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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-2573
Appellant Case No.: 2012-213579

Cashman Properties, LLC, ... Respondent,

v.

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, ... Appellants.

BRIEF OF RESPONDENT

John S. Nichols
BLUESTEIN NICHOLS
THOMPSON DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599 telephone

Roberts Vaux
James P. Scheider, Jr.
Mark S. Berglind
VAUX & MARSCHER, P.A.
Post Office Box 769
Bluffton, South Carolina 29910
(843) 757-2888 telephone

Attorneys for Respondent

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. Did the Master in Equity Correctly Grant Declaratory Relief to the Cashmans as a matter of law?

II. Was there sufficient evidence to support the Master in Equity's Findings of Fact and Conclusions of Law that:

(A) There is evidence to support the finding that there has been a consistent and cooperative pattern and practice of use and ownership of all three docks for eighty (80) years?

(B) There is clear and convincing evidence that the Cashmans had the substantial belief that they had the right to use all three docks for eighty (80) years?

(C) There is evidence to support the finding that all of the parties used Dock 3 without permission from each other?

III. Did the Master in Equity make any improper holdings *ex mero motu* as to:

(A) The ownership and access to the land upon which the dock is attached?

(B) Whether the Defendants were prevented by laches from seeking reimbursement from the Cashmans for expenses related to the docks prior to the filing of the lawsuit?

COUNTER-STATEMENT OF THE CASE

This is a dispute over the ownership interests of a pier and two floating docks in Beaufort County, South Carolina. On May 21, 2009, Cashman[1] brought an action against the Defendants[2] seeking a declaratory judgment that Cashman was the owner of the walkway and pier head on "the Common Area into the May River" near Bluffton, South Carolina. (Supp. R. p. 11). Cashman also stated causes of action for: (1) prescriptive easement; (2) resulting trust; (3) injunctive relief related to the dock; and (4) adverse possession of the walkway, pier head and floating dock. Cashman also filed a lis pendens that same date.

Wachovia Bank, as trustee under the E.Oswald Lightsey Will, filed an answer on August 6, 2009, rasing a number of defenses.

On September 3, 2009, Cashman filed an Amended Complaint which sought the same relief as the initial complaint. On October 15, 2009, all Defendants filed a joint answer to the Amended Complaint and on November 4, 2009, the Defendants filed an Amended Answer. On December 4, 2009, the court entered a consent order to correct misidentified parties in the caption.

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[1] The plaintiffs were initially Eugene Keeny Cashman, Jr., as Trustee of the Eugene Keeny Cashman, Jr., Revocable Trust, and Kathleen Gilmore Cashman, as Trustee of the Kathleen Gilmore Cashman Revocable Trust. The court substituted Cashman Properties, LLC as the real party in interest at a later date. For simplicity, plaintiff is simply referred to as "Cashman."

[2] The initial defendants were E.O. Lightsey Trust and Wachovia Bank, N.A., as Personal Representative and/or Trustee of the Estate of the E.O. Lightsey Trust. The defendants were later changed to the parties who are appellants before the court. For ease they are referred to collectively as "Defendants" and separately identified where necessary.

The parties engaged in discovery and on May 18, 2010, Defendants moved for summary judgment. On July 29, 2010, Cashman filed a memorandum in opposition to Defendants' motion. The circuit court heard the motion on August 2, 2010, and on August 12, 2010, entered an order denying Defendants' motion.

On August 17, 2010, Defendants moved to file a Third Amended Answer so as to raise the Statute of Frauds as a defense.

On July 18, 2011, the court entered a consent order transferring the matter to the Master in Equity to hear the matter and enter a final judgment.

The case was tried on October 31 and November 1, 2011.[3] On December 22, 2011, the master in equity entered an order finding:

1. Cashman and Defendants were co-owners as tenants in common of the entire pier and pierhead;
2. The ownership of "Dock 3" is appurtenant to the Defendants' property and the Cashman property;
3. Cashman was entitled to immediate access to the pier and pierhead and shall not be barred from such by Defendants or their agents;
4. Defendants had five (5) days to unlock the gate they had located on the pier or deliver a key to Cashman;
5. Cashman and the Defendants were to split equally the expenses directly related to the pier and pierhead that Defendants incurred from September 8, 2009 to the date

[3] At a pretrial hearing the parties moved to substitute the named parties as they appear currently. (R. pp. 4-5).

of the order;

6. The Defendants had thirty (30) days to submit the amount of those expenses to the court;

7. The court would determine the amount of those expenses to be paid by Cashman;

8. All future costs for necessary maintenance and upkeep of the pier and pierhead would be divided equally between the parties or their successors in interest;

9. The dock costs included, but were not limited to, insurance, taxes, maintenance, and upkeep for the pier and pierhead;

10. The court would hold a supplemental hearing to determine how the parties would proceed in the future regarding payment of costs for maintenance and upkeep;

11. That only the order for the supplemental hearing to determine costs should be considered the "final order" in the case for purposes of appeal.

(R. pp. 10-11). The order was filed on December 22, 2011.

The Defendants filed a motion for reconsideration on January 3, 2012. No specific grounds were stated therein. On July 10, 2012, the court entered its Order on Costs. On August 1, 2012, the Defendants filed a "Supplement" to the Motion to Reconsider or in the Alternative Alter Judgment on Behalf of Plaintiff. The supplement was directed at the July 10, 2012, order on costs, and did not state any specific grounds for relief.

On August 15, 2012, Defendants filed a Memorandum in Support of the Motion to Reconsider and the Motion to Amend. The Memorandum asserted numerous challenges to the court's orders. Cashman filed a Memorandum of Law in opposition to the Defendants' motions.

On November 5, 2012, the court entered an Amended Declaratory Judgment. On November 15, 2012, the court held a hearing and issued a supplemental order noting the court denied Cashman's claim for prescriptive easement.

On December 5, 2012, Defendants filed and served a notice of appeal from all orders entered in the case. On December 10, 2012, Cashman filed and served a notice of cross-appeal, but later withdrew the cross-appeal.

FACTS

A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue. *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). The action in this case was to declare the ownership of the pier, pierhead and two floating docks. Thus, while Defendants contend the case should be treated in equity (App. Br. p. 6), the claims are actually at law. *See Millvale Plantation, LLC v. Carrison Family Ltd. Partnership*, 401 S.C. 166, 736 S.E.2d 286 (Ct. App. 2012) (an adverse possession claim is an action at law); *Kelley v. Snyder*, 396 S.C. 564, 722 S.E.2d 813 (Ct. App. 2012) (determination of the existence of a prescriptive easement is a question of fact in a law action). This action is more akin to an action to declare an interest in real property, which is an action at law. *Wigfall v. Fobbs*, 295 S.C. 59, 367 S.E.2d 156 (1988) (determination of title to real property is an action at law). *But see Jocoy v. Jocoy*, 349 S.C. 441, 562 S.E.2d 674 (Ct. App. 2002) (action to determine resulting trusts sound in equity).

If the Court agrees with Defendants, however, then the Court would review the factual findings and legal conclusions *de novo*. *Lewis v. Lewis*, 392 S.C. 381, 388–89, 709 S.E.2d 650, 653–54 (2011). However, this *de novo* review does not require an appellate court to disregard the findings of the trial court or to ignore the fact that the trial court is in the better position to assess the credibility of the witnesses. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of the burden of convincing the appellate court that the trial court committed

error in its findings. *Id.* at 387–88, 544 S.E.2d at 623. Consequently, this Court will affirm the findings of the trial court in an equity case unless the appellant satisfies the Court that the preponderance of the evidence is against the findings of the trial court. *Lewis*, 392 S.C. at 388–89, 709 S.E.2d at 653–54.

With this broad scope of review in mind, the testimony and evidence below was as follows.

Eugene Keeny Cashman, Jr. (Eugene)

Both the Lightseys and the Cashmans own property on Oyster Road on the May River near Bluffton, South Carolina. For many years the Ryans owned a lot between the Cashmans and the Lightseys. (R. p.138). Eugene and his wife bought the lot from the Ryans. (R. pp.138-139; Supp. R. p. 32). Since 1998 Eugene has spent about 24 nights in the Oyster Street property. (R. p.150).

