ORIGINAL

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 Circuit Court Judge for Beaufort County

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Case No.: 2009-CP-07-2573

CASHMAN PROPERTIES, LLC ..... Respondent

-vs.-

WNL PROPERTIES, LLC; E. OSWALD LIGHTSEY TRUST f/b/o LOUISE LIGHTSEY BAUGHMAN; THE TRUST UNDER WILL OF E. OSWALD LIGHTSEY DATED AUGUST 8, 1958, AND CODICIL DATED MARCH 23, 1976, FOR THE BENEFIT OF LILLIAN LIGHTSEY DRAWDY; AND THE TRUST UNDER THE WILL OF E. OSWALD LIGHTSEY FOR THE BENEFIT OF CLAUDIA LIGHTSEY WARE ..... Appellants

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FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

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a) the Declaratory Judgment Act is procedural in nature and does not create any substantive rights and the substantive actions raised by Cashman Properties were either voluntarily withdrawn or decided in favor of the Lightsey Trusts;

b) the purpose of the Declaratory Judgment Act is to declare rights before a breach of existing rights and Cashman Properties alleged a breach of rights; and

c) the trial court breached the general rule that declaratory judgment actions should be dismissed if the underlying issues can be adjudicated in a pending action.

II. Assuming *arguendo* that a declaratory judgment properly could be issued in the instant case, whether the trial court erred in making the following findings and conclusions:

a) that there has been a consistent and cooperative pattern and practice of use and ownership of Docks 1, 2, and 3 for eighty (80) years when such finding is not supported by the evidence;

b) that Cashman Properties demonstrated by clear and convincing evidence that the Cashmans had the substantial belief that they had the right to use Docks 1, 2 and 3 for eighty (80) years; and

c) that the parties used Dock 3 without permission from each other when the evidence establishes that the Lightsey family gave both express written permission and implied permission to the Cashman family.

III. Whether the trial court erred in making the following *ex mero motu* holdings

a) that the base of the pier is attached to land designated as common property, that the common right of access to the river arises from deeds, that neither party claims a right to land below the mean high water mark, and that a structure on common property and used by alleged co-owners becomes common property;

b) laches prevents the Lightsey Trusts from seeking reimbursement from Cashman Properties for any and all expenses related to the dock incurred prior to the filing of the Summons and Complaint.

STATEMENT OF CASE

This appeal arises from a civil action filed by Appellant/Respondent Cashman Properties, LLC, (hereinafter Cashman Properties) against Appellant/Respondent WNL Properties, LLC, E. Oswald Lightsey Trust f/b/o Louise Lightsey Baughman, the Trust Under Will of E. Oswald Lightsey Dated August 8, 1958, and Codicil Dated March 23, 1976, for the Benefit of Lillian Lightsey Drawdy, and the Trust under Will of E. Oswald Lightsey for the Benefit of Claudia Lightsey Ware (hereinafter Lightsey Trusts).

The Summons and Complaint was filed on May 29, 2009, and the Lightsey Trusts filed their Answer on August 10, 2009. Plaintiff's Amended Complaint was filed September 8, 2009. Lightsey Trusts filed their Third Amended Answer to Amended Complaint on September 10, 2010. The case was transferred to the Honorable Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County by order dated July 27, 2011.

Trial was held on October 31 – November 1, 2011. The trial court issued an Order entitled Declaratory Judgment Not Ending Case on December 22, 2011, and in the Order ordered that a supplemental hearing was to be held. The Lightsey Trusts filed a Motion to Reconsider and a Motion to Amend on January 15, 2012. The supplemental hearing was held on April 19, 2012, and the trial court issued an Order entitled Order on Costs on July 10, 2012. Following this hearing, on August 3, 2012, Lightsey Trusts filed a supplement to their Motion to Reconsider and Amend.

A hearing on the Lightsey Trust's Motion to Reconsider and Amend was held on August 15, 2012. Following the hearing, the trial court issued an Order entitled Amended Declaratory Judgment on November 5, 2012. The trial court then issued an Order entitled Supplement to Amended Declaratory Judgment on November 15, 2012.

The Lightsey Trusts filed a Notice of Appeal on December 5, 2012, and Cashman Properties filed a Notice of Appeal on December 10, 2012.

FACTS

In 1930, Fred Lightsey purchased property on Oyster Street in Beaufort County, South Carolina in the area known as the Brighton Beach development. (R. p. 339; R. pp. 341-343). Ownership of the property ultimately passed to the Lightsey Trusts. (R. pp. 22-45; R. p. 32; R. p. 426; R. pp. 428-429).

By 1931, J.O. Cashman had also purchased property on Oyster Street in the Brighton Beach development. (R. pp. 341-343). By 1977, ownership of the property purchased by J.O. Cashman had passed to his son, Eugene K. Cashman, Sr. (R. pp. 119-120; R. p. 179). In 1994, Eugene K. Cashman, Sr., transferred the property to his children, Eugene K. Cashman, Jr., and Betty Cashman Davis. (R. pp. 119-120; R. p. 185). The property was subsequently deeded to Cashman Properties. (R. p. 179).

Neither the Lightsey property nor the Cashman property abuts the May River. Oyster Street itself and a strip of property separate the two properties from the May River. Ownership of the strip of property that abuts the May River was not an issue in this case. (R. pp. 22-45; R. pp. 46-53; R. pp. 626-655).

At least four (4) different docks were alleged to have been built by the parties on the May River. In the 1930s, the Cashmans built a dock (Dock 1) on the May River in

front of the parties' Oyster Street Properties. (R. pp. 85-86; R. p. 89). Dock 1 was replaced by a second dock (Dock 2), which was also claimed to have been built by the Cashmans in 1941. (R. p. 89). At some point in time prior to 1942, the Lightsey family built a dock beside Dock 2 (the "spare dock"). For at least 10 years, the Lightsey's "spare dock" existed alongside Dock 2. (R. pp. 626-655).

On February 18, 1946, Thomas O. Lawton, the original developer of Brighton Beach, gave written permission to a Mr. Sanders to build a dock in the area of Dock 2. The note instructed Mr. Sanders to build his dock "any where [sic] to the right of the Lightsey dock will be satisfactory to me. Do not build it to the left of the Carter-Cashman dock." (R. pp. 357-362).

On February 21, 1961, the Lightsey family received a permit to build another dock (Dock 3) on the May River in front of the Oyster Street properties. (R. p. 391). The Lightsey family permitted, built and paid for Dock 3. (R. p. 89; R. p. 125). After Dock 3 was built, the Lightsey family gave the Cashman family permission to use Dock 3. (R. p. 426). The permission to use Dock 3 included written permission from Oswald Lightsey for J.O. Cashman to add a floating dock to Dock 3 owned by the Lightsey Brothers. (R. p. 385; R. p. 542, Dep. p.42, lines 12-16).

