THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2008-CP-32-04362

Westside Meshekoff Family Limited Partnership .... Appellant,

v.

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

REPLY BRIEF OF APPELLANT

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The legal principles governing the flow of stormwater in this case are straightforward. Under the "Common Enemy" Rule in South Carolina, a landowner may allow stormwater to naturally drain off his property to adjacent properties according to the natural contours of the land. *See Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 509, 598 S.E.2d 712, 714 (2004). However, as happened in this case, an exception to the protections of the Common Enemy Rule is that a landowner may not collect stormwater on its property and then discharge it in concentrated form onto adjacent properties without a legal right to do so. *Id.* In this case, that right was granted to the SCDOT through an easement set forth in the encroachment permit. [R. p. 540]

The key facts of this case are: (1) SCDOT has an easement to discharge stormwater into Westside's stormwater system (Line E); (2) SCDOT is the dominant user of Line E; and (3) SCDOT has never maintained or paid to maintain Line E despite using it for over 20 years. These facts are not disputed and are essentially all that is required to decide this case. The question before this Court is whether the SCDOT, as the dominant easement holder, was somehow relieved of its duty to assist with the maintenance and repair of Line E of the Westside stormwater and the detention pond. SCDOT offers four reasons in its brief why it should not be responsible for maintaining and repairing Line E and the detention pond. First, SCDOT argues that *Hayes v. Tomkins,* 287 S.C. 289, 337 S.E.2d 888 (Ct.App. 1985), does not apply, and it has no duty to pay an equitable allocation to repair the line (Argument I). Second, the SCDOT argues that the encroachment permit constitutes an agreement concerning maintenance of the easement

which relieves the SCDOT of any maintenance duties (Argument II). Third, the SCDOT argues that it was prejudiced by Westside's "delay" in filing suit to enforce the maintenance obligations; and, therefore, the suit is barred by the doctrine of laches (Argument IV). Lastly, interspersed in the above Arguments, the SCDOT argues that established law on the apportionment of repair and maintenance costs for shared easements should be ignored in this instance in order to protect the interests of the SCDOT over those of a private land owner.

I. The fundamental concepts in *Hayes v. Tomkins* apply to easements regardless of the nature of the easement.

The SCDOT's position is that the concept of equitable allocation set forth in *Hayes v. Tomkins* applies only to road easements and should not be extended to stormwater easements. The argument of the SCDOT is essentially that the easement in *Hayes* involved a shared road while the easement in this case involves a shared storm drainage line; therefore, *Hayes* does not apply. This argument is the height of form over substance. *Hayes* is an easement case, and the principles it states apply to any easement, whether the easement allows cars to run across it, cattle hooves, or, in this case, allows water to run through it. *Hayes* simply confirms the duty of an easement owner to maintain the easement and then applies common sense to the principle that where more than one party uses the easement, the maintenance cost is equitably allocated between them. Why this equitable principle should apply to roads but not to stormwater easements is never explained by SCDOT. Who owes the duty of maintenance if it is not the owner of the easement that receives the benefit of the easement? Also absent from

SCDOT's brief is any explanation of what principles govern the allocation of maintenance costs on stormwater easements if *Hayes* does not apply. SCDOT offers this Court no guidance on these essential issues; rather it chooses to ignore established easement law and cling to the meaningless distinction of road versus storm drainage pipe.

SCDOT then further claims that extending *Hayes v. Tomkins* to stormwater cases would conflict with the common enemy rule, although it never identifies the conflict. [Resp. Br. 17] In fact, there is no conflict. If water is flowing naturally, it may be allowed to flow off one's land onto lower lands, without the necessity of an easement. *See Lucas, supra. Hayes* does not apply if there is no easement. However, once a landowner concentrates the water, an easement would be needed to discharge on another's land, as the common enemy rule would no longer apply. *Id.* That is the point at which *Hayes* would control.

