THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. S. Jackson Kimball, III
Master in Equity

Appellate Case No. 2014-000730

EARL C. DUKES, ... Appellant

vs.

KENNITH W. FARRELL, MARY C. FARRELL and
MARTIN BROGDONOVICH, Defendants,

of whom
KENNITH W. FARRELL and MARY C. FARRELL are the ....Respondents

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APPELLANT FINAL BRIEF

J. Cameron Halford
Halford Niemiec & Freeman, L.L.P.
238 Rockmont Drive
Fort Mill, South Carolina 29708
803-547-6618
803-547-6638 (fax)

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STATEMENT OF THE CASE

Appellant and Respondents are adjacent land owners whose respective tracts lie situated on a cove of Lake Wylie in York County. The Dukes and the Farrells trace their respective titles to a common grantor, A.F. Fewell and Edward Fewell, Jr. The Fewells owned the cove constituting both parties' tracts in 1965. (R p. 008, ¶5, at 6; *see also* R.p.185). The cove owned by the Fewells in 1965 later becomes the parties' respective parcels through various conveyances that are of public record and of record in this case, including the deed from A.F. Fewell and Edward

Fewell, Jr. to W A. Bigham dated March 2, 1965. This deed recorded same date in Deed Book 334 at Page 414 in the Offices of the Clerk of Court for York County. (R.p.185) Respondents allege that they are successors in title and owners of an easement appurtenant under said deed. The verbiage of the deed is as follows:

> "It being understood that the Grantee herein, His heirs and assigns, shall have access to the backwater in the cove upon which the above described property is located, subject to the rights of the Wateree Power Company, or its Successors, and other Grantees from the Grantors herein, A.F. Fewell and Edward Fewell, Jr." Id.

The Respondents own Tax Map No. 547-00-00-050, commonly known as 1631 Fieldbrook Drive, Rock Hill The Appellant owns Tax Map No. 547-00-00-057, an adjacent tract known as 1657 Bowater Road, Rock Hill. It is undisputed that Dukes owns some thirty (30') feet between the boundary of the Respondents' property and the waters of Lake Wylie as noted by a plat of Fisher-Sherer dated May 15, 2001. (R.p. 008, ¶5 at line 1). Appellant's boundary lines extend into the lake as denoted by said plat. Id. The unique nature of Plaintiff's boundary lines is recognized by the Master in Equity. The court noted that Plaintiff's tract extends so that a portion of it lies staked out *beneath* the waters of Lake Wylie. Id. It is undisputed that a waterfront structure consisting of a plank walk and upgraded dock of undetermined ancientness physically attaches to the lands of the Appellant via pilings (R.p. 305 at 7-13), *see also* (R.p. 52 15-19). The court construed the dock as the property of Respondent in its order of April 3, 2014. (R.p. 008 at ¶5, line 5; *see contra*, R.p.298 at 17-20); (see also, R p.333 at 22-24). Noteworthy is that Defendants' pleadings are devoid of any claims as to anything other than adverse *use* of the Plaintiff's tract and the dock, and do not assert disputed ownership or intent to dispossess Plaintiff of property, real or personal; (R p.300 at 12-17). E g., Defendants claimed allege easement rights over and through Plaintiff's tract and the dock to access the backwaters of the

cove. Sworn deposition testimony confirms the same: "*So, what you are telling me is, the entire time you've accessed the waters by walking on the dock, is that correct*?" "*Yes.*" (R.p. 99, lines 12-15]. Respondent purchased its tract, 1631 Fieldbrook Drive, on August 12, 2005. (R.p.194).

It is not in dispute that over the years the dock has undergone various incarnations and enlargements [R.p. 305 at 20]. The Respondents permanently occupy and use the dock, having done so for six to eight years prior to the lawsuit commencing. Respondents' present day "use" of the dock that is situate upon Plaintiff's parcel includes the storage/housing of multiple boats and watercraft. [R.p.141, at 16-25]. The Plaintiff's Summons and Complaint filed August 19, 2011 alleged causes of action for Trespass, Injunctive Relief, and Nuisance. Defendants filed a general denial answer and counterclaims dated October 7, 2011 claiming appurtenant express or implied easement rights across the lands of the Plaintiff, inclusive of the aforementioned 30' strip of land and the waterfront dock. By their counterclaims it is alleged that their occupation extends from rights granted to their predecessor in title, W.A. Bigham allowing them to freely pass by all means of conveyance over Dukes' land for access the waters of Lake Wylie. In support of its arguments, Respondents claim to have held and used the existing dock/pier and its older incarnations since 1976 through tacking and privity with predecessors in title. (R p 306 at 12-14). It is not disputed, however, that the Respondents do not acquire their property until the date of August 12, 2005. (R.p. 182). "So, you've not owned your property for 20 years out there? "No." (R.p. 101 at 10-12). In reference to issues of tacking and privity, the court inquired "Tacking *isn't an issue here*?" wherein defense counsel confirmed "*Not that I'm aware of*", the court thereafter recognizing "*Okay That's a question.*" [R.p. 306 at 12-14]. The court's April 3, 2014 ruling nevertheless establishes that Respondents had satisfied the requisite use under claim of right for twenty years, under Respondent's reliance upon *Loftis v S C Elec And Gas Co.*, 361

S.C. 434, 604 S.E.2d 714 (Ct. App. 2004). Appellant had cited the case of *Windham v Riddle*, 381 S.C. 192, 672 S.E.2d 578 (2009) that the grant to W.A. Bigham from the parties' common grantor could constitute nothing more than an easement in gross. (R.p.269, at 10-17; R.p.270 at 2; 8-12).

Alternatively, Respondents had alleged Implied Easement rights through pleading the elements of adverse possession and, later, (at summary judgment arguments occurring March 13 & 14 respectively) prescriptive easement rights under claim of right as to the dock, specifically, referenced by Defendants pleadings as the "*disputed use and improvements*". (R.p. 24, at 28). The defendants did not, however, plead prescriptive easement or easement by necessity. The court expressly noted that the exclusivity element of adverse or hostile use was not claimed [R p.336 at 24-25], defendants therefore failing to establish a necessary element of Adverse or Hostile Possession proving paragraph (33) of their Third, Alternative Defense and Counterclaim. (R.p 24 at ¶33); see also (R.p.332 at 14-18); (R.p.280 at 24-25, R.p.281 1-7). The trial court's order of April 3, 2014 granted Respondents *both* an easement appurtenant and, in the alternative, an *easement by prescription*. (R.p.008 ¶7, 8). Further, the April 3, 2014 ruling established Farrell as the fee simple owner of the dock situate upon Plaintiff's tract. (Id. at ¶5, line 5). The ruling occurs just days before the jury trial term of court scheduled to begin the week of April 7, 2014. (R.p.314 at 15-19).

