STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

James G. Sercu And
Sherri A. Sercu

Plaintiffs,

v.

Douglas Steven Hart,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Civil Action No.: 2019-CP-32-00630

TRIAL ORDER

SUMMARY

The parties tried this easement dispute case February 8 and 10, 2023. Plaintiffs own Lot 2 and Defendant owns adjoining Lot 1 in The Woods at Lake Murray subdivision in Lexington County. Plaintiffs access their lot across an easement that crosses Defendant's lot. Plaintiffs' lot is serviced by various utilities that cross Defendant's lot.

Plaintiffs claim the right to use this easement; Defendant disputes Plaintiffs' right to use easement and argues he has not prevented Plaintiffs from accessing their lot. Defendant also claims Plaintiffs are trespassing since no prior permission to place utilities across his property.

On February 11, 2019, the Plaintiffs filed their Summons and Complaint in this matter. The Defendant filed his Answer and Counterclaim on July 23, 2019. The Plaintiffs moved for Summary Judgment and the Motion for Summary Judgment was granted on the counterclaim for invasion of privacy leaving his counterclaim of trespass action and defamation. At trial, Plaintiffs dismissed, with prejudice, the defamation action.

The parties presented various witnesses and evidence and argued their claims and defenses. For the reasons stated below, the court rules for the Plaintiffs, that they do have a valid easement across Lot 1 and the right to use utilities that service the Plaintiffs' lot, that the Defendant has

PLAINTIFF'S EXHIBIT IV 2 Hart 10/22/20

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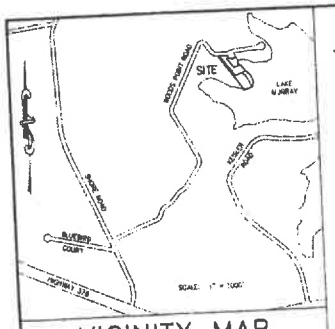
REC FEE: 10.00 ST FEE: 0.00
CO FEE: 10.00 Pages: 1
Lexington County, S.C.D. Debra H. Gantt
PLAT OVERSIZED Bk:Pg 13017:77

SLIDE 1026 pg 3



VICINITY MAP

NOTES:
THIS SURVEY WAS PERFORMED WITHOUT THE BENEFIT OF A TITLE EXAMINATION BY AN ATTORNEY. NO ABSTRACT TITLE SEARCH, NOR TITLE COMMITMENT SEARCH WERE FURNISHED. THERE MAY BE OTHER RECORDED OR UNRECORDED SETBACKS, EASEMENTS, RESTRICTIONS OR RIGHTS-OF-WAY THAT MAY AFFECT THIS PROPERTY THAT WERE NOT OBSERVED OR NOT SHOWN ON THIS SURVEY.
THIS SURVEY IS BASED ON REFERENCED PLATS OF RECORD AND EXISTING EVIDENCE AND CONDITIONS OBSERVED THE DATE OF THIS SURVEY.
SUBSURFACE AND ENVIRONMENTAL CONDITIONS WERE NOT SURVEYED OR EXAMINED OR CONSIDERED AS PART OF THIS SURVEY. NO EVIDENCE OR STATEMENT IS MADE CONCERNING THE EXISTENCE OF UNDERGROUND OR OVERHEAD CONDITIONS, CONTAINERS OR FACILITIES THAT MAY AFFECT THE USE OR DEVELOPMENT OF THIS PROPERTY.
EASEMENTS LOCATIONS SHOWN ARE APPROXIMATE.

LINE	BEARING	DISTANCE
L1	S 18°00'18" W	43.35'
L2	S 68°22'40" E	41.52'
L3	S 40°02'09" E	15.14'
L4	S 40°07'09" E	44.71'
L5	S 25°58'16" E	48.46'
L6	S 48°12'26" E	6.82'
L7	S 48°12'28" E	80.84'
L8	S 26°47'53" E	70.15'
L9	S 15°08'35" E	40.24'
L10	S 12°54'41" W	71.95'
L11	S 63°13'55" W	12.20'
L12	S 63°13'55" W	35.01'
L13	S 74°33'25" W	59.99'

WATER PROVIDER:
GILBERT WATER
P. O. BOX 71
GILBERT, SC 29054
803-892-0071

SEWER PROVIDER:
L.C.J.M.W.S.
P. O. BOX 2555
LEXINGTON, SC 29071
803-359-8373

OWNER/CONTACT:
HALL BUILDERS
2039 DEVINE STREET
COLUMBIA, SC 29205
803-933-9666

MINIMUM BUILDING SETBACKS REQUIRED UNDER THE LEXINGTON COUNTY ZONING ORDINANCE:
10' FROM ALL ROAD RIGHTS-OF-WAY
10' FROM SUBDIVISION PERIMETER BOUNDARY
THE DEVELOPER WAIVES THE REQUIRED MINIMUM SETBACK ON ALL INTERIOR SIDE LOT LINES AND ELECTS TO REDUCE THIS DISTANCE TO 5'(FEET).

