THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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S.C. SUPREME COURT

Case No.: 2020-CP-10-00209
Appellate Case No.: 2020-001030

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

Maybank 2754, LLC, ... Appellant,

v.

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

JOINT PETITION FOR WRIT OF CERTIORARI BY RESPONDENTS EUGENE ZURLO, INDIVIDUALLY AND AS CO-TRUSTEE OF THE EUGENE J. ZURLO LIVING TRUST DATED DECEMBER 11, 1997; 1776, LLC; BEACH FENWICK, LLC; THE BEACH COMPANY [sic]; AND PENNY CREEK ASSOCIATES, LLC

Respectfully submitted,

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October 17, 2024
Charleston, South Carolina

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STATEMENT OF THE CASE

A. Factual Background

On or about January 18, 1999, Penny Creek Associates, LLC ("**Penny Creek**") was formed as a South Carolina limited liability company. Upon formation, Michel Laplante ("Laplante") and certain members of the Laplante family[1] ("**Laplante Family**") were collectively fifty percent (50%) members of Penny Creek. The Eugene J. Zurlo Living Trust Dated December 11, 1997 ("**Zurlo Trust**") was the other fifty percent (50%) member. Although the overall ownership was split equally between the Zurlo Trust and the Laplante Family, the Third Amended and Restated Operating Agreement of Penny Creek established Laplante and the Zurlo Trust as the sole voting members of Penny Creek.

In March 1999, Penny Creek purchased certain property located along Maybank Highway in Johns Island, South Carolina ("**Original Tract**"). In August 2000, Penny Creek executed and delivered a note, in favor of First Union National Bank, secured by a mortgage upon the Original Tract.[2] In April 2006, Penny Creek executed and delivered a promissory note in favor of Wachovia Bank, National Association, also secured by a mortgage on the Original Tract. These notes were ultimately consolidated and the respective mortgages modified. Certain portions of the Original Tract were released from the mortgages, leaving others, including the one at issue in this action.

On April 19, 2006, Maybank 2754, LLC ("**Appellant**") was formed as a South Carolina limited liability company to acquire a small parcel of property (the "**Maybank Tract**") adjacent

[1] The Laplante Family, as referenced herein, consists of John H. Laplante (now deceased), Peter F. Laplante and Marianne Laplante-Scarlata in addition to Michel Laplante.

[2] Wells Fargo Bank, N.A. is the successor by merger to Wachovia Bank, National Association that is the successor by merger to First Union and was, at all times relevant to this action, the owner and holder of both notes executed and delivered by Penny Creek.

to the Original Tract. Until October 2013, Penny Creek was the sole member of Appellant. On or about October 7, 2013, a Resolution of the Sole Shareholder of Penny Creek ("**Resolution**")[3] was executed by Laplante and purportedly executed by "Gene Zurlo" on behalf of the Zurlo Trust.[4] The Resolution references a Contract for Assignment of Interest dated October 7, 2013, pursuant to which Penny Creek agreed to sell its entire membership interest in Appellant to the Laplante Family, for cited consideration. The Resolution also states, inter alia:

> WHEREAS, as a condition of closing, [Penny Creek] has agreed to grant, transfer, sell and convey to [Laplante Family], their successors and assigns, an access easement for pedestrian and vehicular ingress egress and access to, from and over that portion of the lands of [Penny Creek] known as "Residual Tract B-2-2" … ("30' Private R/W), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

This Resolution and the Contract for Assignment referenced therein are the sole documents upon which Appellant relies for its claim of an easement upon property now owned by Beach Fenwick, LLC ("**Beach Fenwick**"). Appellant admits, in its Complaint, that only upon completion of Pitch Fork Road would the parties agree as to the location and condition of the access easement and only then would an easement agreement be executed and recorded. Appellant also admits that Pitch Fork Road was not completed prior to Beach Fenwick's acquisition, the Resolution was never recorded, there is no agreement as to the location of any easement, nor has any other interest allegedly held by Appellant upon Beach Fenwick's property ever been recorded.

In December 2013, Eugene J. Zurlo ("**Zurlo**"), as trustee of the Zurlo Trust, individually

[3] The use of the term Resolution for the purposes of this Petition includes all ancillary documents, including the Assignment and Assignment Contract.

[4] "Gene Zurlo" was not a trustee of the Zurlo Trust. Rather, Eugene J. Zurlo and Charlotte Zurlo were and remain Co-Trustees.

and derivatively on behalf of Penny Creek, commenced a derivative action against Penny Creek and others, including Laplante, seeking a judicial dissolution of Penny Creek. That case was resolved in February 2016 by way of a settlement made a part of the record ("**Dissolution Action**"). The settlement resulted in, among other things, Penny Creek executing and delivering to the Zurlo Trust a promissory note in the amount of $3,250,000, which note was secured by a mortgage on the Original Tract. The mortgages[5] held by Wells Fargo were unaffected. Ultimately, the note and the mortgage delivered by Penny Creek in favor of the Zurlo Trust were assigned to 1776, LLC ("**1776**").

On August 14, 2014, Wells Fargo, as mortgagee, initiated a foreclosure action upon the Original Tract, naming Penny Creek, Laplante, and others, with actual, recorded interests in the Original Tract, as defendants ("**Foreclosure Action**"). Importantly, Laplante actively participated for years in this Foreclosure Action and throughout essentially its entire duration, from August 14, 2014 through a hearing that occurred on June 19, 2017, during which he was severed only due to the deficiency being waived. This hearing occurred a mere four days prior to the entry of the Master-In-Equity's Order and Judgment of Foreclosure and Sale on June 23, 2017 ("**Foreclosure Order**"). The Original Tract was subject to a Master's sale on September 7, 2017, pursuant to which 1776 credit bid its lien upon the Original Tract and became the title holder by way of Master's Deed dated August 29, 2017 and recorded in the office of the Register of Deeds for Charleston County at Book 0662, Page 915. Appellant's alleged easement is not expressly mentioned in the Foreclosure Action, nor in the deed to 1776. 1776 conveyed a portion of the

[5] The mortgages securing the indebtedness to Wells Fargo's predecessors, then ultimately Wells Fargo, were modified, see Modification of Mortgages dated October 1, 2102 and recorded in the office of the Register of Deeds for Charleston County on October 15, 2012, in Book 0284, Page 614.

