STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)
) FIFTEENTH JUDICIAL CIRCUIT
)
) CASE NUMBER: 2011-CP-26-06190
Parkway Plaza POA, Inc.; Donald N. Ludlow Jr.; Harman, LLC; Patricia Efaw, f/k/a Patricia K. Hardwick,)
)
Plaintiffs,)
)
v.)
)
Carroll Wayne Hill, and HMT Group, LLC,)
)
Defendants.)
)
HMT Group, LLC,)
)
Third-party Plaintiff,)
)
v.)
)
Horry County, a South Carolina County, and Hartland Properties, LLC,)
)
Third-party Defendants.)

ORDER

This matter is before the Court by way of Plaintiffs Parkway Plaza POA, Inc. (Parkway Plaza), Donald N. Ludlow Jr. (Ludlow), Harman, LLC (Harman) and Patricia Efaw's (collectively, Plaintiffs) declaratory judgment, nuisance, and injunction action against Defendants Carroll Wayne Hill (Hill), and HMT Group, LLC (HMT) (collectively, Defendants); Defendants' counterclaims against Plaintiffs; and HMT's third-party complaints against Horry County and Hartland Properties, LLC (Hartland). This Court held a hearing during the week of March 3, 2014, in Horry County. Present at the nonjury trial were

Plaintiffs, represented by Lynette Hedgepath, Esquire; Defendants, represented by Kenneth Moss, Esquire; and Third-party Defendants Horry County, represented by Lisa Thomas, Esquire, and Hartland, represented by Kevin Hughes, Esquire.

BACKGROUND

In 2004, Surfrider Development, Inc. (Surfrider Development) managed several acres of property located in or around Longs, South Carolina. Surfrider Development, through Hill, contracted with engineers and surveyors to design a commercial development alongside South Carolina Highway 9. Defendant Hill was a managing member of this corporation and owned much, if not all, of this property. Hill oversaw this development, replete with recorded plats and master drainage plans. Subsequently, HMT, as a successor-in-interest to Surfrider Development—another corporation of which Hill was a member—carved out Parcel B from this property development.

Parcel B is located to the south of Surfrider Boulevard, a road owned by Hill. Soon after development of HMT's remaining property began, HMT sold Parcel B to Hartland. Hartland constructed a commercial building on Parcel B, dividing the building into four units (A, B, C, and D). Hartland subsequently sold these units to the individual Plaintiffs in early 2008.

Plaintiffs, in keeping with the local zoning regulations, operate three distinct yet equally successful businesses on Parcel B: a salon, a restaurant, and a physicians' office. Defendants and Plaintiffs recognize that almost immediately after opening, parking on and around Parcel B became a point of contention. Plaintiffs attempted to inform their patrons that parking is limited to the spaces delineated on Parcel B; however, this warning had little effect. Defendants' attempted to resolve this issue by erecting signs and employing tow

truck companies, but the problem remained.

Subsequently, Hill destroyed the paved entrances to Parcel B, erected fencing, removed the catch basins for Parcel B's drainage system, and filled the remaining trenches with mud. The situation reached its apex when, during removal of the mud from Parcel B's entrances, Hill and two workers were arrested after a brawl erupted.

ANALYSIS

This Court addresses each party's causes of action separately below. Because the Court's findings as they relate to the right-of-way on Surfrider are paramount to all, the Court will address its interpretation of the right-of-way first, which logically flows from Defendant HMT's causes of action against Hartland.

I. HMT's Third-Party Causes of Action against Hartland

Defendant HMT filed a third-party complaint against Hartland alleging the following causes of action: (1) trespass, (2) nuisance, (3) civil conspiracy, and (4) trademark infringement. Defendants' causes of action for nuisance, civil conspiracy, and trademark infringement are identical to those filed as counterclaims against Plaintiffs; therefore, the Court will address those claims below, which leaves only the trespass claim against Hartland left to determine.

Defendant HMT alleges that Hartland committed the intentional tort of trespass by (1) creating two access points to Parcel B, complete with curb cuts and paved entrances, and (2) by utilizing HMT's drainage system that bordered Parcel B.

Trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property. *See Hedgepath v. Amercian Tel. & Tel. Co.*, 348 S.C. 340, 357, 559 S.E.2d 327, 337 (Ct. App. 2001). It is well settled in South Carolina that the terms

easement and right-of-way are used interchangeably and that a right-of-way is simply an easement across another's land along a particular line for a particular purpose, such as for ingress and egress, utility lines, drainage or other such purposes. *See* 12 S.C. Juris. *Easements,* § 18 (1992); 25 Am.Jur.2d *Easements,* § 7 (1996); 28(A) C.J.S. § 12(b) (1996); *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997).

An easement is a right which one person has to use the land of another for a specific purpose, and gives no title to the land on which the servitude is imposed. *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) *Douglas v. Med. Investors, Inc.*, 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971) (citations omitted). An appurtenant easement inheres in the land, concerns the premises, has a terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. *Windham v. Riddle*, 381 S.C. at 201, 672 S.E.2d at 583; 12 S.C. Juris. *Easements* § 3. The principle is well settled that a right-of-way appurtenant cannot be granted, unless it is essentially necessary to the enjoyment of the land to which it appertains. *See Kershaw v. Burns*, 91 S.C. 129, 133, 74 S.E. 378, 379 (1912).

