IN THE COURT OF APPEALS
STATE OF GEORGIA

JANE FRASER and JEFF KILGORE, Plaintiffs/Appellants, v. GLYNN COUNTY, GEORGIA, Defendant/Appellee.	Case No. A25A0994

BRIEF OF APPELLANTS JANE FRASER AND JEFF KILGORE

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INTRODUCTION

For more than 100 years, the public used roads on Sea Island, Georgia[1] that were built and/or maintained by Appellee Glynn County, Georgia (the "County") on land dedicated to the County for that express purpose. Indeed, the 1924 deed dedicating a segment of the Sea Island Causeway, which affords the only means of ingress and egress to Sea Island, mandated that the land shall revert back to the grantor if it ever ceases to be used for a public purpose. Non-parties Sea Island Company, LLC and its related entities, including SIA Propco I, LLC, and Bridges and Roads, LLC (collectively, the "Sea Island Entities") now control these public roads under color of title and illegally block the public from accessing them and/or charge those they deem worthy of admission onto the island an exorbitant fee for that privilege. The County enabled this behavior when it wrongfully abandoned these public roads and transferred them to the Sea Island Entities for purely private use—in violation of not only the 1924 deed's reverter clause and the public trust doctrine, but also state and local laws prohibiting the abandonment of roads that serve a substantial public purpose.

Appellant Jane Fraser ("Fraser") is a Sea Island resident who holds a common reverter interest in the Sea Island Causeway pursuant to the 1924 deed. Appellant

[1] Sea Island is a barrier island located within the navigable waters of the State of Georgia that was formerly known as Fifth Creek Island, Isle of Palms, Long Island or Glynn Isle until it became Sea Island in the 1920s. R-Vol. 2 at 16, n.1.

Jeff Kilgore ("Kilgore") resides in Glynn County but is no longer able to visit Sea Island as he did before the roads were closed to the public. Fraser and Kilgore ("Plaintiffs") filed a Verified Complaint ("Complaint") in the Glynn County Superior Court seeking declarations that the abandonment and subsequent transfer of public roads to private owners for private use was *ultra vires* and void and that title to these roads remains vested in the public.[2] Alternatively, Fraser sought a declaration that, if the abandonment was lawful, the abandoned segment of the Sea Island Causeway reverted back to her and the other reverter interest holders when it ceased to be used for a public purpose. Plaintiffs' intent in filing the Complaint is to assure that the Sea Island Causeway and, thereby, Sea Island's roads and public beaches remain accessible to the public in accordance with the original intent of the original grantor and their historical public use.

In seeking this relief, Plaintiffs invoked the sovereign immunity waiver found in Ga. Const. of 1983, Art. 1, § 2, ¶ V (b)(1) ("Paragraph V").[3] The trial court

[2] This is one of three related and contemporaneously filed actions filed by the Plaintiffs that seek similar relief involving the same roads. The second action is *Jane Fraser and Jeff Kilgore v. Sea Island Company, LLC; Bridges and Roads, LLC; SIA Propco I, LLC; and William Fallon in his official capacity as the County Manager for Glynn County, Georgia* (CAFN No. CE24-00129), in which Plaintiffs seek declaratory and injunctive relief against the Sea Island Entities, and mandamus relief against the Glynn County manager in connection with these same public roads. The Sea Island Entities attempted to remove the case to federal court where it is awaiting a ruling on Plaintiffs' motion for remand. In the third action, *In re: Petition of Jane Fraser, individually and as representative of the public's common interest in the land that is subject to this petition* (CAFN No. CE24-00130), Fraser seeks to have the public roads returned to the public under O.C.G.A. § 44-2-40 *et seq*. (the "Land Registration Law"). This case is also pending in the Court of Appeals (Case No. A25I0123) following the Court's acceptance of the County's application for interlocutory appeal.

[3] Though this action also involves the acts of the Sea Island Entities, Plaintiffs were constrained to bring it exclusively against the County and in the name of the County in order to comply with Paragraph V (as construed by the Supreme Court in *State v. SASS Group, LLC*, 315 Ga. 893 (2023)).

dismissed the Complaint for lack of subject matter jurisdiction, concluding that it failed to allege a justiciable action seeking declaratory relief from "past, current, or prospective acts that occurred on or after January 1, 2021[,]" as required for an effective Paragraph V waiver. This was reversible error.

PART I

A. STATEMENT OF FACTS RELEVANT TO APPEAL

1. The Unlawful Abandonment

In 2004, the Sea Island Company submitted an Abandonment Application to Glynn County requesting that the County abandon certain public roads identified in the application ("Application Roads") so that the Sea Island Company could privatize those roads and, ultimately, Sea Island itself. R-Vol. 2 at 47-49, ¶¶ 125–136. The application launched a formal County process to determine whether the requested abandonment could be accomplished in light of state and local laws prohibiting the abandonment of public roads serving a substantial public purpose. *Id.* at 53-54, ¶¶ 152-57; 57-59, ¶¶ 170-76. As a part of that process, the County Engineer acknowledged that "[t]he rights-of way proposed for abandonment are currently being used as ingress and egress by the general public as well as for property owners on Sea Island[,]" as they had been for the past 75 years. *Id.* at 59-60, ¶¶ 178–79.

