

STATE OF SOUTH CAROLINA)
 COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS)
 TENTH JUDICIAL CIRCUIT)

William Benjamin Duncan and James)
 Brian Duncan,)
)
 Plaintiffs,)

C. A. No.: 2018-CP-04-00900

vs.)

**ORDER GRANTING DEFENDANTS’
 MOTIONS FOR SUMMARY JUDGMENT ON
 PLAINTIFFS’ CLAIMS RE: OWNERSHIP OF
 THE DISPUTED AREA**

Transcontinental Gas Pipe Line)
 Company, LLC, Piedmont Natural)
 Gas Company, Inc., and Central)
 Electric Power Cooperative, Inc.,)

Defendants.

RECEIVED
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SC Court of Appeals

_____)
 Piedmont Natural Gas Company, Inc.,)
)
 Third-Party Plaintiff,)

vs.)

Universal Ensco, Inc.,)
)
 Third-Party Defendant.)
 _____)

INTRODUCTION

This matter came before the Court on August 25, 2021, for oral argument on Defendants’ Motions for summary judgment on Plaintiffs’ claims to ownership of what the Parties call “the Disputed Area” based on adverse possession and acquiescence. The Fifth and Sixth Causes of Action in Plaintiffs’ Amended Complaint allege claims to ownership of the Disputed Area under the 10-year adverse possession statute and a 20-year common law presumption of grant, respectively. Additionally, Plaintiffs’ First, Second, Fourth, and Seventh Causes of Action appear to be based, in whole or in part, on Plaintiffs’ alleged ownership of the Disputed Area. Defendant Piedmont Natural Gas Company, Inc. (“PNG”) and Defendant Transcontinental Gas Pipe Line

Company, LLC (“Transco”) filed their Motion for summary judgment on July 16, 2021. Defendant Central Electric Power Cooperative, Inc. (“Central Electric”) filed its Motion for summary judgment regarding Plaintiffs’ claims to ownership of the Disputed Area on July 19, 2021. After carefully reviewing the materials in the record that may be considered on summary judgment under Rule 56(c), SCRCF, the legal memoranda submitted by Plaintiffs and by PNG, and the oral argument of counsel at the August 25, 2021 hearing, the Court grants Defendants’ Motions for summary judgment on Plaintiffs’ claims to ownership of the Disputed Area. Any causes of action in Plaintiffs’ Amended Complaint regarding, or to the extent they are related to, depend on, or derive from, Plaintiffs’ alleged ownership of the Disputed Area are dismissed with prejudice from this action.¹

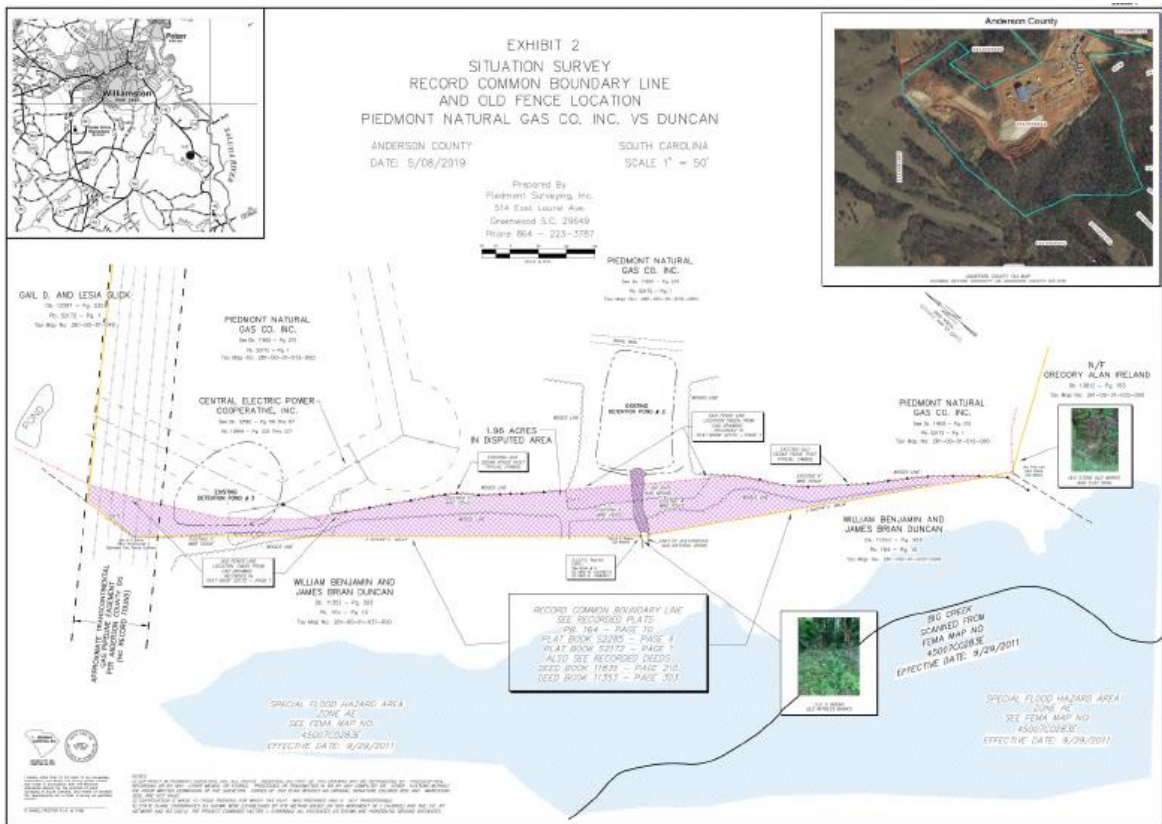
PNG currently owns an approximately 50.80-acre tract of land in Anderson County, South Carolina at 1425 Cannon Bottom Road near Belton, South Carolina (the “PNG Property” or “PNG’s Property”). From 1990 until 2012, the PNG Property was owned as a 58.85-acre tract of land by Thomasena Fowler and Ira M. Fowler Sr. (the “Fowlers”). After Mr. Fowler died in 2011, the PNG Property was owned by Ms. Fowler and the Fowlers’ children from 2012 to 2015. In May 2015, PNG purchased 52.09 acres from the Fowlers, which included the Disputed Area. Plaintiffs own a 300-plus-acre tract of land near Belton, South Carolina (“Plaintiffs’ Property”), a portion of which adjoins the PNG Property. Plaintiffs’ Parents, Kathy B. Duncan and William J. Duncan (“Plaintiffs’ Parents”) purchased Plaintiffs’ Property in April 1993, and conveyed the Property to Plaintiffs by deeds in September 2009, and April 2014. Beginning in 2016, PNG had

¹ PNG also moved for summary judgment on Plaintiffs’ nuisance cause of action complaining about exterior lighting at the Compressor Station on the PNG Property, which the Court denied in a separate Form 4 Order, dated August 27, 2021. Plaintiffs stated at the August 25th hearing that they were only pursuing the exterior lighting claim under their nuisance cause of action. Defendants did not move for summary judgment on Plaintiffs’ surface water claim.

a natural gas compressor facility (the “Compressor Station”) constructed on the PNG Property to provide natural gas to the Duke Energy Carolinas, LLC Lee Steam Station for the generation of electricity for customers in Anderson County, South Carolina and surrounding areas.

Reproduced below are a Survey with colored markings and a Google Earth Photograph with colored markings, both of which were prepared by PNG’s surveyor and which show the PNG Property and Plaintiffs’ Property as well as the Disputed Area.² As part of the construction of the Compressor Station, three artificial drainage systems (the “Detention Ponds”) were built on the PNG Property. Two of the Detention Ponds are shown on the Survey, and all three Detention Ponds are shown on the Google Earth Photograph.

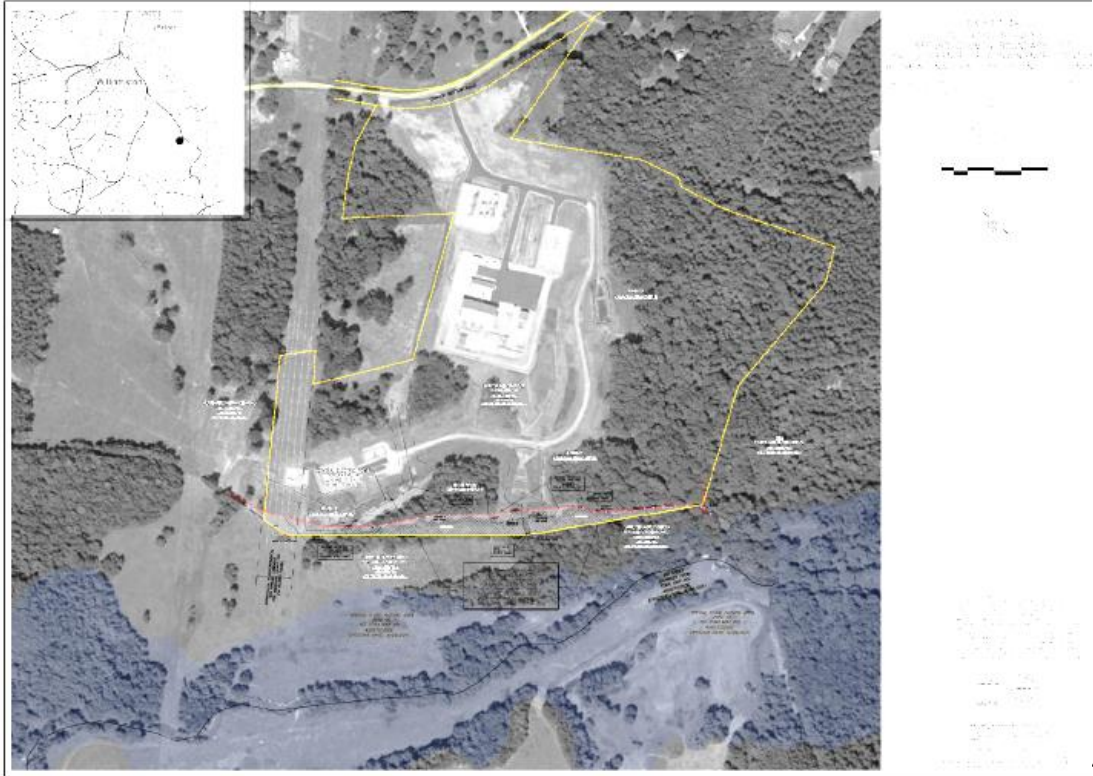
Survey



² Plaintiffs have not challenged the accuracy of either the Survey or the Google Earth Photograph.

