THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
Charleston County Court of Common Pleas
Hon. Judge Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001030

Maybank 2754, LLC…….Appellant,

Versus

Eugene Zurlo, Individually and as co-trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe…….....…...……Respondents.

BRIEF OF APPELLANT

Respectfully Submitted,

s/Scarlet B. Moore

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STATEMENT OF THE CASE

This matter was commenced in the Charleston County Court of Common Pleas by the Appellant Maybank 2754, LLC ("Maybank"), a limited liability company organized and existing under the laws of the State of South Carolina, filing an action on January 13, 2020, against multiple defendants named herein as Respondents, seeking various points of relief related to the Appellant's assertion of the existence of a thirty (30)-foot easement in favor of the Appellant on land owned by Respondent Beach Fenwick, LLC, pursuant to the conveyance of title to same – "Property". (R. Vol. I pp. 475-490.) The Complaint was verified by Michel F. Laplante, who serves as Manager of Maybank. (R. Vol. I p. 488.) The adjacent lot owned by the Appellant has a building situated thereon with office spaces for lease. During all material times, office space on the Appellant's lot has been leased and was being leased as of the date of the filing of the Complaint. Until on or about October 4, 2013, Respondent Penny Creek solely owned Maybank and was the sole member of Maybank. Eugene Zurlo, identified as a Respondent in this matter individually and as a co-trustee of the Eugene J. Zurlo Living Trust dated December 11, 1997, was a member of Penny Creek at all relevant times and was a member at the time of the filing of the Complaint. The Eugene J. Zurlo Living Trust is upon the information and belief of the Appellant the sole member of Respondent 1776, LLC, with Eugene Zurlo and his Wife serving as co-trustees. On October 4, 2013, Respondent Zurlo executed that certain Resolution of the Sole Shareholder of Penny Creek Associates, LLC – a true and correct copy of the Resolution is attached to the Complaint and incorporated therein as an exhibit by the Appellant. (R. Vol. I pp. 489-490.) Pursuant to the Resolution, Penny Creek approved the transfer of its membership interest in Maybank to individuals set forth therein – members of the Laplante Family – and also agreed to grant to them, and their assigns, a thirty (30) foot private right of way access easement

for pedestrian and vehicular ingress, egress and access to, from and over the Property, the location and condition of which to be mutually agreed upon at the completion of that certain roadway known as Pitchfork Road. (R. Vol. I pp. 489-490.) Pursuant to the Resolution, upon completion of Pitchfork Road, an easement agreement to memorialize the thirty (30) foot private right of way easement would follow. As of the date of the filing of the Complaint, Pitchfork Road had not been completed, and the Resolution was not recorded. At the time of the Resolution, members of the Laplante Family owned real estate, or had an interest in residential real estate, that was also adjacent to the Property. Maybank was assigned rights to the thirty (30) foot private right of way easement. (R. Vol. I pp. 489-490.)

As the Appellant describes in the Complaint, Mr. Zurlo has a contentious history with certain members of the Laplante Family. On December 16, 2013, a little over two (2) months after Zurlo executed the Resolution, Zurlo and others commenced a derivative and judicial dissolution action against Penny Creek and others in Charleston County Court of Common Pleas under case # 2013-CP-10-07280. (R. Vol. I pp. 216-302.) On August 14, 2014, approximately ten (10) months after Zurlo executed the Resolution, a foreclosure action, the Property being a subject thereof, was commenced against Penny Creek and others by Wells Fargo Bank, N.A., in Charleston County Court of Common Pleas Case # 2014-CP-10-4946. (R. Vol. I pp. 303-474.) Thereafter, on or about February 29, 2016, the derivative and judicial dissolution action was settled on the record before the Court. Upon information and belief of the Appellant Maybank, on May 19, 2016, as part of the settlement of the derivative and judicial dissolution action, Penny Creek executed and delivered a promissory note to The Eugene J. Zurlo Living Trust dated December 11, 1997, and secured it with a second mortgage on the Property. On April 7, 2017, articles of organization of 1776 were filed with the South Carolina Secretary of State. On the

same day that 1776 was created, April 7, 2017, The Eugene J. Zurlo Living Trust dated December 11, 1997 also assigned the Zurlo Note and Mortgage to 1776. Upon information and belief of the Appellant, around the time of the creation of 1776, the Zurlo Note and Mortgage went into default. Thereafter, 1776 intervened in the above-referenced foreclosure action and received a credit bid based on the indebtedness owed on the Zurlo Note and Mortgage. Subsequently, 1776 was the winning bidder at the foreclosure sale and consequently received title to the Property by virtue of a Master's deed.

During the pendency of the above-referenced derivative and judicial dissolution and foreclosure action, the Property was in the process of being developed while it was still owned by Penny Creek, and Respondent Seamon Whiteside was hired by Penny Creek to prepare planned unit development guidelines for the Property that were submitted to the City of Charleston for approval. Upon information and belief, as a direct result of its involvement with the development process and in working with Penny Creek, and later also with 1776 and Zurlo for the development of the Property, Seamon Whiteside acquired ***actual knowledge*** of the thirty (30) foot private right of way easement. (R. Vol. I p. 481.) Upon information and belief, sometime after 1776's acquisition of the Property, Beach Company became involved with and assisted with, the development of the Property. The Appellant asserts in its verified complaint that as a direct result of its involvement with the development process and working with 1776 and Zurlo for the development of the Property, Beach Company acquired ***actual knowledge*** of the thirty (30) foot private right of way easement. (R. Vol. I p. 481.) Subsequently, on November 27, 2019, 1776 entered into a certain development agreement with the City of Charleston to develop the Property, which was recorded with the Register of Deeds in Charleston County, South Carolina. Then, on December 12, 2019, 1776 transferred the Property to Beach

Fenwick by virtue of a deed recorded with the Register of Deeds of Charleston County, South Carolina.

The current owner of the Property that is the subject of this litigation is Respondent Beach Fenwick, and upon information and belief of Appellant is an affiliate and/or subsidiary of Beach Company, sharing some of the same officers, directors and/or employees who had actual knowledge of the thirty (30) foot private right of way easement, and otherwise had actual knowledge of the thirty (30) foot private right of way easement before it acquired title to the Property. Also, on December 12, 2019, 1776 partially assigned its rights and obligations of the above-referenced development agreement to Beach Fenwick except for its obligations "with respect to the contribution of land for Northern Pitchfork Road…." pursuant to that certain partial assignment and assumption of rights and obligations under development agreement recorded with the Register of Deeds of Charleston County, South Carolina. Upon information and belief of the Appellant, the development plans for the Property do not have any specific provisions or reservations for the thirty (30) foot private right of way easement upon the completion of Pitchfork Road.

The Appellants allege multiple causes of action against the Respondents: Conspiracy leading to a demand for a declaratory judgment that an easement exists in favor of the Appellant; that the Resolution as described above establishes that a restrictive covenant exists that runs with the land, which covenant touches and concerns the land and specifically identifies the easement; that there exists a civil conspiracy committed by the Respondents due to the fact that all Defendants had actual knowledge of the easement and they purposely concealed such from any recorded documents and their representations and submissions to the City of Charleston to obtain development approval of the Property causing damages to the Appellant; that the Appellant is

entitled to a temporary injunction restraining the Respondents Zurlo, 1776 and Beach Fenwick from developing the Property to preserve the status quo until after a trial on the merits and a judgment is rendered and alleging irreparable harm if the injunction is not granted; and the Appellant specifically requested a jury trial on all issues triable by jury. (R. Vol. I pp. 475-490.) The Answer of the Beach Entities is curious on the issue of actual knowledge of the easement – they allege that they deny so much thereof as alleges or may be construed to allege that there exists any valid legitimate or enforceable easement, as alleged by Appellant, in or upon the Property and thus also deny Beach Co. could have had any actual notice thereof. (R. Vol II p. 496, paragraph 32; p. 497, paragraphs 35 and 39; p. 498, paragraphs 40, 41 and 45; p. 499, paragraph 45; p. 500, paragraph 57; p. 501, paragraph 57; p. 510, paragraph 32; p. 511, paragraphs 35 and 39; p. 512, paragraphs 39, 40, 41 and 45; p. 513, paragraph 45; p. 514, paragraph 57; p. 515, paragraph 57.)