In the present case, Defendants do not deny the existence of a fifty-foot right-of-way over Surfrider, which they indicated on a plat they recorded with Horry County. Therefore, the only remaining issue for the Court to determine is the scope of the easement granted to Plaintiffs.

The determination of the existence of an easement is a question of fact, but a determination of the scope of that easement is a question that sounds in equity. *Plott v. Justin Enterprises*, 374 S.C. 504, 510, 649 S.E.2d 92, 95 (Ct. App. 2007); *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006). In determining the extent of an easement (number of access points or routes), consideration must be given to what is essentially

necessary to enjoyment of property. *Smith v. Commissioners of Public Works of City of Charleston*, 312 S.C. 460, 441 S.E.2d 331 (S.C. App. 1994); 12 S.C. Jur. *Easements* § 20; 12 S.C. Jur. *Easements* § 18. If the easement language is uncertain or ambiguous in any respect, all surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court. *Smith*, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994). Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted. *Windham v. Riddle*, 381 S.C. at 202, 672 S.E.2d at 583 (2009) (citing *Hamilton v. CCM, Inc.*, 274 S.C. 152, 263 S.E.2d 378 (1980)); *Tupper*, 326 S.C. 318, 487 S.E.2d 187; 12 S.C. Jur. *Easements* § 20.

Here, Defendants are responsible for this portion of Highway 9's commercial zoning designation. It is uncontroverted that Hill, through different development groups, owned and designed this area in Longs after successfully petitioning Horry County to rezone the surrounding area for commercial properties. Credible expert testimony established that Hill and the respective development groups considered Parcel B throughout the design and construction process, even though they chose not to include it in the neighboring development, Parkway Plaza. Because of this development scheme and intent, the record is devoid of any credible evidence that either Hill or his development group protested, legally or otherwise, any of Hartland's construction. Hill even testified that he was delighted that Hartland developed Parcel B with a similar design and functionality to the neighboring Parkway Plaza development. It is clear to the Court that a certain level of implied consent and understanding existed between these neighboring projects.

Defendants are further responsible for installing curbing on the northern border of

Parcel B. In 2004, Surfrider Development, Inc. recorded a plat with Horry County, which identified the Parcel B. Hill signed the "Certificate of Ownership and Dedication" on behalf of Surfrider Development, Inc. This Certificate states, in relative part:

> The undersigned hereby acknowledges that I am the owner of this property shown and described hereon and that I hereby adopt this [plat] with my free consent and that I hereby dedicate all items as specifically shown or indicated on said plat.

This plat identified a fifty-foot public right-of-way over Surfrider. Horry County reviewed and adopted this plat with the clarification that access to the parcel "be from Surfrider Blvd" in March 2004. Subsequently, Surfrider Development recorded this plat, thereby adopting that all future access to Parcel B be from their right-of-way.

Surfrider Development then sold this parcel to Harland. Hartland developed the property by raising the elevation, erecting a building, cutting the curb to form two points of entry, paving a parking lot, and constructing a drainage system. Testimony established that prior to Hartland's development, Defendants purposefully designed and developed the land to the north of Surfrider, and recorded plats and a Master Drainage plan with Horry County. Testimony further established that once recorded, Horry County was required to abide and enforce Defendants' design against all subsequent owners of Parcel B.

The Court also heard testimony from several expert engineers that worked on these developments. First, the engineer that designed Defendants' drainage system testified that he included Parcel B in his design calculations. Second, Hartland's drainage system engineer testified that Horry County rejected Hartland's original plan because it failed to comply with Defendants' design. Thus, due to Defendants' actions, Horry County required that Parcel B's drainage system conform to Defendants' recorded plat and Master Drainage plan. Therefore, this Court finds that Defendants necessarily created an appurtenant easement because

Hartland was forced to construct a drainage system that connected to Defendants' system: without a drainage system, Hartland could not use and enjoy Parcel B for the specific purpose that Defendants intended when they conveyed the property to Hartland, commercial development.

Defendant Hill also testified that curb cuts were necessary for any commercial development on Parcel B, as evidenced by the multiple curb cuts on Defendants' development. Because Defendants' had this parcel designated for commercial zoning, curb cuts into Surfrider's curbing were essentially necessary to Hartland's use and enjoyment. This Court also finds that Hartland's installation of two points of access for Parcel B—given the intent of the parties at the time of conveyance and the nature of the parcel's zoning—was reasonable and essentially necessary for Hartland's use and enjoyment.

Therefore, considering the intent of the parties at the time of conveyance, along with all the facts and circumstances, this Court finds that Defendants conveyed an appurtenant easement to Hartland for a specific purpose, the commercial development of Parcel B. This appurtenant easement, coupled with the plats and drainage plans Defendants' recorded with Horry County, made the developments to Parcel B essentially necessary for its use and enjoyment by Hartland. As such, Defendants' have failed to prove by a preponderance of the evidence that Hartland committed a trespass.