Since 1961, the Lightsey family has spent $89,550.66 to build and maintain Dock 3 and to pay property taxes associated with Dock 3. (R. pp. 599-624). The Cashman family could not identify any receipts solely for Dock 3. (R. pp. 134-138).

On September 15, 2004, the Lightsey Family held a regularly scheduled meeting to discuss their jointly owned property. During the meeting, which occurred before there

was any dispute over Dock 3, the Lightsey family acknowledged that it had allowed the Cashman family to attach a floating dock to the left side of Dock 3's pier. (R. p. 426).

By November of 2004, the small floating dock that the Cashman family was given permission to add to Dock 3 had blown away, was beached and thus was not in usable condition. (R. p. 426; R. p. 476, Dep. p. 53, lines 6-12; R. p. 544, Dep. p. 54, lines 7-13). Photographs taken of Dock 3 on November 23, 2004, as part of a routine appraisal of the Lightsey Trusts' property, show that the floating dock installed by the Cashman family was no longer attached to Dock 3. (R. pp. 431-438).

Between November 2004 and February 2005, the Lightsey family placed a lock on the gate at Dock 3. The lock was placed on the gate to keep trespassers off of Dock 3. (R. p. 469, Dep. p.26, lines 16-22). In February 2005, Eugene K. Cashman, Jr., asked a member of the Lightsey family for a key so that the Cashman family could continue to use Dock 3, and a member of the Lightsey family sent the key without consulting with the rest of the Lightsey Family. (R. p. 472, Dep. p.38, lines 8-11; R. p. 544, Dep. p. 55, lines 3-20). However, as of March 16, 2005, the Lightsey family asked the Cashman family to return the key and stop using Dock 3. (R. pp. 442-444; R. p. 446; R. p. 472, Dep. p. 37, lines 3-5). Mr. Cashman, Jr. voluntarily returned the key on March 28, 2005 with a note that stated that if he needed to make the Cashman family's use of Dock 3 a "business relationship," he was willing to do so. (R. p. 106; R. pp. 448-449; R. p. 544, Dep. p. 55, line 21-R. 545, Dep. p. 56, line 3).

From 2005 through May 2009, Dock 3 was exclusively used by the Lightsey family, and the Cashmans did not have a key, and did not otherwise object to being

excluded from Dock 3. Id. Four (4) years and two (2) months later, on May 29, 2009, the within complaint was filed.

STANDARD OF REVIEW

Whether a declaratory judgment arises in equity or in law, and thus which standard of review should be followed, is completely dependent on the underlying issue supporting the declaratory judgment. See, e.g., South Carolina Farm Bureau Mut'l Ins. Co. v. Kennedy, 398 S.C. 604, 730 S.E.2d 862 (2012); Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991) (hereinafter Felts II); Ballenger v. City of Inman, 336 S.C. 126. 518 S.E.2d 824 (Ct. App. 1999). In the instant case and as discussed in depth in Section I of the Argument, there is no underlying issue supporting this declaratory judgment.

Since the trial court crafted a result not recognized by statutory or case law, the result is more akin to an action in equity and should thus be reviewed under that standard. In an action at equity, tried by a judge, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. See, e.g., Inlet Harbour v. S.C. Dep't of Parks, Rec. & Tourism, 377 S.C. 86, 659 S.E.2d 151 (2008).

SUMMARY OF ARGUMENT

For the reasons set forth herein, the trial court erred in granting a declaratory judgment to Cashman Properties, erred in making factual findings and conclusions, and erred in making *ex mero motu* holdings.

ARGUMENTS

I. The trial court erred in granting a declaratory judgment to Cashman Properties.

Cashman Properties' Complaint set forth the following causes of action: prescriptive easement, resulting trust, and adverse possession. Cashman Properties sought the remedies of declaratory judgment and injunction in its Complaint. (R. pp. 25-29). The remedies of declaratory judgment and injunction were improperly couched as causes of action. Id.

Nevertheless, Cashman Properties' theory of the case was that their historical use of Dock 3, and participation in maintenance of Dock 3, entitled it to either an ownership interest in Dock 3 "through" deed and/or adverse possession or resulting trust, or in the alternative, the right to use Dock 3 through a prescriptive easement.

Regarding adverse possession, Cashman Properties alleged that "Plaintiffs and Plaintiffs' family have used and enjoyed the walkway, pier head and floating dock continuously and exclusively for more than forty (40) years, and therefore, own title to the walkway, pier head and floating dock **through** deed and/or adverse possession." (R. p. 29). (emphasis added). Cashman Properties requested that the court "determine that Plaintiffs' own an undivided interest in and to the walkway, pier head, and floating dock **through** deed and/or adverse possession . . . ." Id. (emphasis added). At the trial of the case, Cashman Properties voluntarily withdrew its claim for adverse possession. Counsel for Cashman Properties conceded that it could not establish the element of exclusive use and thus could not establish adverse possession. (R. pp. 215-218, 233). Thus, there is no claim for adverse possession in this case.

Cashman Properties never argued, or presented any evidence to support, the allegation that they owned Dock 3 through a deed.

Regarding resulting trust, Cashman Properties alleged that it "maintained and enjoyed the walkway and pier head" and "if Defendants held legal title to [Dock 3], they hold such title in trust for the benefit of the Plaintiffs because of the continuing improvements the Plaintiffs made to [Dock 3.]" (R. p. 27). The trial court did not find that a resulting trust had been established in any of the Orders issued. At the hearing on the Motion to Reconsider, the following colloquy took place:

> The Court: [A]s I probably did state if – in one of our phone conferences and certainly in the email it was my intent to find it on the DJ cause of action and deny the other two. What's next?
> Counsel for Cashman Properties: For clarification Your Honor, that was the resulting trust and the prescriptive easement that you were denying?
> The Court: That's correct.

(R. pp. 4-11; R. pp. 12-20; R. p. 21; R. p. 317, Trans. p. 6, lines 1-9). Accordingly, the trial court did not order that a resulting trust was established in this case.

Regarding prescriptive easement, Cashman Properties alleged that "Plaintiffs and their family used the walkway to access their floating dock without interruption from Defendant . . .", that the "use of the dock is under a claim of right . . . ." and that therefore "Plaintiffs have acquired a prescriptive easement . . . ." (R. p. 26). The trial court expressly denied Cashman Properties' claim for a prescriptive easement in the Supplement to the Amended Declaratory Judgment. (R. p. 21). Thus, the prescriptive easement issue was decided in favor of the Lightsey Trusts.