On or about June 16 and 25, 2020, the parties appeared before Honorable Judge Bentley D. Price pursuant to certain motions filed by the Respondents and a motion filed on behalf of the Appellant, in the following particulars: Beach Fenwick, LLC and The Beach Co.'s motion to dismiss; Beach Entities' Motion to Refer to the Master-In-Equity; Seamon Whiteside Associates, Inc.'s motion to dismiss civil conspiracy; 1776, LLC's motion to dismiss; 1776's motion to refer to the Master-In-Equity; Eugene J. Zurlo, individually and as co-trustee of Eugene J. Zurlo Living Trust's motion to refer to the Master-In-Equity; and the Appellant Maybank 2754's motion for temporary injunction. (R. Vol I pp. 179-184; R. Vol II pp. 532-533; pp. 534-580; pp. 581-591; pp. 592-593; p. 594; pp. 595-613; pp. 614-615.) On June 30, 2020, Judge Price issued a Form 4 Order finding that "Appellant Maybank 2754 LLC's Motion/Temporary Inunction is denied. Defendant Beech Company's Motion to Dismiss and Refer to the Master, along with all

outstanding motion to refer to the master, are granted." (R. Vol. I pp. 176-178.) On July 7, 2020, the Appellant filed a Motion for Reconsideration of the Court's Order Entered on June 30, 2020 and request for Expedited Ruling. (R. Vol. II pp. 690-703.) On July 8, 2020, the Respondents collectively represented by Eugene J. Zurlo individually and as co-trustee of the Eugene J. Zurlo living trust dated December 11, 1997, filed a Joint Response to the Appellant's Motion for Reconsideration in which they asserted that the matter was correctly transferred to the Master-in-Equity. (R. Vol. II pp. 704-705.) On July 13, 2020, Judge Price issued a more detailed order further elaborating on the trial court's ruling denying the temporary injunction request by Appellant and granting the relief sought by the Respondents, which was transfer of this matter to the Master-in-Equity. (R. Vol. I pp. 179-184.) Specifically, Judge Price ordered that the "entire case and all the pending Motions are referred to the Master-in-Equity, pursuant to and consistent with South Carolina Rules of Civil Procedure, Rule 53. All pre-trial matters, including the parties' motions shall be and are hereby referred to the Master-in-Equity, with finality, with appeal directly to the South Carolina Court of Appeals or the South Carolina Supreme Court." (R. Vol. I pp. 179-184.) The Appellant filed and served a timely Notice of Appeal of Judge Price's June 20, 2020 and July 13, 2020 orders, on July 15, 2020. (R. Vol. V pp. 1931-1942.) On August 14, 2020, the Eugene J. Zurlo defendants filed a Motion and Memorandum in Support of Summary Judgment, and subsequently on September 14, 2020 filed a Supplemental Memorandum in Support of Motion for Summary Judgment. (R. Vol. II pp. 740-922.) On August 18, 2020, while the first appeal filed by Appellants was pending the Master-in-Equity filed an order transferring this matter back to the Circuit Court, and purported to moot the appeal filed by Appellant. (R. Vol. I pp. 185-187.) Subsequently, Beach Fenwick, LLC and the Beach Company filed a Motion for Summary Judgment on August 19, 2020 and a Memorandum of

Law in Support of Motion for Summary Judgment on September 18, 2020. (R. Vol. III pp. 923-925; pp. 1442-1484.) On August 26, 2020, Respondent Seamon, Whiteside & Associates filed a Supplement to Motion to Dismiss and/or Motion for Summary Judgment. (R. Vol. III pp. 1347-1348.) On September 3, 2020, the Respondent 1776, LLC filed a Notice and Motion for Summary Judgment and a Memorandum of Law in Support of Summary Judgment on September 21, 2020. (R. Vol. III pp. 1349; Vol. IV pp. 1485-1489.) Subsequently, on or about September 15, 2020, all of the Respondents filed in this Appellate Court a joint Motion to Dismiss Appeal and for Costs and Memorandum in Support Thereof, based on the order of Judge Scarborough transferring this matter back to the Circuit Court. (R. Vol. IV pp. 1423-1431.) Of note is that the Respondents in their motion to dismiss incorrectly purport that the only issue raised by the Appellant is the issue of jurisdiction of the Master-in-Equity – when in fact the issues raised are not fully developed until the filing of the Initial Brief pursuant to the S.C. Rules of Appellate Practice. The Appellant filed a Return to the motion asserting that the order entered by the Master-in-Equity was entered without jurisdiction due to the fact that pursuant to Rule 205 of the S.C. Rules of Appellate Practice, upon the service of a notice of appeal the appellate court shall have ***exclusive*** jurisdiction over the appeal, with the trial court retaining jurisdiction over matters not affected by the appeal. (R. Vol. IV, pp. 1490-1492.) In an order by Honorable Judge Bruce Williams filed on November 12, 2020 on behalf of this Court, Judge Williams ***denied*** the Respondents' motion to dismiss the appeal citing Rule 205 of the S.C. Rules of Appellate Practice as urged by Appellant in its Return specifically based on the issue of lack of jurisdiction by the Master to take action on the matter pending the appeal. (R. Vol. I, pp. 214-215.) However, the Appellant in its Return noted that given the position of the Respondents, they would likely be willing to file a consent order voluntarily transferring the matter to the

Circuit Court. (R. Vol. IV, pp. 1485-1486.) Appellant's counsel has yet to receive any further correspondence from the Respondents regarding a consent order resolving the appeal and formally and correctly transferring the matter to the Circuit Court. Nevertheless, the Circuit Court continued to hear matters regarding this case following the entry of the Order of Judge Williams.

On September 17, 2020, the Appellant filed a Response in Opposition to the Defendants' Motion for Summary Judgment, as detailed above. (R. Vol. IV pp. 1432-1441.) The parties appeared before Honorable Judge Bentley D. Price on or about August 24, 2020 to present evidence and testimony on the issues presented to the Court, which included the multiple summary judgment motions filed by the Respondents. (R. Vol. IV pp. 1692-1754.) At the outset of the hearing, counsel for Appellant specifically raised the question of whether or not the trial court had jurisdiction over the motions given the filing of the Notice of Appeal. Of note is the following exchange by Appellant's trial counsel and the trial court:

> **Mr. Tarokh**: Your Honor, Jason Tarokh, on behalf of the Plaintiff. We have some preliminary issues that I think the Court should consider before we dive into the motions for summary judgment, if the Court prefers.
> **The Court:** All right. And what are they?
> **Mr. Tarokh:** Yes, Your Honor. There's currently a pending appeal. I bring that up, in all candor, to the Court. If you recall, a couple of weeks ago we were before Your Honor via Zoom on my motion for temporary injunction and their motions for order of referral to the Master-In-Equity. The Court ordered that this case and all pending motions, et cetera, be transferred to the Master-In-Equity. We appealed that order. The Defendant sought a status conference with a master-in-equity to obtain one. And the Master-in Equity issued an order transferring this case back to the Circuit Court.
> **The Court:** Perfect.
> **Mr. Tarokh:** The only issue I have with it, Your Honor, is the Master-in-Equity, without jurisdiction even issued that order.
> **…**….
> **The Court:** But the Master agreed with you and sent it back up.
> **Mr. Tarokh:** Right. But the Master also did not have jurisdiction. So

> it's questionable whether or not the order is even valid, to begin with.
>
> (R. Vol. IV p. 1695, lines 13-25; p. 1696, lines 1-12; p. 1697, lines 11-16.)

On October 7, 2020, Judge Price issued an order granting summary judgment in favor of Eugene Zurlo and The Beach Company. (R. Vol. I pp. 188-190.) Judge Price also granted the Defendant Seamon Whiteside and Associates Inc's Motion to Supplement/Motion to Dismiss. (R. Vol. I pp. 188-190.) In a supplemental order filed on October 8, 2020, Judge Price granted 1776, LLC's motion for summary judgment, and granted The Beach Company and Beach Fenwick's Motion for Summary Judgment. (R. Vol. I pp. 191-193.) On October 12, 2020, Judge Price issued a more detailed order granting summary judgment in favor of all defendants. (R. Vol. I pp. 194-210.) On October 16, 2020, the Appellant filed a Motion to Alter or Amend Order Entered on October 7, 2020, Order Entered on October 8, 2020, and Order Granting All Defendants Summary Judgment: Motion to Amend and/or Vacate Findings of Fact: Request for Ruling on Issues Raised: and Request for Expedited Ruling. (R. Vol. IV pp. 1493-1558.) The Respondents filed various responses to the Appellant's Motion. On November 6, 2020, Judge Price filed an Order denying the Appellant's October 7, 2020 Motion to Alter or Amend Order. (R. Vol. I pp. 211-213.) Appellant filed a timely notice of appeal of all three orders entered on October 7, October 8, and October 12, 2020 regarding summary judgment, on November 9, 2020. (R. Vol. V pp. 1990-2019.)

ARGUMENT

I. The trial court did not have subject matter jurisdiction to hear the Respondents' motions for summary judgment as exclusive jurisdiction of this matter remains with the S.C. Court of Appeals.

