of the
17 front property corner. However, when you went into the
18 field, it lined up perpendicular to the lot we found in the
19 back corner. So that told me that was the correct corner
20 from the front corner, but that was the big discrepancy.

21 Q. I see. Could you record your site plan as a plat in
22 the Charleston County planning office?

23 A. It's a format issue when you get to record a plat,
24 but it doesn't require any additional field information.
25 It's just substantially more information to get it in the

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1 format in order to record.

2 Q. Based upon your experience with Lot 13 and Lot 11 --
3 and what was the other lot that you had been asked to do work
4 on?

5 A. 9.

6 Q. Lot 9? Based upon your experience with 11, 9 and
7 13, in your professional opinion, would it have been
8 appropriate for a surveyor to scale off of the plat to
9 establish the property corners?

10 A. Not if you find monuments in the field. If the
11 existing pipes are there, there's no reason to be scaling
12 anything on that plat.

13 Q. Why is that, sir?

14 A. Because it's not an accurate -- like the plat says,
15 that it's not based for layout of lots. It's for the layout
16 of right-of-ways and easements, does not certify lot land.
17 So it's kind of like a preliminary plat for the lots.

18 Q. I see. And what distance did you use for the front
19 line of Lot 11, based upon your experience with the other
20 lots and the information that you found in the field?

21 A. Total front distance as shown on my revised site
22 plan was that the front distance should be a chord distance
23 on a radius, chord distance would be 74.03 feet.

24 Q. And total front property line is what?

25 A. That is the front property line.

1 Q. Of Lot 11?

2 A. Of Lot 11.

3 Q. I'm sorry. Thank you, Lot 11. I apologize. And
4 that's based upon what you found in the field?

5 A. That's correct.

6 Q. Did the front property line -- withdrawn. You said
7 that you also had occasion to establish the two corners of
8 Lot 12 as part of your work, since one of them was also the
9 corner of Lot 13?

10 A. Yes.

11 Q. And what was that front property line dimension, if
12 you recall?

13 A. 103.56.

14 Q. That's between existing pipes?

15 A. Yes. Next existing pipe, or whatever, for Lot 13
16 was 107. Okay. There's two dimensions on this particular
17 plat. And distance between the old pipes were actually 103.2
18 feet, as opposed to -- 103.2 as opposed to 103.56.

19 Q. And the 103.2 represents what, what's shown on the
20 plat?

21 A. Yes, from my survey, yes.

22 Q. Thank you. Now, do you recall the topography that
23 existed on Lot 11 at the time that you did your original work
24 in 2005?

25 A. The topography?

2303

1 Q. Yes, sir.

2 A. Yes, when I do my data collector, it records not
3 only location, but it records elevation.

4 Q. Okay. What was the natural flow of drainage and
5 stormwater on Lot 11?

6 A. From the street, there's a ditch along the back
7 property line. So it's from -- for Lot 11, the drainage was
8 actually flowing toward Lot 12 and also to the back of the
9 lot.

10 Q. What is this drainage ditch you are talking about?
11 Is it just a hole in the ground, or has it been formalized in
12 some way?

13 A. What's that?

14 Q. What is the function of this ditch in the back that
15 you've testified about?

16 A. I don't understand the question.

17 Q. All right. What about Lot 12, from your
18 observations then, how did Lot 12 drain?

19 A. Basically, from front to back.

20 Q. So from the street to this drainage ditch in the
21 back?

22 A. That's correct.

23 Q. And at my request, you reviewed the current
24 improvements on Lot 12 recently, did you not? Lot 12, I was
25 asking about whether you looked at the improvements on Lot

1 12?

2 A. Yes, I did.

3 Q. And you are familiar with the improvements on Lot 11
4 since 2005, are you not?

5 A. There's no significance improvements on Lot 11.

6 Q. Meaning what?

7 A. It doesn't look like the residence has been
8 expanded. The only significant improvement would be the
9 enclosure of the grounds.

10 Q. The enclosure of what?

11 A. Enclosure of the ground-level garage, parking and
12 the garage.

13 Q. Does there appear to be anything which would affect
14 the drainage of the lot from front to back as you said it
15 existed before?

16 A. Not on Lot 11.

17 Q. I see. Did you look at the drainage as it existed
18 at the time of a recent visit?

19 A. Yes.

20 Q. On Lot 12?

21 A. Yes. Lot 12 now had been improved with a very nice
22 house and driveway and --

23 THE COURT REPORTER: And what? You trailed off
24 there.

25 THE WITNESS: Lot 12 has a new residence and

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1 driveway.

2 THE COURT REPORTER: Okay. We'll leave it there. I
3 didn't hear the last few words.

4 THE COURT: Can you angle that microphone a little
5 more toward you. I am also having trouble hearing you.

6 Mr. BERTELE: Should I ask the question again,
7 Judge, so we can all hear it?

8 THE COURT: I think he stopped. He said very nice
9 house and driveway.

10 BY MR. BERTELE:

11 Q. Was there anything built on Lot 12 which, in your
12 opinion, affected the drainage of the property from front to
13 back?

14 A. Significantly.

15 Q. And what was that?

16 A. The drainage on Lot 12 now flowed from the house to
17 the street, across the new driveway onto Lot 11, as well as
18 whatever comes off of the house onto the driveway now flows
19 onto Lot 11.

20 Q. And this condition didn't exist before those
21 improvements were installed, to your knowledge?

22 A. Obviously not, yes.

23 Q. And did these improvements on Lot 12 affect, in your
24 opinion, the natural drainage flow on Lot 11?

25 A. Absolutely.

1 Q. In what way, sir?

2 A. In addition to the driveway being an impediment, at
3 the end of the driveway, there is significant vegetation and
4 higher grade to where it basically ponds on the side of the
5 driveway until it gets to an elevation to where it can
6 discharge back to the ditch.

7 Q. At my request, you prepared a report about this?

8 A. I did.

9 Q. And do you have a copy with you?

10 A. I do.

11 Q. Will you please refer to it, sir?

12 MR. BERTELE: And could I have it marked as
13 Defendant's 25?

14 MR. MASON: We object. It wasn't provided to us
15 until this morning. And it's dated this morning. This
16 litigation has been pending for some time and this witness
17 was deposed. And it wasn't provided in his deposition. So
18 we think it's too late to use as evidence.

19 THE COURT: You wish to be heard?

20 MR. BERTELE: Yes, Judge. Mr. Franklin was deposed
21 about two years ago in the earlier case that involved the
22 boundary line dispute. Since that time, we filed this case
23 with a claim of nuisance as a result of the creation of the
24 driveway impediment entitlement. And Mr. Mason never sent me
25 any demand for discovery with respect to that. And I

1 received this report this morning myself. And I submitted it
2 to him properly.

3 It's relevant to the issues that are now before the
4 Court. It wasn't relevant to the issues that were the
5 subject of Mr. Franklin's deposition two years ago, when the
6 only issue, as we heard, was the boundary line dispute
7 between Lot 11 and Lot 12. I've attempted to comply with the
8 rules of discovery in every respect, but I never got a
9 request for an interrogatory regarding experts. And,
10 certainly, the issue has been out there since I filed this
11 complaint, which was in 2016.

12 If Mr. Mason wishes a continuance to review the
13 report, I have no objection to that. But this is an issue in
14 the case that's been there from the beginning. And I
15 apologize for the fact that I didn't have this material
16 sooner. But it's necessary with respect to one of the claims
17 in the case.

18 THE COURT: Your objection is to admissibility of
19 the written report?

20 MR. MASON: Right. And it's also based on hearsay,
21 because the witness is here. So he wants to put in a written
22 version of his own testimony, and I also object on that
23 basis, that he could just simply testify to whatever he has
24 to testify to.

25 THE COURT: Anything else?

1 MR. MASON: No, Your Honor.

2 THE COURT: Anything else?

3 MR. BERTELE: No.

4 THE COURT: My experience has been that you don't
5 introduce the written report. The witness may testify
6 concerning the report. Do you have one? Mark it for
7 identification purposes only.

8 MR. BERTELE: Judge, I have an extra.

9 THE COURT: It's marked for identification purposes
10 only.

11 (Plaintiff's Exh. 25, David Franklin's report, was
12 marked for identification.)

13 BY MR. BERTELE:

14 Q. What was the purpose for which you were asked to
15 prepare a report?

16 A. The purpose of the report is based upon observations
17 by the customer, Mrs. Blank, about stormwater backing up onto
18 her property. And the report is to determine what may be
19 causing such backups.

20 Q. Did you determine the cause of the issue that Ms.
21 Blank was complaining about?

22 A. Yes. Some I have already previously mentioned.

23 Q. Yes.

24 A. But in my opinion, what happened on this particular
25 case is there was not significant planning and/or design of

1 the stormwater on her lot and how it may affect Mrs. Blank's
2 property.

3 Q. What's the basis of your opinion that there wasn't
4 sufficient design?

5 A. Charleston County has a stormwater management
6 program permitting procedure process. And for a
7 single-family residential lot less than one acre, there is a
8 form that's generally required to be certified to. And that
9 form indicates that it will be in substantial compliance with
10 the stormwater regulations. And I have identified three
11 areas in the stormwater management manual that would be
12 noncompliant.

13 Q. And what are those three areas that you have
14 identified as noncompliant?

15 A. Well, on page 210 of the stormwater manual, the
16 narrative requires the flooding issues and potential impacts.
17 Quality of downstream structures must be considered. And on
18 page 2 of 3, the stormwater runoff generated shall be
19 controlled to pre-development and/or natural grades and the
20 stormwater discharge to special protection areas with
21 sensitive resources or have existing flooding or water
22 quality issues.

23 And on page 3 of 11, there should be acceptable
24 quality controls, even detention structures that may be used
25 to protect against adverse downstream impacts that are

1 related to the increase in peak flow rates and flow volumes
2 from a land-disturbing activity.

3 Q. Are those the sections of the Charleston County
4 Stormwater Management Program permitting standards you were
5 reading from?

6 A. Yes. Those could have been corrected with proper
7 stormwater design for the lot.

8 Q. But you found that what existed on the site was
9 deficient with respect to those three areas?

10 A. In those three areas. And, basically, since the
11 driveway was constructed very near the property line,
12 whenever the water runs off of the driveway, it's going into
13 a swale on the property line. And that's a significant
14 increase in flow which really didn't exist before the lot was
15 developed.

16 Q. Based upon what exists there now, do you have a
17 proposed solution to prevent stormwater from overflowing Ms.
18 Blank's property?

19 A. I do.

20 Q. What is that solution?

21 A. I have taken one of the exhibits of the lot layout
22 for Lot 12 and basically recommended that the necessary trees
23 or vegetation be removed along that property line in order to
24 construct a proper drainage swale that goes basically from
25 the road back to the ditch in the back of the property.

1 Q. All right. What's the document that you are
2 referring to?

3 A. Would you repeat the question, please?

4 Q. Yes. I was asking what document are you referring
5 to that you marked up.

6 A. It would be the exhibit of Lot 12. It's in the
7 report.

8 Q. Is that August 17 plat, exhibit?

9 A. What's that?

10 Q. Is that dated August 17th?

11 A. Yes, August 17th, 2016.

12 MR. BERTELE: May I have this marked as D-20 (sic)?

13 THE COURT: Any objection?

14 MR. MASON: No objection.

15 THE COURT: Mark in it evidence.

16 THE COURT REPORTER: P-20.

17 MR. BERTELE: P-20, sorry.

18 (Plf. Exh. 20, 8/17/16 plat, was received in
19 evidence.)

20 BY MR. BERTELE:

21 Q. P-20 is marked as an exhibit. It's dated August
22 17th, 2016, correct?

23 A. That is correct.

24 Q. And it bears the seal of Mr. Gillette?

25 A. That's correct.

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1 Q. And this is what you marked up?

2 A. Yes.

3 Q. And let me show you, is that it?

4 A. Yes.

5 Q. And what are the red dotted lines here? What do
6 they signify?

7 A. They represent a swale to be constructed to drain at
8 a slope of 0.5 percent to the drainage ditch in the back.

9 Q. Is the drainage ditch indicated on the Exhibit P-20?

10 A. The drainage ditch is added with a note. It is not
11 actually a part of the original plat.

12 Q. Well, you red lined it in, so to speak?

13 A. That's correct.

14 Q. And that's red line marked "ditch" is representative
15 of where the ditch is?

16 A. That's correct.

17 Q. And there are other markings on here, "low area not
18 draining," is that your marking in red?

19 A. Right, the area between the new driveway and
20 Mrs. Blank's house.

21 Q. All right. And is the driveway that was constructed
22 on the property next-door, that's shown on this exhibit?

23 A. That is correct.

24 Q. And what is your proposed solution to this flooding
25 problem?

1 A. To remove the necessary vegetation, trees, and put a
2 ditch in. And typically when you are doing something like
3 that, I recommend you sod rather than attempt to seed the
4 drainage swale so it would not wash away on you.