PROCEDURAL BACKGROUND

The case was filed by Plaintiff Dukes on August 19, 2011 against adjacent land owners. Primary Defendants named in the action were Kennith W. Farrell, Mary W. Farrell, and Martin Brogdonovich. (R.p. 14).The Farrell Defendants timely answered and asserted counterclaims on or about October 7, 2011. Plaintiff replied to counterclaims on October 28, 2011. At one point,

the case involved multiple Defendants and various third party Defendants. Defendant Martin Brogdonovich entered a May 14, 2012 Answer and Third Party Complaint demanding trial by jury. The case is never consensually referred. The claims between Dukes and Brogdonovich are resolved through settlement and compromise prior to mediations occurring in the case. The third party defendant claims between Defendant Brogdonovich and Defendants Reynolds, Fisher-Scherer, Inc., Robert R. Medford, and Lutzel, Broadway & Associates, PC and Tina Patrick Broadway later resolved through court – ordered mediation, excluding the claims between Dukes and Farrell. The case remained un-referred through summary judgment arguments occurring, last, on March 13, 2014 and March 14, 2014 before the master in equity. (R.p.294-376).

The master heard two (2) motions for summary judgment in the case. Plaintiff's motion for summary judgment was heard by the master in equity on October 17, 2013 The court's order of November 7, 2013 (entered November 15, 2014) denied Plaintiff's motion for summary judgment predicated on alleged easement in gross pursuant to the case of *Windham v Riddle*, 381 S.C. 192, 672 S.E 2d 578 (S.C. 2009). (R.p.56 at ¶1); (*see also*, R.p.269 10-20). (See also, R p.290, 13-20); (*See also*, Order, R p. 006 at ¶s 1-3). Defendants' motion for summary judgment was heard on the dates of March 13, 2014 and March 14, 2014 respectively. The court's order of April 3, 2014 granted Defendants summary judgment finding an express easement, or in the alternative, prescriptive easement. From the April 3, 2014 Order Earl C. Dukes now appeals to this court.

STANDARD OF REVIEW

Appellant respectfully asserts the Court of Appeals is presented with a de novo review. The determination of the scope of an easement is a question in equity. *Hardy v Aiken*, 369 S C at 165, 631 S.E 2d at 541. On appeal in an action in equity, the appellate court may find facts in

accordance with its views of the preponderance of the evidence. *Grosshuesch v Cramer*, 367 S.C. 1, 4, 623 S.E 2d 833, 834 (2005). This appeal involves stipulated facts.[1] When an appeal involves stipulated or undisputed facts, and appellate court is likewise free to review whether the trial court properly applied the law to those facts. *WDW Properties v City of Sumter*, 342 S.C. 6, 535 S.E.2d 631 (2000). In such cases, the appellate court is not required to defer to the trial court's legal conclusions. *J K Constr , Inc v Western Carolina Regional Sewer Auth ,* 336 S.C. 162, 519 S.E. 2d 561 (2001), *Duke Power Co v Laurens Elec Co-op , Inc ,* 344 S.C. 101, 543 S.E.2d 560 (Ct. App. 2001). To determine whether an action is legal or equitable, this court must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of relief sought. *Ex Parte Wheeler v Estate of Green*, 381 S.C. 548, 673 S.E.2d 836, 839 (Ct. App. 2009). Plaintiff's complaint alleged both legal and equitable causes of action, including prayer for injunctive relief to place Plaintiff in full, peaceful and *exclusive* quiet enjoyment of his tract and the dock; alternatively removal of the dock, or damages related to Trespass and Nuisance claims (R.p.13-35). Defendants' pleadings prayed for declaratory judgment. Defendants' pleadings do not claim ownership of the dock, nor any portions of Plaintiff's tract. Conversely, Defendant pleads only *adverse use* (R p 24 at para.30); see also (R.p.303 at 8-10) and entitlement to easement rights through elements of adverse possession, or express grant. The master in equity court's ruling of April 3, 2014 construed the aforementioned 1965 deed for the *second* time, and made equitable determinations in its ruling as to the existence, scope and extent. (R.p.336 at 13-15). In an action in equity, tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Townes Associates, Ltd v City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

Generally, the construction of a clear and unambiguous deed is a question of law for the court. *Hammond v Lindsay*, 277 S C 182, 284 S.E.2d 581 (1981). (R.p.336 at 13-15). In determining the grantor's intent, the deed must be conveyed as a whole and effect given to every part if it can be done consistently with the law. *Gardner v Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987). However, where the description in a deed is *ambiguous*, the question of what land was conveyed is factual. *Stephens v Long*, 92 S.C. 65, 75 S.E.530 (1912) Generally, adverse possession is a question of fact and will only become a question of law when evidence is undisputed and susceptible of but one inference. *Mullis v Winchester*, 237 S.C. 487, 118 S.E.2d 61 (1961). Equity will take cognizance of a boundary dispute where there is some equitable feature, such as the practical certainty of a multiplicity of suits growing out of the confusion or uncertainty, and where there is an inadequate remedy at law. *Little v Little*, 223 S.C. 332, 75 S.E.2d 871 (1953). A boundary dispute, if it encompasses an issue of title, is an action at law. Likewise, an action in trespass to try title is an action at law. *Knox v Bogan*, 322 S.C. 64, 472 S E.2d 43 (Ct. App. 1996) The determination of the existence of an easement is an action at law. *Slear v Hanna*, 329 S C. 407, 496 S.E 2d 633 (1998), *Elderidge v City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998). The scope or extent of an easement is a question in equity. *Tupper v Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). The determination of the extent of a grant of an easement is an action in equity. Id. (R.p.340 at 19-24).The master in equity ruled both on the existence, type, extent and scope of the alleged easement Thus, appellant respectfully asserts that this court may take its own view of the evidence. *Townes Assocs, Ltd v City of Greenville,,* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Because the case involves equitable rulings under stipulations of fact[1], Appellant respectfully asserts that this court is presented with an equitable review. The court of appeals is free to determine whether the

master in equity properly applied the law to the facts, has jurisdiction to find stipulated facts in accordance with its own view of the preponderance of the evidence, and jurisdiction to review questions of law presented *de novo*.

ARGUMENT

I. DID THE MASTER IN EQUITY ABUSE ITS DISCRETION BY AFFECTING SUBSTANTIAL RIGHTS IN FAILING TO VIEW IN A LIGHT MOST FAVORABLE TO PLAINTIFF QUESTIONS OF FACT REGARDING SCOPE, EXTENT, AND USAGE OF PLAINTIFF'S LAND BY DEFENDANTS ?

