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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2026-000507
Trial Court Case No. 2025-CP-10-03402

Laura Schaible and Russell Schaible, Respondents,
v.
Ilonka Sonja Taylor and David Abdo, Appellants.

FINAL BRIEF OF APPELLANTS

Shawn R. Willis
NELSON MULLINS RILEY & SCARBOROUGH LLP
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200
E-Mail: shawn.willis@nelsonmullins.com

Attorneys for Appellants Ilonka Sonja Taylor and David Abdo

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STATEMENT OF ISSUES ON APPEAL

- I. Are the orders on appeal void due to lack of subject matter jurisdiction of the master in equity?**
- II. Did the 1959 deed from Charles S. Dwight to Rebecca M. Palmer (the “Palmer Deed”) validly create an express easement over the shared driveway?**
- III. Did the Palmer Deed grant an appurtenant easement or an easement in gross?**
- IV. Has Appellants’ use of the shared driveway exceeded the scope of the express easement created by the Palmer Deed?**
- V. Did the trial court apply the wrong standard for mutual mistake for Appellants’ reformation counterclaim?**
- VI. Are Respondents’ claims barred under the doctrine of laches?**
- VII. Did the trial court err in granting injunctive relief that was not based on the declaratory judgments?**

STATEMENT OF THE CASE

Respondents commenced civil action 2018CP1000440 in Charleston County (the “First Action”) against Appellants on January 30, 2018 seeking declaratory and injunctive relief regarding the existence, character and scope of an express easement described in a recorded deed from 1959. (R. pp. 31-44). Appellants served and filed their answer on April 20, 2018, which asserted affirmative defenses of laches and failure to join a necessary party. (R. pp. 64-70). Appellants filed and served an amended answer on September 27, 2018. (R. pp. 71-77). Appellants filed a motion to dismiss for failure to join a necessary party on November 9, 2018, which was denied by order entered on September 25, 2019. (R. pp. 113-114, 29-30). Appellants sought and received leave from the trial court to further amend their answer, and Appellants filed their second amended answer on September 17, 2020, which contained a counterclaim for declaratory relief interpreting and reforming the same recorded deed from 1959. (R. pp. 78-87).

Respondents filed an Answer to Appellant’s Counterclaims on October 23, 2020. (R. pp. 88-93).

On February 12, 2021, an order of reference was issued in the First Action by circuit court Judge Deidre Jefferson pursuant to Rule 53, SCRCF based on consent of the parties (the “Order of Reference”). (R. pp. 26-28). The Order of Reference referred the causes of action in the First Action to the master in equity and authorized the master in equity to enter final judgment with appeals to be taken in accordance with the South Carolina Appellate Court Rules. (R. pp. 26-27).

A date-certain trial in the First Action was scheduled to be held in front of the master in equity on June 24, 2021. (R. p. 476, line/item 7). The parties did not try the case to verdict that day but instead read terms of a settlement into the record. (R. pp. 392-403). On December 7, 2023, the master in equity issued an order striking the action pursuant to Rule 40(j), SCRCF (the “Dismissal Order”), which was entered in the First Action. (R. pp. 23-25).

On December 2, 2024, Respondents filed a motion in the First Action to restore the case pursuant to Rule 40(j), SCRCF (the “Motion to Restore”). (R. p. 112). No order of reference was issued in the First Action after the Motion to Restore was filed. (R. pp. 472, 475). On May 20, 2025, circuit court Judge Jennifer McCoy issued a consent order for substitution of counsel for the Appellants, which was entered in the First Action (the “Order Substituting Defense Counsel”). (R. pp. 20-22).

On June 12, 2025, the master in equity issued a consent order restoring the case pursuant to Rule 40(j), SCRCF (the “Order to Restore”). (R. pp. 17-19). The Order to Restore was entered in the First Action and also a new civil action, 2025CP1003402 (the “Second Action”). (R. p. 472, line/item 2, p. 478, line/item 17). No order of reference was issued in the Second Action. (R. pp. 478-479). The Order to Restore references the prior Order of Reference that had been entered on February 12, 2021 in the dismissed First Action. (R. p. 17). The Order to Restore stated that it

amended and restated a previous order to restore issued on February 18, 2025 and ordered the case to be restored to the master in equity's docket. (R. p. 17). The Charleston County Clerk of Court's file book for the First Action does not show the entry of an order to restore on February 18, 2025, but instead shows the submission by Respondents' counsel of a proposed order to restore. (R. p. 472, line/item 11, p. 475, line/item 21). The Charleston County Clerk of Court's file book for the Second Action does not show any entries prior to June 12, 2025. (R. pp. 478-479).

The master in equity held a trial on October 22, 2025 and entered a judgment in favor of Respondents on January 13, 2026 in the Second Action (the "Trial Order"). (R. pp. 6-16). Appellants engaged new counsel and timely moved for reconsideration of the Trial Order under Rules 52 and 59(e), SCRCF. (R. p. 478, line/item 12, pp. 94-111). Appellants also filed a post-trial motion to amend their pleadings pursuant to Rule 15(c), SCRCF. (R. p. 478, line/item 6). The master in equity entered an order denying Appellants' post-trial motions on February 5, 2026 (the "Motion to Reconsider Order"). (R. pp. 3-5).

Appellants timely served and filed their notice of appeal. Appellants filed a motion with this Court on April 1, 2026 requesting leave to file a motion with the circuit court pursuant to Rule 60(b)(4), SCRCF seeking to vacate the orders issued by the master in equity as void based on the master in equity's lack of subject matter jurisdiction. This Court denied the Appellants' motion on April 21, 2026.

STATEMENT OF THE FACTS

This case involves a dispute between two neighbors in a residential subdivision over a driveway that has been used as a shared driveway since 1959.

Appellants and Respondents live in "The Crescent" neighborhood in the City of Charleston on Broughton Road. (R. p. 34, paragraph 7). Appellants own "Lot 6" and Respondents own the

adjacent “Lot 5”, both of which are lots in Block K of The Crescent. (R. pp. 404, 411-417, 453-456). Also adjacent to Lot 5 on its other side is “Lot 4”, which is also in Block K of The Crescent. (R. p. 404).

The driveway in dispute is located on an approximately fifteen (15’) foot wide portion of Lot 5 that leads from Broughton Road and is situated between Lot 4 and Lot 6. (R. pp. 404-405, p. 243, lines 4-23, p. 250 lines 20-23). The location and boundaries of Lots 4, 5 and 6 are shown on a recorded plat that was prepared in February 1929 by J.P. Gaillard (the “Conveyance Plat”). (R. p. 404).

Respondents purchased Lot 5 in 2005 and Appellants purchased Lot 6 in 2007. (R. pp. 411-417, 453-456). Appellants’ vesting deed for Lot 6 contains a grant of express easement rights over the driveway on Lot 5 that were originally established through an express easement grant contained in a 1959 deed from Charles S. Dwight (“Dwight”) conveying Lot 6 to Rebecca Palmer (the “Palmer Deed”). (R. pp. 435-437, 453-456).

The driveway has been used as a shared driveway for access from Broughton Road to Lots 4, 5 and 6 for decades. (R. p. 296, lines 16-19, p. 302, lines 15-22). Rebecca Palmer resided on Lot 6 and used the shared driveway for access to Lot 6 prior to Appellants’ purchase of Lot 6. (R. p. 245, lines 17-22, p. 254, lines 12-21, p. 302, lines 23-25, p. 323, line 25 – p. 324 line 22). Dwight owned Lots 4, 5 and 6 and conveyed each of them to third parties over the course of 1959 and 1960. (R. p. 34, paragraph 8 – p. 36, paragraph 17, p. 85, paragraph 67-69, pp. 139-140, pp. 449-452).