The trial court in this matter did not have subject matter jurisdiction to proceed with motions for summary judgment filed by the Respondents. It is well-settled that issues relating to subject matter jurisdiction may be raised at any time. See *Johnson v. State*, 319 S.C. 62, 459 S.E.2d 840 (1995); *GNOC Corp. v. Estate of Rhyne*, 312 S.C. 86, 439 S.E.2d 274 (1994); *State v. Gorie*, 256 S.C. 539, 183 S.E.2d 334 (1971). Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong. *Dove v. Gold Kist*, 314 S.C. 235, 442 S.E.2d 598 (1994); *Watson v. Watson*, 319 S.C. 92, 460 S.E.2d 394 (1995). Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." *Badeaux v. Davis*, 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct. App. 1999) (quoting *Lake v. Reeder Constr. Co.* , 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998)). Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this court *ex mero motu*. *Id.* Rule 205, SCACR, provides that the appellate court shall have exclusive jurisdiction over matters on appeal. The lower court may only proceed with *matters not affected by the appeal*. (emphasis added) Rule 225(a), SCACR, provides that the lower court retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

The trial court erred in this case by proceeding with the Respondents' summary judgment motions because jurisdiction of the case is at the Court of Appeals. Further, the first appealed

order transferred the case to the Master-in-Equity, and thus at the trial level jurisdiction is still with the Master. This Court has confirmed this fact, given Judge Bruce Williams' order denying the Respondents' motion to dismiss based on a subsequent and infirm order by the Master transferring the case back to the Circuit Court without jurisdiction. (R. Vol. I pp. 214-215.) The Master was simply without jurisdiction to enter such an order as the matter was pending before this Honorable Court. Additionally, the issue of summary judgment is a matter that is affected by this appeal, due to the fact that the issue of which court will ultimately hear this matter is squarely before the S.C. Court of Appeals. Therefore, Judge Price did not have subject matter jurisdiction to hear the motions for summary judgment, and this Court should find that the orders entered regarding summary judgment are void.

II. The trial court erred in transferring this matter to the Master-in-Equity given the fact that the Appellant requested a jury trial in its verified complaint.

Pursuant to Rule 53(b) of the S.C. Rules of Civil Procedure, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. However, the rule provides that any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, *upon the filing of a jury demand, the matter shall be returned to the circuit court.* (emphasis added). Thus, Judge Price's order transferring this matter to the Master-in-Equity was infirm at its inception, given the fact that the Appellant demanded a jury trial in its verified complaint. (R. Vol. I pp. 475-490.) The Master also seems to recognize this fact in his order of August 18, 2020, in which he finds that the matter should be transferred to the Circuit Court for disposition pursuant to Rule 38 and 53(b). (R. Vol. I pp. 185-187.) Of course, this Honorable Court has already found that the Master was without jurisdiction to enter such an order given the status of the pending appeal before this Court. Therefore, the

circuit court erred in transferring this matter to the Master, and this Court should reverse this order.

III. The trial court erred in granting summary judgment in favor of the Respondents.

The Appellant firmly asserts that the trial court had no jurisdiction to hear the motions for summary judgment. Additionally, the trial court clearly erred in granting the Respondents' motions for summary judgment on the merits of the motions. An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRCP. *Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).* "In cases applying the preponderance of the evidence burden of proof, the [nonmoving] party is only required to submit a . . . scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).* The South Carolina Supreme Court has held that great care should be used in the consideration of summary judgment motions. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina All. For Fair Emp't. v. S.C. Dept. of Labor, Licensing & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999)(citing Etheredge v. Richland Sch. Dist. I, 330 S.C. 447, 499 S.E, 2d 238 (Ct. App. 1998.)*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003)* (quoting Rule 56(c), SCRCP). In determining whether any triable issue of fact exists, the

evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill.* Summary judgment may be granted when the evidence is capable of only one reasonable interpretation. *Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014*). However, summary judgment is a drastic remedy that "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543* (1991) (quoting *Watson v. S. Ry. Co., 420 F. Supp. 483, 486 (D.S.C. 1975*).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Carolina*, supra, at 485, 523 S.E. 2d at 799 (citing *Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990).* Questions of credibility make summary judgment inappropriate. *Hansen v. DHL Labs., Inc., 316 S.C. 505, 513, 450 S.E.2d 624, 628 (Ct. App. 1994), decision affirmed, 319 S.C. 79, 459 S.E.2d 850 (1995).*

In reviewing the record of this case, it is clear that genuine issues of material fact exist as to the following issues (for which there exists much more than a mere scintilla of evidence supporting the claims), which should preclude the entry of summary judgment against the Appellant: (1.) whether the Resolution of the Sole Shareholder of Penny Creek Associates, L.L.C. (herein "Resolution"), that certain Contract for Assignment of Interest and Assignment (herein "Contract for Assignment"), and that certain Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the Sole Member of Maybank 2754, LLC (herein "Assignment"), created an easement and/or a restrictive or merely constituted an "agreement to agree"; (2) the nature or character, extent and the location of the easement; (3.) the manner in which Zurlo signed the Resolution and its sufficiency to bind Penny Creek Associates,

LLC thereto; (4.) the parties' intent as to the Maybank 2754, LLC membership interest transfer (which occurred) being specifically conditioned on the grant of the easement; (5.) the parties' intent relative to the reference in the Resolution, Contract for Assignment and Assignment to "that certain roadway known as Pitch Fork Road"; (6.) the Defendants' actual and imputed knowledge of the easement; (7.) the innocent purchaser and/or bona-fide purchaser for value status of 1776, LLC and Beach Fenwick, LLC; (8.) Zurlo and/or all the Defendants being part of a deceitful scheme and conspiracy to develop the subject property without affording any provisions or reservations for the easement with the specific intent to harm the Appellant, which caused Appellant damages, including special damages; (9.) the application of equitable estoppel and/or unclean hands as to both the sufficiency in which Zurlo signed the Resolution to bind Penny Creek Associates, LLC thereto, and Respondents' ability to disavow, dishonor and deny the existence of the easement when the grant of the easement was made a specific condition of the membership interest of Maybank, 2754, LLC transfer, which occurred; (10.) whether the June 23, 2017 foreclosure judgment entered in *Wells Fargo Bank N.A., etc., v. Penny Creek Associates, LLC*; *et. al*., Charleston County Court of Common Pleas Case # 2014-CP-10-04946 (herein "foreclosure case") has any application, enforceability or effect against the rights, claims and interests of Appellant, Michel F. Laplante, John H. Laplante (herein "John"), Marianne Laplante-Scarlata ("herein "Marianne"), or Peter F. Laplante (herein "Peter") relative to the subject property and easement; (11) whether the foreclosure judgment entered in the foreclosure case is the law of the case in the instant case; (12.) whether the doctrine of judicial estoppel applies against the Appellant by virtue of its claims against the attorney and law firm that prepared the Resolution, Contract for Assignment and Assignment pending in *Maybank 2754, LLC v. Buist, Byars & Taylor, LLC; et. al*., Charleston County Court of Common Pleas Case #

2020-CP-10-02180; (13.) whether the doctrine of collateral estoppel applies against the Appellant; (14.) whether the doctrine of estoppel by silence applies against the Appellant; and (15.) whether the doctrine of laches applies against the Appellant.

Honorable Judge Bentley D. Price in his order of October 12, 2020, erroneously finds as a matter of law that the Wells Fargo foreclosure action voids any recorded or unrecorded easement not subordinated to the Wells Fargo Mortgages, and that the Appellant has no facts to support a claim with no law on the Appellant's side. (R. Vol. I pp. 198-199.) The Order Granting Summary Judgment also states, "The threshold legal issue is whether there is a legally enforceable easement." (R. Vol. I p. 200.) The Court's conclusion and analysis are erroneous as more fully explained herein.

Defendants are not entitled to summary judgment. The Affidavit of Michel F. Laplante (herein the "Affidavit") provides at least a scintilla of evidence, and indeed more, to support Appellant's claims and raise genuine issues of material fact, thereby making summary judgment improper. The Affidavit was submitted at the hearing pursuant to the Respondents' summary judgments motions, and is fully incorporated herein as if fully reproduced by Appellant. (R. Vol. V pp. 1943-1989.) Further, the Appellant's Responses to Defendants' [The Beach Entities] Requests for Admissions filed on May 15, 2020 provide at least a scintilla of evidence, and indeed more, to support Appellant's claims and raise genuine issues of material fact, thereby making summary judgment improper, as follows:

i. Appellant's Responses to Defendants' [the Beach Entities'] Requests for Admissions filed on May 15, 2020 in response # 1. states in relevant part that, "In addition to the Resolution, the Appellant claims the right to an easement by virtue of that certain Contract for Assignment dated October 7, 2013, which is referenced in the Resolution, and that Certain Assignment Interest

and Written Consent in Lieu of a Special Meeting of the Sole Member of Maybank, 2754, LLC dated October 4, 2013, which is attached to and referenced in the Contract for Assignment of Interest dated October 7, 2013." The Contract for Assignment and Assignment were attached to Appellant's Responses to Defendants' [Beach Entities'] Requests for Admissions and filed with the Court.

ii. The easement that is the subject of this action is described on both pages of the Resolution, Sections 4.5 of the Contract for Assignment, and Paragraph 6. of the Assignment. Like the Resolution, the Assignment references that the grant of an easement is a condition of closing.