Despite this clear and uncontroverted evidence that the Application Roads

were serving a substantial public purpose, the Glynn County Board of Commissioners voted in favor of abandonment. *Id.* at 57-62, ¶¶ 170–191. After the vote, the County executed a 2005 Quit Claim Deed conveying its interest in certain public roads to Sea Island Company. *Id.* at 68, ¶ 215; R-Vol. 3(1), at 336-41. For reasons not revealed in the written record, the County executed a second 2009 Quit Claim Deed that is substantively identical to the 2005 deed. R-Vol. 2 at 68, ¶ 217; R-Vol. 3(1), at 342-47.

2. The Roads at Issue

In addition to the Application Roads, there are two other categories of public roads whose ownership is being challenged in this action. R-Vol. 2 at 42, ¶ 101; 69, ¶ 223; 40, ¶¶ 89, 93. The second category of public roads were not included in the Abandonment Application (and thus were not abandoned) but were nevertheless transferred to Sea Island Company via the 2005 and 2009 Quit Claim Deeds (the "Excluded Roads"). *Id.* at 69, ¶¶ 219-223. The third category is comprised of roads that the Sea Island Company expressly dedicated to the public when it filed the Sea Island Plats ("Sea Island Plat Roads") but over which the Sea Island Company now claims ownership despite there being no evidence that they were ever abandoned or transferred back to Sea Island Company.[4] *Id.* at 40, ¶¶ 89, 93; 242-45.

[4] Where possible, the Application Roads, the Excluded Roads and the Sea Island Plat Roads are referred to collectively as the "Roads."

St. Simons Island and Sea Island are connected by the Sea Island Causeway. *Id.* at 24, ¶ 19. The County acquired a segment of the Sea Island Causeway (the "Causeway Segment"), which serves as the only means of ingress and egress to Sea Island, through a 1924 deed from T.L. Cain ("Cain Deed"). *Id.* at 24-26, ¶¶ 19-22; 217-18. The Cain Deed conveyed two land tracts to Glynn County. *Id.* The first tract became the Causeway Segment and the second tract became what is known as Twitty Park.[5] *Id.* at 36, ¶¶ 68-69; 77, ¶¶ 262-65. The Causeway Segment was included in the Abandonment Application and in the 2005 and 2009 Quit Claim Deeds. *Id.* at 42, ¶ 101. For generations, the County maintained the Roads and the public used them. *Id.* at 85, ¶¶ 309–310; 94, ¶¶ 358-60. The Causeway Segment provides the only means by land for the public to access the Sea Island beaches, which are properties held in the public trust.

3. Sea Island Entities Block Public Access to Sea Island

However, since the purported abandonment and transfers, the Sea Island Entities have prevented the public from accessing and using the Roads without intervention from the County as explained below. *Id.* at 40, ¶ 93; 69-70, ¶¶ 221–223, 229. To implement these restrictions, the Sea Island Entities erected a gate and guardhouse on the Causeway Segment which prohibits the general public from entering the island. *Id.* at 71-72, ¶¶ 230–36. While the Sea Island Entities allow

[5] The second tract is discussed in more detail in Section III (B) (4) below.

certain approved visitors, such as guests at the Cloister, contractors, and others providing services to residents, they sometimes limit the access of non-preferred service providers to certain days and times. *Id.* at 72-74, ¶¶ 236–47. All of these visitors must pay exorbitant entrance fees at the gatehouse to access the island which are collected and retained by the Sea Island Entities. *Id.* at 71-72, ¶¶ 231-33.[6] The Sea Island Entities also posted "No Parking" and "Private Property" along the Sea Island Causeway, preventing Plaintiffs and the general public from enjoying and accessing the adjacent marshes. *Id.* at 75, ¶ 253.

4. The Plaintiffs Below

Kilgore is a resident of Glynn County but has never lived on Sea Island. *Id.* at 21, ¶ 3. In his youth, Kilgore enjoyed visiting the island to shop, frequent the beach and beach club, and go crabbing. *Id.* at 74, ¶ 248. Beginning in or around 2004, Kilgore lost access to the island when it was closed to the public. *Id.* at 26, ¶ 24; 74, ¶ 249.

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[6] The 2024 fees schedule is:

- Day Pass (4 wheels) $50.00
- Day Pass (6 wheels) $75.00
- Day Pass (over 6 wheels) $150.00
- Day Pass (Trailer) $50.00
- Day Pass (Semi-Truck/Tractor-Trailer) $250.00
- Annual Fee (Personal Vehicle — 4 wheels) $175.00
- Annual Fee (Company Vehicle — 4 wheels) $350.00
- Annual Fee (6 wheels) $650.00
- Annual Fee (over 6 wheels) $1,200.00
- Annual Fee (Trailer) $325.00
- Annual Fee (Semi-Truck/Tractor-Trailer) $2,500.00

R-Vol. 2 at 71-72, ¶¶ 231.

