THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge

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Case No. 2017-001555

CAROLINA CENTER BUILDING CORP., Appellant,

v.

ENMARK STATIONS, INC. AND
THE TOWN OF HILTON HEAD ISLAND, Respondents

RESPONDENT ENMARK STATIONS, INC.'S FINAL BRIEF

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STATEMENT OF THE CASE

A. Procedural History

This action arises out of a dispute over a paved roadway shown on Exhibit 74 ("Roadway") used by the public and patrons of Respondent, Enmark Stations, Inc. ("Enmark"), owner and operator of an Enmark service station on Hilton Head Island. (R. pp. 881). The Roadway traverses across adjoining land owned by Appellant, Carolina Center Building Corp. ("Carolina"). This action was initiated on August 15, 2013, when Carolina filed a Summons and Complaint in the Beaufort County Court of Common Pleas. Subsequently, Carolina filed an Amended Summons and Complaint on November 19, 2014, setting forth eight (8) causes of action as follows:

1. Declaratory judgment action seeking an Order that Enmark has no express easement over the Roadway (R. pp. 97-100);

2. Declaratory judgment action seeking an Order that Enmark does not hold a prescriptive easement over the Roadway (R. pp. 100-02);

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 (R. p. 102);

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 (R. p. 103);

5. A slander of title claim seeking actual and punitive damages (R. p. 104);

6. A trespass cause of action seeking actual and punitive damages (R. pp. 104-05);

7. A nuisance cause of action seeking actual and punitive damages (R. p. 105); and

8. A mandamus action against the Town seeking enforcement of the Town of Hilton Head Land Management Ordinance ("LMO") (R. pp. 105-06).

Enmark filed an Answer and Counterclaim to Carolina's Amended Complaint, dated December 17, 2014. (R. pp. 136-42). 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. (R. pp. 136-40). Enmark also asserted counterclaims requesting a declaratory judgment that it held a prescriptive easement and easement by express grant over the Roadway. (R. pp. 140-42).

Respondent Town of Hilton Head Island ("Town") filed an Answer to the Amended Complaint, dated January 20, 2015, expressly denying that Carolina was entitled to a Writ of Mandamus. (R. pp. 143-47). While it appears that Carolina did not file a Reply to Enmark's December 17, 2014 Counterclaim, it did file a Reply, dated October 7, 2013, to Enmark's Answer and Counterclaim. The Trial Court deemed this Reply to be responsive to Enmark's Answer and Counterclaim. (R. p. 43).

Pursuant to a hearing on a motion for Summary Judgment filed by Carolina, the Trial Court issued an Order on October 23, 2015, finding that Enmark held no express easement rights. (R. pp. 78-79). This order was not appealed.

This case was then referred to the Honorable Marvin H. Dukes, III, Beaufort County Master in Equity, per S.C. Code Ann. § 14-11-85, and a non-jury trial was conducted on June 20 and 21, 2016. (R. p. 77). On March 30, 2017, Judge Dukes issued a Final Order, finding that Enmark held a prescriptive easement for ingress and egress over the Roadway ("Opinion"). (R. p. 45-58). Further, Judge Dukes dismissed Carolina's causes of action for slander of title, trespass, and nuisance, and denied Carolina's request for a Writ of Mandamus against the Town. (R. pp. 59-74).

Subsequently, Carolina filed a Motion to Alter, Amend, or Reconsider on April 7, 2017, which was denied by Judge Dukes on July 14, 2017. (R. pp. 151-71; 39-41). Carolina filed its Notice of Intent to Appeal to the South Carolina Court of Appeals on July 18, 2017. (R. pp. 1-76).

B. Factual History[1]

Carolina and Enmark own adjoining parcels of real property located on Hilton Head Island. Located on Enmark's property is a gas station with a convenience store and car wash ("Station"). The paved Roadway adjoins Carolina and Enmark's property and is used by customers of Enmark and the general public to obtain access to the Station, an adjoining shopping center, and other roads. (R. pp. 769-76; 881).

The Station was constructed by Chevron Oil Company ("Chevron") in 1984. (R. pp. 654-57). Shortly after it opened, the Roadway leading from Enmark's property across the property now owned by Carolina was constructed. For the last 33 years, the Roadway has been in continuous use and existence, being improved with asphalt paving and speed bumps on at least two occasions.

Carolina purchased the adjoining tract to the Station on October 31, 1996, with the full knowledge of the existence and use of this long-standing Roadway. (R. pp. 708-713). Carolina took no affirmative action to prohibit the Roadway's use until at least 2012 when its counsel requested Enmark close the Roadway. Thereafter, the parties entered into a July 24, 2013 Tolling Agreement and Carolina commenced this action on August 15, 2013. (R. pp. 851-52; 80-88).

STANDARD OF REVIEW

The determination of the existence of an easement is a question of fact in a law action. *Bundy v. Shirley*, 412 S.C. 292, 301, 772 S.E.2d 163, 168 (2015). Accordingly, the appellate court's scope of review is limited to the correction of errors of law. The Trial Court's findings of

[1] Enmark's reading of Rule 208(b)(1)(C) SCACR is that disputed facts or matters should not be included in the Statement of Case. To avoid being bound by Carolina's Factual History in its Statement of the Case under Rule 208(b) (2) SCACR, Enmark has set forth a brief factual summary.

fact as to the existence of the prescriptive easement will not be disturbed unless they are found to be without reasonable supporting evidence. *Id.* (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)).

The determination of the extent or scope of a grant of an easement is an action in equity. *Id.* As to this issue, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. *Id.*

In this case, the dispute centers around the existence of a prescriptive easement and not its boundaries, because the subject Roadway has been in the same location for over thirty-three (33) years. Neither of these standards require the appellate court to ignore the factual findings made by the Trial Judge, who saw and heard the witnesses, and was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Malpass v. Hodson*, 309 S.C. 397, 399-400, 424 S.E.2d 470, 472 (1992); *Dorchester County Dep't of Social Servs. v. Miller*, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996) (citing *Cherry v. Thomasson*, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981)).

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND ENMARK WAS ENTITLED TO A PRESCRIPTIVE EASEMENT.

A. Illegality of Use – Unclean Hands

The Trial Court construed Carolina's defense of "illegality" of use as analogous to an unclean hands assertion, although no such defense or position was plead. (R. p. 57). The doctrine of unclean hands precludes a party from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010), *aff'd as modified*, 404 S.C. 421, 746 S.E.2d 35 (2013). Carolina has cited no case where the doctrine of unclean hands was used to prevent the

recognition of a prescriptive easement in our State. The Trial Court properly concluded it is not applicable in this matter for numerous reasons.

i. Carolina Failed to Prove that Enmark Acted Unfairly or Illegally.

Carolina does not argue and failed to prove that Enmark took any illegal action in regard to the Roadway. Instead, Carolina focuses solely on the alleged actions of Chevron, the original owner of the Station. The Station was permitted and constructed by Chevron in 1984. (Supplemental R. p. 74, R. p. 929). In 1985, Chevron leased the Station to Ron Ballenger, then married to Alice Means. (R. p. 536, lines 2-11). Ms. Means took over the lease in 1989 and subsequently bought the Station in 1993 through her corporation, ASA, Inc. ("ASA"). (R. p. 540, line 9-p. 541, line 22 (referencing R. pp. 661-67)). Ms. Means continued to operate the Station until she sold it to Enmark in 2009. (R. p. 556, line 21-p. 557, line 8 (referencing R. pp. 670-72)). Enmark currently owns and operates the Station.