SCDOT tries to support the trial court order which found that Westside had to prove that SCDOT's stormwater "caused" the damage to the Westside's storm drain system. Westside analyzed this issue extensively in its brief. [App. Br. pp. 31-37] Significantly, SCDOT does not mention *Hayes* in its "cause" discussion. Nor does it cite any other case. There is no discussion of where the element of "cause" comes from in the trial court's order and why it is necessary. That "cause" is a required element is just assumed by the SCDOT and is in conflict with the principles of *Hayes v. Tomkins* and established easement law.

II. The encroachment permit cannot reasonably be construed to impose all maintenance and repair obligations for Line E upon Westside.

There is no maintenance agreement in the encroachment permit (neither in the pre-printed permit form nor in the additional provisions added by the applicant and SCDOT). The holding of the trial court, and SCDOT's position on appeal, are based solely upon transforming an indemnity agreement in the pre-printed form for the encroachment area, into a maintenance agreement for the easement located outside of the encroachment area. All the encroachment permit states relating to maintenance and repairs is that Westside's predecessor agreed to assume all liability the SCDOT might otherwise have for property damage arising from the construction, use or removal of the encroachment, and it agrees to indemnify the SCDOT for any damage sustained by reason of the encroachment. That language falls far short of putting Westside in the position of agreeing to maintain the SCDOT's easement on Westside's land.

The SCDOT also completely ignores the important testimony of its one witness, longtime SCDOT employee Clarence Blakely. Blakely was in charge of issuing encroachment permits for SCDOT. He made clear in his testimony that SCDOT encroachment permits are for encroachments only on SCDOT's right of way, and that SCDOT does not seek to control what a landowner does off the SCDOT right of way. [R. p. 283, lines 11-20] As Blakely stated in discussing the Westside permit, using corrugated metal pipe instead of reinforced concrete pipe on private land would not violate the encroachment permit. [*Id.*, lines 6-21] He also testified that upstream landowners needed an encroachment permit to discharge their stormwater into the

SCDOT's system on its right of way, but that the SCDOT found itself in the opposite position with Westside since Westside was not encroaching on the SCDOT right of way with stormwater, but rather the SCDOT was seeking to discharge stormwater onto Westside's property. [R. p. 346, line 15-p. 347, line 18] Blakely further testified that the SCDOT had not suffered any damage on its right of way. [R. p. 356, lines 11-25] Moreover, the SCDOT has never made any claim for indemnification against Westside. Therefore, the SCDOT's own testimony and actions have established that the indemnity provision in the encroachment permit does not apply to the repair and maintenance of Line E which is not in the SCDOT right of way. There is nothing left in the permit that SCDOT can argue covers maintenance and repair outside of the encroachment area.

The SCDOT also fails to respond to Westside's argument that encroachment permits are statutory instruments designed to allow encroachments onto SCDOT's right of way. Not only does this mean that the pre-printed form is meant to align with the statute and is speaking to maintenance of encroachments onto SCDOT's land in an effort to avoid a "hazard to the traveling public," but it also means that SCDOT has no right to regulate what materials the private landowner uses on his land. Blakely confirmed this when he stated that SCDOT does not seek to regulate what a private landowner does on his own property. [R. p. 283, lines 6-20] SCDOT does not explain how a pre-printed form designed to comply with the statute, also applies to maintenance of structures well outside the purview of the statute, off the right of way.

The SCDOT comes up with a strained and speculative "water encroachment" argument in an effort to make the encroachment permit applicable. [Resp. Br., 32-37] The SCDOT makes this argument for the first time on appeal. Regardless, it has no merit for two primary reasons. First, it is based on the unfounded claim that the SCDOT had unlimited use of the Westside property for stormwater drainage prior to the improvements on the Westside property in 1987. There is no evidence to demonstrate that SCDOT had any vested right to discharge concentrated stormwater on the property that became Westside Plaza. The SCDOT did not exercise its powers of eminent domain on the property nor enter into an easement agreement with the original owner of the property. But, yet, the SCDOT continues to claim it gets a "free ride" without any evidence in support of this claim.

Second, the SCDOT's argument is based on speculation about what would have happened if the developer of the Westside property had blocked the stormwater drainage from U.S. #1 thereby causing the stormwater to back up on the road. This obviously did not happen as the developer and the SCDOT agreed to an easement for the use of Line E to handle such water. Rather than proving a point, this argument only magnifies the SCDOT's "free ride" position—you cannot stop us from using your property to transport our stormwater and we do not have to pay for it.