Original Tract to Beach Fenwick by way of deed dated December 12, 2019 and recorded in the office of the Register of Deeds for Charleston County at Book 0846, Page 268 (the "**Subject Property**"). Here again, there was no language evidencing any easement held by Appellant.

B. Procedural Background

Appellant initiated this action on January 13, 2020. On February 17, 2020, Beach Fenwick and The Beach Company [*sic*] ("**The Beach Co.**") (collectively, the "**Beach Respondents**"), filed a Motion to Dismiss, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, seeking to dismiss Appellant's claims. On the same date, the Beach Respondents also filed their Motion for Order of Reference to Master-In-Equity, pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, as well as the Foreclosure Order. Similar motions followed on behalf of 1776 and Zurlo, individually, as well as the Zurlo Trust. Appellant filed a Motion for Temporary Injunction on March 11, 2020.

On June 16, 2020 and again on June 25, 2020, the Honorable Bentley D. Price, held hearings on the outstanding motions. Following the two hearings, the Circuit Court issued its Form 4 Order, on June 30, 2020, with the following statement:

> [Appellant's] Motion/Temporary Injunction is denied. [The Beach Respondents'] Motion to Dismiss and Refer to the Master, along with all outstanding motions to refer to the master, are granted.

Thereafter, on July 1, 2020, Appellant filed a Motion to Reconsider pursuant to Rule 59 of the South Carolina Rules of Civil Procedure. The Circuit Court entered its Order denying Appellant's Motion for Temporary Restraining Order and Appellant's Motion to Reconsider on July 13, 2020. The July 13 Order also referred the entire case and all pending motions to the Master-In-Equity, pursuant to and consistent with Rule 53 of the South Carolina Rules of Civil Procedure, finding all pre-trial matters, including the parties' motions, shall be referred to the Master-In-Equity, with finality, with appeal directly to the South Carolina Court of Appeals or the

South Carolina Supreme Court. The July 13 Order likewise corrected a scrivener's error by the Circuit Court, noting the Motion to Dismiss filed on behalf of the Beach Respondents was not argued and not considered by the Circuit Court, but was to be transferred, with other motions, to the Master-In-Equity.

On July 15, 2020, Appellant filed a Notice of Appeal, indicating its appeal from the Circuit Court's Form 4 Order entered on June 30, 2020 and from the Circuit Court's Order of July 13, 2020 indicating both Orders refer the entire case to the Master-In-Equity, and thus, are immediately appealable because they affect the mode of trial. Respondents filed their Motion to Dismiss Appeal and Memorandum in Support Thereof with the Court of Appeals on or about September 15, 2020. In response thereto, the Court of Appeals issued its Order, filed November 12, 2020, denying Respondents' Motion to Dismiss Appeal.

By letter dated July 24, 2020, counsel for the Beach Respondents requested a status conference with the Honorable Mikell R. Scarborough, Master-In-Equity for Charleston County, South Carolina. Following a brief procedural history, counsel requested a status conference to allow the Master and the parties to determine a path for moving forward, in consideration of the pending appeal. In response to this letter, counsel for Appellant advised Judge Scarborough of Appellant's position that a status conference before the Master-In-Equity would be improper, in consideration of the pending appeal. Citing Rule 205 of the South Carolina Appellate Court Rules and the Circuit Court's Order of July 13, 2020, counsel for the Beach Respondents responded to Appellant's position against the opportunity for a status conference before the Master-In-Equity, agreeing with Appellant's position that should the Master-In-Equity determine the matter should be in Circuit Court or there were no matters not affected by the appeal, the parties would proceed accordingly.

Following a status conference, the Master-In-Equity issued a Form 4 Order, filed on August 18, 2020, which concluded, in part: "[t]he matter should be returned to the circuit court for disposition under Rule 38 and 53(b) and that this ruling would moot Plaintiff's appeal." Thereafter, on August 19, 2020, the Beach Respondents filed their Motion for Summary Judgment. The Beach Respondents' Memorandum of Law in Support of Motion for Summary Judgment was filed with the Circuit Court on September 18, 2020. The Beach Respondents' Motion for Summary Judgment, along with dispositive motions on behalf of the other respondents, were heard before The Honorable Bentley D. Price on September 24, 2020. The Circuit Court entered a Form 4 Order on October 7, 2020, granting summary judgment to the Zurlo Entities and to The Beach Co. By that Order, the Circuit Court also denied Plaintiff's Motion to Amend Complaint. By a Form 4 Order entered October 8, 2020, the Circuit Court supplemented the Form 4 Order entered on October 7, 2020, granting 1776's Motion for Summary Judgment and clarifying that the Motion for Summary Judgment on behalf of Beach Fenwick was also granted. The Circuit Court followed with its Order Granting All Defendants Summary Judgment, entered on October 12, 2020. Appellant filed its Motion to Alter or Amend Order Entered on October 7, 2020, Order Entered on October 8, 2020, and Order Granting All Defendants Summary Judgment; Motion to Amend and/or Vacate Findings of Fact; Request for Ruling on Issues Raised and Request for Expedited Hearing on October 16, 2020. The Beach Respondents, Zurlo and the Zurlo Trust, and 1776 filed Memoranda in Opposition to Appellant's Motion to Alter or Amend.

