THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2008-CP-32-04362

Westside Meshekoff Family Limited Partnership ..... Appellant,

v.

South Carolina Department of Transportation; DW Properties, LLC;
Danwood LLC; Robert W. Denton; and Alpine of SC, Inc., ...Defendants
Of whom South Carolina Department of Transportation is the .....Respondent.

INITIAL BRIEF OF APPELLANT

Edwin Russell Jeter
JETER & WILLIAMS, P.A.
Post Office Box 7425
Columbia, South Carolina 29201
(803) 765-0600

Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, PC
Post Office Box 944
Columbia, South Carolina 29202
(803) 779-8900

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THIS COURT SHOULD FIND, BASED UPON ITS OWN VIEW OF THE EVIDENCE, THAT WESTSIDE PROVED THAT IT WAS ENTITLED TO AN EQUITABLE APPORTIONMENT OF REPAIR AND MAINTENANCE COSTS?

II. WHETHER THE TRIAL COURT ERRED IN FINDING AN EASEMENT EXISTED PRIOR TO 1987?

III. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE ENCROACHMENT PERMIT GOVERNED THE MAINTENANCE AND REPAIR OBLIGATIONS UNDER THE EASEMENT FOR LINE E AND THE DETENTION POND?

IV. WHETHER THE TRIAL COURT ERRED IN INJECTING CAUSATION AS A REQUIRED ELEMENT OF PROOF IN AN ACTION UNDER AN EASEMENT FOR EQUITABLE APPORTIONMENT OF REPAIR AND MAINTENANCE COSTS?

V. WHETHER THE TRIAL COURT ERRED IN FINDING THAT WESTSIDE'S METHOD OF ALLOCATING THE PERCENTAGE OF USE OF LINE E BY THE DOT WAS AN IMPROPER BASIS FOR APPORTIONING THE COSTS WHEN SUCH METHODS WERE BASED ON WIDELY USED AND ACCEPTED ENGINEERING STANDARDS?

VI. WHETHER THE TRIAL COURT ERRED IN FINDING THAT WESTSIDE'S CLAIM WAS BARRED BY LACHES?

STANDARD OF REVIEW

This appeal is from a decision of the trial court sitting in an equity case without a jury. As such, the standard of review is as stated in *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008): "In an appeal from an action in equity, tried by a judge alone, this court may find facts in accordance with its own view of the preponderance of the evidence."

STATEMENT OF THE CASE

Plaintiff, Westside Meshekoff Family Limited Partnership ("Westside"), the owner of Westside Plaza Shopping Center on U.S. #1 in West Columbia, filed this action on June 9, 2008, against the South Carolina Department of Transportation ("DOT"); APAM, Inc.; Kimbrell's Investment Company, Inc.; RI CS2, LLC; DW Properties, LLC; Danwood, LLC; Boom, Inc.; Robert W. Denton; and Alpine of S.C., Inc. The Complaint alleged causes of action for an equitable apportionment of certain maintenance and repair costs of Westside's storm water drainage system, trespass, injunctive relief, and negligence *per se*. Prior to trial, Westside settled the claims against APAM, Inc.; Kimbrell's Investment Company, Inc.; RI CS2, LLC; and Boom, Inc.; whose properties discharged storm water directly or indirectly into the DOT's storm water system. In addition, Westside dismissed all causes of action except the equitable apportionment claim prior to trial. Thus, the claim for an equitable apportionment of maintenance and repair costs went to trial against the DOT, Danwood, DW Properties, Denton, and Alpine.

After the close of Westside's case, the trial court granted the motions of DW Properties, Denton, and Alpine, for an involuntary dismissal of the claims against them. Westside has not appealed that decision. The case went to the trial court for a judgment as to the liability of Danwood and the DOT on the equitable apportionment cause of action. The trial court issued its initial order on June 14, 2011, denying Westside its requested relief and finding for the Defendants. Westside timely filed a Rule 59(e) motion, and both Danwood and DOT filed Rule 59(e) and Rule 60 motions. On September 12, 2011, the trial court granted these motions in part and denied them in part, and issued an amended order which denied the equitable allocation that Westside sought and in addition, ruled that Westside's claims were barred by laches. The amended order denied the defenses that the case was actually one at law, that Westside had unclean hands, and that Westside was equitably estopped from pursuing relief. Westside received a copy of this Order on September 20, 2011.

On October 19, 2011, Westside timely filed a notice of appeal, naming only the DOT as a respondent. Neither the DOT nor Danwood filed a notice of appeal. This appeal concerns only Westside's claim for equitable relief against the DOT.

STATEMENT OF FACTS

Westside brought this case for an equitable apportionment of the costs of repairing and maintaining a storm drainage line (referred to as "Line E") and detention pond which are both heavily utilized by the DOT. To date, all costs of repairing and maintaining Line E and the detention pond have been borne by Westside. Storm water from the DOT's storm drainage system serving U.S. #1 and other private properties discharges directly into Line E on Westside's property. Line E transports the storm water to the detention pond located at the rear of Westside's property, where it is treated and then discharged into a stream at the rear of the property. DOT has done nothing to slow down or treat the storm water prior to it being discharged into Line E. Instead, DOT has relied on Westside to transport and treat the storm water from the DOT's storm drainage system. DOT asserts that it has the right to collect and discharge storm water onto Westside's property, that Westside must transport and treat the storm water from DOT's system, that DOT cannot be required to pay any repair or maintenance costs incurred by Westside in performing this service, and that Westside has no right to prevent DOT from using Westside's system. DOT has refused to exercise its power of condemnation over Line E or any other of Westside's property for its use, choosing instead to burden Westside with all maintenance and repair costs associated with Line E and the detention pond.

Westside Plaza is located on the south side of U.S. #1 in West Columbia, on the corner of Dreher Road and U.S. #1. It is located in the low part of the surrounding drainage area, and the storm water from nearby properties flows toward the Westside

property. The evidence in this case began in 1970, when the DOT widened U.S. #1 into a four lane road. [Tr. 354, l. 12-25; 355, l. 1-6] The plans from that project show that DOT collected the storm water from properties on the north side of U.S. #1 into its own storm water system, and then openly discharged the storm water onto the Westside property, which was then farm land, through a pipe that was constructed as part of that project. [Tr. 353, l. 15-24; Ex. 41] There was no evidence presented at trial concerning any terms on which the storm water was discharged, whether it was done with or without permission or what discussions and reasons led up to DOT discharging storm water onto that land through the pipe. [Am. Order p. 6; Sept. 12, 2011] Given the lack of evidence, the parties are left to speculate as to that issue.

Clarence Blakely, the DOT's chief geodetic technician who is in charge of the issuance of encroachment permits, and who joined the DOT in 1989, testified at trial. [Tr. 352, l. 23-25; 353, l. 1-9] He stated from his review of the 1970 plans, that from 1970 on, DOT had a system that collected water from the properties across U.S. #1 and off of the highway itself, and then discharged the water through a pipe into a swale on the property later acquired by Westside. [Tr. 353, l. 15-24; 354 l. 12-16] The DOT stipulated that Blakely was not testifying as to the collection and discharge of storm water for any time prior to 1970. [Tr. 354, l. 20-25; 355, l. 1-6] The situation remained in this status for 17 years, until 1987.

DOT has a standard form for its encroachment permits, as shown by the permits issued for Westside and some of the up-gradient landowners. [Exs. 1-4] The DOT form

is intended to grant the right to adjoining landowners to encroach onto DOT's right of way, and sets the terms on which permission will be granted for such encroachment. The form contains an indemnity clause concerning activity within the encroachment area which will be discussed *infra*.