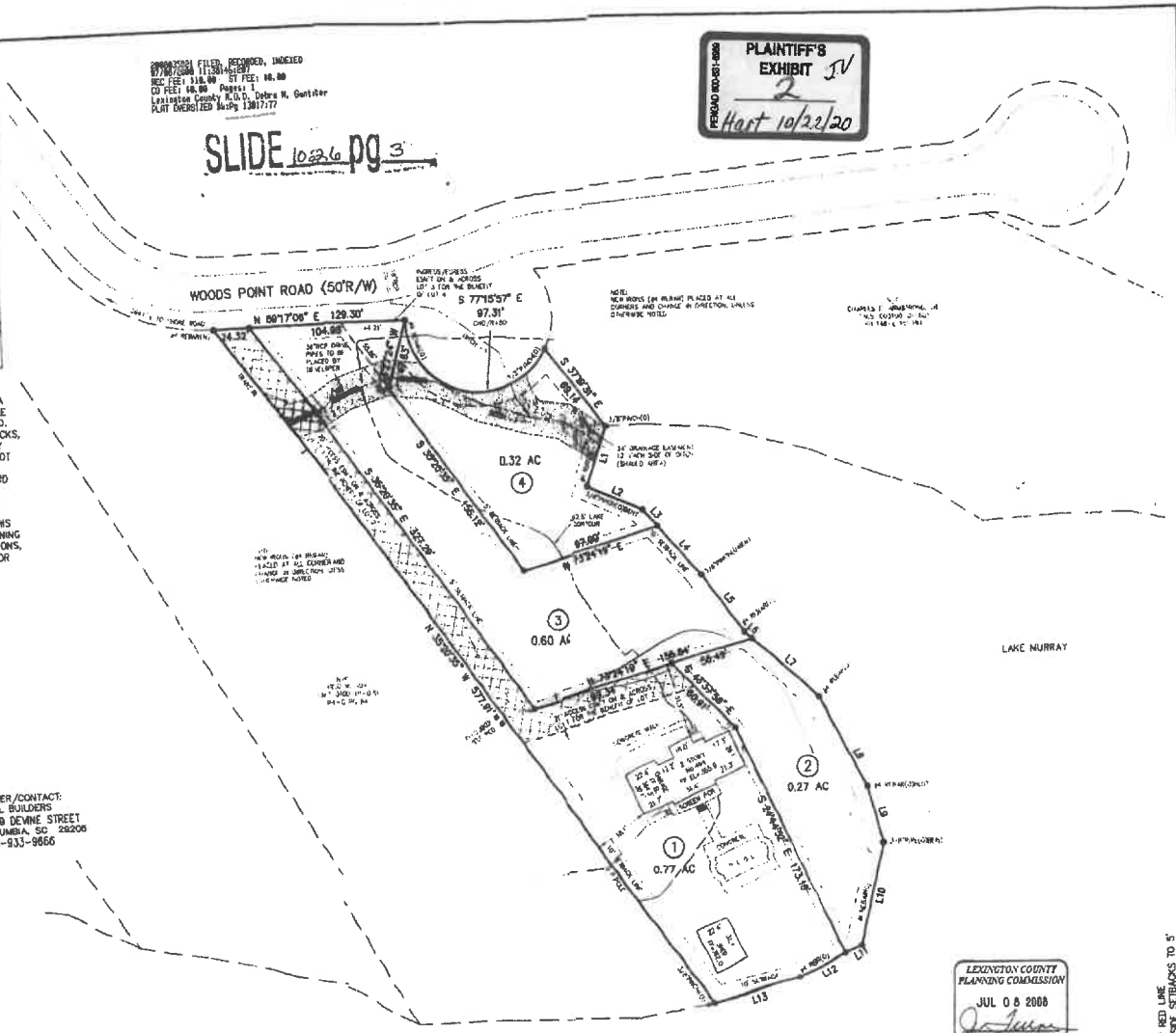
ANY AMENITY AREA PERMITTED SEPARATELY BY ZONING

1.95 AC TOTAL
4 LOTS IN SUBDIVISION

REFERENCE PLATS:
PLAT OF 1.95 AC PREPARED FOR RICHARD M. B. HANSON, BY BAXTER LAND SURVEYING CO., INC. DATED 12/29/95 AND RECORDED AT SLIDE 195-12A.
PLAT OF 2.02 AC PREPARED FOR ALAN B. KAHN & JOHN H. BURG BY WILLIAM WINGFIELD DATED JUNE 12, 1975.
PLAT OF 19.42 AC PREPARED FOR ALAN B. KAHN & JOHN H. BURG BY WILLIAM WINGFIELD DATED DECEMBER 20, 1972.

I HAVE CONSULTED THE F.E.M.A. FLOOD INSURANCE RATE MAP PANEL 450129 0085 C DATED 2/9/00 AND TO THE BEST OF MY KNOWLEDGE & BELIEF, THE PROPERTY IS LOCATED IN ZONES "X" & "AE" AS SHOWN THEREON.

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



LEXINGTON COUNTY PLANNING COMMISSION
JUL 08 2008

OWNER'S CERTIFICATION - SUMMARY APPROVAL PLAT
WHEREAS I AM THE OWNER OF THE PROPERTY SHOWN AND DESCRIBED HEREON AS "THE WOODS AT LAKE MURRAY" SUBDIVISION, I HEREBY CERTIFY THAT I: ADOPT THIS PLAN OF SUBDIVISION WITH MY FREE CONSENT; ESTABLISH AND DEDICATE EASEMENTS AND RIGHTS-OF-WAY AS SHOWN ON THIS PLAT; AND CERTIFY THAT ALL CURRENT STATE AND COUNTY TAXES OR OTHER ASSESSMENTS RELATIVE TO THIS PROPERTY HAVE BEEN PAID.

6/30/2008 Chris Hall
DATE OWNER(PRINTED NAME) SIGNATURE

SOUTH CAROLINA UNITED DESIGN SERVICES, INC. No. C00974 CERTIFICATE OF AUTHORIZATION

UNITED DESIGN SERVICES, INC.
LAND SURVEYING SERVICES
540 ST. ANDREWS ROAD, COLUMBIA, SC 29210 ☎ (803)750-9142

FINAL SUBDIVISION PLAT OF

THE WOODS AT LAKE MURRAY

LEXINGTON COUNTY AND GILBERT, SOUTH CAROLINA

MAG NORTH

25 0 50
SCALE: 1" = 50'

DATE: 7 APRIL 2008
T.M.S.: 003100-01-053
DWG.#: US-458-111
SHEET 1 - 1

REVISED 6/18/08 PER LEXINGTON COUNTY RED LINE
REVISED 6/24/08 LOTS 1 & 2, INTERIOR SIDE SETBACKS TO 5'

interfered and obstructed the Plaintiffs use of this easement, and the Plaintiffs are entitled to actual damages for $63,200.00 and punitive damages for $125,000.00.