The Circuit Court entered its Form 4 Order denying Appellant's Motion to Alter or Amend Order dated October 7, 2020 on November 6, 2020. On November 9, 2020 Appellant filed its Notice of Appeal from the Circuit Court's Form 4 Order filed October 7, 2020; the Circuit Court's Form 4 Order filed on October 8, 2020; the Circuit Court's Order Granting All Defendants

Summary Judgment entered October 12, 2020; and the Circuit Court's Form 4 Order filed November 6, 2020. Following briefing, the Court of Appeals issued its ruling on August 7, 2024, finding the Circuit Court erred in referring the matter to the Master-In-Equity, reversing the Circuit Court's grant of summary judgment, and reversing the Circuit Court's denial of Appellant's Motion to Amend Its Complaint. On August 22, 2024, the Beach Respondents filed their Joint Petition for Rehearing alongside Zurlo, 1776, and Penny Creek. The same day, Respondent Seamon, Whiteside & Associates, Inc., also filed a Petition for Rehearing. On September 5, 2024, Appellant filed a Return to the petitions for rehearing. The Court of Appeals denied the petitions for rehearing on September 17, 2024.

LEGAL STANDARD

Upon judicial discretion, a writ of certiorari should be granted "where there are special and important reasons." Rule 242(b), SCACR. "[W]hile neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general," the South Carolina Appellate Court Rules sets forth "the character of reasons which will be considered" on a writ of certiorari, which includes "[w]here there are novel questions of law," and "[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." Rule 242(b), SCACR.

ARGUMENT

The Court of Appeals' opinion threatens to upend fundamental aspects of property and contract law and certiorari should be granted. On many issues, the Court of Appeals' decision is in direct conflict with prior decisions of the Supreme Court. Further, there are other issues presented where there is not necessarily any binding South Carolina precedent on point, meaning novel questions of law are presented in this petition. Lastly, the Court of Appeals' decision is sufficiently egregious and fundamental as to warrant correction on certiorari as well. *See*

Kaklamanos v. Allstate Ins. Co., 796 So. 2d 555, 557–58 (Fla. Dist. Ct. App. 2001) (granting certiorari when the lower court's purely legal error was "sufficiently egregious or fundamental") (quoting *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 531 (Fla. 1995)), *approved*, 843 So. 2d 885 (Fla. 2003). For the reasons set forth more fully herein, this Court should grant this Petition and reverse the Court of Appeals' decision.

A. The Court of Appeals' Decision Conflicts with Supreme Court Precedent Regarding the Sufficiency of Location Descriptions in Easements in order to Create a Valid and Enforceable Easement.

The Court of Appeals held a genuine issue of material fact exists as to whether the Resolution creates an easement. However, the Court of Appeals overlooked why the Resolution fails to create an easement as a matter of law, and in doing so, its decision conflicts with a prior decision of the Supreme Court. The Court of Appeals implicitly held identifying the location of the purported easement in the Resolution was not necessary for its creation and validity. This holding egregiously errs as a matter of law on a fundamental aspect of property law. Because the description in the Resolution does not sufficiently identify the location (nor condition) of the easement, the language is far too vague to constitute an enforceable easement.

The Court of Appeals erred in relying upon isolated statements within two cases and failing to analyze and compare the easement language in those cases to the language in the Resolution. The Court of Appeals first cited to *Smith v. Commissioners of Public Works of City of Charleston*, which contained the following express easement:

> Kittredge and all future owners of Dean Hall Plantation and Cypress Gardens shall have the right, and the same ***is hereby granted*** to them, of ingress, egress and regress ***to the banks of and across the canal about to be constructed, leading from the Cooper River to Back River, at any point contiguous to the lands being conveyed*** by Kittredge to the Authority.

312 S.C. 460, 463, 441 S.E.2d 331, 333 (Ct. App. 1994) (emphasis added). The Court of Appeals

next cited to this Court's decision in *Douglas v. Medical Investors, Inc.*, which contained the following express easement:

> The grantor herein reserves unto himself, his heirs and assigns, an easement or right-of-way over and across a strip of land, eighteen feet in width at all points, ***lying along the northern side of the lot above described*** and ***adjacent to the above mentioned property*** now or formerly of Whitworth and Wyatt. Said strip is reserved for use by the grantor, his heirs and assigns as a driveway ***leading to the grantor's adjacent property immediately to the west of the lot above described*** . . . .

256 S.C. 440, 444, 182 S.E.2d 720, 721–22 (1971) (emphasis added). Both of these easement descriptions were held enforceable, but the Court of Appeals failed to compare either of these descriptions with the one contained within the Resolution.

Instead, in cursory fashion, the Court of Appeals cited the *Smith* opinion's characterization of that easement as being "unlocated," but valid, for the proposition that the location of a purported easement was not necessary for its creation and validity. *Smith* at 468, 441 S.E.2d at 336. However, rather than supporting this proposition, both *Smith* and *Douglas* demonstrate the location of an easement—at least "in general terms"—***is*** an essential element for its creation and validity. *See id.* After all, according to *Smith*, an "easement in general terms" must still set forth sufficient details to establish "the use contemplated." *See id.* (citing *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545 (1944) (stating an easement in general terms is limited to a use which is reasonably necessary and imposes as little burden as possible for the use contemplated)).

A side-by-side comparison of the easements in *Smith* and *Douglas* with the purported one contained in this matter reveals the easements in *Smith* and *Douglas* contain far more location information than the one in the Resolution. In both *Smith* and *Douglas*, the relative position ***and*** direction of the easement—i.e. the location—were expressly stated. In contrast, neither of the two sections in the Resolution that reference an easement identify either the relative position of the

easement or the direction. The only features identified by the Resolution are (1) the purpose of the easement is for access; and (2) a condition precedent for the creation of the easement, i.e. the completion of Pitch Fork Road. Neither of these two characteristics—the general purpose nor the condition precedent—sufficiently indicate the location of the easement on the Subject Property.[6] Further, unlike the express grant in *Smith* and the express reservation in *Douglas,* the Resolution states either that Penny Creek "shall grant" or "has agreed to grant" an easement at a later time. Indeed, the grant in *Smith* was "hereby" granted and the grant in *Douglas* was "herein" reserved, which demonstrates the grants occurred via and at the time of the respective agreements, whereas the Resolution language here used the term "shall" and phrase "has agreed to," indicating the grant would be occurring in the future.

