Nos. 21-CV-665 & 21-CV-666

DISTRICT OF COLUMBIA COURT OF APPEALS

HENRIETTA CONDOMINIUM ASSOCIATION, et al.,

Appellants/Cross-Appellees,

v.

S2 U STREET, LLC,

Appellee/Cross-Appellant,

On Appeal from the Superior Court of the District of Columbia, Civil Division
No. 2020 CAR 3007

REPLY BRIEF OF APPELLANTS

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/s/ Ray M. Aragon
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SUMMARY OF ARGUMENT

In spite of the many peripheral issues raised by Appellee/Cross-Appellant S2 U St., LLC ("S2" or "Appellee"), this case and this appeal are straightforward. The case below involves a land dispute and the Henrietta Appellants' defense and claim of adverse possession. This appeal concerns the trial court's multiple errors. First, after appropriately finding that disputed issues of fact precluded summary judgment, the trial court suddenly reversed itself, granting summary judgment to Appellee on reconsideration, even in the absence of any new evidence or any new issues. The trial court then compounded its error, refusing to even consider the Henrietta Appellants' presentation of substantial and overwhelming new evidence on their motion for reconsideration. In simplest terms, after inappropriately granting reconsideration and summary judgment to Appellee, even though nothing had changed, the trial court then simply closed its eyes to sworn testimony from neighborhood residents, the owners of the Henrietta Property, and managers of local businesses that have observed the property at issue (the "Disputed Area") for decades. In doing so, the trial court wrongly chose to sacrifice all fairness on the altar of Procrustean order, thereby guaranteeing a manifestly unjust result.

The basic questions on appeal are whether the trial court's entirely inconsistent standards in addressing motions to reconsider were abuses of sound discretion. Did the trial court abuse its discretion when it entertained Appellee's motion for reconsideration, even though Appellee presented no new arguments and no new evidence? And, did the trial court further abuse its discretion in reversing its finding of disputed issues of material fact and granting summary judgment to Appellee, even though its findings were based on precisely the same evidence the trial court previously found supported a finding of disputed issues of fact, and Court's guidance over four decades has been that any doubts as to whether a genuine issue of fact precludes

summary judgment must be resolved in the non-movant party's favor? Finally, did the trial court abuse its discretion in refusing even to consider compelling new evidence from lifetime neighborhood residents, prior owners of the Henrietta Property, studiously ignoring more than four decades of consistent and undisputed evidence showing that the Disputed Area claimed by both parties in the litigation below has been continuously enclosed as an integral part of the Henrietta Property for at least forty unbroken years, finding instead that no matter how compelling the evidence from the community, the court's interest in finality on its docket is supreme.

In a strange turn of events, all of these inconsistent actions took place in a period of less than 4 months. The trial court first denied Reese/S2 U Street's Motion for Summary Judgment ("First Motion," at App. 019-323), on its finding that disputed issues of fact precluded pretrial judgment in favor of Plaintiffs. *See* March 16, 2021 Order at App. 345-48.

Then, even though no new evidence was submitted, and no new arguments were presented, the trial court abruptly changed its mind, reconsidering and granting summary judgment for S2 following S2's Opposed Motion to Alter or Amend Order; or for Relief from Order ("Appellee's Motion for Reconsideration"). *See* May 12, 2021 Order at App. 372-380. In making this 180-degree turn, the trial court apparently was swayed by S2's repeated argument on reconsideration that the Henrietta Appellants had not directly challenged evidence in an affidavit submitted by then-Plaintiff and former owner Lester Reese ("Reese"). *See* Appellee's Motion for Reconsideration at App. 355-57. Unfortunately, the trial court appears never to have realized that the allegedly unchallenged Reese affidavit had been submitted only with S2's reply brief in the First Motion, thus precluding Plaintiff from responding to it. *See* New Affidavit of Lester

Reese date March 1, 2021 ("New Reese Affidavit"), Exh. A to Plaintiff's Reply in Support of Motion for Summary Judgment, Second Supp. App. at 49-53.[1]

Appellee, thus concealing by indirection that it had submitted a new substantial affidavit only on reply, argued that the evidence in the "Reese Affidavit" was "wholly uncontested." Appellee's Motion for Reconsideration at App. 356. Thus, the gravamen of Plaintiff's motion for reconsideration is that the Henrietta Appellants failed to rebut evidence that Reese submitted only upon reply. The trial court, evidently failing to understand that the Henrietta Appellants had no opportunity in its opposition to rebut evidence submitted only upon reply, found this argument reasonable. On reconsideration, the Court completely changed its mind, reached an entirely opposite conclusion based on the exact same evidence, and wrongly entered judgment for Appellee. *See* May 12, 2021 Order at App. 375.