The illegal actions relied upon by Chevron during the original permitting and construction of the Station all occurred in 1983 and 1984, some twenty-five (25) years before Enmark purchased the property in 2009. (R. pp. 670-72). Enmark did not take part in Chevron's actions relating to the establishment of the Roadway, and Carolina failed to prove that Enmark had any role in Chevron's actions. Any improper or illegal actions by a prior, unrelated property owner cannot be attributed to Enmark under an unclean hands defense. All the reported South Carolina cases applying this equitable doctrine are based on improper or inequitable conduct of a party in the litigation – not on conduct by an unrelated third party some twenty-five (25) years in the past. *See e.g. Id. at 74,* 698 S.E.2d at 247; *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011); *Ingram v. Kasey's Assoc.*, 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000).

ii. There is no False Representation Made During Permitting.

Carolina asserts that Chevron, who was seeking to obtain required permits for the Station,

made misrepresentations to the circuit court in their 1983 appeal. Said appeal involved the denial by Beaufort County of a request for a permit pursuant to prior approved plans under a vested rights theory and alternatively for a variance for a building setback and for a second curb cut onto Palmetto Bay Road. Even if the conduct of Chevron could somehow be attributed to Enmark, there is no showing of any illegal or unfair conduct by Chevron in 1983 or 1984. The Honorable Luke N. Brown, Jr. issued an Order on February 11, 1983, granting Chevron's appeal and requiring Beaufort County to issue a Development Permit allowing two separate entrances, or curb cuts, onto Palmetto Bay Road on two independent grounds. (Supplemental R. pp. 69-82). First, he held Chevron held vested rights under its prior 1973 and 1974 building permits and Beaufort County abused its discretion in denying said work. (Supplemental R. pp. 78;81). As an alternate ground, Judge Brown found that a variance should have been granted because the required elements (a unique hardship, no significant impact on adjoining owners, etc.) were met. (Supplemental R. pp. 78; 85-86).

Chevron ultimately constructed the Station with only one (1) entrance or curb cut onto Palmetto Bay Road. Shortly after the Station was opened on June 1, 1984, Chevron constructed the subject Roadway. (R. p. 929). Carolina asserts Chevron made the following three (3) false representations to the Court in 1983.

(a) No structure could be built within the adjoining power line easement.

Chevron's "representation" that no structure could be built within the adjoining power line easement related solely to the building setback variance sought by Chevron, not to its request for a second entrance to Palmetto Bay Road. The Palmetto Electric power line easement, which is on the property owned by Chevron (R. pp. 654-57; p. 716), clearly only prohibits the construction of vertical structures, but not roadways. (R. p. 726). Thus, there was no false representation to the

circuit court as to any possible roadway across said easement.

(b) Development was subject to Sea Pines Architectural Review Board approval.

The applicable Sea Pines restrictive covenants required Sea Pines Architectural Review Board ("ARB") approval for any "building, fence or other structure." (R. p. 733 § 1). This approval was obtained by Chevron for the Station building, pumps, and car wash on two different occasions. (Supplemental R. pp. 91; 122) No such approval was required for the Roadway because it is not a "building, fence or other structure." For the past thirty-three (33) years, the ARB has never initiated any action as to a violation of the covenants due to the construction of the Roadway in 1984. In fact, on September 20, 1993, nine (9) years after the Roadway was constructed, the ARB approved substantial changes to the Station's buildings, pumps, and signs – making no mention of any unapproved Roadway. (Supplemental R. pp. 166).

(c) The Market Place Shopping Center will not grant permission for a rear access.

The Market Place Shopping Center ("Market Place") is located behind the Station. (R. p. 535, lines 4-7). A representative of the Market Place confirmed in writing on July 3, 1981, that it would not grant access through its property for a rear access for the Station. (Supplemental R. p. 115). The fact the Market Place apparently changed its mind (or simply never objected) some three (3) years later, when the Roadway was built, is not evidence of any misrepresentation or improper activity by anyone years later in 1983 or 1984.

Thus, the Trial Court's conclusion there were no false representations is founded on reasonable supporting evidence.

iii. The Roadway's Construction was Not in Violation of Existing Regulations.

The Town was incorporated in 1983 shortly before Chevron opened the Station in 1984. (R. p. 579, lines 21-23; p. 929). At the time the Town was incorporated it adopted the Development Standards Ordinance ("DSO") used by Beaufort County. (R. p. 413, lines 19-3). Carolina never

put into evidence the DSO. Teri Lewis, the Town permitting official, testified she did not know if the DSO required a permit for the construction of the Roadway. (R. p. 582, lines 6-11). The only other evidence presented on this issue was testimony of Curtis Coltrane, Carolina's expert witness, who stated he felt the construction of the Roadway required a permit under the DSO. (R. p. 434, line 6-p. 438, line 4). However, Mr. Coltrane did not cite any specific provisions of the DSO that were violated, and the Trial Court correctly held under *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003) that Mr. Coltrane's testimony as to the issue of a violation of the DSO was inadmissible. (R. p. 400, line 19-p. 407, line 25). Carolina bore the burden of proof on this issue and failed to meet same.

The Town in 1987, adopted the Land Management Ordinance ("1998 LMO"). The Trial Court properly found that the Roadway was in existence almost three (3) years before the adoption of the LMO when the station opened in 1984. (R. p. 61 ¶44). After the Town adopted the LMO in 1987, no Town permit or approval was required for the continued existence of the original Roadway because it was a valid nonconforming use under § 16-10-201 of the 1998 LMO. (R. p. 1061). Section 16-7-103 of the 1998 LMO provides, "nonconformities shall be allowed to continue in accordance with the regulations of this Chapter." (R. p. 1046). A "nonconforming use" is defined in § 16-10-201 as follows:

> **Nonconforming Use:** Any legally established activity using land, buildings, or structures which was legally established, but 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.

(R. p. 1061).

Consequently, the Trial Court concluded the Roadway was constructed and paved in compliance with the applicable rules and regulations and was not the result of an "illegal" act. (R. p. 57-58).

iv. Carolina Failed to Prove That It Was Prejudiced by any Improper Actions.

The alleged misconduct of Chevron occurred well before Carolina purchased its property adjoining the Station for $1,500,000 on October 31, 1996. (R. pp. 708-13). Carolina's sole member is Kumar Viswanathan. Mr. Viswanathan was clearly aware of the existence of the Roadway prior to and at the time of Carolina's purchase. As a prospective purchaser, Mr. Viswanathan's attorney wrote the current owner's attorney regarding "an encroachment of a driveway" on June 15, 1994 – two and one-half (2½) years prior to Carolina's purchase. (R. p. 795). Said letter 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.

(R. p. 795).