In 1987, Westside's predecessor in title, Dayton & Associates, was in the process of developing the Westside property into the shopping center which is there today, and needed driveway cuts to gain access to its property from U.S.#1. [Ex. 1] DOT's Blakely testified that Dayton & Associates was entitled to have the driveway cuts into the highway, and that the encroachment permit gave the landowner nothing beyond that which they were entitled to have. [Tr. 223, l. 20-25; 224, l. 1-4] The DOT issued an encroachment permit to Dayton on August 21, 1987, giving the exact locations of the driveway cuts. [Ex. 1]

However, the DOT had to find an outlet for the storm water it was collecting from its own highway and the adjoining landowners on the north side of U.S. #1. Storm water in that area generally flowed from the north side of the highway onto the highway itself, and then toward the south side of the highway where the Westside property is located. Blakely testified that, unlike the commercial landowners on the north side of the highway who needed an encroachment permit to discharge storm water into the DOT storm drainage system, the DOT, with respect to Westside's property, was in the opposite position of seeking to discharge storm water onto the land of another (i.e. Westside's property). [Tr. 356, l. 15-25; 357, l. 1-18] While no one who was present in 1987

testified, it appears in the encroachment permit that the parties added language to the form for encroachment permits that was intended to carry out a function that was entirely different from DOT's intended use of the permit. In the amendments to the form, Dayton agreed to accept up to 98 cubic feet per second (cfs) of DOT's storm water into a line that Dayton would construct on its own property which would then discharge into a detention pond. The line was shown to connect to the DOT storm drainage system at a junction box on the edge of the DOT right of way off U.S. #1. [Ex.1, p. 4-5] The amended encroachment permit refers to the storm drain line to be used to carry the storm water to the detention pond as "48 [inch] R.C.P." [Ex. 1] This refers to the pipe's size (48" in diameter) and the material for the pipe (reinforced concrete pipe). When Line E was constructed, Dayton installed 48" corrugated metal pipe (referred to as CMP) rather than reinforced concrete pipe. [Am. Order p. 3, Sept. 12, 2011] At trial, the DOT admitted that it does not seek to control what material is used on private property, and further admitted that it would have had no right to require Dayton to use reinforced concrete pipe on its own property. [Tr. 225, l. 6-10] Westside's contractor, Tim Richardson with Ideal Construction, testified that corrugated metal pipe was commonly used on commercial property at the time of construction for the Westside system. [Tr. 247, l. 15-25; 248, l. 1-25; 249, l. 1-9]

The primary function of Line E was to carry the DOT's storm water away from the highway and back to the detention pond. [Ex. 7; Tr. 461, l. 6-25; 462, l. 1-12] From there, the storm water would collect in the detention pond so that silt could settle out of

the water, and the treated storm water then slowly discharged into the stream behind the Westside property. [Tr. 129, l. 8-25; 130, l. 1] Blakely testified that upon construction of Line E, DOT abandoned its pipe that discharged into the swale and began discharging its storm water into the Westside storm drain line pursuant to the encroachment permit. [Tr. 353, l. 25; 354, l. 11] Westside contributes approximately 20% of the storm water transported by Line E, with DOT contributing the remaining 80%. [Tr. 471, l. 7-9, l. 25; 472, l. 1-7] The DOT admits that it does not treat the storm water before discharging it into Line E and it admits it has not paid Westside for treating its storm water. [Tr. 222, l. 9-25; 223 l. 1-15; 224, l. 9-12] DOT's Blakely testified that the 1987 Dayton encroachment permit, which contained the amendments to the pre-printed form, was an agreement for DOT to use the land of another for a specific purpose. He testified that the amended encroachment permit was an agreement for the DOT to use Westside's storm drainage system to discharge the storm water it collected and carry it away from U.S. #1. [Tr. 355, l. 19-25; 356, l. 1-20] He also testified that DOT considered the Dayton encroachment permit to be binding on any successors in title since 1987, and that DOT would take action to protect its use of the Westside system if that use were denied by the landowner. [Tr. 356, l. 7-14] Blakely reiterated that DOT entered into an agreement for the use of Westside's storm drainage system to transport the DOT's storm water away from the highway. [Tr. 356, l. 21-25; 357, l. 1-14]

The pre-printed encroachment permit form that DOT uses to allow encroachments provides for the DOT to be indemnified for injuries sustained from the encroachment

onto the DOT right of way. [Exs. 1-4] The indemnity paragraph states that Dayton agreed *"to assume any and all liability this Department might otherwise have in connection with accidents or injuries to persons or property, including the highway, that may be caused by the construction, maintenance, use, moving or removing of the encroachment contemplated herein and agree to indemnify this Department for liability incurred or damage sustained by reason of the past, present, or future existence of said encroachment."* [Ex. 1, p.1] By its express terms, this indemnity obligation is limited to encroachments only on the DOT right of way. DOT and Westside agree that the encroachment permit is silent about responsibility for repair and maintenance costs for the encroachment, and both further agree that it does not speak to any repair or maintenance obligations for Line E. In its opening statement, DOT's counsel stated: "The encroachment permit itself is silent as to how maintenance costs are to be apportioned. It doesn't even mention maintenance costs." [Tr. 29, l. 19-22] Then in arguments at the close of Westside's case, DOT's counsel further stated: "The 1987 encroachment permit is silent as to maintenance. There is nothing in there that says, 'We are going to put in this storm drain system. And, oh, by the way, you guys need to help us dredge the pond every other year.' There is no mention in there of it at all." [Tr. 642, l. 5-10] Thus, the DOT, as a party to the encroachment permit, admitted that there was no agreement covering the repair or maintenance of Line E and the detention pond.

Blakely's testimony confirmed that the DOT understood that the indemnity obligations under the encroachment permit were limited to encroachments on DOT's

right of way. He testified that DOT had not sustained any injury or damage from the storm drain pipe in its right of way and was making no claim for indemnity under the encroachment permit. [Tr. 400, l. 21- 25] Blakely buttressed the point that the encroachment permit's indemnity obligation only applies on DOT's right of way by stating that DOT does not seek to govern storm drainage lines on private property. [Tr. 225, l. 6-10] Thus, according to Blakely, the DOT employee charged with issuing encroachment permits, the encroachment permit indemnity provisions cover only the DOT right of way, which includes certain driveways for Westside Plaza and a very small length of storm drain pipe from a DOT catch basin to one located on Westside's property. [Ex. 1, p.5]

Westside acquired the shopping center in 1997. [Ex. 13] Matthew Meshekoff has been the managing partner of Westside since 2005, and he testified at trial. He said that he began managing the center in 2003 or 2004, and then his parents formally turned management over to him in 2005.[1] [Tr. 61, l. 23-25; 62 l. 1; 98, l. 8-11]

Matthew Meshekoff testified he was unaware of the encroachment permit and unaware that DOT was sending its storm water into the Westside system until 2008, when he discovered the existence of the encroachment permit. [Tr. 66, l. 5-25; 67, l. 1-21; 75, l. 21-25; 78, l. 1-13] From a surface level observation of Westside, it is not readily apparent that the DOT storm drainage system ties into the Westside system. Furthermore,

---

[1] The parents did not testify at trial. Mr. Meshekoff died in 2010. [Tr. 99, l. 16-17] Mrs. Meshekoff died recently, after the trial.

an encroachment permit is not something that is normally part of the closing documents for a commercial property sale, nor is it part of the normal due diligence review prior to purchase. DOT acknowledged that the encroachment permit is not filed with any county property records such as with the Register of Deeds. [Tr. 225, l. 22-25; 226, 11-9] Ron Swinson, an experienced real estate developer and co-owner of the Danwood commercial center located just across U.S. #1 from Westside Plaza, testified about the extensive due diligence he performed before he purchased the Danwood center. He testified he hired engineers and attorneys to advise him on issues such as being sure the storm drain system was properly handling the storm water. [Tr. 746, l. 12-19] He admitted that in all of the work of his attorneys and engineers, he never knew about the encroachment permit for Danwood. [Tr. 737, l. 6-25; 738, l. 1-6] Thus, it is entirely understandable that Matthew Meshekoff, like the experienced developer Ron Swinson, would be unaware of the encroachment permit, and therefore unaware that DOT was using Line E.