Thereafter, having granted the Appellee a complete do-over for no demonstrated reason, based on identical evidence, and granting summary judgment to Appellee, the Court then refused on grounds of order and finality to consider the extraordinary new evidence presented by Appellants. In doing so, the trial court chose to ignore four decades of sworn evidence by prior and current owners of the Henrietta Property, lifetime residents of the immediate neighborhood, and even the manager of a nonprofit organization that had been located directly across the street from the Henrietta Property for more than fifteen years, all consistently establishing that the

[1] Appellee's March 1, 2021, Reply in Support of Summary Judgment was inadvertently omitted from Appellants' Appendix, and is being submitted to the Court as part of Appellants' Second Supplemental Appendix, which is being filed with this Brief. *See* Second Supp. App. at 32. Also included in the Second Supplemental Appendix are: Appellants' February 23, 2021, Additional Filing of Exhibits in Opposition to Summary Judgment, *id.* at 1; Exhibits to Appellants' June 8, 2021, Opposed Motion to Alter or Amend Order Granting Summary Judgment, *id.* at 76; and Appellants' August 18, 2021 Response to Plaintiff's Statement on Damages, *id.* at 189.

Disputed Area has been part of the Henrietta Property for decades. The trial court likewise dismissed Appellants' reason for seeking reconsideration, which was that their former counsel essentially abandoned the Appellants' by failing even to inform them that Appellee's Reconsideration Motion had been filed, and by filing a nearly incoherent opposition, including pictures of fences and property that had no relationship to the overall land dispute.

The trial court's decision to ignore the clear and compelling evidence submitted by Appellees was not supported by the law or issues in the case, or by the reality that the Disputed Area had been part of the Henrietta Property for decades. Rather, the decision to refuse to consider the wealth of evidence provided by Appellants was supported only by the trial court's newly discovered interest in finality, without regard to fairness. *See* July 13, 2021 Order at App. 400-06 (denying reconsideration and rejecting evidence from decades of Henrietta property owners, long-term neighborhood residents, and business neighbors regarding the makeup of the Henrietta Property, based on the trial court's interest in finality).

The trial court's errors are abuses of its discretion and have prevented the Henrietta Appellants from even presenting their evidence, prematurely terminating the litigation in favor of Appellee, while ignoring evidence clearly establishing long-term, continuous adverse possession of the Disputed Area. Indeed, the evidence of adverse possession presented by the Henrietta Appellants—but rejected without review by the trial court, would almost certainly entitle the Appellants to judgment on the merits if they were given a fair opportunity to present to a jury relevant facts and issues of law prior to judgment being entered. Simply, the trial court, in error, prematurely and wrongly ended this litigation by refusing to consider compelling evidence, effectively imposing a heightened standard of proof on the non-movant party to survive a motion for summary judgment that barred clear and compelling evidence of adverse possession.

On *de novo* review of the First Motion, and to avoid manifest injustice resulting from the trial court's multiple abuses of its discretion, the Appellee's Motion for Reconsideration should be reversed, and the Henrietta Appellants should be permitted to present its compelling evidence to a jury. In the alternative, the trial court's refusal to hear the Henrietta Appellants' Motion for Reconsideration of Summary Judgment, in which the trial court abused its discretion by rejecting evidence sufficient to grant judgment to Appellants simply choose to close this action, should be reversed and remanded to the trial court for reconsideration.

ARGUMENT

In their Opening Brief, the Henrietta Appellants set forth their fundamental arguments detailing why the action of the trial court was an abuse of its discretion and why this action should be remanded for further hearing and trial. In this Reply, the Henrietta Appellants fully incorporate their prior arguments, but to avoid repetition, focus on addressing the largely misleading arguments raised by Appellee in its Opposition Brief. Additionally, the Henrietta Appellants present argument in opposition to the Appellee's cross-appeal on denial of damages.

I. The Trial Court Appropriately Applied Rule 56 in Initially Denying Summary Judgment to Appellee

Fundamental to this appeal is the trial court's initial decision to deny summary judgment to Appellee based on disputed issues of material fact. When a court finds such disputed issues, summary judgment is simply inappropriate. Superior Court Rule of Civil Procedure 56 permits summary judgment based on the entirety of the record, "*only* when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law." *Han v. Southeast Acad. of Scholastic Excellence Pub. Charter Sch*., 32 A.3d 413, 416 (D.C. 2011) (quoting *Jones v. Thompson*, 953 A.2d 1121, 1124 (D.C. 2008); *see* Super. Ct. R. Civ. P. 56. In reviewing the record for such issues, even the trial court acknowledged that the evidence "must

be viewed in the light most favorable to the non-moving party." *See* March 16, 2021 Order at App. 346 (citing *Doe v. Safeway, Inc.*, 88 A.3d 131, 132 (D.C. 2014). Given the finality of summary judgment, courts must move cautiously in granting them. *See Dewey v. Clark*, 180 F.2d 766, 770 (D.C. 1950) ("Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them" (quoting *Associated Press v. United States*, 326 U.S. 1, 10 (1945))). As such, if a court has any doubts as to whether a genuine issue of material fact exists, summary judgment must be denied because the trial court cannot "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett v. Covington & Burling LLP*, 979 A.2d 1239, 1244 (D.C. 2009).