Other cases are in accord. The Court of Appeals has held that while it "is not essential to the validity of a grant of an easement that it be described by metes and bounds or by figures giving definite dimensions of the easement," *Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn*, 348 S.C. 58, 72, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting 28A C.J.S. *Easements* § 54, at 233 (1996)), the "description of an easement . . . is sufficient when it contains language ***that acts as a guide to the location*** of the easement on the land such that the easement is '***capable of being rendered to a certainty [by reference] to something extrinsic*** . . . to which it refer[s],'" *id.* (emphasis added) (quoting *Allen v. Duvall*, 311 N.C. 245, 316 S.E.2d 267, 270 (1984)). In *Rogers v. River Hills Limited Partnership*, the South Carolina federal district court cited *Binkley* and held that an "easement must be sufficiently defined to indicate the location of the easement on the property." No. 4:09-CV-01540-JMC, 2011 WL 4808207, at *4 (D.S.C. Oct. 7, 2011), *aff'd*,

[6] Although the Resolution mentions thirty feet, it does ***not*** indicate whether that distance is the width or the length. Regardless, even if this distance can be construed as a third feature of the easement, it is insufficient in identifying the location of the easement.

514 F. App'x 276 (4th Cir. 2013). In finding the purported easement invalid, the court reasoned:

> In describing the easement, the [purported easement document] simply provide[d]: "This right of ingress and egress shall be large enough to meet the requirements of the Horry County Planning and Zoning Commission to enable said parcel to be made a part of River Hills Subdivision." Nothing in the [purported easement document] specifie[d] the location of the easement or even how one is to determine the location of the easement; the document only indicates the size of the easement. These descriptions are far too vague to constitute an enforceable conveyance.

Id. The purported easement in the Resolution is likewise invalid. The Resolution's language only identified two characteristics—the general purpose and the condition precedent—and failed to specify how one is to determine the relative position and direction of the purported easement. Even the Court of Appeals acknowledged "the language of the Resolution ***leaves open the location and condition*** of the right of way, making it unclear whether 'ingress and egress' were meant to include a terminus to be located on [Appellant's] property." Indeed, not only is the terminus point unspecified, but it is not even clear a terminus would even exist on the Maybank Tract and there is no reference to any access to Pitch Fork Road. After all, there is no specificity to the access purportedly granted and the reference to Pitch Fork Road is solely focused on its completion as a condition precedent, rather than access to it. Therefore, the description fails to reference the purported easement's location in relation to any extrinsic point. Additionally, as set forth more fully herein, the purported easement, to the extent it grants anything, is to the Laplante Family, who was not and is not the owner of the allegedly dominant estate.

In sum, the Resolution's description is analogous to the description in *Rogers*, not the descriptions in *Smith* and *Douglas*. Because the description in the Resolution does not sufficiently identify the location of the purported easement, the language is far too vague to constitute an enforceable easement. This Court should grant certiorari here, because the Court of Appeals' decision conflicts with the *Smith* decision, and more importantly, the *Douglas* decision as a

Supreme Court decision, regarding what constitutes an enforceable easement description. To the extent there is no direct conflict with *Smith* and *Douglas*, this Court should nevertheless grant certiorari as the Court of Appeals' decision deals with a novel question of law that has never been expressly addressed by this Court, i.e. what language regarding location and condition of an easement is sufficient to constitute an enforceable easement. Further, the Court of Appeals' holding threatens to fundamentally upend property law and must be corrected in order to avoid setting bad precedent.

B. The Court of Appeals' Upholding of an Unenforceable Agreement to Agree Due to the Easement Location Being Intentionally Left To-Be-Determined Directly Conflicts with this Court's Precedent.

This Court has long-established precedent that "[p]rovisions which are essentially agreements to agree in the future have no legal effect." *N. Am. Rescue Prod., Inc. v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015); *see also Ellis v. Taylor*, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994) ("A contract provision leaving material terms open for future agreement is void for indefiniteness."). As set forth above, the purported easement's location was insufficiently identified, but moreover, the lack of identification was ***intentional***. The Court of Appeals' finding that the Resolution created a valid and enforceable easement when its location was left to-be-determined directly conflicts with this Court's established precedent that holds agreements to agree are invalid. In other words, the Court of Appeals' holding threatens a fundamental aspect of contract law.

The Resolution's language is clearly an agreement to agree for a couple of reasons. First, the Resolution's plain language establishes a condition precedent that must occur prior to the location being identified: "the location and condition of [the purported easement] shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road." The absence of sufficient location information ***and*** the condition precedent demonstrate how the Resolution is,

with respect to the purported easement, merely an unenforceable agreement to agree and in violation of the Statute of Frauds. Sufficient location information is an essential term of an easement, as set forth above, and, by leaving an essential term to be determined later, there can be no agreement. *See also BCD LLC v. BMW Mfg. Co., LLC*, 360 F. App'x 428, 435 (4th Cir. 2010) ("The parties merely agreed to enter into negotiations to reach an agreement, but subsequently failed to reach an actual agreement on essential terms pertaining to land allocations, divisions of parcels, and restrictive covenants for the property.") (citing *Trident Constr. Co., Inc. v. Austin Co.*, 272 F.Supp.2d 566, 575 (D.S.C. 2003)). Further, the plain language demonstrates the condition precedent was to the ***formation*** of the contract rather than the ***performance*** of the contract, because an agreement still needed to be negotiated on the location and condition of the of the easement; in other words, the contemplated specific performance, e.g. recordation of the easement, could not immediately occur, because the location and condition still needed to be agreed upon. *See, e.g.*, *M W., Inc. v. Oak Park Mall, L.L.C.*, 44 Kan. App. 2d 35, 46–49, 234 P.3d 833, 842–44 (2010); *cf. Champion v. Whaley*, 280 S.C. 116, 123, 311 S.E.2d 404, 408 (Ct. App. 1984). Because there was ***intentionally*** no meeting of the minds as to the essential and material terms at the time of the Resolution, the purported easement merely amounts to an unenforceable agreement to agree.