As the trial court noted, the first evidence of problems at Westside occurred in July of 2005. [Am.Order p. 15, September 12, 2011] In July of 2005, a sinkhole formed on Line E near the U.S. #1 entrance to the shopping center. [Tr. 68, l. 11-25; 69, l. 1; Tr. 115, l. 20-22] Repairs were quickly made. Then, in 2006, more sinkholes started to appear on other lines in the shopping center. Those lines are not involved in this litigation. [Tr. 72, l. 4-17] Then, in 2008, problems with Line E made it clear that Line E needed to be replaced. Westside hired Ideal Construction to replace the corrugated metal pipe running between the junction boxes in Line E with reinforced concrete pipe. [Tr. 73,

l. 6-25; 74, l. 1-10]

In May of 2008, prior to filing suit, Westside put the DOT and the up-gradient landowners on notice of the problems and the repairs being made to Line E. [Ex.26; Tr. 620, l. 4-25; 621, l. 1-25; 622, l. 1-14] DOT has consistently disavowed any responsibility for the costs of maintaining the system, and has never changed that position. [Ex. 8 (DOT Interrog. Resp. #13)] Prior to 2008, although the DOT knew about the encroachment permit and its accompanying agreement regarding the use of Line E, the DOT never offered to do any maintenance on Line E or the detention pond. [Ex. 8 (DOT Interrog. Resp. #13); Tr. 212, l. 11-21] After 2008, in the three years prior to trial, the DOT never deviated from its position that it has no responsibility for repair and maintenance to Line E or the detention pond. [Tr. 90, l. 20-25; 91, l. 1; 212, l. 11-21]

At trial, Westside established the DOT's and Westside's proportional use of Line E through the testimony of Michael Lambrecht, P.E. Mr. Lambrecht received a degree in civil engineering from the Citadel and had 16 years experience in storm drainage projects by the time he testified at trial. [Tr. 404, l. 11-23; 405, l. 16-25; 406, l. 1-25; 407, l. 1-25; 408, l. 1-14] He is a licensed professional engineer in South Carolina. [Tr. 410, l. 12-17] Lambrecht, who was the only engineer to testify, is experienced in storm water analysis and design. As a regular part of his duties he investigates the sources of drainage of storm water on properties on which he is working, since that plays a large role in the design of systems to handle that water. [Tr. 410, l. 4-11; 414, l. 25; 415, l. 1-8] Lambrecht testified that he was asked to determine what storm water was coming into

Line E from offsite sources, and how much was coming from those sources. [Tr. 431, l. 10-25; 432, l. 1-5] To determine the proportion of usage by each of the landowners discharging storm water into Line E (with the exception of certain residential owners whose use would be immaterial according to Lambrecht), he utilized the widely accepted ten year storm design standard. His calculation utilized peak flows based on a ten-year storm event. Lambrecht testified that this was a standard engineering benchmark to use for flow rate calculations, and that it is commonly used by both DOT and Lexington County. [Tr. 431, l. 16-25; 432, l. 1-25; 433, l. 1-25; 434, l. 1-11] He further testified that utilizing other methods would not materially change the findings as to the percentage of water coming into the Westside system from the other properties. [Tr. 434, l. 12-25; 435, l. 1-10] In his judgment, this approach was the best tool available to a civil engineer to approximate percentages of use. [Tr. 441, l. 12-25; 442, l. 1-7]

Lambrecht testified that storm water entering the Westside system at Line E from the DOT catch basin was 65 cfs based on peak flow rates. [Tr. 439, l. 17-25; 440, l. 10] DOT readily accepts this conclusion. [Tr. 451, l.8-16] Based on totaling the peak flow rates from all properties whose storm water eventually flows into Line E, Lambrecht assigned 81.48% as the percentage of use of Line E by water flowing into it from the DOT catch basin. [Am. Order p.9 fn4, Sept. 12, 2011] He testified that storm water runoff from the Westside property constituted 18.52% of the use of Line E. [Ex 28; Tr. 468, l. 13-25; 469, l. 1-25; 470, l. 1-9; 471, l. 1-9]

DOT cross-examined Lambrecht on his calculation, but he never disavowed his

approach. [Tr. 603, l.2-25; 604, l. 1-10] Moreover, the DOT never offered the trial court any alternative approach for allocating proportional use. [Ex. 22 (p.34, l. 20-25; p.35, l. 1); Ex. 8 (DOT Interrogatory Resp. #17)] In fact, during trial DOT readily accepted Mr. Lambrecht's calculation of 65 cfs, which equates to 81.48% of the use. [Tr. 451, l. 12]

Matthew Meshekoff and Tim Richardson with Ideal Construction testified as to the costs associated with repairing Line E and the proportional costs resulting from partial use of the detention pond. There is no dispute about the amount of these costs. The evidence concerning the costs to repair the detention pond had to be allocated not just to Line E, but to the other two lines on the Westside property that use the detention pond to dispose of Westside's onsite storm water. For that reason, Westside presented one-third of the detention pond costs as costs attributable to Line E. [Tr. 86, l. 10-25; 87, l. 1-15] This approach is supported by the expert testimony of Michael Lambrecht who identified Line E as a major contributor of silt to the detention pond. [Tr. 461, l. 6-25; 462, l. 1-12; 599, l. 4-19]

At trial, Westside established that it spent $325,240 repairing Line E and in maintaining the detention pond. [Ex. 17-24] With respect to Line E, these costs primarily involved removing and replacing the storm drainage pipe. As to the detention pond, the costs were primarily for removing accumulated silt, debris and vegetation from the pond. The details of these costs were presented as follows:

Ideal Construction Invoices for Line E

-Invoice No. 01852-2 dated 6/06/2008 $235,635.35 [Ex.17; Tr. 73, l. 6-25; 74, l. 1-25; 75, l. 1-6; Tr. 83, l. 3-25]

-Invoice No. 01852-1 dated 3/31/2008 $ 36,013.60 [Ex. 18; Tr. 73, l. 6-25; 74, l. 1-25; 75, l. 1-25; 76, l. 1-15]

-Invoice No. 01812IV-01830 dated 11/10/2006 $31,000.00 [Ex. 19; Tr. 68, l. 11-25; 69, l. 1-24; 71, l. 23-25; 72, l. 1-3]

-Ideal Engineering $ 3,000.00

Total: $305,648.95

Ideal Construction Invoice for Detention Pond

-Application for Payment #1 dated 10/13/2006 $45,528.00 [Ex. 21; Tr. 84, l. 4-25; 85, l. 1-25; 86, l. 1-25; 87, l. 1-15]

-Westside attributes 33% to Line E totaling **$15,024.24**

-American Engineering Invoice for Engineering Services $13,840.00 [Exs. 22-24; Tr. 88, l. 4-19; 90, l. 17-19]

-Westside attributes 33% to Line E totaling **$4,567.20**

TOTAL: $325,240.39

The trial court excluded $3,000 of Westside's costs as not recoverable, and the DOT has not otherwise raised an issue with the costs. Thus, once accepting the exclusion of $3,000 in costs, the uncontested evidence supports $322,240 as Westside's repair and maintenance costs for Line E and the detention pond.