Dwight’s 1959 conveyances of Lots 4 and 6 included grants of express easements over Lot 5 for access from Broughton Road. (R. p. 34, paragraph 9, pp. 139-140, pp. 435-437). Dwight’s easement grants for Lots 4 and 6 were identical, except that the easement grant language for Lot 6

contained a scrivener's error that was not present in the easement grant language for Lot 4. (R. p. 34, paragraph 9, p. 85, paragraph 69, pp. 139-140, pp. 435-437). Dwight's 1960 conveyance of Lot 5 expressly references the 1959 easement grants for Lots 4 and 6. (R. pp. 35-36, paragraph 14). Respondents' vesting deed expressly references the 1959 easement grants for Lots 4 and 6. (R. pp. 411-417).

Appellants have used the driveway located on Lot 5 for access to Lot 6 since they purchased Lot 6 in 2007. (R. p. 364, lines 1-23). Respondents became unhappy at some point with Appellants and have numerous grievances with them. (R. p. 256, line 13 – p. 273, line 5). Respondents commenced the First Action against Appellants on January 30, 2018 to terminate the express easement. (R. p. 279, line 10 – p. 280, line 8).

STANDARD OF REVIEW

The following standards of review are applicable to all issues on appeal. The standards of review that are specific to certain issues on appeal are included in the argument sections for each issue.

“Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues.” *Est. of Tenney v. S.C. Dep't of Health & Env't Control*, 393 S.C. 100, 712 S.E.2d 395 (2011)(citing *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)). When a suit involves both legal and equitable issues, each cause of action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 180, 708 S.E.2d 787, 792 (Ct.App.2011). “The character of an action is primarily determined by the allegations

contained in the complaint.” *Seebaldt v. First Fed. Sav. & Loan Ass’n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977).

An appellate court reviews all questions of law *de novo*. *Fesmire v. Digh*, 385 S.C. 296, 683 S.E.2d 803 (Ct.App.2009)(citing *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008)).

ARGUMENT

I. The orders on appeal are void due to lack of subject matter jurisdiction of the master in equity.

Standard of Review

The jurisdiction of a court or of a particular judge over the subject matter of a proceeding depends upon the authority granted by the Constitution and laws of the state and is fundamental. *Harden v. S.C. State Highway Dep’t*, 266 S.C. 119, 221 S.E.2d 851 (1976). If the lower court did not have subject matter jurisdiction, a reviewing court should decline to pass on exceptions raised and instead reverse the lower court for lack of subject matter jurisdiction. *Id.*; *State v. Gorie*, 256 S.C. 539, 183 S.E.2d 334 (1971); *McGlohon v. Harlan*, 254 S.C. 207, 174 S.E.2d 753 (1970); *Foster v. Nordman*, 244 S.C. 489, 137 S.E.2d 600 (1964); *McCullough v. McCullough*, 242 S.C. 108, 130 S.E.2d 77 (1963). Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by a reviewing court *ex mero motu*. *Id.*

Argument

The Trial Order and Motion to Reconsider Order (the “Subject Orders”), which are the orders on appeal, are void and must be vacated by this Court because the master in equity lacked subject matter jurisdiction.¹

A judgment from a court that lacked subject matter jurisdiction or personal jurisdiction is void. *Sanders v. Smith*, 431 S.C. 605, 616, 848 S.E.2d 604, 609 (Ct.App.2020); *Belle Hall Plantation Homeowner’s Ass’n, Inc. v. Murray*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct.App.2017)). Lack of subject matter jurisdiction renders a judgment void from inception, rather than voidable. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)(“[a] void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely ‘voidable.’”); *see Ross v. Richland Co.*, 270 S.C. 100, 240 S.E.2d 649 (1978)(generally, a judgment is void only if a court acts without jurisdiction); *see also Genobles v. West*, 23 S.C. 154 (1885)(irregularities which do not involve jurisdiction do not render a judgment void.) “[S]ubject matter jurisdiction refers to a court's constitutional or statutory power to adjudicate a case.” *Johnson v. S.C. Dep’t of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007).

A master in equity’s authority to determine issues referred to him by the circuit court is a question of subject matter jurisdiction. *First Citizens Bank and Trust Company, Inc. v. Taylor*, 431 S.C. 149, 847 S.E.2d 249 (Ct.App.2020). An order issued by a master in equity is void at inception if the master does not have jurisdiction. *Maybank 2754, LLC v. Zurlo*, 444 S.C. 47, 66, 906 S.E.2d 94, 104 (Ct.App.2024).

¹ Appellant asserted in its April 1, 2026 Motion for Limited Remand to this Court that the Order to Restore is also void for lack of subject matter jurisdiction for the same reasons as set forth here for the Subject Orders. However the Order to Restore was not appealed by Appellants and is not an order on appeal.

Subject matter jurisdiction of a master in equity is an issue that can be raised at any time, even on appeal. *First Citizens, supra*. Despite the parties' consent to the master in equity's restoration under Rule 40(j) and their participation in the trial held by the master in equity, lack of subject matter jurisdiction cannot be waived through consent or otherwise. *Chabek v. Nationwide Mut. Fire Ins. Co.*, 303 S.C. 26, 29, 397 S.E.2d 786, 788 (1990)("We deem as irrelevant the fact that both parties consented to the reference of the matter and, indeed, tried the matter before the master. Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court *ex mero motu*.")(citing *Harden v. South Carolina State Highway Department*, 266 S.C. 119, 124, 221 S.E.2d 851, 853 (1976)).

Here, the master in equity lacked subject matter jurisdiction when he issued each of the Subject Orders, because he had no power or authority to issue them. The power and authority granted to the master in equity under the Order of Reference pursuant to Rule 53, SCRCP terminated when he dismissed the First Action under Rule 40(j), SCRCP, and the circuit court did not grant any power or authority to him at any point thereafter.

Rule 53, SCRCP allows the circuit court to issue an order of reference that refers all or some of the causes of action in a case to a master in equity or special referee. Rule 53(b), SCRCP. Once referred, the master shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter. Rule 53(c), SCRCP. In an action where the parties consent to reference, the order of reference must be signed by either a circuit court judge or the clerk of court. Rule 53(b), SCRCP.

A master has no power or authority except that which is given to him by the order of reference. *Bunkum v. Manor Props.*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct.App.1996). Once a master in equity's duties under an order of reference have concluded, the master no longer has

any jurisdiction and all power and authority returns to the circuit court. *Id.*; *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 340-341, 745 S.E.2d 90, 92 (2013); *Wachovia Bank of South Carolina, N.A. v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000)(“[t]he proper construction of [an] order of reference is that it gives the master jurisdiction over the case and all matters arising from it until the master has performed all the duties assigned to him.”)²

The Order of Reference here referred the causes of action in the First Action to the master in equity and authorized him to enter final judgment. (R. pp. 26-28). Like the orders of reference in *Bunkum*, *Wachovia Bank* and *Narruhn*, the Order of Reference here did not specifically authorize the master in equity to conduct hearings or enter orders after he entered final judgment. Thus, determination of whether the master in equity had subject matter jurisdiction to issue the subject orders depends on whether and when the master in equity concluded his duties under the Order of Reference.³

The master in equity’s power and authority under the Order of Reference terminated when he dismissed the First Action under Rule 40(j), SCRCF, because striking an action pursuant to Rule 40(j) is a dismissal of the action. Rule 40 was amended in 1994 and Rule 40(j) substantially revised the procedure for dismissing a case previously found in Rule 40(c)(3). *See* Rule 40, SCRCF Notes, Notes to 1994 Amendments (“Rule 40(j) is the final section of the rule and

² *Narruhn* was decided after the 1999 amendments to Rule 53 that substantially revised Rule 53 to include the current language in Rule 53(c). *Narruhn* did not overrule *Bunkum* and *Wachovia Bank*, both of which were decided prior to the 1999 amendments. *Narruhn* cited *Wachovia Bank* contrasting it on its facts.