II. Plaintiffs' Causes of Action against HMT and Hill

Plaintiffs brought the following causes of action and requests for relief against HMT and Hill: (a) a declaratory judgment, and (b) a nuisance cause of action seeking relief through a permanent injunction. The Court addresses each cause of action separately.

a. Declaratory Judgment

As stated above, South Carolina recognizes that appurtenant easements inhere in the land and pass with the dominant estate upon conveyance. *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975). Where language in a plat reflecting an easement is capable of more than one construction, that construction which restricts the property will be adopted. *Windham v. Riddle*, 381 S.C. at 202, 672 S.E.2d at 583 (citing *Hamilton v. CCM, Inc.*, 274 S.C. 152, 263 S.E.2d 378 (1980)). Although the existence of an easement is a question of fact in a law action, the determination of the extent of an easement is an equitable matter. *Plott v. Justin Enterprises*, 374 S.C. at 510, 649 S.E.at 95.

In the present case, Plaintiffs initiated this matter by filing a declaratory judgment action against Defendants to determine the rights of ingress and egress, and any express or implied easements along Surfrider Boulevard. Previously, this Court found that Defendants granted an appurtenant easement to Hartland. This appurtenant easement inheres to the land. Therefore, Plaintiffs have the same easement granted to Hartland.

This Court, taking into consideration all of the facts, arguments, case law, and equities involved, finds that the extent of this easement justifies Plaintiffs' two existing points of ingress and egress onto Surfrider. To invalidate Plaintiffs' points of ingress and egress because of the actions a prior owner within their chain of title took in developing this parcel would be unfair to Plaintiffs, who necessarily rely on public documents to determine their rights under recorded plats and deeds.

b. Nuisance and Permanent Injunction

Plaintiffs further complain that Defendant Hill's actions, individually and as an agent of HMT, justify their nuisance cause of action. A nuisance claim provides a remedy for invasions of a property owner's right to the use and enjoyment of his property. *Clark v.*

Greenville Cnty, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993) ("Nuisance law is based on the premise that '[e]very citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property.'" (quoting *Peden v. Furman Univ.*, 155 S.C. 1, 16, 151 S.E. 907, 912 (1930))).

The traditional concept of a nuisance requires a landowner to demonstrate that the defendant unreasonably interfered with his ownership or possession of the land. *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001). "If a lawful business is operated in an unlawful or unreasonable manner so as to produce material injury or great annoyance to others or unreasonably interferes with the lawful use and enjoyment of the property of others, it will constitute a nuisance." *LeFurgy v. Long Cove Club Owners Ass'n*, 313 S.C. 555, 558, 443 S.E.2d 577, 579 (Ct. App. 1994). Since the degree of annoyance or inconvenience necessary to constitute an actionable nuisance cannot be generally quantified, each case must depend largely on its own facts. *Shaw v. Coleman*, 373 S.C. 485, 496, 645 S.E.2d 252, 258 (Ct. App. 2007) (citing *LeFurgy*, at 559, 443 S.E.2d at 579).

Actions for injunctive relief are equitable in nature. *See Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). To obtain a permanent injunction, a plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743, 2756, 177 L. Ed. 2d 461 (2010).

The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected. *Carter v. Lake City Baseball,* 218 S.C. 255, 62 S.E.2d 470 (1950); *Forest Land Co. v. Black,* 216 S.C. 255, 57 S.E.2d 420 (1950). In cases where an injunction is sought to abate an alleged private nuisance, the court must deal with the conflicting interests of the landowners by balancing the benefits of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant or deny an injunction as seem most consistent with justice and equity under the circumstances of the case. *LeFurgy*, 313 S.C. at 558, 443 S.E.2d at 578; *see also Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 130 S.E.2d 363 (1963).

Here, it is uncontroverted that Hill owns the land between Parcel B and Surfrider. The general rule is that the owner of the servient estate may erect gates across an easement if they (1) are so located, constructed, and maintained as not to unreasonably interfere with the right of passage of the dominant estate, (2) are necessary for the preservation of the servient estate, and (3) are necessary for use of the servient estate." *Judy v. Kennedy*, 398 S.C. 471, 476, 728 S.E.2d 484, 486 (Ct. App. 2012) (citing *Brown v. Gaskins*, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct. App. 1984)).

Defendant Hill, owner of the servient estate, erected chain-link fencing on the two points of access to Parcel B after removing the pavement and catch basins. In place of the pavement, Hill filled the trenches with mud. These points of access, located on Hill's property, served as entrances to Plaintiffs' businesses. Hill limited his fences to the paved portions of Plaintiffs' entrances by extending them from the curbing to the center of the entrance. In other words, the freestanding fences did not connect, but reduced the width of the entrances in half.