Eugene's grandfather, J.O. Cashman, and J.O.'s neighbor, Dr. T.R. Waters, constructed Dock No. 1. (R. pp. 85, 89). J.O. received permission to construct the pier from Mr. Lawton. (R. p. 110).

Dock No. 2 was built by J.O. Cashman in 1941 with permission from the U.S. Army Corps of Engineers. (R. p. 89; R. pp. 345, 348, 350, 355). Dock No. 2 replaced Dock No. 1. (R. p. 99). The Lightsey family used Dock No. 2 even though they had their own spare dock. (R. pp.128-129, 161).

The Lightsey Family provided materials for construction of Docks 1 and 2. (R. p. 89). The Lightseys also had a floating dock at the end of Dock No. 2. (R. p. 89).

The Lightsey Family built Dock No. 3 in the early 1960s. (R. pp. 89, 125). J.O.

Cashman was to participate financially, but the Lightsey Family did not accept payment because they acknowledged the previous years history in No. 1 and No. 2. (R. p. 89). Dock No. 3 was built and participated in by the Lightseys, Carrs and Cashmans as it had for Dock No. 1 and Dock No. 2. (R. p. 92). Floating docks were subsequently attached after construction. (R. p. 92).

In the early 1960s the first floating dock was put on the east side, about the time that the original dock was constructed. (R. p. 93). Eugene always referred to Dock No. 3 as the "Cashman, Carter, Lightsey" Dock. (R. p. 93, 94).

The Cashman Family used the floating dock on the east side of the pier head. (R. p. 95). The Lightsey Family did not use the floating dock, but could have done so had they needed it for boat tie-ups, swimming or other recreation. (R. p. 95).

Eugene never asked permission from the Lightseys to use Dock No. 3 or the floating docks on either side of Dock No. 3. (R. p. 94). He could not recall any member of the Lightsey family using Dock No. 3, other than Norris Laffitte once or twice in early 2000 with Charlie Drawdy and Billy Ware. (R. p. 108). Eugene never excluded others from Dock No. 3, although he did file a police report once regarding vandalism, and thought this was necessary to make an insurance claim. (R. pp. 94-95). Dock No. 3 was constructed in 1961 or 1962, and from that date through 2005 his use was never interrupted by the Lightseys. (R. p. 111).

Eugene identified a number of photographs of the area. (R . p. 97; R. p. 626). These photographs established long-term use of each of the Docks by the Cashman family. (R. pp. 98-104).

The Cashman Family actively used Dock No. 3 and the floating dock and maintained it. (R. pp. 92, 93). They provided electricity and water to all three of the Docks beginning in the late 1960s. (R. p. 92-93, 105, 160). At some point in 1984 the Lightseys ran water all the way down to the end of the pier. (R. p. 147). Water ran concurrently from pumps on both properties through a "T" connector. (R. pp. 159-160, 168-169). Eugene was adamant that the Cashmans were the first to supply water to the dock. (R. p. 169). The Cashman's use of the pier and dock from November 24, 2004 through May 29, 2009, was interrupted by the Lightseys putting a lock on the gate. (R. pp. 146-147).

Some time in 2005 Eugene was told that he could not have access to the Dock. (R. pp. 105, 106). For about six months Eugene was trying to arrange someone to replace the floating dock on the east side. (R. p. 105). Eugene discovered that the Dock was locked. (R. pp. 106, 143). Because he had a longstanding good relationship with Norris Lafitte, he called Norris, who sent him a key. (R. pp. 106, 142, 143; R. p. 440). The following day Norris called Eugene and said "you got to send me the key back." (R. pp. 106, 143). Eugene had not opened the envelope, so he simply sent it back to Norris. (R. pp. 106-107, 159).

Norris followed the conversation up with a letter. (R. p. 106; R. p. 446). Eugene sent a letter in reply. (R. pp. 107, 143; R. p. 448). In the letter, Eugene offered to pay money and create a written agreement if that was what was required. (R. pp.144, 158-159; R. p. 448). He never offered to pay money for an ownership interest in the dock. (R. p. 159).

Eugene maintained insurance on the docks, and began buying insurance on Dock No. 3 from the day it was built. (R. pp. 108-109, 121; R. p. 379). He read an exclusion in the policy for "structure located on or in part in or over water." (R. p. 121-123; R. p. 408). Eugene identified a letter from the insurer, Chubb, that said the policy had provided coverage for more than twenty years for the dwelling and other structures, including the dock. (R. p. 160; R. p. 408, 454, 459).

The floating dock was replaced in the 1970s. (R. p. 109). The Cashmans applied to the Corps of Engineers to replace the dock. (R. p. 109; R. p. 381, 383). Oswald Lightsey wrote a letter to Eugene on July 22, 1977, stating "We received the enclosed letter in the mail today, and since you are doing the work described therein, thought you would be the one to comply with their request." (R. p. 406). The request was from the Water Resources Commission regarding the permit application, and requested proof of publication of the proposed work in a local newspaper. (R. p. 404).

When asked his understanding about ownership of Dock No. 3, Eugene stated:

> It was my understanding that the Cashman family owned and provided the plumbing to it and we had ownership in the pier by participation in the kinds of things that went on including maintenance as well as the utilities provided.

(R. p. 111). He testified the Cashmans spent money on maintenance from 1961 until the present. (R. pp. 130-138, 161-162; R. p. 580). He agreed some of the items were not related to the pier, but the majority of items were related to the pier or the floating dock. (R. p. 137-138). He had records his father kept in file from 1974 through 1995. (R. p. 168; R. pp. 379, 381, 383, 393, 399).

Eugene stated the Lightsey property located at 31 Oyster Street had been for sale since 2007 or 2008. (R. p. 111). He identified a document that was part of the real estate sales information that said "dock on May River completed." (R. p. 112).

Eugene testified his father and grandfather were contractors and they would perform any routine maintenance that needed to be done. (R. p. 112). They would use excess of supplies on hand. (R. pp. 112-113). This explains why there are no invoices. (R. p. 161).

Eugene's father, Eugene, Sr., owned the property on Oyster Street from 1977 until 1994. (R. p. 120). Eugene obtained an ownership interest in the home in 1994 when his father transferred his interest to Eugene and Eugene's sister. (R. p. 115). Prior to 1994 he did not have a legal ownership interest. (R. p. 116). His father could have excluded him from the property if he had wanted to do so. (R. p. 116).

Eugene also identified the draft of a letter his father wrote to the Corps of Engineers on May 5, 1977, concerning the dock. (R. pp. 116-118; R. pp. 385, 387, 396). The first full paragraph stated, "the dock is owned by the Lightsey brothers and have permission to construct this floating dock as per stated below by a licensed district engineer." (R. p. 116; R. p. 385). Eugene agreed the letter states Oswald Lightsey gave Eugene's father permission to build or attach a floating dock and ramp. (R. pp. 118-119). Eugene also identified a letter the Corps sent in response. (R. p. 119; R. p. 391). Prior to that letter there was a floating dock on the east side of the pier which had been there since the pier was completed. (R. p. 152). An arrow on the letter pointed to a floating dock known as "the Cashman floating dock." (R. p. 163; R. p. 389).

The letter was sent for purposes of permitting to replace or repair the floating dock. (R. p. 153). Because the permit was in the Lightsey name under previous documents, Eugene's father had to have permission from the permitted group to put the floating dock in place. (R. pp. 153-155). Eugene's father was "following the directions of the 1977 requirement to get a dock permit." (R. p. 166).