Additionally, the Appellant's Requests for Judicial Notice of Recorded Documents and City of Charleston Ordinances filed on August 24, 2020 provide at least a scintilla of evidence, and indeed more, to support Appellant's claims and raise genuine issues of material fact, thereby making summary judgment improper. (R. Vol. III pp. 926-1146.) Pursuant to Rule 201(d), SCRE, judicial notice is mandatory if requested by a party and supplied with the necessary information. The Order Granting Summary Judgment does not state that the Court took notice as requested by the Appellant. Therefore, it is error for the Court not to take judicial notice especially since the matters were referenced in Appellant's Response in Opposition to the Defendants' Motions for Summary Judgment filed on September 17, 2020. (R. Vol. IV pp. 1432-1441.) Appellant's Requests for Judicial Notice of Recorded Documents and City of Charleston Ordinances filed on August 24, 2020 requested that the Court take judicial notice of the following documents, which were attached to the request:

i. Limited Warranty Deed, recorded on May 15, 2006, in Book F583, Page 757, in the office of the Charleston County, South Carolina, Register of Deeds. All

subsequent recording references are in the official records of said office. This deed is the vesting deed of Appellant's adjacent lot.

ii. Development Agreement by and between the City of Charleston, and 1776, LLC, recorded on December 2, 2019, in Book 0843, Page 506. The Development Agreement references and attaches certain City of Charleston Ordinances, which shows the subject property and Appellant's adjacent lot were zoned as part of a PUD district, which was later amended. The Development Agreement also shows that the Eugene J. Zurlo Living Trust Dated December 11, 1997, is the sole member of 1776, LLC. 1776, LLC is the predecessor of interest of Beach Fenwick, LLC of the subject property upon which Appellant claims an easement. The Development Agreement references "Pitchfork Road" and shows that the subject property is primed for development.

iii. Title to Real Estate (Deed to Beach Fenwick, LLC from 1776, LLC), recorded on December 12, 2019, in Book 0846, Page 268. This deed describes the subject property upon which Appellant is claiming an interest and demonstrates that conveyance of the subject property occurred after Beach Fenwick, LLC became aware of the easement by virtue of the discussion between Laplante and agents of Seamon Whitesides & Associates, Inc., and The Beach Company (the Beach Co.), which was after the December 2, 2019 meeting described in the Affidavit.

iv. Partial Assignment and Assumption of Rights and Obligations Under Development Agreement, recorded on December 12, 2019, in Book 0846, Page 269. This partial assignment references "the contribution of land for Northern Pitchfork Road" in paragraph 2 therein.

v. A Plat of a Portion of TMS # 346-00-00-004, and -076 Owned by 1776, LLC, recorded in Book L19, Page 0515. This plat shows land owned by 1776, LLC "for the Northern Pitchfork Road" and also shows its location across the subject property. The Appellant's adjacent lot is also depicted.

vi. City of Charleston Ordinance, Ratification Number 2019-102. This ordinance the First Amendment to Amended and Restated Planned Unit Development Guidelines. A certain Appendix "M" is attached to this ordinance. Appendix

"M" is a drawing that depicts, among other things, Maybank's adjacent lot, the subject property and contains the words, "ALLOWABLE CONNECTION", that is linked to and identifies a large arrow from the subject property to Maybank's adjacent lot. Clearly, there is an inference that Appendix "M" depicts a possible connection point for the easement, which is also evidence of the existence of the easement.

vii. City of Charleston Ordinance, Ratification Number 2018-164. Among other things, this ordinance references "Pitchfork Road".

The Appellant's Requests for Judicial Notice of Recorded Document and Document filed with the South Carolina Secretary of State filed on September 14, 2020 provide at least a scintilla of evidence, and indeed more, to support Appellant's claims and raise genuine issues of material fact, thereby making summary judgment improper. Pursuant to Rule 201(d), SCRE, judicial notice is mandatory if requested by a party and supplied with the necessary information. The Order Granting Summary Judgment does not state that the Court took notice as requested by the Appellant. Therefore, it is error for the Court not to take judicial notice and especially since they were referenced in Appellant's Response in Opposition to the Defendants' Motions for Summary Judgment filed on September 17, 2020. (R. Vol. IV pp. 1432-1441.) Appellant's Requests for Judicial Notice of Recorded Document and Document filed with the South Carolina Secretary of State filed on September 14, 2020 requested that the Court take judicial notice of the following documents, which were attached to the request:

i. A Plat Showing the Subdivision of Tract B-2-1 into Tract B-2-3 and Residual Tract B-2-1, recorded in Plat Book EH, Page 903 on May 4, 2005 in the office of the Charleston County Register of Deeds. This plat is the plat referenced in the Affidavit.

ii. Articles of Organization of Beach Fenwick, LLC, filed with the South Carolina Secretary of State. This document shows Beach Fenwick, LLC, was created on December 3, 2019, which was after the December 2, 2019 meeting described in the Affidavit where the easement was discussed with an agent of The Beach Company (the Beach Co.), and also shows that The Beach Company (the Beach Co.) is the manager of Beach Fenwick, LLC. Additionally, the Amended Answer on behalf of The Beach Company and Beach Fenwick, LLC, admits that Beach Fenwick is affiliated with the Beach Co. Therefore, knowledge of The Beach Company (the Beach Co.) of the easement is imputed to Beach Fenwick, LLC, despite Beach Fenwick, LLC being created after the December 2, 2019 meeting. (R. Vol. III pp. 1376-1380.)

The Order of Judge Price granting summary judgment in favor of the Respondents also contains erroneous findings of fact which should be amended and/or vacated. The erroneous findings of fact are as follows:

a. "**The factual history involving the Appellant's claim to a future easement is not in dispute**." (R. Vol I p. 195.)

There is no explanation as to how the Court found that the easement was a "future easement". The Order Granting Summary Judgment provides no specific evidentiary basis for its conclusion that the easement was a "future easement." The Resolution, Contract for Assignment and Assignment clearly granted an easement as a condition of the closing of the Maybank membership transfer, which occurred as evidenced by Appellant's Responses to Defendant's [Zurlo's] Requests for Admissions filed on March 10, 2020, admits in Request # 12 that "Exhibit F" is the "Buist, Byars & Taylor, LLC Statement of Settlement Purchasers of Maybank 2754, LLC dated October 7, 2013."

The Resolution states on the first page, "WHEREAS, as a condition of closing, the Company [PCA] has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement...to, from and over...[the subject property]...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road...." The second page of the resolution states, "BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company [PCA] shall grant to Purchasers, their successors and assigns, an access easement...to, from and over...[the subject property]..., the location and condition of which shall be mutually agreed upon at a future date. Section 4.5 of the Contract for Assignment states, "**30' Access Easement**. Seller shall grant, transfer, sell and convey to Purchaser, its successors and assigns, an access easement...to, from and over...[the subject property]..., the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road...." Paragraph 6 of the Assignment states, "**30' ACCESS EASEMENT**. As a condition of closing, Transferor [PCA] agrees to grant, transfer, sell and convey to Transferee, it successors and assigns, an access easement...to, from and over...[the subject property]...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road....". (R. Vol. I pp. 489-490.)

An easement by grant is not required to be recorded to be valid, and recording is not necessary if the buyer has actual notice. *See, Frierson v. Watson*, 636 S.C. 60, 68 (Ct. App. 2006). "A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. *Loftis v. South Carolina Elec. and Gas Co.*, 361 S.C. 434, 441 (Ct. App. 2004).

Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus v. Wessinger*, 303 S.C. 412, 415 401 S.E.2d 169 (1991). Therefore, this finding of fact should be amended to provide the specific evidentiary basis for the Court's conclusion that the easement is a "future easement" or vacated.

b. "**The alleged future springing easement never was recorded, nor was it ever subordinated to the two Wells Fargo mortgages, which were recorded well before the date of the Resolution Appellant relies on to establish its easement in October 2013**." (R. Vol I p. 196.) (emphasis added).

There is no explanation as to how the Court found that the easement was a "future springing easement". Additionally, there is no explanation as to what exactly a "springing" easement is, or what the Court meant with the word, "springing". The Order Granting Summary Judgment provides no specific evidentiary basis for its conclusion that the easement was a "future springing easement." The Resolution, Contract for Assignment and Assignment clearly granted an easement as a condition of the closing of the Maybank membership transfer, which occurred as evidenced by Appellant's Responses to Defendant's [Zurlo's] Requests for Admissions filed on March 10, 2020, admits in Request # 12 that "Exhibit F" is the "Buist, Byars & Taylor, LLC Statement of Settlement Purchasers of Maybank 2754, LLC dated October 7, 2013." Furthermore, Appellant relies upon not only the Resolution, but also the Contract for Assignment and Assignment as described above. The Contract for Assignment is even referenced on the first page of the Resolution, as referenced above.

