

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
J Michael Baxley, Circuit Court Judge

S.S. SUPREME COURT

Op No 4725
(S C Ct App filed August 11, 2010) ~

David Ashenfelder,

Respondent,

v

City of Georgetown,

Petitioner

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Ashenfelder, Respondent-Appellant,

v

City of Georgetown, Appellant-Respondent

Appeal From Georgetown County
J Michael Baxley, Circuit Court Judge

Opinion No 4725
Heard December 10, 2009 – Filed August 11, 2010

APPEAL DISMISSED

Andrew F Lindemann, of Columbia, for Appellant-Respondent

David J Gundling, of Pawleys Island, for Respondent-Appellant

PER CURIAM In this cross-appeal, the City of Georgetown (the City) alleges the trial court erred in denying its directed verdict motions on David Ashenfelder's causes of action for conversion and prescriptive easement. Ashenfelder alleges the trial court erred in granting directed verdicts on his causes of action for adverse possession, declaratory judgment, estoppel,

trespass, and inverse condemnation prior to the declaration of a mistrial. We dismiss the appeal as premature.

FACTS/PROCEDURAL BACKGROUND

A vehicle struck and severely damaged a billboard in Georgetown operated by Ashenfelder. Prior to the accident, Ashenfelder never formally sought a sign permit from the City. After the accident, the City removed and disposed of the damaged billboard and Ashenfelder inquired as to the possibility of rebuilding the billboard. The City informed Ashenfelder that the billboard was located on city property and that the City would not issue a permit allowing him to rebuild.

Ashenfelder originally filed suit against the City asserting certain federal constitutional claims along with state law claims. The City removed the action to the United States District Court for the District of South Carolina. Subsequently, the district court dismissed Ashenfelder's federal claims and remanded the state law claims to the circuit court. Upon remand, Ashenfelder amended his complaint to add Lucien Bruggeman as an additional defendant. In his second amended complaint, Ashenfelder asserted causes of action for adverse possession and prescriptive easement against Bruggeman; he also asserted causes of action for conversion, negligence, trespass, estoppel, declaratory judgment, and inverse condemnation against the City.

The case proceeded to trial, and the City moved for directed verdicts on all causes of action at the close of Ashenfelder's case. The trial court directed a verdict and dismissed Ashenfelder's causes of action for adverse possession, declaratory judgment, estoppel, negligence,¹ trespass, and inverse condemnation. The trial judge denied the City's motion for a directed verdict on Ashenfelder's claims for conversion and prescriptive easement. After the jury was unable to reach a verdict, the trial court declared a mistrial and

¹ Ashenfelder did not address the ruling on his cause of action for negligence in his statement of issues on appeal. See Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.")

denied the City's renewed directed verdict motions on the remaining two causes of action. The City and Ashenfelder both appealed.²

STANDARD OF REVIEW

An appellate court may determine the question of appealability of a decision from a lower court as a matter of law. See S C Code Ann § 14-3-330 (1976 & Supp 2009) (creating appellate jurisdiction in law cases), S C Code Ann § 14-8-200(a) (Supp 2009) (setting forth the appellate jurisdiction of the court of appeals), City of Newberry v Newberry Elec Coop, Inc., 387 S C 254, 256, 692 S E 2d 510, 512 (2010) ("Statutory interpretation is a question of law"). Even if not raised by the parties, this court may address the issue of appealability *ex mero motu*. Main Corp v Black, 357 S C 179, 180-81, 592 S E 2d 300, 301 (2004) (affirming an order issued by the court of appeals *ex mero motu* dismissing an interlocutory appeal), St Francis Xavier Hosp v Ruscon/Abco, 285 S C 584, 586, 330 S E 2d 548, 549 (Ct App 1985) (addressing the question of appealability even though neither party raised the issue).

LAW/ANALYSIS

The City alleges the trial court erred in denying its directed verdict motions on Ashenfelder's causes of action for conversion and prescriptive easement. In his cross-appeal, Ashenfelder alleges the trial court erred in directing verdicts on his causes of action for adverse possession, declaratory judgment, estoppel, trespass, and inverse condemnation.

This case presents a question as to the effect of a mistrial on appealability in a case with multiple claims and multiple defendants where the court directs a verdict on some, but not all, claims prior to the mistrial. Jurisprudence as to a mistrial holds:

A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court. State v Smith, 336 S C 39, 518 S E 2d 294 (Ct App 1999). It

² Bruggeman did not appeal.

leaves the parties "as though no trial had taken place " Grooms v Zander, 246 S C 512, 514, 144 S E 2d 909, 910 (1965) (rulings of trial judge in proceeding ending in mistrial represent no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante) A court ruling as to admissibility and competency of testimony during a trial which is later declared a mistrial results "in no binding adjudication of the rights of the parties " Keels v Powell 213 S C 570, 572, 50 S E 2d 704, 705 (1948)

State v Woods, 382 S C 153, 158, 676 S E 2d 128, 131 (2009) A mistrial based on the failure of a jury to agree is not directly appealable Keels, 213 S C at 572-73, 50 S E 2d at 705 The denial of a directed verdict is not appealable until after final judgment Id at 573, 50 S E 2d at 705

Section 14-3-330 controls the right of appeal Ex parte Capital U-Drive-It, Inc., 369 S C 1, 6, 630 S E 2d 464, 467 (2006)

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions, *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from,

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the

action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action,

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver

S C Code Ann § 14-3-330 (emphasis in original) The court of appeals also exercises its appellate jurisdiction under this statute S C Code Ann § 14-8-200(a) ("This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case ")

The appellate courts of our state have addressed the appealability of final decisions of the trial courts See, e.g., Lewis v State, 368 S C 630, 631, 630 S E 2d 464, 464 (2006) ("Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory, but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final ") (quoting Adickes v Allison & Bratton, 21 S C 245, 259 (1884)), Jefferson by Johnson v Gene's Used Cars, Inc., 295 S C 317, 318, 368 S E 2d 456, 456 (1988) (finding an interlocutory order is appealable under S C Code Ann § 14-3-330(1) only if it involves the merits, i.e. it "finally determines some substantial matter forming the whole or a part of some cause of action or defense ") (quoting Henderson v Wyatt, 8 S C 112, 112 (1877)), Lakes v State, 333 S C 382, 384-85, 510 S E 2d 228, 230 (Ct App 1998) ("An appellate court has jurisdiction to review an order affecting a substantial right when the order has the effect of discontinuing the action or preventing an appealable judgment ") (citing S C Code Ann § 14-3-330(2)(a) (Supp 1997)), Breland v Love Chevrolet Olds, Inc., 339 S C 89, 93-94, 529 S E 2d 11, 13 (2000) (stating that the court does not generally allow immediate

appellate review of the denial of any motions made pursuant to Rules 12(b) or 12(c), SCRCPP), Bank of N Y v Sumter County, 387 S C 147, 154, 691 S E 2d 473, 477 (2010) (noting it is well-settled that an order denying summary judgment is never reviewable on appeal) (citing Olson v Faculty House of Carolina, Inc., 354 S C 161, 580 S E 2d 440 (2003)), Keels, 213 S C at 573, 50 S E 2d at 705 (holding an order refusing to direct a verdict is not appealable until after final judgment)

Because the trial court denied the City's motions for directed verdict, the City's issues on appeal are not immediately appealable. See Keels, 213 S C at 573, 50 S E 2d at 705. As to Ashenfelder's cross-appeal, this case further presents an opportunity to address the effect, if any, of Rule 54(b) of the South Carolina Rules of Civil Procedure upon our jurisprudence. Rule 54(b) states

(b) Judgment Upon Multiple Claims or Involving Multiple Parties When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is *subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties*

Rule 54(b), SCRCPP (bold emphasis in original) (italicized emphasis added)

In Link v School District of Pickens County, 302 S C 1, 393 S E 2d 176 (1990), the supreme court considered the impact of Rule 54(b) where the appellant failed to immediately appeal a partial grant of summary judgment. The process of directing entry of judgment on one or more, but less than all, claims under Rule 54(b) is referred to as certification. Link, 302 S C at 4, 393 S E 2d at 177. The court noted that an order which is immediately appealable by statute is not rendered unappealable because it has not been certified under Rule 54(b). Id. Ultimately, the court found the appellant was entitled, pursuant to section 14-3-330(1), to wait until there was a final judgment against him to appeal the partial grant of summary judgment. Id at 6, 393 S E 2d at 179. However, the court recognized

This Court has not had occasion to address the effect of granting a Rule 54(b) certification on appealability. Until the adoption of the South Carolina Rules of Civil Procedure, "final judgment" was a term of art denoting the disposition of *all* issues in the action. This is the definition which has traditionally been applied to the term "final judgment" in [section] 14-3-330(1). Rule 54(b) certification purports to alter the definition of "final judgment" by allowing a final judgment to be entered on certain claims before disposition of the entire case. Until this Court determines whether granting certification mandates an immediate appeal, the safer course is to immediately appeal any order certified under Rule 54(b).

Id at 5 n 3, 393 S E 2d at 178 n 3 (emphasis in original) (internal citations omitted)

The supreme court specifically indicated in Link that it has not yet addressed the effect of certification by a trial court. Id. Even though the partial decision herein was not certified by the trial court, this case involves an additional concern under Rule 54(b) that was not addressed in Link. The rule specifically states that when fewer than all claims have been adjudicated, "the order or other form of decision is subject to revision at any time before

the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties " Rule 54(b), SCRCP Because the directed verdicts on Ashenfelder's causes of action for adverse possession, declaratory judgment, estoppel, trespass, and inverse condemnation are subject to revision under Rule 54(b) in the absence of certification, we need not yet reach whether the decisions are immediately appealable under section 14-3-330 In essence, we are one step removed from the question of whether section 14-3-330 is controlling, as noted in Link, because we do not yet have a decision that dons a veil of appealability due to the potential for revision Appellate courts should not delve into the realm of reviewing decisions that may be altered by the trial judge See, e.g., State v Glenn, 285 S C 384, 385 330 S E 2d 285 285-86 (1985) (finding appellate review speculative when the trial judge is free to alter his ruling)

A trial judge may direct a verdict where there are no material facts in dispute and the case presents only a question of law Rule 50(a), SCRCP, Fields v J Haynes Waters Builders, Inc., 376 S C 545, 564, 658 S E 2d 80 90 (2008) However, that decision is still subject to revision at any time before entry of that judgment by the clerk when the directed verdict is not certified and other claims in the action have not yet been adjudicated

The trial judge, under our procedure, is afforded many opportunities to change his mind For instance no authority is needed for the proposition that a trial judge even after judgment, has the right to grant a new trial based upon his reconsideration of a previous motion for directed verdict and of course many other illustrations could be given of a trial judge's right to reconsider decisions he has made during the course of a trial and before final judgment is entered

PPG Indus., Inc v Orangeburg Paint & Decorating Ctr., Inc., 297 S C 176, 183, 375 S E 2d 331, 335 (Ct App 1988), see also Rule 54(b), SCRCP, Grooms, 246 S C at 514, 144 S E 2d at 910 ("When the trial of this case was thus terminated, the status of the litigation and of the parties became the same as though no trial had taken place ")

Moreover, this court has had the opportunity to explore the application of Rule 54(b), finding the time to file post-trial motions did not begin to run until all claims had been adjudicated, where there was no "express determination" that there was no reason for delay in entering judgment on the previously adjudicated claims Holroyd v Requa, 361 S C 43, 53-54, 603 S E 2d 417, 422 (Ct App 2004) This court has also held that Rule 54(b) does not require certification, but if the court chooses to certify a judgment, it must do so in a definite and unmistakable manner Tommy L Griffin Plumbing & Heating Co v Jordan, Jones & Goulding, Inc., 351 S C 459, 466, 570 S E 2d 197 200 (Ct App 2002) Federal Rule 54(b) is substantially similar to the South Carolina rule See Fed R Civ P 54(b) Under the federal rule, "[a]bsent a certification under Rule 54(b) any order in a multiple[]claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory " 10 Charles Alan Wright, Arthur R Miller & Mary Kay Kane, Federal Practice and Procedure § 2654 (3d ed 2010) "[A]n appeal from a decision adjudicating a portion of the case must be dismissed " 10 Charles Alan Wright, Arthur R Miller, and Mary Kay Kane, Federal Practice and Procedure § 2660 (3d ed 2010)

As previously indicated, in the context of a mistrial in a case involving multiple claims, Rule 54(b) suggests that the directed verdicts on some claims may not be final because these decisions are subject to revision While it may be possible for us to harmonize the rule with mistrial jurisprudence by limiting its impact to evidentiary or similar trial decisions, the specific language of Rule 54(b) is much broader as it addresses any decision or order, however designated, ultimately, we may wish to review the need to revise the rule if we do not wish to accept its parameters or if it is inconsistent with desired appellate jurisprudence In addition, we recognize that there are judicial economy arguments under either interpretation, however, the scope of the rule greatly assists the appellate review process, especially in a situation where the record does not include the entry of any written decision on the partial judgment Similarly, judicial economy is thwarted if trials are stopped upon appeal of a partial directed verdict after presentation of the plaintiff's case

In this matter, no judgment was ever entered by the clerk and as indicated, no written or form order memorialized the directed verdicts See

Serowski v Serowski, 381 S C 306, 315, 672 S E 2d 589, 594 (Ct App 2009) ("Until written and entered, a court has discretion to modify or amend a ruling ") Rather, the only order entered was a form order declaring a mistrial See Rule 58(a)(2), SCRCP ("Subject to the provisions of Rule 54(b) the court shall promptly prepare the form of the judgment and after review and approval by the court, the clerk shall promptly enter it") Therefore, because the decision is subject to revision pursuant to Rule 54(b) and because there is neither a written order memorializing the directed verdicts under Rule 58(a)(2) nor entry of an order, the only judgment in this case is the order declaring a mistrial See Rule 77(d), SCRCP, Grooms 246 S C at 514, 144 S E 2d at 910

Rule 54(b), without conflicting with Link, affords the trial court an opportunity to exercise its discretion to make sure there will be no need to revise a directed verdict or any other decision Aside from a hung jury it is possible for a court to grant a mistrial based on its own recognition of error in earlier rulings or in the proceedings See Ford v State Ethics Comm'n, 344 S C 642, 645, 545 S E 2d 821, 823 (2001) ("There is no dispute a trial court has the discretion to change its mind and amend its oral ruling "), PPG Indus., Inc., 297 S C at 183-84, 375 S E 2d at 335 (discussing the many opportunities of the trial court to change its mind) Thus, the rule affords the court the opportunity to correct its prior rulings or address any fairness or other concerns about the trial proceedings Pursuant to the process of certification, the appellate courts of this state need not question whether or not the possibility of revision exists Moreover, this requirement does not present an onerous burden upon trial counsel because a motion to certify need not be extensive, if such motion is desired Importantly, the analysis herein does not preclude entry of an order maintaining the earlier directed verdicts, instead, the focus of the rule invites a determination by the trial court that the decision is no longer subject to revision Once we are assured that the possibility of revision no longer exists, then we may proceed to analyze whether a decision is appropriate for appeal under Link and section 14-3-330³

³ We are hesitant to apply a ten-day cap on revision of the court's oral rulings because that ten-day period is also necessarily tied to the entry of a written order See Leviner v Sonoco Prods Co., 339 S C 492, 494, 530 S E 2d 127,

Turning to the case at hand, the directed verdicts on Ashenfelder's claims remain subject to revision. There is no written order directing the clerk to enter judgment, as required by the Rules of Civil Procedure. See Rule 58(a), SCRCP ("A judgment is effective only when so set forth and entered in the record.")

Without prejudice, the appeal in this matter is hereby

DISMISSED

WILLIAMS, PIEPER, and LOCKEMY, JJ , concur

128 (2000) (stating that a trial judge has only ten days from entry of judgment to alter or amend an earlier order absent an indication that a more full and complete order or judgment is to follow)

The South Carolina Court of Appeals

David Ashenfelder,

Respondent/Appellant

v

City of Georgetown,

Appellant/Respondent

The Honorable J. Michael Baxley
Georgetown County
Trial Court Case No. 2004 CP 22 00955

ORDLR DENYING PETITION FOR REHEARING

PER CURIAM After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence there is no basis for granting a rehearing.

It is therefore ordered that the Petition for Rehearing be denied.

H. Baxley

Daniel G. Pieper

James E. Schryer

Columbia, South Carolina

cc Andrew F. Lindemann, Esq.
David J. Gundling, Esq.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
I Michael Baxley Circuit Court Judge

SC Court of Appeals

Case No 2004-CP-22-0955

David Ashenfelder

Respondent-Appellant

v

City of Georgetown

Appellant-Respondent

**SUPPLEMENTAL BRIEF
OF RESPONDENT-APPELLANT**

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STATEMENT OF ISSUE ON APPEAL

Is the denial of a renewal motion for directed verdict under Rule 50(b) after the jury fails to reach a verdict immediately appealable?

STATEMENT OF THE CASE

This case proceeded to trial on October 8, 2007 before Judge J Michael Baxley and a jury. At the close of the case in chief, the City and Bruggemann moved for a directed verdict (R p 169-242). At that time the Trial Judge granted a directed verdict and dismissed the causes of action for negligence, estoppel and inverse condemnation, adverse possession, declaratory and injunctive relief. The Trial Judge refused to grant a directed verdict on the conversion cause of action and the prescriptive easement cause action and the case was submitted to the jury. The jury was not able to reach a unanimous verdict, and as a result, the Trial Judge declared a mistrial (R p 294). Pursuant to Rule 50(b), SCRCP, the City made a renewal directed verdict/JNOV motion after the jury could not reach a verdict. The motion was denied by Judge Baxley (R p 295).

The City subsequently filed a timely appeal to this Court from the trial court denial of the directed verdict motions and renewal directed verdict/JNOV action on the remaining causes of action for conversion and prescriptive easement.

ARGUMENTS

I THE DENIAL OF A RENEWABLE MOTION UNDER RULE 50(B) AFTER THE JURY FAILS TO REACH A VERDICT IS NOT IMMEDIATELY APPEALABLE

Pursuant to Rule 48, SCRCP, the jury verdict must be unanimous. The jury failed to reach a unanimous verdict and the Trial Judge granted a mistrial and returned the case to the trial docket (R p 294). After the mistrial was granted, the City renewed its directed verdict motion.

which was denied by the Trial Judge (R p 295) The City appealed the Trial Judge's denial of his motion for directed verdict/JNOV pursuant to Rule 50(b), SCRCP Rule 50(b) SCRCP provides in part as follows

(b) Motion for Judgment Notwithstanding the Verdict Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion if a verdict was not returned such party may move for judgment in accordance with his motion for a directed verdict A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial

The right to appeal is granted in S C CONST Art V, § 5 where it is stated that “ The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe ” As such in the civil arena the right of appeal arises from and is controlled by statutory law *Chem-Nuclear Systems LLC v South Carolina Bd of Health and Environmental Control*, 374 S C 201, 648 S E 2d 601 (2007) *Ex Parte Capital U-Drive-It Inc* 630 S E 2d 464 (S C 2006), and *Wright v Dickey*, 636 S E 2d 1 (S C Ct App 2006) The relevant statute for civil law appeals is S C CODE ANN § 14-3-330 which provides in part as follows

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions, *provided* that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from,

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action,

The denial of the City's motion for directed verdict/JNOV is interlocutory and not appealable. "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory [and not final]" *Mid-State Distribs Inc v Century Importers Inc* 310 S C 330, 426 S E 2d 777 (1993), *Ex parte Wilson* 367 S C 7, 625 S E 2d 205 (2005), and *Wieters v Bon-Secours-St Francis Xavier Hosp Inc* 378 S C 160, 662 S E 2d 430 (Ct App 2008). An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. *Ex Parte Capital U-Drive-It Inc* 630 S E 2d 464 (S C 2006).

The denial of a motion for directed verdict/JNOV is not a final judgment. The South Carolina Appellate Court Rules provide that provides in part that "Judgments, Orders and Decisions Subject to Appeal. Appeal may be taken, as provided by law, from any final judgment appealable order or decision." Rule 201 SCACR. The denial of the City's motion for a directed verdict/JNOV is not a final judgment. South Carolina adheres to the final judgment rule, which provides that, with certain exceptions, an appeal lies only from a final judgment. S C Code Ann § 14-3-330, Rule 72, SCRCR, Rule 201(a) SCACR, *Brunson v American Koyo Bearings* 623 S E 2d 870 (S C Ct App 2005). As a general rule, only final judgments are appealable. *Wieters v Bon-Secours-St Francis Xavier Hosp, Inc* 378 S C 160, 662 S E 2d 430 (Ct App 2008), *Bolding v Bolding*, 283 S C 501, 323 S E 2d 535 (Ct App 1984). *Ex Parte Capital U-Drive-It Inc*, 630 S E 2d 464 (S C 2006). *Hagood v Sommerville* 607 S E 2d 707 (S C 2005). *Ex parte Wilson* 367 S C 7, 625 S E 2d 205 (2005).

Further the denial of a motion for directed verdict/JNOV is not an ultimate decision on the merits. Generally, an order is a final judgment on one or more issues, for purposes of appeal,

if it constitutes an ultimate decision on the merits, and order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case *Mungo v Rental Uniform Service of Florence Inc* 678 S E 2d 825 (S C Ct App 2009)

In *Pocisk v Sea Coast Const of Beaufort*, 380 S C 584, 671 S E 2d 98 (S C App ,2008), the court held that

Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within § 14-3-330 *Baldwin Const Co Inc v Graham* 357 S C 227, 593 S E 2d 146 (2004) Intermediate orders involving the merits may be immediately appealed pursuant to § 14-3-330(1) An order which involves the merits is one that “must finally determine some substantial matter forming the whole or a part of some cause of action or defense ” *Mid-State Distribs Inc* 310 S C at 334 426 S E 2d at 780 Interlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2) Orders affecting a substantial right “discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense ” *Id* at 335 n 4, 426 S E 2d at 780 n 4

Rule 72, SCRCP provides that “Appeal may be taken, as provided by law, from any final judgment or appealable order ” Although the Respondent Appellant recognizes that this rule does not control appealability, the Note to the Rule sets forth the policy behind the proposition that appeals may only be taken from final orders The Note provides that

This Rule 72 parallels, in part S C Code § 14-3-330, but is designed to reduce appeals from interlocutory or intermediate orders in an action It accords with the modern decisions of the Supreme Court narrowing “dilatory appeals” from such interlocutory orders as grant or deny motions addressed to the pleadings, motions at trial, and the like All such questions are left to the appeal from final judgment or order of dismissal There is no conflict with the Supreme Court jurisdictional statutes and all statutory rights to appeal are preserved specifically by subdivision (6)

Professor Lightsey discusses the general rule of appealability as follows (see 15 S C JUR Appeal and Error § 15)

As noted above, the statutory provisions concerning appellate jurisdiction provide explicitly for immediate appeals from interlocutory decisions in certain circumstances [FN1 citations contained in footnotes will be omitted] Nevertheless, the Supreme Court and Court of Appeals have repeatedly maintained that as a general rule, only final judgments are appealable [FN2] Thus, if an interlocutory decision does not fit

neatly within one of the statutory exceptions to the final judgment rule, a party may not take an immediate appeal from that decision [FN3]

The underlying purposes of the final judgment rule are to allow lawsuits to be completed without the delay and expense of interlocutory appeals, to enable the appellate courts to review cases in whole rather than in a piecemeal fashion, and to avoid the waste of judicial resources that might result from appellate resolution of issues that final judgment renders moot [FN4]

In order to be "final," a judgment must result in a binding adjudication of the rights of the parties [FN5] It must dispose of the cause, or a distinct branch thereof, as to all the parties, reserving no further questions or directions for future determination It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term, that is, it must put the case out of Court, and must be final in all matters within the pleadings [FN6]

In the case at bar, the Trial Judge denied the City's Rule 50(b) motion and left the matter as it was, i e , a mistrial with the matter being placed on the trial docket A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court *State v Smith* 336 S C 39, 518 S E 2d 294 (Ct App 1999) It leaves the parties 'as though no trial had taken place" *Grooms v Zander*, 246 S C 512, 514, 144 S E 2d 909, 910 (1965) (rulings of trial judge in proceeding ending in mistrial represent no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante) A court ruling as to admissibility and competency of testimony during a trial which is later declared a mistrial results "in no binding adjudication of the rights of the parties" *Keels v Powell* 213 S C 570, 572, 50 S E 2d 704, 705 (1948) Based upon the above authority, the failure to grant the directed verdict was not a final ruling on the matter in that the City had the right in the new trial to raise the same issues and have them decided by the trial judge or jury

It is well settled in South Carolina that an order denying a motion for a directed verdict or a nonsuit is not appealable until after final judgment 15 S C JUR Appeal and Error § 26, *Keels*

v Powell 213 S C 570, 50 S E 2d 704 (1948) *Hayes v Atlantic Coast Line R. Co* 196 S C 386, 13 S E 2d 921 (1941) *Floyd v Page* 124 S C 400, 117 S E 409 (1923) *Parham-Thomas-McSwain Inc v Atlantic Life Insurance Co*, 106 S C 211, 90 S E 1022 (1916) *Barker v Thomas* 85 S C 82, 67 S E 1 (1910) *Agnew v Adams* 24 S C 86 (1885) (*per curiam*)

The case of *Keels v Powell*, 213 S C 570, 50 S E 2d 704 (1948) is directly on point with the case at bar. In *Keels* at the close of all the testimony, defendants moved for the direction of a verdict upon the ground that there was no evidence tending to prove that the defendants claim. This motion was overruled and the case was submitted to the jury. The jury failed to agree and a mistrial was ordered. The cause was brought to the court upon appeal by the defendants from the refusal of the trial judge to direct a verdict. The *Keels* court held as follows:

The respondent objects to the consideration of the appeal. He takes the position that the rulings and order referred to in the assignments of error are not appealable until after final judgment. This contention must be sustained.

The effect of the mistrial was to leave the parties in status quo ante with the cause still pending for trial in the circuit court. The overruling of the motion for a directed verdict and the rulings made with reference to the admissibility and competency of the testimony resulted in no binding adjudication of the rights of the parties. Therefore the appeal is prematurely brought, and jurisdiction thereof cannot be retained.

The foregoing rule has been generally recognized. In the case of *Parham-Thomas-McSwain, Inc v Atlantic Life Ins Co*, 106 S C 211, 90 S E 1022 in which there was a mistrial on circuit, the defendant appealed from an order refusing a motion to direct a verdict. The court said:

‘An order refusing a nonsuit, or the direction of a verdict, is not appealable until after final judgment. The reasons are fully stated in *Agnew v Adams* 24 S C 86. This ruling is recognized in *Barker v Thomas*, 85 S C 82, 67 S E 1. *Woods v [Rock Hill] Fertilizer Co* 102 S C 442, 86 S E 817, [Ann Cas 1917D, 1149] and numerous other cases. * * * As both the plaintiff's cause of action, and the defendant's counterclaim, are dependent upon questions of fact, it necessarily follows that judgment absolute cannot be rendered by this court. * * * The tendency of the court is to discourage appeals from interlocutory orders, in order that there may be an end of the case. It therefore feels constrained to refuse to entertain jurisdiction of these appeals, and it is so ordered.’