5 Q. Does your report contain copies of the various
6 sections from the Charleston County Stormwater Management
7 Program?

8 A. It contains excerpts from the paragraphs that I
9 read, as well as the application form that is typically
10 required to get a building permit.

11 Q. All right.

12 MR. BERTELE: Your Honor, I would offer those
13 excerpts from his report as being copies of regulations.
14 He's testified to them. And, therefore, I think that they
15 are an appropriate exhibit. They don't contain his opinion.
16 They contain only copies of the permitting standards and
17 procedures for stormwater management.

18 THE COURT: Any objection?

19 MR. MASON: No, Your Honor.

20 THE COURT: Mark those in evidence, please.

21 (Plandtiff's Exh. 25, Excerpts from Mr. Franklin's
22 report/copies of regulations, was marked in evidence.)

23 BY MR. BERTELE:

24 Q. Did you perform a cost estimate for the work that
25 you determined was necessary to solve the existing flooding.

1 problem on Lot 11?

2 A. Well, actually, I prepared a proposal using my
3 company that I have my general contracting license with, Eco
4 Harbor, Inc. In that proposal, I have records survey, tree
5 survey, 2,000; drainage plan, 2,500; permits, 500; mobilized
6 equipment, 1,000; remove trees and grind stumps, 3,000.

7 Q. Why is that necessary, sir?

8 A. There are several trees that had to be removed. And
9 they need to be ground up, as opposed to dug out. If you dig
10 them out, they make a big mess. Then you need to haul away
11 dirt and debris, 1,500 for that. Separation of the swale,
12 1,000; cut the swale, couple thousand; and sod the disturbed
13 areas, six pallets at 4,000. That's labor into it. And
14 clean up and demobilize, 750. Total construction cost
15 \$18,250; overhead and profit, 5,000; contract price,
16 \$23,250.

17 Q. Does the \$23,250 represent your best estimate of the
18 cost to install a swale and make other modifications to Ms.
19 Blank's property to alleviate the flooding problem?

20 A. That's my proposal to her.

21 MR. BERTELE: Thank you. I have no further
22 questions.

23 MR. MASON: May it please the Court, Your Honor.

24 THE COURT: Yes.

25 CROSS-EXAMINATION

1 BY MR. MASON:

2 Q. Mr. Franklin, you were the professional who was
3 responsible to make sure that Ms. Blank's house was located
4 in the right place on Lot 11; isn't that correct? That was
5 your job?

6 A. Yes.

7 Q. All right. And you did it without going out to the
8 field; isn't that correct? You first drew the site plan
9 without going out in the field at all? Isn't that right?

10 A. Which is a standard industry practice, right.

11 Q. And when you went out to the field, you determined
12 that her property was located on wetlands and that the house
13 could not be built where you had drawn it on the plan; isn't
14 that correct?

15 A. That is correct.

16 Q. And it couldn't be built in accordance with the plan
17 that you submitted to Charleston County to get the building
18 permit; isn't that correct?

19 A. That's correct.

20 Q. You had to move the house; isn't that correct?

21 A. Absolutely.

22 Q. And you moved the house without telling Charleston
23 County and without filing a revised site plan; isn't that
24 correct?

25 A. That could be correct, yes.

1 Q. Well, it is correct, isn't it?

2 A. That's correct.

3 Q. And what should have been done is, you should have
4 stopped at that point in time and gone back to Charleston
5 County and filed a revised site plan; isn't that correct?

6 MR. BERTELE: Objection. This has nothing to do
7 with the issues here, Judge. The house had been built. They
8 could have challenged it back in 2015. They didn't bring any
9 claim about the house not being built according to whatever
10 was submitted originally. And we are past that now, Judge.
11 The house is there. The issue is the boundary line and the
12 damage done by the construction on Lot 12.

13 THE COURT: You wish to be heard?

14 MR. MASON: I think it's very relevant, Your Honor.
15 It's why she encroaches on the lot next-door, is because she
16 couldn't build it on her lot. So it's part and parcel of
17 this whole case and why we are here today.

18 THE COURT: Anything else?

19 MR. MASON: No, Your Honor.

20 THE COURT: Anything else?

21 MR. BERTELE: No, Judge.

22 THE COURT: This is not a ruling on the res judicata
23 issue. It goes to bias. It's admissible. Go ahead.

24 BY MR. MASON:

25 Q. Thank you. And the work you did for the contractor

1 was a good client of yours; isn't that correct?

2 A. Yes.

3 Q. So did he call you and say, hey, Mr. Franklin, we
4 can't build this house where you've shown it on the site
5 plan, come out here and have a look?

6 A. No, that was not necessary.

7 Q. Why?

8 A. Because I made the change myself.

9 Q. You went out there and saw there was a problem and
10 you went out there to survey it?

11 A. And I changed it myself. The client did not have to
12 ask me.

13 Q. You could tell it was wrong when you went out there?

14 A. I notified the client that it would be necessary to
15 relocate the house for the reasons stated. And it is also
16 very common that an engineer or a surveyor can make changes
17 to his plans without necessarily notifying Charleston County.

18 Q. Well, you also designed the foundation for this
19 home; isn't that correct?

20 A. I did. Yes, I did.

21 Q. Did you design the home itself or just the
22 foundation? Did you design the home itself or just the
23 foundation?

24 A. He already had plans for the house. So, basically,
25 the only thing he required was the foundation plan.

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1 Q. And what flood elevation was this property in? Let
2 me just ask you. Was this a house that had to be elevated?

3 A. Yes, it was in a flood zone, and we did elevate the
4 house.

5 Q. Like a drive-under type house foundation?

6 A. Parking underneath, yes.

7 Q. And, in fact, it would be illegal to enclose the
8 ground floor area of the house, isn't that correct, from an
9 engineering standpoint?

10 A. Not in this flood zone.

11 THE COURT: I didn't understand. What did he say?

12 THE WITNESS: It's in an A flood zone. You can
13 enclose in an A flood zone.

14 BY MR. MASON:

15 Q. Were you involved in getting any kind of permit to
16 enclose the downstairs area of this house?

17 A. No.

18 Q. It wasn't part of your foundation design; isn't that
19 correct?

20 A. It wasn't part of my scope of work.

21 Q. But your foundation plan showed it open underneath?

22 A. It did.

23 Q. So if there was a 1,000-year flood event or
24 whatever, water could pass under your foundation; is that
25 right?

2319

1 A. Absolutely.

2 Q. And some point after you were involved, Ms. Blank
3 closed it in. And you don't know whether that was done with
4 a permit or not; isn't that correct?

5 A. That's correct, I don't know.

6 Q. All right. Now, did you see on the subdivision plan
7 where it says all lots have to be raised one foot above the
8 elevation of the road?

9 A. That is a -- that's a former Charleston County
10 requirement. It's now actually two feet above the flood
11 zone. But that is not anywhere on any documents that I know
12 of.

13 Q. Do you have the full-size one? I think it's 27. Is
14 it your testimony that you -- can I see? You might have it
15 up here.

16 MR. MASON: May I approach the witness to see if
17 he's got the exhibit?

18 BY MR. MASON:

19 Q. Exhibit 27, do you see where it says at No. 2, all
20 lots are to be filled in a minimum of one foot above the
21 bottom of the roadway ditch at the right-of-way line and
22 graded to drain in accordance with the county road code?
23 Have I read correctly from Exhibit 27, sir?

24 A. Yes.

25 Q. So that was the drainage requirement at the time

1 this subdivision was platted; isn't that correct?

2 A. That's correct.

3 Q. And isn't it correct that Ms. Blank's lot, the lot
4 you call Lot 11, is not graded to that standard as we speak
5 right now?

6 A. I am not so sure about that. Because I think the
7 elevation at her house is higher than the road.

8 Q. It says the lot, isn't that what it says?

9 A. Yes, says the lot. But the lot is already graded a
10 foot above the ditch, and in this particular case, there's
11 not a ditch on the front.

12 Q. Is it fair to say you didn't do anything to check to
13 see whether that lot meets the elevation requirement of the
14 plat?

15 A. I don't think it applies because there's not a ditch
16 in the front.

17 Q. So what happened, Mr. Franklin, is when you got out
18 to the field, you realized the house couldn't be built in the
19 wetlands where you had originally sited it, so you moved it
20 closer to Lot 12; is that correct?

21 A. Absolutely.

22 Q. How much further did you move it over to get it out
23 of the wetlands?

24 A. I will look. Appears to be about -- well, really
25 not that much.

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1 Q. Did you move it over about 20 feet?

2 A. No. Well, let's see. Okay. Yeah, the -- about the
3 same distance off the lot line. It was the lot line that
4 moved 20 feet. It wasn't the location of the house relative
5 to the lot line.

6 Q. So did you move the house 20 feet and the lot line
7 20 feet?

8 A. I didn't move the lot line.

9 Q. Well, you moved it from what you originally -- you
10 originally scaled out the property when you laid out the
11 house, you had one set of dimensions. Then when you went out
12 there and had the wetlands problems, you did another plan
13 that had another totally different set of dimensions; is that
14 correct?

15 A. That's correct.

16 Q. My question is, if you look at the original site
17 plan you did, you showed the front by the road at about 55
18 feet. But then when you went out there and saw you had a
19 problem, it's now 74 feet. So my question is, that 20-foot
20 differential, is that how much you slid the house over?

21 A. Approximately. But we did not have a problem
22 because we moved it to where the property line is, as opposed
23 to where the plat called for it. That's not a problem.

24 Q. So by moving the property line, you solved your
25 problem; isn't that correct?

1 A. I did not move the property line. I determined the
2 property line.

3 Q. And you determined the property line was 20 feet
4 more than it was when you did the site plan; isn't that
5 correct?

6 A. The plat was -- the plat that I prepared, the site
7 plan was wrong. It was incorrect, invalid. No discussion.
8 I put the lot where the property line is because of the
9 existing corners. There was no moving the property line.
10 That is an irrelevant argument.

11 Q. Well, you did move it?

12 A. I did not move the property line.

13 Q. You went out there and claimed you found some things
14 in the field; isn't that correct?

15 A. I did not claim to find anything. I found the
16 corners.

17 Q. And that solved your problem, right?

18 A. There was no problem.

19 Q. Do you have the -- let me see the exhibits you've
20 got in front of you there, please, sir. I'm going to put
21 them up on the screen real quick. I show you what's been
22 marked Exhibit 4. You prepared that; is that correct?

23 A. That's correct.

24 Q. You submitted that to Charleston County. The red is
25 from the prior use of Elmo. You prepared Exhibit 4; is that

1 correct?

2 A. Yes.

3 Q. And you submitted this to Charleston County to get a
4 building permit for your long-time general contractor client;
5 isn't that correct?

6 A. That is correct. And it has a reference on it that
7 it was referencing the plat that is not a certified plat.

8 Q. All right. And on Exhibit 4, you also show on there
9 notations that there's iron pipes found; isn't that correct?
10 Isn't that correct, sir?

11 A. I can't read it.

12 Q. Do you see the little circles at each of the four
13 property corners?

14 A. Yeah.

15 Q. Is that a symbol that there's some pipe found?

16 A. Yeah, that's a symbol that there should be a pipe
17 there.

18 Q. Okay. But you wouldn't have been able to show any
19 pipes on this drawing because you've never had been out there
20 and surveyed the lot --

21 A. That's correct.

22 Q. -- at the time you did Exhibit 4?

23 A. That's correct.

24 Q. So you prepared a site plan that showed that
25 property corners were found when you hadn't even been out to

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1 the field on this project yet; is that correct, sir?

2 A. I think that was an assumption that I made that I
3 would find corners there, and that assumption was wrong.

4 Q. Even though you testified at length how screwed up
5 this subdivision is and all that, you --

6 A. Right.

7 Q. -- assumed you would find property corners and you
8 put them on a survey on a job you had never been to before;
9 isn't that correct?

