THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2008-CP-32-04362
Case Tracking No. 2011201527

Westside Meshekoff Family Limited Partnership.....Appellant,

v.

South Carolina Department of Transportation;
DW Properties, LLC; Danwood, LLC;
Robert W. Denton; and Alpine of SC, Inc.,.....Defendants,

Of whom South Carolina Department of
Transportation is the,.....Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Appellant Westside Meshekoff Family Limited Partnership (hereinafter referred to as "Westside Meshekoff") commenced this matter on June 9, 2008 when it filed its Summons and Complaint with the Richland County Court of Common Pleas. Complaint. The action was assigned Civil Action Number 2008-CP-40-4088, and the Summons and Complaint was served upon the Respondent South Carolina Department of Transportation (hereinafter referred to as "SCDOT") shortly thereafter. *Id.* The Complaint alleged that Westside Meshekoff was a partnership that owned Westside Plaza Shopping Center, located adjacent to U.S. Highway 1 in West Columbia—located in Lexington County—and named as Defendants SCDOT and eight owners of real property also located adjacent to U.S. Highway 1. *Id.* The Complaint further alleged that Westside Meshekoff acquired its property from Dayton & Associates XVII (hereinafter referred to as "Dayton and Associates"), which had constructed the shopping center; and that in August, 1987, Dayton and Associates entered into an Encroachment Permit with SCDOT, authorizing Dayton and Associates to connect storm drainage pipe to an existing storm drainage catch basin adjacent to U.S. Highway 1, and to channel the storm water to a detention pond to be constructed at the rear of the property. *Id.* The Complaint further alleged that the Encroachment Permit allowed discharge of up to 98 cubic feet per second (CFS) into the storm drainage system, that the Encroachment Permit "was not recorded in the public record," and that Westside Meshekoff purchased the property without notice of the Encroachment Permit. *Id.* The Complaint then alleged that improvements to the properties of the remaining eight Defendants had resulted in storm water runoff from those properties

entering into the SCDOT storm drainage system serving U.S. Highway 1, and discharging into Westside Meshekoff's storm drainage system, carrying with it excessive silt, harmful pollutants, trash, and debris, all of which damaged the storm drainage system. *Id.* The Complaint then alleged four causes of action, three of which had been dropped by trial, leaving only an equitable claim seeking apportionment of maintenance and repair costs for the storm drainage system.

Venue was subsequently changed to the Lexington County Court of Common Pleas by Consent Order, with the action being assigned the current Civil Action Number, 2008-CP-32-4362. Consent Order Changing Venue.

SCDOT answered, interposing a qualified general denial, and affirmative defenses including easement by prescription, the Common Enemy Rule, waiver and estoppel, negligence of Westside Meshekoff's predecessor in title, Dayton, in not properly constructing the storm drainage system, and ratification by Westside Meshikoff of the terms of the Encroachment Permit. Answer of SCDOT.

Westside Meshekoff reached settlement with several of the originally-named Defendants, leaving SCDOT, DW Properties, LLC, Danwood, LLC, Robert W. Denton, and Alpine of S.C., Inc. as the Defendants remaining as the case was called for trial. *Compare* Complaint *with* Tr., p. 11, line 3 to p. 12, line 4. The matter was tried non-jury before the Honorable R. Knox McMahon April 18-21, 2011. Tr., p. 1. At the conclusion of Westside Meshekoff's case, SCDOT moved pursuant to SCRCP Rule 15(b) to amend its Answer to add affirmative defenses sounding in Laches and Unclean Hands, which motion the Court granted. *Id.*, p. 623, line 1 to p. 633, line 4, p. 634, line 11 to p. 635, line 5. The Court heard further motions, and dismissed the claims against DW Properties, LLC, Robert

W. Denton, and Alpine of S.C., Inc., leaving Danwood, LLC and SCDOT as the sole remaining Defendants. *Id.*, p. 700, line 23 to p. 707, line 5.

At the conclusion of the trial, the Court allowed the parties to submit Post-Trial Briefs in Summation, which the parties did. *See, e.g.*, Westside Meshekoff Post-Trial Brief, SCDOT Post-Trial Brief and Summation. The Court issued its Order June 10, 2011, denying Westside Meshekoff's claim to the relief requested, filing it June 14, 2011. *See*, June 10, 2011 Order. Westside Meshekoff filed a timely Rule 59(e) motion, seeking reconsideration and reversal of the ruling, as did SCDOT, seeking correction of minor scrivener's errors in the Order, *see*, Westside Meshekoff and SCDOT Motions Pursuant to SCRCP Rule 59; and the Court issued its Amended Order dated September 9, 2011, articulating its rationale and correcting its scrivener's errors, but still denying Westside Meshekoff's claim for relief, filing the Amended Order September 12, 2011. Amended Order.

Westside Meshekoff filed and served a timely Notice of Appeal on or about October 19, 2011, appealing the matter against SCDOT only.

STATEMENT OF FACTS

In December, 1986, Dayton & Associates XVII, a South Carolina General Partnership, (hereinafter referred to as "Dayton and Associates"), acquired 23 acres of undeveloped property located south of and adjacent to U.S. Highway 1, near West Columbia, in Lexington County, South Carolina. *See, e.g.*, Trial Exhibit 40-A and -B. Dayton built West Side Plaza shopping center on the 23 acres, and following a series of corrective deeds and intermediate conveyances, the shopping center was conveyed to

Edward and Helen Meshekoff in May, 1990. Trial Exhibit 40-G. Mr. and Mrs. Meshekoff were residents of New York, and operated the shopping center through Wyatt Development Company, a property management company out of Aiken, South Carolina, and the property manager, Diane "Dee" Reeves. Deposition of Dee Reeves, p. 25, line 16 to p. 26, line 7; Tr. p. 99, lines 2-5.

Between 1992 and 1997, through a series of conveyances to revocable trusts, then to two separate family partnerships, Edward and Helen Meshekoff, acting in their respective capacities individually, as trustees, and as general partners of the partnerships, eventually deeded the property known as West Side Plaza shopping center to the current owner, Westside Meshekoff Family Limited Partnership (hereinafter referred to as "Westside Meshekoff"), the Appellant herein, in February 1997. Trial Exhibit 40-H through –O, inclusive; Tr. p. 98, lines 12-21. Although Mr. and Mrs. Meshekoff continued to operate the shopping center through the local property manager, they gradually withdrew from their management responsibilities due to health-related issues, and began ceding management duties to their son, Matthew Meshekoff, two years before officially naming him as managing partner of Westside Meshekoff in December, 2005. Tr. p. 61, line 20 to p.62, line 1; p. 97, line 14-19; Reeves Deposition, p. 26, line 8 to p. 27, line 11. For the years 2005 through the filing of this lawsuit in 2008, Matthew Meshekoff resided in California, and continued to manage the shopping center through the local property manager Dee Reeves. Tr. p. 60, lines 15-20; p. 114, lines 3-11; Reeves Deposition, p. 27, lines 12-18.

In July, 2005, Dee Reeves heard from a tenant at West Side Plaza that a sink hole had developed in the parking lot, and she immediately called a contractor, Tim Richardson,

of Ideal Construction. Reeves Deposition, p. 44, line 16 to p. 45, line 8. Richardson and his company responded and quickly secured the area for safety, then repaired the sinkhole, which was at a driveway leading into the parking lot, adjacent to the SCDOT right-of-way for U.S. Highway 1. Tr. p. 231, line 10 to p. 234, line 6. Richardson discovered that the collapsing pipe causing the sink-hole was the line serving SCDOT's catch basin, and told Reeves that the source of the storm water entering the collapsed line was the SCDOT pipe passing under U.S. Highway 1, and even had Reeves climb down into a manhole some 250 feet up the line, well away from the area of collapse, to show the condition of the line, the source of the storm water entering the line, and that there was a potential further problem that could arise. Id., p. 291, line 6 to p. 295, line 18; p. 297, lines 16-21. *See also, id.*, p. 305, line 23 to p. 307, line 20, *and* Trial Exhibit 44 (photographs taken by Richardson of the inside of the storm drain line in 2008, which Richardson testified looked "pretty much the same" as the line had looked in 2005). Reeves—and through her, Westside Meshekoff's managing partner Matthew Meshekoff—were aware that the line was damaged and that the source of the storm water entering the was the SCDOT pipe and catch basin as early as late July, 2005. *Cf.*, Reeves Deposition, p. 55, line 19 to p. 56, line 5 (Reeves testified that whenever anything came up with regard to West Side Plaza, she was able to get in touch with Matthew Meshekoff right away); Tr. p. 114, lines 3-13; p. 115, line 20 to p. 116, line 5; p. 120, lines 3-22; p. 121, lines 8-15; p. 123, lines 9-16 (Matthew Meshekoff testified that Reeves, his "on-site eyes and ears," had called to tell him of the sinkhole, and that Richardson and Ideal Construction, experienced professionals in the field, were present to advise him if needed).

Westside Meshekoff had further problems with sinkholes developing in the middle of its parking lot in 2006, for which it again brought in Richardson and Ideal Construction to

effect repairs. Richardson found that the storm drainage system had failed, attributed the failure to failed corrugated metal pipe and bad joints, and removed and replaced it with Reinforced Concrete Pipe. *Id.*, p. 234, lines 16-19; p. 235, lines 7-22. The cost involved in the repair of the 2006 failure is not part of this lawsuit. *See, e.g., id.*, p. 234, lines 16-21.