Eugene identified a drawing from October 31, 1960 made by the Lightsey brothers for a dock permit; it did not contain a floating dock to the right of the pier. (R. pp. 156, 168; R. p. 364). He also read from an exhibit that stated, "Addition to the property owners' permit per on page 6 did not authorize floating docks," which appeared to reference a 1941 permit. (R. p. 156; R. p. 383). The Department of the Army wrote a letter stating:

> Reference is made to your letter of 5 May, 1977 requesting authorization to replace a floating dock and a ramp attached to the eastern end of an existing dock located on the northerly bank of the May River approximately 4.1 miles above this map near Bluffton, South Carolina. * * * A review of the files reveal that the permit authorizing the original structure was issued in 1961 without having been advertised by public notice. Therefore, before the work proposed in your letter finally can be authorized ... public notice must be issued and circulated for a minimum of 15 days.

(R. pp. 156-157; R. p. 391). Eugene stated that reading the two letters together neither the Cashman family nor the Lightsey family had a permit to construct a floating dock in 1977. (R. p. 157). Apparently both the Lightseys and the Cashmans "just built it and put it in there without following the permit process." (R. p. 168).

Eugene identified a public notice the Corps of Engineers issued regarding the floating dock. (R. p. 120; R. p. 401). The notice states that the applicant is "the Lightsey

brothers." (R. p. 121).

Eugene agreed that no one in his family ever paid any taxes related to the pier. (R. p. 123). He agreed that 1986 property card (the first year Beaufort County assessed docks county wide) stated the Lightseys' property on Oyster Street included a pier, header, a float and a gazebo. (R. p. 123; R. p. 413). The property card for 1996 also included those items and Eugene paid no property taxes on those things. (R. p. 126; R. p. 417). He agreed the Lightseys were charged for the taxes in 2004. (R. p. 127; R. p. 424). He did not remember ever paying any property taxes for the property associated with the pier, header, float or gazebo. (R. p. 127).

Eugene agreed that Diane Reynolds asked for his permission to go down to the dock, and he told her it was fine with him but she would have to ask the Lightseys. (R. pp. 125, 144-146).

The Lightseys never asked anyone in the Cashman family for any money associated with repairs and improvements made to the dock or repairs to the gazebo. (R. p. 139). This included repairs to the pilings and replacement of the main pier. (R. pp. 139-140; R. p. 420). No one asked Eugene's permission to make those repairs or to repairs to the gazebo. (R. p. 140).

Eugene identified a photograph from November 2004 which revealed the Cashman dock had washed away and was on the river bank. (R. pp. 141-142; R. p. 431). Eugene had removed the damaged dock in anticipation of replacing it. (R. p. 142).

Eugene agreed that before his father would do something to the pier he would have first checked with the Lightseys. (R. p. 147). This included putting electricity and

water on the pier and the dock. (R. p. 148). When asked why, Eugene said:

> That's the way we did business. I mean it was not something to be presumptuous on our part to do something out of a friendship or relationship with the Lightseys without at least acknowledging what we were going to do and I am, you know, suggesting that was just the way business was done in that way.

(R. p. 158). Eugene did not call to ask permission to do certain things. (R. p. 158).

From 1994 until 2005, when he discovered the lock on the gate, Eugene never told anyone in the Lightsey family that he believed he had an ownership interest in the pier. (R. p. 151). He also never attempted to exclude anyone from the Lightsey family from the pier during that time. (R. p. 151).

Diane Reynolds

Ms. Reynolds has lived in Bluffton for 50 years. (R. p. 171). She has been using the subject dock since 1976 with the permission of the Carters, the Cashmans, and the Lightseys. (R pp. 171, 177). Mrs. Carter lived next to the Cashmans on Oyster Street, and after she died her grandson tore the home down. (R. p. 174). This lot was between the Cashmans and the Lightseys. (R. p. 174).

Ms. Reynolds identified a letter she wrote the Cashman in 2004 (i.e., seven years before the hearing). (R. p. 172; R. p. 422). The letter states "To the Cashman Family. In 1965 the Cashman family, Mrs. Carter and the Lightseys gave me permission to use your dock." (R. p. 172; R. p. 422). Ms. Reynolds stated the date was a scrivener's error and should have said "1975." (R. pp. 172-173).

Since 1975, the dock was known as "the Cashman, Carter, Lightsey dock." (R. p. 174). All three families told her they owned the dock together and they all three said she

could use it. (R. p. 174).

Ms. Carter died about ten years prior to the hearing, and this was the last time the Carters lived on the property. (R. p. 175).

Betty Cashman Davis

Eugene Cashman, Sr. is her father and J.O. Cashman is her grandfather. (R. pp. 179, 186). She is a half owner with her sister-in-law, Kathy Cashman, of the property on Oyster Street that is deeded to Cashman Properties, LLC. (R. p. 179). She first received an interest in the property in 1994 at the same time her brother received an interest. (R. p. 185). Prior to that time her father allowed her to use the dock. (R. p. 185). Her father told her he wanted the property to stay in the family. (R. p. 186).

J.O. Cashman owned Dock 2. (R. pp. 180, 186, 187). Betty used Dock 2 with her family and friends. (R. p. 180). They swam and fished off the dock and rode their boat in the area. (R. p. 180).

Dock 2 was destroyed by a storm when Betty was about 15 years old. (R. p. 180). Dock 3 was then built and she "just made a smooth transition from dock 2 to dock 3," meaning "full use of it for myself, as well as my family and friends." (R. p. 180). They used Dock 3 for fishing, crabbing and parties. (R. p. 181). She was there "a great deal" and they used the dock all year. (R. p. 181). They would spend Christmas and Thanksgiving at the area from 1961 or 1962 until 2004 or 2005. (R. p. 181). Her father and entire family used the pier. (R. p. 182).

The first floating dock was constructed right after Dock 3 was built. (R. p. 182). The Cashman family had the floating dock built on the east side, and it was used by their

family and friends. (R. p. 182). The Lightseys did not use it "unless they needed just to tie up a boat...." (R. p. 182). It was Betty's understanding that the pier was owned by the Carters, the Lightseys and the Cashmans, and that the Cashmans owned the floating dock. (R. p. 183, 187-188). J.O. Cashman built and maintained the dock. (R. p. 188).

The Cashmans did maintenance on the pier and the floating dock. (R. p. 183, 184). Her son sanded the rust off of the ramp that went to the dock before it could be painted. (R. p. 183). He also took the fails from the pier down to the floating dock that Betty had. (R. p. 186). The Cashmans replaced boards from lumber her father would provide. (R. p. 183). They replaced the floatation for the floating dock, and replaced the floating dock when it was taken off by a storm. (R. p. 184). She remembered "two different ramps and I can remember two or either three different floating docks." (R. p. 184). These replacements and repairs were made by her father, Eugene Cashman. (R. p. 184).

Betty first received notice that the Lightsey family asserted exclusive rights to the pier and floating docks In February 2005. (R. p. 184). A floating dock had been lost and by the time the Cashmans were prepared to replace it they could not go down on the dock. (R. pp. 184-185, 187). The Cashmans intended on constructing a new floating dock. (R. p. 185).

The deposition of Norris Laffitte and Eugene Cashman were entered into evidence by agreement. (R. pp. 188-190; R. p. 461, 530). Their testimony was as follows.

Norris Laffitte (Deposition)

The Lightseys owned parcel no. 31 on the plat along the May River. (R. p. 464,

Dep. p. 7, ll. 9-22). Mr. Laffitte's great-grandfather, W. Fred Lightsey, acquired the property. (R. p. 464, Dep. p. 8, ll. 1-2). Mr. Laffitte is the grandson of W. Norris Lightsey. (R. p. 464, Dep. p. 8, ll. 10-13). The home located on the parcel was a vacation home and was never used as a permanent residence. (R. p. 468, Dep. p. 24, ll. 13-20). Mr. Laffitte is the person who is more "in tune with this property than anybody else in the family." (R. p. 473, Dep. p. 41, ll. 5-13).