³ *Wachovia Bank* involved a foreclosure action referred to a master in equity, *Bunkum* involved a quiet title and partition action referred to a master in equity, and *Narruhn* involved supplementary proceedings referred to a special referee. The *Wachovia Bank* opinion held that jurisdiction was not returned to the circuit court when the master in equity entered the foreclosure order, despite it being a final judgment, because the master in equity’s duties under the order of reference had not yet concluded because a judicial sale and possibly surplus funds proceedings would follow the entry of the foreclosure order. The *Bunkum* opinion held that jurisdiction returned to the circuit court after the master issued final judgment ordering partition by sale, because the master had concluded his duties under the orders of reference. Like *Bunkum*, the *Narruhn* opinion held that jurisdiction returned to the circuit court after the special referee issued a final order regarding the supplementary proceedings, because they master had concluded his duties under the orders of reference.

substantially revises the procedure for dismissing a case previously found in Rule 40(c)(3).”) Dismissal pursuant to Rule 40(j) is an alternative to a voluntary dismissal pursuant to Rule 41(a), SCRCP. *Id.* (“[a] case can also be dismissed voluntarily under Rule 41(a).”) Rule 40(j) allows a party to strike its claims from any docket one time as a matter of right, provided that all parties adverse to the claims agree in writing that they may be stricken and also agree that the statute of limitations for the claims stricken will be tolled if a motion to restore the claims is made within one (1) year after being stricken. Rule 40(j), SCRCP.

A strike under Rule 40(j) is a dismissal of the action. *Personal Care, Inc. v. Theos*, 426 S.C. 78, 87, 825 S.E.2d 281, 285 (Ct.App.2019)(“[n]evertheless, we believe this argument ignores the procedural posture of the case as ‘dismissed’”); *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 631, 779 S.E.2d 826, 831 (Ct.App.2015)(“the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal”)(citing *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003)(relying on the notes to the 1994 amendments of Rule 40 to interpret Rule 40(j) and applying statutory rules of construction to construction of the South Carolina Rules of Civil Procedure.) After an action is stricken pursuant to Rule 40(j), no pending proceedings exist until and unless a new lawsuit is filed or the causes of action are restored pursuant a motion to restore. *Personal Care*, 426 S.C. at 87, 825 S.E.2d at 285 (“[The] motion to restore [pursuant to Rule 40(j)] was, in essence, equivalent to filing a new lawsuit.”)

Here, the master in equity’s power and authority under the Order of Reference ended when he entered the Dismissal Order on December 7, 2023. The Dismissal Order was issued on a Form 4 that clearly indicated it was a final order dismissing the action. (R. pp. 23-25). See *Cheap-O’s Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 567 S.E.2d 514 (Ct.App.2002)(a Form 4 order dismissing an action is a final order unless the Form 4 specifically and with certainty indicates that additional

specified action will follow.) Like the Form 4 determined to be a final order in *Cheap-O's*, the Dismissal Order here clearly and unequivocally indicated that it was a final order with no action to follow: the master in equity wrote as the “Statement of Judgment” that “[t]his action is hereby stricken per SCRCP Rule 40(j).”, marked the box indicating that the action was stricken pursuant to Rule 40(j), and also marked the box indicating that the Form 4 order “ends” the case. (R. pp. 23). The dismissal of the action was reflected in the clerk of court’s file book by marking the status of the First Action as “dismissed” and the disposition as “dismissed per Rule 40(j)”. (R. p. 472). See Rule 79(f), SCRCP. Once the First Action was dismissed, the master in equity’s duties were concluded and subject matter jurisdiction returned to the circuit court. See *Bunkum* and *Narruhn*, *supra*.

After the First Action was dismissed, there was no longer any pending proceeding capable of being referred to the master in equity pursuant to Rule 53. Referral under Rule 53(b) is limited to “actions”. Rule 53(b), SCRCP (“[i]n an *action* where parties consent....[i]n all other *actions*....”)(emphasis added). “Actions” for purposes of Rule 53 are “pending proceedings”. *Chabek*, 303 S.C. at 28, 397 S.E.2d at 787 (“[a]n ‘action’ is a pending proceeding to determine the rights and liabilities of the parties....”). Since only causes of action in pending proceedings can be referred to a master in equity, once the First Action was dismissed, a new order of reference was required to be issued by the circuit court in order to give any power or authority to the master in equity for any proceedings thereafter. However, that never occurred.

A matter restored pursuant to Rule 40(j) is not the same action that was dismissed but instead is a new action. *Personal Care*, *supra*; Rule 40, SCRCP Notes, Notes to 1994 Amendments (“[u]pon being restored the case is placed on the General Docket where it proceeds as a *newly filed action* on the General Docket”)(emphasis added). If a restored action was the

same action as the dismissed action, the statute of limitations tolling provisions in Rule 40(j) would have no purpose. *See Goodwin, supra*.

Respondents' filing of the Motion to Restore was the equivalent of filing of a new lawsuit, which is a new action and new pending proceedings between the parties. A new order of reference was required under Rule 53 in order for the master in equity to have subject matter jurisdiction over the new pending proceedings between the parties in the new action, because subject matter jurisdiction cannot originate with a master in equity. "Absent a reference of any or all issues in an action, the master lacked jurisdiction to enter judgment since nothing can originate before a master." *Chabek*, 303 S.C. at 28, 397 S.E.2d at 787 (citing *Carpenter v. Bloomer*, 54 N.J. Super. 157, 148 A.2d 497 (1959); 5 Am.Jur.2d Arbitration and Award § 4 at 521 (1962)). "Until an action is commenced, there is no proceeding pending and, thus, nothing to refer." *Id.* (citing *State v. McQuillan*, 252 Mo. 334, 338–9, 158 S.W. 652, 653 (1913)("Before there can be a reference there must be an action pending.)) No order of reference was ever issued after the Motion to Restore was filed. Thus, the circuit court retained subject matter jurisdiction from that point forward and the master in equity had no subject matter jurisdiction when he conducted the trial and issued the Subject Orders.

II. The Palmer Deed validly created an express easement.

Standard of Review

The existence of an easement is a question of fact in a law action, the determination of the scope of an easement is an equitable matter. *Plott v. Justin Enterprises*, 374 S.C. 504, 649 S.E.2d 92 (Ct.App.2007); *see Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 659 S.E.2d 151 (2008). "The determination of the existence of an easement is a question of fact

in a law action and subject to an any evidence standard of review when tried by a judge without a jury.” *Slear v. Hanna*, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998).

The determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court. *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct.App.2012)(citing *Hunt v. Forestry Comm'n*, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct.App.2004)). This court reviews questions of law *de novo*. *Id.* (citing *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008)). A reviewing court is free to decide questions of law with no particular deference to the trial court. *Id.*

A reviewing court determines, as a matter of law, whether the language in a deed is ambiguous. *Crystal Pines Homeowners Ass'n, Inc. v. Phillips*, 394 S.C. 527, 533, 716 S.E.2d 682, 685 (Ct.App.2011)(citing *Santoro v. Schulthess*, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct.App.2009)). If the reviewing court determines a deed is ambiguous, it must interpret the deed. *Id.* “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.” *Slear, supra*.

Argument

The trial court erred in interpreting the Palmer Deed as a matter of law. The language of the express easement grant contained in the Palmer Deed is as follows:

TOGETHER with a permanent easement over a fifteen foot strip of land, a part of Lot 5, Block K, lying between Lot 4, Block K and Lot 5, Block K, as shown on the above referred to plat, for the purposes of ingress and egress to Lot 6, Block K, hereinabove described, from Broughton Road. Said easement being necessary for proper use of said lot and is appendant and appurtenant thereto, and shall be used jointly by the owners of Lots 4, 5, and 6, Block K, their heirs and assigns, and their agents, servants and invitees for purposes of ingress and egress to and from Broughton Road. (Emphasis added.)

(R. p. 435).

The trial court ruled that the Palmer Deed was unambiguous and did not create an express easement. (R. pp. 12-13). The trial court ruled that the reference to “Lot 5” instead of “Lot 6” in the phrase “lying between Lot 4, Block K and Lot 5, Block K” in the first sentence controlled the interpretation of the easement grant and the easement grant failed at inception because it described an impossible location since an easement could not be simultaneously located “on” Lot 5 and also “between” Lot 5 and something else. (R. pp. 8, 13). The trial court erred as a matter of law by basing its interpretation of the express easement grant in the Palmer Deed by reading this single phrase isolation, rather than construing the instrument as a whole and giving effect to every part of it. When the language of the easement grant in the Palmer Deed is read as a whole, it sufficiently describes the easement for the purpose of creating a valid express easement.