In its attempt to clear this high bar, Appellee initially submitted a skeletal affidavit from Reese and claimed that because Henrietta Appellants had neither denied or admitted requests for admissions, then there were no issues of material fact, and they were entitled to judgment as a matter of law. First Motion at App. 19-323 (providing the Affidavit of Lester Reese, dated January 11, 2021 ("Initial Reese Affidavit") wherein he states (i) he "periodically parked his vehicle" on the Disputed Area, (ii) that the "present owners" of the Henrietta Condominium Association built the parking pad and fence in or around 2009, and (iii) that he discovered in 2020 that the fence encroached on his property).

In response, Henrietta Appellants set forth "specific facts," including but not limited to the fact that since at least March 1999, there had been a fence on the Disputed Area delineating it as a parking lot for the Henrietta Property. *See* Opposition to Motion for Summary Judgment at App. 335. The Henrietta Appellants also noted that the Disputed Area had been used as a driveway to their property since at least March 1999 and that Reese's property had a separate driveway which was more convenient for him to access his property and for which photographs

showed that he used. *See* Opposition to Motion for Summary Judgment at App. 335. They also provided **photographs, aerial images, and a 2010 appraisal report** which called into question the credibility of the Initial Reese Affidavit and established that the concrete pad and wooden fence were built by prior owners of the Henrietta Property. *See* Opposition to Motion for Summary Judgment at App. 342-43.

In its March 16, 2021 Order, the trial court found, appropriately, that there were disputed issues of fact regarding the Disputed Area, and that these disputed issues must be considered in the light most favorable to the non-moving party, i.e., the Henrietta Appellants. *See* March 16, 2021 Order at App. 346. As is typical in such motions, rather than list every possible disputed issue of fact, the trial court identified a key disputed fact at issue (the presence and legal significance of a fence segregating Plaintiff's property from the Henrietta Property and the Disputed Area), found that summary judgment was inappropriate, and denied Appellee's motion.[2] *Id.* at App. 348.

II. The Trial Court Erred in Agreeing to Reconsider its Denial of Summary Judgment

Undeterred by the trial court's finding that disputed issues precluded summary judgment, Appellee sought reconsideration under Rules 59(e) and 60(b), asking the trial court to "alter or amend" its order denying summary judgment, or, alternatively, grant relief from the trial court's prior order. Appellee's Motion for Reconsideration at App. 349. In fact, the rules cited by Appellee to support its motion are generally irrelevant to motions for reconsideration, but the trial court helpfully stepped in, ignoring Appellee's incorrect stated basis for its motion, and

[2] The trial court's identification of the fence as a disputed issue of fact does not mean, as Appellee contends, that the fence was the only disputed issue of material fact, but simply that the identification of any disputed issue of material fact precludes summary judgment.

deciding *sua sponte* that Appellee's wrongly focused motion should be considered a motion under Rule 54(b). *See* May 12, 2021 Order at App. 374.

Most notable in Appellee's Motion for Reconsideration is that it provided no new evidence whatsoever, made no new arguments, and provided no reason why the trial court should reconsider its prior decision, other than that Appellee simply wanted to reargue a motion it had lost. *See generally,* Appellant's Motion for Reconsideration at App. 349-63. Appellee simply argued again that it was entitled to summary judgment, focusing this time on the statements made in the New Reese Affidavit, and reasoning, quite wrongly, that its disagreement with the trial court's denial of summary judgment was sufficient to warrant reconsideration of the trial court's initial order. *Id*.

In addressing the Motion for Reconsideration, the trial court seemed to change its very standard. It its initial order denying summary judgment, the trial court stated that a non-moving party will survive a motion for summary judgment if it "*present[s] sufficient evidence to support a conclusion that a factual dispute exists*, such that a judge or jury must resolve the conflicting assertions at a trial." *Clay Props., Inc. v. Wash. Post Co*., 604 A.2d 890, 893-94 (D.C. 1992) (*emphasis added*); *see* March 16, 2021 Order at App. 347.

In addressing Appellee's renewed motion, however, the trial court appeared to change it view of the law. Ignoring the binding *Clay Props* standard it had previously used, the trial court now decided that to avoid summary judgment the Henrietta Appellants must *"produce enough admissible evidence to make a prima facie case in support of their claims." See* May 12, 2021 Order at App. 376. Elsewhere in its opinion, the trial court grants summary judgment to quiet title because Appellees "*have not established a claim for adverse possession or an easement*," *id.* at App. 377 (emphasis added), and grants declaratory judgment to Appellee because

"[Appellants] have failed to present evidence to sustain a claim for adverse possession." *Id.* at App. 378 (emphasis added). In the same opinion, the trial court found that summary judgment should be awarded if "the record does not contain sufficient evidence from defendants to *refute* plaintiff's material assertions of fact." May 12, 2021 Order at App. 376 (emphasis added). Of course, what is notable about the trial court's new standards is that they are not proper standards for summary judgment at all, but standards for victory after evidentiary hearing or trial. Even more egregiously, the trial court grants summary judgment on trespass because "the undisputed evidence shows that the defendants are encroaching on the Subject Property by their continued use and possession of the Area in Dispute." *Id.* at App. 379. This is not a standard at all; it is a simple statement of every adverse possession case, and probably every boundary dispute. It certainly should not entitle any litigant to anything, but in this case it did.