10 A. That's correct.

11 Q. In fact, you don't hold yourself out as a surveyor;
12 is that correct?

13 A. That's not correct.

14 Q. At the time you gave your deposition, you didn't
15 hold yourself out as a surveyor; isn't that correct?

16 A. Well, when you've been surveying for 30 years, I
17 don't know how much more you have to do to be a surveyor.

18 Q. So you've never gone to school to take any
19 continuing education classes in surveying; is that correct?

20 A. I have passed the State of South Carolina's
21 surveying test. And that is no small feat.

22 Q. But you don't regularly do surveys? That's not the
23 type of work you regularly do, is it, sir?

24 A. I do surveying when I need to do surveying.

25 Q. And when you needed to do surveying on this project

1 Q. So he found some markers. And did he properly use
2 those markers to locate other points on the surveys?

3 A. Well, he used the -- he showed right-of-way markers
4 on his plat. But that doesn't necessarily mean that a survey
5 marker is a property line.

6 Q. So you disagree with how he used some of the
7 concrete monuments; isn't that correct?

8 A. I don't know how he used the concrete monuments.

9 Q. Can we looking at Exhibit 4? If I read correctly,
10 on Macoma Drive, you put down that the front distance was 55
11 feet, 55.57 feet. And you wrote the word "plat". And then
12 in the back, you wrote that it's 195.81. And you wrote the
13 word "plat".

14 Then you went out there and found the problem about
15 not being able to build a house in the wetlands. You
16 prepared Exhibit 5. And now you have the front distance at
17 74.03 in the field. And you had the back distance at 221.58
18 in the field; isn't that correct?

19 A. That's correct.

20 Q. So as I stated, the lot grew in the front and grew
21 in the back by a little more than 20 feet once you found the
22 problem?

23 MR. BERTELE: Objection. We've been through this
24 many times. It's repetitive.

25 THE WITNESS: The lot did not grow --

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1 survey Lot 11, do a building layout on Lot 11, and revise the
2 site plan for Lot 11. You charged a total of \$750; is that
3 correct?

4 A. Survey, 250; building layout, 250; revised site
5 plan, 250 for Lot 11.

6 Q. So are you the one who physically located the house
7 where it sits right now?

8 A. Yes.

9 Q. Okay. And you've used a couple words during your
10 testimony where you referred to the driveway constructed by
11 Lot 12 on their property. It's not your opinion, is it, that
12 Lot 12 encroaches on Lot 11, is it?

13 MR. BERTELE: Objection.

14 THE WITNESS: I don't understand the question.

15 MR. BERTELE: I don't understand the form of the
16 question. There's no -- I'm sorry. I don't understand the
17 form of the question.

18 THE COURT: It's not your opinion what?

19 MR. MASON: In testifying about the drainage of --

20 THE COURT: I don't need an explanation. What's
21 your question?

22 MR. MASON: Is whether your work indicated that the
23 driveway on Lot 12 encroaches in any way on the Lot 11?

24 THE COURT: You may answer the question if you can
25 answer.

1 THE WITNESS: Based on the plat that I drew the
2 sketch on, it does not appear to encroach on Lot 11.

3 BY MR. MASON:

4 Q. In other words, it's your opinion that all of Lot
5 12's improvements are physically on Lot 12; isn't that
6 correct?

7 A. That's what I understand, yes.

8 Q. Okay. And have you seen any drawings that show that
9 the building that's on Lot 11, Mrs. Blank's house, encroaches
10 on Lot 12?

11 A. Repeat the question.

12 Q. Yeah. Have you seen any surveys that show that the
13 building on Lot 11 encroaches on Lot 12, Ms. Blank's house?

14 A. Yeah. I saw some preliminary discussion about when
15 you use the erroneous survey subdivision plat, that you could
16 get that.

17 Q. Well, two other surveyors have reviewed your work
18 and gone out in the field, and you have disagreements with
19 those gentlemen; isn't that correct?

20 A. I don't have a disagreement. I only know that I
21 located a lot based upon monuments in the field and not
22 scaling plats.

23 Q. Okay. And so is it your testimony that whoever
24 reviewed what happened, what the lay of the land is out
25 there, should have been looking for monuments and based their

1 even a numbered lot, it says "no lot"? That raises some red
2 flags about why is it called "no lot". You didn't -- that
3 didn't ring in your mind?

4 A. Nope.

5 Q. Now, when you took some pictures of the driveway, I
6 noticed you didn't use any kind of a level when you took the
7 photos; is that correct?

8 A. No, I just took photos.

9 Q. So if these properties were properly separated, in
10 other words, if both the houses on Lot 11 and Lot 12 each
11 have the legally required setback, would there be enough land
12 in between them to create a swale?

13 A. I'm not sure how to answer the question, because
14 improvements on Lot 12 being at or near the property line do
15 not allow sufficient room to build a swale at the property
16 line.

17 Q. Well, I guess it depends on where the property line
18 is.

19 A. There's no discussion about where the property line
20 is. That's solved. That's a closed issue. There is no
21 discussion about where the property line is. That is an
22 erroneous argument.

23 Q. The reason you are yelling at me, sir, is because
24 you are emotionally connected to that argument because it
25 reflects on the quality of work you did; isn't that correct?

1 A. No, because I think it's stupid.

2 Q. So you think that the work that surveyors Gillette
3 did and Arrington did is stupid? Isn't it part of your
4 ethical duty as a surveyor to confer with your colleagues and
5 try to reach some understanding or agreement based on where
6 boundaries are located based on the rules you use in your
7 profession? Isn't that something you are supposed to do?

8 A. It depends.

9 Q. Depends on?

10 A. Whether or not there's any discussion about it.
11 There should be no discussion about this.

12 Q. So if surveyors have questions, there's no
13 discussion? Is that what you are telling me? So you don't
14 call up somebody who did a plat or did some work in front of
15 you if you have a question? You don't do that?

16 A. If it's appropriate.

17 Q. And it often is, right? Look what I found here,
18 what do you think --

19 A. Rarely is it.

20 Q. So I want to be real clear for the record what it is
21 you claim to have found when you went out there on Exhibit 5.
22 I am going to put it up here in the four corners. So what is
23 it you claim to have found at this corner of -- at the south
24 corner of Macoma Road? What is it you claim to have found
25 where my finger is?

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1 A. An iron --

2 MR. BERTELE: Excuse me. Could counsel identify for
3 the record what he's pointing to? I see his finger, but I
4 would like him to say what it is.

5 BY MR. MASON:

6 Q. Exhibit 5, IO, are you saying you found what? You
7 are saying you found --

8 A. IO represents iron old. And that would be a
9 surveyor monument, iron pipe old.

10 Q. What did you find at the other, at the north corner
11 of Macoma Drive the front?

12 A. Same thing.

13 Q. And what did you find at the --

14 A. The same thing.

15 Q. So in all four corners, you say you found an iron
16 old, but you don't say what type of iron, isn't that correct,
17 what type of iron?

18 A. That's right.

19 Q. What type of iron? I'm asking you. You didn't say
20 what type. I'm asking you now, what type of iron was it?

21 A. It was approximately about a three-quarter inch iron
22 pipe.

23 Q. When you say "pipe", do you mean hollow in the
24 middle?

25 A. Yes, I believe it was hollow in the middle.

1 THE WITNESS: I really can't answer that question --

2 THE COURT: Hold on.

3 THE WITNESS: -- and the reason is --

4 THE COURT: Hold on, please. I've got to rule.

5 I've ruled that the photograph -- he can't use the
6 photograph to answer questions. And you keep referring back
7 to the photograph, which is creating a dilemma for me.

8 Listen to his question and answer his question if
9 you can, but don't make reference to that photograph, because
10 I kept it out.

11 THE WITNESS: Well, I can't answer the question
12 because wetlands were never officially determined. It was
13 based upon my professional judgment that we were getting too
14 close to the wetlands. And it was my recommendation to
15 relocate the house different than what was originally shown
16 on the original site plan.

17 BY MR. MASON:

18 Q. Well, when you relocated the house, did you relocate
19 it towards Lot 12 as little as you had to under the
20 circumstances, or what was the thought process about why you
21 moved it towards Lot 12 and how far you moved it? So tell me
22 your thought process.

23 A. That is a good question. And I did attempt to
24 relocate the house as far away from the wetlands as I
25 could.

1 Q. That's how it ended up where it ended up?

2 A. That's how it is where it is.

3 MR. MASON: Nothing further, Your Honor.

4 THE COURT: Do you have anything else?

5 MR. BERTELE: Yes, a few questions, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. BERTELE:

8 Q. In your opinion, was the lot and the construction of
9 the house on Lot 11 graded and built in accordance with
10 applicable codes and ordinances in effect at the time of the
11 construction in 2005?

12 A. Yes.

13 Q. And you've told us that your original site visit
14 in '05 was when you found those iron pipes. Now, you
15 returned to the site when this initial -- when the first
16 lawsuit was brought, did you not?

17 A. That's correct.

18 Q. And did you find those same iron pipes there?

19 A. No. The front left corner was laying on the ground,
20 and so I reset it.

21 Q. Meaning had been removed?

22 A. It was just on the ground. I don't know how it got
23 taken out.

24 Q. The last time you saw it, it was in the ground,
25 right?

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1 THE COURT: Call your next witness, please.

2 MR. BERTELE: Thank you, Your Honor. Mr. Joel
3 Evans.

4 JOEL EVANS,

5 having been duly sworn, testifies as follows:

6 THE CLERK: State your full name and spell your last
7 name for the record.

8 THE WITNESS: Joel Hayden Evans, E-v-a-n-s.

9 DIRECT EXAMINATION

10 BY MR. BERTELE:

11 Q. Good afternoon, Mr. Evans. By whom are you
12 employed?

13 A. Charleston County.

14 Q. And what's your title and position with Charleston
15 County?

16 A. I'm the planning director.

17 Q. And this case concerns the common boundary line
18 between two lots, one owned by Ms. Blank and the other
19 formerly owned by the Defendant here. We've already had some
20 testimony by Mr. Gillette regarding two plats that he
21 submitted for approval coming out of P-17 and 18, please:

22 Please take a look at P-17 and 18, and tell me
23 whether they bear the seal of the Charleston County Planning
24 Commission?

25 A. Yes. This plat has the -- it looks like the

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1 approved and recorded plat for the county, yes.

2 Q. And what about the other one?

3 A. Yes. This is the approved plat, yes.

4 Q. I see. And in connection with the submission of
5 these plats, does the Charleston County Planning Commission
6 conduct any independent investigation of the references on
7 the plat?

8 A. No. That is for the surveyor to provide. And then
9 they attest to that by their signature and their seal.

10 Q. So you are relying upon what the surveyor tells you
11 is the property line?

12 A. Correct.

13 Q. And does Charleston County Planning Commission
14 conduct any title search or investigate the public records
15 regarding any claims against the particular property that's
16 the subject of the plat?

17 A. No.

18 Q. And is it fair to say that Charleston County
19 Planning Commission does not attest to the validity of the
20 boundaries, the borders that are shown on those plats?

21 A. No. Again, we just take this in. When a surveyor
22 submits a property boundary or plat, we take it in, to see if
23 it complies with our zoning and land development regulations
24 ordinance, and process it accordingly.

25 Q. I see. Now, these plats contain a legend, quitclaim

1 area. Do you see that? I think it's on P-17.

2 A. I do see that.

3 Q. Okay. Does Charleston County Planning require that
4 any such areas that are being excluded by the owner be
5 designated as such? Do you follow my question?

6 A. I don't. Can you clarify?

7 Q. The quitclaim area, is that something -- if the
8 owner was going to exclude certain property, would the County
9 require that line?

10 A. Exclude it from the plat?

11 Q. Yes, sir.

12 A. Yes, sir. They would have to clarify what it is
13 they are excluding or not excluding.

14 Q. So this line shows the area being excluded from this
15 plat, correct?

16 A. I believe so.

17 Q. I see. And so if there was some error or mistake in
18 what was shown on the plat, what would the property owner
19 have to do in order to correct that and show an accurate or a
20 different property line than is shown on the original plat?

21 A. Resubmit another plat.

22 Q. And the plats that are approved by Charleston
23 County, are they used to develop maps and so on and other --
24 by other county agencies?

25 A. Yes. Our plats are, after they've been approved and

1 recorded, they go on to our mapping department eventually.
2 And then the mapping department will map them in their GIS
3 system.

4 Q. So that's where the maps that appear on the GIS come
5 from, what somebody submits to you for recording?

6 A. Correct.

7 Q. And so those maps are subject to the same
8 limitations you told me about as to reliability and accuracy
9 of the boundaries?