Since Westside contributes 18.52% of the storm water flowing through Line E, it seeks an equitable apportionment from the DOT of 81.48% of the costs to repair and maintain Line E and the detention pond. Accounting for Westside's responsibility for maintenance and repair, which totals $59,679 ($322,240 x .1852), the total sought from

other property owners was $262,561 ($322,240 - $59,679). To date, Westside has collected $77,740 in settlements with former parties to this action. Further accounting for these payments the total sought from the DOT is $184,821.

The burden on Westside as the servient tenement includes its responsibility to the Environmental Protection Agency (EPA), South Carolina Department of Health and Environmental Control (DHEC), and other interested administrative agencies, for the transporting, storage, and discharge of the DOT's storm water into the stream behind Westside. [Tr. 174, l. 10-25; 176, l. 10-24; 179, l. 19-25; 180, l. 1-25; 181, l. 1-25; 182, l. 1- 17] Any future changes in regulatory standards, such as requiring enhanced treatment before releasing the water, or treating new pollutants not presently in the water, will fall, at least initially, on Westside. Under the trial court order, this future burden has been placed solely on Westside, and the DOT, as the primary user of Line E, does not share in this burden.

ARGUMENT

I. WESTSIDE PROVED THE EXISTENCE OF AN EASEMENT THAT REQUIRED AN EQUITABLE APPORTIONMENT OF REPAIR AND MAINTENANCE COSTS.

To prevail on an equitable apportionment claim, Westside had to prove the existence of an easement, the costs of maintaining and repairing the easement, and provide evidence by which the Court could apportion those costs based upon some equitable method of determining use. *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct.App. 1985). As demonstrated below, Westside proved each of these elements by a preponderance of the evidence, and there is no evidence in the record to dispute its proof.

A. Common Use of Easement Gives Rise to Equitable Allocation of Repair and Maintenance

"An easement is a right which one person has to use the land of another for a specific purpose, and gives no title to the land on which the servitude is imposed." *Douglas v. Med. Investors, Inc.,* 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971) (citations omitted). An easement can arise by agreement, by prescription, or by other methods not relevant here. The owner of an easement ordinarily must keep the easement in repair. *Hayes v. Tompkins,* 287 S.C. at 294, 337 S.E.2d at 891. Unless there is an agreement to the contrary, the owner of a servient estate (Westside) does not have the duty to maintain and repair an easement for the benefit of the dominant estate (DOT). *Id.* When both the dominant and servient estates use the property subject to the easement, as is the case in this appeal, a court may divide the responsibility for maintenance and repair, and may

take into account such factors as the dominant tenant's duty of maintenance and repair, the burden of the easement on the servient tenant, and the extent of the servient tenant's use. *Id.*

In *Hayes v. Tompkins*, a dominant estate owner appealed the trial court's decision that he had to pay an equitable share of maintenance of a gravel road easement. The servient estate owner appealed the holding that an easement existed. The easement at issue was not an express easement; the trial court found that there was an implied easement of necessity.[2] This Court stated that the servient estate owners were not under a duty to maintain the gravel road easement for the benefit of the dominant estate. *Id.* However, since the two parties both used the gravel road, this Court held that "the apportionment by the trial judge of the burden of maintenance and repair is equitable." *Id.* at 294, 337 S.E.2d at 891.

Other jurisdictions have also held that an express easement, even when silent on the issue, requires that the servient estate and dominant estate both maintain the easement if they both use it. The Supreme Court of Iowa held in *Bina v. Bina*, 239 N.W. 68 (1931), cited by this Court in *Hayes v. Tompkins,* that though the express easement grant did not address the issue, the servient estate could repair the easement road and recover from the dominant owner a proportionate share of the repair cost when the two parties both

---

[2] Though *Tompkins* involved an implied easement or, alternatively a prescriptive easement, the method of creation of an easement does not affect who should pay to maintain the easement, if there is no express agreement discussing such. The South Carolina courts will examine the express easement and ascertain the intention of the parties so that the grant can be construed so as to carry out that intention. *Smith v. Commissioners of Pub. Works*, 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994).

benefitted from the road. The Supreme Court of Colorado held in *Barnard v. Gaumer*, 361 P.2d 778 (1961), that absent an agreement as to the maintenance of a private drive, the burden of upkeep should be distributed between the dominant and servient tenements in proportion to their relative use of the road. In *Hart v. Hart*, 497 S.E.2d 496 (1998), the easement was one that had been created by the court in a divorce proceeding. The Court of Appeals of Virginia held that where an easement owner is not the sole user of a private right of way, but uses it in common with the servient estate, then the costs of maintenance of the easement should be proportionately distributed among all users. *Id.*

1. Existence of Easement

The parties agree there was an easement in existence, although the parties differ somewhat on the details of when and how the easement was created. Westside proved an easement per the encroachment agreement. DOT does not dispute that finding, nor did the trial court. However, as an alternative theory, the DOT claims an easement by prescription. Because DOT has used the storm drain line by claim of right since the execution of the encroachment permit in 1987, Westside agrees that DOT would have acquired an easement by prescription from 1987 if one was not otherwise granted by the encroachment permit. However, DOT failed to prove it had an easement of any kind prior to 1987. The trial court concluded that the parties agreed there was an easement but had not stated whether it was adverse or under a claim of right; however, the existence of an easement was not in dispute. [Am. Order, p.6, Sept. 12, 2011]

Westside proved by a preponderance of the evidence that an easement existed

beginning in 1987. Indeed, in its Answer and interrogatory responses, DOT acknowledges the existence of an easement to use the line pursuant to the encroachment permit. Interrogatory 16 and the DOT's response are as follows:

> 16. Do you contend that you have a legal or equitable right to have storm water from your property discharged onto the Westside Plaza property owned by the Plaintiff? If so, set forth all facts known to you which support your contention.
>
> **Answer:** Yes. By prescription: storm water from US Highway 1 has drained onto and through the property on which Westside Plaza currently is situated long before Westside Plaza ever existed. Also **by agreement** of Plaintiff's predecessor in title, which agreed to accept storm water from US Highway 1 and the culvert, which had existed prior to the development of the property, **in the Encroachment Permit**, pursuant to which the Plaintiff's predecessor in title was permitted three driveways entering US Highway 1 and two driveways entering Dreher Road . . . .

[Exhibit 8; DOT Answers to Interrogatories (emphasis added)] Westside presented other evidence that the encroachment permit created an easement in 1987. The DOT's witness, Clarence Blakely, testified that the encroachment permit was an agreement for the DOT to use Westside's storm drainage system to transport the storm water away from U.S. #1. He also testified that DOT considered the encroachment permit to be binding on any successors in title, and that DOT would take action to protect its use of the system if that use were denied by the landowner. Blakely's testimony was that DOT entered into an agreement for the use of Westside's land to transport storm water away from the highway. Under *Douglas v. Med. Investors, Inc.*, 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971), this testimony establishes an agreement "to use the land of another for a specific purpose"

and is conclusive on the issue of the existence of an easement to use the Westside storm water system (specifically Line E and the detention pond) by and through the encroachment permit. [Ex. 1]

While Westside agrees that the encroachment permit created an express easement for DOT to utilize Line E and the detention pond, the DOT has also claimed an easement by prescription. Clarence Blakely testified that DOT had been discharging storm water into the Westside system since 1987 under claim of right, which would provide the 20 years of use necessary for an easement by prescription to use the Westside system and pond. *See Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Revis v. Barrett,* 321 S.C. 206, 209, 467 S.E.2d 460, 462 (Ct. App.1996) ("to establish a prescriptive easement, one must show: (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under a claim of right.") Because the parties agree that an easement was created in 1987 by the encroachment permit, Westside does not challenge the DOT's claim that it has an easement by prescription since 1987 to utilize Line E and the detention pond. However, as discussed *infra*, DOT did not acquire an easement by prescription prior to 1987.