For unknown reasons, the SCDOT spends over 10 pages in its brief making the point that Westside should have known about the encroachment permit sooner than it did. This argument is irrelevant since Westside does not contest that it is bound by the

encroachment permit. In fact, the encroachment permit is the very document relied upon by Westside as establishing the SCDOT's easement to use Line "E" and the detention pond. Therefore, whether the Meshekoff family should have known about the encroachment permit sooner is just not material to whether there is a maintenance agreement.

However, the SCDOT's unnecessary argument does illustrate an essential weakness in the SCDOT's approach to this case—namely the assumption that encroachment permits are typically used to create easements. Following that assumption, the SCDOT's position is that if an owner were on constructive notice of facts indicating a possible easement, that owner should then go searching the records of the SCDOT for encroachment permits. The encroachment permit was not generally available to the public and had to be obtained via a Freedom of Information Act request. [R. p. 283, line 22-p. 284, line 9] Nor was the encroachment permit filed in the index of condemnation deeds maintained by the SCDOT pursuant to S.C. Code Ann. §57-5-550 (1991), therefore the permit was not recorded and was not in the chain of title available to the Meshekoffs. The SCDOT's argument, based upon a fundamental misunderstanding of property law, is that in addition to looking at the county Register of Deeds office for an easement, one should also look for unfiled easements at the SCDOT located in encroachment permits—documents which by their very nature are not intended to grant an easement right off the SCDOT right of way. In other words, as to SCDOT easements, a subsequent purchaser cannot rely on the Recording Act, and should go hunting for unrecorded easements in

desk drawers at the SCDOT. *See Burnett v. Holliday Bros.,* 279 S.C. 222, 225, 305 S.E.2d 238, 240 (1983)(purpose of the recording statute is to protect a subsequent buyer without notice).

Continuing with this unnecessary argument about constructive notice, the SCDOT also argues that adequate "due diligence" would have alerted Westside to the encroachment permit. The only evidence about due diligence in the purchase of a commercial property came from Ronald Swinson, an experienced real estate developer who was an owner of the Danwood parcel upstream from Westside. [R. p. 524, lines 8-24] Swinson testified about due diligence prior to buying commercial property. He stated he always hires an attorney to check title and he always reviews as-built drawings of the existing property. [R. p. 525, lines 4-19] He further testified that he engages engineers to review the as-built drawings as well as the existing conditions of the property to be purchased. [*Id.*] He said he did so before purchasing the Danwood property. [R. p. 526, lines 5-18] He was also aware that the Danwood property had a storm drain system. [*Id.*] Yet despite his knowledge of a storm drain system, despite his review of the as-builts, despite his hiring of an attorney to check title, and despite his engaging engineers to review existing conditions, no one ever asked for an encroachment permit, and he did not know one existed. [R. p. 534, lines 6-18] When Danwood's encroachment permit was proffered as an exhibit, his attorney even disclaimed knowledge of whether a portion of the permit was authentic or not. [R. p. 121, line 14-p. 123, line 5] The due diligence "expert" had no idea of the existence of the encroachment permit

relating to his own property. This lack of knowledge was probably because there was no issue with curb cuts and, therefore, no reason to look at the encroachment permit. In the absence of problems with the storm drain system, there was no reason to follow up on it. Thus, the SCDOT's "due diligence" argument falls flat in light of the clear testimony that review of encroachment permits is not part of normal due diligence in the purchase of commercial property.

