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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh

Case No. 2022-CP-37-00447
Appellate Case No. 2025-000982

Frances J. Ratliff, Edward J. Ratliff, Jr., James L. Ratliff, Lucretia B. Morgan, Sherri Akers
Crisp, Amy Cawthon,

Appellants,

v.

Oconee County, Globe, A South Carolina Limited Partnership, Farnes, A South Carolina
Limited Partnership,

Respondents.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Appellants' chain of title does not identify their property as being located on a public road and Appellants have always paid taxes on the roadway. Deeds in the chain of title to adjacent property emanating from a common grantor reference a public road. Is this sufficient evidence to conclude that the common grantor had authority and showed conduct that clearly, convincingly, and unequivocally demonstrated his intent to dedicate the road to the public.
- II. Dedication is incomplete without express or implied acceptance by the public. Oconee County did not introduce any evidence of maintenance activities on Ellenburg Road before the creation of Lake Keowee. Records post-Lake Keowee's creation show that Oconee County maintenance on Ellenburg Road stops before Appellants' property. Appellants have always maintained the roadway in front of their property and paid taxes on the roadway. Do these facts show public acceptance by strict, cogent, and convincing evidence?
- III. Did the lower court error in failing to find common law abandonment of the dead end Private Driveway where: (1) historic roads coming off of the Private Driveway were flooded for the creation of Lake Keowee; (2) Oconee County maintenance has always stopped before the Private Driveway; (3) Oconee County placed an End of County Maintenance sign before the Private Driveway; (4) Oconee County has no records of ever performing maintenance on the Private Driveway; and (5) Oconee County has always collected taxes for the Private Driveway.
- IV. Where Oconee County in prior public hearings and litigation has maintained that it has a prescriptive easement by maintenance over the Private Driveway, or that the Private Driveway was part of a state road before the creation of Lake Keowee that reverted to the County, and where the complaint specifically asked the lower court to determine these rights, did the lower court error in not making a final ruling on these disputed issues?
- V. Did the lower court error in not ruling on Appellants' objections to the introduction of hearsay testimony from Oconee County's deposition designations?
- VI. Did the lower court error in excluding testimony about Oconee County employees' conduct in marking a county map with the location of its end of maintenance as hearsay where Rule 801(d) provides that conduct of an agent in the scope of agency is not hearsay?
- VII. Did the lower court abuse its discretion in denying Appellants' request for a jury trial on the disputed issues of fact in this matter?
- VIII. Did the lower court abuse its discretion in not disqualifying Globe and Farnes' counsel where that counsel's Law Firm represented Jimmy Ratliff and Lucretia Morgan in a real estate closing that resulted in the creation of a plat that Ratliff and Morgan claim is erroneous and that Globe and Farnes have used against the Law Firm's prior clients?

INTRODUCTION AND STATEMENT OF THE CASE

On June 17, 2022, Frances J. Ratliff, Edward J. Ratliff, Jr., James L. Ratliff, Lucretia B. Morgan, Sherri Akers Crisp, Amy Cawthon (collectively, Appellants or the “Ratliff Family”) filed a Complaint for Declaratory Judgment seeking a declaration of what rights, if any, that Oconee County had over the paved section of roadway routed in front of Appellants’ properties located at 585 Ellenburg Road and 599 Ellenburg Road in Seneca, South Carolina that dead ends at the eastern edge of 599 Ellenburg Road (hereinafter, the “Private Driveway”). (Complaint 1-2). The Private Driveway is partially on Appellants’ property (585 Ellenburg Road and 599 Ellenburg Road) and partially on adjacent undeveloped property owned by Respondents Globe, A South Carolina Limited Partnership, and Farmes, A South Carolina Limited Partnership. The Private Driveway connects these properties to the public road system.

The Ratliff Family filed this declaratory judgment action following the Oconee County Board of Zoning Appeals’ (“BOZA”) grant of variance application in April 2022 for the construction of new road tying into the Ratliff Family’s private property and extending the current dead-end section of Ellenburg Road beyond the Ratliff Family’s private property for a new nineteen-home subdivision. Despite conflicting evidence on Oconee County’s maintenance activities along the Private Driveway and the Ratliff Family’s objections, the BOZA granted the variance application based on its assumption that Oconee County held a prescriptive easement over the Private Driveway by disputed longtime county maintenance. Based on the faulty premise that Oconee held a prescriptive easement over the Private Driveway, the BOZA determined it could grant a variance for a future new public road to tie into the purported existing public road system. The BOZA stated during public hearings that if the Ratliff Family still challenged this assumption, they would have to bring legal action to settle the issue, which the Ratliff Family did by bringing this action.

Based on Oconee County’s position taken during the BOZA hearings and the BOZA’s ultimate ruling, the Ratliff Family specifically sought a “declaration that Oconee County **does not** have a prescriptive easement over the Private Driveway.” (Complaint at 2).¹

The Ratliff Family originally filed this action without a jury demand. (Complaint at 1). However, on October 24, 2023, only a few months after the parties had begun discovery, Appellants moved for a jury trial on contested factual issues. (Motion Jury Trial (Oct. 24, 2023); Mem. Support Mot. Jury Trial (Jan. 16, 2024)). A hearing was held on this motion on January 17, 2024, and the lower court denied Appellants’ jury request on January 18, 2024. (Form 4 Order). A bench trial was held in this matter on June 12-14, 2024, in Oconee County before Judge R. Lawton McIntosh.

Prior to the bench trial, Appellants moved to disqualify Respondents Globe and Farmes counsel Andrew Holliday, Esq., based on his law firm’s involvement in closing Jimmy Ratliff and Lucretia Morgan’s purchase of 585 Ellenburg that included preparation of a 2020 Henderson Plat that Respondents have used against Jimmy and Lucretia in this lawsuit. (Motion Disqualify (June 4, 2024)). This motion was denied. (Form 4 Motion Disqualify (June 10, 2024)).

Before the BOZA, on appeal of the variance order, and throughout this case, Respondents have taken the position that Oconee County holds a prescriptive easement over the Private Driveway by longtime maintenance, or alternatively that Ellenburg Road was a historic state road that reverted to the County once the state abandoned it for the creation of Lake Keowee. (Trial Tr. 155:13-24 (Jimmy Ratliff)); Dep. 123:13-125:24 (James Coley); Dep. Trial Tr. (Dep. 206:11-25,

¹ The Ratliff Family’s appeal of the BOZA decision is still pending a request for certiorari at the South Carolina Supreme Court. (*John’s Marine Service, Inc., Frances J. Ratliff, Edward J. Ratliff, Jr., James L. Ratliff, Lucretia B. Morgan, Sherri Akers Crisp, Amy Cawthon v. Oconee County Board of Zoning Appeals, Ridgewater Engineering & Surveying, LLC*, Appellate Case No. 2022-CP-37-001796).

208:1-209:10 (Reid)). At trial in this matter, Respondents abandoned both arguments, instead arguing only that Ellenburg Road was a historically dedicated county road that was not abandoned with the creation of Lake Keowee where T.B. Ellenburg's property began—the last private property on the road. (Trial Transcript 22:12-23:3, 601:20-602:22, 656:17-657:7).

In response, Appellants argued against a finding of a public dedication, and presented evidence showing that even if the Private Driveway was a historic county road, then Oconee County had shown an intent to abandon this section of road based on evidence that:

- 1) All maintenance activities in front of 585 & 599 Ellenburg at least as far back as when the Ratliff family purchased 599 Ellenburg in 1981, including paving by the Ratliffs and Ellenburgs in mid to late 1980's, have been performed by owners of 585 & 599 Ellenburg;
- 2) Oconee County stopped paving Ellenburg Road in the mid to late 1980's in the vicinity of 565 Ellenburg Road and again in 2012 at the same location;
- 3) Oconee County placed an "End of County Maintenance" sign at or near 565 Ellenburg Road and kept it at that location for decades until it was removed, possibly in 2015;
- 4) Oconee County has expended no public funds to maintain the roadway in front of 585 & 599 Ellenburg Road and all such costs have been foisted onto the private landowners;
- 5) Oconee County has collected taxes on the entire road surface in front of 585 & 599 Ellenburg Road;
- 6) Oconee County has no records of ever having performed any maintenance in front of 585 or 599 Ellenburg.

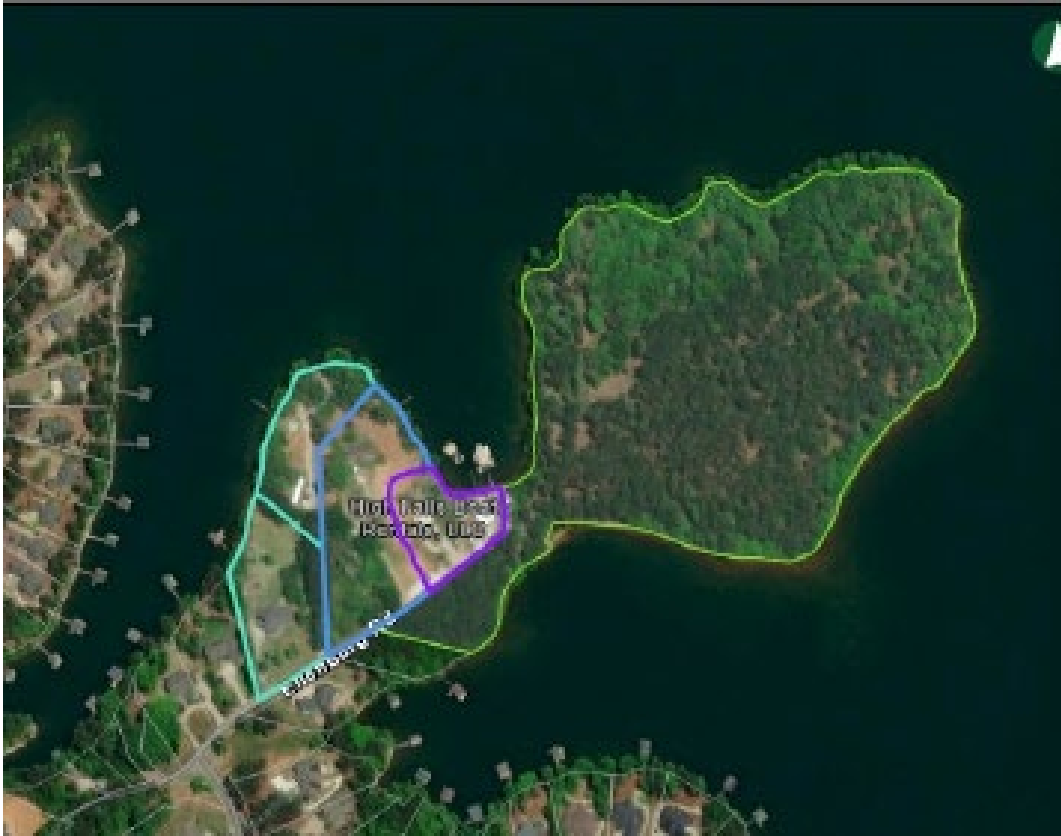
Ultimately, the lower court ruled that Ellenburg Road was a historic public road and that Appellants failed to carry their burden to prove common law abandonment. (Form 4 Order (Jul. 3, 2024)). The lower court entered its final order on August 6, 2024. (Order (Aug. 6, 2024)). Appellants filed post-trial motions on August 15, 2024. (Plt.'s Post Trial Mot. Alter Amend Findings of Fact and Conclusions of Law; Motion Alter Amend Judgment (Aug. 15, 2024)). The lower court denied post-trial motions on August 19, 2024. (Form 4 Post Trial Motions (Aug. 19,

2024)).² Appellants filed their initial Notice of Appeal on September 17, 2024. (First Notice of Appeal). However, Respondents moved to dismiss the appeal because of their pending motion for attorneys’ fees and costs. This Court agreed and dismissed the original appeal on November 8, 2024. The lower court denied Respondents motion for attorneys’ fees and costs on April 17, 2025, and Appellants filed their Notice of Appeal on May 16, 2024. (Second Notice of Appeal).

STATEMENT OF THE FACTS

Appellants (collectively, the “Ratliff Family”) have owned 585 Ellenburg Road since 2020 and 599 Ellenburg Road since 1981, and their family has operated John’s Marine Service on Lake Keowee at the dead end of Ellenburg Road since 1982. (Pl. Exhibits 19, 23; Def. Exhibit 3). The property adjacent to the Ratliff Family and extending beyond the existing dead end is a fifteen-acre arrowhead-shaped peninsula on Lake Keowee referred to as Arrowhead Point. (Pl. Exhibit 58). The “stem” section of Arrowhead Point abuts property owned by the Ratliff Family and meets in the existing roadway and the “body” is to the northeast and juts out into Lake Keowee. This case concerns the nature and extent of Oconee County’s rights over the Private Driveway and is highly contested.

² The lower court’s denial of post-trial motions indicates a failure to serve the post-trial motions on the court. Appellants provided copies of their post-trial motions to the court on August 20, 2024, within ten days after filing their motion as required by the rules. (Letter to Court (Aug. 20, 2024)).



Lake Keowee was created in the late 1960's through the early 1970's. The road name "Ellenburg Road" only came into existence after the creation of Lake Keowee. Prior to that time, there was an unnamed road in the same location that connected to State Highway 183 on the west and to an unnamed loop road on the east that eventually connected to State Highway 201. (Pl. Exhibits 31). Prior to trial, Respondents claimed that Oconee County held an easement over Ellenburg Road by longtime maintenance or because it used to be part of a state road before the creation of Lake Keowee. At trial, Respondents instead argued that the historic unnamed road was dedicated to the public before the creation of Lake Keowee. Evidence was introduced at trial on each of these issues.

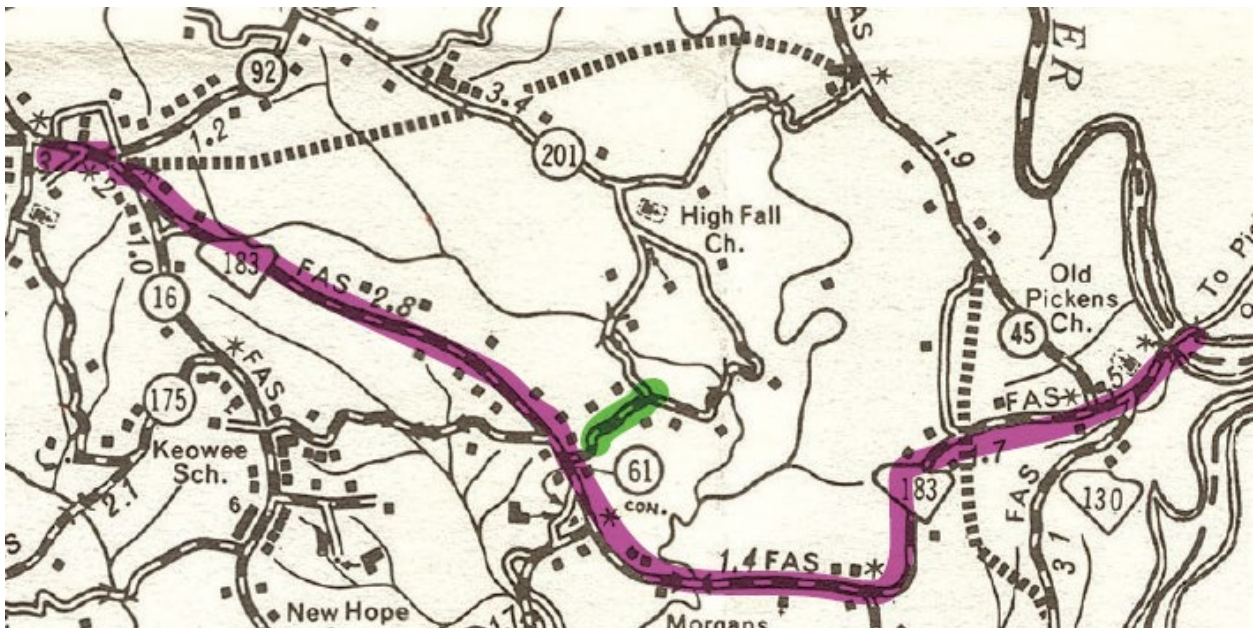
A. History of State Roads and the Creation of Lake Keowee.

