THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2016-CP-10-4122

RECEIVED
OCT 13 2020
SC Court of Appeals

MICHELE BLANK ....Appellant

vs.

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

BRIEF OF RESPONDENT

Mark A. Mason
SC Bar No. 3676
465 W. Coleman Boulevard, Suite 302
Mount Pleasant, South Carolina 29464
(843) 884-1444
mark@masonlawfirm.com
Attorney for Respondent,
Patricia Timmons, Trustee of the
Gorden H. Timmons Exempt Family Trust

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case....................1

Standard of Review....................11

Argument 12

I. THE COURT CORRECTLY DISMISSED THE SLANDER OF TITLE CLAIM DUE TO THEIR BEING NO EVIDENCE OF MALICE OR OF SPECIAL DAMAGES 12

II. THE TRIAL COURT DID NOT ERR IN REJECTING THE NUISANCE CLAIM....................15

III. THE COURT SHOULD AFFIRM FOR ANY GROUND APPEARING ON THE RECORD....................18

Conclusion 18

TABLE OF AUTHORITIES

CASES

Babb v. Lee County Landfill, SC LLC, 405 S.C. 129, 147 S.E.2d 468 (2013).............7

Bodiford v. Spanish Oak Farms, Inc., 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct.App.1995) .... .12

Chapman v. Allstate Ins. Co., 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975)...........12

Clark v. Greenville County, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993)..............16

Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994)..13

Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991)..............................13

Home Invs. Fund v. Robertson, 10 Ill.App.3d 840, 295 N.E. 85, 87 (1973)................13

Jordan v. Judy, 413 S.C. 341, 347–48, 776 S.E.2d 96, 100 (Ct. App. 2015)................11

Linda Mc Co. v. Shore, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010)....................12

Okatie River, L.L.C. v. Se. Site Prep, L.L.C., 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct.App.2003)...12

Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 22, 567 S.E.2d 881 (Ct.App. 2002).. .13

Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct.App.1989)..12

Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct.App. 2001)..16

Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).......12

COURT RULES

220(c), SCAR..18

STATEMENT OF ISSUES ON APPEAL

(1) DID THE TRIAL JUDGE CORRECTLY DISMISS THE SLANDER OF TITLE CLAIM DUE TO THERE BEING NO EVIDENCE OF MALICE OR OF SPECIAL DAMAGES?

(2) DID THE TRIAL JUDGE ERR IN REJECTING THE NUISANCE CLAIM?

STATEMENT OF THE CASE

On May 27, 2015, Respondent sued Appellant in Case No. 2015-CP-10-3013, *Patricia A. Timmons, Trustee v. Michelle G. Blank.* The relief sought was "an order requiring Defendant to move her house off the Plaintiff's property." (R.10, 572). On June 7, 2016, that case (the "first case") was dismissed with prejudice by Respondent, and consented to, by Appellant as documented by way of a Form 4 Judgment in a Civil Case, which simply stated, "Plaintiff states in open court on record they are dismissing their case with prejudice. Defendant consents." (R, 685, Plaintiff's Exhibit 16). No evidence was ever presented in the 2015 action. Respondent was not required by the Form 4 dismissal to take any further action relative to the boundary dispute between the parties. R. 685.

In August 2016, Appellant filed a Lis Pendens and a three count Complaint to enforce the 2016 Form 4 Judgment in a Civil Case (R. 38, the "second case"). Respondent immediately moved to amend the Lis Pendens, requesting that the Court identify the property in dispute in the second case, so that Respondent could sell the remainder of its property, not subject to any dispute, as Appellant's claim only pertained to an approximately 10' strip of Respondent's land. (R. 65). The second case was heard on the merits April 22 through 25, 2019 in a bench trial before The Honorable William P. Keesley. Judge Keesley entered a final Order on June 14, 2019 (R.4). The trial judge's

Order resolved the boundary line dispute between the parties, and, dismissed Appellant's slander of title and nuisance claims. A Notice of Appeal was served September 4, 2019.

