

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
CAROLINA CENTER BUILDING CORP.,)
)
Plaintiff,)
)
vs.)
)
ENMARK STATIONS, INC.; TOWN OF)
HILTON HEAD ISLAND,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL COURT
CIVIL ACTION NO.: 2013-CP-07-2066

FINAL ORDER ENDING CASE

RECEIVED

JUL 18 2017

SC Court of Appeals

This case was tried before me over a two-day period commencing on June 20, 2016. Appearing on behalf of the Plaintiff, Carolina Center Building Corp. ("Carolina"), was H. Fred Kuhn, Jr. with Moss, Kuhn & Fleming, P.A. Appearing on behalf of the Defendant, Enmark Stations, Inc., ("Enmark"), was Russell P. Patterson of Russell P. Patterson, P.A., and representing the Town of Hilton Head Island ("Town"), was Gregory M. Alford of Alford & Thoreson, LLC.

This is a dispute over a paved roadway as depicted in red on Exhibit 74, a copy of which is attached hereto, used by patrons of Enmark, owner and operator of an Enmark service station, and the general public which traverses across the land owned by Carolina ("Roadway").

A. PROCEDURAL HISTORY

Carolina proceeded to trial under its Amended Complaint, dated November 19, 2014, setting forth seven (7) causes of action, as follows:

1. Declaratory judgment action seeking an Order that Enmark has no express easement over the Roadway;

2. Declaratory judgment action seeking an Order that Enmark does not hold a prescriptive easement over the Roadway;
3. Declaratory judgment action seeking an Order that no easement exists and that Enmark is responsible for preventing any further illegal trespass by installing curbing in its parking area;
4. If the Court determines that Enmark holds easement rights over the Roadway, that Carolina can make reasonable changes to the location and dimensions of same, at the cost of Enmark;
5. A slander of title claim seeking actual and punitive damages;
6. A trespass cause of action seeking actual and punitive damages;
7. A nuisance cause of action seeking actual and punitive damages; and
8. A mandamus action against the Town seeking enforcement of the Town of Hilton Head Land Management Ordinance ("LMO").

Enmark filed an Answer and Counterclaim to Carolina's Amended Complaint, dated December 17, 2014. In addition to generally denying the material allegations of Carolina's Complaint, Enmark asserted defenses of waiver, estoppel, laches, acquiescence, statute of limitations, and privileged communications. Enmark also asserted a counterclaim requesting a declaratory judgment that it held a prescriptive easement over the Roadway and a second counterclaim requesting a declaratory judgment it held an easement by express grant.

The Town filed an Answer to the Amended Complaint, dated January 20, 2015. While it appears Carolina did not file a Reply to Enmark's Counterclaim dated December 17, 2014, it did file a Reply, dated October 7, 2013, to Enmark's Answer and Counterclaim, dated September 10, 2013, which was basically a general denial. Since the counterclaims in Enmark's Answer and Counterclaim dated December 17, 2014 are essentially the same as its original Answer and Counterclaim dated September 10, 2013, this Court in this Order deemed Carolina's original Reply to also be responsive to Enmark's Answer and Counterclaim, dated December 17, 2014.

Pursuant to a hearing on cross motions for Summary Judgment filed by Carolina and Enmark, this Court issued an Order dated October 23, 2015, finding that Enmark held no express easement rights. No appeal was filed of said Order.

The parties, prior to trial, agreed to the admission of a stipulated exhibit list consisting of 83 exhibits. Additional exhibits were introduced at trial. In addition to carefully considering the evidence submitted at trial, and arguments of counsel, the Court reviewed and considered the following written briefs submitted by the parties:

1. Enmark's Pre-Trial Brief, dated June 15, 2016;
2. Enmark's Post-Trial Brief, dated July 16, 2016;
3. Carolina's Post-Trial Brief, dated July 21, 2016;
4. Town's Post-Trial Brief, dated July 25, 2016;
5. Reply Brief of Carolina, dated August 25, 2016¹

B. LEGAL DISCUSSION

1. Burden of Proof

1. The party claiming a prescriptive easement has the burden of proof. *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct.App. 1997). There is a strict standard of proof for prescriptive easement cases, and the party claiming such easement has the burden of proving all elements by clear and convincing evidence. *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 170 (2015). As will be discussed below in more detail, "[W]hen the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse." *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d

¹ Although Enmark objected to the Court's consideration of Carolina's August 25, 2016 Brief as being untimely and not pursuant to the Court's request for briefs in this matter, the Court accepted said filing and considered the arguments therein.

136, 141 (2006). Thereafter, the burden shifts to the title owner of the servient estate (ie. Carolina in this case) to rebut the presumption that the use was adverse. *Sanitary & Aseptic Package Co. v. Shealy*, 205 S.C. 198, 31 S.E.2d 253, 255 (1944). An attempt to claim adversely may be inferred by the acts and conducts of the dominant user. *Kelly v. Snyder*, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct.App. 2012).

2. Element of Prescriptive Easement

2. The elements for a prescriptive easement in South Carolina are well settled. “To establish an easement by prescription, a party must show the following: (1) the continued and uninterrupted use or enjoyment of a right for a full period of 20 years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse. *Paine Gayle Properties, LLC v. CSX Transportation, Inc.*, 400 S.C. 568, 583, 753 S.E.2d 528, 536 (Ct.App. 2012); *Simmons v. Berkley Elec. Coop., Inc.*, 404 S.C. 172, 182, 744 S.E.2d 580, 586 (Ct.App. 2013) (*reversed in part by Simmons v. Berkeley Elec. Coop., Inc.*, No. 2013-001447, 2016 WL 6520167 (S.C. Nov. 2, 2016) (“*Simmons 2016*”). Prior to the decision of *Simmons 2016*, the third element could have been met by a showing under a claim of right. *Simmons 2016* held a claim of right is no longer available to a party claiming a prescriptive easement. *Simmons 2016* at *4. Thus, while evidence and arguments at trial were presented on this element, the *Simmons 2016* decision issued after the trial makes clear a claim of right is no longer sufficient.

3. It is this Court’s finding that there is clear and convincing evidence as to each of the elements of a prescriptive easement and that Enmark is entitled to a prescriptive easement over the Roadway, for the reasons discussed below.

A. A continuous and uninterrupted use or enjoyment of the Roadway for a full period of twenty (20) years

4. At the outset, it is clear that Enmark can rely not only on its use of the Roadway for the last seven (7) years since its purchase from Ms. Alice Mean's company, ASA, Inc, on March 19, 2009 (Ex. 5), but also the use of the two prior owners (Chevron Oil – Ex. 2; ASA – Ex. 3) dating back to when the station was first built by Chevron Oil Company (“Chevron”) in 1984. A party may tack the period of use of prior owners in order to reach the 20-year requirement. This includes not only use by ancestors and heirs, but between parties in privity. *Kelley* at 575, 722 S.E.2d at 819.

5. The Chevron service station (“Chevron Station”) was constructed by Chevron on approximately 0.65 acres on Palmetto Bay Road, Hilton Head Island, South Carolina as described in Ex. 1. The Chevron Station commenced operating on June 1, 1984, the date Beaufort County issued its Certificate of Occupancy. (Ex. 78, Bates 1460). The Roadway was in existence and used by patrons of the Chevron Station and others at the time of the opening of the Chevron Station, or very shortly thereafter. Originally the Roadway provided easy access to the Winn-Dixie, located to the southwest of the Chevron Station.