2. Costs of Repair and Maintenance to DOT

Having shown the existence of an easement by the preponderance of the evidence, Westside then established the cost of maintaining the easement. Westside spent $325,240 repairing Line E and in maintaining the detention pond. The details are noted in the factual discussion. The trial court excluded $3,000 of Westside's costs as non-

recoverable, and Westside does not dispute this reduction. No party challenged the amount of the costs. Thus, there is no issue in the record that Westside spent $322,240 (after adjusting the figures for the detention pond to allocate only 1/3 of those costs to Line E) in costs in maintaining and repairing Line E and the detention pond.

As noted, there has been no challenge by the DOT as to the reasonableness of such costs and it is not in dispute that costs associated with Line E were incurred of necessity to maintain the system and protect the public (both on Westside's property and on the other properties). Tim Richardson of Ideal Construction testified as to the need for immediate repairs to Line E to prevent harm to the public and no party challenged the need for immediate repair work. [Tr. 240, l. 9-24] Furthermore, DOT did not question the need for maintenance of the detention pond or the reasonableness of Westside's costs with respect to same.

3. Determining Equitable Allocation for DOT

Once an easement for the benefit of the DOT is established, whether by the encroachment permit or by prescription, and the costs of maintenance and repair are established as well, the question then becomes how to apportion the cost of maintenance and repair. Under *Hayes v. Tompkins*, the courts look at the burden on the servient estate, and the benefit, in terms of use, to both estates. The burden on Westside is severe, as it is responsible to the EPA, DHEC, and other interested administrative agencies, for the discharge of the treated storm water into the stream behind Westside. Any future changes in regulatory standards, such as requiring enhanced treatment before releasing the water,

or treating new pollutants not presently in the water, will fall, at least initially, on Westside. DOT has sought to escape this burden by putting it solely on Westside. In terms of the benefit to the dominant estate, Westside presented expert testimony to establish the benefit in terms of use, which DOT gained from the easement. As shown below, DOT is responsible for about 80% of Line E's use. No evidence was presented to dispute this figure. Michael Lambrecht, who was the only engineer to testify, stated he was asked to determine the proportion of usage of the system by each of the landowners discharging storm water into the system (with the exception of certain residential owners whose use would be immaterial according to Lambrecht). Using widely accepted engineering standards, Lambrecht assigned 81.48% as the percentage of use of Line E to the DOT. He calculated Westside's use of Line E as being 18.52% of the total use. No party introduced any evidence of a different allocation of use.

There was undisputed evidence of other benefits to DOT. The encroachment permit solved the problem DOT had of what to do with as much as 98 cfs of storm water flow that was collecting in its storm drainage system. The easement agreement saved the DOT from having to condemn the land for its use, thereby minimizing public criticism of DOT and saving the DOT treasury from making a significant lump sum, up front, payment. However, DOT is seeking to convert these legitimate benefits into a "free ride" on the back of a private property owner to treat and dispose of DOT's storm water without charge to DOT. DOT avoided the condemnation costs, but it never asked for nor paid for, nor received, an express agreement relieving it of any obligation to share in

maintenance and repair costs. Thus it is clearly equitable to hold DOT to its apportioned share of the maintenance and repair costs.

Since Westside contributes 18.52% of the storm water flowing through Line E, Westside sought an equitable apportionment from the DOT for the balance of 81.48% of the costs to repair and maintain Line E and the detention pond. The total costs were $325,240. The trial court excluded $3,000 of the costs leaving a balance of $322,240. Of that amount, Lambrecht testified that Westside was responsible for 18.52%, or $59,679. That left a total of $262,561 ($322,240 - $59,679) due from the Defendants. To date, Plaintiff has collected $77,740 in settlements with former parties to this action. After reducing the balance by the amount of these payments, the total sought from the DOT, was $184,821.

There is no evidence contradicting Westside's proof of: (1) the existence of an easement based upon the encroachment permit executed in 1987; (2) $322,240 in costs in maintaining and repairing the easement; and, (3) a method to allocate those costs based on proportionate use. Since the amount of $184,821 is an equitable apportionment of those costs to the DOT, Westside asks that this Court find that based upon the equities and the preponderance of the evidence, Westside should be awarded judgment against the DOT in the amount of $184,821, plus costs.

II. ERRORS IN THE TRIAL COURT ORDER THAT MERIT REVERSAL AND ENTRY OF JUDGMENT IN FAVOR OF WESTSIDE

A. No easement existed prior to 1987.

The trial court erroneously stated the parties agreed there was a pre-existing

easement of undetermined origin prior to 1987, which allowed DOT to discharge water onto Westside's predecessor's land. [Am. Order, p.6, Sept. 12, 2011] The significance of this "fact" to the trial court was that the encroachment permit merely changed the location of this easement. However, the trial court was confused about this point in a fact intensive case covering over 750 pages of trial transcript. The parties agreed, as discussed earlier, there was an easement beginning in 1987, but there was no agreement concerning an easement prior to 1987. In fact, Westside clearly disputed that DOT had an easement prior to 1987, noting to the court on more than one occasion that DOT did not prove they had discharged water in a concentrated form on the property for 20 years: "They didn't do that for 20 years were (sic) they had an easement by prescription. They only did it for 17 years. When the negotiations took place in 1987, the DOT had no right pursuant to the common enemy rule and no right pursuant to easement to dump any water on the land that our predecessors owned." [Tr. 648, l. 16-25; 649, l. 1-25; 650, l. 1-2; *see also* Post Trial Brief of Plaintiff Westside Meshekoff Family, L.P., pp.13-14] (*see also Revis v. Barrett*, 321 S.C. 206, 209, 467 S.E.2d 460, 462 (Ct.App. 1996)(where this Court stated a prescriptive easement requires 20 years of use) Westside's counsel's statement followed the testimony of DOT's Blakely, who joined the Department in 1989, and testified from old plans as to the existence of a drain constructed in 1970 dumping concentrated water on the property Westside later acquired. The DOT stipulated Blakely was not offering evidence of the discharge of water in a concentrated form prior to 1970. [Tr. 354, l. 20-25; 355, l. 1-6] Because the DOT's evidence was limited in time from

1970 until 1987, there is no evidence of a prescriptive easement prior to 1987, nor of an agreement among the parties about an easement prior to 1970. The trial court erred in so finding.

B. There was no maintenance agreement in the encroachment permit.

Absent an agreement concerning maintenance, *Hayes v. Tompkins* directs a court to equitably apportion maintenance costs. *Id.* at 294, 337 S.E.2d at 391. Thus, the presence of a maintenance agreement would moot the effect of *Hayes v. Tompkins*. The trial court erred in finding that the boilerplate indemnity language in the standard DOT encroachment permit applied to any acts outside of the DOT right of way. The trial court further erred in finding that the pre-printed indemnity language acted as a maintenance agreement for an easement that was agreed to after the form was printed. [Am. Order, pp.6-7, Sept. 12, 2011] The DOT stipulated in opening statement and then again on motions after the close of Westside's case that no such maintenance agreement could be found in the encroachment permit. Thus, there was nothing for the court to decide on that issue.