The state roads in the vicinity of 585/599 Ellenburg Road before and after the creation of Lake Keowee are State Highway 201, State Highway 183, and State Highway 61, Highway 61 Connector, and State Highway 12. (Pl. Exhibit 31, 32). Appellants called Yelena Kalashnikova, the Director of Road Data Surfaces, to testify on behalf of the South Carolina Department of Transportation as to each of these historic state roads in the vicinity of Ellenburg Road. (Trial Tr. 166:7-18 (Kalashnikova)). Ms. Kalashnikova has worked for SCDOT for over fifteen years, spending more than ten years in its GIS office. (Trial Tr. 167:2-9 (Kalashnikova)). The SCDOT keeps an inventory of roads in the state system, those roads removed from the state system, and it is the ultimate authority in determining what roads are in or out of the state road system, not online mapping services. (Trial Tr. 167:25-168:9 (Kalashnikova)).

Ms. Kalashnikova testified that neither historic nor modern Ellenburg Road has ever been part of the state road system; therefore, any plat or deed referencing it as a state road is incorrect. (Trial Tr. 171:12-15, 177:1-6, 199:8-24 (Kalashnikova), Pl. Exhibits 45, 47). Further, private party plats cannot create a state road simply by their notation. (Trial Tr. 199:5-7 (Kalashnikova)).

Ms. Kalashnikova testified about historic state highway maps in SCDOT's system. The 1957 SCDOT Highway Map for Oconee County, revised February 1, 1969, depicts the road system before Lake Keowee was created in the late 1960's and early 1970's. (Trial Tr. 169:9-21 (Kalashnikova), Pl. Exhibit 31). Highlighted in green is the approximate location of modern day Ellenburg Road. (Trial Tr. 170:2-5 (Kalashnikova)). After the green section is a loop road that connects to State Highway 201 near High Fall Church (the "Loop Road").

1969 State Highway Map (Pl. Ex. 31)



Ms. Kalashnikova testified that State Highway 201 did not turn south to the Loop Road but continued east towards State Highway 45 and the green highlighted section was not State Highway 201, which is reflected in official records showing that when State Highway 201 was added in 1951 it connected Highway 92 and Highway 45. (Trial Tr. 170:14-171:16 (Kalashnikova), Pl. Exhibit 31; 178:15-180:15, Pl. Exhibit 34). Ms. Kalashnikova testified that State Highway 183 was highlighted by the SCDOT in purple on Plaintiff's Exhibit 31 and that State Highway 61 and the 61 Connector road ended at State Highway 183 and it did not continue onto modern Ellenburg

county maps and in its system reflecting county roads comes from the county and is not verified by SCDOT, and SCDOT does not make determinations on whether non-state roads are private or public. (Trial Tr. 185:16-186:9, 187:19-189:3, 198:1-7 (Kalashnikova)).

B. Chain of Title for the Ratliff Family Property.

Appellants called Elliott Quinn, a licensed surveyor for forty years, to testify about historic deeds and plats in the Ratliff Family's property chain of title. Mr. Quinn was qualified as an expert in land surveying, to include identifying property boundaries, rights-of-way, easements, and preparing surveys, maps, plats reflecting the same. (Trial Tr. 245:22-25, 248:7-249:4 (Quinn)). Mr. Quinn reviewed historic deeds and plats to determine rights-of-way along Ellenburg Road in front of 585 and 599 Ellenburg. (Trial Tr. 250:18-25 (Quinn)). Mr. Quinn's team prepared documents for 585 and 599 Ellenburg indicating where the pavement changes color, the center line striping ends, and the location of property pins. (Pl. Exhibits 79-81).

The Ratliff Family's properties at 585 and 599 Ellenburg Road derive from 66 acres of land owned by T.B. Ellenburg that he purchased from J.J. Younce in 1950, (Pl. Exhibit 1), which was carved out of a larger 225-acre property that J.J. Younce purchased from the Federal Land Bank in 1936. (Def. Exhibit 1.1; Trial Tr. 260:16-261:19 (Quinn)). J.J. Younce's deed to T.B. Ellenburg described the property by reference to surrounding landowners and the Federal Land Bank deed but did not provide a description of any roads accessing the 66 acres. (Pl. Exhibit 1; Trial Tr. 261:17-19 (Quinn)). Respondents introduced two other deeds from J.J. Younce in 1946 and 1947, outside of the Ratliff Family chain of title, describing what they contend is modern Ellenburg Road as a "public road," and one plat from 1946 they contend depicts a portion of modern Arrowhead Point. (Def. Exhibits 1.2A, 1.2B, 1.3). Two later deeds for the purported Arrowhead Point property repeat this same "public road" description. (Def. Exhibit 1.5A (Mayfield to Sloan 1952), Def. Exhibit 1.12A (Sloan to SC Land & Timber 1965)). In December

1957, T.B. Ellenburg appears to have sold a one-acre tract of land to Dodgin south of the road and then bought it back a few days later to correct it to a life estate. (Def. Exhibits 1.6, 1.7). These deeds describe this same road in question as a “county road,” but this descriptor is not used on any other documents introduced into evidence.

From 1962 to 1966, T.B. Ellenburg sold all but 6.5 acres of his original 66 acres, the majority of which was flooded for Lake Keowee. The various deeds and plats conveying and depicting T.B. Ellenburg’s land between 1962 and 1966 inconsistently describe the access road to T.B. Ellenburg’s property as:

- a “public road” (1962 1-acre deed to Pinions, the prior Dodgin tract, Pl. Exhibit 2, Trial Tr. 261:20-262:15 (Quinn));
- an “unnamed paved road” (1963 deed to Jerry & Fay Ellenburg, Pl. Exhibit 3, Trial Tr. 262:16-263:6 (Quinn));
- as “pvmt” (pavement) on a 1964 plat that also includes directional arrows to S.C. 183 and High Falls Church, (Trial Tr. 263:7-264:7 (Quinn), Pl. Exhibit 4);
- with no description at all, in the 1964 deed of 51.2 acres to S.C. Land and Timber, (Trial Tr. 264:8-265:12 (Quinn), Pl. Exhibit 5);
- as “Blacktop Road” or “Road” on a 1966 plat that also includes directional arrows to S.C. 183 and S.C. 201 (Trial Tr. 265:13-269:16, Pl. Exhibit 6); and,
- again as an “unnamed paved road” in the 1969 deed from Jerry Ellenburg property to Crescent, (Pl. Exhibit 9).

After 1966, T.B. Ellenburg was left with approximately 6.5 of his original 66 acres. (Pl. Exhibit 6). The Duke Power map depicting T.B. Ellenburg’s prior and remaining land shows that after his last land sale to Crescent he was the only remaining private property owner at the dead end of what is now Ellenburg Road. (Trial Tr. 269:17-272:23 (Quinn), Pl. Exhibits 7, 10).

T.B. Ellenburg Plats & Sells Eventual 565, 585, & 599 Ellenburg

In August of 1974, T.B. Ellenburg subdivided and surveyed these remaining 6.5 acres into three properties. One property was sold to the Morgans, what is approximately modern 565 Ellenburg Road (the “Morgan Property”). (Trial Tr. 273:11-275:22, Pl. Exhibits 11, 12). The 1974 plat of the Morgan Property show an access road to the property labeled only as “road,” and does not depict any public rights-of-way along the road (the “Morgan Plat”). (Trial Tr. 273:11-274:7 (Quinn), Pl. Exhibit 11). In 1994, a new owner of the Morgan Property had the property surveyed to subdivide the property (the “Kempinski Plat”). The Kempinski Plat notated Ellenburg Road as “WA-42 ditch to ditch r/w,” however, the plat referenced the 1974 Morgan Plat and, in his review, Quinn saw no documents showing a change in the nature of the road between 1974 and 1994. (Trial Tr. 275:23-277:5 (Quinn), Pl. Exhibit 13). In 2005, a new owner of the Morgan Property also had the property surveyed and continued the same “WA-42 ditch to ditch r/w” notation (the “Mercedes Plat”); however, the Mercedes Plat also referenced the 1974 Morgan Plat with no additional supporting documents for the existence of a ditch to ditch right-of-way. (Trial Tr. 277:6-278:3 (Quinn), Pl. Exhibit 14).

T.B. Ellenburg kept the middle property, which was referred to during trial as 585 Ellenburg Road and today is owned by Jimmy Ratliff and Lucretia Morgan (the “Ellenburg Property”).⁴ (Trial Tr. 278:23-279:10 (Quinn), Pl. Exhibits 16, 17, 19). The 1974 plat of the Ellenburg Property show an access road to the property labeled only as “road,” and does not depict any public rights-of-way along the road (the “Ellenburg Plat”). (Trial Tr. 278:23-280:6 (Quinn), Pl. Exhibit 16). This plat was not recorded until 1997, after the Kempinski Plat had been prepared. (Compare Pl. Exhibit 13 and 16). The Ellenburg Property was kept in the Ellenburg family and there were no more plats of this property until Jimmy Ratliff and Lucretia Morgan purchased the

⁴ For ease of reference, this property was referenced throughout trial as 585 Ellenburg; however, the actual tax map parcel includes both addresses of 591 Ellenburg and 585 Ellenburg.

property in December 2020 and the bank required a survey. (See Henderson Plats *infra*; Trial Tr. 33:18-24 (Jimmy Ratliff), Pl. Exhibits 19, 20).

T.B. Ellenburg sold the third property to Nancy Bearden in 1974, which is modern 599 Ellenburg Road and was later purchased by Edward and Frances Ratliff in 1981 (the “Bearden Property”). (Pl. Exhibit 21, 22, 23). The 1974 plat of the Bearden Property shows an access road to the property labeled only as “road,” but does not depict any public rights-of-way along the road (the “Bearden Plat”). (Trial Tr. 284:12-285:10 (Quinn), Pl. Exhibit 21). The Ratliff Family has owned the Bearden Property since 1981. In 2021, Jimmy Ratliff hired Michael Henderson to prepare a survey of the Bearden Property for a possible subdivision (the “2021 Henderson Plat”). This plat was never signed and sealed by Henderson or recorded by the Ratliffs. (Pl. Exhibit 65 at 6).

The Henderson Plats

In December 2020, Jimmy Ratliff and Lucretia Morgan purchased 585 and 591 Ellenburg Road from relatives of T.B. Ellenburg (Tax Map #150-00-01-099 and referred throughout trial collectively as “585 Ellenburg”). (Trial Tr. 32:1-33:16 (Jimmy Ratliff), Pl. Exhibit 19). As part of their purchase, the bank required an updated plat. (Trial Tr. 33:18-24 (Jimmy Ratliff)). Michael Henderson prepared the plat dated November 23, 2020 (the “2020 Henderson Plat”). (Trial Tr. 33:25-34:18 (Jimmy Ratliff), Pl. Exhibit 20). Jimmy Ratliff testified that he never reviewed this plat when it was created because he was familiar with the property pins and that he had no intention of dedicating any portion of this property to Oconee County. (Tr. Trans. 34:23-35:20 (Jimmy Ratliff)).

The prior plat for 585 Ellenburg (the Ellenburg Plat), was prepared in 1974 when the property was owned by T.B. Ellenburg, but it was only recorded in 1997 when T.B. Ellenburg transferred the property to Terry Ellenburg. (Pl. Exhibit 16; Pl. Exhibit 17 (Deed T.B. to Terry

Ellenburg)). The Ellenburg Plat reflects a road but does not identify it as public or include any notations of a public right of way. (Pl. Ex. 16, Trial Tr. 35:21-37:4 (Jimmy Ratliff)). Ms. Morgan testified that she did not study the 2020 Henderson Plat because of time constraints but that at closing she was not informed of any new encumbrances or easements being placed on the property and she did not intend to convey any easement across her property. (Trial Tr. 528:19-531:1 (Morgan)).

Michael Henderson testified by deposition designation about his preparation of the 2020 Henderson Plat of 585 Ellenburg and the 2021 Henderson Plat of 599 Ellenburg. Mr. Henderson provided his entire work file for both plats. (Dep. 9:18-10:8 (Henderson), Dep. Exhibit 3). Mr. Henderson testified that his notation of “public right-of-way” on the 2020 Henderson Plat of 585 Ellenburg road was only meant to indicate the existence of a public right-of-way if one existed. He did not have any supporting documentation to show that this section of road was public, he just included the notation because that was his guess, but he testified that he did not, in fact, know if there was actually a right-of-way at that location. (Dep. 14:8-16:16 (Henderson)). In reviewing the 1974 source plat for 585 Ellenburg (the Ellenburg Plat), Mr. Henderson agreed that it did not show a public right-of-way of any kind and that its dashed lines indicated a dirt road. (Dep. 23:21-24:23 (Henderson)).

Likewise, on his 2021 Henderson Plat of 599 Ellenburg, Mr. Henderson testified that he did not have any supporting documentation to label Ellenburg Road as subject to a public right-of-way, he simply labeled it that way because there was a road there. Mr. Henderson agreed that the source plat for his work, the 1974 Bearden Plat, did not reflect any public right-of-way. (Dep. 28:1-5, 28:16-30:14, 20-31:9 (Henderson), Deposition Exhibit 3 at 6, 8). He was unaware of any documents between 1974 and 2021 that would indicate the creation or existence of a public right-of-way along Ellenburg Road in front of 585 or 599 Ellenburg. (Dep. 32:4-33:23 (Henderson)).

C. Maintenance and Use of Ellenburg Road Since the Creation of Lake Keowee.

Appellants called a number of witnesses to testify as to how Oconee County and the private landowners have treated the Private Driveway over the last forty years. These witnesses testified consistently that the Ratliff Family and Ellenburg family have maintained the roadway and shoulders of the road since at least the 1980's and that Oconee County has not performed any maintenance over the Private Driveway but instead it installed an End of County Maintenance sign at or near 565 Ellenburg and each time it has paved a portion of Ellenburg Road it has stopped paving at 565 Ellenburg.

James Ratliff

James "Jimmy" Ratliff was born in 1980, grew up at 599 Ellenburg Road, and has spent his entire adult life working in boat service and repair at John's Marine Service at 599 Ellenburg, first for his dad and then as the owner for approximately the last twenty years. (Trial Tr. 27:11-28:23, 29:10-13, 43:5-15 (Jimmy Ratliff)). Jimmy has spent nearly every day of his adult life on this property. (Trial Tr. 43:13-15 (Jimmy Ratliff)). He also has an ownership interest with Lucretia Morgan in 575 Ellenburg and 585 Ellenburg, he lives at 585 Ellenburg, and he is a part owner of 599 Ellenburg with his mother and siblings. (Trial Tr. 30:12-32:6 (Jimmy Ratliff), Pl. Exhibits 15, 19, 24).

Jimmy recalls the roadway in front of 599 Ellenburg being tar and gravel for a time during his childhood because he specifically remembers not being able to roller skate, skateboard, or play basketball very well in front of his house. He also has a general recollection that the roadway was paved because he recalls later being able to ride his bike in front of his house on a smooth surface. (Trial Tr. 43:16-44:9 (Jimmy Ratliff)).