Hill was unable to articulate a reason for erecting this fencing, destroying the pavement, or depositing mud in the trench created by the removal of the pavement. Instead, this Court finds that Hill purposefully and maliciously destroyed the paved entrances to Plaintiffs' building and erected fencing to cripple the ingress and egress through both points of access. Simply put, given the commercial nature of the dominant estate, Hill's actions unreasonably interfered with Plaintiffs' ingress and egress and were unnecessary for the use or preservation of the servient estate. This interference with Plaintiffs' access to their businesses directly affected Plaintiffs' lawful use and enjoyment of their property: evidenced by, but not limited to, the fact that Hill's actions necessarily acted as deterrent for Plaintiffs' patrons and severally crippled the ability of emergency services personnel from gaining access to the property. Therefore, this Court finds that Hill caused Plaintiffs an irreparable injury.

Balancing the benefits of an injunction against the inconvenience and damage to Defendant, the granting of a permanent injunction is consistent with justice and equity under these circumstances. This Court further finds that the public interest would not be disserved by a permanent injunction.

Therefore, because repetition seems likely, this Court permanently prohibits Hill and HMT from taking any further action that prevents or interferes with the ingress and egress to Parcel B. Additionally, because Hill readily volunteered to repair Plaintiffs' paved entrances that he destroyed, this Court requires that he remove the existing nuisance, an uneven gravel surface, and restore the entrances to their original, paved condition.

III. HMT's Causes of Action against Parkway, Ludlow, Harmon, and Efaw

Defendants HMT and Hill asserted the following counterclaims against Plaintiffs:

Trespass; Battery; Outrage; Nuisance; Civil Conspiracy; and Trademark Infringement. The Court addresses each claim individually below; however, the Court includes its Hartland analysis in addressing the civil conspiracy, nuisance, and trademark causes of action.

a. Trespass

Trespass is an intentional tort. *Snow v. City of Columbia*, 305 S.C. 544, 553, 409 S.E2d 797, 802 (Ct. App 1991). Trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property. *Hedgepath*, 257 S.C. at 544, 593 S.E.2d at 503. Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the result would follow from his act. *Snakenberg v. Hartford Casualty Ins. Co.*, 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989). The damages recoverable for trespass are strictly limited to damages to one's property interests, the only proper measure of them being the value of the property. *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 143, 747 S.E.2d 468, 474 (2013).

In the present case, Defendants allege that Plaintiffs committed the intentional tort of trespass in the following ways: (1) allowing patrons to park along Surfrider and in the neighboring Parkway Plaza lot and (2) through the unauthorized connection to the HMT stormwater system. It is uncontroverted that Chris' Pizza's patrons and delivery truck drivers park in the Parkway Plaza lot and on Surfrider. Defendants failed to present any evidence that these are agents of Plaintiffs. Pommey Farmay testified for Defendants that on at least one occasion Plaintiff Harman's agent, Christopher Efaw, parked his truck in the Parkway Plaza parking lot. However, Farmay also stated that Christopher Efaw parked behind his business and that this did not interfere with his customer parking in front. Additionally, this witness testified that Christopher Efaw was a customer of his restaurant. Defendants failed

to establish that Christopher Efaw ever parked in the Parkway Plaza lot without patronizing a business within Parkway Plaza or the damage he caused to the value of HMT's property.

Contrary to Defendants' claim, Plaintiffs even took steps to minimize any intrusion by third parties onto Defendants' property, e.g. posting signs and distributing flyers to patrons. Furthermore, Defendants' failed to establish how the drainage system, installed in 2004, is in any way an intentional act committed by Plaintiffs who purchased their units in 2008. It is uncontroverted that Plaintiffs did not construct the drainage system for Parcel B. Hartland constructed the drainage system for Parcel B several years before any Plaintiff purchased their unit. As for Hartland, their appurtenant easement extended to HMT's drainage system, and therefore, forecloses HMT's cause of action for trespass

For the foregoing reasons, I find that Defendants have failed to present sufficient evidence to justify their cause of action for the intentional tort of trespass.

b. Battery

Thirdly, Defendant Hill alleges that Harman, by and through its agent, Christopher Efaw, committed a battery against Hill. A battery is the actual infliction of any unlawful, unauthorized violence on the person of another, irrespective of its degree; it is unnecessary that the contact be by a blow, as any forcible contact is sufficient. *Mellen v. Lane*, 377 S.C. 261, 277, 659 S.E.2d 236, 244 (Ct. App. 2008) (citing *Herring v. Lawrence Warehouse Co.*, 222 S.C. 226, 241, 72 S.E.2d 453, 458 (1952)). Hill complains that Christopher Efaw and several workers struck him repeatedly during a physical altercation. Christopher Efaw staunchly denies this allegation.

Generally, an employer is not liable for the torts of an independent contractor. *Cherry v. Myers Timber Co., Inc.*, 404 S.C. 596, 601, 745 S.E.2d 405, 407 (Ct. App. 2013).

While no concrete rule exists, the general test is the degree of control exercised by the employer. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 116, 512 S.E.2d 510, 520 (Ct. App. 1998) (citations omitted). Courts determine this degree of control by analyzing the relationship through four factors: (1) direct evidence of the right to, or exercise of, control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. *Chavis v. Watkins*, 256 S.C.30, 32, 180 S.E.2d 648, 649 (1971).

