**IN THE COURT OF APPEALS**
**STATE OF GEORGIA**

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| **380 PROPERTIES, LLC.,** | ) | |
| | ) | |
| | ) | |
| **Appellant,** | ) | |
| | ) | **CASE NUMBER** |
| | ) | **A19A2098** |
| **v.** | ) | |
| | ) | |
| **LORI SENE SORROW,** | ) | |
| | ) | |
| **Appellee.** | ) | |
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# BRIEF OF APPELLEE LORI SENE SORROW

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Appellee Lori Sene Sorrow hereby files her brief in opposition to Appellant 380 Properties, LLC's appeal.

## PART ONE - APPELLEE'S RESPONSE TO APPELLANT'S INTRODUCTION AND FACTUAL BACKGROUND

Appellee has set forth a detailed background factual statement in her brief as Appellant in the related case *Lori Sene Sorrow v. 380 Properties, LLC,* A19A2097, which statement is also pertinent to this case and which Appellee incorporates by reference. *Appellant's Br. (2097) at pp. 1-7.* Appellant sets forth below additional other facts which are pertinent to this cross-appeal and necessary to provide more content and context to Appellant's introduction and factual background. *Appellant's Br. (2098) at pp. 1-5.*

Appellant commenced this case in March 2014 asserting claims for trespass, ejectment, nuisance, punitive damages and attorney's fees. [R. (2097) 5-36]. Appellee, through her initial answer and counterclaim and two amendments, asserted counterclaims for easement abandonment, express easement rights, prescriptive easement and adverse possession. [R. (2097) 39-53, 491-501, 594-607].

Appellee has resided at 1130 State Street ("1130 State") since 1996. [R. (2097) 1209]. Appellant acquired 380 14th Street ("380 14$^{th}$) in December 2013

and, within three months of becoming Appellee's neighbor, commenced this lawsuit. [R. (2097) 5, 1047].

In 2014, Appellant applied for rezoning of 380 14th to authorize a hotel development. [R. (2097) 1052]. As part of this rezoning, Appellant submitted a conditional site plan that expressly stated that "all existing to remain including trees" as to the conditions in the alley adjacent to Appellant's home. [R. (2097) 1508-10]. While the rezoning application and this litigation were pending, Appellant sought Appellee's support for the rezoning. [R. (2097) 1105 (p. 56, line 5) through 1106 (p. 55, line 9]. Appellee resolved that she would follow the lead of her neighborhood, and when the neighborhood decided to oppose the rezoning, Appellee joined in this opposition. [R. (2097) 1104 (p. 53, lines 1-6), 1105 (p. 57, lines 4-10)]. The rezoning was eventually approved by the City. [R. (2097) 1052].

Almost immediately following its acquisition of 380 14th, Appellant began lobbying the City to issue a citation to Appellee. [R. (2097) 2150-51, 2161-62]. Initially, the focus of Appellant's lobbying was to have the City issue a citation against Appellee relative to an open pole barn, which she utilized to cover her car in a portion of the alley which is the subject of her easement abandonment claim. [*Id.*]. Following Appellant's effort, the City, in early 2014, issued a citation to Appellee asserting that she had an unpermitted structure in the alley. [R. (2097)

2159]. Prior to this citation, Appellee had never received a permit/building code citation from the City. [R. (2097) 873]. On April 14, 2014, this citation was disposed of by a *nolo contendere* plea entered by Appellee. [R. (2097) 2151, 2164]. Upon such disposition, Appellee and the City agreed that no more citations would be issued to Appellee until this litigation had concluded and the rights of the parties in the alley were determined. [R. (2097) 2151]. This agreement was entered on the municipal court docket on the same date. [R. (2097) 979, 989].

In August 2014, Appellant made efforts again to cause the City to cite Appellee, notwithstanding the April 2014 agreement between Appellee and the City. [R. (2097) 2151-52]. Appellant made a complaint to the Mayor's Office of Constituent Services, which was in turn relayed to the City's Office of Buildings. [*Id.*]. In August, Appellant's attorney complained directly to the City's Solicitor's office to seek additional citations against Appellee. [R. (2097) 2152, 2166-70]. In these instances, the City expressly acknowledged the April 2014 agreement suspending City enforcement action until such time as this litigation had concluded, and it declined Appellant's request to issue additional citations. [*Id.*].

Undaunted, and with disregard of the City-Appellee agreement, Appellant continued its efforts to induce the City to issue citations to Appellee. In December 2014, Appellant's owners emailed the City seeking to have citations issued to

Appellee. [R. (2097) 2152, 2172-73]. Appellant even sought to get involved another enforcement division, (i.e., the City's Office of Zoning Enforcement), but this division concluded the matter was not within its purview. [R. (2097) 2152-53, 2172-73, 2175-78].

By December 2014, discovery in this litigation had closed and the parties were under a December 22, 2014 deadline to submit summary judgment motions. [R. (2097) 54, 88]. Appellee submitted her motion by the deadline, with fifteen affidavits providing detailed and extensive evidence on the historical use of the alley supporting her claims for easement abandonment, express easement rights to Mecaslin Street, and adverse possession. [R. (2097) 89-313]. Appellant failed to file a summary judgment motion by the court ordered deadline. [R. (2097) 445-51].

Instead, Appellant continued its efforts to have Appellee cited. On January 2, 2015, Appellant's owners sent City code enforcement officials an email referencing a prior phone call and meeting with these City officials and one of Appellant's attorney (M. Hakim Hilliard). [R. (2097) 2153, 2180]. In response, one of the City's officials stated that the City would be issuing a citation to Appellee. [R. (2097) 2189]. The City, in fact, issued a citation to Appellee the same month, which was essentially identical to the citation disposed of in April 2014 by Appellee's *nolo contendere* plea. [R. (2097) 2153, 2186]. In issuing this

citation, the City, at Appellant's behest and urging, contravened the April 2014 agreement it had reached with Appellee to refrain from further enforcement activity until this litigation had concluded. [R. (2097) 979, 989, 2151].