To the same effect is *Floyd v Page* 124 S C 400, 117 S E 409 and *Woods v Rock Hill Fertilizer Co* 102 S C 442 86 S E 817, Ann Cas 1917D, 1149 And see the full discussion of the question presented, in *Good v Hartford Accident & Indemnity Co* 201 S C 32, 21 S E 2d 209, in which the case of *Long v Carolina Baking Company* 193 S C 225, 8 S E 2d 326 is distinguished

The appeal is, therefore, dismissed without prejudice, and the case is remanded for trial

Further in *Hayes v Atlantic Coast Line R Co et al* , 196 S C 386, 13 S E 2d 921 (1941)

the court held as follows

The defendants have appealed upon numerous exceptions which they state in their brief raise four questions Numbers I and II of these questions charge error on the part of the trial Judge in the refusal of their motions for nonsuit and direction of the verdict However under the decisions of this Court an appeal from the refusal of such motions cannot be had until after final judgment, so the exceptions raising these questions are overruled *Agnew v Adams* 24 S C 86, *Bryson v Railway Co* 35 S C 608, 14 S E 630, *Barker v Thomas* 85 S C 82 67 S E 1 *Floyd v Page* 124 S C 400, 117 S E 409 *Parham-Thomas-McSwain v Atlantic Life Ins Co* 106 S C 211, 90 S E 1022 *Woods v Rock Hill Fertilizer Co* , 102 S C 442, 86 S E 817 *Ann Cas 1917D 1149*

A similar issue was addressed in the case of *Burchette v Lynch*, 128 N C App 65, 493 S E 2d 334 (N C App ,1997) In *Burchette* the defendant moved for directed verdict at the close of plaintiffs' evidence and at the close of all evidence, and these motions were denied The jury deadlocked on the first issue of defendant's negligence, however, the jury unanimously found the Plaintiff was not contributorily negligent The trial court entered judgment on the verdict that the Plaintiff was not contributorily negligent and ordered a mistrial as to the negligence issue Defendant thereafter filed a motion for judgment notwithstanding the verdict and a motion for a new trial, which the trial court denied The Defendant appealed the denial of the motion on the negligence cause of action The *Burchette* court ruled in part that

On appeal, defendant argues the evidence presented by plaintiffs failed to establish his negligence, and in the alternative, that the evidence was sufficient to establish plaintiff Patricia Burchette's contributory negligence However, we need not address these arguments, as defendant's appeal is interlocutory, and we dismiss his appeal “ ‘If an

appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves ' ' *Tinch v Video Industrial Services* 124 N C App 391, 393-94, 477 S E 2d 193, 196 (1996) (citations omitted), *disc review denied cert denied and disc review allowed* 345 N C 646, 483 S E 2d 718 (1997)

"An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy " *N C Dept of Transportation v Page* 119 N C App 730, 733, 460 S E 2d 332, 334 (1995) Here, the jury deadlocked on issue number one regarding defendant's negligence but proceeded to answer issue number two, finding plaintiff Patricia Burchette not contributorily negligent Because the issues of whether defendant negligently injured plaintiffs and what damages, if any, plaintiffs are entitled to recover were not answered by the jury, the judgment entered on the verdict is interlocutory since it "leaves further action by the trial court and does not dispose of the case in its entirety " *Tinch* 124 N C App at 393, 477 S E 2d at 196

Generally there is no right of immediate appeal from an interlocutory order *Id* at 393, 477 S E 2d at 195 The purpose of this rule is " 'to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts ' " *Id* at 393, 477 S E 2d at 196 (citations omitted)

Here, defendant has not shown he would be deprived of a substantial right without immediate appellate review of the trial court's judgment and order While a new trial on the question of defendant's negligence would present the same factual issues as were considered at the first trial, a new trial would not pose a threat of inconsistent verdicts At a new trial, the only liability issue the jury would be faced with is whether or not defendant was negligent on the day of the accident, a question the jury failed to answer at the first trial Thus, no substantial right of defendant would be prejudiced absent immediate appellate review of the trial court's judgment and order For the sake of efficiency, defendant should have waited until a final determination as to his negligence was made before filing an appeal with this Court

Following a subsequent trial in the same case, the defendant again appealed based upon the denial of its JNOV motion in the first trial In *Burchette v Lynch*, 139 N C App 756, 535 S E 2d 77 (N C App ,2000) the court ruled as follows

Further, defendant cannot have been prejudiced by denial of his JNOV motion on the issue of his negligence, given the mistrial and subsequent retrial of the case on that issue When a trial court orders a new trial, the case remain[s] on the civil issue docket for trial *de novo*, unaffected by rulings made therein during the [original] trial *Goldston v Wright* 257 N C 279, 280, 125 S E 2d 462, 463 (1962)

Stated otherwise, a “mistrial results in nullification of a pending jury trial ” 75B Am Jur 2d *Trial* § 1713 (1992), *see also* *People v Thompson* 424 Mich 118 379 N W 2d 49, 56 (1985) (“a hung jury mistrial is essentially a nullity”), *cert denied sub nom Thompson v Foltz* 498 U S 971, 111 S Ct 440, 112 L Ed 2d 423 (1990) Accordingly, any error on the part of the trial court in denying defendant's motion regarding the negligence issue would thus be harmless as on retrial defendant would not be bound by the evidence presented at the former trial Whether [his] evidence at the new trial will support [a motion for directed verdict] cannot now be decided *Akzona Inc v Southern Railway Co* 314 N C 488, 495, 334 S E 2d 759, 763 (1985)

In short, [d]efendant, in respect to the denial of his motion for [JNOV], has nothing to appeal from, for the very simple reason that in this respect there is neither a final judgment nor any interlocutory order of the superior court affecting his rights *Goldston* 257 N C at 280, 125 S E 2d at 463 We therefore do not consider defendant's purported appeal of denial of his JNOV motion on the negligence issue proffered at Trial I which resulted in a mistrial on that issue

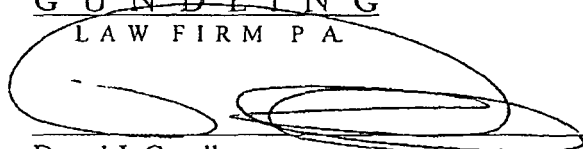
In the case at bar, there is nothing to appeal from the denial of the City s motion for directed verdict (JNOV) The mistrial places the parties back in the same position as they were as if the case were never tried As such the City cannot be prejudiced as it may raise the same motions at the retrial of the case

CONCLUSION

Based on the foregoing, the Respondent Appellant contends that the City's appeal of the Trial Court's denial of its Rule 50(b) motions is interlocutory and is not proper for this Court to address on appeal

Respectfully submitted,

G U N D L I N G
L A W F I R M P A

A large, stylized handwritten signature in black ink, appearing to read 'David J. Gundling', is written over the printed name and firm name.

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January 14, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JAN 19 2010

SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
J Michael Baxley, Circuit Court Judge

Case No 04-CP-22-0955

David Ashenfelder,

Respondent/Appellant,

v

City of Georgetown,

Appellant/Respondent

**SUPPLEMENTAL BRIEF ON APPEALABILITY
OF APPELLANT/RESPONDENT**

By letter dated December 16, 2009, the Court has requested additional briefing on the following issue "Is the denial of a renewed motion under Rule 50(b) after the jury fails to reach a verdict immediately appealable?" The Appellant-Respondent City of Georgetown submits the following discussion of that

jurisdictional issue and urges the Court to proceed with a decision on the merits of these cross-appeals

PROCEDURAL BACKGROUND

At the trial of this case, the City of Georgetown and the co-defendant Lucien Bruggeman moved for a directed verdict as to all causes of action. The trial judge granted a directed verdict and dismissed the causes of action for negligence, estoppel, and inverse condemnation against the City as well as the adverse possession claim against Bruggeman. The conversion claim and the prescriptive easement claim were the only causes of action that survived the directed verdict motions and were submitted to the jury (R. 239). The jury was unable to reach a unanimous verdict, and as a result, the trial judge declared a mistrial (R. 294). Pursuant to Rule 50(b), SCRCP, the City then made a renewed directed verdict/JNOV motion after the jury could reach no verdict. That motion was denied by the trial judge (R. 295).

DISCUSSION

The City of Georgetown submits that this Court has appellate jurisdiction to consider the appeal filed by David Ashenfelder from the grant of the directed verdict in favor of the City and Bruggeman.¹ Like the grant of partial summary judgment, the grant of a partial directed verdict is immediately appealable. *See*,

¹ The Respondent-Appellant Ashenfelder has since abandoned on appeal his claims against Bruggeman.

Link v School District of Pickens County, 302 S C 1, 393 S E 2d 176 (1990) (order granting partial summary judgment is immediately appealable under S C Code Ann § 14-3-330(1) and (2)) The partial directed verdict dismissed several of Ashenfelder's causes of action As a result, there exists appellate jurisdiction under S C Code Ann § 14-3-330(1) and (2)

There is admittedly authority holding that a mistrial is the equivalent of "no trial" having been held See e g , *Keels v Powell*, 213 S C 570, 50 S E 2d 704 (1948), *Grooms v Zander*, 246 S C 512, 144 S E 2d 909 (1965), *Floyd v Page*, 124 S C 400, 117 S E 409 (1923) However, that case law, which pre-dates the adoption of the South Carolina Rules of Civil Procedure, should not be read so broadly to suggest that a mistrial erases or nullifies any adjudicative rulings that did occur during trial In fact, such a broad reading is actually contrary to later Supreme Court case law

In *Keels*, the Supreme Court held that the *denial* of a directed verdict motion "resulted in no binding adjudication of the rights of the parties " *Keels*, 50 S E 2d at 705 In *Floyd*, the Court also found that the *denial* of a directed verdict motion was not a "binding adjudication of the rights of the parties " *Floyd*, 117 S E at 409 In *Grooms*, the trial judge took the defendant's directed verdict motion under advisement, sent the case to the jury, and after the jury failed to reach a verdict, declared a mistrial The trial judge then granted the directed verdict motion after

the mistrial was declared. The Supreme Court reversed on the basis that Circuit Rule 79 (the predecessor to Rule 50, SCRCp) authorized a JNOV motion/renewed motion for directed verdict only after a verdict had been returned. The Court explained

The motion for a directed verdict could not be granted after the termination of the trial for the obvious reason that there was no jury to which an instruction for the defendant could have been given. Therefore, the request the defendant's rights under the motion be preserved was nugatory. *If the request is considered as a Posttrial motion for judgment notwithstanding the failure of the jury to agree upon a verdict the result is unchanged. Such a motion was unknown to our practice prior to the adoption of Rule 79, and the rule may be invoked only by a party against whom a verdict has been returned.* The rule does not apply in case of a mistrial and there is sound reason for this omission.

Grooms, 144 S E 2d at 910 (Emphasis added)

In light of the adoption of Rule 50(b), SCRCp, the holding in *Grooms* is no longer valid. Rule 50(b), SCRCp, provides in pertinent part as follows: "if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict." Rule 50(b), SCRCp. Thus, Rule 50(b) provides for the precise scenario in *Grooms*, where a directed verdict may be renewed and granted after a mistrial (i.e., no verdict is returned).

The City submits that the grant or partial grant of a directed verdict is a binding adjudication even after a mistrial is declared. That issue has not previously

been decided by this Court or the Supreme Court. However, in *Enoree Baptist Church v Fletcher*, 287 S C 602, 340 S E 2d 546 (1986), the Supreme Court did rule that the trial court's order granting a motion to amend during a trial in which a mistrial was ultimately declared was a substantive ruling that was later binding and enforceable in the re-trial. In other words, the Court rejected the argument that the mistrial should be construed as overturning a substantive ruling in the first trial. The decision in *Enoree Baptist Church* demonstrates that a mistrial does not erase or nullify all rulings in the first trial.

The same is true here. The declaration of a mistrial did not erase or nullify the partial directed verdict granted by Judge Baxley on the causes of action for negligence, estoppel, inverse condemnation, and adverse possession. There is no logical basis articulated in the case law (or elsewhere for that matter) for treating a partial directed verdict granted after the plaintiff presents its case-in-chief as non-adjudicative simply because the jury could not reach a verdict on the claims that were unaffected by the directed verdict.² Instead, the partial directed verdict should be treated the same as a pre-trial partial summary judgment ruling would be. If Judge Baxley had partially granted summary judgment during the pre-trial

² This appears to present a novel issue. The City's counsel was unable to locate any cases in any jurisdiction specifically addressing the effect of a mistrial on the grant of a partial directed verdict during the trial. The South Carolina cases cited herein do not address that specific issue nor offer any basis for nullifying such a partial directed verdict where the jury could not reach a verdict on claims unaffected by those on which the partial directed verdict was entered.

hearing that was held, there is no question that the ultimate mistrial on other claims would have had no impact on those summary judgment rulings. There is no logical basis for treating the partial directed verdict rulings after the plaintiff presents its case-in-chief any differently.

Moreover, David Ashenfelder clearly believes the partial directed verdict rulings are binding adjudications because he filed an appeal from those rulings and has not argued to date that the mistrial erased those rulings or that the parties must start over as if no first trial occurred. The case law – *Keels* and *Floyd* – recognizes that the *denial* of a directed verdict is not immediately appealable after a mistrial because those rulings are not "binding adjudications." In sharp contrast, the *grant* of a partial directed verdict is a binding adjudication and should be immediately appealable. *Keels* and *Floyd* are not determinative of the issue here, the Court did not address the effect of a *grant* of a directed verdict. *Grooms* likewise is not determinative because Rule 50(b) has now been adopted and allows for a directed verdict after mistrial.

In sum, David Ashenfelder has appealed the partial directed verdict, and his appeal should proceed. It should be treated no differently than a grant of partial summary judgment which is immediately appealable. This Court thus has appellate jurisdiction over this case.

The foregoing analysis resolves only part of the question. While the Court has appellate jurisdiction over Ashenfelder's appeal, the Court must also address whether it has appellate jurisdiction over the City's appeal from the denial of the renewed directed verdict/JNOV motion. *Keels* and *Floyd* suggest that typically the denial of a directed verdict motion is not immediately appealable. However, in the present case, the Court may and should entertain appellate jurisdiction over the City's appeal as well. This Court has repeatedly recognized that "this Court may review an interlocutory order when the order is coupled with an appealable issue." *Southeastern Housing Foundation v. Smith*, 380 S. C. 621, 670 S. E. 2d 680, 688, n. 14 (Ct. App. 2008).

The Supreme Court has agreed. In *Edge v. State Farm Mut. Automobile Ins. Co.*, 366 S. C. 511, 623 S. E. 2d 387 (2005), the trial court granted in part and denied in part Rule 12(b) motions to dismiss. The plaintiff appealed the partial grant of those motions, and the defendant then cross-appealed seeking review of the portions of the order denying its motion to dismiss. The Supreme Court unanimously allowed the defendant's appeal of the denial of its motion to dismiss to proceed "because of judicial economy." 623 S. E. 2d at 390. The Supreme Court acknowledged that "[a]n order that is not directly appealable may be considered if there is an appealable issue before the court." *Id.*, citing *Briggs v. Richardson*, 273

S C 376, 256 S E 2d 544 (1979), *Cox v Woodmen of Word Ins Co* , 347 S C 460, 556 S E 2d 397 (Ct App 2001) The Supreme Court explained

Here, an order in this case which is appealable is before the Court and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), we will consider State Farm's cross-appeal

Id

Thus, the Supreme Court in *Edge* and this Court in *Southeastern Housing Foundation* (in addition to other cases) recognize that where judicial economy is best served the Court may exercise appellate jurisdiction over an interlocutory order that would not otherwise be immediately appealable. This case is such a case. Ashenfelder's appeal presents an appealable issue thereby conferring appellate jurisdiction on this Court. While the denial of the renewed directed verdict/JNOV motion may not typically be immediately appealable, it may be considered as part of this appeal for reasons of judicial economy. The parties have already fully briefed and orally argued the merits of the City's appeal. The City's appeal issues – including the application of the exhaustion of administrative remedies defense – are closely intertwined with Ashenfelder's appeal grounds. An adjudication of the City's appeal in conjunction with Ashenfelder's appeal may avoid another appeal in the future and may fully dispose of this litigation, or at a minimum, narrow the issues for the subsequent re-trial. The parties have already

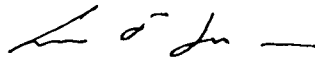
expended the resources to present these issues. Ashenfelter has not raised to date any objection – jurisdictional or otherwise – to the Court's consideration of the City's appeal issues. This is precisely the scenario, as in the *Edge* and *Southeastern Housing Foundation* cases, where judicial economy will be well served by this Court's adjudication of the City's appeal.

For these reasons, the Court is respectfully requested to exercise its appellate jurisdiction and proceed with an adjudication on the merits of the appeals filed by both parties.

Respectfully submitted,

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January 19, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 26 2010

SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
J Michael Baxley, Circuit Court Judge

Op No 4725
(S C Ct App filed August 11, 2010)

David Ashenfelder,

Respondent/Appellant,

v

City of Georgetown,

Appellant/Respondent

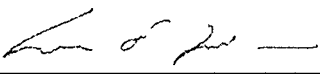
PEITION FOR REHEARING

The Appellant/Respondent City of Georgetown petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Ashenfelder v City of Georgetown*, Op No 4725 (S C Ct App filed August 11 2010)

The grounds for the Appellant/Respondents petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein

The Appellant/Respondent's petition for rehearing is based on the Court's decision in *Ishenfelder v City of Georgetown* Op No 4725 (SC Ct App filed August 11, 2010), the supporting memorandum filed herewith, the briefs and Record on Appeal, Rule 221(a), SCACR, Rule 224, SCACR, and other rules of court

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August 26, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
AUG 26 2010
SC Court of Appeals

APPEAL FROM GEORGE TOWN COUNTY
J Michael Baxley Circuit Court Judge

Op No 4725
(S C Ct App filed August 11 2010)

David Ashenfelder,

Respondent/Appellant,

v

City of Georgetown

Appellant/Respondent

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

The Appellant/Respondent City of Georgetown has petitioned this Court for a rehearing of the recent decision in *Ashenfelder v City of Georgetown*, Op No 4725 (S C Ct App filed August 11, 2010). The Appellant/Respondent City respectfully submits that the following points were overlooked or misapprehended by this Court.

The Appellant/Respondent City respectfully submits that this Court erred in dismissing the appeal filed by David Ashenfelder on the basis that the decision of the trial court directing a verdict was not certified under Rule 54(b) SCRPC, for an immediate appeal. The Court overlooked or misunderstood the existing precedent of the South Carolina Supreme Court that holds that certification is not required in order for an appellate court to exercise jurisdiction over an appeal of an order dismissing some but not all claims.

This Court failed to consider or apply the holding from the case of *Lebovitz v. Mudd*, 289 S.C. 476, 347 S.E.2d 94 (1986).¹ In *Lebovitz*, the Supreme Court addressed in detail the impact or effect of Rule 54(b), SCRPC, on appellate jurisdiction and reached a different result than this Court in the case at bar. In *Lebovitz*, the circuit court granted a Rule 12(b)(6) motion but dismissed only one of multiple causes of action. The plaintiffs sought and were denied certification pursuant to Rule 54(b), SCRPC. The plaintiffs filed an appeal nonetheless, and the defendants moved to dismiss the appeal. The Supreme Court denied that motion.

The Supreme Court first addressed the impact or effect of Rule 54(b), SCRPC. The Court explained that certification under Rule 54(b) "purports to render a partial judgment appealable as a final judgment." 347 S.E.2d at 95.

¹ The Supreme Court's decision in *Lebovitz v. Mudd* is not even cited by this Court.

Importantly, the Court held that "[l]ack of Rule 54(b) certification does not preclude immediate appeal of an order which is directly appealable under S C Code Ann § 14-3-330 " 347 S E 2d at 95-96 The Court then ruled that "[a]n order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading " 347 S E 2d at 96 The Court ultimately concluded that "[t]he order is therefore subject to an immediate appeal notwithstanding the refusal to certify under Rule 54(b) ' *Id*

The holdings from *Lebovitz* were later re-affirmed in the case of *Link v School District of Pickens County*, 302 S C 1, 393 S E 2d 176 (1990) In *Link*, the Supreme Court confirmed that Rule 54(b) does not bar an immediate appeal of an order granting only partial summary judgment on one of multiple causes of action The Court thus ruled that the lack of certification under Rule 54(b) does not prevent the grant of partial summary judgment from being immediately appealable²

In *Link*, the Supreme Court made an additional point that is critical in the present case The Court recognized that 'Rule 54(b) should not be construed to

² The Supreme Court in *Link* also recognized that *Lebovitz* was in complete conflict with the case of *Plaza Dev Services v Joe Harden Builder Inc* 296 S C 115 370 S E 2d 893 (Ct App 1988) in which this Court had held as follows 'When multiple claims are made against a single defendant an order adjudicating some but not all of them is ordinarily not appealable ' 370 S E 2d at 895 The *Link* Court however overruled *Plaza Dev Services* to the extent it holds that one may not appeal the granting of a 12(b)(6) motion under § 14-3-330 if the ruling affects some but not all of a party's causes of action *Link* 393 S E 2d at 178 n 2

alter appellate jurisdiction or supersede or modify the other means by which a party can secure a review of a trial court determination " *Link*, 393 S F 2d at 178. This point was re-stated by this Court in *Tommy I. Griffin Plumbing & Heating Co v Jordan Jones & Goulding Inc*, 351 S C 459, 570 S E 2d 197 (Ct App 2002), where this Court cited Rule 82(a) SCRPC, for the proposition that "the rules of civil procedure should not be construed to extend or limit the jurisdiction of any court of this state " 570 S E 2d at 201.

To summarize, these cases stand for the following points of law that significantly impact the Court's dismissal of the appeals in the present case:

- (1) Rule 54(b) certification is not necessary as a prerequisite or condition for filing an immediate appeal from an order adjudicating fewer than all causes of action and which is otherwise directly appealable under Section 14-3-330.
- (2) Rule 54(b) may *not* be construed as affecting in any respect the appellate jurisdiction of the court.
- (3) Rule 54(b) is designed and intended *only* to allow the court to certify an order not otherwise directly appealable so as to allow for that order to then be appealed immediately.

In light of the foregoing points of law that were overlooked by this Court, it is clear that this Court erred in requiring an order for which there is appellate jurisdiction to be certified under Rule 54(b) before an appeal can proceed. That ruling is contrary to and in conflict with the Supreme Court's rulings in *Lebovitz* and *Link*. If this Court were correct in its ruling, intermediate orders that

adjudicate some but not all claims will no longer be directly appealable unless certified. However, the Supreme Court has clearly spoken in *Lebovitz* and *Link* that Rule 54(b) certification is not a prerequisite to the exercise of appellate jurisdiction.

In the present case, this Court has effectively overruled *Lebovitz* and *Link* to the extent those cases hold that the "[l]ack of Rule 54(b) certification does not preclude immediate appeal of an order which is directly appealable under S.C. Code Ann. § 14-3-330." *Lebovitz*, 347 S.E.2d at 95-96. This Court has indeed required that an interlocutory appeal of an order adjudicating less than all claims may not proceed "in the absence of certification" because this Court concluded that an uncertified order remains subject to revision. This Court held that "we need not yet reach whether the decisions are immediately appealable under section 14-3-330

because we do not yet have a decision that dons a veil of appealability due to the potential for revision." This Court's error is two-fold. First, as already mentioned, certification under Rule 54(b) is *not* a prerequisite to an immediate appeal. This Court has, however, made certification a prerequisite. This Court had held that an appellate court should not even consider the appealability of the order until the appeal was certified and thus no longer subject to revision. Second, the Court's ruling has made Rule 54(b) a bar to appellate jurisdiction. In contravention of Rule 82(a), SCRPC, and the holding in *Link*, the Court has used a rule of civil procedure

– Rule 54(b) – as a mechanism for limiting or at least modifying the court's appellate jurisdiction

This Court has further explained that "[p]ursuant to certification, the appellate courts of this state need not question whether or not the possibility of revision exists." In effect, this Court's construction of "certification," which is novel under existing law, requires all interlocutory or intermediate orders to be "certified" in order to be appealed prior to final judgment. Not only is that in conflict with *Lebovitz* and *Ink*, but it also prohibits the immediate appeal of orders that would otherwise be directly appealable under Section 14-3-330. In effect, this Court allows Rule 54(b) to trump statutory appellate rights.

This novel construction by this Court is the apparent result of the final sentence of Rule 54(b), which was adopted from Federal Rule 54(b). However, this Court is urged to apply Rule 54(b) as the federal courts do in the context of intermediate appeals that are not certified under Rule 54(b). The collateral order doctrine allows for an immediate appeal of certain orders absent certification under Rule 54(b), including by way of example an appeal from the denial of *Harlow* qualified immunity. See *Mitchell v Forsythe*, 472 U.S. 511 (1985). The federal courts have held that the Rule 54(b) has no applicability to an immediate appeal under the collateral order doctrine. For instance, in *TechnoSteel LLC v Beers Const. Co.*, 271 F.3d 151 (4th Cir. 2001), the Fourth Circuit explained that Rule

54(b) 'generally does not apply to orders that are not final under § 1291 but nevertheless are appealable, either as a result of some other statutory provision or as a judicially created exception to the final-judgment rule, such as the collateral order doctrine " 271 F.3d at 159. See also, *Ramirez v. Webb*, 803 F.2d 721 (6th Cir. 1986) (table) ('The collateral order doctrine is not affected by Rule 54(b). Therefore, plaintiffs' argument that the collateral order doctrine is subject to Fed. R. Civ. P. 54(b) is unpersuasive")

The same approach is advisable under South Carolina law.³ This Court is urged to rule that Rule 54(b) has no applicability to orders for which there otherwise exists appellate jurisdiction under Section 14-3-330 absent certification under Rule 54(b). In other words, the final sentence of Rule 54(b) should not prevent or effect any interlocutory or intermediate appeal allowed by Section 14-3-330. This would be consistent with the existing authorities, namely *Iebovitz* and *Link*, which already hold that Rule 54(b) certification is not a prerequisite to appellate jurisdiction.

Finally, this Court is also urged to reconsider the practical effect of its decision. The Court has held that the oral order of Judge Baxley granting in part a directed verdict at the close of the plaintiff's case-in-chief is subject to revision and

³ See *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188, 194 (2007) ('where there are no South Carolina cases directly on point, the Court may look to the construction placed on the corresponding federal rules of civil procedure').

is not immediately appealable because it was not reduced to writing. From a practical standpoint, it is not typical in trial practice for a trial judge to stop a trial and issue a written order on a partial directed verdict granted in the middle of trial. It is also not common for a partial directed verdict to be reduced to writing even after the end of the trial. Even where a judge grants a complete directed verdict, it is seldom that a written order is issued. It is well recognized that oral rulings at directed verdict as well as other stages of the trial are contained on the record and are subject to appellate review without the issuance of a formal written order or even a form order. While it is true that an order may be subject to being revised, it is impractical to construe an oral order granting a directed verdict as not being final after the trial is completed and the trial judge does not retain jurisdiction over the matter. The trial of this case ended in October 2007. There has been no attempt by Judge Baxley to revise or revisit his directed verdict rulings in the interim. The Court's opinion will most probably be read as placing a burden on trial judges to reduce directed verdict and other trial rulings to writing before they are considered final and thus appealable. That burden is unnecessary where oral rulings are made on the record during the course of trial and allow for appropriate appellate review.

In sum, the partial directed verdict issued by Judge Baxley dismissed several of Ashenfelder's causes of action. As a result, there exists appellate jurisdiction under Sections 14-3-330(1) and (2). Ashenfelder's appeal from a partial directed

verdict should be treated no differently than a grant of partial summary judgment which is immediately appealable. This Court is respectfully requested to reconsider its prior decision and allow Ashenfelder's appeal to proceed.

II

With respect to the City's appeal from the denial of its renewed motion for directed verdict/JNOV motion after the jury could reach no verdict, this Court correctly ruled that such a motion is typically not immediately appealable. That was indeed conceded by the City. However, the Court failed to address the City's alternative basis for appellate jurisdiction.

Because this Court does have appellate jurisdiction over Ashenfelder's appeal, the Court may and should entertain appellate jurisdiction over the City's appeal as well. This Court has repeatedly recognized that "this Court may review an interlocutory order when the order is coupled with an appealable issue." *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 670 S.E.2d 680, 688, n.14 (Ct. App. 2008).

The Supreme Court has agreed. In *Edge v. State Farm Mut. Automobile Ins. Co.*, 366 S.C. 511, 623 S.E.2d 387 (2005), the trial court granted in part and denied in part Rule 12(b) motions to dismiss. The plaintiff appealed the partial grant of those motions, and the defendant then cross-appealed seeking review of the portions of the order denying its motion to dismiss. The Supreme Court

unanimously allowed the defendant's appeal of the denial of its motion to dismiss to proceed "because of judicial economy " 623 S L 2d at 390 The Supreme Court acknowledged that "[a]n order that is not directly appealable may be considered if there is an appealable issue before the court " *Id* , citing *Briggs v Richardson*, 273 S C 376 256 S E 2d 544 (1979), *Cox v Woodmen of Word Ins Co* , 347 S C 460 556 S E 2d 397 (Ct App 2001) The Supreme Court explained

Here, an order in this case which is appealable is before the Court and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), we will consider State Farm's cross-appeal

Id

Thus, the Supreme Court in *Edge* and this Court in *Southeastern Housing Foundation* (in addition to other cases) recognize that where judicial economy is best served the Court may exercise appellate jurisdiction over an interlocutory order that would not otherwise be immediately appealable This case is such a case As discussed at length above, Ashenfelter's appeal presents an appealable issue thereby conferring appellate jurisdiction on this Court While the denial of the renewed directed verdict/INOV motion may not typically be immediately appealable it may be considered as part of this appeal for reasons of judicial economy The parties have already fully briefed and orally argued the merits of the City's appeal The City's appeal issues – including the application of the

exhaustion of administrative remedies defense – are closely intertwined with Ashenfelder's appeal grounds. An adjudication of the City's appeal in conjunction with Ashenfelder's appeal may avoid another appeal in the future and may fully dispose of this litigation, or at a minimum, narrow the issues for the subsequent retrial. The parties have already expended the resources to present these issues. This is precisely the scenario, as in the *Ldgc* and *Southeastern Housing Foundation* cases, where judicial economy will be well served by this Court's adjudication of the City's appeal.

On rehearing, the Court is respectfully requested to consider and address the City's alternative basis for appellate jurisdiction with respect to its appeal.⁴

⁴ The City further incorporates by reference the arguments and authorities as set forth in the Supplemental Brief on Appealability of Appellant/Respondent filed on or about January 19, 2010, at the direction of the Court.

CONCLUSION

Based on the foregoing discussion, the Appellant/Respondent City of Georgetown respectfully requests that the Court rehear its decision dismissing this appeal. The Court is requested to exercise its appellate jurisdiction and proceed with an adjudication on the merits of the appeals filed by both parties.

Respectfully submitted,

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August 26, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

J Michael Baxley Circuit Court Judge

Case No 2004 CP 22 0955

David Ashenfelder

Respondent/Appellant

v

City of Georgetown

Appellant/Respondent

**REPLY TO APPELLANT/RESPONDENT'S
PETITION FOR REHEARING**

The Appellant/Respondent City submitted that this Court erred in dismissing the appeal filed by David Ashenfelder on the basis that the decision of the trial court directing a verdict was not certified under Rule 54(b), SCRCP, for an immediate appeal

After reflecting on this Court's Order and this Court's insightful reference to *State v Woods* 382 S C 153, 158, 267 S E 2d 128 131 (2009) and the cases cited therein, Respondent/Appellant Ashenfelder believes that the resolution to this appeal is much simpler than Appellant/Respondent City would have this Court believe. The real issue is the effect of a mistrial on orders issued by the Court during trial.