10 A. That's correct, yes.

11 MR. BERTELE: No more questions.

12 THE COURT: Cross.

13 CROSS-EXAMINATION

14 BY MR. MASON:

15 Q. If there were two adjoining property owners in the
16 existing subdivision that had a boundary line dispute and
17 they were trying to resolve it, would this be a method by
18 which they could come to the County and say, hey, we are
19 shifting this property or agreeing to shift the boundaries?
20 Is this the proper procedure to follow?

21 A. The subdivision process, correct.

22 Q. So if these parties were actually trying to resolve
23 an encroachment issue and they hired surveyors to help them,
24 the process you have in your file is the proper process to
25 file; isn't that correct?

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1 A. That's correct. If there's going to be a property
2 line adjustment of any sort, then the process would be to
3 come to Charleston County, submit a plat showing that
4 adjustment, and we process the application.

5 Q. And was that what was done in this case?

6 A. In this case, it looks like in 2015, a survey was
7 submitted showing a property boundary adjustment.

8 MR. BERTELE: Excuse me, which document are you
9 referring to?

10 THE WITNESS: I'm sorry. Excuse me. I grabbed the
11 files when I found out I was testifying out of my office from
12 the subdivision files.

13 MR. BERTELE: I was asking which of the two, P-17 or
14 P-18, you are referring to?

15 THE COURT: I don't know that he's got -- does yours
16 have exhibit stickers on it?

17 THE WITNESS: No, sir. I'm -- well, the ones that
18 he handed me, Your Honor, yes. Sorry. Yes.

19 MR. BERTELE: Which one?

20 THE COURT: Which one has the quitclaim section on
21 it?

22 THE WITNESS: They both do.

23 THE COURT: Okay. Go ahead.

24 BY MR. MASON:

25 Q. Mr. Evans, the language about the quitclaim, the

1 plat doesn't itself change title, but if references to a
2 quitclaim area, then that reference is to a deed that could
3 be signed at some future time to effectuate the plat? Is
4 that -- when it says future quitclaim area, did you
5 understand that the parties were asking for permission to
6 make this adjustment? And it wouldn't have been right for
7 them to do the adjustment until the County gave them
8 permission; isn't that correct?

9 A. Correct.

10 Q. So you wouldn't have expected that exchange to have
11 already taken place?

12 A. Correct.

13 Q. You were giving them permission as to whether they
14 could do it, right?

15 A. Correct.

16 MR. MASON: Your Honor, may I approach the witness?

17 THE COURT: Sure.

18 BY MR. MASON:

19 Q. Can you show me the application for this whole thing
20 out of your file? Mr. Evans, does your department deal with
21 building site plans as something that it does, like approve a
22 building site plan for somebody to get a building permit?

23 A. Yes, a site plan is required for someone who is
24 getting a building permit.

25 Q. If somebody submits a site plan and then they go out

1 in the field and see they can't build their house where they
2 have sited it, for some reason, and then they change it, is
3 that -- do they then need to come back to the construction
4 and building permit department for planning to submit a
5 revised site plan?

6 A. It should be resubmitted. It happens. We realize
7 it happens regularly. I'm sure it does, because I've seen
8 adjustments out in the field. But it should be resubmitted
9 to us to make sure that it meets the setback requirements.

10 Q. Okay. And if it's resubmitted, then you go through
11 a process of checking it?

12 A. Yes. And the purpose of it is, again, just to make
13 sure that it meets the zoning requirements, which means the
14 setbacks.

15 Q. Understood. And if it doesn't, then it could result
16 in a denial of the permit?

17 A. A denial or there are other avenues. Someone can
18 ask for a variance, if it's in the setbacks, yes.

19 Q. And do you happen to know the setbacks for this
20 subdivision we are talking about, the Copahee View?

21 A. I believe so, by looking up the plat in the file. I
22 believe it's 5 feet on the side and 25 on the front. And it
23 looks like 15 on the rear.

24 MR. BERTELE: I'm sorry, sir. You spoke a little
25 quickly.

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1 PATRICIA ANN TIMMONS,

2 having been duly sworn, testifies as follows:

3 THE CLERK: Please state your full name, spelling
4 your last name for the record.

5 THE WITNESS: Patricia Ann Timmons, T-i-m-m-o-n-s.

6 DIRECT EXAMINATION

7 BY MR. BERTELE:

8 Q. Good afternoon, Ms. Timmons. We are here again on
9 same issue as was brought to court back in 2015, the boundary
10 line between Lot 12, which you formerly owned, correct?

11 A. Yes.

12 Q. On behalf of the trust, the Gordon Timmons Trust --

13 A. Yes.

14 Q. -- and Ms. Blank. You were a plaintiff in that
15 case, were you not?

16 A. Yes.

17 Q. And that case was brought to resolve that boundary
18 line dispute, wasn't it?

19 A. Yes.

20 Q. And at the time that you bought or the trust
21 bought -- excuse me. I will reframe the question. At the
22 time that the trust purchased Lot 12 -- by the way, how did
23 you acquire title to this property?

24 A. We purchased the property.

25 Q. Who did you buy it from?

R 341

1 A. Not that I'm aware of, other than this particular
2 case.

3 Q. Well, how about the case of Eric Hakkila v. the
4 Gordon Timmons Exempt Family Trust.

5 MR. MASON: Objection, Your Honor. Relevance.

6 THE COURT: How is it relevant?

7 MR. BERTELE: I will withdraw the question.

8 THE COURT: All right.

9 BY MR. BERTELE:

10 Q. So when you bought this property from the bank in
11 2013, did you decide to buy this property?

12 A. Personally?

13 Q. Yes, ma'am, as the trustee.

14 A. As the trustee, not only myself, my husband and I
15 decided to buy this.

16 Q. And the purpose of this was what?

17 A. What do you mean?

18 Q. Why did you buy the land?

19 A. To build a house on it.

20 Q. And to resell it?

21 A. Yes.

22 Q. You weren't going to live there?

23 A. No, but at that time, my daughter was going to live
24 there.

25 Q. You mean at the time that you bought the house?

R 342

1 Improper pitting, Your Honor.

2 THE COURT: Rephrase your question.

3 MR. BERTELE: Yes, Judge.

4 BY MR. BERTELE:

5 Q. Did you decide to settle the lawsuit that was
6 brought against Ms. Blank in 2016?

7 A. Yes.

8 Q. And for what reason?

9 A. I thought it was appropriate.

10 Q. And you were giving up certain claims in connection
11 with that lawsuit. Did you understand that?

12 A. Be more specific, if you would. What claims?

13 Q. You sued Ms. Blank because you claimed her house
14 infringed or encroached upon your property?

15 A. Yes.

16 Q. Right? And that didn't change when you settled the
17 case in -- the house was still there in 2016 when the case
18 was dismissed, wasn't it?

19 A. Yes.

20 Q. And so you gave up the right to sue over where her
21 house was located, didn't you?

22 A. Yes.

23 Q. And you gave up the right to claim that that was
24 your property line, didn't you?

25 A. I don't know that I did that.

1 Q. Well, how could you bring a lawsuit over a property
2 line without giving up the right to the property line if you
3 gave up the suit?

4 A. I don't know how to answer that.

5 Q. And did you direct Mr. Gillette or his firm to file
6 a plat containing the same boundary that was used in the
7 previous case as the basis for that plat?

8 A. Mr. Gillette is whom?

9 Q. Mr. Gillette -- I apologize, ma'am. Mr. Gillette
10 has testified previously that he filed the plat which we have
11 marked as --

12 MR. MASON: Your Honor, I object to counsel giving
13 information to the witness rather than asking a question.

14 MR. BERTELE: I will certainly refrain from that.

15 BY MR. BERTELE:

16 Q. All right. We marked as P-17 and P-18 two plats,
17 ma'am. Okay? Do these look familiar to you?

18 A. Yes.

19 Q. And P-17 has a signature or indication that it was
20 prepared by Mr. Gillette?

21 A. Uh-huh.

22 Q. And so does P-18?

23 A. Okay.

24 Q. And he's told us that he filed these on behalf of
25 you, as the property owner; is that true?

1 A. Yes.

2 Q. And what was the point in your telling him to do
3 this?

4 A. Well, first, the 17 or the 18?

5 Q. Both of them, ma'am.

6 A. To confirm the property lines, the property
7 boundaries.

8 Q. To confirm the property boundaries that you had
9 given up in the earlier case? That's what you were
10 confirming?

11 A. I don't know that I gave up the boundaries.

12 Q. Well, ma'am, do you say that Ms. Blank's house still
13 encroaches on your property?

14 A. Yes.

15 Q. Even though you told the judge that you were giving
16 up that claim?

17 A. I did not tell the judge that.

18 Q. Well, you gave up the claim, didn't you, when you
19 gave up that suit?

20 A. Not to my understanding.

21 Q. Where did you get that understanding from?

22 A. My common sense.

23 Q. Your common sense. Okay. So does your common sense
24 tell you that you can sue Ms. Blank again if she walks out on
25 the side of her house in an area and claims your property?

R 345

1 Q. Have you seen that letter before, ma'am?

2 A. I haven't seen the letter, but I have been made
3 aware that it existed.

4 Q. Okay. Thank you. And do you understand what the
5 essence or the significance of the letter was?

6 A. I don't remember what it was.

7 Q. So wasn't the purpose of the plat to, filing that
8 plat, ma'am, to revive an issue that had since been dealt
9 with? Wasn't that the case?

10 A. I don't understand that question.

11 Q. Yes. I showed you two plats, correct?

12 A. Yes.

13 Q. And first plat has a quitclaim there in it, doesn't
14 it?

15 A. Uh-huh.

16 Q. And that means you are giving up land, doesn't it?

17 A. Yes.

18 Q. But you never gave up any land, did you?

19 A. Well, I gave it up to myself.

20 Q. Gave it up to yourself?

21 A. Both properties are the property of Gordon H.
22 Timmons Exempt Family Trust.

23 Q. And you were quitclaiming it to who?

24 A. To the Gordon H. Timmons Exempt Family Trust.

25 Q. The purpose of the quitclaim deed was to do what, of

R 346

1 that line on the plat there?

2 A. Just as the gentleman said earlier, to isolate the
3 property that was in dispute.

4 Q. And so your view is that the dotted line was what
5 was in dispute?

6 A. The dotted line? Which dotted line are we talking
7 about?

8 Q. On P-17, ma'am.

9 A. Yes, most definitely.

10 Q. That was the area in dispute?

11 A. The quitclaim area was in dispute.

12 Q. Well, what did you give up by dismissing that case,
13 according to your commonsense view of what happened in June
14 of 2016?

15 A. What did I give up?

16 Q. Yes, ma'am. You gave up something, didn't you, by
17 walking out of that courtroom with a dismissal against you?

18 A. Well, I gave up really nothing, because no decisions
19 had been made other than not suing Mrs. Blank again.

20 Q. You gave up nothing?

21 A. That's not what I said.

22 Q. Other than suing her again. Well, here we are now,
23 ma'am. We are in this same situation again, aren't we?

24 A. Yes, we are.

25 Q. So you really did give up nothing, right. Thank

R 347

1 you.

2 MR. BERTELE: I have no further questions.

3 THE COURT: Do you wish to question the witness?

4 CROSS-EXAMINATION

5 BY MR. MASON:

6 Q. Mrs. Timmons, did you decide what you would prefer
7 to do than get Ms. Blank to move her house, was to try to
8 work out some resolution of her claim that she owned portion
9 of Lot 12? Did you decide that that was a good --

10 A. That was exactly what the thought process was.

11 Q. So did you isolate this land because you were going
12 to try to give it to her to try to resolve the dispute, not
13 because she owned it?

14 A. That was an alternative, yes.

15 Q. Okay. And did you also have to do it so that you
16 had good title to the remainder of the lot that you built the
17 house on?

18 A. Yes.

19 Q. Did you come to learn that it would be impossible
20 for you to sell the house you built while there was a portion
21 of the land that that house was on that was in the legal
22 dispute?

23 A. Yes.

24 Q. And as a result of that, did you then isolate that
25 land?

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1 A. Yes.

2 Q. And as the quitclaim area?

3 A. Yes.

4 Q. And --

5 A. That's exactly why.

6 Q. When you sold the house to the Patricks, did you
7 keep title to the isolated area in case it was needed in the
8 future to try to resolve a dispute with Ms. Blank?

9 A. Yes.

10 Q. And do you still own that land today?

11 A. Yes.

12 Q. And as far as you know, own it unencumbered, just
13 the way it was originally, just separated out on that drawing
14 on the survey that you've been asked about?

15 A. Yes.

16 Q. Okay. And when you left the courtroom that day, did
17 you realize that what you were giving up was not to make this
18 Blank move her house off your land?