6. Shortly after completion of the Chevron Station, it was leased by Chevron to Mr. Ballenger, then married to Ms. Means, starting in 1985. Ms. Means lived in the Point Comfort area of Hilton Head, down the street from the Chevron Station, which was only the second gas station on the south end of Hilton Head at the time.

7. Ms. Means divorced Mr. Ballenger in 1989 and obtained the lease on the Chevron Station in 1989 as part of said domestic proceedings.

8. Ms. Means thereafter leased the Chevron Station until she purchased same on August 23, 1993, in the name of ASA, Inc. (“ASA”), a company she owned (Ex. 3). She

continued to own and operate the Chevron Station until March 19, 2009, when she sold it to Enmark (Ex. 5). Thus, Mr. Ballenger (Ms. Means' former husband), Ms. Means, or her company, ASA, have operated or owned the Chevron Station for twenty-four (24) consecutive years (1989 – 2009). Ms. Means testified credibly that the Roadway during that entire time period was in use and existence, in the same location as marked in red on Ex. 74. I find this witness's testimony as to the Roadway credible and compelling. It should be noted Ms. Means is truly an independent witness, with no stake of any kind in the outcome of this dispute.

9. Various aerial photographs and recorded plats further confirm and support this conclusion. The 1986 aerial photographs (Exs., 30, 31 and 89) show car tracks leading to the Roadway from the car wash, which were identified by Ms. Means. Aerial photographs taken in 1988 (Ex. 32); 1995 (Exs. 33, 34); 2002 (Ex. 36); 2012 (Ex. 40); and 2013 (Ex. 41) further evidence the location and usage of the Roadway.

10. In addition, PB 38 P 53, prepared on November 1, 1989 (Ex. 21 – "1989 Plat") is very compelling. This is an as-built of the property and improvements identified as the Sea Pines Welcome Center, now owned by Carolina ("Welcome Center"), which shows the Roadway. The legend on the 1989 Plat indicates the Roadway is comprised of "Asphalt Paving," consistent with the testimony of Ms. Means, who testified that her husband, Mr. Ballenger, prior to 1989, paved the Roadway with asphalt.

11. Mr. Scott Middleton is the son-in-law of Ms. Means. He undertook the day-to-day operations of the Chevron Station starting in 2000. While dating Ms. Means' daughter from 1995 to 2000, he visited Hilton Head on a regular basis and testified the Roadway was in use and existence during that time period. Further, he testified that Mr. Ballenger, while he ran the Chevron Station, made repairs to the Roadway with Quikcrete. When Mr. Middleton ran the

station for Ms. Means from 2000 until it was sold to Enmark on March 19, 2009, he testified the Roadway was continually used by patrons of the Chevron Station and the general public to access the adjoining shopping center and to by-pass the traffic on the adjoining Sea Pines Circle.

12. After Enmark purchased the property on March 19, 2009 (Ex. 5), the Roadway continued in use by the patrons of the station, now an Enmark Station, and by members of the public in the same location as it existed since 1984.

13. The continuous and uninterrupted use or enjoyment of the Roadway since 1984 is further supported by the extensive improvements made to the Roadway from 1984 to the present.

14. As stated above, I find the Roadway was paved with asphalt by Mr. Ballenger, or others, prior to 1989, when Ms. Means took over the lease of the Chevron Station. The asphalt paving of the Roadway was completed by November 1, 1989, as confirmed in the 1989 Plat. While memories may fade, the recorded plat clearly indicating the Roadway was paved with asphalt is very compelling evidence to the Court.

15. From 1989 until Ms. Means purchased the Chevron Station, there is credible testimony the asphalt Roadway was patched and repaired, and two (2) speed bumps were added. In part, this was due to patrons of the station and the public hitting potholes and complaining to Ms. Means and Mr. Middleton as to the condition of the Roadway.

16. After Ms. Means, through ASA, acquired the Chevron Station on August 23, 1993 (Ex. 5), in 1994 she re-paved the Roadway with asphalt, re-installing and repairing the two speed bumps. This is confirmed not only by the credible testimony of Ms. Means and Mr. Middleton, but also by the ASA Depreciation Schedule showing new paving during this time period (Ex. 75). Photographic evidence introduced at trial clearly shows two layers of asphalt paving (Exs. 43, 44(A)). Various witnesses, including Theresa B. Lewis, Town LMO Official;

Timothy M. Drake, a landscaper hired by Colonial; Curtis L. Coltrane, Colonial's expert witness on the LMO; Kumar Viswanathan, owner of Carolina, and Robert H. Demere, III with Enmark, all confirm there are two (2) layers of asphalt on the Roadway. This is consistent with the original paving of the Roadway prior to 1989 and the subsequent repaving by Ms. Means in 1994. It is logical Ms. Means would have waited until she acquired ownership of the Chevron Station prior to spending monies on substantial improvements, such as repaving the Roadway in 1994.

17. Finally, the Court took into consideration the existence of a drainage catch basin in the middle of the Roadway (Exs. 42, 50, 51), further evidencing the long-standing existence of the Roadway in its present location. Mr. Viswanathan testified he did not construct same, so it was in existence prior to his acquisition of the Welcome Center on October 31, 1996 (Ex. 15).

18. I find and conclude said Roadway has been in continuous and uninterrupted use or enjoyment by Enmark, ASA, Ms. Means, Mr. Ballenger, and Chevron for twenty-nine (29) years, from 1984 until said period was tolled by the Tolling Letter agreement entered into by Colonial and Enmark, on July 24, 2013 (Ex. 62 – Tolling Agreement).

(i) Interruption of 20-Year Period

19. Carolina asserts under *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005) and *Kelley* that Enmark has not met this first requirement due to its actions to stop or interrupt Enmark's usage of the Roadway. Under these cases, the continuous period of use may be interrupted by "overt acts" of the servient landowner, such as erecting a physical barrier or perhaps verbal threats to stop said usage. *Pittman* at 52, 610 S.E.2d at 481; *Kelley* at 573, 722 S.E.2d at 818. It should be noted that no South Carolina case has ever found mere "verbal threats" was sufficient to interrupt the continuous use period for a prescriptive easement. This

Court has found no case anywhere in the United States which has held mere verbal threats or even just a demand letter was sufficient to interrupt the requisite time period. A close reading of the relevant authorities confirms this conclusion.

20. The Court in *Pittman* relied on an Oregon decision to adopt the “new” standard in South Carolina as to this issue, stating as follows:

We decline to adopt the analysis applied by the North Carolina Supreme Court and conclude a more reasoned approach was articulated by the Oregon Court of Appeals in *Garrett v. Mueller*, 144 Or.App. 330, 927 P.2d 612 (1996). The court embraced the opinion of Justice Oliver Wendell Holmes Jr., who stated the following in determining what a landowner must do to interrupt prescriptive use.

“A landowner ... is not required to battle successfully for his rights. **It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action.** Such an assertion interrupts the would-be dominant owner's impression of acquiescence, and the growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact.” (emphasis added)

Pittman at 51, 610 S.E.2d at 481 (quoting *Garrett* at 617 (quoting *Brayden v. New York, N.H. & H.R. Co.*, 51 N.E. 1081, 1081-82 (Mass. 1898))).