In its Order filed on August 11, 2010, this Court cited *State v Woods* 382 S C 153, 158, 267 S E 2d 128 131 (2009). In *Woods*, the court ruled that

A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court State v. Smith 336 S C 39, 518 S E 2d 294 (Ct Appl 1999) ***It leaves the parties "as though no trial had taken place"*** Grooms v Zander, 256 S C 512, 514 144 S E 2d 909 910 (1965) (***rulings of trial judgment in proceeding ending in mistrial represent no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante***) A court ruling as to admissibility and competency of testimony during a trial which is later declared a mistrial results 'in no binding adjudication of the rights of the parties' Keels v Powell 213 S C 570 572, 50 S E 2d 704 7055 (1948) [Emphases added]

The cases cited by this Court raise the issue as to the effect of any orders made during trial when the case ends in a mistrial In Grooms v Zander 246 S C 512, 514, 144 S E 2d 909, 910 (1965) the court stated that

A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court When the trial of this case was thus terminated, ***the status of the litigation and of the parties became the same as though no trial had taken place*** Keels v Powell, 213 S C 570, 50 S E 2d 704 [emphases added]

Finally in Floyd v Page 124 S C 400 117 S E 409 (1923) the court ruled that

The effect of the mistrial was to leave the parties litigant in statu quo ante, with the cause still pending for trial in the circuit court ***The rulings of the trial judge in the court below having eventuated in no binding adjudication of the rights of the parties***, the appeal is prematurely brought and jurisdiction thereof may not be entertained In the case of Parham-Thomas-McSwain, Inc , v Atlantic Life Ins Co 106 S C 211 90 S E 1022, in which there was a mistrial on circuit, the defendant appealed from an order refusing a motion to direct a verdict In that case, Mr Chief Justice Gary, speaking for a unanimous court said

' An order refusing a nonsuit, or the direction of a verdict, is not appealable until after final judgment The reasons are fully stated in Agnew v Adams, 24 S C 86 This ruling is recognized in Barker v Thomas, 85 S C 82, 67 S E 1, Woods v Fertilizer Co , 102 S C 442, 86 S E 817, and numerous other cases * * * As both the plaintiff's cause of action and the defendant's counterclaim are dependent upon questions of fact it necessarily follows that judgment absolute cannot be rendered by this court * * * If the court should entertain jurisdiction of the appeal under such conditions and should reach the conclusion that there was sufficient testimony to carry the case to a jury, it could not make any orders changing the present status of the case The tendency of the court is to discourage appeals from interlocutory orders in order that there may be an end of the case It therefore feels constrained to refuse to entertain jurisdiction of these appeals, and it is so ordered "

South Carolina law is clear that when a mistrial is ordered it is as if the trial never occurred and the parties are placed in the same position as they were before the trial As such all rulings

during the trial including the rulings by Judge Baxley on the motions to grant directed verdict are a nullity, or legally invalid. Pursuant to South Carolina Law, the parties' claims and defenses remain intact and are not affected by a judge's rulings in a case that ended in a mistrial. As such, the parties shall retry the case as if the prior trial never occurred. In that Judge Baxley's directed verdict rulings are based upon evidence submitted at a trial that never occurred at law, such rulings cannot be used to bind parties to the subsequent trial were the evidence may not be the same as the trial that was a nullity. The parties are free in the re-trial to submit new and additional evidence and the trial judge should be permitted to rule on motions made during the trial based upon the evidence before him.

Upon review of the cases cited by the Appellant/Respondent City in its memorandum, none of the cases deal with mistrials and are thus distinguishable from the case at bar. The cases cited by this Court relating to mistrial raise the issue of the jurisdiction¹ of this Court to hear this appeal in the first place. If all of Judge Baxley's rulings are a nullity because of the mistrial, then there are no rulings to appeal from and no rulings for the court to certify.

¹ Moreover, it is well settled that subject matter jurisdiction may be questioned by a party at any time, even for the first time on appeal and even without exception, or by the court itself on its own motion. *Knight Publishing Co. v. University of South Carolina*, 295 S.C. 31, 367 S.E.2d 20 (1988) (per curiam); *Nix v. Mercury Motor Express, Inc.*, 270 S.C. 477, 242 S.E.2d 683 (1978); *McCullough v. McCullough*, 242 S.C. 108, 130 S.E.2d 77 (1963). See SC JUR APP'AL ERROR § 21.

Based upon the foregoing Respondent/Appellant Ashenfelter contends that this court lacks jurisdiction to hear any appeals from judicial rulings in a trial that ended in a mistrial As such this court should find that all rulings of Judge Baxley are a nullity and dismiss this appeal

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
J Michael Baxley, Circuit Court Judge

Op No 4725
(S C Ct App filed August 11, 2010)

David Ashenfelder,

Respondent/Appellant,

v

City of Georgetown

Appellant/Respondent

RESPONSE TO RESPONDENT/APPELLANT'S RETURN
TO PETITION FOR REHEARING

The Appellant/Respondent City of Georgetown has petitioned this Court for a rehearing of this Court's recent decision dismissing the appeal filed by David Ashenfelder on the basis that the decision of the trial court directing a verdict on several causes of action was not certified under Rule 54(b), SCRCP for an immediate appeal. The City presented argument and authorities to show that the

lack of certification under Rule 54(b) does not prevent a partial directed verdict from being immediately appealable. The City further pointed out that Rule 54(b) should not prevent or effect any interlocutory or intermediate appeal allowed by Section 14-3-330.

In response to the petition for rehearing, Ashenfelder has not disagreed with or for that matter even addressed any of the arguments made by the City on the Rule 54(b) certification issue. Instead, despite not filing his own petition for rehearing, which must be filed within fifteen days of the decision date, Ashenfelder attempts to use his return to the City's petition to request that this Court alter its reasoning and change its opinion. In effect, Ashenfelder is making an untimely petition for rehearing.

Moreover, Ashenfelder's change in position cannot be made at this stage of the appeals process. The Supreme Court and this Court have previously rejected attempts to raise new issues or arguments in a petition for rehearing. The same should certainly be true for a response to a petition for rehearing. In *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001), the Supreme Court explained that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." 564 S.E.2d at 322.

Nonetheless, even if the Court were to consider Ashenfelder's new position the City submits that the position is flawed. There is admittedly authority holding that a mistrial is the equivalent of "no trial" having been held. See e.g., *Keels v. Powell*, 213 S.C. 570, 50 S.E.2d 704 (1948), *Grooms v. Zander*, 246 S.C. 512, 144 S.E.2d 909 (1965), *Floyd v. Page*, 124 S.C. 400, 117 S.E. 409 (1923). However, that case law which pre-dates the adoption of the South Carolina Rules of Civil Procedure should not be read so broadly to suggest that a mistrial erases or nullifies any *adjudicative rulings* that did occur during trial.¹ In fact, such a broad reading is actually contrary to later Supreme Court case law.

In *Keels*, the Supreme Court held that the *denial* of a directed verdict motion "resulted in no binding adjudication of the rights of the parties." *Keels*, 50 S.E.2d at 705. In *Floyd* the Court also found that the *denial* of a directed verdict motion was not a "binding adjudication of the rights of the parties." *Floyd*, 117 S.E. at 409. In *Grooms*, the trial judge took the defendant's directed verdict motion under advisement, sent the case to the jury, and after the jury failed to reach a verdict,

¹ Ashenfelder cites to a more recent *criminal* case which provides that a mistrial is the equivalent of "no trial." In *State v. Woods*, 383 S.C. 153, 267 S.E.2d 128 (2009), the criminal case cited by Ashenfelder, the issue did not involve an adjudicative ruling from the prior trial. Instead, the criminal defendant maintained that the ruling on change of venue for purposes of jury selection in the first trial was not binding at the re-trial. The Supreme Court allowed the trial judge at the re-trial to revisit issues of pre-trial publicity and make a renewed determination with respect to selection of the jury. That decision is very different from an adjudicative ruling such as a partial directed verdict. Even in a criminal case, if certain charges were dismissed at directed verdict, those charges could not be re-tried simply because the jury hung on the charges that were ultimately submitted to it for a decision. See *State v. Winburne*, 273 S.C. 62, 254 S.E.2d 297 (1979); *Fong Foo v. United States*, 369 U.S. 141 (1962).

declared a mistrial. The trial judge then granted the directed verdict motion after the mistrial was declared. The Supreme Court reversed on the basis that Circuit Rule 79 (the predecessor to Rule 50, SCRPC) authorized a JNOV motion/renewed motion for directed verdict only after a verdict had been returned. The Court explained:

The motion for a directed verdict could not be granted after the termination of the trial for the obvious reason that there was no jury to which an instruction for the defendant could have been given. Therefore, the request the defendant's rights under the motion be preserved was nugatory. *If the request is considered as a Posttrial motion for judgment notwithstanding the failure of the jury to agree upon a verdict the result is unchanged. Such a motion was unknown to our practice prior to the adoption of Rule 79 and the rule may be invoked only by a party against whom a verdict has been returned. The rule does not apply in case of a mistrial and there is sound reason for this omission.*

Grooms, 144 S.E.2d at 910. (Emphasis added)

In light of the adoption of Rule 50(b), SCRPC, the holding in *Grooms* is no longer valid. Rule 50(b), SCRPC, provides in pertinent part as follows: "If a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict." Rule 50(b), SCRPC. Thus, Rule 50(b) provides for the precise scenario in *Grooms*, where a directed verdict may be renewed and granted after a mistrial (i.e. no verdict is returned).

The City submits that the grant or partial grant of a directed verdict is a binding adjudication even after a mistrial is declared. That issue has not previously been decided by this Court or the Supreme Court. However, in *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 340 S.E.2d 546 (1986), the Supreme Court did rule that the trial court's order granting a motion to amend during a trial in which a mistrial was ultimately declared was a substantive ruling that was later binding and enforceable in the re-trial. In other words, the Court rejected the argument that the mistrial should be construed as overturning a substantive ruling in the first trial. The decision in *Enoree Baptist Church* demonstrates that a mistrial does not erase or nullify all rulings in the first trial.

The same is true here. Contrary to Ashenfelter's current position, the declaration of a mistrial did not erase or nullify the partial directed verdict granted by Judge Baxley on the causes of action for negligence, estoppel, inverse condemnation, and adverse possession. There is no logical basis articulated in the case law (or elsewhere for that matter) for treating a partial directed verdict granted after the plaintiff presents its case-in-chief as non-adjudicative simply because the jury could not reach a verdict on the claims that were unaffected by the directed verdict.² Instead, the partial directed verdict should be treated the same as a pre-

² This appears to present a novel issue. The City's counsel was unable to locate any cases in any jurisdiction specifically addressing the effect of a mistrial on the grant of a partial directed verdict during the trial. The South Carolina cases cited herein do not address that

tial partial summary judgment ruling would be. If Judge Baxley had partially granted summary judgment during the pre-trial hearing that was held, there is no question that the ultimate mistrial on other claims would have had no impact on those summary judgment rulings. There is no logical basis for treating the partial directed verdict rulings after the plaintiff presents its case-in-chief any differently. Certainly, Ashenfelter has offered no logical basis.

The case law – *Keels* and *Floyd* – recognizes that the *denial* of a directed verdict is not immediately appealable after a mistrial because those rulings are not "binding adjudications." In sharp contrast, the *grant* of a partial directed verdict is a binding adjudication and should be immediately appealable. *Keels* and *Floyd* are not determinative of the issue here: the Court did not address the effect of a *grant* of a directed verdict. *Grooms* likewise is not determinative because Rule 50(b) has now been adopted and allows for a directed verdict after mistrial.

In sum, the partial directed verdict -- as a binding adjudication -- should not be nullified simply because the jury could not reach a verdict on the different claims which were ultimately submitted to the jury. The causes of action on which the directed verdict were granted are obviously unaffected by the hung jury. Those causes of action were not presented to the jury. As a result, there is no logical

specific issue nor offer any basis for nullifying such a partial directed verdict where the jury could not reach a verdict on claims unaffected by those on which the partial directed verdict was entered.

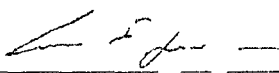
basis for nullifying those adjudications, and Ashenfelder's appeal should proceed unless his intention is to abandon the appeal and accept the directed verdict on his causes of action for negligence estoppel, inverse condemnation, and adverse possession

CONCLUSION

Based on the foregoing discussion, the Appellant/Respondent City of Georgetown respectfully renews its request that the Court rehear its decision dismissing this appeal. The Court is requested to exercise its appellate jurisdiction and proceed with an adjudication on the merits of the appeals filed by both parties

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
J Michael Baxley, Circuit Court Judge

Case No 04-CP-22-0955

David Ashenfelder,

Respondent-Appellant,

v

City of Georgetown,

Appellant-Respondent

**APPELLANT'S BRIEF OF
APPELLANT-RESPONDENT**

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STATEMENT OF ISSUES ON APPEAL

- I Did the lower court err in failing to apply its ruling on the City of Georgetown's failure to exhaust administrative remedies defense to the claims seeking monetary relief, including the conversion cause of action?
- II Did the lower court err in denying the City of Georgetown's motions for directed verdict on the conversion cause of action?
- III Did the lower court err in denying the City of Georgetown's motions for directed verdict on the prescriptive easement cause of action?

STATEMENT OF THE CASE

The Respondents-Appellants, David Ashenfelder, Carol Ashenfelder and Jade Inns, Inc.,¹ have alleged that they were the owners of a billboard located on Short Church Street within the City of Georgetown. On January 13, 2003, the billboard, which was constructed of wooden pilings and plywood faces, was severely damaged or destroyed when struck by a motorist who was fleeing from a South Carolina Highway Patrol Trooper. The motorist lost control of his vehicle and crashed into the billboard structure located adjacent to U S Highway 17. After the incident resulting in the damage to the billboard, the City had the remains of the billboard removed because of the dangers posed to pedestrians and motorists in the vicinity.

When David Ashenfelder inquired as to the possibility of rebuilding the billboard at its original location, Gerald Freeman, who was the City's Zoning Administrator, provided the informal opinion that the City could not issue a sign permit to put the billboard once again on City property (R 154-155). Based upon information obtained in the 1980s, the City took the position that the billboard had been located on City property and within the right-of-way of Short Church Street (R 155).² There is no dispute that Ashenfelder had never obtained permission or approval from the City to locate his billboard on City property (R 153).

¹ For ease of discussion and reference, the Respondents-Appellants will be referred to as "Ashenfelder" throughout this brief. Furthermore, Judge Baxley ultimately ruled that only David Ashenfelder could proceed as a plaintiff and thus it is appropriate to refer to him as the sole Respondent Appellant on appeal (R 271).

² Initially in this litigation, Ashenfelder and the City were in agreement that the billboard had been located on City property. After remand from federal court, Ashenfelder changed his theory of the case, amended his pleadings to join Lucien Bruggeman as a defendant, and took the position that the billboard had been located on Bruggeman's property.

Upon receiving the informal opinion from Gerald Freeman that he would be unable to issue a sign permit to rebuild the billboard in its previous location, Ashenfelder sent an undated letter to L. Boyd Johnson, who was the City Administrator at that time (R. 363). By letter dated March 27, 2003, Johnson responded to Ashenfelder and explained that the billboard could not be replaced on public property and that the billboard would not meet certain zoning requirements (R. 364).

Ashenfelder never formally sought a sign permit nor was officially denied a sign permit (R. 156). Instead of pursuing the available administrative process and appeals through the Board of Zoning Appeals and the state courts, Ashenfelder filed the present action against the City of Georgetown on December 3, 2004. He took no other action between March 2003 and December 2004 (R. 157).

The complaint filed in December 2004, named the City of Georgetown as the sole defendant (R. 14). Ashenfelder asserted federal constitutional claims under 42 U.S.C. § 1983 and state claims, including a conversion claim and a cause of action requesting the court to judicially recognize a prescriptive easement across the City's property where the billboard had been located (R. 10). The City removed the action to the United States District Court for the District of South Carolina. After discovery was completed, the City moved for summary judgment. Judge C. Weston Houck dismissed Ashenfelder's due process and Fifth Amendment takings claims and declined to exercise supplemental jurisdiction over the state law claims. The state law claims were then remanded to state court (R. 12).

After remand, Ashenfelder filed a motion to amend his complaint on November 13, 2006, in order to join Lucien Bruggeman as an additional defendant. Bruggeman was the current titleholder of the property adjacent to U.S. Highway 17 and Short Church Street. Ashenfelder

changed his theory of the case and claimed for the first time that the billboard had been located on the Bruggeman property rather than on the City's property (R 50) Ashenfelder thus withdrew his claims for a prescriptive easement and adverse possession against the City and re-asserted those claims against Bruggeman (R 51-52) He also asserted for the first time a claim that he acquired title by adverse possession to the property where the billboard had been located (R 51) Ashenfelder's motion to amend was granted by Judge J Michael Baxley by order filed April 11, 2007 Ashenfelder later filed an additional motion to amend which was granted by order of Judge Paul M Burch filed May 30, 2007

In his second amended complaint, Ashenfelder asserted causes of action for negligence, estoppel, conversion, and inverse condemnation against the City He sought monetary relief as well as declaratory and injunctive relief (R 64-70)

The case proceeded to trial on October 8, 2007, before Judge J Michael Baxley and a jury At the close of Ashenfelder's case-in-chief, the City and Bruggeman moved for a directed verdict (R 169-242) At that time, Judge Baxley granted a directed verdict and dismissed the causes of action for negligence, estoppel, and inverse condemnation He also directed a verdict on the adverse possession claim Finally, Judge Baxley dismissed the claims for declaratory and injunctive relief finding that Ashenfelder had failed to exhaust his administrative remedies by failing to apply for a sign permit and then appeal any subsequent denial by the Zoning Administrator to the Board of Zoning Appeals and, if necessary to the Circuit Court and state appellate courts (R 235-238) The conversion claim and the prescriptive easement claim were the only causes of action that survived the directed verdict motions and were submitted to the jury (R 239)

The jury was unable to reach a unanimous verdict, and as a result, Judge Baxley declared a mistrial (R 294) Pursuant to Rule 50(b), SCRCR, the City then made a renewed directed verdict/JNOV motion after the jury could reach no verdict That motion was denied by Judge Baxley (R 295)

The City subsequently filed a timely appeal to this Court from the trial court's denial of the directed verdict motions and renewed directed verdict/JNOV motion on the remaining causes of action for conversion and a prescriptive easement Ashenfelter also filed a cross-appeal

ARGUMENTS

I The trial judge erred in failing to apply his ruling on the City of Georgetown's failure to exhaust administrative remedies defense to the claims seeking monetary relief, including the conversion cause of action

At directed verdict, the City raised an exhaustion of administrative remedies defense as to all claims, including Ashenfelder's conversion cause of action (R 170). In addition to the conversion claim and other claims seeking only monetary relief, Ashenfelder had also asserted causes of action seeking declaratory and equitable relief. In ruling on the directed verdict motion, Judge Baxley correctly granted judgment as a matter of law to the City on the equitable and declaratory claims based on Ashenfelder's failure to exhaust his administrative remedies prior to bringing suit (R 235-236). However, he erred in failing to extend that ruling to the other causes of action as well, including the conversion claim on which directed verdict was ultimately denied.

Under South Carolina law, "[t]he general rule is that administrative remedies must be exhausted absent circumstances excusing application of the general rule." *Law v. South Carolina Department of Corrections*, 368 S.C. 424, 629 S.E.2d 642, 650 (2006). "A general exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that a pursuit of them would be a vain or futile act." *Id.*

The requirement that a plaintiff exhaust his administrative remedies prior to initiating suit is particularly important in land use matters. In *Lominick v. City of Aiken*, 244 S.C. 32, 135 S.E.2d 305 (1964), the Supreme Court held "that generally the exhaustion of administrative relief available to a party is necessary before the party can seek redress in the courts." 135 S.E.2d at 310. In that case, the Court ruled that the City of Aiken and another interested party failed to exhaust their

administrative remedies, including an appeal of a decision by a building inspector to the Zoning Board of Adjustment. The Court explained that "[i]t was incumbent upon the respondent Schwerin and, for that matter, the City Council of Aiken to appeal to the Zoning Board of Adjustment from the decision of the Building Inspector if they, or either of them, considered his decision erroneous. Not having done so, she cannot now attack the validity of his decision." *Id*

In the more recent case of *Harkins v Greenville County*, 340 S C 606, 533 S E 2d 886 (2000), the Supreme Court again explained that a party aggrieved by a decision of a zoning administrator or building official is required to exhaust all administrative remedies provided by ordinance. The case of *Stanton v Town of Pawley's Island*, 309 S C 126, 420 S E 2d 502 (1992), is also instructive given the similarity of issues with the present case. In *Stanton*, the plaintiff's beach home was severely damaged by Hurricane Hugo, and the building official for the Town of Pawley's Island refused to issue a building permit to allow for the rebuilding of the lower level of the home. The Supreme Court affirmed the dismissal of the action because the plaintiff failed to appeal the denial of the building permit to the Zoning Board of Adjustments and hence had not exhausted his administrative remedies.

The record in the present case includes the City's zoning ordinances which demonstrate the existence of an appeals process from a decision by the zoning administrator. Section 1001.1 of the City of Georgetown Zoning Ordinances provides that "[a] permit shall be required for the erection, alteration or reconstruction of any sign and such permit shall be issued by the Zoning Administrator." (R 409). Section 1100 vests the power in the Zoning Administrator to make decisions enforcing the zoning ordinances. That section further provides:

It is the intention of this Ordinance that all questions arising in connection with the enforcement of the Ordinance shall be presented first to the Zoning Administrator and that such questions

shall be presented to the Board of Zoning Appeals only on appeal from the decisions of the Zoning Administrator

(R 419) The Board of Zoning Appeals is empowered by Section 1202 "to reverse any order, requirement, decision, or determination of the Zoning Administrator " (R 419) Likewise, Section 1205 of the Zoning Ordinances authorizes judicial review of any decision of Board of Zoning Appeals by the Circuit Court (R 421) A decision of the Circuit Court may then be appealed in accordance with state law to the State appellate courts

It is, however, undisputed that Ashenfelder failed to exhaust any administrative remedies. Indeed, by his own testimony, Ashenfelder concedes that he never applied for a sign permit needed to rebuild the billboard (R 156) Moreover, he conceded that he did not take any formal action to challenge the Zoning Administrator's informal statement that he would not qualify for a sign permit (R 157) Likewise, after he received the March 27, 2003 letter from the City Administrator, he did not file an appeal to the Board of Zoning Appeals (R 157) The record is thus clear that Ashenfelder did not even attempt to obtain a remedy using the administrative appeals process available to him By formally seeking a sign permit, even if rejected, Ashenfelder could have pursued all of the legal issues and defenses raised in this litigation at the Board of Zoning Appeals and then, if necessary, on appeal to the Circuit Court and the state appellate courts

As discussed above, Judge Baxley agreed with the City's exhaustion of administrative remedies defense He dismissed Ashenfelder's declaratory judgment claim and his estoppel claim for failure to exhaust administrative remedies (R 235) He found that "an exhaustion of administrative remedies including filing for a permit, contesting the denial of it, as well as pursuing that through whatever appellate opportunities may be available was not done in this case " (R 236) He further rejected Ashenfelder's claim that exhaustion of administrative

remedies would have been futile (R 236) Judge Baxley did not, however, dismiss the other causes of action based on his erroneous conclusion that the defense only applied to claims for prospective or equitable relief (R 172)

"The question of whether to require the plaintiff to exhaust administrative remedies is a matter within the sound discretion of the trial judge " *Law v South Carolina Department of Corrections*, 368 S C 424, 629 S E 2d 642, 650 (2006) "A matter within the sound discretion of the trial judge will not be disturbed on appeal absent an abuse of discretion " *Id* "An abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support " *Id*

Here, Judge Baxley's refusal to apply the exhaustion of administrative remedies defense to Ashenfelder's claims for monetary relief, including his conversion claim, was controlled by an error of law In *Hyde v South Carolina Department of Mental Health*, 314 S C 207, 442 S E 2d 582 (1994), the Supreme Court held that "[w]here an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts " 442 S E 2d at 583 In *Hyde*, the plaintiff brought suit seeking only money damages under the Whistleblower Act The Supreme Court reversed the lower court order striking the exhaustion of administrative remedies defense The Court concluded that the "State Employee Grievance Procedure provides an adequate administrative remedy to determine factual issues " *Id*

Moreover, in *Allen v South Carolina Alcoholic Beverage Control Commission*, 321 S C 188, 467 S E 2d 450 (Ct App 1996), the plaintiff brought an action for money damages under the Whistleblower Act This Court affirmed summary judgment for the Alcoholic Beverage Control Commission finding that administrative remedies were available under the State

Employee Grievance Act and that the plaintiff was required to exhaust his administrative remedies before the State Employee Grievance Committee prior to instituting an action under the Whistleblower Act 467 S E 2d at 453. Importantly, this Court in *Allen* addressed whether exhaustion may be excused because the specific relief sought -- money damages -- was not available through the administrative process. This Court rejected that contention and "declined to excuse Allen's failure to exhaust on the basis Allen sought relief beyond that which the State Employee Grievance Committee is authorized to grant" 467 S E 2d at 454. The Court explained that "[t]he difference in remedies under the State Employee Grievance Act and the Whistleblower Act does not eliminate the exhaustion requirement." *Id.* See also, *Bennett v South Carolina Department of Corrections*, 305 S C 310, 408 S E 2d 230 (1991).

The same is true in the present case. The fact that Ashenfelder could not recover money damages by pursuing his administrative remedies, including an appeal to the Board of Zoning Appeals and the Circuit Court, does not excuse the exhaustion requirement. Certainly, as in *Hyde*, the administrative process was available to determine factual issues, including whether the billboard was located on City property or someone else's property and whether Ashenfelder had a legal right to have his billboard in that location. A determination of those factual issues through the available administrative process would have likely foreclosed the necessity of this litigation, which is precisely the reason for requiring the exhaustion of administrative remedies as a prerequisite for filing suit.

In short, while Judge Baxley was correct in ruling that Ashenfelder failed to exhaust his administrative remedies and that exhaustion was not futile, he erred as a matter of law in limiting the application of the defense to claims for declaratory and equitable relief. The exhaustion defense should also foreclose Ashenfelder's tort claims including his conversion claim which is

the only remaining cause of action asserted against the City. Therefore, the City requests that this Court remand for entry of a directed verdict on the conversion claim as well.

II The trial court erred in denying the City of Georgetown's motion for directed verdict on the conversion cause of action

As discussed above, the only cause of action against the City on which Judge Baxley did not direct a verdict in the City's favor is the conversion claim. In addition to maintaining that the failure to exhaust administrative remedies defense bars that claim as a matter of law, the City also submits that Ashenfelder failed to support his claim as a matter of law.

South Carolina law provides that "[c]onversion is the *unauthorized* assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557, 566 (Ct. App. 2004) (Emphasis added). The critical word in that definition is "unauthorized." In order to prove his conversion claim, it was incumbent on Ashenfelder to present evidence that the City's removal of the damaged remains of the billboard was *unauthorized*. Ashenfelder, however, presented no witnesses or other evidence in his case-in-chief that would demonstrate that the removal of the damaged remains of the billboard was unauthorized.³

The City submits that the removal of the damaged remains of the billboard was a valid and legitimate exercise of the police power, and clearly Ashenfelder has presented no evidence

³ Ashenfelder presented no City employees as witnesses in his case-in-chief. He failed to present any evidence to establish or refute the basis for the City's removal of damaged remains of the billboard. The only witnesses presented in his case-in-chief were David Ashenfelder himself, Ryan Moore (an engineering expert who offered opinions on the location of the billboard), and Barry Haynes (a damages witness).

to the contrary. The burden of proof was on Ashenfelder -- he was required to show that the acts of the City were unauthorized. It was not the City's burden of proof to show a valid exercise of its police power.

Nonetheless, the City presented South Carolina case law establishing that "a state in a bona fide exercise of its police power may interfere with private property, and even order its destruction for the welfare and comfort of its citizens." *Peoples Program for Endangered Species v. Sexton*, 323 S.C. 526, 476 S.E.2d 477, 479 (1996), citing *Sentell v. New Orleans & Carrollton Railroad Co.*, 166 U.S. 698 (1897). In *Peoples Program*, the South Carolina Supreme Court further ruled that "[t]he individual's privilege to use property freely is always subject to a legitimate exercise of the police power under which new burdens and restrictions may be imposed when the public welfare demands." *Id.* See also, *Quality Towing Inc. v. City of Myrtle Beach*, 340 S.C. 29, 530 S.E.2d 369 (2000).