In January 2015, Appellant continued to email the City regarding the citation status of Appellee. [R. (2097) 2154, 2188]. In February 2015, the City issued another citation to Appellee, again in contravention of the April 2014 Agreement. [R. (2097) 2154, 2191]. In February 2015, Appellant's owners again emailed numerous officials at the City, this time including a complaint regarding a storage shed in Appellee's back yard. [R. (2097) 2154, 2193-94].

Appellant's efforts intensified on March 16, 2015, when its legal counsel sent an arrogant, demanding letter to the City stating that Appellant had finally been able to convince the City to cite Appellee; demanding that a City inspector assigned to the case be replaced; stating his understanding, as Appellant's legal counsel, that another inspector would be sent to Appellee's property to issue more citations to her; expressing his client's concern with the afore-referenced City inspector remaining involved in the matter; stating that Appellant was troubled that the inspector had refused to issue more citations to Appellee; seeking confirmation that Appellee's property would be inspected that day and citations would be issue; and threatening to take the matter to Mayor Kasim Reed's office if these demands

were not met. [R. (2097) 2154-55, 2196-97]. Following this communication, a city representative responded informing Appellant's counsel of a planned onsite visit to Appellee's home by city officials. [R. (2097) 2155, 2199]. And in April 2015, Appellee was served with a new citation. [R. (2097) 2156, 2206].

During this same month, Appellant, without seeking leave of court, filed its first motion for summary judgment more than three months after the scheduling order deadline. [R. (2097) 425-40]. The sole basis of Appellant's summary judgment motion was the assertion of an unclean hands defense based upon the very citations, which Appellant actively lobbied the City for, issued to Appellee in 2014 and in January 2015 (and the threat, subsequently realized) of additional citations, again which Appellant lobbied for, to Appellee. [*Id.*].

In May and June 2015, Appellant continued to barrage the City regarding Appellee, asking the zoning enforcement division to reverse its decision about citing Appellee and requesting meetings related to their requests. [R. (2097) 2156, 2208-09]. On June 24, 2015, Appellant's legal counsel sent the City's Deputy Solicitor a letter seeking to confirm Appellant's understanding of the individual citations that would be addressed at trial, listing a range of alleged violations (most of which had nothing to do with the alley between 1130 State and 380 14$^{th}$), and comparing Ms. Sorrow to an individual who had widely publicized code

enforcement issues in the City at that time. [R. (2097) 2157, 2220-22]. The facts in the preceding paragraphs are undisputed, in that Appellant did not challenge the authenticity of the documents establishing such facts, but instead sought to dismiss these facts as irrelevant (and therefore immaterial). [R. (2097) 2140-49, 2269-83].

Later, Appellant was involved in communication with the City about an administrative search warrant that was executed at Appellee's residence. [R. (2097) 1616, lines 12-20]. In July 2015, Noman Rashid, one of Appellant's owners who had been pre-advised and furnished with prior information that the City was planning on executing a search of Appellee's home, began demanding to be updated by the Solicitor's office on whether the warrant had been executed. [R. (2097) 1617, lines 6-25 through 1618, lines 1-9]. However, when asked at deposition what information he thought would come from the administrative search warrant that was relevant to the alley, Mr. Rashid stated "I have no idea." [R. (2097) 1618, lines 10-14].

The administrative search warrant was executed in September 2015 and subsequently suppressed by the City's Municipal Court. [R. (2097) 868, 872-898][1]

[1] Appellee has initiated litigation against the City related to its conduct in this matter, including a Fourth Amendment claim related to the search warrant, which remains pending. Sorrow v. City of Atlanta, United States District Court, Northern District of Georgia, Civil Action No. 1:17-cv-02908-MLB.

Notwithstanding all of Appellant's agitation and influencing of the City's actions against Appellee, the three 2015 citations against Appellee were dismissed with prejudice. [R. (2097) 2157, 2224, 2226, 2228].

**PART TWO – ARGUMENT AND CITATION OF AUTHORITY.**

**A. Appellant's brief substantially violates the rules of this Court regarding record citation, and Appellant's uncited and miscited factual assertions do not warrant consideration in this appeal. (Enumerations Nos. 1 and 2).**

Proper citation of the record is the *sine qua non* of appellate briefing. An appellant's brief is required to have "citation to the parts of the record or transcript essential to a consideration of the errors". *Ct. App. Rule 25(a)(1)*. The citations are to be to the volume or part of the record or transcript and the page numbers that appear on the appellate record or transcript as sent from the trial court. *Id.* There are glaring, substantial passages of Appellant's brief which wholly fail to comply with this rule.

Appellant's noncompliance with this Court's rule regarding proper citation has the apparent motivation of casting Appellee in a negative light on this appeal, regardless of the record itself. Appellant's disregard for citation protocol manifests early in its brief; there are fifteen sentences in Appellant's "Introduction and Factual Background", only five of which are cited. *Appellant's Br. (2098) at pp. 1-3.* The remaining ten sentences are uncited, and an examination of these

sentences reinforces Appellee's conclusion that Appellant's commentary was intended to cast her in a negative light, without regard to the absence of factual support in the record for statements placed before this Court in Appellant's introduction. *Id.*

The properties in question are characterized in the first sentence as "prime Midtown Atlanta real estate", without any citation to the record establishing this as a fact. *Id. at p. 1.* Next there is an uncited reference to "potential purchasers" having "explored the acquisition and development of these sites [for years]. *Id.* This unsupported commentary is the attempted set-up for the first mischaracterization of Appellee.

The third sentence proclaims that "for years, Defendant has sought to stop such developments as all costs." *Id.* Appellant do not point to a single fact in the record to establish this bold, sweeping statement. Moreover, this unsupported statement is directly contradicted in multiple places by Appellee's testimony. When asked if she had been involved in trying to stop other developments at 380 14th, Appellee responded "no". [R. (2097) 1104 (p. 53, lines 13-16)]. Appellee also testified that she considered supporting Appellant's development plans if her Home Park neighborhood (where these properties are located) had decided to

support the development, and her opposition arose after the neighborhood voted to oppose the project. [R. (2097) 1104 (p. 52, line 25 through p. 53, line 6)].