21. In the Oregon *Garrett* decision, cited as the authority for the above “new” South Carolina rule, the plaintiff had put up gates, confronted personally the defendant on the disputed roadway, asserted he was trespassing, ordered him to leave, and later put locks on a gate when the defendant continued to try and use said road. *Garrett* at 616. Only when the locks were placed on the gate did the court in Oregon find an interruption of the time period for a prescriptive easement. *Id.* at 618. The Oregon Court **held that if the actions of the plaintiff were sufficient to allow the defendant to file suit to enforce any alleged easement, said action would**

be sufficient to stop the usage period. *Id.* The placement of a gate with locks met that requirement. *Id.*

22. In *Pittman*, our South Carolina Court relied exclusively on the fact that the servient landowner erected cables and poles across a disputed roadway on numerous occasions and called law enforcement to interrupt the continuous use period. *Pittman* at 52, 610 S.E.2d at 482. The South Carolina Court summarized the actions which resulted in the interruption of the twenty year period as follows:

Turning to the present case, we conclude Respondent's actions were sufficient to interrupt Petitioner's use of the land for the prescriptive period. Not only did Respondent set posts and cables across it, but Respondent also plowed the road every year and planted the road with rye a couple of years. When Petitioner removed the barriers, Respondent replaced them. Respondent also called law enforcement authorities when Petitioner used his tractor to destroy the barriers. Respondent's actions caused Petitioner to discontinue use of the land, *albeit* briefly, and were certainly sufficient to leave Petitioner with the impression that Respondent did not acquiesce in the use of his land.

Id. at 52, 610 S.E.2d at 481-82. It is very clear the South Carolina Court in *Pittman* did not rely on verbal warning or even written demands to interrupt the continuous use period.

23. In *Kelly*, also cited by Carolina, the servient owner took no action to prevent the use of a disputed roadway and thus said issue was not reached by the Court, although the Court quoted the *Pittman* rule. *Kelley*, 296 S.C. at 573, 722 S.E.2d at 818.

24. A review of the actions of Carolina in this case reveals its actions were not sufficient to interrupt the usage of the Roadway under the above cases. In the Oregon decision, the Court in *Garrett* appeared to establish a bright line that the assertion of rights by the servient would trigger a cause of action if an easement existed. *See Garrett* at 616. Nothing Carolina did would have allowed Ms. Means, her company, ASA, or Enmark to file suit to enforce their claimed easement rights until Carolina put up fence posts right before the litigation was filed (Ex. 42) and the parties entered into the Tolling Agreement on July 24, 2103 (Ex. 62). Again, in

none of the cases relied up on by Carolina, nor in any other case this Court has been able to find, has a court relied solely on verbal or written warnings. In every case, there was some overt, physical act that would legally allow the easement holder to file suit to protect his rights.

25. Carolina's evidence of "overt" acts consist primarily of three (3) letters it asserts cut off Enmark's rights under the above cases. The first is a June 15, 1994 letter written by Carolina's attorney, Cary S. Griffin, to John L. Wilson, counsel for the then owner of the station, ASA, Inc. and Ms. Means. (Ex.47). This letter is not sufficient to cut off the rights of Enmark under the above cases for several reasons. First, Carolina did not own the property at the time it was written, having only obtained title over 2½ years later on October 31, 1996 (Ex. 15-10/31/96 Deed into Carolina). Mr. Griffin's letter clearly states it was written on behalf of a "prospective purchaser". *Pittman* and *Kelley* require action by the owner of the servient estate. See *Pittman* at 52, 610 S.E.2d at 481-82; *Kelley* at 573, 722 S.E.2d at 818. In addition, the letter does not demand the Roadway be closed, but simply asks for additional title information. Clearly Ms. Means or her company, ASA, could not have sued Carolina to enforce its claimed easement right as to the Roadway based on said letter when Carolina was only a perspective purchaser, not the owner, and had done nothing to interfere with her use of the Roadway. Thus, the standard set in *Pittman* was not met.

26. Carolina's second claimed interruption of the prescriptive period is a letter written on behalf of Carolina some fourteen (14) years later, on September 15, 2008 by Robert J. Arundell, then counsel for Carolina (Ex 55). Said letter is written some twenty-four (24) years since the Roadway was in continuous use starting in 1984. Assuming, *arguendo*, said letter by itself was a sufficient overt act to constitute an interruption of use, it came too late. I find and conclude the requisite twenty (20) year continuous use period had already been met. In addition,

said letter was written in the context of negotiations between the owners of the adjoining shopping center, ASA, as owner of Chevron Station, and Carolina as to a new roadway plan proposed by Carolina. No action was ever taken to limit, restrain, or prevent the use of said Roadway until posts were placed by Carolina adjacent to the Roadway in 2013 and the July 2013 Tolling Agreement (Ex. 62) was signed by the parties some five (5) years later. In other words, I find and conclude that ASA or Ms. Means could not have filed suit as of September 15, 2008, asserting a violation of their claimed prescriptive easement rights based on the Arundell letter.

27. Most importantly, pursuant to Mr. Arundell's following letter on the same issue, dated October 29, 2012 (Ex 61), Carolina's counsel stated his client had changed his mind after the September 15, 2008 letter due to a change in plans ("In 2008, in anticipation of prospective redevelopment plans, we notified ASA, Inc. that the encroachment would have to be closed. However, when those redevelopment plans were put on hold, my client decided to allow the encroachment to remain open" (emphasis added). Thus, this September 15, 2008 letter cannot satisfy a clear, unequivocal action by the servient owner to stop usage of the Roadway as required under *Pittman*. See *Pittman*, 363 S.C. 47 at 52, 610 S.E.2d at 481-82. Ms. Means testified she did not have the impression she was required in 1998 to quit using the Roadway, or any other time, since she was under the belief she had legal rights to use same based on a written easement (Ex. 48 – 2/23/94 letter Wilson to Griffin) and longstanding, historical use of the Roadway (Ex. 52 – 6/2/08 letter Wilson to Viswanathan – 2nd paragraph). Nothing was ever done to restrict or prohibit such continued usage until much, much later when the posts were constructed by Carolina in July 2013 and the parties entered into the Tolling Agreement (Ex. 62).

28. The third letter relied upon by Carolina is Mr. Arundell's letter of October 29, 2012, referenced above. (Ex. 61). While said letter does not provide a precise date of when the

Roadway was to be closed, said letter, coupled with the posts constructed adjacent to the Roadway (Ex. 42), does arguably meet the standard in *Pittman* to serve as an interruption of continued use. Upon the subsequent execution of the Tolling Agreement on July 24, 2013 (Ex. 62) and filing suit by Carolina on August 15, 2013, Enmark knew for certain the intent of Carolina was to seek the closure of the Roadway. In any event, assuming the October 29, 2012 letter (Ex. 61) was sufficient to interrupt or stop the time period, the paved Roadway had been in continuous use for over twenty-eight (28) years (1984 to 2012) – more than sufficient to meet the twenty (20) year continuous use requirement. Thus, none of the letters relied upon by Carolina prevent the fulfillment of this element. There was no other credible evidence of any other action by Carolina sufficient to “interrupt” the continuous use of the Roadway under *Pittman*.

B. The identity of the thing enjoyed

29. Ms. Means testified that the Roadway has been used by herself, her employees and patrons of the Chevron Station, including herself, in the same location from at least 1984 through today. Again, I find her testimony credible and compelling on this issue. Mr. Middleton’s testimony is also consistent with said facts. This same testimony was provided by numerous witnesses for the time periods they were familiar with the Roadway (See: Mr. Demere – 2009 to present; Ms. Lewis – 1998 to present; Mr. Green – 1992 to present). Additional evidence strongly supports this conclusion, including the aerial photographs since 1986, the 1989 Survey (Ex. 21); the October 20, 1992 as-built survey for Chevron showing the curb cut and Roadway (Ex. 45); and Carolina’s August 10, 2007 Conceptual Site Plan (Ex. 50).