An easement by grant is not required to be recorded to be valid, and recording is not necessary if the buyer has actual notice. *See, Frierson*. "A purchaser of land with actual,

constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. *Loftis, supra.*

Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus.* Therefore, this finding of fact should be amended to provide the specific evidentiary basis for the Court's conclusion that the easement is a "future springing easement" or vacated.

c. **"The Foreclosure Order notes that "all persons whosever claiming an interest under the defendants be forever barred and foreclosed of all right, title, interest, and equity of redemption in the Subject Property" and specifically retained jurisdiction " to do all necessary acts incident to this foreclosure and to hear any post-judgment matters."** (R. Vol I p. 196.) (emphasis added).

Even so, Maybank was not named as a defendant, and neither were John, Marianne or Peter. Laplante was named and served with process, but he was severed from the foreclosure claim as set forth on the second page of the referenced Foreclosure Order. Thus, Laplante's rights and interests in the subject property survived the foreclosure. Therefore, the Foreclosure Order did not impact their rights in the property. Therefore, it cannot be said that they are claiming an interest "under the defendants" in the foreclosure case.

Moreover, the Foreclosure Order itself states in Paragraph 3.b. that "**The sale shall be subject to** taxes, assessments, **existing easements**, and **easements** and restrictions **of record**." (R. Vol. I pp. 13-14.) (emphasis added). Thus, even assuming arguendo that the Foreclosure Order impacted their rights (which it did not because of a failure of due process and lack of jurisdiction as will be later explained herein), the Foreclosure Order itself made the foreclosure sale, subject to the Appellant's easement and created an inference that there are two categories of

easements that were not affected by the Foreclosure Order: existing easements and easements of record. Therefore, Appellant's easement in this case fits squarely within the former category and survived the foreclosure sale.

Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus.* Therefore, this finding of fact should be vacated.

d. **"Laplante, individually was a named party to the foreclosure action, and at the relevant time, was the managing partner of PCA. Laplante's knowledge and conduct is therefore, imputed to Maybank. See *In re Infinity Bus. Grp., Inc*., 497 B.R. 794, 813 (Bankr D.S.C. 2013); S.C. Code § 33-44-120.** (R. Vol I p. 197.)

It is unclear exactly what Laplante's specific knowledge and conduct was that the Court found was imputed to Maybank. Regardless, Laplante's knowledge and conduct does not overcome or provide an alternative to service of process, as stated and referenced above. Moreover, the case and page cited in this finding of fact, *In re Infinity Bus. Grp., Inc*.**,** 497 B.R. 794, 813 (Bankr D.S.C. 2013) cites another case that states "concluding that whether the agent was acting on behalf of the principal and by implication, whether his own knowledge of the activity is imputed to the principal, **is ultimately a genuine issue of material fact for the jury**". (emphasis added). It is unclear how *In re Infinity Bus. Grp., Inc*., even applies to this case. Presuming it does, then the motions for summary judgment should have been denied so that this case can be decided by a jury. Although Laplante was the managing partner of PCA "at the relevant time", this does not automatically mean that his knowledge and conduct is imputed to Maybank.

Furthermore, "S.C. Code § 33-44-120" does not appear to even exist. Presuming, this is a typo and S.C. Code § 33-44-102 was intended, the fact that Laplante had knowledge of the foreclosure case, this does not overcome the necessity of service of process to properly establish jurisdiction against Maybank, John, Marianne and Peter, as discussed supra. *See Green Tree Servicing, LLC v. Adams*, 375 S.C. 583; 654 S.E.2d 100 (S.C. Ct. App. 2007) ("A court may not act against a party without personal jurisdiction...a court should not render a judgment affecting the rights of a party without proper notice.") In *Adams*, the Court agreed in part that the circuit court could not bind Adams to a foreclosure action to which he was not a party. However, because the circuit court properly exercised personal jurisdiction over Adams in a subsequent action to add him as a party to the foreclosure action, there was no reversible error. *Id*. at 586-7.

A judgment is void if a court acts without personal jurisdiction. *Thomas & Howard Co. v. T.W. Graham & Co*., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002) (citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920). ("The purpose of the summons is to acquire jurisdiction of the person of the defendant.. . .").

Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus.* Therefore, this finding of fact should amended to specifically describe Laplante's knowledge and conduct and how exactly it was imputed to Maybank or vacated.

e. "**Maybank 2754 is a limited liability company organized pursuant to the laws of the State of South Carolina. Laplante is its managing member**." (R. Vol I p. 197.)

Pursuant to the Affidavit, Laplante became Maybank's managing member after the October 15, 2019 death of his son, John. Therefore, this finding of fact should be amended to clarify that Laplante was not the managing member of Maybank at the time of the Resolution, Contract for Assignment and Assignment or the foreclosure case or vacated.

f. **"Maybank relies upon a document entitled Resolution of the Sole Shareholder of Penny Creek Associates, LLC, dated October 7, 2013, for its claim of a future easement across the former PCA property purchased by Beach Fenwick LLC from 1776, LLC ("Subject Property")."** (R. Vol. I p. 197).

As explained herein, Maybank also relies on the Contract for Assignment and Assignment in addition to the Resolution for its claim of an easement across the subject property. Thus, the Resolution is not the only document upon which Appellant bases its easement claim. The Resolution references the Contract for Assignment. Therefore, this finding of fact should be vacated.

g. "**Appellant avers in its Complaint that Pitch Fork Road has not been completed and admits the "Future Easement" never was recorded. It is the claim of that future easement, and matters attendant thereto, that give rise to this action**." (R. Vol. I p. 197).

Appellant has not specifically alleged or admitted a so-called "Future Easement". Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus.* Therefore, this finding of fact should be amended to provide the specific evidentiary basis for the Court's conclusion that the easement is a "Future Easement" or vacated.

Erroneous Conclusions of Law by the Trial Court

Further, the trial court under the heading "**CONCLUSIONS OF LAW**" states that, "**The Court finds as a matter of law there is no legal right to an easement based upon the pleadings, the Motions for Summary Judgment, the affidavits submitted and the able arguments of counsel at the September 24, 2020 hearing**..." (R. Vol. I p. 200.) (emphasis added). It was error for the Court not to consider The Appellant's Responses to Defendants' [The Beach Entities] Requests for Admissions filed on May 15, 2020, and Appellant's requests for judicial notice. Also, there were no other affidavits besides the Affidavit that was filed.

In part "A." of the "**CONCLUSIONS OF LAW**" section, the Order Granting Summary Judgment explains that because the Resolution was never subordinated to the Wells Fargo Mortgage, it "**was therefore foreclosed upon in 2017, rendering the easement void and of no effec**t." (R. Vol. I pp. 200-201) (emphasis added). The entire conclusion of law in part "A." is erroneous. *See, Green Tree Servicing, LLC* ("A court may not act against a party without personal jurisdiction...a court should not render a judgment affecting the rights of a party without proper notice."). A judgment is void if a court acts without personal jurisdiction. *Thomas, supra.* A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, supra (citing S*anders*, supra.) ("The purpose of the summons is to acquire jurisdiction of the person of the defendant.. . .").

Maybank was never named in the foreclosure case, *Wells Fargo Bank, N.A., etc., v. Penny Creek Associates, LLC; et. al*., Charleston Court of Common Pleas Case # 2014-CP-10-04946. The court in the foreclosure case never had personal jurisdiction over the Appellant, John, Marianne, or Peter in the foreclosure case, as discussed above. A judgment is void if a court acts without personal jurisdiction. *Thomas, supra.* A court generally obtains personal

jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, supra (citing *State v. Sanders*, supra). ("The purpose of the summons is to acquire jurisdiction of the person of the defendant.. . .").

Additionally, the subject easement was neither the subject of, nor specifically referenced in, the foreclosure case. Accordingly, the foreclosure judgment is void against the Appellant and cannot properly serve as a basis to grant Defendants' summary judgment against the Appellant in this case.

Furthermore, as explained above, the Foreclosure Order itself states in Paragraph 3.b. that "**The sale shall be subject to** taxes, assessments, **existing easements**, and **easements** and restrictions **of record**." (emphasis added). Additionally, the Order Granting Summary Judgment states, "**Further, the Appellant has already judicially admitted that its alleged easement was extinguished in the bank's foreclosure action**." (R. Vol. I p. 201). This conclusion of law is incorrect and erroneous. The Appellant denies making any admission that the alleged easement was extinguished in the bank's foreclosure action. The Appellant respectfully seeks clarification from the Court as to specific factual basis for this conclusion of law. The Order Granting Summary Judgment cites no evidence or facts to support this conclusion of law, which is error.

In part B. of the "**CONCLUSIONS OF LAW**" section, the Order Granting Summary Judgment states, "**The October 7, 2013, Resolution on which the Appellant relies (The Resolution) never was recorded, nor was there any recording of the intention to place a future easement on the property PCA owned which is now owned by Beach Fenwick, LLC. This prevented actual or constructive Notice of the future easement's alleged existence**." (R. Vol. I p. 202.) (emphasis added).