The subject dock is located on the other side of Oyster Street from the Lightsey property. (R. p. 464, Dep. p. 8, ll. 14-19). Mr. Laffitte was aware of documents related to the permitting of Dock No. 3 dated February 21, 1961 from the Corps of Engineers. (R. p. 465, Dep. p. 9, ll. 4-8; R. p. 467, Dep. p. 18, ll. 20-23). "Lightsey Brothers" obtained that permit and built the dock, which Mr. Laffitte referred to as "dock three," in the early 1960s. (R. p. 467, Dep. p. 18, l. 25 - p. 19, l. 6; R. p. 471, Dep. p. 35, ll. 15-17). Lightsey Brothers was a business owned by Norris and Oswald Lightsey that ran a sawmill in Miley, South Carolina and that also owned land. (R. p. 467, Dep. p. 19, ll. 7-15). Mr. Laffitte did not have a copy of the permit, nor did he know of anyone who could provide a copy. (R. p. 467, Dep. p. 20, ll. 9-16).

The Dock is attached to property under a "covenant to stand seized" dated August 31, 1931, that gives permissive use to "all present and/or future owners of lots" in the subdivision as well as a 6.25 acre tract owned by Thomas O. Lawton. (R. p. 465, Dep. p. 9, l. 17 - p. 12, l. 3).

Mr. Laffitte identified a letter from J.O. Cashman dated September 9, 1941. (R. p. 465, Dep. p. 12, l. 21- R. p. 466, Dep. p. 13, l. 7). The letter stated, "Mr. T.O. Lawton

owns the land in front of which the wharf will be located, for which we have permission to build same." (R. p. 466, Dep. p. 13, ll. 8 -13). Mr. Laffitte knew of no other documents regarding Mr. Cashman's permission. (R. p. 466, Dep. p. 14, ll. 1-2). Mr. Laffitte also had no reason to doubt the authenticity of a permit dated September 29, 2941, from the War Department and addressed to C.O. Cashman. (R. p. 466, Dep. p. 4, ll. 12-20).

There were also three deeds. The first one was a deed of land in 1946 from Sam Buckner to J.O. and Bessie Cashman for $700. (R. p. 466, Dep. p. 15, l. 18 - p. 16, l. 6). The second deed was riverfront property the Cashmans sold to Ms. Carter in 1946 – that deed provided "the grantees shall have access to or use of the wharf erected, or to be erected, at the foot of street and road conveyed by the grantors herein." (R. p. 466, Dep. p. 16, l. 20 - R. p. 467, Dep. p. 17, l. 9).

On May 27, 1975, Eugene Cashman, Sr., applied for a permit to build a floating dock. (R. p. 468, Dep. p. 21, l. 12 - p. 22, l. 9).

Mr. Laffitte used the dock frequently as a youth from 1965 through 1973, and again after college from 1983 until 1998. (R. p. 468, Dep. p. 22, l. 23 - p. 23, l. 16). He saw the Cashmans there as well and said, "they were like us. When we were at the river, we were at the river. We didn't stay at the house. We stayed out on the water." (R. p. 468, Dep. p. 23, l. 25 - p. 24, l. 2). He also saw the Cashmans used the dock. (R. p. 468, Dep. p. 24, ll. 3-9; R. p. 474, Dep. p. 48, l. 21 - R. p. 475, Dep. p. 49, l. 1). He was unaware of the Cashmans ever asking permission to use the dock. (R. p. 472, Dep. p. 39, ll. 18-24; R. p. 475, Dep. p. 49, ll. 2-9). When he started using the dock in 1983 there was an electrical line running from the Cashmans' house to the dock. (R. p. 473, Dep. p. 44, ll. 15-23). He

agreed Mr. Cashman ran water to the dock, but Mr. Laffitte ran a water line sometime after 1983, and put a sink at the end of the dock. (R. p. 474, Dep. p. 45, ll. 2-11). In the fall of 2007 Billy Ware (Oswald Lightsey's son-in-law) severed the electrical line from the Cashman property and installed a new line from the Lightsey property down to the pier. (R. p. 475, Dep. p. 50, ll. 9-23).

Mr. Laffitte placed the lock on the gate between November 2004 and February 2005 to keep trespassers off the dock. (R. p. 469, Dep. p. 26, ll. 19-22). He sent a key to Mr. Cashman. (R. p. 469, Dep. p. 26, ll. 23-24). He then retrieved the key, and when Mr. Cashman called about the letter Mr. Laffitte said "I am not at liberty to comment." (R. p. 472, Dep.p. 37, l. 3 - p. 38, l. 1). This prevented Mr. Cashman from repairing the Cashman floating dock. (R. p. 476, Dep. p. 53, ll. 16-25).

The Lightsey family held meetings twice a year. (R. p. 469, Dep. p. 27, ll. 15-19; R. p. 470, Dep. p. 30, ll. 6-7). Participants included his side of the family: Margaret Lightsey McMillan Payne (Norris's daughter), Morris Laffitte, Tuck Laffitte (Mr. Laffitte's brother), Beth McMaster and Lalla Lee Campsen (Mr. Laffitte's sisters). (R. p. 469, Dep. p. 28, ll. 2-10). The other side of the family included Oswald Lightsey's daughters: (1) Louise Lightsey (Lou) Bowman, her husband Pat, their son Lee, their daughters Jan Hunter and Lynn Asnip; (2) Lil Lightsey Drawdy, her husband Charlie, Sr., and her sons Charlie, Jr., and Oswald; (3) Claudia Lightsey Ware, her husband Billy, their son Sanford, and her son-in-law Trip Welsh. (R. p. 469, Dep. p. 28, ll. 17-25; R. p. 470, Dep. p. 29, ll. 10-12). The bank representative was Fran Cass, Randy Fisher or John Swink. (R. p. 469, Dep. p. 28, ll. 12-16).

Mr. Laffitte explained the entry for March 16, 2005 in which he described send the key to Mr. Cashman and then retrieving it. (R. p. 470, Dep. p. 29, l. 7; R. p. 470, Dep. p. 30, l. 18 - p. 31, l. 3). On that agenda Mr. Laffitte raised the topic of "who owns" the pier. (R. p. 470, Dep. p. 31, ll. 6- 22). This included a review of documents Mr. Laffitte had regarding the 1961 permit and the taxes Lightsey Brothers paid on the property. (R. p. 470, Dep. p. 31, l. 25 - R. p. 471, Dep. p. 35, l. 13). The documents did not demonstrate payment of taxes prior to 1986. (R. p. 471, Dep. p. 35, ll. 18-24).

Mr. Laffitte agreed that Mr. Cashman's father built a floating dock on the east side of the pier in the 1970s, and it was known as the "Cashmans' floating dock." (R. p. 472, Dep. p. 40, ll. 6-15; R. p. 476, Dep. p. 53, ll. 10-13). The floating dock on the west side was known as the Lightseys' floating dock. (R. p. 472, Dep. p. 40, ll. 16-17; R. p. 476, Dep. p. 53, ll. 14-15). The docks were not for general use, and there was always a "no trespassing" sign on the gate. (R. p. 472, Dep. p. 40, l. 18 - R. p. 473, Dep. p. 41, l. 4). The Cashmans did all repairs to the floating dock, and they used the Lightsey pier and pierhead to get to their ramp and the floating dock. (R. p. 474, Dep. p. 46, ll. 10-21).

Mr. Laffitte identified a document that demonstrated that Lil Drawdy wanted to buy the property for $1.8 million but also wanted assurances regarding use of the dock. (R. p. 473, Dep. p. 42, ll. 13-19). Mr. Laffitte advised her that he could not get her clear title to the common property and the pier and she withdrew her offer. (R. p. 473, Dep. p. 43, ll. 21-23).

Eugene Cashman (Deposition)

The properties at issue were two lots; one Mr. Cashman bought in 1999 and the

other his grandfather bought from Mr. Lawton in the 1920s. (R. p. 533, Dep. p. 6, l. 9 - p. 7, l. 4). The properties are now owned by Kathleen Gilmore Cashman and her revocable trust. (R. p. 533, Dep. p. 5, l. 13 - p. 6, l. 5).

Mr. Cashman described the long-term use of the property by his family. (R. p. 533, Dep. p. 7, l. 5 - p. 8, l. 16) Mr. Cashman's time there spanned 68 years. (R. p. 533, Dep. p. 8, l. 17 - R. p. 534, Dep. p. 9, l. 9). The Lightseys family has been there throughout the same time. (R. p. 534, Dep. p. 9, ll. 10-20). The two families have always been very close. (R. p. 534, Dep. p. 9, l. 21 - p. 10, l. 7).

