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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-315

Filed: 17 December 2019

New Hanover County, No. 15 CVS 2255

RAYMOND CLIFTON PARKER, Plaintiff,

v.

MICHAEL DESHERBININ and wife, ELIZABETH DESHERBININ, Defendant.

Appeal by Plaintiff and cross-appeal by Defendants from judgment entered on 6 September 2018 by Judge Beecher R. Gray in New Hanover County Superior Court. Heard in the Court of Appeals 3 October 2019.

Hodges Coxe Potter & Phillips, L.L.P., by Bradley A. Coxe, for Plaintiff-Appellant.

Ward and Smith, P.A., by Alex C. Dale, for Defendants-Appellees.

INMAN, Judge.

Raymond Clifton Parker (“Plaintiff”) appeals from an amended judgment, entered following this Court’s reversal and remand of the original judgment, dismissing his claims for adverse possession of a disputed tract of land and entering a declaratory judgment in favor of Michael and Elizabeth DeSherbinin (“Defendants”). Plaintiff contends that the trial court’s amended judgment is

inconsistent with the mandate remanding the earlier judgment. After careful review, we affirm the judgment of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

A complete recitation of the background facts of this case can be found in our prior opinion, *Parker v. DeSherbinin*, ___ N.C. App. ___, 810 S.E.2d 682 (2018) (“*Parker I*”), *disc. review denied*, ___ N.C. ___, 813 S.E.2d 248 (2018). The facts pertinent to this appeal are as follows:

In 1982, George Losak was hired to conduct a survey (the “Losak Survey”) of a lot located in the Edgewater Subdivision in New Hanover County (“Plaintiff’s Lot”). *Id.* at ___, 810 S.E.2d at 683-84. Plaintiff’s Lot consisted of a portion of Lot 4 as identified on Edgewater Subdivision map (the “Edgewater Map”) recorded in Map Book 2, Page 113 of the New Hanover County Registry, and it was bordered to the north by Lot 5 as identified on that same map. *Id.* at ___, 810 S.E.2d at 684. Losak completed the survey of Plaintiff’s Lot and recorded it at Map Book 21, Page 63, in the New Hanover County Registry. *Id.* at ___, 810 S.E.2d at 685. In 1984, Plaintiff bought the property by general warranty deed that incorporated the Losak Survey. *Id.* at ___, 810 S.E.2d at 683, 685.

In 2013, Defendants purchased the portion of Lot 5 on the Edgewater Map that adjoined Plaintiff’s property (“Defendants’ Lot”). *Id.* At the time of the purchase, Defendants’ predecessors in title were in a boundary dispute with Plaintiff. *Id.*

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Defendants hired Marc Glenn to conduct a survey (the “Glenn Survey”) to locate the boundary line dividing Plaintiff’s and Defendants’ Lots, which Glenn placed five feet south of the line established in the Losak Survey. *Id.* Given the conflicting surveys, Plaintiff and Defendants both claimed ownership of the overlapping five-foot wide strip of land (the “Disputed Area”). The Glenn Survey also showed a chain-link fence, which Plaintiff had installed in 1985, inside the Disputed Area south of the Losak Survey boundary line. *Id.* at ___, 810 S.E.2d at 687.

Plaintiff hired Charles Riggs in October 2014 to survey his property in an attempt to “retrace” the Losak Survey (the “Riggs Survey”). *Id.* at ___, 810 S.E.2d at 685. The Riggs Survey, like the Glenn Survey, also showed that Plaintiff’s chain-link fence was between the Glenn and Losak boundary lines. *Id.*, 810 S.E.2d at 687. Plaintiff filed his initial complaint after the completion of the Riggs Survey, asserting, among other things, claims for a declaratory judgement as to the true boundary line between the lots and for adverse possession of the Disputed Area under both color of title and twenty years of continuous possession.