Fraser resides on Sea Island and has a colorable claim to the Causeway Segment. *See id.,* at 20-21, ¶¶ 1-2. Specifically, the previously mentioned Cain Deed transferred two tracts to Glynn County as quoted below:

> The first tract of land is conveyed to the second party for the purpose of a right of way for a road from St. Simons to Long Island [n/k/a Sea Island]; and the second tract of land is conveyed for the purpose of a park for the use and benefit of the public.
>
> It is understood and agreed that if the lands should ever cease to be used for such purposes then title to the same shall revert to the first party.

Id. at 217. Fraser acquired the reverter interest contained therein from the descendants of T.L. Cain. *Id.* at 37-39, ¶¶ 73-88.

Plaintiffs Fraser and Kilgore also represent the public's common interest in the use and enjoyment of the Roads and the Sea Island Foreshore ("Foreshore").[7] *Id.* at 21, ¶¶ 2–3.

5. Plaintiffs' Position of Uncertainty

Plaintiffs' Complaint alleges that the abandonment of the Roads and the deeds conveying title to Sea Island Company are *ultra vires* and void, that title to the Roads remains vested in the County, that the public has a right to use the Roads, and that these rights are being inhibited. *Id.* at 76-97, ¶¶ 255–375. Alternatively, Fraser alleges that if the abandonment is deemed lawful, then title to the Causeway Segment

[7] The Foreshore is the area of shoreline on Sea Island that lies between the low tide mark and high tide mark. R-Vol. 2 at 24, ¶ 16. The State of Georgia owns the Foreshore. *See* O.C.G.A. §§ 44-5-2, 12-5-231, & 50-16-1; R-Vol. 2 at 24 ¶¶ 8-12.

should have reverted to her and the other holders of the Cain Deed's reverter interest. *Id.* at 97-98, ¶¶ 376–79.

In either case, Plaintiffs are in a position of uncertainty. *Id.* at 76, ¶¶ 256-58; 80-81, ¶¶ 281-82; 84-85, ¶¶ 305-06; 89, ¶¶ 328-29; 93, ¶¶ 352-53. As alleged in the Complaint, Kilgore risks criminal prosecution for trespassing if he exercises what he believes is his right as a member of the public to enter onto Sea Island. *Id.* at 76, ¶ 257. Fraser and the general public are likewise in a position of uncertainty regarding their rights to enjoy and access the marshland adjacent to the Causeway Segment. Fraser and the general public could, for example, face repercussions for parking on the shoulder of a road they contend is public. *See id.* at 75, ¶¶ 251–53. Additionally, Fraser's status as a common holder of the Cain Deed's reverter interest gives her property rights to the Causeway Segment which are disputed by the County and the Sea Island Entities. *Id.* at 75-76, ¶¶ 251–53, 256–58.

As alleged in the Complaint, the County has a continuing duty to ensure that public roads remain open to the public. *Id.* at 75, ¶ 254. *See also* Glynn County Ordinance § 2-13-25 ("It shall be the continuing duty and obligation of Glynn County, through its agents and employees, whenever any such as is prohibited herein occurs, to enter upon any such public street, public roadway, public alley or public easement to effect compliance with the provisions of this ordinance."). Plaintiffs alleged that their rights are violated each day the County shirks this legal duty by

continuing to allow the Sea Island Entities to restrict public access to the Roads. R-Vol. 2 at 75, ¶ 254; 80, ¶ 280; 84, ¶ 302; 88, ¶ 325; 92, ¶ 349; 96, ¶ 374.

6. The *Twitty Park* Litigation

In 2016, Fraser and the Glynn County Environmental Coalition, Inc. ("GEC") filed a lawsuit styled *The Glynn Environmental Coalition, Inc., and Jane Fraser v. SIA Propco II, LLC, Glynn County, Georgia, and John and Jane Does*, Superior Court of Glynn County (CAFN No. CE16-0025-063) ("*Twitty Park* Litigation"). *Id.* at 5. Twitty Park is public property owned by the County since 1924 when T.L. Cain conveyed the land to the County "for the purpose of a park for the use and benefit of the public" via the same deed that conveyed the Causeway Segment. *See id.* at 5; 217-18; R-Vol. 3(1) at 364.

Although the Cain Deed stipulated that "if the lands should ever cease to be used for such purposes, then title to the same shall revert to the first party," the County purported to transfer Twitty Park to Sea Island Company in 1982.[8] R-Vol. 2 at 51, ¶145; R-Vol. 3(1) at 365. Fraser and the GEC alleged this transfer violated the Cain Deed's restriction requiring the County to own and maintain the land in the public trust. *See id.* On April 29, 2019, Glynn County Superior Court Judge Stephen D. Kelley entered a final judgement in the plaintiffs' favor declaring that "the deed to Twitty Park from the County to SIC is hereby rendered void and title to Twitty

[8] Sea Island Company subsequently transferred title to its affiliate, SIA Propco II, LLC.