The storm drainage system failed again in 2008, this time in the line that had failed with the first sinkhole in July, 2005; and Richardson and his company again came in to complete repairs, again finding and removing failed corrugated metal pipe, and replacing all of it with reinforced concrete pipe. *Id.*, p. 240, lines 9-17; p. 242, lines 17-25; p. 243, lines 3-12. *See also, id.*, p. 242, lines 21-25 (interestingly, Richardson found the structures—the catch-basins, which were made of concrete—to be sound, and only removed the failed corrugated metal pipe). The cost involved in the July, 2005 repair and the 2008 repair are the costs for which Westside Meshekoff seeks to be reimbursed from SCDOT.

Evidence at trial further showed the following facts relevant to the issues at trial and now, on appeal: Prior to 1970, U.S. Highway 1 consisted of two lanes as it passed in front of the tract subject of this appeal, which tract was then owned by Holmes Dreher. Tr. p. 370, lines 9-15. *Cf.*, Trial Exhibit 40-A (Grantor of deed into Dayton and Associates was Holmes C. Dreher). In 1970, the Highway Department expanded U.S. Highway 1 to four lanes, which involved, in part, moving storm drainage catch basins from the edge of the two-lane highway at least fifteen to twenty feet further south to accommodate the widening of the road. *Id.*, p. 374, lines 1-14. Accordingly, the catch basin shown on the 1987 Dayton and Associates Stakeout Plan—Trial Exhibit 39—as being adjacent to the current five-lane width of U.S. Highway 1 had been in place and existing since the widening of the highway, and Highway Department storm drainage structures had been in

place since before 1970. *Id.*, p. 374, lines 18-21; *see also*, Trial Exhibit 41 (showing drainage structures along U.S. Highway 1, with the Dreher property south of the highway—at the bottom portion of the pages—to the right portion of sheet 22 and the left portion of sheet 23).

In 1987, prior to the development of the 23-acre tract and the construction of West Side Plaza shopping center, storm water run-off from U.S. Highway 1 emptied into a South Carolina Highway Department drainage catch basin, and then exited from a 48-inch reinforced concrete pipe "stub-out" into a depression on the then-undeveloped tract, flowing downhill and away from the road in a southerly direction along the natural contours of the tract, eventually exiting the tract to the southwest. Tr. p. 487, line 6 to p. 488, line 20; p.488, line 25 to p. 489, line 21; p. 490, lines 8-16; p. 495, line 12 to p. 496, line 14; p. 496, line 23 to p. 498, line 8; p. 499, line 3 to p. 500, line 8. *See also*, Trial Exhibit 39. The rate of flow of storm water run-off entering the catch-basin from properties north of U.S. Highway 1 was unmeasured and unknown for trial purposes, *see*, Tr. p. 500, lines 9-13, but the pre-development topographical contours shown on the "Stakeout Plan" of West Side Plaza prepared for Dayton and Associates—the builder of the shopping center—show high gradient values in the 278-288 foot range at north property line of the tract at U.S. Highway 1, then gradually diminishing through the tract southward, with a low of 254-260 foot range in the southwest corner of the tract, indicating that the natural flow of surface water through the pre-developed tract was from the north toward the south and southwest. *See*, Trial Exhibit 39. The Stakeout Plan further shows that storm water exiting the stub-out from the then-existing catch basin adjacent to U.S.

Highway 1 was unfettered by pipe-size flow limitations as it ran southward through the tract along the natural contours. *Id.*

On or about July 15, 1987, prior to developing the tract, Dayton and Associates submitted an Application for Encroachment Permit to the South Carolina Department of Highways and Public Transportation—the predecessor of the SCDOT, the Respondent herein (which will also be referred to as "SCDOT")—requesting permission to construct five driveway entrances from its property onto the Highway Department's public ways—two onto Dreher Road and three onto U.S. Highway 1—and further requested permission to connect onto an existing catch basin along U.S. Highway 1 "with a new 48[inch] R.C.P." Trial Exhibit 1, Application for Encroachment Permit. In effect, the application was seeking to re-route the flow of storm-water from the out-flow of the stub-out pipe from the then-existing SCDOT catch basin. In its application, Dayton and Associates further represented that "[t]he 98 C.F.S. [Cubic Feet per Second] from the existing 48 [inch] R.C.P. [Reinforced Concrete Pipe] will be carried around the shopping center site in a 48 [inch] R.C.P. to the detention pond." *Id.* Responding to the application, the Highway Department issued its Encroachment Permit August 21, 1987, authorizing and permitting Dayton and Associates to construct the requested five driveways, and "to connect existing catch basin along U.S. Hwy. #1 with a new 48 [inch] RCP as shown on application dated July 15, 1987,...". *Id.*

At the bottom of the Encroachment Permit, a representative of "Wyatt Development Co." signed for Dayton on August 26, 1987, accepting the permit, and agreeing "to comply with all the provisions, terms, conditions, and restrictions set out [in the permit]," and further agreeing "to bind [its] ...successors and assigns, to assume any

and all liability [the] Department might otherwise have in connection with ... damage to property ... that may be caused by the construction, maintenance, use moving or removing of the encroachment contemplated, ... and ... to indemnify [the] Department for any liability incurred or injury or damage sustained by reason of the past, present, or future existence of said encroachment." Encroachment Permit. The general partners of Dayton and Associates were Dayton Partners Limited Partnership, out of Ohio, and 7 Oaks, a South Carolina General Partnership. *Cf.*, Trial Exhibit 40-C, p. 2 (Dayton and Associates deed signed by Weldon E. Wyatt, General Partner and Managing Partner of 7 Oaks, a South Carolina General Partnership and General Partner of Dayton and Associates). Weldon Wyatt also did business as Wyatt Development Company, which developed shopping centers. Reeves Deposition, p. 13, line 22 to p. 14, line 1; p. 14, lines 15-19.

Notwithstanding its representations to SCDOT in its application for Encroachment Permit, Dayton and Associates did not use *reinforced concrete pipe* in constructing the storm water drainage system for West Side Plaza, in general, nor, specifically, for the line that re-routed the storm drainage outflow from the SCDOT catch basin; it used *corrugated metal pipe*, and installed it poorly. *See, e.g.*, Tr. p. 501, line 2 to p. 503, line 9. *See also, id.* p. 254, line 6 to p. 255, line 24; p. 281, line 16 to p. 282, line 5; p. 297, line 22 to p. 299, line 17. (Richardson, qualified as an expert in corrugated metal pipe installation, opined that all of the pipe his company dug up was corrugated metal pipe, that it had been so poorly installed that he was "surprised it lasted what it did," and found joint failures with bands designed to join lengths of pipe either not sealed or not even installed, vertical and horizontal misalignment, gaps between the seams of the pipes and from the pipe to the

junction boxes, and seams that had sheets of tar paper covering them in lieu of properly installed bands sealing the seams.).

The storm drainage system of West Side Plaza consists of five lines of pipe, identified in plans as Lines "A," "B," "C," "D," and "E." *Cf.*, Trial Exhibits 7 and 85 (Plans of tract showing the storm drainage system). Line "A" runs along and collects surface water from the southern property line, then deposits storm water in the detention pond at the southwest corner of the tract; Lines "B," "C," and "D" collect surface water from various catch basins throughout the parking lot, converge, and then run under and between the buildings to deposit storm water into the detention pond; and Line "E"—the line subject of this action and appeal—connects to the SCDOT catch basin adjacent to U.S. Highway 1—the catch basin subject of the 1987 Encroachment Permit. *Id.* Line "E" routes the outflow from the SCDOT catch basin adjacent to U.S. Highway 1 away from the catch basin in a westerly direction, then turns in a southerly direction at the northwest corner of the tract, where it runs behind the shopping center buildings parallel to the western property line of the tract, emptying into the detention pond. *Id.* The detention pond detains the storm water, and meters it out from the southwest corner of the tract onto adjoining property from an outflow pipe. *Id.* Although storm water from SCDOT's catch basin and U.S. Highway 1 still flows to and exits the tract to the southwest corner, as it did for countless years across the natural contours of the tract before 1987, the path of the storm water since 1987 in getting to that point via Line "E" has been vastly altered in order to accommodate the construction of Westside Meshekoff's shopping center. *Compare* Trial Exhibit 39 *with* Trial Exhibits 7 and 85.

Michael Lambrecht, Westside Meshekoff's civil engineering expert witness, completed storm drainage rate of flow calculations for storm water exiting the SCDOT catch basin and entering the Westside Plaza storm drainage system, e.g., Tr. p. 452, lines 18-23, but he testified to no fewer than *three different* rates of flow for storm water exiting the SCDOT catch basin pipe and entering Westside Meshekoff's line "E,"—65 Cubic Feet per Second, *id.*, p. 438, line 9 to p. 440, line 10; p. 459, line 17 to p. 460, line 1; p. 460, line 9 to p. 461, line 5; 87.5 Cubic Feet per Second, *id.* p. 456, line 21 to p. 458, line 22; and 81.4 Cubic Feet per Second, *id.*, p. 468, line 2 to p. 470, line 9; p. 471, lines 7-9. On cross examination, Lambrecht ultimately opined to a reasonable degree of engineering certainty that 65 Cubic Feet per Second was the peak rate coming through the pipe at any single point in time, conceding "[i]t's the best we can do with the information we have." *Id.*, p. 482, line 9 to p. 484, line 7. Westside Meshekoff then attempted to extrapolate from the three different means of calculating the rate of flow of storm water exiting the SCDOT catch basin into Line "E" of the drainage system, and the three different results, what the percentage of "equitable" apportionment of the costs of repair to the line should be, with some confusion. *See. id.*, p. 452. line 18 to p. 471, line 9.