19 A. Yes, yes.

20 Q. As I understand it, you are a defendant in this
21 case, right? You are not the one who brought it. So you are
22 defending it. You are not the one who filed it against her?

23 A. Exactly.

24 Q. Isn't that correct?

25 A. That is correct.

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1 Q. So you are here today as a defendant?

2 A. Yes.

3 Q. At no point in time during any of this process, has
4 any judge or court determined where the boundary line is; is
5 that correct?

6 A. That is correct.

7 Q. Okay. And we just heard testimony from her expert
8 surveyor, who says that no part of the improvements that were
9 on lot -- on your Lot 12 encroach in any way on Lot 11.
10 Isn't that correct, that all the improvements you built are
11 on the Lot 12 property?

12 A. Yes.

13 Q. And were you trying to do this to be a good
14 neighbor?

15 A. Absolutely.

16 Q. Did you feel like you had any legal obligation to do
17 that whatsoever?

18 A. No, none.

19 Q. Were you in any way conceding that she was right
20 about the boundary?

21 A. Oh, no, no.

22 MR. MASON: That's all I have, Your Honor. Thank
23 you.

24 MR. BERTELE: Couple more, Judge. I will be quick.

25 REDIRECT EXAMINATION

Q 350

1 BY MR. BERTELE:

2 Q. Ms. Timmons, there came a point in which there was
3 an objection made to part of the concrete driveway extending
4 over Ms. Blank's property line. Do you recall that?

5 A. Yes.

6 Q. And the concrete that was allegedly or that we
7 contend was encroaching was removed, wasn't it?

8 A. Yes.

9 Q. So there was a part that was on Ms. Blank's property
10 line as she asserted; isn't that true?

11 A. It's in the -- it's what she is saying is her
12 property line.

13 Q. Yes.

14 A. Small corner, about an one-square-foot corner that
15 she insisted we remove.

16 Q. Because it was on what she contended was her
17 property line, right?

18 A. Yes.

19 RECROSS-EXAMINATION

20 BY MR. MASON:

21 Q. So even though you disputed that one-foot area of
22 the driveway out by the road went over on to Ms. Blank's
23 property, you removed it anyway; isn't that correct?

24 A. Yes, we did.

25 Q. You paid to remove it?

1 order?

2 MR. MASON: Defendant agrees, Your Honor.

3 THE COURT: Bring him in.

4 MARK STRONG,

5 having been duly sworn, testifies as follows:

6 THE CLERK: Please state your full name and spell
7 your last name for the record.

8 THE WITNESS: Mark Wheaton Strong, S-t-r-o-n-g.

9 THE COURT: Did you want to make an objection to
10 this man not being on the witness list?

11 MR. BERTELE: He's not been disclosed in discovery,
12 Judge.

13 THE COURT: That wasn't my question. Do you want to
14 make an objection that this witness is not disclosed to you?

15 MR. BERTELE: Yes, sir, I do.

16 THE COURT: What's going on with this?

17 MR. MASON: Your Honor, I do see where he's not on
18 the interrogatory answers that we provided back in February
19 2017.

20 THE COURT: Who is he?

21 MR. MASON: He's the general contractor who built
22 the house on Lot 12.

23 THE COURT: Was he involved in the prior litigation?

24 MR. MASON: No, Your Honor.

25 MR. BERTELE: No, he wasn't deposed. He hasn't been

1 identified by anybody at any time.

2 MR. MASON: Your Honor, he's in response to that
3 evidence that they just put in this morning.

4 THE COURT: Which is what?

5 MR. MASON: Well, there's some evidence that just
6 provided that report about the grading this morning. And
7 he's the contractor that built the driveway they say is
8 graded in the wrong direction. So he's responsive to
9 testimony that they just disclosed this morning.

10 MR. BERTELE: Same comment, Judge. He didn't ask me
11 for an expert report. And he could have provided it. The
12 nuisance claim has been in the case from the very beginning.
13 And if he had asked me about the report, and if he had
14 anticipated that there was going to be an issue, which he
15 should have on the nuisance claim that there was flooding,
16 because I think we allege it, that this witness should have
17 been properly identified at some point.

18 THE COURT: He was responsible for the construction
19 of the driveway and grading?

20 MR. MASON: On Lot 12.

21 THE COURT: Bear with me. Are you going to elicit
22 opinions from him?

23 MR. MASON: No, he's not an expert, Your Honor.

24 THE COURT: I will take it under advisement. Make
25 your proffer. Ask him what you want to ask.

1 A. Yes.

2 Q. And did Mr. Gillette mark the corners for you?

3 A. Yes.

4 Q. And did you observe where the corners got marked,
5 like in the field while you were out there working?

6 A. Yes.

7 Q. And what did you see?

8 A. We had a -- it was brought to our attention that we
9 had a problem with the right side property line, which is the
10 west property line. From where we -- on our site plan, where
11 we had initially set the positioning of our house to be
12 built, we were too close to that existing house, according to
13 that line that we found. So it came to my attention that
14 because of where the driveway was attached to the house, we
15 would have to move the house in order to fit the house on the
16 lot based on where the discrepancy was.

17 Q. So did you move the house on Lot 12 in order to
18 accommodate --

19 A. From the site plan, we had to move it, yeah, east
20 to -- eastward.

21 Q. So you moved it away from the house on Lot 11?

22 A. Correct.

23 Q. Was that your original plan?

24 A. No.

25 Q. Did you intend to use a different portion of the lot

1 to build the house?

2 A. Yes.

3 Q. And so by spacing it away, so then what happened
4 next after you spaced it away?

5 A. We had to reposition. Then we were ready to dig our
6 footing. After we put the -- we had to bring dirt in,
7 actually. You have to build the house pad first. We raised
8 the pad approximately a foot and a half above existing grade
9 in order to assure that we had sloped away from the house,
10 which is required by the County.

11 Q. Did you have any interactions with Ms. Blank in that
12 process?

13 A. I'm not sure time-wise, but I did introduce himself
14 to her. We put a silt fence up, which is also required by
15 our permit. At the time I put it up, I put it approximately
16 five feet away from her house. Then I was told that, it's on
17 my property, you have to move it. She defined where she
18 thought it was. I went ahead and moved the silt fence to
19 that point because it wasn't affecting my ability to build a
20 house. And I thought that was the right thing to do.

21 Q. And did it remain there throughout construction?

22 A. Throughout construction, yes.

23 Q. Okay. And were you otherwise courteous with respect
24 to the construction that was taking place with this
25 neighboring property owner?

1 A. Yes, I was.

2 Q. By doing what kinds of things?

3 A. Trying to identify, giving her my card to let her
4 know that if there was any problems with the subcontractors
5 on the job, that I was available to come out and handle it.
6 When we got to -- I think I only talked to her maybe one
7 other time on an issue about noise or something. I can't
8 remember the date on that.

9 At the time that we were getting ready to pour the
10 drive and establish final grade, I met with her at the door
11 and identified a couple of things that needed to be done, if
12 she would allow me to do it.

13 Q. And what were those things?

14 A. Establishing the swale properly. At the time, she
15 pointed out there was water trapped in an area of the trees
16 that was right on the property line. I gave her a solution
17 for that. She didn't like it. She didn't want any of the
18 trees touched because of the birds that were in the trees and
19 the barrier it provided. So I didn't go into that area other
20 than to pull out what was on our side of the proposed line, a
21 dead tree that had fallen in that area.

22 Q. Okay. And how did you slope the concrete itself?

23 A. Normally, like I said, at least drop it six inches
24 away from the garage door or the house wall to meet the code,
25 we did that, and then flattened out and actually brought the

1 edge up to try to control water runoff so that it would be
2 redirected down toward the road.

3 Q. Is that what you did, direct water down toward the
4 road?

5 A. That was how it was set up.

6 Q. Did you observe how the driveway handles in a rain,
7 like, actually been out there when it's raining?

8 A. Yes. It rained quite a bit at the time we were
9 doing this.

10 Q. Where did the water flow from the driveway?

11 A. Where we wanted it to.

12 Q. Which was where?

13 A. Toward the street.

14 Q. And what about, did you also slope it towards your
15 own property?

16 A. Well, we couldn't. The street was above the
17 existing grade on both houses. And so in order to relieve
18 the runoff that was draining away from the front of the house
19 as well, we swaled the lot. You can see it in the picture,
20 actually, of what we were looking at. We created a swale to
21 pull the water to the east property line and then down the
22 east property line to the ditch in the rear.

23 We met with the owner of Lot 13, who was aware of
24 what we were doing and was appreciative of it, because the
25 land out there was so flat that he was having puddles in

1 question of the drainage of the property, which was the
2 essence of our claim, the nuisance claim that we have in the
3 complaint. And, again, I wasn't provided with this witness's
4 name or the substance of his testimony. And so I am not
5 totally prepared to cross-examine him, nor should I have to
6 under the circumstances.

7 So I've withheld any objection to any individual
8 questions, because I believe Your Honor indicated that this
9 was all in the nature of a proffer. And now that we know
10 what he's expected to say, I object to it all.

11 THE COURT: I understand. Witness was not
12 disclosed, therefore, the objection is sustained.

13 Mr. Strong, thank you, sir. You can step down.

14 THE COURT: Court's in recess until 9:30 a.m.

15 MR. BERTELE: Thank you.

16 (Whereupon, court adjourns for the day.)
17
18

19 THE COURT: All right. Mr. Bertele, call your next
20 witness.

21 MR. BERTELE: Yes. Thank you, Your Honor. Before
22 we proceed, I promised to give you a copy of that plat with
23 the yellow highlighting on it.

24 THE COURT: Thank you.

25 MR. BERTELE: Now, if I might, Judge, P-26 has that

1 affidavit with it on already. This original marking was
2 P-20. So I like that we are --

3 THE COURT: The notebook stops at 25.

4 MR. BERTELE: Yes, sir. And P-26 was introduced
5 yesterday and shown to Mr. Gillette. I have a copy of P-26
6 for everyone. So can I present it?

7 THE COURT: Sure.

8 MR. BERTELE: Thank you, Judge.

9 Okay. I call Jennifer Smith.

10 JENNIFER SMITH,

11 having been duly sworn, testifies as follows:

12 THE CLERK: Please state your full name and spell
13 your last name for the record.

14 THE WITNESS: Okay. It's Jennifer Smith, S-m-i-t-h.

15 DIRECT EXAMINATION

16 BY MR. BERTELE:

17 Q. Good morning, Ms. Smith. You are a licensed
18 attorney in the state of South Carolina?

19 A. Yes.

20 Q. And how long have you been so licensed?

21 A. 17 years in May, I think, 2002. No. Wait. 2001.
22 I'm so sorry. I'm trying to short myself. So 18 years in
23 May.

24 Q. And what is your field of practice?

25 A. I practiced in the area of property law, primarily

1 with real estate and insurable property.

2 Q. Do you have any related activities in the title
3 field?

4 A. Yes, yes, I'm a title insurance agent. And I have
5 been since December 2002.

6 Q. We are here in the matter of Michele Blank v.
7 Patricia Timmons. Were you involved in any prior action to
8 which those two individuals were parties?

9 A. Yes.

10 Q. And was that the earlier Timmons v. Blank case?

11 A. Yes.

12 Q. And you represented Ms. Blank?

13 A. Yes, I did, with co-counsel Richard Farrier.

14 MR. BERTELE: May I approach the witness, Judge?

15 THE COURT: Yes, sir.

16 MR. BERTELE: Thank you.

17 BY MR. BERTELE:

18 Q. Ms. Smith, can you identify this as the answer that
19 you filed in this case of Timmons v. Blank?

20 A. Yep. It looks like what I signed.

21 Q. All right. And this was a defense to a trespass
22 action?

23 A. Honestly, I don't remember, but if you say so, yes.

24 Q. No, ma'am. I would like you to be able to tell us
25 what you recall about the case.

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1 A. It was a property line dispute and my recollection
2 of the case is the Timmons basically wanted to take my
3 client's driveway.

4 Q. And what about the house that was on the property?

5 A. On which property?

6 Q. On the Blank property, your client's property?

7 A. The Timmons moved -- had the property line moved to
8 abut the house, from what I remember.

9 Q. Okay. And your answer reflected your understanding
10 of what? How was the defense -- what was the defense that
11 you presented in this case?

12 A. That the survey that the Timmons had done was
13 overreaching, and that the original lot lines as set forth
14 by, I think it was David Franklin, were the correct lot
15 lines, and that Ms. Timmons's house was -- I mean, Ms.
16 Blank's house was properly placed. And the property line --
17 actually, if you stood in front of her house, the property
18 line went to the left of the driveway and straight, like back
19 at an angle.