In the present case, Christopher Efaw hired two workers, Donnie and Brandon Eddy (Eddys) to fix the mud trenches that blocked the points of access to Parcel B. Hill willfully and maliciously destroyed the paved entrances and covered the entrances with "muck" to "prove it was his road." At trial, Hill failed to produce any evidence that these workers were acting as agents of Harman or that Christopher Efaw knew the Eddys had any propensity for violence.

Instead, the Court heard the following testimony: a separate business employed the Eddys; the Eddys furnished their own equipment, e.g. the bobcat; Christopher Efaw did not control or instruct them in any way; and Christopher Efaw never directly paid the Eddys. There was also testimony that Hill initiated the confrontation by grabbing a shovel from one of the men. Subsequently, the investigating officer arrested Hill and the Eddys; notably, the police did not arrest Christopher Efaw.

Therefore, this Court, giving equal weight to all four factors, finds that the construction workers were independent contractors, not agents of Harman. Even assuming Hill did not initiate the confrontation, this Court nevertheless finds that Hill has failed to prove by a preponderance of the evidence that Christopher Efaw ever touched him. Therefore, Hill's cause of action for battery must fail.

c. Outrage

Defendant Hill also brought an outrage or intentional infliction of emotional distress cause of action against Plaintiffs. Defendant Hill avers that the parking issues and events that substantiate his battery cause of action justify this claim against Plaintiffs.

The tort of intentional infliction of emotional distress arises when one by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (quoting Restatement (Second) of Torts § 46 (1965)); *Upchurch v. New York Times Co.*, 314 S.C. 531, 537, 431 S.E.2d 558, 561 (1993). In order to recover for the intentional infliction of emotional distress or outrage, a plaintiff must establish that (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. *Ford v. Hutson*, 276 S.C. at 162, 276 S.E.2d at 778; *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011).

Here, Hill alleges that years of confrontation over parking issues and stormwater run-off, in combination with the alleged battery, caused him stress, anxiety, and frustration. Hill testified that Plaintiffs' intentional actions lead to a heightened level of stress and many sleepless nights. This Court, however, finds that (1) there is insufficient evidence of an intentional or reckless act by Plaintiffs, which inflicted sever emotional distress, (2) the

record is devoid of evidence of extreme or outrageous conduct by Plaintiffs, and (3) there is no evidence Hill suffered severe emotional distress. There is simply nothing in Plaintiffs' actions that this Court could characterize as extreme and outrageous; as exceeding possible bounds of decency; or which this Court would regard as atrocious and utterly intolerable in a civilized community.

d. Nuisance

Defendants assert the cause of action of nuisance against Plaintiffs and Hartland for the following: (1) reducing the stormwater management capacity of HMT's drainage system, (2) channeling effluent onto Defendant's property, and (3) directing patrons to park vehicles on Defendants property.

First, Defendants presented testimony from Russ Courtney, an expert in stormwater management. Courtney testified that prior to Parcel B's development, no effluent from Parcel B flowed onto Surfrider. Courtney opined that connecting Parcel B's drainage system to HMT's system has reduced HMT's system's capacity and this burden caused Defendants to suffer additional maintenance costs. However, Courtney admitted that he did not perform any calculations to determine this reduction or burden to HMT's system.

In response, Plaintiffs presented testimony from their expert, Stephen Powell—the designer of HMT's stormwater drainage system. Powell testified that he included Parcel B in his calculations when he designed HMT's master plan. Powell reasoned that his plan would accommodate any post development run-off from that property. Subsequently, Surfrider Development reviewed Powell's design, approved it, and submitted it to Horry County for recording. As a result, the county was required to enforce Surfrider Development's recorded master plan.

Second, it is uncontroverted that effluent did not flow unto Surfrider until Hill destroyed the paved entrances and catch basins for Parcel B. The Court finds that Defendants have failed to establish why Plaintiffs or Hartland are responsible for the effects of Defendant Hill's actions.

This Court further finds the testimony of Powell—HMT's designer of the drainage master plan—more credible than Defendants' expert witness. As such, this Court finds that the drainage system design contemplated and incorporated any future development of Parcel B. Because Defendants failed to make any legal objection to the development of Parcel B, Plaintiffs reasonably believed that they purchased, and Hartland reasonably believed it conveyed, a building that complied with county ordinances, was free from encumbrances, and conformed to the limits of this easement. Thus, Defendants have failed to demonstrate Plaintiffs' liability to the existing drainage system and any unreasonable interference, by Plaintiffs or Hartland, with Defendants' system since. Even assuming, *in arguendo*, that Plaintiffs and Hartland are responsible for the effluent into HMT's drainage system or onto Surfrider, this annoyance does not rise to the level of unreasonable interference with Defendants' property.