Yes. An abuse of discretion arises when a determination is controlled by error of law or when the decision is without evidentiary support. *Hillman v Pinion,* 347 S.C. 253, 554 S.E.2d 427 (Ct App. 2001). The abuse of discretion that occurs is the erroneous fee simple grant of ownership of a dock situated upon Plaintiff's tract to Respondents (R.p.8, ¶5 at 5) without evidence that reasonably supported the judges' findings (R.p 298 at 17-20). Likewise, Appellant respectfully asserts error where factually there existed unproven elements of adverse possession or prescriptive use for less than twenty years. (R.p.316, line 3-5); (R.p.309 at 14-18); *but see also* (R.p.231-232) Appellant counsel argued that Respondents could not claim adverse possession through an item of personal removable property – the dock. "*It is not real property.*" (R. p. 291 at 11-14). In reply, the court states "*No, but if it (the dock) sits on real property that you have acquired (sic), you can change it out every day if you want to if you acquired title through adverse possession*" Id. at 15-18. Appellant respectfully asserts error enters the courts' analysis here. (R.p.279 at 5-9); (R.334 at 6); (R.p.342 at 16). Defense counsel confirmed for the court "[L]et me acknowledge the fact that this deed says you have access to the water. It *doesn't* say you have the right to get to the pier." (R p. 277, at 7-10). "It does not necessarily say we can

build a pier." [R.p.333. at 5-6.] In dealing with Respondent's adverse possession and prescriptive use arguments, the court inquired "*How does that apply to a dock over the water*?" (Id. at 24, line 5-6). It is admitted by Respondent counsel that "*we cannot establish it existed at the time of the deed between Bigham and Fewell, we would need to rely upon the elements of adverse possession* ." (R. p. 281 at 18-22); (R.p 279 at 5-10) thus constituting the very lack of evidentiary support underlying the court's determination. Prior to granting summary judgment, the court openly recognized the novelty of Defendants' argued-for extension: "*You're also, though, asking me to impose also–and in addition, an* ***additional*** *implied easement*" (sic) (R.p. 303 at 8-9) in reference to the dock. "*Well, the easement by prescription is not an implied easement.*" [Id., p.303 at 12-13.]. Defense counsel confirmed for the court "*it is not clear from the Fewell deed that a pier is intended*" [R. 281 at 18-22]. Defendant's sworn deposition testimony confirms that the dock was "*destroyed*" in May, 2006 when struck by a rogue boat. [R.p. 163 at 17]. "Oh yeah, it has to be *totally rebuilt.*" (sic). [R.p.164 at 4-6]. It is not disputed that a dock of undetermined ancientness, and its various incarnations, exists upon the Plaintiff's tract (R p.298 at 17-20).

The trial court's April 3, 2014 ruling affected substantial rights as to the marketability and value diminution of Plaintiff's property, and effectively foreclosed the Plaintiff from ability to contest counterclaims on the merits or prove damages from alleged Nuisance or Trespass. (R.p 342 at 15-16). It did so days before jury trial scheduled to commence during the subsequent week of April 7, 2014. Plaintiff counsel advised the court "*Judge, this is now number 1 for trial next week....*" Which was acknowledged by the master in equity: "*That's right That's why we're hearing it today That's why I couldn't postpone it*" [R.p. 21 at 15-19]. The master's equitable

determination of easement type, extent, and scope occurs just days before jury trial. (R.p.314, at 15-19). (R. p. 315 at 4-8).

The court continued the Defendants' summary judgment argument heard March 13, 2014. The parties reconvened before the master on Friday March 14, 2014. At the court's request each parties' research and examination of the parties' respective chain of title confirmed the common grantor source in 1965; that being A.F. Fewell and Edward Fewell, Jr. On Friday March 14,2014 Summary Judgment is granted predicated on a judicial finding of both express easement granted in the 1965 deed or in the alternative prescriptive easement rights established where genuine issue of fact for trial existed. (R.p.008). The ruling effectively nullified Plaintiff's claims for Nuisance and Trespass to Title. (R.p.342 at 16). Under the April 3, 2014 Order the Defendant is declared owner of the dock attached to Plaintiff's tract of land having satisfied elements of adverse use in the form of a prescriptive easement that Defendants never pleaded (R.p.22-24). Nor does Defendants' counterclaims plead necessity or that access of Plaintiff's dock and underneath boundary was reasonably *necessary* to the enjoyment of the alleged dominant estate. Id.

As to Plaintiff's claims, a "*Nuisance*" is anything that works hurt, inconvenience, or damage or which essentially interferes with the enjoyment of life or property. It is an unreasonable interference, which is continuous or has the potential to recur, with the use and enjoyment of the Plaintiff's land by the Defendant's conduct on his or her land. *Clark v Greenville County*, 313 S.C. 205, 437 S.E.2d 117 (1993). The basic measure of damages for a permanent nuisance is the diminution in market value resulting from actual or potential harm, which Plaintiff alleged in its Complaint. (see also, R.p.104 at ¶(5), lines 2-3). *Winget v Winn-Dixie Stores, Inc.*, 242 S.C. 152, 130 S E.2d 363 (1963). Additionally, Trespass is defined under South Carolina law as any

interference with one's right to the ***exclusive***, peaceable possession of his property. *Charleston Joint Venture v McPherson*, 308 S C. 145, S.E 2d 544 (1992) An order that effectively forecloses a party from contesting the case on the merits affects a substantial right and is immediately appealable. *McLaughlin v Strickland*, 279 S.C. 513,309 S.E.2d 787 (Ct. App. 1983). The substantial right implicated in the case sub judice was ability to prove damages arising out of non-exclusive use, interference, and permanent occupation of the dock by Respondents. (R.p.006 ¶2, at 1-3); see also (R.p.008 at ¶4, lines 5-6)

An order dismissing some, but not all, of the claims in a case, either by summary judgment or dismissal pursuant to Rule 12(b)(6), SCRCP "*involves the merits*" and is immediately appealable because it finally determines some substantial matter forming the whole or a part of some cause of action or defense. *Link v School Dist of Pickens County*, 302 S.C. 1, 393 S.E 2d 176 (1990). The court noted in earlier rulings denying Plaintiff summary judgment against Defendants' counterclaims "*Because a court decision on the issues presented could result in a situation substantially affecting the use and value of the property of both Plaintiff and Defendants . "* The court ordered alternative dispute resolution via mediation between all parties.(R.p. 006). However, the master in equity's later April 3, 2014 ruling establishes, at law, that the Respondents had proven a right to use the Plaintiff's lands for a specific purpose – *access to the water via dock*, judicially foreclosing any ability of the Plaintiff to demonstrate interference with exclusive, peaceful possession claimed by Plaintiff's Trespass and Nuisance claims. Not until summary judgment arguments heard on March 13 – 14, 2014 does entitlement via *prescriptive easement* rights appear by way of Defendant claims, memorandum, or argument. No easement by prescription was pleaded by Defendants in reply to the complaint. (R.p.024).