The Roadway was paved, open, and obvious to all. In fact, it was listed as a specific title exception in Carolina's contract of sale and deed of conveyance and taken in consideration when establishing the purchase price. (R. pp. 712 ¶ D; p. 791¶ D; p. 719). Mr. Viswanathan had to pass this property daily to reach his home in Sea Pines Plantation. His office was nearby, and it is clear he would have seen the Roadway many times prior to his purchase. (R. pp. 303, lines 2-6). The Trial Court properly found his testimony that perhaps he did not walk behind the property or see the Roadway as part of his pre-purchase due diligence was not believable. S*ee Malpass v. Hodson*, 309 S.C. 397, 399-400, 424 S.E.2d 470, 472 (1992) (appellate court should give deference to the trial court's conclusions because it judged the credibility and candor of the witness firsthand). (R. p. 58 (referencing R. p. 303, line 10-p. 304, line 8)). The Trial Court's finding on this issue is further supported by the fact that Mr. Viswanathan completed extensive and detailed due diligence, including having third-parties inspect the interior of the property, noting numerous defects. (R. p. 787 §15). Regardless of how the Roadway came into existence,

Carolina knew of its existence and long-standing use and the purchase price it paid took this into consideration. There can be no resulting prejudice to Carolina by recognizing the continued existence of a Roadway that the Trial Court found to have been in existence since 1984. (R. p. 61 ¶44).

If "illegality" is a valid defense to a prescriptive easement claim, Carolina failed to provide reasonable supporting evidence of any such improper activity by Enmark, or any prejudice from said alleged activity.

B. No Violation of Local Ordinances.

Carolina asserts that the Trial Court should not have found a prescriptive easement existed since the Roadway violated local ordinances. The three (3) required elements for a prescriptive easement in South Carolina are well established. 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. *Simmons v. Berkley Elec. Coop., Inc.,* 404 S.C. 172, 182, 744 S.E.2d 580, 586 (Ct. App. (*reversed in part by Simmons v. Berkeley Elec. Coop., Inc.,* 419 S.C. 223, 797 S.E.2d 387 (2016) ("*Simmons* 2016").

Carolina has cited no case law for its position that a prescriptive easement must have been constructed lawfully. Assuming, *arguendo*, this factual determination is relevant, there was reasonable supporting evidence, that all work concerning the Roadway was lawful. As the Roadway was constructed and improved in various stages, each stage of work is discussed separately.

i. Original Construction of Road.

The original 1984 construction of the Roadway is discussed above in Part I(A)(iii), *supra.*

ii. The Original Paving of the Roadway Was Not a Violation of the Town LMO.

The Trial Court properly found that the Roadway was originally paved shortly after the

Station opened in 1984. (R. p. 61 ¶44). Ms. Means, the prior station tenant and subsequent owner, testified that the Roadway was paved with asphalt by Mr. Ballenger, her ex-husband, or others, prior to 1989. (R. p. 539, lines 11-22). The Court specifically found Ms. Means to be a very credible witness. (R. pp. 47-48; p. 54; p. 56). The asphalt paving of the Roadway in its current location was clearly in existence on November 1, 1989, as confirmed by the legend on the 1989 recorded plat, indicating that Roadway is comprised of "Asphalt Paving." (R. p. 719). While the memory of a witness may fade over time, this recorded plat clearly confirms the Roadway was paved with asphalt sometime prior to November 1, 1989. (R. p.7 19). The Town incorporated in 1983 and operated under Beaufort County's DSO until the Town enacted the 1998 LMO in January 1987. (R. p. 413, lines 17-13). No Town permit would have been required for the original paving because the paving most likely occurred prior to the Town's adoption of the 1998 LMO. The existing paved Roadway would have been deemed a lawful nonconformity under § 16-7-103 of the 1998 LMO. (R. p. 583, line 12-p. 584, line 15 (referencing R. pp. 1046)).

However, if in fact the Roadway was paved after the adoption of the 1998 LMO, the original paving was still in compliance with the 1998 LMO. The paving of an existing roadway does not constitute development requiring a permit under the 1998 LMO. Section 16-10-201 of the 1998 LMO defines the term development as follows:

> The use of a structure or land; or the construction, reconstruction or alteration of a structure; or an increase in land use intensity; or filling, excavating or dredging a parcel or intertidal or underwater land; or a change in effects or conditions of a site; or the alteration of a shore, bank or floodplain; or the construction or extension of a utility; or the subdivision of land.

§ 16-10-201. (R. p. 1053).

Many of the words used in the definition of development are defined terms under the 1998 LMO. For example, site is defined as "a lot or lots occupied or planned for occupation by a

structure or a set of structures and support improvements." *Id.* (R. p. 1065). Furthermore, structure is defined as

> Anything constructed, installed, or portable, the use of which requires a location on a ***parcel*** of ***land***. Structure includes a fixed or movable ***building*** which can be used for residential, business, commercial, agricultural, or office purposes, either temporarily or permanently. "Structure" also includes, but is not limited to, ***swimming pools***, tennis courts, ***signs***, cisterns, sewage treatment plants, sheds, fences and ***gates***, docks, mooring areas, and similar accessory ***construction***.

Id. (R. p.1066).

It is clear that the 1998 LMO definition of development is plain and unambiguous, thus the Court must construe the terms of the statute as written. *Fullbright v. Spinnaker Resorts, Inc.* 420 S.C. 265, 272, 802 S.E.2d 794, 797 (2017) (quoting *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 439, 581 S.E.2d 836, 838 (2003)). A careful reading of the definition of development, after considering the definitions of construction, site, and structure, reveals the simple action of paving an existing roadway does not constitute development requiring a permit. This conclusion was confirmed by the testimony Ms. Lewis, the Town LMO Official, when she stated that no permit is required to repave an existing roadway. (R. p. 585, line 3-p. 586, line 18). Therefore, the original paving of the Roadway was not a violation of the Town LMO, whether it was paved before or after the adoption of the 1998 LMO in 1987.

iii. The Subsequent Re-Paving of the Roadway Was Not a Violation of the Town LMO.

In 1994, after Ms. Means, through her company, ASA, acquired the Station, she re-paved the Roadway with asphalt, re-installing and repairing the two speed bumps. (R. p. 540, lines 14-16). This is confirmed not only by the credible testimony of Ms. Means and her son-in-law, Mr. Middleton, but also by the ASA Depreciation Schedule showing new paving in 1994. (R. pp. 874-78). Again, the Trial Court found Ms. Means to be a very credible witness. S*ee Malpass v. Hodson*, 309 S.C. 397, 399-400, 424 S.E.2d 470, 472 (1992) (appellate court should give deference

to the trial court's conclusions because it judged the credibility and candor of the witness firsthand). (R. pp. 47-48; p. 54; p. 56). Photographic evidence introduced at trial clearly shows two layers of asphalt paving. (R. pp. 777; p. 779). Various witnesses, including Ms. Lewis, the Town LMO Official; Timothy M. Drake, the expert landscaper hired by Carolina; Curtis L. Coltrane, Carolina's expert witness on the LMO; Mr. Viswanathan, owner of Carolina; and Ms. Means all confirm there are two (2) layers of asphalt on the Roadway. (R. p. 582, lines 24-2 (Lewis); p. 387, line 6-p. 388, line 9 (Drake); p. 452, lines 9-12 (Coltrane); p. 338, lines 13-16 (Viswanathan); p. 558, lines 7-18 (Means)). The two layers of asphalt are consistent with the original paving of the Roadway occurring prior to 1989 and the subsequent repaving by Ms. Means in 1994. As the Trial Court stated, it is logical Ms. Means would have waited until she acquired ownership of the Station before spending money on substantial improvements, such as repaving the Roadway. (R. p. 48-49).