Third, Defendant Hill testified that parking remains a point of contention between Plaintiffs and Defendants. As discussed above, it is uncontroverted that Chris' Pizza's customers and delivery truck drivers occasionally parking in the Parkway Plaza lot and on Surfrider, but these individuals are not Plaintiffs' agents. Contrary to Defendants' claim, Plaintiffs even took steps to minimize this intrusion onto Defendants property, e.g. they posted signs and distributed flyers.

The Court heard testimony from Farmay, the prior owner of a Quiznos restaurant who

leased space from Defendants in Parkway Plaza. Farmay testified that parking was a constant issue and that his restaurant had since closed. However, restaurants close every day for a plethora of reasons and Farmay did not testify that he closed his restaurant because of the parking problem. Defendants' failed to present any evidence concerning lost rental value or property value to Parkway Plaza. Defendants' also failed to present any evidence that Plaintiffs ever directed their patrons and clients to park in Parkway Plaza or on the side of Surfrider.

For the foregoing reasons, this Court finds that Defendants have not established a nuisance cause of action by a preponderance of the evidence.

e. Civil Conspiracy

The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005); *see also Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp.*, 358 S.C. 460, 470, 596 S.E.2d 51, 56–57 (2004) ("A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage.") (citation omitted). It is essential that the plaintiff prove all of these elements in order to recover. *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938). The "essential consideration" in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).

In order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); *accord Cowburn,* 366 S.C. at 49, 619 S.E.2d at 453. This Court has observed:

> Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence.

Peoples Federal, 358 S.C. at 470, 596 S.E.2d at 57 (citations omitted).

Here, Defendants' contend that Plaintiffs and Hartland conspired together to commit the torts of trespass and nuisance with the willful intent to injure the property rights of HMT. HMT established (1) that Plaintiffs purchased adjoining units in a building located on a parcel that Hartland developed, (2) that Plaintiff Harman's agent, Christopher Efaw is married to Plaintiff Efaw, and (3) Plaintiffs are members of the Parkway Plaza Horizontal Property Regime. However, the record is devoid of any evidence, direct or circumstantial, that the Plaintiffs and Hartland entered into a civil conspiracy against HMT. Furthermore, Defendant HMT failed to produce evidence of any special damages suffered because of this alleged conspiracy. This Court finds that Defendant HMT has failed to present any evidence necessary to establish a cause of action for civil conspiracy.

f. Trademark Infringement

Defendants further allege damages under the theory of common law trademark infringement. The focus of a common law trademark infringement claim is the likelihood of confusion by the public. *Taylor v. Hoppin' Johns, Inc.*, 304 S.C. 471, 405 S.E.2d 410 (Ct. App. 1991). Likelihood of confusion has been found to exist in trademark cases when

consumers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark. *Id.* at 477, 405 S.E.2d 413 (quoting *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1229 (3d Cir. 1978).

In *Hoppin' Johns*, the court determined a nightclub in North Charleston infringed upon the trademark of a culinary bookstore in Charleston by utilizing an identical name. Taylor, who opened a culinary bookstore in 1986 and whose store name was regularly used in articles, newspapers, magazines, and by local television shows, sued Wilson, owner of a nightclub opened in 1989.

In less than a month after the nightclub opened, Taylor received inquiries about whether he had invested or opened the nightclub in North Charleston. The nightclub also ran print and radio advertisements under the name "Hoppin' Johns." Additionally, the court noted that Taylor received telephone calls at his bookstore by people inquiring about the club because directory assistance gave the bookstore number in response to inquiries it received. There was also evidence of mail being delivered to the bookstore intended for the nightclub.

In the present case, Defendants operate "Parkway Business Center Condominium Association, Inc.," (Parkway Business Center) a commercial development that leases units or stores to local business owners. A sign bearing the name "Parkway Plaza" marks the Parkway Business Center's development. However, Defendants did not register a trademark for Parkway Business Center or Parkway Plaza.

Plaintiffs collectively own a building that neighbors the Parkway Business Center. Separated by Surfrider, the buildings are similar in size, layout, and design. When Hartland developed Parcel B, it named the regime "Parkway Plaza Horizontal Property Regime." The

Master Deed and the property description in Plaintiffs' deeds, prepared by Hartland, set forth the regime's name.

Defendants failed to produce even a scintilla of evidence in support of their counterclaim that Plaintiffs or Hartland ever used "Parkway Plaza" in advertisements. It is uncontroverted that Plaintiffs do not use "Parkway Plaza" in the names of their businesses. Unlike the plaintiff in *Hoppin' Johns*, Defendants cannot support a claim for confusion given the proximity of the development and Plaintiffs' building, and because Defendants never produced any evidence of confusion. Even if Defendants established the confusion element, they have manifestly failed to produce any evidence of lost profits, a requisite element before this Court can grant Defendants an award of damages. For the reasons stated, the Court finds that Defendants have failed to substantiate a cause of action for trademark infringement against Plaintiffs or Hartland by a preponderance of the evidence.