In February of 2016, Defendants hired another surveyor, James Blanchard, to perform a survey locating: (1) the dividing line of Lots 4 and 5 as set forth on the Edgewater Map; and (2) the boundary line between the Plaintiff’s and Defendants’ Lots. Mr. Blanchard then produced a map (the “Blanchard Map”) which located the

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boundary between Plaintiff's and Defendants' Lots consistent with the Glenn Survey. *Id.* at ___, 810 S.E.2d at 685.

The case proceeded to a bench trial in August of 2016. *Id.* at ___, 810 S.E.2d at 683. Plaintiff tendered Mr. Riggs as an expert in land surveying and introduced the Riggs Survey into evidence. Defendants similarly tendered Mr. Blanchard as an expert and introduced the Glenn Survey and Blanchard Map into evidence. Defendants also tendered James Lee Seay, Jr., a real estate attorney, as an expert in real estate and title searching. At the end of trial, the trial court found that the Blanchard Map showed the true boundary line between the Lots. *Id.* at ___, 810 S.E.2d at 685. It also concluded that Plaintiff had failed to establish adverse possession of the Disputed Area. *Id.* at ___, 810 S.E.2d at 685-86. As a result, it entered judgment in favor of Defendants on all claims. *Id.* at ___, 810 S.E.2d at 686. Plaintiff appealed that judgment to this Court.

On appeal, we held that the trial court erred in not ruling as a matter of law that Plaintiff had adversely possessed the portion of the Disputed Area south of the fence for the requisite twenty years. *Id.* at ___, 810 S.E.2d at 691. As a result, we reversed that conclusion and remanded the case back to the trial court with directions to enter a judgment granting Plaintiff possession of that portion of the Disputed Area south of the fence. *Id.* We also held, however, that there remained "factual issues of whether the metes-and-bounds description" of Plaintiff's deed and the incorporated