Finally, the trial court did not issue any temporary or permanent injunctions in any of the Orders issued in this case. (R. pp. 4-11; R. pp. 12-20; and R. p. 21). Further,

at the hearing on the Motion to Reconsider, the trial judge, counsel for Cashman Properties, and counsel for the Lightsey Trust agreed the request for the injunctions were moot. (R. 317, Trans. p. 6, lines 12-16).

This left only the remedy of a declaratory judgment, which was erroneously granted by the trial court.

a) The trial court erred in granting a declaratory judgment to Cashman Properties because the Declaratory Judgment Act is procedural in nature and does not create any substantive rights and the substantive actions raised by Cashman Properties were either voluntarily withdrawn or decided in favor of the Lightsey Trusts.

Under the Uniform Declaratory Judgment Act, "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree." S.C. Code Ann. § 15-53-20.

The Uniform Declaratory Judgment Act grants a trial court broad powers; however, these powers are not without limits. For example, the Uniform Declaratory Judgment Act has been limited by a justiciable controversy requirement. See, e.g., Pee Dee Electric Cooperative, Inc., v. Carolina Power and Light Company, 279 S.C. 64, 301 S.E.2d 761 (1983). In addition, a declaratory judgment will ordinarily be refused if a special statutory remedy has been provided or where another remedy will be more effective or appropriate under the circumstances. E.g., Bank of Augusta v. Satcher Motor Company, 249 S.C. 53, 152 S.E.2d 676 (1967). Moreover, "courts will not entertain an

action for declaratory judgment if there is pending, at the time the action is commenced, another action between the same parties in which the same issues presented in the action for declaratory judgment can be adjudicated." Wessinger v. Rauch, 288 S.C. 157, 160, 341 S.E.2d 643, 644 (Ct. App. 1986).

Another limitation of "[t]he Uniform Declaratory Judgments Act [is that it] 'does not create substantive rights or duties.'" Harvey v. S.C. Dep't of Corrections, 338 S.C. 500, 506, 527 S.E.2d 765, 768 (Ct. App. 2000) *quoting* Felts v. Richland County, 299 S.C. 214, 216, 383 S.E.2d 261, 262-63 (Ct. App. 1989) (hereinafter Felts I) *aff'd* 303 S.C. at 354, 400 S.E.2d at 781 (Felts II). Indeed, Felts I found that the Uniform Declaratory Judgments Act is "remedial and procedural in nature and does not create substantive rights or duties." Felts I, 299 S.C. at 216, 383 S.E.2d at 262-63. Rather than creating substantive rights or duties, the Uniform Declaratory Judgments Act instead authorizes an action to "establish a party's entitlement to a pre-existing right." Harvey, 338 S.C. at 506, 527 S.E.2d at 768. See also Noisette v. Ismail, 299 S.C. 243, 384 S.E.2d 310 (Ct. App. 1989) *rev'd in part by* 304 S.C. 56, 403 S.E.2d 122 (1991).

Thus, there must be a pre-existing legal on which the declaratory judgment is dependent. For example, whether a declaratory judgment arises in equity or in law is completely dependent on the underlying issue. See, e.g., Kennedy, 398 S.C. at 604, 730 S.E.2d at 862; Felts II, 303 S.C. at 254, 400 S.E.2d at 781; Ballenger, 336 S.C. at 126, 518 S.E.2d at 824. In other words, a court's authority to issue a declaratory judgment must fall within the parameters of an established legal theory. If this were not the case, then the Declaratory Judgment Act would subsume all substantive causes of action, and each judge could establish his or her individual elements for granting or denying a

declaratory judgment in each individual case. Therefore, success on a declaratory judgment action is necessarily dependent on success of an underlying claim. See, e.g, Becker v. Kroll, 340 F. Supp.2d 1230 (D. Utah 2004) *aff'd in part, rev'd in part (on other grounds) and remanded* (holding that "Plaintiff's causes of action for declaratory judgment and injunction are, of course, dependent on the success of the underlying claims"); Days Inn Worldwide, Inc., v. Sai Baba, 300 F. Supp.2d 583 (N.D. Ohio 2004) (holding that a "request for declaratory judgment must accompany the substantive claim for which declaratory judgment is sought" and the Defendants "failed to state a claim on which relief can be granted by failing to link their request for declaratory judgment to an underlying substantive claim for relief"); Economic Opportunity Comm'n of Nassau County, Inc., v. County of Nassau, 106 F. Supp.2d 433 (E.D.N.Y 2000) (stating that "a court may only enter a declaratory judgment in favor of a party who has a substantive claim of right to such relief"); Matos v. First Nat. Bank, 092681B, 2010 WL 3327725 (Mass. Super. June 16, 2010) (finding that because plaintiff's declaratory judgment claim is "dependent on the success" of plaintiff's underlying claims, the "failure of the Plaintiff's previous claims" means that the declaratory judgment claim "must also fail."); Repwest Ins. Co. v. Praetorian Ins. Co., 890 F. Supp. 2d 1168, 1183-84 (D. Ariz. 2012) (finding that "[d]eclaratory judgment is a remedy that is dependent on Plaintiff's success on an underlying cause of action. Because the Court has dismissed Plaintiff's only cause of action against Defendant Aon, its claim for declaratory relief must also be dismissed.").

In his opening statement, counsel for Cashman Properties recognized that the declaratory judgment action was dependent on underlying legal theories. Counsel stated,

"we filed a Complaint asking for a declaratory judgment as to who has rights to this dock and the floating dock. The legal theories that we have filed are prescriptive easements, resulting trust and adverse possession." (R. p. 80). Counsel for Lightsey Trust made the same recognition in his opening statement. Counsel stated, "Declaratory judgment is the same thing. I don't think there is any way the Court can allow or find that the Cashmans have any interest in this dock unless it -- those [rights] would have to flow through the causes of action . . . ." (R. pp. 82-83).

All of the substantive legal theories raised by Cashman Properties that could possibly result in an ownership interest in Dock 3, or the right to use Dock 3, were either withdrawn or decided in favor of the Lightsey Trusts. Accordingly, all underlying claims upon which the remedy of a declaratory judgment could be based were withdrawn or decided in favor of the Lightsey Trusts. Since there is no substantive basis for a declaratory judgment, the trial court erred in entering a declaratory judgment that Cashman Properties has an ownership interest in the Lightsey Trusts' Dock 3.

b) The trial court erred in granting a declaratory judgment to Cashman Properties because the purpose of the Declaratory Judgment Act is to declare rights before a breach of existing rights and Cashman Properties alleged a breach of rights.