Park reverts to the County under the terms of the original Cain Deed." R-Vol. 2 at 51, ¶145; R-Vol. 3(1) at 374. In so ruling, Judge Kelley determined that the Cain Deed created a fee simple determinable with a possibility of reverter; whereby, Glynn County owned Twitty Park and the Causeway Segment in fee simple determinable subject to the public trust doctrine and Fraser and GEC's possibility of reverter should the fee simple determinable no longer be used by the public.[9] *Id.*

B. PROCEDURAL HISTORY

On February 5, 2024, Plaintiffs filed their Complaint in the Superior Court of Glynn County asserting several counts for declaratory judgment. R-Vol. 2 at 16-124. In Count I, Plaintiffs sought a judgment declaring that the purported abandonment of the Causeway Segment was *ultra vires* and void, that the purported transfer of the Causeway Segment to the Sea Island Company and all subsequent, purported transfers were void, and that Sea Island Entities be estopped from blocking access to parcels purportedly abandoned by the County and the Foreshore. *Id.* at 76-80, ¶¶ 255-79. In Counts II-V, Plaintiffs sought the same relief as to the remaining Roads. *Id.* at 80-97, ¶¶ 280-375. Count VI, which was pled in the alternative to Count I, sought a judgment declaring that if the purported abandonment of the Causeway Segment is found to be lawful, then the Causeway Segment reverted to the common

[9] The Sea Island Entities and Glynn County were parties of record in the Twitty Park Litigation. Therein, the Court also determined that the rule against perpetuities did not apply, and that laches and other equitable theories could not override title. Judge Kelley's judgment is final and entitled to *res judicata* and collateral effect.

holders of the Cain Deed's reverter interest, including Fraser. *Id.* at 97-98, ¶¶ 376-79.

On April 3, 2024, the County filed its Motion to Dismiss arguing that the trial court lacked subject matter jurisdiction and that that Plaintiffs Complaint failed to state a claim upon which relief can be granted. R-Vol. 3(2) at 785-814. Plaintiffs filed their Response in Opposition on May 6, 2024. *Id.* at 817-47. On May 31, 2024, the County filed its Reply Brief. *Id.* at 865-83. On July 30, 2024, the County filed its Supplemental Brief. *Id.* at 938-954. The trial court held oral argument on August 2, 2024. *See* R-Vol. 4.

On October 3, 2024, the trial court dismissed the Complaint with prejudice for lack of subject matter jurisdiction finding no waiver of sovereign immunity. R-Vol. 3(2) at 955-65. The Plaintiffs filed their notice of appeal on October 23, 2024. R-Vol. 2 at 1-15.

PART II

A. Statement of Jurisdiction

The Court of Appeals has jurisdiction because this appeal involves title to land. O.C.G.A. § 15-3-3.1 (a)(1).

B. Enumerations of Error

1. The trial court's ruling that Plaintiffs were not seeking prospective relief as needed for a declaratory judgment is reversible error.

2. The trial court committed reversible error by ruling that Plaintiffs failed to establish a Paragraph V sovereign immunity waiver because they were not seeking to enjoin past, current or prospective acts that occurred on or after January 1, 2021.

3. The trial court committed reversible error by relying on its own assessment of the merits as opposed to the Complaint's well-plead allegations.

4. The trial court committed reversible error in failing to enforce the Cain Deed's reverter interest which had already been conclusively established by the same court in the prior *Twitty Park* Litigation.

5. The trial court erred in dismissing the Complaint with prejudice for lack of subject matter jurisdiction as this was not a ruling on the merits.

PART III

A. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's ruling on a motion to dismiss based on sovereign immunity. *Ramos v. Owens*, 366 Ga. App. 216, 216 (2022) (citing *Bryant v. Ga. Ports Auth.*, 364 Ga. App. 285, 285 (2022)). In so doing, this Court construes the pleadings in the light most favorable to the non-moving party with any doubts resolved in that party's favor. *Douglas County v. Hamilton State Bank*, 340 Ga. App. 801 (2017). As discussed below, the trial court committed reversable error when it disregarded Plaintiffs' well-pled allegations to find they failed to prove a waiver of the County's sovereign immunity.

B. ARGUMENT AND CITATION OF AUTHORITIES

1. The Trial Court's Ruling That Plaintiffs Were Not Seeking Prospective Relief as Needed for a Declaratory Judgment Is Reversible Error.

The trial court concluded that the Plaintiffs failed to allege a justiciable controversy based on the court's erroneous findings that "there are no enforcement actions threatened by the County," and that "Plaintiffs do not seek resolution of any recent or contemplated future acts of Defendant Glynn County." R-Vol. 3(2) at 961-62. These findings ignore the Complaint's well-plead allegations to the contrary Specifically, the Complaint alleged:

- That Kilgore as a member of the general public is at risk of criminal prosecution for trespassing if he were to attempt to enter Sea Island and is thus in a position of uncertainty as to his legal rights.[10] R-Vol. 2 at 76, ¶ 257; 81, ¶ 282; 85, ¶ 306; 89, ¶ 328; 93, ¶ 353.
- That Fraser, a Sea Island resident, suffers harm because the Sea Island Entities restrict who may enter the island, thereby infringing her ability to

[10] A person commits the offense of criminal trespass when he or she: (b)(2) enters upon the land of another person or entity after receiving notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant that such entry is forbidden; or (b)(3) remains upon the land of another person or entity after receiving notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant that such entry is forbidden. O.C.G.A. § 16-7-21 (b)(2)-(3). A conviction for criminal trespass carries a penalty of up to a $1,000 fine and confinement for up to 12 months. See O.C.G.A § 17-10-3 (a)(1).

use her preferred contractors and service providers. *See id.* at 73-74, ¶¶ 238-247

- That Fraser and the public at large suffer harm because, after the Sea Island Entities acquired the Causeway Segment, they erected no parking and no trespassing signs along the shoulder of the causeway, preventing Fraser and others from parking on the Causeway to enjoy and access the adjacent marshland. *See id.* at 72, ¶ 235; 74-75, ¶¶ 250-53.
- That Fraser is in a position of uncertainty with respect to her reverter interest in the Causeway Segment which was implicated when the County granted this land to a private entity for non-public use. *Id.* 76, ¶ 258.