30. Carolina argued that with the placement of a trash dumpster near the southeastern terminus of the Roadway, its location was materially changed. This Court disagrees. The aerial photographs first appear to show the existence of a trash dumpster sometime between 1988

(Ex. 32) and 1995 (Exs. 33, 34). However, the placement of this single dumpster did not materially change the location of the Roadway, as is evidenced by more recent photographs and surveys (Exs. 21, 42, 44A) and the testimony of Ms. Means and others. There is no credible evidence that the placement of this dumpster was placed on or near the Roadway in an effort to close or materially alter the Roadway. I find and conclude this is not sufficient to impact or diminish the identity of the Roadway or its location.

C. The use or enjoyment of the Roadway was Adverse

31. As noted above, “[W]hen the claimant has established that the use was open, notorious, continuous, and uninterrupted, the use will be presumed to have been adverse.” *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). Thereafter, the burden shifts to the title owner of the servient estate, Carolina in this case, to rebut the presumption that the use was adverse. *Sanitary & Aseptic Package Co. v. Shealy*, 205 S.C. 198, 31 S.E.2d 253, 255 (1944). An attempt to claim adversely may be inferred by the acts and conducts of the dominant user. *Kelly v. Snyder*, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct.App. 2012). I find and conclude that Enmark has established by clear and convincing evidence its use of the Roadway was open, notorious, continuous, and uninterrupted for a period in excess of twenty (20) years. The burden then shifts to Carolina to rebut said presumption, which it has failed to do. Carolina’s argument it granted permission for said use is not supported by the credible evidence.

(i) No Permission was Ever Granted by Plaintiff

32. Carolina asserts it provided permission to various owners in the chain of title, thus defeating any claim of adverse use. Mr. Viswanathan, principal of Carolina, testified he gave oral permission to ASA and Ms. Means to use the Roadway. I do not find said testimony

credible or supported by the evidence presented. There are several reasons I reached this conclusion.

33. First, it is inconsistent with the testimony of Ms. Means and Mr. Middleton, which I find more credible and convincing. Ms. Means testified unequivocally that she and her patrons used the paved Roadway since 1984, including the time she leased and owned the property commencing in 1989 through March 2009 when she sold same. She further testified she never obtained consent from anyone to use the Roadway or sought to obtain same. Again, this Court gives great weight to the testimony of Ms. Means. Mr. Middleton also testified credibly that he never obtained or sought permission from Carolina, the adjoining owner.

34. Second, the record reflects Mr. Viswanathan holds an undergraduate degree in engineering, a graduate degree in civil engineering, and an MBA, all from Purdue University. I find he was an extremely experienced developer, and routinely and consistently documented all important matters in writing. There is not in existence a single document referencing any grant of permission to use the Roadway, although there are many documents sent by Mr. Viswanathan and his attorneys from June 15, 1994 (Ex. 47), through October 29, 2012 (Ex. 61) concerning the Roadway – a period of over eighteen (18) years.

35. Another key fact I relied on is the February 8, 2008 easement proposal sent by Carolina to Mr. Middleton and ASA (Ex. 51). Not only did the letter and accompanying draft easement not request ASA to discontinue use of the Roadway, or grant "permission" to use same, but the proposed easement agreement provided Carolina would pay all costs of relocating the Roadway (Ex. 51). Mr. Viswanathan admitted at trial this was his offer. Common sense leads to the conclusion he recognized the legal rights of ASA, the adjoining owner in the Roadway, since it was a listed title exception in his October 1996 deed to his property (Ex. 5), as

well as its Contract of Sale (Ex. 46). In recognition of said rights from a negotiating point of view, he would have to pay 100% of the costs of relocation of same in order to induce ASA to give up its rights to the Roadway.

D. Claim of "Illegality" of Use Does Not Prevent a Prescriptive Easement

36. Carolina asserted at trial the prescriptive easement claim should be denied since the Roadway was established "illegally," asserting the construction and pavement of the Roadway and change in the 6" concrete curbing around the Chevron Station to allow access to the Roadway was completed without necessary governmental approvals. While I have determined said work was completed in compliance with the existing rules and regulations, as discussed in Section 3 of this Order below, even if that were not the case, this would not be fatal to the establishment of a prescriptive easement. Carolina has cited no specific legal authority for this argument and this Court has not located any case supporting said position.

37. This Court has construed this argument as analogous to an "un-clean" hands assertion, although no such defense or position was plead. This Court finds no resulting inequity to Carolina by recognizing the continued existence of a Roadway that has been in existence since 1984. From Carolina's perspective, I find and conclude prior to and at the time of its purchase of the Welcome Center parcel for \$1,500,000 on October 31, 1996 (Exs. 15, 46), Mr. Viswanathan clearly was aware of the existence of the Roadway and the purchase price reflected the existence of said Roadway. As a "prospective purchaser", on June 15, 1994, two and one-half (2½) years prior to his purchase, Mr. Viswanathan's attorney wrote Ms. Means' attorney as to the "alleged encroachment of a driveway" (Ex. 48). Said letter further provided as follows:

"There is an encroachment of a driveway that is shown on Plat Book 38 Page 53 (position attached). It is obvious that this area is utilized for access from The Market Place general parking to the Chevron Station."

The Roadway was paved, open and obvious to all. It was listed as a specific title exception in the Contract of Sale and deed of conveyance (Exs. 15, recorded Page 1278, Para. O – DB 38 P 53 – Ex. 21; Ex. 46, Page CC0108, para. D). Mr. Viswanathan, who had to pass this property on a daily basis to reach his home in Sea Pines Plantation and whose office was nearby, would have clearly seen said Roadway. His testimony he perhaps did not walk behind the property or see the Roadway as part of his pre-purchase due diligence is not credible. This is especially true since it appears he completed extensive, detailed due diligence, including third-parties inspecting the interior, noting numerous defects (Ex. 46, § 15). I thus find nothing inequitable as to this Court’s recognition of the prescriptive rights of Enmark in the Roadway, as the Roadway was clearly a part of the property Carolina purchased. Carolina’s purchase price took into consideration said Roadway.

E. Plaintiff’s Claim That a Prescriptive Easement Must Connect to a Public Road is Without Merit

38. Carolina argued at trial Enmark’s prescriptive easement claim fails since it is an “easement to nowhere” (i.e. no terminus at a public road). There simply is no such requirement under South Carolina law that an easement has to terminate at a public road. Carolina has not cited any legal authority for this position. Whether users of the Roadway traverse other parties’ property who are not parties to this action does not impact this Court’s power to determine the relative rights in the Roadway between the parties before the Court. This Order is clearly not binding on other property owners who are not parties. Carolina’s argument Enmark’s claim should be denied since it did not name these adjoining owners as parties falls on deaf ears, since Carolina instituted this case and could have named said parties in its original Complaint, or its two (2) amended Complaints filed thereafter.