Under South Carolina law, to establish an easement by prescription a party need only show a justifiable claim of right or adverse and hostile use. *Revis v Barrett*, 321 S.C. 206, 209 n.1, 467 S.E.2d 460, 462 n. 1 (Ct. App. 1996). Failing to prove elements of adverse possession by clear and convincing evidence, did the master in equity court misconstrue a *justifiable* claim of right? Appellants respectfully assert the master in equity court errs in granting relief to Defendants on a non-pleaded right, erroneously viewing all evidence, facts, and inferences of non-continuous use for less than twenty years (R.p.065, R.p.101 at 7-12.) in a light most favorable to Defendants/Respondents. The court does so construing language from 1965 conveyance which is the alleged grant of express easement. The Respondent's predecessor in title, W.A. Bigham, was conveyed what later becomes the present day Farrell tract. The deed contains the following language:

> " It being understood that the Grantee herein, His heirs and assigns, shall have access to the *Backwater in the cove on which the above described property is located*, subject to the rights of the Wateree Power Company, or its Successors, and other Grantees from the Grantors herein, A.F. Fewell and Edward Fewell, Jr." (R.p.245 at *).

In general, 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. *Douglas v Med Investors, Inc.*, 256 S C. 440, 445, 182 S.E.2d 720, 722 (1971). The above deed does not reference termini on either the alleged dominant or alleged servient estate. (R.p.300 at 12-17). The four corners of the deed do not identify the Appellants parcel, whatsoever, as the alleged servient estate. (R.p.294) No termini is denoted on either Appellant's or Respondents' tract. Yet, the court judicially declared ownership of the *dock* in Farrell (R.p.008 at ¶(5) line 5)defining both that the easement was appurtenant (R.p.316, at 3-4); (R.p.314 at 1-4) and defining its scope and extent. (R.p. 315 at 2-8). The court does so erroneously viewing non-pleaded facts of alleged

prescriptive rights in a light most favorable to the movant under Rule 56, SCRCP. (R.p.308 at 12-18).

Despite expressly recognizing that there were genuine issues of material fact for trial concerning the *extent* and *usage* of the alleged Farrell easement, the court's order of April 3, 2014 held that the Farrells were owners of an express easement appurtenant which allowed them to pass freely over the 30' strip of land belonging to the Plaintiff, and the dock. The court simultaneously construes the claims of prescriptive easement raised in argument before the court, for the first time, as part of Defendants' March, 2014 summary judgment arguments.

The court's order established that "*The Farrells also argue that they are entitled to summary judgment as to their Third, Alternative Defense and Counterclaim, which deals more specifically with the existing dock and pier, which is located upon the property of the Plaintiff As to this issue, I find and conclude that there are genuine issues of fact for trial concerning the extent and usage of Farrell's easement For this reason, summary judgment as to the Third, Alternative Defense and Counterclaim is denied.*" (R.p.009 ¶(2)). By its order, the court established dock ownership in Respondents, and the court foreclosed any triable issue of fact as to Plaintiffs' Trespass and Nuisance claims. Earlier, the court had found "*it is undisputed that the Farrells are owners of real property and improvements at 1631 Fieldbrook Drive* ..."(R p.008, ¶2). Defendants' pleadings confirm the same. (R.p. 22). Appellants respectfully assert error enters the court's analysis where the court went *one step further* on April 13, 2014: [A]nd "*the Farrell's pier and dock* (sic)" are situated on the water above Plaintiff's property. (R.p.008, p.2 at ¶(5) lines 4-5). The court's ruling judicially defined the extent of the alleged easement, despite recognizing "there are genuine issues of fact for trial concerning the extent and usage of Farrell's easement" (sic) [R.009, lines 4-5].

The master went beyond ruling upon the issue of whether there was an express easement appurtenant. In ruling as a matter of law that an easement by prescription had been established by the Defendants through adverse hostile use, or alternatively claim of right, the court erroneously ruled Defendants *owned the dock.* (R.p. 008, ¶5). The dock becomes judicially defined as the Defendants' access to the Backwater in the cove under the 1965 deed, irrespective of the grant not identifying terminus or the alleged servient estate. (R.p.300 at 12-17) "Because I find and conclude that there is an express easement, it is not necessary to rule on the Farrell's claim of an easement by prescription. However, *if it is determined that there is not an easement appurtenant* (sic), I find and conclude in the alternative that the FARRELLS have established the necessary elements to find and conclude that they have acquired an *easement by prescription* (sic) over Plaintiff's property for access to the waters of Lake Wylie. (R.p.008). "*They are therefore entitled to summary judgment as to that issue in so far as it relates to access to Lake Wylie, and the same is granted in the alternative*" Id. Did the court error in misconstruing the thing enjoyed–water access– as constituting Plaintiff's tract and the dock? Appellants respectfully assert the court abused its discretion by judicially erroneously defining the type, scope and extent of Respondents' rights as *inclusive of* the dock (R.p.300, 12-17; 24-25); (R.p.303 at 8-9) (R.p.008 ¶5 at 5-6); (R.p 287, 17-24); see also Rule 36 fact admissions, (R.p.71, ¶s (10)-(13)).

In erroneously viewing non-established ownership in a light most favorable to the movant - as Defendant's water access described by the aforementioned deed - Plaintiff's claims for Trespass to Title (R.p.343 at 16) and Nuisance were effectively foreclosed. Despite not being pleaded, alleged facts and inferences of prescriptive use via the dock are erroneously viewed in a light most favorable to the moving party under Rule 56. (R.p.336 at 4-25). Thus, "access to the

'backwater in the cove" set forth in the 1965 deed becomes court-defined to be ipso facto the waterfront dock, (R.p.333 at 5-24); (see also R.p.334 at 15-24) situated upon Plaintiff's tract and the disputed 30' strip separating Respondents from the present-day water. The ruling occurs despite Defense counsel confirming for the court "..it is not clear from the Fewell deed that a pier is intended." (R.281 at 1-7) (R.p. 336, at 11, 2-3]. There existed no clear and convincing evidence concerning the dock in relation to the 1965 grant, whatsoever (R.p 276 at 9-10).