IV. HMT's Third-Party Causes of Action against Horry County

Third-party plaintiff HMT also filed a claim against Horry County for a writ of mandamus, a 42 U.S.C. § 1983 cause of action, and a declaratory judgment. Additionally, Defendants sought an injunction against Horry County. For the reasons stated below, this Court finds that Defendants have failed to establish these claims by a preponderance of the evidence.

a. Writ of Mandamus

The writ of mandamus is the "highest judicial writ known to law." *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 493, 685 S.E.2d 600, 605 (2009). Mandamus is utilized only to compel ministerial duties and then only if the "asserted right is clear and certain." *Godwin v. Carrigan*, 227 S.C. 216, 222, 87 S.E.2d 471, 473 (1995). The primary purpose of

a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created [or] imposed by law." *Porter v. Jedziniak*, 334 S.C. 16, 18, 512 S.E.2d 497, 497 (1999); *Knight v. Austin*, 396 S.C. 518, 722 S.E.2d 802 (2012); *see also Sanford*, 285 S.C. at 493, 685 S.E.2d at 605–06 (holding the principal function of mandamus is to command and execute, and not to inquire and adjudicate) (internal quotations omitted).

HMT alleges that Horry County violated his "14th and 5th Amendment rights" in the following ways: (1) by loosely interpreting misleading procedures in the planning functions of Horry County, (2) unequal and improper enforcement of towing ordinances that infringe upon HMT's property rights, and (3) unlawful persecution.

First, HMT claims Horry County's misleading planning procedures, coupled with Horry County's loose interpretation of county ordinances, led to confusion and misinterpretation. As such, HMT requests that this Court order that Horry County "require all persons wishing to record a survey plat or other document in the Register of Deeds to certify separately on the face of each document being recorded whether any party of the property is actually subject at the time of its recording to any public right-of-way."

In the present case, county ordinances require that specific wording is included on the plat and signed by the party before Horry County will approve the plat. HMT takes exception to this language. Specifically, HMT claims that this verbiage is capable of misinterpretation and may cause mistakes and confusion concerning the existence of public rights-or-way.

It is uncontroverted the Horry County has required this verbiage on all plats filed in the county for over two decades. Defendant Hill never testified that he did not understand this language when he signed the plat. Instead, the Court heard Hill testify that he is an

experienced developer, familiar with this stage of development. Additionally, Hill testified that he understood that if he disagreed with the description or with the access to Parcel B, he did not have to record the plat with Horry County.

Even if HMT established confusion over this verbiage, this Court cannot issue a writ of mandamus when no government inactions are alleged. HMT submitted this plat for approval with Horry County. Horry County reviewed, approved, and recorded Hill's plat. As such, HMT cannot claim Horry County failed to take any required action or enforce an established right or a corresponding imperative duty imposed by law. Therefore, HMT has failed to establish the requisite elements necessary for this Court to grant a writ of mandamus.

Second, HMT claims that the Horry County police, through unequal and improper enforcement of the county towing ordinances, have violated HMT's property rights. Specifically, HMT avers that the Horry County police instructed tow truck operators to refrain from towing a vehicle on HMT's property.

The South Carolina Tort Claims Act allows civil suits against government entities. S.C. Code Ann. § 15–78–10. However, certain exceptions to this wavier were retained. S.C. Code Ann. § 15–78–60. Specifically, the Act states that a government entity is not liable for a loss resulting from the exercise of discretion or judgment by a government employee or the failure to perform any act which is in the discretion or judgment of the government employee. S.C. Code Ann. § 15–78–60(5). Furthermore, when the legal right is doubtful, or the performance of duty rests in discretion, or when there is another adequate remedy, a writ of mandamus cannot rightfully be issued. *City of Rock Hill v. Thompson*, 349 S.C. 197, 200,

563 S.E.2d 101, 102 (2002) (citing *In the Interest of Lyde*, 284 S.C. 419, 327 S.E.2d 70 (1985).

On this issue, the Court heard testimony from Captain Kerr of the Horry County Police Department. Kerr responded to an incident concerning Surfrider in the past. Kerr testified that after investigating, he allowed a delivery truck to temporarily park on HMT's property while making a "five-minute" delivery. Kerr further testified that he never prevented Hill from calling a tow truck and that in the moment he was unable to determine the validity of Hill's assertion that he owned the property.

Third, South Carolina law permits the Horry County police officers to make warrantless arrests for misdemeanors when probable cause exists, however, the legislature left this power to arrest within the discretion of the arresting officer. *See State v. Robinson*, 335 S.C. 620, 518 S.E.2d 269 (Ct. App. 1999); S.C. Code Ann. § 17–13–30. This Court finds that Kerr and the arresting officer were acting within their inherent discretion as police officers. Therefore, HMT's cause of action is denied because Horry County is immune from liability under the South Carolina Tort Claims Act.

b. 42 U.S.C. § 1983

HMT further alleges that Horry County violated his "14th and 5th amendment[sic] rights" though the "unequal enforcement of laws and their property rights through the exercise or[sic] police powers" and by "expressly permitting parking" on HMT's property. 42 U.S.C. § 1983 provides in relative part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

To assert a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that (1) the actions of the police officers deprived him of an actual constitutional right and (2) the right was clearly established at the time of the alleged violation. *Camden v. Hilton*, 360 S.C. 164, 177, 600 S.E.2d 88, 94 (Ct. App. 2004) (citing *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 1697, 143 L.Ed.2d 818, 827 (1999).