Interestingly, in seeking reconsideration after denial of summary judgment, Appellee cited this Court's opinion in *Tobin v. John Grotta Co.,* 886 A.2d 87 (D.C. 2005) to support its argument that reconsideration is appropriate. *See* Appellee's Motion for Reconsideration at App. 355. In fact, a careful reading of *Tobin* demonstrates quite clearly that the trial court erred in even considering Appellee's motion for reconsideration. In *Tobin,* this Court considered whether a trial court erred in initially denying and thereafter granting a motion for summary judgment. *See Tobin*, 886 A.2d at 90. In its consideration, this Court was crystal clear that a repetitive motion for reconsideration was inappropriate: "critical to our decision is that appellees, in their motion for reconsideration, modified their request for relief [by moving for judgment on only one issue] thereby changing the procedural posture of the case." This is clear guidance by this Court that repetitive motions for reconsideration, i.e., motions that simply seek the precise relief that was previously denied are improper.

Nevertheless, that is exactly what Appellee did. On reconsideration it made no new arguments, offered no new evidence, and proposed no new findings. Instead, it simply repeated argued its prior, unsuccessful arguments. The *Tobin* Court found it "critical" that the motion for reconsideration not be (as here) identical to the original, unsuccessful motion. *Id.* As such, Appellee's "silver bullet" case actually teaches that repetitive motions for summary judgment seeking the same relief are improper and should not be permitted.[3]

This is simple hornbook law. As the trial court pointed out, regardless of their procedural basis, motions for reconsideration "cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled." May 12, 2021 Order at App. 374 (citing *Ali v. Carnegie Institute of Washington*, 309 F.R.D. 77, 81 (D.D.C. 2015)). Interestingly, the trial court also cited *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264 (7th Cir. 1996), for the proposition that "[r]econsideration is not an appropriate forum for ... arguing matters that could have been heard during the pendency of the previous motion." *Caisse Nationale*, 90 F.3d at 1270.

Having thus determined that motions for reconsideration cannot be used to reargue facts and theories upon which a court has already ruled," the trial court allowed Appellant to do exactly that, and Appellant repeated and restated every argument that had been previously made and rejected, changing focus only to thunder on about Appellants' alleged failure to rebut a crucial affidavit of former owner Lester Reese—but without disclosing to the trial court that it was referring to the New Reese affidavit that Appellee filed only with its reply, thus depriving

[3] It also is noteworthy that the *Tobin* Court reversed and remanded the trial court's summary judgment on reconsideration for all but one count of the claims at issue. *Id.*

Appellants opportunity to address the new evidence. *See* May 12, 2021 Order at App. 374 (quoting *Ali*, 309 F.R.D. at 81).

The trial court appeared to take the bait. Rather than consider the entire record, the trial court relied almost entirely on the New Reese Affidavit, which contradicted and supplemented the Initial Reese Affidavit with additional information not provided in discovery.[4] Ignoring the full record, and specifically ignoring the Henrietta Appellants' initial, weighty response to the First Motion, the trial court reversed its decision as to summary judgment. *See* May 12, 2022 Order at App. 374-77. As such, the trial court erred both in choosing to reconsider the First Motion and then arriving at a wholly inconsistent outcome, based largely on its finding that the New Reese Affidavit was largely unopposed, but without realizing that the New Reese Affidavit was submitted on reply thus precluding Appellants from responding. Furthermore, the trial court required the non-movant party to "produce enough admissible evidence to make a prima facie case in support of their claims." *See id.* at App. 376 (emphasis added). Elsewhere in its opinion, the trial court explains granting summary judgment by stating that the Henrietta Appellees "have not established a claim for adverse possession or an easement." *Id.* Of course, each of these standards is for victory after hearing or trial, and not a standard on summary judgment at all.

In the absence of any new evidence, any new argument, or any showing that evidence could not have been presented previously, the trial court erred in entertaining Appellee's Motion

[4] Moreover, the two Reese affidavits contradict each other. As an example, the Initial Reese Affidavit states "6. On or around 2009, the Henrietta Condominium Association (the 'Association'), the present owner of the Adjacent Property, constructed a concrete driving pad and built a fence," while the New Reese Affidavit states "30. The Modern Day Fence was erected in early 2008"). The trial court chose to cite the statements in the New Reese Affidavit as "undisputed," *see* App. at 377, but failed to realize that Reese's statements were indeed disputed, under oath, by Reese himself.

for Reconsideration. It then compounded its error by simply abandoning its prior finding that there were disputed issues of fact related to the long-existing fence that segregated the Disputed Area from the Appellee's property and enclosed the Disputed Area as part of the Henrietta Property. *See generally*, May 12, 2021 Order at App. 372-380. Rather, creating new standards that permit summary judgment if the non-movants "have failed to present evidence to sustain a claim for adverse possession," *id.* at App. 378 (emphasis added) or because the non-movants "have not established a claim for adverse possession or an easement," *id*. at App. 377 (emphasis added), the Court, in an abuse of its discretion, simply reversed course, and granted Appellee summary judgment.