Concerning road maintenance, Jimmy Ratliff testified that his family and T.B. Ellenburg's family have always maintained the travel surface of the road and both sides of the road from 585

Ellenburg to the dead end. (Trial Tr. 39:11-24, 40:14-41:22, 42:10-15 (Jimmy Ratliff), Pl. Exhibit 49). During Jimmy's childhood and through high school, his family maintained the roadway in front of his family's home at 599 Ellenburg and he and his siblings maintained the sides of the road. (Trial Tr. 57:4-13 (Jimmy Ratliff)). Since moving out of the house, Jimmy has been at 599 Ellenburg daily and has continued to maintain the roadway by adding gravel, fixing the road where needed, and adding drainage. (Trial Tr. 57:14-60:25, (Jimmy Ratliff) Pl. Exhibits 57, 61 (maintenance invoices)).

The Ratliff family has used both sides of the roadway for parking vehicles and boats going back decades to when Jimmy was a child, as depicted on photographs entered in evidence. (Trial Tr. 45:23-50:22 (Jimmy Ratliff), Pl. Exhibits 52, 53, 54, 55, 56). Because Jimmy lives and works at the dead end of Ellenburg Road receiving boats for service, it is part of his business to notice when anyone drives to his property. The only time he has ever seen county employees trying to perform maintenance in front of 585 and 599 Ellenburg was over the last several years when the developer began the variance process with Board of Zoning Appeals to develop the Globe and Farmes property. (Trial Tr. 61:1-62:1 (Jimmy Ratliff)). One time during this process, county employees came to the Ratliff property attempting to mow but Jimmy turned them away from his property and they never mowed. (Trial Tr. 61:4-16 (Jimmy Ratliff)). According to Jimmy, county employees have never performed maintenance in front of 585 Ellenburg & 599 Ellenburg. (Trial Tr. 156:18-21 (Jimmy Ratliff)).

Jimmy Ratliff recalls a black and white End of County Maintenance sign being located near 565 Ellenburg Road as far back in his childhood as he can remember. (Trial Tr. 50:20-52:20, 53:3-11 (Jimmy Ratliff), Exhibit 83A). He marked its approximate location on Plaintiff Exhibit 83A. At some point the sign was removed, but he does not have a specific memory of when. After the old sign was removed, a county employee installed a new sign at the dead end, but Jimmy only

recalls this new sign being in that location for several weeks before it was removed. (Trial Tr. 53:12-54:4, 56:2-9 (Jimmy Ratliff)). While Jimmy is not exactly sure when the new sign was temporarily placed at the dead end, at least one photo of his mother and son standing at the dead end of Ellenburg road in 2012 does not show any sign at that location. (Trial Tr. 56:10-57:3, (Jimmy Ratliff), Pl. Exhibit 50).

Jay Ratliff

Edward John “Jay” Ratliff is married to Karen Rasbornik. He is an engineer and has been employed by Duke Energy since 2005. (Trial Tr. 541:19-542:11 (Jay Ratliff)). Prior to working for Duke, Jay was a submariner in the United States Navy stationed in Georgia. (Trial Tr. 542:11-25 (Jay Ratliff)). Prior to the Navy, Jay earned a bachelor’s in electrical engineering from the Citadel and an MBA from the University of Florida. (Trial Tr. 542:20-25 (Ratliff)).

Jay Ratliff grew up at 599 Ellenburg from 1981 until he graduated high school in 1995. (Trial Tr. 543:1-10 (Jay Ratliff)). Jay Ratliff is a part owner of 599 Ellenburg and is familiar with its 1974 plat. In his understanding, there is no public rights-of-way over Ellenburg Road. (Trial Tr. 543:21-544:15 (Jay Ratliff), Pl. Exhibit 21). Jay recalls that his childhood address was Route 1, Box 268, Seneca, and it later changed to 599 Ellenburg by the time he got his driver’s permit at age 15, in the late 1980’s or early 1990’s. (Trial Tr. 544:16-545:8 (Jay Ratliff)). After graduating high school in 1995 until he was married and moved to Clemson in 2005, Jay Ratliff frequently visited his parents at 599 Ellenburg. From 2005 to 2019, when he moved out of state, he visited 599 Ellenburg about once a week. (Trial Tr. 545:9-547:16 (Jay Ratliff)). Since 2019, he has continued to return frequently to visit family.

Growing up at 599 Ellenburg, Jay Ratliff recalls when the road was tar and gravel. The road quality particularly sticks out in his memory because in grade school around age 10 he had a bike accident on his property where he flew over the handlebars and hit the tar and gravel with his

chin, requiring dental work and eating from a straw for about six weeks. (Trial Tr. 548:4-18 (Jay Ratliff)). Jay also recalls driving go-carts on the tar and gravel road and walking home from the school bus stop at Knox Road over tar and gravel the entire way home. Jay believes his family's section of roadway was paved when he was around 12, but for certain by time he was 15 in the late 1980's. (Trial Tr. 549:6-25, 552:1-13 (Jay Ratliff)). Jay distinctly remembers when the upper section of Ellenburg Road was asphalted because he was then able to rollerblade from Knox road over smooth paving to the end of the paving at the edge of the Morgan Property at 565 Ellenburg Road, at which point he would then have to remove his rollerblades and walk home, which he believes happened when he was about 12 years old. (Trial Tr. 552:14-553:20 (Jay Ratliff)). Now with the upper section of Ellenburg Road paved, Jay begged his father to finish the paving from the Morgan Property to the end of the road. His father agreed and got together with T.B. Ellenburg to pave the rest of the road from 565 Ellenburg to the dead end at 599 Ellenburg. (Trial Tr. 553:21-555:15 (Jay Ratliff)).

Given the few people who lived on Ellenburg Road growing up, the family noticed when people drove down the road and only family visitors or customers of John's Marine drove down to their property. (Trial Tr. 555:16-556:6 (Jay Ratliff)). Jay testified about a series of photographs dating back to the 1990's showing the roadway in front of 599 Ellenburg filled with boats and vehicles on both sides of the road, which was typical. (Trial Tr. 556-566 (Jay Ratliff), Pl. Exhibit 51). Jay identified the transition point where the County stopped paving Ellenburg Road and his father and T.B. Ellenburg began paving at 565 Ellenburg as reflected in Plaintiff's Exhibit 49 where the pavement noticeably changes coloring. (Trial Tr. 567:18-568:9 (Jay Ratliff), Pl. Exhibit 49)).

Jay Ratliff also placed the End of County Maintenance sign at that same paving transition point at 565 Ellenburg, which he recalls as a white sign with black lettering. (Trial Tr. 568:10-19

(Jay Ratliff)). Jay has no memory of the sign not being there until it disappeared around 2015. (Trial Tr. 568:20-24 (Jay Ratliff)). He marked the location of the End of County Maintenance sign on Plaintiff Exhibit 83H at 565 Ellenburg's western property line, because the Morgan property tree line was his point of reference. (Trial Tr. 569:3-570:13 (Jay Ratliff), Pl. Exhibit 83H). Mr. Ratliff has never seen any county employees maintain the sides of the road in front of 599 Ellenburg. (Trial Tr. 570:14-571:3 (Jay Ratliff)).

Laurie Ellenburg Bright

Laurie Ellenburg Bright lives in Oconee County and grew up at 591 Ellenburg Road.⁵ She lived at 591 Ellenburg from 1974 until 1998 and then again from 2002 to 2021, roughly 43 years total. (Trial Tr. 418:18-419:11 (Laurie Ellenburg Bright)). When she grew up, Ms. Bright's grandfather T.B. Ellenburg lived at 585 Ellenburg and her parents lived at 591 Ellenburg until 2002. (Trial Tr. 419:12-22 (Bright)). Ms. Bright recalls the road being a rural route known as Route 1 and later becoming Ellenburg Road in the late 1980's or early 1990's when the 911 system was installed and all roads were required to be named. (Trial Tr. 419:23-420:18 (Bright)). During her childhood, the only families that lived on Ellenburg Road were one elderly lady at the corner of Knox Road, an elderly couple, the Morgans, that stayed next door during the summer, her family, and the Ratliffs. (Trial Tr. 420:19-421:9 (Bright)).

The Ellenburg Road of her childhood looked similar to the 1994 Google Earth image introduced as Plaintiff's Exhibit 58. (Trial Tr. 421:10-422:11 (Bright), Pl. Exhibit 58). As still evident in this 1994 Google Earth image, her grandfather had cleared the trees across from their property to make an area to graze his two or three cows. (Trial Tr. 422:21-423:6 (Bright), Pl.

⁵ 591 Ellenburg and 585 Ellenburg are two addresses on the same tax map parcel. For ease of reference, Appellants referred to this entire tax parcel as 585 Ellenburg throughout trial.

Exhibit 58). Ms. Bright recalls John's Marine having boats all over the sides of the road and in their yard. (Trial Tr. 423:15-22 (Bright)).

Maintenance of the roadway and both sides of the road in front of her family's property was taken care of by her grandfather and father when she was growing up, and her family as an adult, and the Ratliff Family maintained the area in front of their property. (Trial Tr. 427:6-428:8 (Bright)). Throughout her entire 43 years living at 591 Ellenburg, Ms. Bright never saw county employees maintaining the roadway or sides of the road in front of 585 or 599 Ellenburg. (Trial Tr. 428:9-14 (Bright)). The only maintenance she ever saw the county perform was a resurfacing project around 2010 that did not reach 585 Ellenburg. (Trial Tr. 428:15-429:3 (Bright)).

Ms. Bright recalls seeing an End of County Maintenance sign on a daily basis located near the entrance to Harbor Oaks since her childhood. (Trial Tr. 423:23-426:15 (Bright), Pl. Exhibit 83(E)). Her earliest recollection of noticing the sign at that location is around the mid 1980's when she was ten years old. (Trial Tr. 426:16-20 (Bright)). She also recalls the sign being near an old iron bathtub that her grandfather used to water his cows near what today is 582 Ellenburg. (Trial Tr. 429:4-11, 434:25-435:5 (Bright)). Ms. Bright does not recall when the sign ceased being at that location and she does not recall ever seeing a similar sign at a different location. (Trial Tr. 426:21-427:5 (Bright)). Living at 591 Ellenburg for more than forty years, Ms. Bright has no doubt that there was an End of County Maintenance sign on the right-hand side of the road before reaching her family's property. (Trial Tr. 442:23-443:4 (Bright)).

Karen Rasbornik

Karen Rasbornik married Jay Ratliff in 2000 and has known the Ratliff Family since 1998. (Trial Tr. 444:5-17 (Rasbornik)). Ms. Rasbornik has an engineering degree from Fairleigh Dickinson University and a master's in engineering management from the University of Colorado at Boulder. (Trial Tr. 445:14-19 (Rasbornik)). Ms. Rasbornik estimated that from 1998 to 2005

she visited 599 Ellenburg at least once a month, and then when she and Jay Ratliff lived in Oconee County between 2005-2021 they visited weekly. (Trial Tr. 448:15-450:9 (Rasbornik)).

Ms. Rasbornik recalls Ellenburg Road before the Harbor Oaks subdivision was built and there being an End of County Maintenance sign on the right-hand side of the road going toward John's Marine where the pavement changes color. (Trial Tr. 450:22-451:10 (Rasbornik)). She remembers her and Jay running down Ellenburg Road in 1998 and using the sign as a race benchmark. (Trial Tr. 451:2-12 (Rasbornik)). Ms. Rasbornik marked the location of what she recalled as being a black and white sign, on Plaintiff's Exhibit 83F, near the property line of 565 Ellenburg. (Trial Tr. 451:13-453:10 (Rasbornik), Pl. Exhibit 83F). She recalled the sign being in that same location until at least October 2009 when she and her mother-in-law met with Oconee County employees about where county activities ended on Ellenburg Road. (Trial Tr. 453:17-454:14 (Rasbornik)).

In October 2009, Ms. Rasbornik and her mother-in-law Jan Ratliff met with Oconee County employees because Jan was concerned about Harbor Oaks development activity along Ellenburg Road and wanted to clarify where county maintenance ended. (Trial Tr. 454:1-454:14, 475:19-476:12 (Rasbornik)). They met with Mack Kelly, Director of Road and Bridges, Prince Brown, Right-of-way Technician, and Larry Harden, Manager in Roads and Bridges. (Trial Tr. 455:9-457:1 (Rasbornik)). Ms. Rasbornik kept meeting notes reflecting that Jan Ratliff's goals for the meeting as communicated to county employees were (1) to get a more accurate map of county road maintenance, which she received, (2) to understand her rights, and (3) to learn whether there was a proposed road widening project. (Trial Tr. 457:2-458:1, 475:2-24 (Rasbornik), Pl. Exhibits 62, 63). County employees asked if there was an End of County Maintenance sign on Ellenburg Road and eventually provided a map of Ellenburg Road to Ms. Rasbornik and Jan Ratliff. (Trial Tr. 475:10-19, 481:19-483:9 (Rasbornik), Pl. Exhibit 63).

Appellants proffered testimony from Ms. Rasbornik explaining that the map introduced as Plaintiff's Exhibit 63 was provided by county employees and marked by them showing 599 Ellenburg in green and the end of county maintenance also marked by county employees with a green dot near the property line of 565 Ellenburg. (Trial Tr. 489:25-498:17 (Rasbornik Proffer, Pl. Exhibit 63)). Toward the end of the meeting, Ms. Rasbornik requested the county employees to initial the map with the date, and Ms. Rasbornik witnessed Prince Brown initial and date the map. (Trial Tr. 495:18-496:9 (Rasbornik Proffer), Pl. Exhibit 63). From their discussions, Ms. Rasbornik understood that the map she received was a copy of the current county tax map that the roads and bridges department used for road maintenance. (Trial Tr. 497:6-17 (Rasbornik Proffer)). On the way out of the meeting, Ms. Rasbornik recalls signing the visitor log and telling her mother-in-law that they needed to take a picture of the End of County Maintenance sign, which they did later that month, but unfortunately the photo was never printed or digitally preserved. (Trial Tr. 499:9-500:6 (Rasbornik)).

Ms. Rasbornik does not recall ever seeing county personnel performing maintenance on Ellenburg Road beyond where she marked the location of the sign; rather, the Ratliff Family performed its own maintenance, with which she helped over the years. (Trial Tr. 500:12-501:23 (Rasbornik)). Boats have always been parked along the edge of the asphalt of 585 and 599 Ellenburg and Ms. Rasbornik does not recall ever seeing members of the general public who were not visiting John's Marine down at that section of road. (Trial Tr. 501:24-502:13 (Rasbornik)).

On cross examination, Ms. Rasbornik confirmed that her placement of the End of County Maintenance sign was at the same location as marked in green by county employees on Plaintiff's Exhibit 63. (Trial Tr. 505:10-506:1 (Rasbornik)). At the 2009 meeting, county employees indicated that they had been performing maintenance in the area marked in yellow on the map provided to Ms. Rasbornik. (Trial Tr. 507:10-14 (Rasbornik), Pl. Exhibit 63). Responding to

questions from the County, Ms. Rasbornik confirmed that the purpose of the 2009 meeting was to discuss what rights and easements Oconee County had over Ellenburg Road and where maintenance ended, which is what was marked by the county employee on the map. (Trial Tr. 511:4-15 (Rasbornik)).