Second, even looking past the plain language, there is no genuine issue of fact; Laplante testified under oath that they "did not want to encumber the sale" and that if they had "located the exact alignment [they] would have encumbered the sale of that [P]roperty and [he] would not have met [his] fiduciary duties to Penny Creek by subdividing the [P]roperty in that fashion." (R. at 1654.) Thus, Laplante himself, as the manager of Penny Creek at the time of the Resolution, admits the Subject Property was ***intentionally*** not encumbered by an easement via the Resolution. Again, because the stated intent was to encumber the Subject Property later, the Resolution merely

amounts to an unenforceable agreement to agree. The Court of Appeals' overlook of Laplante's admission here is an egregious error requiring the grant of certiorari. But most importantly, the Court of Appeals' refusal to follow this Court's established precedent on agreements to agree upends fundamental contract law and should be corrected following the grant of certiorari.

C. The Court of Appeals' Finding that the Foreclosure Order Did Not Extinguish the Purported Easement Will Result in Unnecessary Uncertainty in Future Foreclosures in South Carolina, Which Can Be Avoided by the Grant of Certiorari in this Case.

Even assuming *arguendo* the Resolution created a valid easement, the foreclosure extinguished it. The Court of Appeals held Appellant cannot be bound to the foreclosure and Foreclosure Order, because the Master-In-Equity did not have personal jurisdiction over Appellant and did not provide Appellant with proper notice. The Court of Appeals' holding not only errs as a matter of law, but turns fundamental property law on its head. There is ample authority elsewhere on this issue, but this Court should grant certiorari, because research reveals this particular issue is a novel one in South Carolina. Further, to the extent limited South Carolina authority exists, the Court of Appeals misapplied it, also necessitating correction on certiorari.

Even if the alleged easement is valid, because it was subsequent to the mortgage and was never subordinated, the easement was extinguished by the foreclosure and Foreclosure Order. Moreover, because neither the Resolution nor any valid instrument was of record, the lack of notice to Appellant is insignificant.[7] The following authority demonstrates notice is not a requirement for this extinguishment nor was Appellant required to be a party to the foreclosure action when the purported easement was never recorded and could have been.

[7] The Court of Appeals' Order inexplicably suggests the Foreclosure Order was defective as to the interest in question because of a lack of notice to Appellant, but at no point does the Court of Appeals indicate how the lender or any mortgagee would be in a position to provide direct notice to any holder of an unrecorded interest in property. This is, after all, the very reason for the recording statute.

South Carolina statutory law mandates "[t]he recordation of any contract in the nature of a subordination, waiver or extension of any lien on real property, created by law or by agreement of the parties, ***shall*** be upon the record of the recorded mortgage or other written instrument . . . ." S.C. Code Ann. § 30-7-20 (1976) (emphasis added). This requirement exists because the "purpose of the foreclosure is to fully determine the entire controversy . . . ." *Gen. Plywood Corp. v. Richard Jones, Inc.*, 216 S.C. 322, 327, 57 S.E.2d 636, 638 (1950); *see also* Restatement (Third) of Property (Mortgages) § 7.1 (1997) (stating "the purpose of foreclosure is to give the foreclosure purchaser the same title that mortgagor had when the foreclosed mortgage was executed"). In other words, the effect of a foreclosure is to address all encumbrances, such as easements, that are subsequent in time to the original mortgage being foreclosed. In the matter at hand, the Court of Appeals found an easement by grant does not have to be recorded to be valid, citing *Frierson v. Watson*, 371 S.C. 60, 68, 636 S.E.2d 872, 876 (Ct. App. 2006). The foregoing does ***not***, however, address the threshold issue in this case. The question is not whether an easement must be recorded to be valid, the question is whether the failure to record a grant of an easement somehow insulates it from the subsequent foreclosure of a superior mortgage. While some question may exist in this matter regarding whether Beach Fenwick had sufficient notice of the alleged easement at the time of the acquisition, the arguments set forth herein remain true even if the Court assumes, *arguendo*, that Beach Fenwick did have sufficient notice.

The Corpus Juris Secundum memorializes a long-established principle of property law: "As a general rule, a complete and valid foreclosure discharges ***all*** rights, claims, mortgages, or other encumbrances against the mortgaged land acquired ***subsequent*** to that date, ***unless the rights under the mortgage are expressly subordinated to such subsequent rights***." 59 C.J.S. *Mortgages* § 732 (2024) (emphasis added) (compiling cases); *see also Ex parte De Loach*, 159 S.C. 345, 157

S.E. 1, 5 (1931) (Cothran, J., concurring) (setting forth the principle that "[i]f the senior mortgage shall have been executed to secure payment of the purchase money of the property mortgaged, a sale under foreclosure of the senior mortgage and a purchase of the property at such sale by the senior mortgagee or a third person will divest the lien of a junior lienee whether by mortgage or judgment and will convey to the purchaser full title, free from incumbrances, whether the junior lienee may have been made a party to the proceedings or not").

Nationwide authority supports this fundamental principle of property law. For example, in *In re Foreclosure of Lien By Ridgeloch Homeowners Association, Inc. Against McNeill*, the North Carolina appellate court found "[l]ong settled case law holds, 'The sale [under a mortgage or deed of trust] cuts out and extinguishes all liens, encumbrances and junior mortgages executed subsequent to the mortgage containing the power.'" 182 N.C. App. 464, 469, 642 S.E.2d 532, 536 (N.C. App. 2007) (quoting *Dunn v. Oettinger Bros.*, 148 N.C. 276, 61 S.E. 679, 681 (1908)). The court further explained that "[o]rdinarily, all encumbrances and liens which the mortgagor or trustor imposed on the property subsequent to the execution and recording of the senior mortgage or deed of trust will be extinguished by sale under foreclosure of the senior instrument." *Id.* (quoting *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 175, 158 S.E.2d 7, 10 (1967)). The authors of American Jurisprudence offer further support, specifically in the context of easement encumbrances: "Generally, an easement is lost by the foreclosure of a mortgage or trust deed on the servient tenement where such mortgage or trust deed was executed prior to the creation of the easement." 25 Am. Jur. 2d *Easements and Licenses* § 91 (2024) (citing *Boyer v. Whiddon*, 264 Ga. App. 137, 589 S.E.2d 709 (2003); *Kling v. Ghilarducci*, 3 Ill. 2d 454, 121 N.E.2d 752 (1954);