Although the Westside Meshekoff experts Richardson and Lambrecht attempted to minimize the qualitative differences between the reinforced concrete pipe Dayton and Associates had represented to SCDOT that it would install and the corrugated metal pipe it actually did install in constructing the Westside Meshekoff storm drainage system, neither was able to convincingly testify that corrugated metal pipe was the functional equivalent of reinforced concrete pipe. *Compare id.*, p. 312, line 25 to p. 313, line 5 *with id.*, p. 314, lines 3-13 (Richardson testifying that corrugated metal pipe, properly installed, should last

up to 40 years, while reinforced concrete pipe, properly installed, should last virtually forever); *see also*, *id.*, p. 308, lines 1-6 (Richardson testifying that corrugated metal pipe would rust, while reinforced concrete pipe would not); p. 462, lines 18-20 (Lambrecht, on direct examination, testifying that, as an engineer, he preferred reinforced concrete pipe); p. 484, line 11 to 485, line 9 (Lambrecht testifying that corrugated metal pipe was not the functional equivalent of reinforced concrete pipe). Both opined that the corrugated metal pipe was poorly installed. *See, e.g.*, *id.*, p. 254, line 6 to p. 255, line 24; p. 281, line 16 to p. 282, line 5; p. 297, line 22 to p. 299, line 17; p. 501, line 2 to p. 503, line 9.

Matthew Meshekoff, the current managing partner of Westside Meshekoff, testified that his parents, Edward and Helen Meshekoff, who had acquired the shopping center in 1990, were unable to testify—with Mr. Meshekoff having recently died and Mrs. Meshekoff having complete dementia. Tr., p. 97, line 20 to p. 98, line 3; p. 99, lines 16-17. Consequently no one was able to testify at trial to the circumstances of Mr. and Mrs. Meshekoff acquiring the shopping center, such as what due diligence they exercised in reviewing as-built plans or agreements their predecessors in title had committed them to, or in hiring lawyers locally to assist them in acquiring such information. No one was present and able to testify to what the Meshekoffs knew and when they knew it, as managing general partners of Westside Meshekoff Family Limited Partnership, the appellant herein and current owner, when they acquired the shopping center from the previous owner in 1997—another Meshekoff partnership of which they were also the general managing partners. *See*, Trial Exhibit 40-M, -N, and –O. Matthew Meshekoff himself disclaimed virtually any meaningful knowledge of the acquisition or operation of the shopping center prior to shortly before 2005. *Cf.*, Tr. p. 97, lines 14-19 (took over as

managing partner in 2005, but had been acting in that capacity prior to that date); *id.*, p. 99, line 18 to p. 100, line 2 (he did not attend the 1997 closing when Westside Meshekoff acquired the shopping center and did not know who from the family partnership, if anyone, did attend); *id.*, p. 100, lines 12-13 (he did not appear to know if Westside Meshekoff had local attorneys for the closing); *id.*, p. 100, line 22 to p. 101, line 2 (he did not know that Westside Meshekoff had acquired the shopping center from another Meshekoff family partnership); *id.*, p. 101, line 3 to p. 102, line 17 (he did not appear to know when he had acquired a partnership interest in the Westside Meshekoff family partnership); *id.*, p. 105, line 10 to p. 106, line 9 (he "had nothing to do with [his parents'] business" in 1997 when the shopping center was acquired); *id.* p. 140, line 19 to p. 152, line 14 (generally, Matthew Meshekoff's lack of awareness of his family's ownership of the property prior to Westside Meshekoff acquiring it in 1997, and his family's and Westside Meshekoff's lack of due diligence with regard to investigating the the storm drainage system when an as-built survey was public record as of July 28, 1988).

STANDARD OF REVIEW

The Appellant Westside Meshekoff has characterized its claim as "equitable apportionment of maintenance costs," and maintains that it is an equitable claim, with a standard of appellate review for an action in equity. *See, e.g.*, Complaint, pp. 6-7, Tr. p. 12, lines 8-13, Brief of Appellant, p. 2. In actions in equity, tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the evidence. *E.g.*, *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); *Smothers v. Richland Memorial Hospital*, 328 S.C. 566, 570, 493 S.E.2d 107, 109 (Ct. App. 1997). However, the broad scope of appellate review afforded actions

in equity does not require this Court to disregard the findings of the trial judge, who was in a better position to evaluate the credibility of the witnesses. *Smothers*, 328 S.C. at 570, 493 S.E.2d at 109.

ARGUMENT I

HAYES V. TOMPKINS, THE CASE WHICH THE APPELLANT WESTSIDE MESHEKOFF RELIES UPON AS THE CORNERSTONE OF ITS CLAIM, IS INAPPOSITE TO THE FACTS OF THIS CASE, AND WESTSIDE MESHEKOFF HAS FURTHER FAILED TO PROVE ITS CLAIM THAT IT WAS ENTITLED TO EQUITABLE APPORTIONMENT OF REPAIR AND MAINTENANCE COSTS FOR ITS STORM DRAINAGE SYSTEM.

Westside Meshekoff relies upon *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1985), as its cornerstone and starting point in attempting to extend the *Hayes* holding from its application in a case involving a way of necessity over land of another founded on an implied grant, or an easement of right-of-way over land of another arising by prescription, 287 S.C. at 291, 337 S.E.2d at 890, to storm water drainage from a state-maintained highway involving either an easement by prescription or by written agreement of the servient tenement's predecessor in title, which written agreement included acceptance of financial responsibility for maintenance and repair by the predecessor in title and its successors and assigns—the latest of which is the Appellant herein, Westside Meshekoff. As such, the *Hayes* holding is distinguishable on its facts, is inapposite to the facts of this case, and should not be extended. The Trial Court agreed that the *Hayes* holding did not apply, and issued its Amended Order denying Westside Meshekoff's claim for equitable apportionment of maintenance and repair costs. Amended Order, p. 6-7.

Hayes is distinguishable because it is a road case, dealing with an easement for ingress and egress over the land of another, created either impliedly because of a way of

necessity, or by prescriptive use, and not a storm water or surface water drainage case. 287 S.C. at 291, 337 S.E.2d at 890. The Westside Meshekoff claim arises out of SCDOT releasing storm water runoff from U.S. Highway 1 into and through undeveloped property owned by one of Westside Meshekoff's predecessors in title for years before 1987, when the Westside Plaza Shopping Center was built, then continuing to release that storm water from the same catch basin that existed adjacent to U.S. Highway 1 into a storm drainage pipe system built by Westside Meshekoff's predecessor in title and developer of the shopping center, Dayton and Associates, pursuant to a 1987 SCDOT Encroachment Permit. *See*, Trial Exhibit 1. In its July 15, 1987 Application for Encroachment Permit, Dayton and Associates *requested* SCDOT permission to be allowed to connect its storm drainage system consisting of 48 inch reinforced concrete pipes (RCP) to the *then existing* SCDOT catch basin, and accept storm drainage of up to 98 Cubic Feet per Second (CPS). *Id.*, p. 2. When SCDOT issued its Encroachment Permit, Dayton and Associates signed its acceptance of the terms and conditions of the Permit, and agreed on behalf of itself and its successors and assigns, to be responsible for maintenance and repair costs incident to the encroachments. *Id.*, bottom of p.1.

If the *Hayes* holding is extended to storm water or surface water drainage cases, it will entitle virtually every down-gradient property owner through whose property surface water from an up-gradient property owner flows to petition for equitable apportionment of maintenance and repair costs. Apart from the likelihood that disputes over such claims would spawn a veritable tidal wave of equitable apportionment claims inundating the court system, with each down-gradient property owner making claims against every up-gradient property owner in the watershed, the effect upon SCDOT would be devastating. SCDOT

which has a statutory duty to maintain safe—and therefore surface-water-free—roads, *see*, *S.C. Code Ann.* §§ 57-1-10 and 57-5-10 (1976 as amended); *see also*, Tr. p. 485, line 6 to p. 487, line 5 (Westside Meshekoff civil engineering expert Michael Lambrecht testified to his understanding of SCDOT's duty to keep its roads safe and free of surface water, and that one means of keeping the surface water off of the roads was the use of crowned roads and catch basins similar to the catch basin adjacent to the Westside Plaza Shopping Center), and has catch basins comparable to the one subject of this action adjacent to state maintained roads throughout South Carolina in numbers too many to count. *Cf., id.*, p. 294, line 9 to p. 295, line 8 (Westside Meshekoff utilities and storm drainage construction expert Tim Richardson testifying to SCDOT having comparable "Type 9" catch basins adjacent to roads statewide).

Such an extension of the Hayes holding to storm water or surface water would also conflict with the "common enemy rule," which South Carolina courts have historically followed with regard to surface water since the early twentieth century. *See, generally*, *Irwin v. Michelin Tire Corp.*, 288 S.C. 221, 224, 341 S.E.2d 783, 784 (1986). *But see*, Amended Order, p. 12 (Trial Court, citing M and M Corp of South Carolina v. Auto-Owners Ins. Co., 390 S.C. 255, 260, n.1, 701 S.E.2d 33, 35 n.1 (2010) for proposition that, since common enemy rule addresses *tort* liability for surface water issues and the Westside Meshekoff claim was in *equity*, the common enemy rule precepts did not directly apply, but were nevertheless "instructive.").

