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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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 REHEARING 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,

s/ Cheryl D. Shoun

Cheryl D. Shoun, S.C. Bar No. 5092
Rhett D. Ricard, S.C. Bar No. 102353
Alexandra H. Austin, S.C. Bar No. 102646
Maynard Nexsen, P.C.
205 King Street, Suite 400 (29401)
Charleston, South Carolina 29402

Phone: (843) 577-9440
Fax: (843) 414-8209
cshoun@maynardnexsen.com
ricard@maynardnexsen.com
aaustin@maynardnexsen.com

Attorney for Respondents Beach Fenwick, LLC, and The Beach Company [sic]

J. Rutledge Young, Jr., S.C. Bar No. 05737
Patrick C. Wooten, S.C. Bar No. 77985
Blake Abernethy McKie, S.C. Bar No. 80198
Brian C Duffy, S.C. Bar No. 16247
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044
jry@duffyandyoung.com
pwooten@duffyandyoung.com
bmckie@duffyandyoung.com
bduffy@duffyandyoung.com

Attorneys for Respondent Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust dated Dec. 11, 1997

Brian A. Hellman, Esq., S.C. Bar No. 72399
Jason S. Smith, Esq., S.C. Bar No. 80700
Hellman Yates & Tisdale, P.A.
105 Broad Street, Third Floor
Charleston, SC 29401
(843) 266-9099
bh@hellmanyates.com
js@hellmanyates.com

Attorneys for Respondent 1776, LLC

Thomas Bacot Pritchard, S.C. Bar No. 65006
Parker Nelson & Associates
211 King Street, Suite 202
Charleston, SC 29401
(843) 727-2500
tpritchard@pnlaw.net

August 22, 2024
Charleston, South Carolina

Attorney for Respondent Penny Creek Associates, LLC

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STATEMENT OF ISSUES ON REHEARING

1. Whether the location of an easement, which was admittedly left to be determined, must be sufficiently identified in order to be valid?
2. Whether the location of an easement that was intentionally left to be determined merely constitutes an agreement to agree, which is unenforceable under South Carolina contract law?
3. Whether foreclosures extinguish subsequent-in-time encumbrances, such as easements, when said encumbrances are neither recorded nor subordinated?
4. Whether boilerplate, standard form language in a foreclosure order constitutes a clear contemplation of an unrecorded and unsubordinated easement that was never made of record during a foreclosure action?
5. Whether a duty arises for a party to a foreclosure action that holds a purported easement to make said easement of record during the foreclosure action, such that estoppel will apply for failure to meet said duty?
6. Whether a purported easement that does not clearly inhere with the land, locate a terminus point, and is unnecessary constitutes an appurtenant easement?

ARGUMENT¹

The Court’s opinion threatens to upend fundamental aspects of property law and must be reheard in order to avoid setting bad precedent.² Respectfully, the Court overlooked and misapprehended several matters of law, necessitating reconsideration. *See Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (“In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.”) (citing Rule 221(a), SCACR). For the reasons set forth herein, this Court should grant rehearing and reverse its Order.

A. Because the Purported Easement Description Does Not Sufficiently Identify Its Location, the Language is Far Too Vague to Constitute an Enforceable Easement.

This Court held a genuine issue of material fact exists as to whether the Resolution³ creates an easement. However, this Court overlooked why the Resolution fails to create an easement as a matter of law.⁴ This Court implicitly held identifying the location of the purported easement in the Resolution was not necessary for its creation and validity. This holding errs as a matter of 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.

¹ Respondents herein incorporate by reference all facts and arguments set forth in all Respondents’ prior briefs before this Court as well as the Petition for Rehearing filed by Respondent Seamon, Whiteside & Associates, Inc., pursuant to Rule 208(b)(6), SCACR. Respondents expressly do **not** waive any argument previously presented to this Court. Additionally, all capitalized terms used herein shall have the same meanings as those provided in Respondents’ prior briefing and/or the Court’s Order and Opinion dated August 7, 2024 (“Order”).

² The Court’s opinion is already available on Westlaw: *Maybank 2754, LLC v. Zurlo*, No. 2020-001030, 2024 WL 3688319, at *1 (S.C. Ct. App. Aug. 7, 2024).

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

⁴ It is well settled that “[a]n easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription.” *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015) (quoting *Kelley v. Snyder*, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012)). Appellant has only argued an easement exists by grant and relies exclusively on the Resolution for the easement by grant. Hence, this Petition only addresses whether an easement by grant exists as a matter of law.