3. Plaintiff's Request for a Mandamus is Denied

39. A "mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy." *City of Rock Hill v. Thompson*, 349 S.C. 197, 199, 563 S.E.2d 101, 102 (2002). It is only available against a public official to perform a mandatory legal duty that is ministerial in nature. *Id.* at 200, 563 S.E.2d 102. When the legal right is doubtful, the performance of a duty rests in the discretion of the public official, or there is an alternative remedy, mandamus is not available. *Id.*; *In the Interest of Lyde*, 284 S.C. 419, 421, 327 S.E.2d 70, 71 (1985); *Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 201 S.E.2d 241 (1973). A writ of mandamus is not available where an available administrative remedy has not been pursued to its end. *Bradley v. State Human Affairs Commission*, 293 S.C. 376, 380, 360 S.E.2d 537, 539 (1972). Where a party has another adequate remedy, a writ of mandamus will not be granted. *In Re Tyson*, 282 S.C. 212, 318 S.E.2d 279 (1984). As is discussed below, Carolina has met none of the requirements for an order from this Court requiring the Town to issue an enforcement order under the LMO for Enmark to remove or shut down the Roadway under these authorities.

A. No Mandamus Available Since a Violation of the LMO is Doubtful and Uncertain

40. Ms. Lewis, the LMO official, candidly admitted she made no final determination the Roadway violated the LMO since she could not determine if the construction activities related to the Roadway were in violation of the LMO. After consideration of all of the testimony and voluminous trial exhibits this Court can certainly understand why she reached such a conclusion under her discretion as the LMO official. Under *City of Rock Hill*, and *Interest of Lyde*, this Court cannot issue a Mandamus where the claims asserted by Carolina as to LMO violations are doubtful, which is certainly the case at bar. *See City of Rock Hill*, 349 S.C. at 199,

563 S.E.2d at 102; *In the Interest of Lyde*, 284 S.C. at 421, 327 S.E.2d at 71. For this reason alone, the drastic remedy of Mandamus is not appropriate. As discussed below, based on this Court's analysis and application of the LMO to the facts in this matter, I also find no violation of the LMO, thus Mandamus is not an appropriate remedy.

(i) The Initial Construction of the Roadway was not a Violation of the Town LMO

41. Even if the issues of Carolina not exhausting its administrative remedies, or the doubt and uncertainty by the LMO Official of an actual violation were not present, I find and conclude there was no violation of the LMO as to the construction and maintenance of the Roadway. As discussed below, this Court finds that Carolina has not shown by a preponderance of evidence the Roadway was constructed, improved or maintained in violation of the LMO.

42. The Town was incorporated in 1984 and adopted the LMO in 1987. As stated above, I find and conclude that the Roadway was in existence almost three (3) years before the adoption of the LMO when the station opened in 1984. There was no evidence the construction of the Roadway or curb cut violated any then applicable ordinance. When the Town adopted the LMO in 1987, no Town permit or approval was required for the continued existence of the original Roadway since it was a valid non-conforming use under § 16-7-101 et. seq. of the LMO (Ex. 83). Section 16-7-103 of the LMO provides "nonconformities shall be allowed to continue in accordance with the regulations of this Chapter" (Ex. 83). A "nonconforming use" is defined in § 16-10-201 (Ex. 83) as follows:

"Nonconforming Use: Any legally established activity using land, buildings or structures which was legally established, but that fails to conform in any respect to an applicable use requirement set forth in this title, in any applicable and approved development plan or in any permit issued hereunder."

There is no evidence the original Roadway was not a legally established activity under the Beaufort County Development Standards Ordinance ("DSO"), the predecessor to the 1987

LMO. In fact, the DSO was never put into evidence. Thus, there is no evidence that under the DSO anyone was even required to obtain a permit or approval for a Roadway of this nature.

43. I find and conclude the original Roadway is not a violation of the LMO and thus the remedy of Mandamus is not available to Plaintiff.

(ii) The Subsequent Paving of the Roadway was not a Violation of the Town LMO

44. Having determined the original Roadway is an allowed, nonconforming use under the 1987 LMO, the Court must determine if the original paving required a permit under the applicable LMO. Carolina and its expert, Mr. Coltrane, assumed the Roadway was paved sometime between 2002 and 2008. However, Ms. Lewis, the Town LMO Official, was unable to determine a date of the original paving. As set forth above, I find and conclude the Roadway was originally paved sometime shortly after the station opened in 1984. Section 16-1-105 of the 1988 LMO (Ex. 83) lists the "development activities" that trigger a requirement for a permit from the Town. A careful reading of this section reveals the simple action of paving an existing Roadway does not constitute development requiring a permit. This may be one reason the Town never raised any issue with the Roadway over the last 27 years that the Roadway has been paved (1989 – 2016), despite inspecting the site at least twelve (12) times (Ex. 79).

45. I find the original repaving of a lawfully permitted roadway was not a violation of the applicable LMO.

(iii) The Subsequent Repaving of the Roadway was not a Violation of the LMO

46. Finally, this Court must determine if the subsequent repaving and construction of two (2) speed bumps on the Roadway constitutes a violation of the LMO. I find and conclude the answer to this question is no. First, the Court must determine if repaving a Roadway constitutes a development activity triggering permit requirements under § 16-1-105 of the LMO

(Ex. 83), the same analysis applied above to the original paving. Since the original paving did not constitute development activity under this section, the repaving of same is even an easier conclusion to reach. Ms. Lewis, the Town LMO Official, confirmed in her testimony no permit is required to repave an existing roadway. Thus, the mere repaving and installation of speed bumps on the Roadway by Ms. Means on or about July 1994 was not a violation of the LMO and Carolina's request for a Mandamus as to this activity should be denied.

47. As an alternate basis for my conclusion of no violation of the LMO as to the subsequent repaving, the LMO provisions dealing with existing nonconformities must be considered. Section 16-7-103 of the LMO (Ex. 84) clearly provided all "nonconformities shall be allowed to continue in accordance with the regulations of this Chapter." Section 16-7-106(B) provides the Town Administration may waive various provisions as to setbacks, development review, zoning regulations, etc, if any proposed improvement to an existing non-conformity does not occupy a greater footprint (Ex. 83). Testimony from Ms. Means and Mr. Middleton confirmed that the repaving and speed bumps of the Roadway was in the same location as the prior existing paved Roadway. Thus, the ability or right of the Town LMO to exercise her discretion (i.e., LMO states she "may waive") to waive setback provisions for the repaving precludes this Court from issuing a Mandamus, as this decision is clearly discretionary. No Mandamus is allowed for such discretionary decisions. *See City of Rock Hill*, 349 S.C. at 199, 563 S.E.2d at 102; *In the Interest of Lyde*, 284 S.C. at 421, 327 S.E.2d at 71.

- B. Assuming, *arguendo*, a Permit for the Original Construction, Original Paving or Re-Paving Was Required and Was Not Obtained, What are the Town's Options as to Enforcement?

48. Even if this Court finds, *arguendo*, there is a clear, absolute violation of the LMO as to the original Roadway construction, its original paving, or its subsequent repaving, and that Carolina had properly exhausted its administrative remedies (discussed below in Section C), the Court cannot usurp the Town's discretion as to what is the appropriate remedy. See *City of Rock Hill* at 199, 563 S.E.2d at 102; *In the Interest of Lyde* at 421, 327 S.E.2d at 71. Section 16-8-107 of the current LMO (Ex. 83) lists eight (8) possible remedies available to the Administrator for a LMO violation. These include the discretion under § 16-8-106(F) to take action to abate any alleged violation, or to simply impose a fine under a misdemeanor criminal action (16-8-106(G)), or to impose a fine under the catch-all remedies section of 16-8-106(H) ("Take any other action at law or in equity to prevent or remedy any violation, or otherwise enforce the provisions of this Ordinance"). Ms. Lewis also testified that pursuant to recent LMO amendments, an after-the-fact permit can be issued since the 20' setback requirement between commercial properties had been eliminated.