Therefore, as the foregoing authority makes clear, the City may interfere with a citizen's private property as a valid exercise of its police power and may even order the destruction of that property if needed to protect the safety and welfare of its citizens. The City took the position that the damaged remains of the billboard were removed because they presented a safety hazard to nearby pedestrians and motorists. As already determined by Judge Baxley, that constitutes a valid exercise of the City's police power to protect the safety of its citizens.⁴ Ashenfelder failed to present any evidence in his case-in-chief to refute the City's position, and thus failed to present any evidence that the removal of the damaged remains of the billboard was "unauthorized." On

⁴ In addressing the inverse condemnation claim, Judge Baxley stated "the Court finds that the evidence shows that this action was an exercise of the police power." (R. 237)

that additional basis, therefore, a directed verdict should have been granted on Ashenfelder's conversion claim

Moreover, to the extent that Ashenfelder has alleged that the City converted his "right" to have a billboard at that location,⁵ that claim would implicate a real property interest. South Carolina law clearly holds that conversion does not lie for the taking of a real property right. In *Hawkins*, this Court held that "a conversion action does not lie when alleging the exercise of dominion or control over real property." *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557, 566 (Ct. App. 2004). Consequently, Ashenfelder is barred from pursuing any interference with a real property interest by means of a conversion cause of action.

Finally, in denying the City's second motion for directed verdict on the conversion claim, Judge Baxley commented that the evidence taken in a light most favorable to the plaintiff could be construed as "the City wanted to remove [the billboard] and simply took the opportunity given to do so unlawfully and without authority." (R. 279). He then observed that "[t]hese actions, if proven, would remove this from the Tort Claims Act." (R. 279). However, given that ruling and that interpretation of the evidence, the City would clearly be entitled to absolute sovereign immunity under S.C. Code Ann. § 15-78-60(17). Counsel for the City responded as follows:

especially given your comments, that was the exact point I made in my first directed verdict motion, that if the Plaintiff were going to pursue this case under a theory that officials acted unlawfully and outside the scope of their official duties and with the intent to harm. As Your Honor just indicated, you said this conversion claim would fall outside the Tort Claims Act. Well, it can't fall outside the Tort Claims Act against the City of Georgetown. It could fall outside the Tort Claims Act against employees of the City of Georgetown, but no employee has been sued.

⁵ The City denies that Ashenfelder has actually pled a conversion of any "right" to the continued use of the subject property for his billboard -- as opposed to the alleged conversion of the billboard structure itself. See, Second Amended Complaint, para. 18. (R. 67).

(R 280) Consequently, Judge Baxley's basis for denying the second directed verdict motion on the conversion claim was in error. Under his reasoning and potential interpretation of the facts, the City would nonetheless be entitled to absolute sovereign immunity under S.C. Code Ann. § 15-78-60(17). Hence, a directed verdict should have been granted.

For these additional reasons, the City was entitled to a directed verdict and the dismissal of Ashenfelder's conversion claim.

III The trial court erred in denying the City of Georgetown's motion for directed verdict on the prescriptive easement cause of action

In addition to denying a directed verdict on the conversion cause of action, Judge Baxley also denied a directed verdict on Ashenfelder's second cause of action seeking a judicial determination that he enjoyed a prescriptive easement over the property of Lucien Bruggeman. While that cause of action is not directed at nor seeks any direct relief from the City, the City is an interested party to that claim. The City contends that Judge Baxley erred in failing to direct a verdict on the prescriptive easement cause of action.

"To establish a prescriptive easement, one must show (1) continued use for 20 years, (2) the identity of the thing enjoyed, and (3) use which is either adverse or under a claim of right." *Morrow v. Dyches*, 328 S.C. 522, 492 S.E.2d 420, 423 (Ct. App. 1997). "The party claiming a prescriptive easement has the burden of proving all elements." *Id.* The claim of right must be "justifiable." *Jones v. Daley*, 363 S.C. 310, 609 S.E.2d 597, 600 (Ct. App. 2005). The plaintiff must demonstrate "a substantial belief that she had the right to use the property in a manner consistent with the alleged easement." *Id.*

Ashenfelder, however, has not demonstrated a justifiable claim of right. He presented no evidence of a substantial belief for a continuous period of twenty years prior to January 2003 that he had a *legal right* to use the property on which the billboard was located. Certainly, he did not demonstrate any legal right to use the property owned by Lucien Bruggeman and his predecessors in title.

Ashenfelder conceded that he had no ownership interest in the property where the billboard was located. (R. 150) He did not hold a deed to that property. Moreover, he never paid taxes on that property nor did he insure the property. (R. 150) In addition, Ashenfelder conceded that he never had a lease for placement of his billboard on that property. He never paid anyone for the use of the property that clearly he did not own. (R. 150) Therefore, Ashenfelder had no legal right to use the property. "An easement is the legal assertion that one has a valid right to share in the use of another's property for a specific purpose." *Jones v. Daley*, 363 S.C. 310, 609 S.E.2d 597, 600 (Ct. App. 2005). Ashenfelder failed to prove that he had a valid right to share in the use of Bruggeman's property.

It is important to recognize that in 1996, Ashenfelder took the position with P. Douglas Green, a predecessor in title to Bruggeman, that the billboard was *not* located on the Bruggeman property but rather was located on City property. In a letter dated February 22, 1996, Ashenfelder wrote the following to Green:

It is not my intention to deny you anything that rightfully belongs to you. However, my sign is not located on the property that you purchased from a tax sale. It does, in fact, belong to the City and is leased from the City to Burger King.

(R. 362) This letter was in response to a February 6, 1996 letter from Green which gave Ashenfelder thirty days to remove the billboard or agree to pay rent. (R. 361) Clearly, Green took the position that the billboard was located on his property, which is the same property now

owned by Bruggeman. In response, Ashenfelder took the position that the billboard was not located on the Green/Bruggeman property, which enabled him to avoid removing his billboard or paying rent. Yet, in complete contradiction to his previous position, Ashenfelder now contends that he is entitled to a prescriptive easement by claim of right across the Green/Bruggeman property.

The flaw in Ashenfelder's position becomes even clearer upon recognition that Ashenfelder changed his theory during the course of this litigation. In his initial complaint, Ashenfelder did not sue Bruggeman or Green. He only sued the City and claimed a prescriptive easement *across the City's property* (R. 20). He then learned, while this action was pending in federal court, that a private party cannot obtain a prescriptive easement against publicly owned property (R. 35-36).⁶ On remand to state court, Ashenfelder changed his theory and amended his complaint to name Bruggeman as a new party-defendant, he abandoned his previous claim of a prescriptive easement against the City (which was removed from the amended complaint), and he took the position *for the first time* that the billboard was located on the Green/Bruggeman property, which was in direct contrast to the position he took with Green in 1996. Importantly, Ashenfelder has not provided evidence of any occasion prior to November 2006, when he filed

⁶ In *Steiner v. County of Marshall*, 568 N.W.2d 627 (S.D. 1997), the South Dakota Supreme Court held that "one cannot obtain a prescriptive easement against the government." 568 N.W.2d at 632. Similarly, the Washington court in *City of Benton City v. Adrian*, 50 Wash. App. 330, 748 P.2d 679 (1988), held that "title by adverse possession, or an easement by prescription, cannot be acquired to property held by a municipal corporation for public purposes in its governmental capacity." 748 P.2d at 683. See also, *Matthews v. State of New Mexico*, 113 N.M. 291, 825 P.2d 224 (1991), *Schilling v. Backer*, 678 N.W.2d 802 (S.D. 2004), *Classen v. State Dept. of Highways*, 621 P.2d 15 (Alaska 1980). Moreover, in *South Carolina State Highway Dept. v. Metts*, 240 S.C. 816, 270 S.E.2d 816 (1978), the South Carolina Supreme Court held that "[i]t is well settled that no rights in a public street or highway can be acquired against the State or municipality by adverse possession." 240 S.E.2d at 817.

his motion to amend his complaint, where he took the position that the billboard was actually located on the Green/Bruggeman property (R 48) There is simply no testimony or document evidence to show any claim of right to use the Green/Bruggeman property asserted by Ashenfelder prior to 2006

In short, Ashenfelder failed to present evidence that he asserted a claim of right to use the Green/Bruggeman property for a continuous period of twenty years The evidence clearly shows that in 1996, he was not asserting a claim of right to use the Green/Bruggeman property By his own admission, in 1996, he did not take the position that his billboard was on the Green/Bruggeman property⁷ Further, Ashenfelder never presented evidence to support a *justifiable* claim of right to have his billboard on anyone's property For these reasons, Judge Baxley erred in denying the directed verdict motion with respect to Ashenfelder's prescriptive easement claim against Bruggeman Because Ashenfelder can demonstrate no legal right to have his billboard either on City property or on the Bruggeman property, all claims against the City for failing to allow him to rebuild the billboard in its original location fail

⁷ In his trial testimony, David Ashenfelder stated as follows

Q In 1996 --

A Yes

Q -- did you take the position that the billboard was located on Mr Green's property?

A No, I did not

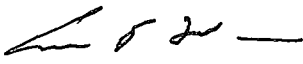
(R 142)

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent City of Georgetown respectfully requests that this Court reverse the orders of Judge J Michael Baxley denying in part the City's motions for directed verdict and denying the City's renewed directed verdict/JNOV motion made after the jury could reach no verdict. The Appellant-Respondent further requests that the Court remand for entry of judgment in the City's favor.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent City of Georgetown certifies that the Final Appellant's Brief of Appellant-Respondent complies with Rule 211(b), SCACR

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January 7, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
J Michael Baxley, Circuit Court Judge

Case No 04-CP-22-0955

David Ashenfelder

Respondent-Appellant,

v

City of Georgetown

Appellant-Respondent

**RESPONDENT'S BRIEF OF
APPELLANT-RESPONDENT**

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STATEMENT OF THE CASE

The Respondent-Appellant, David Ashenfelder,¹ has alleged that he was the owner of a billboard located on Short Church Street within the City of Georgetown. On January 13, 2003, the billboard, which was constructed of wooden pilings and plywood faces, was severely damaged or destroyed when struck by a motorist who was fleeing from a South Carolina Highway Patrol Trooper. The motorist lost control of his vehicle and crashed into the billboard structure located adjacent to U S Highway 17. After the incident resulting in the damage to the billboard, the City had the remains of the billboard removed because of the dangers posed to pedestrians and motorists in the vicinity.

When David Ashenfelder inquired as to the possibility of rebuilding the billboard at its original location, Gerald Freeman, who was the City's Zoning Administrator, provided the informal opinion that the City could not issue a sign permit to put the billboard once again on City property (R 154-155). Based upon information obtained in the 1980s, the City took the position that the billboard had been located on City property and within the right-of-way of Short Church Street (R 155).² There is no dispute that Ashenfelder had never obtained permission or approval from the City to locate his billboard on City property (R 153).

¹ Carol Ashenfelder and Jade Inns, Inc. were originally named as Plaintiffs. The Respondent-Appellant's counsel has withdrawn these parties on appeal. As a result, David Ashenfelder is the only remaining plaintiff on appeal.

² Initially in this litigation, Ashenfelder and the City were in agreement that the billboard had been located on City property. After remand from federal court, Ashenfelder changed his theory of the case, amended his pleadings to join Lucien Bruggeman as a defendant, and took the position that the billboard had been located on Bruggeman's property.

Upon receiving the informal opinion from Gerald Freeman that he would be unable to issue a sign permit to rebuild the billboard in its previous location, Ashenfelder sent an undated letter to L. Boyd Johnson, who was the City Administrator at that time (R. 363). By letter dated March 27, 2003, Johnson responded to Ashenfelder and explained that the billboard could not be replaced on public property and that the billboard would not meet certain zoning requirements (R. 364).

Ashenfelder never formally sought a sign permit nor was officially denied a sign permit (R. 156). Instead of pursuing the available administrative process and appeals through the Board of Zoning Appeals and the state courts, Ashenfelder filed the present action against the City of Georgetown on December 3, 2004. He took no other action between March 2003 and December 2004 (R. 157).

The complaint filed in December 2004, named the City of Georgetown as the sole defendant (R. 14). Ashenfelder asserted federal constitutional claims under 42 U.S.C. § 1983 and state claims, including a conversion claim and a cause of action requesting the court to judicially recognize a prescriptive easement across the City's property where the billboard had been located (R. 20). The City removed the action to the United States District Court for the District of South Carolina. After discovery was completed, the City moved for summary judgment. Judge C. Weston Houck dismissed Ashenfelder's due process and Fifth Amendment takings claims and declined to exercise supplemental jurisdiction over the state law claims. The state law claims were then remanded to state court (R. 12).

After remand, Ashenfelder filed a motion to amend his complaint on November 13, 2006, in order to join Lucien Bruggeman as an additional defendant. Bruggeman was the current titleholder of the property adjacent to U.S. Highway 17 and Short Church Street. Ashenfelder

changed his theory of the case and claimed for the first time that the billboard had been located on the Bruggeman property rather than on the City's property (R 50) Ashenfelder thus withdrew his claims for a prescriptive easement and adverse possession against the City and re-asserted those claims against Bruggeman (R 51-52) He also asserted for the first time a claim that he acquired title by adverse possession to the property where the billboard had been located (R 51) Ashenfelder's motion to amend was granted by Judge J Michael Baxley by order filed April 11, 2007 Ashenfelder later filed an additional motion to amend which was granted by order of Judge Paul M Burch filed May 30, 2007

In his second amended complaint, Ashenfelder asserted causes of action for negligence, estoppel, conversion, trespass, and inverse condemnation against the City He sought monetary relief as well as declaratory and injunctive relief (R 64-70)

The case proceeded to trial on October 8, 2007, before Judge J Michael Baxley and a jury At the close of Ashenfelder's case-in-chief, the City and Bruggeman moved for a directed verdict (R 169-242) At that time, Judge Baxley granted a directed verdict and dismissed the causes of action for negligence, estoppel, trespass, and inverse condemnation He also directed a verdict on the adverse possession claim Finally, Judge Baxley dismissed the claims for declaratory and injunctive relief, including estoppel, finding that Ashenfelder had failed to exhaust his administrative remedies by failing to apply for a sign permit and then appeal any subsequent denial by the Zoning Administrator to the Board of Zoning Appeals and, if necessary, to the Circuit Court and state appellate courts (R 235-238) The conversion claim and the prescriptive easement claim were the only causes of action that survived the directed verdict motions and were submitted to the jury (R 239)

The jury was unable to reach a unanimous verdict, and as a result, Judge Baxley declared a mistrial (R 294) Pursuant to Rule 50(b), SCRCP, the City then made a renewed directed verdict/JNOV motion after the jury could reach no verdict That motion was denied by Judge Baxley (R 295)

The City subsequently filed a timely appeal to this Court from the trial court's denial of the directed verdict motions and renewed directed verdict/JNOV motion on the remaining causes of action for conversion and a prescriptive easement Ashenfelder also filed a cross-appeal challenging the dismissal of his adverse possession, estoppel, trespass, and inverse condemnation claims He did not appeal the directed verdict on the negligence cause of action

ARGUMENTS

I The Respondent-Appellant David Ashenfelder has abandoned on appeal all claims against Lucien Bruggeman which includes his adverse possession claim, which is not alleged against the City

On appeal, Ashenfelder contends that Judge Baxley erred in granting a directed verdict on his adverse possession cause of action. That adverse possession claim was alleged only against the Defendant Lucien Bruggeman. The same is true with respect to Ashenfelder's cause of action for a prescriptive easement. When Ashenfelder amended his complaint after remand from the United States District Court, he withdrew his adverse possession and prescriptive easement claims against the City. Instead, he added Bruggeman as a party-defendant and asserted those claims against Bruggeman alone. Ashenfelder clearly changed his theory of liability on remand from federal court. He then took the position for the first time that the billboard was located on the Green/Bruggeman property, which was in direct contrast to the position he took with Bruggeman's predecessor in interest, Douglas Green, in 1996, as well as the position taken in the federal litigation.

At any rate, on appeal, Ashenfelder has elected to abandon all claims against Bruggeman. When Ashenfelder filed his brief in support of his cross-appeal, he removed Bruggeman as a party, and in accordance with the position taken by Ashenfelder, this Court issued an order that the only parties to this appeal are Ashenfelder and the City. Bruggeman's counsel was suspended from the practice of law by the Supreme Court, and no attempt was made to retain Bruggeman as a party to the appeal. Specifically, the appeal was not stayed to allow Bruggeman to retain new counsel or to otherwise file a brief. Clearly, Ashenfelder's intent, as accepted by this Court, was to abandon all claims against Bruggeman. He does not argue his adverse

possession claim against Bruggeman, who is the only party against whom the claim is actually alleged in his second amended complaint. Consequently, Ashenfelder should not be permitted to appeal any cause of action that is directed only against Bruggeman and not the City. Moreover, because Ashenfelder has effectively dismissed Bruggeman as a party to this appeal, the trial court's ruling on the causes of action against Bruggeman is the law of the case. On these bases alone, the Court should affirm the dismissal of Ashenfelder's adverse possession claim.³

II The dismissal of Lucien Bruggeman as a party on appeal and the abandonment of all claims against Bruggeman have rendered moot and/or non-justiciable other claims alleged against the City of Georgetown

Ashenfelder's dismissal of Lucien Bruggeman as a party on appeal and/or his abandonment of all claims against Bruggeman also renders Ashenfelder's other claims as moot or otherwise non-justiciable. For instance, Ashenfelder seeks declaratory and equitable relief pertaining to his right to rebuild the billboard on what he now contends was Bruggeman's property. Because Ashenfelder has abandoned his attempts to establish a property interest to a portion of Bruggeman's property either by way of adverse possession or a prescriptive easement, he can no longer obtain the declaratory or equitable relief that he seeks. Neither this Court nor the trial court has the authority to order the rebuilding of a billboard on the non-party Bruggeman's property. *See, Gunter's Island Hunting Club v Hucks*, 282 S C 124, 317 S E 2d 470 (Ct App 1984) (court could not "lawfully adjudicate" property rights where owners of record of the subject property were not parties to the action). Consequently, as an additional

³ For these same reasons, this Court should remand for entry of judgment against Ashenfelder on his prescriptive easement claim. By dismissing Bruggeman, Ashenfelder should be barred from continuing to pursue that cause of action as well.

sustaining ground and as an issue of justiciability, the City submits that the abandonment of the claims against Bruggeman has mooted Ashenfelder's other claims and in particular his claims for prospective relief, estoppel, and trespass

III Ashenfelder's failure to exhaust his administrative remedies prior to instituting suit is a bar to all of his causes of action, including those seeking declaratory, equitable and/or monetary relief

At directed verdict, the City raised an exhaustion of administrative remedies defense as to all claims (R 170) In ruling on the directed verdict motion, Judge Baxley correctly granted judgment as a matter of law to the City on the equitable and declaratory claims based on Ashenfelder's failure to exhaust his administrative remedies prior to bringing suit (R 235-236) However, Judge Baxley did not apply that same ruling to each of claims where monetary relief was sought ⁴

On appeal, Ashenfelder claims that Judge Baxley erred even in applying the exhaustion of administrative remedies defense to the equitable and declaratory claims The City disagrees and further asserts as an additional sustaining ground that all claims should be barred by that defense

Under South Carolina law, "[t]he general rule is that administrative remedies must be exhausted absent circumstances excusing application of the general rule " *Law v South Carolina Department of Corrections*, 368 S C 424, 629 S E 2d 642, 650 (2006) "A general exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that a pursuit of them would be a vain or futile act " *Id*

⁴ Judge Baxley's denial of the exhaustion of administrative remedies defense to the claims seeking monetary relief is one of the issues raised in the City's appeal

The requirement that a plaintiff exhaust his administrative remedies prior to initiating suit is particularly important in land use matters. In *Lominick v City of Aiken*, 244 S C 32, 135 S E 2d 305 (1964), the Supreme Court held "that generally the exhaustion of administrative relief available to a party is necessary before the party can seek redress in the courts " 135 S E 2d at 310. In that case, the Court ruled that the City of Aiken and another interested party failed to exhaust their administrative remedies, including an appeal of a decision by a building inspector to the Zoning Board of Adjustment. The Court explained that "[i]t was incumbent upon the respondent Schwerin and, for that matter, the City Council of Aiken to appeal to the Zoning Board of Adjustment from the decision of the Building Inspector if they, or either of them, considered his decision erroneous. Not having done so, she cannot now attack the validity of his decision " *Id*.

In the more recent case of *Harkins v Greenville County*, 340 S C 606, 533 S E 2d 886 (2000), the Supreme Court again explained that a party aggrieved by a decision of a zoning administrator or building official is required to exhaust all administrative remedies provided by ordinance. The case of *Stanton v Town of Pawley's Island*, 309 S C 126, 420 S E 2d 502 (1992), is also instructive given the similarity of issues with the present case. In *Stanton*, the plaintiff's beach home was severely damaged by Hurricane Hugo, and the building official for the Town of Pawley's Island refused to issue a building permit to allow for the rebuilding of the lower level of the home. The Supreme Court affirmed the dismissal of the action because the plaintiff failed to appeal the denial of the building permit to the Zoning Board of Adjustments and hence had not exhausted his administrative remedies.

The record in the present case includes the City's zoning ordinances which demonstrate the existence of an appeals process from a decision by the zoning administrator. Section 1001.1 of the City of Georgetown Zoning Ordinances provides that "[a] permit shall be required for the

erection, alteration or reconstruction of any sign and such permit shall be issued by the Zoning Administrator " (R 409) Section 1100 vests the power in the Zoning Administrator to make decisions enforcing the zoning ordinances That section further provides

It is the intention of this Ordinance that all questions arising in connection with the enforcement of the Ordinance shall be presented first to the Zoning Administrator and that such questions shall be presented to the Board of Zoning Appeals only on appeal from the decisions of the Zoning Administrator

(R 419) The Board of Zoning Appeals is empowered by Section 1202 "to reverse any order, requirement, decision, or determination of the Zoning Administrator " (R 419) Likewise, Section 1205 of the Zoning Ordinances authorizes judicial review of any decision of Board of Zoning Appeals by the Circuit Court (R 421) A decision of the Circuit Court may then be appealed in accordance with state law to the State appellate courts

It is, however, undisputed that Ashenfelder failed to exhaust any administrative remedies Ashenfelder makes no attempt on appeal to dispute these facts Nor can he Indeed, by his own testimony, Ashenfelder concedes that he never applied for a sign permit needed to rebuild the billboard (R 156) Moreover, he conceded that he did not take any formal action to challenge the Zoning Administrator's informal statement that he would not qualify for a sign permit (R 157) Likewise, after he received the March 27, 2003 letter from the City Administrator, he did not file an appeal to the Board of Zoning Appeals (R 157) The record is thus clear that Ashenfelder did not even attempt to obtain a remedy using the administrative appeals process available to him By formally seeking a sign permit, even if rejected, Ashenfelder could have pursued all of the legal issues and defenses raised in this litigation at the Board of Zoning Appeals and then, if necessary, on appeal to the Circuit Court and the state appellate courts

Ashenfelder has not refuted this conclusion. He has not shown that he could not have pursued all of the legal issues and defenses raised in this litigation through an administrative appeal.⁵

As discussed above, Judge Baxley agreed with the City's exhaustion of administrative remedies defense. He dismissed Ashenfelder's declaratory judgment claim and his estoppel claim for failure to exhaust administrative remedies. (R. 235) He found that "an exhaustion of administrative remedies including filing for a permit, contesting the denial of it, as well as pursuing that through whatever appellate opportunities may be available was not done in this case." (R. 236) He further rejected Ashenfelder's claim that exhaustion of administrative remedies would have been futile. (R. 236)

Ashenfelder has not demonstrated that Judge Baxley's application of the exhaustion of administrative remedies defense does not bar his declaratory or equitable claims. Without question, Ashenfelder could have presented his arguments regarding his entitlement to rebuild the billboard to the Board of Zoning Appeals and, if dissatisfied with that proceeding, then by appeal to the Circuit Court. It was entirely improper for Ashenfelder to circumvent the Board of Zoning Appeals, and Judge Baxley was correct in so holding.

⁵ In *Hyde v. South Carolina Department of Mental Health*, 314 S.C. 207, 442 S.E.2d 582 (1994), the Supreme Court held that "[w]here an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts." 442 S.E.2d at 583. Also, in *Allen v. South Carolina Alcoholic Beverage Control Commission*, 321 S.C. 188, 467 S.E.2d 450 (Ct. App. 1996), this Court addressed whether exhaustion may be excused because the specific relief sought -- money damages -- was not available through the administrative process. This Court rejected that contention and "declined to excuse Allen's failure to exhaust on the basis Allen sought relief beyond that which the State Employee Grievance Committee is authorized to grant." 467 S.E.2d at 454. The Court explained that "[t]he difference in remedies under the State Employee Grievance Act and the Whistleblower Act does not eliminate the exhaustion requirement." *Id.* In the case at bar, Ashenfelder makes no arguments to distinguish *Hyde* and *Allen* other than to point out that those are not land use or zoning cases, which of course is a distinction without a difference. Nonetheless, it is worth pointing out that Ashenfelder cites no case where exhaustion was not required in the land use or zoning context, that is, absent proof of futility.

To reiterate, the necessity that Ashenfelder exhaust his administrative remedies in this land use case is demonstrated by the precedents cited above. A determination through the available administrative process of the factual issues raised here would have likely foreclosed the necessity of this litigation, which is precisely the reason for requiring the exhaustion of administrative remedies as a prerequisite for filing suit.

In short, Judge Baxley was correct in ruling that Ashenfelder failed to exhaust his administrative remedies and that exhaustion was not futile. Ashenfelder should certainly be precluded from pursuing his claims for declaratory and equitable relief when he failed to first raise those claims using the administrative avenues available to him. In addition, taking Judge Baxley's ruling to its natural conclusion, the exhaustion defense should also foreclose Ashenfelder's claims for monetary relief. The City thus asserts the exhaustion defense as a bar to all claims.

IV The trial court ruled correctly in dismissing Ashenfelder's adverse possession claim against the current property owner, Lucien Bruggeman

In the event this Court concludes that Ashenfelder may still appeal the dismissal of his adverse possession claim against Lucien Bruggeman, the City will briefly discuss that claim and demonstrate that Judge Baxley was correct in granting a directed verdict.

S C Code Ann § 15-67-210 provides

In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

S C Code Ann § 15-67-210 Based thereon, Ashenfelder was required to show that his possession of the Green/Bruggeman property was actual, open, notorious, exclusive, continuous, and hostile for the entire statutory period of ten years *See, Lusk v Callaham*, 287 S C 459, 339 S E 2d 156 (Ct App 1986) The person claiming that he adversely possesses real property must prove it by clear and convincing evidence *Id*

In granting a directed verdict on the adverse possession claim, Judge Baxley focused on Ashenfelder's failure to prove the element of hostility for a continuous period of ten years Judge Baxley focused on the 1996 correspondence between David Ashenfelder and P Douglas Green, concluding that the February 22, 1996 letter "is fatal to the adverse possession claim " (R 213) By way of background, in 1996, Ashenfelder took the position with Green, a predecessor in title to Bruggeman, that the billboard was *not* located on the Green/Bruggeman property but rather was located on City property In a letter dated February 22, 1996, Ashenfelder wrote the following to Green

It is not my intention to deny you anything that rightfully belongs to you However, my sign is not located on the property that you purchased from a tax sale It does, in fact belong to the City and is leased from the City to Burger King

(R 362) This letter was in response to a February 6, 1996 letter from Green which gave Ashenfelder thirty days to remove the billboard or agree to pay rent (R 361) Clearly, Green took the position that the billboard was located on his property, which is the same property now owned by Bruggeman In response, Ashenfelder took the position that the billboard was not located on the Green/Bruggeman property, which enabled him to avoid removing his billboard or paying rent

In *Lusk v Callaham*, 287 S C 459, 339 S E 2d 156 (Ct App 1986), this Court held that "adverse possession requires hostile possession, that is, possession with intention to dispossess the owner " 339 S E 2d at 158 "The mere possession of land, however, does not in and of itself manifest hostility toward the landowner " *Id*

As Judge Baxley concluded, the February 22, 1996 letter demonstrates Ashenfelder's belief that the property where the billboard was located was owned by the City He disputes Green's claim of ownership More importantly, at no time did Ashenfelder assert his own right of ownership or that he was claiming any ownership rights adverse to Green In fact, Ashenfelder wrote, "It is not my intention to deny you anything that rightfully belongs to you " (R 362) During the trial, Ashenfelder testified that he was confused in 1996 and did not know who owned the property However, as Judge Baxley pointed out, such equivocation does not satisfy the hostility element (R 214) Ashenfelder simply did not establish by clear and convincing evidence that he possessed the property with any intent to dispossess Green or his predecessors or successors in title ⁶

On appeal, Ashenfelder attempts to argue that his own "mental attitude" is not material He cites to the case of *Knox v Bogan*, 322 S C 64, 472 S E 43 (Ct App 1996), where this Court attempted to ascertain the impact of the Supreme Court's decision in *Perry v Heirs at Law and Distributees of Gadsden*, 316 S C 224, 449 S E 2d 250 (1994) In *Perry*, the Supreme Court found that the "mistaken belief" rule applied to boundary dispute claims but not to a dispute involving an entire tract of land Ashenfelder's reliance on *Knox* and *Perry* is misplaced for several reasons First, the dispute between Ashenfelder and Green/Bruggeman did not involve

⁶ With the exception of Bruggeman, there is no evidence of Green's predecessors or successors in title nor any "hostility" shown by Ashenfelder as to those titleholders

the entire tract of land Ashenfelder is now claiming ownership by adverse possession of only a small portion of the Green/Bruggeman tract. Second, the trial court did not rely on the "mistaken belief" rule to reject the adverse possession claim. Instead, Judge Baxley cited the fact that Ashenfelder did not claim any ownership rights but insisted to Green in 1996 that the City owned the land where the billboard was located. Even if Ashenfelder now claims ignorance as to the titleholder, Ashenfelder himself has not shown that he claimed ownership of any portion of the subject property prior to the filing of his amended complaint. Indeed, when this suit was originally brought, Ashenfelder claimed and affirmatively pled that the City owned the property where the billboard was located. In short, Ashenfelder did not show by clear and convincing evidence that he continuously claimed ownership for the statutory period of ten years or the common law period of twenty years. And for that reason, the directed verdict must be affirmed.