³ Affidavit of R. Daniel Proctor, Ex. 2.

Google Earth Photograph



Plaintiffs’ adverse possession and acquiescence claims involve a boundary dispute between Plaintiffs and PNG that affects the ownership of the approximately two-acre Disputed Area. The Disputed Area is shaded in purple on the Survey, above, and grey cross-hatching on the Google Earth Photograph, above. PNG owns the Disputed Area based on all the deeds and plats in the public record, including numerous deeds and plats in Plaintiffs’ recorded chain of title. Plaintiffs have conceded in filings in this case that the deeds and plats in Plaintiffs’ chain of title and in the public record locate the boundary line such that PNG owns the Disputed Area.⁵ There is no document in the public record for Anderson County, South Carolina that gives Plaintiffs title, in any way, to the Disputed Area. The boundary line in the public record is shown in orange on both

⁴ Proctor Aff., Ex. 3A.

⁵ Plaintiffs’ Memorandum in support of their Motion for summary judgment, dated February 8, 2021, (“Plaintiffs’ Summary Judgment Memorandum”) at 3.

the Survey and Google Earth Photograph. Plaintiffs claim that they own the Disputed Area based on the location of a fence that was in place when Plaintiffs' Parents purchased Plaintiffs' Property in 1993. The location of the fence is shown in red on both the Survey and the Google Earth Photograph. No deed or plat in Plaintiffs' chain of title or in PNG's chain of title describes or shows the fence as the boundary line between the two Properties.⁶

Transco and Central Electric have structures or equipment located in the Disputed Area through easements or rights-of-way granted to them by PNG. Transco owns, and is responsible for, Detention Pond 3, a portion of which is located in the Disputed Area. Guy wires and anchors for an electric transmission pole owned by Central Electric are also located in the Disputed Area near Detention Pond 3. Plaintiffs concede that their claims against Transco and Central Electric related to structures or equipment in the Disputed Area turn on whether Plaintiffs can establish adverse possession or acquiescence against PNG.

ANALYSIS

I. Summary Judgment Standard

The South Carolina Court of Appeals recently set forth the standard for summary judgment in two opinions: Rainey v. S.C. Dep't of Social Servs., Op. No. 5838 (S.C. Ct. App. filed July 21, 2021) (Howard Adv. Sh. No. 25 at 18-19) and Williams v. Jeffcoat, Op. No. 5834 (S.C. Ct. App. filed July 14, 2021) (Howard Adv. Sh. No. 24 at 11). Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Calvert v. House Beautiful Paint & Decorating Ctr., Inc., 313 S.C. 494, 496, 443 S.E.2d 398, 399 (1994). "The purpose of summary judgment is to expedite

⁶ W. Glen Dalton (April 2, 2020) Depo. 33:5-8; R. Daniel Proctor Depo. 73:4-75:19; Marion Weatherford Depo. 21:24-22:3.

disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citation omitted).

In reviewing a motion for summary judgment, the Court gives "every benefit of the doubt" to the non-moving party. Watters v. Terminix Serv., Inc., 376 S.C. 632, 635, 658 S.E.2d 110, 111 (Ct.App. 2008). The facts in the record, and any reasonable inferences to be drawn from those facts, must be viewed in a light most favorable to the non-moving party. Abdelgheny v. Moody, 432 S.C. 346, 350, 852 S.E.2d 225, 227 (Ct.App. 2020). "[M]aterials used to support or refute a motion for summary judgment must be those which would be admissible in evidence." Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct.App. 2002). The party opposing a motion for summary judgment may not rely upon an issue of fact that is not genuine or an inference that is not reasonable to rebut a motion for summary judgment. Main v. Corley, 281 S.C. 525, 526-27, 316 S.E.2d 406, 407 (1984).

Two additional issues merit discussion here on the summary judgment standard. First, Defendants contend, and Plaintiffs have not disputed, that their burden of proof at trial on adverse possession and acquiescence would be clear and convincing evidence. As previously mentioned, Plaintiffs have two specific causes of action for adverse possession. Plaintiffs' Amended Complaint does not contain a separate cause of action for acquiescence but merely includes allegations related to acquiescence in Plaintiffs' claims for adverse possession.⁷ The party asserting a claim of adverse possession must show by "clear and convincing evidence" that it has met all six requirements for adverse possession. Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986); see also Zinnerman v. Williams, 211 S.C. 382, 386, 45 S.E.2d 597, 599 (1947); Jones v. Leagan, 384 S.C. 1, 10-11, 681 S.E.2d 6, 11 (Ct.App. 2009). Similarly, the burden of

⁷ Amended Complaint, ¶¶ 52-63.

proof for estoppel is also clear and convincing evidence. Barnes v. Johnson, 402 S.C. 458, 471, 742 S.E.2d 6, 12 (Ct.App. 2013).

Because their burden of proof at trial would be clear and convincing evidence, Plaintiffs cannot oppose Defendants' Motions for summary judgment on adverse possession or acquiescence with just a scintilla of evidence. Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009). When the burden of proof at trial is clear and convincing evidence, the circuit court must apply that standard on summary judgment as well. Nebraska v. Wyoming, 507 U.S. 584, 590, 113 S.Ct. 1689, 1694 (1993) ("In determining whether a material factual dispute exists, the Court views the evidence through the prism of the controlling legal standard."). "[T]he appropriate summary judgment question [for this Court is] whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown [each element of the cause of action] by clear and convincing evidence or that the plaintiff has not." George v. Fabri, 345 S.C. 440, 453, 548 S.E.2d 868, 875 (2001) (citation omitted), see also Russell v. Wachovia Bank N.A., 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003).

Second, "when ruling on a motion for summary judgment, a court must determine whether the plaintiff has established a prima facie case as to each element of a claim...." Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). If a plaintiff cannot establish facts on each element of the cause of action asserted, summary judgment is "mandated" by Rule 56(c), SCRCP. Id. (to "properly deny" a motion for summary judgment, "a court must determine that a genuine issue of material fact exists for each essential element of the plaintiff's claim"); see also Bessinger v. Bi Lo, Inc., 329 S.C. 617, 496 S.E.2d 33 (Ct.App. 1997); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957). "A complete failure of proof concerning an essential

element of the non-moving party's case necessarily renders all other facts immaterial." Carolina Alliance for Fair Emp't v. S.C. Dep't of Lab., Licensing, and Regul., 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct.App. 1999).

II. Plaintiffs' Adverse Possession Claims

PNG's predecessors in title, the Fowlers, were and PNG is the record owner of the Disputed Area based on the publicly recorded deeds and plats in Anderson County, South Carolina. Major v. Penn Comm. Servs., Inc., 395 S.C. 175, 183, 717 S.E.2d 70, 74 (Ct.App. 2011) (citing King v. Hawkins, 282 S.C. 508, 510, 319 S.E.2d 361, 363 (Ct.App. 1984) for the proposition that "party was record owner of property when deed matched recorded plats indicating disputed property was owned by the party and party's predecessors in interest"). It is undisputed that the properly recorded deeds in PNG's chain of title (and the 1981 plat referenced in those recorded deeds) includes the Disputed Area in the PNG Property and that the properly recorded deeds in Plaintiffs' chain of title (including the 1982 plat referenced in those recorded deeds) excludes the Disputed Area from Plaintiffs' Property.⁸ Plaintiffs have made no showing, and do not contend, that the location of the boundary line between Plaintiffs' Property and the PNG Property is ambiguous in the public record.⁹ The doctrine of adverse possession is, therefore, strictly construed against Plaintiffs and strictly in favor of PNG, the party that admittedly has recorded

⁸ W. Glen Dalton (April 2, 2020) Depo. 32:24-33:8, 40:22-41:10, 41:22-43:2, 47:25-48:20; R. Daniel Proctor Depo. 73:4-75:19; Marion Weatherford Depo. 20:13-24:12, 26:3-12; Plaintiffs' Answers to PNG's Second Requests to Admit, Nos. 13-16.

⁹ The 1981 plat referenced in the deeds in PNG's chain of title and the 1982 plat referenced in the deeds in Plaintiffs' chain of title both unambiguously locate the boundary line between the two Properties in the same location. This boundary line excludes the Disputed Area from Plaintiffs' Property and includes the Disputed Area in what is now the PNG Property. There are physical monuments on the ground (pins and an old stone) which match the boundary line in question shown on both the 1981 and 1982 plats, and these physical monuments exclude the Disputed Area from Plaintiffs' Property. As mentioned earlier, no deed or plat in the public record references a fence as the boundary line between the two Properties.

title to the Disputed Area. King v. Hawkins, 282 S.C. at 511, 319 S.E.2d at 363 (stating “the doctrine of adverse possession must be strictly construed in favor of the owner of the title to land”).