In the fourth sentence of the introduction, Appellant states falsely that Appellee's "own testimony establishe[d] . . . intimidation campaigns and legal threats intended to scare away potential buyers" but no citation to Appellee's deposition is made to support these incendiary remarks. *Appellant's Br. (2098) at p. 2.* In the next sentence, Appellant states that its purchase and exploration of development of 380 14th was "much to the chagrin of [Appellee]". *Id.* While there is a citation behind this sentence, the citation is imprecise and confusing[2] and provides no support for the characterization of Appellee's state of mind regarding Appellant's purchase of the land. The remainder of this paragraph has no citations regarding Appellee's alleged "ramping up her efforts to stop development",

[2] Appellant makes numerous citations to the record in Appellee's appeal as follows: (R. (2097)-324). Some of these citations include references to "Exhibits" and "Tabs". Appellant's Memorandum of Law in Opposition to Appellee's Motion for Summary Judgment and Rule 56(f) motion is found at page 324 of the record in Appellee's appeal. [R. (2097) 324-88]. While the motion, as set forth in the record, has a number of documents accompanying it, these documents are not designated as "Exhibits" or "Tabs", as indicated by Appellant's brief citations. Thus, in addition to the problem of an absence of supporting citations for many statements contained in the brief, a number of the actual citations, such as the one referenced in the footnoted sentence, lead nowhere and are ultimately unintelligible.

"extensive[ly] lobbying the City of Atlanta against rezoning of the property", "threats of legal action", and "trespassing upon the land".[3] *Id.*

The next (third) paragraph continues with the asserted theme of Appellee "trespassing" on Appellant's land, notwithstanding the fact that the outcome of this litigation will ultimately determine this issue. *Id.* The first two citations in the paragraph suffer from the same deficiencies as described in footnote 1. However, in its assertion that Appellee's purported trespassing resulted in "numerous criminal citations", Appellant omitted material additional information that one citation was disposed of on a *nolo contendere* plea, without any admission of liability by Appellee, three other citations were dismissed with prejudice [R. (2097) 2157, 2224, 2226, 2228], and charges set forth in the April 2015 citation had nothing to do with the alley or any fence traversing the alley. [R. (2097) 2156, 2206] Moreover, Appellant left out any mention of the central role it played, through its owners and attorneys, in lobbying the City and procuring the issuance of these citations, as is detailed in Appellee's statement of facts above and analyzed and discussed in Section B.5 of this brief below.

In the last sentence of the third paragraph and the fourth and final paragraph of the introduction, Appellant irrationally attempts to characterize the issues

[3] Appellant's attempt to characterize Appellee's opposition to its rezoning in a negative light misses the fundamental principle that she had a First Amendment right to do so.

present in this litigation (that it commenced) as part of Appellee's intent to "hinder development" and "stop development" of the property. *Appellant's Br. (2098) at p. 2-3.* This overlooks the facts that the issues in this case presented by Appellee's counterclaims involve uses of the alley and the prescriptive easement pathway over 380 14th which go back years and years and decades in time, far predating Appellant's purchase of 380 14th. [R. (2097) 1026-1058, 1146-1229].

Appellant's liberties with the record, its abject failure to assure that there is support in the record for statements made, and its further failure to point this Court and Appellee to the places in the record that supposedly support factual assertions, is improper appellate advocacy. This Court has noted that "briefs that fail to provide proper citations can hinder this [c]ourts consideration of parties' arguments on appeal." *May v. S.E. GA Ford, Inc.*, 344 Ga. App. 459, no.1 (2018) (citations and punctuation omitted). This Court has further advised that "[i]t is not the duty of this [c]ourt to cull the record on a party's behalf to locate information or facts in support of a party." *Demere March Assoc. v. Boatright Roofing and Gen. Contracting,* 343 Ga. App. 235, 236 n.1 (2017). Appellee submits that Appellant's introduction is so extremely deficient that it should receive no consideration in the determination of this appeal and that Appellee's statement of

facts above, which is extensively cited to the record, should be treated as unopposed.

**B. <u>The trial court correctly denied Appellant's motions for partial summary judgment as to the affirmative defense of unclean hands, albeit for incorrect reasons. (Enumeration No. 1)</u>**

**1. Appellant's unclean hands defense fails, as a matter of law, because the conduct alleged to be inequitable is unrelated to Appellee's counterclaims.**

Georgia appellate courts are consistent and firm in requiring a direct connection between the equitable claims and issues present in a case and the assertion of unclean hands as a defense to such claims. In the absence of a direct connection to the claims, the defense fails. *100 Lakeside Trail Trust v. Bank of America, N.A.*, 342 Ga. App. 762, 768 (2017); *Hampton Island, LLC v. HAOP, Inc.*, 306 Ga. App. 542, 547 (2016); *Clawson v. Intercat, Inc.*, 294 Ga. App. 624, 628 (2009); *Simpson v. Pendergast*, 290 Ga. App. 293, 298 (2008); *Zaglin v. Atlanta Army Navy Store, Inc.*, 275 Ga. App. 855, 858-59 (2005); *Gibson v. Huffman*, 246 Ga. App. 218, 224 (2000); *Adams v. Crowell*, 157 Ga. App. 576 (1981). In *Zaglin*, this Court stated this principle clearly and succinctly:

> The unclean hands maxim which bars a complainant in equity from obtaining relief has reference to an inequity which infects the cause of action so that to entertain it would be violative of conscience. It must directly relate to the transaction concerning which complaint is made. The rule refers to equitable rights respecting the subject-matter of the action. It does not embrace outside matters.

*Zaglin, supra, 275 Ga. App. at 858*.