The language of the encroachment permit, and the statutory basis for such permits, do not support the trial court's conclusion, in that they apply only on the DOT's right of way. DOT's testimony contradicts the trial court's conclusion in that DOT testified it is making no claim for indemnity under the encroachment permit and makes no effort to control work off of its right of way. Finally, the DOT never introduced any evidence that any work was done on its right of way that would trigger the encroachment permit

indemnity provisions. In summary, while the encroachment permit is an agreement to indemnify if Westside's encroachment on DOT's right of way causes damages or injury, it contains no agreement as to maintenance and repair costs for the Westside storm drainage system off of DOT land (i.e. Line E and the detention pond).[3]

While the trial court found that the indemnification language in the encroachment permit bars Westside from seeking an equitable contribution for maintenance and repairs from DOT, the parties agree that such language is not there. In opening statement, DOT's counsel stated: "The encroachment permit itself is silent as to how maintenance costs are to be apportioned. It doesn't even mention maintenance costs." [Tr. 29, l. 19-22] At the close of Westside's case, DOT's counsel reiterated its position as to whether or not the encroachment permit addresses maintenance obligations: "The 1987 encroachment permit is silent as to maintenance." [Tr. 642, l. 5] Thus, the other party to the contract, repeatedly agreed with Westside that the encroachment permit did not address maintenance obligations for Line E and the detention pond. The parties being in agreement on this issue, the trial court erred by supplying terms and conditions not in the agreement itself and not contemplated by the parties. *Ecclesiastical Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) ("In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties"); see also *Low Country Open Land Trust v. Charleston S. Univ.*, 376 S.C.

[3] Alternatively, the proof of an easement arising from DOT's use of the Westside system since 1987 gives rise to an easement by prescription. Since a prescriptive easement is the opposite of an easement by agreement, there can be no maintenance agreement for the prescriptive easement.

399, 411, 656 S.E.2d 775, 781 (Ct. App. 2008) ("Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of . . . judicial construction.") There being no agreement on maintenance in the encroachment permit, under *Hayes v. Tompkins* the common law provides that apportionment of the repair and maintenance costs is the proper remedy.

Furthermore, the trial court's conclusion is inconsistent with the statute creating encroachment permits. Encroachment permits are a creature of statute. The permits are a precondition to the construction of driveways and side street entrances onto the state highways. S.C. Code Ann. §57-5-1080 (1976). The permit may contain such requirements as are necessary to "avoid creating a hazard to the traveling public." S.C. Code Ann. §57-5-1090 (1976). Permits may be denied where it is judged that they "may create a hazard to the traveling public." *Id.* However, there is nothing in the statute that authorizes the DOT to regulate private property outside the access point to the highway, and DOT's Blakely made that point when he stated that DOT does not seek to govern how a landowner transports storm water across the owner's land. [Tr. 225, l. 6-10] Once the storm drain line leaves the access point to the DOT right of way, the permit has no applicability. The form language in the encroachment permit cannot be read as broadly as the trial court construed it.

The term "encroachment" further supports this conclusion. An encroachment is an extension of possession onto the property of another. *See Merriman v. McCain*, 201 S.C. 76, 21 S.E.2d 404, 409 (S.C. Sup. Ct 1942); *see also Wachstein v. Christopher*, 57

S.E. 511, 512 (Ga. Sup. Ct. 1907) (stating if one building upon his own land encroaches on the adjoining land of his neighbor, the latter may maintain an ejectment and it is immaterial whether the encroachment is on the surface, above it, or below it). Because DOT's permit granted the right to allow an encroachment onto its right of way, the term "encroachment," by definition refers to an encroachment onto the DOT's land. The pre-printed Westside encroachment permit, to the extent it is dealing with encroachments, can only include certain driveways for Westside Plaza and a very small length of storm drainage pipe in the DOT right of way from a DOT catch basin to one located on Westside's property. [Ex. 1] However, DOT used the permit for an entirely different purpose in this instance by adding the language that created an easement. Blakely testified that, unlike the other commercial landowners who needed an encroachment permit to discharge storm water into the DOT system, the DOT was in the opposite position in that the DOT was seeking to discharge storm water onto the land of another (i.e. Westside's property). That meant that the only relevant part of the encroachment permit relating to the storm drainage line on Westside's property was the amended language which established an easement to use Line E and the detention pond.

The pre-printed language of the permit also contradicts the trial court's finding that there was a maintenance agreement. The permit states the DOT is entitled to indemnity for *"injuries to . . . property, including the highway, that may be caused by the construction, maintenance, . . . of the encroachment,"* and Westside agreed to indemnify DOT for " *damage sustained by reason of the past, present, or future existence*

of said encroachment." [Ex. 1, p. 1] Clearly, the form language establishes there is indemnity to the benefit of DOT if a problem occurs while maintenance is being performed on the encroachment. Even if one assumes Westside would likely be performing maintenance on the encroachment, that indemnity ends once the storm drain line leaves the DOT right of way. Furthermore, the indemnity covers only damage caused by the encroachment on DOT's right of way. Once the pipe leaves the DOT right of way, there is no encroachment and there can no longer be any indemnity obligations with respect thereto. There is no language in the DOT form that requires Westside to be financially responsible for maintenance costs, either on or off the DOT right of way, because that was never intended when the form was printed. In this case, there is not even any evidence that any work was done on the DOT right of way. This point is supported by Blakely's testimony that DOT was making no claim for indemnity under the encroachment permit.

The trial court's finding that there was a maintenance agreement is also erroneously based on its belief that there was a prior easement to the 1987 encroachment permit. [Am. Order, p.6, Sept. 12, 2011] In fact, the undisputed evidence is that the DOT failed to prove any prior easement. Even if there were an easement prior to 1987, as the trial court misunderstood, that would not affect Westside's claim for an equitable allocation. Once there is an easement, whether it was created in 1970 in an unspecified and unknown way as the trial court misunderstood, or was created by the 1987 permit, or by prescriptive use since 1987, there is a duty on the dominant party to contribute its

share of the repairs and maintenance along with the servient owner who is also using the easement. *See Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1985). Further, it does not matter whether, as the DOT alternatively contends, it has an easement by prescription arising from the use of the Westside system since 1987. There is certainly no maintenance or repair agreement for that easement, since it arises involuntarily by prescription.

C. The trial court erred in injecting the element of "causation" and other factors in determining whether an equitable apportionment of maintenance and repairs costs should be assessed against the dominant easement holder.

After Westside spent over $320,000 in costs associated with the repair and maintenance of Line E and the detention pond, it came into the court seeking equity in the form of an equitable apportionment of such costs. The trial court refused to require the DOT, as the primary user of Line E, to share in any of the costs, and left Westside to bear the entire burden of repair and maintenance because, the court held, Westside failed to prove that the DOT's storm water caused the maintenance costs. [Am. Order, pp.10-11, Sept. 12, 2011] This decision, if affirmed, would cause an unprecedented change in the law of allocating responsibility for sharing maintenance and repair costs for a common easement. The effect of this decision, if left to stand, transfers the burden of repair and maintenance entirely to the servient estate unless the servient estate proves the repair and maintenance costs were somehow caused by the dominant estate. The decision was incorrect under current law, and should be reversed by granting Westside an equitable apportionment based upon DOT's benefit as proved at trial.

The general rule in the United States is that the dominant tenement, the owner of the easement, "has a duty to maintain the easement and must bear the entire cost of its maintenance and upkeep." *Hart v. Hart*, 497 S.E.2d 496, 502 (Va.App. 1998); *see also Lake Lookover Prop. Owner's Ass'n. v. Olsen*, 791 A.2d 270 (N.J. .Super. A.D. 2002). This rule is based on the principle that whoever enjoys the privilege must bear the duty. *Thompson on Real Property* (2d ed.), Vol. 7, §60.05(a). Thus, under the general rule, the DOT would bear the entire cost of maintaining Line E, as well as the proportional share of the detention pond costs.

Where the servient tenement uses the easement there arises an obligation on the part of all common users to contribute in proportion to the benefit received. *Harris v. Ferguson*, 18 S.C.L. (2 Bail.) 397 (1831), cited in *Hayes v. Tompkins*; *See Thompson on Real Property* (2d ed.), Vol. &, §60.05(a). As stated in *Hayes v. Tompkins*, this rule of proportional responsibility is founded upon the equality of burden and benefit and has been codified in some states. *See e.g. Healy v. Onstott*, 237 Cal. Rptr. 540 (1987) (citing Cal. Civ. Code § 845).