The person claiming that he adversely possesses real property (emphasis) must prove it by clear and convincing evidence. See *Miller v Leaird*, 307 S.C. 56, 413 S E 2d 841 (1992). Plaintiff counsel argued on March 14, 2014 "*if he's claiming adverse, that has to be proved by clear and convincing evidence*". (R. p. 325 at 6-20] and "*Out of the five, he can't make three.*" (R. p.328, 1-4). Respondent express or implied easement claims are judicially defined to include water access as including both Plaintiff's 30' strip of land aforementioned, *and* the dock. The record is devoid of any evidence to support the trial court's determination that the dock constituted the property of the Respondents, nor any predecessor in title of the Respondents. However, both parties stipulate that a dock of undetermined ancientness and its various incarnations and enlargements is situated upon the Plaintiff's tract TMS # 547-00-00-057 at 1657 Bowater Road. Defendant's pleadings confirm that Defendants are the owners of real property and improvements, *only*, at tract 547-00-00-050, that being 1631 Fieldbrook Road in Rock Hill.

II. DID THE MASTER ERR AS A MATTER OF LAW BY FAILING TO RECOGNIZE AN EASEMENT IN GROSS IN GRANTING EXPRESS EASEMENT APPURTENANT WHERE THE PLAINTIFF'S AND DEFENDANTS' PROPERTIES DERIVED FROM A COMMON GRANTOR ?

Yes. Appellants respectfully assert the master erred as a matter of law by failing to recognize an easement in gross vs. an express easement appurtenant where there existed a common grantor.

It is undisputed[1] that the Plaintiff and the Defendants' properties were derived from a common source, A.F. Fewell and Edward Fewell, Jr. The Fewells owned the cove in 1965 at the relevant time of the grant to Respondent's predecessor in title, W.A. Bigham. In *Tupper v Dorchester County*, 326 S.C. 318, 487 S.E 2d 187 (1997) the South Carolina Supreme Court explained the differences between easements in gross and appurtenant easements as follows: "The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another, the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, *has one terminus* [334 S.C. 589] on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance Unless an easement has *all* the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. Id. at 325-326, 487 S.E.2d at 1991. (*see*, memorandum, R.p.57 at ¶(1) at lines 6-15).

Under South Carolina law an easement cannot exist where both the purported servient and dominant estates are owned by the *exact same person. Haselden v Schein*, 167 S C. 534, 539,166 S.E.2d 634, 635 (1932). (See, R p. 174 at 15-18). As A.F Fewell and Edward Fewell, Jr. retained legal title to the alleged servient estate (present day Dukes tract), and also held title to the Farrell tract (formerly W.A. Bigham) at the time of creating the "*magic language*" [R.p. 297 at 18-19). Appellant respectfully asserts no *easement appurtenant* could have been created by the 1965 Fewell sale to W.A. Bigham. Both parcels, at the time of grant, were owned by the same exact person(s) - - A F. Fewell and Edward Fewell, Jr. The conveyance reserved rights within the grantors and their assigns. Further, no terminus is described upon the tract of either the Respondents or the Appellant. (R.p.300 at 12-17). The "magic language" cited by Respondent

counsel references only *access to the backwater in the cove* on *which* ***the above described property*** *is located* ...(sic)". The grant identifies *only* the Farrell tract (then being conveyed to W.A. Bigham), and omits, entirely, any express reference of the alleged servient estate as the tract "on which the above described property is located" (sic). (R p.245). Moreover, Defendant's counterclaims failed to allege prescription, necessity or that access across Plaintiff's parcel was reasonably necessary to the enjoyment of the alleged dominant estate.

The court acknowledges this during oral argument including the lack of terminus being defined. "*Does it matter that this is not an easement to one place – from one place to ---across one – another place to a third place, but rather is – the whole thing is related to use (sic) upon the plaintiff's property.*" (R.p.300). "It's not like an access easement". Id "Access" to the water is judicially construed to be "access" thru Plaintiff's tract, to the water, which the court questioned "*which is not the same water that's there now, I think?*" Id. R.p.300 at 24-25 "30 feet across the property of the plaintiff to the lake, the level of which *varies*." (R.p.298 at 14-15). "*Wherever the water may be at any given time*" (R.p 302, at 25). In deposition, Farrell responds to the same inquiry concerning the raising or lowering of Lake Wyle: "Okay. If the water had been lowered over time, is it possible that you became blocked from the water?" "If – if the lake dried up?" "Yes." [R.p.138 at lines 2-4]. Fact witnesses confirm the same, that the backwaters in the cove have raised and lowered and are subject to the regulatory rights of Duke Power. (Deposition of Dennis K Edwards, R.p.366 at 17-25). (R.p.298 at 14).

The determination of the existence of an easement is a question of fact. *Morrow v Dyches*, 328 S.C. 522, 492 S.E.2d 420 (Ct. App. 1997). Generally, the construction of a clear and unambiguous deed is a question of law for the court. *Hammond v Lindsay*, 277 S.C. 182, 284 S.E.2d 581 (1981). However, where the description in a deed is ambiguous, the question of what

land was conveyed is factual. *Stephens v Long,* 92 S.C. 65, 75 S.E. 530 (1912). Appellant counsel advised the master "*nothing about the grant cites my client Duke's property*" Plaintiff's June 18, 2013 memorandum advised the court "The four corners of the deed relied upon by Defendants is absolutely devoid of any specific mention of Plaintiff's property, the alleged servient estate." (R.p.55, ¶(1) at 7-9). In construing the language "*access to the back waters in the cove*", the court declared that the deed was not ambiguous, however. "*It's a matter of interpretation of the deed, which is a thing that is a matter of law It doesn't have anything—I find that the deed is not ambiguous, clear, and simply needs to be construed according to general principals.*" (R.p.336 at 11-15).

In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found *within the four corners* of the deed. *Gardner v Mozingo*, 293 S.C. 23, 25, 358 S E.2d 390, 391-92 (1987). The four corners of the deed in question are silent as to the tract retained by the Fewells, or impact to said tract as the alleged servient estate. Appellant respectfully avers it was error to infer access or reasonable necessity in a light most favorable to the movants in granting Summary Judgment. (R.p 344 at 5-24).

Erroneously Viewing all evidence and inferences in a light most favorable to the movant, the court failed to note the grant was devoid of language implicating Appellant's tract as constituting necessity for Defendant's *access to the water* Appellant respectfully asserts an abuse of discretion where the court, additionally, looked beyond the deed's four corners to other extrinsic evidence to determine that the easement was appurtenant. (R.p.316 at 3-5). Because the court

found the deed unambiguous, the intention of A.F. Fewell and Edward Fewell, Jr. respectfully should have been limited to the deed. Appellants respectfully assert error where extrinsic evidence of use was used to contradict the plain language of the deed. *See*, Gardner, 293 S.C. at 25, 358 S E 2d at 392 ("The construction of a clear and unambiguous deed is a question of law for the court. The terms of an unambiguous deed may not be varied or contradicted by evidence drawn from other sources other than the deed itself.") *Scott v Scott*, 216 S.C. 280, 293, 57 S.E.2d 470, 476 (1950). The court goes on to examine elements of adverse possession, and prescriptive rights, as the alternative means by which relief is granted to Respondents ignoring that the rights conveyed to Defendants' predecessors were in gross, and ignoring that **all** elements of an alleged easement appurtenant had not been proven conclusively. (R.p.340 at 22-24).