Appellee's claims below are as follows: (i) a claim as to easement rights as to the portion of the alley immediately adjacent to her home, which portion has been obstructed as to access from owners and occupants of 380 14th for more than twenty years prior to Appellant's acquisition of 380 14th; (ii) an ingress/egress easement in the alley from the point of obstruction at the rear of her home through to Mecaslin Street; (iii) a prescriptive easement from the alley over 380 14th Street to 14th; and (iv) fee simple title under adverse possession as to a portion of the alley immediately adjacent to the rear of her property. [R. (2097) 1026-44]. Appellee's claims are grounded in a history of use as to these various areas of property going back more than seven years as to the prescriptive easement and more than twenty years as to the easement abandonment, express easement and adverse possession claims. [R. (2097) 1026-1058, 1146-1229]. These claims rest factually on the actions and inactions of property owners and users of 1130 State and 380 14th going back to the 1960s. [R. (2097) 1146-1229].

Appellant purported unclean hands defense rests on the issuance of one City citation issued to Appellee in 2014, three City citations issued to her in 2015, and mischaracterized references to Appellee's testimony regarding city permitting. *Appellant Br. at pp. 3-4*. These citations, the genesis and disposition of which will

be the focus of more detail later in this brief, and the testimony regarding city permitting are fundamentally unrelated to the claims of easement rights arising out of abandonment, out of continuous use of an express easement, and rights based upon a prescriptive easement and adverse possession. They are quintessentially the "outside matters" referred to by this Court in *Zaglin*.

An examination of this Court's many precedents reinforce this analytical conclusion. In *100 Lakeside Trail*, Bank of America brought an action to reform a security deed to reflect the correct party. The action arose with respect to certain assets that the bank had acquired from another financial institution. The defendant asserted that the bank had engaged in inequitable conduct by not exercising due diligence when it acquired the security deed and by inducing one of the defendants to stop making payments prior to the bank's pursuing foreclosure. Based upon these allegations, the defendant asserted an unclean hands defense. This Court affirmed the trial court's granting of summary judgment in favor of the bank and rejected the unclean hands defense finding that the alleged inequitable conduct was not related to the claim to reform the security deed. *100 Lakeside Trail, supra, 342 Ga. App. 768, 768*.

In *Hampton Island*, plaintiffs sought the equitable relief of specific performance as to a purchase and sale agreement which required defendant to

purchase two parcels of land from plaintiffs as part of a settlement. Defendant alleged that plaintiffs had solicited a third party to breach contractual obligations owing to defendant and attempted to interpose an unclean hands defense based on such allegations. This Court, as in *100 Lakeside Trail*, affirmed the trial court's grant of summary judgment in favor of plaintiffs, unequivocally finding that the facts underlying defendant's assertion of an unclean hands defense were unrelated to plaintiff's equitable claim.

In *Clawson*, Intercat sued three of its former employees for specific performance of a shareholder agreement which required the employees to sell back their stock following their terminations. The employees asserted that they were terminated in retaliation for filing a shareholder's derivative action making claims against Intercat's president for financial misconduct, and they attempted to defeat plaintiff's equitable claims by asserting that their allegedly improper termination constituted unclean hands. The trial court granted Intercat's summary judgment motion, and this Court affirmed, stating that "the doctrine of unclean hands applies to misconduct in the same underlying transaction as the agreement sought to be enforced". *Id*. at 674. This Court found that the facts alleged as unclean hands were inapplicable to plaintiff's claims.

In *Simpson*, plaintiff sued defendant for specific performance of a shareholder agreement which required defendant to sell shares to plaintiff. Defendant responded that plaintiff had breached certain fiduciary duties owed to the corporation, and therefore had unclean hands precluding the equitable relief of specific performance. This Court affirmed the trial court's finding that the breach of fiduciary duties allegations did not relate to the specific performance claim, although the trial court's ruling was reversed on other grounds.

In *Zaglin*, the defendant counterclaimed against an estate for enforcement of sale on death provisions in joint venture agreements with the decedent. Plaintiff, the estate representative, sought to assert an unclean hands defense arguing that defendant had failed to comply with certain duties owed to the estate under the joint venture agreements in question. As in numerous cases summarized above, summary judgment was granted in favor of the party seeking the equitable relief, and the unclean hands defense was rejected as unrelated.

*Gibson v. Huffman, 46 Ga. App. 218 (2000),* is closely analogous to the instant case. The plaintiff obtained an injunction to enforce restrictive covenants limiting defendant's property to agricultural and recreational uses. The defendant alleged that plaintiff was in violation of restrictive covenants related to his residential property and that these asserted violations constituted unclean hands

precluding plaintiff's entitlement to equitable relief. This Court upheld the trial court's entry of the injunction, agreeing with the trial court's conclusion that the facts of defendant's unclean hands defense was not related to plaintiff's claim.

In *Adams*, plaintiff sued on a note given pursuant to the sale of real property. Defendant asserted that plaintiff sought to deprive her co-seller from a share of the note proceeds and contended that these factual allegations provided an unclean hands defense. This Court affirmed the trial court's judgment in favor of plaintiff and concluded that the alleged unclean hands defense had no application to the case.