Mr. Cashman described the construction of the various piers, adding that Dock 1 and Dock 2 were used by the Lightseys, Carters, Cashmans, Pitts, Boones and other individuals in the neighborhood. (R. p. 535, Dep. p. 14, l. 6 - R. p. 536, Dep. p. 17, l. 19). No one was denied use of the pier, and use was based on a "handshake." (R. p. 536, Dep. p. 17, l. 20 - p. 18, l. 3; R. p. 536, Dep. p. 19, ll. 3-11). Dock 1 was known as the "Cashman-Waters Pier," Dock 2 was known as the "Cashman-Carter Pier," and Dock 3 was known as the "Lightsey-Cashman-Carter Pier." (R. p. 536, Dep. p. 19, l. 14 - p. 20, l. 8). Eventually the Lightseys and the Cashmans had to put a "no trespassing" sign on Dock 3. (R. p. 536, Dep. p. 20, l. 11 - R. p. 537, Dep. p. 21, l. 13; R. p. 539, Dep. p. 29, l. 19 - p. 32, l. 25).

Lightsey Brothers built Dock 3 and refused an offer from Mr. Cashman's father to pay half. (R. p. 534, Dep. p. 11, ll. 6-10; R. p. 537, Dep. p. 21, ll. 17-22; R. p. 537, Dep. p. 22, l. 19 - p. 23, l. 16). The permit was a "piggyback" on the permission Mr. Lawton had given Mr. Cashman's grandfather. (R. p. 546, Dep. p. 62, ll. 9-21).

The Cashmans provided water and electricity to Dock 3. (R. p. 538, Dep. p. 26, l. 22 - p. 29, l. 18). It was Mr. Cashman's understanding that the three families - the Lightseys, Cashmans and Carters - believed they had the right to restrict access to the pier. (R. p. 540, Dep. p. 33, ll. 1-16). Dock 3 was originally a pier with one floating dock that was used by the Cashmans, Carters and Lightseys. (R. p. 540, Dep. p. 35, ll. 8-18). The second floating dock was added in the 1970s for convenience. (R. p. 541, Dep. p. 37, l. 14 - p. 39, l. 8; Supp. R. p. 37, Dep. 49, ll. 3-15). Mr. Cashman identified a letter his father sent to the Corps of Engineers in May 1977 seeking permission to replace the floating dock and make other repairs, and stating "that Oswald Lightsey gave permission to attach the floating dock." (R. p. 542, Dep. p. 41, l. 18 - p. 43, l. 3). Mr. Cashman also identified the letter from the South Carolina Water Resources Commission of July 21, 1075, to Lightsey Brothers and the subsequent letter from Norris Laffitte to Mr. Cashman forwarding the letter. (R. p. 543, Dep. p. 45, l. 23 - p. 48, l. 2). Mr. Cashman's father paid for the second floating dock. (Supp. R. p. 37, Dep. p. 51, ll. 9-11). The majority of use was by the Cashman family. (R. p. 546, Dep. p. 62, l. 22 - p. 63, l. 17).

The floating dock had to be repaired a number of times and was completely replaced once. (Supp. R. p. 37, Dep. p. 51, l. 12 - Supp. R. p. 38, Dep. p. 53, l. 19). The dock is no longer there – it was beached and Mr. Cashman disassembled it and carried it off. (R. p. 544, Dep. p. 54, ll. 7-13). When it came time to replace it in 2005 Mr. Cashman was denied access to the pier. (R. p. 544, Dep. p. 54, ll. 14-17; R. p. 544, Dep. p. 55, ll. 12-13). He discovered the lock on the gate when he was taking someone down to the pier to give him an estimate for the cost of replacing the floating dock. (R. p. 544,

Dep. p. 54, l. 18 - p. 55, l. 9). Mr. Cashman contacted Mr. Laffitte and he agreed to send a key, which he did. (R. p. 544, Dep. p. 55, ll. 10-20). Mr. Laffitte then called back and asked Mr. Cashman to send the key back because "you don't have permission to go out on the dock." (R. p. 544, Dep. p. 55, l. 21 - p. 56, l. 3). Mr. Cashman had not opened the envelop and he returned it to Mr. Laffitte. (R. p. 544, Dep. p. 56, ll. 1-16). Mr. Laffitte followed up with a letter explaining that at the family meeting it was decided that the Lightseys wanted exclusive use of the dock. (R. p. 544, Dep. p. 56, l. 24 - R. p. 545, Dep. p. 57, l. 5).

Ms. Cashman was asked why he believed the Cashmans were tenants in common with the Lightseys for the pier, and he responded:

> Over 80 years of relationships where they - - the families, and the generations that have been a part of those, have mutually shared in and used docks one, two, and three; that for participation in maintenance, upkeep and additions to, as in the case of electricity - - and that there was no basis at any time anywhere in the past that would support that entitlement and use was not, you know, ever going to be an issue.

(R. p. 545, Dep. p. 59, ll. 14-23). No one in the Lightsey family asked the Cashmans to do maintenance, but the Cashmans did it out of their responsibility of ownership. (R. p. 545, Dep. p. 60, ll. 2-11). They installed the water and electricity because "we thought it would be a very good idea, and they were just agreed to" and his father took care of it. (R. p. 545, Dep. p. 60, ll. 12-22). It was implied that the Cashman family had an ownership interest in Dock 3. (R. p. 545, Dep. p. 60, l. 23 - R. p. 546, Dep. p. 61, l. 6). The Cashman family never asserted exclusive use to Dock 3 to the exclusion of the Lightsey family. (R. p. 546, Dep. p. 61, ll. 7-10).

ARGUMENTS

I The Master in Equity Correctly Granted Declaratory Relief to the Cashmans

Defendants contend that because Cashman sought relief under the theories of adverse possession, resulting trust or prescriptive easement, and neither theory survived to the final order, then the Master in Equity had no authority to enter a declaratory judgment. (App. Br. pp. 7-15). The Court should affirm the Master's order.

(A) The Action is Permissible under the Declaratory Judgment Act

Defendants first argue that this action fails because there is no "underlying claim" upon which the declaratory action can arise. (App. Br. pp. 9-12). The Court should not be persuaded by this argument.

The Declaratory Judgments Act provides that "[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." S.C. Code Ann. § 15-53-20 (1976); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462 (2004). "Any person ... whose rights, status, or other legal relations are affected by a statute [or] municipal ordinance ... may have determined any question of construction or validity arising under the ... statute [or] ordinance ... and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30 (1976); *Sunset Cay*. *See also* Rule 57, SCRCP ("The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.").

In this case, Cashman brought an action for a declaration that the parties are "the

joint owners, as tenants in common, of the fixture (i.e. the walkway and pier head) located on and emanating from the Common Property." (Supp. R. p. 15, ¶ 31). Cashman requested the court "issue an Order finding the [parties] are joint owners of the fixture affixed to the Common Area as tenants in common and for such other relief as this Court may find just and proper." (Supp. R. p. 15, prayer). Cashman also stated causes of action for prescriptive easement (Supp. R. 15, Second Cause of Action), Resulting Trust (Supp. R. p. 16, Third Cause of Action), Injunctive Relief (Supp. R. p. 17, Fourth Cause of Action), and Adverse Possession (Supp. R. p. 17, Fifth Cause of Action).

At trial, Cashman withdrew the claim for Adverse Possession, and the Master found Cashman failed to prove a prescriptive easement. (R. p. 21, ¶ 1). Cashman also prayed, however, that the Court "determine ownership rights of the land at issue in the Plaintiffs' Fifth Cause of Action; determine that the Plaintiffs own an undivided interest in and to the walkway, pier head, and floating dock through adverse possession; and for such other relief as this Court may find just and proper." (Supp. R. p. 18, prayer).