The entire conclusion of law in part "B." is erroneous. As explained herein, Maybank also relies on the Contract for Assignment and Assignment in addition to the Resolution for its claim that easement across the subject property was created. Thus, the Resolution is not the only document upon which Appellant bases its easement claim. The Resolution even references the Contract for Assignment, which language is referenced above. An easement by grant is not required to be recorded to be valid, and recording is not necessary if the buyer has actual notice. *See, Frierson, supra.* "A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. *Loftis, supra.* Furthermore, Appellant has demonstrated at least a scintilla of evidence that Beach Fenwick, LLC had actual and imputed knowledge of the easement before it acquired the property, which creates material issues of fact as to the actual and imputed knowledge of Beach Fenwick, LLC. At the very least, there is an inference that Beach Fenwick, LLC had knowledge of the easement by and through The Beach Company (The Beach Co.) its manager for the reasons described above. Also, the easement was not a "future" easement for the reasons described above.

In part C. of the "CONCLUSIONS OF LAW" section, the Order Granting Summary Judgment states, "**The Resolution fails to meet the essential elements required in order to create a property right. The description of the alleged future springing easement lacks any identifiable location or condition, the duration of the easement or its scope.**" (R. Vol. I p. 202.) The entire conclusion of law in part "C." is erroneous.

The Appellant claims an easement by virtue of the Resolution, Contract for Assignment and Assignment as explained above. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek*

Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting 28A C.J.S. Easements § 57 (1996)). As the Court of Appeals stated in *Smith*, 441 S.E.2d 331, 335 (S.C. Ct. App. 1994):

> Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965); 23 Am.Jur.2d Easements and Licenses § 23 (1966) (**if the language is uncertain or ambiguous in any respect, all surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court**).
>
> (emphasis added).

After the Court of Appeals in *Smith* found that the agreement established an easement, the court ruled that the easement was to be located in a location as is reasonably necessary for the full enjoyment of the Appellants' property. The Court of Appeals stated, "The subject **unlocated** easement must be interpreted, however, in light of good faith, reasonableness **and what was necessarily the intent of the parties to the 1955 agreement**." *Id*. at 336 (emphasis added). Accordingly, the Court of Appeals in *Smith* remanded the case for a determination of the number of access points and routes to include their width. *Id*. at 337.

In *Douglas v. Medical Investors, Inc*., 256 S.C. 440, 182 S.E.2d 720 (1971), the South Carolina Supreme Court ruled that an instrument creating an easement was an easement in gross for commercial purposes even though it was not apparent on its face. The Court found that the wording of the instrument "leaves the exact character of the easement in doubt", and stated, **"[w]e are therefore presented with a situation where it is impossible to determine the nature or character of the easement from the language used in the reservation. Under such**

circumstances, parole evidence was properly considered in determining the character of the easement reserved." *Id*. (emphasis added). In reaching its ruling the Court stated, "The fallacy in respondent's argument [that the character of the easement should be determined solely from the working of the instrument and parole evidence also was inadmissible] lies in the fact that...the wording of the present reservation leaves the exact character of the easement in doubt." *Id*. at 447. Thus, the Court ruled that parole evidence was properly admitted to determine the character of the easement. Therefore, parole evidence is necessary and admissible to determine the intention of the parties relative to the nature or character, extent and location of the easement, and the intention of the parties relative to the reference to "that certain roadway known as Pitch Fork Road".

Moreover, as to the terminus element, the Court of Appeals in *Williams v. Tamsberg*, 425 S.C. 249, 262-63, 821 S.E.2d 494 (S.C. Ct. App. 2018), stated:

> **Determining the existence of a terminus is a fact-specific inquiry dependent upon the facts of each individual case**...the existence of a terminus on the land of the party claiming an easement appurtenant may be established if the easement meets certain criteria. Intuitively, the dominant estate must have access to the purported easement. In addition, a court could find an easement appurtenant if the purported easement (1) at least touches the dominant estate and (2) in cases where the easement is an adjacent boundary between—or runs parallel to—the dominant and servient estates such as in the instant case, the easement does not extend beyond the purported dominant estate's boundary—i.e., at most, the easement ends at the lot line of the dominant estate.
>
> (citations omitted) (emphasis added).

Additionally, Count II of the Complaint, plead in the alternative to Count I, seeks a declaratory judgment pursuant to South Carolina Code §15-53-10, et. seq., that a restrictive covenant exists over the subject property by virtue of the Resolution. Count II of the instant action is also similar to the situation in *West v. Newberry Electric Cooperative*, 357. S.C. 537

(S.C. Ct. App. 2004). In *West*, the Court of Appeals found that a 1955 written easement agreement was a restrictive covenant despite the fact that the agreement was unrecorded. In so finding, the Court of Appeals stated:

> **The very language of the 1955 easement reveals it to be a restrictive covenant that runs with the land**. In the agreement, NEC promises to relocate the power line should the property ever "be developed." That agreement applies to the land. While the agreement does not specify whether this promise was to be honored only with respect to the Matthews, **it does envision the future of the land** and thus applies to the Wests. *See Marathon, 325 S.C. at 604, 483 S.E.2d at 765* (explaining that a "restrictive covenant runs with the land, and is thus enforceable by a successor-in-interest, if the covenanting parties intended that the covenant run with the land, and the covenant touches and concerns the land") (citation omitted).
>
> Moreover, the restrictive covenants in the 1955 easement touch and concern the subject property. The Matthews insisted upon several conditions in order to maintain the safety and value of the property. The subject of the covenants is a power line connected to and crossing over the land. Adherence to the covenants by NEC directly affects the nature and value of the easement to both NEC and the Wests. The covenants in the easement also restrict the manner in which NEC can use the easement. **The exact location of the easement on the property is not described in the easement, but its possible relocation is contemplated.** The covenants were obviously intended to touch and concern the subject property.
>
> *Id*. at 542-3.

Just as the exact location of the easement was not described in *West* and was found to be enforceable as a restrictive covenant, the exact location of the easement is not described in the Resolution as described above, Contract for Assignment and Assignment and should be found to be a restrictive covenant alterative or in addition to an easement. *Id.* Thus, the location of the easement being upon the subject property, the servient estate, is clear and obvious. However, the exact location of the easement over the subject property, its condition and scope are inherently ambiguous because they were to be mutually agreed upon at the completion Pitch

Fork Road. Thus, the Resolution, Contract for Assignment and Assignment are ambiguous and such ambiguities should be construed together in favor of the Appellant as the non-moving party. Furthermore, because the Resolution, Contract for Assignment and Assignment are ambiguous, parole evidence and extrinsic evidence should be considered by a jury to ascertain the parties' intentions at the time the contract was entered.

The exact location of the easement over the subject property, its condition, duration and scope are not "essential elements" to create an easement. *See, Smith v. Commissioners of Public Works of the City of Charleston*, 441 S.E.2d 331, 335 (S.C. Ct. App. 1994); *Douglas, supra.* Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus, supra.*

In part D. of the "CONCLUSIONS OF LAW" section, the Order Granting Summary Judgment states, "**Assuming for the sake of argument the Resolution created an easement, the easement is one in gross and therefore is not transferrable to the Appellant.** (R. Vol. I p. 202.) The entire conclusion of law in part "D." is erroneous. "An easement is the right of one person to use the land of another for a specific purpose. An easement is characterized as either appurtenant, in gross, or in gross for commercial purposes. A restrictive covenant... is contractual in nature and restricts in some particular the free use of land by its owner." *Smith, supra.* "The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate

upon conveyance." *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

"Easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate." *Smith*, supra. "The distinction between an appurtenant easement and an easement in gross involves the extent of a grant of an easement, as opposed to the creation of an easement." *Williams, supra.* "An easement in gross is of a commercial character when the use authorized by it results primarily in economic benefit rather than personal satisfaction. Easements in gross, if of a commercial character, are alienable." *Sandy Island Corp v. Rasdale*, 246 S.C. 414, 422 143 S.E.2d 803 (1965). Moreover, as to the terminus element, the Court of Appeals in *Williams* stated:

> **Determining the existence of a terminus is a fact-specific inquiry dependent upon the facts of each individual case**...the existence of a terminus on the land of the party claiming an easement appurtenant may be established if the easement meets certain criteria. Intuitively, the dominant estate must have access to the purported easement. In addition, a court could find an easement appurtenant if the purported easement (1) at least touches the dominant estate and (2) in cases where the easement is an adjacent boundary between—or runs parallel to—the dominant and servient estates such as in the instant case, the easement does not extend beyond the purported dominant estate's boundary—i.e., at most, the easement ends at the lot line of the dominant estate.

(citations omitted) (emphasis added).