These clear and consistent holdings, most of which affirm summary judgment in favor of the party seeking equitable remedies and adverse to the party seeking to interpose an unclean hands defense, emphasize that the direct relationship requirement of the defense is applied strictly and is of material substance. In this case, Appellee has presented evidence, unrefuted by Appellant, from neighbors and persons knowledgeable about 1130 State, 380 14th and the alley that the area that is the subject of Appellee's easement abandonment claim has been obstructed and used by 1130 State as a private driveway for a period of time tracing back to the 1960s. She has also presented evidence, unrefuted by Appellant, that previous owners of 380 14th going back to the late 1970s were

aware of an obstruction by the owners and occupants of 1130 State to the portion of the alley that is subject of Appellee's easement abandonment and that there was resulting nonuse of this portion of the alley for more than twenty years. [R. (2097) 1026-58, 1146-1229]. Appellee's evidence further establishes that owners and occupants of 1130 State (i) have used the remainder of the alley from the point of obstruction to Mecaslin Street as a means on ingress and egress consistently throughout the years; for more than seven years have used a pathway from the alley across 380 14th to access 14th Street and, as a result of such use and other actions including maintenance and repair of the pathway, have gained prescriptive easement rights; (iii) have adversely, openly, publicly, uninterruptedly, exclusively and peaceably possessed a portion of the alley, and are entitled to fee simple title as a result of the adverse possession. [*Id.*]. There is no direct relationship, such as is required by Georgia law, between Appellee's real estate claims and the municipal citations and permitting issues raised by Appellant.

Notwithstanding the trial court's conclusion that there remained issues of fact to be tried as to Appellant's unclean hands defense, both the trial court and Appellant earlier in these proceedings articulated that Appellee's claims in this litigation and the municipal citations and permitting issues were unrelated. In a

June 10, 2015 hearing on the first motions for summary judgment filed in this case, the trial court judge expressed his view on Appellant's unclean hands defense:

> Judge Dempsey: "The clean hands thing doesn't have any kind of weight whatsoever because it isn't related to the underlying transaction. The fact that [Ms. Sorrow is] getting cited and all that stuff has nothing to do with the underlying transaction. . . .The other side's clean hand thing doesn't get it."

[T-13]. The trial court's conclusion stated above judge was entirely correct. More noteworthy is that Appellant also concluded in court proceedings that the municipal citations and claims at issue in this case were unrelated. As will be discussed in the section below detailing Appellant's inequitable conduct, in early 2015, Appellant was exerting intense pressure to impel the City to prosecute Appellee. After the City issued a citation to Appellee in February 2015, Appellee moved to dismiss the citation on the basis that the City and Appellee had reached an agreement, entered on the docket of the Municipal Court, that no further citations would be issued to Appellee until such time as the underlying litigation was resolved. [R. (2097) 2151]. On March 4, 2015, Appellant, through its counsel of record in the litigation below, filed an "Interested Party's Response to Motion to Dismiss". [R. (2097) 763]. In that filing, Appellant argued vociferously that this litigation was "unrelated" to the municipal citations:

> The civil action pending between Sorrow and 380 Properties . . . is unrelated to Sorrow's citations. . . .

> Sorrow, however, asks this Court to overlook her conduct and dismiss the present case based on an unrelated civil litigation pending in the Superior Court of Fulton County. See 380 Properties, LLC v. Lori Sene Sorrow, Fulton County Superior Court, Civil Action No. 2014 CV 243275.
>
> The civil litigation has to do with whether Sorrow had a *right* to construct the pole barn on property owned by 380 Properties and block easements rights in the alley. The present case [City of Atlanta Municipal Court] involves whether the City issued permits and approved plans for the construction of the pole barn, fences, and storage shed, which are prerequisites for constructing each of these. The issues in the civil litigation and this case are *completely unrelated*. (emphasis in original).
>
> This Court should not be distracted by the *unrelated* civil litigation. (emphasis in original).

[*Id.*]. Appellant was correct in its March 2015 municipal court filing, the trial court was correct in its June 10, 2015 hearing, and Appellee was correct in her December 2017 motion for summary judgment when all concluded that the claims and issues in the instant litigation are unrelated to the municipal citations that were issued to Appellee. The trial court did not err in denying Appellant's motion for summary judgment as to the affirmative defense of unclean hands, but as argued in Appellee's appeal, the trial court should have granted Appellee's motion for partial summary judgment as to this defense. *Appellant's Br. (2097) at pp. 27-31.*

**2. Appellant has failed to make the requisite showing of injury arising out of the alleged inequitable conduct.**

Appellant has made no showing below that it was directly injured by the conduct alleged to be unclean hands. This is a requirement, and the failure to do so is fatal to its attempt to claim the defense. *Gibson, supra; Calloway v. Partners Nat'l Health Plans,* 986 F.2d 446, 451 (11th Cir. 1993); *Boone v. Corestaff Support Services, Inc.,* 805 F.Supp.2d 1362 (N.D. Ga. 2011). *Gibson* is instructive on this point as well. In striking down the defendants' argument that plaintiff's alleged violation of residential restrictive covenants provided a defense to plaintiff's entitlement to injunctive relief against defendants for violations of use covenants pertaining to agricultural land, this Court observed:

> [T]he restrictions in [Plaintiff's] deed were made for the benefit of the other residential property owners only and not for the benefit of defendants' agricultural property.

*Gibson, supra, 246 Ga. App. at 224*. The building codes under which citations were issued to Appellee in 2014 and 2015 are exercises of the City's police power for the benefit of the general public and not for the specific benefit of Appellant. *Clive v. Gregory*, 280 Ga. App. 836, n. 3 (2006). Further, the issues that Appellant attempts to raise regarding permitting requirements apply to periods of time well before Appellant became the owner of 380 14th and no retroactive showing of injury to Appellant arising out of these matters, and the period of time before Appellant became an owner of 380 14th, can logically be made.

### 3. The authorities cited by Appellant for the proposition that the issuance of municipal citations establishes the unclean hands defense in cases involving equitable claims to real estate are not apposite.