20 MR. BERTELE: Let me ask that P-10 be admitted.

21 THE COURT: Any objection?

22 MR. MASON: No, Your Honor.

23 THE COURT: Mark it in evidence please, ma'am.

24 (Plaintiff's Exh. 10, Answer to Interrogatories,
25 is received in evidence.)

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1 BY MR. BERTELE:

2 Q. Had you represented Ms. Blank in any transaction
3 before you defended her in the Timmons case?

4 A. Yes. I had represented Ms. Blank when she purchased
5 the lot and then when she did her construction build-out, as
6 a closing attorney.

7 Q. All right. Let me show you P-1. Can you identify
8 this as the property deed that was delivered to Ms. Blank at
9 the closing?

10 A. Uh-huh, yes.

11 Q. And you represented her at the closing?

12 A. Yes.

13 Q. As well as the title insurance company that was
14 involved?

15 A. I didn't represent the title insurance company, but
16 I did serve as an agent for the title policy.

17 Q. Okay. I see.

18 (Off-the-record conference.)

19 BY MR. BERTELE:

20 Q. Now, let me show you P-1 again, ma'am.

21 A. This is P-1.

22 Q. You have it. Thank you. And what's the derivation
23 of the title to this lot that Ms. Blank was purchasing?

24 A. Donald Horton, Donald W. Horton, as the grantor,
25 transferring to Michele J. Blank, who was my client.

1 Mr. Horton obtained the property from Pritchard & Company
2 Incorporated and Harold Sherman, who owned as tenants in
3 common, which would have been a divided 50 percent each.

4 Q. And was there a legal description attached to the
5 deed?

6 A. Yes.

7 Q. What was the reference in the legal description?

8 A. Would you like for me to read --

9 Q. No, just characterize it. Was there a metes and
10 bounds description?

11 A. No, no. There's a plat ordinance.

12 Q. I see. And was a survey performed at the time that
13 this closing occurred?

14 A. No. South Carolina is not a survey state. So
15 surveys are not required to come with closing properties.

16 Q. So had there been any documents upon which -- that
17 you reviewed in connection with the property indicating how
18 it was located, what its dimensions and such were?

19 A. Yes. I would have reviewed the plat that
20 Mr. Cuttino -- I assume Cuttino, C-u-t-t-i-n-o -- would have
21 prepared. And there wouldn't have been a reason to second
22 guess that plat because the lot was a raw lot. Hadn't been
23 built out.

24 Q. All right. So let's look at P-27A. Is that the
25 plat that you are referring to?

1 A. I don't know. I would have to see the deed again to
2 compare.

3 Q. Sure.

4 A. I shouldn't have handed it back.

5 Q. Sure, of course.

6 A. This appears to be the deed -- I mean, the plat,
7 yeah. There's Lot 12 and the Lot 13.

8 Q. Now, when your client took title, was there a
9 designation on the property that she was acquiring?

10 A. No, not at that time. It says "no lot".

11 Q. Okay. And what efforts, if any, did you make with
12 respect to that situation?

13 A. You know, I don't remember what I did, but it did
14 have a named lot number, Lot No. 11 as it is indicated in
15 Exhibit A. And I don't have the derivation deed into Donald
16 Horton, but I wouldn't have arbitrarily assigned a Lot No. 11
17 if it had not actually been the case. There may be an
18 interim plat after this one, because this legal refers to an
19 updated, recorded September 12th, 1978, unless this is the
20 same one. Oh, no, this is the same one. But, no, there
21 would have been an interim assignment of a lot number. And
22 it probably came from the county records. But I don't have
23 those in front of me.

24 Q. At the time of the closing there was, or subsequent
25 thereto, there was a lot identification placement on that

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1 property?

2 A. Correct, lot identification, right.

3 Q. Did the fact that this lot appeared on the plat as
4 "no lot", did that represent any concern to you?

5 A. Not after additional research would have been done,
6 no.

7 Q. All right.

8 A. The lot would have had to have had a lot number and
9 a TMS number in order for it to be transacted. So, no, this
10 wouldn't be a problem.

11 Q. You are referring -- are you referring to the
12 recording of the deed?

13 A. Of the deed that I executed? No. I'm referring to
14 the original title search when Michele presented a contract
15 to purchase this property.

16 Q. Yes.

17 A. When we conducted the research, we would have gone
18 back 40 to 60 years to ensure that we had a proper chain of
19 title, that there was an actual piece of property cut out and
20 ready to be transacted. So that information would have been
21 relayed in that process.

22 Q. Okay. Thank you. Now, you were telling us about
23 your representation of Ms. Blank and the lawsuit that Ms.
24 Timmons filed. And let me show you P-2. Do you recognize
25 P-2, ma'am?

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1 A. It looks familiar. Oh, this is the Franklin plat.

2 Q. Yes, ma'am. What purpose, if any, did you use this
3 document for in connection with this defense of Ms. Blank?

4 A. Well, this would have gone to show where our
5 position of the lot lines were for Ms. Blank's piece of
6 property, and subsequently, the Timmons right border for Lot
7 12.

8 Q. I see. Thank you.

9 MR. BERTELE: I move P-2 into evidence.

10 THE COURT: Any objection to this?

11 MR. MASON: No objection, Your Honor.

12 (Plaintiff's Exh. 2, Plat dated 6/6/15, is moved
13 into evidence.)

14 BY MR. BERTELE:

15 Q. At the time this lawsuit was commenced, was there
16 any construction going on on Lot 12 by the Plaintiff in that
17 case, Ms. Timmons?

18 A. At the time the lawsuit commenced, I think that
19 there was no construction going on at that time. I don't
20 recall. I recall when I walked it with Richard, it was just
21 scruff.

22 Q. All right. Let me show you P-11 and P-12. P-11 is
23 entitled a motion for temporary restraining order?

24 A. Yes.

25 Q. In the Timmons v. Blank case?

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1 court.

2 MR. BERTELE: Thank you. I offer P-11 and 12 into
3 evidence.

4 MR. MASON: No objection, Your Honor.

5 THE COURT REPORTER: They are already in.

6 THE COURT: I thought so.

7 BY MR. BERTELE:

8 Q. Do you recall any dispositive motions being made in
9 that case?

10 A. Any dispositive motions?

11 Q. Yes.

12 A. Well, there was a restraining order. I could look
13 at the docket. And it's just been -- I'm sorry to say, it's
14 been a few years. And I haven't really kept it at the
15 forefront of my mind. There was -- I don't recall if there
16 were any motions to dismiss when we went for our trial with
17 Judge Scarborough. The judge did make us step out to --

18 Q. Well, before we get to that, let me see if I can get
19 a document identified. Let me show you this Defendant's
20 Motion for Summary Judgment.

21 A. Oh, okay. I guess I made a motion for summary
22 judgment. That's, I think, good practice.

23 Q. And do you recall what the substance of the motion
24 was based upon?

25 A. I can look at it and refresh myself. Well,

1 basically, I was arguing that summary judgment should have
2 been granted to my client in defense of this case, because
3 the facts were -- really, the law was clear and the facts
4 were not reasonably subject to dispute, to quote myself.

5 When you took all of the evidence into account from
6 the location of the driveway, which had been there for some
7 time, it pre-dated the -- the driveway had pre-dated the
8 clear development of that side of the subdivision.

9 Franklin, who -- Mr. Franklin, who had already
10 surveyed Ms. Blank's property, found existing monuments that
11 were -- corresponded. Here I have noted from 2005.

12 MR. MASON: Your Honor, I object to this hearsay
13 testimony and the relevance of the summary judgment motion
14 that was denied for her just testifying by reading a
15 document. It's not relevant. And it's hearsay.

16 THE COURT: Is this in evidence?

17 MR. BERTELE: Is it in evidence?

18 THE COURT REPORTER: No.

19 THE COURT: What's the relevance of it?

20 MR. BERTELE: Judge, it establishes the basis of the
21 claim that the property line, the property line which was
22 asserted in the earlier case, is the basis upon which we
23 assert the residue affect of that property line, namely, that
24 it was established in the first case what Mrs. Blank's
25 property dimensions were. And, therefore, that was one of

1 Q. Ms. Smith, again, as the judge has ruled, confine
2 your comments to your -- the basis that you had to assert a
3 legal argument that Ms. Blank was entitled to summary
4 judgment as a matter of law with respect to the competing
5 property boundaries which were asserted in this case.

6 A. Based on the data presented, I felt that motion for
7 summary judgment was a valid motion to make. It was a valid
8 motion to bring.

9 Q. And the basis of the information that you had was
10 what?

11 A. The basis of the information were competing surveys
12 that were produced by different surveyors by the various
13 parties in the actual action, and also an analysis, an
14 in-depth analysis of the production of those particular
15 surveys.

16 Q. And was there a legal precedent to support your
17 conclusion that Ms. Blank was entitled to judgment as a
18 matter of law?

19 A. I believe so, yes. And I've cited many cases in the
20 summary judgment. Do I need to --

21 Q. That's fine. That's fine. As Mr. Mason said in
22 argument, Judge Scarborough denied this motion, correct?

23 A. I presume so. I don't remember if he pended it or
24 if he denied it. I'm sure that if he denied it, there would
25 be an order in the docket.

1 Q. Let me show you P-15. Is this --

2 A. Oh, he denied it, respectfully.

3 Q. Was there oral argument on the motion?

4 A. I don't remember. I have to pull the transcript.

5 Q. All right. Let me ask you another question.

6 A. Sure.

7 Q. Was this matter scheduled to go to trial?

8 A. Yes.

9 Q. Do you remember when?

10 A. What day is this? 5/2/16, this is the -- may 2nd,
11 2016, would have been the day of trial. That's when he would
12 have heard the motions, pretrial motions. And we would have
13 gone right into proceeding that day, I believe. I believe
14 that's the date.

15 Q. All right. And at the time of trial, you were ready
16 to proceed with the case?

17 A. Yes.

18 Q. And were you being assisted by any other attorney?

19 A. Yes.

20 Q. Who was that?

21 A. Richard Farrier.

22 Q. And before the case was tried, were there any -- was
23 there any activity prior to the commencement of the trial?

24 A. We had a conference with the judge, with both sides,
25 Defendant's and Plaintiff's counsel.

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1 Q. And was the substance of the case discussed in that
2 conference?

3 A. The nature of the case was discussed.

4 Q. And the defense and the Plaintiff's position?

5 A. I assume so, yes.

6 Q. Okay. And what, if anything, happened subsequent to
7 the ending of that meeting with Judge Scarborough?

8 A. Judge Scarborough encouraged us to step out and take
9 time to attempt to settle the case.

10 Q. I see. And did that happen?

11 A. We did step out and take time to attempt to settle
12 the case.

13 Q. How was this case finally dissolved?

14 A. The plaintiff decided to dismiss the case.

15 Q. And who gave you that information?

16 A. Chris Lanning, Attorney Chris Lanning, who was
17 working for the plaintiffs.

18 Q. And how did you respond to that?

19 A. I will accept the dismissal with prejudice.

20 Q. Meaning what?

21 A. Meaning that the issue is moot.

22 Q. Meaning what issue is moot?

23 A. That the issue of the boundary line, because that's
24 why we were there, to try the case for the boundary line.

25 Q. Did Mr. Lanning make any comment about the

1 Plaintiff, the trust, reserving any rights to the boundary
2 lines after this dismissal?

3 A. I don't recall that.

4 Q. What was your understanding of the effect of the
5 dismissal?

6 A. That the matter was settled.

7 Q. Settled or dismissed?

8 A. Well, if you dismiss a case, that means that that
9 particular case is no longer being litigated. But my
10 understanding is, if you dismiss a case with prejudice, that
11 the matter is over. It's concluded.

12 Q. And did you discuss the effect of this dismissal
13 with prejudice with Ms. Blank?

14 MR. MASON: Objection. Relevance and hearsay, Your
15 Honor.

16 MR. BERTELE: The question was whether she discussed
17 it.

18 THE COURT: What relief are you seeking? Tell me
19 all the relief you are seeking.

20 MR. MASON: We are seeking monetary damages for
21 having to give up a portion of our property when we sold it
22 to a third-party.