UNDISPUTED FACTS

Plaintiffs own the property at 462 Woods Point Road, Gilbert, SC, in Lexington County and have been since February 5th, 2016, as the result of an earlier lawsuit in 2013. The Defendant Douglas Steven Hart owns the property right next to theirs at 464 Woods Point Road since July 19, 2011. The recorded plat of the properties is shown in Plaintiffs' Exhibit 2 as the chain of title for both Lots reference this plat. The Plaintiff Sherri A. Sercu gave a Durable Power of Attorney to her husband, Plaintiff James G. Sercu and the same is recorded in the Lexington County Register of Deeds Office in Book 21044 at Page 2338 (See Plaintiffs' Exhibit 5), under paragraph 19 gave the Plaintiff James G. Sercu specific authority to prosecute this matter for his wife Sherri A. Sercu.

DISPUTED FACTS

Plaintiffs and Defendant disagree as to whether or not the Plaintiffs have an easement at all or the right to use utilities. Plaintiffs have maintained that they own a valid easement as referenced on the Plat of the Properties which states there is a 20-foot access easement for ingress and egress. Defendant claims there is another unrecorded plat ("phantom plat") that shows the true intention of the owner and there is no valid easement. Defendant also maintains that he has never obstructed or interfered with the Plaintiffs' use of the easement or the use of his property and that he is entitled to damages for the Plaintiffs' use of utilities.

TRIAL

Plaintiffs submitted evidence, without objection, the chain of title for the Properties to establish that the Plaintiffs have an implied easement and the right to use utilities for their property. (See Plaintiffs Exhibit 1, Deed from Carl Anthony Thompson to Plaintiff James G. Sercu)(See Plaintiffs' Exhibit 2, Plat of Subdivisions)(See Plaintiffs' Exhibit 3, Deed from Security Bank to Carl Anthony Thompson)(See Plaintiffs' Exhibit 4, Easement to Town of Lexington from Carl Thompson) (See Plaintiffs' Exhibits 5 and 6, Easements to SCE&G from Richard Hanson) (See Plaintiffs' Exhibit 7, Deed from Arthur State Bank to Defendant Douglas Steven Hart and Terry Wise Hart) See Plaintiffs' Exhibits 8A and 8B, Chain of Title Search Summaries of Lot 1 and Lot 2, which includes a deed from Leonard R. Wall to Richard M.B. Hanson which is the common source for Lot 1 and Lot 2 and in Deed Book 3597 at Page 292 dated January 11, 1996).

The testimony and evidence put forth established that the deed from Security Federal Bank to Carl Anthony Thompson, incorporated by reference, on the last page under Exhibit A, the plat of the property recorded at the Office of the RMC for Lexington County in Plat Book 13017, at page 77. (See Plaintiffs' Ex 3; See Plaintiffs' Ex.2) (Deposition testimony) The deed from Carl Anthony Thompson to the Plaintiffs not only reference this same plat but has specific language of this easement. (See Exhibit 1; See Exhibit 2). Finally, the deed from Arthur State Bank to the Defendant references this same plat, on the last page under Exhibit A, as recorded in Plat Book 13017, at page 77. (See Exhibit 7; See Exhibit 2). All three deeds reference Plat Book 13017, at page 77, which such plat grants a 20-foot access easement on and across to benefit lot 2, the property of the Plaintiffs at 462 Woods Point Road. The recorded easements regarding utilities have been on record since August 28, 2002. (Plaintiff's Exhibit 6). The Plat for the Properties also references utilities of water and sewer, which services Lots 1 and 2. (See Plaintiff's Exhibit 2). The Defendant testified that he had no evidence that the Plaintiffs installed any utilities on his

property, that the Defendant bought the property in 2011, and it took about seven years for the Defendant to discover there were utilities running across his property to service the Plaintiffs. (See Trial Transcript Vol. II, p. 81). The testimony from Plaintiff James Sercu and Defendant Hart established that Carl Anthony Thompson, the previous owner of Lot 1, had utilities as early as September 2010 and these were the same utilities that the Plaintiffs have on the property. (Vol 1. Pg. 30) (Vol 2. For Hart's testimony that utilities were there).

The Plaintiff also presented an Order from the Honorable Judge Keesley regarding the Defendant's destruction of this easement. (Exhibit 20). When addressing the previous Keesley injunction Order, the court does so mindful that while not bound by earlier Keesley Order, this court finds its logic and analysis compelling at that time, Carl Anthony Thompson owned Lot 2 and both Plaintiff James Sercu and Defendant Hart were defendants. In this Order, it states that the Defendant Hart was destroying parts of the easement described in the Plat (Exhibit 2). It was presented that the easement described in this Order is the same easement that this case is about as seen in Plaintiffs' Exhibit 2.

While Defendant is the owner of the underlying fee burdened by this easement, he is not the sole arbiter of what constitutes and does not constitute interference. Among other things, the Defendant's position was that he may do what he pleases with his property if he does not interfere with the plaintiff's right of access. (Exhibit 20 pg. 6). The Keesley Order states "It appears that Mr. Hart is removing every other section of the concrete along the expansion joints. All of these removed sections are within the old 20-foot-wide easement. No one has contested that the plaintiff has an easement over that section for ingress and egress." (Exhibit 20, p. 5) The Order pointed out that the Defendant is unilaterally deciding what interferes with the owner's right of access and was ultimately enjoined from destroying the easement. (Exhibit 20, p. 6, 10-11)

Defendant put forth evidence and testimony to rebut the Plaintiffs' claim there is a valid implied evidence and have the right for utilities. However, Defendant introduced no new deeds, plats, or written/recorded documentation regarding Lot 1 or Lot 2 that the Plaintiffs did not already introduce and admit into evidence. The only new evidence put forth by the Defendant regarding this issue was his own testimony.