The Court 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 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 next cited to *Douglas v. Medical Investors, Inc.*, which contained the following express easement:

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 failed to compare either of these descriptions with the one contained within the Resolution.

Instead, in cursory fashion, the Court 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 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 Property.⁵

Other cases are in accord. Indeed, this Court 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*,

⁵ 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 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 Maybank’s property.” Indeed, not only is the terminus point unspecified, but 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.

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. The Court should find that its opinion misapprehended the law and created an injustice, and the Court should grant rehearing and reverse its opinion.

B. Because the Location was Intentionally Left To-Be-Determined, the Resolution Only Amounts to an Unenforceable Agreement to Agree.

As set forth above, the purported easement’s location was insufficiently identified, but

moreover, the lack of identification was **intentional**. 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, as set forth above; 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 to **performance** of the contract, because an agreement still needed to be negotiated on the location of the easement; in other words, the contemplated specific performance, e.g. recordation of the easement, could not immediately occur, because the location 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; Michel 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, Michel Laplante himself, as the manager of Penny Creek at the time of the Resolution, admits the Property was *intentionally* not encumbered by an easement via the Resolution. Again, because the stated intent was to encumber the Property later, the Resolution merely amounts to an unenforceable agreement to agree. The Court’s overlooking of Michel Laplante’s admission here is an error requiring reversal.

C. **To the Extent the Easement is Even Valid, the Foreclosure Order Extinguished It.**

Even assuming *arguendo* the Resolution created a valid easement, the Foreclosure Order extinguished it. The Court held Appellant cannot be bound to the Foreclosure Order, because the master-in-equity did not have personal jurisdiction over Appellant and did not provide Appellant with proper notice. The Court’s holding not only errs as a matter of law, but turns fundamental property law on its head. 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 Order. Moreover, because neither the Resolution nor any valid instrument was of record, the lack of notice to Appellant is insignificant.⁶ 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.

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

⁶ The Court’s 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 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.

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. To be sure, the Court 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, go so far as to establish that the failure to record a granted easement somehow insulates it from the subsequent foreclosure of a superior mortgage. Instead, 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 Ridgeloach 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)).⁷

To be sure, a treatise, cited by the Court 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. Even in those situations, when the easement could have or should have been recorded

⁷ At the risk of beating a dead horse, a survey of other state court holdings solidifies the fundamental nature of this particular point of property law. 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).

and was not, the foreclosure extinguishes the easement despite the holder of such an 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).⁸ Because it is undisputed the purported easement was subsequent to the foreclosed mortgage and was never subordinated, Appellant’s alleged easement was extinguished by the Foreclosure Order as a matter of law.⁹ As set forth above, it does not matter Appellant was not a formal party to the foreclosure action either. *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

⁸ The Court 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 easement at issue in the present case, *Green Tree* is **not** applicable to this case. Instead, the plethora of other authority applies.

⁹ Appellant has admitted as much as well. Although the Court stated it as 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.”).

should have or could have recorded the easement—this Court violated long-standing property law and should reconsider and reverse its ruling.

Lastly, the Court, 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 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) Michel 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.

D. Standard Form Language in the Foreclosure Order Neither Overturns Long-Established Authority Nor Allows the Purported Easement to Escape this Precedent.

To sidestep the foregoing authority, the Court 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 Property was subject to “existing easements, and easements and restrictions of record.” However, this argument 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 here 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 Aug. 22, 2024), *available at* <https://www.charlestoncounty.org/Departments/Master-In-Equity/forms/Masters%20Decree.pdf>.

This boilerplate language cannot reasonably be 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 also suggested the master-in-equity “clearly contemplated some easements existed and were not recorded, and those existing easements would survive the sale of the 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 enforceable easement and never recorded. Based on the foregoing, the Court’s reasoning here 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 should be reversed on rehearing.

E. Appellant Should Be Estopped for Failing to Raise the Purported Easement’s Existence in the Foreclosure Action.

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 Michel Laplante was a party to

the foreclosure action in the first instance. There is no genuine dispute that Appellant, via Michel Laplante, had actual notice during the foreclosure action and should have come forward then with any purported encumbrance. After all, Michel Laplante was the managing member of Penny Creek during the pendency of the foreclosure action, which the Court misapprehended. Further, despite this fact, 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 Property that was ultimately foreclosed.