Smith v. Harris, 181 Kan. 237, 311 P.2d 325 (1957)).[8]

A treatise cited by the Court of Appeals for a separate proposition provides that "easements created after the mortgage attaches to the servient estate are cut off by a judicial foreclosure sale if the easement holder is joined as a party defendant in the foreclosure proceeding." Jon W. Bruce, et al., Mortgage Foreclosure Sale of Servient Estate, *The Law of Easements & Licenses in Land* § 10:41 (2024) (compiling cases). The cases cited by this treatise clarify the parameters of a foreclosure when a purported easement holder is not joined as a party in the foreclosure proceeding. However, even in those situations, when the easement could have or should have been recorded and was not, the cases still recognize that foreclosure extinguishes the easement despite the holder of such easement not being a party to the foreclosure action. For example, in *Camp Clearwater, Inc. v. Plock*, the New Jersey state court held "[i]f the holder of such easement right or encumbrance is not made a party, his rights are not cut off by the foreclosure sale . . . ***unless the instrument creating his right or lien was not recorded and could have been*** . . . ." 52 N.J. Super. 583, 600, 146 A.2d 527, 537 (Ch. Div. 1958) (emphasis added), *aff'd*, 59 N.J. Super. 1, 157 A.2d 15 (App. Div. 1959); *see also Diamond Benefits Life Ins. Co. v. Troll*, 66 Cal. App. 4th 1, 6, 77 Cal. Rptr. 2d 581, 584 (1998) (emphasis added).[9] Because it is undisputed the purported easement was subsequent to the foreclosed mortgage and was never subordinated or recorded, Appellant's

[8] Other state court holdings solidify the fundamental nature of this property law principle. *See, e.g.*, *Minton v. Long*, 19 S.W.3d 231, 234–35 (Tenn. Ct. App. 1999); *HSBC Bank USA v. Reg'l Specialty Food Mktg. & Distribution Servs., Inc.*, 294 A.D.2d 803, 804, 741 N.Y.S.2d 791 (2002); *Alabama Hist. Comm'n v. City of Birmingham*, 769 So. 2d 317, 320–21 (Ala. Civ. App. 2000).

[9] The Court of Appeals also relied upon *Green Tree Serv., LLC v. Adams*, 375 S.C. 583, 654 S.E.2d 100 (Ct. App. 2007), for support that Appellant cannot be bound by the Foreclosure Order, because it was not made a party. However, the encumbrance in that case, i.e. a lien, was "duly recorded." *Id.* at 583, 585, 654 S.E.2d at 101. Because the lien was duly recorded, unlike the purported easement at issue in the present case, *Green Tree* is ***not*** applicable to this case. Instead, the plethora of other authority applies.

alleged easement was extinguished by the Foreclosure Order as a matter of law.[10] As set forth above, it simply does not matter Appellant was not a formal party to the foreclosure action. *See* 59 C.J.S. *Mortgages* § 732 (2024). By overlooking the surfeit of authority regarding a subsequent encumbrance being extinguished by a foreclosure—even in situations in which the easement holder is not made a party when said holder should have or could have recorded the easement—the Court of Appeals violated long-standing property law and should be reversed.

Lastly, the Court of Appeals, citing to the same treatise discussed above, makes much of an isolated statement that "[e]ven if a subsequent easement holder is not joined as a party defendant in a judicial foreclosure, a *bona fide* purchaser at the foreclosure sale ***without notice*** of the easement may take the servient estate free of the servitude." Jon W. Bruce, et al., Mortgage Foreclosure Sale of Servient Estate, *The Law of Easements & Licenses in Land* § 10:41 (2024) (emphasis added). However, this treatise once again cites to *Camp Clearwater* for this proposition. In that case, the court found the "notice of the existence of an easement" could be chargeable to a purchaser "by notice from a physical inspection of the property or from recital in a deed in [a] chain of title." *Camp Clearwater*, 52 N.J. Super. at 598, 146 A.2d at 536. In so finding, the court held most of the purported easement holders' rights were extinguished by the foreclosure, but one

[10] Appellant has admitted as much as well. Although the Court of Appeals stated it was unable to locate in the record where this admission occurred, the basis for this admission comes through the pleading filed by Appellant in *Maybank 2754, LLC v. Buist, Byars & Taylor, LLC et al.*, Civil Action No. 2020-CP-1001811 (Charleston County, filed Apr. 13, 2020). (R. at 525, ¶ 24.) In that case, Appellant claimed its former attorney committed legal malpractice for failing to record the Resolution. First, Appellant expressly alleges it had "lost the value of a[n] . . . easement across the Property." The direct implication from Appellant's allegations is that any purported easement was extinguished (i.e. lost) by foreclosure. Thus, Appellant is asserting an inconsistent position and should be estopped. *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964) ("[A]llegations, statements or admissions contained in a pleading are conclusive as against the pleader."); *Quinn v. Sharon Corp.*, 540 S.E.2d 474, 480, 343 S.C. 411, 423 (Ct. App. 2000) ("[T]he fact a litigant is using the court as a forum for his inconsistent statements injures the judicial system; therefore, such abuse must be avoided under all circumstances.").

particular party (i.e. George Wilson) was not made a party to the foreclosure action and his rights were not extinguished by foreclosure. *Id.* at 599–01, 146 A.2d at 536–37. However, the missing party's easement arose from a deed that "was of record." *Id.* The notice existing at that time arose from the allegations of the bill to foreclose and from the recitals in a later deed. *Id.* Clearly, *Camp Clearwater* concerns a significantly different set of facts than the one at bar. Appellant cannot rely upon this isolated statement within a treatise nor inapposite facts in *Camp Clearwater* to escape the reality that (1) the Resolution was not of record, and (2) Laplante and/or Appellant elected not to intervene and make the purported and unknown easement a part of the record in the foreclosure action. As *Camp Clearwater* makes clear, the failure to make the purported easement of record results in its extinguishment. And from a policy perspective, the burden should be on the property holder to protect its rights, rather than on any other party to a foreclosure who would not have known to put an unrecorded easement holder on notice. Any attempt to limit the priority of a mortgage and effectiveness of a foreclosure sale to a question of notice of an unrecorded junior interest invites disparate treatment between various bidders in foreclosures to determine what type of actual notice each held. Such precedent threatens the clarity supposed to be provided to lenders and to subsequent purchasers by foreclosures. The foregoing analysis involving nationwide treatises and case law from outside of South Carolina underscores this issue is a fundamental one to property law as well as it being a novel one for this Court to accept on a writ of certiorari. Indeed, perhaps the fundamental nature of this law explains why it has never before been addressed by this Court. However, this Court should address it once-and-for-all so that parties in South Carolina will never have to fear uncertainty in foreclosure actions in the future.