As discussed above, under § 16-1-105 of the 1998 LMO, it is clear that the simple act of paving an existing Roadway does not constitute development requiring a permit. (R. p. 1037-38). Ms. Lewis, the Town LMO Official, clearly stated that no permit is required to repave an existing roadway. (R. p. 585, line 3-p.586, line 18).

Alternatively, the 1998 LMO provisions dealing with an existing nonconformity confirm the repaving was in compliance with the LMO. As discussed above, the original Roadway was constructed in 1984 prior to the adoption of the LMO. When the LMO was adopted in 1987, the Roadway was considered a valid non-conforming use under § 16-10-201 of the 1998 LMO. (R. p. 1061). Section 16-7-103 of the 1998 LMO clearly provided that all "nonconformities shall be allowed to continue in accordance with the regulations of this Chapter." (R. p. 1046). Section 16-7-106(B) of the 1998 LMO 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. (R. p. 1046). Testimony from Ms. Means confirmed that the repaving and speed bumps on the Roadway were in the same location as the prior existing paved Roadway. (R. p. 539, line 21-p. 540, line 25). Therefore, the subsequent repaving of the Roadway was not a violation of the Town 1998 LMO, and Ms. Lewis had the ability or right to exercise her discretion to waive any setback provisions for the repaving.

There is no requirement in South Carolina that a prescriptive easement be constructed legally. In addition, there is reasonable supporting evidence said Roadway was constructed illegally or in violation of local ordinances. The Trial Court's Order on these issues should be affirmed.

C. There was no Final Decision by an LMO Official to Remove the Roadway Pursuant to the August 8, 2013 Lewis Letter.

Carolina asserts Enmark is bound by an August 8, 2013 decision of Ms. Lewis to remove the Roadway because it was a "final decision" under the LMO. (R. p. 853). The Town asserts it rescinded and revised said decision and did not require the removal of the Roadway.

The 1998 LMO clearly provides that the LMO Official has the decision-making authority regarding the administration, interpretation, and enforcement of the LMO. § 16-2-101 and § 16-2-102 (R. p. 1046). Since 2008, the Town's LMO Official has been Ms. Teri Lewis. (R. p. 579, lines 9-20). On August 8, 2013, Ms. Lewis, in her capacity as the LMO Official, issued a letter to Carolina regarding the Roadway. (R. p. 853). By Ms. Lewis' own admission, this was not a final determination under the 1998 LMO. (R. p. 602, lines 13-19). Ms. Lewis testified that she issued her August 8, 2013 letter based entirely on information she received from Carolina's counsel. (R. p. 591, lines 16-19). After issuing said letter she received additional information from Enmark's counsel and consulted with the Town attorney, Gregg Alford. (R. p. 591, line 20-p. 592, line 25;

R. p. 595, lines 4-16). Ms. Lewis then authorized the Town attorney to revise and correct the Town's position as to the Roadway. (R. p. 595, line 4-p. 596, line 21). Mr. Alford thereafter issued letters on January 16, 2014 (R. p. 860-61), and February 4, 2014 (R. p. 860-61). Specifically, the Town determined in its discretion that the Roadway was a "legal nonconformity" under § 16-10-201 of the 1998 LMO and it was taking no action as to the Roadway. (R. p. 860-61).

Ms. Lewis further testified she routinely consults with legal counsel (either the Town's in-house counsel or outside counsel) when attorneys representing property owner's contract her office regarding LMO issues. (R. p. 594, line 20-p. 595, line 16). Carolina takes the extraordinary position that the LMO Official cannot rescind or revise decisions she makes – regardless if the LMO Official subsequently determines they were issued in error. This is true even, as in this case, when she consulted with the Town attorney, further investigated the facts and the law, and realized an error was made and decided to change her position. Such a position is simply nonsensical.

A second reason the August 8, 2013 letter from Ms. Lewis is not a final decision binding Enmark is the simple fact that the letter was not directed to Enmark and was never even sent by the Town to Enmark. (R. p. 602, lines 13-19; p. 628, line 21-p. 630, line 19). Under § 16-8-103 of the 1998 LMO, upon determination of a violation, the Town "shall notify in writing the person responsible for such violations." (R. p. 1081). It is this notice that triggers the obligation to appeal within fourteen (14) days of notice of the decision under § 16-3-2002 of the 1998 LMO. (R. p. 1043). Obviously, Enmark could not timely appeal said decision if notice of the decision was not sent or directed to it.

The August 8, 2013 letter is thus not a final LMO determination binding on Enmark because it was rescinded and was never properly sent or directed Enmark by the Town. It is

irrelevant if Enmark received the August 13, 2013 letter by other means because § 16-3-2002 of the 1998 LMO sets forth the exclusive method of service.

In its brief asserting there was a final determination by the Town with no appeal by Enmark, Carolina argues Enmark's counsel provided "false and fraudulent information" to the Town in relation to the August 26, 2013 e-mail sent to the Town by Enmark's counsel. (Referencing R. pp. 854-56).. While this assertion appears irrelevant to the determination of the final decision issue, Enmark addresses same below.

Enmark's counsel wrote the Town attorney on August 26, 2013, in response to Carolina's request that the Town close the Roadway. (Referencing R. pp. 854-56). Enmark's counsel advised the Town of the respective claims of the parties to be determined in a declaratory judgment by the Court, stating "his client believes" that the Roadway was built prior to 1974 as evidenced by an attached plat recorded in Plat Book 38 P 53, dated February 11, 1974. (R. p. 854). Upon obtaining a more legible copy of the admittingly hard to read document, the correct date of the plat of November 1, 1989 was determined. (R. p. 719). At a meeting on May 8, 2014, with representatives of Carolina, Enmark, and the Town, the correct date was confirmed and discussed by all parties. (R. pp. 956-57). The Town did not thereafter change its position that it would not require the removal of the Roadway. (R. p. 602, line 13-p.603, line 21). Thus, the error in providing the date of a recorded document was not a factor in the Town's action in this case.

In addition, the Town, Carolina, or any other party, could have easily confirmed the date of the plat because it is part of the public record, but failed to do so. The error by Enmark's counsel was ultimately corrected prior to the Town's January 16, 2014 and February 4, 2014 letters. The issue with the date of the plat is nothing more than a red herring.

D. <u>There is No Requirement a Prescriptive Easement Must Connect to a Public Roadway.</u>

The Trial Court properly ruled that Carolina's claim that a prescriptive easement must

connect to a public road is without merit. There is simply no requirement under South Carolina law that a prescriptive easement must terminate at a public road. Carolina has cited no legal authority for its position. Whether users of the Roadway traverse property owned by parties who are not a party to this action does not impact the Trial Court's authority to determine the relative rights in the Roadway between the parties before this Court. The Trial Court's order and any order issued by this Court will not be binding on other property owners who are not parties to this case.

In addition, Carolina instituted this case and could have named any adjoining property owners in its original Complaint, or the subsequent amendment. However, Carolina as the master of its own litigation, failed to name any additional parties. It also never filed any motion to require Enmark to bring in said parties.

E. Enmark Met the Requirement of Adverse Use.

The party claiming a prescriptive easement has the burden of proving all the elements of a prescriptive easement by clear and convincing evidence, including that the use and enjoyment of the property was adverse. *Simmons v. Berkley Elec. Coop., Inc.*, 404 S.C. 172, 182, 744 S.E.2d 580, 586 (Ct. App. 2013) (*rev'd in part, Simmons* 2016); *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 170 (2015). Prior to *Simmons* 2016, the adverse element could be met by a showing under a claim of right. However, *Simmons* 2016 held a claim of right is no longer available to a party claiming a prescriptive easement. *Simmons* 2016 at 232, 744 S.E.2d at 392.