Lucretia Morgan

Lucretia Morgan co-owns property at 591/585 Ellenburg and 575 Ellenburg with Jimmy Ratliff. (Trial Tr. 516:3-18 (Morgan)). Ms. Morgan has lived in Oconee County for eight or nine years and began servicing her boat at John's Marine in 2011. (Trial Tr. 517:1-15 (Morgan)). Ms. Morgan distinctly recalls her first visit to John's Marine because the road was narrow and she was concerned about where they were going because it would be difficult to turn a boat around on such a narrow road. She noticed the End of County Maintenance sign before seeing the boat shop and assumed they must be going to someone's private property. (Trial Tr. 517:23-518:7 (Morgan)). Ms. Morgan marked the location of the End of County Maintenance sign at the western edge of 565 Ellenburg. (Trial Tr. 519:2-24 (Morgan), Pl. Exhibit 83G). Ms. Morgan recalls seeing the white sign with black letters at that location for several years before it disappeared. (Trial Tr. 519:25-520:19 (Morgan)).

Ms. Morgan began seeing Jimmy Ratliff in 2014 and today they are engaged and she helps with his company's books and administration. (Trial Tr. 520:25-521:22 (Morgan)). Ms. Morgan also handles paying property taxes for 585 Ellenburg and 599 Ellenburg. She testified that the owners pay taxes for the entire property including the roadway and they do not receive credit for any alleged County easement over the road. (Trial Tr. 521:23-522:22, 526:7-528:18 (Morgan), Pl. Exhibits 59, 60).

Ms. Morgan has been at 599 Ellenburg nearly every day since 2015 and currently lives next door. In all that time, she has never seen county employees performing any pavement or lawn

maintenance on this section of Ellenburg Road. (Trial Tr. 524:3-525:7 (Morgan)). Instead, she and Jimmy maintain that section of road. (Trial Tr. 525:8-14 (Morgan)). Ms. Morgan has also never observed anyone travel to the end of Ellenburg Road that was not visiting John's Marine or her boat rental business. (Trial Tr. 525:24-526:6 (Morgan)).

Diane Harris

In 2014, Diane Harris and her husband purchased property in the Harbor Oaks subdivision together with 582 Ellenburg Road where they eventually constructed a boat dock. (Trial Tr. 202:20-203:5, 206:7-21 (Harris), Pl. Exhibit 49 at 4). When Ms. Harris purchased 582 Ellenburg, it had various pieces of debris and junk that needed to be removed, including an iron bathtub placed about a foot from the roadway, and she recalls vegetation along the sides of the road being overgrown. (Trial Tr. 203:19-204:22 (Harris)). The Harris property abuts the Globe & Farnes property. (Demonstrative 2). The Harris's have used John's Marine to service their boats since 2014 and are very familiar with that section of Ellenburg Road and have frequented it nearly every day for the last ten years. (Trial Tr. 207:11-14, 208:9-209:6 (Harris)).

Ms. Harris recalled that when the county last repaved Ellenburg Road it stopped at 565 Ellenburg Road, where the pavement changes color. (Trial Tr. 211:14-25, 213:5-14, Pl. Exhibit 49 at 1). Apart from seeing paving crews at the top section of Ellenburg Road, Ms. Harris has never seen any county employees performing any maintenance activities near 582 Ellenburg and her property has never benefitted from any county maintenance activities. (Trial Tr. 213:18-214:11, 218:16-219:9 (Harris)). Ms. Harris recalls seeing an End of County Maintenance sign near her property when she purchased it in 2014, which she indicated on Plaintiff's Exhibit 83B as being located across the street from 582 Ellenburg. (Trial Tr. 215:25-218:6 (Harris), Pl. Exhibit 83B). To the best of her recollection, she believes the last time she saw the sign was when the county paved the upper portion of Ellenburg Road in 2016. (Trial Tr. 218:7-15 (Harris)).

Bruce Hadley

Bruce Hadley has known the Ratliff Family since 2003 when he began taking his boat to John's Marine for service. (Trial Tr. 371:14-372:5 (Bruce Hadley)). Mr. Hadley estimated that he has visited John's Marine six to seven times a year by way of Ellenburg Road since 2003. (Trial Tr. 372:13-17 (Hadley)). Because of his frequent visits to John's Marine, Mr. Hadley is familiar with the road conditions of Ellenburg Road. (Trial Tr. 373:11-18 (Hadley)). Mr. Hadley testified to the existence of an End of County Maintenance sign on the right side of the road when traveling towards John's Marine and he notated on Plaintiff's Exhibit 83C the placement of a black and white sign between 591 and 582 Ellenburg Road. (Trial Tr. 375:15-378:9 (Hadley), Pl. Exhibit 83C). Mr. Hadley specifically recalled the End of County Maintenance sign because every time he saw it, it raised questions in his mind as to the intent of the county in placing the sign at that location. (Trial Tr. 379:23-380:12 (Hadley)). Mr. Hadley also recalls seeing John Ratliff and Jimmy Ratliff perform road maintenance over the years. (Trial Tr. 379:9-19 (Hadley)). Mr. Hadley does not recall ever seeing a member of the public drive down the dead-end section of Ellenburg road who was not visiting John's Marine or the Ratliffs. (Trial Tr. 383:17-25 (Hadley)).

Gary Taylor

Gary Taylor first bought a home on Lake Keowee in 2000/2001 and he began living there full-time in 2004. (Trial Tr. 397:18-22 (Gary Taylor)). Mr. Taylor has known the Ratliff Family since 1996/97 when he started taking his boat to John's Marine for maintenance. (Trial Tr. 398:25-399:9 (Taylor)). Mr. Taylor has been driving down Ellenburg Road to John's Marine four to six times a year since the late 1990's and around 2012 he was down there every Saturday restoring a boat he had purchased. (Trail Tr. 400:9-22 (Taylor)). Mr. Taylor recalls seeing an old white and black End of County Maintenance sign between 565 Ellenburg and 582 Ellenburg. (Trial Tr. 401:5-403:8 (Taylor), Pl. Exhibit 83D). He specifically recalls seeing the sign in 2008 when he

was helping Jimmy Ratliff install culverts and he asked if they needed state or county approval and Jimmy Ratliff pointed to the county sign and he saw for himself that it indicated end of county maintenance. (Trial Tr. 403:12-404:8, 413:20-414:3 (Taylor)). Over the more than twenty years he has frequented John's Marine, Mr. Taylor has never seen the county performing maintenance from the location of the sign to the end of the road, but he does recall the yellow centerline striping going a bit farther down the road than the sign but stopping short of John's Marine. (Trial Tr. 404:18-24, 406:16-407:10, 416:23-417:10 (Taylor)).

John Hamrick

John Hamrick testified that his companies Globe and Farnes have owned the Arrowhead Point property since 2008 and he has never seen any county employees performing maintenance on the end section of Ellenburg Road. (Trial Tr. 612:10-19 (Hamrick)).

Oconee County

Oconee County testified at trial by deposition designation through James Coley, Director of Planning Department, and Kyle Reid, Assistant Director of Public Works.

James Coley

James Coley was designated to testify to Oconee County Tax Maps from 1986 to 2008, GIS maps, and Oconee County discovery requests, among other topics. (Dep. 10:10-19, 11:16-23 (Coley)). As part of Mr. Coley's job, he reviews development plans, zoning actions, and variance requests. (Dep. 12:6-13:8 (Coley)).

Mr. Coley testified that he is familiar with plats and reviews plats every day in his job. (Dep. 39:4-10 (Coley)). When shown the 1974 Morgan Plat and asked about any indicated right-of-way, Mr. Coley at first tried to avoid the question but he ultimately testified that he did not see any written indication on this plat that Oconee County has a right-of-way over 565 Ellenburg. (Dep. 34:19-35:24, 39:1-40:11 (Coley), Deposition Exhibit 2 at 8). Similarly, Mr. Coley testified

that the 1974 Ellenburg Plat of 585 Ellenburg indicated the presence of a “road” but did not indicate that Oconee County had a right-of-way over the road. (Dep. 51:2-56:3 (Coley), Dep. Exhibit 4 at 6 (Ellenburg Plat)). When he reviewed the 2020 Henderson Plat of 585 Ellenburg Road, Mr. Coley agreed that while the 2020 Henderson Plat referenced the 1974 Ellenburg Plat, it now indicated a public right-of-way which was a change from the 1974 Ellenburg Plat. (Dep. 56:7-58:19 (Coley), Dep. Exhibit 5 (2020 Henderson Plat)). Finally, when Mr. Coley was presented with the 1974 Bearden Plat of 599 Ellenburg, he also confirmed that it had no indication or written words stating that Oconee County has a right-of-way over the road. (Dep. 60:14-67:3 (Coley), Dep. Exhibit 6 at 11 (Bearden Plat)).

Mr. Coley also testified about Oconee County Tax Maps from 1986 to 2008. (Dep. 78:23-80:5 (Coley), Dep. Exhibit 8 (Tax Maps)). The maps from 1986 and 1988 show property outlines of 565, 585 and 599 Ellenburg but do not depict Ellenburg Road as connecting to these properties. (Dep. 80:8-82:15 (Coley), Dep. Exhibit 8 at 1-2)). Beginning with the 1991 tax map and continuing on the next ten tax maps through 2008, Ellenburg Road is marked on the map as WA-42 and Mr. Coley agreed that each map depicts the road as ending at 565 Ellenburg Road. (Dep. 82:16-97:8 (Coley), Dep. Exhibit 8 at 3-12).

Finally, Mr. Coley explained that he was the county staff liaison to the Oconee County Board of Zoning Appeals for its review of Ridgewater Engineering’s road width variance request submitted on behalf of the future developer of the Globe and Farnes property. (Dep. 13:9-14:8 (Coley)). As part of this role, he communicated with the Appellants and developer during the variance process. In his December 1, 2021 email to Lucretia Morgan and Jimmy Ratliff, and developer Andy Lee, Mr. Coley explained that the BOZA asked the County “to clarify the confusion on the ownership of Ellenburg Road, to include prescriptive easement status, county maintenance records, history and platting.” (Dep. 122:11-123:12 (Coley), Dep. Exhibit 13). Then,

in his January 19, 2022 email to the same group, he stated that “the County has reviewed their position and maintains that Oconee County does have a prescriptive easement to the end of paving on Ellenburg Rd.”; however, he could not recall any basis for that determination. (Dep. 123:13-125:25 (Coley), Dep. Exhibit 13).

Kyle Reid

Kyle Reid is the Oconee County Assistant Director of Public Works and has worked at the county since 2009. (Dep. 145:17-25, 147:21-25 (Reid)). Part of Reid’s job responsibilities involve overseeing vegetation removal along county rights-of-way and easements, asphalt repair, paving, putting in culvert pipe, and other road maintenance work. (Dep. 147:2-10 (Reid)). Concerning the Private Driveway, Mr. Reid testified that the County’s position is that it has a prescriptive easement over the roadway in front of 585 Ellenburg and 599 Ellenburg by virtue of longtime maintenance. (Dep. 152:11-153:17 (Reid)). Mr. Reid’s conclusion was not based on any documents, but rather on what he called the “collective history of the road department,” meaning that he asked employees about their recollection of maintenance in front of 585 and 599 Ellenburg and he came away with the understanding that maintenance had occurred. (Dep. 153:18-154:6 (Reid)). However, Mr. Reid failed to document his questions to employees and their responses, he did not summarize this information, and he could not recall who told him what information. (Dep. 154:7-18 (Reid)).⁶

Mr. Reid testified that he personally had been at a repaving job on Ellenburg Road in 2012 and that the County stopped paving before reaching 565 Ellenburg and never got to 585 or 599 Ellenburg. (Dep. 163:2-164:9 (Reid)). Mr. Reid explained that the paving work did not reach 565 Ellenburg Road or go past it because he claimed that vehicles were parked in the road in front of

⁶ Appellants objected to Reid’s testimony about what other employees told him as hearsay. The Court did not rule on these objections, see Section IV infra.

599 Ellenburg Road, but he also testified he was instructed just to pave the worst of the road and stop. (Dep. 164:13-165:5 (Reid)). Mr. Reid could not explain why they did not pave 565 Ellenburg and 585 Ellenburg when there were no cars blocking the road in front of these properties. (Dep. 166:25-167:24 (Reid)). Whatever the actual explanation, Mr. Reid testified that he never asked any of the landowners of 565, 585, or 599 Ellenburg whether they could move their vehicles for paving activities. (Dep. 167:25-168:3 (Reid)). When the centerline was striped, the County did not direct the contractor to strip to the end of the road but instead told the contractor to stop at 565 Ellenburg, and no one ever asked the landowners to move vehicles so that the centerline could be striped past 565 Ellenburg. (Dep. 169:5-170:13 (Reid)).

Mr. Reid admitted that the County does not own the fee to the roadway in front of 585 or 599 Ellenburg, it has no recorded easements, and it has no records of ever having paved or patched the roadway in front of 585 or 599 Ellenburg. (Dep. 198:17-199:4, 201:25-202:5 (Reid), Deposition Exhibit 23). When questioned about the location of the End of County Maintenance sign, Mr. Reid acknowledged that the County does not have any documents that contradict Laurie Ellenburg Bright's sworn affidavit that an End of County Maintenance sign was located between 575 Ellenburg and 585 Ellenburg road for years, and, in fact, Mr. Reid testified that the County does not dispute her testimony. (Dep. 204:8-206:1 (Reid), Dep. Exhibit 16).

Oconee County provided all of its maintenance records for Ellenburg Road and the closest location of any maintenance reflects one entry for work at 566 Ellenburg. There are no maintenance records in any of the County's current or historical system that reflect any maintenance in front of 585 or 599 Ellenburg.⁷ None of references to "sign" in the maintenance

⁷ (Dep. 222:17-25, 223:12-23, 225:24-226:17, 226:25-227:18, 228:7-9, 229:3-7, 230:7-22, 231:8-23 (closest to 585/599 Ellenburg), 234:9, 16-234:25, 236:12-23, 237:20-238:2, 8-10, 238:23-240:4, 240:24-242:4, 12-18, Dep. Exhibits 27, 28, 29, 30).

records have any relation to moving the End of County Maintenance sign or establishing it briefly at the dead end of Ellenburg Road.⁸

When asked to describe the rights the County claimed to hold over 585 and 599 Ellenburg Road, Mr. Reid testified that “Maintenance over years is all we’ve got.” (Dep. 260:15-22 (Reid)). However, he was unable to testify as to when such maintenance activities began. (Dep. 260:19-23 (Reid)). On the issue of dedication, Mr. Reid testified that he did not recall ever seeing any documents indicating that the landowners of 585/599 Ellenburg ever dedicated the roadway in front of their properties to Oconee County. (Dep. 125:21-25 (Reid)).

STANDARD OF REVIEW

“Declaratory judgment actions are neither legal nor equitable; therefore, the standard of review depends upon the nature of the underlying issues.” *S.C. DOT v. Horry County*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011).

“The determination of whether property has been dedicated to the public is an action in equity.” *K&A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 572, 682 S.E.2d 252, 256 (2009). “If the action is viewed as interpreting a deed, it is an equitable matter and the appellate court may review the evidence to determine the facts in accordance with the court's view of the preponderance of the evidence.” *Id.* (quoting *Slear v. Hanna*, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998)). “In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence.” *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623, S.E.2d 833, 834 (2005) (citing *Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995)).

⁸ (Dep. 225:24-226:13, 236:15-237:16, 240:5-23, 241:24-242:11 (Reid) Dep. Exhibit 27, 29, 30).