Reviewing the entire record *de novo* and relying solely on the evidence before the trial court at the time it entered its May 12, 2021 Order, it is clear that there were multiple issues of material fact which precluded the granting of summary judgment both initially and on reconsideration. As such, the case should be remanded to the trial court for full presentation of the issues in the case to the appropriate factfinder. Finding that the Court erred in granting summary judgment, the issues of whether the trial court abused its discretion in regard to the motions to reconsider would become moot.

III. The Trial Court Again Erred in Refusing Even to Consider the Henrietta Appellants' Motion for Reconsideration, Which Contained Overwhelming Evidence that the Disputed Area Had Been Part of the Henrietta Property for Decades

The parties agree "that motions for reconsideration, whatever their procedural basis, cannot be used as an opportunity to reargue facts and theories upon which the court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier," except under Rule 60(b) when it is demonstrated that failing to consider new evidence

would result in a manifest injustice. *Ali*, 309 F.R.D. at 81; *see also* Appellee's Opposition Brief at 25.

Superior Court Rule of Civil Procedure 60 permits reconsideration for "any other reason that justifies relief." Super. Ct. R. Civ. P. 60(b)(6). The trial court noted that "defendants appear to request relief under Rule 60(b)(6)," yet then refused to evaluate under (b)(6) because new evidence was also presented. July 13, 2021 Order at App. 403. The new evidence was presented as support for the position that a manifest injustice would result should the court fail to reconsider its prior motion. Just because new evidence was presented did not excuse the trial court from evaluating whether reconsideration should be granted under Rule 60(b)(6) in order to avoid injustice.

The trial court relied on *Puckrein v. Jenkins*, 884 A.2d 46 (D.C. 2005), for the position that "ignorance or carelessness of an attorney does not provide grounds for Rule 60(b)(6) relief." July 13, 2021 Order at App. 404 (citing *Puckrein*, 884 A.2d at 59). However, the trial court failed to consider that this Court has found that grounds for Rule 60(b)(6) relief may include when counsel fails to "devote *reasonable efforts* in representing the clients," *Clark v. Moler*, 418 A.2d 1039, 1043 (D.C. 1980) (*emphasis added*) (finding that when an attorney failed to take appropriate action in a case, that it "present[ed] an exceptional circumstance where an attorney ha[d] violated 'his implicit duty to devote reasonable efforts in representing his client,' and as such his negligence should not be imputed to his client" (quoting *Railway Express Agency, Inc. v. Hill*, 250 A.2d 923, 926 (D.C. 1969)). In this case, former counsel failed even to inform the Henrietta Appellants of the Appellee's Motion for Reconsideration until well after briefing was completed, and submitted a completely skeletal opposition that unfortunately contained pictures of irrelevant sections of the Reese property. *See* Decl. of Melissa Haupt at Supp. App. 6-7. As

such, the Appellants never had the opportunity to directly respond to the Appellee's Motion for Reconsideration. In their motion for reconsideration, Appellants acknowledge that they were not informed of the Appellee's Motion for Reconsideration, that they had immediately relieved their counsel and sought new representation, and as such "respectfully [sought] the leave and indulgence of the court to file a proper opposition to the Motion to Amend, and to address the issues raised by [Appellee] in its Motion to Amend." *Id.* at Supp. App. 6. Such an opposition would include sworn testimony that the Disputed Area had been fenced in for more than 60 years, and that the Disputed Area had been used exclusively and continuously for the purposes of the Henrietta Property since at least 2003. *Id.*

The result of the trial court refusing to reconsider its May 12, 2021 Order in addressing the Appellants' motion for reconsideration is manifest injustice. While in some cases an argument can be made that the proper remedy for ineffective counsel is a malpractice claim, in this case, and any case involving unique real property, the only practical way to avoid manifest injustice is to permit the actual evidence to be heard. At any reasonable hearing, Appellants would be able to establish adverse possession and the Appellants' rights to the Disputed Area. The trial court refused them this right, choosing rigid order over fairness, and over getting the case decided on the actual evidence. This injustice can be remedied only by allowing the Henrietta Appellants the opportunity to present their evidence. The trial court's refusal to do so is an abuse of its discretion.