III. The evidence presented at trial does not support the finding that SCDOT had a prescriptive easement prior to 1987.

DOT's position is that it proved a prescriptive easement existed from a date prior to 1970. That simply is incorrect. First, that argument is based completely upon speculation. No one testified what water was being discharged onto the Westside property (formerly owned by Holmes Dreher) prior to 1970, nor on what terms. There may have been multiple discharge points, some of which may have been off of the Dreher property. The discharge may have been with the permission of the Drehers. There may have been an agreement covering costs and maintenance but allowing the DOT to discharge. No one established where the discharge points were and whether they were at the same point as existed after 1970. If they were at different locations, there would not be 20 years of use at the point which DOT is now claiming it had an easement. The DOT's only witness, who joined the Department in 1989, was specifically limited to testifying from 1970 forward, based upon his review of Department plans. [R. p. 344, line 12-p. 345, line 6] The fact that stormwater was flowing downhill without any further testimony establishing how much water was being discharged, in what form, and the

understanding and position of the property owner with respect to same, does not establish a prescriptive easement.

SCDOT offers other evidence in support of its claim. The fact that the trial judge visited the center in 2011 merely would have established an uncontroverted fact that the elevation of the north side of U.S. #1 is higher than the side on which Westside sits. Further, the fact that SCDOT put a contention in answers to interrogatories is certainly no proof of the accuracy of its contention. And, the testimony cited from Blakely was merely speculation that typically the SCDOT would act in certain ways, with no professed knowledge of whether or not the SCDOT acted that way in this instance, 20 years before his employment.

The lack of evidence of the terms, or lack thereof, pursuant to which SCDOT discharged unknown amounts of water onto the Westside property prior to 1970, by unknown means at unknown locations, is far too weak a record to make a finding that a prescriptive easement existed. Moreover, even if the SCDOT had a prescriptive easement as of 1987, it would not relieve the SCDOT from the duties of maintenance and repair imposed upon the dominant easement holder. The SCDOT takes conflicting positions depending upon which one suits its argument best. SCDOT argues that an easement by prescription exists, which necessarily has no agreement by the parties as to maintenance and repair, and then seeks to avoid maintenance and repair obligations by claiming such an agreement is in place by the encroachment permit. If the SCDOT had an easement by prescription, then the encroachment permit did nothing to change the obligations of the

SCDOT as the dominant easement holder. However, the evidence clearly establishes that the encroachment permit created the easement and that it is silent as to maintenance and repair obligations.

IV. Laches is not applicable as the SCDOT failed to prove unreasonable delay by Westside or that it suffered any prejudice by the timing of Westside's claims.

SCDOT argues that Westside should have sued as early as 1990, even though it had no notice of potential claims until 2005. According to the position of SCDOT, to avoid laches, a landowner must conduct a hazardous inspection of underground stormwater systems in a new shopping center, in case it might want to bring an action prior to any harm or injury occurring. [R. p. 288, line 12-p. 289, line 23] To fail to do so, according to the SCDOT's brief, constitutes laches. Clearly the SCDOT is taking an extreme position that has no place in the law of equity.

The SCDOT's laches argument, and the holding in the amended order, is based upon the mistaken assumption that, as a matter of equity, the SCDOT should not have to pay any maintenance and repair costs for Line E and the detention pond because the owners of Westside failed to obtain and study the unrecorded encroachment permit upon purchase of the property from the original developer. To accept the SCDOT's argument would be to impose the burden of discovering an unrecorded easement set forth in a document not normally used for such purpose on an unsuspecting purchaser of commercial property. Further, it would also impose "due diligence" efforts on Westside's owners not undertaken by even the most sophisticated of commercial property owners. Such harsh positions are beyond contrary to the equitable principles of laches,

and are themselves inequitable. The SCDOT also argues that Westside had notice of problems with its storm drainage system beginning in July of 2005. [Resp. Br. p.44] However, whatever notice Westside had in 2005 about problems with its storm drainage system is irrelevant to laches beginning in 1990 or 1997. That notice came years later. Regardless, a party does not establish laches based upon constructive notice but upon proof of a "known right," a point which Westside has made in its brief and to which the SCDOT failed to respond. [*See* App. Br. pp. 38-40]