Even if the *Hayes* holding were not distinguishable on its facts, Westside Meshekoff simply failed to offer sufficient evidence to prove its claim to equitable relief, offering only one witness from the ownership entity—Matthew Meshekoff—who knew

virtually nothing about his own company pre-dating 2005, when he had taken over as managing partner from his parents, Edward and Helen Meshekoff. *See, generally*, Statement of Facts and record citations therein, *supra*, pp. 14-15. The Encroachment Permit subject of this action was put into evidence through Matthew Meshekoff, although he was able to testify to little about it other than what he had read.

Westside Meshekoff also offered two expert witnesses—Tim Richardson and Michael Lambrecht—who, though clearly possessing the requisite expertise in their respective fields, added little to tip the equity scales in Westside Meshekoff's favor. Richardson testified to the quick response and quality repairs made to the storm drainage system by his company; but his most compelling testimony was with regard to the original poor installation of the corrugated metal pipe, with improperly joined seams and negative slopes. *See*, Statement of Facts and record citations therein, *supra*, p. 11. Lambrecht testified to the pre-development topography of the tract subject of this action, as gleaned from a 1987 Dayton and Associates "Stakeout Plan," showing drawings of the proposed shopping center over the then-existing topographical contours of the undeveloped tract, *see*, Trial Exhibit 39, and testified that the then-existing SCDOT catch basin emptied storm water into and through the natural contours of the tract, flowing in a southerly direction away from U.S. Highway 1, unfettered by pipe capacity flow limitations, see, generally, Statement of Facts and record citations therein, *supra*, pp. 8-9. Lambrecht further testified to his rate of flow calculations for storm water exiting the SCDOT catch basin and entering the Westside Meshekoff storm drainage system, and came up with no fewer than three different rates of flow in his direct examination by the Westside Meshekoff trial attorney—65 cubic feet per second, 87.5 cubic feet per second, and 81.4 cubic feet per second—all of

which were markedly less than the 98 cubic feet per second that Dayton and Associates had agreed to accept into the Westside Plaza Shopping Center storm drainage system, on behalf of itself and its successors and assigns—which included Westside Meshekoff, the Appellant herein. Statement of Facts and record citations therein, *supra*, pp. 12-13. Richardson and Lambrecht also highlighted, albeit unintentionally, the multitude of qualitative differences between the corrugated metal pipe installed by Dayton and Associates—that had been poorly installed and had failed so miserably—rather than the reinforced concrete pipe that Dayton and Associates had represented in its Application for Encroachment Permit to SCDOT it would install in connecting the storm drainage system to SCDOT's catch basin. *See, generally*, Statement of Facts and record citations therein, *supra*, pp. 13-14. *See also*, Trial Exhibit 1 (the 1987 Encroachment Permit).

Despite the bells and whistles expert testimony as to the three different rates of flow calculations, there was no convincing evidence presented by Westside Meshekoff establishing a causal connection between the simple *use of* the storm drainage system, and the flow of storm water, and the damage to and deterioration of the system. To the contrary, Westside Meshekoff's own experts' testimony as to the flawed installation and the qualitative differences between the corrugated metal pipe that *was used*, and the reinforced concrete pipe that *was supposed to have been used*, was compelling. As the Trial Court properly noted in its Amended Order, "no evidence at trial showed how the rate of flow ... caused the costs to the drainage system. It remains unclear what the causes of the problem to Westside's drainage system were. This causes too much speculation as to whether the problem was a defect in installation, negligence in the maintenance of the system, or some other problem not identified. Despite the testimony from Michael

Lambrecht as to the rate of flow from each defendant, it is uncertain whether the rate of flow actually caused the failure of the system." Amended Order, p. 10.

Finally, evidence submitted through the Encroachment Permit established that Dayton and Associates had accepted the Encroachment Permit on behalf of its successors and assigns, thereby agreeing to be financially responsible for the cost of maintenance and repair to the encroachments subject of the Permit—including the storm drainage system attached to SCDOT's catch basin—thereby binding the successors and assigns—including Westside Meshekoff—to be similarly responsible for the costs. If the *Hayes* holding was ever even applicable to the facts of this case, the evidence of that agreement to be responsible for maintenance and repair cost fatally undermined Westside Meshekoff's attempt to prevail under its equitable theory of recovery based upon the *Hayes* holding. Cf., Hayes, 287 S.C. at 294, 337 S.E.2d at 891 (*"[i]n the absence of an agreement*, the ... owners of the servient tenement, are under no duty to maintain and repair the easement ... for the benefit of the dominant tenement ... .")(emphasis added).

The Trial Court properly ruled based upon the applicable case law and the evidence, and the Amended Order dated September 9, 2011 and filed September 12, 2011 should be affirmed.

ARGUMENT II.

THE TRIAL JUDGE PROPERLY FOUND THAT THE 1987 ACCEPTANCE BY WESTSIDE MESHEKOFF'S PREDECESSOR IN TITLE OF THE MAINTENANCE AND REPAIR RESPONSIBILITIES SET FORTH IN THE ENCROACHMENT PERMIT BINDS WESTSIDE MESHEKOFF FOR REPAIR COSTS TO ITS STORM DRAINAGE SYSTEM.

Even if the *Hayes v. Tompkins* holding were extended to apply to storm and surface water drainage easements rather than simply ways of necessity and easements of right-of-

way over land arising by prescription, the equitable apportionment of maintenance costs contemplated by the *Hayes* holding applies only in the absence of an agreement by the owners of the servient tenement to maintain and repair. 287 S.C. at 294, 337 S.E.2d at 891. The Trial Judge properly found that the Encroachment Permit not only changed the location of SCDOT's storm drainage, but also established an agreement between SCDOT and Dayton and Associates as to future costs of maintenance and repair. Amended Order, pp. 6-9. That finding was amply supported by the evidence at trial.

In accepting the Encroachment Permit on August 26, 1987, Westside Meshekoff's predecessor in title to Westside Plaza Shopping Center—Dayton and Associates—agreed "to comply with all the provisions, terms, conditions, and restrictions set out [in the Permit]," and further agreed on behalf of itself and its successors and assigns, "to assume any and all liability [SCDOT] might otherwise have in connection with accidents .... or ... damage to property, ... that may be caused by the construction, maintenance, use moving or removing of the encroachment contemplated herein ... ." Trial Exhibit 1. In binding its successors and assigns, Dayton and Associates, as the servient tenant, bound Westside Meshekoff to the agreement as well. Although Westside Meshekoff initially sought to avoid that agreement by claiming lack of record notice or actual of the Encroachment Permit and maintenance agreement, evidence at trial indicated otherwise.

A. Westside Meshekoff had Constructive and Record Notice of the 1987 Encroachment Permit.

In its Amended Order, the Trial Court reasoned that the mere existence of the SCDOT catch basin to the Westside Plaza storm drainage system should have given notice to Westside Meshekoff that SCDOT had some right to use the system, and could be

considered constructive notice of the existence of a permit or easement. Amended Order, p. 8. Evidence at trial established that, had Westside Meshekoff and its predecessor in title, former managing partner, and family patriarch Edward Meshekoff exercised appropriate due diligence in acquiring the shopping center, they should not only have had constructive notice of the Encroachment Permit, but record notice as well.

Westside Meshekoff has attempted to evade notice of and accountability for the terms and conditions of the 1987 Encroachment Permit by maintaining that the Encroachment Permit was not recorded in the Register of Deeds for Lexington County, was not readily accessible to the public at SCDOT, and that, through its managing partner, Matthew Meshekoff, Westside Meshekoff had no notice of it. However, Matthew Meshekoff admitted on cross examination that he presumed—although he did not know—that his parents had local attorneys representing them at certain times, and that those attorneys presumably would have been retained for the purpose of making sure that the property complied with local and state requirements. Tr. p. 105, line 10 to p. 106, line 9. Matthew Meshekoff, himself, the managing partner of Westside Meshekoff, appeared to have no concept of whether Westside Plaza had been in his family before his partnership acquired title in 1997, *id.*, p. 140, line 19 to p. 141, line 8; had no concept of what constituted due diligence in acquiring commercial property, *id.*, p. 143, lines 8-19; and did not know what was "customary" responsibility for a real estate attorney incident to a commercial property purchase, although he agreed that looking at public records relating to the property was "reasonable." *Id.*, p. 143, line 20 to p. 144, line 9.

Matthew Meshekoff was able to agree when cross examined that the As Built Survey of Westside Plaza—which the Westside Meshekoff trial attorney had put into

evidence through him as Trial Exhibit 7—had been recorded July 28, 1988. *Id.*, p. 144, line 13 to p. 145, line 3; Trial Exhibit 7. He was also able to agree that the survey was on file with Lexington County before Westside Meshekoff acquired the property—and in fact, before Edward and Helen Meshekoff initially had acquired the shopping center in 1990. *Id.*, p. 145, lines 4-7. *See also*, Trial Exhibit 40-G (The deed conveying the shopping center to Edward and Helen Meshekoff was filed May 1, 1990). Matthew Meshekoff also identified, with some assistance, a Class-A Land Title Survey of Westside Plaza Shopping Center that was dated December 30, 1996—before Westside Meshekoff acquired the property January 31, 1997. Tr. p. 147, line 5 to p. 150, line 13; Trial Exhibit 83. *See also*, Trial Exhibit 40-M (Deed from Fourm Meshekoff Family Limited Partnership, conveying the shopping center to Westside Meshekoff Family Limited Partnership, dated January 31, 1997 and signed by Edward Meshekoff, as General Partner). Both the 1988 As Built Survey and the 1996 Title Survey show the detention pond and the storm drainage system, including Line "E" connecting the detention pond to the SCDOT catch basin adjacent to U.S. Highway 1, with the 1996 survey identifying Line "E" as corrugated metal pipe. Tr., p. 144, line 15 to p. 147, line 4; p. 150, line 15 to p. 151, line 25; Trial Exhibits 7 and 83.