III. DID THE MASTER IN EQUITY COURT ERROR BY MISCONSTRUING THE IDENTITY OF THE THING ENJOYED - WATER ACCESS - AS THROUGH OF PLAINTIFF'S TRACT AND THE WATERFRONT DOCK WHILE CONSTRUING ADVERSE POSSESSION IN THE FORM OF PRESCRIPTIVE EASEMENT ?

Yes. The master in equity court abused its discretion by erred as a matter of law by construing alleged prescriptive easement under the elements of adverse possession where the Respondent could not demonstrate adverse use or claim of right for a period beyond eight (8) years. (R.p 181) See also (R.p. 306 at 12-14). The Respondents did not purchase until August 12, 2006. The deed conveying their property and its boundary lines is not disputed. (R.p. 71 ¶s (1) – (13)). The plat referenced by said deed is unambiguous. (R.p.66). In discovery, Defendant admits the accuracy and correctness of the deed, plat and boundary lines. (R.p.71 at 10) Viewing the facts and evidence in a light most favorable to the movant, however (R.p.287 at 17-25), the court inferred dock ownership in Respondents. (R.p.008 at 5 line 5) The court failed to view all facts and inferences of material increase of burden on Plaintiff's lands via dock extensions in granting

summary judgment. The master cited that Respondents below had established both an express easement appurtenant and easement rights by prescription through use under justifiable claim of right. Assuming, *arguendo*, the language of the 1965 Fewell to Bigham deed conveyed anything other than an easement in gross, argued by Plaintiff pursuant to Windham, supra, the owner of an easement nonetheless cannot materially increase the burden of the servient estate or impose thereon a new and additional burden under South Carolina law. *Clemson Univ v First Provident Corp.*, 260 S.C. 640, 650, 197 S E.2d 914, 919 (1973) (quoting 25 Am. Jur. 2d Easements and Licenses, §72 at 478. (R.p.310 at 2-5). *See also* (R.p.303 at 8-9). The court ignored that Appellant counsel had cited a case for the proposition of expansion: "No one has cited me to a case that deals specifically with the question of improvement of an easement The court ruling erroneously does so via dock construed as Defendants' own property upon Plaintiff's parcel.(R.p.008, ¶(5) at 5); *See also*, (R.p.298 at 18-19). There exists no evidence to support the finding. Appellants likewise assert error where the court did so by defining Defendants' water access ipso facto *as the dock and Plaintiff's tract,* which dock physically attached to the lands of the Appellant. The court did so despite recognizing distinct questions of fact regarding the extent of Defendants' alleged rights and a clear and unambiguous 1965 deed. (R.p.302 at 7-8).

The court previously noted "*I do believe based on what I've read prior and what we've heard today that there is a factual issue concerning the extent of that easement or size of that easement, if you will, based on the docks Before when we heard this, there were representations that the dock had been enlarged* (sic)" (R.p.315, at 4-8) A fundamental principal of easement law is that an easement for the benefit of a particular piece of land (the Farrell tract as alleged) cannot be enlarged and extended to other parcels of land, (Dukes adjacent Tract) whether adjoining or distinct tracts, to which the right is not attached (see R.p.303 at 8-9) This was briefed for the

court by Plaintiff's June 18, 2013 memorandum. (R. p. 058, ¶(2); R.p.059 at ¶(2), line 5) The 1965 grant so heavily relied upon in this case is devoid of language that references the Duke's parcel. It only references access to the backwaters in the cove. (R.p.196 at *).

The court likewise took judicial notice of the non-exclusive nature of the easement issue related to applicability of the elements of adverse possession: "That's not what this is *It's an easement.* And it doesn't claim to be an *exclusive* easement (sic)" [R.p 336 lines 24-25]. The court declared Farrell express owner of the dock itself in failing to view the evidence and all inferences of non-continuity and/or non-exclusive use under a claim of right in a light most favorable to the Plaintiff. (R.p.340 at 19-24). In deposition, the defendant Kennith Farrell testifies "How long, therefore, have you held your property? *How many years*?" Defendant confirms "Seven-eight years". (R.p. 138 at 19-23). (R.p.104 at 2). Without tracking, (R.p.306 at 12-14) it would be impossible for Defendants to satisfy the requisite period of time under adverse possession or alleged prescriptive easement.

The record in the case is *devoid* of any documentary evidence of Farrell ownership of the dock, nor ownership of said dock by Respondents' predecessors. The trial court rules nevertheless that Farrell is owner of the dock (R.p 008, ¶5 at 5). The finding is likewise contra to what Defendants confirm in their pleadings and deposition testimony. Defendants allege only that they own real property and improvements at 1631 Fieldbrook. Further, the court errs by holding that the Farrell's pier and dock are merely situate *on the water above* Plaintiff's property. (R.p.008). It was undisputed in the case that the pier and dock physically attaches to the Plaintiff's tract via pilings. (R.p.298 at 20). Portions of the tract extend and lie beneath the waters of Lake Wylie. Defendant Kennith W. Farrell confirms this in deposition testimony. He likewise confirms he has not utilized the property below the dock which attaches via pilings to Plaintiff's

tract. (R.p. 160 at 2-11). Fact witness Dennis K. Edwards confirms the same. It is undisputed that the dock, which is not real property, attaches to the land of the Plaintiff Earl C. Dukes. (R.p.298 at 17-20).

The court took judicial notice of the Plaintiffs' tract boundaries and the record plat which denotes the same on April 3, 2014. (R.p.008, ¶(2). By erroneously declaring ownership of the dock in Farrell, the court goes on to grant, alternatively, an easement by prescription over Plaintiff's property. The court ruling defined the extent of the easement. The master does so despite expressly recognizing genuine issues of fact for trial concerning the extent and usage of Farrell's alleged easement. (R.p 310 at 2-5). At no place in Defendants' Answer or Counterclaims do Defendants plead prescription until the summary judgment motion, heard on March 13 and March 14, 2014.