South Carolina law provides that when the claimant has established its use of the property in question 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 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 property adversely may be inferred by the acts and conduct of the

dominant user. *Kelley v. Snyder*, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct. App. 2012).

i. Enmark and the Prior Station Owners' Use of the Roadway was Open, Notorious, Continuous, and Uninterrupted for Over Twenty Years.

The Trial Court properly concluded that Enmark 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 and thus, its use was presumed to be adverse.

A party may tack the period of use of prior owners to reach the twenty (20) year requirement. *Id.* This ability includes not only use by ancestors and heirs, but between parties in privity. *Id.* Thus, Enmark can thus lawfully tack the use of the two prior owners in the chain of title, ASA, and Chevron, to prove approximately thirty-two (32) years of continued use of the Roadway.

The Station was constructed by Chevron and opened for business on Palmetto Bay Road on June 1, 1984, the date Beaufort County issued its Certificate of Occupancy. (R. p. 929). As testified to by Ms. Means, the Roadway was in existence and used by patrons of the Station and others soon thereafter. (R. p. 534, line 24-p. 535, line 3; p. 539, lines 2-4). The Roadway provided easy access to a Winn-Dixie, located to the southwest of the Station, as well as to adjoining shops and roadways. (R. p. 535, lines 8-15). Soon after opening, Chevron leased the Station to Mr. Ron Ballenger, then married to Ms. Alice Means, starting in 1985. (R. p. 535, line 23- p. 536, line 11). Ms. Means took over the lease in 1989 and bought the Station in 1993 through her company, ASA. (R. pp. 661-67). Mr. Ballenger (Ms. Means' former husband), Ms. Means, or her company, ASA, have used, operated, or owned the Station for twenty-five (25) consecutive years (1984-2009). Ms. Means, an independent witness, testified at length that the Roadway during these twenty-five (25) years was in use and existence in the same location as the Roadway marked on Exhibit 74. (R. p. 557, lines 2-18). Ms. Means stated at all times she consistently asserted her rights to use the

Roadway during her entire involvement with the Station, from 1989 through her sale to Enmark on March 19, 2009. (R. p. 551, line 13-p. 552, line 14; p. 570, line 19-p. 571, line 14). She also testified as to its use starting in 1984. (R. p. 552, lines 15-18). The Trial Court found Ms. Means a very credible witness. *See Malpass v. Hodson*, 309 S.C. 397, 399-400, 424 S.E.2d 470, 472 (1992) (appellate court should give deference to the trial court's conclusions because it judged the credibility and candor of the witness firsthand). (R. pp. 47-48; p. 54; p. 56).

Ms. Means' testimony as to the existence and use of the Roadway is further confirmed by various aerial photographs and recorded plats. Aerial photographs taken in 1986 show car tracks leading to the Roadway from the car wash, as confirmed by Ms. Means. (R. p. 537, lines 9-20 (referencing R. pp. 757-58, 1094)). Additional aerial photographs taken in 1998 (R. p. 759), 1995 (R. p. 760-61), 2002 (R. p. 763), 2012 (R. p. 767), and 2013 (R. p. 768) are also consistent with the location and usage of the Roadway. Of even more importance is a November 1, 1989 as-built survey of the property and improvements identified as the Sea Pines Welcome Center, now owned by Carolina, and recorded in Plat Book 38 at Page 53, showing the Roadway ("1989 Plat"). (R. p. 719). The legend of 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, paved the Roadway with asphalt prior to 1989. (R. p. 539, lines 11-22).

Mr. Scott Middleton, Ms. Means' son-in-law, further supports the long-standing use of the Roadway. Mr. Middleton took over the day-to-day operations of the Station starting in 2000. (R. p. 967, lines 7-20). On regular visits to Hilton Head from 1995 to 2000, he confirmed the Roadway was in continuous use and existence in the same location it is today. (R. p. 993, line 9-p. 994, line 2). He also testified that Mr. Ballenger, while he leased the Station from 1985 to 1989, made repairs to the Roadway with Quickcrete. (R. p. 995, lines 6-25). Mr. Middleton confirms the

Roadway was openly used by customers of the Station and the public to access the Station, and adjoining businesses and roadways. (R. p. 993, line 25-p. 994, line 2).

The existence of a drainage catch basin in the middle of the Roadway, further evidences the long-standing existence of the Roadway in its present location. (R. pp. 769-76; pp. 807-15; pp. 816-23). Mr. Viswanathan testified that he did not construct the drainage catch basin and thus it was in existence prior to Carolina's acquisition of the Welcome Center on October 31, 1996. (R. p. 320, lines 6-23 (referencing R. pp. 708-13)).

After Enmark purchased the property on March 19, 2009 (R. p. 670-72), the Roadway continued to be used by the patrons of the Station and by members of the public in the same location as it existed since 1984. (R. p. 642, lines 6-16; p. 644, lines 3-7). This was confirmed by the testimony of Ms. Means, Mr. Middleton, and Robert H. Demere III. (R. p. 557, lines 2-18 (Means); p. 993, line 25-p.994. line 2 (Middleton); p. 640, line 23-p .642, line 25 (Demere)).

Accordingly, Enmark 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 Trial Court properly presumed its use to be adverse. (R. p. 55). The Trial Court's findings on these issues are based on reasonable supporting evidence. Therefore, the burden shifts to Carolina to rebut this presumption. *Sanitary*, 205 S.C. 198, 31 S.E.2d at 255. As discussed below, Enmark failed to meet its burden to rebut this presumption.

ii. Carolina Never Granted Permission to Enmark to Use the Roadway.

Carolina asserts it provided permission to various owners in the Station's chain of title, thus defeating any claim of adverse use. The Trial Court, listening to the witnesses and judging their credibility first hand, found no such permission was ever granted. Mr. Viswanathan, principal of Carolina, testified he gave oral permission to ASA and Ms. Means to use the Roadway. (R. p. 325, line 9-p. 325, line 25). However, as found by the Trial Court, this testimony is not credible

for numerous reasons. *See Malpass v. Hodson*, 309 S.C. 397, 399-400, 424 S.E.2d 470, 472 (1992) (appellate court should give deference to the trial court's conclusions because it judged the credibility and candor of the witness firsthand).

Mr. Viswanathan's testimony is in direct contrast with the testimony of Ms. Means and Mr. Middleton, who are both independent, credible witnesses. Ms. Means testified that she never obtained consent from anyone to use the Roadway because she believed she always had a right to use same. (R. p. 551, line 13-p. 552, line 14; p. 570, line 19-p. 571, line 14). Mr. Middleton also testified that he never requested or received permission from Carolina, through March 2009. (R. p. 981, lines 6-8). Mr. Demere, with Enmark, also testified Enmark was never granted permission to use the Roadway, nor does it seek permission. (R. p. 641, line 2-p. 642, line 25).