A declaratory judgment is not proper in this case because Cashman Properties alleged that a breach of existing rights had already occurred. The intended and basic purpose of the Declaratory Judgments Act is "to provide for declaratory judgments **without awaiting a breach of existing rights."** Sunset Cay LLC v. The City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (emphasis added). Sunset Cay acknowledged that the "intended purpose" of the Act is to afford "a speedy and inexpensive method of deciding legal disputes and of settling legal rights and

relationships, without awaiting a violation of the rights or a disturbance of the relationship." Id. *See also* Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970) (noting that intended purpose of the Declaratory Judgment Act is to provide "a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships without awaiting a violation of the rights or a disturbance of the relationships"); Williams Furniture Corporation v. Southern Coatings & Chemical Co., 216 S.C. 1, 56 S.E.2d 576 (1949) (stating that the intended purpose of the declaratory judgment statute is "to afford a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure, and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships").

In its Amended Complaint, Cashman Properties alleged that a breach of its rights occurred when the Lightsey Trusts placed a lock on the gate to Dock 3. (R. p. 25, Paragraph 25). In Paragraph 26, Cashman Properties alleged that a member of the Lightsey family told them over four (4) years before suit was filed that the Cashman family was no longer allowed to use the dock. (R. p. 25). Cashman Properties then alleged in Paragraph 28 that the Lightsey Trusts cannot exclude the Cashman family from the dock. (R. p. 25).

Because the intended purpose of the Declaratory Judgment Act is to settle legal rights without awaiting a violation of the rights, and since Cashman Properties clearly alleged a violation of rights in its Amended Complaint, a declaratory judgment is simply not proper in this case, and the trial court should not have issued a declaratory judgment.

c) The trial court erred in granting a declaratory judgment to Cashman Properties because the trial court breached the general rule that declaratory judgment actions should be dismissed if the issues can be adjudicated in a pending action.

The trial court's granting of a declaratory judgment in this case violates the general rule that "courts will not entertain an action for declaratory judgment if there is pending, at the time the action is commenced, another action between the same parties in which the same issues presented in the action for declaratory judgment can be adjudicated." Wessinger, 288 S.C. at 160, 341 S.E.2d at 644 (emphasis added). Thus, where there is an action pending that adjudicates the claims on which the declaratory judgment is based, the declaratory judgment should be dismissed. Id.; Medical University of South Carolina v. Taylor, 294 S.C. 99, 103, 362 S.E.2d 881, 883 (Ct. App. 1987). *See also* Camofi Master LDC v. College P'ship, Inc., 452 F.Supp.2d 462 (S.D.N.Y. 2006) (dismissing a declaratory judgment action because the declaratory judgment served no useful purpose since it was duplicative of the adjudication of the breach of contract claim); Fleisher v. Phoenix Life Ins. Co., 858 F. Supp. 2d 290, 302 (S.D.N.Y. 2012) (finding that "Plaintiffs' declaratory judgment claim seeks resolution of legal issues that will, of necessity, be resolved in the course of the litigation of the other causes of action. Therefore, the claim is duplicative in that it seeks no relief that is not implicitly sought in the other causes of action."); Sofi Classic S.A. de C.V. v. Hurowitz, 444 F.Supp.2d 231, 249 (S.D.N.Y. 2006) (dismissing declaratory judgment claim since it sought "resolution of legal issues that will, of necessity, be resolved in the course of the litigation of the other causes of action" and holding that "the claim is duplicative in that it seeks no relief that is not implicitly sought in the other causes of action").

While Wessinger dealt with two separate actions, the logic of the general rule applies here. At the start of the case, there was a prescriptive easement, a resulting trust, and an adverse possession claim pending between Cashman Properties and the Lightsey Trusts at the same time the declaratory judgment claim was pending. The underlying issues (ownership of Dock 3 through deed and/or adverse possession or resulting trust and the right to use Dock 3 through prescriptive easement) were the same. Since the pending prescriptive easement, resulting trust, and adverse possession claims were duplicative with the declaratory judgment, a declaratory judgment was improper. Therefore, the trial court erred in granting Cashman Properties a declaratory judgment.

For the forgoing reasons, the trial court erred in issuing a declaratory judgment in this matter.

II. Assuming *arguendo* that a declaratory judgment could properly be granted in the case, the trial court erred in making factual findings and conclusions of law that were not supported by the evidence in the case or the law in South Carolina.

a) The trial court erred when it found that there has been a consistent and cooperative pattern and practice of "use and ownership" of Docks 1, 2, and 3 for eighty (80) years when such finding is not supported by the evidence.

The trial court found that the parties have established a consistent and cooperative pattern of "use" and "ownership" of "Docks 1, 2 and 3 for 80 years." This was not supported by the evidence offered at trial.

Since the 1930s, at least 4 different docks were built on the May River by the parties. Prior to 1941, Mr. J.O. Cashman, the grandfather of Eugene K. Cashman, Jr., and Betty Cashman Davis, allegedly built a dock (Dock 1). (R. p. 89; R. pp. 345-346; R. p. 534, Dep. p. 10, lines 8-18). In 1941, J.O. Cashman applied for a permit to build a second dock along the May River. (R. pp. 345-346). Dock 2 was built, and the

Cashman family said that it was the owner of Dock 2. Betty Cashman Davis testified that her grandfather, J.O. Cashman, was the owner of Dock 2. (R. p. 180; R. p. 186). Ms. Davis testified that her grandfather owned Dock 2 because he built it. (R. pp. 187-188). Significantly, she did not testify that Dock 2 was jointly owned by the Cashmans and the Lightseys.

Eugene K. Cashman, Jr. testified that photographs from 1942 showed the "Lightseys' spare dock" and Dock 2. (R. p. 99; R. pp. 626-656). Mr. Cashman, Jr. testified that the Lightsey's "spare dock" could be used to access the sandy beach area and, at high tide, could be used to get into a boat. (R. p. 99). In fact, the photographs admitted into evidence shows the "spare dock" was in use by the Lightseys and that numerous boats were parked by and tied to the "spare dock." (R. pp. 626-655).

On February 18, 1946, Thomas O. Lawton, an original developer and owner of the Brighton Beach development, gave written permission to a Mr. Sanders to build a dock. Mr. Lawton gave Mr. Sanders permission to build the dock and stated that the Sanders' dock could be built "any where [sic] to the right of the Lightsey dock will be satisfactory to me. Do not build it to the left of the Carter-Cashman dock." (R. pp. 357-362). Mr. Lawton did not write that that the second dock was jointly owned by the Cashman and the Lightseys. Therefore, in 1946, the Lightsey family had its own dock, and the Cashman family had a dock with the Carter family.