THIS MATTER involves a real property boundary line dispute. Respondent submits that the trial court correctly ruled upon all matters set forth in the Order under appeal (R.4) and that the said Order should be affirmed in all respects.

The trial court's Order under appeal (R. 4) accurately states the material facts. Those material facts are recited in the Background section of the said Order, at pages 4 through 14. (R. 7-17). Respondent hereby disputes Appellant's Statement of Facts, as stated in Appellant's Brief, to the extent they differ from the facts found by the trial judge, all of which are supported by the evidence, or reasonable inferences therefrom.

1. Both parties took title to their respective adjacent single family residential building lots by way of deeds containing a legal description that referenced the same approved and recorded subdivision plat, which in 1978 originally established the Copahee View Subdivision, in Charleston County, South Carolina, by approved plat recorded in Plat Book AL at Page 77 in the RMC Office for Charleston County. R. 537,582, 697) Exhibit 2 (the "Subdivision Plat"); See Plaintiff's 27(a). Resolution of the boundary dispute centered upon the determination of the location of the common side property line, which divides Lot 11 (Appellant Blank) from Lot 12 (Respondent - Timmons).

2. Michelle Blank ("Blank" or "Plaintiff" or "Appellant") is the owner of Lot 11, TMS 614-00-00-020, which property was originally designated as "No Lot" on the Copahee View Subdivision Plat. Blank acquired the "No Lot" in 2005 from Donald W. Horton, who she then hired to build a home on the lot. Mr. Horton hired engineer D.E.

Franklin to prepare a site plan that established the proposed location of Blank's residence, in order that Blank or her builder could obtain a building permit from Charleston County. See, R702, Defendant's Exhibit 4. Mr. Franklin prepared the said site plan from the Copahee View Subdivision Plat, without having performed a field survey. Timmons agrees that the first site plan prepared by Franklin and submitted to Charleston County to obtain Blank's building permit (R. 702, Defendant's Exhibit 4) accurately stated the boundaries of Lot 11 as shown on the Copahee View Subdivision Plat. See, R. 697, Plaintiff's 27(a).

3. Patricia Timmons, Trustee of the Gorden H. Timmons Exempt Family Trust, ("Timmons" or "Defendant" or "Respondent") is the owner of Lot 12, T.M.S. 614-09-00-021, having acquired it in 2013. References to "Timmons" herein refer to the said Trust.

4. The Copahee View Subdivision Plat was a County approved plat, drawn to scale, (R. 697, Plaintiff's 27(a)), and it stated certain exact distances as to certain of the boundaries of Lot 10 and Lot 11, by assigned distances as follows:

Common Southern side boundary between Lot 11 and 12 = 190'

Common Northern side boundary between Lot 10 and 11 = 241.5'

5. The starting point for determining ownership/boundaries of real property is the legal description contained in the deed by which each respective claimant took title and in this case that was by reference to the same Copahee View Subdivision Plat. (R. 697, Plaintiff's Exhibit 27(a)).

6. Using the subdivision plat, Blank's surveyor Mr. Franklin prepared a site plan and located her proposed residence on Lot 11, but without performing a field survey

or visiting Lot 11. (R. 702, Defendant's Exhibit 4). The said site plan prepared by Mr. Franklin, with which Timmons agrees, was then used by Blank's building contractor, Donald W. Horton (the grantor from whom Blank purchased the lot) to obtain a building permit to construct a home on Lot 11 in the location sited by Mr. Franklin.