Against the phalanx of authorities holding that the unclean hands defense does not apply when the alleged inequitable conduct is not directly related to the equitable claims, Appellant has tortured one case, materially mischaracterizing it as being "binding precedent" and then later "persuasive authority" for the proposition that the issuance of municipal citations alone established the unclean hands defense as to equitable real estate claims. The misread case is *Hollifield v. Monte Vista Biblical Gardens*, 251 Ga. App. 124 (2001). In *Hollifield*, the defendant sought to buy the land of his neighbor; his neighbor refused. Ignoring this rejection, defendant proceeded to exercise control and dominion as to his neighbor's land by erecting a fence, paving a driveway, and building an encroachment on his neighbor's property. One of defendant's actions knowingly violated the applicable local government building code. Within five years of these actions, the neighbor sued for ejectment. Defendant responded by arguing that plaintiff was estopped from obtaining the remedy of ejectment because plaintiff had not taken action to prevent the completion of the improvements. Defendant's estoppel argument was rejected by the trial court, and this Court affirmed the rejection of defendant's estoppel defense, holding that when a party "fails to

exercise reasonable diligence by knowingly building on the land of another . . . he cannot avail himself of the defense of estoppel." *Id*. at 126. Thus, the first material ground of distinction of *Hollifield* is that the affirmative defense at issue in that case was estoppel, not unclean hands.

A second material point of distinction from this case is that in *Hollifield*, the ejectment claim was brought within five years of the placement of the encroaching structures. *Id*. at 125. This fact was specifically noted by the Court, who observed that a different legal result could have resulted had the claim been for adverse possession (requiring a continuous, exclusive, uninterrupted public and peaceful use for 20 years) or adverse possession under color of title (requiring such use for seven years). *Id*. at 127-28. Appellant's claims are within the very time frames identified by the *Hollifield* court as a distinguishing factor.

A third material point of distinction is that the county code violations mentioned in the case were not central to the case's holding. In *dicta*, the Court discussed defendant's absence of good faith and reasonable diligence and commented upon his admission that he had intentionally violated a local building code when he built the encroachments on plaintiff's property. *Id* at 127. But contrary to Appellant's assertion, there is simply no language anywhere in the

opinion that a building code violation would have established a dispositive unclean hands defense as to an adverse possession or abandonment of easement claim.

A fourth material point of distinction is that contrary to the defendant in *Hollifield* and contrary to Appellant's assertions, Appellee has made no admissions of violations of the City's municipal code. As noted earlier, Appellee entered a *nolo contendere* plea to the 2014 citation and in so doing, expressly did not admit guilt. [R. (2097) 2151, 2164]. Appellee contested all of the 2015 citations, and all were dismissed with prejudice. [R. (2097) 2157, 2224, 2226, 2228]. Finally, Appellant's characterizations of Appellee's deposition testimony as admissions of municipal code violations are unfounded and not supported by the record. Specifically, Appellee testified that she believed that a general repair permit she obtained applied to the roof that she placed on the pole barn. [R. (2097) 2409 (lines 11-15), 2411 (lines 11-15), 2485 (lines 23-25) through 2486 (lines 1-6)]. Appellee further testified that she did not believe that she needed a variance or other approval for the pole barn. [R. (2097) 2416 (lines 8-19), 2513 (lines 22-25 through 2514 (lines 1-4)]. Appellant further testified that the fence which obstructed the alley in 1990 (when her family first acquired an ownership interest in 1130 State) was already there and that subsequent owners "inherited" the fence. [R. (2097) 2370 (lines 18-24), 2462 (lines 8-14)].

Appellant also proffered below and in its appellate brief, presumably as persuasive authority, a Nevada case, *City of Reno v. Nevada First Thrift*, 100 Nev. 483, 686 P.2d. 231 (1981). Appellant's citation of this case as authority for the proposition that the unclean hands defense is established as to equitable real estate claims by the issuance of municipal citations is unacceptably misleading and outright frivolous. This is so because in *Reno*, the unclean hands defense was not before the Nevada Supreme Court and was not considered by the court. In that case, a developer had substantially completed construction of a project, when the city changed its zoning laws and building code. The city subsequently denied the developer a business license and certificate of occupancy because the project did not meet the standards of the new regulations. The developer sued the city seeking an order compelling the issuance of the license and certificate. The trial court denied plaintiff's relief, alleging that it had unclean hands with respect to certain building code violations. After a change in ownership, the new owner brought a second lawsuit (a mandamus action) before a different judge and prevailed in obtaining both the license and certificate. The city appealed, but the Nevada Supreme Court affirmed the issuance of the mandamus, holding that under the doctrine of estoppel, "when a building permit has been issued, vested rights against changes in zoning laws exist after the permittee has incurred considerable expense

in reliance thereupon." *Id*. at 487. In *dicta*, the Nevada Supreme Court commented that the earlier trial court ruling had applied the unclean hands doctrine, but expressly noted that "we, of course, have no occasion to pass on the propriety of that ruling." *Id*. at 489. Thus, the issue of whether building code violations equate to unclean hands such as will render unavailable equitable remedies was not before, and therefore not reviewed by, the Nevada Supreme Court. Accordingly, *Reno* provides absolutely no support for Appellant's unclean hands argument.

As with his conclusion that unclean hands was unavailable to Appellant because of the unrelatedness of the alleged inequitable conduct and Appellee's equitable claims, the trial court also correctly analyzed and read *Hollifield*. In its order denying the parties second summary judgment motions, the trial court stated:

> The Court notes that is not persuaded by Plaintiff's argument with regard to an unclean hands defense to the counterclaims. Plaintiff reads *Hollifield* too broadly. There, the unclean hands defense is upheld against an estoppel theory, not against a claim asserting prescriptive title or abandonment of easement. *Hollifield* is further distinguished from the case at hand because the relevant timeframe there is well short of the statutory time to acquire prescriptive title, even by color of title, as the court so notes. 251 Ga. App. 127-128.

Throughout this litigation and on this appeal, Appellant has read *Hollifield* in an unjustifiably expansive manner. *Hollifield* provides no basis for the reversal of the trial court's denial of Appellant's summary judgment motion on the issue of

unclean hands, nor does it provide any impediment to the reversal of the trial court's denial of Appellee's motion for partial summary judgment on this issue in the related appeal.

**4. Appellant would be unable to establish an unclean hands defense at trial because the evidence upon which it would rely is inadmissible.**

There is a complete absence of a legal basis for the assertion of the unclean hands defense by Appellant in this case. Appellant's difficulty is compounded by the fact that there is also a complete absence of a factual basis for the defense in this case. The evidence that Appellant seeks to muster in support of the unclean hands defense would be inadmissible at the trial of this case.