Cashman Properties' own testimony and photographic evidence shows that there was not an eighty-year pattern of joint "use" and "ownership" for "Docks 1, 2 and 3." First, for at least twenty years of this time period (1942-1962), the Lightsey family had a dock and the Cashman family had a dock. These two docks are established by the

testimony of Mr. Cashman, Jr., the 1946 letter from Mr. Lawton, and the photographs showing both docks existing and in use by the families at the same time.

Second, the Cashman family claimed that it owned the second dock. They did not claim Dock 2 was jointly owned with the Lightsey family. As Ms. Davis testified, her grandfather owned Dock 2 because he built it. (R. pp. 187-188).

Third, the Lightsey family's conduct since obtaining a dock permit in 1961 establishes that the Lightsey family believed it was the sole owner of Dock 3. The Lightsey family built Dock 3 and paid all taxes and expenses associated with building and maintaining Dock 3.

Fourth, in 1977, Eugene Cashman Sr. drafted a letter to the permitting authority stating that Dock 3 was "owned by the Lightsey Brothers" and that he had their "permission to construct" a small floating dock to the side of Dock 3. (R. p. 385). He too did not say that Dock 2 was jointly owned by the Cashmans and the Lightseys.

Finally, the Cashman family's failure to pay any of the expenses associated with taxes and maintenance on Dock 3 also mitigates against a finding of an eighty-year pattern of joint use and ownership relating to the docks. (R. p. 123; R. pp. 126-127; R. p. 474, Dep. p. 46, lines 3-9). If the Cashman family believed it was a co-owner of Dock 3, it seems logical that someone from that family would have offered to pay at least some of the more than $80,000 of taxes and expenses associated with Dock 3.

Based on the evidence presented at trial, as discussed above, the trial court erred in finding that there was an eighty-year pattern of cooperation between the Lightsey family and the Cashman family relating to use and ownership of "Docks 1, 2 and 3."

b) The trial court erred when it found that Cashman Properties demonstrated by clear and convincing evidence that the Cashmans had the substantial belief that they had the right to use Docks 1, 2 and 3 for eighty (80) years.

Eugene K. Cashman, Jr. and Betty Cashman Davis were the only two members of the Cashman family that testified at trial. Mr. Cashman, Jr. testified that prior to 1994, he used the Oyster Street property as a guest of his father and that he did not obtain a legal ownership interest in the property until 1994 when his father, Eugene K. Cashman, Sr., transferred legal ownership to Mr. Cashman, Jr. and his sister Betty Cashman Davis. (R. pp. 115-116). By November 2004, the Cashman's small floating dock had blown away from the pier, was beached, and was not in a usable condition. (R. p. 426; R. pp. 428-429; R. p. 476, Dep. p. 53, lines 6-12; R. 544, Dep. p.54, lines 7-13). Mr. Cashman was locked out of the pier in 2005, voluntarily returned the key, and, therefore, did not have access to Dock 3 after 2005. (R. p. 105). Therefore, Eugene K. Cashman, Jr., based on his own testimony, could only have used Dock 3 as a matter of right from 1994 through 2005 (11 years).

Betty Cashman Davis testified that she obtained a legal ownership interest in the Oyster Street property in 1994, at the same time as her brother. She also stated that prior to 1994, she used the Oyster Street property as the guest of her father. (R. p. 185). Betty Cashman Davis testified that the Cashman family use of the pier was interrupted as of November 2004, by which time the floating dock had been washed away. (R. p. 187). In addition, Ms. Davis testified that in February 2005, "we couldn't go down on the dock" and that the Lightsey family had asserted exclusive rights to Dock 3. (R. pp. 184-185). Therefore, Betty Cashman Davis, based on her own testimony, could only have used Dock 3 as a matter of right from 1994 through 2005 (11 years).

Eugene K. Cashman, Sr. was the predecessor-in-interest of Eugene K. Cashman, Jr. and Betty Cashman Davis. Significantly, Eugene K. Cashman, Jr. testified that "it was my **understanding** that the Cashman family owned and provided the plumbing to [Dock 3] and we had ownership in the pier by participation . . . ." (R. p. 111). Similarly, Betty Cashman Davis testified that "it is my **understanding** that [Dock 3] was owned by the Carters, the Lightseys, and the Cashmans." (R. p. 183). The testimony of Mr. Cashman, Jr. and Ms. Davis relating to what their understanding of the ownership of Dock 3 prior to 1994 is not sufficient to establish that the usage of Eugene K. Cashman, Sr., their predecessor-in-interest, was under a "claim of right" as the trial court concluded. See Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (Ct. App. 1997) (holding that a claimant's testimony that he thought his predecessor-in-interest had a right of way was insufficient to establish a belief amounting to a claim of right and that "evidence establishing the mere fact of use does not necessarily equate with evidence establishing the character of such use.")

Further, as discussed in detail in below, there is ample evidence that establishes that Mr. Cashman, Sr.'s use of Dock 3 was by both the express and implied permission of the Lightsey family. This includes a statement that the Lightsey family owns Dock 3 and permitted Mr. Cashman, Sr. to use Dock 3 in a document written by Mr. Cashman, Sr., as well as Mr. Cashman, Sr.'s verbal acknowledgement of the express permission. (R. p. 116; R. pp. 236, 238; R. p. 385; R. p. 542, Dep. p.41, line 14-Dep. p. 42, line 23).

In addition, Mr. Cashman, Jr., testified that his father, Eugene K. Cashman, Sr., is still alive. (R. p. 115). Specifically, the first question asked of Mr. Cashman, Jr. during cross examination is whether his father "was still alive." Thus, in order to carry its

burden of proof, Cashman Properties could have called Mr. Cashman, Sr., and questioned him about these matters. However, Mr. Cashman, Sr., was not called as a witness at trial. There is a general rule in civil cases that when a party "fails to produce the testimony of an available, material witness who is within some degree of control of the party, it may be inferred that the testimony of such witness, if presented, would be adverse to the party who failed to call the witness." Baker v. Port City Steel Erectors, Inc., 261 S.C. 469, 475, 200 S.E.2d 681, 683 (1973). This general rule is "applied when the uncalled witness is a relative of the party failing to call such witness, or within some degree of control of said party." Matthews v. Porter, 239 S.C. 620, 633 124 S.E.2d 321, 328 (1962). This general rule certainly applies in the instant case, since Mr. Cashman, Sr. is the father of Mr. Cashman, Jr. and Ms. Davis. Most significantly, Cashman Properties did not submit any evidence into the record as to why Cashman, Sr. did not testify at trial, nor did they offer any testimony at trial regarding this subject.