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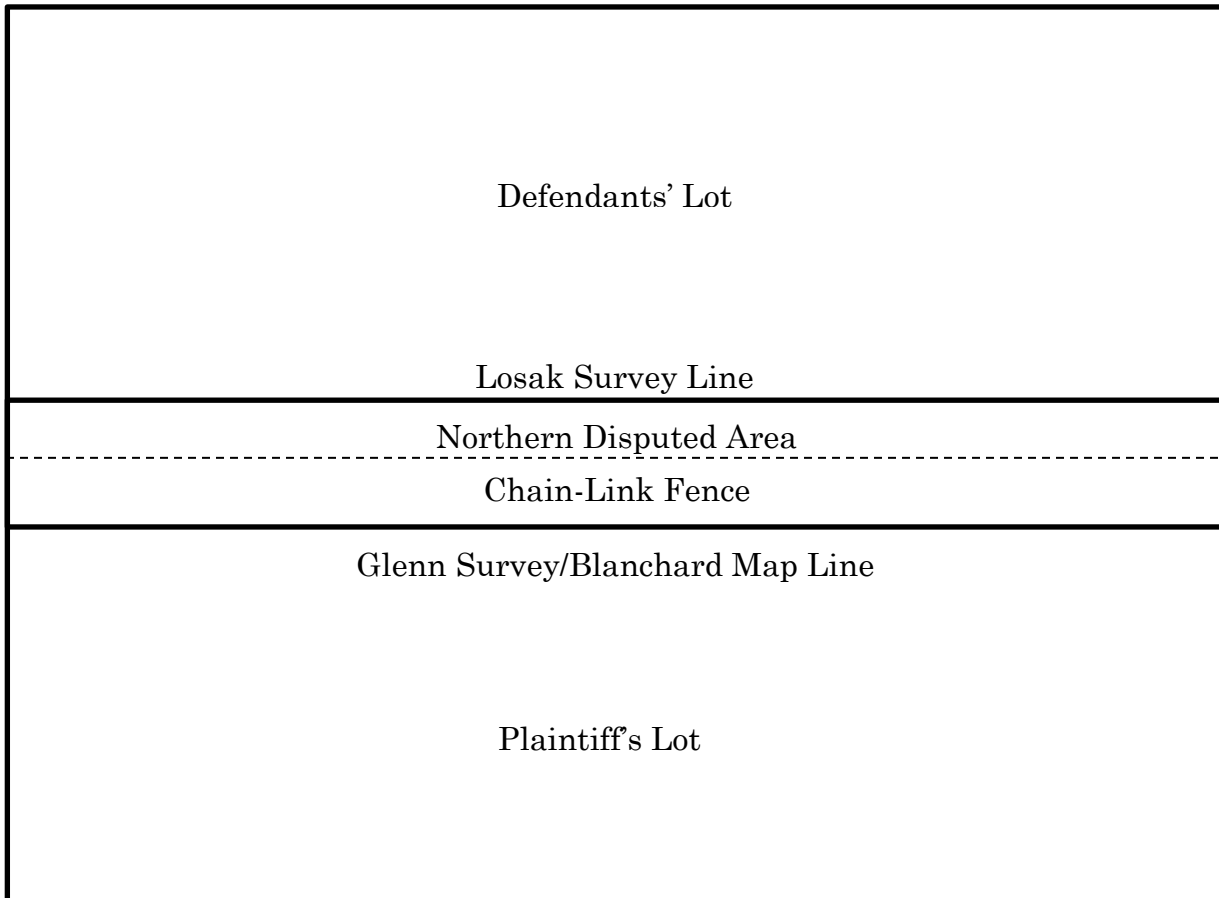
Losak Survey accurately depicted Plaintiff's property. *Id.* at ___, 810 S.E.2d at 689-90. Resolution of those factual issues, we explained, was necessary to determine whether Plaintiff adversely possessed the portion of the Disputed Area north of the chain link fence (the "Northern Disputed Area") under color of title. *Id.* We quoted with emphasis the following language from our Supreme Court's holding in *McDaris v. "T" Corp.*, 265 N.C. 298, 144 S.E.2d 59 (1965), to illustrate what Plaintiff must prove on remand: "[h]e must not only offer the deed upon which he relies for color of title, he must by proof fit the description in the deed to the land it covers in accordance with appropriate law relating to course and distance, and natural objects and other monuments called for in the deed." *Id.* at ___, 810 S.E.2d at 689 (quoting *McDaris*, 265 N.C. at 300-01, 144 S.E.2d at 61). And we noted that Plaintiff "bear[s] the burden of establishing the on-the-ground location of the boundary lines which [he] claim[s]. . . . [He] must locate the land by fitting the description in the deeds [and incorporated Losak Survey] to the earth's surface." *Id.* at ___, 810 S.E.2d at 689 (citations, quotation marks, and emphasis omitted).

We therefore directed the trial court "to determine whether the deed and survey under which [Plaintiff] acquired title sufficiently describe[d] the remaining portion of the Disputed Area." *Id.* at ___, 810 S.E.2d at 690. If, on remand, Plaintiff satisfied his evidentiary burden and "fit the description of the deed and survey under which he claims color of title to the" Northern Disputed Area, the trial court was

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directed to award Plaintiff ownership of the entire Disputed Area under application of the rules of lappage. *Id.* An illustration¹ of the tracts, various surveys, and the Disputed Area is provided below:



On remand, the trial court held another hearing to resolve the undecided factual issues identified in our earlier decision. The trial court thereafter entered an amended judgment in which it concluded that Plaintiff had not established color of title to the Northern Disputed Area, and thus had failed to present a valid claim for

¹ The diagram provided is neither to scale nor representative of the irregularities of the parties' respective lots. It is provided strictly for illustrative purposes.

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adverse possession under color of title and operation of lappage rules. In its amended judgment, the trial court made the following findings of fact:

9. Plaintiff's and Defendants' properties are portions of Lots 4 and . . . 5 as shown on the map of Edgewater Subdivision

. . . .