A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments. *Floyd v. Dross*, 442 S.C. 79, 88, 897 S.E.2d 191, 196 (Ct.App.2024); *K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009); *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct.App.2001). An easement is a right given to a person to use the land of another for a specific purpose. *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015). An easement may be created by an express written grant. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965). “In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law.” *Proctor*, at 573, 730 S.E.2d at 363 (quoting *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582–83 (2009)).

Deeds may be construed using the rules of contract interpretation. *Id.* (citing S.C. *Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001). “Common sense and good faith are the leading touchstones of the construction of a contract[,] and contracts are to be so construed as to avoid an absurd result. Where one construction would make a contract unusual or extraordinary and another, equally consistent, would make the contract reasonable, fair[,] and just, the latter construction will prevail.” *Id.* (citing *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct.App.2005) (quoting *Georgetown Mfg. & Warehouse Co. v. S.C. Dep't of Agric.*, 301 S.C. 514, 518, 392 S.E.2d 801, 804 (Ct.App.1990)).

When an easement is created by express grant, if the instrument creating the easement is unambiguous then any attempt to determine the grantor’s intent must be limited to the instrument itself, and using extrinsic evidence to contradict the plain language of the instrument is improper. *Floyd, supra*. “The intention of the grantor must be found within the four corners of the deed.” *Proctor, supra*.

An express easement does not require a definite statement as to exact location. *See* 25 Am.Jur.2d Easements and Licenses § 55. Failure to precisely describe the location of an easement is not necessarily fatal to its validity. *James v. Chicago Title Ins. Co.*, 2014 MT 325, 339 P.3d 420 (Mont. 2014). Although the law does not require legal perfection in the description of an easement, the description must be sufficiently full and definite to afford means of identification. *WS CE Resort Owner, LLC v. Holland*, 360 Ga. App. 720, 860 S.E.2d 637 (2021), cert. denied, (Feb. 15, 2022).

When read together with the rest of the language of the easement grant in the Palmer Deed, the reference to “Lot 5” instead of “Lot 6” in the phrase “lying between Lot 4, Block K and Lot 5,

Block K” in the first sentence is obviously a scrivener’s error. Other language in the easement grant clearly describes the easement being located “on” Lot 5:

“[t]ogether with a permanent easement over a fifteen foot strip of land, a part of Lot 5, Block K...”

Other language in the easement grant clearly describes the easement being in a location for use by Lots 4, 5, and 6:

“...shall be used jointly by the owners of Lots 4, 5, and 6, Block K, their heirs and assigns, and their agents, servants and invitees for purposes of ingress and egress to and from Broughton Road.”

The language of the easement grant also incorporates the recorded Conveyance Plat expressly by reference which clearly and unambiguously shows a fifteen (15’) foot wide portion of Lot 5 leading from Broughton Road being located between Lot 4 and Lot 6. (R. p. 404). Boundaries of an easement that are shown on a plat expressly incorporated by reference into the instrument creating the easement determine the area burdened by the easement. *See Martin v. Bay*, 400 S.C. 140, 145-152, 732 S.E.2d 667, 670-673 (Ct.App.2012); *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979); *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975); *Bennett v. Invs. Title Ins. Co.*, 370 S.C. 561, 635 S.E.2d 660 (Ct.App.2006). “As a general rule, when maps, plats, or field notes are referred to in a grant or conveyance they are to be regarded as incorporated into the instrument and are usually held to furnish the true description of the boundaries of the land....” *Holly Hill Lumber Co. v. Grooms*, 198 S.C. 118, 135, 16 S.E.2d 816, 823 (1941).

However, the trial court ignored all of these other parts of the Palmer Deed. When read together as a whole, the other language in the easement grant describing the easement as being located “over a fifteen foot strip of land, a part of Lot 5” to be used “jointly by the owners of Lots 4, 5, and 6, ...for purposes of ingress and egress to and from Broughton Road” together with the

boundaries and measurements shown on the Conveyance Plat clearly showing a fifteen (15') foot portion of Lot 5 leading from Broughton Road lying between Lot 4 and Lot 6, clearly and sufficiently describes the intended location for the easement granted in the Palmer Deed.

The trial court also did not weigh any evidence of the boundaries of the express easement to determine its location. “When determining boundaries, resort is generally had first to natural boundaries, next to artificial monuments, then to adjacent boundaries, and last to courses and distances.” *Bodiford v. Spanish Oak Farms, Inc.*, 317 S.C. 539, 455 S.E.2d 194 (Ct.App.1995). (citing *Garrett v. Locke*, 309 S.C. 94, 98, 419 S.E.2d 842, 845 (Ct.App.1992)). “This rule, however, merely indicates the weight generally given to each type of evidence of location.” *Id.* (citing *Southern Realty & Investment Co. v. Keenan*, 99 S.C. 200, 207–09, 83 S.E. 39, 41–42 (1914)). “The rule does not provide an order of admissibility, such that evidence of artificial boundaries is admissible only if there is no evidence of natural boundaries.” *Id.* “The facts of a case may therefore require that an inferior means of location be preferred over a higher means of location.” *Id.* Though the language of the easement grant contains the scrivener’s error “between Lot 4...and Lot 5”, other evidence of the boundaries of the easement exists in the Palmer Deed as described above. Additionally, the Conveyance Plat clearly shows artificial monuments (“pipes”) establishing at least two of the boundaries of the fifteen (15') foot portion of Lot 5 leading from Broughton Road lying between Lot 4 and Lot 6 and clearly shows courses and distances for the boundaries of the fifteen (15') foot portion of Lot 5 leading from Broughton Road lying between Lot 4 and Lot 6. (R. p. 404). The trial court was required to weigh all of this evidence to determine the location of the express easement. However, the trial court did not do so and instead ignored everything except the isolated phrase containing the scrivener’s error.

The trial court's ruling that the Palmer Deed was unambiguous was based on a factual finding in the Trial Order that Appellants conceded that that isolated phrase "between Lot 4 ...and Lot 5" was unambiguous and waived any argument based on ambiguity. (R. p. 8). Not only was this finding of fact in the Trial Order not supported by the evidence at trial⁴, but interpreting the Palmer Deed based on that factual finding was an error of law. The trial court was required to determine whether the Palmer Deed unambiguously reflected the intent of the parties at the time of the Palmer Deed in 1959, who were Dwight and Rebecca Palmer, not Appellants or Respondents. "The court should put itself, as best it can, *in the same position occupied by the parties when they made the contract*, because in doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language." *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977)(citing 17 Am.Jur.2d, Contracts §272 (1964))(emphasis added.) The opinions of Appellant or Respondents regarding ambiguity are not relevant to a court's interpretation of the Palmer Deed. The trial court erred as

⁴ The Trial Order only quotes a portion of Appellants' counsel's response to the trial court's questioning on the issue of ambiguity. The trial transcript clearly reflects that Appellants did not concede that the easement grant language in the Palmer Deed unambiguously described an impossible location for the easement and also clearly reflects that Appellants did not concede that the isolated phrase that contained the typographical error controlled the interpretation of the Palmer Deed. While Appellants' counsel did state "if we're going to isolate that one piece, we can do that, and we can be very literal and say, well, there can't be 15 feet between lot four and lot five," (R. p. 354, lines 6-9), that is not the entirety of Appellants' counsel's answer to the Court's question. Appellants' counsel continued and said:

"but that also is contrary to well established law that says you take the deed as a whole, the four corners of the deed, all the words on the deed, and the very next part of that sentence says 'as shown on the plat that's referenced above,' which is this plat. So, I do not think that the law supports the conclusion that there is no easement because you can't find it between lot four and five." (R. p. 354, lines 12-20).