23 THE COURT: Overruled. You may answer the question.

24 THE WITNESS: I don't know that I can answer
25 anything that I've discussed with Ms. Blank because --

1 BY MR. BERTELE:

2 Q. No, excuse me. I was asking whether you did
3 discuss --

4 A. I'm sure I would have discussed this with my
5 client.

6 Q. Okay. Thank you.

7 MR. BERTELE: A few more questions, Your Honor. I'm
8 just getting my documents lined up.

9 THE COURT: Yes, sir.

10 BY MR. BERTELE:

11 Q. Now, you told us earlier that you served as a title
12 agent as well as an attorney in real estate transactions?

13 A. Yes.

14 Q. And in your capacity as a title agent, are you able
15 to determine the insurability of property?

16 A. Yes.

17 Q. Let me show you what's been marked as P-22 and P-23.
18 Can you identify them as an opinion of title and an invoice?

19 A. Yes.

20 Q. That you prepared?

21 A. Uh-huh, yes.

22 Q. And what was the purpose of the -- withdrawn. P-22
23 is a letter dated August 22nd, 2016, addressed to me. And
24 what was the purpose of the letter and the opinion that you
25 rendered in it?

1 A. The purpose of the letter dated August 22nd, 2016,
2 would have been to give you, at your request, an opinion
3 regarding insurability. So I would have -- I took the data
4 for the property and went over it with an underwriters, with
5 investors, to determine what we would need in order for an
6 order for Michele's property to be insurable, because at that
7 point, it was not marketable or insurable. So she was not
8 able to even sell her property if she wanted to.

9 Q. Let me show you what's been admitted into evidence
10 as P-17 and P-18.

11 A. Okay.

12 Q. What significance, if any, was P-17 with respect to
13 the basis for your opinion?

14 A. These were competing plats that popped up after this
15 case was dismissed. So the P-17 is dated June 3rd, 2016, and
16 was revised June 22nd, 2016. And I did review this in
17 conjunction with preparing my letter, my opinion letter.

18 Q. What, in your opinion, is the effect of the
19 recording of that plat by Ms. Timmons on the title of Ms.
20 Blank?

21 A. I have to look back and compare. Okay. The plat
22 dated June 3rd and revised June 22nd, 2016, shows the Timmons
23 lot as having 115.70 feet across the frontline. And then the
24 plat dated July 18, 2016, revised August 4, 2016, shows the
25 front coverage as 103.19. And I believe my recollection is

1 that the original plat, the lot line that we adhered to in
2 the original lawsuit followed the August 17, 2016, plat.
3 Wait a minute. Do I have that one?

4 Q. I'm sorry. You are asking --

5 A. No. July 18, August 4, filed August 17 -- maybe I
6 got the wrong date. Is there an August 17th plat?

7 MR. MASON: Your Honor, I object to the witness
8 asking the attorney questions while she's trying to testify.
9 BY MR. BERTELE:

10 Q. Let me see if I can assist.

11 THE COURT: I don't think there's anything wrong
12 with her asking to see another exhibit if there's an exhibit.

13 MR. BERTELE: Thank you, Judge. I will try to
14 comply with that.

15 BY MR. BERTELE:

16 Q. Ma'am, let me show you what's been marked as P-20.
17 Can you identify that?

18 A. I don't know. It's really tiny. Oh, this is the
19 August 17th plat. Let me see if I can see it. This one has
20 103.18. So this would have been what I relied on,
21 Plaintiff's P-20. Okay. So what's your question?

22 Q. My question was, what affect did the recording of
23 that June 3rd plat have upon the title of Ms. Blank?

24 A. In the world of insurability, it would be not
25 matching what the other records had. So --

1 Q. Which records are you referring to?

2 A. The historical records of the property.

3 Q. All right. Is that --

4 A. I think it was a 1970 -- the 1976 or '78 plat.

5 Q. You are referring to P-27A?

6 A. Yes.

7 Q. And what about P-22 -- P-2? Excuse me.

8 A. This?

9 Q. Yes, ma'am. You identified in your opinion a site
10 plan dated May 2nd, 2005?

11 A. Oh. This would have been the site plan that
12 Mr. Franklin prepared when Ms. Blank was proposing to build
13 her home.

14 Q. Okay. And what's the date on that, ma'am?

15 A. This is dated June 6th, 2005.

16 Q. Okay. Was that the document you were referring to
17 when you referred to a site plan dated May 6th?

18 A. Yes, yes.

19 Q. So it should have been June 6th?

20 A. Yeah, it should have been -- wait. June 6, yeah.

21 Sorry.

22 Q. And in your opinion, what would be required in order
23 to cure the defect that you found based upon the recording of
24 that plat in June of 2016?

25 A. I'm sorry. Say that again.

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1 Q. Yes. How would you cure the defect?

2 A. Oh, I have it stated clearly in my opinion letter,
3 to verify that the '05 plat the August 26th, 2016 plat are
4 identical, to record the August 17 plat and then we needed a
5 quitclaim deed in order to clear up the overlapping claim of
6 interest on the disputed property. So that would definitely
7 need to be from Timmons, because my understanding is they
8 retained ownership of that particular strip. And I would
9 also like the prophylactic release of any potential interest
10 on people that purchased from the main part of the lot from
11 the Timmons.

12 Q. Okay.

13 A. So if I were coming into this cold as closing
14 attorney, that's what I would prefer happen.

15 Q. You said you needed a quitclaim deed from the
16 Timmons?

17 A. Yes, at a minimum.

18 Q. That would be to close the chain of title, so to
19 speak?

20 A. That would help close chain of title, yes.

21 Q. Did you have any -- withdrawn. Did you prepare a
22 bill for your services?

23 A. I did.

24 Q. That was P-23?

25 A. Correct.

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1 rules. Mark it for identification so that we will know --
2 Appellate Court will know what we are talking about.

3 (Plaintiff's Exh. 22, Letter dated 8/22/16, was
4 marked for identification.)

5 THE COURT: I'm sustaining your objection.

6 Now, with regard to the bill, do you have an
7 objection to that?

8 MR. MASON: Yes, Your Honor.

9 THE COURT: Her bill?

10 MR. MASON: Yeah. We don't think attorney fees are
11 recoverable. There's no contractor statute.

12 MR. BERTELE: If I can address that, Judge. It's an
13 invoice for issuing insurability opinion as a title agent.

14 THE COURT: Objection overruled. Mark that in
15 evidence.

16 (Plaintiff's Exh. 23, Invoice dated 8/29/16, was
17 received in evidence.)

18 BY MR. BERTELE:

19 Q. Let me show you P-18, ma'am. Was this the document
20 to which you were referring in the letter that you wrote to
21 me of August 22nd, identified as P-22?

22 A. Presumably, yes. I am not looking at plat book S16,
23 page 176, but I'm going to presume that this is the same --

24 Q. Well, doesn't that plat have a recording stamp on
25 it?

1 A. It does. And it's really tiny. And I can't see it
2 with my glasses. I'm really sorry. This says -- I think it
3 says S16-176. yes, I will go with that.

4 Q. All right. So that appears, P-18, appears to be the
5 plat that you were referencing in your letter of August 22nd?

6 A. Yes.

7 Q. And that was part of the basis of your opinion?

8 A. Yes.

9 MR. BERTELE: Thank you. No more questions.

10 THE COURT: Cross.

11 MR. MASON: Yes.

12 CROSS-EXAMINATION

13 BY MR. MASON:

14 Q. Good morning, Ms. Smith. Are you related by blood
15 or marriage to Ms. Blank?

16 A. No.

17 Q. You are a title agent for investors?

18 A. Yes, investors and fidelity, which is a branch of
19 Chicago and common law.

20 Q. And your law firm or the law firm you were formerly
21 with did this closing for Ms. Blank; is that correct?

22 A. Yes, sir. It was my solo practice then. It just
23 has a different name now.

24 Q. Did you sell her an investor's title policy?

25 A. At that time I was with First American.

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1 Q. Did you sell her a First American policy?

2 A. Yes.

3 Q. And when this title as you came up, did she contact
4 you relative to submit a claim against the title policy?

5 A. Yes.

6 Q. And did you reject the claim, or did the company
7 reject the claim because there was a survey exclusion in her
8 policy?

9 A. I don't recollect. I did not reject her claim, but
10 I believe that her claim went off for processing. But I did
11 not participate in that process.

12 Q. But you know how this works. If a client doesn't
13 purchase a survey -- and you always tell them to get a
14 survey, isn't that correct, if they want to have coverage on
15 their title policy for survey defects?

16 A. Right. You know, that's a difficult question to
17 answer, because even if a client has a survey, that there may
18 still be different exclusions that apply for surveys. So it
19 isn't a band-aid for all survey clients.

20 Q. But, certainly, no survey at all gives rise to a
21 survey --

22 A. There was a survey.

23 Q. But there wasn't at the time you did the closing,
24 was there?

25 A. Yes.

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1 Q. So you did two closings, and you insured the title
2 for this property two times before this dispute arose; is
3 that correct?

4 A. Yeah.

5 Q. And the second time you insured it, the house was
6 under construction at the time?

7 A. I think that you have to actually have the
8 construction on closing. And then the construction commences
9 post. But I don't participate in that process. So I assume
10 they hadn't broken dirt yet.

11 Q. When did you get Mr. Franklin's -- you called it a
12 survey. That's different than a site plan, right?

13 A. A site plan requires that the property be surveyed.
14 I think you are conflating.

15 Q. So you got a survey from Mr. Franklin at some point
16 around the time you did the second closing?

17 A. He would have had to produce one as part of the
18 transaction.

19 Q. So when you drew the mortgage for the construction
20 loan closing, did you use a legal description that referred
21 to Mr. Franklin's survey or to the subdivision plat?

22 A. I don't recall. I would have to look at the
23 document.

24 Q. But there's a difference; isn't that correct?

25 A. In the legal description for the property?

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1 Q. Well, there's a difference in dimensions between the
2 subdivision plat and Franklin's survey?

3 A. No, I don't believe there is.

4 Q. So you think Franklin's survey is the same as the
5 subdivision plat?

6 A. I think so.

7 Q. All right.

8 A. That's my recollection.

9 Q. Were you here during his testimony the other day?

10 A. No.

11 Q. Okay. So do you know anything about when they tried
12 to locate the house where it was shown on the site plan, they
13 couldn't locate it there, and they had to move it over about
14 20 feet?

15 A. Oh, I do recall that from the first case.

16 Q. Okay. So you recall that happened. And then it was
17 after that that Mr. Franklin went out in the field and
18 actually did a survey, and he came back with a drawing that
19 showed the front and rear property lines being about 20 feet
20 wider than they were on his site plan. Do you recall that?

21 A. No. I would have to look at the documents. It's
22 been a few years.

23 Q. Okay. Fine. Do you recall there being a
24 discrepancy between the site plan and Mr. Franklin's survey?

25 A. Not offhand, Mr. Mason. It would be helpful to see

1 the documents.

2 Q. All right. Again, you will have to use your glasses
3 because it's small.

4 A. I know. My reader part is so small.

5 Q. Let me show you Defendant's 5. Is that what you
6 call the survey?

7 A. I haven't seen this from you. I think this is
8 what -- this is a 6/6/05. So, yeah, I would have seen
9 this.

10 Q. Okay. Is that what you are calling the survey, the
11 Franklin survey?

12 A. Yes. It is a site plan, but it is a survey, because
13 site plans require that you actually survey the lot in order
14 to place the house.

15 Q. Okay.

16 A. You are conflating the terms.

17 Q. And is Exhibit 4 a survey?

18 A. Yeah. It would require a survey in order to set
19 pins and then set the house.

20 Q. Were you not aware that Mr. Franklin prepared the
21 site plan off the subdivision plat without going out into the
22 field? Were you not aware of that?

23 A. I don't recall it, but it's been over three years,
24 so ...

25 Q. So when you look at Exhibit 4 and you tell me it's a

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1 survey, why are you telling me it's a survey? Because it
2 shows property corners like someone went out in the field?

3 A. Yeah. It has all the dimensions. And it has
4 direction. You know, when a plat is produced, it has to be
5 based on the survey somewhere.

6 Q. So you, as a closing attorney, would have assumed
7 that Mr. Franklin prepared Exhibit 4, he had gone out in the
8 field to prepare that document? Is that your testimony?

9 A. I would have presumed.

10 Q. Okay. All right. So they are both surveys.
11 Neither of them is recorded; is that correct?

12 A. I couldn't tell you that without surveying the
13 public records.

14 Q. Well, you've just gone over a lengthy opinion of
15 title. If there was a recorded plat for Ms. Blank's lot,
16 wouldn't that have been something you would have looked at?

17 A. Uh-huh, sure.

18 Q. And you don't reference in any of your testimony or
19 your opinion that was a recorded plat showing just Lot 11,
20 like a Franklin plot that got recorded? You would have
21 referenced it when you did your work; isn't that correct?