The determination of the existence of an easement is a question of fact in a law action. *Bundy v. Shirley*, 412 S.C. 292, 302, 772 S.E.2d 163, 168 (2015). “A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner.” *Id.* (quoting *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006)). A prescriptive easement must be proven by clear and convincing evidence. *Id.* at 306, 772 S.E.2d at 170-71. The proponent of the easement carries the burden of proof. *Id.* at 306, 772 S.E.2d at 170.

“In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law.” *Horry County*, 391 S.C. at 81, 705 S.E.2d at 24 (quoting *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009)). “This Court will not disturb the trial court's factual findings unless they are without evidence reasonably supporting those findings.” *Id.* On appeal, the appellate court “reviews all questions of law de novo.” *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017).

A denial of the request for a jury trial under Rule 39 is reviewed for an abuse of discretion. *Satcher v. Satcher*, 351 S.C. 477, 490, 570 S.E.2d 535, 541 (Ct. App. 2002).

A denial of a motion to disqualify is reviewed for an abuse of discretion. *Brooks v. S.C. Comm'n on Indigent Def. & Office of Indigent Def.*, 419 S.C. 319, 324, 797 S.E.2d 402, 404 (Ct. App. 2017).

ARGUMENT

I. Respondents Did Not Carry their Burden of Proof to Show that Ellenburg Road Was Dedicated to Oconee County.

The lower court erred in concluding that Respondents carried their burden of proof to show that Ellenburg Road was historically dedicated to Oconee County, in failing to set forth any factual

findings supporting a finding of public dedication of Ellenburg Road, and in failing to define its extent, purpose, and/or limits.

In discovery, Oconee County admitted that (1) it does not own the fee to the roadbed of Ellenburg Road in front of 585 Ellenburg Road or 599 Ellenburg Road; and (2) it does not have any recorded easements along Ellenburg Road in front of 585 Ellenburg Road or 599 Ellenburg Road. (Pls. Mot. Limine to Establish Admitted Facts at 2; Oconee County Dep. Exhibit 23). As such, Respondents needed an alternate theory of how Oconee County obtained its alleged rights over the Private Driveway. Prior to trial, Oconee County had always taken the position (before the Oconee County Board of Zoning Appeals and during discovery) that its rights over the Private Driveway arose out of a prescriptive easement by longtime maintenance, or alternatively because Ellenburg Road was a state road before Lake Keowee was created and the road reverted to the County after flooding for the lake. (Dep. 122:11-125:25 (Coley) (explaining position before BOZA hearings), Dep. Exhibit 13; Dep. 152:11-153:17, 206:11-25, 208:1-209:10 (Reid)).

However, during trial, Respondents seemingly abandoned both arguments in favor of a new theory of historic dedication. (Trial Tr. 601:20-602:22, 656:17-657:7 (Judge observing that Respondents did not prove prescriptive easement or state road theory)). Respondents took the position that Ellenburg Road was a historic county road, presumably through dedication, though Respondents never actually articulated a legal theory for its alleged rights over the Private Driveway. “In situations where title is claimed by dedication rather than an actual conveyance, the actions of the parties ‘must be so unequivocal and positive as to leave little doubt that it was the intention of the owner to dedicate the same to the public use.’” *Vick v. S.C. DOT*, 347 S.C. 470, 477, 556 S.E.2d 693, 697 (Ct. App. 2001) (quoting *Shia v. Pendergrass*, 222 S.C. 342, 348, 72 S.E.2d 699, 701 (1952)).

Proving dedication requires proof of two elements: (1) “the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use;” and (2) “there must be, within a reasonable time, an express or implied public acceptance of the property offered for dedication.” *Mack v. Edens*, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1995) (citing *Horry County v. Laychur*, 424 S.E.2d 259 (1993), overruled in part on other grounds by *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 797 S.E.2d 387 (2016); *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992)). “To have a completed dedication, there must be some form of acceptance of the offer to dedicate.” *Tupper v. Dorchester County*, 326 S.C. 318, 326, 487 S.E.2d 187, 192 (1997) (citation omitted). “The mere fact that the County approved the plat does not constitute an acceptance of the proposed public dedication.” *Id.* at 327, 487 S.E.2d at 192 (citation omitted). “It is the duty of the fact finder to determine whether or not the public dedication has been accepted.” *Id.* (citing *McAllister v. Smiley*, 301 S.C. 10, 389 S.E.2d 857 (1990)).

a. Intent to Dedicate

Respondents did not offer any evidence that historic Ellenburg Road was ever expressly dedicated to Oconee County before the creation of Lake Keowee, and no evidence that modern Ellenburg Road or the Private Driveway has ever been expressly dedicated after the creation of Lake Keowee.

Absent express dedication, the Respondents had the burden to prove implied dedication by conduct of the landowner that clearly, convincingly, and unequivocally indicates an intention to create a public right⁹:

⁹ Importantly, the Appellants’ property boundary extends into the Private Drive. Thus, Oconee County’s burden to show the existence of a dedication to the public would require evidence of dedication by the Appellants and/or their predecessors in title.

It is generally accepted that to constitute a valid dedication, there must not only be an intention on the part of the owner to dedicate a property to the public use, but that such intention must be manifested in a positive and unmistakable manner. It need not be made by deed or other writing, but may be effectually and validly made by acts or verbal declarations. It also may be implied from long use by the public of the land claimed to be dedicated. *Absent an express gift, one who asserts a dedication must demonstrate conduct on the part of the landowner clearly, convincingly and unequivocally indicating his intention to create a right in the public.*

Anderson v. Hemingway, 269 S.C. 351, 354, 237 S.E.2d 489, 490 (1977) (citations omitted, emphasis added).

Since we know that individual owners of property are not apt to transfer it to the community or subject it to public servitude without compensation, the burden of proof to establish dedication is upon the party claiming it.

Id. (citing *Tyler v. Guerry*, 251 S.C. 120, 160 S.E.2d 889 (1968) (remaining citations omitted).

‘Dedications being an exceptional and a peculiar mode of passing title to interest in land, the proof must usually be strict, cogent, and convincing and the acts proved must be inconsistent with any construction other than that of dedication.’

Id. (quoting *Seaboard Air Line Ry. Co. v. Town of Fairfax*, 80 S.C. 414, 430, 61 S.E. 950, 956 (1908)).

Respondents attempted to show implied dedication solely from historic deeds and plats for land bought and sold along Ellenburg Road. There is no dispute that prior to the creation of Lake Keowee, the 1969 State Highway Map depicts modern Ellenburg Road as intersecting with State Highway 183 (as highlighted below in green by the SCDOT in Plaintiff Exhibit 31), and then splitting into, or connecting with, the Loop Road that eventually leads to State Highway 201. Most of the Loop Road was flooded with the creation of Lake Keowee. (Pl. Exhibit 32 (1971 State Highway Map)). Even so, the burden of proof of dedication cannot be proven by reference to maps alone. *Anderson*, 269 S.C. at 355, 237 S.E.2d at 490.

1969 State Highway Map (Pl. Ex. 31)



Appellants' and Globe's and Farmes' property connect back to a common owner J.J. Younce, who purchased 225 acres in 1936 from the Federal Land Bank. (Def. Exhibit 1.1).¹⁰ However, the deeds and plats branching out from J.J. Younce do not reflect a consistent description of modern Ellenburg Road. Appellants' chain of title came through T.B. Ellenburg, who purchased sixty-six acres from J.J. Younce in 1950. (Pl. Exhibit 1). The Younce to Ellenburg deed does not mention a plat or describe any access roads. (Pl. Exhibit 1). Respondents Globe and Farmes contend that their property came through Larkin Mayfield, Jr., who purchased 34.56 acres from J.J. Younce in 1946. (Def. Exhibit 1.2A). The Mayfield deed describes the property as "lying and being on the public road" and references a plat. (Def. Exhibit 1.2A). The plat depicts lines for roads but does not include any notation of the name of the road, the type of road, or whether it is public or private. (Def. Exhibit 1.2B).

¹⁰ The Federal Land Bank deed to Younce referenced a plat but Respondents did not locate and introduce this plat into evidence. (Def. Exhibit 1.1).

Throughout the years, the numerous deeds and plats vary significantly as to how modern Ellenburg Road is described. (See Statement of Facts B. Chain of Title, supra). There are some deeds from T.B. Ellenburg's original 66 acres that describe Ellenburg Road as a public road but there are numerous other deeds that do not, and none of plats or deeds in the 585 or 599 Ellenburg Road chain of title refer to the road as public. (See Statement of Facts B. Chain of title, supra). Respondents' position appears to be that J.J. Younce's deed to Mayfield describing the road as a public road and plats showing the presence of a road were sufficient to imply that J.J. Younce dedicated the entire road to Oconee County.

In *Anderson v. Town of Hemingway*, 269 S.C. 351, 237 S.E.2d 489 (1977), the landowner brought a declaratory judgment action to determine whether the Town of Hemingway held an easement over his land. The Town claimed that Magnolia street was dedicated more than fifty years prior and it introduced maps showing the road running across Anderson's lot. Anderson introduced a plat and map that did not show Magnolia street. *Id.* at 354-55, 237 S.E.2d at 490. In concluding that the Town's maps standing alone were not enough for the Town to carry its burden of proof, the Supreme Court noted that: "It is elementary law that an intention to dedicate must be plainly manifest." *Id.* at 355, 237 S.E.2d at 490 (quoting *Shia v. Pendergrass*, 222 S.C. 342, 72 S.E.2d 699 (1952)). The Court also observed that, consistent with the *Shia* case, Anderson's payment of taxes on the land was "evidence contrary to an intent to dedicate the street to the public." *Id.* at 355-56, 237 S.E.2d at 491. In conclusion, the Town failed to meet a preponderance burden "much less the required strict, cogent, and convincing proof" required for dedication and the court did not need to reach the issue of acceptance. *Id.* at 356, 237 S.E.2d at 491.

Here, it is undisputed that to show implied dedication Respondents only rely on deeds and several plats, all outside of Appellants' chain of title, that are dated prior to the creation of Lake Keowee. Respondents did not show that J.J. Younce had the authority to dedicate the entirety of

modern Ellenburg Road to the public. Moreover, it is undisputed that Appellants have consistently paid taxes on their entire property without any reduction for the dimensions of the roadway, which contradicts any implied intention to dedicate from historical deeds and plats. (Trial Tr. 521:23-522:22, 526:7-528:18 (Morgan), Pl. Exhibits 59, 60); see also *Helsel v. N. Myrtle Beach*, 307 S.C. 24, 28, 413 S.E.2d 821, 824 (1992) (fact that property was not subject to tax was a fact in favor of finding dedication).

These facts, without more, are insufficient for Respondents to carry their burden to show by strict, cogent, and convincing proof, an intent to dedicate the entirety of Ellenburg Road to the public before or after the creation of Lake Keowee.

a. Public Acceptance

Even if Respondents were able to prove implied intention to dedicate, they failed to introduce sufficient evidence showing public acceptance. Public acceptance can be shown where public authorities undertake road maintenance or public safety, on occasion by longtime public use, and where taxes are not assessed against the property.

In *Helsel v. N. Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992), the Helsels landowners sought a declaratory judgment that the dead-end section of a street was not public property. The Supreme Court disagreed and found intent to dedicate by the original owner and implied acceptance by the public where: (1) the Helsel property was created pursuant to land subdivided by plat showing streets and lots there were sold pursuant to the plat; (2) the City presented testimony from longtime residents that the street end had been used by the public for parking and beach access continuously since opening in 1942; (3) the City presented testimony that public authorities had continuously maintained and policed the street since 1944; and (4) the property was not listed on tax maps and not assessed taxes. *Helsel*, 307 S.C. at 27-28, 413 S.E.2d at 823-24. Respondents did not introduce similarly persuasive evidence in this case.

Here, Respondents failed to introduce evidence of public maintenance of Ellenburg Road pre-Lake Keowee. Post-Lake Keowee, Oconee County maintenance records reflect maintenance back to 1998, but even these records do not reflect any maintenance beyond 565 Ellenburg, stopping short of the Private Driveway. (Dep. Exhibits 27-30). The earliest testimony of Oconee County maintenance on Ellenburg Road came from Jay Ratliff, who testified that he recalled the entirety of Ellenburg Road being tar and gravel until Oconee County paved it in the mid-1980s stopping at 565 Ellenburg Road, which is also what Oconee County admitted to in its Answer. (Trial Tr. 549:6-25, 552:1-13 (Jay Ratliff); Complaint ¶ 10; Oconee County Answer ¶ 4). Oconee County presented no competing evidence of ever having paved Ellenburg Road before that date. Additionally, the County admitted in discovery that it had no records of ever having paved or patched in front of 585 or 599 Ellenburg Road. (Dep. Exhibit 23).

Again, the payment of taxes factors into the question of acceptance. *Mack*, 320 S.C. at 240, 239 S.E.2d at 126 (continued payment of taxes weighs against public acceptance); *Anderson*, 269 S.C. at 355-56, 237 S.E.2d at 491 (same); *Tupper*; 326 S.C. at 327, 487 S.E.2d at 192 (payment of taxes is contrary to intent to dedicate). Here, the evidence is that Appellants have consistently paid real property taxes on their full property for years with no deduction or credit for the dimensions of Ellenburg Road that the County claims rights over. (Trial Tr. 521:23-522:22, 526:7-528:18 (Morgan), Pl. Exhibits 59, 60).

More is required to prove public acceptance and the evidence presented by Respondents is a far cry from that introduced in *Hesel*.

Additionally, the Ratliff and Ellenburg families' acts in paving their section of Ellenburg Road and maintaining the roadway and sides of the road at their own expense for decades, (Trial Tr. 39:11-24, 40:14-41:22, 42:10-15 (Jimmy Ratliff); Trial Tr. 552:14-555:15 (Jay Ratliff); Oconee County's act of installing an End of County Maintenance Sign near 565 Ellenburg, (Pl.

Exhibits 83A-H; Oconee County Answer ¶ 4 (admitting to installing sign in mid-1980s); along with Oconee County's testimony that it stopped paving in 2012 at 565 Ellenburg with no attempt to contact the Ratliff Family or pave to the end of the road, (Dep. 163:2-165:5, 166:25-168:3 (Reid)); are all contrary a finding of acceptance of the Private Driveway into the public road system.

Because Respondents failed to carry their burden of proof on dedication, Appellants request this Court reverse the lower court's order and find that the Private Driveway has never been dedicated to the public and is not a public road.

II. Assuming Ellenburg Road Is a Public Road, the Private Driveway Was Abandoned After the Creation of Lake Keowee.

Assuming, arguendo, that the road in front of 585 & 599 Ellenburg is found to have been dedicated prior to the creation of Lake Keowee, Appellants contend that this section of roadway was abandoned after the creation of Lake Keowee based on the following:

1. The public purpose to drive to the dead end of Ellenburg Road to access the prior Loop Road to High Falls Church or State Highway 201 is impossible after flooding of the roads for Lake Keowee;
2. Oconee County paved Ellenburg Road in the mid-1980's and in 2012 and both times stopped at 565 Ellenburg Road;
3. The Ratliff Family has used the roadway and shoulders for staging boats for service at John's Marine since the 1980s and has never been informed by Oconee County that boats and vehicles were parked in the public right-of-way;
4. Oconee County placed an End of County Maintenance Sign at or near 565 Ellenburg Road in the mid-1980s and it existed at that location for decades;
5. Oconee County employees met with Ratliff Family members in 2009 and provided a map indicating the End of County Maintenance at 565 Ellenburg;
6. The only persons who travel to the dead end of Ellenburg Road are visitors of the Ratliff Family and patrons of John's Marine;

7. Oconee County has no records of ever performing road or shoulder maintenance in front of 585 & 599 Ellenburg and no records of expending public funds to maintain this section of road;
8. Members of the Ratliff Family and Ellenburg families have performed all maintenance on the roadway and shoulders of 585 & 599 Ellenburg over the last 40 years;
9. Oconee County tax maps for 1986-2008 show Ellenburg Road ending at 565 Ellenburg Road;
10. The Ratliffs and Ellenburgs have paid taxes on the Private Driveway in front of 585 & 599 Ellenburg and have never had taxes reduced for the dimensions of the roadway.

a. Legal Framework for Abandonment

A public road can be abandoned either through the statutory process or by common law abandonment. *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 318-319, 433 S.E.2d 875, 884 (Ct. App. 1992) (recognizing the statutory abandonment scheme does not replace common law abandonment but provides a formal process with less demanding proof of “best interests of all concerned” rather than “intent to abandon”). Appellants concede that they have not filed a statutory abandonment but contend that even if Oconee County had rights over modern Ellenburg Road at one time, it abandoned its rights through common law abandonment.