HMT failed to allege the specific constitutional right Horry County violated. The Court assumes that HMT is claiming a taking when Horry County categorized Surfrider as a public right-of-way and through the unequal enforcement of laws by Horry County police officers. As to the classification, it is self-evident that any error concerning Surfrider's classification is of HMT's, as successor in title to Surfrider Development, Inc., own design. Hill, an agent for both organizations, instructed the surveyor make this designation and chose to record a plat with Horry County that designated a fifty-foot public right-of-way and access to Parcel B via Surfrider. Additionally, the Court finds that HMT's rights over Surfrider were not clear to Horry County police officers; a necessary element under a 42 U.S.C. § 1983 cause of action. Furthermore, even if HMT established the requisite elements, South Carolina law precludes a cause of action against Horry County for the issuance of any permit, license, certificate, approval, registration, order, or similar authority. S.C. Code Ann. 15–78–60(12).

As discussed above, the decision to arrest or enforce the laws of Horry County inherently involve police discretion. As such, Horry County is immune from liability concerning the arrest of Hill. S.C. Code Ann. 15–78–60(5); . For the reasons stated, the Court finds HMT has failed to establish a cognizable claim under 42 U.S.C. § 1983.

V. Plaintiffs and Hartland's Motion to Amend the Pleadings

Plaintiffs' and Hartland moved to amend the pleadings to include an affirmative defense while simultaneously requesting a directed verdict. For the following reasons, the Court denies Plaintiffs' and Hartland's motion to amend the pleadings.

Neither Plaintiffs nor Hartland plead the affirmative defense of the statute of limitations in their answer. *See* Rule 8(c), SCRCP. However, Rule 15(b), SCRCP, allows for amendments of pleadings to conform to the evidence presented at trial. It provides in pertinent part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP. The decision whether to allow the amendment of pleadings to conform to the evidence is left to the sound discretion of the trial court. *Kelly v. South Carolina Farm Bureau Mut. Ins. Co.*, 316 S.C. 319, 323, 450 S.E.2d 59, 61 (Ct. App. 1994). Amendments should be allowed if no prejudice occurs to the opposing party. Rule 15(b), SCRCP; *Soil & Material Eng'rs, Inc. v. Folly Assoc.*, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987).

Defendants Hill and HMT vehemently opposed the parties motion to amend the pleadings. The rules of civil procedure allow a party to amend the pleadings when the issue is tried by implied consent. *Dunbar v. Carlson*, 341 S.C. 261, 266, 533 S.E.2d 913, 916 (Ct. App. 2000) (Implied consent depends on whether the parties recognized an issue not raised by the pleadings entered the case during the trial). In *Dunbar*, the Court held that a party did not try and issue by implied consent since the evidence presented to support a statute of limitations claim was admissible for another purpose. *Dunbar*, 341 S.C. at 268, 533 S.E.2d at 917. Because counsel reasonably refrained from objecting to this evidence, the court of

appeals determined that counsel did not try an issue by implied consent and would be prejudiced an amendment to that effect. *Id.*

Here, Plaintiffs filed this action against Defendants. The complaint was complete with specific dates and Defendants' answer, counterclaims, and third-party complaints dealt specifically with those dates. Plaintiffs' and Hartland averred that the issues were not apparent until after mediation and discovery occurred, yet neither explained their delay in seeking to amend their respective pleadings. Plaintiffs also posited that only in the week leading up to trial did the affirmative defense become evident. To allow Plaintiffs and Hartland to refrain from making a motion to amend until the directed verdict stage would greatly prejudice Defendants, who at that point had rested their counterclaim and third-party plaintiff cases. The Court finds that any evidence relating to the chronology of events was admissible for another purpose during trial. As such, the Court finds that Defendants would be prejudiced if the Court allowed Plaintiffs and Hartland to amend their pleadings. For the foregoing reasons, the Court denies Plaintiffs' and Hartland's Motions to Amend the Pleadings.

CONCLUSION

For the foregoing reasons, this Court finds that Hill created an appurtenant easement or right-of-way over Surfrider Boulevard for the use and enjoyment of Parcel B. This right-of-way allows for multiple points of ingress and egress, utilities, and irrigation.

Therefore, the Court **GRANTS** Plaintiffs' nuisance and permanent injunction. Defendants are hereby prohibited from interfering or preventing the ingress and egress to Parcel B from both points of access, and must remove the existing gravel section and repair the catch basins and paved entrances Hill destroyed.

IT IS ORDERED that Defendants' counterclaims against Plaintiffs are **DENIED.**

IT IS ORDERED that Third-party Plaintiff's causes of action against Horry County and Hartland, LLC are **DENIED.**

IT IS FURTHER ORDERED that Plaintiffs' and Hartland's Motion to Amend the Pleadings are hereby **DENIED.**

Michael G. Nettles, Presiding Judge

April 4, 2014

Florence, South Carolina