SCDOT introduces a new argument for the first time on appeal arguing prejudice in that the Meshekoffs did not seek relief from the developer for what the SCDOT considers to be an inadequate storm drain line due to the use of corrugated metal pipe rather than reinforced concrete pipe. First, it is undisputed the corrugated metal pipe lasted its useful life. [*See* App. Br. p. 35] Therefore, SCDOT has not established any prejudice from the pipeline construction. Second, the SCDOT's testimony from its only witness, Clarence Blakely, was that the SCDOT allows the use of corrugated metal pipe and there is no breach of the encroachment permit if a landowner uses corrugated metal pipe instead of reinforced concrete pipe off of the SCDOT's right of way. [R. p. 283, lines 6-21] In fact, the SCDOT allowed an upstream landowner, DW Properties d/b/a Zaxby's, to use corrugated metal pipe to connect its storm drainage system to that of the SCDOT. [R. pp. 546-552; see notes on p. 548 and 551 re: 10" CMP] This included installing corrugated metal pipe within the SCDOT right of way. [*Id.*] Regardless of how much the SCDOT's argument is negated by its own witness and its own actions,

SCDOT's argument assumes the developer did something wrong for which Westside could have sought relief. However, there was absolutely no evidence of wrongdoing by the developer. There was testimony about the contractor who put the pipe in the ground, but no evidence that the developer did something actionable concerning the pipeline. SCDOT merely makes an assumption it did not prove, and then argues from there.

As the owner of the easement, SCDOT had just as much right as Westside to seek relief against the developer or contractor. What is more, SCDOT knew of the unique terms of this encroachment permit and the rights it had thereunder as an owner of the easement for Line E. Furthermore, the SCDOT could have monitored the installation of Line E when it was installed. In fact, for all that is known, it is just as likely a scenario that it did so and did not object to the installation of corrugated metal pipe. In addition, how can the SCDOT claim prejudice for Westside's failure to perform heightened maintenance on Line E when the SCDOT, as the dominant easement holder, had the primary responsibility for such maintenance?

Finally, without any support in the record, SCDOT claims, again for the first time on appeal, that it was prejudiced by its inability to find witnesses. It makes the remarkable statement that principals of Dayton and Associates were no longer available. That might be news to Weldon Wyatt, a principal of Dayton, since there was no evidence he was not available or not within the subpoena power. And, it states, once again without any support in the record, that its own former employees were retired. However, employees' retirement does not mean they cannot be subpoenaed for trial or a deposition.

The SCDOT simply made no effort to gather testimony from these witnesses, and now after trial claims they are unavailable, without anything in the record to support those remarkable statements. If the SCDOT were really frustrated in finding witnesses, it could have brought this issue up with the trial court and asked for a continuance, or moved for other relief. It did neither, and it never identified witnesses it could not locate, or the efforts the SCDOT went to find them. The SCDOT never established what retired employees were unavailable. It never established that Weldon Wyatt was unavailable. The only two people the SCDOT has shown could not testify are Mr. and Mrs. Meshekoff. However, the SCDOT did depose the local property manager who had been there through much of the existence of the center and would have far more knowledge than the elderly Meshekoffs.

Although the SCDOT did argue laches based upon the unavailability of the Meshekoffs (see SCDOT Brief and Summation, R. p. 654, pp. 669-670), it did not argue laches based upon Mr. Wyatt or the retired employees. [*Id.*; R. p. 497, line 24-p. 631, line 9] Further, it is important to note that the trial court did not accept the SCDOT's prejudice argument concerning lack of witnesses. [*See* R. p. 27, pp. 40-42]

V. The SCDOT is not entitled to take advantage of the rights of private property owners by accepting the benefits of continual use of private property through an easement without accepting the accompanying maintenance and repair obligations.

In an effort to avoid responsibility for repair and maintenance costs for its easement, the SCDOT suggests that this Court simply ignore *Hayes v. Tomkins* so that the SCDOT can continue to act in disregard of the rights of private landowners. It even

argues that the scope of the problem it has created with respect to private landowners may be too large to fix and that this Court must protect it from its own carelessness at the expense of private property owners. There are several responses to this unfounded and improper appeal to this Court. First, there is absolutely no evidence as to the size of the problem before this Court. The SCDOT offered no evidence of the scope of the problem. It simply speculates that the problem may be too large to fix, therefore this Court must save the SCDOT from further exposure at the expense of landowners and the principles of law that govern easements. Second, if this Court changes easement law to protect the SCDOT, it will not only be changing easement law as it applies to governments, but whatever principles it establishes will apply to private disputes as well, since there is no principled distinction between easements involving government entities and those involving private landowners. That would call into question decades of precedent on which private parties have relied in fashioning their contracts and other legal relations.