In the order, the Master held the case involved "ownership of a pier, pierhead and two floating docks...." (R. p. 5, ¶ 2). The Master also found the case presented "a justiciable controversy, and a Declaratory Judgment pursuant to the Declaratory Judgments Act, S.C. Code 15-53-10, *et. seq.* is necessary to determine the rights and relationship of the Parties to this action." (R. p. 9, ¶ 1). The Master declared the parties are "co-owners as tenants in common of the entire pier and pierhead." (R. p. 9, ¶ 5). The Master also found "in the absence of an agreement or contract, a fixed and permanent structure constructed on common property and used by co-owners in a manner such as

this becomes common property." (R. p. 10, ¶ 7). This Court should affirm.

The Supreme Court in *Sunset Cay* noted that despite the Declaratory Judgment Act's broad language, it has its limits. The Court stated:

> An adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the Uniform Declaratory Judgments Act. *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970); *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957). A declaratory judgment should not address moot or abstract matters. *Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876, 882 (1951).
>
> To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy. *Power v. McNair*, 255 S.C. at 154, 177 S.E.2d at 553. "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Power v. McNair*, 255 S.C. at 154, 177 S.E.2d at 553; *Graham v. State Farm Mutual Automobile Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (same); *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002) (same).
>
> The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy. *Waller*, 220 S.C. at 223, 66 S.E.2d at 882. The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. The Act should be liberally construed to accomplish its intended purpose of affording 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. *Graham*, 319 S.C. at 71, 459 S.E.2d at 845; *Power*, 255 S.C. at 154, 177 S.E.2d at 553; *Waller*, 220 S.C. at 223, 66 S.E.2d at 882; *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 16, 567 S.E.2d 881, 888-89 (Ct. App. 2002).
>
> Our courts have found the existence of a justiciable controversy, for example, in determining whether a vehicle insurance policy should be reformed to include underinsured motorist coverage, *Graham*, *supra*; in determining whether the consolidation of two municipalities resulted in the merger of municipally owned utility systems, *City of Columbia*, *supra*; in the determination of heirs' contingent or vested interest under a will,

> *Waller*, *supra*; in deciding whether the court should issue a writ of mandamus directing the sheriff to accept a non-cash bid at a judicial sale, *Holden*, *supra*; and in a dispute involving homeowners' challenge to amendments of their subdivision's restrictive covenants, *Pond Place Partners*, *supra*.

Sunset Cay, 357 S.C. at 423-424, 593 S.E.2d at 466-467 (underline added). Thus, courts entertain declaratory judgment actions in all kinds of cases to answer questions so as to resolve various kinds of disputes. *See*, *also*, *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South*, 385 S.C. 428, 685 S.E.2d 163 (2009) (church congregation filed a declaratory judgment action against the national church and local Diocese seeking an order declaring that the congregation held title to its property or, in the alternative, held its property in trust for the benefit of the inhabitants of the Waccamaw Neck pursuant to a Trust Deed); *In re Estate of Rider*, 394 S.C. 84, 713 S.E.2d 643 (Ct. App. 2011) (personal representative of decedent's estate filed petition for declaratory judgment in probate court, naming Wife and ten others as respondents to the petition, and seeking a determination of whether decedent's execution of the letter completed the transfer of all the securities such that they are not part of decedent's estate); *Southeast Toyota Distributors, LLC v. Jim Hudson Superstore, Inc.*, 387 S.C. 508, 693 S.E.2d 33 (Ct. App. 2010) (Southeast Toyota brought a declaratory judgment action against Jim Hudson to determine whether Hudson's relocation of his dealership was exempt from protect pursuant to S.C. Code Ann. § 56-15-46(C)); *Query v. Burgess*, 371 S.C. 407, 639 S.E.2d 455 (Ct. App. 2006) (Query brought a declaratory judgment against Burgess and the State of South Carolina seeking to establish ownership over certain marshlands abutting his Folly Beach property).

There is no question that there is a justiciable controversy in this case, namely, whether the Cashmans have an ownership interest in Dock 3. That is all that is required under the Act and under Rule 57.

Defendants point to *Harvey v. SC Dept. of Corrections* for the rule that the Act "does not create substantive rights or duties." 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000) (App. Br. pp. 10-11). Lightsey also point to the case upon which *Harvey* relied, *Felts v. Richland County*, 299 S.C. 214, 383 S.E.2d 261 (Ct. App. 1989), *aff'd* 303 S.C. 354, 400 S.E.2d 781 (1991). (App. Br. p. 10). These cases, however, do not prevent the Master from entering the order in this case.

The discussion lifted from *Harvey* and from *Felts* involved the appellate court's discussion of its scope of appellate review. The Courts were explaining that an action brought under the Act is "neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts*, 303 S.C. at 356, 400 S.E.2d at 782. That is, a declaratory judgment action is simply that, an action to declare rights, and whether the action is legal or equitable depends on the nature of the underlying issue and the main purpose of the complaint. *See Estate of Revis v. Revis*, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App.1997) ("To make this determination the court looks to the main purpose of the action as determined by the complaint.").

Here, the main purpose of the complaint is the determination of the ownership of property affixed to a common area. This is akin to an action at law to determine title to real property. *Cf. Lowcountry Open Land Trust v. State*, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct. App. 2001) (where main purpose of complaint concerns determination of

title to real property, it is an action at law). That purpose did not change where the claims for adverse possession or prescriptive easement failed.

Defendants also point to cases from other jurisdictions in support of the argument that "success on a declaratory judgment action is necessarily dependent on success of an underlying claim." (App. Br. pp. 11-12). These cases, however, are meaningfully distinct from this case, and do not control the procedure in South Carolina. *See Becker v. Kroll*, 340 F. Supp.2d 1230 (D. Utah 2004), *aff'd in part and rev'd in part*, 494 F.3d 904 (10 th Cir. 2007) (district court did not describe the nature of the declaratory relief, just that plaintiff brought a claim for "declaratory judgment" and stated, without citation to authority, the language quoted in the brief; the Tenth Circuit Court of Appeals reversed without addressing this portion of the district court's order); *Days Inn Worldwide, Inc. v. Sai Baba, Inc.*, 300 F. Supp.2d 583 (N.D. Ohio 2004) (noting defendants failed to link their counterclaim for declaratory judgment to an underlying substantive claim for relief, without citation to any authority for the specific rule; the case relied upon *Int'l Ass'n of Machinists and Aerospace Workers v. Tennessee Valley Authority*, 108 F.3d 658, 668 (6th Cir.1997) that held a declaratory judgment action is barred if the underlying claim is time-barred by the statute of limitations); *Economic Opportunity Com'n of Nassau County, Inc. v. County of Nassau*, 106 F. Supp.2d 433 (E.D. N.Y. 2000) (the federal Declaratory Judgment Act, 28 U.S.C. § 2201, merely provides a remedy where none previously existed, and does not supply an independent cause of action; a court may only enter a declaratory judgment in favor of a party who has a substantive claim of right to such relief; district court stated it was "at a loss to discern the underlying substantive

claim alleged by the Plaintiffs in the particular causes of action); *Matos v. First Nat. Bank*, 27 Mass. L. Rptr., 2010 WL 3327725, slip at 4 (Mass. Super. 2010) (in a memorandum opinion the superior court of Massachusetts stated, without citation to authority, that the "Plaintiff has requested that this court invalidate Defendant Mokkedem's claim to legal title to the property. However, this claim is dependent on the success of the Plaintiff's claims under Chapter 93A and Chapter 183C. Due to the failure of the Plaintiffs previous claims, the claim must also fail"; the Chapter 93A claim failed due to the expiration of the applicable statute of limitations, and the Chapter 183C claim failed due to Plaintiff's contrary admissions on a tax return, that is, under a rule akin to judicial estoppel); *Repwest Ins. Co. v. Praetorian Ins. Co.*, 890 F. Supp.2d 1168 (D. Ariz. 2012) (court noted plaintiff sought "a declaration that [defendant's] conduct constituted a breach of contract that existed between [plaintiff and defendant]" under Arizona's reinsurance statute governing brokers, and dismissing the claim for declaratory relief because the court had already dismissed plaintiff's only cause of action against defendant for breach of contract).