The As Built Survey for The Westside Plaza Shopping Center shows five driveways connecting the shopping center parking lot with state-maintained highways—three on U.S. Highway 1, and two on Dreher Road. Trial Exhibit 7. Under *S.C. Code Ann.* § 57-5-1080 (1976 as amended) a permit for any such driveway is required—and was required in 1987. South Carolina statute also gave SCDOT the right to deny any permits for any driveways which, in the judgment of the Department, may create a hazard to the traveling public. *S.C. Code Ann.* § 57-5-1090 (1976 as amended).

Matthew Meshekoff admitted at trial that, at the time the Westside Plaza Shopping Center was about to be acquired by either his parents in 1990 or by Westside Meshekoff in 1997, someone could have gone to the Lexington County Register of Deeds office and looked at the 1988 As Built Survey. Tr. p. 146, lines 8-21. Had Matthew Meshekoff's parents and his predecessor as managing partner for Westside Meshekoff themselves exercised due diligence by reviewing the 1988 As Built Survey and hiring a South Carolina attorney for purposes of checking for clear title and to make sure the property complied with all municipal and state requirements, they would have learned of the statutory requirement for Encroachment Permits for the driveways connecting to public ways shown on the As Built Survey, and they could have gotten a copy of the 1987 Encroachment Permit in which Dayton and Associates had agreed to bind its successors and assigns for repair and maintenance costs through a Freedom of Information Act request, as Matthew Meshekoff was able to do without any difficulty prior to filing this lawsuit. *Cf.*, Tr. p. 360, line 1 to p. 361, line 5 (Clarence Blakely, of SCDOT, testifying that Encroachment Permits are available to the public through Freedom of Information Act requests); *id.*, p. 66, lines 20-24; p. 75, line 21 to p. 76, line 1; p. 106, lines 10-24 (Matthew Meshekoff testifying that, for purposes of this lawsuit, he "commissioned" his attorneys to submit a FOIA request to SCDOT, and had no trouble getting a copy of the Encroachment Permit). *See, also, id.*, p. 713, line 20 to p. 714, line 1; p. 716, lines 4-19, p. 720, line 13 to p. 722, line 14; p. 743, lines 3-23 (Ronald Swinson, similarly situated as managing member of the ownership entity of Danwood Shopping Center, SCDOT's co-Defendant in this lawsuit, Danwood, LLC, testifying to the due diligence he exercises in purchasing a commercial property, including always reviewing an as-built survey, and hiring an attorney

to check for clear title, encumbrances, and compliance with municipal ordinances and state statutes).

It follows that, had Edward and Helen Meshekoff been exercising due diligence when they acquired the shopping center in 1990, they would have known of and examined the 1988 As Built Survey, showing the driveways and connection to the SCDOT catch basin, and would have been as able as their son was, some eighteen years later, to "commission" an attorney to make a FOIA request for the Encroachment Permit. Having done so, they could have read the language pursuant to which Dayton and Associates had accepted the benefits of the Permit while binding its successors and assigns. They could then have chosen to either accept the maintenance and repair responsibility imposed by the Encroachment Permit, or chosen to negotiate more favorable terms from the seller, or chosen to simply walk away from the sale. Mr. and Mrs. Meshekoff had the means of discovering and obtaining the 1987 Encroachment Permit, and were therefore constructively on notice of the contents of the Encroachment Permit, including the maintenance and repair responsibilities. *Cf., Fuller-Ahrens Partnership v. S.C. Department of Highways and Public Transportation,* 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993) (holding that filing of right-of-way deed and related documents in Highway Department's offices was sufficient to impart constructive notice to subsequent purchaser of the deed and its contents, just as though the transaction was recorded in the county where the land was situated). *See also, North Point Development Group v. South Carolina Department of Transportation*, 397 S.C. 440, 446, 725 S.E.2d 128, 132 (Ct. App. 2012)(deed from landowner's predecessor in title to SCDOT, referring to plans, was sufficient to put

landowner on notice that access rights had been conveyed to SCDOT and to impose a duty on landowner of further inquiry).

B. Westside Meshekoff had further notice of the 1987 Encroachment Permit through its Property Manager, Weldon Wyatt.

The Trial Court further reasoned and concluded that Westside Meshekoff should have had further notice of the Encroachment Permit through the property management company it hired to manage the shopping center, which property management company was owned by the same individual who had been a managing general partner in both Dayton and Associates, the partnership that had built the shopping center, and Westside Associates, the partnership from which the Meshekoff family had acquired the shopping center. Amended Order, p. 8. Evidence at trial supported the rationale and conclusion of the Trial Court on this point, as well.

Westside Meshekoff was only able to disclaim knowledge of the Encroachment Permit at trial because the only witness it offered to testify to its legacy of ownership of Westside Plaza was its managing partner, Matthew Meshekoff, whose meaningful recall of partnership events extended no further back than 2005, and who knew virtually nothing of substance relating to his parents' acquisition of the shopping center in 1990, their management of the property since the 1990 acquisition, or their intra-familial conveyances of the property up to the conveyance into Westside Meshekoff in 1997. *See, generally*, Tr. pp. 60-219. Matthew Meshekoff's parents were unable to testify at trial in 2011, with his father, Edward, having passed away in 2010 and his mother, Helen, being in poor health. *Id.*, p. 97, line 20 to p. 98, line 3; p. 99, lines 16-17. Westside Meshekoff offered no reliable evidence to establish its familial chain of title to the shopping center subject of this

action, essentially beginning the presentation of its evidence with Matthew Meshekoff testifying to his assuming the managing partner duties in 2005, identifying two color photographs of the shopping center, and then testifying to the 2005 sink hole and subsequent repairs and costs incurred. *See, generally, id.*, p. 60, line 15 to p. 76, line 5.

Yet despite Matthew Meshekoff's real or apparent inability to provide the Court with any historical context to his family's ownership of the Westside Plaza Shopping Center, other evidence at trial, including the chain of title back through Dayton and Associates' ownership, amply established that Edward and Helen Meshekoff, and every family entity to which they had conveyed the shopping center as individuals, trustees, or partners since acquiring it in 1990, had a readily available means of gaining notice of the 1987 Encroachment Permit far more immediate and far less formal than searching public records.

They could have simply asked their property manager, Weldon Wyatt.

Weldon Wyatt, an Aiken County developer and owner of a property management company, *see*, Reeves Deposition, p. 13, line 25 to p. 14, line 19, was a principal in both Dayton & Associates, the partnership that had developed and built Westside Plaza Shopping Center, and West Side Plaza Associates, the partnership to which Dayton and Associates had conveyed the property in 1988 and which, in turn, conveyed the property to Edward and Helen Meshekoff in 1990. *Cf.*, Trial Exhibit 40-C, p. 2 (June 3, 1988 Deed from Dayton and Associates, conveying the shopping center to West Side Plaza Associates, signed by Weldon E. Wyatt on behalf of Dayton and Associates); Trial Exhibit 40-G, p. 2 (April 30, 1990 Deed from West Side Plaza Associates, conveying the shopping center to Edward and Helen Meshekoff, signed by Weldon E. Wyatt on behalf of West

Side Plaza Associates). Weldon Wyatt also owned Wyatt Development Company, which had a property management division, *see*, Reeves Deposition, p. 13, line 14 to page 17, line 3, which property management division managed Westside Plaza for the Meshekoffs, *id.*, p. 25, line 16 to p. 26, line 13. When Helen and Edward Meshekoff took title to the shopping center from West Side Plaza Associates in 1990, the "Grantees' Address" on the front of the deed, for the return of the original deed to the Grantees—the Meshekoffs—was hand-written as "Helen & Edward Meshekoff, c/o Wyatt Development Company, Property Management Division." Trial Exhibit 40-G, p. 1. From the time that Helen and Edward Meshekoff took ownership of the shopping center in 1990, up through and including the 2005-2008 time frame, the shopping center was managed by Wyatt Development Company—which was owned by Weldon Wyatt—and eventually "WRS, Inc.," a successor company in which Wyatt also had ownership interest. Reeves Deposition, p. 13, lines 14-24, p. 14, line 9 to p. 15, line 22, p. 24, line 17 to p. 25, line 1. From the application for and acceptance of the 1987 Encroachment Permit, to the poor installation of the storm drainage system using corrugated metal pipe instead of the reinforced concrete pipe, to the conveyance to Edward and Helen Meshekoff, to the managing of the shopping center while the Meshekoffs made intra-familial conveyances to revocable trusts, a second family partnership, and ultimately to Westside Meshekoff Family Limited Partnership, the one constant in Westside Plaza Shopping Center has been Weldon Wyatt.

Given that close association, Westside Meshekoff can not come into Court in equity, and disclaim through ignorance, lack of information, or lack of means to that information, the acts and omissions of its predecessor in title in applying for and accepting the 1987 Encroachment Permit, when the very entity that signed the acceptance of the

Encroachment Permit was not only its predecessor in title, but also the property manager for the shopping center throughout the time that the Meshekoff family has owned it, either through Edward and Helen Meshekoff, individually, or their revocable trusts, or the two separate family partnerships that have owned the shopping center between 1990 and 1997.

C. SCDOT Did Not "Stipulate" That There Was No Maintenance Agreement Binding Westside Meshekoff Through Statements Made At Trial By Trial Counsel.