Common law abandonment can be inferred from all of the facts and circumstances of the case and need not be express:

It is well settled that an easement may be lost by abandonment and in determining such question the intention of the owner to abandon is the primary inquiry. The intention to abandon need not appear by express declaration, but may be inferred from all of the facts and circumstances of the case. It may be inferred from the acts and conduct of the owner and the nature and situation of the property, where there appears some clear and unmistakable affirmative act or series of acts clearly indicating, either a present intent to relinquish the easement, or purpose inconsistent with its further existence.

Carolina Land Co. v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975).

An easement created by dedication may be abandoned by unequivocal acts showing a clear intent to abandon. To constitute abandonment, the use for which the property is dedicated must become impossible of execution, or the object of the use must wholly fail. Generally, a mere misuser or nonuser does not constitute abandonment of land dedicated to public use.

K&A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 577, 682 S.E.2d 252, 259 (2009) (quoting *City of Myrtle Beach v. Parker*, 260 S.C. 475, 486, 197 S.E.2d 290, 295-96 (1973) (internal quotation marks omitted)).

State law at the time Lake Keowee was created allowed counties to abandon county roads which in their discretion were rendered unserviceable after the creation of Lake Keowee without following the standard abandonment process. (1967 S.C. Acts 1819-20 (Act No. 813) (“provided, however, that such abandonments . . . shall not require advertising, judicial approval, or any other requirement prior to effecting accomplishment”, Ex. 1 to Motion Alter or Amend). As such, Oconee County did not need to undertake any formal action or court approval to determine and abandon its maintenance of the now dead-end road that after the flooding for Lake Keowee only served as access for the one remaining private landowner, T.B. Ellenburg, to reach his remaining six acres of land (modern day 565-599 Ellenburg). Oconee County did in fact take steps to abandon land pursuant to Act 813 below the 804 boundary to Duke as part of the creation of Lake Keowee. (Quit Claim Deed Book 10-N, Page 21, Ex. 2 to Motion Alter or Amend).

In *K&A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252 (2009), dedication was not challenged, and the Supreme Court affirmed the master in equity’s determination that SCDOT abandoned a former toll road right of way by clear and unequivocal evidence showing that: (1) the old toll road was re-routed; (2) use and maintenance of the old road diminished significantly because traffic used the new road; (3) the toll road operator deeded a portion of the old road to a private landowner; (4) SCDOT issued a quitclaim deed to a private landowner for a portion of the old road; (5) other landowners built their home on a portion of the

old road; and (6) if the public still had a right of way, there would have been no need for the SCDOT to deed the land. *Id.* at 578, 682 S.E.2d at 260.

The *K&A* Court found support for abandonment in *Williams v. Woodward*, 240 S.W.2d 94 (Ky. Ct. App. 1951). The court in *Williams* found abandonment where (1) a highway was relocated and the public gained access through a different route; (2) adjacent landowners had built fences over the old road obstructing it; and (3) the old roadway had not been “used to any substantial extent by the public” for just nearly twenty years. *Id.* at 95.

Similar to the *K&A* and *Williams* cases, there are sufficient facts in the record to show abandonment by clear and unequivocal acts and the Court should find that the Private Driveway was abandoned by Oconee County after the creation of Lake Keowee.

a. Facts Showing Abandonment

There is no question the Loop Road connecting Ellenburg Road to High Falls Church and State Highway 201 is now underwater and was abandoned. (Quit Claim Deed Book 10-N, Page 21). The question for the lower court was how much of modern Ellenburg Road that remained above water was abandoned as well.

After the creation of Lake Keowee, the only private landowner at the dead end of Ellenburg Road was T.B. Ellenburg, whose property was completely surrounded by the lake and remaining property owned by Duke. (Pl. Exhibits 32, 58, 10). Mr. Ellenburg didn’t sell any portion of his remaining six acres of land until 1974. (Pl. Exhibits 11-12, 16-17, 21-22). After the County deeded to Duke the lands below the 804 contour line along with portions of Ellenburg Road that were flooded, it would be consistent with these acts for the County to then determine the location of its maintenance and install an End of County Maintenance sign just before reaching the Ellenburg property, the only remaining private landowner on this dead end section of road that later became Ellenburg Road. The County’s acts in the 1980’s of paving only up to 565 Ellenburg

and placing an End of County Maintenance sign at this location (admitted in its Answer) are evidence of its determination that the remainder of the road was no longer serviced by the County. (Compl. ¶ 10, Answer Oconee County ¶ 4; Motion Establish Admitted Facts).

i. Impossibility of Purpose

Based on historic State Highway Maps, the historic public purpose for traveling to the end of modern Ellenburg Road, and past it, could have been to access properties along the Loop Road or access High Falls Church and State Highway 201. (Pl. Exhibit 31). Once Lake Keowee was created and the Loop Road became flooded, this purpose no longer existed because it became impossible to reach High Falls Church or State Highway 201 through Ellenburg Road. (Compare Pl. Exhibits 31 and 32). It follows that after the creation of Lake Keowee, there was no longer any public purpose to drive down to the dead end of Ellenburg Road where there are only private landowners. This shows an impossibility of purpose or that the object of the use failed, as required for common law abandonment. *K&A Acquisition Group*, 383 S.C. at 577, 682 S.E.2d at 259.

ii. County & Ratliff Paving and Use of Ellenburg Road

Oconee County admits that it paved Ellenburg Road in the mid-1980s and installed an End of County Maintenance Sign at or near 565 Ellenburg Road. (Compl. ¶ 10, Answer Oconee County ¶ 4; Motion Establish Admitted Facts). This is consistent with testimony from Jay Ratliff, who recalls walking the full length of Ellenburg Road when it was tar and gravel to and from the school bus on Knox Road. (Trial Tr. 549:6-25, 552:1-13 (Jay Ratliff)). Jay Ratliff has distinct memories of when Ellenburg Road was paved before he was driving age, in the mid-to-late 1980's, because he was then being able to rollerblade on the smooth surface until he reached 565 Ellenburg, which was still tar and gravel. (Trial Tr. 552:14-553:20 (Jay Ratliff)). Jay Ratliff also recalled a bike accident he had in front of his parents' property when he hit his chin on the gravel road and had to have dental work and eat from a straw for six weeks. (Trial Tr. 548:4-18 (Jay Ratliff)). Jay Ratliff

testified that he begged his father to pave the remaining section of Ellenburg Road in front of 565 to 599, and his father got together with T.B. Ellenburg did just that. (Trial Tr. 553:21-555:15 (Jay Ratliff)).

Oconee County also testified that when it paved Ellenburg Road in 2012 it again stopped at 565 Ellenburg. (Dep. 163:2-164:9 (Kyle Reid)). This is consistent with the pavement quality and faded center line striping on the ground at that location. (Pl. Exhibit 49). The County testified that when paving in 2012 it made no attempt to pave in front of 565 to 599 Ellenburg Road and did not request or demand that the Ratliff Family move boats or vehicles so that it could pave the road and strip the centerline to the end of the road. (Dep. 167:25-168:3 (Reid)). The County's actions are consistent with treating the Private Driveway as private property.

Jimmy and Jay Ratliff and Laurie Ellenburg Bright testified that John's Marine has used the entirety of the roadway in front of their property for boat staging and vehicles for decades, which was confirmed by arial photographs taken throughout the decades. (Trial Tr. 556-566 (Jay Ratliff), Pl. Exhibit 51); Trial Tr. 423:15-22 (Bright); Trial Tr. 45:23-50:22 (Jimmy Ratliff), Pl. Exhibits 52-56, Def. Exhibit 3 (Letter to BOZA describing use of road)). The Ratliffs' use of their property is also consistent with treating it as private property.

Additionally, photographs were entered into evidence showing a fence that was installed by Duke on the Globe/Farmes side of Ellenburg Road and boats lined up all along the road. (Trial Tr. 556:7-557:5 (Jay Ratliff), Pl. Exhibit 51 at 1). The testimony at trial was that the Ratliffs treated this fence as the boundary of the property they maintained and used for their business and the County never informed the Ratliffs that they were operating John's Marine on a public road. (Trial Tr. 49:23-50:20 (Jimmy Ratliff), 556:21-557:1 (Jay Ratliff)). These acts are consistent with abandonment.

iii. End of County Maintenance Sign

Concerning the End of County Maintenance Sign, in addition to the County admitting its placement at least by the mid-1980's, numerous witnesses testified to having seen the sign located at or near 565 Ellenburg for the pasty forty years. Jimmy Ratliff recalled seeing a black and white End of County Maintenance sign during his childhood located at or near 565 Ellenburg, which he marked on Plaintiff Exhibit 83A. (Trial Tr. 50:20-52:20 (Jimmy Ratliff), Pl. Exhibit 83A). Jay Ratliff testified that a black and white sign was located near 565 Ellenburg where the pavement changes colors and he has no memory of the sign not being in that location until it was moved around 2015. (Trial Tr. 568:10-24, 569:3-570:13 (Jay Ratliff), Pl. Exhibit 83H). Laurie Ellenburg Bright, who grew up at 585 Ellenburg and lived there from 1974 to 1998 and again from 2002 to 2021, testified to seeing the End of County Maintenance sign daily and recalled her earliest memory of seeing the sign was when she was about ten years old in the mid-1980's. (Trial Tr. 418:18-419:11, 423:23-426:20 (Bright)). She particularly recalled its placement in relation to an old iron tub that was near what is today 582 Ellenburg Road, and she placed it roughly at 555 or 566 Ellenburg Road. (Trial Tr. 429:4-11, 434:25-435:5 (Bright), Pl. Exhibit 83E).

Karen Rasbornik has been married to Jay Ratliff since 2000 and has been visiting the Ratliff Family since 1998. (Trial Tr. 444:5-17 (Rasbornik)). Karen particularly recalled the existence of the End of County Maintenance sign because she recalled noticing it on the right-hand side before the Harbor Oaks subdivision was built and in the late 1990's she and Jay would use the sign as a benchmark when running down Ellenburg Road. (Trial Tr. 450:22-451:12 (Rasbornik)). She identified the location of the black and white sign as being near 565 Ellenburg where the pavement changes colors. (Trial Tr. 451:13-453:10 (Rasbornik) Pl. Exhibit 83F). Ms. Rasbornik also has a specific memory of the End of County Maintenance sign because she and her mother-in-law Jan Ratliff met with Oconee County employees in 2009 to discuss where County activities ended on

Ellenburg Road. (Trial Tr. 453:17-454:14 (Rasbornik)). Proffered testimony from Ms. Rasbornik showed that she recalled County employees marking a map in green with the location of the end of County maintenance at 565 Ellenburg. (Trial Tr. 489:25-498:17 (Rasbornik Proffer), Pl. Exhibit 63)). Following this meeting, Karen recalls taking a picture of the End of County Maintenance sign, though it was not saved. (Trial Tr. 499:9-500:6 (Rasbornik)).

Lucretia Morgan is currently engaged to Jimmy Ratliff and together they own various properties on Ellenburg Road including 585 Ellenburg. (Trial Tr. 516:3-18 (Morgan)). She has serviced her boats at John's Marine since 2011. (Trial Tr. 517:1-15 (Morgan)). Ms. Morgan recalls her first visit to John's Marine because the road was narrow and she was concerned about potentially having to turn around. She noticed the End of County Maintenance sign before seeing the boat shop and she assumed they must be going to someone's private property. (Trial Tr. 517:23-518:7 (Morgan)). During her testimony, Ms. Morgan marked the location of the End of County Maintenance sign at the western edge of 565 Ellenburg. (Trial Tr. 519:2-24 (Morgan), Pl. Exhibit 83G). Ms. Morgan recalls seeing the white sign with black letters at that location for several years before it disappeared. (Trial Tr. 519:25-520:19 (Morgan)).

Diane Harris has owned 582 Ellenburg Road with her husband since 2014. (Trial Tr. 202:20-203:5, 206:7-21 (Harris), Pl. Exhibit 49 at 4)). Ms. Harris testified that when they purchased 582 Ellenburg, significant junk had to be removed including an iron bathtub, which is consistent with the description by Laurie Ellenburg Bright. (Trial Tr. 203:19-204:22 (Harris)). She and her husband have been on that section of Ellenburg Road nearly every day for the last ten years and she recalls seeing an End of County Maintenance sign on the left side of the road across from their property. (Trial Tr. 215:25-218:6 (Harris), Pl. Exhibit 83B).

Finally, John's Marine patrons also testified to the existence and location of the End of County Maintenance sign. Bruce Hadley has been servicing boats at John's Marine since 2003

and visits the business six to seven times a year. (Trial Tr. 372:13-17 (Hadley)). Mr. Hadley testified that a black and white End of County Maintenance sign was located on the right side of the road when traveling towards John's Marine, and he placed it between 591 and 582 Ellenburg Road. (Trial Tr. 375:15-378:9 (Hadley), Pl. Exhibit 83C). Mr. Hadley specifically recalled this sign because it always raised questions in his mind as to the intention of the County installing that sign. (Trial Tr. 379:23-380:12 (Hadley)).

There can be little doubt that Oconee County installed an End of County Maintenance sign at or near 565 Ellenburg and kept it in that location for decades, informing the public that it had no responsibility to maintain the rest of Ellenburg Road to the dead end, which is consistent with the County's actions, its maintenance records, and testimony from the Ratliff Family.

iv. The Only Persons that Travel to the Dead End of Ellenburg Road Are Patrons of John's Marine and Visitors to the Landowners.

The general public does not travel to the dead end of Ellenburg Road. The only persons who travel the Private Driveway are the landowners, their visitors and invitees, and patrons of John's Marine. The general public had no need to travel to the dead end of the road, no place to park and no place to turn around absent a trespass on private property.

Jimmy Ratliff has been at 599 Ellenburg on a daily basis nearly his entire life and he has continuously worked at John's Marine for more than twenty years. (Trial Tr. 27:11-28:23, 29:10-13, 43:5-15 (Jimmy Ratliff)). Jimmy testified that it is part of his business to notice when cars drive down to his properties and the only time he has ever seen county employees trying to perform maintenance in front of 585 and 599 Ellenburg was over the last several years when the developer began the variance process with Board of Zoning Appeals to develop Globe and Farnes' property. (Trial Tr. 61:1-62:1).

Karen Rasbornik, who has been in the Ratliff Family for over twenty years, testified that she does not recall ever seeing members of the general public who were not visiting John's Marine down at that section of road. (Trial Tr. 501:24-502:13 (Rasbornik)).

Lucretia Morgan has been coming to John's Marine since 2011, lives at 585 Ellenburg, and conducts a business at 599 Ellenburg. She does not recall ever seeing anyone come to the end of Ellenburg Road that was not visiting John's Marine or her boat rental business. (Trial Tr. 525:24-526:6 (Morgan)).