49. Ms. Lewis testified in deciding the appropriate remedy for a violation she must use her discretion, deciding each violation on a case-by-case basis. Factors she considers include: (a) the Roadway has been in existence since at least 1984; (b) there is evidence Ms. Means or her contractor contacted the Town as to permitting when it was repaved sometime in July 1994; (c) that the current owner, Enmark, was not involved in any of the work associated with the Roadway (i.e., original construction, original paving or re-paving); (d) the Town has never had an issue with the Roadway or sought to stop the repaving of same in the past for a very long period of time, while also issuing other permits and conducting site inspections at least twelve (12) times (Ex. 79); (e) the severity of the violation; and (f) there is no evidence of repeat violations; and other conditions.

50. The LMO Administrator, in her discretion, might decide to order an abatement plan of some additional landscaping, or impose a simple fine, or require an after-the-fact permit. This Court simply does not have the authority under the cases of *City of Rock Hill* and *In the Interest of Lyde* to make such a discretionary decision. *City of Rock Hill* at 199, 563 S.E.2d at 102; *In the Interest of Lyde* at 421, 327 S.E.2d at 71. In addition, without the benefit of years of enforcing the LMO on Hilton Head, the Court obviously does not have the requisite knowledge or experience necessary to issue the appropriate LMO remedy under these complicated facts.

51. Carolina asserts that under § 16-8-110 of the LMO (Ex. 83) the fact that a violation has existed for a long period of time does not constitute any type of waiver or implied approval by the Town and the Town is required to remove the Roadway. Such a simplistic argument ignores the many unusual facts concerning the long history of the existence of the Roadway, the fact I have found its construction and repaving did not violate the LMO, that Ms. Lewis could not make a determination of any violation, and the broad discretion afforded Ms. Lewis in determining an appropriate remedy. Under *City of Rock Hill* and *In the Interest of Lyde*, this Court declines to order a removal of the Roadway.

C. Failure to Exhaust Administrative Remedies

52. At trial, there were two (2) opposing arguments as to each party asserting the other failed to exhaust its administrative remedies under the LMO. I find that Carolina failed to exhaust its administrative remedies for the reasons discussed below and thus the writ of mandamus is not available, even if the Roadway was constructed in violation of the LMO.

53. The Town, by letters dated January 16, 2014 and February 4, 2014, notified Carolina's then counsel, Robert J. Arundell, that it had determined in its discretion the Roadway was a "legal nonconformity" under § 16-10-201 of the LMO and it was taking no action as to the

Roadway. (Exs. 66, 68). The Town's attorney specifically advised Carolina's counsel that if his client, Carolina, did not agree with said decision, an appeal should be filed under § 16-3-205 of the LMO in fourteen (14) days. Section 16-10-201 required Carolina to file an appeal or be bound by said decision. No appeal was filed and I find Carolina did not exhaust its administrative remedies under the LMO, thus the extraordinary relief of Mandamus is not available.

54. Carolina argues that Enmark failed to appeal a final determination of the LMO Official, a letter dated August 8, 2013 (Ex. 62), from Ms. Lewis, and thus the Town and Enmark are bound by said decision since no appeal was filed by Enmark. I find and conclude that the August 8, 2013 letter was not a final determination under the LMO. Ms. Lewis, who I find an impartial and credible witness, testified that she issued the August 8, 2013 letter based entirely on information she received from Carolina's counsel. Upon receipt of additional information from counsel for Enmark (Ex. 64), and consultation with Mr. Gregg Alford, the Town's outside counsel, she rescinded or corrected her initial decision and worked with Mr. Alford to issue a revised determination through Mr. Alford's office, as reflected in Mr. Alford's January 16, 2014 (Ex. 66), and February 4, 2014 (Ex. 68) letters.

55. Ms. Lewis testified she almost always consults with legal counsel (either the Town's in-house counsel or outside counsel) when attorneys representing property owners contact her office as to LMO issues. She confirmed at trial that the Town attorney, Mr. Alford, on behalf of her office, communicated her final decision on the Roadway issue set forth in Exhibits 66 and 68. Thus, I do not find Enmark failed to file an appeal of the August 8, 2013 letter of Ms. Lewis (Ex. 63).

56. Another reason I find that the August 8, 2013 letter from Ms. Lewis is not a final LMO Determination binding on Enmark is that it was admittedly never sent to Enmark. Under § 16-8-105(C)(1) of the LMO, upon determination of a violation, the Town “shall deliver to the person responsible for the violation, a written notice of violation(s).” Subsection C(3) also confirms written notice must be sent “to any other person responsible for the violations.” It is this notice that triggers the obligation to appeal within fourteen (14) days of notice of the decision under § 16-8-305 of the LMO. As Enmark was never sent the August 8, 2013 letter which Carolina asserts is a final determination by the LMO Official, it could not timely appeal same and thus it did not fail to exhaust its administrative remedies. Carolina’s LMO expert witness, Curtis L. Coltrane, testified that since it is clear Enmark received through other means the August 8, 2013 letter, as evidenced by Enmark’s counsel’s e-mail to Ms. Lewis dated August 26, 2013. He testified this “acknowledged receipt” meets the obligations of the Town as to delivering notice of the determination to Enmark. I do not agree with said position for two reasons. First, in two separate provisions of § 16-8-305, cited above, the term “shall” is used, indicating it is a mandatory requirement. This requirement was admittedly not met by the Town and is fatal to Carolina’s argument. In addition, the only evidence of the date of “acknowledged receipt” of the August 8, 2013 letter is Enmark’s counsel’s e-mail to Ms. Lewis, dated August 26, 2013 (Ex. 64). This is sixteen (16) days after the letter was issued, well past the fourteen (14) day appeal period.

57. I find and conclude that Carolina has thus failed to pursue all administrative remedies available to it and the drastic remedy of a mandamus as a matter of law is not available.

58. For all of these reasons, the remedy of a Mandamus requiring the removal of the Roadway is not appropriate and is denied.

4. Plaintiff Did Not Prove a Slander of Title

59. “[T]o maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff’s title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties.” *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct.App. 1995). “Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff’s rights.” *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994); *see also Solley v. Navy Federal Credit Union, Inc.*, 397 S. C. 192, 204, 723 S. E. 2d 597, 603 (Ct.App. 2012). Carolina cannot meet any of these elements. Carolina asserts through the August 26, 2013 e-mail from Enmark’s counsel (Ex. 64) and its counsel’s April 30, 2014 letter (Ex. 66), Enmark slandered its title by asserting easement rights or making other statements as to the Roadway. A review of the requisite elements of this claim find Carolina has failed to meet its burden of proof on this cause of action.

A. No False Statement

60. As discussed above, this Court has found and concluded that in fact Enmark does have easement rights over the Roadway. Thus, this cause of action fails since any assertion Enmark holds easement rights over the Roadway is true.