“The burden of proof of adverse possession is on the one relying thereon.” Weston v. Morgan, 162 S.C. 177, 192, 160 S.E. 436, 441 (1931). See also Lyles v. Fellers, 138 S.C. 31, 42, 136 S.E. 13, 17 (1926); Butler v. Lindsey, 293 S.C. 466, 470, 361 S.E.2d 621, 623 (Ct.App. 1987). Regardless of the applicable time period, six elements must be shown by clear and convincing evidence to establish title by adverse possession. Miller v. Leaird, 307 S.C. 56, 413 S.E.2d 841 (1992) (requiring proof of all six elements for claim asserting presumption of grant and forty-year adverse possession statute). Possession must be (1) actual, (2) open, (3) notorious, (4) hostile, (5) continuous, and (6) exclusive for the full relevant time period. Id., 307 S.C. at 61, 413 S.E.2d at 843-44; Haithcock v. Haithcock, 123 S.C. 61, 67, 91, 115 S.E. 727, 729, 736 (1923) (holding that the trial court “charged the law applicable to the case, clearly and correctly” and publishing jury charge that required proof of “actual, hostile, exclusive and continuous possession of land for 20 years” to claim presumption of grant). See also Davis v. Monteith, 289 S.C. at 180, 345 S.E.2d at 726; Jones v. Leagan, 384 S.C. 1, 10-11, 681 S.E.2d 6, 11 (Ct.App. 2009). Plaintiffs here may acquire title to the Disputed Area by adverse possession only if they demonstrate all six elements of adverse possession for the entire relevant time period. All six elements must exist and concur for the entire time period. S.C. Code. Ann. §§ 15-67-210, 240, & 250; see also King v. Hawkins, 282 S.C. at 511, 319 S.E.2d at 362-63 (citing Walker v. Oswald, et al., 156 S.C. 424, 153 S.E. 286 (1930)).

As discussed above, an essential element of an adverse possession claim is proof by clear and convincing evidence that the possession was “hostile” for the entire relevant time period. All Saints Parish v. The Protestant Episcopal Church in the Diocese of S.C., 358 S.C. 209, 231, 595

S.E.2d 253, 265 (Ct.App. 2004) (“adverse possession claim fails if the claimant’s possession is not hostile.”). South Carolina law allows for adverse possession claims based on hostile possession for 10 years, 20 years, or 40 years.¹⁰ Here, Plaintiffs cannot personally satisfy any of these time requirements because it is undisputed that Plaintiffs were initially deeded Plaintiffs’ Property in 2009, and PNG began building and engaging in other activities in the Disputed Area in August 2016—less than 10 years later.¹¹ Plaintiffs can only prove their adverse possession claims if they can show that the possession of the Disputed Area by Plaintiffs’ Parents was also “hostile.”

Hostile possession requires possession with the intent to dispossess the true owner. Ouzts v. McKnight, 114 S.C. 303, 306, 103 S.E.2d 561, 562 (1920). The mere possession or use of land does not, in and of itself, manifest hostility toward the true landowner. Knight v. Hilton, 224 S.C. 452, 456, 79 S.E.2d 871, 873 (1954); Croft v. Sanders, 283 S.C. 507, 511, 323 S.E.2d 791, 794 (Ct.App. 1984). “The presumption is that the occupant [of land] intends to claim only what his deed calls for, and that the land to which the occupant had no title he holds consistent with the title of the true owner.” Lyles v. Fellers, 138 S.C. at 44, 136 S.E. at 18. See also Knight, 224 S.C. at

¹⁰ Here, the only relevant time period is common law presumption of grant, which requires the six elements of adverse possession for twenty years. See, e.g. May v. Jeter, 245 S.C. 529, 538, 141 S.E.2d 655, 660 (1965) (“adverse possession for a period of twenty years raises a presumption of a grant”). In their Amended Complaint, Plaintiffs do not assert a claim under the 40-year statute. The 10-year statute in S.C. Code. Ann. §§ 15-67-210, 240, & 250 does not apply for the reasons set forth in footnote 11.

¹¹ Plaintiffs’ Amended Complaint, ¶ 8 at p. 4; ¶ 19 at p. 5. Plaintiffs cannot assert a claim under the 10-year statute even if all elements were otherwise satisfied. Under the 10-year statute, tacking time of possession with others is allowed only between an ancestor and an heir. Terwilliger v. White, 222 S.C. 176, 72 S.E.2d 169 (1952). Tacking is not allowed under the 10-year statute between grantor and grantee or between successive purchasers. Adams v. Adams, 220 S.C. 131, 66 S.E.2d 809 (1951); Pegues v. Warley, 14 S.C. 180 (1880). It is undisputed that Plaintiffs first obtained title to Plaintiffs’ Property through deeds starting in 2009, when Plaintiffs’ mother deeded her interest in Plaintiffs’ Property to Plaintiffs and Plaintiffs’ father, William Duncan. Plaintiffs did not inherit Plaintiffs’ Property from their Parents because both of Plaintiffs’ Parents are still living. Tacking is not allowed under the 10-year statute for the time Plaintiffs’ Parents owned the Property because the Parents’ interests passed by deeds to Plaintiffs.

456, 79 S.E.2d at 873 (“there is every presumption that [any] occupancy is in subordination to legal title” to the land occupied); Butler v. Lindsey, 293 S.C. 466, 470, 361 S.E.2d 621, 623 (Ct.App. 1987). Here, Plaintiffs cannot satisfy the required element of hostility because both Plaintiffs’ Parents and Plaintiffs admitted in their deposition testimony that they occupied the Disputed Area based on the mistaken belief that the fence was the boundary line between Plaintiffs’ Property and the PNG Property and the belief that Plaintiffs’ Parents and then Plaintiffs owned the Disputed Area.

Brown v. Clemens, 287 S.C. 328, 338 S.E.2d 338 (1985), is dispositive of Plaintiffs’ adverse possession claims. Defendant Clemens owned an L-shaped parcel of land that adjoined land owned by plaintiff Brown. From 1936 to 1977, Clemens’ predecessors in title and Clemens built a chicken coop, a garage, and did other work on land that was actually owned by Brown in the public record. According to the South Carolina Supreme Court, “Clemens and her husband testified the encroachments were built on Brown’s property under the mistaken belief [the Clemenses] were on their own land.” 287 S.C. at 330, 338 S.E.2d at 339. The Supreme Court stated the well-settled law in South Carolina that “a claim of adverse possession fails where an encroaching neighbor is under a mistaken belief as to the boundary location and therefore lacks the intention to dispossess the true owner.” Brown, 287 S.C. at 331, 338 S.E.2d at 339 (emphasis added). The Supreme Court reversed the lower court and rejected Clemens’ claim of adverse possession because Clemens occupied the disputed property in question based on her mistaken belief as to the location of the boundary line and the occupation was not “hostile” as a matter of law:

Here the coop and garage were erected under a mistaken belief as to the location of the boundary. There is no evidence of record that the possession ever became hostile for the requisite statutory period after construction. A finding of adverse possession was erroneous under the

existing rule in Ouzts and Lynch.

Id. (emphasis added). See also Lusk v. Callaham, 287 S.C. 459, 461, 339 S.E.2d 156, 158 (Ct.App. 1986). South Carolina appellate courts continue to follow this rule where the claim of adverse possession involves a dispute between adjoining landowners as to the location of the boundary line. Perry v. Heirs at Law and Distributees of Gasden, 316 S.C. 224, 226, 449 S.E.2d 250, 251 (1994) (holding that the rule that “possession under a mistaken belief that the property is one’s own and with no intent to claim against the property’s true owner cannot constitute hostile possession” still applies “to cases involving boundary disputes between adjoining land owners”); Wigfall v. Dobbs, 295 S.C. 59, 61, 367 S.E.2d 156, 157 (1988) (referencing South Carolina law that “the possession of land by an encroaching land owner beyond the true boundary line under a mistaken belief regarding the location of the boundary line is not hostile”); All Saints Parish, 358 S.C. at 231, 595 S.E.2d at 266; Cook v. Eller, 298 S.C. 395, 397, 380 S.E.2d 853, 854 (Ct.App. 1989).

Plaintiffs assert that South Carolina’s position on mistaken occupation and hostility in boundary disputes is the minority rule in the United States and suggest that this Court should not follow Brown v. Clemens. However, Brown v. Clemens is a South Carolina Supreme Court decision that is directly on point and binding on this Court. Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct.App. 1993) (holding Court of Appeals bound by decision of the Supreme Court and any change in the law must come from the Supreme Court). Moreover, the rule that possession based on a mistaken belief as to location of the boundary line is not “hostile” for the purposes of adverse possession has been the law in South Carolina for 100 years. Ouzts v. McKnight, *supra*. The South Carolina Supreme Court has shown no inclination to change this rule in cases involving boundary disputes. In Brown v. Clemens, the Supreme Court granted Clemens’ petition to argue against precedent and then declined to overrule this longstanding rule

and rejected Clemens' claim of adverse possession. In Weeks and Perry, the Supreme Court expressly chose to keep the rule and holding in Brown v. Clemens in cases, like the current lawsuit, that involve boundary disputes. Additionally, the South Carolina Legislature is presumed to be aware of case law interpreting the requirements of adverse possession, and it has done nothing to change or alter the long-standing rule that occupation of land based on a mistaken belief as to the location of the boundary line is not hostile. Nationwide Mut. Fire Ins. Co. v. Walls, 433 S.C. 206, 215, 858 S.E.2d 150, 154 (2021) ("in reaching this decision, we find it significant that the General Assembly has not amended section 38-77-142 since this Court decided Williams in 2014"); York v. Longlands Plantation, 429 S.C. 570, 576, 840 S.E.2d 544, 547 (2020) (finding the General Assembly's "silence over the past seven decades" significant); Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation."). This Court has no authority to change or alter the 100-year-old rule on hostility. Irwin v. Michelin Tire Corp., 288 S.C. 221, 225, 341 S.E.2d 783, 785 (1986) ("If there is to be such a fundamental change in the law, we believe that it should be by legislative action and not judicial decision."); McCord v. Laurens Cnty. Health Care Sys., 429 S.C. 286, 298, 838 S.E.2d 220, 226 (Ct.App. 2020) (rejecting adoption of "hospital corporate negligence doctrine" because "such a declaration of public policy is for the legislature or perhaps our supreme court").