IV. Appellees Attempt to Conceal the Trial Court's Errors by Confusing the Issues and Adding Entirely New Arguments on Appeal

Although the issues related to Appellants' appeal are simple, Appellee attempts to confuse the clarity of the issues, first by making arguments supporting the trial court's decision

that the trial court never made, and then by inappropriately adding entirely new arguments on appeal.

A. Appellee's Claim that Vacant Property Cannot Be Adversely Possessed is Simply Wrong

In its First Motion, Motion for Reconsideration, and its Opposition Brief, Appellee falsely claim that "vacant" property prevents a showing of continuous and exclusive use. *See* First Motion at App. 26; Appellee's Motion for Reconsideration at App. 358; Opposition Brief at 8. This is simply untrue: as the nature of the property is not determinative of a successful adverse possession claim. *See Gan v. Van Buren St. Methodist Church*, 224 A.3d 1205, 1209 (D.C. 2020) (finding a fenced-in driveway adjacent to property may be obtained through adverse possession).

An adverse possession simply requires a showing that the use was continuous for a period of fifteen years and permits tacking time with a prior owners' use. *See id*. The evidence submitted by Appellants that the Disputed Area was used as a staging area for construction during the time the Henrietta Property was being renovated clearly establishes ongoing adverse possession, particularly as during that time the Disputed Area was entirely separated from the Reese Property and joined into the Henrietta Property by a chain-link fence.

As to exclusivity of use, the fact that a person who later claims ownership of a disputed property, such as Reese, may have occasionally entered the property simply does not preclude adverse possession. *See Senez v. Collins*, 182 Md. App. 300, 334 (2008) ("The mere act of going upon the land is not enough. The owner [claiming title] must assert his claim to the land or perform some act that would reinstate him in possession before he can regain what he has lost.").

B. Appellee's Argument that the Condominium Act Prevents Claims of Adverse Possession is Both Legally Inaccurate and Not Relevant to this Appeal

In its Brief, Appellee repeatedly argues that the Condominium Act prevents Henrietta Appellants' claim of adverse possession. *See* Opposition Brief at 2, 26 (arguing that the District's Condominium Act, which requires recordation of a plat, precludes adverse possession of adjacent non-plat property). Appellee provides no legal basis for this claim other than to cite to the general Condominium Act, which neither addresses nor concerns adverse possession. There appears to be no case law or legal authority to support such an argument. It is clear that disputed land need not be identified on a deed, and that the very basis of adverse possession law is ownership of property not properly identified in deeds or surveys. *See Gan*, 224 A.3d at 1209 ("Where land that is adversely held, adjoins land described in a deed, but is not described in the deed, and continues to an obvious boundary, such as a fence, the grantor's intent to convey the entire enclosed area is implied from the circumstance." (quoting 2 C.J.S. Adverse Possession § 172 (2013)).

More to the point, however, is that, whether specious or sound, this argument has no relevance to the appeal: this matter was only raised peripherally by Appellee in seeking summary judgment and was not addressed by the trial court in *any* of its three opinions relevant to this appeal. As such, this argument is a diversion that should not be part of this Court's analysis.

V. The Trial Court Correctly Denied S2 U Street's Purely Speculative Claim for Damages Without a Hearing

Should the Court decline to address the trial court's decision to consider and grant Appellee's motion for reconsideration, and thereafter to refuse even to consider the wealth of evidence that the Henrietta Appellants presented to overcome any claim for summary judgment, the Court will have to address Appellee's cross-appeal in which it seeks review of the trial

court's review and rejection of Appellee's claims for damages. As shown in the record below, Appellee submitted its Statement of Damages, Fees & Costs, supporting its claim of damages with a sworn statement by one of the Appellee's owners, Lee Simon, as well as supporting exhibits. *See* Appellee's Statement of Damages at Supp. App. at 35-76; Affidavit of Lee Simon, *id.* at 43-48; Supporting Exhibits, *id.* at 49-76.

Appellants argued to the trial court that the damages sought by Appellee were entirely speculative or simply not available. After a hearing, the trial court agreed that the damages were speculative, and denied Appellee's application. *See* Docket No. 96 at App. 18.

In a half-hearted argument, Appellee attempts to argue that the trial court should not have dismissed its damages claims. Rather, it argues that because Appellee "submitted at least some evidence as to its claims for damages," the trial court should have held those claims over for trial. Opposition Brief at 34. However, by failing to cite any authority indicating that the trial court lacked the authority to recognize Appellee's claim of damages as speculative, Appellee essentially admits that it has no argument that the trial court abused its discretion.

A. A Court Must Dismiss Speculative Claims for Damages

It is axiomatic that a court cannot award damages for entirely speculative injuries. *See Cormier v. District of Columbia Water and Sewer Auth*., 959 A.2d 658, 667 (D.C. App. 2008) (*citing Martin v. Johns–Manville Corp.*, 494 A.2d 1088 (Pa. 1985)). If there is uncertainty regarding the fact of damages, the damages claims are indeed speculative, and therefore unavailable. *See Cormier*, 959 A.2d at 667 (*citing Pashak v. Barish*, 450 A.2d 67 (Pa. Super. Ct. 1982)). Moreover, even if a plaintiff can arguably show damages, he is not entitled to an award of damages unless he has established the amount of damages to a reasonable degree of certainty. *See Garcia v. Llerena*, 599 A.2d 1138, 1144 (D.C. 1991). And, of course, there must be some

legal relationship between the parties that is somehow breached or injured before damages can be awarded. Appellee's claims for damages fail to meet each of these requirements.