In addition to failing to demonstrate the hostility element, Ashenfelder also failed to show exclusive possession. In *Butler v Lindsey*, 293 S C 466, 361 S E 2d 621 (Ct App 1987), this Court explained that "where an owner of property and an occupier are both in possession, the possession of the legal owner prevails to the exclusion of the other. The exclusive possession necessary to acquire title by adverse possession is not satisfied if occupancy is shared with the owner or with agents of the owner." 361 S E 2d at 624. Ashenfelder readily concedes that he never made any attempt to exclude Green or Bruggeman or any other titled owner from possessing the subject property. (R 151). At best, Ashenfelder and the titled owner co-possessed the property, but that does not satisfy the exclusivity requirement. *See also*, S C Code Ann § 15-67-250.

In sum, if this Court determines that Ashenfelder can even appeal the directed verdict on the adverse possession claim when Bruggeman has been effectively dismissed from this case and

is not represented in this appeal, this Court should nonetheless affirm on the merits. Ashenfelder has clearly not demonstrated the elements of hostility and exclusivity continuously for the ten or twenty year periods as required.

V The trial court was correct in dismissing the estoppel claim

Ashenfelder has also appealed from the directed verdict on the estoppel claim. Judge Baxley dismissed that equitable claim based on Ashenfelder's failure to exhaust administrative remedies. (R. 235-236). He did not reach the merits of the claim.

For the reasons already discussed above, the City maintains that the directed verdict on the estoppel claim was correctly entered. In addition, as already discussed as well, the Court cannot award any equitable relief and allow Ashenfelder to rebuild the billboard on Bruggeman's property when Bruggeman was effectively dismissed from this case by Ashenfelder and is not a party to this appeal. The abandonment of the claims against Bruggeman should also dispose of the equitable estoppel claim.

Moreover, if the merits are reached, Ashenfelder has not shown that the City should be estopped from denying Ashenfelder the opportunity to rebuild the billboard. "As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy." *Town of Sullivan's Island v. Byrum*, 306 S. C. 539, 413 S. E. 2d 325, 328 (Ct. App. 1992). More importantly within the context of the present case, the South Carolina Supreme Court has explained that "the doctrine of estoppel will not be applied to effect public revenues or *property rights*." *Heyward v. South Carolina Tax Commission*, 240 S. C. 347, 126 S. E. 2d 15, 17 (1962). (Emphasis added)

"To prove estoppel against the government, the claiming party must show (1) a lack of knowledge and the means of knowledge about the truth of the matter in question, (2) justifiable reliance on the government's conduct, and (3) a prejudicial change in position " *Town of Sullivans Island v Byrum*, 306 S C 539, 413 S E 2d 325, 328 (Ct App 1992) "When a [plaintiff] has actual or constructive notice of a matter, and does not show any misrepresentation or concealment by the government, estoppel will not lie against the government " *Id*

Here, Ashenfelder has made no showing of any misrepresentation or concealment of any fact by the City He has likewise not demonstrated any *justifiable* reliance on any conduct by the City A failure to enforce the law, to the extent that is what Ashenfelder is maintaining, is no basis for estopping the government from later doing so Ashenfelder has certainly not presented any authority for his estoppel claim Therefore, even if Judge Baxley had reached the merits of the claim, a directed verdict was proper and should be affirmed

VI The trial court was correct in dismissing the trespass claim

Ashenfelder has also appealed the directed verdict on the trespass cause of action "Trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property " *Hawkins v City of Greenville*, 358 S C 280, 594 S E 2d 557, 565 (Ct App 2004) "For a trespass action to lie, the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion " 594 S E 2d at 566

To the extent that Ashenfelder is claiming a trespass to the billboard itself, that claim will not lie In *Creative Displays Inc v South Carolina Highway Dept* , 272 S C 68, 248 S E 2d

916 (1978), the Supreme Court held that an outdoor advertising sign "is personal property, both by stipulation of the parties to the lease and as a matter of law " 248 S E 2d at 917 A trespass action will not lie with respect to harm to personal property The proper cause of action for harm to personal property is a conversion claim, which Ashenfelder has also asserted

To the extent Ashenfelder is claiming a trespass to the real property on which the billboard is located, Judge Baxley was correct in ruling that the City is entitled to enter property for purposes of ensuring the public safety (R 237) The City's police powers support the right and privilege to enter property to make inspections and to take action to protect the safety and welfare of its citizenry Further, as Judge Baxley ruled, the trespass claim is barred by Tort Claims Act immunities, including Sections 15-78-60(4), (7), and (9) (R 236) Ashenfelder has not shown how Judge Baxley's reliance on these immunity provisions was in error

At any rate, as an additional sustaining ground, the City submits that Ashenfelder, who is not the titled owner of the subject property and has not established any rights by adverse possession or prescription, enjoys no standing or other basis for claiming a trespass to a third party's property Ashenfelder must show that he has rights to the property upon which the trespass occurred, and he has not made such a showing Further, the fact that he has now abandoned his claims of adverse possession and prescriptive easement against Lucien Bruggeman further requires the dismissal of his trespass claim The Court cannot determine any real property rights to Bruggeman's property in his absence *See, Gunter's Island Hunting Club v Hucks*, 282 S C 124, 317 S E 2d 470 (Ct App 1984) Without establishing any ownership or possessory interests upon Bruggeman's property, Ashenfelder can claim no trespass to real property

And finally, as another additional sustaining ground, Ashenfelder has not demonstrated any harm resulting from the alleged trespass to the real property. Instead, he alleges an interference with his personal property interests and harm proximately resulting from the removal of the damaged remains of the billboard, but as discussed above, that harm is actionable, if at all, as a conversion claim because the billboard is personal property, not real property under South Carolina law.

VII The lower court was correct in dismissing the inverse condemnation claim

Ashenfelder contends that Judge Baxley erred in granting a directed verdict on his inverse condemnation cause of action. "In an action for inverse condemnation, the property owner is the moving party claiming an act of the sovereign has damaged his property to the extent of an actual taking, entitling him to compensation." *WRB Ltd Partnership v County of Lexington*, 369 S.C. 30, 630 S.E.2d 479, 481 (2006). "Whether the plaintiff has established a claim for inverse condemnation is a matter for the court to determine." *Id.*

In *Myers v Real Property at 1518 Holmes Street*, 306 S.C. 232, 411 S.E.2d 209 (1991), the Supreme Court held as follows: "This Court has long recognized that the State's exercise of eminent domain is distinguished from its exercise of the police power. Just compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power." 411 S.E.2d at 211 (Emphasis in original). Judge Baxley determined, as was his prerogative, that "the evidence shows that this action was an exercise of the police power." (R. 237). Consequently, he dismissed the inverse condemnation.

Importantly, Ashenfelder has not shown that the removal of the damaged remains of the billboard was not an exercise of the police power. Ashenfelder had the burden of proof on showing that an inverse condemnation occurred, which includes a showing that the alleged damage did not result from an exercise of the police power. He never presented in his case-in-chief any City employees as witnesses. He made no effort to present any evidence as to the reasons for the removal of the damaged billboard.

Now, on appeal, in an effort to avoid this lack of proof in his case-in-chief, Ashenfelder repeatedly cites to the testimony of Boyd Johnson, Gerald Freeman, and Steven Church, however, it is important to recognize that those witnesses testified after Ashenfelder rested. Those witnesses testified after the directed verdict was granted. Those witnesses' testimony has no bearing on and should not be considered in evaluating whether Ashenfelder presented sufficient evidence to withstand the directed verdict motion. The propriety of Judge Baxley's rulings should be judged on the evidence in the record when he ruled and not on any evidence later received in the City's case-in-chief.

Moreover, Ashenfelder is now arguing *for the first time on appeal* that the police power is an affirmative defense on which the City had the burden of proof. That argument fails for several reasons. First, Rule 8(c), SCRPC, which includes a list of affirmative defenses, does not include the police power. Second, Ashenfelder has presented no authority to support his position that police power is an affirmative defense. Third, as already stated, this issue is raised for the first time on appeal and hence was waived at trial.

In short, Ashenfelder failed to present any evidence in his case-in-chief to demonstrate that the City's actions were not a valid exercise of its police power. For that reason, the dismissal of the inverse condemnation claim should be affirmed.

Furthermore, as an additional sustaining ground, the City argued at trial that an inverse condemnation action should not lie for "taking" of personal property. Instead, a common law claim for conversion is available to remedy such a "taking," and there is no need for a constitutional takings claim in that context. In *Cobb v. South Carolina Dept. of Transportation*, 365 S.C. 360, 618 S.E.2d 299 (2005), the Supreme Court explained

In eminent domain proceedings, a governmental entity is the moving party seeking to take property in exchange for compensation. In inverse condemnation cases, the property owner is the moving party claiming an act of the sovereign has damaged his property to the extent of an actual taking entitling him to compensation. These actions are treated alike under the takings clause of our State Constitution.

618 S.E.2d at 301. Thus, the Supreme Court has held that inverse condemnation must be treated like eminent domain. The recovery of the value of personal property is not available in an eminent domain action. See, *City of North Charleston v. Claxton*, 315 S.C. 56, 431 S.E.2d 610 (Ct. App. 1993), *Creative Displays Inc. v. South Carolina Highway Dept.*, 272 S.C. 68, 248 S.E.2d 916 (1978). In *Creative Displays*, the Supreme Court held that an outdoor advertising sign is personal property and is not subject to recovery in a condemnation proceeding. Therefore, if the value of a billboard may not be recovered in an eminent domain action, then it likewise should not be recovered in an inverse condemnation action. Such a result would appear to be required by the Supreme Court's holding in *Cobb*.

In sum, the City submits that the dismissal of Ashenfelder's inverse condemnation action should be affirmed.⁷

⁷ Ashenfelder has not appealed from the directed verdict dismissing his negligence claim. The trial court's ruling on that claim is the law of the case.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent City of Georgetown respectfully requests that this Court affirm the order of Judge J Michael Baxley granting in part the City's motion for directed verdict. The City further renews its request that the Court reverse the orders to the extent only that the City's motions for directed verdict were denied in part. The City further requests that the Court reverse the order denying the City's renewed directed verdict/JNOV motion made after the jury could reach no verdict. The Appellant-Respondent requests that the Court remand for entry of judgment in the City's favor.

Respectfully submitted,

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January 7, 2009

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant-Respondent City of Georgetown certifies that the Final Respondent's Brief of Appellant-Respondent complies with Rule 211(b), SCACR

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January 7, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
J Michael Baxley Circuit Court Judge

Case No 2004-CP-22-0955

David Ashenfelder,

Respondent-Appellant,

v

City of Georgetown

Appellant-Respondent

**FINAL APPELLANT'S BRIEF
OF RESPONDENT-APPELLANT**

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STATEMENT OF ISSUES ON APPEAL

- I DID THE TRIAL COURT ERR IN GRANTING THE APPELLANT/RESPONDENT'S MOTION FOR DIRECTED VERDICT AS TO THE ADVERSE POSSESSION CAUSE OF ACTION?
- II DID THE TRIAL COURT ERR IN GRANTING THE APPELLANT/RESPONDENT'S MOTION FOR DIRECTED VERDICT AS TO THE DECLARATORY JUDGMENT CAUSE OF ACTION?
- III DID THE TRIAL COURT ERR IN GRANTING THE APPELLANT/RESPONDENT'S MOTION FOR DIRECTED VERDICT AS TO THE ESTOPPEL CAUSE OF ACTION?
- IV DID THE TRIAL COURT ERR IN GRANTING THE APPELLANT/RESPONDENT'S MOTION FOR DIRECTED VERDICT AS TO THE TRESPASS CAUSE OF ACTION?
- V DID THE TRIAL COURT ERR IN GRANTING THE APPELLANT/RESPONDENT'S MOTION FOR DIRECTED VERDICT AS TO THE INVERSE CONDEMNATION CAUSE OF ACTION?

STATEMENT OF THE CASE

Mr. David Ashenfelder operated a billboard in the City of Georgetown since 1979. As a result of an accident on January 13, 2003, the City maintained that the billboard was damaged. The City subsequently removed and discarded the billboard and refused to replace it or allow Mr. Ashenfelder to replace it. This matter was commenced on December 3, 2004 by the filing of a Summons and Complaint setting forth causes of action against the City of Georgetown for conversion, negligence, violation of 42 U.S.C. §1983, violation of the Fifth Amendment to the United States Constitution, estoppel, and laches and waiver resulting from their removal of the billboard. The Defendant, City of Georgetown, filed a Notice of Removal on January 3, 2005 removing this case to the United States District Court for the District of South Carolina, Charleston Division. The Defendant filed an Answer on January 7, 2005 setting forth seventeen defenses. On December 16, 2005, the Defendant City of Georgetown filed a Motion for Summary Judgment. On March 16, 2006, the Honorable C. Weston Houck, United States District Judge ruled on the motion for summary judgment. Judge Houck held, in citing *Parratt v. Tyler*, 451 U.S. 527 (1981) and its progeny, that the *Parratt* doctrine excludes Mr. Ashenfelder's §1983 claim because he had an adequate state remedy. With respect to Mr. Ashenfelder's remaining federal question based on violation of the Fifth Amendment to the United States Constitution, Judge Houck held that this claim was not ripe for adjudication. Judge Houck held that because South Carolina provides for compensation of governmental takings, Mr. Ashenfelder's Fifth Amendment taking claim should be dismissed because it is not ripe. Finally, the Court held that it could decline to exercise supplemental jurisdiction over the state law claims since the Court had already dismissed all claims over which it had original jurisdiction. As a result, Judge Houck ruled that this action should be remanded to the South

Carolina Court of Common Pleas On March 30, 2006, the Defendant City of Georgetown filed a Motion to Alter or Amend Judge Houck's Order which was denied by Order of C Weston Houck dated June 29, 2006

On November 13, 2006, Mr Ashenfelder filed a Notice of Motion and Motion to Amend his Complaint On January 3, 2007, the Defendant City of Georgetown filed a Motion to Exclude Witnesses and a Motion for Summary Judgment On February 12, 2007, the Honorable J Michael Baxley denied the Defendants Motion to Exclude Witnesses and for Summary Judgment and granted Mr Ashenfelder's Motion to Amend Complaint which among other things, added Lucien A Bruggeman as a party Defendant based upon allegations that he owned the property where Mr Ashenfelder's billboard was located Defendant City of Georgetown filed its Answer to the Amended Complaint on April 3, 2007 and Mr Bruggeman filed his Answer to the Amended Complaint on April 4, 2007 On March 15, 2007, Mr Ashenfelder filed another Motion to Amend Complaint By Order of the Honorable J Michael Baxley filed on May 31, 2007, the Motion to Amend the Complaint was granted and on June 1, 2007, Mr Ashenfelder filed the Second Amended Summons and Complaint Mr Bruggeman filed his Answer to Second Amended Complaint on June 18, 2007 and the City of Georgetown filed its Answer to Second Amended Complaint on June 19, 2007 By virtue of the Second Amended Complaint, Mr Ashenfelder's causes of action against Mr Bruggeman included claims for adverse possession and prescriptive easement Mr Bruggeman raised no affirmative defenses The City of Georgetown raised the following defenses standing and ripeness, failure to exhaust administrative remedies, waiver, estoppel, statute of frauds, the City's actions are fairly debatable and therefore presumptively valid, absolute legislative immunity, statute of limitations, laches, sovereign immunity, damage caps and punitive damages bar as set forth in S C Code

Ann § 15-78-120, immunity pursuant to the South Carolina Tort Claims Act, S C Code Ann § 15-78-10, et seq , failure to mitigate damages, and sovereign immunity as to all claims for money damages

On October 2, 2007, the City of Georgetown filed a Motion for Summary Judgment, which was heard just prior to the trial and denied by the Honorable J Michael Baxley, the Trial Judge. This case proceeded to trial on October 8, 2007. At the end of Mr Ashenfelder's case in chief, the City of Georgetown made a motion for directed verdict. The Trial Judge granted the City's directed verdict motion on the adverse possession cause of action (R p 213, line 18-p 214, line 14). With respect to the declaratory judgment claim and the estoppel claim, the Trial Judge also granted directed verdict stating that Mr Ashenfelder failed to exhaust administrative remedies (R p 235, line 21-p 236, line 14). Further, the Trial Judge granted directed verdict on the negligence claim because he found that this case involved an intentional tort and did not sound in negligence (R p 236, lines 14-17). The Trial Judge also granted directed verdict as to the trespass claim since he held that the government was immune under S C Code Ann § 15-78-60, Subsections, 4, 7 and 9 (R p 236, line 17-p 237, line 20). Finally, the Trial Judge granted summary judgment as to the inverse condemnation cause of action, finding that this action was an exercise of police power and that the South Carolina law is clear that in any police power exercise there is no inverse condemnation (R p 237, line 20-p 238, line 3). The Court denied the City's motion for directed verdict on the issues of prescriptive easement and conversion. At the end of the evidence, both Mr Ashenfelder and the City of Georgetown made motions for directed verdict. The Trial Judge denied Mr Ashenfelder's directed verdict motion on the issues of adverse possession (R p 268, lines 8-22) and conversion (R p 269, lines 8-12). The City of Georgetown made a motion alleging that all of the Plaintiffs did not have standing to proceed

The Trial Judge ruled that only Mr. Ashenfelder had standing to proceed and allowed the matter to go forward as to David Ashenfelder only (R. p. 271, lines 5-20). The Trial Judge denied the City of Georgetown's motion for directed verdict on the prescriptive easement cause of action (R. p. 275, line 17-p. 276, line 3) and the conversion cause of action (R. p. 277, line 23-p. 279, line 23).

This matter was presented to the jury on the prescriptive easement and conversion causes of action and after several hours of deliberation, the jury was unable to reach a verdict. The City made a motion for the Trial Judge to reconsider his directed verdict rulings on the two remaining causes of action which the Trial Judge denied the Motion (R. p. 295, lines 1-14).

Based on the jury's failure to reach a verdict, the Trial Judge declared a mistrial (R. p. 294, lines 16-22), such Order being filed on October 15, 2007. Prior to this case being rescheduled for trial, the parties appealed. Mr. Ashenfelder filed and served his Notice of Intent to Appeal on November 13, 2008 and the City of Georgetown filed its Notice of Cross-Appeal on November 16, 2008.

ARGUMENTS

STANDARD OF REVIEW

It is well established that when considering a motion for a directed verdict, the trial court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. If the evidence as a whole is susceptible of more than one reasonable inference, the case should be submitted to the jury. *Gamble v. International Paper Realty Corp.* 323 S.C. 367, 474 S.E.2d 438 (1996), *Rice v. Multimedia, Inc.* 318 S.C. 95, 456 S.E.2d 381 (1995). In ruling on a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence, and the court does not have the authority to decide credibility issues or to

resolve conflicts in the testimony *Garrett v Locke* 309 S C 94, 419 S E 2d 842 (Ct App 1992) (Judge erred in granting directed verdict where more than one inference arose from the evidence, conflicts in the testimony were for the jury to resolve as the finders of fact)

In reviewing the grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party. Rather, it must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor *Bultman v Barber* 277 S C 5, 281 S E 2d 791 (1981)

I THE TRIAL COURT ERRED IN DIRECTING A VERDICT ON THE ADVERSE POSSESSION CAUSE OF ACTION

After Mr. Ashenfelder rested his case, upon motion by the City of Georgetown, the trial court directed a verdict dismissing Mr. Ashenfelder's adverse possession cause of action. The determination of title to real estate is legal in nature *Wigfall v Fobbs* 295 S C 59, 367 S E 2d 156 (1988), *Clark v Hargrave* 323 S C 84, 473 S E 2d 474 (Ct App 1996). Likewise, an adverse possession claim is an action at law *Miller v Leaird* 307 S C 56, 413 S E 2d 841 (1992).

To constitute adverse possession, the possession must be continuous, hostile, open, actual, notorious and exclusive for the entire ten (10) year statutory period *Davis v Monteith*, 289 S C 176, 345 S E 2d 724, (1986), citing, *Lusk et al v Callaham* 287 S C 459, 339 S E 2d 156 (Ct App 1986), *Gregg v Moore* 226 S C 366, 85 S E 2d 279 (1954). In *Getsinger v Midlands Orthopaedic Profit Sharing Plan*, 327 S C 424, 489 S E 2d 223 (S C App, 1997), the court stated as follows:

“The burden of proof of adverse possession is on the one relying thereon” *Weston v Morgan* 162 S C 177, 192, 160 S E 436, 441 (1931). “A [claimant's] title by adverse possession requires proof of actual, open, notorious, hostile, continuous, and exclusive possession by the claimant, or by one or more persons through whom he claimed, for the

[required] period [T]he burden of proof [of adverse possession] is upon the party relying thereon ” *Muller* 307 S C at 61, 413 S E 2d at 844

The party asserting adverse possession must establish the claim by clear and convincing evidence *Davis v Monteith* 289 S C 176, 345 S E 2d 724 (1986), *Thomas v Dempsey* 53 S C 216, 31 S E 231 (1898) *See also Zinnerman v Williams* 211 S C 382, 386, 45 S E 2d 597, 599 (1947)

In South Carolina, adverse possession may be established under a 10-year statute of limitation *See* S C Code § 15-3-340 (Supp 1996), S C Code § 15-67-210 (1976), S C Code § 15-67-220 (1976) The person claiming adverse possession under these statutes must have personally held the property for 10 years, and tacking^{FN2} is allowed only between an ancestor and an heir *Terwilliger v White* 222 S C 176, 72 S E 2d 169 (1952), *Terwilliger v Marion* 222 S C 185, 72 S E 2d 165 (1952) *See also* S C Juris *Adverse Possession* § 19(a) (1991) (during the 10-year period, tacking is not allowed between successive occupants)

FN2 “Tacking” is a doctrine that permits an adverse possessor to add his period of possession to that of a prior adverse possessor in order to establish continuous possession for the required period Black's Law Dictionary 1452 (6th ed 1990)

In addition to the 10-year statute of limitation for adverse possession, South Carolina common law recognizes the 20-year presumption of a grant *Terwilliger v Daniels* 222 S C 191, 72 S E 2d 167 (1952) *See* S C Juris *Adverse Possession* § 4 n 4 (1991) (there are several methods for acquiring property through the passage of time, and the acquisition of land under the common law period is more accurately labeled the 20-year presumption of a grant) Under the presumption of a grant, the time of possession may be tacked not only by ancestors and heirs, but also between parties in privity in order to establish the 20-year period *White* 222 S C 176, 72 S E 2d 169

To constitute adverse possession, which results in obtaining title to the disputed property, the possession must be continuous, hostile, open, actual, notorious, and exclusive for the requisite period *Mullis* 237 S C 487, 118 S E 2d 61 The claimant's possession must be hostile to not only the true owner, but also to the rest of the world so as to indicate his exclusive ownership of the property *Id* These elements must also be present in the presumption of a grant *See* 3 Am Jur 2d *Adverse Possession* § 5 (1986) (title by adverse possession is often said to rest on the presumption of a lost grant, mere possession does not afford the presumption of a grant-the possession must be actual, open, adverse, exclusive, and uninterrupted, as well as inconsistent with the existence of title in another, and under a claim or right or title)

Mr Ashenfelder met his burden of proof by showing that he met all the elements of the adverse possession cause of action Mr Ashenfelder was required to prove that his possession

was continuous, hostile, open, actual, notorious, and exclusive for the requisite period

a Mr Ashenfelder's Possession was Continuous for the Required Period

Possession of the property must be continuous and uninterrupted for the entire requisite period *Smith v Southern Ry -Carolina Div*, 237 S C 597, 118 S E 2d 440 (1961), *Glenn v Walker* 113 S C 1, 100 S E 706 (1919) Mr Ashenfelder began possession of the property and the billboard in 1979 (R p 101, line 25-p 102, line 2, R p 104, lines 7-14) and operated it on the property continuously until it was removed by the City of Georgetown after January 13, 2003 (R p 115, line 19-p 117, line 14, Plaintiff's Exhibit 10, (R p 363)) The Trial Judge further stated that "I do not find that from '79 to '89 there had been a ten-year period that meets the requirements " (R p 214, lines 11-12) Mr Ashenfelder believes that the Trial Judge's finding was in error There was no question from the testimony that Mr Ashenfelder's possession, use and maintenance of a billboard on the property, was the same during the entire period from 1979 until the billboard was removed by the City of Georgetown in January 2003 There was no evidence that Mr Ashenfelder's possession was ever interrupted during that time As such, Mr Ashenfelder's had continuous and uninterrupted possession of the billboard from 1979 to sometime after January 13, 2003 or 24 years The possession met the 10-year statutory period and the 20-year common law period

b Mr Ashenfelder's Possession was Hostile

In determining what amounts to hostility, the relation which the party claiming adverse possession occupies with reference to the owner is important As a general rule, the law presumes that the exclusive possession of land by one who is a stranger to the holder of the legal title is adverse *Mullis v Winchester*, 237 S C 487, 118 S E 2d 61 (1961), citing *Knight v Hilton*, 224 S C 452, 79 S E 2d 871 Mr Ashenfelder here was a stranger to the owners of the

property during the entire 24 year period There can be no question but what the City entered into possession of this land with the intention to dispossess the owners thereof

The Trial Judge ruled that the statement in the letter introduced as Plaintiff's Exhibit 9 was fatal to the adverse possession claim (R p 213, lines 20-22) The letter from Mr Ashenfelder to P Douglas Green dated February 22, 1996, stated in part as follows

You are requesting me to remove or rent my sign that is advertising Winyah Bay Outfitters, from property does not belong to you

On the day I left the letter from Mr Doyle, City Attorney with your secretary, I also left a map indicating where my sign is located according to the survey stakes that are marked on the lines for Burger King The letter indicates that the sign

- 1 Was not within the Highway right-of-way (That being Highway 17)
- 2 That the sign was on City property
- 3 That the property from the City was leased to Burger King

I also have a letter dated April 7, 1986 indicating that the sign is on a public right of way adjacent to the new Burger King According to the letter, "A recent survey confirmed the encroachment of this structure into the right-of-way"

It is not my intention to deny you anything that rightfully belongs to you However, my sign is not located on the property that you purchased from a tax sale It does in fact, belong to the City and is leased from the City to Burger King (Exhibit 9, R p 362)

The Trial Judge went on to rule that the statement in the letter stating that the property belongs to the City constitutes a failure to show an open and active, a hostile, a continuous claim of ownership of the property (R p 213, line 22-p 214, line 2) The Trial Judge further stated that Mr Ashenfelder stated that he was really not certain who the owner of the property was and there was evidence from various sources (R p 214, lines 2-5) Finally the Trial Judge concluded that "I find that [the] claim fails as a matter of law because of the subsequent correspondence in the testimony today "

It is evident that the Trial Judge believed that Mr Ashenfelder's confusion as to ownership of the tract of land that he was possessing was fatal to his claim Mr Ashenfelder disagrees

In *Knox v Bogan*, 322 S C 64, 472 S E 2d 43 (S C App ,1996) the court stated as follows

To constitute adverse possession, the possession must be continuous, hostile, open, actual, notorious and exclusive for at least ten years *Davis v Monteith* 289 S C 176, 345 S E 2d 724 (1986) As we understand the state of the record on appeal, there is no question but that the Knoxes' possession has been continuous, open, actual, notorious and exclusive for both the ten year adverse possession statutory period and the twenty year common law presumption of grant period The only issue is whether the Knoxes' possession was sufficiently hostile As we read *Perry v Heirs at Law* and *Wigfall v Fobbs* either there is no longer a hostility requirement where the claim is to an entire tract, or South Carolina does in fact follow the majority view that the mental attitude of the possessor of land is immaterial Under the majority view an actual, exclusive, open and notorious possession without the consent of the title owner is both wrongful and adverse and will ripen into perfect title in the usual way when the statute of limitations has run See Allen Levern Ray, Note, *South Carolina Law on Boundary Disputes* 12 S C L Q 418, 421 (1960) The majority view represents the most practical approach to the hostility requirement of adverse possession and is in keeping with the national trend of authority *Id* at 424

Mr Ashenfelder believes that the trial court dismissed his adverse possession claim because Mr Ashenfelder was confused as to the ownership of the property In that South Carolina does in fact follow the majority view that the mental attitude of the possessor of land is immaterial, it does not matter what Mr Ashenfelder believed, the fact of the matter is that Mr Ashenfelder did not own the property during his 24 years of possession and that the property was in fact owned by Lucien Bruggemen and his predecessors in title (R p 100, lines 11-17, Plaintiff's Exhibits 17 (R p 385), 19 (R p 386), 20 (R p 388), 21 (R p 394) and 33 (R p 405))

c Mr Ashenfelder's Possession was Open and Notorious

The possession of land must not be hidden, but apparent in the local community 8 S C JUR ADVERSE POSSESSION § 29 For example, an out-of-state owner need not be notified of a possessor's acts if one in the local community would know of possession *Id* It is unnecessary that the legal owner have actual knowledge that the adverse possessor is claiming the property adversely, it is sufficient that the hostile possession of the adverse claimant was so notorious that the legal owner by ordinary diligence should have known of it *Id*

This case involves Mr. Ashenfelder's operation and maintenance of a billboard on the property for 24 years that had the dimensions of 12 feet by 32 feet (R p 103, lines 19-25, Plaintiff's Exhibits 2 (R p 353) and 29 (R p 401)) One cannot imagine a more open and notorious possession of a tract of property than a 384 square foot billboard

d Mr. Ashenfelder had Actual Possession

Mr. Ashenfelder had actual possession of the area claimed Not only was there a billboard on the property but for over 16 years it was advertising his motel, the Georgetownian Motel (Plaintiff's Exhibit 29, (R p 401)) There is no question that Mr. Ashenfelder had actual possession and the City of Georgetown was well aware of it (R p 246, line 24-p 247, line 1)

e Mr. Ashenfelder's Possession was Exclusive

To be successful, an adverse possession claimant's possession must be such as to indicate his exclusive ownership of the property *Curtis v DesChamps*, 290 S C 315, 350 S E 2d 201 (Ct App 1986) The evidence is clear that no one other than Mr. Ashenfelder used, possessed and maintained the billboard and the property around the billboard from 1979 until January 2003 Although both the City of Georgetown requested that the billboard be removed in 1986 and the property owner asked that the billboard be removed or Mr. Ashenfelder pay rent, neither the City or the owner exercised possession or took any action to do so

In *Eller Media Co v Bruckner Outdoor Signs Inc* 299 A D 2d 166, 753 N Y S 2d 28 (N Y A D , 2002) the court dealt with an adverse possession claim involving a billboard. The proof in the case established that the Respondent's tenant constructed a billboard on the disputed lot and surrounded the billboard with a chain-link fence. The proof in the case also demonstrated with the requisite force that the billboard generated advertising revenues and, in so doing, increased the value of the land upon which it was placed. The *Eller Media* court found that the statutory requirements for the Respondent's claim of ownership of the disputed lot predicated on adverse possession were thus met. The court also held that the Respondent also satisfied the common-law criteria for adverse possession since its use of the disputed lot was hostile, open and notorious, exclusive and continuous for more than the 10-year statutory period. The *Eller Media* court noted that the billboard, which stood 60 feet above ground, and the six-foot high chain link fence were erected by Respondent's tenant between 1980 and 1982, and the tenant continued to use the billboard and pay the Respondent for that use until 1997 when the tenant transferred ownership of the billboard to another company. The *Eller Media* court found that the Respondent's tenants, from 1980 to the present [2002], establish continuous and uninterrupted use of the subject lot for the statutory period.