Defendant testified that when he bought the property there was no discussion of easement rights, granting of easements, did not know what the word easement meant in 2011, only understood the meaning of the word easement when this lawsuit was brought, and had never seen the Plat of the Properties before which describes this easement even at his closing. (Vol 2. 28:3-17) (Plaintiffs' Exhibit 2). Defendant testified that the earliest deed in the chain of title to Lot 2 (Defendant's Exhibit 10), mentioned a plat titled "464 Woods Point Road", which differs from the recorded Plat in Plaintiff's Exhibit 2, and does not expressly mention a subdivision plat. (Trial Transcript, Vol. II., p. 29). Defendant maintained the opinion that the Plaintiffs have never had a valid easement because the earliest deed references a different plat and Hall Builders and Mr. Cliff Hall granted the easement when they had no right to do so. (See Trial Transcript, Vol. II., pp. 106-112; 128-129). However, the Defendant admitted that he has seen no other plat other than Plaintiff's Exhibit 2, he has searched for the other plat and could not find it and could not produce any tangible evidence of this other plat's existence. (Trial Transcript, Vol. II., pp. 106-112). Thus, the only evidence put forth to this Court by the Defendant to rebut the Plaintiffs' implied easement is there might have existed another unrecorded plat never filed or seen. (*Id).*

It was also revealed that the Defendant has held many different opinions on whether or not the Plaintiffs have a valid easement. Defendant maintained that the Plaintiffs do not have an easement due to the phantom plat. (Trial Transcript, Vol. II., pp. 106-112).

Defendant's title superiority claim is based on the existence of the "phantom plat." The totality of the evidence and reasonable inferences dictate the language in this deed that contains a partial reference to this plat must simply be treated as a scrivener's error. The Court notes that there was no evidence or testimony:

(1) From the surveyor who allegedly prepared this plat.

(2) From the owner of the property who requested plat preparation.

(3) Attorney office who prepared this deed.

(4) Other deeds or instruments in the chains of title referencing this plat.

(5) Any copy or version of the actual plat.

In Defendant's deposition, he testified that when he and his wife bought the property, "I understood that there was an easement there and the easement is for ingress and egress only." (Trial Transcript, Vol. II., p. 116). Defendant in his affidavit when opposing Plaintiffs' Summary Judgment testified that he did not believe Carl Anthony Thompson ever owned the easement and, therefore, could not convey it to the Plaintiffs. (Vol 130-131)(Affidavit).

The Plaintiffs introduced many photographs and videos exhibits, displaying the Defendant's actions. In these photographs and videos, it showed that the Defendant destroyed parts of the concrete in the easement using machinery, dug up brick pavers, created potholes, left the easement area unmaintained with weeds, yard debris, branches, timber and wooden planks, used cinder blocks to create a wall to limit access of the easement, and even depicted the Defendant in a video digging up the easement at night. (Plaintiffs' Exhibit 19). Additionally, every time Plaintiff Sercu tried to repair or maintain the easement area, Defendant Hart would undo those attempts. (Trial Transcript, Vol. I, p. 50) (side by side photos). This spanned from February 2016 until October 17, 2022. (Trial Transcript, Vol. I., p. 71).

Plaintiff James Sercu testified as to actual damages in the form of diminution of value. Plaintiff James Sercu testified that the rent was $2,100 since 2014, that it has increased since, and that 20-25% of that rental value would be his damages. (Trial Transcript, Vol. I., pp. 75-76). Plaintiffs' counsel also provided an expert witness Ronnie Wingard to testify regarding the property. Mr. Wingard has 50 years of experience in the retail business, sales, and personally inspected the properties. (Trial Transcript, Vol. II.) Mr. Wingard testified that $2,100 would be an accurate basis to start while increasing each year by 8 percent pursuant to Consumer Price Index (CPI). Additionally, there is a significant jump that would occur in 2022 with his current evaluation of the Plaintiffs' property at $4,500 per month. (Trial Transcript, Vol. II.) (Plaintiff's Exhibit 24). Also, Plaintiff James Sercu testified regarding his personally spending $200 on crush and run and estimated he spent approximately $13,000 to replace concrete dug up by the Defendant.

Defendant testified to rebut this evidence that he had always maintained the property, that the reason for ripping up the concrete was to return the property to a more natural state, the cinder blocks were for a mailbox project, and that Plaintiff James Sercu was illegally dumping materials on his driveway so he had every right to remove it. (134, 135-137, 140, 143, 168). Defendant maintained that he has always been a good neighbor, he has never lied while under oath, testified he too is entitled to damages for the Plaintiffs' trespass of utilities for $1,000 per month.

CONCLUSIONS OF LAW

This Court holds jurisdiction because of the Order of Reference dated June 30, 2021.

I. Do the Plaintiffs have a valid easement as depicted on the Plat of the Properties and have a right to utilities.

"Generally, when a deed references a plat that contains an easement, an implied easement arises even though the deed itself is silent. Stated differently, a presumption of an implied easement arises unless rebutted by a specific, contrary intention by the grantor. Absent evidence of the

seller's intent to the contrary, a conveyance of land that references a map depicting streets conveys to the purchaser, as a matter of law, a private easement by implication with respect to those streets, whether or not there is a dedication to public use. Furthermore, according to the great weight of judicial opinion, the lot purchaser is entitled to the use of all the streets and ways, near or remote, as laid down on the plat by which he purchases." *Gooldy v. Storage Center-Platt Springs, LLC*, 422 S.C. 332, 338-39, 811 S.E.2d 779, 782 (2018). "This presumption is entrenched in South Carolina property law… The Court agreed with the realty company under the general rule 'that where a deed describes land as is shown on a certain plat, such plat becomes a part of the deed.' This Court has since repeated the rule from *Blue Ridge* on numerous occasions." *Gooldy*, 422 S.C. at 339, 811 S.E.2d at 782.