The benefit received is normally calculated based upon the extent of "use" of the easement. *Barnaud v. Gaumer*, 361 P.2d 778, 781 (Colo. 1961) (road easement); *see* Friedman, *Contract and Conveyances of Real Prop. Owner's Ass'n.*, §4.9(m) (5th ed.), quoted in *Hart v. Hart*, 497 S.E.2d at 502 ("'Where the easement owner is not the sole user of a private right of way, but uses it in common with the servient [estate], then the costs of repair and maintenance should be [proportionately] distributed among all users'

between both the dominant and servient estates"); *Lake Lookover Property*, 791 A.2d at 277 (holding that the costs of maintenance of a dam creating a lake used by the residents, should be apportioned reasonably, and indicated that factors effecting the value of the lots should be a factor in the estimate of the benefit received). While "use" is clearly the predominant factor in determining benefit, however benefit is calculated, the cases consistently balance the benefit received by a user against the maintenance cost that should be apportioned to that user. An equitable balance must be reached.

In *Fobar v. Higginson*, 126 N.E.2d 521(1955), a dominant tenement (akin to DOT) sued the servient tenement seeking a mandatory injunction that the downstream servient tenement repair the drainage ditch that served the dominant tenement's land. The court of appeals started with the premise that each party to the easement should bear costs in proportion to the benefit received from the drainage easement. *Id.* at 523. However, it applied the general rule that the dominant tenement bears all expenses, in spite of the existence of a co-owner, and put all of the burden on the dominant owner since it determined that the dominant tenement received all of the benefit. The court of appeals ignored the conflicting evidence as to the cause of the deterioration of the drain line, and instead based its decision on the benefits received. *Id.*

In *Hayes v. Tompkins*, this Court applied the well accepted general rule that "in the absence of an agreement" the owners of the servient tenement "are under no duty to maintain and repair the easement . . . for the benefit of the dominant tenement . . . ." 287 S.C. at 294, 337 S.E.2d at 891. However, since both Hayes and Tompkins used the road

to access their properties, this Court balanced the burden of the easement on the servient tenement, the duty of the dominant tenement to keep it in repair, and the benefit that both parties derived from its use. *Id.* The trial court held that it was equitable that Hayes contribute one-third of the annual maintenance and repair costs, since Tompkins, the servient tenement, used the road more than Hayes. Because Tompkins bore the burden of subjecting his land to the easement, and since Hayes, as the dominant tenement, also bore the responsibility for maintenance and repair costs, this Court affirmed the trial court apportionment as equitable. *Id.*

In this case, since Westside, as the servient tenement, also used the easement, the trial court was required to give consideration to the equitable apportionment method used in *Hayes v. Tompkins*. However, the trial court did not apply *Hayes v. Tompkins* to the facts, and failed to apportion the maintenance costs according to the benefit received, the burden on the landowner, and DOT's duty of maintenance as the dominant tenement. In basing its decision on the absence of proof that DOT's water caused the repairs needed for the system, the trial court erred. The trial court strayed away from balancing benefit versus burden, and privilege against duty, and erroneously focused on "causation." Moreover, even if the "causation" principle were the correct approach, the trial court's order places the burden of proof of "causation" upon the wrong party. The rule is that the dominant tenement owes the duty of repair and maintenance. If the dominant tenement is to avoid that duty, it would be incumbent on the dominant tenement to prove that the Plaintiff "caused" the damage. In this case, the trial court found it was speculative as to

who caused the damage and when it was caused. Thus, in the absence of proof that Westside caused the damage, under the "causation" standard used by the trial court, the burden of repair and maintenance should still be on the dominant easement holder. In erroneously focusing on cause rather than use, the trial court relieved "privilege" of any duty, and put all of the "burden" on the one least benefitted.

None of the case law regarding the apportionment of maintenance and repair costs in multi-use easement situations focuses on "proof of causation," and the trial court did not cite any precedent for doing so. By injecting a requirement that the servient tenement prove causation of the repair and maintenance costs, the trial court gave the dominant tenement free of charge a huge benefit in disposing of its storm water, at the cost of a huge burden placed on the servient tenement to repair the easement (over $320,000), with no charge to the dominant estate for its 80% use. It was during this 80% use over 21 years that the deterioration of the storm drain line occurred. Even though Line E indisputably reached its expected useful life, the DOT has been relieved of any maintenance obligation. [Tr. 254, l. 2-5; 500, l. 14-21]

The effort to find a "cause," strongly urged on the trial court by the DOT and other defendants, took the trial court's eyes off of the burdens and risk analysis *Hayes* instructed it to make. As a result, after correctly noting what *Hayes* held, the trial court then engaged in a "cause" analysis for the next seven pages of its Order while it never considered the burden on Westside nor the benefit to DOT. [Am. Order, pp.6-13, Sept. 12, 2011]

The mistaken effort to determine causation also led the trial court into numerous competing explanations for the "failure" of the system. As the court found, the effort to determine a cause created "too much speculation." [Am. Order, p.10, Sept. 12, 2011] All the trial court could conclude was that the system failed; it did not determine the cause of the failure. [*Id.* at 11] However, the evidence was undisputed that drain lines of this type have a useful life of 15-30 years, and that this line lasted 18 years before any problems came to light. The line was replaced 21 years after its installation. Thus, the line was not a "failure" in terms of reaching its useful life.

The trial court's focus on "cause" creates far more problems than it solves, problems which the *Hayes* analysis avoids. For instance, the trial court did not conclude that the DOT caused the failure, and the trial court did not conclude the Plaintiff caused the failure. Yet, the trial court decision would require the servient estate to prove the dominant estate "caused" some or all of the maintenance, just in order to recover a fair share of maintenance costs. What if there is no "cause"? Also, is normal "wear and tear" a "cause" which must be proven? The next logical step down the path the trial court took would be for a future court to then hold the servient estate must prove what percentage of the maintenance the dominant estate caused, a holding that would be completely at odds with *Hayes* approach of equitably balancing burdens and risks. Left as is, the trial court approach will make it very difficult for servient estates to collect maintenance costs from shared easement holders. Unless the dominant estate agrees to pay its share of the costs, it can put the servient estate to the burden of proving it "caused" the expenses. Why does

it fall on the servient estate to pay all expenses not "caused" by the dominant estate? That is not South Carolina law; the dominant tenement is responsible for all maintenance costs except to the extent the servient estate shares in the benefit. Westside proved a reasonable allocation of the repair and maintenance costs based upon generally accepted engineering principles, which are used by the DOT and Lexington County, among others. If anything, Westside's approach of allocating expenses by using storm water flow to calculate use, was more conservative than required by *Hayes*, in that it gives no weight to the burden on Westside of having the easement on its property, including the possible future burden of changes in regulatory requirements.

D. <u>The trial court erred in finding that Westside's method of apportioning use was too speculative.</u>

While the Court, in its role of doing equity, may decide to use another approach as to apportionment of maintenance and repair costs based upon the evidence before it, the DOT has offered the Court no alternative. Moreover, if any party would be capable of offering a differing engineering alternative or analysis, one would think it would be the DOT, who chose not to do so. Westside submits that while there may be other ways to determine usage of Line E and the detention pond by DOT, Westside's methodology is based upon widely used and accepted engineering standards. Moreover, adopting the calculations and methodology offered by Westside (i.e. percentage of use) would be in keeping with how prior courts have apportioned maintenance and repair costs for common easements. The trial court erred in concluding that the engineer's calculations for allocation were speculative. [Am. Order, pp. 9-11, Sept. 12, 2011] There was

nothing speculative about the approach employed by Westside's professional engineer. The evidence was undisputed that his approach was based upon commonly accepted engineering standards and practices used by both Lexington County and the DOT in storm drainage design and calculations. Under these circumstances, Westside's method of apportionment can hardly be characterized as speculative. Furthermore, nothing in *Hayes v. Tompkins* would suggest that when considering the issue of equitable apportionment, the servient land owner even needs to undertake a professional engineering analysis to establish use as Westside did in this instance. Once again, the trial court is placing the burden on the wrong party.