Westside Meshekoff argues that SCDOT "stipulated" in opening statement, then later in motions after the close of Westside Meshekoff's case that "no such maintenance agreement could be found in the encroachment permit," and concludes that "[t]hus, there was nothing for the court to decide on that issue." Brief of Appellant pp. 9, 26. Not only does the argument misapprehend—or misrepresent—the context of the statements, it is contrary to long-standing South Carolina case law defining stipulations and statements of counsel not being taken as evidence.

The statements are taken out of context, particularly given SCDOT's subsequent cross examination of Matthew Meshekoff only minutes after opening statements on the very language in the Encroachment Permit by which Dayton and Associates had bound its successors and assigns. Tr., p. 106, line 25 to p. 109, line 11. The first statement quoted is *four lines* lifted out of an opening statement that ran seventeen pages long, in which SCDOT trial counsel apprised the trial court of the upcoming chain of title issues, easement questions, construction flaws, surface water issues, and inapplicability of the *Hayes v. Tompkins* case, upon which Westside Meshekoff was relying as the cornerstone of its claim. *See, generally, Id.* p. 17, line 6 to p. 34, line 17. Immediately before the

statement, trial counsel for SCDOT had stated, "there were no demands for payment. Evidence will not show any demands for payment of construction costs, *sharing* maintenance costs at all, from the 1987 encroachment permit up until the filing of this lawsuit with S.C.D.O.T. The encroachment permit itself is silent as to how maintenance costs are to be *apportioned.* It doesn't even mention maintenance costs." *Id.*, p. 29, lines 15-22 (emphasis added). SCDOT trial counsel was speaking from the perspective of the encroachment permit being silent as to SCDOT *sharing* maintenance costs, or being *apportioned* maintenance costs, or having, in any way, to be financially responsible for maintenance or repairs to Westside Meshekoff's property. Similarly, the second statement was made by SCDOT trial counsel during argument of motions at the conclusion of Westside Meshekoff's case. The entire text of the staement is, "there was no offer by D.O.T. to pay any costs of the maintenance prior to – we still haven't done it – prior to this lawsuit. There was no requirement that we do it. The law didn't require it. The 1987 permit is silent as to maintenance. There is nothing in there that says, 'We are going to put in this storm drain system. And, oh by the way, you guys need to help us dredge the pond every other year.' There is no mention in there of it at all." *Id.*, p. 641, line 25 to p. 642, line 10. Once again, the proper context of the statement was that the Encroachment Permit is silent as to SCDOT having to contribute to maintenance or repair costs for the Westside Meshekoff property. No one misconstrued the context at trial—particularly Westside Meshekoff's trial counsel, neither of whom suggested at trial that the out of context statements were a stipulation.

The statements were not a stipulation. The South Carolina Supreme Court has defined a stipulation as an agreement, admission, of concession made in judicial

proceedings made by the parties thereto or their attorneys. It is an agreement, an understanding. *South Carolina Department of Transportation v. Richardson*, 335 S.C. 278, 283, 516 S.E.2d 3, 6 (Ct. App. 1999), *citing Porter v. South Carolina Pub. Serv. Comm'n*, 333 S.C. 12, 30, 507 S.E.2d 328, 337 (1999). *See also, State v. Anderson*, 318 S.C. 395, 399-400, 458 S.E.2d 56, 58 (Ct. App. 1995)("Generally, a stipulation is an agreement between the parties to which there must be mutual assent."). The parties did make stipulations at trial, and they were agreements clearly announced to the trial judge, on the record, unambiguously, and in proper context. *See,* Tr. p. 155, line 8 to p. 158, line 25, p. 620, line 4 to p. 622, line 19. *See also, id.* p. 214, lines 12-25; p. 215, lines 10-25; p. 219, line 20 to p. 220, line 13 (Westside Meshekoff trial counsel attempted to introduce a May 20, 2008 demand letter he had mailed to an Assistant Chief Counsel for SCDOT at Matthew Meshekoff's request to demand contribution for costs of maintaining the detention pond and storm drainage system shortly before suit was filed June 9, 2008, which letter had been unknown to SCDOT trial counsel because it had been neither forwarded to him by the Assistant Chief Counsel, nor produced to him through discovery—and was contrary to SCDOT trial counsel's opening statement that there had been no demands addressed to SCDOT for payment. When one of the other Defendant's attorney objected to the admission of the letter into evidence, SCDOT trial counsel nevertheless stipulated for the record—unambiguously and in the proper context—that the letter did constitute a demand for payment).

The statements were not evidence. South Carolina courts have long held that statements of fact appearing only in argument of counsel will not be considered as evidence. *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933).

See also, *Sessions v. Withers*, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997)(Statements by Defendant's attorney that Defendant's expert had rendered a certain opinion regarding a personal injury suit were disregarded by the Court when the expert's testimony on that opinion had not been presented to the Court); *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991)(Arguments of Counsel are not evidence); *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986)(Trial Court properly disregarded statements of Counsel that he claimed reflected testimony appearing in depositions that had not been otherwise entered).

D. Westside Meshekoff's Storm Drainage Line "E" is an Encroachment Subject of the 1987 Encroachment Permit, For Which Westside Meshekoff is Financially Responsible for Construction, Maintenance, and Repair Costs.

Westside Meshekoff further argues that the maintenance and repairs contemplated by the Encroachment Permit do not include the complained of damage to the Westside Plaza storm drainage system, since it is not an "encroachment" and is not within the SCDOT right-of–way. Brief of Appellant, pp. 26-31. That argument is contrary to the testimony of its own engineering expert and the plain meaning of the acceptance signed by Dayton and Associates.

1. Lambrecht Testimony as to Encroachment

Michael Lambrecht was called as a witness for Westside Meshekoff, and after going through his education and early work history, testified that he was employed with Florence and Hutcheson Engineering Firm, managing the civil engineering side, which included work involving small or large commercial development requiring a grading plan, storm water design, and, water, sewer, and gas to serve the facility; and about sixty percent

of his work was SCDOT road design. Tr. p. 407, line 19 to p. 408, line 14. Lambrecht was then offered to and accepted by the Trial Court as an expert witness in the area of civil site design, to include storm water drainage and detention/retention ponds. *Id.*, p. 410, line 18 to p. 412, line 24. On cross examination, Lambrecht testified that, in his experience as an engineer dealing with SCDOT, he had applied for encroachment permits, and had storm drainage provisions in his applications, for traffic and for storm water. *Id.*, p. 494, line 17 to p. 495, line 1. He further testified to his understanding of SCDOT's duty to keep its roads safe and free of surface water, and that one means of keeping the surface water off of the roads was the use of crowned roads and catch basins similar to the catch basin adjacent to the Westside Plaza Shopping Center. *Id.*, p. 485, line 6 to p. 487, line 5. Lambrecht further testified that, if SCDOT had been depositing surface water from its road into an undeveloped piece of property for several years, and then someone proposed to develop that property, if their development proposal were to block the surface water from the SCDOT catch basin, the water would back up on to the road, constituting an encroachment to the SCDOT right of way and road. *Id.* p. 491, line 10 to p. 492, line 3. He then testified that, to account for and avoid such an encroachment, someone developing formerly undeveloped property adjacent to a public road would submit and application for encroachment permit that included not only driveways that would encroach into the public roadway, but also a proposal disposing of the surface water coming off of the road so as to avoid a water encroachment. Id., p. 492, line 4 to p. 493, line 22. See also, id., p. 493, lines 20-22 ("Q: But when you are an engineer, when you do plans, you try to account for that; don't you?" "A: Yes, sir, you have to account for that."). Finally, Michael Lambrecht agreed that, in August of 1987, when Dayton and Associates submitted its

application for encroachment permit, it included in its application not just the proposed drawings for the five proposed driveways, but provisions as to how they were going to deal with storm runoff coming from the existing SCDOT catch basin. *Id.*, p. 494, lines 5-11.

Until Dayton and Associates developed the Dreher tract in 1987, SCDOT had unfettered ability and right to deposit storm water from U.S. Highway 1 into the existing catch basin adjacent to the Dreher tract, without limitations on the rate of flow imposed by pipe capacities. Dayton and Associates proposed a limitation on that use involving their connecting a storm drainage system to the SCDOT catch basin. In accepting the Encroachment Permit, Dayton and Associates agreed to be bound for the cost of maintenance and repair to the encroachment, and bound its successors and assigns. The "encroachment," for purposes of the connection to the catch basin, was not simply the five feet or seven feet or ten feet between the edge of the SCDOT stub-out pipe and the end of the DOT Right-of-way, as Westside Meshekoff attempts to argue, it was the *entire connection to the existing SCDOT catch basin* proposed by Dayton and Associates, because it was that entire connection that circumscribed SCDOT's formerly unlimited use of the drainage, and it is that connection which, if it fails, will obstruct the flow of storm water off of U.S. Highway 1 and will be an encroachment into the SCDOT roadway, according to Westside Meshekoff's own expert witness.

2. Plain Meaning of the Application, Permit, and Acceptance.

Applying contract principles to the plain language of Dayton and Associates' acceptance, given the context of the Encroachment Permit and Dayton's Application for Encroachment Permit attached to it, provides meaningful insight into whether the

maintenance and repair financial responsibility applies to maintenance and repair to Line "E" of the storm drain system, and supports the Trial Judge's ruling that it does apply.

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. *Ecclesiastes Production Ministries v. Out parcel Associates, LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 502 (Ct. App. 2007). The parties' intention must, in the first instance, be derived from the language of the contract. *Id.*, citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). To discover the intention of a contract, the court must first look to its language, and if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. *Ecclesiates*, 374 S.C. at 498, 649 S.E.2d at 502, citing *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973).