7. Lot 11 was stated on the Copahee View Subdivision Plat. (R, 697, Plaintiff's 27(a)) to be "No Lot". Blank testified that more than 50% of her property was wetlands and this was presumably why it was not a numbered lot originally offered by sale by the developer at the time it established the subdivision. When her builder and Mr. Franklin went to stake out the location of Blank's home per Mr. Franklin's first site plan, it was not physically possible to locate her home where Franklin first planned to locate it due to the presence of wetlands on Lot 11. Therefore, in the field, the location of the Blank home was shifted away from the wetlands towards, and partially onto, Lot 12 (See, R. 690, Plaintiff's Exhibit 24 showing encroachment of Blank home on Lot 11, by 5.25 feet onto Timmons Lot 12).

8. A revised site plan showing Franklin's revised proposed location of the home (R. 538, Plaintiff's Exhibit 2) was never submitted to the County Building Department for approval, nor was that revised site plan survey ever recorded. Charleston County has a procedure whereby a plat that adjusts a property line can be approved and thereafter recorded. (R. R. 336, L17-22, R. 538).

9. Engineer Franklin testified that when the Blank home could not be located on Lot 11 as per his original site plan (R. 702, Defendant's Exhibit 4), Franklin then performed a field survey and prepared a revised site plan moving the location of Blank's proposed home toward Lot 12 (R. 538, Plaintiff's Exhibit 2) to get the home being

constructed out of the wetlands on Lot 11. 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 survey of Lot 11 (R538, Plaintiff's Exhibit 2). Additionally, the rear property line of Lot 11 first stated by Franklin to be 191.81 feet based on the subdivision plat (R. 702, Defendant's Exhibit 4) became 221.58 feet based on Franklin's eventual survey of Lot 11 (R. 538, Plaintiff's Exhibit 2). Franklin testified this substantial numeric expansion of the width of Lot 11 from that originally expressed on the subdivision plat (Defendant's Exhibit 4 and R. 697, 27(a)) was proper because Franklin claimed he was then able to locate old iron pipes in the field in 2005 that were located at a distance that was 20 or more feet greater than shown on the 1978 subdivision plat and that Franklin's June 6, 2005 site plan he testified therefore took precedence over the 1978 subdivision plat, based on the alleged discovery of monuments Franklin claims to have located in the field. There was no evidence presented as to who placed the monuments Franklin alleged he located. Timmons challenged Franklin's testimony by pointing out that the front and rear property lines depicted by Franklin were 20 feet more than stated on the subdivision plat at the road and at the rear of Lot 11. Blank's lot did not grow 20 feet in width to accommodate her home when the home site was moved from the wetland location where it was originally sited.

10. Blank's home was constructed in an unapproved location and the issue was whether the Blank home was constructed entirely on Lot 11 or whether, as Timmons claimed, a 5.25 foot portion of the Blank home encroached on Timmons Lot 12.

11. Timmons purchased Lot 12 in 2013. Blank's home was in place at that time. When Timmons began construction, his surveyor reported to Gorden Timmons that Blank's home encroached on Lot 12. (R. 690, Plaintiff's Exhibit 24 showing Blank's home encroaching 5.25' onto Timmons Lot 12).

12. Gorden Timmons, a businessman with prior development experience, commissioned two independent surveys in an effort to fairly and properly determine the respective boundaries. He instructed two (2) independent survey companies to survey the entire street (called Macoma Drive) in order to locate permanent monuments in an intensive effort to accurately determine the correct boundaries. The findings were that the boundaries of Lot 11 and Lot 12 matched the county approved, recorded 1978 subdivision plat through which Blank and Timmons each took their respective titles. Also, the Timmonses re-planned the location of their home on Lot 12, to be placed away from the Blanks home, which according to Timmons' surveyors had been built 5.25 feet on Timmons' property. Timmons also took into account that in order for the Blank home to legally meet the side building setback requirements she would need a total of 10.25' of Timmons' Lot 12. Timmons offered to convey that portion of Lot 12 to Blank for no consideration to resolve her home encroachment problem (R. 690, Plaintiff's Exhibit 24 establishing a 5' setback from the Blank home encroachment). Notwithstanding this offer to convey the 10.25' of property, Timmons maintained the position that the Blank home encroached upon Lot 12.