Even if an easement for access for ingress and egress is established, a party must still establish that he has good title for easement. The way to determine good title is to establish the chain-of-title for Plaintiffs' and Defendant's properties. One way to establish chain-of-title is to track the title back to a common source. *Haithcock v. Haithcock*, 123 S.C. 61, 115 S.E. 727, 729 (1923). If one party has shown good title through a proper chain-of-title, the burden is on the other party to disprove good title. *Lynch v. Lynch*, 236 S.C. 612, 619, S.E.2d 301, 304 (1960). The Court finds that the Plaintiffs have a valid easement by grant and by implication pursuant to *Gooldy.* The chain of title for the properties established that all of the deeds referenced the same plat, Plaintiffs' Exhibit 2, which has been recorded at the Office of the RMC in Lexington County in Plat Book 13013, at page 77 since July 8, 2008. The plat clearly grants an access easement across Lot 1 to benefit Lot 2 to which Defendant's own deed for Lot 1 references. (Plaintiffs' Exhibit 7 – Hart's deed). On the first page of Defendant's deed it states, "This conveyance is made subject to existing easements and easements and restrictions of record." "Property owners are charged with

constructive notice of instruments recorded in their chain of title." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001). It is clear that when Defendant bought his property and recorded the deed on August 9, 2011, the Plat which grants the Lot 1 an access easement had been on record for more than three years. The Court finds the Defendant was on actual and constructive notice of the Plaintiffs' Easement. Both the Plaintiffs' and Defendant's chain-of-title all reference a common source that being the deed in the exhibit for the chain-of-title (Plaintiff's Exhibit 8A and 8B) showing the deed from Leonard R. Wall to Richard M.B. Hanson as the common source for Lot 1 and Lot 2. Richard M.B. Hanson conveyed Lot 2 prior in time to the conveyance of Lot 1. When the conveyance of Lot 2 was made to Hall Builders, LLC on September 3, 2008 and recorded in Book 13126 at Page 53, the Defendant received ownership of his lot (Lot 1) after the conveyance of Lot 2 and would have known of the deed into Lot 2 when he received his deed as well as the plat references which are the same for Lot 1 and Lot 2.

This Court is not persuaded by Defendant's argument that there might exist some other plat, which would then invalidate what was recorded and specifically referenced in both parties' chain of titles. The Court also does not find Defendant's argument that he never knew about any easement until this lawsuit began persuasive or credible. Defendant's claim of ignorance first is contradicted from the 2014 order by Judge Keesley which states Defendant Hart never contested the owner of Lot 2 doesn't have an easement, but rather argued he may do what he pleases so long as he doesn't interfere with the owner's right of access. Defendant cannot at one point maintain the position there is an easement as depicted in Plaintiffs' Exhibit 2 in a hearing before Judge Keesley, and then, testify to the contrary in this Court. Second South Carolina is a race-notice state

and with the plat already of record and specifically referenced in Defendant's deed, Defendant cannot turn a blind eye and be afforded any benefit.

The Defendant's burden to rebut this implied easement must be done so by specific, contrary evidence of the seller's intent and this has not been done. *Gooldy*. Defendant admitted that he has seen no other plat besides Plaintiffs' Exhibit 2, has searched for the phantom plat but could not produce it. (Trial Transcript, Vol. II, p.202-205) Exhibit "A" of Defendant's Deed references a plat by United Design Services, Inc., which is the same company who issued the plat in Plaintiffs' Exhibit 2. Defendant's testimony is speculative and mistitling the plat would at most rise to the level of a scrivener's error. With no specific, contrary evidence Defendant cannot meet his burden of rebuttal. The reasons the Defendant cannot meet his burden of proof is because these lots (Lot 1 and Lot 2) are in a planned subdivision indicated by the certification and County approval of the plat referred to in the deed to Lot 1 and Lot 2. There is no question that said plat is referenced in the deeds for the Plaintiffs and Defendant are the properties conveyed into the Plaintiffs and Defendant and that when Richard Hanson (common source) conveyed Lot 1 and Lot 2 to later grantees, he initialed the legal description of the page showing that said plat referred to herein shows he recognized the proper legal description and plat for said Lot 1 and Lot 2 is Plat 1301 at Page 77. Those deeds referred to Lot 1 and Lot 2 are also the general Tax Map Number for that property before it was subdivided. Defendant also raised a question as to the plat referencing that the easements were approximate locations. In reviewing this plat for the access for ingress/egress was not approximate but was exact because it had the footage, bearings and boundaries. Defendant also raised a question about Cliff Hall signing the plat as the owner but upon further review of the plat, it indicates that the actual owner of the property was Hall Builders who was the grantor on the deed into Lot 1.

"Owners of the servient tenement, are under no duty to maintain and repair the easement for the benefit of the dominant tenement. Ordinarily, the owner of an easement has the duty to keep it in repair." *Hayes v. Tompkins*, 287 S.C. 289, 294, 337 S.E.2d 888, 891 (Ct. App. 1985). Additionally, "The law is settled in South Carolina that when the width, length, and location of an easement for ingress and egress have been set forth in a plat or other instrument, then the rights under the easement exist as to all of the land within the easement, and no party may occupy or obstruct any portion of it." *Pallanck v. Lemieux*, 2005-UP-557, 2005 S.C. App. Unpub. LEXIS 270, 8 (Ct. App. 2005) (citing *Xanadu Horizontal Property Regime v. Ocean Walk Horizontal Property Regime*, 306 S.C. 170, 172, 410 S.E.2d 580, 581-82 (Ct. App. 1991)).

Therefore, this Court holds that the Plaintiffs have a 20-foot access easement across the Defendant's property depicted in Plaintiffs' Exhibit 2. Pursuant to South Carolina Jurisprudence, Plaintiffs have the right and duty to maintain the easement, not have any person or party interfere or obstruct any part of it, and Plaintiffs have the right to the entire width and length as depicted on the Plat. The Plaintiffs also have all rights regarding their utilities as such are of record since 2002 and 2008. (Exhibits 2 and 6).