This evidence falls into two categories, namely the four citations issued by the City to Appellee alleging code violations and Appellee's testimony that she did not obtain permits for certain items pertaining to her property.[4] Turning to the citations first, it is clear under Georgia law that these citations are not admissible at trial. The first citation was issued in 2014 and disposed of by a *nolo contendere* plea entered by Appellee on April 14, 2014. *Nolo contendere* pleas are not

[4] Appellee has maintained that as to certain items, no permit was required, and that as to other items, she had obtained the appropriate city permit. [R.(2097) 2409 (lines 11-15), 2411 (lines 11-15), 2416 (lines 8-19), 2485 (lines 23-25) through 2486 (lines 1-6)] [R.(2097), 2513 (lines 22-25 through 2514 (lines 1-4)]. Appellee has made no admissions as to these permitting matters.

admissions of guilt, and accordingly, Appellee's *nolo plea* in the Municipal Court of Atlanta is not admissible in the trial of this case. *O.C.G.A. §24-4-410(2); Waszczak v. City of Warner Robins*, 221 Ga. App. 528, 529 (1996)*; Reese v. Lyons*, 193 Ga. App. 548 (1989)**.**

The three citations issued against Appellee in 2015 were all dismissed with prejudice. [R. (2097) 2157, 2224, 2226, 2228]. Even if these citations had not terminated favorably to Appellee, they would still be inadmissible, as only felony convictions or crimes of moral turpitude are admissible in civil actions. *O.C.G.A. § 24-6-609***.**

Given that the issues of permitting regarding Appellee's property are not related to Appellee's equitable claims, her testimonial evidence regarding these permitting matters would be irrelevant to the issues to be decided and required to be excluded on this ground. When the exclusion of this evidence is factored into the equation, there is no competent evidence that could be presented that would provide a basis for a finding any inequitable conduct by Appellee.

**5. The undisputed record below establishes that as to the municipal citations in question, it is Appellant's conduct which has been inequitable.**

Any party seeking equitable relief is subject to the unclean hands doctrine. *O.C.G.A. § 23-1-10***.** *Williams v. Williams*, 255 Ga. 264, 265 (1985) ("It is well

established . . . that equity is not available to one who lacks clean hands as to the relief sought."); *cf. Countrywide Home Loans, Inc. v. Sheets*, 160 Idaho 268, 273 (Sup. Ct. 2106) ("In determining if the clean hands doctrine applies, a court has discretion to evaluate the relative conduct of both parties and to determine whether the conduct of the party seeking an equitable remedy should, in the light of all the circumstances, preclude such relief.")

Appellee submits that it is Appellant's conduct which has been inequitable in light of the circumstances of this case. In effect, Appellant sought to manufacture its unclean hands defense through lobbying for and procuring the very citations which it alleges as inequitable conduct. These citations were brought about through relentless, threatening tactics, and steadfast bullying by Appellant and its attorneys. [R. (2097) 2152-53, 2166-70, 2172-73, 2175-78, 2180, 2188, 2191, 2193-94, 2196-97, 2199, 2208-09, 2220-22].

The record paints a clear picture of Appellant using undue influence to pressure the City into issuing the 2015 citations against Appellee, notwithstanding the April 2014 agreement reached with the City's Solicitor's Office that no more citations would be issued against Appellee until this litigation was concluded. [R. (2097) 2151]. All of this points to conduct on the part of Appellant that is unfair, unjust and inequitable. Several things stand out in these facts which emphasize the

unwholesome conduct by Plaintiff. First, the Solicitor's Office and Municipal Court both recognized the wisdom of awaiting resolution of this litigation regarding Appellee and Appellant's rights in the alley, however Appellant completely disrespected the judgment and decision of the Solicitor's Office with respect to the agreement it made with Appellee and the judgment and decision of the Municipal Court in entering the agreement on the docket of the court. [R. (2097) 2152, 2166-70, 2172-73, 2175-78, 2180, 2188, 2191, 2193-94, 2196-97, 2199, 2208-09, 2220-22] Second, Appellant should have been willing to allow this legal action to reach its conclusion, since it is Appellant that initiated this lawsuit. [R. (2097), 5-35]. Third, the essence of this matter is that Appellant brought about the very citations upon which it seeks to mount an unclean hands defense. As it is Appellant's conduct that has been inequitable, the unclean hands defense is unavailable to Appellant.

**6. Appellant's unclean hands defense fails because the conduct alleged to be inequitable is not unconscionable nor violative of conscience.**

The unclean hands doctrine applies only to illegal, immoral, fraudulent or unconscionable conduct. *Miles v. Deen*, 184 Ga. App. 198 (1987). The conduct alleged to be inequitable has to so infect the underlying cause of action that to allow the action to go forward "would be violative of conscience. *Pryor v. Pryor*,

263 Ga. 153 (1993). The record below would not support a conclusion that this high standard has been met in this case.

Appellant's unclean hands defense rests squarely on four municipal citations regarding City code enforcement issues. As has been noted previously, the 2014 citation was disposed of with Appellee's *nolo* plea, with no admission of guilt and with an understanding that further citations would not issue until such time as this litigation had concluded and the parties' rights in the alley had been ascertained. The three 2015 citations were all dismissed with prejudice. Appellant makes no showing that the issues raised by these citations is sufficient to be "violative of conscience". This finding is reinforced by the unrelatedness of Appellee's counterclaims and the citations.

Second, given that numerous cases have concluded that easements were abandoned because of obstructions to alleys, it is easily inferred that the mere facts related to erecting a gate or fence traversing an alley does not equate to conduct "violative of conscience". *Duffy Street SRO v. Mobley*, 266 Ga. 849 (1966); *Donald Azar, Inc. v. Muche,* 326 Ga. App. 726 (2014).