D. A Novel Question Exists on Whether Standard Form Language in a Foreclosure Order Overturns Long-Established Authority Or Allows the Purported Easement to Escape this Precedent.

To sidestep the foregoing authority, the Court of Appeals then held, in the alternative, that

even if Appellant were bound by the Foreclosure Order, the order did not extinguish the easement because the Foreclosure Order explicitly stated the sale of the Subject Property was subject to "existing easements, and easements and restrictions of record." The impact from standard form language in foreclosure orders represents a novel question of law that should be addressed by this Court in order to provide certainty for future foreclosures in South Carolina.

Although this Court has not addressed this issue, this argument adopted by the Court of Appeals was rejected in *Alabama Historical Commission*. In that case, the court faced an argument that the redemption deed stated the property at issue was "subject to easements, rights of way, reservations, agreements, and restrictions and set back lines of record." *Alabama Hist. Comm'n v. City of Birmingham*, 769 So. 2d 317, 320 (Ala. Civ. App. 2000). The court then held "[t]here [was] nothing in the redemption deed to support the conclusion that the historical easement, having been terminated by foreclosure, was reestablished by the boilerplate language in the redemption deed." *Id.* at 321. This principle applies with equal force to boilerplate language in foreclosure orders. The boilerplate language in the Foreclosure Order cited by the Court of Appeals comes from the standard form Master's Decree and Judgment of Foreclosure of Real Estate found on the County of Charleston's website. *See* Master-In-Equity Forms: Master's Decree and Judgment of Foreclosure of Real Property, CharlestonCounty.Org, (last visited Oct. 16, 2024), *available at* https://www.charlestoncounty.org/Departments/Master-In-Equity/forms/Masters%20Decree.pdf.[11] This boilerplate language cannot reasonably be

[11] Upon information and belief, other counties utilize boilerplate language substantially similar to the language used in Charleston County. *See, e.g.*, Judicial/Foreclosure Sales Information and Links, Lex-Co.SC.Gov, (last visited Oct. 16, 2024), *available at* https://lex-co.sc.gov/departments/master-equity/judicialforeclosure-sales-information-and-links and https://lex-co.sc.gov/sites/lexco/files/Documents/Lexington%20County/Departments/master%20in%20equi

interpreted to overturn the significant authority holding foreclosures extinguish all encumbrances subsequent to the mortgage being foreclosed. It would take some particular set of circumstances to alter the effect of foreclosure rather than boilerplate language used in most, if not all, foreclosure orders in this state. *See* 46 A.L.R.2d 1197 (1956) ("[I]n the absence of particular circumstances affecting the situation, an easement is lost by the foreclosure of a mortgage or trust deed on the servient tenement, where such mortgage or trust deed was executed prior to the creation of the easement."). It defies reason to hold use of the standard form language evinced some intent by the master to overturn fundamental law on the effect of foreclosures.

The Court of Appeals suggested the Master-In-Equity "clearly contemplated some easements existed and were not recorded, and those existing easements would survive the sale of the [Subject] Property." Other than making an assumption based on the boilerplate language referenced above, there is ***no*** evidence in the record to support this contention. After all, it is undisputed there was never any mention of this purported easement during the course of the foreclosure action. It begs the question how the Master-In-Equity "clearly contemplated" the purported easement when it was never submitted for the master's consideration. And, indeed, it was never transformed into an easement and never recorded. Based on the foregoing, the Court of Appeals' reasoning threatens the clarity supposed to be provided by foreclosures; instead, it invites chaos by allowing alleged easement holders, relying on boilerplate, standard form language, to crawl out of the woodwork to defeat summary judgment by merely alleging a purported easement existed subsequent to a foreclosure. Such precedent cannot stand and certiorari should be granted

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ty/Forms%20Examples/Record%20cover%20sheet%20-%20Foreclosure.pdf; Basic Facts About Foreclosures Sales, GreenvilleCounty.Org, (last visited Oct. 16, 2024), *available at* https://www.greenvillecounty.org/masterinequity/Sales.aspx; General Information on Judicial Foreclosure Sales, AikenCountySC.Gov, (last visited Oct. 16, 2024), *available at* https://www.aikencountysc.gov/DspDocTopic.php?qDocID=349.

in order to provide clarity for parties in South Carolina foreclosure actions moving forward.

E. A Novel Question is Presented on Whether Appellant Should Be Estopped for Failing to Raise the Purported Easement's Existence in the Foreclosure Action.

Like in the prior question presented, another novel question of law exists regarding whether Appellant should be estopped for failing to raise the purported easement's existence in the Foreclosure Action, which warrants the granting of certiorari here. Even if notice were somehow required in order for Appellant to be bound to the Foreclosure Order (which it was not), notice was inherently provided, because Laplante was a party to the foreclosure action in the first instance. There is no genuine dispute that Appellant, via Laplante, had actual notice during the foreclosure action and should have come forward then with any purported encumbrance. After all, Laplante was the managing member of Penny Creek at the relevant time of the Foreclosure Action and he actively participated throughout essentially the entire duration of the Foreclosure Action, from August 14, 2014 through a hearing that occurred on June 19, 2017, during which he was severed only due to the deficiency being waived. This hearing occurred a mere four days prior to the entry of the Master-In-Equity's Order and Judgment of Foreclosure and Sale on June 23, 2017. Further, despite his active participation, there is no dispute Laplante never—whether in discovery, at the foreclosure hearing, or at the auction sale—took the position that another company in which he was a member possessed an easement over the Subject Property that was ultimately foreclosed.