B. Alleged Loss of Income from the Apartment Building

Appellee's largest claim for damages is for alleged loss of income from the Apartment Building, which Plaintiff misleadingly calls a loss of "profit from development." Appellee's Statement of Damages, Supp. App. at 40. However, Appellee was unable to substantiate this claim in any way—essentially because it sought to collect a year's worth of damages for alleged loss of income on a property it did not own, for a project it never began. Appellee appears to claim that if not for a border dispute on a far side of the Reese Property, the Apartment Building would have been fully rented and would have been a cash account to the extent of $265,459 by May 2021 (at which time the Appellee would have owned the property for less than two months). *Id.*

This claim was without any basis whatsoever. First, Appellee did not own the Reese Property until late April 2021, and thus sought loss-of-business damages for a business it did not run, on property it did not own. Moreover, the Apartment Building on the Reese Property is not on or affected by any litigation regarding the Disputed Area. The fact that a dispute arose regarding a sliver of property with which the Apartment Building has no relationship whatsoever on land that Appellee did not own simply cannot affect Appellee's business—it had no legal connection to the Reese Property at all.

Appellee essentially admits this in its statement of damages stating that after purchasing the Reese Property and April 2021 it "allowed the work to start on the existing building (the Apartment Building) while a litigation that affected the lots to be subdivided continued." *See also* Affidavit of Lee Simon at ¶¶ 10-11, at Supp. App. 76. In other words, Appellant was

seeking to recover the profits as if the Apartment Building was offering rentals (it wasn't) and as if Appellant owned the Apartment Building (it didn't). Because these damages were entirely imaginary, Appellant failed to produce rent rolls or any evidence of actual income. There was no rental income, and therefore no damages due to anyone, much less to a party such as Appellee that had no legal relationship with the Reese Property until about six weeks before the trial court initially granted summary judgment. In fact, the record below demonstrated that until Appellee purchased the Reese Property in April 2021, former owner Reese was closing the Apartment Building for renovation, applied for a building permit in March 2020, and received demolition permits on April 8, 2021 and April 21, 2021, the day he transferred the property to Appellee. For Appellee to demand full rent damages for an empty/vacant building it neither operated, nor owned, is well beyond speculative and into the category of misleading. The trial court properly found that such damages were unavailable to Appellee.

On appeal, Appellee does not even argue that such damages were appropriate, only that the trial court should have *held them over for trial*, a rather injudicious suggestion in a case in which summary judgment had already been granted in its favor. *See* Opposition Brief at 34. In summary, Appellee's request for business losses for foregone rent and income on a building it didn't own, for apartments it did not rent, as part of a business it did not operate, is beyond speculative. The trial court appropriately denied this risible claim.

C. Alleged Loss of Interest

Plaintiff's second largest claim for damages involves a claim for higher interest. Again, this claim is entirely speculative and not supported in any way. First, Appellee is seeking damages for a year or more of alleged delay and alleged increase in interest to purchase the Reese Property. However, until a few weeks before the trial court granted summary judgment,

the parties had no legal relationship at all. Thus, Appellants cannot be liable for an interest rate Appellee received on a property it intended to purchase (but did not own), any more than they can be liable for delays incurred by a company with which they had no legal relationship whatsoever.

Even if the parties had a legal or contractual relationship, Plaintiff's only claim for damages is based on a statement that a separate corporation that has common ownership with Appellee once got a loan at a better rate, at 2.75% rather than 3.75%, but the date, project, amount, and conditions are all unknown, which make Appellee's statement of interest rates worthless in any comparison. A different loan to a different company in a different year for different amounts on a different property with a different maturity rate cannot reasonably be compared to the loan Appellee received on the Reese Property. Thus, appellee's claim for damages for higher interest on the purchase of the Reese Property is entirely speculative, and Appellee has produced no valid evidence to support it.