12. That none of the original monuments shown on the Edgewater Map could be located by Mr. Blanchard.

13. Mr. Blanchard established the dividing line between Lots 4 and 5 of Edgewater Subdivision as follows:

a. By determining the northern line of Edgewater Subdivision by determining the southern line of the Avenel Subdivision, the adjoining property to the north of Edgewater

b. That concrete monuments evidencing the southern line of Avenel and the northern line of Edgewater are shown on the Avenel Map and were located by Mr. Blanchard.

c. Mr. Blanchard established a line southwardly and perpendicular to the northern line of Edgewater Subdivision and along the eastern right of way of Final Landing Lan, as shown on the Edgewater Map, for the distance shown on the Edgewater Subdivision Map required to reach the dividing line between Lots 4 and 5 all as shown on the Edgewater Map.

d. Mr. Blanchard located the northern line of the tract adjoining Edgewater Subdivision on the south, i.e. the southern line of Edgewater Subdivision

e. Mr. Blanchard found monuments confirming his determination of the southern line of Edgewater

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Subdivision as shown on the original Edgewater Map.

f. That the Edgewater Map showed a fence running along the northern line of Edgewater Subdivision and that Mr. Blanchard, during the performance of his field work, located remnants of a wire fence running along the line which he determined to be the northern line of Edgewater.

14. The Defendants introduced [the Blanchard Map], showing the findings of his survey and illustrating his testimony and opinions as to the location of the boundary-line between Lots 4 and 5 of Edgewater Subdivision, as well as the boundary-line between the Defendants' tract . . . and Plaintiff's tract

. . . .

18. The Losak Survey . . . depict[ed] pipes and monuments which Mr. Losak ignored in determining the boundary-line between the subject properties.

19. The Court finds Mr. Blanchard's testimony to be credible and correct as to the location of the boundary-line between the Plaintiff's and Defendants' properties.

. . . .

25. Marc Glenn determined the boundary-line to be as shown on his map . . . , which is substantially where Mr. Blanchard locates the boundary-line.

. . . .

31. During [the] chance meeting [between the parties in 2014] Plaintiff raised the boundary-line issue and told Defendant about the Losak Survey and the monuments Losak found, but he did not show any of the monuments to the Defendants nor did he point them out.

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.....

55. Mr. Seay testified that . . . Losak did not have a tie line that locates to the ground the tracts shown on the Edgewater Map. Mr. Seay testified that a “tie line” is a line connecting tracts on a survey map, which is necessary to determine the location of a tract on the map in relation to other tracts.

56. In comparing the Edgewater Map to the Losak Survey, the Court finds that Losak ignored the fence line on the north boundary of the Edgewater Map, which resulted in Losak creating a new, unknown boundary line.

57. No visible line or monuments mark the northern boundary line of Plaintiff’s purported northern boundary line as shown in the Losak Survey.

58. The Losak Survey does not establish known visible boundaries under which Plaintiff could claim any form of adverse possession.

59. The description in Plaintiff’s deed and the incorporated Losak Survey are not certain and are not adequate for adverse possession.

60. Plaintiff’s deed and the incorporated Losak Survey are inadequate to support a claim of lappage.

In short, the trial court found that the boundary line in the Losak Survey was not identifiable by reference to any monuments on the ground, and that Losak generated his boundary line without relying on monuments, which led to a deviation from the boundary line as set forth in the Edgewater Map and the establishment of a new boundary line untethered to any landmarks. As a result, the trial court was unable to locate the Losak Survey boundary line on the ground—testimony and

evidence from Mr. Riggs notwithstanding—and dismissed Plaintiff’s claim of adverse possession by color of title to the Northern Disputed Area. Plaintiff now appeals.²

II. ANALYSIS

A. *Standard of Review*

In a bench trial in which the superior court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hinnant v. Philips, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (citation, quotation marks, and ellipses omitted).³ Furthermore, unchallenged findings of fact are binding on appeal. *Carolina Marlin Club Marina Assoc., Inc. v. Preddy*, 238 N.C. App. 215, 221, 767 S.E.2d 604, 608 (2014).

B. *Plaintiff’s Appeal*

Plaintiff contends that our mandate in *Parker I* required the trial court to enter an amended judgment awarding him title to the Northern Disputed Area. He argues

² Defendants cross-appeal eight issues. Three of those issues are not argued in their brief. Defendants concede that each of the five remaining issues was previously decided by this Court in *Parker I*, and that we are bound by the decision of that panel. As a result, we dismiss the entirety of Defendants’ cross-appeal.