13. The two independent surveyors hired by Timmons located many monuments, including original permanent concrete monuments used to establish the location of the paved public roads. Both of Timmons' separate and independently

operating surveyors ultimately determined the boundaries of Lot 11 and 12 were consistent with those shown on the 1978 Copahee View Subdivision plat.

14. The 1978 subdivision plat contains a certification by the original 1978 subdivision surveyor that he "surveyed the lots and roads on the ground and the distances are as shown" on the subdivision plat. This certification was in fact confirmed by the two independent surveys Timmons commissioned.

15. Franklin testified that no part of the improvements constructed by Timmons on Lot 12 encroached upon Lot 11. R. 328, L.4-7. Therefore, Blank's claim for trespass against Timmons failed, 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).

16. On May 27, 2015, Timmons sued Blank in Case No. 2015-CP-10-3013, *Patricia A. Timmons, Trustee v. Michelle G. Blank.* The relief sought in the first case was "an order requiring Defendant to move her house off the Plaintiff's property." On June 7, 2016, the case was dismissed with prejudice by Timmons as documented by way of a Form 4 Judgment in a Civil Case which simply recited "Plaintiff states in open court on record they are dismissing their case with prejudice. Defendant consents." (R. 685, Plaintiff's Exhibit 16). No evidence was ever presented in the 2015 action. Blank contends that this naked statement of dismissal established by *res judicata* all facts and conclusions of law necessary to establish her boundaries and correct her title problem. Timmons asserts the dismissal prevented the trust from ever suing Blank again to require that she move her home. As a matter of kindness, Timmons eventually decided not to pursue his 2015 legal action to compel Blank to remove her encroachment, as that

remedy appeared to be to be too harsh. Timmons resolved to voluntarily give Ms. Blank a portion of his Lot 12 in order to resolve the encroachment issue, rather than continuing to seek to require her to move her home. It is noteworthy that the standard form dismissal with prejudice did not contain any formal findings of fact, or contain any term that required Timmons to do anything post dismissal. Therefore, in proceeding with a second action, *Blank v. Timmons,* Case No. 2016-CP-10-4122, filed by Blank on August 9, 2016, she essentially confirms that the relief she sought from the Court was still required in order to properly resolve the parties' boundary dispute. There were no issues which were actually litigated in the 2015 *Timmons v. Blank* action and no final judgment was entered on the merits in that first lawsuit. No questions were actually litigated in the first lawsuit. It is Blank that initiated the second lawsuit against Timmons in 2016 after Timmons dismissed the 2015 action.

17. On August 9, 2016, Blank initiated the second lawsuit against Timmons in an effort to block the sale of the home Timmons had constructed entirely on Lot 12 to James and Holly Patrick (Complaint, ¶12). Therefore, on September 14, 2016, days before the closing, Timmons moved the Court in Blank's action to require Blank to amend or cancel her Lis Pendens so that Blank's new lawsuit/boundary claim only encumbered the small area of land Blank claimed on Lot 12 that was actually in dispute. R. 65. That relief was granted by Judge Cooper by Order Amending Lis Pendens filed September 14, 2016. (R. 31). The Order and a plat attached thereto identified the area in dispute as "Quit Claim Area 3,636.41 SF." R.35. Timmons agreed at that time to "hold title to the disputed portion of Lot 12 (the part highlighted in yellow) during the pendency of this second 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." R.33. At all times, Timmons has remained ready, willing and able to quitclaim the disputed area of Lot 12 to Blank for free, but without an admission that her boundary claim was in fact correct. Timmons, an experienced businessman, sought to avoid expensive property boundary litigation and he recognized a practical need to resolve the boundary dispute without regard to the merits of Blank's claim. The identification of the disputed area was done as part of Timmons' good faith effort to quitclaim the disputed area to Blank to end the boundary litigation, notwithstanding that Timmons reasonably and justifiably believed the Trust owned the disputed area. The identification of the area in dispute was not a malicious act. Rather, it was one of kindness.