D. Alleged Loss of Use of Value

Plaintiff's claim for loss of use of value is equally insubstantial. Just as with its claim for extra interest expenses, Appellee was unable to produce evidence to support its claim. Although it claimed it intended to subdivide the Reese Property, Appellee was unable to show it had applied for such subdivision, much less received it. Instead, it attached a letter from the Department of Consumer and Regulatory Affairs, Office of the Zoning Administrator, which theoretically addresses the regulatory acceptability of three separate configurations of the Reese Property. *See* Appellee's Statement of Damages Exh. C at Supp. App. 55-57. Although the letter states clearly that it does not convey zoning authority, Appellee wishes to pick one of the three subdivision plans it had not finalized and for which it had not applied, assume that the

subdivision, zoning, and deviations were fully approved, and then charge Appellants for the theoretical losses from into the future, even though Appellee could not show that it was denied any zoning, that it had subdivided the property, or that the value of the subdivided property was diminished because of the underlying lawsuit. As before, Appellee's alleged damages on its theoretical plans are entirely hypothetical and are not damages at all. Even though Appellee tries to prop up this claim by comparing the best-case future zoning of the Reese Property to another fictitious plot in Northeast D.C. of undisclosed history, size, and value, Appellee has produced no evidence that the value of the plots are similar in any way, other than that they are in the same neighborhood, and its statement that they are of identical development value is meaningless. Again, Appellee's claims are entirely hypothetical, based on an assumption that it had zoning it does not have and never applied for, and could have borrowed more money on a property it didn't own until April 2021. Less hypothetical would be whether Appellee received a significant discount on the purchase price of the Reese Property because of its full knowledge of all of the matters about which it now complains.

E. Alleged Loss of Property Taxes

Appellee's demand for property taxes was also hypothetical; as it did not own the Reese Property until April 2021, and it could not demonstrate that it had actually been assessed and paid property taxes—something that would have been easy to prove with a simple canceled check. Thus, it is again clear that Appellee is seeking damages for tax payments that had not been assessed or paid.

F. Alleged Loss of Parking Space Revenue

Finally, Appellee sought damages for parking payments as if it had applied for zoning and been approved and the Disputed Area was being operated as a parking lot, something

Appellee did not do. Rather, Appellee assumes it is entitled to a long-term claim for damages for speculative parking rental on a private property it didn't own until four weeks before summary judgment was granted, and (naturally) assumes long-term profitability of a business Appellee does not run on a property it did not own. Again, this is the very definition hypothetical or speculative damages, made even more speculative by Appellee's decision to seek a permit to enclose the Disputed Area, which is inconsistent with operation of an open parking lot. *See* Defendants' Statement on Damages, Second Supp. App. at 197 (discussing Fence Permit issued to Plaintiff on June 2, 2021).[5] The trial court rightly denied its highly speculative claim.

In summary, as demonstrated at the time, Appellee's claims for damages were based on hypothetical businesses, generating hypothetical profits, based on hypothetical zoning that did not actually exist, on a property it didn't own. Even if the claims were not hopelessly insubstantial, Appellants simply can't be held liable for claims of lost profits over time for businesses Appellee did not conduct on the Reese Property, which it did not own. As none of these claims could be substantiated in any reasonable way, the Court properly rejected them as speculative and entirely hypothetical and had no duty to hold a hearing on such evanescent damage claims. As such, Appellee's cross-appeal should be denied.

CONCLUSION

As demonstrated in the record below, the trial court erred in entertaining Appellee's motion for reconsideration, as it contained no new evidence and no new arguments. The trial court compounded this error by focusing on the "unchallenged and undisputed" self-serving evidence that Appellee put into evidence only on reply, such that Appellants had no opportunity

[5] Plaintiff's effort to seek parking fees while also seeking damages for some future planned rezoning of the Disputed Area that has not yet occurred is an effort at speculative double counting. Appellee is not entitled to damages on either hypothetical claim.

to challenge it. In doing so, the trial court failed to focus on the entire record, which demonstrated numerous issues of disputed material fact, and the trial court erred in granting Appellee summary judgment.

Having erroneously entertained and granted Appellee's motion for summary judgment, the trial court again abused its discretion in refusing even to consider the extraordinary evidence from neighbors, former owners of the Henrietta Property, indicating that the Disputed Area had been physically segregated into the Henrietta Property, and used exclusively by the various Henrietta owners, for at least four decades. In refusing even to consider the compelling evidence submitted by the Appellants on reconsideration, the trial court also failed to consider the reason why Appellants (who had never been informed of Appellee's Motion for Reconsideration by prior counsel) had been denied a realistic opportunity to oppose Appellee's Motion for Reconsideration. Rather, the trial court, raising form well above the evidentiary truth in this action, determined that the Court's interests in finality outweighed all considerations of fairness, completeness, or accuracy, thus guaranteeing a resolution that, unless addressed by this Court, will result in a clear and substantial miscarriage of justice.

For these reasons, the trial court's decision to entertain and grant Appellee's Motion for Reconsideration should be reversed and remanded to the trial court. In the alternative, the trial court's failure to allow Appellants to present substantial evidence substantiating their long-term adverse possession of the Disputed Area should be reversed and remanded to the trial court. Finally, because the claims for damages made by Appellee were entirely speculative and hypothetical, the Court should deny Appellee's cross-appeal regarding damages.

Respectfully submitted,

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PROOF OF SERVICE

I, Ray Aragon, certify that a true and correct copy of the foregoing Reply Brief of Appellants/Cross-Appellees was served via email and via CaseFile Express on December 15, 2022, on:

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