Appellants' counsel then also said "I think the plat reference makes it clear," (R. p. 354, lines 23-25) and that:

"the only way you can conclude it doesn't exist is if you isolate that language from the rest of the deed that incorporates the plat. I think when you add the plat reference, it's very clear exactly where that easement is." (R. p. 355, lines 7-11).

a matter of law by not putting itself in the position that Dwight and Rebecca Palmer were in in 1959 in order to judge the meaning of the words and the correct application of the language granting the easement.

The proper interpretation of the Palmer Deed takes all parts of it into consideration and reads it as a whole. As discussed above, when the Palmer Deed is read as a whole the easement grant is unambiguous and clearly and sufficiently describes the location of the express easement as being located on the fifteen (15') foot portion of Lot 5 lying between Lot 4 and Lot 6 as a matter of law. “A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one, i.e., when it is obscure in meaning through indefiniteness of expression, or containing words having a double meaning.” *Crystal Pines* at 533, 716 S.E.2d at 685 (citing 30 S.C. Jur. Contracts § 32 Ambiguity (1999) (footnote omitted)). The scrivener’s error does not create an ambiguity, because when all parts of the Palmer Deed are read together it may not fairly or reasonably be understood in more ways than one. The Palmer Deed is not obscure in meaning through indefiniteness of expression, and it does not contain words having a double meaning.

However, to the extent that the scrivener’s error in the easement grant could be read to create an ambiguity with regard to the location of the easement, extrinsic evidence is permitted to be into account. “If the language is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction [that] the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect.” *Ten Woodruff Oaks, LLC v. Point Dev., LLC*, 385 S.C. 174, 180, 683 S.E.2d 510, 513 (Ct.App.2009) (quoting 25 Am.Jur.2d *Easements* §18 at 516 (2004)); see *Martin v. Bay*, 400 S.C. 140, 732 S.E.2d 667 (Ct.App.2012). “When intention is not expressed accurately in the deed evidence *aliunde* may be admitted to supply or explain it. The instrument is not thereby varied or

contradicted but is explained or corrected.” *Crystal Pines*, at 533-534, 716 S.E.2d at 686 (citing *K & A Acquisition, supra*).

If this Court determines that the scrivener’s error makes the easement grant in the Palmer Deed ambiguous, the most relevant extrinsic evidence regarding the contemporaneous circumstances surrounding the Palmer Deed includes Dwight’s conveyances of Lot 4 and Lot 5, since the easement grant language in the Palmer Deed expressly states that the “easement...shall be used jointly by the owners of Lots 4, 5, and 6, Block K...for purposes of ingress and egress to and from Broughton Road”.⁵ Dwight conveyed Lot 4 to John J. Murray and Irma J. Murray by deed in December 1959 (the “Murray Deed”), which was just three (3) months after he conveyed Lot 6 to Rebecca Palmer in September 1959. (R. p. 85, paragraph 68, pp. 139-140). Dwight conveyed Lot 5 to Jacqueline H. Stehmeyer by deed in March 1960 (the “Stehmeyer Deed”), which was just six (6) months after he conveyed Lot 6 to Rebecca Palmer and three (3) months after he conveyed Lot 4 to the Murrays. (R. pp. 35-36, paragraph 14). The easement grant in the Murray Deed for Lot 4 contained identical language to the easement grant for Lot 6 in the Palmer Deed, except that the Murray Deed did not contain the scrivener’s error. Instead, the Murray Deed stated:

“TOGETHER with a permanent easement over a fifteen foot strip of land, a part of Lot 5, Block K, lying between Lot 4, Block K and Lot 6, Block K, as shown on the above referred to plat....” (Emphasis added.)

The Stehmeyer Deed expressly states that Lot 5 was conveyed subject to the easements previously granted for Lot 4 and Lot 6. The Stehmeyer Deed also, notably, contains information describing the location of the easements granted for Lot 4 and Lot 6:

⁵ Appellant argued to the trial court that recorded documents in the chains of title to Lots 4, 5 and 6 provide extrinsic evidence supporting the creation of an express easement by the Palmer Deed. Appellant and Respondent stipulated at trial to the inclusion in the trial record of the recorded instruments in the chains of title to Lots 4, 5 and 6 as listed in the exhibit list included in Appellants’ pre-trial brief (R. p. 344, line 20 – p. 345, line 17, pp. 469-470). However, the trial transcript does not reflect that all of them were introduced into evidence.

“That portion of the above described property [Lot 5] fifteen feet wide leading from Broughton Road to the main portion of said property is conveyed subject to the easements therein granted by Charles S. Dwight by deeds of conveyance conveying lots 6 and 4, Block K, The Crescent recorded in the R.M.C. Office for Charleston County in Book R-68, page 10, and Book W-68, page 122, respectively.”

(R. pp. 35-36, paragraph 14).

Additionally, Respondents’ own testimony at trial proved that the driveway is actually located on the fifteen (15’) foot wide portion of Lot 5 lying between Lot 4 and Lot 6. (R. p. 243, lines 4-23, p. 245 lines 1-25, p. 250 lines 20-23). Respondents put into evidence a recorded plat from 2003 that showed the driveway actually located on the strip of Lot 5 lying between Lot 4 and Lot 6. (R. p. 405.) Moreover, Respondents’ own testimony proved that Rebecca Palmer herself used the driveway on the strip of Lot 5 lying between Lot 4 and Lot 6 to access Lot 6. (R. p. 255, lines 3-6, p. 324, lines 13-22). The only evidence presented at trial supporting a determination that the easement grant in the Palmer Deed described an impossible location is the isolated phrase “between Lot 4...and Lot 5”. (R. p. 250, line 24 – p. 251, line 4). If this Court determines that the Palmer Deed is ambiguous, then the evidence overwhelmingly supports an interpretation that Palmer Deed validly created an express easement on the fifteen (15’) foot wide portion of Lot 5 lying between Lot 4 and Lot 6 for the purpose of access to Lot 6 from Broughton Road.

III. The express easement created by the Palmer Deed was an appurtenant easement instead of an easement in gross.

Standard of Review

The existence of an easement is a question of fact in a law action, the determination of the scope of an easement is an equitable matter. *Plott v. Justin Enterprises*, 374 S.C. 504, 649 S.E.2d 92 (Ct.App.2007); see *Inlet Harbour v. S.C. Dep’t of Parks, Recreation & Tourism*, 377 S.C. 86, 659 S.E.2d 151 (2008). “The distinction between an appurtenant easement and an easement in

gross involves the extent of a grant of an easement, as opposed to the creation of an easement.” *Proctor v. Steedley*, 398 S.C. 561, 571, 730 S.E.2d 357, 362 (Ct.App.2012). When a party appeals a judgment pertaining to the scope of an easement, the appellate court may take its own view of the preponderance of the evidence. *In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018).

Argument

The trial court’s determination that if an express easement was created by the Palmer Deed then it was an easement in gross rather than an appurtenant easement is error as a matter of law and is also unsupported by the evidence.

“The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof.” *Tupper v. Dorchester County*, 326 S.C. 318, 325-326, 487 S.E.2d 187, 190, 191 (1997)). “Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross.” *Id.*

The trial court determined that the express easement granted in the Palmer Deed was an easement in gross because it is not essentially necessary to the enjoyment of Lot 6. (R. pp. 13-14.). The trial court’s cited *Jowers v. Hornsby*, 292 S.C. 549, 550-51, 357 S.E.2d 710, 711 (1987) as authority for its determination that the necessity element for an appurtenant easement was not satisfied. (R. pp. 9, 13-14.). This was error because the necessity test in *Jowers* does not apply to express appurtenant easements but instead is only for implied easements by necessity. The easement granted by the Palmer Deed is an express easement, not an implied easement by necessity. The rules for implied easements of necessity do not apply to express appurtenant

easements. *Williams v. Tamsberg*, 425 S.C. 249, 256-266, 821 S.E.2d 494, 503 (Ct.App.2018)(citing *Smith v. Commissioners of Pub. Works of City of Charleston*, 312 S.C. 460, 441 S.E.2d 331 (Ct.App.1994)).⁶