Utilities Issues

Defendant would have had constructive notice in the utilities and the Town of Lexington and SCE&G easements that are exhibits in this case are in his chain-of-title at the time of the conveyance of his lot to him. Also, the plat in his chain-of-title referenced utility service by Gilbert Summit Rural Water District and the Town of Lexington and SCE&G. This is a subdivision plat approved by the County which required evidence of utilities for the subdivision as a whole and the lots therein. The Gilbert Summit documents (see Plaintiff's Exhibit 23; see SC Rules of Evidence, Rule 803(6) and (8)) also showed Mr. Thompson who owned Lot 2 which was conveyed to the

Plaintiffs had water services as early as September 14, 2010, prior to the deed into Defendant. The subdivision plat indicated that the utilities referred to in the plat were for all of the lots in the subdivision. Also, the plat showed this was a subdivision and the plat was being submitted based on the certification language as the plan for the subdivision. Also, Defendant had actual and constructive notice as the title documentation because they were in his chain-of-title and he would have been under inquiry to check them as required by *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 896.

II. Has the Defendant obstructed or interfered with the Plaintiffs' easement?

a) Defendant's actions

Plaintiffs presented evidence that the easement back in 2013 was in pristine condition. (Exhibit 9A) When addressing the previous Keesley injunction Order, the court does so mindful that while not bound by earlier Keesley Order, this court finds its logic and analysis compelling. In 2014, Judge Keesley's Order states that the Defendant interfered, obstructed with then owner Carl Thompson's right of access to the easement and even destroyed parts of that easement. (Exhibit 20). On March 3, 2016 after Defendant Hart was enjoined by Judge Keesley, the condition of the easement was still in good condition despite parts of the concrete missing. (Exhibit 9B) However, on April 24, 2016 the Plaintiffs' photograph shows the easement in extremely poor condition and not maintained. (Exhibit 9C). Plaintiff James Sercu's testimony and exhibits presented to this Court that the Defendant has interfered, obstructed, and even destroyed portions of the easement persuasive. (See Plaintiffs' Exhibits 9-B, 10, 11, 11-B, 12, 13, 14, 15-B, 16, 16A-C, and 19). Every time the Plaintiff tried to restore a hole created by the Defendant, the Defendant would the very next day undo any restoration by the Plaintiff (Plaintiffs' Exhibits 15 and 19).

Again, just like in 2014 in Judge Keesley's order, Defendant is trying to unilaterally decide what the Plaintiffs' property rights are, and again, he is wrong in doing so.

Therefore, this Court finds that the Defendant's actions as depicted from the evidence presented to this Court show the Defendant has obstructed and interfered with the Plaintiffs' easement rights.

b) Private Nuisance

"A nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. It is anything which hurts, inconveniences, or damages; anything which essentially interferes with the enjoyment of life or property." *O'Cain*, 322 S.C. at 562, 473 S.E.2d at 466 (Ct. App. 1996). The Plaintiffs have carried their burden that they have a valid 20-foot access easement as depicted on Plaintiffs' Exhibit 2 and that the Defendant has substantially and unreasonably interfered with their use and enjoyment of the property. The actions by the Defendant were done intentionally, done to hurt, inconvenience and damage the Plaintiffs right to use the easement.

Therefore, this Court finds that the Plaintiffs have met their burden in showing that the Defendant's actions have substantially and unreasonably interfered with their use of the easement and their property, and are entitled to actual damages.

c) Permanent Injunction

The Plaintiffs request a permanent injunction refraining Defendant from encroaching, occupying, obstructing and destroying the Plaintiffs' easement. This Court agrees that a permanent injunction is necessary to protect the legal rights of the Plaintiffs as the Defendant has caused

irreparable harm and this behavior will only continue without this Court's intervention. *See Foc Lawshe, L.P. v. Int'l Paper Co.*, 352 S.C. 408, 416, 574 S.E.2d 228, 232 (Ct. App. 2002) ("A plaintiff's entitlement to an injunction requires the complaint to allege facts sufficient to constitute a cause of action for an injunction while establishing that an injunction is reasonably necessary to protect the legal rights of the plaintiff during the litigation. Generally, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law.") This Court's permanent injunction echoes what Judge Keesley's temporary injunction tried to protect by prohibiting the Defendant from destroying parts of the easement.

Therefore, it is ordered that the Plaintiffs are entitled to a permanent injunction to refrain the Defendant from encroaching, occupying, obstructing and destroying the Plaintiffs' easement.

d) Negligence

To prove a cause of action for negligence, a party must show: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 314, 743 S.E.2d 109, 112 (Ct. App. 2013). "Superimposed upon the above elementary law of torts is the rule that if one engages in activity involving peril to others to the knowledge of the actor, his negligence while so engaged, whether consisting of acts of commission or omission, which result in damage to another is actionable." *Green v. Blanton*, 294 S.C. 14, 17, 362 S.E.2d 179, 180 (Ct. App. 1987). "And it is a familiar rule that to establish liability for ones negligent acts, it is not necessary that the person charged with negligence should have contemplated the particular event which occurred, but it is sufficient that he should have foreseen that his negligence would probably result in injury or damage to others." *Id.*

The Defendant is under a duty to properly maintain his property as to not interfere with the Plaintiffs' property rights, including, interfering with the easement. The Defendant has engaged in activity involving peril to the Plaintiffs as shown at trial.

Therefore, this Court finds that the Plaintiffs have met their burden in showing that the Defendant's actions have breached his duty to not interfere with the Plaintiffs' easement rights and to not engage in activities that involve peril to others and are entitled to damages.

e) Conclusion

The Plaintiffs have brought multiple causes of action that are all based on the Defendant's actions of interfering and obstructing with their use of the 20-foot access easement shown in Plaintiff's Exhibit 2. This Court holds that the Plaintiffs have met their burden in all of their causes of action for private nuisance, permanent injunction, and negligence and are entitled to damages.