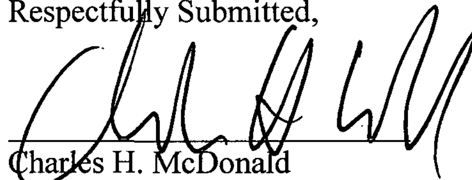
The SCDOT also makes the wildly speculative claim that extending the sound fundamental easement principles set forth in *Hayes v. Tomkins* to stormwater or surface drainage cases "would spawn a veritable tidal wave of equitable apportionment claims." [Resp. Brief at p. 16] As a threshold matter, it is important to remember that Westside's claim for equitable apportionment is based entirely upon an easement which is silent as to maintenance and repair obligations. Furthermore, in those cases where no easement exists, the "Common Enemy Rule" would apply and stormwater run-off would be treated as the common enemy of all and a downstream property owner would have to accept the

natural drainage and run-off from the surrounding properties. *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 509, 598 S.E.2d 712, 714 (2004). Therefore, only in those instances where a property owner collects stormwater run-off and discharges it onto the property of another in concentrated form would the potential for liability exist—as it should since this is one of the recognized exceptions to the protection afforded by the Common Enemy Rule. *Id.* The handling and treatment of stormwater is much different now than it was in 1987 with much stricter regulation on the discharge of stormwater from developed properties. While other situations similar to the present one may well exist, no one knows how many. It is just as likely as not that the number is relatively small. Thus, the SCDOT's dire prediction of a "veritable tidal wave of equitable apportionment claims" is nothing more than unfounded hyperbole.

In situations where the SCDOT needs to use private property to handle and transport stormwater runoff from its highways, and from other properties for which the SCDOT agrees to accept stormwater drainage, the SCDOT has readily available options. First, the SCDOT can exercise its right of eminent domain and acquire the right of way it needs to dispose of the concentrated stormwater in the manner it deems best. Second, the SCDOT can negotiate appropriate easement agreements with private property owners for the handling and transport of the stormwater discharge from the SCDOT right of way that accounts for maintenance and repair responsibilities of both the SCDOT and the private land owner with respect to the easement. Third, with respect to the SCDOT's apparent willingness to accept stormwater from upstream commercial properties, the SCDOT can

negotiate with the upstream landowners whereby the upstream landowner discharges concentrated water into the SCDOT system for an acceptable fee. But, absent an express agreement, the SCDOT cannot burden private property with the perpetual right to discharge stormwater without compensation or without any further obligations from the SCDOT. Simply put, none of the owners of the Westside property agreed to give the SCDOT the free ride to which it claims it is entitled. Neither should this Court. The SCDOT should have to pay its fair share of maintenance and repair costs for the easement it holds. There is nothing inequitable or unfair about that result.

Respectfully Submitted,



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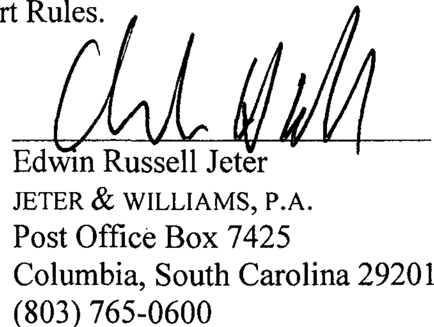
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Reply Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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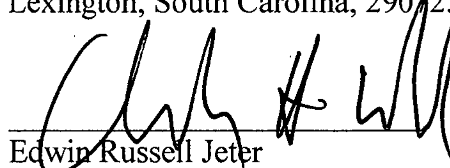
PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant by mailing a copy of same to the Respondent's attorney of record, Patrick John Frawley, Davis, Frawley, Anderson, Ayer, Fisher & Smith, LLC, 140 East Main Street, Lexington, South Carolina, 29072.



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