Since express appurtenant easements are perpetual and irrevocable from the time they are granted, the necessity element for an express appurtenant easement is determined at the time express easements are created. *Tamsberg*, at 266-267, 821 S.E.2d at 503-504. Respondents had the burden of proof to prove that the necessity element for an appurtenant easement was not met. “Easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate.” *Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873 (Ct.App.2012)(internal citations omitted). Respondents did not meet their burden of proof because they did not present any evidence that the express easement grant in the Palmer Deed was not necessary at the time of its creation in 1959. The only witnesses who testified on behalf of Respondents were the Respondents themselves. (R. p. 239, lines 20–21). The only evidence Respondents presented regarding necessity was the Respondents’ own opinions regarding current necessity and speculative future necessity, neither of which are evidence relevant to the necessity element of an express appurtenant easement. (R. p. 253, lines 1-3, p. 254 lines 1-2, p. 280, lines 6-8 and lines 17-20, p. 329, line 19 – p. 331, line 3). Appellants’ objected at trial to Respondents’ testimony with regard to necessity on the basis that the Respondents were not parties to the 1959 Palmer Deed, but the trial court overruled that objection. (R. p. 253, lines 4-

⁶ Implied easements by necessity and express easements are different and legally distinct. “An easement may be created by an express written grant.” *Tamsberg*, at 259, 821 S.E.2d 500 (citing *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965)). Implied easements are not created by written grants but instead arise through intent. “The intent of the parties, as shown by all the facts and circumstances under which a conveyance was made, may give rise to an easement by implication.” *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006)(citing *Hamilton v. CCM, Inc.*, 274 S.C. 152, 158, 263 S.E.2d 378, 381 (1980). “The party asserting the right of an easement by necessity must demonstrate: (1) unity of title, (2) severance of title, and (3) necessity.” *Id.* at 418-419, 633 S.E.2d at 140-141 (2006)(citing *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002)).

25). Respondents' counsel argued that the necessity required for the express easement to exist and be appurtenant to Lot 6 is *current* necessity. (R. p. 348, line 20 – p. 350, line 11.) Appellants moved for directed verdict at the close of Respondents' case. (R. p. 336, lines 21-23). However, the trial court did not rule on Appellants' motion for directed verdict. (R. p. 358, line 25– p. 359, line 3). In *Tamsberg*, this Court held that the lower court's grant of summary judgment was proper when the party with the burden of proof did not present evidence that an express easement was not necessary at the time of creation:

“We find the master properly granted Tamsberg's motion for summary judgment because Appellants did not present any evidence that the easement was not necessary at the time of its creation in 1911 or reaffirmation in 1971. Further, no issue of material fact is created when examining the easement's necessity to the present enjoyment of 47 Legare.”

Tamsberg, at 266-267, 821 S.E.2d at 503-504.

Though the trial court applied the *Jowers* test for necessity rather than the *Tamsberg* test, the Trial Order does contain a conclusion of law related to the necessity of the express easement at the time of the Palmer Deed. Item B(11) in the Conclusions of Law section of the Trial Order that “[c]learly, at its inception, the easement was not necessary to access Lot 6...” (R. p. 14, paragraph 11). However, that conclusion of law is not supported by the findings of fact in the Trial Order or any of the evidence provided at trial. None of the findings of fact in the Order regarding the necessity of the express easement grant in the Palmer Deed relate to whether the easement was necessary for the enjoyment of Lot 6 in 1959 when the express easement was created. Instead, all of the findings of fact in the Order regarding the necessity of the express easement relate to whether the express easement is currently necessary for Lot 6 or will be necessary for Lot 6 in the future. (R. p. 9-10). Neither current nor future necessity are relevant

for determining whether an express easement is appurtenant or in gross. *Id.* The trial court's ruling was error as a matter of law and also was not supported by any evidence.

Since the trial court erred in characterizing the express easement granted by the Palmer Deed as an easement in gross, this Court can and should determine the character of the easement to be an appurtenant easement. *See Proctor, In re Estate of Kay, supra.* Express easements are not presumed to be easements in gross when they may be fairly construed as appurtenant. *Rhett, supra.* Here, the Palmer Deed may be fairly construed to grant an appurtenant easement and no evidence provided at trial proved otherwise. The plain and clear language of the easement grant described Dwight's intent for the easement to an appurtenant easement. As discussed hereinabove, when the Palmer Deed is read as a whole the express easement is described as leading from Broughton Road over the fifteen (15') foot wide portion of Lot 5 to Lot 6, which indicates the easement has a terminus on Lot 6. The language in the Palmer Deed includes the phrase "said easement being necessary for the proper use of said lot", which indicates Dwight's intent that the easement was necessary for the enjoyment of Lot 6 at the time of creation. The language in the Palmer Deed includes the phrases "a permanent easement" and "shall be used jointly by the owners of Lots 4, 5, and 6, Block K, their heirs and assigns, and their agents, servants and invitees for purposes of ingress and egress to and from Broughton Road", which indicate Dwight's intent for the easement to concern Lot 6 by providing access to it from Broughton Road and to inhere in the Lot 6 by being perpetual and irrevocable for all current and future owners of Lot 6 to enjoy. Though the phrase "heirs and assigns" will not convert an easement in gross to an appurtenant easement when the elements of an appurtenant easement are not otherwise present, such language is relevant to the determination of the grantor's intent. *Douglas v. Medi. Investors, Inc.*, 256 S.C. 440, 447–48, 182 S.E.2d 720, 723 (1971); *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 423, 143

S.E.2d 803, 808 (1965); *Ballington v. Paxton*, 327 S.C. 372, 381, 488 S.E.2d 882, 887 (Ct.App.1997); see also *Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 468, 441 S.E.2d 331, 336 (Ct.App.1994) (stating that the phrase “all and singular, the rights, members, hereditament and appurtenances to the said premises belonging, or in anywise incident or appertaining[,]” which followed a deed's property description, showed an intent to grant all rights essential to the enjoyment of the premises conveyed.)

IV. Appellants’ use of the express easement created by the Palmer Deed has not exceeded the scope of the easement.

Standard of Review

The existence of an easement is a question of fact in a law action, the determination of the scope of an easement is an equitable matter. *Plott v. Justin Enterprises*, 374 S.C. 504, 649 S.E.2d 92 (Ct.App.2007); see *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 659 S.E.2d 151 (2008). The standard of review for equitable actions is *de novo*. *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011). In equity actions, an appellate court can review the record and make findings based on its view of the preponderance of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 335 S.C. 118, 515 S.E.2d 544 (Ct.App.1999).

Argument

The trial court ruled that if an express easement was created by the Palmer Deed, then Appellants’ use of the express easement exceeds the easement’s scope. This ruling is error.

The trial court’s ruling that Appellants’ use of the easement exceeds the scope of the easement is both incorrect as a matter of law and also not supported by the evidence presented at trial. “The language of an easement determines its extent.” *Plott* at 513, 649 S.E.2d at 96. “[T]he owner of the easement cannot materially increase the burden of the servient estate or impose

thereon a new and additional burden.” *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) (quoting 25 Am.Jur.2d Easements and Licenses, § 72, page 478). “The right of the easement owner and the right of the landowner are not absolute, irrelative and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both.” *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 96, 28 S.E.2d 545, 549 (1943). “In other words, a grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated.” *Id.* If use of an easement is not defined, it must be interpreted as whatever least restricts the property owner. *Snow v. Smith*, 416 S.C. 72, 86, 784 S.E.2d 242, 249 (Ct.App.2016).

However, the use of the express easement in the Palmer Deed is not undefined. To the contrary, the use is specifically defined in the Palmer Deed as being “for the purposes of ingress and egress to Lot 6, Block K, hereinabove described, from Broughton Road.” (R. pp. 435-437). The language describing the use of the express easement does not contain any limitations of access points from the easement to any specific portions of Lot 6. “Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense.” *S.C. Public Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). “The intention of the parties must be determined by a fair interpretation of the grant or reserve creating the easement.” *Springob v. Farrar*, 334 S.C. 585, 595, 514 S.E.2d 135, 141 (Ct.App.1999).