³ We note that Plaintiff’s brief does not comply with Rule 28 of the North Carolina Rules of Appellate Procedure, which requires the appellant to set forth “a concise statement of the applicable standard(s) of review for each issue, . . . either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.” N.C. R. App. P. 28(b)(6) (2019).

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that the uncontroverted evidence fit the Losak Survey boundary line to the land and the trial court entered “irrelevant, unnecessary, and unauthorized findings of fact and conclusions of law” in reaching the opposite result. We disagree.

In our prior decision, “[w]e reverse[d] and remand[ed] this matter to the trial court to determine whether the deed and survey under which Appellant acquired title sufficiently describe[d] the remaining portion of the Disputed Area.” *Parker I*, __ N.C. App. at __, 810 S.E.2d at 690. We further directed the trial court to make findings of fact regarding whether “the metes-and-bounds description” of Plaintiff’s deed, and incorporated survey, could be found on the ground. *Id.* at __, 810 S.E.2d at 689-90. This Court did not direct the trial court to rule in Plaintiff’s favor. Remanding a case for further factual determinations does not mandate the trial court to find certain facts. Instead, it allows the trial court “to reconsider the evidence before it and to enter new and/or additional findings of fact based on the evidence.” *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393-94, 545 S.E.2d 788, 793 (2001); *see also State v. Salinas*, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012) (“Remand is necessary because it is the trial court that is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and then based upon those findings, render a legal decision.” (internal citations and quotation marks omitted)).

The trial court’s order satisfied that mandate. In Finding of Fact 18, it found that “Mr. Losak ignored [pipes and monuments] in determining the boundary-line

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between the subject properties.” It further found in Findings of Fact 13 and 19 that Mr. Blanchard correctly identified the boundary line as the dividing line between Lots 4 and 5 on the Edgewater Map, and found in Finding of Fact 56 that “in comparing the Edgewater Map to the Losak Survey, the Court finds that Losak ignored the fence line on the north boundary of the Edgewater Map, which resulted in Losak creating a new, unknown boundary line.” And, in Finding of Fact 59, the trial court found that “[t]he description in Plaintiff’s deed and the incorporated Losak Survey are not certain and are not adequate for adverse possession.” The trial court’s findings support its conclusions of law that “Plaintiff is not entitled to any relief based on the issue of lappage” and “[t]hat Plaintiff has not possessed the Northern Disputed Area in such a manner to satisfy the possession requirement for adverse possession in any manner.” Taken together, and upon reviewing the evidence in the record, we construe these findings and conclusions to mean that Plaintiff failed to carry his evidentiary burden—to the satisfaction of the trier of fact—of tying the Losak Survey to the land, resulting in his failure to establish a claim of adverse possession under color of title and the operation of lappage rules. *Cf. Harrelson v. State Farm Mut. Auto. Ins. Co.*, 272 N.C. 603, 609, 158 S.E.2d 812, 817 (1968) (noting that “[u]pon appeal we may look to the evidence in the record to interpret the findings of fact made by the trial judge” (citation omitted)).

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Plaintiff asserts, incorrectly, that uncontroverted evidence tied the Losak Survey's boundary line to the land. Plaintiff points primarily to the Riggs Survey, which includes reference to the Losak Survey boundary on its map, and Mr. Riggs's testimony that, in his expert opinion, the boundary line in the Losak Survey was consistent with the boundary line he developed in the Riggs Survey.

Defendants, however, offered evidence to the contrary. For example, Mr. Riggs testified on cross-examination that "the Losak map is a retracement of the Edgewater map[,]” and that the boundary line between the parties' properties was "the common line between lots 4 and 5, . . . based on the Edgewater map[,]” while Mr. Blanchard, as Defendants' expert, testified that Mr. Losak appeared to have miscalculated the location of the common line between the lots on the Edgewater Map and deviated significantly from the actual boundary as a result. Thus, if Mr. Blanchard is to be believed, Mr. Riggs could not have located the Losak line on the Edgewater Map, as Mr. Losak placed his line elsewhere. Mr. Blanchard also identified monuments that marked the boundary line consistent with the Edgewater Map, and pointed out that the Losak Survey—and by extension the Riggs Survey—did not draw the boundary line from those landmarks.