Case law from outside of South Carolina demonstrates Laplante had a duty to make the purported easement a part of the record of the foreclosure action. *See, e.g.*, *Kling v. Ghilarducci*, 3 Ill. 2d 454, 463, 121 N.E.2d 752, 757 (1954) (finding preclusion when plaintiff failed to set up a claim during foreclosure, because "[i]f plaintiff had any easement or claim of easement in the premises not subject to the trust deed, it was incumbent upon her to set up her claim in the foreclosure proceedings"); *Littlebrook Airpark Condo. Ass'n v. Sweet Peas, LLC*, 2019 ME 3,

¶ 21, 199 A.3d 677, 682–83 (2019) (holding a junior encumbrance was extinguished upon foreclosure even if the various individual owners were not given written notice of foreclosure, because notice was given to agent and sole member of the organization holding the junior encumbrance). Even the Court of Appeals recognized three separate ways in which Laplante's duty would necessarily have arisen during the foreclosure action. *See Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 361, 559 S.E.2d 327, 339 (Ct. App. 2001) (finding three "distinct scenarios" in which a duty to speak or disclose arises). Because Laplante, individually and/or as a member of Penny Creek, had implicit notice to assert the existence of a purported easement, his failure is imputed to Appellant as the purported assignee. The easement would therefore be extinguished. The Court of Appeals' Order, holding otherwise, discourages subordination and instead creates a perverse incentive for easement holders to hide encumbrances, effectively giving them superior rights. Such precedent threatens the clarity supposed to be afforded by foreclosures. Ultimately, Appellant should thus be estopped, collaterally and by silence, from arguing otherwise. Because this Court has never addressed this issue, like the Supreme Court of Illinois has in *Kling* and the Supreme Judicial Court of Maine has in *Littlebrook*, this Court should grant certiorari.

F. The Court of Appeals' Suggestion that the Purported Easement Could Be an Appurtenant One Conflicts with Precedent.

The Court of Appeals found there was a genuine issue of material fact as to the character of the purported easement. However, there is no genuine dispute that the alleged easement cannot be appurtenant and must be characterized as an easement in gross. Thus, the Court of Appeals' suggestion the purported easement could be an appurtenant one conflicts with established precedent. The Court of Appeals correctly identified the elements of an appurtenant easement.

Such an easement "[1] inheres in the land,[12] [2] concerns the premises, [3] has one terminus on the land of the party claiming it, and [4] is essentially necessary to the enjoyment thereof." *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). Further, the Court of Appeals also correctly held that "[u]nless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross." *Id.* at 325–26, 487 S.E.2d at 191 (citing 12 S.C. Jur. *Easements* § 3(c) (2024)). Despite correctly citing to this law, the Court of Appeals failed to correctly apply it and thus creates a conflict with this Court's elemental requirements in *Tupper*.

The question of the characterization of the easement is definitively resolved, as a matter of law, by focusing on either the third or fourth elements (or both). The Court of Appeals even acknowledged "the language of the Resolution leaves open the location and condition of the right of way, making it unclear whether 'ingress and egress' were meant to include a terminus to be located on [Appellant's] property." Further, because the "grant" was to members of the Laplante family and not Appellant, there can be no question of fact as to whether there was an intent to have a terminus on the grantee's property, as the Laplantes were never owners of the Maybank Tract. Because the purported easement does not have this essential third element, it must be characterized as a mere easement in gross. Although the Court of Appeals suggested the "Resolution's language also does not make clear whether the parties intended the easement to be necessary for the enjoyment of the land," it is undisputed that the Subject Property is adjacent to and has direct

[12] The Court of Appeals states the Resolution's reference to "successors and assigns" of the Purchasers, i.e. the Laplante Family, makes it clear the intention of the purported easement was to inhere with the land and be transferable as an appurtenant easement. However, case law directly rebuts this contention. This same Court has previously held that "[g]enerally, the phrase 'heirs and assigns' will ***not*** convert an easement in gross to an appurtenant easement when the elements of an appurtenant easement are not otherwise present. *Proctor v. Steedley*, 398 S.C. 561, 574, 730 S.E.2d 357, 364 (Ct. App. 2012) (emphasis added) (compiling cases in support).

access from Maybank Highway and that Pitch Fork Road did ***not*** exist at the time of the purported grant (or, for that matter, over ten years later). Accordingly, there is no question of fact as to whether the easement was necessary, because Appellant had and still has ready access to the Maybank Tract and it did not require an easement to a nonexistent road. Because the purported easement cannot establish this fourth essential element, it must be characterized as a mere easement in gross.[13]

Given the purported easement must be considered an easement in gross, it necessarily follows it is incapable of transfer or assignment. *Id.* at 325, 487 S.E.2d at 191 ("An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer."). In this case, the Resolution expressly grants the purported easement to the Laplante Family. Clearly, the Resolution does not list Appellant as an express grantee of the purported easement. Therefore, Appellant has no claim to the purported easement and cannot survive summary judgment.[14] The Court of Appeals' holding therefore conflicts with the elemental requirements outlined in *Tupper* as well as the summary judgment standard set forth by Rule 56 of the South Carolina Rules of Civil Procedure.

CONCLUSION

For the reasons set forth above, Respondents respectfully request this Petition be granted. The Court of Appeals' opinion threatens to upend fundamental aspects of property and contract law and certiorari should be granted.

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[13] Even if the Resolution's language is "capable of more than one construction," the "construction which least restricts the property will be adopted." *Tupper*, 326 S.C. at 326, 487 S.E.2d at 191. Thus, no matter how it is sliced, this purported easement must be characterized as an easement in gross, as a matter of law.

[14] Even if the easement were transferrable, the record contains no evidence Appellant was ever transferred any right to this purported easement. After all, Appellant is not a party to either the Assignment or the Assignment Contract.