In accepting the Encroachment Permit, Dayton and Associates agreed "to comply with all the provisions, terms, conditions, and restrictions set out herein," and further agreed to "bind [its] ...successors and assigns, to assume any and all liability this Department might otherwise have in connection with accidents or injuries to persons, or *damage to property, including the highway, that may be caused by the construction, maintenance, use moving or removing of the encroachment contemplated, herein* and agree to indemnify this Department for any liability incurred or injury *or damage sustained by reason of the past, present, or future existence of said encroachment.*" Trial Exhibit 1, bottom of p. 1 (emphasis added). At the top of the first page of the Permit is pre-printed language, "[i]n compliance with your request and pursuant to statutory authority and subject to all the provisions, terms conditions, and restrictions written herein, ... YOU ARE HEREBY AUTHORIZED AND PERMITTED TO:" followed by the type-written,

"Construct two drives on road S-32-275. three drives along U.S. Hwy. #1, *and to connect existing catchbasin along U.S. Hwy. #1 with a new 48" RCP as shown on application dated July 15, 1987, a copy of which is attached hereto and made a part of this permit.*" *Id.* (emphasis added). The July 15, 1987 Application for Encroachment Permit is attached as the second page of the Permit, which includes three separate requests for permission—the first two, respectively, "to construct two drive way entrances onto Dreher Road S-32-275, as shown on the attached sketch," and "to construct three driveway entrances along U.S. Hwy. No. 1 as shown on the attached sketch;" and the third, "to connect onto an existing catch basin along U.S. Hwy. No. 1 with a new 48" R.C.P. The 98 C.F.S. from the existing 48" R.C.P. will be carried around the shopping center site in a 48" R.C.P. to the detention pond." *Id.*, p. 2. Attached to the Permit page 1 and the Application page 2, are three additional pages: a sketch of the proposed Dreher Road drive ways, a sketch of the proposed U.S. Highway 1 driveways, showing the proposed 48 inch RCP connection into the existing catch basin, and what appears to be a partial copy of construction plans for the shopping center, showing the northwest corner adjacent to U.S. Highway 1, and the proposed 48" RCP storm drainage line connecting to the catch basin and running around the shopping center to the detention pond. Trial Exhibit 1, pp. 3, 4, and 5.

Dayton and Associates' application requests permission to construct three encroachments, describes them in clear, unambiguous language, and further illustrates them with three attached drawings, one for each requested encroachment. *Id.*, pp. 2, 3, 4, and 5. The Permit that is issued states in clear, unambiguous language that the Department is authorizing and permitting Dayton and Associates to construct the driveways and connect to the catch basin as requested, and attaches and incorporates the application as

part of the permit. *Id.*, p. 1. The acceptance language is similarly clear and unambiguous, and when Dayton and Associates read the acceptance language before signing it, it would have clearly understood that it was agreeing to bind its successors and assigns to assume any liability for damage to property that might be caused by the construction, maintenance, or use of the "encroachment contemplated"—and there were three encroachments contemplated, one of which was the storm drain line which we now know as "Line E." Michael Lambrecht's testimony and the plain meaning of the Acceptance signed by Dayton and Associates, the Encroachment Permit, and the Application for Encroachment Permit support the Trial Judge's ruling that Westside Meshekoff is bound to pay the costs of the maintenance and repair to Line "E."

ARGUMENT III.

THE TRIAL JUDGE PROPERLY FOUND THAT THE RESPONDENT SCDOT HAD A DRAINAGE EASEMENT PRIOR TO THE 1987 ENCROACHMENT PERMIT BASED UPON THE DIRECT AND CIRCUMSTANTIAL EVIDENCE.

In its Amended Order, the Trial Court correctly concluded that "the existence of an easement to discharge storm water onto the [Westside Meshekoff] property is not in dispute," Amended Order, p. 6; and Westside Meshekoff concedes that "the parties agree there was an easement in existence, although the parties differ somewhat on the details of when and how the easement was created," arguing that Westside Meshekoff proved an easement pursuant to the Encroachment Permit, that SCDOT would have acquired an easement by prescription from 1987 had an easement not already been granted by the Encroachment Permit, but that SCDOT failed to prove at trial that it had an easement of

any kind prior to 1987. Brief of Appellant, p. 19. Evidence at trial did establish that SDCOT had an easement by prescription prior to 1987.

It has long been held that, in order to establish an easement by prescription, three things must be proven: 1) the continued and uninterrupted use or enjoyment of a right for the full period of 20 years; 2) the identity of the thing enjoyed; and 3) that use or enjoyment was adverse, or under claim or right. *See, e.g., Horry County v. Laychur*, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993); *Williamson v. Abbott*, 107 S.C. 397, ___, 93 S.E. 15, 15-16 (1917). Evidence at trial directly established that SCDOT's "existing catch basin" adjacent to U.S. Highway 1 referred to in the 1987 Encroachment Permit was probably in place since at least 1970, by virtue of SCDOT's Clarence Blakely's testimony and his reference to SCDOT plans for the widening of the highway in 1970. Trial Exhibit 41. *See also*, Tr. p. 396, line 13 to p. 397, line 3 (Blakely testified that SCDOT had released storm water from U.S. Highway 1 into the Dreher property since "[p]rior to 1970"). Circumstantially, testimonial evidence from Westside Meshekoff's own engineering expert. Michael Lambrecht, established that storm water run-off from the SCDOT catch basin, as shown on the 1987 Stakeout Plan for Dayton and Associates, released into natural drainage flowing in a south-westerly direction into and through the then-undeveloped Dayton and Associates property. Tr., p. 487, line 14 to p. 490, line 25; p. 495, line 12 to p. 500, line 8; Trial Exhibit 39. Lambrecht also testified that the pre-development drainage flow was probably from U.S. Highway 1 in that same south-westerly direction into and through the Dreher property prior to 1987. *Id.* Evidence further established that the undeveloped property had been acquired from Holmes C. Dreher, who had owned the property since June 30, 1953. *Cf.*, Trial Exhibit 40-A (legal

description of the 21.383 acres conveyed to Dayton and Associates by Holmes C. Dreher contains a derivation, indicating it is "a portion of the property conveyed to grantor by deed of Lula Mae E. Dreher dated June 30, 1953,...").

Although there was no specific evidence of exactly when SCDOT or its predecessor, the South Carolina Department of Highways and Public Transportation, first released storm water run-off from U.S. Highway 1 into and through the Dreher property, the property was put into evidence by the attorney for Alpine and Robert Denton, Tr. p. 42, line 14 to p. 43, line 2, and the Court did view the property, with which he had been familiar. *id.* p .619, line 17 to p. 620, line 1; *cf.*, *id.*, p. 619, lines 19-20 ("Sometime[s] memory lane is a little bumpy, too."). Furthermore, the Court could take Judicial Notice that U.S. Highway 1 had been in place, with water flowing downhill, into and through the undeveloped Dreher property, for a period in excess of twenty years prior to 1987. *Cf.*, *Moss v. Aetna Life Insurance Company*, 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976)(Judicial notice takes the place of proof. It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge.); *Wise v. Wise*, 394 S.C. 591, 600-601, 716 S.E.2d 117, 122 (Ct. App. 2011)(Although appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable, the South Carolina Court of Appeals held that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.).

If direct and circumstantial evidence, the Trial Court's visit to the site after it was put into evidence, and Judicial Notice were not sufficient to prove the prescriptive term, Westside Meshekoff also introduced Trial Exhibit 8 for purposes of establishing SCDOT's

easement. Tr., p. 95, lines 19-21. SCDOT did not object, *id.*, p. 95, lines 22-24, and Exhibit 8 was admitted into evidence. *Id.*, p. 96. line 13. Trial Exhibit 8 was selective SCDOT Answers to Westside Meshekoff's Interrogatories through the course of discovery, including SCDOT Answer to Interrogatory number 16, in which SCDOT responded to the inquiry into whether SCDOT "contend[ed] that [it] had a legal or equitable right to have storm water from [its] property discharged onto the Westside Plaza property," by responding, "Yes. *By prescription: storm water from US Highway 1 has drained into and through the property on which Westside Plaza currently is situated long before Westside Plaza ever existed.* Also, by agreement of Plaintiff's predecessor in title, which agreed to accept storm water from US Highway 1 and the culvert, which had existed prior to the development of the property, ..."). Trial Exhibit 8 (emphasis added).

There was no evidence at trial that SCDOT's use of the Dreher property for storm water run-off from U.S. Highway 1 was ever interrupted, although there was evidence that the easement was modified in 1970 with the widening of U.S. Highway 1, but only to the extent that the catch basin releasing storm water was moved in a southerly direction to allow for the widening of the highway. *See*, Trial Exhibit 41. *See also*, Tr. p. 374, lines 1-14 (SCDOT's Clarence Blakely testimony that, when Highway Department expanded U.S. Highway 1 to four lanes, it involved, in part, moving storm drainage catch basins from the edge of the two-lane highway at least fifteen to twenty feet further south to accommodate the widening of the road). Storm water still emptied from the catch basin into and through the natural contours of the Dreher property, and still flowed in a south-westerly direction away from U.S. Highway 1. Interestingly, there was no evidence at trial indicating any limitation of that easement as to the pre-development rate of flow, leading to the

conclusion that the pre-1987 easement for the release of storm water from the "existing" catch basin adjacent to U.S. Highway 1 as it existed in 1987 was not yet fettered nor otherwise circumscribed by pipe capacity nor improper and inadequate materials, nor defective installation of the Westside Meshekoff storm water system.