III. Defendant's Counterclaim for Trespass

a) Trespass Law

"[A] trespass is any interference with one's right to exclusive, peaceable possession of his property." *Ravan v. Greenville County*, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993). Additionally, "[t]he essence of trespass is the unauthorized entry onto the land of another." *Id.*, 315 S.C. at 464, 434 S.E.2d at 306. As already mentioned, the Plaintiffs' have met their burden in establishing that they have an easement and have the right to utilities. (See Exhibits X). Therefore, Defendant's cause of action for trespass for those utilities are dismissed with prejudice.

b) Plaintiffs' affirmative Defenses

Further, even if the Defendant could maintain an action for trespass, the Defendant is barred by the statute of limitations and the equitable doctrine of laches. The Defendant has no

evidence as to when the trespass would have occurred, has no evidence that the Plaintiffs' installed any utilities on his property, and only discovered it about seven years after buying his property when the Defendant was well aware that the house on Lot 2 had utilities. (Hart's depo and trial Vol 2.) Thus, even under our three-year statute of limitations Defendant is untimely in beginning his counterclaim. *See S.C. Code Ann.* §15-3-530(3), "Within three years… (3) an action for trespass upon or damage to real property". Finally, this Court finds that the equitable doctrine of laches bars any trespass claim which is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have been done. *Jones v. Leagan*,384 S.C. 1, 19-20, 681 S.E.2d 6, 16 (Ct. App. 2009). There is no reasonable justification for the Defendant to wait more than seven years to bring an action for trespass for utilities if he truly believed his property rights were infringed upon. Also, the Defendant had actual and constructive notice of the utilities as these items were in the chain-of-title to Defendant's property including recorded easements and plat which reference the utilities servicing the subdivision. Furthermore, if there are circumstances sufficient to put party upon an inquiry, he is held to have notice of everything which that inquiry properly conducted would certainly disclose. It stands upon the principal that the parties are bound to exercise due diligence and is assumed to have the knowledge to which that diligence would lead him. *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 896

This Court holds that even if the Plaintiffs could maintain an action for Trespass, the statute of limitations and the equitable doctrine of laches bars any claim.

IV. Damages

Continuous is important

a) Actual and Compensatory Damages

The Plaintiffs have met their burden for their causes of action of Negligence and Private Nuisance and are entitled to actual damages. Additionally, the Plaintiff Sercu's testimony regarding his damages went uncontradicted. Plaintiff Sercu testified that the rental value of his property in 2014 was $2,100.00, that number has since increased, and the damages incurred would be a percentage of 20-25% of the rental value. (Trial Transcript, Vol. I., p. 75). "In South Carolina, a property owner is ordinarily competent to offer testimony as to value of his property." *Cooper v. Cooper*, 289 S.C. 377, 379, 346 S.E.2d 326, 327 (Ct. App. 1986). In calculating damages for private nuisance South Carolina law lets the diminution of the rental value be considered. *See Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 141-42, 747 S.E.2d 468, 474-75 (2013). ("The damages recoverable for trespass and nuisance being strictly limited to damages to one's property interests, the only proper measure of them is the value of the property. A well-known principle of property law is that property consists of a bundle of rights. The value of a piece of property is the value of all of the rights one obtains through ownership of the property. Thus, included in the value of property are the rights of exclusive possession and use and enjoyment protected by the trespass and nuisance causes of action respectively. To the extent those interests are harmed by a temporary trespass or nuisance, the harm would be reflected in the lost rental value of the property. In measuring the damages for a nuisance, the diminution in the value of the use of the property necessarily includes annoyance and discomfort, which directly affect the value of the use. It is not, therefore, proper to permit a recovery both for the diminution in the value of the use and for annoyance and discomfort, which necessarily enter into and constitute a part of the diminution of such value. To do so is to allow a double recovery. Lost rental value includes the annoyance and discomfort experienced as the result of a temporary trespass or nuisance. The lost rental value of the property is the difference between the rental value absent the trespass or nuisance and the rental

value with the trespass or nuisance. The rental value with the trespass or nuisance present would be less, in part, because a hypothetical renter would have to suffer the annoyance and discomfort of the nuisance or trespass. Thus, the lost rental value measures the monetary value of the harm to the property interest. Furthermore, because lost rental value includes damages caused by annoyance or discomfort, to permit a plaintiff to recover both the lost rental value plus an additional sum for annoyance and discomfort would be to permit a double recovery. The Supreme Court of South Carolina has already recognized the lost rental value of property as the measure of and limit on damages for a temporary harm to property.")

This Court agrees with the Plaintiffs' valuation of damages.

This action was filed February 11, 2019, which means in calculating damages based on the rental value this appropriate time period would be from February 2016 to October 17, 2022 when Plaintiff James Sercu said it all stopped. (Trial Transcript, Vol. I. p. 71). With 25% of $2,100.00 being $525.00 multiplying this by 81 months, the total amount in actual damages comes to $42,525.00. Plaintiff James Sercu also testified that he estimated replacing the concrete removed from the easement area by the Defendant would cost approximately $13,000.

i.) Plaintiffs' Expert Ronnie Wingard

Defendant's counsel objected to Mr. Wingard being admitted as an expert since Mr. Wingard himself admitted that "he was not an expert".

"The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. Generally, however, defects in the amount and quality of education or experience go to the weight of the expert's testimony and not its admissibility. *State v Schumpert*, 435 S.E.2d 859 (1993);*McMillan v Durant*, 439 S.E.2d 829 (1993); *O'Tuel v. Villani*, 455 S.E.2d 698 (Ct. App.

1995) (overruled on other grounds by, *I'On,L.L.C. v . Town of Mt. Pleasanat*, 526 S.E.2d 716 (2000). See also *Waters v. South Carolina Land Resources Conservation Comm'n*, 467 S.E.2d 913 (1996) (a witness's admitting he was not an expert in the field of radioactive mineral migration through hydraulic systems did not render him incompetent to testify as an expert witness; this fact went the the weight of the testimony). Trial Handbook for South Carolina Lawyers, Alex Sanders and John S. Nichols Pages 563-564 (2006).

However, the voir dire and qualifications of Mr. Wingard show Mr. Wingard is more than qualified to testify on the valuations of property in Lexington County with his 52 years of experience in the real estate business and 49 years as a real estate broker. (Trial Transcript, Vol. II., pp. 7-8.)

Rule 702 of the South Carolina Rules of Evidence provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." There seemed to be confusion as to how exactly "expert" was to be defined when Wingard was questioned multiple times. Mr. Wingard's specialized knowledge, skill, experience, and training in this field assists the trier of fact in the issue of damages for the Plaintiffs. So Mr. Wingard is recognized as an expert in evaluating and appraising property in Lexington County.