E. The trial court erred in finding laches bars Westside's claim.

By finding that the trigger date for laches began in 1997, the trial court effectively foreclosed Westside from ever seeking contribution for repairs and maintenance for Line E from the dominant easement owner who benefits from 80% of the use of Line E. Placing all past and future maintenance costs on the servient tenement, including those due to future unknown regulations, is a harsh result and is not in keeping with equitable remedies. It is undisputed, as the trial court found, that Westside first discovered a problem with its storm drain system in July of 2005, when a sinkhole appeared and was quickly repaired. Westside sought the costs for those, and later other repairs, but not for any earlier maintenance. However, the trial court held that laches was triggered upon Westside's acquisition of the property in 1997, and therefore the 11 year lapse before putting the DOT on notice of repair and maintenance problems in 2008, was an

unreasonable delay. While there might be some argument about the applicability of a 1997 trigger date if Westside first sought relief in 2008 for costs from 1997 or 2000, in fact, Westside is not seeking any costs from those early years. Westside put the DOT on notice of a claim in May of 2008 before filing suit in June of 2008. [Ex. 16] Thus, within less than three years from first notice of a problem and first incurring costs, Westside filed suit. This period is not an unreasonable delay.

Laches requires an unreasonable delay, accompanied by prejudice to the defendant. *Terry v. Lee*, 314 S.C. 420, 424, 445 S.E.2d 435, 437 (1994). Laches arises upon the failure to assert a known right. *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004). Laches requires the party to "have known of a right, and known that the other party was abandoning that right." *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 471 (2007). Laches is the equitable equivalent of "waiver" which is the "intentional relinquishment or abandonment of a known right." *Id.* The "known right" in issue is the right to an apportionment of those costs which first started to accrue in 2005, and which continued to accrue until 2008. The failure to assert a claim does not come into existence until a reason or situation demands attention. *Ex Parte Stokes*, 256 S.C. 260, 266, 182 S.E.2d 306, 309 (1971). Until a situation demands action, the failure to assert is irrelevant. *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 498, 451 S.E.2d 924, 929 (1994) Prior to 2005, there is no evidence that Westside knew of any of these problems. Thus there was no "known right" prior to 2005, at the earliest.

The trial court's laches holding focused on Westside's "constructive knowledge"

of the DOT permit in establishing the trigger date for laches, and concluded that constructive knowledge existed as of 1997. [Am. Order, p.16, Sept. 12, 2011] Laches, as an equitable doctrine, is based upon an unjustified delay. Laches cases focus on the "intentional relinquishment of a known right." Using "constructive knowledge" does not provide the element of sitting on a "known right" in this case. Constructive knowledge not only did not exist in 1997, but it would not have been sufficient to trigger laches if it had existed. The order seems to assume the Meshekoffs would have learned of the encroachment permit through the original developer, but that is mere speculation and there is no evidence that ever occurred. [Am. Order, p.8, Sept. 12, 2011] While the storm drain system is a matter of intense focus in this case, it constitutes a minor part of the overall Westside property, and there is no evidence it was a material issue between the seller and purchaser in 1990 or 1997. Matthew Meshekoff denied he was aware of DOT's use of the drain line until 2008. The evidence was that the encroachment permit was not in the chain of title and had to be obtained through a FOIA request. [Tr. 225, l. 22-25; 226, l. 1-9] The evidence also established that potential purchasers often do not discover encroachment permits. Ron Swinson, a co-owner of Danwood and an experienced real estate developer, testified to the due diligence he conducted before purchasing the shopping center across the highway from Westside. He hired engineers and attorneys before purchasing Danwood to advise him on issues such as being sure the storm drain system was properly handling the storm water. [Tr. 746, l. 12-19] He admitted that in all of their due diligence, they never physically inspected the storm drain

pipes, and never discovered the encroachment permit for Danwood. [Tr. 737, l. 6-25; 738, l. 1-6] If an experienced developer utilizing engineers and attorneys does not consider the encroachment permit relevant to pre-purchase due diligence, there is no reason to assume the Meshekoff family would have seen or requested a copy of the Westside encroachment permit. Because the undisputed evidence at trial was that experienced real estate developers do not require review of an encroachment permit as part of the due diligence process, and there was no evidence that the Meshekoffs actually learned of the Westside permit, there is no basis in the record for the trial court to impute constructive knowledge of the DOT's use of Line E to the Meshekoffs in 1997.

The trial court also erred in confusing delay with prejudice, without treating these distinct components as requiring proof of prejudice in addition to delay. The burden of proof is on the party asserting laches. *Emery v. Smith*, 361 S.C. at 215, 603 S.E.2d at 602. To support laches, there must be a material change in position. *Mid State Trust II v. Wright*, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (1996). The DOT offered no proof to support a material change in its position. The trial court apparently thought that the delay in asserting the claim for repair and maintenance costs against DOT somehow caused costs to increase significantly. First, it is undisputed that no one knew of these problems prior to 2005. It is pure speculation as to what DOT might hypothetically have done that would have changed this result. Prior to 2008, although the DOT knew about the easement, the DOT never offered to do any maintenance on Line E or the detention pond. [Exs. 1, 8 (DOT Interrog. Resp. #13); Tr. 212, l. 11-21] After 2008, in the three years

prior to trial, DOT never offered a penny in repair or maintenance costs, and there was no evidence to indicate they would have helped with any repair or maintenance, or that costs would have been less if they had started to replace Line E in 2005. [Tr. 90, l. 20-25; 91, l. 1; 212, l. 11-21] It is also uncontradicted that the corrugated metal pipe in the Westside system functioned within the boundaries of its expected useful life. [Tr. 254, l. 2-5; 500, l. 14-21] The argument that perhaps DOT could have done something to cause the pipe to have lasted longer hardly demonstrates prejudice considering the pipe reached its useful life.

Without a showing of prejudice, the fact that Westside brought its claims within the stature of limitations also shows no undue delay. In this case, Westside discovered the first instance of damage to Line E in July of 2005. In 2008, Line E became a significant problem, and it was determined that it needed to be replaced. Westside put DOT on notice of a claim in May of 2008. Westside filed its suit in June of 2008. Thus, Westside filed its suit within three years of any problems first arising, which would be within the limitations period for an action at law. Indeed, where the statute of limitations has not run on an action at law, laches will not shorten the limitations period. *Twelfth RMA Partners, LP v. National Safe Corporation*, 335 S.C. 635, 641, 518 S.E.2d 44, 47 (Ct. App. 1999).

The trial court's decision also erred in setting the date for initiating the laches period, in that it used a date at which time Westside had no claims to assert. The landowner sat on nothing as it did not know it had claims, and yet the trial court ruled it

lost its rights, not only for items then recoverable, but for all later costs that might come up in the future. The ruling puts a landowner in the position of having to bring a declaratory judgment action prior to having a cause of action, in order to defeat laches. That would be an unprecedented change in the understanding of laches if such a requirement were sustained by this Court.

CONCLUSION

In conclusion, Westside asks that this Court reverse the trial court's amended order and enter judgment in favor of Westside for the amount of equitable apportionment proven at trial.

Respectfully Submitted,

Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, PC
Post Office Box 944
Columbia, South Carolina 29202
(803) 779-8900

Edwin Russell Jeter
JETER & WILLIAMS, P.A.
Post Office Box 7425
Columbia, South Carolina 29201
(803) 765-0600

Attorneys for Appellant