In the case at bar, Mr. Ashenfelder possessed and maintained the billboard on the property from 1997 until 2003 and although he did not erect a fence around the billboard, he also maintained the grounds around the billboard by cutting the growth and cleaning debris from the neighboring Burger King restaurant (R. p. 124, lines 15-24). The area around the sign that he maintained was 30 feet by 50 feet (R. p. 125, lines 8-20).

Based upon the foregoing and viewing the evidence and all reasonable inferences in the light most favorable to Mr. Ashenfelder, since the evidence as a whole is susceptible of more

than one reasonable inference, the cause of action for prescriptive easement should have been submitted to the jury in that Mr Ashenfelder satisfied the requirements of adverse possession. Ordinarily, the question of adverse possession is one of fact for the jury and only becomes one of law for the court when the evidence is undisputed and susceptible of but one inference. *Mullis v Winchester* 237 S C 487, 118 S E 2d 61 (1961), *Lynch v Lynch* 236 S C 612, 115 S E 2d 301 (1960). As such, Mr Ashenfelder respectfully submits that the Trial Judge erred in directing a verdict on the adverse possession cause of action.

II THE TRIAL COURT ERRED IN GRANTING THE APPELLANT'S MOTION FOR DIRECTED VERDICT ON THE DECLARATORY JUDGMENT CAUSE OF ACTION

In the Second Amended Complaint, Mr Ashenfelder requested the following relief:

31 The Plaintiffs are informed and believes that he is entitled to an Order of this Court declaring that they are entitled to keep and maintain the billboard at the same location where it existed since at least 1977.

In April 1979, Mr Ashenfelder purchased the Georgetonian Motel in Georgetown (R p 101, line 15-p 102, line 2). When he purchased the motel he took possession and began maintaining a billboard advertising the Georgetonian Motel (R p 104, lines 7-14 and 19-23, Plaintiff's Exhibit 29 (R p 401)). The billboard was 12 feet by 32 feet, was constructed of 5/8th inch plywood and was supported by 5 telephone poles, placed 8 feet apart and approximately 19 feet off the ground (R p 104, line 24-p 105, line 13). From 1979, Mr Ashenfelder continually did whatever maintenance was necessary on the billboard. He painted the billboard in between renting and he always re-primed the billboard so that the previous advertiser was not listed. He replaced the molding that was around the billboard (R p 124, lines 6-14). He also maintained the grounds around the billboard by cutting the growth and cleaning debris from the neighboring Burger King restaurant (R p 124, lines 15-24, R p 107, Plaintiff's Exhibit 34 (R p 406)).

Plaintiff's Exhibit 34 shows Mr Ashenfelder using a DR Trimmer, a commercial weed-eater that he used to maintain around the billboard (R p 127, line 25-p 139, line 5) The area around the billboard that Mr Ashenfelder maintained was thirty feet by fifty feet (R p 125, lines 8-20)

The City never asked Mr Ashenfelder to permit the billboard (R p 126, lines 23-25) Mr Ashenfelder permitted the billboard through the South Carolina Department of Transportation from the time he purchased the Georgetownian Motel in 1979 until it was removed by the City of Georgetown in 2003 (R p 127, lines 1-12) Mr Ashenfelder introduced documentation from the South Carolina Department of Highway showing the permitting and the fees paid by him to maintain the permits for the billboard during the entire 24-year period that he owned, operated and maintained it (Plaintiff's Exhibit 1 (R p 297))

In 1986 the City threatened to push over the billboard and Mr Ashenfelder hired Georgetown attorney, Kenneth L Mitchum to send a letter to the City (R p 119, lines 15-24, p 120, lines 19-25) Mr Mitchum sent a letter to Patrick J Doyle on April 15, 1986 that stated "this sign has been in place for thirty-five years, it seems to me that any such destruction of this sign on April 28, 1986 would be ridiculous" (R p 121, lines 1-10, Plaintiff's Exhibit 3 (R p 354)) Patrick J Doyle, as attorney for the City of Georgetown, responded to Mr Mitchum's letter on October 20, 1986 stating that since the Georgetownian Motel billboard is not within the state highway right-of-way that it should be removed within thirty days He also stated in the letter that the latest plat confirmed that the billboard is on City property (R p 121, line 20-p 122, line 23, Plaintiff's Exhibit 7 (R p 358)) Mr Ashenfelder never removed the billboard and the City never took any action to have the billboard removed (R p 122, line 20-p 123, line 5) Although the letter from James P Doyle refers to a plat that confirmed that the billboard was on City property, the Plat was never produced (R p 123, lines 6-9)

Mr. Ashenfelder sold the Georgetownian Motel on April 21, 1995 (R. p. 102, line 20-p. 103, line 1) and rebuilt the billboard (R. p. 106, line 2-p. 107, line 15). After he sold the Georgetownian Motel, he advertised other businesses on the billboard (R. pp. 84-95). He advertised Winyah Bay Outfitters (R. p. 105, line 23-p. 106, line 1), Cantrell Mortgage (Plaintiff's Exhibit 34 (R. p. 406)), Sid and Luther's Restaurant (R. p. 108, line 13-p. 109, line 8, Plaintiff's Exhibit 14 (R. p. 369)), Island Adventures (R. p. 109, lines 9-14, Plaintiff's Exhibit 15 (R. p. 374)), and Randy Jones from Litchfield Real Estate Company (R. p. 109, lines 15-22, Plaintiff's Exhibit 16 (R. p. 379)).

L. Boyd Johnson worked for the City of Georgetown from 1983 continuously until at least 2003 when the billboard was removed (R. p. 129, lines 6-12). He worked as zoning administrator from 1983 to 1993 and in that capacity was obligated to enforce the zoning code (R. p. 129, lines 16-22). After that he worked as the City Administrator and after that the director of zoning and code enforcement (R. p. 243, line 25-p. 244, line 13). He was aware that the billboard was there but never required that the billboard be permitted, never objected that the billboard was in violation of the City ordinances and never took any action to have the billboard removed (R. p. 129, line 23-p. 130, line 11). When the billboard was damaged in 2003 he did not take pictures or direct that pictures be taken of the damaged billboard, did not direct that any reports be done about the damage to the billboard and did not contact or attempt to contact Mr. Ashenfelder to tell him that the billboard was damaged even though he knew since at least 1986 that Mr. Ashenfelder owned the billboard (R. p. 246, line 5-p. 247, line 3). In fact Mr. Johnson testified that he could not testify as to the damage to the billboard because he did not see it (R. p. 249, lines 16-20). Mr. Ashenfelder first discovered that the billboard was missing on January 23 or 24, 2003 when he drove through Georgetown (R. p. 110, lines 3-20).

Gerald Freeman worked for the City of Georgetown from 1978 until May, 2004. He started working in the building department and eventually became the head of the Planning and Zoning Department in about 1989 (R p 251, line 15-p 252, line 9). The Planning and Zoning Department grants permits and is responsible for code enforcement (R p 252, line 10-p 358, line 17). He was the zoning administrator when Mr. Ashenfelder's billboard was removed by the City (R p 253, lines 18-19). As long as Mr. Freeman worked for the City (i.e. 26 years), he was aware that Mr. Ashenfelder's billboard was in place (R p 254, lines 11-19). He was not aware of any formal action that was taken to have Mr. Ashenfelder remove the billboard (R p 256, lines 17-19), or to permit the sign (R p 257, lines 15-25). It was Mr. Freeman's belief that the billboard was erected even before the City had a sign ordinance (R p 258, line 23-p 259, line 5). Mr. Freeman visited the location of the billboard one time after the accident but assigned Pat Gregory to be responsible to take care of the matter [Ms. Gregory did not even testify for the City at trial] (R p 260, lines 12-21). Even though he assigned Ms. Gregory to the matter, he did not require her to prepare a report, no report was prepared, and no pictures were taken by the Planning and Zoning department (R p 260, line 16-p 261, line 7).

Shortly after the time that the City of Georgetown removed the billboard, Mr. Ashenfelder spoke with Steven Church, the investigating officer and asked him whether he had taken pictures of the scene and the condition of the billboard. Officer Church responded that he had taken pictures of the entire accident scene and that the billboard had been damaged but it was still standing (R p 111, line 17-p 112, line 12). Officer Church never provided Mr. Ashenfelder with pictures of the accident scene (R p 112, lines 13-15). The City of Georgetown never provided pictures of the full billboard and its condition after the accident (R p 113, lines 2-4). Mr. Ashenfelder had discussions with Gerald Freeman shortly after the City

of Georgetown removed the billboard and Mr Freeman confirmed that he could not issue Mr Ashenfelder a permit because he stated it is a public right-of-way (R p 113, line 5-p 114, line 2) L Boyd Johnson, City Administrator, responded to Mr Ashenfelder's letter and stated that they could not permit the billboard to be replaced as it was located on public property and that there is no lease for the billboard on this property He also stated that a billboard on that site would not meet zoning requirements as such required spacing and they needed to find a new location on private property that meets the zoning requirements in order to erect a new billboard (R p 117, line 15-p 118, line 13, Plaintiff's Exhibit 11 (R p 364))

Article X, Sign Regulations, Section 1001-13 of the Georgetown Code of Ordinances states

"All signs are required to be maintained in such a manner as to protect the general public and adjacent property from damage and blight All signs and supports, structures, braces, guys, and anchors thereof shall be kept in good repair, refurbished from time to time, as necessary, and perpetually maintained in safe condition, free from deterioration, defective or missing parts, or peeling or faded paint, and able to meet the structural standards described in the building code Any sign not in compliance with this provision is hereby declared to be a nuisance

If a sign or any part thereof is declared to be a nuisance, the Zoning Administrator shall notify the appropriate person(s) in writing that the condition must be corrected within a specified time period If no action is taken within the time period by the person(s) charged with maintaining such sign, the Zoning Administrator shall initiate action to have the sign removed at the person(s) expense, in addition to being subject to Section 1106 of the Ordinance

In the event that the Zoning Administrator determines that such sign or parts thereof constitute an immediate threat to the public, he/she shall arrange for barricades to prevent public injury The person(s) charged with maintaining such sign shall be given twenty-four hours notice to eliminate the threat or the Zoning Administrator shall initiate action described in the preceding paragraph The Zoning Administrator shall document the reason(s) such sign is declared to be an immediate threat to public safety" [Emphases added] (Plaintiff's Exhibit 35)

Despite the requirements of the Georgetown County Zoning Ordinance which are obviously meant to protect a citizen's right to their property, the City took no action that they were required to take to comply with the Ordinance. Mr. Johnson testified the Zoning Administrator gave no notice as required by the ordinance, is not aware of any documentation, as required by the Ordinance, that would state the City's reason to have the billboard maintained or repaired, the City did not barricade the place around the billboard and there was no record or documentation whereby the City officials declared that the billboard was an immediate threat to public safety (R. p. 247, line 4-p. 248, line 12). The City of Georgetown, without notice, simply removed Mr. Ashenfelder's billboard and hauled it off to the county landfill two days after the accident which occurred on January 13, 2003 (R. p. 249, line 22-p. 250, line 13). Mr. Freeman, the Zoning Administrator at the time testified that he did not barricade the billboard (R. p. 263, lines 8-10), he never gave any notice to Mr. Ashenfelder as required by the Ordinance (R. p. 263, lines 19-22), he did not prepare a document that declared the billboard a public threat pursuant to the Ordinance (R. p. 264, lines 1-5).

With regard to the declaratory judgment claim, the Court dismissed the claim for failure to exhaust administrative remedies (R. p. 235, lines 21-25). The Court ruled that the issue was whether the City should be required either to permit or allow the construction or reconstruction of the billboard without a permit (R. p. 235, line 25-p. 236, line 3). The Court found as a matter of law that it would not have been a futile effort to exhaust administrative remedies with respect to requesting a permit for reconstruction of the billboard (R. p. 236, lines 7-10).

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is

prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree. S.C. Code Ann. § 15-53-20. This chapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered. S.C. Code Ann. § 15-53-130.

Mr. Ashenfelder believes that declaratory judgment relief is an appropriate remedy in this case. Mr. Ashenfelder argues that the City of Georgetown should not be permitted, in violation of their own ordinances, to remove Mr. Ashenfelder's billboard, then demand strict compliance with the ordinances to require him to exhaust administrative remedies to have it permitted. The billboard was erected before the sign ordinance was enacted and permitted by the State of South Carolina. Mr. Ashenfelder, at the cost of the City, should be able to replace and operate his billboard as it was before the City's wrongful removal. To rule otherwise sets a dangerous precedent. A municipality could remove a nonconforming and grandfathered structure, saying it was a nuisance, but giving no notice to the owner. When the owner complains, the municipality could tell them that they would have to get it permitted knowing all along that the structure cannot be permitted under the current ordinances. The effect would be that the municipality could remove any offending structure that they wanted. Mr. Ashenfelder believes that exhaustion of administrative remedies has no application in the case at bar and that declaratory judgment relief allowing Mr. Ashenfelder to replace the billboard at the City's cost, is the best remedy and the most practical under the circumstances.

Based upon the foregoing, Mr. Ashenfelder respectfully submits that the Trial Judge erred in granting directed verdict against Mr. Ashenfelder on the declaratory judgment cause of action.

III THE TRIAL COURT ERRED IN GRANTING THE APPELLANT'S MOTION FOR DIRECTED VERDICT ON THE ESTOPPEL CAUSE OF ACTION

The Court dismissed the estoppel cause of action based on failure to exhaust administrative remedies (R p 235, line 21-p 236, line 14) Mr Ashenfelder contends that the City of Georgetown trespassed on the property and removed his billboard and destroyed it The exhaustion of administrative remedies argument supposes that he should have requested a permit to reconstruct the billboard that the City of Georgetown improperly removed Mr Ashenfelder refers this Court to the arguments above relating to declaratory judgment as to why he believes that exhaustion of administrative remedies is not applicable

In *South Carolina Coastal Council v Vogel* 292 S C 449, 453, 357 S E 2d 187, 189 (Ct App 1987) the Court stated "A governmental body is not immune from the application of the doctrine of estoppel *where its officers or agents act within the proper scope of their authority* The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment" A municipality can be estopped by the acts of its officers within the scope of their authority *Farrow v City Council of Charleston*, 169 S C 373, 168 S E 852 S C 1933 The acts of government agents acting within the scope of their authority can give rise to estoppel against the government, but unauthorized conduct or statements do not give rise to estoppel *South Carolina Coastal Council v Vogel* 292 S C 449, 357 S E 2d 187 (Ct App 1987), *appeal dismissed* 294 S C 80, 362 S E 2d 646 (1987) To prove estoppel against the government, the claiming party must show (1) a lack of knowledge and the means of knowledge about the truth of the matter in question, (2) justifiable reliance on the government's conduct, and (3) a prejudicial change in position *Midlands Utility Inc v South Carolina Dept of Health and Envtl Control* 298 S C 66, 378 S E 2d 256 (1989) Further a governmental body may, within the limitations of its

powers, be estopped by its acquiescence in, and approval of, acts originally unauthorized CJS
 ESTOPPEL § 173 citing *Denton v City and County of San Francisco* 260 P 2d 83, 119 C A 2d
 369 *Leasure v Beebe* 83 A 2d 117, 32 Del Ch 210 *Lincoln County v School Dist No 65-R In*
and For Lincoln County 66 N W 2d 561, 159 Neb 262 *City of East Orange v Board of Water*
Com'rs of City of East Orange 180 A 2d 185, 73 N J Super 440 *affirmed* 191 A 2d 747, 40 N J
 334 *Abarno v City of New York* 157 N Y S 2d 513, 3 Misc 2d 1053 *affirmed* 178 N Y S 2d
 1022, 6 A D 2d 1040, appeal denied 182 N Y S 2d 295, 7 A D 2d 837 and 157 N E 2d 512, 5
 N Y 2d 511, 184 N Y S 2d 1026 *State ex rel Northeast Transp Co v Schaaf* 86 P 2d 1112,
 198 Wash 52

In that the billboard was located in the same location since at least 1971 (Plaintiff's
 Exhibit 1 (R p 297)), Mr Ashenfelder lacked any knowledge that the billboard was in violation
 of any City Ordinances The billboard had been permitted with the State of South Carolina since
 1978 (Plaintiff's Exhibit 1 (R p 297), R p 126, line 23-p 127, line 17) and as far as Mr
 Ashenfelder was concerned was properly and permissibly located The City of Georgetown
 never required that the billboard be permitted (R p 126, lines 23-25, R p 245, lines 1-3) In
 1986 the City threatened to push over the billboard and Mr Ashenfelder hired Georgetown
 attorney, Kenneth L Mitchum to send a letter to the City (R p 119, lines 15-24-p 120, lines 19-
 25) Mr Mitchum sent a letter to Patrick J Doyle on April 15, 1986 that stated "this sign has
 been in place for thirty-five years, it seems to me that any such destruction of this sign on April
 28, 1986 would be ridiculous" (R p 121, lines 1-10, Plaintiff's Exhibit 3 (R p 354)) Patrick J
 Doyle, as attorney for the City of Georgetown, responded to Mr Mitchum's letter on October 20,
 1986 stating that since the Georgetownian Motel billboard is not within the state highway right-of-
 way that it should be removed within thirty days He also stated in the letter that the latest plat

confirmed that the billboard is on City property (R p 121, line 20-p 122, line 23, Plaintiff's Exhibit 7 (R p 358)) Mr Ashenfelder never removed the billboard and the City never took any action to have the billboard removed (R p 122, line 20-p 123, line 5, R p 374, lines 4-17), never claimed that the billboard violated the sign ordinance (R p 245, lines 4-6), and never took any action under the sign ordinance to have it removed (R p 245, lines 7-11) Although the letter from James P Doyle refers to a plat that confirmed that the billboard was on City property, the Plat was never produced (R p 123, lines 6-9)

As a result, Mr Ashenfelder lacks any knowledge and the means of knowledge about the truth of the matter in question Based on the City's continued acquiescence for a period of over 30 years, and failure to press the matter as threatened in 1986, Mr Ashenfelder justifiably relied on the government's conduct

Although the City threatened to remove the billboard, they took no action and Mr Ashenfelder, in reliance on the City of Georgetown's acquiescence continued to maintain the area around the billboard and maintain, repair and improve the billboard From 1979, Mr Ashenfelder continually did whatever maintenance was necessary on the billboard He painted the billboard in between renting and he always re-primed the billboard so that the previous advertiser was not listed He replaced the molding that was around the billboard (R p 124, lines 6-14) He also maintained the grounds around the billboard by cutting the growth and cleaning debris from the neighboring Burger King restaurant (R p 124, lines 15-24) The area around the billboard that he maintained was thirty feet by fifty feet (R p 125, lines 8-20) Plaintiff's Exhibit 34 shows Mr Ashenfelder using a DR Trimmer, a commercial weed-eater that he used to maintain around the billboard (R p 127, line 25-p 128, line 5) Further, after he sold the Georgetownian Motel, he continued advertising other businesses on the billboard and maintained it

for the advertisers (R p 105, line 14-p 106, line 1, Plaintiff's Exhibit 34 (R p 406), R p 108, lines 13-25-p 109, line 8, Plaintiff's Exhibit 14 (R p 369), R p 109, lines 9-14, Plaintiff's Exhibit 15 (R p 374), R p 109, lines 15-22, Plaintiff's Exhibit 16 (R p 379)) Mr Ashenfelder also totally rebuilt the billboard after he sold the Georgetownian Motel in 1995 (R p 106, lines 2-p 107, line 15)

In *South Carolina State Highway Dept v Metts*, 270 S C 73, 240 S E 2d 816 (1978), the court stated as follows

It is also well settled that "it is of the essence of equitable estoppel that the party entitled to invoke the principle shall have been misled to his injury " *Grady v City of Greenville* 129 S C 89 123 S E 494 In *Blue Ridge Realty Company v Williamson*, 247 S C 112 145 S E 2d 922 the essential elements of an equitable estoppel, as related to the party claiming the estoppel, are "(1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change his position prejudicially "

The billboard had been on the same location for over 50 years, and Mr Ashenfelder maintained it and permitted it through the South Carolina Department of Transportation from 1979 until 2003 when it was removed by the City of Georgetown During that time the City never requested that it be permitted or brought an action to remove it Of great importance was the fact that in 1986 the City asked that it be removed which Mr Ashenfelder refused The City took no action to have it removed and Mr Ashenfelder continued to operate, maintain, repair and rebuild the billboard from 1986 Mr Ashenfelder respectfully submits that the testimony revealed that all of the requirements of equitable estoppel were satisfied

The Trial Judge ruled that Mr Ashenfelder should have applied for a permit to replace the billboard and that by failing to do so failed to exhaust administrative remedies (R p 236, lines 4-7) Mr Ashenfelder respectfully submits that the Trial Judge failed to consider that had in not been for the wrongful action of the City in removing the billboard, he would not have had

to do anything. The City did not challenge the billboard while it was in place, but they unilaterally removed it, then stated that Mr. Ashenfelder would now need a permit for it to be replaced. Mr. Ashenfelder did not need to seek an administrative remedy to permit the billboard before the billboard was torn down by the City and should not have to seek one after the improper action by the City. Mr. Ashenfelder simply wants what he had before the City's improper action, nothing more.

A generally recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act. *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (S.C., 2000) citing *Moore v. Sumter County Council*, 300 S.C. 270, 387 S.E.2d 455 (1990). In *Charleston Television Inc. v. S.C. Budget and Control Bd.*, 301 S.C. 468, 473, 392 S.E.2d 671, 673 (1990), the court excused the requirement of exhaustion based, in part, on a finding that the subject administrative remedy required "an onerous and unnecessary burden." The Court held that *Charleston Television* was not required to petition for a rule change prior to seeking judicial review to contest the applicability of a regulation to a lease. *Id.* Mr. Freeman testified that the billboard could not be permitted and that he could apply for a permit but it would be denied. (R. p. 259, line 3-p. 260, line 7)

In any event, in the case at bar Mr. Ashenfelder did not need or want a permit, variance or anything that the City could offer, except for restoration of what he had that the City acquiesced in for more than 30 years and wrongfully taken. The billboard was already properly permitted through the State and had been so permitted since 1978. As a result to require Mr. Ashenfelder to seek an administrative remedy would be unreasonable, futile, onerous and unnecessarily burdensome.

Based upon the foregoing Mr. Ashenfelder respectfully submits that the Trial Judge erred.

in granting directed verdict against Mr Ashenfelder on the estoppel cause of action

IV THE TRIAL COURT ERRED IN GRANTING THE APPELLANT'S MOTION FOR DIRECTED VERDICT ON THE TRESPASS CAUSE OF ACTION

The Trial Judge dismissed the trespass because the Court found that this claim as a matter of law is not cognizable because a governmental entity is immune from such claim under S C Code Ann §15-78-60(4), which has to deal with the enforcement of any particular law as well as S C Code Ann §15-78-60(9), where entry upon property is expressly or impliedly authorized by law and further in S C Code Ann §15-78-60(7), which deals with nuisances (R p 235, line 17-p 237, line 1) The Trial Judge took judicial notice of the Georgetown City Code Section 1001-13, which deals with structural standards and other safety necessities and the Court went on to state that after the billboard was damaged it was not in compliance with the structural standards (R p 237, lines 2-7) The Trial Judge pointed out that the City did not comply with the time frames or procedures set out in the Ordinance but since the City is immune from the trespass claim, it would be violative of public policy to require them to comply with the Ordinance if there are exigent circumstances (R p 237, lines 12-20)

Mr Ashenfelder believes that there is no question that the City of Georgetown trespassed on the property to remove his billboard Although there is a factual issue as to the rights that Mr Ashenfelder had to maintain the billboard on the property, Mr Ashenfelder believes that the Trial Judge's reasoning was flawed As to trespass, the court in *Hawkins v City of Greenville*, 358 S C 280, 594 S E 2d 557 (S C App , 2004) stated that

Trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property " *Hedgepath v Am Tel Tel Co* 348 S C 340, 356, 559 S E 2d 327, 337 (Ct App 2001) (quoting *Silvester v Spring Valley Country Club* 344 S C 280, 286, 543 S E 2d 563, 566 (Ct App 2001), *cert denied* (citing *Ravan v Greenville County* 315 S C 447, 434 S E 2d 296 (Ct App 1993))) "To constitute actionable trespass, however, there must be an affirmative act, invasion of land must be intentional, and harm caused must be the direct result of that invasion " *Snow v*

City of Columbia 305 S C 544, 553, 409 S E 2d 797, 802 (Ct App 1991), *accord Mack v Edens* 320 S C 236, 240, 464 S E 2d 124, 127 (Ct App 1995) The gist of trespass is the injury to possession, and generally either actual or constructive possession is sufficient to maintain an action for trespass *Macedonia Baptist Church v City of Columbia* 195 S C 59, 71, 10 S E 2d 350, 355 (1940)

For a trespass action to lie, “the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion” *Mack v Edens* 320 S C 236, 240, 464 S E 2d 124, 127 (Ct App 1995) Hawkins argues the same acts that he claims warrant a finding of inverse condemnation also compel a finding of civil trespass Hawkins did not offer proof that any action by the City caused the flooding of the Servicemaster property

Having failed to show any affirmative and intentional act necessary to sustain an action for trespass, we hold the trial court properly granted summary judgment

The court in *Hawkins* went through a detailed discussion on sovereign immunity and did not site immunity as an addition sustaining ground for its decision In this case, there is no question that the City of Georgetown by affirmative act, invaded the land intentionally and caused harm to Mr Ashenfelder as a direct result of that invasion

Based upon the foregoing and viewing the evidence and all reasonable inferences in the light most favorable to Mr Ashenfelder, since the evidence as a whole is susceptible of more than one reasonable inference, the cause of action for trespass should have been submitted to the jury

V THE TRIAL COURT ERRED IN GRANTING THE APPELLANT’S MOTION FOR DIRECTED VERDICT ON THE INVERSE CONDEMNATION CAUSE OF ACTION

With respect to inverse condemnation, the Trial Judge found that the evidence showed that the City’s action in removing and destroying Mr Ashenfelder’s billboard was an exercise of police power and that South Carolina law is clear that in a police power exercise that there is no inverse condemnation (R p 237, lines 20-25) Firstly, the City of Georgetown did not raise police power as an affirmative defense Secondly, any power that the City had to remove the

billboard was specifically contained in the City's Ordinance, specifically Article X, Sign Regulations, Section 1001-13 of the Georgetown Code of Ordinances, which the City ignored (see discussion in Section II above)

In *Hawkins v City of Greenville*, 358 S C 280, 594 S E 2d 557 (S C App ,2004) the Court stated as follows

An action for inverse condemnation is appropriate where the government takes private property for public use *Quality Towing Inc v City of Myrtle Beach* 340 S C 29, 38, 530 S E 2d 369, 373 (2000) Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency *Horry County v Ins Reserve Fund* 344 S C 493, 498, 544 S E 2d 637, 640 (Ct App 2001) While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings *Horry County* 344 S C at 498, 544 S E 2d at 640 "The term 'inverse condemnation' describes an action grounded, not on statutory condemnation power, but on the constitutional proscription against the taking or damaging of property for public use without just compensation" *Vick v South Carolina Dep't of Transp* 347 S C 470, 480, 556 S E 2d 693, 698 (Ct App 2001) "One basic difference between condemnation and inverse condemnation is that in condemnation proceedings, the governmental entity is the moving party, whereas, in inverse condemnation, the property owner is the moving party" *South Carolina State Highway Dep't v Moody* 267 S C 130, 136, 226 S E 2d 423, 425 (1976) (quoting 27 Am Jur 2d *Eminent Domain* § 829 (1996)) The action is not based on tort, but on the constitutional prohibition of the taking of property without compensation *Horry County* 344 S C at 498, 544 S E 2d at 640

An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain To establish an inverse condemnation, a plaintiff must show "(1) an affirmative, positive, aggressive act on the part of the governmental agency, (2) a taking, (3) the taking is for a public use, and (4) the taking has some degree of permanence" *Marietta Garage Inc v South Carolina Dep't of Pub Safety* 352 S C 95, 101, 572 S E 2d 306, 308 (Ct App 2002), *Gray v South Carolina Dep't of Highways & Pub Transp* 311 S C 144, 149, 427 S E 2d 899, 902 (Ct App 1992)

The record clearly reflects that the City of Georgetown took an affirmative, positive, aggressive act to destroy and remove Mr Ashenfelder's billboard, such act constituted a taking, the taking was for a public use in that the City maintained that it was non conforming to the City

Ordinances and the taking was permanent in that it was removed and taken to the County landfill. As such, the elements of inverse condemnation were met.