Appellants’ use of the easement to access all portions of Lot 6 between Broughton Road and their parking pad and garage is reasonably necessary and convenient. No evidence was presented at trial that the Appellant’s use of the driveway has materially increased the burden on

Lot 5, or has created a new or additional burden on Lot 5. Instead, the evidence Respondents presented at trial only shows that Respondents *do not like the way the Appellants use their own property, Lot 6.* (R. p. 256, line 13 – p. 273, line 5, p. 289, line 21 – p. 295, line 24, p. 314, lines 6-18, p. 325, line 17 – p. 328, line 20). The driveway located on Lot 5 would be the exact same length and located in the exact same the same location regardless of whether Appellants use it to access only the garage and parking pad on Lot 6 or to also access other points along the driveway between Broughton Road and the garage and parking pad on Lot 6. (R. p. 405). In fact, the driveway would be the exact same length and located in the exact same the same location regardless of whether Appellants used the driveway at all, because the Respondents use the entire length of the driveway to access their home, which is situated farther away from Broughton Road than Appellants’ garage and parking pad. (R. p. 405, p. 243, lines 4-10, p. 244, line 22 – p. 245, line 12).

The Trial Order does not contain any findings of fact supporting a ruling that the Appellants’ use of the easement has materially increased the burden on Lot 5 or that the Appellants’ use of the easement has created a new or additional burden on Lot 5. Instead, the only findings of fact in the Trial Order regarding the overburdening ruling are findings that the Respondents *do not like how the Appellants use their own property, Lot 6.* (R. pp. 11-12). The fact that Respondents do not like seeing vehicles parked on Lot 6 – *which is an activity that occurs outside the boundaries of the easement and on property the Appellants own in fee simple* - does not constitute a burden on the servient estate. The servient estate is only burdened by Appellants’ activities that occur on Lot 5, not Lot 6. No evidence was presented at trial that Appellants’ use of the easement has materially increased the burden on Lot 5 or that the Appellants’ use of the easement has created a new or additional burden on Lot 5.

V. Reformation of the Palmer Deed depends on mutual mistake of the parties in 1959, not mistake of Appellants.

Standard of Review

The standard of review for equitable actions is *de novo*. *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011). In equity actions, an appellate court can review the record and make findings based on its view of the preponderance of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 335 S.C. 118, 515 S.E.2d 544 (Ct.App.1999).

Argument

Appellants' Second Amended Answer and Counterclaim asserted a counterclaim requesting a declaratory judgment reforming the Palmer Deed to reform the phrase "between Lot 4, Block K and Lot 5, Block K" to "between Lot 4, Block K and Lot 6, Block K" based on mistake. (R. pp. 84-86). The trial court did not expressly rule on Appellants' counterclaim for reformation in the Trial Order but included findings of fact in the Trial Order regarding mistake and reformation was not granted. (R. p. 9, paragraphs 15-17). The findings of fact on which the trial court based its denial of Appellants' counterclaim for reformation are errors as a matter of law.

In item C(17) in the Findings of Fact in the Trial Order, the trial court found that Appellants' knowledge and sophistication as an attorney and an experienced real estate investor, respectively, defeated any claim of mistake. (R. p. 9). In item A(5) of the Conclusions of Law in the Trial Order, the trial court found that no evidence of mutual mistake supporting reformation of the Palmer Deed was presented at trial. (R. p. 13). In item A(6) of the Conclusions of Law in the Trial Order, the trial court found that the constructive notice provided to Appellants by the recorded documents in the chain of title to Lot 6 defeated any claim of mistake. (R. p. 13). Appellants

requested that the trial court reconsider those findings of fact in its post-trial motion for reconsideration, which the trial court denied in its Motion for Reconsideration Order. (R. p. 105-107).

The trial court's denial of Appellants' counterclaim for reformation based on these factual rulings are error as a matter of law because these findings regarding mistake are irrelevant to the mistake required for reformation of the Palmer Deed. The mistake required for reformation of a contract on the ground of mistake is mutual mistake of the parties to the contract. "A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it." *George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 590, 545 S.E.2d 500, 504 (2001). "A mistake is mutual whe[n] both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Before equity will reform a contract, the existence of a mutual mistake must be shown by clear and convincing evidence." *Id.* (citation omitted).

Here, the mutual mistake occurred between the parties to the Palmer Deed, which were Charles S. Dwight to Rebecca M. Palmer. Appellants were not parties to the Palmer Deed. Neither their knowledge nor their sophistication is relevant to their declaratory counterclaim seeking reformation of the Palmer Deed based on mistake. Only the mistake of the parties to the Palmer Deed, Charles S. Dwight to Rebecca M. Palmer, is relevant for Appellants' reformation counterclaim. However, the trial court did not consider any of the evidence presented regarding the intent of Charles S. Dwight and Rebecca M. Palmer when ruling on mutual mistake.

Reformation based on mutual mistake is an equitable remedy. *56 Leinbach Invs., LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 769 S.E.2d 242 (Ct.App.2014). A party seeking

reformation because of mutual mistake must prove a mutual mistake by clear and convincing evidence. *Crosby v. Protective Life Insurance Co.*, 293 S.C. 203, 359 S.E.2d 298 (Ct.App.1987).

The clear and convincing standard for reformation is due to reformation being an extraordinary remedy:

Reformation is an extraordinary remedy, but one that is appropriate to correct a mistake in a written document the has been proven by clearly and convincingly not available to rewrite instruments.

Although reformation corrects a mistake between the written document and the actual intent of the contracting parties, it will not rewrite a contract simply because it has become less favorable to one party. Under the remedy of reformation, the law will not make a better contract than that which the parties themselves have seen fit to enter into, or will not alter it for the benefit of one party to the detriment of another.

Reformation is not available for the purpose of making a new and different contract for the parties but is confined to establishment of the actual agreement; thus, a court of equity cannot, and should not, undertake to make a new contract between the parties by reformation. Thus, a court may not substitute by reformation an agreement that it thinks is proper but to which the parties had never assented.

66 Am.Jur.2d Reformation of Instruments § 1 (2011) (footnotes omitted).

Here, the Appellants did not seek to rewrite the Palmer Deed because doing so would benefit them or be to the detriment of Respondents. Instead, they sought reformation because the evidence is clear and convincing that the inclusion of the phrase “between Lot 4, Block K and Lot 5, Block K” instead of “between Lot 4, Block K and Lot 6, Block K” in the easement grant language of the Palmer Deed was simply a scrivener’s error that was mutual mistake between Dwight and Rebecca Palmer.

Since the standard of review on Appellants’ counterclaim for reformation is *de novo*, this Court is able to reform the Palmer Deed to correct the scrivener’s error. *See Lewis, Townes Assoc, supra*. Clear and convincing evidence was presented to the trial court that Charles S. Dwight and

Rebecca M. Palmer intended for the Palmer Deed to create an express appurtenant easement over Lot 5 between Lot 4 and Lot 6 for the purpose of ingress and egress to Lot 6 from Broughton Road, as discussed already hereinabove. No evidence was presented to the trial court that Dwight and Rebecca Palmer did not intend for the easement to be created.

VI. Respondents' claims should be barred under the doctrine of laches.

Standard of Review

The standard of review for equitable actions is *de novo*. *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011). In equity actions, an appellate court can review the record and make findings based on its view of the preponderance of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 335 S.C. 118, 515 S.E.2d 544 (Ct.App.1999).

Argument

Appellants asserted the affirmative defense of laches but the Trial Order did not contain a ruling on laches. (R. p. 84, paragraph 58, p. 6-16). Appellants requested in its post-trial motion for reconsideration for the trial court to amend the Trial Order to issue a ruling on the affirmative defense of laches, which the trial court denied. (R. p. 97, pp. 3-5).

The equitable doctrine of laches is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Jones v. Leagan*, 384 S.C. 1, 16, 681 S.E.2d 6, 20-21 (Ct.App.2009)(citing *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1998)). The party seeking to establish laches must show (1) delay, (2) that was unreasonable under the circumstances, and (3) prejudice. *Id.* (citing *Kelley v. Kelley*, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct.App.2006)). The determination of whether laches has been established is largely within the discretion of the trial

court. *Id.* Additionally, for the defense of laches to be sustained, “the circumstances must have been such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts.” *Id.* (quoting *Byars v. Cherokee County*, 237 S.C. 548, 560, 118 S.E.2d 324, 330 (1961)).