In order to show an easement by prescription, a party must show (1) the continued and uninterrupted use or enjoyment of a right for a *full period of twenty years*; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse **or** under claim of right. *Horry County v Laychur*, 315 S.C. 364, 367, 434 S E 2d 259, 261 (1993); *Babb v Harrison*, 220 S.C. 20, 24-25, 66 S.E. 457, 458 (1951); *Hartley v John Wesley United Methodist Church of Johns Island*, 355 S.C. 145, 150, 584 S.E.2d 386, 388 (Ct. App. 2003); *Loftis v S C Elec And Gas Co* , 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004). Appellant respectfully asserts that the right identified – water access – was erroneously defined by the court to be *ipso facto* the dock (R.p.282 at 7-8; 17-20) through Plaintiff's parcel, where Respondents were unable to prove adverse use or use under a claim of right for the requisite period of time – twenty years. It is only by tacking that Defendants can claim the requisite period of time. However, any fact witnesses identified by Defendants fail to identify their belief, claim, or right is dependent upon the 1965

Fewell deed. Rather, fact witnesses can only testify they regarding the dock as theirs by belief, and/or "use" that is non-continuous. (R.p. 365, 1-6). Respondents do not purchase their property until August 12, 2006, thus failing the continuity period. As the dock physically does not attach to the Respondent's parcel, they likewise fail the exclusivity required under adverse possession allegations. The court erroneously views prescriptive claims of the Defendants in a light most favorable to the movant to extend a court-ordered grant of easement appurtenant across Plaintiff's thirty foot strip of land, and the dock.

IV. WAS IT AN ABUSE OF DISCRETION FOR THE MASTER TO FIND THAT DEFENDANTS HAD ESTABLISHED PRESCRIPTIVE EASEMENT RIGHTS THROUGH USE OF IMPROVEMENTS THAT WERE NOT REAL PROPERTY?

Yes. The master in equity abused its discretion and committed error of law by finding that the Respondent could, via a dock, establish the necessary elements of adverse possession or prescriptive use through permitted items of non-real property. (R.p.279 at 5-9); See also (R.p.282 at 17-20); See also (R.p.291 at 11-18) and (R p.316 at 3-5). The relevant inquiry becomes can a party claiming adverse use or hostile claim of right to another's real property for water access do so via using an attachment not constituting real property? The dock is a permitted item of removable personal property attaching, physically, to the lands of the Plaintiff at 1657 Bowater Road. As cited by Plaintiff counsel, "*It is not real property*". (R.p. 292 at 11-18). Appellants respectfully assert the master in equity's error is most illustrated by "I need to expand my horizons here. Adverse possession typically would relate to ground, ***the ground.*** You would own it. I can see if you acquired the property, dry land, by adverse possession, if a structure was built upon it and it was destroyed, you could rebuild it because you have title of the property....*How does that apply to a dock over the water* ?" (R.p.281 at 5-6); *See also* (R.p.291 at 11-14; 15-18).

Defense counsel confirms "Our right, first of all, under the deed is to *get to the water*. There is a dock of undetermined ancientness, if that's the word, at least since 1976 in place. That obviously has *the effect* (sic) of giving us access to the water". (R.p.281 at 11-15). Did the court erroneously determine as a matter of law that the dock provided the effect of giving Respondent's access to the water described in the 1965 deed? The court grants Defendants ownership of the dock where defense counsel had confirmed "*we cannot establish it existed at the time of the deed between Bigham and Edwards—pardon, Bigham and Fewell, we would need to rely upon the elements of adverse possession or we would have to prove it*". (Id. at 17-21).

Appellant respectfully asserts that error enters the trial court's analysis by permitting Defendants to allude to elements of prescription, where they were never pleaded in the first instance; and to allege necessity by and through an appurtenance that cannot constitute real property. "*What we have cited in our memorandum, and I hope this will help, is the elements of easement by prescription under Loftis, which I have*". In reply, Plaintiff counsel advised the court that "*you cannot claim adverse possession through an item of personal removable personal property which a dock is* ***It is not real property***" (R p 291 at 10-13]. In reply, however, the court opines: "*No, but if it sits on real property that you have acquired, you can change it out every day if you want to if you acquired title (emphasis) to it by adverse possession.* (Id., 14-18).

At no time had Defendants alleged they had acquired title to any real property – whether above or below the waters – belonging to Plaintiff. In fact, Defendants admit and concede the correctness of the deed and boundary lines in Rule 36 discovery admissions. (R.p.71 at 10-13) Nonetheless, the court erroneously declares ownership of the dock, specifically, in the Farrells The court linked "access to backwaters in the cove", erroneously, as access through Plaintiffs' tract and the disputed 30' feet of property terminating with a dock that had undergone various

extensions and enlargements. (R.p.305 at 20). In so doing, the court ignored entirely its former ruling that a court decision on the issues presented could result in a situation substantially affecting the use and value of the property of both Plaintiff and Defendants. The court's ruling on August 3, 2014 effective transforms Defendant *use* to ownership. Defendant is judicially declared owner of the dock, and hence owner of *extended* appurtenant easement rights and/or prescriptive easement rights across Plaintiff's parcel (R.p.303 at 8-9) – reference to which is omitted entirely by the four corners of the 1965 Fewell / Bigham deed. As set forth above, erroneously viewing these matters in a light most favorable to the movant, the court's order affected substantial rights, literally conveying ownership of a dock that physically attaches to Plaintiff's parcel to Defendants through "use". Moreover, the court ruling affected substantial rights including the marketability and value diminution of Plaintiff's tract. It transformed shared, non-continual use to judicially declared ownership of a dock as the "water access", or the thing enjoyed, (R.p.326 at 14-20) as "necessity", not referenced in the 1965 deed. It does so despite no direct evidence in the deed's four corners evidencing the grantor's intent, express or implied, to extend rights beyond "water access" or extensions via pier. Clemson Univ. v. First Provident Corp., 260 S.C. 640, 650, 197 S.E. 2d 914, 919 (1773) (quoting 25 Am. Jur. 2d Easements and Licenses §72 at 478). (R.p.057); (R.p.058). (R.p.059 at ¶(2) at 2-7).

V. DID THE MASTER IN EQUITY ERROR BY FAILING TO RECOGNIZE IN A LIGHT MOST FAVORABLE TO PLAINTIFF DEFENDANTS' PERMANENT OCCUPATION OF THE DOCK IN RULING DEFENDANTS HAD ESTABLISHED PRESCRIPTIVE EASEMENT RIGHTS?

Neither party can demonstrate the *origin* of the waterfront dock, which has undergone various transformations. Records of the dock's repairs are subpoenaed by Plaintiff. (R.p.96-97). "If the intent of supplying these items from the builder is to say that we built back *more majestically or larger* than we did before . ." The court recognizes the issue by stating ***"larger will serve"*** [R.p.

305 at 20); *See also* (R.p.303 at 8). In response, Defense counsel: "So what ...That would go to the question of the extent of the easement." Which the court responded to, accurately, as "*which would be a factual determination.*" (R.p.305 at 21-25). Prior to grant of summary judgment, the court acknowledges "*I do believe based on what I've read prior and what we've heard today that there is a factual issue concerning the extent of the easement or size of that easement, if you will, based on the dock(s) ";* "*Before when we heard this, there were representations that the dock had been enlarged.*" (R.p.315 at 6-9).