Respondents did not enter any evidence that the general public uses the disputed section of Ellenburg Road for any purpose whatsoever.

v. Maintenance of the Private Driveway

Even before trial, Oconee County admitted that it had no records of ever having paved or patched the Private Driveway in front of 585 or 599 Ellenburg Road. (Dep. 201:25-202:5 (Reid), Deposition Exhibit 23). Oconee County provided all of its maintenance records for Ellenburg Road and the closest that any maintenance records reflect any work is at 566 Ellenburg and there are no maintenance records in any of the County current or historical system that reflect any maintenance in front of 585 or 599 Ellenburg.¹¹

Numerous witnesses testified that they have never seen Oconee County employees performing any maintenance between 565 and 599 Ellenburg.

Jimmy Ratliff testified that his family and T.B. Ellenburg's family maintained the travel surface of the road and both sides of the road from 585 Ellenburg to the dead end. (Trial Tr. 39:11-24, 40:14-41:22, 42:10-15 (Jimmy Ratliff), Pl. Exhibit 49). During Jimmy's childhood and through high school, his family maintained the roadway in front of his family's home at 599

¹¹ Dep. Exhibits 27, 28, 29, 30.

Ellenburg and he and his siblings maintained the sides of the road. (Trial Tr. 57:4-13 (Jimmy Ratliff)). Since moving out of the house, Jimmy has been at 599 Ellenburg daily and has continued to maintain the roadway by adding gravel, fixing the road where needed, and adding drainage. (Trial Tr. 57:14-60:25, Pl. Exhibits 57, 61 (invoices for maintenance)).

Lucretia Morgan has been down at 599 Ellenburg nearly every day since 2015 and currently lives next door. In all that time, she has never seen county workers performing any asphalt or pavement maintenance, or lawn maintenance on Ellenburg Road. (Trial Tr. 524:3-525:7 (Morgan)). Instead, she and Jimmy have performed maintenance. (Trial Tr. 525:8-14 (Morgan)).

Jay Ratliff has never seen any county employees maintain the sides of the road in front of 599 Ellenburg. (Trial Tr. 570:14-571:3 (Jay Ratliff)).

Karen Rasbornik does not recall ever seeing county personnel performing maintenance on Ellenburg Road beyond where she marked the location of the sign; rather, the Ratliff Family performed its own maintenance, with which she helped over the years. (Trial Tr. 500:12-501:23 (Rasbornik)).

Laurie Ellenburg Bright testified that maintenance of the roadway and both sides of the road in front of her family's property was taken care of by her grandfather and father when she was growing up, and her family as an adult, and the Ratliff Family maintained the area in front of their property. (Trial Tr. 427:6-428:8 (Bright)). Throughout her entire 43 years at the Ellenburg Property, Ms. Bright never saw county employees maintaining the roadway or sides of the road in front of 585 or 599 Ellenburg. (Trial Tr. 428:9-14 (Bright)). The only maintenance she ever saw the county perform was a resurfacing project around 2010 that did not reach 585 Ellenburg. (Trial Tr. 428:15-429:3 (Bright)).

Diane Harris, owner of 582 Ellenburg since 2014, recalled that when the county last repaved Ellenburg Road it stopped at 565 Ellenburg Road, where the pavement changes color.

(Trial Tr. 211:14-25, 213:5-14, Pl. Exhibit 49 at 1). Apart from seeing these paving crews, Ms. Harris has never seen any county employees performing any maintenance activities near 582 Ellenburg and her property has never benefitted from any county maintenance activities. (Trial Tr. 213:18-214:11, 218:16-219:9 (Harris)).

Mr. Hamrick testified that his companies Globe and Farmes have owned the Arrowhead Point property since 2008 and he has never seen any county employees performing maintenance on the end section of Ellenburg Road. (Trial Tr. 612:10-19 (Hamrick)).

Oconee County has expended no public funds to maintain the roadway in front of 585 & 599 Ellenburg Road and all such costs have been foisted onto the private landowners. The only evidence in the record on maintenance of the Private Driveway shows that the Ratliff Family and the Ellenburg Family have individually maintained their section of roadway for decades and no county employees have ever performed maintenance on this section of Ellenburg Road, which is consistent with the County's declaration to the public that its maintenance responsibilities ended at 565 Ellenburg Road and consistent with County stopping its 2012 repaving and centerline striping at 565 Ellenburg.

vi. Tax Records and Tax Maps Reflect that the Ratliffs Pay Taxes on the Roadway.

Appellants offered evidence that the owners of 585 and 599 Ellenburg pay taxes on their entire property and do not receive credit or reduction in taxes for the dimensions of the roadway. Lucretia Morgan testified that she pays property taxes for 585 Ellenburg and 599 Ellenburg and that the landowners pay taxes for the entire property and do not receive credit for the portion of property in the roadway or any alleged easement by the County. (Trial Tr. 521:23-522:22, 526:7-528:18 (Morgan), Pl. Exhibits 59, 60).

James Coley, director of the planning department for Oconee County, testified about Oconee County Tax Maps from 1986 to 2008. (Dep. 10:10-19, 11:16-23, 78:23-80:5 (Coley), Dep. Exhibit 8 (Tax Maps)). The maps from 1986 and 1988 show an outline of 565, 585 and 599 Ellenburg but do not depict Ellenburg Road connecting to these properties. (Dep. 80:8-82:15 (Coley), Dep. Exhibit 8 at 1-2)). Beginning with the 1991 tax map and continuing on the next ten tax maps through the 2008, Ellenburg Road is marked on the map as WA-42 and Mr. Coley agreed that each map depicts the road as ending at 565 Ellenburg Road. (Dep. 82:16-97:8 (Coley), Dep. Exhibit 8 at 3-12). Oconee County tax maps are consistent with taxes being paid by the private landowners for the entirety of 585 Ellenburg and 599 Ellenburg, and Oconee County offered no competing testimony on this issue.

Taken together, all of these facts and circumstances show “unequivocal acts showing a clear intent to abandon.” *K&A Acquisition Group, LLC*, 383 S.C. at 577, 682 S.E.2d at 259. Accordingly, the Court should find that if Ellenburg Road was historically dedicated before the creation of Lake Keowee, then the Private Driveway was abandoned after the creation of Lake Keowee as evidenced by all of these unequivocal acts.

III. The Court Erred in Refusing to Rule on the Issues of Prescriptive Easement and State Road.

Appellants brought this declaratory judgment specifically seeking a “declaration that Oconee County does not have a prescriptive easement over the Private Driveway,” (Compl. at 2), because Oconee County had taken the position before the Oconee County Board of Zoning Appeals that it held a prescriptive easement over Ellenburg Road by virtue of longtime maintenance. (See Introduction and Statement of the Case, *supra*). At the close of evidence, the lower court and Respondents appear to have agreed that Oconee County failed to establish a prescriptive easement; however, the court refused to modify its final Order to reflect this finding.

(Trial Tr. 601:20-602:22). In conjunction with finding a failure of Respondents to prove dedication, or alternatively upon a finding of abandonment, the Court should also find that Respondents failed to carry their burden to prove a prescriptive easement by clear and convincing evidence.

On the question of whether Ellenburg Road was a historic state road, Oconee County took the position during its deposition that it could have been a historic state road before Lake Keowee was created that reverted to the County. (Dep. 206:11-25, 208:1-209:10 (Reid)). Because Respondents took this position, Appellants were forced to call the SCDOT to testify at trial and the lower court should have answered the factual question of whether Ellenburg Road was ever a state road, but the court denied Appellants' request that it do so. (Motion Alter or Amend; Order Denying Mot. Alter Amend).

Appellants called Yelena Kalashnikova, the Director of Road Data Surfaces, to testify on behalf of the South Carolina Department of Transportation as to each of these historic state roads in the vicinity of Ellenburg Road. (Trial Tr. 166:7-18 (Kalashnikova)). Ms. Kalashnikova unequivocally testified that modern Ellenburg Road has never been part of the state road system, therefore any plat or deed references to it as a state road were incorrect. (Trial Tr. 171:12-15, 177:1-6, 199:8-24 (Kalashnikova), Pl. Exhibits 45, 47). Further, private party plats cannot make

a road a state road by their notation. (Trial Tr. 199:5-7 (Kalashnikova); Factual Background A. History of State Roads, supra).

Because reversion of a state road was a theory Respondents pursued and it necessitated Appellants calling SCDOT, as part of this Court's ruling, Appellants request the Court to find that Ellenburg Road was never a historic state road and therefore the reversion theory does not apply.

IV. The Court Erred in Not Excluding Hearsay Testimony from Oconee County and in Excluding Testimony from Karen Rasbornik on Hearsay Grounds.

The parties agreed to call Oconee County by deposition designation. Both parties submitted deposition designations to the court. Appellants also submitted objections to certain testimony from Oconee County as hearsay. (Pl. Objections to Def. Designations of Oconee County 30(b)(6)). In particular, this testimony related to Kyle Reid testifying about what other employees told him about having performed maintenance on Ellenburg Road. (Dep. 155:3-18, 23-25 (Kyle Reid testifying about what Larry Harden told him about mowing on Ellenburg road)). Certain testimony was also double hearsay, employees telling Kyle Reid what others had told them about maintenance on Ellenburg Road. (Dep. 159:9-19 (Kyle Reid testifying that Larry Harden knew David Debose had done work on Ellenburg road)). This testimony should have been excluded under Rule 801, SCRPC. Appellants raised this issue to the court when the designations were introduced and the court suggested that this testimony would likely be hearsay. (Trial Tr. 236:3-240:4). However, the court never ruled on this issue and did not do so on upon Appellants Motion to Reconsider so that the record for appeal would be clear. (Pl. Post Trial Mot. VI). Appellants now request that the Court rule that the hearsay identified by Appellants be stricken from the record.

Additionally, the lower court ruled that because of hearsay and the dead man statute (the map notations were created by Prince Brown who is now deceased) Karen Rasbornik could not

testify to a meeting she had with County employees where these employees indicated on a county tax map the location of the End of County Maintenance. The court allowed Appellants to proffer her testimony. (Trial Tr. 489:17-498:17). Appellants argued that this testimony should be admitted under Rule 801(d)(2)(A) and (D) as a statement offered against a party and (A) “the party’s own statement in either an individual or a representative capacity,” or (D) “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.” (Trial Tr. 468:17-470:2, 483:12-489:23). The County employees in that meeting were clearly operating as agents and employees of the County—Mack Kelly, Director of Roads and Bridges, Prince Brown, Right-of-way Technician, and Larry Harden, Manager in Roads and Bridges—which means that Karen Rasbornik’s testimony about the meeting was not hearsay and was admissible. (Trial Tr. 455:9-457:1 (Rasbornik)).

Moreover, the South Carolina Supreme Court has observed that “applying the Dead Man’s Statute to exclude testimony is disfavored” and there are numerous exceptions, two of which apply here. *Brooks v. Kay*, 339 S.C. 479, 486-87, 530 S.E.2d 120, 124 (2000). First, Oconee County opened the door for this proffered testimony to be admitted when it questioned Ms. Rasbornik about the purpose of the meeting and the map. (Trial Tr. 510:24-511:25 (Rasbornik)); *Brooks*, 399 S.C. 486, 530 S.E.2d at 124 (observing the Dead Man’s Statute “will not exclude . . . testimony where the party asserting the statute ‘opens the door’ by offering testimony otherwise excludible.”). Second, the Dead Man’s Statute does not exclude testimony “where the witness’s present or previous interest will not be affected by the event of the trial.” *Id.* Karen Rasbornik does not have an ownership interest in the properties at issue in this lawsuit. (Pl. Exhibit 24 (Deed of Distribution 599 Ellenburg)). Therefore, these two exceptions should have permitted Ms. Rasbornik’s testimony to be admitted into the record.

Accordingly, Ms. Rasbornik's proffer should be admitted into evidence and not excluded as hearsay or by the Dead Man's Statute.

V. The Court Erred in Denying Appellants the Right to a Jury Trial on the Disputed Issues of Fact.

In October 2023, Appellants moved for a jury trial on this action pursuant to Rule 39(b), SCRPC. (Pl. Motion for Jury Trial (Oct. 24, 2023)). Appellants explained that while they had brought the action in June 2022, at the same time this declaratory judgment was filed Appellants had also filed an appeal of an Oconee County Board of Zoning Appeals Variance Order (the "Variance Case"). The Variance Case was the primary focus for the parties to this action until the appeal was denied by the circuit court in November 2022 and then appealed to this Court. Briefing to this Court concluded in June of 2023. Because of the focus on the Variance Case, discovery in this matter only began in earnest in February and March of 2023, with the first deposition taking place in August 2023.

The court denied Appellants' request for a jury trial. A denial of the request for a jury trial under Rule 39 is reviewed for an abuse of discretion. *Satcher v. Satcher*, 351 S.C. 477, 490, 570 S.E.2d 535, 541 (Ct. App. 2002). "An abuse of discretion occurs if a trial court's decision is unsupported by the evidence or controlled by a legal error." *Id.* (citation omitted).

This declaratory judgment action was brought pursuant to S.C. Code Ann. Section 15-53-10, *et seq.* When a declaratory judgment action "involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. All existing rights to jury trials are hereby preserved." S.C. Code Ann. § 15-53-90.

"[N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial

by jury of any or all issues.” Rule 39(b), SCRCF. When a declaratory judgment action “involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. All existing rights to jury trials are hereby preserved.” S.C. Code Ann. § 15-53-90.

In *Patterson v. McNeill-Patterson & Assoc.*, 312 S.C. 471, 441 S.E.2d 328 (Ct. App. 1994), the South Carolina Court of Appeals affirmed the circuit court’s grant of a jury trial under Rule 39(b), SCRCF, finding “no reversible error because the court found [the party opposing the motion for jury trial] would suffer no prejudice.” *Id.* at 472, 441 S.E.2d at 329. The court explained that “a party’s failure to make a timely demand for a jury trial does not mean the opposing party acquires a right to have, as a matter of law, a non-jury trial.” *Id.* (quoting *Hannah v. United Refrigeration Services, Inc.*, 305 S.C. 394, 394, 409 S.E.2d 360, 361 (1991) (internal quotation marks omitted)).

The lower court denied Appellants’ request for a jury trial without analysis and without finding any prejudice that would result to Respondents in granting a jury trial. (Form 4 Order (Jan. 18, 2024)). As such, this Court should find that the lower court abused its discretion in denying Appellants’ request for a jury trial early in discovery and without any prejudice analysis.

VI. The Lower Court Erred in Denying Appellants’ Request to Disqualify Globe’s & Farnes’ Counsel.

Appellants moved to disqualify attorney Andrew Holiday, Esquire (“Attorney”) and the law firm of Derrick, Ritter, Williams & Morris, P.A. (“Law Firm”) from continuing to represent Respondents Globe, A South Carolina Limited Partnership, and Farnes, A South Carolina Limited Partnership in this matter based on a conflict of interest.

A denial of a motion to disqualify is reviewed for an abuse of discretion. *Brooks v. S.C. Comm'n on Indigent Def. & Office of Indigent Def.*, 419 S.C. 319, 324 797 S.E.2d 402, 404 (Ct. App. 2017).