Based on the above, the trial court erred when it found that Cashman Properties demonstrated by clear and convincing evidence that the Cashmans had the substantial belief that they had the right to use Docks 1, 2 **and** 3 for eighty (80) years.

c) The trial court erred when it found that the parties used Dock 3 without permission from each other when the evidence establishes that the Lightsey family gave both express and implied permission to the Cashman family.

i. Expressed written permission.

The Lightsey family gave express written permission for the Cashman family to use Dock 3. In 1977, Oswald Lightsey gave express written permission for Eugene K. Cashman, Sr. to use Dock 3 by attaching a small floating dock for use by the Cashman family. In a document drafted by Eugene K. Cashman, Sr. that was sent to the dock

permitting authority, Mr. Cashman, Sr. wrote in his own words that Dock 3 was "owned by Lightsey Brothers" and that he had "permission to construct" a floating dock on the side of Dock 3. (R. p. 385). When asked about this document at trial, Eugene K. Cashman, Jr. conceded that it was a letter drafted by his father, that the handwriting on the letter was that of his father, and that the letter was signed by his father, Eugene K. Cashman, Sr. (R. p. 116; R. p. 542, Dep. p.4 1, line 14-Dep. p.42, line 23). It was also established that a member of the Lightsey family signed the following section of the document: "I, Oswald Lightsey, do hereby give permission to Eugene K. Cashman to attach a floating dock and ramp to dock as mentioned in above application for permit." (R. pp. 385-386). Eugene Cashman, Jr. acknowledged that this document, drafted by his father and signed by a member of the Lightsey family, constituted his father requesting, and Oswald Lightsey granting, permission for Eugene Cashman Sr. to use Dock 3.

> Q. And so in 1977 your father used the words that he had the permission of the Lightseys, right?
>
> A. Yes, it was permission from the Lightseys to replace the floating dock that I previously testified to as –
>
> Q. And Mr. Lightsey also used the word that he was giving permission to your father, Eugene K. Cashman, correct?
>
> A. Yes, to the district engineer.
>
> Q. Well Mr. Lightsey actually says he gives permission to Eugene K. Cashman. He is giving your father permission, right?
>
> A. That's correct.

(R. p. 118).

The floating dock described above was the second floating dock attached to Dock 3 by the Cashman family. The first floating dock was not attached pursuant to a permit

from the Army Corps of Engineers, and the trial court correctly noted that in his Amended Declaratory Judgment. However, the trial court incorrectly noted that the first floating dock was without the permission of the Lightsey family when, in fact, there was no evidence at all presented by Cashman Properties to support a finding that the first floating dock was not built with the permission of the Lightsey family.

Eugene K. Cashman, Jr. testified, "[t]he amenities that were on [Dock 3] included the floating docks that were subsequently attached after construction and **to my knowledge those were not permitted until the second floating dock which the Cashman family obtained a permit** and the maintenance of the pier and the floating docks on the Cashman side were maintained by the Cashmans when storms or other matters were seemed to be needing repair." (R. p. 92) (emphasis added).

Mr. Cashman, Jr. also stated that in 1977, neither the Cashman family nor the Lightsey family had a permit for a floating dock. (R. p. 168). The following colloquy addressed how the first floating dock without a government permit was built:

> Q. And you testified that this was the permit that allowed -- I think you said that prior to that there had never been a permit for a floating dock?
>
> A. Based on what I see right here there was not requested on this particular document permitting for floating docks.
>
> Q. You know how the Cashmans would have had one if there had never been a permit granted for it?
>
> A. Yeah, probably just built it and put it there without following the permit process.
>
> Q. And that would have been the same thing the Lightseys would have done back in that day, right?

A. That would have been the way you did business back then, yes. Probably the same way the one on dock number two got installed.

(R. p. 168).

While this testimony established that the first floating dock on Dock 3 was built without a permit from the Army Corps of Engineers, neither it nor the other evidence addresses whether the first floating dock was built with the permission of the Lightsey family. Indeed, Mr. Cashman, Jr. testified that his family checked with the Lightsey family before adding a water line and an electrical line to the pier. (R. pp. 147-148; R. p. 538, Dep. p.28, lines 2-11). As Mr. Cashman, Jr. stated in his deposition, his father "wouldn't have gone and just one day have [the Lightsey Family] come back and arrive and see lights on the dock." (R. p. 538, Dep. p.28, lines 9-11). Accordingly, it strains credibility that the Cashman family would have added a floating dock without permission from the Lightsey family. Nevertheless, even if they did, the use became permissive in 1977 with the written permission of the Lightsey family.

ii. Implied permission through conduct

In addition, the conduct of the parties supports the documentary evidence related to permission. For example, before making any improvements or modifications to Dock 3, Eugene K. Cashman, Sr. contacted the Lightsey family and made certain that he had the Lightsey family's approval before modifying Dock 3. Eugene K. Cashman, Jr., testified that his father, Eugene K. Cashman, Sr., first checked with the Lightsey family before adding a water line and an electrical line to Dock 3. (R. pp. 147-148; R. p. 538, Dep. p.28, lines 2-11). Again, as Mr. Cashman, Jr. testified, his father "wouldn't have gone and just one day have [the Lightsey family] come back and arrive and see lights on the dock." (R. p. 538, Dep. p.28, lines 9-11).

Mr. Cashman Jr. also testified that he would only allow others to use Dock 3 if there was no objection made by the Lightseys, which is also consistent with a permissive use. Specifically, Mr. Cashman, Jr. testified that a neighbor named Diane Reynolds asked if she could use the Dock 3. Mr. Cashman, Jr.'s response was that she could only use Dock 3 "if there were no objections by the Lightseys." (R. p. 539, Dep. p.32, lines 15-18).

In contrast, Mr. Cashman, Jr. testified that no one from the Lightsey family ever asked his permission prior to modifying or repairing Dock 3. (R. pp. 140-141). Significantly, modifications and repairs made by the Lightsey family included replacing twenty (20) of the main pilings on Dock 3, and installing a new roof over the gazebo. (R. pp. 139-140). Mr. Cashman Jr. also testified that no one from the Lightsey family asked the Cashman family for permission to add a sink to the pier. He just went to the pier one day and found a sink had been installed. (R. p. 538, Dep. p. 27, lines 11-13).