18. The existence of Blank's claim to ownership of a small portion of Lot 12 would have prevented Timmons from selling Lot 12 to the Patricks. In order to remove the disputed area from the Patrick's contract to purchase Lot 12, the Timmons Trust had to reduce the amount the Trust would have otherwise received from a sale of the entirety of Lot 12 to the Patricks by Fifteen Thousand and no/100 Dollars ($15,000.00).

19. Timmons did not sue Blank after dismissing with prejudice the 2015 action seeking to have Blank move her house from encroaching upon Lot 12. Rather, Blank sued Timmons in the instant action and Timmons has defended and counterclaimed. The dismissal of the 2015 *Timmons v. Blank* action did not fully resolve the boundary issue as between the parties, or at least what was settled by the prior action is not entirely clear from the brevity of the Form 4 judgment of dismissal with prejudice. R. 685. The dismissal with prejudice certainly did not require Timmons to take any affirmative acts to rectify any title issues post dismissal. Blank's attorney at the time of

the 2015 action's dismissal, Jennifer Smith, Esq., testified that in order to rectify Blank's title, certain affirmative steps needed to be taken by Timmons, none of which were referenced in the Form 4 dismissal, or ever legally required of Timmons. R. 385, L.21 to R. 386, L.22. Therefore, the boundary dispute persisted following the dismissal with prejudice of the 2015 *Timmons v. Blank* action.

20. Blank sought an award of attorney' fees. There was no evidence in the record of the amount of attorney's fees being sought, the time expended, or the claimed hourly rate. Therefore, there is no evidence in the record to support an award of attorney's fees, even if attorney's fees were recoverable as to a claim upon which Blank prevailed, which is not the case here. Therefore, Blank's claim for attorney's fees was denied, as being unsupported by law or fact. *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991).

21. Blank seeks an award for damages she claims to have sustained as a result of flooding she experienced on the ground/garage level of her home during Hurricane Matthew. The evidence on this point is that Blank's Lot 11 was previously designated as "No Lot" because according to Blank it consisted of approximately 50% wetlands. R. 697, R. 439 Lines 9-15. The home was constructed in an "AE flood zone, elevation 14." In this flood zone, the ground floor may only be utilized for parking. Further, only the building pad area was raised up when the home was constructed. 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." Blank Lot 11 was not raised and has no roadside ditch as required by the subdivision plat. Therefore, the water took its natural path off the public road through

Lot 11 to the wetland area. Blank testified she used a portion of the ground floor area as an art studio for her stained glass artwork business. Blank sustained flooding damage as a result of Hurricane Matthew. (Exhibit 6 "Matthew flooded my entire studio.") R. 551. She made a claim for an artist's relief grant as a result of claimed Hurricane Mathew flooding damage, for which she sought $8,000.00 and received some compensation. FEMA denied Blank's claim because the area involved was 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. (R. 564, Plaintiff's Exhibit 8). Blank's flooding on Lot 11 during Hurricane Matthew was not caused by the construction of a home by Timmons on Lot 12. The flooding was caused by an extreme weather event, that being Hurricane Matthew. Therefore, the trial court declined to award the damages claimed by Blank as a result of flooding. The judge found that no improvement on the Timmons property interfered with Blank's interest in the private use and enjoyment of Lot 11. Therefore, the trial court concluded Blank's nuisance claim against Timmons must fail.

22. The trial judge crafted a mechanism to solve the boundary line dispute by calling for the parties to take certain post trial actions to correct the public record. (R. 29). Blank filed this appeal, rather than following the court's instructions.