In December 2020, the Law Firm and attorney Emma Morris represented Jimmy Ratliff and Lucretia Morgan in the purchase of 585 Ellenburg Road. As part of this transaction, Michael Henderson of Cornerstone of Seneca, Inc. was hired to prepare the 2020 Henderson Plat. The Law Firm is representing Globe and Farnes in this lawsuit opposed to Jimmy Ratliff and Lucretia Morgan, and the Law Firm has used the 2020 Henderson Plat to argue a position in opposition to its former clients as related to their rights to 585 Ellenburg. For this reason, Appellants contend that a conflict of interest exists for Attorney Holliday and the Law Firm to represent clients taking a position in opposition to James Ratliff and Lucretia Morgan as it relates to the title of 585 Ellenburg. The Law firm did not disclose this conflict or obtain a waiver from James Ratliff or Lucretia Morgan and James Ratliff and Lucretia Morgan have not waived this conflict.

When James Ratliff and Lucretia Morgan purchased 585 Ellenburg in December 2020, the bank required a new survey. (Motion Disqualify Aff. Lucretia Morgan ¶ 4). Michael Henderson was hired to prepare the new survey. (Aff. Morgan ¶ 6). The Law Firm informed Lucretia Morgan that this new survey would need to be reviewed by the planning commission and recorded in the public records. (Aff. Morgan ¶ 7). Neither Morgan nor Ratliff wanted a survey and did not know they had a choice not to record this survey, and the Law Firm did not walk them through its title policy exclusion that specifically excluded coverage for “Easement and right of way for Ellenburg Road as shown on the new plat to record.” (Aff. Morgan ¶¶ 7, 11; Aff. Ratliff ¶¶ 6, 10). The Henderson survey was eventually recorded in public records. (Pl. Exhibit 20).

Until 2021, there had never been a question that the Appellants own and perform all maintenance on 585 Ellenburg and 599 Ellenburg. Only when a developer (Andy Lee) began

seeking a road width variance to develop property to the east of 599 Ellenburg did Oconee County claim for the first time that it has a prescriptive easement over Appellants' property. Andy Lee's company has a contract with John Hamrick the owner of Globe and Farmes to purchase the property for development. (Trial Tr. 611:2-18 (Hamrick); 631:12-633:11 (Andy Lee), Pl. Exhibit 71).

The developer referenced the 2020 Henderson Plat during comments to the Oconee County Board of Zoning Appeals and it was made part of the hearing package for the BOZA, and the developer used the 2020 Henderson Plat to argue that a public right-of-way already exists across Appellants' property and in opposition to Ratliff's position that the road is private. (BOZA Hearing Trans. 78:20-79-16, Record p. 283 (April 25, 2024), attached as Exhibit E to Motion Disqualify).

Appellants also believe that Attorney Andrew Holliday represents the developer Andy Lee in certain matters in addition to representing Globe and Farmes. In public comments submitted to BOZA for the April 2022 Hearing, Attorney Andrew Holliday submitted an email in support of the variance, reflecting his longtime involvement with many of the parties. (BOZA Record p. 302-303, attached as Exhibit F to Motion Disqualify). In these comments, Mr. Holliday makes the following comments to the detriment of Jimmy Ratliff, his firm's former client, suggesting that Mr. Ratliff is lying, opposing the variance for pecuniary gain, and attempting to extort the developer, and would lose any related court case:

“The fourth question you must answer is more difficult but that is mostly due to the ridiculous amount of misunderstandings, rumors, and outright lies being told about this variance request. The most dangerous untruth being told with regard to this variance request is that this developer is decreasing the size of the current road and seizing property from Mr. Ratliff.

....

These drawings do not show that Mr. Ratliff will be "cut off" as has been asserted. The doubling of paved surfaces adjacent to his business does not sound like a

substantial detriment to Mr. Ratliff or a substantial detriment to the operations of his business.

.....

There have also been claims that dangerous conditions will be present on the road if this variance is granted. If the paved area near Mr. Ratliff's property is doubled presumably any safety concerns would be reduced. Mr. Ratliff's claims regarding safety ring especially hollow when considering that his business is the cause of large trucks to be traversing Ellenburg Road in the first place.

.....

I am not aware of any substantial arguments relating to detriments to the public good made by Mr. Ratliff or others but to the extent they assert such, I would disagree. *Mr. Ratliff's opposition to this variance seem personal and pecuniary and not focused on the public good. My opinion is that he is seeking to extort this developer and I think he expects to be paid off to drop his opposition to this developer.*

Most importantly, the ownership of the road and the easements or lack thereof is immaterial to your decision. You do not have the authority to determine the ownership of the road nor should you. *That belongs squarely in the purview of the Circuit Court in the event Mr. Ratliff sees fit to bring such a case. In my opinion he would lose such a case* due to an easement by necessity clearly existing through his property but that point truly is irrelevant to you decision making.

(Ex. F to Motion Disqualify (emphasis added)).

Ultimately, the BOZA granted a road variance application that was premised on the conclusion that Oconee County has a prescriptive easement over 585 & 599 Ellenburg. This decision remains on appeal and the existence of a prescriptive easement is at issue in this case.

Because this lawsuit concerns what rights, if any, Oconee County has over 585 Ellenburg and 599 Ellenburg, throughout discovery the Globe and Farmes have consistently referred to and used the 2020 Henderson Plat against Appellants, arguing that the 2020 Henderson Plat is evidence of a public right-of-way. (Deposition James Ratliff 30-37, 130-132 (Oct. 5, 2023), excerpts attached as Exhibit G to Motion Disqualify; Trial Tr. 82:7-85:18, 118:17-121:18, 123:2-125:11 (Jimmy Ratliff cross examination on the 2020 Henderson Plat and work of the Law Firm on closing)). This clearly connects the Law Firm's representation of Lucretia Morgan and James Ratliff in the purchase of 585 Ellenburg with this matter.

Basis for Disqualification

Jimmy Ratliff's and Lucretia Morgan's purchase of 585 Ellenburg is substantially related to this current action. The accuracy of the 2020 Henderson Plat that was prepared as part of that transaction is contested by Appellants and directly at issue in this suit to determine the County's rights over property in front of 585 and 599 Ellenburg. Jimmy Ratliff and Lucretia Morgan were not told about the new purported right-of-way added to the 2020 Henderson Plat and were not walked through the title policy exceptions that included this purported right-of-way. (Aff. Morgan ¶¶ 10-11; Aff. Ratliff ¶¶ 9-10).

Pursuant to Rule 1.9(a), RPC, Rule 407, SCACR:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

This conflict is imputed to other attorneys in the Law Firm under Rule 1.10, RPC, Rule 407, SCACR. In *Townsend v. Townsend*, 323 S.C. 309 (1996), the Supreme Court expounded on when a matter is substantially related:

“In determining whether the matter is ‘substantially related,’ one should consider, among other things, whether the affected lawyer ‘would have or *reasonably could have* learned confidential information in the first representation that would be of significance in the second.’”

Townsend, 323 S.C. at 317. The court went on to conclude that the matters under review in *Townsend* were substantially related because the lawyer “reasonably could have gained information in the first matter that will be relevant in the second matter.” *Id.* That is the case here. The undersigned raised these concerns to Attorney Holliday, but these concerns were not addressed. (Letter David Paavola to Andrew Holliday (May 17, 2024), attached as Exhibit H to Motion Disqualify; Response Email Andrew Holliday to David Paavola (May 21, 2024), attached as Exhibit I Motion Disqualify).

During the course of the Law Firm's prior representation, the Law Firm possessed confidential information about Appellants. Based on the Law Firm's prior representation of Plaintiffs, the Law Firm has or reasonably could have confidential information that is of significance in this matter. *See Townsend v Townsend*, 323 S.C. 309, 317, 474 S.E.2d 424, 429 (1996).

The Law Firm now represents Globe and Farnes on matters that are substantially related to its prior representation and whose interests are materially adverse to Jimmy Ratliff and Lucretia Morgan. (Affidavit of Williams O. Higgins, Esq. ¶ 9(g), attached as Exhibit J to Motion Disqualify). As a result of these circumstances, there is a reasonable risk that confidential information obtained during Law Firm's prior representation of Appellants is material to this matter, including, but not limited to, specific information regarding the existence of a public right of way. The Law Firm has not obtained informed consent in writing from Plaintiffs as required by Rule 1.9(a), RPC, Rule 407, SCACR.

Law Firm's representation of Globe and Farnes is a conflict of interest pursuant to Rule 1.9(a), RPC, SCACR 407. (Higgins Aff. ¶ 9(h)), Ex. J). William Higgins has served as an ethics expert witness in legal malpractice, motions to disqualify, and other matters concerning application of the rules of professional conduct. He is a former chair of the South Carolina Bar's Ethics Advisory Committee and Professional Responsibility Committee, and chaired the Ethics 2000 subcommittee, which developed the Bar's proposal for rules of professional conduct. (Higgins Aff. ¶ 2, Ex. J). Mr. Higgins has also practiced commercial real estate law for over thirty years and teaches real estate transactions at the Joseph F. Rice School of Law University of South Carolina. In Mr. Higgins's opinion, James Ratliff and Lucretia Morgan's purchase of 585 Ellenburg and the present lawsuit are substantially related for purposes of Rule 1.9(a), meaning a conflict of interest exists for the Law Firm's representation of Globe and Farnes. (Higgins Aff. ¶

10(a)). Because the Law Firm has not obtained written consent, it is prohibited from continued representation of Defendants Globe & Farmes in this matter. (Higgins Aff. ¶ 10(c)).

For these reasons, the lower court abused its discretion when it denied Appellants' Motion to Disqualify.

CONCLUSION

In this equitable action, the Court will take its own view of the preponderance of the evidence.

Dedication

On the question of the dedication of historic Ellenburg Road (from Knox Road to the Loop Road), Respondents did not introduce sufficient evidence to show that this section of road was impliedly dedicated to the public before or after the creation of Lake Keowee. Respondents had the burden of proof to show both an intent to dedicate and public acceptance.

Respondents had the burden of proof to demonstrate conduct on the part of the landowner that clearly, convincingly, and unequivocally indicating his intention to create a right in the public. First, Respondents did not show that J.J. Younce owned this entire section of road such that he could dedicate it to the public. Second, J.J. Younce deeded some property out of his 225 acres with reference to a public road; however, his deed to T.B. Ellenburg, from which Appellants' ownership derives, made no mention of a public road and neither do any of the other deeds and plats in Appellants' chain of title. Additionally, Appellants have always paid taxes on their entire property including the roadway, which numerous courts have concluded is evidence contrary to an intent to dedicate, and the Court should find the same in this case.

Public acceptance is typically shown by public authorities accepting maintenance responsibility for a road, providing public safety or services, long time public use, and removal of the property from the tax rolls. Here, based on State Highway Maps, there is no question that

historic Ellenburg Road connected property between State Highway 183 (Knox Road) and the Loop Road. However, this fact alone does not make the road public. Respondents did not introduce any testimony of long-time public use of the road or public maintenance of the road before the creation of Lake Keowee. After the creation of Lake Keowee around 1969/1970, the oldest public maintenance record entered in evidence dated to 1998. Appellants introduced testimony from Jay Ratliff that the County paved Ellenburg Road in the mid-1980's. Even so, there are no records of public maintenance or services prior to 1980 and none near the time that Respondents claim the road was dedicated in 1946. Again, Appellants' payment of property taxes to Oconee County and their carrying of the maintenance burden is contrary to showing public acceptance of the Private Driveway.

For these reasons, Respondents failed to carry their burden of proof to show that historic Ellenburg Road and the Private Driveway was dedicated to the public.

Abandonment

Appellants carried their burden of proof to show common law abandonment by clear and unequivocal acts by Oconee County evidencing an intent to abandon the Private Driveway as shown by testimony and evidence showing:

1. The public purpose to drive to the dead end of Ellenburg Road to access the prior Loop Road to High Falls Church or State Highway 201 is impossible after flooding of the roads for Lake Keowee;
2. Oconee County paved Ellenburg Road in the mid-1980's and in 2012 and both times stopped at 565 Ellenburg Road;
3. The Ratliff Family has used the roadway and shoulders for staging boats for service at John's Marine since the 1980s and has never been informed by Oconee County that boats and vehicles were parked in the public right-of-way;
4. Oconee County placed an End of County Maintenance Sign at or near 565 Ellenburg Road in the mid-1980s and it existed at that location for decades;

5. Oconee County employees met with Ratliff Family members in 2009 and provided a map indicating the End of County Maintenance at 565 Ellenburg;
6. The only persons who travel to the dead end of Ellenburg Road are visitors of the Ratliff Family and patrons of John's Marine;
7. Oconee County has no records of ever performing road or shoulder maintenance in front of 585 & 599 Ellenburg and no records of expending public funds to maintain this section of road;
8. Members of the Ratliff Family and Ellenburg families have performed all maintenance on the roadway and shoulders of 585 & 599 Ellenburg over the last 40 years;
9. Oconee County tax maps for 1986-2008 show Ellenburg Road ending at 565 Ellenburg Road;
10. The Ratliffs and Ellenburgs have paid taxes on the roadway in front of 585 & 599 Ellenburg and have never had taxes reduced for the dimensions of the roadway.

For these reasons, the Court should find that if the Private Driveway was a dedicated public road, it was then abandoned after the creation of Lake Keowee by these acts.

Prescriptive Easement & State Road

The lower court erred in not ruling on the factual and legal questions before it—whether Oconee County has a prescriptive easement over the Private Driveway by longtime maintenance, and whether Ellenburg Road was a state road before the creation of Lake Keowee. In prior litigation and before the Oconee County Board of Zoning Appeals, Oconee County took the position that it held a prescriptive easement over the Private Driveway by longtime county maintenance, or alternatively that Ellenburg Road was a historic state road that reverted to the county with the flooding for Lake Keowee. For this reason, Appellants specifically sought declaratory judgment in this action that Oconee County does not have a prescriptive easement over the Private Driveway.

Should the Court not find dedication, or if it finds abandonment of dedicated road, it should at the same time rule on these alternate theories raised by Oconee County in prior litigation so that no future questions arise on these theories of public right-of-way.

Evidentiary Issues

The lower court admitted testimony from Oconee County by 30(b)(6) deposition designation. However, the court did not rule on Appellants' hearsay objections. This was error, as certain objectionable testimony goes to the question of what maintenance Oconee County has performed on the Private Driveway. The lower court erred in not ruling on this evidentiary issue.

Additionally, the lower court excluded testimony from Karen Rasbornik about a meeting she had with County employees where they marked a map with the end of county maintenance as hearsay. This was error because Rule 801(d) provides that statements of agents operating in the scope of their agency is not hearsay.

Jury Trial

The lower court abused its discretion in denying Appellants' jury trial request on the factual disputes. The court did not identify any prejudice to Respondents in granting a jury trial and the parties had only recently begun discovery a few months before the jury trial was requested. If a new trial is granted on any issues, it should be with a jury.

Disqualification

The lower court abused its discretion in denying Appellants' request that Globe's and Farnes' counsel be disqualified. Attorney Andrew Holliday's Law Firm participated in closing Jimmy Ratliff and Lucretia Morgan's purchase of 585 Ellenburg in 2020, which resulted in the creation of the 2020 Henderson Plat. This plat reflected a new public right of way that was not present on the prior 1974 Ellenburg Plat. Appellants contend this was an error and Henderson testified that he had no basis to add this public right-of-way notation other than his assumption that

the road was public. Respondents' counsel used this disputed 2020 Henderson Plat against his Law Firm's prior clients. This created a conflict of interest that was not disclosed and not waived. For these reasons, he should have been disqualified from continuing to represent Globe and Farnes and the lower court erred in denying this request.

For all of these reasons, the Court should reverse the lower court's order and find that the Private Driveway is private property and Oconee County has no rights over it.

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