There was no evidence with regard to whether SCDOT's prescriptive use of the Dreher property for storm water release from U.S. Highway 1 was adverse or under claim of right by SCDOT—other than the statement introduced by Westside Meshekoff in Trial Exhibit 8; and there was no evidence that SCDOT's use was by permission through Mr. Dreher; but there was ample evidence, direct and circumstantial, from which the Trial Court could conclude that SCDOT's easement was prescriptive before 1987.

ARGUMENT IV.

THE TRIAL JUDGE PROPERLY FOUND THAT WESTSIDE MESHEKOFF'S CLAIM WAS BARRED BY LACHES.

At trial, SCDOT amended its Answer pursuant to SCRCP Rule 15(b) to conform to the evidence, and add affirmative equitable defenses of laches and unclean hands to the waiver and estoppel defense already pled. Tr. p. 622, line 21 to p. 633, line 4; p. 634, line 11 to p. 635, line 5. The Trial Court found that, even had Westside Meshekoff been entitled to recover under its theory of equitable apportionment of maintenance costs, the defense of laches would have barred any recovery. Amended Order, pp. 15-16. Evidence at trial supports the Trial Court's finding of laches on the part of Westside Meshekoff, and the Amended Order should be affirmed.

Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. *See, e.g., Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004). Laches is an equitable doctrine, which arises upon the failure to assert a known right. *Id.* The party seeking to establish laches must show 1) delay, 2) unreasonable delay, and 3) prejudice. *Id.*, citing *Hallums v. Hallums*, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988), *All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 358 S.C. 209, 235, 595 S.E.2d 253, 267 (Ct. App. 2004). Although delay alone in assertion of a right does not constitute laches, whether a claim is barred by laches is to be determined in light of facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party. *Ables v. Gladden*, 378 S.C. 558, 565, 664 S.E.2d 442, 445 (2008), citing *Hallums*, 296 S.C. at 198-99, 371 S.E.2d at 527-28.

Evidence at trial established that the Westside Meshekoff Family Limited Partnership—the Appellant herein—acquired the Westside Plaza shopping center in 1997 by deed signed by Edward Meshekoff, the managing general partner of the Fourm Meshekoff Family Limited Partnership, Trial Exhibit 40-M. Evidence further showed that Edward Meshekoff had, himself, individually, along with his wife, Helen Meshekoff, earlier acquired the shopping center in 1990, Trial Exhibit 40-G, before conveying his individual ownership interest to a revocable trust, with himself as trustee in 1992, Trial Exhibit 40-H, and then, as trustee, conveying the revocable trust's ownership interest to the Fourm Meshekoff Family Limited Partnership in 1996. Trial Exhibit 40-J. Evidence further showed that, after signing the deed as general partner of the *grantor*, Fourm Meshekoff Family Limited Partnership, conveying the shopping center to the grantee,

Westside Meshekoff Family Limited Partnership, Edward Meshekoff went on to serve as managing partner for the *grantee*, Westside Meshekoff, from 1997 until shortly before 2005, when the current managing partner, Matthew Meshekoff, took over. Tr. p. 61, line 20 to p. 62, line 1; p. 97, lines 14-19; Reeves deposition, p. 26, line 8 to p. 27, line 11. In short, evidence at trial showed that, despite the stupefying series of intra-familial conveyances of the shopping center between 1992 and 1997, obfuscating the chain of title and affording the current Westside Meshekoff managing partner plausible deniability as a trial witness as to any meaningful knowledge of the physical characteristics of the property, in actual fact, there has been singular ownership of Westside Plaza since 1990, when Edward and Helen Meshekoff acquired it, up through shortly before 2005, when Edward Meshekoff withdrew as managing partner for Westside Meshekoff.

Evidence at trial further established that the Meshekoffs individually and Westside Meshekoff, the partnership and Appellant herein, had the means of notice of the storm drainage connection with the SCDOT catch basin and the 1987 Encroachment Permit setting forth their financial obligation for maintenance and repair of the storm drainage system as an encroachment as early as 1990, *see, generally*, Argument IIA and B, pp. 22-29, *supra*, and further had notice of the fact that their storm drainage system was poorly installed with corrugated metal pipe, which could rust if not properly maintained, rather than reinforced concrete pipe, which would not rust. *Cf.*, Tr. p. 308, lines 1-6 (Richardson testifying that corrugated metal pipe would rust, while reinforced concrete pipe would not); *id.*, p. 312, line 25 to p. 313, line 5; p. 314, lines 3-13 (Richardson testifying that corrugated metal pipe, properly installed, should last up to 40 years, while reinforced concrete pipe, properly installed, should last virtually forever); *id.*, p. 462, lines 18-20

(Lambrecht, on direct examination, testifying that, as an engineer, he preferred reinforced concrete pipe); *id.*, p. 484, line 11 to 485, line 9 (Lambrecht testifying that corrugated metal pipe was not the functional equivalent of reinforced concrete pipe); *id.*, p. 254, line 6 to p. 255, line 24; p. 281, line 16 to p. 282, line 5; p. 297, line 22 to p. 299, line 17; p. 501, line 2 to p. 503, line 9 (Both Richardson and Lambrecht opining that the corrugated metal pipe was poorly installed). Yet there is no evidence of the Meshekoffs, either individually, as trustees of their revocable trusts, or as managing partners of either the Fourm Meshekoff Family Partnership, or the current owner, Westside Meshekoff, making any attempts to contact SCDOT with regard to the duty imposed by the Encroachment Permit, or to heighten their preventive maintenance—or *any* maintenance—of the corrugated metal storm drainage system in order to prolong its life and minimize their eventual damage cost, before the sink holes began appearing in July, 2005, and this law suit was filed June 9, 2008. *But see, id.*, p. 214, lines 12-25; p. 215, lines 10-25; p. 219, line 20 to p. 220, line 13 (stipulation by SCDOT that SCDOT Assistant Chief Counsel had received a May 20, 2008 letter from Westside Meshekoff's attorney, demanding contribution of costs incurred in repairing the Westside Plaza storm drainage line and detention pond less than three weeks before suit was filed June 9, 2008).

The foregoing evidence at trial clearly established neglect by Edward and Helen Meshekoff since 1990 and Westside Meshekoff since at least 1997, for an unreasonable and unexplained length of time under circumstances affording opportunity for diligence. *E.g.*, *Emery*, 361 S.C. at 215, 603 S.E.2d at 602 Injury, prejudice, and disadvantage resulted for SCDOT because, had the Meshekoffs and Westside Meshekoff timely discovered that the storm drainage system was corrugate metal pipe instead of reinforced

concrete pipe, as had been represented by Dayton and Associates in the Application for Encroachment Permit, they could have gone to Dayton and Associates, the developer, or West Side Plaza Associates, their predecessor in title—or Weldon Wyatt, their property manager, who had been a principal in both Dayton and Associates and West Side Plaza Associates—and demanded that *they* correct the deficiency or share in the costs of maintenance and repair. Heightened maintenance on the corrugated metal pipe system would have extended its life and reduced the cost of repair, there by reducing the amount Westside Meshekoff sought to recover from SCDOT. Westside Meshekoff's delay in asserting its stale claim for so many years has further prejudiced SCDOT by depriving it of being able to mount an aggressive defense to this lawsuit by finding witnesses still living and available with knowledge of the substantive facts of the case. SCDOT employees from 1987 or 1970 had retired; Wyatt Development Company was no longer in existence. *Cf.*, Reeves Deposition, p. 13, lines 14-24, p. 21, lines 15-22 (Reeves left the employ of Wyatt Development Company when it was sold to another company in 2003). Principals of Dayton and Associates were no longer available to provide information as to who installed the storm drainage system, who could have provided testimony and insight into why a pipe of lesser quality than had been represented in the Encroachment Permit application was so poorly installed. Even the former controlling principals of the Meshekoff entities—Edward and Helen Meshekoff—were beyond being deposed. None of those potential sources of evidence were available in 2008, three years after the initial damage to Line "E" was discovered, eleven years after Westside Meshekoff took ownership of the shopping center, and eighteen years after Edward and Helen Meshekoff took ownership. Instead, the only person Westside Meshekoff tendered as a witness to

what Westside Meshekoff knew and when it knew it was Matthew Meshekoff, the California-based managing partner, had virtually no first hand knowledge of anything pre-dating 2005, and was able to offer only a litany of "I don't know" responses to questions, the answers to which he *should have* known.

Evidence at trial amply supported the Trial Judge's finding of laches, and the Amended Order should be affirmed.

CONCLUSION.

The case which Westside Meshekoff uses as the cornerstone of is equitable claim is distinguishable from the facts of the case at bar, and Westside Meshekoff failed to offer evidence sufficient to establish its claim. Furthermore, Westside Meshekoff was bound by the agreement of its predecessor in title to be responsible for maintenance and repair of the storm water drainage system for which it now seeks equitable apportionment of maintenance and repair costs from SCDOT. Finally, even had the Trial Court found that Westside Meshekoff was entitled to recover under its equitable apportionment theory of recovery, SCDOT's defense of laches bars any such recovery.

The Trial Court's Amended Order should be affirmed.

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September 7, 2012.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
R. Knox McMahon, Circuit Court Judge

Case No. 2008-CP-32-04362
Case Tracking No. 2011201527

Westside Meshekoff Family Limited Partnership.....Appellant,

v.

South Carolina Department of Transportation;
DW Properties, LLC; Danwood, LLC;
Robert W. Denton; and Alpine of SC, Inc.,.....Defendants,

Of whom South Carolina Department of
Transportation is the,.....Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that this Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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