Norris Laffitte, a member of the Lightsey family, ejected non-permissive users from Dock 3 with no question about the Cashmans. Mr. Laffitte testified that he told a woman who claimed she had permission to be on Dock 3 that she needed to get off of the dock. (R. p. 472, Dep. p.38, line 18-Dep. p.39, line 2). Mr. Laffitte also testified that he installed and then replaced the "No Trespassing" signs on Dock 3 without consulting the Cashmans. (R. 472, Dep. p.40, line 23-R. p. 473, Dep. p. 41, line 4). Mr. Cashman, Jr. also testified that no one from the Lightsey family asked his permission before placing a lock on the gate to Dock 3. (R. p. 140).

The conduct of the parties related to the costs of repairing Dock 3 also supports permissive use. The Lightsey family offered documentary evidence to support

$89,550.66 of expenses to build, maintain and pay tax associated with Dock 3. (R. pp. 599-624). Mr. Laffitte testified that the Lightsey family took care of the pier, pierhead, gazebo, west side ramp, and west side floating dock and that he had no knowledge of the Cashman family performing any repairs on the pier, pierhead, gazebo, west side ramp, or west side floating dock. (R. p. 474, Dep. p. 46, lines 3-9). Mr. Cashman, Jr. testified that no one from the Lightsey family asked him to contribute to repairs such as piling replacements and a new roof on the gazebo for Dock 3. (R. p. 140).

Despite maintaining a file specifically dedicated to Dock 3, and despite the fact that the file included receipts from 1974 - 1995, the Cashman family could not identify a single receipt solely for expenses incurred on the pier, pier head and gazebo. (R. pp. 580-597). Specifically, Eugene K. Cashman, Jr., testified regarding the following receipts:

- the August 21, 1974 estimate and the April 11, 1977 estimate related solely to the floating dock. (R. p. 132; R. pp. 580-597).
- the May 25, 1977, document was for the floating dock only and did not involve any work on the pier. (R. p. 133; R. pp. 580-597).
- the June 18, 1980, receipt for $12.22 was for unknown items. (R. pp. 133-134; R. pp. 580-597).
- receipts dated June 25, 1980, June 25, 1980, July 23, 1984, and July 26, 1984 for 2x8's and 2x4's for lumber of the size used on the floating dock and duct tape. (R. pp. 134-136; R. pp. 580-597).
- the July 29, 1980 receipt was for cleats, bolts and nuts for the floating dock. (R. p. 134; R. pp. 580-597).

- the receipts from June 27, 1980, July 24, 1984, July 25, 1984, July 31, 1984, July 7, 1984 and July 7, 1987 were exclusively for the floating dock. (R. pp. 134-137).
- the February 22, 1986 document, two of the three services listed were solely for the floating dock and no one knew if the other listed service was for the floating dock or the pier. (R. pp. 136-137; R. pp. 580-597).
- the June 9, 1995, receipt contained (1) charges unrelated to the dock such as putting new lights at the BBQ pit; (2) charges related exclusively to the floating dock such as installing a dock ladder and putting new rope on the floating dock; and (3) charges related to services to the floating dock. (R. pp. 137-138; R. pp. 580-597).

Mr. Cashman, Jr. stated that the above constituted all of the documentary evidence of expenses incurred by the Cashman family related to the pier. (R. p. 138). Specifically, he testified at trial as follows:

> Q. Now you don't have any other documentary evidence, checks, receipts, invoices, work orders, anything of that nature to show that the Cashman family ever incurred any expenses associated with the pier, right?
>
> A. Not in my possession, no.
>
> Q. Well do you know if there's any that exist anywhere in anybody's possession?
>
> A. Presently, no.

Id. Accordingly, Mr. Cashman, Jr. did not testify any expenditures were for the pier, pierhead, or gazebo of Dock 3. All of the expenses incurred by the Cashman family were

related to their small floating dock, which they were responsible for the maintaining **until it washed away in 2004**. (R. 474, Dep. p. 46, lines 10-14).

The testimony from Eugene K. Cashman, Jr. and Betty Cashman Davis that they and their children would nail down protruding nails, occasionally replace boards, and temporarily ran water to Dock 3 does not alter the fact that their use was permissive. (R. pp. 112, 162, 183). Indeed, such actions by permissive users recognize the neighborly accommodation of the Lightsey family in allowing the Cashman family to use Dock 3 free of charge for more than 50 years.

The Cashman family never paid any taxes associated with Dock 3. (R. p. 123, 126-127; R. pp. 575-578). Eugene Cashman, Jr. testified that neither he nor his father nor his sister nor anyone associated with the Cashman family has paid any taxes associated with the pier, gazebo, and dock. (R. p. 123, 126-127). The Lightsey family paid all of the taxes associated with the Dock 3 since 1986 when Beaufort County began taxing docks. (R. pp. 413, 415, 417-418; p. 424; pp. 451-452; pp. 456-457; pp. 575-578; pp. 657-659; and pp. 661-662).

In addition, Eugene K. Cashman, Jr.'s, letter to Norris Laffitte, dated March 28, 2005, also evidences that the Cashman family had permission to use the Lightsey family dock. First, he voluntarily returned the key to Dock 3 and did not say he had a right to use Dock 3. Second, he stated that if he needed to make the Cashman families' use of Dock 3 a "business relationship" he was willing to do so. (R. pp. 448-449). He closed by asking the Lightsey family to reconsider its decision to have exclusive use of the pier. Id. The language used in this letter is consistent with a permissive use and a neighborly accommodation.

The Lightsey family has acknowledged in writing that express permission had been given to the Cashman family to use Dock 3. The minutes of the Lightsey Trusts Jointly Owned Property Meeting of September 2004 (which were taken down before any dispute arose over Dock 3 and five (5) years before this lawsuit was filed) stated that "the Lightsey family has allowed the Cashman family" to use Dock 3. (R. p. 426).

Finally, Eugene K. Cashman, Sr. verbally acknowledged that he was a permissive user of the Lightsey dock in two separate conversations with Will McMaster. Mr. McMaster is married to Beth McMaster, a Lightsey granddaughter, and has visited the Bluffton property as a guest. (R. pp. 235-238). Mr. McMaster testified that Mr. Cashman, Sr., told him that "the Lightseys had given the Cashmans permission to use that pier and that [Cashman, Sr.] would like to get a document stating that they had permission in the past and would like to have permission in the future." When asked if "Mr. Cashman actually use[d] the word permission," Mr. McMaster stated "Yes." (R. p. 236). Regarding the second conversation, Mr. McMaster testified as follows:

> The second conversation was very similar to the first conversation in that he was seeking a document that would establish that he had had permission, the Cashman family had permission to use the dock in the past and they wanted permission to use the dock in the future and during this conversation he said that I realize that we don't own the dock because it was built with Lightsey labor and material.