As can be seen, none of these cases inform the Court on how to apply the South Carolina Declaratory Judgment Act or Rule 57. Each case is limited to the distinct facts and none of them arise under a procedure akin to the Act or South Carolina's Rule.

The Court should therefore reject Defendants' argument that the Master in Equity had no authority to enter a declaratory judgment.

(B) The Purpose of the Declaratory Judgment Act is Served by the Order

Defendants contend that because Cashman alleged an existing violation of rights by the placement of the lock on the gate, a declaratory judgment was not proper and should not have been issued. (App. Br. pp. 12-14). The Court should not be persuaded by this argument.

Defendants rely principally on *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462 (2004). Defendants point to the language that the "basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. The Act should be liberally construed to accomplish its intended purpose of affording 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." (App. Br. Pp. 12-13). Defendants contend this language precludes a court from entering a declaratory judgment where there is an allegation that rights have already been violated. The Court should not adopt this view.

First, Defendants cite to no authority that says that a declaratory judgment action is available *only* when other rights have not been invaded. This is because the Act permits a declaratory judgment action " whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20 (1976).

Second, the conclusion Defendants suggest does not flow from the premise. That is, simply because a plaintiff does not *need* to wait for a breach of an existing rights does not mean the plaintiff may not bring a declaratory judgment action where that breach has

already occurred. Cases are legion where a party brought an action for declaratory judgment *after* the party has suffered some violation of rights. *See, e.g., Campbell v. Robinson*, 398 S.C. 12, 726 S.E.2d 221 (Ct. App. 2012) (Court of Appeals reversed and remanded plaintiff's actions for declaratory judgment and claim and delivery in a dispute over ownership of an engagement ring after the engagement was called off); *Leggett v. Smith*, 386 S.C. 63, 686 S.E.2d 699 (Ct. App. 2009) (claim for declaratory judgment as to insurance coverage permitted to proceed while underlying tort claim stayed; plaintiff's rights had already been violated); *Stecker v. TALX Corp.*, 384 S.C. 224, 681 S.E.2d 890 (Ct. App. 2009) (plaintiff permitted to bring declaratory judgment action for interpretation of an agreement following assertion of indemnification rights by the defendant). In fact, any declaratory judgment action regarding the existence of coverage for a claim would necessary occur *after* the party seeking coverage has suffered a violation of rights.

The Court should reject this argument and find declaratory relief was appropriate.

(C) The Master Did Not Breach any rules requiring dismissal

Defendants contend that the Master in equity "breached the general rule that declaratory judgment actions should be dismissed if the issues can be adjudicated in a pending action." (App. Br. pp. 14-15). This Court should reject this argument.

Defendants rely primarily upon *Wessinger v. Rauch*, 288 S.C. 157, 341 S.E.2d 643 (Ct. App. 1986). That case, however, is distinguishable from this case in a meaningful way.

In *Wessinger*, defendant was the plaintiff in a prior lawsuit against Wessinger seeking an order establishing plaintiff's title to real property. The jury found against plaintiff. She then brought a second action against the same parties, seeking the same relief, and claimed the ability to do so under statutory law. Wessinger moved for summary judgment on a number of grounds, including a claim that the statute upon which plaintiff relied was unconstitutional. The trial judge denied the motion and allowed plaintiff to relitigate the question of her title to the property. Wessinger then brought a separate action against plaintiff, seeking a declaratory judgment that the statute upon which plaintiff relied was unconstitutional. The trial court dismissed the action for declaratory judgment on the ground it was barred by res judicata because the issue presented was the same as had been adjudicated by the prior denial of summary judgment in the pending action between the same parties. Wessinger appealed the second order.

This Court affirmed. First, the Court held res judicata did not apply because the denial of summary judgment in the prior action was not a final determination. However, the Court affirmed on an additional sustaining ground, that is, "a declaratory judgment action is not a substitute for a new trial or an appeal, nor can it operate to supersede former adjudications or proceedings already pending." 288 S.C. at 160, 341 S.E.2d at 644. The Court stated:

> As a general rule, 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. *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E.2d 294 (1984). *Cf. Williams Furniture Corp. v. Southern Coating & Chemical Co.*, 216 S.C. 1, 56 S.E.2d 576 (1949) (court may refuse to render declaratory judgment where the remedy

> is invoked to try issues or determine the validity of defenses in pending cases).
>
> The reason for this rule is obvious. A subsequent case deciding an issue in a prior case would be a classic example of a tail wagging a dog.
>
> The action by [plaintiff] was pending at the time the Wessingers, Swain and Koon commenced their action for declaratory judgment. The issues presented by the action for declaratory judgment can be adjudicated in the pending action by [plaintiff] .
>
> We hold the action for declaratory judgment should have been dismissed for these reasons.

288 S.C. at 160, 341 S.E.2d at 644-645. Thus, it was the existence of another pending action that drove the decision to dismiss the declaratory judgment action. *See also Medical University of South Carolina v. Taylor*, 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987) (describing the dispositive issue as whether the circuit court erred in granting MUSC a declaratory judgment and injunctive relief where there were pending administrative proceedings to which Taylor and MUSC were parties and in which the same identical issues involved in the instant action could have been adjudicated; Court reversed refusal to dismiss declaratory judgment action because the other action was pending and the remedy in that other action would be more appropriate under the circumstances).

Here, there was no other action pending between the same parties involving the identical issues being adjudicated in the declaratory judgment action. Defendants realize this, but contends this rule should apply where claims for other relief are brought in the same action as the claim for declaratory judgment. This is simply not the law and, as noted above, litigants often seek declaratory relief along with claims for damages or

claims for injunctive relief. This is a settled rule in South Carolina, and this Court should not expand the rule of *Wessinger* to multiple claims brought in one action.

Accordingly, the Court should affirm the Master's decision to grant the declaratory relief in this case.

II. The Master in Equity's Findings of Fact and Conclusions of Law Are Supported by the Evidence

Defendants challenge several factual findings in the order, claiming there is no evidence to support those findings. This Court should affirm.

(A, B) There Is Clear and Convincing Evidence to Support the Findings That There Has Been a Consistent and Cooperative Pattern and Practice of Use and Ownership of All Three Docks for Eighty (80) Years and That the Cashmans Had the Substantial Belief That They Had the Right to Use All Three Docks for Eighty (80) Years

Contrary to Defendants' contention in the Brief, there is abundant evidence to support the Master's finding that the parties had cooperatively used the common area and Docks 1, 2, and 3 to access the water for over eighty (80) years. (R. p. 14, ¶ 6; p. 17, ¶ 16). There is also sufficient evidence to support the Master's conclusion that the Cashmans "demonstrated by clear and convincing evidence a substantial belief that Cashmans had the right to use the aforementioned docks to access the River and that their use and enjoyment continued uninterrupted for at least eighty (80) years." (R. p. 18, ¶ 4).

Eugene Cashman testified the family used and enjoyed Dock 3 from the date it was built (1961-1962) until 2005. (R. p. 95). He testified to their use dating back to the 1920s. (R. pp. 95-104; R. p. 626). When Dock 3 was completed the Cashman family constructed a floating dock for which they obtained a permit in the 1970s. (R. pp. 92-94,

156-157). The Cashman family provided electricity from the late 1970s or early 1980s and water from the 1970s, and provided maintenance and insurance. (R. pp. 101-105, 108, 112-113; R. p. 459). He also directly testified the relationship and cooperation had gone on for over eighty years. (R. p. 545, Dep. p. 59, ll. 14-23).

Betty Cashman Davis also testified to the family's continued use and enjoyment of all three piers. (R. pp. 180-184). She stated that from 1961 until 2004 the Cashmans spent Christmas, Thanksgiving and summer vacations at the Oyster Street home, and they used the pier on those occasions. (R. p. 181). The Cashmans replaced two ramps and two or three floating docks since 1961. (R. p. 184).

Diane Reynolds testified she had been using the dock with permission from the Cashmans, Lightseys and Carter families since 1975, and she observed the Cashmans using the dock during that time. (R. pp. 171-174).