The trial court found that Plaintiffs are not seeking relief from prospective acts because they challenge County acts occurring two decades ago and are not seeking to enjoin any current or prospective County acts. R-Vol. 3(2) at 962, 965. In doing so, the trial court accepted the County's argument that the only ones capable of infringing Plaintiffs' rights were the Sea Island Entities. R-Vol. 3(2) at 962, 965. This argument constitutes a gross oversimplification of the issue and cannot render the Complaint non-justiciable.

As Plaintiffs' Complaint alleged, the County has an ***ongoing*** legal duty to ensure that the public has access to county roads and that each day these roads are closed to the public constitutes a new violation that waives sovereign immunity. R-

Vol. 2 at 75, ¶ 254; 80, ¶ 278. *See also* Glynn County Ordinance § 2-13-24(a)-(b) (making it unlawful for any person to block a public road); Glynn County Ordinance § 2-13-25 ("It shall be the continuing duty and obligation of Glynn County, … to enter upon any such public street, public roadway, public alley or public easement to effect compliance with the provisions of this ordinance."). Indeed, Georgia courts have held that a county is a necessary party to any action challenging title flowing from an allegedly unlawful county abandonment process. *McRae v. SSI Dev., LLC*, 283 Ga. 92, 93 (2008).

Accordingly, Plaintiffs met their burden of establishing a justiciable controversy because "a request for declaratory relief is a request for 'prospective relief—relief from the threat of wrongful acts and injuries yet to come.'" *Cobb Cnty. v. Floam*, 319 Ga. 89, 99 (2024)) (citing *Lathrop v. Deal*, 301 Ga. 408, 434 (2017)). Put another way, "[t]o state a claim for declaratory judgment, a party need only allege the existence of a justiciable controversy in which future conduct depends on resolution of uncertain legal relations." *City of Atlanta v. Hotels.com, L.P.*, 285 Ga. 231, 234–35 (2009).

Contrary to the trial court's ruling, Plaintiffs were not required to show that "[d]efendant Glynn County, Georgia threatens any ***current*** action impacting either Plaintiff Fraser or Plaintiff Kilgore." R-Vol. 3(2) at 959 (emphasis added). It is enough that the Plaintiffs are ***at risk*** of future enforcement actions like criminal

prosecutions because this places Plaintiffs in a position of uncertainty. *See, e.g.*, *Jenkins v. Manry*, 216 Ga. 538, 540 (1961) (master plumber barred from practicing his trade by a new licensure rule properly sought a declaration that the rule is unconstitutional before he violated the rule; he was not required to risk criminal prosecution before challenging the rule). *See also Richardson v. Phillips*, 302 Ga. App. 305, 309 (2010) (A declaratory judgment's "purpose is to permit one who is walking in the dark to ascertain where he is and where he is going, to turn on the light before he steps rather than after he has stepped in a hole.").

Within the framework of Plaintiffs' Complaint are allegations evidencing the existence of a bona fide controversy in which future conduct depends on the resolution of uncertain legal questions regarding the title of roads leading to and on Sea Island. The trial court erred in finding the Complaint non-justiciable.

2. The Trial Court Committed Reversible Error by Ruling That Plaintiffs Failed to Establish a Paragraph V Sovereign Immunity Waiver Because They Were Not Seeking to Enjoin Past, Current or Prospective Acts That Occurred on or After January 1, 2021.

The sovereign immunity waiver found in Paragraph V reads in relevant part:

> Sovereign immunity is hereby waived for actions in the superior court seeking declaratory relief from acts of […] any county, consolidated government, or municipality of this state or officer or employee thereof outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States. Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, only after awarding declaratory relief, enjoin such acts to enforce its judgment. ***Such waiver***

> ***of sovereign immunity under this Paragraph shall apply to past, current, and prospective acts which occur on or after January 1, 2021.***

Ga. Const. of 1983, Art. I, § 2, ¶ V (b)(1) (emphasis added).

The trial court erred in concluding the Complaint does not seek declaratory relief from "past, current or prospective acts that occurred on or after January 1, 2021." R-Vol. 3(2) at 961. In so ruling, the Court ignored the well-plead allegations enumerated above that detail the current and future acts that have been or could be taken against the Plaintiffs as a direct result of the unlawful abandonment and transfer of the Roads.