The allegations in Plaintiffs' Amended Complaint, repeated statements of Plaintiffs' counsel in legal memoranda filed with this Court, and the undisputed facts in the record establish that Plaintiffs' claims to ownership of the Disputed Area involves a classic "boundary dispute" between adjoining land owners. Gardner v. Mozingo, 293 S.C. 23, 24, 358 S.E.2d 390, 391 (1987). (using the term "boundary line dispute"); Brown v. Clemens, supra (stating the "case involves a

boundary dispute” where the underlying issues were the contested location of the boundary line between two adjoining properties and ownership of the “disputed property” between the boundary line claimed by Brown and the boundary line claimed by Clemens); see also, Boundary Dispute, collinsdictionary.com, <https://www.collinsdictionary.com/us/dictionary/english/boundary-dispute> (last visited August 21, 2021) (defining “boundary dispute” as a “dispute between neighbors about the boundary between their properties”). The Disputed Area does not exist as a separate and distinct tract of land in the public records of Anderson County, South Carolina nor, for that matter, in any document in the record before the Court. Plaintiffs admit that the deeds in Plaintiffs’ chain of title and the plats in the public records of Anderson County, South Carolina place the boundary line in the same location and, importantly, exclude the Disputed Area from Plaintiffs’ Property.¹² There are markings on the ground (pins and stones) between the two Properties that match the plats in the public record, and these physical monuments locate the Disputed Area inside the PNG Property.¹³ Plaintiffs admit that the Tax Maps for Anderson County, South Carolina place the property line so as to locate the Disputed Area inside the PNG Property.¹⁴ Plaintiffs’ claims to ownership of the Disputed Area turn on whether the boundary line between the two adjoining Properties is the fence (which Plaintiffs claim is “the true boundary line”) or the actual “property line” in the public records for Anderson County, South Carolina (which PNG claims is the boundary line).¹⁵

Plaintiffs’ Amended Complaint clearly alleges a boundary dispute between Plaintiffs and

¹² Plaintiffs’ Answers to PNG’s Second Requests to Admit, Nos. 1-16; Plaintiffs’ Amended Answers to PNG’s Second Request to Admit, No. 3; Plaintiffs’ Summary Judgment Memorandum at 3.

¹³ Proctor Aff., ¶ 5 at 3.

¹⁴ Plaintiffs’ Answers to PNG’s Second Requests to Admit, Nos. 13-16.

¹⁵ Amended Complaint, ¶ 18.

PNG.¹⁶ Plaintiffs' Amended Complaint repeatedly alleges that the fence is the "boundary" or "property line" separating Plaintiffs' Property and the PNG Property.¹⁷ Plaintiffs attached to their Amended Complaint, as Exhibit F, a plat that was prepared by a surveyor retained by Plaintiffs. Exhibit F compares the "property line" shown in the public records for Anderson County, South Carolina with "the original location of the fence."¹⁸ Paragraph 21 of the Amended Complaint alleges that Exhibit F shows the location of the fence (which Plaintiffs claim is the boundary line) and "the moved property line" (which PNG claims is the boundary line).

Consistent with their Amended Complaint, Plaintiffs took the position in sworn interrogatory responses that their claims to the Disputed Area is based on their belief that the fence was the boundary line between the two Properties:

The Fence was in place when Plaintiffs' and their family purchased the subject property on April 21, 1993. The fence was **the boundary** between Plaintiffs' property and Piedmont's property since at least April 21, 1993. Since April 21, 1993, Plaintiffs occupied, maintained and used the property up to the fence line, and the predecessors in title for Piedmont's property did the same. Plaintiffs sprayed and maintained the fence, and bush hogged the area up to the fence. Until the time that Piedmont moved the fence, no one ever took any actions inconsistent with **the fence being the true boundary between Plaintiffs' property and**

¹⁶ Wilson v. City of Columbia, Op. No. 28056 (S.C. Sup. Ct. filed September 2, 2021) (Howard Adv. Sh. No. 31 at 9-22) ("The parties, through their pleadings, determine the issues before the Court."); Johnson v. Alexander, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) ("[p]arties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions"); Postal v. Mann, 308 S.C. at 387, 418 S.E.2d at 323 ("a party cannot take a position contradictory of, or inconsistent with his pleadings"); Fisher v. S.C. Dep't of Health and Env'n't Control, 309 S.C. 10, 12-13, 419 S.E.2d 794, 795 (Ct.App. 1992) (a party "is judicially bound by the statements in [the party's] pleadings").

¹⁷ Amended Complaint, ¶¶ 38, 53, 59, Prayer ¶ (b).

¹⁸ Amended Complaint, ¶ 21; see also Rule 10(c), SCRCP ("any plat, ... diagram or other paper which is attached as an exhibit to a pleading is a part thereof **for all purposes...**") (emphasis added); Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) ("a copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes if a copy is attached to such a pleading").

Piedmont's property.¹⁹

In other sworn interrogatory responses, Plaintiffs stated that the fence “was the boundary line between [the PNG] property and Plaintiffs’ property” and that the fence was “the true[] property boundary, and no one ever took any actions inconsistent with it being the true boundary line.”²⁰

Similarly, in legal memoranda filed with the Court, Plaintiffs repeatedly noted that Plaintiffs’ claims to ownership of the Disputed Area involves a dispute over the location of the property/boundary line between Plaintiffs’ Property and the PNG Property.²¹ For example, Plaintiffs moved for injunctive relief on their acquiescence claim and Plaintiffs’ Memorandum in support of their Motion for injunctive relief stated that PNG “contend[s] that the new property line [it is] trying to establish is the property line pursuant to the metes and bounds description contained in deeds, in spite of the fact that the [f]ence was long recognized as the true boundary line” (emphasis added).²² Similarly, in their Memorandum opposing Defendants’ Motion for summary judgment, Plaintiffs describe the dispute over ownership of the Disputed Area as involving whether “the fence” or the “platted property line ... according to the recorded plats and deeds” is “the boundary between the [P]roperties....”²³

The only reasonable inferences from the evidence in the record are: (1) Plaintiffs’ Parents and Plaintiffs mistakenly assumed and believed the fence was the boundary line between Plaintiffs’ Property and the PNG Property; and (2) Plaintiffs’ Parents and Plaintiffs occupied the Disputed

¹⁹ Plaintiffs’ Responses to PNG’s First Interrogatories to Plaintiffs, Nos. 5 at 4, & 13 at 7.

²⁰ Id.

²¹ Plaintiffs’ Summary Judgment Memorandum at pp. 2, 4, 8, & 11; Plaintiffs’ Memorandum in Support of Motion for Injunctive Relief, dated June 14, 2019, (“Plaintiffs’ Memorandum in Support of Injunctive Relief”) at pp. 2, 4, 5, & 6.

²² Plaintiffs’ Memorandum in Support of Injunctive Relief at p. 2.

²³ Plaintiffs’ Opposition Memorandum, dated August 24, 2021, (“Plaintiffs’ Opposition Memorandum”) at 3-4.

Area because they thought that they owned the Disputed Area given the location of the fence. There is no evidence in the record that the Plaintiffs' Parents or Plaintiffs occupied the Disputed Area with the intent to dispossess and take the Disputed Area from the record owners, the Fowlers or PNG. When they purchased Plaintiffs' Property in 1993, Plaintiffs' Parents assumed, without any supporting facts, that the fence was the boundary line between Plaintiffs' Property and what is now the PNG Property. See discussion infra pp. 25-26. Neither Plaintiffs' Parents nor Plaintiffs had Plaintiffs' Property surveyed when they first acquired title to the Property.²⁴ Plaintiffs did not have their Property surveyed until March 2017—over a year after PNG purchased the PNG Property and began building the Compressor Station—and this survey showed that Plaintiffs do not own the Disputed Area based on what is in the public record. The deposition testimony of Plaintiffs' Parents and Plaintiffs affirmatively establishes that they occupied the Disputed Area under the erroneous belief that the fence was the boundary line and that they owned the Disputed Area—exactly the same facts as Brown v. Clemens, supra.²⁵

Under well-settled South Carolina law, the occupation of the Disputed Area by Plaintiffs' Parents and Plaintiffs was simply not hostile, which is an essential and required element for any claim of adverse possession regardless of the relevant time period. Given that an essential element of adverse possession (hostility) is missing, Rule 56(c), SCRCP, “mandates” summary judgment be entered in Defendants' favor on Plaintiffs' Second, Fourth, Fifth, Sixth and/or Seventh Causes of Action to the extent that any of these Causes of Action are based on ownership of the Disputed Area by adverse possession. Hansson, 374 S.C. at 357, 650 S.E.2d at 71. See also Law v. S.C.