There exists material issues of fact as to the nature and character of the easement the parties created. The very language of the Resolution, Contract for Assignment and Assignment make the easement assignable. Furthermore, the Affidavit should be considered so that the character of the easement can be determined. For example, the Affidavit explains that the easement was always intended to benefit the commercial utility and value of the adjacent lot, which is commercial real estate, and without the easement the adjacent lot will be limited in its

commercial utility and development potential. Furthermore, Laplante should be considered an expert whose testimony to this effect is relevant and helpful. Thus, the Court erred in finding that no material issues of fact exists as to the type of easement created when "assuming for the sake of argument." The easement was not an easement in gross and material issues relative to issue exists.

The Court failed to make any findings of fact to support its conclusion that "assuming for the sake of argument the Resolution created an easement" an easement in gross was created by virtue of the Resolution, or specifically explain why the easement would be an easement in gross. The Court also erred in failing to consider the Contract for Assignment, Assignment and Affidavit. Easements in gross are not favored by the courts, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate. Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus, supra.*

In part E. of the "CONCLUSIONS OF LAW" section, the Order Granting Summary Judgment states, **"At best, the Resolution creates 'an agreement to agree', which does not amount to a contract in South Carolina...The unrecorded Resolution, or more precisely, the unrecorded contract referenced therein but not provided until after the filing of this action, purportedly is a contractual right for the Seller (PCA) and Buyer (Laplante Family) to agree in the future to create an easement. In South Carolina, this agreement to agree does not amount to a contract and cannot detrimentally impact future purchases of the property because the parties 'subsequently failed to reach an actual agreement on essential terms pertaining to land allocations...and restrictive covenants for the property.'"** (R. Vol. I pp.

203-204.) The entire conclusion of law in part "E." is erroneous. *See, Smith; Douglas; Williams; West, supra.*

The grant of an easement was a specific condition of closing for the Maybank membership transfer purchase, which occurred as evidenced by Appellant's Responses to Defendant's [Zurlo's] Requests for Admissions filed on March 10, 2020, admits in Request # 12 that "Exhibit F" is the "Buist, Byars & Taylor, LLC Statement of Settlement Purchasers of Maybank 2754, LLC dated October 7, 2013." The membership transfer of Maybank (which occurred) was specifically conditioned on the grant of the easement. Therefore, the doctrines of unclean hands and/or equitable estoppel apply to prevent Defendants from disavowing or denying the existence and validity of the easement. Accordingly, material issues of fact also exist as to these issues.

As an initial matter, pursuant to the language of the Resolution as reproduced above, the location of the easement over the subject property, the servient estate, is clear and obvious. However, the exact location of the easement over the subject property, its condition and scope are inherently ambiguous because they were to be mutually agreed upon at the completion Pitch Fork Road. Thus, the Resolution, Contract for Assignment and Assignment are ambiguous and such ambiguities should be construed together in favor of the Appellant as the non-moving party. Furthermore, because the Resolution, Contract for Assignment and Assignment are ambiguous, parole evidence and extrinsic evidence should be considered by a jury to ascertain the parties' intentions at the time the contract was entered.

Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See, Baugus, supra.* The exact location of the easement over the subject property, its condition, duration and scope are not

"essential elements" necessary to create an easement. *See, Smith and Douglas, supra.* Additionally, the argument that the Resolution, Contract for Assignment and Assignment do not amount to a mere agreement to agree is supported under existing law. *See Ten Woodruff Oaks, LLC v. Point Development, LLC,* 385 S.C. 174, 180 683 S.E.2d 510 (Ct. App. 2009). In *Woodruff Oaks,* this Honorable Court rejected the argument that a letter agreement that the parties signed evinced an intent of the parties to create an easement upon the preparation and recording of various legal documents at some point in the future. This Court explained that to constitute a grant of an easement, any words clearly showing the intention to grant an easement are sufficient, and whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument. If the language is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language may be considered by the court, to the end that the intention of the parties may be ascertained and given effect. *Woodruff Oaks, supra.* The Court held that the evidence in this case supported the master's interpretation of the agreement as one creating an easement interest rather than as a expression of the intent to do so upon the satisfaction of certain terms.

For the reasons stated above, the Court erred in granting summary judgment and concluding that no material issues of fact exist in finding that the Resolution fails to meet the essential elements required in order to create a property right and in also concluding the Resolution and Contract for Assignment (which include the Assignment) as a mere "agreement to agree".

In part F. of the "CONCLUSIONS OF LAW" section, the Order Granting Summary

Judgment states, "**The Court takes judicial Notice that in a separate legal malpractice action that the Appellant has filed against its own former attorney...The Appellant cannot take a contrary position in this litigation, rendering its lengthy affidavit and numerous exhibits irrelevant...to conclude, it is well established that 'courts should be particularly jealous of the integrity of judicial sales....**" (R. Vol. I pp. 204-205.) The entire conclusion of law in part "F." is erroneous. The Court appears to be applying the doctrine of judicial estoppel against the Appellant, which is error. As the South Carolina Supreme Court stated in *Auto-Owners Insurance Company v. Rhodes*, 405 S.C. 584, 597-8, 748 S.E.2d 781 (2013):

> Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004)*. "The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." *Id*.
>
> For the doctrine of judicial estoppel to apply, the following elements must be satisfied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Id*. at 215-16, 592 S.E.2d at 632.

The Court made no findings of fact regarding any of the elements to establish judicial estoppel. Indeed, no elements of judicial estoppel are present here.

In *Maybank 2754, LLC v. Buist, Byars & Taylor, LLC; et. al*.; Charleston County Court of Common Pleas Case # 2020-CP-10-02180 (the "malpractice case"), Appellant alleges it has suffered and continues to suffer damages as a result of the Defendants' legal malpractice and breach of fiduciary duty in failing to properly record a document in the official records to put all future buyers and lenders on notice that the subject property is subject to an easement as would

an attorney exercising proper judgment and oversight. (R. Vol. II pp. 520-531.) The issues and theories of recovery in the malpractice case are different than the issues and theories of recovery present here.

Judicial estoppel does not apply to contradictory positions (which there are none) involving issues of law. *State v. McCall*, 364 S.C. 205, 209, 612 S.E.2d 453 (S.C. Ct. App. 2005). Furthermore, the fact a document was not recorded to put all future buyers and lenders on notice that the subject property is subject to an easement is irrelevant in the instant case (not the malpractice case) because an easement by grant is not required to be recorded to be valid, and recording is not necessary if the buyer has actual notice. *See, Frierson v. Watson*, 636 S.C. 60, 68 (Ct. App. 2006). "A purchaser of land with actual, constructive, or implied notice that the property is burdened with an easement ordinarily takes the estate subject to the easement. *Loftis, supra.*

Furthermore, the complaint in the malpractice case filed after the instant case, even references the instant case. Paragraph 18 of the complaint filed in the malpractice case states, "The Property is in the process of being developed. However, upon information and belief, the development plans for the Property do not have any specific provisions or reservations for the thirty (30) foot private right of way easement upon the completion of Pitchfork Road, a consequence of which is Charleston County Court of Common Pleas Case # 2020-CP-10-00209 [the instant case], wherein Maybank is seeking a declaratory judgment for the existence of the thirty (30) foot private right of way easement, or alternatively, a declaratory judgment for the existence of a restrictive covenant, civil conspiracy and temporary injunction against the current owner of the Property and others." Therefore, presuming there was a judicial-estoppel-qualifying position (which there was not), the reference to the instant case in the malpractice

cannot support any finding that there was an intentional effort to mislead the court, which is a necessary element the Court must find to apply judicial estoppel. Furthermore, presuming there was a judicial-estoppel-qualifying position (which there was not), there is no finding or evidence that the Appellant has been successful in maintaining that position and received some benefit. Again, no elements of judicial estoppel are present here and the Court did not make any such findings of fact.

Moreover, the reference in this conclusion of law that courts should be particularly jealous of the integrity of judicial sales is misplaced because court in the foreclosure case never had personal jurisdiction over the Appellant in the foreclosure case, and as a result, its rights and interests in the subject property were never extinguished or impacted by the foreclosure judgment. *See, Green Tree Servicing, LLC, supra.* A judgment is void if a court acts without personal jurisdiction. *See*, *Thomas, supra.* A court generally obtains personal jurisdiction by the service of a summons. *See, Ex parte S.C. Dep't of Revenue*, supra, (citing *Sanders, supra*). ("The purpose of the summons is to acquire jurisdiction of the person of the defendant.. . .")