Even Norris Laffitte acknowledged that at the times he visited the property from 1965 to 1972 and 1983 through 1998, the Cashman family frequently used the dock. (R. p. 468, Dep. p. 23, l. 22 -p. 24, l. 9).

Documents and photographs also support the Master's finding. This includes correspondence from the Corps of Engineers and letter regarding replacing the pier. (R. pp. 379-406; Supp. R. p. 30). The repair documents also demonstrate the Cashmans family continued to use and maintain the pier. (R. p. 580). The minutes from the Lightsey Family meeting of October 27, 2004, refers to the Cashman floating dock. (R. p. 428). The minutes from the March 2005 meeting note for the first time that the Lightsey family wanted exclusive use. (R. p. 442).

This evidence is sufficient to support the Master's findings that the parties had a cooperative and consistent pattern and practice of joint use and the conclusion that the Cashmans had a substantial belief that they had the right to use all three docks.

(C) There Is Evidence to Support the Finding That All of the Parties Used Dock 3 Without Permission from Each Other

Defendants point to evidence they contend belies the Master's finding that the parties used Dock 3 without seeking permission from each other. (App. Br. pp. 21-30). This argument should not be persuasive.

The Master found that the Cashmans built the floating dock onto Dock 3 in 1961 "without a permit and without permission from the Lightseys." (R. p. 15, ¶ 11). This finding is supported by the trial testimony of Eugene Cashman, who said he never asked permission from the Lightseys to use Dock No. 3 or the floating docks on either side of Dock No. 3. (R. p. 94). Eugene also did not call to ask permission to do certain things. (R. p. 158). Mr. Laffitte also stated he was unaware of the Cashmans ever asking permission to use the dock. (R. p. 472, Dep. p. 39, ll. 18-24; R. p. 475, Dep. p. 49, ll. 2-9).

The evidence demonstrates that these parties used all three docks in cooperation and without seeking each other's permission. Although there may be evidence of permissive use or cooperation to obtain permits, the overwhelming evidence is that both parties were involved in the construction of Dock 3, both parties made improvements and repairs to the pier, ramps and the floating docks, and all parties had free access to the Dock until the Defendants locked the gate.

Accordingly, the Court should uphold the Mater's finding that there is evidence

that the parties used Dock 3 without permission from each other.

III. The Master in Equity Did Not Make Any Improper Holdings *ex Mero Motu*

Defendants argue the Master erred in making certain rulings *ex mero motu*. (App. Br. pp. 30-31). The Court should reject these arguments.

(A) The Master Appropriately Addressed the Ownership and Access to the Land upon Which the Dock Is Attached

The Master found that the land to which the base of the pier was attached was "common property for the benefit of all Brighton Beach Subdivision property owners to access the May River ('River')." (R. p. 14, ¶ 7). The Master added that the common right to access the River is granted to both parties through prior deeds, and that the parties acknowledge that the highland portion of the dock adjoins common property. (R. p. 14, ¶ 7). Defendants contend these findings are in error because the issue of the ownership of the property at the base of the pier was not raised in the pleadings. (App. Br. pp. 30-31).The Court should affirm.

First, while Defendants contend it was error for the Master to make these findings, Defendants do not assert any prejudice from any error. *Cumbie v. Cumbie*, 245 S.C. 107, 139 S.E.2d 477 (1964) (burden is on appellant not only to show error, but resulting prejudice).

Second, at the hearing, the Master stated, "Clarify something for me and I think you both might have said the same thing in opening, the real estate that this dock is affixed to is not owned by either party, is that right? It is for a common area in the neighborhood, is that right or is that an issue?" (R. p. 87). Neither party objected to the

Master's comments but both attempted to answer the question. (R. pp. 87-88).

Third, this finding makes no difference to the issues that are on appeal. *See Jennings v. Jennings*, 401 S.C. 1, 6, 736 S.E.2d 242, 244 (2012) ("[W]hatever doesn't make any difference, doesn't matter.").

Accordingly, the Court should reject Defendants' argument that this finding is in error.

(B) The Master Appropriately Addressed Whether the Defendants Were Prevented by *Laches* from Seeking Reimbursement from the Cashmans for Expenses Related to the Docks Prior to the Filing of the Lawsuit

Defendants contend the Master erroneously raised *laches* on his own, and that the record does not support such a ruling. (App. Br. pp. 31-32). The Court should affirm.

At the hearing on costs, the Master stated, "my thinking on that is there is probably a laches issue on contribution going back." (R. pp. 283-248). The Master also noted that Defendants did not plead in the alternative for any contribution towards costs. (R. pp. 301-303, 310-311).

In the subsequent order, the Master found that although the majority of costs over the years have been borne by the Defendants, they never requested contribution from the Cashmans for these expenses. (R. p. 17, ¶ 15). The Master concluded the parties were jointly responsible for the expenses from the date the Complaint was filed. (R. p. 18, ¶ 8; p. 19, ¶¶ 5-10). The Master subsequently issued an order that the Cashmans pay the Defendants $462.01 reflecting one-half of the cost of maintenance and taxes from May 29, 2009. (Supp. R. p. 1).

Mr. Cashman testified that Defendants never asked anyone in the Cashman family for money associated with repairs and improvements made to the dock or repairs to the gazebo. (R. p. 139). This included repairs to the pilings and replacement of the main pier. (R. pp. 139-140; R. p. 420). In his deposition, Mr. Cashman stated that Lightsey Brothers built Dock 3 and refused an offer from Mr. Cashman's father to pay half. (R. p. 534, Dep. p. 11, ll. 6-10; R. p. 537, Dep. p. 21, ll. 17-22; R. p. 537, Dep. p. 22, l. 19 - p. 23, l. 16).

As the Supreme Court recently stated, the equitable defense of laches follows the equitable maxim: "Equity aids the vigilant, not those who slumber on their rights." *Eldridge v. Eldridge*, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (2012), *citing Hemingway v. Mention*, 228 S.C. 211, 89 S.E.2d 369 (1955). Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Eldridge*, *citing 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." *Eldridge*, 398 S.C. at 121-122, 728 S.E.2d at 28, *citing Chambers of S.C., Inc. v. County Council for Lee Cty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Thus, the predicate for laches is an unreasonable and unexplained delay. *Eldridge*.

Defendants contend that there's no unreasonable and unexplained delay because they always believed they owned Dock 3. (App. Br. p. 32). The Court should not be persuaded by this argument.

To begin with, there is no challenge to the Master's holding that the Defendants never requested contribution for these expenses. Further, Defendants never requested contribution in the alternative in their responsive pleadings. In addition, there is abundant evidence that the Cashmans expended sums to maintain and improve the pier, and to replace the floating docks and the ramps, without contribution from the Defendants.

Under these circumstances, the Court should affirm the Master's decision to limit the recovery of past costs to the date of filing of the Complaint.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully Submitted,

John S. Nichols
SC Bar No. 4210
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599 telephone

Roberts Vaux
SC Bar No. 5702
James P. Scheider, Jr.
SC Bar No. 4968
Mark S. Berglind
SC Bar No. 74839
VAUX & MARSCHER, P.A.
Post Office Box 769
Bluffton, South Carolina 29910
(843) 757-2888 telephone

February 3, 2014

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-2573
Appellant Case No.: 2012-213579

Cashman Properties, LLC, ... Respondent,

v.

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, ... Appellants.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

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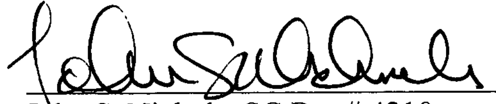
Respectfully submitted,

February 3, 2014



John S. Nichols, SC Bar # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
jsnichols@bntdlaw.com

Roberts Vaux, SC Bar # 5702
James P. Scheider, Jr., SC Bar # 4968
Mark S. Berglind, SC Bar # 74839
VAUX & MARSCHER, P.A.
Post Office Box 769
Bluffton, South Carolina 29910
(843) 757-2888

Attorneys for Respondent