²⁴ William J. Duncan Depo. 12:10-12, 38:14-16, 39:7-9; Kathy B. Duncan Depo. 23:14-24:5.

²⁵ William Joseph Duncan Depo. 47:16-48:14, 70:15-71:2 (emphasis added); Kathy Duncan Depo. 34:9-35:6, 41:13-42:3; James Brian Duncan Depo. 33:2-8, 41:11-42:1; William Benjamin Duncan Depo. 42:25-43:8.

Dep't of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (summary judgment appropriate where plaintiff failed to introduce facts on essential element of cause of action); Bloom v. Ravoria, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000) (“[W]here a verdict is not reasonably possible under the facts presented, summary judgment is proper.”); Carolina Alliance for Fair Emp't v. S.C. Dep't of Lab., Licensing, & Regul., 337 S.C. at 485, 523 S.E.2d at 800 (“A complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.”).

Plaintiffs suggest that this Court should treat the Disputed Area as an “entire tract of land” under Wigfall v. Fobbs, *supra*, and Knox v. Bogan, 322 S.C. 64, 472 S.E.2d 43 (Ct.App. 1996). However, there is no factual or legal basis for doing so here. As discussed above, Plaintiffs have consistently taken the position in pleadings, discovery, and prior filings in this case that their claims related to the Disputed Area involved a dispute as to the proper location of the boundary line. There is no plat, deed, tax map, or anything else in the public record that indicates the Disputed Area is an entire tract of land or a separate and distinct tract of land. The undisputed evidence in the record is that, during the entire relevant time period, the deeds and plats in the public record included the Disputed Area in, and as part of, what is now the PNG Property. The tax maps for Anderson County, South Carolina do not show the Disputed Area as a separate tract of land nor was the Disputed Area assessed as a separate tract for real estate tax purposes.²⁶ Exhibit F to Plaintiffs’ Amended Complaint, which was prepared by Plaintiffs’ surveyor and, under Rule 10(c), SCRCPP, is considered part of Plaintiffs’ Amended Complaint, does not describe the Disputed Area as a “tract” but, instead, as merely the “area between [the] original fence location

²⁶ Kevin Wiles Depo. 6:18-7:17; 8:14-23; 9:7-24.

and [the] property line.”²⁷ See footnote 16, supra. As with any boundary dispute, the Disputed Area here is merely the disputed property whose ownership is affected by the boundary dispute, depending on whether the boundary line is the fence, as Plaintiffs claim, or the property line in the public record, as PNG claims.

Moreover, there is no evidence in the record that the Disputed Area exists factually or practically as a separate and distinct tract of land. The Disputed Area is not separately fenced, was not cultivated as a separate tract, does not have any road frontage, and can only be accessed from either Plaintiffs’ Property or the PNG Property. There is no evidence in the record before the Court that Plaintiffs’ Parents or Plaintiffs ever treated or even described the Disputed Area as a separate and distinct tract of land. In fact, the theory of Plaintiffs’ ownership claims is that the Disputed Area had always been fenced in and treated by Plaintiffs’ Parents and Plaintiffs as part of Plaintiffs’ 300-plus-acre tract of land. Plaintiffs’ Amended Complaint alleges and seeks to include the Disputed Area as part of “Plaintiffs’ Property,” which is the 300-plus-acre tract that Plaintiffs’ Parents purchased in 1993.²⁸ The claim of Plaintiffs’ counsel that the Disputed Area is, by itself, a “tract of land” is not evidence that can be considered on summary judgment. Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986).

III. Plaintiffs’ Acquiescence Claim

Plaintiffs also claim ownership of the Disputed Area on the grounds that PNG and the Fowlers acquiesced to the fence being the boundary line between the two Properties. Plaintiffs’ claim to ownership of the Disputed Area based on acquiescence turns on the conduct of PNG’s predecessors in title, the Fowlers, because it is admitted by Plaintiffs that, shortly after purchasing

²⁷ Amended Complaint, ¶ 21.

²⁸ Amended Complaint, ¶¶ 6 & 7.

the PNG Property from the Fowlers, PNG asserted ownership over the Disputed Area.²⁹ Acquiescence related to a boundary line dispute involves the application of the doctrine of estoppel. Coker v. Cummings, 381 S.C. 45, 53, 671 S.E.2d 383, 388 (Ct.App. 2008) (“His silence is acquiescence and it estops him”) (emphasis added) (citation omitted). See also Brown v. Clemons, 287 S.C. at 332, 338 S.E.2d at 340 (using terms “ESTOPPEL” and “theory of acquiescence” interchangeably); McClintic v. Davis, 228 S.C. 378, 90 S.E.2d 364 (1955) (discussing “estoppel” and “acquiescence” interchangeably). South Carolina law provides that “mere silence or acquiescence will not operate to work an estoppel where the other party has constructive notice of public records which disclose the true facts.” Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 74, 558 S.E.2d 910, 910 (Ct.App. 2001) (emphasis added) (quoting Dressel v. Weeks, 779 P.2d 324, 331 (Alaska 1989)). In South Carolina Dep’t of Pub. Transp. v. Horry Cnty., 391 S.C. 76, 705 S.E.2d 21 (2011), the Supreme Court followed Binkley, stating “[m]ere silence or acquiescence will not work an estoppel when the party seeking estoppel has constructive notice of the public records that disclose the true facts.” 391 S.C. at 84, 705 S.E.2d at 25. See also South Carolina State Highway Dep’t v. Metts, 270 S.C. 73, 240 S.E.2d 816 (1978) (rejecting defendant’s claim that the Highway Department was estopped or acquiesced in the defendant locating a gasoline island and pumps in the Highway Department’s right-of-way where the right-of-way was disclosed in the public record).

Here, the undisputed evidence in the record, even when viewed in the light most favorable to Plaintiffs, demonstrates that the location of the actual boundary line between the PNG Property and Plaintiffs’ Property—a boundary line that gives PNG title to the Disputed Area—is disclosed in numerous deeds in Plaintiffs’ chain of title, including the deeds by which Plaintiffs’ Parents

²⁹ Amended Complaint, ¶¶ 19 & 21.

conveyed Plaintiffs' Property to Plaintiffs.³⁰ Brown v. Clemens, *supra*, therefore requires that the Court grant summary judgment to Defendants on Plaintiffs' acquiescence claim. In Brown, the South Carolina Supreme Court rejected Clemens's claim of ownership to land based on "the theory of acquiescence" because the true location of the boundary line was disclosed in the public record in Clemens's deed and in deeds in her chain of title and, thus, gave Clemens "the means of knowledge" to determine the true boundary line. The Supreme Court held Clemens did not have title under "the theory of acquiescence" even though Clemens's predecessors in title had built structures on the disputed property that Brown actually owned in the public record. 287 S.C. at 332, 338 S.E.2d at 340.

Here, Plaintiffs' Parents and Plaintiffs had constructive notice and the "means of knowledge" as to the true location of the boundary line because, as Plaintiffs admit, the deeds conveying title to Plaintiffs' Parents and Plaintiffs and other publicly recorded deeds and documents in their chain of title showed the real location of the boundary line. See Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 107, 217 S.E.2d 16, 20 (1975); Fuller-Ahrens P'ship v. S.C. Dep't of Highways and Pub. Transp., 311 S.C. 177, 181, 427 S.E.2d 920, 923 (Ct.App. 1993); S.C. Code Ann. § 30-7-10 (1991) (current version of South Carolina notice statute). See also Binkley, 348 S.C. at 71, 558 S.E.2d at 909 ("Property owners are charged with constructive notice of instruments recorded in their chain of title."). The public records for Anderson County, South Carolina, the authenticity of which have been admitted by Plaintiffs,³¹ show that Plaintiffs' chain of title dating back to 1983 is as follows:

³⁰ See, e.g., Plaintiffs' Summary Judgment Memorandum at 3.

³¹ Affidavit of Jonathan Turner, ¶ 4 at 2; Plaintiffs' Answers to PNG's Second Requests to Admit, Nos. 1-9; Plaintiffs' Amended Answers to PNG's Second Request to Admit, No. 3; Plaintiffs' Answers to PNG's Third Requests to Admit, Nos. 1-16.

<u>DATE RECORDED</u>	<u>GRANTOR to</u>	<u>GRANTEE</u>
July 27, 1983	James W. Mahon	James B. Brogdon; Cynthia Brogdon
April 5, 1991	James Brogdon	Cynthia Brogdon
April 22, 1993	Cynthia Brogdon	William J. Duncan; Kathy B. Duncan
September 30, 2009	William J. and Kathy Duncan	William J. Duncan; Plaintiffs Ben and Brian Duncan
April 23, 2014	William J. Duncan	Plaintiffs Ben and Brian Duncan

Plaintiffs admit that each deed for the above conveyances in Plaintiffs' chain of title, including the deed conveying Plaintiffs' Property from Cynthia Brogdon to Plaintiffs' Parents and the deeds from Plaintiffs' Parents to Plaintiffs, was properly recorded in the public records for Anderson County, South Carolina, and Plaintiffs admit that each deed expressly states that the land being conveyed is shown on a recorded June 2, 1982 plat prepared by surveyor F.E. Ragsdale for J.W. Mahon (the "1982 Ragsdale Plat"). Under well-settled South Carolina law, where a deed references a plat, the plat becomes part of the deed. Carolina Land Co., Inc., 265 S.C. at 105, 217 S.E.2d at 19. In particular, "[w]here a deed describes land as it is shown on a certain plat, such plat becomes part of the deed for the purpose the boundaries, metes, courses and distances of the property conveyed." Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979). Reference to a plat in a deed is an unambiguous and accepted way to describe the boundaries of the land conveyed by the deed. Milton P. Demetre Family Ltd., P'ship v. Beckmann, 413 S.C. 38, 54-5, 773 S.E.2d 596, 605 (Ct.App. 2014); Bellamy v. Bellamy, 292 S.C. 107, 110-11, 355 S.E.2d 1, 3 (Ct.App. 1987).