Mr. Viswanathan holds an undergraduate degree in engineering, a graduate degree in civil engineering, and an MBA from Purdue University. (R. p. 235, line 23-p. 236, line 3). He is an experienced property developer and customarily and consistently documented in writing all important matters. (R. p. 236, line 14-p. 237, line 5; p. 301, line 8-p. 302, line 8; p. 316, line 6-p. 317, line 19). Carolina did not produce a single document confirming or referencing any grant of permission to use the Roadway, although there are many documents sent by Ms. Viswanathan and his attorneys from June 15, 1994, through October 29, 2012, concerning the Roadway – a period of over eighteen (18) years. (*See e.g.* R. pp. 795-96; pp. 847-50).

On February 8, 2008, Mr. Viswanathan testified that he sent to Mr. Middleton and ASA, a proposed Easement Agreement concerning the relocation and modification of the Roadway, under a plan that involved extensive engineering, permitting, and construction of a new curb cut and driveway on the Station property. (R. p. 323, line 1-p. 324, line 11 (referencing R. p. 816-23)). Carolina offered to pay one hundred (100%) percent of the costs of relocating the Roadway. (R.

p. 322, lines 21-2 (referencing R. pp. 816-23)). If Carolina believed the Station owner held no valid legal rights to the Roadway, or was using same by permission only, it does not seem logical that to make an offer to pay all costs of the work. The Court also noted that the Roadway was a listed title exception in Carolina's October 1996 deed to this property and its Contract of Sale when it purchased the property, thus further evidence Carolina was well aware no permission was needed. (R. pp. 708-13; pp. 784-94).

There is substantial reasonable supporting evidence that Carolina never granted permission to Enmark or any of the other prior owners to use the Roadway. Enmark and the prior owners' use of the Roadway was thus adverse for over twenty years.

F. Enmark Met the Requirements of Twenty (20) Years of Continuous Use.

Carolina argues that it took multiple actions to stop or interrupt the continuous usage of the Roadway. As found by the Trial Court, the evidence does not support such a conclusion.

In South Carolina, no case has clearly held mere verbal threats are sufficient to interrupt the continuous use period for a prescriptive easement. In fact, there is no case anywhere in the United States which has held mere verbal threats or a demand letter was sufficient to interrupt the requisite time period of continuous use. South Carolina's standard for an interruption of the continuous use period can be found in its embrace of the opinion of Justice Oliver Wendell Holmes Jr., who stated "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." *Pittman v. Lowther*, 363 S.C. 47, 51, 610 S.E.2d 479, 481 (2005) (quoting *Garrett v. Mueller*, 144 Or. App. 330, 927 P.2d 612 (1996) (quoting *Brayden v. New York, N.H. & H.R. Co.*, 51 N.E. 1081, 1081-82 (Mass. 1898)).

In *Garrett*, cited as the basis for South Carolina's standard in *Pittman*, the plaintiff undertook numerous overt acts that would have given rise to a cause of action by the easement

claimant. These actions included installing locked gates and personally confronting the claimant, asserting he was trespassing. No such activity took place in this case.

The South Carolina Supreme Court in *Pittman* heavily relied on the servient landowner repeatedly contacting the local police, planting the roadway with crops, and installing poles and cable to physically block the road. *Pittman* at 52, 610 S.E.2d at 482. The Court summarized as follows the action undertaken to interrupt the required twenty (20) year period:

> 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. As in *Garrett*, the court in *Pittman* relied on substantive physical and overt actions that would serve as a basis for the easement holder to pursue legal action. *Id.* A review of the actions of Carolina did not meet this required threshold under these authorities.

i. Placement of Trash Dumpster by Third Party.

Carolina argues that the placement of a trash dumpster near the southeastern terminus of the Roadway constitutes an interruption of continuous use because it materially changed the location of the Roadway. The aerial photographs appear to show the existence of a trash dumpster sometime between 1988 (R. p. 759) and 1995 (R. p. 760-61). However, the placement of this single dumpster did not have a material impact on the use of the Roadway, as evidenced by more recent photographs and surveys all showing the Roadway adjoining the dumpster. (R. p. 765 (2009); p. 766 (2011); p. 767 (2012); p. 768 (2013); p. 772 (2016). As the Trial Court properly concluded, there is no credible evidence that the placement of this dumpster was intended to close or materially alter the Roadway. (R. p. 55). No one associated with the placement of the dumpster

testified at trial. Thus, the placement of the dumpster fails to qualify as a clear, unequivocal action by the servient owner, or anyone else, to stop usage of the Roadway as required. *See Pittman*, 363 S.C. 47 at 52, 610 S.E.2d at 481-82.

(a) Actions by Carolina to Interrupt Use Not Sufficient.

Carolina relies on three (3) letters sent by its counsel to meet the standard in *Pittman* to interrupt the continuous use requirement. As found by the Trial Court, the first two (2) of these letters by themselves are not sufficient. (R. p. 51-52).

The June 15, 1994 letter to ASA's counsel, John L. Wilkins, written on behalf of Mr. Viswanathan when he was just a perspective purchaser, was written two and one-half (2 ½) years before Carolina acquired the property on October 31, 1966. (R. p. 795-96). *Pittman* requires some action on the part of the owner of the servient estate, not by a potential purchaser. Some fourteen (14) years later, on September 15, 2008, Robert J. Arundell, then counsel for Carolina, wrote to Mr. Wilkins as to the Roadway. (R. p. 828). The continuous usage of the Roadway had already ripened into a prescriptive easement because it had been used since 1984 – twenty-four (24) years. Any effort in 2008 to interrupt said usage was simply too late. In addition, Carolina took no other action of any kind to assert its claimed ownership rights other than writing this letter. Under said circumstances, ASA could not have proceeded to Court to challenge said position, because it is clear the parties were still in discussions as to the use of the Roadway.

Enmark would concede that the third letter from Carolina's counsel, dated October 29, 2012, in unequivocal terms set forth Carolina's intention to close the Roadway. (R. p. 847-50). However, by this late date, the Roadway had been in continuous use for over twenty-eight (28) years (1984–2012). The rights to a prescriptive easement held by Enmark were clearly established.

The Trial Court's finding the twenty (20) years of continuous use had been met is consistent

with reasonable supporting evidence.

G. Occasional Use of the Roadway by the Public is not a Bar to a Prescriptive Easement.

Carolina asserts that because members of the public on occasion also used the Roadway, Enmark's prescriptive easement claim should fail. This position is without merit for two reasons.

First, Carolina never made this argument at trial. It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *Creech v. South Carolina Wildlife and Marine Resources Dep't.* 328 S.C. 24, 491 S.E.2d 571 (1997). At no time in its pre-trial, or in its two (2) very extensive post-trial briefs, did Carolina ever take the position that use by the Station owners was no different than that of the public, or that exclusive use was required for a prescriptive easement claim. This new issue, never presented to the Trial Court, cannot be asserted for the first time on appeal.

Even if the issue were available on appeal, it has no legal basis. A thorough review of the extensive law of a prescriptive easement in our State finds there is no requirement of exclusivity of use to establish a prescriptive easement. *Kelley v. Snyder*, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (2012) (citing *Jones v. Daley*, 363 S.C. 319, 317, 609 S.E.2d 597, 600 (Ct. App. 2005)). By the very nature of easements, requiring that a party's use be truly exclusive to establish a prescriptive easement would render it impossible to establish an easement. *Jones*, 363 at 317, 609 S.E.3d at 600. Thus, the fact that Enmark, and its predecessors-in-title, allowed members of the public to traverse or cut through its property over the Roadway does not prevent its prescriptive easement.