Even assuming that the City of Georgetown properly raised the defense of exercise of police, Mr. Ashenfelder contends that any police power was as regulated in the City Ordinance. S.C. Code Ann. § 5-7-30 states in part as follows:

Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it.

In *Lomax v. City of Greenville*, 225 S.C. 289, 82 S.E.2d 191 (1954), stated that:

The rule that grants of police powers to municipalities are to be strictly construed has been generally invoked in cases involving municipal ordinances regulating or restricting the activities of the citizens.

In the case at bar, the limits of the City of Georgetown's police power with respect to signs was set out in a very detailed Ordinance. The City did not comply in any way with the Ordinance and Mr. Ashenfelder contends that it is improper to permit the City to violate its Ordinance under the broad brush of police power, when that is the very power that allowed the City to create the ordinance in the first place.

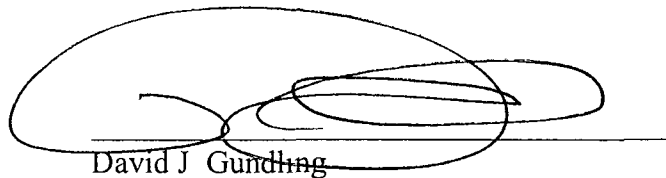
Based upon the foregoing and viewing the evidence and all reasonable inferences in the light most favorable to Mr. Ashenfelder, since the evidence as a whole is susceptible of more than one reasonable inference, the cause of action for condemnation should have been submitted to the jury.

CONCLUSION

Mr Ashenfelder respectfully request that the Court reverse the Trial Court s directed verdict rulings against Mr Ashenfelder relating to his adverse possession, declaratory judgment, estoppel, trespass and inverse condemnation causes of action

Respectfully submitted,

G U N D L I N G
L A W F I R M P A

A handwritten signature in black ink, appearing to read 'David J. Gundling', is written over a horizontal line. The signature is stylized with loops and is partially enclosed by a large, hand-drawn oval.

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Pawleys Island, South Carolina
December 22, 2008

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
J Michael Baxley, Circuit Court Judge

Case No 2004-CP-22-0955

David Ashenfelder,

Respondent-Appellant,

v

City of Georgetown

Appellant-Respondent

**FINAL RESPONDENT'S BRIEF OF
RESPONDENT-APPELLANT**

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ARGUMENTS

I THE TRIAL JUDGE DID NOT ERR IN FAILING TO APPLY HIS RULING ON THE CITY OF GEORGETOWN'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES DEFENSE TO ASHENFELDER'S CLAIMS SEEKING MONETARY RELIEF, INCLUDING THE CONVERSION CAUSE OF ACTION

Initially, since the affirmative actions by the City in removing the billboard, resulted in what the City alleges was the need to exhaust administrative remedies by applying for a permit to restore the billboard, Mr Ashenfelder believes that exhaustion of administrative remedies is inapplicable. The Trial Judge ruled that Mr Ashenfelder should have applied for a permit to replace the billboard and that by failing to do so failed to exhaust administrative remedies (R p 236, lines 4-7). Mr Ashenfelder respectfully submits that the Trial Judge failed to consider that had it not been for the wrongful action of the City in removing the billboard, he would not have had to do anything. The City did not challenge the billboard while it was in place, but they unilaterally removed it, then stated that Mr Ashenfelder would now need a permit for it to be replaced. Mr Ashenfelder did not need to seek an administrative remedy to permit the billboard before the billboard was torn down by the City and should not have to seek one after the improper action by the City. In the case at bar Mr Ashenfelder did not need or want a permit, variance or anything that the City could offer, except for restoration of what he had that the City acquiesced in for more than 30 years and wrongfully taken. The billboard was already properly permitted through the State and had been so permitted since 1978. Mr Ashenfelder argues that the City of Georgetown should not be permitted, in violation of their own ordinances (Article X, Sign Regulations, Section 1001-13 of the Georgetown Code of Ordinances, Plaintiff's Exhibit 35, R p 407) to remove Mr Ashenfelder's billboard, then demand strict compliance with the ordinances to require him to exhaust administrative remedies to have it permitted. The billboard

was erected before the sign ordinance was enacted and permitted by the State of South Carolina Mr Ashenfelder, at the cost of the City, should be able to replace and operate his billboard as it was before the City's wrongful removal To rule otherwise sets a dangerous precedent A municipality could remove a nonconforming and grandfathered structure, saying it was a nuisance, but giving no notice to the owner When the owner complains, the municipality could tell them that they would have to get it permitted knowing all along that the structure can not be permitted under the current ordinances The effect would be that the municipality could remove any offending structure that they wanted Mr Ashenfelder believes that exhaustion of administrative remedies has no application in the case at bar

In any event, the City argues that the Trial Judge erred in not granting directed verdict for the City under the failure to exhaust administrative remedies defense "The doctrine of exhaustion of administrative remedies is generally considered a rule of 'policy, convenience and discretion, rather than one of law, and is not jurisdictional " *Vaught v Wautes* 300 S C 201, 205, 387 S E 2d 91, 93 (Ct App 1989) (citing *Andrews Bearing Corp v Brady* 261 S C 533, 201 S E 2d 241 (1973)) Whether the requirement that administrative remedies be exhausted may be excused is a matter within the trial judge's discretion and his decision will not be disturbed on appeal absent an abuse of that discretion *Allen v South Carolina Alcoholic Beverage Control Com'n*, 321 S C 188, 467 S E 2d 450 (S C App , 1996), citing, *Hyde v South Carolina Dep't of Mental Health* 314 S C 207, 442 S E 2d 582 (1994) An abuse of discretion occurs when (1) a judge's ruling has no evidentiary support, or (2) the judge makes an error of law *Allen*, supra, *Gooding v St Francis Xavier Hosp* 317 S C 320, 454 S E 2d 328 (Ct App 1995)

Mr Ashenfelder argues that there was no abuse of discretion by the Trial Judge The City argued, in its motion for summary judgment pretrial, that the Trial Judge should dismiss all

of Ashenfelder's causes of action for failure to exhaust administrative remedies. The Trial Judge ruled that "[1] will say with regard to your over arching defense of failure to exhaust administrative remedies, I'm going to have to agree with Mr. Gundling that to put the Plaintiff to a vain or futile act would not be appropriate in this case. It seems that there is sufficient evidence in this case that regardless of what administrative remedy the Plaintiff had pursued it would not have been successful. (R. p. 36, lines 4-10). After Mr. Ashenfelder's case in chief, the City again claimed that all causes of action should be dismissed for failure to exhaust administrative remedies. The Trial Judge dismissed the adverse possession cause of action finding that there was not sufficient proof to establish the necessary elements (R. p. 214, line 18-p. 215, line 14), not for failure to exhaust administrative remedies. The Trial Judge also dismissed the negligence cause of action because this matter did not sound in negligence (R. p. 236, lines 14-17), not for failure to exhaust administrative remedies. The Trial Judge further dismissed the trespass cause of action holding that the City is immune (R. p. 236, line 17-p. 237, line 20), not for failure to exhaust administrative remedies. Finally, the Trial Judge dismissed the inverse condemnation cause of action stating that removal of the billboard was an exercise of police power (R. p. 237, line 20-p. 238, line 3), not for failure to exhaust administrative remedies. The Trial Judge allowed the conversion and prescriptive easement causes of action to go to the jury (R. p. 240, lines 6-24). The Trial Judge did dismiss the declaratory judgment and estoppel causes of action for failure to exhaust administrative remedies since they involved issues as to whether the City should be required to issue a permit or allow reconstruction of the billboard (R. p. 235, line 21-p. 236, line 10). As additional sustaining grounds, the Trial Judge found that there was no showing by Ashenfelder that he was entitled to such relief (R. p. 236, lines 10-14). After the close of all the evidence, the City again argued that the prescriptive

easement and conversion causes of action should be dismissed for failure to exhaust administrative remedies (R p 284, lines 19-22) The Trial Judge again denied the City's motion for directed verdict on the prescriptive easement cause of action (R p 275, line 17-p 276, line 3) and the conversion cause of action (R p 278, line 23-p 279, line 23)

The City cites *Lominick x City of Aiken*, 244 S C 32, 135 S E 2d 305 (1964) as authority for the proposition that Mr Ashenfelder should have exhausted administrative remedies In *Lominick* an individual acquired a building permit from the building inspector Subsequently, after complaints from citizens, the City of Aiken attempted to revoke the permit The Court ruled that the City of Aiken or the Citizen should have appealed the decision to the Zoning Board of Appeals and in failing to do so did not exhaust administrative remedies The facts of *Lominick* can be distinguished from the case at bar in which Mr Ashenfelder did not have to pursue any administrative remedies had it not been for the improper action by the City

The City also cites *Stanton v Town of Pawleys Island*, 309 S C 126, 420 S E 2d 502 (1992) as further support for its position In *Stanton*, as in the case at bar, the appellant challenged the trial judge's decision on failure to exhaust administrative remedies The *Stanton* court cited authority for the proposition that the question of whether to require the plaintiff to exhaust administrative remedies was a matter within the sound discretion of the trial judge A matter within the sound discretion of the trial judge will not be disturbed on appeal absent an abuse of discretion and further that an abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support The *Stanton* court ruled that "in order for this Court to reverse the trial judge's order on this issue, Stanton must show that as a matter of law, he was not required to exhaust administrative remedies or that the trial judge's ruling was based upon facts for which

there is no evidentiary support *Stanton* has failed to establish either. Finally in *Stanton* the alleged need for a permit resulted from Hurricane Hugo not from what Mr. Ashenfelder alleges was improper actions by the City.

The City argues that Mr. Ashenfelder should have complied with the City's zoning ordinance by requesting a permit and cites various provisions of the Georgetown County Zoning Ordinance. However, had the City complied with its own ordinance, Mr. Ashenfelder believes that there would have been no necessity to apply for a permit. Article X, Sign Regulations, Section 1001-13 of the Georgetown Code of Ordinances states

"All signs are required to be maintained in such a manner as to protect the general public and adjacent property from damage and blight. All signs and supports, structures, braces, guys, and anchors thereof shall be kept in good repair, refurbished from time to time, as necessary, and perpetually maintained in safe condition, free from deterioration, defective or missing parts, or peeling or faded paint, and able to meet the structural standards described in the building code. Any sign not in compliance with this provision is hereby declared to be a nuisance.

If a sign or any part thereof is declared to be a nuisance, the Zoning Administrator shall notify the appropriate person(s) in writing that the condition must be corrected within a specified time period. If no action is taken within the time period by the person(s) charged with maintaining such sign, the Zoning Administrator shall initiate action to have the sign removed at the person(s) expense, in addition to being subject to Section 1106 of the Ordinance.

In the event that the Zoning Administrator determines that such sign or parts thereof constitute an immediate threat to the public, he/she shall arrange for barricades to prevent public injury. The person(s) charged with maintaining such sign shall be given twenty-four hours notice to eliminate the threat or the Zoning Administrator shall initiate action described in the preceding paragraph. The Zoning Administrator shall document the reason(s) such sign is declared to be an immediate threat to public safety." [Emphases added] (Plaintiff's Exhibit 35)

Despite the requirements of the Georgetown County Zoning Ordinance which are obviously meant to protect a citizen's right to their property, the City took no action that they were required to take to comply with the Ordinance. Mr. Johnson testified the zoning

administrator gave no notice as required by the ordinance, is not aware of any documentation, as required by the Ordinance, that would state the City's reason to have the billboard maintained or repaired, the city did not barricade the place around the billboard and there was no record or documentation whereby the City officials declared that the billboard was an immediate threat to public safety (R p 247, line 4-p 248, line 12) The City of Georgetown, without notice, simply removed the Mr Ashenfelder's billboard and hauled it off to the county landfill two days after the accident which occurred on January 13, 2003 (R p 249, line 22-p 250, line 13) Mr Freeman, the zoning administrator at the time testified that he did not barricade the billboard (R p 263, lines 8-10), he never gave any notice to Mr Ashenfelder as required by the Ordinance (R p 263, lines 19-22), he did not prepare a document that declared the billboard a public threat pursuant to the Ordinance (R 9 264, lines 1-5)

Even if this Court finds that Mr Ashenfelder was required to exhaust administrative remedies, Mr Ashenfelder believes that applying for a permit would have been a vain or futile act A generally recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act *Ward v State*, 343 S C 14, 538 S E 2d 245 (S C , 2000) citing *Moore v Sumter County Council* 300 S C 270, 387 S E 2d 455 (1990) In *Charleston Television Inc v S C Budget and Control Bd* 301 S C 468 473 392 S E 2d 671 673 (1990), the court excused the requirement of exhaustion based, in part, on a finding that the subject administrative remedy required "an onerous and unnecessary burden " The court held that Charleston Television was not required to petition for a rule change prior to seeking judicial review to contest the applicability of a

regulation to a lease *Id* In the case at bar, Mr Freeman¹ testified that the billboard could not be permitted and that you could apply for a permit but it would be denied (R p 259, line 3-p 260, line 7) Mr Ashenfelder argues that the Trial Judge recognized this by ruling that “it would be an impossibility according to the witnesses we have before us to permit that under today’s and even 2003’s statutes in place at the time because of the potential right-of-way encroachment and a nonstandard use and design ” (R p 284, line 23-p 285, line 5) Further, since the billboard was already properly permitted through the State (Plaintiff’s Exhibit 1, R p 297), and had been so permitted since 1978, Mr Ashenfelder saw no need to get another permit As a result to require Mr Ashenfelder to seek an administrative remedy would be unreasonable, futile, onerous and unnecessarily burdensome

The city argues that the Trial Judges ruling of refusing to direct verdict on the conversion and prescriptive easement causes of action was controlled by an error of law The City cites *Hyde v south Carolina Department of Mental Health*, 314, S C 207, 442 S E 2d 582 (1994) for authority for the proposition In *Hyde* the issue was whether one claiming under the Whistleblower Statute had to exhaust administrative remedies pursuant to the State Employee Grievance Procedure and whether the legislature intended such, the *Hyde* court noted that the Whistleblower Statute was subsequently amended to expressly provide that an employee seeking

¹ Gerald Freeman worked for the City of Georgetown from 1978 until may 2004 He started working in the building department and eventually became the head of the Planning and Zoning Department in about 1989 (R p 251 line 15 p 252 line 9) The Planning and Zoning Department grants permits and is responsible for code enforcement (R p 252 line 10 p 253 line 17) He was the zoning administrator when Mr Ashenfelder s billboard was removed by the City (R p 253 lines 18 19) As long as Mr Freeman worked for the City (i e 26 years) he was aware that Mr Ashenfelder s billboard was in place (R p 254 lines 11 19) He was not aware of any formal action that was taken to have Mr Ashenfelder remove the billboard (R p 256 lines 17 19) or to permit the sign (R p 257 lines 15 25) It was Mr Freeman s belief that the billboard was erected even before the City had a sign ordinance (R p 258 line 23 p 259, line 5) Mr Freeman visited the location of the billboard one time after the accident but assigned Pat Gregory to be responsible to take care of the matter [Ms Gregory did not even testify for the City at trial] (R p 260 lines 12 21) Even though he assigned Ms Gregory to the matter he did not require her to prepare a report, no report was prepared, and no pictures were taken by the planning and zoning department (R p 260 line 16 p 261 line 7)

to bring a whistleblower action must exhaust “all available grievance or other administrative remedies” The Hyde court found that this amendment lends support to our conclusion that administrative remedies must be exhausted In the case at bar, the claim against the City involves the tort of conversion The City zoning ordinance provides recourse for failure to issue a sign permit not for claims in tort If such were the case, a municipality could argue that all claims against the municipality would have to be handled by administrative procedures

The city also cited *Allen v South Carolina Alcoholic Beverage Control Commission*, 321 S C 188, 467 S E 2d 450 (Ct App 1996) as further authority that the Trial Judge erred as a matter of law in not requiring Mr Ashenfelder to pursue his conversion cause of action though the City of Georgetown Zoning Ordinance Procedure *Allen*, also a Whistleblower case pointed out that “[t]he court found the doctrines of *res judicata* and collateral estoppel do not bar statutory recovery for state employees, but they do bar relitigation of issues which have been decided or should have been presented to the State Grievance Committee” As such the City appears to argue that Mr Ashenfelder’s claim for conversion must be presented to the City of Georgetown Zoning Board of Appeals The City cites no authority for this proposition in the zoning context Several cases, including *Hawkins v City of Greenville* 358 S C 280, 594 S E 2d 557 (S C App , 2004), *Smith v City of Greenville*, 229 S C 252, 92 S E 2d 639, (1956), and *Clark v Greenville County*, 313 S C 205, 437 S E 2d 117 (1993) include causes of action where torts were claimed against a municipality without any requirement that administrative remedies be exhausted

As such, the Trial Judge did not err in failing to direct a verdict in favor of the City based upon failure to exhaust administrative remedies

II THE TRIAL JUDGE DID NOT ERR IN FAILING TO GRANT THE CITY OF GEORGETOWN'S MOTION FOR DIRECTED VERDICT ON THE CONVERSION CAUSE OF ACTION

The City argues that the Trial Judge erred in directing a verdict for the City on Mr Ashenfelder's cause of action for conversion. The City cited *Hawkins v City of Greenville* 594 S E 2d 557 (S C App ,2004) for the proposition that "Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights ". The City argues that the removal of Mr Ashenfelder's billboard was "authorized" and therefore the elements of conversion were not established.

Firstly, the City misconstrues the elements of conversion and takes the word "unauthorized" out of context. Conversion is the "unauthorized assumption and exercise of the right of ownership ". The City never argued or established that it owned the billboard or had the right of ownership over the billboard. Conversely it was proved, and not contested, that Mr Ashenfelder owned the billboard and had it permitted with the State since 1979 (Exhibit 1, R p 297). The State of South Carolina (Exhibit 1, R p 297), the City (Exhibit 7, R p 358) and the landowner where billboard was located (Exhibit 6, R p 357) all recognized that the billboard was owned by Mr Ashenfelder.

The issue of exercise of police power is an issue totally separate and distinct from Mr Ashenfelder's right of ownership to his property and element of conversion and is an affirmative defense that was never raised by the Defendant. Even assuming that the City of Georgetown properly raised the defense of exercise of police, Mr Ashenfelder contends that any police power was as regulated in the City Ordinance. S C Code Ann § 5-7-30 states in part as follows:

Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the

Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it

In *Lomax v City of Greenville* 225 S C 289, 82 S E 2d 191 (1954) stated that

The rule that grants of police powers to municipalities are to be strictly construed has been generally invoked in cases involving municipal ordinances regulating or restricting the activities of the citizens

In the case at bar, the limits of the City of Georgetown's police power with respect to signs was set out in a very detailed Ordinance (see arguments on page 5 of this Reply setting forth the Ordinance and the City's failure to comply) The City did not comply in any way with the Ordinance and Mr Ashenfelder contends that it is improper to permit the City to violate its Ordinance under the broad brush of police power, when that is the very power that allowed the City to create the ordinance in the first place

The City further claims that Mr Ashenfelder was asserting a real property right to the billboard and that the City cannot convert real property Mr Ashenfelder claimed ownership to the billboard, and right to the real property where it was located based upon claims of adverse possession and prescriptive easement against Mr Bruggeman, the owner of the property As a result, the conversion cause of action did not relate to a claim of conversion as to the real property where the billboard was located

Finally, the City claims that it is entitled to claim sovereign immunity as to the conversion cause of action S C Code Ann § 15-78-60 provides in part as follows

The governmental entity is not liable for a loss resulting from

(17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude,

In that the City has a sign ordinance, actions of the City with respect to signs or billboards cannot be considered outside the scope of their duties. Mr. Ashenfelder contends that there is no evidence that the City officials acted with actual malice, intent to harm or that this case involved a crime of moral turpitude. Even assuming that the City officials meant to harm Mr. Ashenfelder, in that none of the elements of conversion include the “intent to harm,” the City cannot claim immunity under the above-references statute. (See *Eldeco Inc v Charleston County School Dist*, 372 S C 470, 642 S E 2d 726, 218 (2007)). The court in *Eldeco* stated as follows:

The Tort Claims Act provides that “the State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein” S C Code Ann § 15-78-40 (2005). The provision containing the exceptions to the waiver of immunity provides in relevant part, “[a] governmental entity is not liable for a loss resulting from employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude” S C Code Ann § 15-78-60(17).

During the discussion of CCSD's directed verdict motion, the trial court found that “intentional procurement” and “intentional interference” necessarily involves an “intent to harm.” *Eldeco* asserted that it did not have to prove an “intent to harm” to succeed on the merits of its claims against CCSD. At the conclusion of arguments on the motion, the trial court directed a verdict in favor of CCSD, primarily based on § 15-78-60(17).

We hold that this was error. None of the elements required for either cause of action, as clearly shown above, include “intent to harm.” Although it is true that harm may result from an intentional interference with existing or prospective contractual relations, it is not necessary that the interfering party intend such harm. Instead, it is only necessary that they intend to interfere with either an existing contract or intend to interfere with a prospective contract.

Accordingly, the trial court erred in directing a verdict in favor of CCSD based on the “intent to harm” exception to the waiver of immunity provided in the Tort Claims Act.

As such, the Trial Judge did not err in failing to direct a verdict in favor of the City on the conversion cause of action.

III THE TRIAL JUDGE DID NOT ERR IN FAILING TO GRANT THE CITY OF GEORGETOWN'S MOTION FOR DIRECTED VERDICT ON THE PRESCRIPTIVE EASEMENT CAUSE OF ACTION

To determine the existence of an easement by prescription, the following prerequisites must be established

- (1) there must be continued and uninterrupted use or enjoyment of the right for a period of 20 years,
- (2) the identity of the thing enjoyed must be proven, and
- (3) the use must have been adverse or under a claim of right

See Pittman v Lowther 363 S C 47, 610 S E 2d 479 (2005), *Horry County v Laychur* 315 S C 364, 434 S E 2d 259 (1993), *County of Darlington v Perkins* 269 S C 572, 239 S E 2d 69 (1977), *Morrow v Dyches*, 328 S C 522, 492 S E 2d 420, 423 (Ct App 1997)

There is no question that Mr Ashenfelder had continued and uninterrupted use or enjoyment of the property where the billboard was located for over 20 years and the identity of the thing enjoyed was proven. The City argues that Mr Ashenfelder did not demonstrate a justifiable claim of right. To establish an easement by prescription, one need only establish either a justifiable claim of right *or* adverse and hostile use. *Revis v Barrett* 321 S C 206, 467 S E 2d 460 (Ct App 1996)

In *Matthews v Dennis*, 365 S C 245, 616 S E 2d 437 (S C App, 2005) the court stated that

A party claiming a prescriptive easement under a claim of right must "demonstrate a substantial belief that he had the right to *use* the parcel or road based upon the totality of circumstances surrounding his use " [FN10]

FN10 *Hartley v John Wesley United Methodist Church* 355 S C 145, 151, 584 S E 2d 386, 389 (Ct App 2003) (emphasis in original), *see also* 25 Am Jur 2d *Easements and Licenses* § 57, at 552 (2004) (stating "an intent to claim adversely may be inferred from the acts and conduct of the dominant users" and defining "claim of right" as "without recognition of the rights of the owner of the servient estate")

We hold the record supports the special referee's finding that "Plaintiffs have established that theirs has always been a belief that they have had a right to use of the subject roadway for ingress and egress, and had openly done so for well in excess of twenty years " Ruby testified that members of her family had always used Hawk Lane for access while acknowledging they may not have had legal documents granting them the right to do this

Mr Ashenfelder had a substantial belief that he had a right to use the property He began possession of the property and the billboard in 1979 (R p 101, line 25–p 102, line 2, R p 104, lines 7-14) and operated it on the property continuously until it was removed by the City of Georgetown after January 13, 2003 (R p 115, line 19–p 117, line 14, Exhibit 10, R p 363) Mr Ashenfelder had actual possession of the area claimed Not only did Mr Ashenfelder operate the billboard on the property for almost 24 years, but for over 16 years the billboard was advertising his motel, the Georgetownian Motel (Exhibit 29, R p 401) There is no question that Mr Ashenfelder had actual possession and the City of Georgetown was well aware of it (R p 246, line 24–p 247, line 1) The Plaintiff had continued and uninterrupted use and enjoyment of the property for 24 years He believed that he had every right to use the property and maintain the billboard in that he had it permitted through the State since 1979 (Exhibit 1, R p 297)

There is no question from the testimony that Mr Ashenfelder knew that he did not own the property but there was confusion as to whether the property was owned by the City or Mr Bruggeman and his predecessors in title (Exhibits 3 (R p 354), 7 and 6 (R pp 358-361) The actual ownership of the property is not an issue so long as Mr Ashenfelder believed that he had a substantial belief that he had the right to *use* the parcel In any event, the City produced no evidence that the billboard was located on its property, conversely, Mr Ashenfelder proved by expert testimony that the billboard was actually located on Mr Bruggeman's property (Exhibits 17 (R p 385), 19 (R p 386), 21 (R p 394), 22 (R p 400), 33 (R p 405))

The City argues that by Mr Ashenfelder amending his Complaint to add Mr Bruggeman as a party and to claim a prescriptive easement should in some way affect his claim to a prescriptive easement First, the City never established that Mr Ashenfelder claims that Mr Bruggeman owned the property where the billboard was located was incorrect Whether or not he had a mistaken belief as to ownership is irrelevant to the element of "claim of right " See *Loftis v South Carolina Elec and Gas Co* , 361 S C 434, 604 S E 2d 714 (S C App , 2004)

CONCLUSION

Mr Ashenfelder respectfully request that the Court affirm the Trial Judges rulings whereby he refused to grant the City directed verdict/JNOV motions relating to Mr Ashenfelder's causes of action for conversion and prescriptive easement

Respectfully submitted,

G U N D L I N G
L A W F I R M P A

A handwritten signature in black ink, appearing to read "David J. Gundling", is written over a horizontal line. The signature is stylized with loops and is enclosed within a large, hand-drawn oval.

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January 6, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
J Michael Baxley, Circuit Court Judge

Case No 2004-CP-22-0955

David Ashenfelder,

Respondent-Appellant,

v

City of Georgetown

Appellant-Respondent

**FINAL APPELLANT'S REPLY BRIEF OF
RESPONDENT-APPELLANT**

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ARGUMENTS

I THE RESPONDENT-APPELLANT DAVID ASHENFELDER HAS NOT ABANDONED ON APPEAL ALL CLAIMS AGAINST LUCIEN BRUGGEMAN WHICH INCLUDES HIS ADVERSE POSSESSION CLAIM

The City argues that it was the intent of Mr Ashenfelder to abandon on appeal, the adverse possession claim against Lucien Bruggeman (Initial Respondent's Brief of Appellant-Respondent p 5) Mr Ashenfelder disagrees in that it was not the intent of Mr Ashenfelder to abandon an appeal on the adverse possession claim against Bruggeman The fact that this case involved a Notice of Appeal and Notice of Cross-Appeal, has caused a rather confusing and changing caption to this case However the Notice of Appeal, Notice of Cross-Appeal, Joint Motion for Additional Time to File Initial Brief, Appellant-Respondent's Designation of Matter to be Included in the Record of Appeal, and Initial Brief of Appellant-Respondent have all contained Lucien Bruggeman in the caption and Lucien Bruggeman's attorney, Robert C Byrd, Esq (the counsel appointed by the Supreme Court to handle the cases for Bruggeman's trial counsel who was suspended from the practice of law) has been served with all briefs, designations and other pleadings by both parties Further, the City has consistently adopted and argued a position for Bruggeman on Mr Ashenfelder's claims for adverse possession and prescriptive easement throughout the trial¹ and in fact in the City's Initial Brief of Appellant Respondent argued that the trial court erred in denying the City of Georgetown's motion for directed verdict on the prescriptive easement cause of action (Initial Brief of Appellant-Respondent, p 14) Adopting the City's argument, if Bruggeman was not a party to the appeal,

¹ See (R p 82) in which the City argued a motion for summary judgment on the issue of adverse possession (R p 83) in which the City a motion for summary judgment on the issue of prescriptive easement (R p 175) in which the City argued a motion for directed verdict on the issue of adverse possession (R p 179) in which the City argued a motion for directed verdict on the issue of prescriptive easement (R p 272) were the City renewed its motion for a directed verdict on the issue of adverse possession and (R p 295) where the City renewed its motion for directed verdict on all issues, including prescriptive easement after the Trial Judge declared a mistrial

then the Trial Court's ruling on prescriptive easement is the law of the case since it was not appealed by Bruggeman and should not and could not have been an issue on appeal. Such being the case, since Bruggeman did not appeal the ruling on the prescriptive easement cause of action such is the law of the case and this Court should reject the City's appeal of the Court's ruling on this cause of action.