B. No Publication of a False Statement to a Third Party

61. In addition, I find there was no publication of a false statement to a third party by Enmark. In most, if not all, of the reported decisions involving slander of title, a defendant has recorded a lien, deed, mortgage, or some other claim of title at the courthouse. In the subject case, Enmark recorded no document at the courthouse asserting it held title to the Roadway other than filing Counterclaims seeking a Declaratory Judgment in this litigation. Pursuant to an

agreement of the parties dated July 24, 2013 (Ex. 62) the parties entered a "Tolling Agreement" which expressly provided Carolina would file a declaratory judgment action to determine title and rights in the Roadway. Carolina agreed during the pendency of the litigation "not to take any action to close or impede traffic on the Roadway." When Carolina, asserted by Enmark to be violative of the terms of the Tolling Agreement, contacted the Town of Hilton Head to request it close the Roadway, Enmark's counsel communicated to the Town in writing on two (2) occasions.

62. By e-mail of August 26, 2013 (Ex. 64), Enmark's counsel advised the Town of the Tolling Agreement and the respective claims of the parties to be determined in a declaratory judgment by the Court. Enmark did not assert title to the Roadway- only that there was a dispute to same to be resolved by the Court. Additional information in Paragraph 3 of said e-mail was clearly provided as a statement of opinion – not a statement of facts ("As we discussed, my client believes ..."). Mere statements of opinion do not constitute an actionable representation. *Gilbert v. Mid-South Machinery Co. Inc.*, 267 S.C. 211, 220, 227 S.E.2d 189, 193 (1976). Said paragraph reads as follows:

"As we discussed, my client believes this driveway was built prior to the incorporation of the Town in 1983, and certainly prior to the passage of the LMO in 1987. I've attached Plat Book 38 Page 53, dated February 11, 1974 which shows the existence of this roadway. I've talked to numerous individuals who have lived on the island for the last 30+ years and they all have confirmed the existence of this roadway for a very long period of time. I have lived on the island for over 29 years and the driveway has been in existence the entire time I have been on the island. In addition, we have reviewed various aerial photographs which show the existence of this roadway." (emphasis added)

63. Carolina's primary argument that this e-mail is a false statement derogatory to its title is the erroneous reference to PB 38 P 53 being dated February 11, 1974. Upon obtaining a more legible copy of this admittedly hard-to-read document, it is actually dated November 1,

1989. Facts readily apparent from either reading the document or from reviewing same directly from the public records cannot support a false representation claim. *Robertson v. First Union National Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (2002); *Schnellmann v. Roettger*, 368 S.C. 17, 21, 627 S.E.2d 742, 745 (Ct.App. 2007). The Town, Carolina or any other party, could have easily confirmed the date of this document since it was a recorded plat. Further, the evidence is clear from the testimony of Ms. Lewis and Ex. 81 that when the Town was advised of the correct recording date of the plat at a subsequent meeting between all parties, the Town did not alter its position as to the Roadway after said meeting. I find there is no false statement that is derogatory to Plaintiff's title in this document for the reasons discussed above.

64. As Carolina continued its efforts, asserted by Enmark to be violative of the Tolling Agreement, to have the Town close the Roadway, Enmark's counsel again wrote the Town on April 30, 2014 (Ex. 69), providing to the Town an update on the ongoing litigation. Said letter clearly provided it would be up to the Court to determine the respective rights of the parties. This letter is simply a summary of the two opposing parties' position as to the Roadway, which was at that time in litigation. Enmark's counsel stated "[o]n behalf of Enmark, I have asserted that my client has a prescriptive easement and met all applicable regulatory requests at the time it was constructed." The letter concludes it will be up to the Court to determine the disputed issues. I find this letter meets none of the required elements for a slander of title claim since there is no false statements derogatory to Carolina's title. These two communications are simply not sufficient to show a publication of a "false" claim of ownership in the Roadway. There is no other evidence of any other publication to a third party.

65. When the Court raised questions on this issue at trial, Carolina asserted there were "misrepresentations" in the 1984 permitting of the Chevron Station, a failure to obtain Sea Pines

Architectural Review Board approval of the construction of the Roadway, and similar actions related directly to the original permitting and construction of the Chevron Station and Roadway. None of these actions were conducted by Enmark. In addition, they do not constitute false statements as to Carolina's title. There was absolutely no evidence of a false representation as to the title to Carolina's property by Enmark. Carolina has failed to meet the elements of this cause of action.

C. No Malice

66. "Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights." *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994). "[M]alice merely means a lack of legal justification and is to be presumed if the disparagement is false, if it caused damage, and if it is not privileged." *Home Invs. Fund v. Robertson*, 295 N.E.2d 85, 87 (1973).

67. I find that Enmark never acted maliciously in this matter. It filed no documents at the courthouse claiming title, and entered into the Tolling Agreement directing that the parties seek a declaratory judgment by the court. The evidence at trial showed the Roadway has been in use and existence since 1984 – well over 32 years. I find no malice on behalf of Enmark in asserting its rights over a Roadway with such a long-standing use in the same location and used for the same purpose for that extraordinary length of time. I find that the erroneous date referenced by Enmark's counsel to a recorded plat in Exhibit 64 in an e-mail was a simple mistake due to the legibility of the document, and was not made recklessly, wantonly or with conscious disregard of Carolina's rights.

D. No Damage to Carolina

68. In addition to the above, no publication of a false statement by Enmark caused Carolina any damages – special or otherwise. Carolina provided no competent, compelling evidence on this issue. This is true since the Roadway was in existence and taken into consideration in the purchase price Carolina paid when it acquired said property. (See: Ex. 15 – Deed, listing as an exception PB 38 P 53 (Ex. 21), showing the Roadway on recorded page 1278, Exception D). In addition, after an extensive face-to-face meeting with Carolina, its litigation counsel, and Chester C. Williams, Esquire, its LMO expert, the Town did not change its position as to an LMO violation. There simply is no competent evidence of a diminished value of Carolina’s property in the eyes of a third party.

E. Carolina is not Entitled to Recovery of any Attorney Fees

69. Finally, Carolina is seeking litigation costs as a form of “special damages” under its slander of title cause of action. *See Solley v. Navy Federal Credit Union, Inc.*, 397 S. C. 192, 211, 723 S.E. 2d 597, 607 (Ct.App. 2012). Assuming, *arguendo*, Carolina met all the requirements of this cause of action, as this Court has already ruled at trial, Carolina did not specifically include in its Amended Complaint, dated November 19, 2014 (or its two prior Complaints), a request for attorney fees under this cause of action – or any other cause of action. Special damages not properly plead are not recoverable under long-standing South Carolina law. *SCRCP Rule 9(g); AJG Holdings, LLC. v. Dunn*, 392 S. C. 160, 168, 708 S. E. 2d 218, 223 (Ct.App. 2011). No change of this ruling is needed and testimony as to attorney fees and costs was not admitted for this reason. Having found Carolina did not meet the required elements of this claim, it obviously is not entitled to recover attorney fees and costs in any event.

5. Carolina Has Not Proven a Nuisance

70. The traditional concept of private nuisance requires Carolina to demonstrate that Enmark unreasonably interfered with the ownership or possession of its land. *Ravan v. Greenville County*, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct.App. 1993). A nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. *Id.* It is anything which hurts, inconveniences, or damages or anything which essentially interferes with the enjoyment of life or property. *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 253, 125 S.E.2d 628, 632 (1962). This cause of action fails as the Court has recognized the easements rights asserted by Enmark, and thus no nuisance claim can exist.