Plaintiffs further admit that the 1982 Ragsdale Plat locates the boundary line in question so as to exclude the Disputed Area from Plaintiffs' Property.³² The surveyors, including one retained by Plaintiffs prior to suit being filed, have testified in depositions that the 1982 Ragsdale Plat locates the actual boundary line so as to exclude the Disputed Area from Plaintiffs' Property and to include the Disputed Area in the PNG Property.³³ Plaintiffs also admit, and the surveyors have testified, that the 1982 Ragsdale Plat was recorded and in the public records for Anderson County, South Carolina at the time that Plaintiffs' Parents purchased what is now Plaintiffs' Property in 1993.³⁴ Plaintiffs' Parents and Plaintiffs are charged with knowledge of this information in their recorded chain of title under settled South Carolina law.

Constructive notice includes both information disclosed in the chain of title and other information that the landowner could have obtained with reasonable inquiry using the information in their chain of title. Moyle v. Campbell, 126 S.C. 180, 193, 119 S.E. 186, 190 (1923); Binkley, 348 S.C. at 70-71, 558 S.E.2d at 908-09. This is a fundamental principle of real estate law in South Carolina which underlies the recording statutes. McDonald v. Welborn, 220 S.C. 10, 16, 17, 66 S.E.2d 327, 330 (1951); Frierson v. Watson, 371 S.C. 60, 67-8, 636 S.E.2d 872, 875-76 (Ct.App. 2006). A qualified surveyor could have taken the 1982 Ragsdale Plat and located the actual boundary line in question for Plaintiffs' Parents or Plaintiffs. Moyle, 126 S.C. at 194, 119 S.E. at 190 ("Generally the means of knowledge and the duty of using them are equivalent to knowledge"); Binkley, 348 S.C. at 72, 558 S.E.2d at 909 (finding plaintiffs had constructive

³² Plaintiffs' Answers to PNG's Second Requests to Admit, Nos. 1-16; Plaintiffs' Amended Answers to PNG's Second Requests to Admit, No. 3; Plaintiffs' Summary Judgment Memorandum at 3.

³³ W. Glen Dalton (September 17, 2020) Depo. 10:5-14, 11:6-13:8; R. Daniel Proctor Depo. 73:24-75:19; Marion Weatherford Depo. 28:8-32:9.

³⁴ W. Glen Dalton (September 17, 2020) Depo. 10:5-14, 11:6-13:8; R. Daniel Proctor Depo. 73:24-75:19; Marion Weatherford Depo. 28:8-32:9.

knowledge of location of easement because “a surveyor armed with the information [in the Sketch Map] could have located the easement on a [plaintiff’s] property”). The surveyors have done that here and have testified in depositions that the 1982 Ragsdale Plat locates the actual boundary line so as to exclude the Disputed Area from Plaintiffs’ Property and to include the Disputed Area in the PNG Property.³⁵ See also South Carolina Dep’t of Transp. v. Horry Cnty., 391 S.C. at 84, 705 S.E.2d at 25 (“the deed creating the easement was properly recorded; thus, [defendants] had constructive notice of the easement, regardless of their legally unfounded argument that finding the deed in question would be like ‘finding a needle in a haystack.’”). The undisputed evidence in the record indicates that Plaintiffs’ Parents and Plaintiffs are all college graduates and experienced business people.³⁶ The voluntary decision of Plaintiffs’ Parents and Plaintiffs to not have Plaintiffs’ Property surveyed when they obtained title to the Property does not change the fact that Plaintiffs’ Parents and Plaintiffs had “the means of knowledge” to determine the true boundary line based on what was admittedly disclosed in the deeds and the 1982 Ragsdale Plat in their properly recorded chain of title.

Additionally, the fact that Plaintiffs’ Parents and Plaintiffs here might have engaged in intermittent farming activities in the Disputed Area, without objection from the Fowlers, does not allow Plaintiffs to assert acquiescence given that the boundary line was disclosed by deeds and the 1982 Ragsdale Plat in Plaintiffs’ recorded chain of title. E.g. Boyd v. Bellsouth Tel. Tel. Co., Inc., 369 S.C. 410, 423, 633 S.E.2d 136, 143 (2006) (lengthy use of driveway across defendant’s property did not create easement by estoppel because fact that there was no “easement allowing

³⁵ W. Glen Dalton (September 17, 2020) Depo. 10:5-14, 11:6-13:8; R. Daniel Proctor Depo. 73:24-75:19; Marion Weatherford Depo. 28:8-32:9.

³⁶ William J. Duncan Depo. 18:2-10, 19:8-25, 20:1-25; Kathy Duncan Depo. 12:3-10, 15:6-9, 15:21-16:20, 13:16-14:3; William B. Duncan Depo. 124:6-7, 14:21-22, 16:7-11; James B. Duncan Depo. 10:10-11, 11:3-6, 13:13-24.

[plaintiff] to cross [defendant's] property was a matter of public record, which [plaintiff] and her predecessors in title had knowledge of or at least means to obtain the knowledge"); Brown v. Clemens, supra, (Clemens and her predecessor in title actually built and maintained structures on the disputed property but were still precluded from asserting title to the disputed property based on "the theory of acquiescence"); South Carolina Highway Dep't v. Metts, supra, (defendant and his predecessors in title built, and maintained for decades, concrete islands and gas pumps in plaintiff's recorded right-of-way but defendant was prevented, as a matter of law, from asserting estoppel because of the Highway Department's recorded right-of-way); Binkley, supra, (plaintiffs built houses and lived in the easement area but could not assert estoppel based on "silence or acquiescence" because the easement was recorded in plaintiffs' chain of title). Because Plaintiffs' chain of title here disclosed the true location of the boundary line, the Fowlers and PNG owed no duty to Plaintiffs' Parents or Plaintiffs "*outside the avoidance of affirmative misleading acts...*" Binkley, 348 S.C. at 74, 558 S.E.2d at 910 (emphasis in original).

There is no evidence in the record, even when the record is viewed in the light most favorable to Plaintiffs, that would support a reasonable inference the Fowlers or PNG committed any affirmative misleading act or did anything to affirmatively mislead Plaintiffs' Parents or Plaintiffs that the fence was the boundary line. As discussed earlier, Plaintiffs' Parents and Plaintiffs did not have Plaintiffs' Property surveyed until March 2017—after PNG bought the PNG Property from the Fowlers and construction of the Compressor Station had begun.³⁷ There is no evidence in the record that anyone prevented Plaintiffs' Parents or Plaintiffs from hiring a surveyor to survey the boundary lines.³⁸ Plaintiffs' Parents and Plaintiffs simply assumed that the fence

³⁷ William B. Duncan Depo. 26:6-10; Dalton Plat, Ex. 50 from the Dalton Depo.

³⁸ William J. Duncan Depo. 39:7-9.

was the boundary line.³⁹ No one told them that the fence was the true boundary line.⁴⁰ Plaintiffs' Parents and Plaintiffs never discussed the fence with the Fowlers.⁴¹ None of the Fowlers ever told Plaintiffs' Parents or Plaintiffs that the Fowlers considered the fence to be the boundary line.⁴² The Fowlers did nothing to affirmatively mislead Plaintiffs' Parents or Plaintiffs into thinking the fence was the boundary line.⁴³

Plaintiffs contend that the holdings in Binkley, South Carolina Dep't of Transp. v. Horry Cnty., and South Carolina State Highway Dep't v. Metts are limited to cases involving easements or rights-of-way. However, this contention is not correct. None of these cases contain any language suggesting their holdings are limited to situations involving easements or rights-of-way. Binkley was cited by the South Carolina Supreme Court in Boyd v. Bellsouth Tel. Tel. Co., Inc., 369 S.C. at 423, 633 S.E.2d at 142, for a proposition related to a "properly recorded title." Similarly, Binkley was cited in a 2008 Court of Appeals case, Green Tree Servicing, LLC v. Williams, 377 S.C. 179, 184, 659 S.E.2d 193, 195 (Ct.App. 2008), which involved a "fee simple determinable estate," for the proposition that "notice of a deed is notice of its whole contents." Importantly, the principles articulated in Binkley and the other cases were applied by the Supreme Court in Brown v. Clemens, a case specifically involving a "boundary dispute" and a claim of ownership to "disputed property" based on the "theory of acquiescence."

³⁹ William J. Duncan Depo. 39:3-14, 69:22-70:20; William B. Duncan Depo. 42:25-43:8; James Duncan Depo. 28:25-29:11.

⁴⁰ William J. Duncan Depo. 39:10 – 17; William B. Duncan Depo. 39:8 – 12; James Duncan Depo. 29:24-30:2.

⁴¹ Kathy Duncan Depo. 43:10-44:6; William J. Duncan Depo. 50:9-24; William B. Duncan Depo. 131:21-23; James Duncan Depo. 29:17-19.

⁴² Thomasena Fowler Depo. 30:7-18, 31:16-32:1; Kathy Duncan Depo. 43:10-16.