STANDARD OF REVIEW

A boundary line dispute case is a case at law. The standard of review on a boundary dispute action at law is the substantial evidence standard of review. In other words, the appellate court will give deference to the trial court's findings of fact unless no evidence reasonably supports the findings. *Jordan v. Judy*, 413 S.C. 341, 347–48, 776

S.E.2d 96, 100 (Ct. App. 2015) "A boundary dispute is an action at law and the location of a disputed boundary line is a question of fact." *Bodiford v. Spanish Oak Farms, Inc.*, 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct.App.1995) (citation omitted). **On appeal of an action at law tried without a jury, we will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings.** *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Additionally, the appellate court can correct errors of law. *Okatie River, L.L.C. v. Se. Site Prep, L.L.C.*, 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct.App.2003); see also *Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) ("In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." (internal quotation marks omitted)). The trial court's factual findings in a law action are equivalent to a jury's findings. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). Questions regarding credibility and the weight of the evidence are exclusively for the trial court. *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct.App.1989). "We may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible." Id. "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." *Id.*

ARGUMENT

I. THE COURT CORRECTLY DISMISSED THE SLANDER OF TITLE CLAIM DUE TO THEIR BEING NO EVIDENCE OF MALICE OR OF SPECIAL DAMAGES.

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 o plaintiff's rights." *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). Malice 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. 85, 87 (1973).

The Respondent 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 claimed by Appellant as per the September 14, 2016 Order Amending Lis Pendens, to create a legal mechanism by which Respondent could quitclaim that land to Appellant for free. The Respondent determined how much of Lot 12 would have to be gifted to Appellant in order for her existing home to meet legal setbacks, if the Lot 11 boundary were expanded as claimed by Appellant. At Respondent's expense and effort, it isolated the disputed area and referred to it as the "Quitclaim area" in the plat that was approved. This was done so that Lot 12 could be sold without the conveyance from Respondent including any of the property involved in the boundary dispute. The Respondent was willing to, and intended to, convey the

disputed area to Appellant for free. Respondent acted kindly and entirely in respect toward Appellant's claimed rights, not in conscious disregard of them.

The order of dismissal with prejudice of the first action did not include any requirement that Respondent take any affirmative act to solve the boundary dispute. Respondent gratuitously took it upon himself to initiate a boundary resolution process, which the trial court properly accepted as being done in good faith, and to attempt to avoid litigation, such as the action Appellant filed after the end of the first case.

The trial court correctly rejected Appellant's assertion that the plat was done to maximize the value of Lot 12 to require the purchaser to agree to buy the disputed land. It was not proven how delineating an area of disputed title made potential purchasers think Lot 12 was more valuable than just leaving existing plats in place. Isolation of the disputed area did not financially benefit Respondent, except that it allowed a means by which Respondent's newly constructed residence could be sold. Respondent decided not to move his daughter into what would have been a new home he constructed for her, due to Appellant's harassment. Indeed, the Trust had to reduce the sales price of Lot 12 by $15,000 in order to isolate the disputed area from the land being conveyed to the Lot 12 purchasers.

When Respondent sought to sell the home constructed on Lot 12, it sought an order to amend the lis pendens, filed by Appellant in the second action, just before the closing in an effort to prevent Respondent from selling its property. The motion was filed to have the court isolate the disputed area. A hearing was held and an order was issued isolating the disputed area. (R. 65). Transferring Respondent's interests, if any, in the disputed area would have only further complicated matters. It was respectful of

Appellant's claimed rights for Respondent to take care to isolate the disputed area with court approval. The trial court correctly concluded that the actions of Respondent in filing the Gillette plat, which plat isolated the disputed area, did not constitute malicious acts intended to cloud Appellant's title to Lot 11.

In the trial court's view, any reasonable person examining the records related to these properties after the dismissal of the first action would conclude that the location of the boundary line had yet to be clearly defined. It has taken years of litigation, days of testimony, the court's interpretation, and yet to be accomplished -- the following of the court's directives to reach the point of actually establishing the boundary line. The Court concluded "the boundary line asserted by the Trust was more compelling and that people affiliated with the Trust have made diligent and reasonable efforts to resolve the dispute." (R. 5).