In this respect, this case is analogous to *Starship Enterprises of Atlanta, Inc. v. Gwinnett Cnty.*, 319 Ga. 293, 293 (2024) (hereinafter "*Starship II"*). The plaintiff in *Starship II* was an adult toy store that filed suit in October 2022 under Paragraph V to challenge the constitutionality of a 2015 Gwinnett County ordinance regulating adult establishments. *Id*., at 293. The county argued that Paragraph V does not apply because the store was challenging the 2015 adoption of the ordinance and not a prospective act occurring on or after January 1, 2021. *See id.*, at 296-297. The Supreme Court disagreed, ruling that Paragraph V applied because the ordinance placed the plaintiff ***at risk*** for enforcement actions that could occur after January 1, 2021. *Id.*, at 290. In reaching this conclusion, the Court reasoned that Paragraph V's use of the word "act" embraced not only actions the County ***has*** undertaken, but also

enforcement actions the county ***might*** undertake in the future against the plaintiff. *Id.*, at 300-301 (emphasis added).

The same is true here. Plaintiffs' Complaint sets out similar allegations regarding current and prospective infringements of Plaintiffs' rights to use public property and Fraser's rights as a holder of the Cain Deed's reverter interest. These infringements flow directly from the County's *ultra vires* and void conveyances of the Roads to Sea Island Company and the County's present abdication of its continuing duty to ensure that public roads remain open to the public. *See* Glynn County Ordinance, §§ 2-13-24, 25. While infringements began with the abandonment, infringements are ongoing and continuing, and each time that a Plaintiff's access is limited is a new infringement. Because these infringements may and have occurred after January 1, 2021, Plaintiffs seek relief from acts that allow them to invoke Paragraph V's sovereign immunity waiver against the County.

3. The Trial Court Committed Reversible Error by Relying on Its Own Assessment of The Merits as Opposed to The Complaint's Well-Plead Allegations.

In ruling on a motion to dismiss, the trial court must accept all well-plead material allegations in the complaint as true and must resolve any doubts in favor of the plaintiff." *Bd. of Comm'rs of Glynn Cnty. v. Johnson*, 311 Ga. App. 867, 868 (2011) (citing *Roberson v. Northup,* 302 Ga. App. 405 (2010)). The trial court violated this rule by ignoring the Plaintiffs' well-plead allegations and relying

instead on its own judgment of the merits. For example, the Complaint and the exhibits establish that the Roads were still being used by the general public for a substantial public purpose at the time they were abandoned by Glynn County. R-Vol. 2 at 59-61, ¶¶ 175-181; 313 (County Engineer's report concludes that "[t]he rights-of-way proposed for abandonment are currently being used as ingress and egress by the general public […]"). Under both state and local law, this fact alone prevented the County from abandoning the Roads. O.C.G.A. § 32-7-2(b)(1) allows abandonment only "[w]hen it is determined that a section of the county road system has for any reason ***ceased to be used by the public to the extent that no substantial public purpose is served by it….***" (Emphasis added).[11] Likewise, Glynn County's 2002 Road Abandonment Ordinance required the County Engineer to make written findings and a recommendation to the County Administrator as to whether the abandonment should proceed. R-Vol. 2 at 57-58, ¶ 171; 288 (Glynn County Code § 2-13-44(b)). Subsection (c) of this ordinance states that if "the parcel(s) in question still have substantial useful purpose, the process will stop." R-Vol. 2 at 58, ¶ 172; 288 (Glynn County Code § 2-13-44(c)). Also, the County Attorney Memo incorporated into the ordinance states that "[i]n order for a road to be closed, the

[11] While O.C.G.A. § 32-7-2(b)(1) (R-Vol. 3(1) at 640-41) was amended on May 24, 2010 to broaden the abandonment power to permit abandonment if "removal from the county road system is otherwise in the best public interest[,]" this amendment does not have retroactive effect. *See Davis v. Lugenbeel*, 283 Ga. App. 642 (2007) (statute that creates substantive rights cannot be applied retroactively absent clear contrary legislative intent).

Board of Commissioners must determine that all or part of the road has ceased to be used by the public so as to no longer serve any substantial purpose." *Id.* at 290 (Emphasis in original). The Memo also restates the longstanding rule that "[a] road cannot be closed for the purpose of helping a private landowner." *Id.* at 59, ¶ 175, 290; *Accord McIntosh County v. Fisher*, 242 Ga. 66, 67 (1978).

Thus, the well-plead allegations of the Complaint (including the exhibits) unequivocally show that the abandonment was unlawful because the public maintained continued and substantial use of the Causeway and Roads. Yet, the trial court somehow concluded otherwise in the face of allegations and evidence of their continued public use, suggesting that the County was somehow legally authorized to abandon the Roads without ever identifying the alleged source of that authority. R-Vol. 3(2) at 963 (distinguishing the *Twitty Park* Litigation because it did not involve "the type of legislative authority granted counties regarding public roadways" without explaining how statutes and ordinances forbidding the abandonment of roads serving a substantial public purpose authorized the abandonment of the Roads which were undeniably serving a substantial public purpose at the time of their purported abandonment). The trial court attempted to buttress this unexplained abandonment authority with unsupported findings that were irrelevant to the issues. First, the trial court found that Glynn County officers and employees were "attempting to comply with the legislatively mandated

abandonment procedures[.]" R-Vol. 3(2) at 961. Second, the trial court found that "[p]laintiffs' action attempts to compel Glynn County to reopen currently private areas at great exposure to additional expense to its taxpayers[.]"[12] R-Vol. 3(2) at 962.