Exclusivity of use has been discussed only in claim of right prescriptive easement cases. *See Bundy v. Shirley*, 412 S.C. 292, 310, 772 S.E.2d 163, 173 (2015); *Cleland v. Westvaco Corp.*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993);1993); *Nelums v. Cousins*, 304 S.C. 306, 403 S.E.2d

681 (Ct. App. 1991). However, a party can no longer obtain a prescriptive easement under a claim of right. *Simmons* 2016 at 232, 744 S.E.2d at 392. When the issue of public use was discussed in prior cases, exclusivity of use has been interpreted narrowly as merely the requirement that a party's claim be asserted independently of other users. *Nelums*, 304 S.C. at 308, 403 S.E.2d at 682.

The *Bundy* court ruled the plaintiff was not entitled to a prescriptive easement by claim of right because his use of the property as hunting land was the same as that of the general public. *Bundy* at 310-11, 772 S.E.2d at 173. In reaching this conclusion, the *Bundy* court relied on the holding of the *Cleland* court, which denied the plaintiff a prescriptive easement by claim of right to a roadway used by members of the public to access a river because the plaintiff failed to show that his use of the roadway to access the river was exclusive and different from the rights of the general public. *Id.* (citing *Cleland* at 511, 431 S.E.2d at 266). In so holding, the *Cleland* court cited *Nelums v. Cousins*. *Cleland* at 511, 431 S.E.2d at 266. The *Nelums* court granted the plaintiff a prescriptive easement, regardless of the fact that others have used the road in question, because the plaintiff's claim was asserted independently of any use by other individuals. *Nelums*, 304 S.C. at 308, 403 S.E.2d at 682. In reaching this conclusion, the *Nelums* court relied on *Petus v. Keeling*, 232 Va. 483, 352 S.E.2d 321 (1987), which affirmed the finding of a prescriptive easement even though evidence was presented that general members of the public used the road to travel because the plaintiff's right to get to his property was asserted independently of other users. *Id.* at 486, 352 S.E.2d at 324.

Here, Enmark has asserted its right to the Roadway independently of any other users, including some members of the general public. Similar to the plaintiffs in both *Nelums* and *Petus*, Enmark, and its patrons, use the Roadway to provide access to its property. This is a separate and distinct claim from that of the general members of the public. Thus, even if this issue was available

to Carolina on appeal, the requirement would not prevent Enmark's prescriptive easement.

II. THE TRIAL COURT PROPERLY RULED THAT A WRIT OF MANDAMUS WAS NOT APPROPRIATE AGAINST THE TOWN.

The Trial Court properly denied Carolina's request for a mandamus requiring the Town to find the construction of the Roadway in 1984, as subsequently repaved, was a violation of the 1998 LMO **and** thus necessitated its mandatory removal. (R. p. 66). A "mandamus is the highest judicial writ and is issued only where 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 not applicable as to discretionary acts of a governmental official, but only as to an official performing a mandatory legal duty that is ministerial in nature. *Id.* at 200, 563 S.E.2d at 102; *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). If a party has another adequate remedy or a party has not exhausted its administrative remedies, a writ of mandamus will not be granted. *In Re* Tyson, 282 S.C. 212, 318 S.E.2d 279 (1984); *Bradley v. State Human Affairs Comm'n*, 293 S.C. 376, 380, 360 S.E.2d 537, 539 (1927).

As discussed below, the Trial Court properly ruled that Carolina failed to meet any of the requirements for a writ of mandamus to be issued. (R. p. 59; p, 66).

A. Any Violation of the LMO is Doubtful and Uncertain.

Ms. Lewis, the LMO official, candidly admitted that she never made a final determination that the Roadway violated the LMO, because she could not determine if the construction activities related to the Roadway were in violation of the LMO. (R. p. 604, line 19-p. 605, line 5). For this reason alone, the drastic remedy of Mandamus is not appropriate. Moreover, as discussed in Parts I(A)(iii) & I(B), *supra*, whether any aspect of the Roadway's initial construction in 1984 and its two subsequent re-pavings violated any Town regulations is at best an extremely doubtful and

uncertain determination. When the legal rights sought to be enforced under a mandamus are doubtful mandamus is not available. *City of Rock Hill v. Thompson*, at 199, 563 S.E.2d at 102 ; *In the Interest of Lyde,* at 421, 327 S.E.2d at 71. It is hard to imagine a factual scenario spanning thirty-three (33) years with more doubt than this matter. (R. p. 60-62). Under these circumstances, the remedy of mandamus is not available.

B. Even If There Was a Clear and Definite Violation of the LMO, The Appropriate Remedy by The Town Is Discretionary.

Even if this Court finds, *arguendo*, there is a clear and absolute violation of the 1998 LMO as to any aspect of the Roadway construction, the Court cannot usurp the Town's clear discretion as to 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. Ms. Lewis testified as to the eight (8) possible remedies available to her for an LMO violation. (R. p. 597, lines 10-2). This selection of options includes a small fine, abatement or reduction of the violation, removal of the violation, or virtually any other type of action. (R. p. 597, lines 10-18). In addition to these options, due to recent changes in the LMO, Ms. Lewis testified that Enmark could also be entitled to an after-the-fact permit so the Roadway could lawfully remain in place. (R. p. 623, line 11-p. 624, line 11).

When asked about the appropriate remedy for an LMO violation, Ms. Lewis testified that she must use her discretion, deciding the remedy for each violation on a case-by-case basis. (R. p. 597, lines 10-2). Factors Ms. Lewis would consider in this instance include: (a) the Roadway has been in existence for over thirty (30) years (R. p. 597, line 3-p. 598, line 15); (b) Ms. Means or her contractor appeared to have contacted the Town as to permitting when it was repaved in 1994 (R. p. 544, line 14-p. 545, line 18); (c) the current owner, Enmark, was not involved in any aspect of disputed work on the Roadway (R. p. 599, lines 24-8); (d) the Town inspected the Station at least twelve (12) times over the years and never raised an issue as to the Roadway (R. p. 547,

line 17-p. 550, line 11 (referencing R. pp. 953-54)); (e) the severity of the violation (R. p. 599, line 9- p. 560, line 20); and (f) Means, ASA, or Enmark have not had any prior permitting issues with the Town (R. p. 599, lines 16-23).

It is clear that Ms. Lewis, as the Town LMO official, has extremely broad discretion to determine what remedy is appropriate in the event this Court was to find any aspect of the Roadway construction was in violation of the 1998 LMO. Respectfully, this Court cannot override the Town's discretion as to the appropriate remedy for an LMO violation under a writ of mandamus. *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. Further, this Court must give deference to the Town LMO official's knowledge and experience to issue the appropriate LMO remedy under these complicated facts. *See Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 505, 443 S.E.2d 401, 405 (Ct. App. 1994).

The Trial Court properly found that Carolina failed to meet any of the requirements for a writ of mandamus. Any violation is doubtful and uncertain, and any remedy for a violation is purely discretionary with the Town.

III. THE TRIAL COURT PROPERLY RULED THAT CAROLINA FAILED TO PROVE ITS CAUSE OF ACTION FOR SLANDER OF TITLE.

The Trial Court properly denied Carolina's slander of title claim. (R. p. 67-71). Carolina has proven virtually none of the required elements as to Enmark. The elements of this cause of action are well established. "[T]o maintain a claim for slander of title, a 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 86, 891 (Ct. App. 1995). As noted by the Trial Court, virtually all such claims result from a defendant recording a lien, deed, mortgage, or some other adverse claim of title at the courthouse. (R. p. 67). No such action is

present in this case. Here, Carolina asserts that five actions of Enmark's predecessors in interest and one action by Enmark's counsel constitute a slander of title. However, none of these actions meet the six necessary elements of slander of title, and the Trial Court properly dismissed this claim with prejudice.