(R. p. 238). This testimony is consistent with the Cashmans' own testimony and the other documentary evidence.

Accordingly, Cashman Properties failed to establish that the use of Dock 3 by the Cashman family was **not** with the express and/or implied permission of the Lightsey family.

iii. No distinct and positive assertion of a right hostile to the owner, and brought home to him

A long standing tenant of South Carolina law is that a permissive user of another's property can never ripen into an adverse or prescriptive use. As the South Carolina Supreme Court held in the 1917 case of Williamson v. Abbott, 107 S.C. 397, 93 S.E. 15 (1917), "it is the well-settled rule that use by express or implied permission or license, no matter how long continued, cannot ripen into" a prescriptive right "until there is a distinct and positive assertion of a right hostile to the owner, and brought home to him." Williamson, 107 S.C. at 400-401, 93 S.E. at 16. This rule, that was established in 1917, still applies in South Carolina. "Where one enters land under permission from the title holder, the possession can never ripen into an adverse title unless a clear and positive disclaimer of the title under which entry was made is brought home to the other party." Young v. Nix, 286 S.C. 134, 135, 332 S.E.2d 773, 774 (Ct.App. 1985). Indeed, the asking and obtaining of permission "stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription." Paine Gayle Properties, LLC, v. CSX Transportation Inc., 400 S.C. 568, 584, 735 S.E.2d 528, 537 (Ct. App. 2012) (emphasis in original and quoting Williamson, 107 S.C. at 400-01, 93 S.E. at 16).

There is simply no evidence that the Cashmans engaged in conduct that would amount to a distinct and positive assertion of a right hostile to the Lightseys. Indeed, Mr. Cashman, Jr. testified that between 1994-2005 he never told anyone in the Lightsey family that he believed he had an ownership interest in Dock 3. (Trial Trans. p.84).

III. The trial court erred in making the following *ex mero motu* holdings

a) The trial court erred in *ex mero motu* holding that the base of the pier is attached to land designated as common property, that the common right of access to the river arises from deeds, that neither party claims a right to land below the mean high water mark, and that a structure on common property and used by alleged co-owners becomes common property

Neither the Amended Complaint nor the Third Amended Answer in the instant case raises issues related to the ownership of the land where the base of Dock 3 is located, the source of the right of access to the river, ownership of the land below the mean high water mark, or allegations that a structure on common property becomes common property. (Amended Complaint; Third Amended Answer). Further, the parties did not present evidence on or litigate these issues. Accordingly, it was error for the trial court to rule on issues that were not raised to it. See Southern Railway Company v. Coltex, 285 S.C. 213, 329 S.E.2d 736 (1985) (holding it is improper for the trial court to raise and rule, *ex mero motu*, upon an issue not raised by the parties); Watts v. Metro Security Agency, 346 S.C. 235, 550 S.E.2d 869 (Ct. App. 2001) (stating the purpose of a pleading is to provide fair notice to the parties of the issues to be raised in the course of litigation). Rule 8, SCRCP.

b) The trial court erred in *ex mero motu* holding that laches prevents the Lightsey Trusts from seeking reimbursement from Cashman Properties for any and all expenses related to the dock incurred prior to the filing of the Summons and Complaint.

In its Amended Complaint, Cashman Properties did not raise the issue of laches. Laches was only mentioned in the Lightsey's Fourth Amended Answer as a defense to the Cashman's claims. Laches, as a defense to a potential Lightsey claim, was not addressed through discovery. During the trial, the parties did not present any evidence of

laches, address laches in arguments to the trial court or request that the court make any findings related to laches. Despite these facts, the trial court gratuitously ruled in its Amended Declaratory Judgment that "any claim for costs borne by the Defendants prior to the filing of the Summons and Complaint is barred by laches." This ruling was in error.

First and as discussed above, it was improper for the trial court to raise and rule, *ex mero motu*, upon an issue not raised by the parties. Southern Railway Company, 285 S.C. at 213, 329 S.E.2d at 736. The purpose of a pleading is to provide fair notice to the parties of the issues to be raised in the course of litigation. See Watts, 346 S.C.at 235, 550 S.E.2d at 869; Rule 8, SCRCP.

Second, even if laches were properly before the trial court, laches would not bar the Lightsey Trusts from receiving reimbursement for its costs and expenses relating to the pier and pierhead. Laches is "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S.C., Inc. v. County Council for Lee Cty., 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Accordingly, laches requires an unreasonable and unexplained delay. Eldridge v. Eldridge, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (S.C. 2012).

In the instant case, there is no unreasonable and unexplained delay by the Lightsey Trusts. The Lightsey Trusts believed and continues to believe that they are the sole owner of Dock 3 as acknowledged in writing by Cashman Properties predecessor in interest years before this dispute began. "The dock is owned by Lightsey Brothers and I have permission to construct this floating dock." (R. p. 385).

CONCLUSION

For the reasons contained herein and as may be raised in any Reply Briefs or Supplemental Briefs and at oral arguments, the Orders of the trial court should be reversed as stated herein and judgment entered on behalf of the Lightsey Trusts.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned, J. Ashley Twombley, certifies that the herein Final Brief of Appellants complies with Rule 211(b) the South Carolina Appellate Court Rules.

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THE STATE OF SOUTH CAROLINA
Beaufort County of Common Pleas

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity and Circuit Court Judge for Beaufort County

Case No.: 2009-CP-07-2573

CASHMAN PROPERTIES, LLC ..... Respondent

-vs.-

WNL PROPERTIES, LLC; E. OSWALD LIGHTSEY TRUST f/b/o LOUISE LIGHTSEY BAUGHMAN; THE TRUST UNDER WILL OF E. OSWALD LIGHTSEY DATED AUGUST 8, 1958, AND CODICIL DATED MARCH 23, 1976, FOR THE BENEFIT OF LILLIAN LIGHTSEY DRAWDY; AND THE TRUST UNDER THE WILL OF E. OSWALD LIGHTSEY FOR THE BENEFIT OF CLAUDIA LIGHTSEY WARE..... Appellants

CERTIFICATE OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Appellants, and that on the 3rd day of February 2014, a true and accurate copy of the attached of Final Brief of Appellants was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

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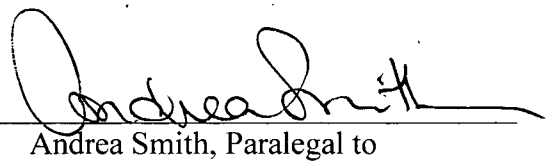
BY: 
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