### C. The trial court correctly denied Appellant's motion for summary judgment on Appellee's claim of prescriptive easement, albeit for incorrect reasons. (Enumeration 2).

The trial court did not err in denying Appellant's summary judgment motion as to Appellee's claim for a prescriptive easement. To the contrary, as Appellee has set forth in its appeal, Appellee established her entitlement to the recognition of a prescriptive easement from the alley across 380 14th to 14th Street, and summary judgment should have been granted in Appellee's favor on this claim.

**1. Undisputed facts establish that Appellee has satisfied the elements required for a prescriptive easement.**

As to the prescriptive easement claim present in this case, Appellant erects a straw man argument and then proceeds to knock it over. This effort is unavailing in that both undisputed facts and applicable law affirm that the trial court's denial of Appellant's summary judgment motion was required.

Appellant's straw man argument is summarized in the following quotation from its brief that Appellee's "sole contention is that her alleged use of this portion of [Appellant's] property gives her a right to a prescriptive easement." *Appellant's Br. (2098) at p. 14.* Based upon this characterization of the facts, Appellant argues that Appellee's notice of her prescriptive easement was legally insufficient. *Id.*

Appellant materially omits that Georgia law allows notice of a prescriptive easement to be given by action, specifically repair of the pathway over which the easement is established. *Keng v. Franklin*, 267 Ga. 472 (1997); *BMH Real Estate Partnership v. Montgomery*, 246 Ga. App. 301, 303-04 (2000). It is undisputed

that Appellee repaired, made improvements to, and maintained open the pathway which is the subject of her prescriptive easement claim. [R. (2097) 1057, 1099 (p. 33, lines 9-14), 1099-1100 (p.38, line 21 through p. 34, line 4]. Appellee also took affirmative steps to keep the pathway open by supporting a zero-lot line setback. [R. (2097) 1099 (p. 32, 12-24)]. Appellant has presented no evidence refuting Appellant's evidence regarding the notice provided by Appellee through her repair to, and improvements and maintenance of, the pathway. [R. (2097) 1473 (line 12) through 1487 (line 24); 1636 (line 16) through 1642 (line 18)].

**2. Based upon these undisputed facts, the trial court was required to deny outright Appellant's motion for summary judgment on Appellee's prescriptive easement counterclaim and correspondingly to grant Appellee's motion on this issue.**

The record is clear, contrary to Appellant's assertion, Appellee's prescriptive easement claim is based upon more than use, and the evidence presented below in summary judgment motions required the denial of Appellant's motion on this matter and should have resulted in the entry of summary judgment for Appellee.

## PART THREE – CONCLUSION.

In December 2014, the parties to this litigation were engaged in very different activities. Appellee worked to complete and file her motion for summary judgment by the Court ordered deadline. [R. (2097) 89-313]. Leading up to this

deadline, Appellee had engaged in research related to the history of the alley that was at the center of the dispute. She went out and obtained numerous affidavits from former property owners, church elders, neighbors and others (several of whom she did not know personally) who were knowledgeable about conditions in the alley as to periods of time going back into the 1960s. [R. (2097) 108-90]. She met the court ordered summary judgment deadline.

By contrast, in December 2014 and the months following Appellee's submission of her numerous supporting affidavits, Appellant was engaged in trying to get the City to issue municipal citations against Appellee, not just for matters related to the alley, but wholly unrelated matters such as Appellee's house and items wholly contained within Appellee's back yard (i.e., a storage shed and drainage channels). [R. (2097) 2156, 2206]. Notwithstanding the court's scheduling order, Appellant did not submit a summary judgment motion. Following this December 2014 deadline, Appellant continued, for months, to lobby the City to issue citations against Appellee. [R. (2097) 2152-53, 2166-70, 2172-73, 2175-78, 2180, 2188, 2191, 2193-94, 2196-97, 2199, 2208-09, 2220-22]. In January 2015, Appellant was finally able to get the City to go back on its agreement with Appellee not to engage in any additional enforcement activity until such time as this litigation was completed. [R. (2097) 2153, 2186]. The City

issued a citation to Appellee which was essentially the same citation that had been disposed of by a *nolo contendere* plea a year earlier, and lo and behold, within weeks, Appellant filed a motion for summary judgment citing unclean hands as its theory and relying upon the very citations that it lobbied so hard to bring into existence. [R. (2097) 425, 2153, 2186].

Appellant's unclean hands defense is meritless. Appellee's counterclaims and the City's citations are unrelated. There is no showing of any injury to Appellant arising out of the citations issued to Appellee. Appellee's conduct was not unconscionable or violative of conscience. The authorities cited by Appellant do not provide the support they seek for the unclean hands defense. And the record shows that Appellant itself acted in an inequitable matter in its outrageous harassment of the City and, by extension, of Appellee. The trial court should have granted Appellee's motion for partial summary judgment as to unclean hands.

Finally, Appellant has not created a triable issue of fact as to Appellee's prescriptive easement claim, and its summary judgment motion on this claim was also meritless. Therefore, Appellant's appeal should be denied.

This 19th day of July, 2019.

This submission does not exceed the word count limit imposed by Rule 24.

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**IN THE COURT OF APPEALS**
**STATE OF GEORGIA**

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| **380 PROPERTIES, LLC.,** | ) | |
| | ) | |
| | ) | |
| **Appellant,** | ) | |
| | ) | **CASE NUMBER** |
| | ) | **A19A2098** |
| **v.** | ) | |
| | ) | |
| **LORI SENE SORROW,** | ) | |
| | ) | |
| **Appellee.** | ) | |
| | ) | |

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## CERTIFICATE OF SERVICE

Pursuant to Rule 6, I hereby certify that there is a prior agreement with counsel for Appellant to allow documents in a .pdf format sent via email to suffice for service. I have this day served a copy of the foregoing ***BRIEF OF APPELLEE LORI SENE SORROW*** by the Court's efile system to the following:

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