Case law demonstrates Michel 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 recognized three separate ways in which Michel 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 Michel Laplante 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’s 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.

F. Even if the Purported Easement Survived Extinguishment by the Foreclosure Order, It is an Easement in Gross that Cannot Be Transferred to Appellant.

The Court 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 easement, to the extent it even exists, cannot be appurtenant and must be characterized as an easement in gross.

The Court correctly identified the elements of an appurtenant easement. Such an easement “[1] inheres in the land,¹⁰ [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 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 failed to correctly apply it.

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 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 Maybank’s [P]roperty.” 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

¹⁰ The Court states the Resolution’s reference to “successors and assigns” of the Purchasers, i.e. the Laplantes, 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).

on the grantee's property, as the Laplantes were never owners of the Property. Because the purported easement does not have this essential third element, it must be characterized as a mere easement in gross. Although the Court suggests 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 Property touches 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 its Property 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.¹¹

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 John H. Laplante, Michel F. Laplante, Peter F. Laplante, and Marianne Laplante-Scarlata. 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.¹²

CONCLUSION

For the reasons set forth above, Respondents respectfully request this Petition be granted.

¹¹ 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.

¹² 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.

Aug 22 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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.

PROOF OF SERVICE

The undersigned certifies the following counsel of record were served a copy via electronic mail on August 22, 2024, of the Joint Petition for Rehearing 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.

Scarlet B. Moore, S.C. Bar No. 72534
P.O. Box 17615
Greenville, S.C. 29606
(864) 214-5805
Scarlet28@msn.com

Jason M. Tarokh, S.C. Bar No. 72837
Tarokh Law, PLLC
P.O. Box 10827

Tampa, FL 33679
(813) 922-5510
jason@tarokhlaw.com

Attorneys for Appellant

Respectfully submitted,

s/ Cheryl D. Shoun

Cheryl D. Shoun, S.C. Bar No. 5092
Rhett D. Ricard, S.C. Bar No. 102353
Alexandra H. Austin, S.C. Bar No. 102646
Maynard Nexsen, P.C.
205 King Street, Suite 400 (29401)
Charleston, South Carolina 29402
Phone: (843) 577-9440
Fax: (843) 414-8209
cshoun@maynardnexsen.com
rricard@maynardnexsen.com
aaustin@maynardnexsen.com

*Attorney for Respondents Beach Fenwick,
LLC, and The Beach Company [sic]*

J. Rutledge Young, Jr., S.C. Bar No. 05737
Patrick C. Wooten, S.C. Bar No. 77985
Blake Abernethy McKie, S.C. Bar No. 80198
Brian C Duffy, S.C. Bar No. 16247
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
(843) 720-2044
jry@duffyandyoung.com
pwooten@duffyandyoung.com
bmckie@duffyandyoung.com
bduffy@duffyandyoung.com

*Attorneys for Respondent Eugene J. Zurlo,
Individually and as Co-Trustee of the Eugene
J. Zurlo Living Trust dated Dec. 11, 1997*

Brian A. Hellman, Esq., S.C. Bar No. 72399
Jason S. Smith, Esq., S.C. Bar No. 80700
Hellman Yates & Tisdale, P.A.
105 Broad Street, Third Floor
Charleston, SC 29401
(843) 266-9099
bh@hellmanyates.com
js@hellmanyates.com

Attorneys for Respondent 1776, LLC

Thomas Bacot Pritchard, S.C. Bar No. 65006
Parker Nelson & Associates
211 King Street, Suite 202
Charleston, SC 29401
(843) 727-2500
tpritchard@pnalaw.net

*Attorney for Respondent Penny Creek
Associates, LLC*

August 22, 2024
Charleston, South Carolina



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Aug 22 2024

SC Court of Appeals

Cheryl D. Shoun
Shareholder
Admitted in SC

August 22, 2024

VIA ELECTRONIC FILING - ctappfilings@sccourts.org

South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *Maybank 2754, LLC v. Eugene J. Zurlo*
Appellate Case No.: 2020-001030

To the Court of Appeals,

Please find enclosed Respondents' Joint Petition for Rehearing in the above-referenced matter for filing with your office via electronic mail. The original will be hand-delivered along with the \$50 filing fee to the Court of Appeals on Friday, August, 23, 2024. By copy of this letter and as reflected in the included Proof of Service, I am serving opposing counsel with this Petition for Rehearing, via electronic mail.

Respectfully,

s/ Cheryl D. Shoun

Cheryl D. Shoun