State v Hutto,481 S.E.2d 432 (1997) notes that, "Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony." *Williams,* 447 F.2d at 1290. The rationale for this exception to the rule against hearsay is that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion. Moreover, the opinion of expert

witnesses must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and from a lifetime of experience. ***Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.***

There is nothing before this Court to suggest that Mr. Wingard's testimony would not be reasonably relied upon by experts in Mr. Wingard's field in forming his opinions or inferences upon the subject. *See* Rule 703 SCRE ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.")

The Court notes it did not consider Wingard's written report.

Mr. Wingard's testimony is that starting in 2016, the rental basis would be $2,100 with it increasing each year by 8-10%. Using the same diminution provided by Plaintiff Sercu of 25%, the Court has broken down these damages for each year.

February 2016 - $2,100 x .25 = $525 x 11 months = $5,775

2017 - $2,310 x .25 = $577.50 x 12 months = $6,930

2018 - $2,541 x .25 = $635.25 x 12 months = $7,623

2019 - $2,795.10 x .25 = $698.76 x 12 months = $8,385.12

2020 - $3,074.61 x .25 = $768.65 x 12 months = $9,223.83

2021 - $3,382.07 x .25 = $845.52 x 12 months = $10,146.21

2022 - $3,720.28 x .25 = $930.07 x 10 months = $9,300.70

Total: $63,200.00

This Court, in considering the testimony from Plaintiff Sercu and Mr. Wingard, together with Defendant's cross-examination questions, find actual damages in the amount of $50,000.00.

b) Punitive Damages

The ten factors relevant in considering punitive damages are: (1) the character of the defendant's acts: (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause; (3) defendant's degree of culpability; (4) the punishment that should be imposed; (5) duration of the conduct; (6) defendant's awareness or concealment; (7) the existence of similar past conduct; (8) likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) defendant's wealth or ability to pay. *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 313-314, 594 S.E.2d 867, 875 (Ct. App. 2004); S.C. Code § 15-32-520. The burden of proof is also governed by *S.C. Code* § 15-33-135 stating that, "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." "To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Solanki v. Wal-Mart*, 410 S.C. 229, 236, 763 S.E.2d 615, 618 (Ct. App. 2014).

When examining the punitive damage factors with the Defendant's actions and his testimony this Court finds that punitive damages are justified. There is no reasonable justification for the Defendant's actions. Defendant testified that he has maintained the property, that the reason for ripping up the concrete was to return the property to a more natural state, the cinder blocks

were for a mailbox project, and that Plaintiff James Sercu was illegally dumping materials on his driveway so he had every right to remove it. (134, 135-137, 140, 143, 168).

The Court is not persuaded that the primary reason for the Defendant's actions was to exercise his property rights, that he has "always been a good neighbor" and it's his foundation. (Trial Transcript, Vol. II., p. 142). The photographs and videos make this quite clear that the Defendant did not maintain the property and actively sought to damage and interfere with its use to harm the Plaintiffs as clearly shown in Plaintiff's Exhibits 15 and 17. This was a continuous and deliberate act by the Defendant that lasted for approximately six years "actuated by willful and wanton motives" *Poole v. Edwards*, 15 S.E.2d 349, 352 (1941). *Poole v. Edwards* allows for an award for punitive damages for a willful obstruction of a right of way or easement. This is not the first time Defendant's actions are addressed as the Honorable Judge Keesley has already enjoined the Defendant for the very same behavior. (See Order)

The Court also finds that the Defendant's testimony is not credible. Defendant has testified too many different versions to justify his actions. First, Defendant testified that the Plaintiffs have an easement, but for ingress and egress only and that they have no right to dump or maintain the easement. Then the Defendant tried to argue that the Plaintiffs have no easement at all in his affidavit to oppose Summary Judgment. At trial, Defendant testified the phantom plat, but brought no evidence of anything like this. When the Defendant was confronted with his affidavit and deposition transcript, this Court does not find many of the Defendant's responses credible nor reasonable.

The Defendant at no point ever brought a legal action to determine the validity of the easement or utilities. If the Defendant was as concerned with his property rights as he testified to, this should have been done. Instead, the Plaintiffs were forced to bring this action to stop the

Defendant's actions. Plaintiffs are not trespassers to Defendant's property, the legal owners of the easement, and Defendant's actions resulted from intentional malice, rather than a mere accident or directed against an unknown trespasser. This is clear when the Defendant decided to dig up the easement in the middle of the night after he was issued a citation.

Therefore, this Court believes a ratio of 2 to 1 is appropriate under the circumstances. Punitive damages for $100,000.00 is justified.

V. HOLDINGS

IT IS SO ORDERED that the Plaintiffs have a 20-foot access easement for ingress/egress across the Defendant's property running from Woods Point Road to Lot 1 as shown in Plaintiff's Exhibit 2. This easement will be for the full use of access rights over the total width of the 20 feet. The Plaintiffs have the right and duty to maintain the easement, including replacement of any concrete or brick pavers that have been removed by the Defendant and to keep the access area free from obstructions such as weeds, boards, concrete blocks and other obstructions that would interfere with the access right over the 20-foot area.

IT IS SO ORDERED that the Defendant is permanently enjoined from interfering, obstructing and/or damaging the 20-foot easement area including those matters set forth in paragraph 1 above.

IT IS SO ORDERED that the rights granted for the access easement to the Plaintiffs includes the same rights in regarding the utilities which are used by the Plaintiffs' property which are located in 20-foot access easement referred to in this paragraph.

IT IS SO ORDERED that the Defendant's counterclaim for trespass is dismissed with prejudice.

IT IS SO ORDERED that the Plaintiffs are entitled to actual damages for $50,000.00 and punitive damages for $100,000.00.

IT IS SO ORDERED.

James O. Spence
Master in Equity

DATE July 27, 2023
Lexington, South Carolina