Defendants' other expert, Mr. Seay, also testified that the Losak Survey lacked a "tie line," which was "necessary to determine the location of the property on the ground relative to its position with the surrounding tracts.” His testimony continued:

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If you don't [have a tie line], you just have lines flying into space that mean nothing. A surveyor has got to be able to take a legal description, get in his truck, go out onto the property, and find those lines on the ground.

....

Mr. Losak found the lines on the ground, in the form of iron pipes, and [a] neighbor's fence, but chose for whatever reason to ignore [them].

Based on this testimony by Messrs. Blanchard and Seay, the trial court did not err in entering the findings recited above.

Plaintiff also argues that because the Riggs Survey and the Blanchard Map show the Losak line in the same place, the location of the Losak line was conclusively established at trial. Plaintiff's burden, however, was not to tie the boundary line in the Losak Survey to another map, but was instead to "establish[] the on-the-ground location of the boundary line[]" by "fitting [it] . . . to the earth's surface." *Parker I*, ___ N.C. App. at ___, 810 S.E.2d at 689 (citations, quotation marks, and emphasis omitted). Given Messrs. Blanchard's and Seay's testimony, we cannot say that the trial court erred in resolving the factual issues it was tasked with addressing on remand in Defendants' favor. Mr. Riggs's testimony and the conflicting evidence cited by Plaintiff to the contrary does not change our holding:

It is clear beyond the need for multiple citation that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attached to the evidence. The trial court must itself determine what pertinent facts are actually established by

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the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.

Gea, Inc. v. Luxury Auctions Marketing, Inc., ___ N.C. App. ___, ___, 817 S.E.2d 422, 432 (2018) (citations and quotation marks omitted).

Plaintiff also identifies Findings of Fact 43, 51, and 57-60, as well as Conclusions of Law 7-10, as outside the scope of the mandate to the trial court on remand. He argues, in essence, that these findings and conclusions addressed factual and legal issues that were not necessary to the determination of whether the Losak Survey could be tied to the ground. Although some of these findings are perhaps irrelevant to or broader than whether the Losak Survey established color of title such that application of the lappage rules would be appropriate, several nonetheless encompass that issue. For example, while Finding of Fact 59 speaks to the unsuitability of the Losak Survey to support a claim for adverse possession generally, that finding encompasses a finding that the Losak Survey was inadequate to show adverse possession under a color of title theory. To the extent that the findings and conclusions complained of are overbroad or irrelevant, they do not warrant reversal as surplusage. *Cf. City of Charlotte v. McNeely*, 8 N.C. App. 649, 653, 175 S.E.2d 348, 351 (1970) (holding irrelevant and unnecessary findings of fact in a judgment dismissing a condemnation proceeding constituted surplusage and did not support reversal); *City of Charlotte v. Little-McMahan Properties, Inc.*, 52 N.C. App. 464, 473,

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279 S.E.2d 104, 110 (1981) (“Defendant . . . argues that the conclusions of law numbered 3 and 6 in the trial court’s order are erroneous. We need not reach those questions, as the challenged conclusions are not necessary to support the judgment of the trial court and are disregarded on appeal.”). In short, because the trial court made findings, supported by the evidence, that disclose the Losak Survey could not be tied to the land, the trial court did not err in concluding that Plaintiff was not entitled to possession of the Northern Disputed Area under color of title and application of the lappage rules.

III. CONCLUSION

For the foregoing reasons, we hold Plaintiff has failed to demonstrate error and affirm the trial court.

AFFIRMED; CROSS-APPEAL DISMISSED.

Judges DIETZ and BROOK concur.

Report per Rule 30(e).