Appellants acquired the right to use the express easement on August 27, 2007 when they acquired Lot 6 and have used Lot 5 to access Lot 6 since that point in time. (R. p. 364, lines 1-9). Appellants will be prejudiced if they are unable to use their express easement rights under the Palmer Deed to access Lot 6 from Broughton Road using the shared driveway, because they purchased Lot 6 in good faith based on reliance that the express easement rights under the Palmer Deed provided access to Lot 6 over the shared driveway.

Respondents had actual knowledge when they purchased Lot 5 in 2005 that the owners of Lots 4 and 6 had easement rights to use the driveway on Lot 5. (R. p. 323, lines 6-22). Respondents had constructive knowledge when they purchased Lot 5 in 2005 that their title to Lot 5 was subject to the express easement described in the Palmer Deed, because it was expressly referenced in Respondents’ vesting deed. (R. p. 411-417). The evidence at trial shows that Respondents did not challenge Appellants’ express easement rights to use the driveway at any point in time prior to January 30, 2018. (R. p. 279, lines 10-20, p. 285, line 4 – p. 286, line 17, p. 316, lines 1-12).

All of the evidence presented at trial also shows that Respondents never challenged the use of the driveway by any of the owners of Lot 4, all of whom had essentially identical express easement rights as Appellants. (R. p. 255, lines 7-25, p. 298, lines 17-23). The evidence also shows that Respondents did not have any personal grievances with the owners of Lot 4. (R. p. 255, lines 7-25, p. 298, lines 17-23).

However, Respondents have plenty of grievances with Appellants. Respondents admitted at trial that they had no right to prevent Appellants from using the driveway on Lot 5 to access their property (R. p. 330, lines 11-17.) However, in the next breath Respondents testified that it would be “the fair thing to do” to “eliminate the easement” because of Appellants’ “abuse and overuse” (R. p. 330, lines 18-25.) Despite Respondents’ attempts to characterize Appellant’s use of the driveway as “abusive”, the evidence at trial clearly showed that Appellants’ use of the driveway was well within the scope of the express easement under the terms of the Palmer Deed and Respondents’ purpose for seeking to extinguish Appellant’s express easement rights had nothing to do with the Appellants’ use driveway itself but instead was because Respondents *do not like the way Appellants use their own property, Lot 6*. (R. p. 256, line 13 – p. 273, line 5, p. 289, line 21 – p. 295, line 24, p. 314, lines 6-18, p. 325, line 17 – p. 328, line 20). Respondents’ testimony is summed up by Russell Schaible’s statement that *Appellants’ property* “was frankly an eyesore.” (R. p. 259, line 25.)

The aesthetics of Lot 6 simply have no bearing whatsoever on Appellants’ use of the driveway on Lot 5 or the interpretation of the express easement grant contained in the 1959 Palmer Deed. Respondents’ delay of nearly twenty (20) years after Appellants began using the driveway is unreasonable under the circumstances. The equities favor Appellants.

VII. The trial court’s injunction exceeds enforcement of the declaratory judgments.

Standard of Review

“Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues.” *Est. of Tenney v. S.C. Dep’t of Health & Env’t Control*, 393 S.C. 100, 712 S.E.2d 395 (2011)(citing *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)). When a suit involves both legal and equitable issues, each cause of

action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 180, 708 S.E.2d 787, 792 (Ct.App.2011).

The standard of review for equitable actions is *de novo*. *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011). In equity actions, an appellate court can review the record and make findings based on its view of the preponderance of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 335 S.C. 118, 515 S.E.2d 544 (Ct.App.1999).

Argument

The trial court issued an injunction in the Trial Order enjoining Appellants from “accessing the easement located on Lot 5 to access 27 Broughton Road (Lot 6).” (R. p. 15, paragraph 3). This ruling is error as a matter of law.

Respondents brought their action under the Uniform Declaratory Judgments Act, S.C. Code Ann § 15-53-10, *et seq.* S.C. Code Ann § 15-53-20 provides that “[c]ourts of record ... shall have power to declare rights, status and other legal relations.” S.C. Code Ann § 15-53-120 establishes the power and authority of courts to grant coercive relief based on declaratory judgments:

“[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.”

The South Carolina Supreme Court has interpreted the Uniform Declaratory Judgment Act to authorize coercive relief to be granted along with declaratory relief where the proper grounds for

such relief appear from the pleadings and proof. *Bank of Augusta v. Satcher Motor Co.*, 249 S.C. 53, 152 S.E.2d 676 (1967).

Here, the injunction issued by the trial court is overly broad and extends beyond enforcement of the declaratory relief requested by Respondents. Respondents brought their action under the Uniform Declaratory Judgments Act and pled their request for an injunction specifically as coercive relief based on certain declaratory judgments requested. (R. pp. 33-44). S.C. Code Ann § 15-53-120 limits the trial court's ability to grant coercive relief to only enjoining the rights specifically requested by the pleadings to be declared and enforced. The injunctive relief requested in Respondents' Complaint was limited to the enforcement of certain matters declared by the declaratory judgments, specifically enjoining Appellants' use of the driveway on Lot 5 "to access all points along the easement and in all other impermissible ways" if the express easement grant in the Palmer Deed "is determined to be existing, valid and appurtenant..." (R. pp. 42-43, paragraph 65).

The injunction contained in the Trial Order is overly broad and exceeded the trial court's authority under S.C. Code Ann § 15-53-120 for multiple reasons:

First, the trial court ruled in the Trial Order that the Palmer Deed did not create an express easement, and alternatively if it did, then the express easement created was not an appurtenant easement but instead was an easement in gross that no longer exists. (R. p. 14). Since trial court determined that the 1959 Palmer Deed did not grant a valid express appurtenant easement, it was neither proper nor necessary for the trial court to issue the injunction contained in the Trial Order.

Second, the injunctive relief requested by Respondents was limited to the scope of the express easement determined by the declaratory judgments. (R. pp. 42-43, paragraphs 64-66). It was neither proper nor necessary for the trial court to completely enjoin Appellants from using the

driveway on Lot 5, rather than limiting Appellants' use of the driveway on Lot 5 to the permissible scope of the express easement.

Third, the injunction issued by the trial court in the Trial Order purports to enjoin rights that were not adjudicated in the action. Respondents' Complaint specifically and only sought declaratory judgments determining the existence, character and scope of the express easement granted by the Palmer Deed. (R. pp. 36-42). No other rights Appellants may have to use Lot 5 for access to Lot 6 from Broughton Road were determined, or requested to be determined, by the declaratory judgment causes of action, for example implied easement rights or prescriptive easement rights. It was neither proper nor necessary for the trial court to enjoin Appellants from using the driveway pursuant to other rights Appellants may have that were neither requested to be determined nor determined by the declaratory judgments.

CONCLUSION

As discussed above, the master in equity did not have subject matter jurisdiction to conduct trial or issue either of the Trial Order or the Motion to Reconsider Order. The trial court also made reversible error in the holdings, and the findings on which each of the holdings are based, for Respondents on all of Respondents' causes of action, and also on Appellants' counterclaim for reformation. Accordingly, both the Trial Order and the Order on Motion for Reconsideration should be vacated as void. Alternatively, both the Trial Order and the Order on Motion for Reconsideration should be reversed, each of Respondents' causes of action should be dismissed, and Appellants should be granted a declaratory judgment reforming the Palmer Deed as described herein.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Shawn R. Willis

Shawn R. Willis (SC Bar No. 71155)

151 Meeting Street / Sixth Floor

Post Office Box 1806 (29402-1806)

Charleston, SC 29401-2239

(843) 853-5200

E-Mail: shawn.willis@nelsonmullins.com

Attorneys for Appellants

Ilonka Sonja Taylor and David Abdo

Charleston, South Carolina

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