A. No Publication to a Third Party of a False Statement Derogatory to Carolina's Title Was Made by Enmark.

Carolina fails to assert that Enmark published a false statement to a third party. Instead, it focuses on alleged misrepresentations in the 1984 permitting of the Chevron Station, a failure to obtain approval from the Sea Pines ARB to construct the Roadway, and similar actions directly related to the original permitting and construction of the Chevron Station and Roadway. None of these actions were conducted by Enmark. Furthermore, none of these actions constitute false statements that are derogatory to Carolina's title. As discussed in Part I(A)(ii), *supra*, there were no false statements made.

The one action directly related to Enmark is the August 26, 2013 e-mail by Enmark's counsel (Referencing R. pp. 854-56)., discussed in Part I(C), *supra*. The error as to the date of the recorded plat cannot support a slander of title claim. 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). Further, 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 Nat'l Bank*, 350 S.C. 339, 565 S.E.2d 309 (2002); *Schnellmann v. Roettger*, 368 S.C. 17, 627 S.E.2d 142 (2007). The Town, Carolina, or any other party, could have easily confirmed the date of the plat but failed to do so. Further, in Part I(C), *supra*, the evidence is clear from the testimony of Ms. Lewis 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. (R. p. 602, line 13-p. 603, line 20). Thus, the e-mail contains no false statement that is derogatory to Plaintiff's title.

B. Enmark Did Not Act with Malice.

"Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights." *Constant v. Spartanburg Steal Prods., Inc.,* 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994).

Based on a review of the documents and evidence presented at trial, there is simply no evidence that Enmark ever acted maliciously in this matter. It filed no documents at the courthouse claiming title and even entered into a Tolling Agreement on July 24, 2013 (R. pp. 851-52), directing that the parties seek a declaratory judgment by the court to resolve this dispute. The erroneous date referenced by Enmark's counsel to a recorded plat 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. (R. pp. 956-57). Finally, the evidence at trial showed the Roadway has been in use and existence since 1984 – well over 32 years. Enmark did not act with malice in asserting its rights over the Roadway with such a long-standing use in the same location

C. Carolina's Property Value Was Not Diminished in the Eyes of Third Parties.

In addition to the above, the August 26, 2013 e-mail by Enmark's counsel (Referencing R. pp. 854-56). did not cause Carolina to experience any damages – special or otherwise. The Roadway was in existence and taken into consideration in the purchase price paid by Carolina to acquire its property. (R. pp. 708-713). Further, after an extensive face-to-face meeting with Enmark's counsel, Carolina's legal counsel, Chester Williams, and the Town, where the correct date of PB 38 P 53, was discussed, the Town did not change its position regarding the alleged 1998 LMO violation. (R. p. 602, line 13-p. 603, line 25 (referencing(R. pp. 956-57).

Carolina's claimed damages associated with removing and restoring the Roadway, its

rental value, and damage to its property due to an auto accident are simply not damages recoverable by law under a slander of title action. *Huff at* 150-51, 459 S.E.2d at 892. Special damages recoverable in a slander of title action are the pecuniary losses that result "directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and the expense of measures reasonably necessary to counteract the publication, including litigation." *Id.* The damages claimed by Carolina have nothing to do with the disputed August 26, 2013 e-mail. In addition, Carolina has no obligation to remove the encroachment and restore the property to a vegetative state, because, as discussed in Part I(C), *supra*, the Town has taken the position that there is no LMO violation. Further, Carolina is not entitled to any rental income because there is no evidence the Roadway property under a power line could be rented. Finally, Enmark is also not responsible for any damages to Carolina's dumpster caused by the independent acts of a third party in a motor vehicle accident that occurred near the Roadway on May 18, 2016. As recognized by all parties, this motor vehicle accident did not occur on the Roadway, but on Palmetto Bay Road. (R. p. 341, line 9-p. 342, line 25).

D. Carolina Is Not Entitled to Recover Attorney's Fees.

Carolina is not entitled to recover any attorney's fees as a form of special damages. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S. C. 192, 723 S.E. 2d 597 (Ct. App. 2012). As noted by the Trial Court, Carolina did not specifically include in its original Complaint or First Amended Complaint a request for attorney's fees under any cause of action. (R. p. 71). Under long-standing South Carolina law, special damages not properly plead are not recoverable. *SCRCP* Rule 9(g); *AJG Holdings, LLC v. Dunn*, 392 S.C. 160, 168, 708 S.E.2d 218, 223 (Ct. App. 2011). Thus, the Trial Court properly excluded all testimony as to attorney's fees and costs and ruled that Carolina was not entitled to same. (R. p. 71).

IV. THE TRIAL COURT PROPERLY RULED THAT CAROLINA FAILED TO PROVE ITS CAUSE OF ACTION FOR NUISANCE.

A nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property. *Ravan v. Greenville County*, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct. App. 1993). It is anything which hurts, inconveniences, damages, or 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).

As discussed in Part I, *supra*, the Trial Court properly ruled that Enmark holds a prescriptive easement over the Roadway and thus, no nuisance claim can exist. The evidence at trial was clear that from its purchase of the Station in 2009 to the present, Enmark simply continued the use of the Roadway in the same manner it has been used since 1984. Enmark took no action to unreasonably interfere with Carolina's rights to the Roadway Carolina clearly knew was in existence when it purchased its property in 1996. No nuisance claim is viable under these facts.

Finally, assuming *arguendo* that this Court grants Carolina's claim for nuisance, Carolina should not be awarded any damages under this cause of action, because as discussed in Part III(C), *supra*, Carolina has failed to provide reasonable supporting evidence it was damaged by any action of Enmark in the use of the Roadway. In addition, no attorney fees can be recovered under a nuisance claim.

V. THE TRIAL COURT PROPERLY RULED THAT CAROLINA FAILED TO PROVE ITS CAUSE OF ACTION FOR TRESPASS.

A trespass is any intentional 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 in Part IV, *supra*, there can be no trespass if Enmark holds a prescriptive easement over the Roadway. In addition, given the long-standing historical use of the Roadway, there can be no finding of an

intentional, unwarrantable entry upon Carolina's land. A good faith basis existed to justify the continued use of the Roadway.

Even if Enmark's easement rights are not upheld by this Court, no damages should be awarded under this claim because again there is no competent evidence of any recoverable damages resulting from the use of the Roadway. As with the nuisance claim, no attorney fees are recoverable under a trespass cause of action.

CONCLUSION

Based on the analysis above, the Trial Court properly ruled that Enmark holds a valid prescriptive easement for ingress and egress over the Roadway. Additionally, the Trial Court properly denied Carolina's request for a writ of mandamus because the alleged violation of the LMO is doubtful and uncertain, and any remedy for a violation is discretionary with the Town. Finally, the Trial Court properly dismissed Carolina's actions for slander of title, trespass, and nuisance since the required elements were not met and Carolina suffered no damages due to Enmark's action. The Trial Court's decision was founded on substantial, reasonable supporting evidence and should be affirmed.

Respectfully submitted,

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