Neither party disputes that the Plaintiff's boundaries extend underneath the waters of the lake. (R p.248). It is not disputed that use of the dock has been utilized by predecessors in title, and general public acquaintances, of the Respondents. It is conceded that Respondent last performed work on the dock when it was struck by a rogue boat where no permit was required to re-build. (R.p.164 at 4). Discovery evidences that the dock, itself, was rendered un-usable in the boat strike. (R.p.94 at ¶3). This is confirmed by both deposition testimony and affidavit in the case. "There's your question of fact. It's been non-continuous". [R.p. 315 at 25; p.316 at 1-2].

On March 14, 2014 the court again analyzes the dock in relation to summary judgment and adverse possession claims. "So—and I tried to make that point yesterday. *There's a distinction in my mind between the right granted in the old deed and the creation and maintenance of a dock,* which goes not just – *which goes out in the water,* not just to the water." (R.p. 333 at 16-20). "*And sits on his property*" as confirmed by defense counsel. Id. at 22. Defendant Kennith Farrell's deposition testimony confirms that "use" of the dock has *morphed* into permanent occupation, (R.p. 304, at 6-12) and not *simple use* under a claim of right. Multiple boats are now stored upon the dock, its last "incarnation" adding a covered roof above the boat dock. Appellants respectfully assert the master erred by failing to recognize, properly, the occupation

of the dock, as defacto hostile claim of right for "access". "*We are talking about two different things*" Id. Erroneously viewing "use" most favorably to the movant, the Appellant respectfully avers that the master errs in grant of summary judgment under analysis of prescriptive easement allegations. (First appearing at summary judgment March 13, 2014 by way of defense memorandum). The grant of summary judgment judicially declared ownership of the present-day dock in Respondent, effectively ceding permanent occupation upon Plaintiff's parcel and not simple "use". The court's ruling effectively forecloses any ability to contest counterclaims on Trespass to title, affecting substantial rights. The court has, using the standard of Rule 56 SCRCP, established ownership via an attachment, erroneously, in favor of the Respondent. In doing so, the court's ruling effectively takes real property boundary from Appellant erroneously adding to the Respondent. Appellant respectfully asserts error where the ruling is without evidentiary support as to dock ownership or origin, viewed erroneously in favor of the movant where distinct questions of fact existed as to scope and expansion. (R.p.315 at 3-8). Appellant asserts error where the ruling judicially declared, erroneously, the type and extent of Respondent's rights upon Appellants' tract of land despite the 1965 grant failing all elements required to be an easement appurtenant. (R.p.300 at 12-17).

CONCLUSION

The stipulated and undisputed evidence in this case reveals that both parties' tracts are derived from a common grantor, A.F. Fewell and Edward Fewell, Jr. The grant is defined by the court as a non-ambiguous deed to be construed under general principals. (R.p.336 at 14-15).The plain, unequivocal intent of the grantor is recognized by the judge in looking at the 1965 deed's four corners: "No. The deed says that Fuel gives to Bigham *the right to get to the water.*" [R.p.276 at 9-10]. Undisputed evidence further establishes Respondent did not acquire his parcel

until year 2006, failing any requisite period of time required under Adverse Possession or prescriptive use claims. As grantee, Respondent's predecessor in title W.A. Bigham could only have obtained personal privilege to access the backwaters of the cove, an easement in gross. At no place in the 1965 grant is the Appellants' parcel/tract expressly identified, nor is the scope or terminus of the alleged easement defined specifically as Appellant's land or a dock. The court's holding erroneously inferred definition, scope, and terminus of the Defendants' rights upon Plaintiff's parcel in place of a deed that was silent as to the same. The court abused its discretion in misconstruing through, extrinsic facts of use, that property in the form of a wooden dock or pier constituted *ground* or *land* subject to adverse and/or prescriptive claims of the Respondents.

The master erroneously viewed the evidence and all inferences in a light most favorable to the movant in granting summary judgment, including, but not limited to, exclusivity, continuity, and adverse or hostile use under *justifiable* claim of right of twenty years. Viewing these matters, and non-pleaded prescriptive easement allegations, in a light most favorable to the movant on March 14, 2014 the Appellant asserts the master's grant of summary judgment was an abuse of discretion, controlled erroneous conception of law, and should be respectfully reversed and vacated by the Court of Appeals.

Appellant further respectfully prays that the court of appeals reverse and remand the matter for trial.

Respectfully submitted,

HALFORD NIEMIEC & FREEMAN, LLP

J. Cameron Halford (SC bar 17184)
238 Rockmont Drive,
Fort Mill, South Carolina 29708
803-547-6618
803-547-6638 fax

1 The parties have stipulated as to (1) a common grantor source, (2) their respective tract boundaries are correct, true and accurate (R p 71 at 10-13), (3) that Dukes owns some thirty feet (30') of land between Farrells' tract and the waters of Lake Wylie, and (4) that Plaintiff's tract boundary lines extend into and underneath the waters of Lake Wylie, and (5) that a waterfront dock physically attaches to the Plaintiff's tract, not Defendants' tract Is also stipulated that the dock has undergone various incarnations and enlargements through the years, including, last being struck by a rogue boat

2 Primary Defendants in this action were Defendants Kennith Farrell, Mary C Farrell, and **Martin Brogdonovich.** Defendant Brogdovich purchased a similar waterfront property adjacent to the Farrells', with a "dock" of undetermined age likewise attaching to Plaintiff's tract The survey settling the Dukes / Brodgonovich is of record [R p 257]

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. S. Jackson Kimball, III
Master in Equity

Appellate Case No. 2014-000730

EARL C. DUKES, ... Appellant

vs.

KENNITH W. FARRELL, MARY C. FARRELL and
MARTIN BROGDONOVICH, Defendants,

of whom
KENNITH W. FARRELL and MARY C. FARRELL are the .....Respondents

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PROOF OF SERVICE FOR APPELLANT FINAL BRIEF
AND RULE 211(b) CERTIFICATION

I hereby certify that I am the attorney for the Appellant in the above captioned Appeal and that I did on March 12, 2015 served by U.S. mail and e-mail a copy of the Appellant's Final Brief upon counsel for Respondents, addressed as follows. I further certify that Appellant's Final Brief complies with SCACR 211(b)(1) and SCACR 211(b)(2) as to content requirements.

John Martin Foster, Esq.
Law Offices of John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731-6106

Attorney for Respondents

J. Cameron Halford
Halford Niemiec & Freeman, L.L P.
238 Rockmont Drive
Fort Mill, South Carolina 29708
803-547-6618
803-547-6638 (fax)

March 12, 2015
Fort Mill, South Carolina