⁴³ Thomasena Fowler Depo. 30:7-18, 31:16-32:1, 36:18-37:9, 37:17-25; William J. Duncan Depo. 50:9-24; 54:9-13.

Plaintiffs also argue that Brown v. Clemens has been overruled by Gardner v. Mozingo, *supra*. This contention is incorrect. Gardner does not say, in any way, that it is overruling, modifying or altering Brown v. Clemens. The mere fact that Gardner was decided after Brown v. Clemens does not mean Gardner overrules Brown. There is no indication in the Gardner opinion that the Gardners argued that deeds and plats in the Mozingos' chain of title disclosed the true location of the boundary line. Importantly, Brown v. Clemens has been cited at least twice by the South Carolina Supreme Court in cases decided after Gardner and in neither opinion did the Supreme Court indicate Brown had been overruled, altered, amended, or modified, in any way, by Gardner. See Perry v. Heirs at Law and Distributees of Gadsden, 316 S.C. at 226, 449 S.E.2d at 251; Wigfall v. Fobbs, 295 S.C. at 61, 367 S.E.2d at 157.

Plaintiffs assert that, in Coker v. Cummings, *supra*, the Court of Appeals allegedly held that “relying only on recorded plats and deeds is not even enough to survive summary judgment on a claim of acquiescence – let alone [sic] to grant summary judgment to a party.”⁴⁴ However, Coker does not say this. First, there is no indication in Coker that either landowner brought the South Carolina Supreme Court’s opinion in Brown v. Clemens to the Court of Appeals’ attention or argued that “means of knowledge” based on deeds and plats in the landowner’s recorded chain of title barred the claim of acquiescence. Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 331 n. 4, 730 S.E.2d 282, 286 n. 4 (2012) (“[i]f a question is not presented for our review, we should not answer it no matter how much we may want to do so.... ‘[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.’”).

⁴⁴ Plaintiffs’ Opposition Memorandum at 9.

Additionally, Brown v. Clemens is a Supreme Court opinion directly on point given the undisputed facts in the record here. The Court of Appeals does not have the power to alter or overrule a South Carolina Supreme Court opinion, so whatever the Court of Appeals said or ruled in Coker cannot change or alter Brown v. Clemens. Daniels v. City of Goose Creek, 314 S.C. at 501, 431 S.E.2d at 260; Page v. New Lower Richland Med. Ctr., 291 S.C. 82, 352 S.E.2d 295 (Ct.App. 1986). Coker purports to draw its legal underpinning from the Supreme Court’s opinion in McClintic v. Davis, supra. 381 S.C. at 53, 671 S.E.2d at 388. However, the Supreme Court in Brown v. Clemens expressly held that the “means of knowledge” concerning the true location of the boundary line disclosed in deeds in Clemens’ chain of title precluded a claim of ownership based on “the theory of acquiescence” under McClintic. 287 S.C. at 331, 338 S.E.2d at 340. To the extent the opinions in Brown v. Clemens and Coker conflict on their interpretation of McClintic, Brown as the Supreme Court opinion controls. Daniels, supra. Importantly, in its 2011 opinion in South Carolina Dep’t of Pub. Transp. v. Horry Cnty.—decided after Coker—the South Carolina Supreme Court reaffirmed the rule that “mere silence or acquiescence does not work an estoppel when the party seeking estoppel has constructive notice of the public records that disclose the true facts.” 391 S.C. at 84, 705 S.E.2d at 25. Plaintiffs’ claim as to what Coker allegedly says about recorded deeds and plats in the public record is not controlling and was implicitly rejected by the South Carolina Supreme Court in 2011. See also Boyd v. Bellsouth Tel. Tel. Co., Inc., 369 S.C. at 423, 633 S.E.2d at 142 (citing Court of Appeals’ decision in Binkley for the proposition that a “properly recorded title normally precludes an equitable estoppel against assertion of that title due to the requirement that the party raising the estoppel be ignorant of the true state of title or reasonable means of discovering it. One with knowledge of the truth or means by which with

reasonable diligence he could acquire knowledge cannot claim to have been misled.”) (citation omitted).

Further, in Coker, the only thing the affidavit in question showed was that “at some point, the boundaries may have been as Coker asserts they were intended.” 381 S.C. at 55, 671 S.E.2d at 388. Here, the undisputed evidence in the record shows that the deeds and 1982 Ragsdale Plat in Plaintiffs’ properly recorded chain of title (including the deeds conveying Plaintiffs’ Property to Plaintiffs’ Parents and from Plaintiffs’ Parents to Plaintiffs), the tax maps for Anderson County, South Carolina, and other deeds and plats in the public record, have all consistently disclosed the true location of the boundary line in question; that these recorded documents indisputably locate the boundary line to give PNG title to the Disputed Area; and that this information gave Plaintiffs’ Parents and Plaintiffs the “means of knowledge” as to the actual boundary line since Plaintiffs’ Parents and/or Plaintiffs could have hired a surveyor to locate the boundary line in question using this publicly available information in Plaintiffs’ chain of title. See Boyd v. Bellsouth Tel. Tel. Co., Inc., 369 S.C. at 423, 633 S.E.2d at 143 (reversing Court of Appeals and *affirming summary judgment for defendant Bellsouth* on claim of estoppel because “[t]he fact that there was not an easement allowing Boyd to cross Bellsouth’s property was a matter of public record, which Boyd and her predecessors in title had knowledge of or at least the means to obtain the knowledge.”); South Carolina Highway Dep’t v. Metts, *supra* (South Carolina Supreme Court *affirmed grant of summary judgment for the Highway Department*, finding existence of the Highway Department’s easement in defendant’s chain of title barred defendant from asserting estoppel as a matter of law).

Plaintiffs contend that, in Knox v. Bogan, *supra*, Jordan v. Judy, 413 S.C. 341, 776 S.E.2d 96 (Ct.App. 2015) and Coker v. Cummings, *supra*, the Court of Appeals decided “boundary dispute cases under the theory of acquiescence without using an estoppel analysis” like Brown v.

Clemens.⁴⁵ First, in both Jordan and Coker, the Court of Appeals discussed acquiescence and estoppel together, stating a landowner's "silence is acquiescence and it estops him."⁴⁶ The Court of Appeals' holding on acquiescence in Knox is based on the Supreme Court's decision in Klapman v. Hook, 206 S.C. 51, 32 S.E.2d 882 (1945). However, in Brown v. Clemens, *supra* the Supreme Court expressly rejected a claim of acquiescence under Klapman because Clemens had "the means of knowledge" to determine the boundary line based on deeds in Clemens's chain of title. Brown v. Clemens, 287 S.C. at 331, 338 S.E.2d at 340. Second, there is no indication in Knox, Jordan, or Coker that the defendant argued that deeds and plats in the plaintiff's chain of title gave plaintiff the means of knowledge to determine the boundary line and thus precluded an acquiescence claim under Brown v. Clemens. Finally, as discussed above, the Court of Appeals' decisions in these three cases cannot overrule the Supreme Court's decision in Brown v. Clemens, which is on point here.

Finally, during oral argument on Defendants' Motions, Plaintiffs' counsel contended that the application of Brown v. Clemens, Binkley, Boyd and Horry County proposed by Defendants, and adopted by this Court, would do away with the doctrine of acquiescence in a boundary dispute. First, this Court is doing what is required under Rule 56, SCRCP: applying controlling South Carolina precedent to the undisputed facts in the record before the Court and the reasonable inferences from those undisputed facts viewed in the light most favorable to Plaintiffs. To the extent Brown v. Clemens and the other cases might modify or end the use of acquiescence to establish a boundary line, the South Carolina appellate courts presumably considered that effect in establishing the law set forth in those decisions. The result here is consistent with the provisions

⁴⁵ Plaintiffs' Opposition Memorandum at 9.

⁴⁶ 413 S.C. at 348-49, 776 S.E.2d at 100; 381 S.C. at 53, 671 S.E.2d at 388.

and intent of the South Carolina recording statutes and will encourage landowners to check their chain of title and have their property surveyed before simply making assumptions about the location of a boundary line. Second, even under this Court's holding, acquiescence would still survive in at least two situations, neither of which apply here: (1) where the deeds and plats in a landowner's chain of title do not provide "the means of knowledge" to locate the boundary line; and (2) under the exception in Binkley, where the adjoining landowner has engaged in affirmative misleading acts concerning the location of the boundary line.

Additionally, Plaintiffs' claim of ownership of the Disputed Area on the grounds of acquiescence is based on the location of the fence line shown in red on the Survey and Google Earth Photograph and the fact that Plaintiffs' Parents and Plaintiffs farmed up to the fence. Croft v. Sanders, 283 S.C. 507, 323 S.E.2d 791 (Ct.App. 1984), is directly on point and forecloses Plaintiffs' acquiescence claim based on the location of the fence given the record before the Court. In Croft, the Court of Appeals held that the placement of a fence does not establish acquiescence to a particular boundary line based on the fence's location. Croft, 283 S.C. at 510, 323 S.E.2d at 793. The court in Croft noted that "a fence may be built between adjoining landowners for purposes that have nothing to do with fixing a boundary." Id. Similarly, the fact that Plaintiffs and Plaintiffs' Parents "farmed" up to the fence line "does not establish title to the disputed property." Croft, 283 S.C. at 511, 323 S.E.2d at 794.