Mr. Ashenfelder argues that since Bruggeman is named in the Notice of Appeal and since his counsel has received service of all briefs and designations in this matter, that since Bruggeman has not contested Mr. Ashenfelder's appeal of the court's ruling on the adverse possession cause of action, that this court should reverse the Trial Judge's grant of directed verdict on the issue of adverse possession.

II CLAIMS AGAINST THE CITY HAVE NOT BEEN RENDERED MOOT AND/OR NON-JUSTICIABLE

The City argues that Mr. Ashenfelder has abandoned all claims against Bruggeman and therefore all other claims by Mr. Ashenfelder are moot or non-justiciable. (Initial Respondent's Brief of Appellant-Respondent p. 6) Mr. Ashenfelder disagrees. The City argues that Mr. Ashenfelder has abandoned his attempts to establish a property interest to a portion of Bruggeman's property either by way of adverse possession or prescriptive easement. Such is not the case. As argued above, Bruggeman has not appealed the Trial Judge's ruling on the prescriptive easement claim and Mr. Ashenfelder has appealed the Trial Judge's directed verdict on the adverse possession cause of action. As such, all claims that Mr. Ashenfelder may have that would entitle him to sue or possession of Bruggeman's property for his billboard are cognizable under either the prescriptive easement cause of action, adverse possession cause of action or both.

III MR ASHENFELDER HAS NOT FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

The City argues that Mr Ashenfelder's failure to exhaust administrative remedies prior to instituting suit is a bar to all of his causes of action, including those seeking declaratory, equitable and/or monetary relief (Initial Respondent's Brief of Appellant-Respondent p 7) Ashenfelder disagrees and contends that Judge Baxley only granted the City's motion for directed verdict based upon failure to exhaust administrative remedies only as to Mr Ashenfelder's declaratory judgment and estoppel cause of action After Mr Ashenfelder's case in chief, the City again claimed that all causes of action should be dismissed for failure to exhaust administrative remedies The Trial Judge dismissed the adverse possession cause of action finding that there was not sufficient proof to establish the necessary elements (R p 214, line 18-p 215, line 14), not for failure to exhaust administrative remedies The Trial Judge also dismissed the negligence cause of action because this matter did not sound in negligence (R p 236, lines 14-17), not for failure to exhaust administrative remedies The Trial Judge further dismissed the trespass cause of action holding that the City is immune (R p 236, line 17-p 237, line 20), not for failure to exhaust administrative remedies Finally, the Trial Judge dismissed the inverse condemnation cause of action stating that removal of the billboard was an exercise of police power (R p 237, line 20-p 238, line 3), not for failure to exhaust administrative remedies The Trial Judge allowed the conversion and prescriptive easement causes of action to go to the jury (R p 240, lines 6-24) The Trial Judge did dismiss the declaratory judgment and estoppel causes of action for failure to exhaust administrative remedies since they involved issues as to whether the City should be required to issue a permit or allow reconstruction of the billboard (R p 235, line 21-p 236, line 10) As additional sustaining grounds, the Trial Judge found that there was no showing by Mr Ashenfelder that he was entitled to such relief (R p

236, lines 10-14) Mr Ashenfelder points out that the issue of exhaustion of administrative remedies was fully argued in the Respondent's Initial Brief of Respondent/Appellant (Respondent's Initial Brief of Respondent/Appellant, pp 1 – 8)

A THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES DOES NOT APPLY TO THIS CASE

Initially, Mr Ashenfelder argues that since the affirmative actions by the City in removing the billboard, resulted in what the City alleges was the need to exhaust administrative remedies by applying for permit to restore the billboard, Mr Ashenfelder believes that exhaustion of administrative remedies is inapplicable. The Trial Judge ruled that Mr Ashenfelder should have applied for a permit to replace the billboard and that by failing to do so failed to exhaust administrative remedies (R p 236, lines 4-7). Mr Ashenfelder respectfully submits that the Trial Judge failed to consider that had it not been for the wrongful action of the City in removing the billboard, he would not have had to do anything. The City did not challenge the billboard while it was in place, but they unilaterally removed it, then stated that Mr Ashenfelder would now need a permit for it to be replaced. Mr Ashenfelder did not need to seek an administrative remedy to permit the billboard before the billboard was torn down by the City and should not have to seek one after the improper action by the City. In the case at bar Mr Ashenfelder did not need or want a permit, variance or anything that the City could offer, except for restoration of what he had that the City acquiesced in for more than 30 years and wrongfully taken. The billboard was already properly permitted through the State and had been so permitted since 1978. Mr Ashenfelder argues that the City of Georgetown should not be permitted, in violation of their own ordinances (Article X, Sign Regulations, Section 1001-13 of the Georgetown Code of Ordinances, Plaintiff's Exhibit 35, R p 407) to remove Mr Ashenfelder's billboard, then demand strict compliance with the ordinances to require him to

exhaust administrative remedies to have it permitted. The billboard was erected before the sign ordinance was enacted and permitted by the State of South Carolina. Mr. Ashenfelder, at the cost of the City, should be able to replace and operate his billboard as it was before the City's wrongful removal. To rule otherwise sets a dangerous precedent. A municipality could remove a nonconforming and grandfathered structure, saying it was a nuisance, but giving no notice to the owner. When the owner complains, the municipality could tell them that they would have to get it permitted knowing all along that the structure can not be permitted under the current ordinances. The effect would be that the municipality could remove any offending structure that they wanted. Mr. Ashenfelder believes that exhaustion of administrative remedies has no application in the case at bar.

In any event, the City argues that the Trial Judge erred in not granting directed verdict for the City under the failure to exhaust administrative remedies defense. "The doctrine of exhaustion of administrative remedies is generally considered a rule of 'policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Vaught v. Waites*, 300 S.C. 201, 205, 387 S.E.2d 91, 93 (Ct. App. 1989) (citing *Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 201 S.E.2d 241 (1973)). Whether the requirement that administrative remedies be exhausted may be excused is a matter within the trial judge's discretion, and his decision will not be disturbed on appeal absent an abuse of that discretion. *Allen v. South Carolina Alcoholic Beverage Control Com'n*, 321 S.C. 188, 467 S.E.2d 450 (S.C. App., 1996), citing, *Hyde v. South Carolina Dep't of Mental Health*, 314 S.C. 207, 442 S.E.2d 582 (1994). An abuse of discretion occurs when (1) a judge's ruling has no evidentiary support, or (2) the judge makes an error of law. *Allen*, supra, *Gooding v. St. Francis Xavier Hosp.*, 317 S.C. 320, 454 S.E.2d 328 (Ct. App. 1995).

Mr. Ashenfelder argues that there was no abuse of discretion by the Trial Judge. The City argued, in its motion for summary judgment pretrial, that the Trial Judge should dismiss all of Mr. Ashenfelder's causes of action for failure to exhaust administrative remedies. The Trial Judge ruled that "[1] will say with regard to your over arching defense of failure to exhaust administrative remedies, I'm going to have to agree with Mr. Gundling that to put the Plaintiff to a vain or futile act would not be appropriate in this case. It seems that there is sufficient evidence in this case that regardless of what administrative remedy the Plaintiff had pursued it would not have been successful. After Mr. Ashenfelder's case in chief, the City again claimed that all causes of action should be dismissed for failure to exhaust administrative remedies. The Trial Judge only dismissed the declaratory judgment and estoppel causes of action for failure to exhaust administrative remedies since he stated that they involved issues as to whether the City should be required to issue a permit or allow reconstruction of the billboard. (R. p. 235, line 21-p. 236, line 10). As additional sustaining grounds, the Trial Judge found that there was no showing by Mr. Ashenfelder that he was entitled to such relief (R. p. 236, lines 10-14). After the close of all the evidence, the City again argued that the prescriptive easement and conversion causes of action should be dismissed for failure to exhaust administrative remedies (R. p. 284, lines 19-22). The Trial Judge again denied the City's motion for directed verdict on the prescriptive easement cause of action (R. p. 275, line 17-p. 276, line 3) and the conversion cause of action (R. p. 278, line 23-p. 279, line 23).

The City cites *Lominick v. City of Aiken*, 244 S. C. 32, 135 S. E. 2d 305 (1964) as authority for the proposition that Mr. Ashenfelder should have exhausted administrative remedies. In *Lominick* an individual acquired a building permit from the building inspector. Subsequently, after complaints from citizens, the City of Aiken attempted to revoke the permit. The Court

ruled that the City of Aiken or the Citizen should have appealed the decision to the Zoning Board of Appeals and in failing to do so did not exhaust administrative remedies. The facts of *Lominick* can be distinguished from the case at bar in which Mr. Ashenfelder did not have to pursue any administrative remedies had it not been for the improper action by the City.

The City also cites *Stanton v. Town of Pawleys Island*, 309 S.C. 126, 420 S.E.2d 502 (1992) as further support for its position. In *Stanton*, as in the case at bar, the appellant challenged the trial judge's decision on failure to exhaust administrative remedies. The *Stanton* court cited authority for the proposition that the question of whether to require the plaintiff to exhaust administrative remedies was a matter within the sound discretion of the trial judge. A matter within the sound discretion of the trial judge will not be disturbed on appeal absent an abuse of discretion and further that an abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support. The *Stanton* court ruled that "in order for this Court to reverse the trial judge's order on this issue, *Stanton* must show that as a matter of law, he was not required to exhaust administrative remedies or that the trial judge's ruling was based upon facts for which there is no evidentiary support. *Stanton* has failed to establish either. Finally in *Stanton* the alleged need for a permit resulted from Hurricane Hugo not from what Mr. Ashenfelder alleges was improper actions by the City.

The City argues that Mr. Ashenfelder should have complied with the City's zoning ordinance by requesting a permit and cites various provisions of the Georgetown County Zoning Ordinance (Initial Respondent's Brief of Appellant-Respondent p. 8). However, had the City complied with its own ordinance, Mr. Ashenfelder believes that there would have been no

necessity to apply for a permit Article X, Sign Regulations, Section 1001-13 of the Georgetown Code of Ordinances states

“All signs are required to be maintained in such a manner as to protect the general public and adjacent property from damage and blight All signs and supports, structures, braces, guys, and anchors thereof shall be kept in good repair, refurbished from time to time, as necessary, and perpetually maintained in safe condition, free from deterioration, defective or missing parts, or peeling or faded paint, and able to meet the structural standards described in the building code Any sign not in compliance with this provision is hereby declared to be a nuisance

If a sign or any part thereof is declared to be a nuisance, the Zoning Administrator shall notify the appropriate person(s) in writing that the condition must be corrected within a specified time period If no action is taken within the time period by the person(s) charged with maintaining such sign, the Zoning Administrator shall initiate action to have the sign removed at the person(s) expense, in addition to being subject to Section 1106 of the Ordinance

In the event that the Zoning Administrator determines that such sign or parts thereof constitute an immediate threat to the public, he/she shall arrange for barricades to prevent public injury The person(s) charged with maintaining such sign shall be given twenty-four hours notice to eliminate the threat or the Zoning Administrator shall initiate action described in the preceding paragraph The Zoning Administrator shall document the reason(s) such sign is declared to be an immediate threat to public safety” [Emphases added] (Plaintiff’s Exhibit 35)

Despite the requirements of the Georgetown County Zoning Ordinance which are obviously meant to protect a citizen’s right to their property, the City took no action that they were required to take to comply with the Ordinance Mr Johnson testified the zoning administrator gave no notice as required by the ordinance, is not aware of any documentation, as required by the Ordinance, that would state the City’s reason to have the billboard maintained or repaired, the city did not barricade the place around the billboard and there was no record or documentation whereby the City officials declared that the billboard was an immediate threat to public safety (R p 247, line 4-p 248, line 12) The City of Georgetown, without notice, simply removed the Mr Ashenfelder’s billboard and hauled it off to the county landfill two days

after the accident which occurred on January 13, 2003 (R p 249, line 22-p 250, line 13) Mr Freeman, the zoning administrator at the time testified that he did not barricade the billboard (R p 263, lines 8-10), he never gave any notice to Mr Ashenfelder as required by the Ordinance (R p 263, lines 19-22), he did not prepare a document that declared the billboard a public threat pursuant to the Ordinance (R p 264, lines 1-5)

B EVEN IF THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES APPLIES TO THIS CASE, PURSUIT OF THEM IN THIS CASE WOULD HAVE BEEN A VAIN OR FUTILE ACT

Even if this Court finds that Mr Ashenfelder was required to exhaust administrative remedies, Mr Ashenfelder believes that applying for a permit would have been a vain or futile act A generally recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act *Ward v State*, 343 S C 14, 538 S E 2d 245 (S C , 2000) citing *Moore v Sumter County Council* 300 S C 270, 387 S E 2d 455 (1990) In *Charleston Television Inc v S C Budget and Control Bd* 301 S C 468 473 392 S E 2d 671 673 (1990), the court excused the requirement of exhaustion based, in part, on a finding that the subject administrative remedy required "an onerous and unnecessary burden " The court held that Charleston Television was not required to petition for a rule change prior to seeking judicial review to contest the applicability of a regulation to a lease *Id* In the case at bar, Mr Freeman² testified that the billboard could not be

² Gerald Freeman worked for the City of Georgetown from 1978 until May 2004 He started working in the building department and eventually became the head of the Planning and Zoning Department in about 1989 (R p 251 line 15 p 252 line 9) The Planning and Zoning Department grants permits and is responsible for code enforcement (R p 252 line 10 p 253 line 17) He was the zoning administrator when Mr Ashenfelder s billboard was removed by the City (R p 253 lines 18 19) As long as Mr Freeman worked for the City (i e 26 years) he was aware that Mr Ashenfelder s billboard was in place (R p 254 lines 11-19) He was not aware of any formal action that was taken to have Mr Ashenfelder remove the billboard (R p 256 lines 17 19) or to permit the sign (R p 257 lines 15 25) It was Mr Freeman s belief that the billboard was erected even before the City had a sign ordinance (R p 258 line 23 p 259 line 5) Mr Freeman visited the location of the billboard one time after the accident but assigned Pat Gregory to be responsible to take care of the matter [Ms Gregory did not even testify for the City at trial] (R p 260 lines 12 21) Even though he assigned Ms Gregory to the matter he did not require

permitted and that you could apply for a permit but it would be denied (R p 259, line 3-p 260, line 7) Mr Ashenfelder argues that the Trial Judge recognized this by ruling that “it would be impossibility according to the witnesses we have before us to permit that under today’s and even 2003’s statutes in place at the time because of the potential right-of-way encroachment and a nonstandard use and design ” (R p 284, line 23-p 285, line 5) Further, since the billboard was already properly permitted through the State (Plaintiff’s Exhibit 1, R p 297), and had been so permitted since 1978, Mr Ashenfelder saw no need to get another permit As a result to require Mr Ashenfelder to seek an administrative remedy would be unreasonable, futile, onerous and unnecessarily burdensome

In summary, Ashenfelder argues that the doctrine of exhaustion of administrative remedies does not apply to this case at bar due to the circumstances of this case as argued below or if the doctrine is applicable to attempt to exhaust administrative remedies would be a vain or futile act and in fact contradictory to the relief that he was requesting due to the improper actions of the City

IV THE TRIAL JUDGE ERRED IN DISMISSING ASHENFELDER’S ADVERSE POSSESSION CLAIM

The City argues that the Trial Judge ruled correctly in dismissing Ashenfelder’s adverse possession claim (Initial Respondent’s Brief of Appellant-Respondent p 11) After discussing the Trial Judges rulings the City stated that “Ashenfelder simply did not establish clear and convincing evidence that he possessed the property with the intent to dispossess Green or his predecessors or successors in title ” (Initial Respondent’s Brief of Appellant-Respondent p 13) In determining what amounts to hostility, the relation which the party claiming adverse

her to prepare a report no report was prepared and no pictures were taken by the planning and zoning department (R p 260 line 16 p 261 line 7)

possession occupies with reference to the owner is important. As a general rule, the law presumes that the exclusive possession of land by one who is a stranger to the holder of the legal title is adverse. *Mullis v Winchester*, 237 S C 487, 118 S E 2d 61 (1961), citing *Knight v Hilton*, 224 S C 452, 79 S E 2d 871. Mr. Ashenfelder here was a stranger to the owners of the property during the entire 24 year period. There can be no question that to maintain a 24' by 36' billboard on someone's property without a lease or other permission constitutes possession of the land with the intention to dispossess the owners thereof.

The City further concludes that since Ashenfelder did not show by clear and convincing evidence that he continuously claimed ownership over the property for the statutory period ten years or the common law period of 20 years, the directed verdict should be affirmed. (Initial Respondent's Brief of Appellant-Respondent p. 14). Ashenfelder agrees that this was the Trial Judges' decision but such rationale is misplaced and error based upon the law of adverse possession. To constitute adverse possession, the possession must be continuous, hostile, open, actual, notorious and exclusive for the entire ten (10) year statutory period. *Davis v Monteith*, 289 S C 176, 345 S E 2d 724, (1986), citing, *Lusk et al v Callahan* 287 S C 459, 339 S E 2d 156 (Ct App 1986), *Gregg v Moore* 226 S C 366, 85 S E 2d 279 (1954). Continuously claiming ownership, is not an element of adverse possession. In *Knox v Bogan*, 322 S C 64, 472 S E 2d 43 (S C App, 1996) the court stated as follows:

To constitute adverse possession, the possession must be continuous, hostile, open, actual, notorious and exclusive for at least ten years. *Davis v Monteith* 289 S C 176, 345 S E 2d 724 (1986). As we understand the state of the record on appeal, there is no question but that the Knoxes' possession has been continuous, open, actual, notorious and exclusive for both the ten year adverse possession statutory period and the twenty year common law presumption of grant period. The only issue is whether the Knoxes' possession was sufficiently hostile. As we read *Perry v Heirs at Law* and *Wigfall v Fobbs* either there is no longer a hostility requirement where the claim is to an entire tract, or South Carolina does in fact follow the majority view that the mental attitude of the possessor of land is immaterial. Under the majority view an actual, exclusive, open

and notorious possession without the consent of the title owner is both wrongful and adverse and will ripen into perfect title in the usual way when the statute of limitations has run *See Allen Levern Ray, Note, South Carolina Law on Boundary Disputes* 12 S C L Q 418, 421 (1960)

Based upon the foregoing an actual, exclusive, open and notorious possession without the consent of the title owner is both wrongful and adverse and will ripen into perfect title in the usual way when the statute of limitations has run As such there is no requirement that Mr Ashenfelder continuously claimed ownership as the Trial Judge ruled and as the City argues

The City also argues that Ashenfelder failed to demonstrate the hostility argument (Initial Respondent's Brief of Appellant-Respondent p 14) The City cites *Butler v Lindsey*, 293 S C 446, 361 S E 2d 621 (Ct App 1978) for the proposition that "where an owner of property and an occupier are both in possession, the possession of the legal owner prevails to the exclusion of the other " There was no evidence that Bruggeman³ or any other owner of the subject property ever actually possessed it jointly with Ashenfelder and in fact as to the portion of the property claimed by Ashenfelder where the billboard was located was only possessed by Ashenfelder for over 20 years, no other possession was possible

Based upon the foregoing, Ashenfelder contends that the Trial Judge erred in dismissing the adverse possession cause of action

V THE TRIAL JUDGE ERRED IN DISMISSING ASHENFELDER'S ESTOPPEL CLAIM

The Court dismissed the estoppel cause of action based on failure to exhaust administrative remedies (R p 235, line 21 p 236, line 14) Mr Ashenfelder contends that the City of Georgetown trespassed on the property and removed his billboard and destroyed it The exhaustion of administrative remedies argument supposes that he should have requested a permit

³ Exhibit 21 (R p 394) shows that Mr Bruggeman s address is 16 Hickory Hollow Cincinnati, OH and the Record shows that Mr Bruggeman did not attend the trial

to reconstruct the billboard that the City of Georgetown improperly removed Mr Ashenfelder refers this Court to the arguments above relating to why he believes that exhaustion of administrative remedies is not applicable

The City argues that the Court cannot award equitable relief and allow Ashenfelder to rebuild on Bruggeman's property arguing that Bruggeman has been dismissed from this appeal (Initial Respondent's Brief of Appellant-Respondent p 15) Ashenfelder denies that he has abandoned any claims against Bruggeman and refers this Court to the arguments set forth in Section I and Section II above

The City argues that Ashenfelder made no showing of any misrepresentation or concealment of any fact by the City or that he justifiably relied on any conduct of the City (Initial Respondent's Brief of Appellant-Respondent p 15) Ashenfelder disagrees In that the billboard was located in the same location since at least 1971 (Plaintiff's Exhibit 1, R p 297), Mr Ashenfelder lacked any knowledge that the billboard was in violation of any City Ordinances especially since the billboard had been permitted with the State of South Carolina since 1978 (Plaintiff's Exhibit 1, R p 297, R p 126, line 23-p 127, lines 1-17) and as far as Mr Ashenfelder was concerned was properly and permissibly located The City of Georgetown never required that the billboard be permitted (R p 126, lines 23-25, R p 245, lines 1-3) In 1986 the City threatened to push over the billboard and Mr Ashenfelder hired Georgetown attorney, Kenneth L Mitchum to send a letter to the City (R p 119, lines 15-24, R p 120, lines 19-25) Mr Mitchum sent a letter to Patrick J Doyle on April 15, 1986 that stated "this sign has been in place for thirty-five years, it seems to me that any such destruction of this sign on April 28, 1986 would be ridiculous" (R p 1252 lines 1-10, Plaintiff's Exhibit 3, R p 354) Patrick J Doyle, as attorney for the City of Georgetown, responded to Mr Mitchum's letter on October 20,

1986 stating that since the Georgetown Motel billboard is not within the state highway right-of-way that it should be removed within thirty days. He also stated in the letter that the latest plat confirmed that the billboard is on City property (R. p. 121, line 20-p. 122, line 23, Plaintiff's Exhibit 7, R. p. 358). Mr. Ashenfelder never removed the billboard and the City never took any action to have the billboard removed (R. p. 122, line 20-p. 123, line 5, R. p. 255, lines 4-17), never claimed that the billboard violated the sign ordinance (R. p. 245, lines 4-6), and never took any action under the sign ordinance to have it removed (R. p. 245, lines 7-11). Although the letter from James P. Doyle refers to a plat that confirmed that the billboard was on City property, the Plat was never produced (R. p. 123, lines 6-9) and no action was taken by the City based thereon or otherwise.

As a result, Mr. Ashenfelder lacked any knowledge and the means of knowledge about the truth of the matter in question. Based on the City's continued acquiescence for a period of over 30 years, and failure to press the matter as threatened in 1986, Mr. Ashenfelder justifiably relied on the government's conduct by acquiescence.

VI THE TRIAL JUDGE ERRED IN DISMISSING ASHENFELDER'S TRESPASS CLAIM

The City argues that Ashenfelder has no standing to assert a claim for trespass since he has shown no rights to the property. (Initial Respondent's Brief of Appellant-Respondent p. 16). Ashenfelder's rights to the property flow from his adverse possession claim, which would give him legal title or prescriptive easement claim which would give him possessory rights to the property superior to the City. Ashenfelder believes that assuming that he can prove his rights to the property under either theory, then a trespass action could lie. Ashenfelder contends that it was error to dismiss the trespass cause of action and to permit the case to go to the jury on the

prescriptive easement cause of action. Also as argued in Sections I and II above, Ashenfelder has not forfeited any rights against Bruggeman.

Further, the City argues that Ashenfelder has not demonstrated any harm resulting from any alleged trespass. (Initial Respondent's Brief of Appellant-Respondent p. 18). Ashenfelder disagrees in that his damages flow from the improper entry onto the property, removal of the billboard and the subsequent destruction thereof.

VII THE TRIAL JUDGE ERRED IN DISMISSING ASHENFELDER'S INVERSE CONDEMNATION CLAIM

The City argues that the removal of Ashenfelder's billboard was a permissible exercise of police power and this justified. (Initial Respondent's Brief of Appellant-Respondent p. 18). The City never raised the affirmative defense of exercise of police power and its pleadings and is precluded from raising it on appeal. Even assuming that the City of Georgetown properly raised the defense of exercise of police power, Mr. Ashenfelder contends that any police power was as regulated in the City Ordinance. S.C. Code Ann. § 5-7-30 states in part as follows:

Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it.

In *Lomax v. City of Greenville*, 225 S.C. 289, 82 S.E.2d 191 (1954), stated that

The rule that grants of police powers to municipalities are to be strictly construed has been generally invoked in cases involving municipal ordinances regulating or restricting the activities of the citizens.

In the case at bar, the limits of the City of Georgetown's police power with respect to signs was set out in a very detailed Ordinance. The City did not comply in any way with the

Ordinance and Mr. Ashenfelder contends that it is improper to permit the City to violate its Ordinance under the broad brush of police power, when that is the very power that allowed the City to create the ordinance in the first place.

The City further argues that they were not required to raise exercise of police power as an affirmative defense since it is not specifically listed in Rule 8(c), SCRPC (Initial Respondent's Brief of Appellant-Respondent p. 19). Specifically Rule 8(c), SCRPC provides in part as follows:

(c) Affirmative Defenses, Reply. In pleading to a preceding pleading, a party shall set forth affirmatively the defenses accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. [Emphases added]

An avoidance is a defense which goes beyond the basic elements of the opposing party's cause and depends upon additional facts to defeat the claim. H. Lightsey & J. Flanagan, *South Carolina Civil Procedure* 240 (1985). Since exercise of police power is being raised by the City to avoid the claim for inverse condemnation, it constitutes an affirmative defense and must be pleaded. Generally, a failure to plead an affirmative defense is deemed a waiver of the right to assert it. *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (S.C. 2007). The City argues that was required to show that the removal of the billboard was not an exercise of police power. As such the City argues an impermissible shift of the burden of proof as to its affirmative defense by stating that Ashenfelder has the burden.

The City also alleges that Ashenfelder first raised the position that exercise of police power was an affirmative defense on appeal. Ashenfelder disagrees. In fact Ashenfelder raised

this issue on at least two occasions at trial (R pp 96-99, R pp 288-289) As such the City argues an impermissible shift of the burden of proof as to its affirmative defense by

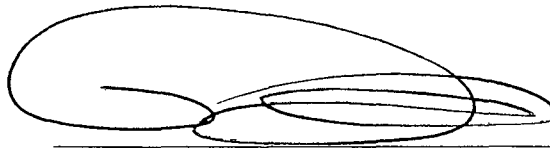
Finally the City argues that an inverse condemnation action does not lie for removal of a billboard suggesting that it is personal property (Initial Respondent's Brief of Appellant-Respondent p 20) Ashenfelder disagrees Ashenfelder's property, which allegedly included a billboard and the land on which it existed, had a value in place prior to the removal, in fact the billboard was being rented In an action for inverse condemnation, the property owner is the moving party claiming an act of the sovereign has damaged his property to the extent of an actual taking, entitling him to compensation *Cobb v South Carolina Dep't of Transp* 365 S C 360, 618 S E 2d 299 (2005) To prevail in such an action, a plaintiff must prove "an affirmative, aggressive, and positive act" by the government entity that caused the alleged damage to the plaintiff's property *Berry's On Main Inc v City of Columbia* 277 S C 14, 16, 281 S E 2d 796, 797 (1981), *Kline v City of Columbia* 249 S C 532, 535, 155 S E 2d 597, 599 (1967) There is no question that by entering onto the land and removing Ashenfelder's billboard, destroying the billboard then refusing to replace it, the City damaged his property interest The City's affirmative, aggressive, and positive act damages Ashenfelder's property This is no different than other cases where inverse condemnation is alleges as a result of acts of the governmental agency that damaged property (See, *WRB Ltd Partnership v County of Lexington*, 369 S C 30, 630 S E 2d 479 (2006))

CONCLUSION

Mr Ashenfelder respectfully request that the Court reverse the Trial Court's directed verdict rulings against Mr Ashenfelder relating to his adverse possession, declaratory judgment, estoppel, trespass and inverse condemnation causes of action

Respectfully submitted,

G U N D L I N G
L A W F I R M P A

A handwritten signature in black ink, appearing to read 'David J. Gundling', is written over a horizontal line.

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