71. Even if Enmark's easement rights were not recognized, I find and conclude this cause of action fails. The Roadway has been in continuous use for over 32 years in the same location and in the same manner. When Carolina purchased its property in October 31, 1996 from Sea Pines, the deed (Ex. 15) and Contract of Sale (Ex. 46) specifically listed as an exception to the title Plat Book 38 at Page 53 (Ex. 21), which clearly indicated the existence of the paved Roadway. Carolina completed substantial due diligence prior to its purchase. Mr. Viswanathan, a longtime resident of Hilton Head and experienced real estate investor, surely would have been aware of the existence and use of the Roadway, since it was obvious to anyone, even on a cursory examination, although he testified "he really didn't look at the back of the property prior to closing." In addition, Mr. Viswanathan holds an undergraduate and graduate's engineering degrees, as well as an MBA. This Court finds that he is an extremely experienced, savvy, successful commercial real estate developer. His testimony that he was not aware of the existence of the Roadway at the Chevron Station used by many, many people, which was across the street from where he worked, and was adjacent to the main road to his house in Sea Pines is simply not credible to the Court. It is clear Carolina purchased the property with the full

knowledge of the existence and use of the Roadway and the price of the property it paid took into consideration the Roadway. Its continued use was no surprise and was not an unreasonable use of the property.

72. Finally, I find and conclude there is no compelling evidence that the use of the Roadway has damaged Carolina. Thus, I find even if a nuisance was proven, no damages should be awarded to Carolina.

6. Carolina Has Not Proven a Trespass

73. A trespass is any interference with "one's right to the exclusive, peaceable possession of his property." *Ravan* at 463, S.E.2d at 306. For the same reasons as discussed above as to the nuisance, I find and conclude there is no trespass since Enmark has easement rights over the Roadway. Even if said rights are not recognized, no damages should be awarded under this claim as there is no evidence of any recoverable damages resulting from the use of the Roadway, Carolina took title and possession with the full knowledge of the existence and use of the Roadway.

It is therefore Ordered, Adjudged and Decreed as follows:

1. That Enmark, its successors and assigns, has a prescriptive easement for ingress and egress over the Roadway.
2. That Carolina cannot close said Roadway, or take any action to obstruct or divert Enmark, or its guests and invitees, from using the Roadway.
3. That Enmark shall be responsible for the continued maintenance and repair to said Roadway.
4. That Carolina's causes of action for slander of title, trespass and nuisance are dismissed, with prejudice.

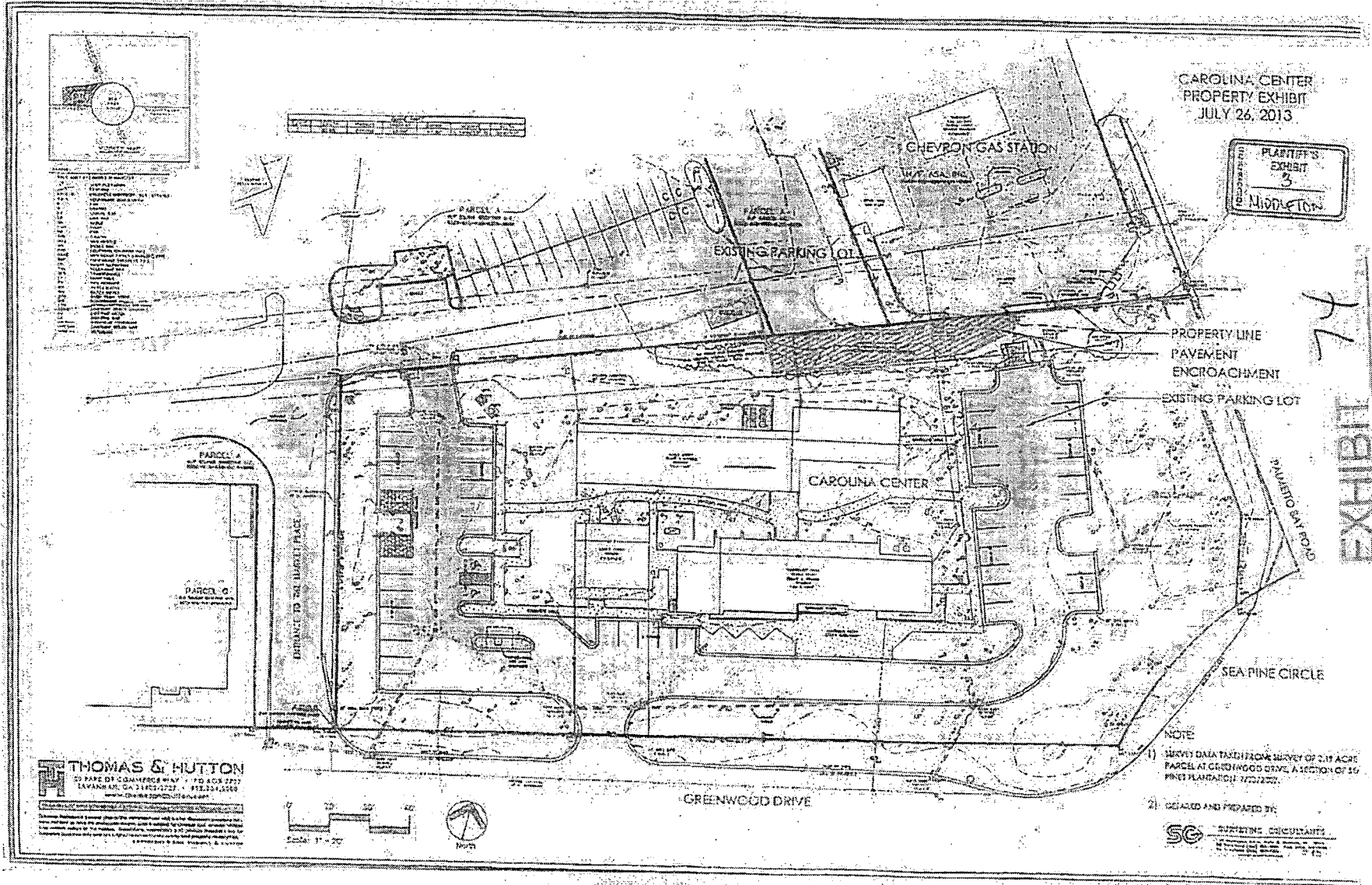
5. That Carolina's request for a mandamus is denied.
6. Each party shall be responsible for their own attorney fees and costs.

AND IT IS SO ORDERED.

Marvin H. Dukes, III
Beaufort County Master in Equity

Beaufort, South Carolina

2017



PLAINTIFF'S EXHIBIT 3
THOMAS & HUTTON

74

EXHIBIT

CAROLINA CENTER
PROPERTY EXHIBIT
JULY 26, 2013

THOMAS & HUTTON
22 PARK DR. COMMERCE WAY • PO BOX 2723
SAVANNAH, GA 31402-0723 • 912.334.1559
www.thomasandtutton.com

NOTE
1) SURVEY DATA TAKEN FROM SURVEY OF 2.11 ACRES PARCEL AT GREENWOOD DRIVE, A SECTION OF 10 PINEHURST PLANTATION 1/22/2009.

2) CREATED AND PREPARED BY:
S.G. SURVEYING CONSULTANTS
1000 W. BROAD ST. SUITE 100
SAVANNAH, GA 31401



Beaufort Common Pleas

Case Caption: Carolina Center Building Corp VS Enmark Stations Inc , defendant,
et al
Case Number: 2013CP0702066
Type: Master/Order/Other

So Ordered:

s/Marvin H. Dukes III #3069