Appellant failed to establish any special damages arising from the recordation of the plat establishing the disputed area, which is the alleged act Appellant contends constituted slander. There is no evidence Appellant was unable to sell or finance her home due to any title issue created by any action of Respondent.

The trial court correctly ruled, Appellant failed to establish her slander of title cause of action and properly denied its claim for attorney's fees and litigation expenses. Also, Appellant made no offer of proof as to the amount of her claim for attorney's fees.

II. THE TRIAL COURT DID NOT ERR IN REJECTING THE NUISANCE CLAIM.

Appellant claimed a nuisance was caused by the construction of a standard residential concrete driveway on Lot 12 and other grading and landscaping, which was

asserted by Appellant to cause frequent flooding and be a substantial and unreasonable interference with the use and enjoyment of her land.

"The traditional concept of 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 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 trial court correctly concluded the nuisance claim had not been proven. First, the more credible evidence was that the driveway, grading and landscaping on Lot 12 did not in fact cause considerable amounts of storm water to be cast onto Lot 11. The driveway is small, and the court concluded it was "simply not credible that such a structure (or anything else the Respondent has done) causes water to pool, pond or be cast upon Lot 11 in amounts constituting a nuisance."

Second, the greater weight of evidence supported the determination that, when Appellant rejected the proposal to construct the exact type of swale she asserted at trial was needed, Respondent took adequate steps to route surface water to the other side of Lot 12, away from Lot 11.

Third, surface water is the common enemy. The Appellant had the burden of proof as to her nuisance claim. Almost all of the testimony from Appellant about water intrusion concerned a catastrophic hurricane event or periods of massive rainfall. The

court acknowledged that she said there was no water intrusion before the driveway was constructed, even during a 1000- year flood. But, her lot is 50% wetlands, by her estimation, with a wide drainage easement behind her lot. The house is constructed in a flood plain zone, and there was conflicting evidence about whether Appellant 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 was not been proven that construction on Lot 12 did anything to substantially enhance the frequency of 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 consider any interest or bias of a witness. Mr. Franklin was combative and dismissive at times during his testimony. He was the one who prepared the very different site plans at issue in the case, the second being an unapproved amended site plan which moved the location of the Appellant's proposed house away form the wetlands by making dramatic changes to the property dimensions. There were 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 the driveway was sloped away from Lot 11 and that grading was done to carry surface water away from the opposite side of Lot 12. Also, photographs appear to show surface water being carried onto Lot 12. (R. 439). Appellant, who was constantly on-site documenting activities that caused her concern, did not document any alleged substantial and unreasonable flow of water off the driveway from Lot 12 onto her property, which she claimed took place.

The court properly determined Appellant did not meet her burden of proof as to nuisance and that she was not entitled to damages. The greater weight of the evidence is that Respondent properly handled the drainage of Lot 12. The provisions for surface water drainage were constructed entirely on Lot 12 and were completed and inspected pursuant to a permit issued by Charleston County.

III. THE COURT SHOULD AFFIRM FOR ANY GROUND APPEARING ON THE RECORD.

This Court should affirm Judge Keesley's Order entered June 14, 2019, for any ground appearing on the record as provided by Rule 220(c), SCAR.

CONCLUSION

The Honorable William P. Keesley, fairly and judiciously presided over the bench trial of this matter and expended considerable time in the review of the many exhibits and legal issues raised. His Order entered June 14, 2019 is correct in all respects and should be affirmed.

Respectfully submitted,

THE MASON LAW FIRM, P.A.

s/ Mark A. Mason

Mark A. Mason (SC Bar No. 3676)
Tidewatch Centre on Shem Creek
465 West Coleman Boulevard, Suite 302
Mount Pleasant, South Carolina 29464
Post Office Box 1271 (29465)
Telephone: (843) 884-1444
Attorney for Respondent

Mount Pleasant, South Carolina
Dated: October 12, 2020