It was reversible error for the trial court to completely disregard the well-plead allegations of the Complaint which irrefutably establish that the Roads were serving a substantial public purpose at the time of their purported abandonment thus making the abandonment illegal. R-Vol. 2 at 59-61, ¶¶ 175-181; 313. Statutes and ordinances in effect at the time clearly establish that the County's abandonment of the Roads and any resulting transfers of these lands were *ultra vires* and void *ab initio*. *See Scarborough Grp. v. Worley*, 290 Ga. 234, 236 (2011) (city's annexation in violation of statutory authority is *ultra vires* and void *ab initio*).

4. The Trial Court Committed Reversible Error in Failing to Enforce the Cain Deed's Reverter Interest Which Had Already Been Conclusively Established by The Same Court in The Prior Twitty Park Litigation.

The trial court erred when it concluded that it was not bound by the final judgment in the *Twitty Park* Litigation that validated the Cain Deed's reverter clause and held that the public trust doctrine barred the transfer of Twitty Park to a private

[12] Neither the Complaint nor the exhibits attached to the Complaint make reference to the costs associated with the relief Plaintiffs are seeking. R-Vol. 2 at 16-333; R-Vol. 3(1) at 334-381. Moreover, the logic and legal argument do not hold up even if there was a record establishing "great exposure of additional expense" (there is no such record). Any expense would necessarily need to be balanced against the denial of the public's continued use. The record does not address the balancing of interests, whether taxes and tolls could be raised, or the value of the public's continued use of the Causeway and Roads.

party. As previously mentioned, whereas the present case involves the first tract conveyed by the Cain Deed for use as a public road, the *Twitty Park* Litigation involved the second tract conveyed by the Cain Deed for use as a public park. *Supra*, 9-10. The relevant language deed language is as follows:

> The first tract of land is conveyed to the second party for the purpose of a right of way for a road from St. Simons to Long Island [n/k/a Sea Island]; and the second tract of land is conveyed for the purpose of a park for the use and benefit of the public.
>
> It is understood and agreed that if the lands should ever cease to be used for such purposes then title to the same shall revert to the first party.

R-Vol. 2 at 217.

Fraser and her *Twitty Park* co-plaintiff The GEC are common owners of these reverter interests, having acquired them from Cain's descendants. *Id.* at 37-39, ¶¶ 73-88. In defiance of the Cain Deed's restrictions, the County transferred Twitty Park to SIA Propco II, LLC, one of the Sea Island Entities, in 1982. R-Vol. 2 at 51, ¶145; R-Vol. 3(1) at 365. In 2016, Fraser and the GEC filed a declaratory judgment action against the County and SIA Propco II, LLC claiming that the transfer of Twitty Park violated the Cain Deed's restriction and the public trust doctrine. R-Vol. 3(1) at 364-376.

Glynn County Superior Judge Stephen D. Kelley framed the issue in *Twitty Park* as follows:

> At the heart of this case is a single question of law—did the County have the authority to convey Twitty Park—a park accepted by the

> County with a right of reverter to T.L. Cain, dedicated to public use, and which had not abandoned [sic] by the public—to [the Sea Island Company] in 1982?

R-Vol. 3(1) at 366 (footnote omitted); R-Vol. 2 at 51, ¶145. Judge Kelley ruled that the transfer to SIA Propco II, LLC was *ultra vires* and void under the public trust doctrine. R-Vol. 3(1) at 373. *See also* R-Vol. 2 at 51, ¶145. This common law doctrine severely restricts the alienation of dedicated public lands, preventing political subdivision like counties from disposing of such lands unless the public has abandoned them, or they have become unsuitable or inadequate for the purposes for which they were dedicated. *Tuten v. City of Brunswick*, 262 Ga. 399, 402(n.3) (1992) (citing *Norton v. City of Gainesville*, 211 Ga. 387, 390 (1955)). In applying this doctrine, Judge Kelly found that in

> [r]eceiving title to Twitty Park in trust—as fee simple determinable with grantor retaining a right of entry—for public use as a park, however, the County could not convey the property without triggering the grantor's reversionary interest.

R-Vol. 3(1) at 631. *See also id.,* at 636. It strains credulity to suggest that Fraser has a reverter interest in Twitty Park but not in the Causeway Segment when both parcels were transferred through the same deed and were subject to the same restriction requiring the parcels to revert to the grantor if they no longer serve a public purpose.

For *res judicata* to apply, three requirements must be met: (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction. *Starship II*, 319 Ga.,

at 303 (citing *Coen v. CDC Software Corp.*, 304 Ga. 105, 105 (2018)) (internal punctuation omitted). Despite acknowledging that the grant of the Causeway Segment and Twitty Park were within the same deed, and that Fraser and the County were also parties to the *Twitty Park* Litigation, the trial court concluded that *Twitty Park* had no preclusive effect because it involved a different issue:

> [Judge Kelley in *Twitty Park*] then moves through analysis of absence of authority as to a public park—an analysis that does not address the type of legislative authority granted counties regarding public roadways.[13]

R-Vol. 3(2) at 963.