22 A. I'm sure I would have.

23 Q. And you didn't, right?

24 A. Hm-mm, obviously not.

25 Q. Okay. So when you ensured the property, did you

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1 Q. So you've testified that you were the litigation
2 attorney in the first case; is that correct?

3 A. Yes. Richard Farrier co-counseled with me.

4 Q. Let me ask you just a few things. One is that you
5 were aware that Ms. Blank was claiming at the time that the
6 Timmons were trespassing on her property? Remember you went
7 over the affidavit that she filed with a motion for temporary
8 restraining order that Mr. Bertele asked you about?

9 A. I would have to look back at the affidavit, but I
10 don't recall if it were the Timmons personally or if it were
11 the Timmons's agents.

12 Q. I'm referring to Plaintiff's Exhibit 11. Were trees
13 provided in the attached affidavit. Michele Blank alleges
14 that Plaintiff's agents have engaged a bulldozer that had
15 been bulldozing trees in the disputed area.

16 Have I read it correctly from Exhibit 11?

17 A. Yes, Plaintiff and/or her agents.

18 Q. And in the prior action, you didn't bring any kind
19 of compulsory counterclaim for trespass; is that correct?

20 A. I would have to look at my prior action.

21 Q. Well, just so we are clear, on the prior action,
22 there was no agreement reached for the Timmons to sign any
23 quitclaim deed at the time the action was dismissed; isn't
24 that correct? There was nothing stated on the record that
25 the Timmons would sign any kind of deed to your client after

1 the case was dismissed; isn't that correct?

2 A. I would have to read the transcript. If you have
3 that, I'm happy to review it.

4 Q. Sure. I'm going to hand you what's been marked as
5 Exhibit 12, which is the Form 4 order of dismissal where it
6 says the case is going to be dismissed with prejudice. And
7 it says that Defendant consents, right?

8 A. This is Defendant's Motion for Temporary Restraining
9 Order being granted. And the area in dispute is not to be
10 disturbed 10 feet --

11 Q. I handed you the wrong Form 4. My apologies.
12 Exhibit 16, there you go.

13 A. So this is -- Plaintiff states in open court that
14 they are dismissing their case with prejudice and the
15 Defendant contents.

16 Q. And you were the Defendant's attorney that consented
17 at that time, right?

18 A. Yes.

19 Q. And there was nothing stated in the order dismissing
20 the case that the Timmons would sign any kind of quitclaim
21 deed to your client; isn't that correct?

22 A. Judge Scarborough didn't notate anything, no.

23 Q. But it wasn't stated to your recollection either;
24 isn't that correct?

25 A. Well, I have to refresh myself with the transcript.

1 I'm sorry. It's been a few years.

2 Q. But you understand that Ms. Blank brought this
3 lawsuit against the Timmons, not the other way around. And
4 as I understand your testimony is, in order to fix the title
5 situation, there's still many things that need to be done,
6 even though the prior action was dismissed. You made a
7 laundry list of those things in your letter; isn't that
8 correct?

9 A. Right. And several of those things were actions
10 that the Timmons decided to after this case was dismissed.
11 And so the opinion was rendered after the initial case was
12 dismissed. And then the Timmons produced other surveys and
13 began aggressively, to my understanding, encroaching on Ms.
14 Blank's property again.

15 Q. But --

16 A. That's what it appears to me from the competing
17 surveys that they had and then the filing of the survey with
18 the incorrect lines.

19 Q. Well, as far as the execution of -- another item you
20 testified had to occur was that a settlement agreement should
21 be attached to the quitclaim deed and both documents
22 recorded; isn't that correct?

23 A. Is it a settlement agreement or a settlement
24 statement?

25 Q. You said a settlement agreement. I believe your

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1 testimony previous was that a copy of an executed settlement
2 agreement should be attached to the quitclaim deed and both
3 documents recorded. Do you recall that testimony?

4 A. Yeah, I see it's No. 4 in my opinion. And that
5 would be -- I assume that I would request a settlement
6 agreement if there were an action ongoing.

7 Q. But there was no settlement, right? You went out in
8 the hall to try to settle, and a settlement was not reached;
9 isn't that correct?

10 A. This letter is not generated as a basis or in
11 relation to the initial suit that was tried. So if you are
12 asking me when we tried the case on May 2nd, 2016, when
13 Richard was still alive and we were trying this case
14 together, that did we reach a settlement that day? We did.
15 The Plaintiff's dismissed with prejudice. And that is the
16 settlement that we reached.

17 Q. And that was it, right? There wasn't an agreement
18 for the Plaintiff to do anything -- for the Plaintiff to do
19 anything beyond that; isn't that correct?

20 A. I think that would be the agreement, that the
21 Plaintiff wasn't going to do anything beyond that, and that
22 the case was over.

23 Q. But there was no agreement to sign any deeds? There
24 was no agreement to sign any settlement agreements after the
25 court hearing ended; isn't that correct?

1 A. There should not --

2 MR. BERTELE: Objection. Asked and answered several
3 times.

4 THE COURT: Overruled. Go ahead and answer.

5 THE WITNESS: Thank you, Your Honor. No, there
6 wouldn't have been a need to have any type of settlement
7 agreement beyond order of dismissal with prejudice.

8 Q. So if there was no need, then why have you given the
9 opinion that all these things still need to be done even
10 though the litigation was ended? Why wouldn't you just take
11 the order of dismissal and have that be the proof that this
12 is resolved?

13 A. Well, Mr. Mason, that's a really good question,
14 because I don't understand how that property lines could be
15 litigated again when the Plaintiff dismissed the argument
16 about the property lines with prejudice. That is pretty
17 dispositive to me. But it, obviously, isn't to the Court
18 yet. And the reason I wrote this opinion is because Mr.
19 Bertele asked me to. And if you will look at it, the dates
20 on the surveys and the actions that the Timmons's agents took
21 post-dated that trial. And post-dated that dismissal with
22 prejudice. So your questions really make no sense to me.

23 Q. Well, the relief the Timmons sought in that first
24 case was to get Ms. Blank to move her house; isn't that
25 correct?

1 A. I don't remember. I would have to look at the
2 complaint.

3 Q. All right.

4 MR. MASON: Your Honor, may I approach?

5 THE COURT: Yes.

6 (Defendant's Exh. 7, Complaint, was marked for
7 identification.)

8 BY MR. MASON:

9 Q. I show you what's been marked as Defendant's Exhibit
10 7. And I want to ask you about paragraph 7 where it reads
11 that: The Plaintiff has attempted to resolve this matter
12 without the Court's assistance by offering to move the
13 property line and give the Defendant additional land so the
14 Defendant's house would not be encroaching onto the
15 Plaintiff's property. The Plaintiff did not seek monetary
16 compensation or concessions from the Defendant with this
17 offer.

18 Do you recall that being a truthful statement as
19 stated in paragraph 7?

20 A. Well, this was not my client. And I didn't write
21 the complaint. So I can't testify to the veracity of the
22 Plaintiff's lawyer's statements.

23 Q. So you filed an answer that admits paragraph 7? You
24 want to read your answer to paragraph 7 so that we know how
25 you responded to it at the time?

1 A. Regarding Plaintiff's allegations contained in
2 paragraph 6 -- would you like for me to read the allegations
3 into the record, Your Honor?

4 The allegation is that the Plaintiff has attempted
5 to resolve this matter without the Court's assistance by
6 offering to move the property line and give the Defendant
7 additional land so that Defendant's house would not be
8 encroaching on to the Plaintiff's property. The Plaintiff
9 did not seek any monetary compensation or concessions from
10 the Defendant with this offer.

11 ANSWER: Regarding Plaintiff's allegation contained
12 in paragraph 6, Ms. Blank admits that she caused the house to
13 be constructed on her lot as it is described in No. 5 above
14 in 2005, having obtained a construction loan for that purpose
15 on April 13th, 2005. And denies that her home encroaches on
16 Plaintiff's property. Further pointing out that Plaintiff
17 did not own the adjacent property at the time Ms. Blank
18 constructed her home.

19 Does that answer your question?

20 Q. Yeah. So with regard to what was taking place at
21 the time that case was heard, there was a discussion about
22 giving her property to resolve the dispute, the quitclaim you
23 referred to in your letter, and that never took place. And
24 you are saying it still needs to take place; isn't that
25 correct?

1 MR. BERTELE: A few redirect, if I might, Judge.

2 THE COURT: Yes, sir.

3 MR. BERTELE: Thank you.

4 REDIRECT EXAMINATION

5 BY MR. BERTELE:

6 Q. In your view, after the June 2, 2016, settlement,
7 was there any reason to record the Franklin survey?

8 A. We really didn't even have a chance to. But, no, I
9 didn't see any reason.

10 (Whereupon, a phone goes off in the courtroom.)

11 BY MR. BERTELE:

12 Q. Do you recall the question?

13 A. No.

14 THE COURT: I think she already answered it.

15 MR. BERTELE: Well, I wasn't sure if she had
16 finished answering it. That was the purpose.

17 THE WITNESS: Oh, if I had cause to record Franklin
18 survey?

19 Q. Yes.

20 A. Hm-mm, I thought the case was over.

21 Q. Well, if you believed that all that was being
22 dismissed was a claim for Ms. Blank to move her house, would
23 you have consented to a dismissal with prejudice?

24 A. What?

25 Q. Yes. If you believed that the only thing that was

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1 being dismissed with prejudice was to have Ms. Blank move her
2 house, would you have consented to the dismissal with
3 prejudice?

4 A. No. I thought it was a dismissal of the entire
5 case, the claim for the entire case.

6 Q. Well, what would be the effect of a dismissal that
7 only dealt with the moving of the house?

8 A. Then the case wouldn't have been settled. We would
9 have had a trial. There still would have been outstanding
10 claims.

11 Q. Okay. So if there was any issue about the boundary
12 line not being resolved as of June 2nd, what would you have
13 done?

14 A. Continued the case. The entire case was very
15 clearly dismissed. If it wasn't, Judge Scarborough would
16 have scheduled it, or we would have continued trying it on
17 that day.

18 Q. All right. Thank you. Again, just to be clear,
19 P-20, this is the August 17th plat that you referred to in
20 your letter?

21 A. I'm sorry. I'm freezing. It's freezing in here.
22 Yes.

23 THE COURT: Won't be much longer.

24 THE WITNESS: I hope not.

25 BY MR. BERTELE:

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1 Q. Now, does that August 17th exhibit, does that
2 represent -- does that indicate an area that is in dispute?

3 A. I'm sorry. This writing is so tiny. Give me a
4 second. Do you have a magnifying glass? It says quitclaim
5 area. And there's a little bubble with an arrow.

6 THE COURT: Your client is wanting to offer her
7 glasses.

8 THE WITNESS: I can't use readers. No. I have
9 trifocals, so when I have to see tiny print, it's just real
10 hard.

11 BY MR. BERTELE:

12 Q. All right. But the August 17th exhibit was the
13 basis upon which you would be able to establish the area in
14 dispute, correct?

15 A. Yes.

16 Q. Okay.

17 MR. BERTELE: No more questions.

18 MR. MASON: No questions.

19 THE WITNESS: Your Honor, am I released?

20 THE COURT: Is she free to go?

21 MR. MASON: Yes.

22 THE COURT: Yes, ma'am. Thank you.

23 (Whereupon the witness is excused.)

24 (Whereupon, a recess transpired.)

25 THE COURT: Call your next witness.

1 MR. BERTELE: Before I proceed, I would like to move
2 into evidence P-1, which is the deed that Ms. Smith
3 identified as the property deed to Ms. Blank.

4 THE COURT: Any objection?

5 MR. MASON: None, Your Honor.

6 Plaintiff's Exhibit 1, Deed, is moved into
7 evidence.)

8 MR. BERTELE: And also P-14, which is the opposition
9 to summary judgment in the earlier case, and Counsel and I
10 were trying to remember if there was a ruling upon that
11 yesterday. Since he believes he made an objection. I don't
12 recall, frankly. That was a brief that Mr. Lanning testified
13 about.

14 THE COURT: Is there an objection to this?

15 MR. MASON: Yes, Your Honor.

16 THE COURT: What was the objection?

17 MR. MASON: Not relevant. Related to a motion that
18 was denied.

19 THE COURT: This is a brief in opposition to a
20 motion for summary judgment?

21 MR. BERTELE: Yes, sir.

22 THE COURT: In the prior case?

23 MR. BERTELE: Yes. It's relevant because it asserts
24 the position upon which the case was focused, namely, the
25 identification of the boundary line and the basis upon which

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