To establish acquiescence, Plaintiffs would be required to show at trial that *both* Plaintiffs (and Plaintiffs' Parents) *and the Fowlers* mutually recognized and intended that the fence was a new boundary line. Proof of recognition and intent of *both* landowners is a critical and indispensable requirement under South Carolina law. Gardner v. Mozingo, 293 S.C. at 26, 358 S.E.2d at 392 (for a new boundary line to be formed, adjoining landowners must "mutually

recognize and acquiesce in [the new property line] for a long period of time”; *affirming the grant of summary judgment for the Gardners* because “[t]here is no evidence the Gardners recognized the Mozingos’ ownership of the property”). “Absent recognition by both [adjoining landowners] that a particular line constituted the true boundary line, a new boundary line could not be established by acquiescence.” Croft, 381 S.C. at 510, 323 S.E.2d at 793.

As the parties who would have the burden of proof on acquiescence at trial, Plaintiffs must affirmatively show acquiescence to the fence line as a new boundary between Plaintiffs’ Property and what is now the PNG Property. Lyles, 138 S.C. at 44, 136 S.E. at 18 (“presumption is that the occupant [of land] intends to claim only what his deed calls for, and that land to which the occupant had no title he holds consistent with the title of the true owner”); Warren v. Wilson, 89 S.C. 420, 71 S.E. 818, 819 (1911) (“[T]he plaintiff, in order to recover, must show title in himself, and must recover upon the strength of his own title, and not upon the weakness of his adversary’s title.”). Here, even assuming Plaintiffs could argue acquiescence given that the actual boundary line is clearly disclosed in Plaintiffs’ chain of title, Plaintiffs have offered no evidence that, at the time the fence was built, the persons who owned Plaintiffs’ Property and PNG’s Property intended the fence line to be a new property line. Plaintiffs’ Parents and Plaintiffs admit that the fence was built prior to their having any involvement with Plaintiffs’ Property.⁴⁷ Plaintiffs’ Parents and Plaintiffs have no personal knowledge as to why the fence was placed where it was built or that the landowners, at the time the fence was built, intended the location of the fence to be a new property line.⁴⁸ See Dillard v. Blackman, 258 S.C. 158, 187 S.E.2d 643 (1972) (fence did not

⁴⁷ Kathy Duncan Depo. 39:19-40:7; William J. Duncan Depo. 38:14-19; William B. Duncan Depo. 38:17-24; James Duncan Depo. 28:19-21.

⁴⁸ Kathy Duncan Depo. 39:19-40:11; William J. Duncan Depo. 38:14-39:6; William B. Duncan Depo. 38:17-24, 39:4-7; James Duncan Depo. 28:19-29:11.

create boundary line different from the property line in deeds and plats where person who built fence testified it was to contain their dog and not intended to fix the property line); Kirkland v. Grant, 286 S.C. 193, 332 S.E.2d 546 (Ct.App. 1985) receded from, on unrelated grounds, by Boyd v. Hyatt, 294 S.C. 360, 364 S.E. 2d 478 (1988) (pasture fence did not create new boundary line where landowner who built fence testified it was not intended to fix the boundary line of the property). The fence could have been placed where it is for any number of reasons, including, as surveyor Proctor opines in his affidavit, just to follow the tree line.⁴⁹ Indeed, Plaintiffs' Parents and Plaintiffs admit the fence follows a tree line and does not go in a straight line.⁵⁰

In their filing opposing summary judgment, Plaintiffs spent a great deal of time setting forth the facts allegedly showing that Plaintiffs and Plaintiffs' Parents thought the fence was the boundary line. However, Plaintiffs have offered no admissible evidence at all that PNG's predecessors in title, the Fowlers, ever saw the fence, let alone recognized the fence was the property line. Ms. Fowler testified in her deposition that she never saw the fence and never agreed that the fence was the boundary line with Plaintiffs' Property.⁵¹ Mr. Fowler is now deceased, but Ms. Fowler testified she did not believe Mr. Fowler would have agreed the fence was the boundary line.⁵² Plaintiffs' Parents and Plaintiffs testified that they never talked to the Fowlers and testified specifically that the Fowlers never told them they considered the fence the property or boundary line between the two Properties.⁵³

⁴⁹ Proctor Aff., ¶ 13 at 6; W. Glen Dalton (April 2, 2020) Depo. 55:6-10.

⁵⁰ Kathy Duncan Depo. 40:2-11, 42:4-10, 50:3-6; William J. Duncan Depo. 38:14-39:6, 45:24-47:5; William B. Duncan Depo. 63:13-64:1; James Duncan Depo. 28:19-29:11, 82:3-8.

⁵¹ Thomasena Fowler Depo. 30:7-18.

⁵² Thomasena Fowler Depo. 31:16-22.

⁵³ Kathy Duncan Depo. 43:10-44:6; William J. Duncan Depo. 50:9-24, 54:9-13; William B. Duncan Depo. 131:18-23; James Duncan Depo. 28:19-29:11.

There are other undisputed facts in the record which show the Fowlers never recognized that Plaintiffs' Parents or Plaintiffs owned the Disputed Area. Every year from 1993 until the Fowlers sold their Property to PNG in 2015, the Fowlers paid the real estate property taxes to Anderson County, South Carolina on 58.85 acres, which included the Disputed Area.⁵⁴ Plaintiffs admit that the official tax maps for Anderson County, South Carolina place the boundary line so as to exclude the Disputed Area from Plaintiffs' Property.⁵⁵ Plaintiffs admit that neither they, nor Plaintiffs' Parents, ever paid the property taxes on the Disputed Area.⁵⁶ Cf. Terwilliger v. White, 222 S.C. 176, 181, 72 S.E.2d 169, 171 (1952) ("failure to pay taxes is evidence that no claim [of adverse possession] was made") (citation omitted). Ms. Fowler testified she and Mr. Fowler would not have paid property taxes on land they did not think they owned.⁵⁷ In 2006, Mr. and Ms. Fowler applied with Anderson County, South Carolina for an agricultural exemption on their property and represented under oath that they owned 58.85 acres (which included the Disputed Area).⁵⁸ In 2012, after Mr. Fowler died, Ms. Fowler signed a deed of distribution that conveyed her husband's interests in 58.85 acres (which included the Disputed Area) to her children. In Gardner v. Mozingo, supra, the Gardners knew that the Mozingos were claiming ownership of the disputed property but the Supreme Court nevertheless affirmed the granting of summary judgment to the Gardners because there was no evidence in the record that the Gardners ever actually recognized the Mozingos' ownership of the disputed property. 293 S.C. at 26, 358 S.E.2d at 392. There is no reasonable inference from evidence in the record here that the Fowlers ever recognized the fence as the boundary line between the two Properties or that the Fowlers recognized the Plaintiffs'

⁵⁴ Kevin Wiles Depo. 7:2-7:17; Thomasena Fowler Depo. 35:19-22.

⁵⁵ Plaintiffs' Answers to PNG's Second Requests to Admit, Nos. 13-16.

⁵⁶ Plaintiffs' Second Amended Answers to PNG's Second Requests to Admit, Nos. 17 & 18.

⁵⁷ Thomasena Fowler Depo. 37:10-13.

⁵⁸ Kevin Wiles Depo. 51:10-53:12.

Parents or Plaintiffs owned the Disputed Area. Bloom v. Ravoria, 339 S.C. at 417, 529 S.E.2d at 714 (where jury verdict not reasonably possible under facts presented, summary judgment is proper).

Plaintiffs also oppose summary judgment on their acquiescence claim by pointing to deposition testimony from third parties, such as the engineers who prepared the storm water pollution prevention plan for the Compressor Station site, that third parties saw the fence and thought the fence was the property line. However, the expectations or assumptions of third parties is not part of the test for acquiescence to a boundary line under South Carolina law. The test in South Carolina focuses solely on whether the two adjoining landowners mutually recognized and intended the fence to be a new boundary line. Disputes over facts that are irrelevant to the claim asserted will not preclude summary judgment. Hooven-Lewis v. Caldera, 249 F.3d 259, 265 (4th Cir. 2001) (holding “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment”); see also Gibson v. Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct.App. 2019) (citing Hooven-Lewis for quoted proposition); Bean v. S.C. Cent. R. Co., Inc., 392 S.C. 532, 546, 709 S.E.2d 99, 106 (Ct.App. 2011) (citing Hooven-Lewis for quoted proposition). For the foregoing reasons, Defendants are entitled to summary judgment on Plaintiffs’ Second, Fourth, Fifth, Sixth and Seventh Causes of Action to the extent those Causes of Action are, in any way, based on, related to, dependent on, or derive from Plaintiffs’ alleged ownership of the Disputed Area on the theory of acquiescence.

CONCLUSION

PNG is the record owner of the Disputed Area. It is undisputed that PNG owns the Disputed Area based on the deeds and plats in the public record for Anderson County, South

Carolina. Plaintiffs have failed, as a matter of law, to establish either adverse possession or acquiescence. For the reasons set forth above, Defendants' Motions for summary judgment relating to Plaintiffs' alleged ownership of the Disputed Area are granted. Any claims in Plaintiffs' Amended Complaint, including Plaintiffs' First, Second, Fourth, Fifth, Sixth and Seventh Causes of Action, regarding, or to the extent that they are related to, depend on, or derive from, Plaintiffs' alleged ownership of the Disputed Area, are dismissed with prejudice from this action.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE FOLLOWS]



Anderson Common Pleas

Case Caption: William Benjamin Duncan , plaintiff, et al VS Williams Gas Pipeline Company, Inc. , defendant, et al

Case Number: 2018CP0400900

Type: Order/Summary Judgment

S/R. LAWTON McINTOSH

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