This is clear error. The two cases both seek declaratory judgments under the same cause of action, the same restriction within the Cain Deed, and the same parties. Also, the trial court's misplaced reliance on "legislative authority granted to counties regarding public roadways" that supposedly authorized transfer of the Causeway Segment only supports Fraser's alternative claim under the Cain Deed's reverter interest that was recognized and enforced in the *Twitty Park* Litigation. *Id.* If the County's transfer of the Causeway Segment was, in fact, legal as the trial court

[13] The trial court never explained this vague reference to legislation that could have authorized the County's transfer of public roads to Sea Island Company. *See* R-Vol. 3(2) at 955-65. Plaintiffs' well-plead allegations established that the Causeway Segment was still serving a substantial public purpose. R-Vol. 2 at 59-61, ¶¶ 175-181; 313. The trial court was bound to accept this fact as true when considering the County's motion to dismiss and this "truth" absolutely forecloses the County's legal authority to abandon and transfer the Causeway Segment.

implied, then the Causeway Segment was no longer "for the use and benefit of the public," causing it to revert to Fraser pursuant to the Cain Deed. R-Vol. 2 at 217.

The trial court drew a second distinction between the two cases that is even less compelling: "The Twitty Park case focuses on preventing prospective actions related to the Twitty Park property; the instant case focuses on reversing actions from transactions taking place almost two decades ago." R-Vol. 3(2) at 964. First, the plaintiffs in the *Twitty Park* Litigation also sought to undo a past transfer of land from the County to a private entity. *See* R-Vol. 3(1) at 365. Also, the only prospective relief sought by the plaintiffs was their request for an order prohibiting the County from transferring or abandoning Twitty Park which would only be possible if the plaintiffs succeeded in establishing the County's continued ownership of this park. *Id. See also* R-Vol. 2 at 51, ¶ 154. Furthermore, as previously developed, Plaintiffs in this case are focused on preventing prospective actions. Their Complaint is replete with allegations about future actions and prosecutions that can only be resolved by the Court finding that the County—and not the Sea Island Entities—owns the Roads in question.

The trial court erred in failing to give the *Twitty Park* Litigation *res judicata* effect as to the validity and enforceability of the Cain Deed's reverter clause and, by implication, the public trust doctrine. In light of its findings, the trial court should

have ruled that the Cain Deed's reverter clause rendered the Causeway Segment's transfer to the Sea Island Entities *ultra vires* and void *ab initio*.

5. The Trial Court Erred in Dismissing The Complaint With Prejudice on Subject Matter Jurisdiction Grounds as This Is Not a Ruling on The Merits.

The trial court erred when it dismissed the Complaint with prejudice. R-Vol. 3(2) at 965. Under § 9-11-41(b)(2),

> [a]ny other dismissal under this subsection and any dismissal not provided for in this Code section, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, does operate as an adjudication upon the merits unless the court in its order for dismissal specifies otherwise.

This stature requires that any dismissal for lack of subject matter jurisdiction must specify that it is without prejudice. *See Pinnacle Benning LLC v. Clark Realty Cap., LLC*, 314 Ga. App. 609, 618 (2012), *disapproved of on other grounds by Song v. eGPS Sols. I, Inc.*, 371 Ga. App. 357 (2024) ("We must remand to the trial court for the entry of an order specifying that dismissal of this count be without prejudice because dismissal of a lawsuit for lack of jurisdiction requires such."); *Strong v. JWM Holdings, LLC*, 341 Ga. App. 309, 315 (2017) ("When a trial court is without jurisdiction over a declaratory judgment claim because of a lack of justiciability, the proper disposition is for the trial court to dismiss the claim without prejudice.").

Under Georgia law, a motion to dismiss under sovereign immunity grounds is brought under O.C.G.A. § 9-11-12(b)(1) for lack of subject matter jurisdiction. *See*

Georgia Dep't of Pub. Safety v. Just., 907 S.E.2d 817, 821 (S23G1170) (Ga. 2024). The trial court erred, therefore, when it dismissed this action with prejudice after concluding Plaintiffs failed to establish waiver of sovereign immunity. *See* O.C.G.A. § 9-11-41(b)(2).

CONCLUSION

The trial court erred in ruling that Plaintiffs failed to prove justiciability and waiver of the County's sovereign immunity. Plaintiffs' allegations of ongoing infringements and potential future prosecutions satisfy the requirements of justiciability and those in Paragraph V requiring that the requested relief relate to past, current, or prospective acts that occurred on or after January 1, 2021.

RULE 24 CERTIFICATION

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

Respectfully submitted this 4th day of February 2024.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that I have, this day, served a true and correct copy of the foregoing **Brief of Appellants Jane Fraser and Jeff Kilgore** upon all parties by mailing a copy of the same to the following:

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I further certify that this brief has been prepared in 14-point Times New Roman in accordance with this Court's Rule 2(c)(3). This submission does not exceed the word count limit imposed by Rule 24. According to the word processing software used to prepare this submission, it contains 8400 words or less, excluding the items identified in Rule 24(f)(3).

Respectfully submitted, this 4th day of February 2025.

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