It was error for the court to rule that Appellant's "lengthy affidavit and numerous exhibits" was irrelevant on the basis of judicial estoppel. It was error for the Court to apply judicial estoppel in this case. Clearly, ambiguities, conclusions, and inferences arising in and from the evidence were not construed most strongly against the movant, which is error. *See*, *Baugus, supra.*

In part G. of the "CONCLUSIONS OF LAW" section, the Order Granting Summary Judgment states, "**Mitch Laplante, as the manager of PCA and controlling member, now manager, of Maybank 2754, is estopped from having Maybank 2754 raise the issue of an easement because he failed to ever raise its existence in neither the PCA Judicial**

Dissolution lawsuit of [sic] the Wells Fargo foreclosure action...Laplante was named defendant in the foreclosure action; was Manager of PCA; was the controlling member of Maybank...Laplante, as the manager of PCA and controlling member of Maybank and a self-touted real estate developer, failed to mention the existence of the 'easement' and now, years later, attempts to relitigate the issue. Collateral estoppel will bar the relitigation of an issue which was actually litigated and necessary to the outcome of a prior lawsuit...Maybank's 'absence from the previous...lawsuit does not insulate it from issue preclusion'...The June 23, 2017, Foreclosure Order is now the law of the case because it involves the same parties and the same property.... " (R. Vol. I pp. 205-209.) (citations omitted). The entire conclusion of law in part "G." is erroneous. As set forth in the Affidavit, Laplante was not the manager of Maybank at the time of the foreclosure action, which makes this conclusion of law incorrect and its apparent factual basis misplaced. Pursuant to paragraph 9 of the Assignment attached to the Contract for Assignment, Laplante only had a voting percentage of 25% at the time of the foreclosure action (not a majority of the voting percentage), which makes this conclusion of law incorrect and its apparent factual basis misplaced. The reliance by the Court on the June 23, 2017 Foreclosure Order is error. The fact that Laplante had knowledge of the foreclosure case does not overcome the necessity of service of process to properly establish jurisdiction against Maybank, John, Marianne and Peter and to ultimately bind them to the judgment. *See*, *Green Tree Servicing*, *supra.*

Furthermore, the party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. See, *Carolina Renewal, Inc., v. S.C. Dep't of Transp.,* 285 S.C. 550, 554-5, 685 S.E.2d 779 (S.C. Ct. App. 2009). The issues of

whether the issue of the subject easement was litigated in the foreclosure action, directly determined in the prior action, and necessary to support the prior judgment are existing genuine issues of material fact that should preclude the entry of summary judgment. The issue of the existence of the easement was not actually ligated, directly determined and necessary to support the foreclosure judgment in the foreclosure action. There is no evidence supporting that the easement was actually litigated, directly determined and necessary to support the prior judgment, and to the extent that the Court relied upon the foreclosure judgment, the conclusions therefrom should be construed in favor of the Appellant. Furthermore, paragraph 40 of the Affidavit states that the subject easement was neither the subject of, nor specifically referenced in, the foreclosure case. At best, this conclusion of law is an inference that should be construed against the Defendants. Furthermore, as explained above, the Foreclosure Order itself states in Paragraph 3.b. that "**The sale shall be subject to** taxes, assessments, **existing easements**, and **easements** and restrictions **of record**." (emphasis added). Thus, the elements necessary to establish collateral estoppel do not exist. However, what does exist are material issues of fact as to whether the easement was actually litigated in the prior action, directly determined in the prior action; and necessary to support the prior judgment. Furthermore, there is an inference that because Laplante was severed from the foreclosure claim, and neither Appellant, John, Marianne nor Peter were named as parties nor served with process that the existence of the easement was not actually litigated or directly determined in the foreclosure action. Additionally, the existence of the easement was not obviously unnecessary to support the foreclosure judgment as inferred by Laplante's severance from the foreclosure claim and Appellant, John, Marianne and Peter not being named as parties therein.

"Estoppel by silence arises when the estopped party **owes a duty** to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts." *Provident Life and Cc. Ins. Co. v. Driver*, 451 S.E.2 924, 928 (S.C. Ct. App. 1994) (emphasis added). Laplante did not owe a duty to speak to anyone about the easement in the dissolution and foreclosure cases and the Order Granting Summary Judgment does not explain from where such duty arises. Furthermore, Zurlo, who was a party in both the dissolution and foreclosure cases, knew about the easement because he signed the Resolution. Thus, even if Laplante owed a duty to inform the opposing parties in the dissolution and foreclosure cases about the easement (which he did not), genuine issues of material fact exist as to whether anyone was led to believe in an erroneous state of facts and relied upon those facts to their detriment, which therefore preclude the application of estoppel by silence.

The June 23, 2017 Order in the foreclosure case is not the law in this case. To conclude otherwise, is to violate fundamental principles of due process. Again, the Master-in-Equity never had personal jurisdiction over the Appellant, John, Marianne or Peter, as discussed above. The Foreclosure Order itself states in Paragraph 3.b. that "**The sale shall be subject to** taxes, assessments, **existing easements**, and **easements** and restrictions **of record**." (emphasis added). (R. Vol. I pp. 13-14.) The Court also concluded that the doctrine of laches applies and stated, "**Appellant's unreasonable delay in asserting its rights has resulted and continues to result in prejudice to the Beach Entities and other defendants**." (R. Vol. I pp. 206-207, note 6.) The conclusion that laches applies to the Appellant is error. "Laches is the *negligent* failure to act for an unreasonable period of time." (citation omitted) (emphasis in original). *Siau v. Kassel*, 369 S.C. 631, 642, 632 S.E.2d 888 (S.C. Ct. App. 2006). "In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of

a right, resulting in prejudice to the defendant. *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465 (2007) "Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice." *Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp*., 368 S.C. 342, 359, 628 S.E.2d 902 (S.C. Ct. App. 2006) (citations omitted). "Laches is a defense in equity, and one who comes to the court seeking equity must come with clean hands." *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598 (S.C. Ct. App. 2004). (citations omitted).

There is no evidentiary basis for the Court's conclusion that laches applies against the Appellant. There has been no finding by the Court as to how the Appellant was negligent to act for an unreasonable period of time and how the Defendants were prejudiced. Indeed, there are genuine issues of material fact as to the application of laches. For example, genuine material issues of fact exist as to whether Appellant was negligent to act, and especially in light of the fact that Pitch Fork Road has not yet been constructed. Zurlo's and The Beach Company's actual knowledge of the easement, which is also imputed to Beach Fenwick, LLC, before 1776, LLC, transferred the subject property to Beach Fenwick, LLC, create material issues of fact as to the prejudice element. Also, 1776, LLC, did not enter into the Development Agreement with the City of Charleston until November 27, 2019, less than two months before this lawsuit was initiated, thereby causing the subject property to be primed for development without any reservation or provision for the Appellant's easement, which therefore creates genuine material issues of fact relative to the unreasonable period of time to act element. Furthermore, genuine issues of material fact relative to the application of equitable estoppel and/or unclean hands against the Defendants exist, which should therefore preclude the entry of summary judgment on the basis of laches. Clearly, ambiguities, conclusions, and inferences arising in and from the

evidence were not construed most strongly against the movant, which is error. *See*, *Baugus*, *supra.*

IV. The trial court erred in (effectively) denying the Appellant's motion to amend its complaint.

The Court erred in granting summary judgment and denying Appellant's Motion to Amend Complaint. Rule 15(a) SCRCP "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist*., 362 S.C. 276, 286, 607 S.E.2d 711, 717 (S.C. Ct. App. 2005). Appellant's counsel made an *ore tenus* motion to amend its complaint at a prior hearing on June 25, 2020, which the court said it would not take up at that time and for Appellant to file the motion to be heard at a later date. After the June 25, 2020 hearing, the Court referred this case to the Master-in-Equity, which caused Appellant to appeal the orders of reference on July 15, 2020 to protect its right to a jury trial. Subsequently, Zurlo filed his motion for summary judgment on August 14, 2020, which was after Appellant's counsel sent Defendants' counsel an e-mail (to comply with Rule 11, SCRCP) on July 8, 2020, inquiring whether they would consent to the filing of the Amended Verified Complaint. After the Master-in-Equity referred the case back to the Circuit Court on August 18, 2020, the other Defendants except Seamon, Whiteside & Associates, Inc., and 1776, LLC, filed their motions for summary judgment. The Beach Entities filed their motion for summary judgment on August 19, 2020, just a day after the Master-in-Equity referred the case back to the Circuit Court. Appellant filed its Motion to Amend Complaint on August 24, 2020. Seamon, Whitesides & Associates, Inc., and 1776, LLC, filed their motions for summary judgment after Appellant filed its Motion to Amend Complaint. Defendants were sent with Appellant's Verified Amended Complaint (without the exhibits attached) on July 8, 2020, before any of their motions for summary judgment were filed.

In deciding to deny Appellant's motion to amend complaint and grant the Defendants' motions for summary judgment, the Court did not rule on any issues raised by the Appellant. Therefore, the trial court erred in failing to rule on each issue raised in opposition to Defendants' motions for summary judgment and in support of Appellant's motion to amend complaint.

CONCLUSION

The Appellant respectfully prays that this Honorable Court will reverse the order of Hon. Judge Bentley D. Price transferring this matter to the Master-in-Equity, denying the Appellant's Motion to Amend its Complaint, reverse the orders of Judge Price granting to the Respondents their respective motions for summary judgment, and for any further relief the Court deems appropriate and necessary.

Respectfully Submitted,

s/Scarlet B. Moore

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